Issue Brief #2

HJR 21 - Study of Personal Information Ownership

For the State Administration and Veterans' Affairs Interim Committee

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Requiring Opt-In For Online Data Collection For Marketing

Purpose and Scope

This issue brief responds to the State Administration and Veterans' Affairs Interim Committee's Feb. 10, 2016, request for further research related to whether Montana law should requiring websites to use an "opt-in" protocol before the website may collect information about a Montana consumer for marketing purposes.

This brief covers:

- The current framework.
- Examples.
- Proponent and opponent arguments.
- Studies about the economic impacts.
- Other states' laws requiring opt-in.
- Relevant Montana statutes.

Current Framework

EU-U.S. Privacy Shield

The Privacy Shield program uses a two-tiered approach to the principle of consumer choice -- one tier for personal information, the second tier concerns sensitive information.

The Privacy Shield agreement defines personal information and sensitive information as follows:

- *Personal information* is data about an identified or identifiable individual that are within the scope of the Directive, received by an organization in the United States from the European Union, and recorded in any form.

- *Sensitive information* is personal information specifying medical or health conditions, racial or ethnic origin, political opinions, religious or philosophical beliefs, trade union membership or information specifying the sex life of the individual. An organization is encouraged to treat any personal information as sensitive information if it is received from a third party and the third party identifies and treats that information as sensitive information.

Opt-out

A website must give the consumer the opportunity to opt-out for:

- third-party tracking of personal information; or

- the use of personal information for a purpose that is "materially different" than the purpose for which it was originally collected or authorized by the individual.

Opt-in

A consumer must provide affirmative consent (i.e. opt-in) if sensitive information is to be:

- disclosed to a third party; or

- used for a purpose other than those for which it was originally collected or subsequently authorized by the individuals through the exercise of choice.

Source: Agreement text at https://www.commerce.gov/privacyshield

Asia-Pacific Economic Cooperation (APEC)

The APEC privacy rules for certification are specific about notification and the principle of choice. However, the exact mechanism of the choice (e.g., opt-in or opt-out) is not dictated. Companies wishing to be certified as in compliance with the APEC privacy principles must provide a mechanism for individuals to exercise choice in relation to the collection, use, and disclosure of their personal information.

Furthermore, the choices must be:

- displayed or provided in a clear and conspicuous manner;
- clearly worded and easily understandable;
- easily accessible and affordable; and
- able to be honored in an effective and expeditious manner.

There are exceptions. The guidelines state: "this Principle recognizes, through the introductory words 'where appropriate' in the Framework itself, that there are certain situations where consent may be clearly implied or where it would not be necessary to provide a mechanism to exercise choice."

The list of exceptions encompasses "obviousness", collection of publically available information, technological impractability, receipt from third parties, disclosure to law enforcement, disclosure to third parties pursuant to a "lawful form of process", or in the event of an emergencies that threaten the life, health, or security of an individual.

Source: Cross Border Privacy Rules Intake Questionnaire available from a link at http://www.cbprs.org/Business/BusinessDetails.aspx.

Organization for Economic Co-operation and Development (OECD)

The OECD guidelines do not specify how choice should be provided.

The OECD guideline related to individual choice states:

- "There should be limits to the collection of personal data and any such data should be obtained by lawful and fair means and, where appropriate, with the knowledge or consent of the data subject."

Source: OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data - part two, point seven.
http://www.oecd.org/sti/ieconomy/oecdguidelinesontheprotectionofprivacyandtransborderflowsofpersonaldata.htm#part1

Federal Trade Commission (FTC)

PROTECTING AMERICA'S CONSUMERS

The FTC does not offer a specific recommendation on how choice should be provided, but does reaffirm that choice is one of the fair information practice principles:

Individual Participation:
Organizations should involve the individual in the process of using PII and, to the extent practicable, seek individual consent for the collection, use, dissemination, and maintenance of PII. Organizations should also provide mechanisms for appropriate access, correction, and redress regarding use of PII.

The FTC staff report, "The Internet of Things: Privacy and Security in a Connected World", which offers recommendations to businesses, does not specify a mechanism for how choice should be exercised, recognizing that one-size does not fit all. However, the report does offer a list of examples of how choices may be offered in various contexts.

Internet Policy Task Force (Dept. of Commerce)

The task force recommends voluntary, enforceable codes of conduct that include consumer choice and offers a variety of options for how choice may best be provided for.

The following recommendations from the task force's recent "green paper" are related to the principle of choice:

Recommendation #1:
The Task Force recommends adoption of a baseline commercial data privacy framework built on an expanded set of Fair
Information Practice Principles (FIPPs).

Recommendation #2:
To meet the unique challenges of information intensive environments, FIPPs regarding enhancing transparency, encouraging greater detail in purpose specifications and use limitations, and fostering the development of verifiable evaluation and accountability programs should receive high priority.

Recommendation #3:
Voluntary, enforceable codes of conduct should address emerging technologies and issues not covered by current application of baseline
FIPPs. To encourage the development of such codes, the Administration should consider a variety of options, including (a) public statements of Administration support; (b) stepped up FTC enforcement; and (c) legislation that would create a safe harbor for companies that adhere to appropriate voluntary, enforceable codes of conduct that have been developed through open, multi-stakeholder processes.

Source: Commercial Data Privacy and Innovation in the Internet Economy: A Dynamic Policy Framework
https://www.ntia.doc.gov/report/2010/commercial-data-privacy-and-innovation-internet-economy-dynamic-policy-framework

Digital Advertising Alliance (DAA)

The DAA principle does not differentiate between an opt-in or opt-out methodology for how the consumer is to exercise choice.

The DAA code of conduct states is that third-party advertising companies should provide consumers with "the ability to exercise choice" and that a service provider should not collect or use personal information for online behavioral advertising with out consent. Consent is defined as "an individual's action in response to a clear, meaningful and prominent notice".[1] The DAA principles applicable to online behavioral advertising companies are as quoted below:

III. CONSUMER CONTROL

A. Third Party Choice for Behavioral Advertising

A Third Party should provide consumers with the ability to exercise choice with respect to the collection and use of data for Online Behavioral Advertising purposes or the transfer of such data to a non-Affiliate for such purpose. Such choice should be available from the notice described in II.A.(2)(a); from the industry-developed Web page(s) as set forth in II.A.2.(b)(i); or from the Third Party's disclosure linked to from the page where the Third Party is individually listed as set forth in II.A.2.(b)(ii).

B. Service Provider Consent for Behavioral Advertising

1. Consent to Collection and Use — Service Providers should not collect and use data for Online Behavioral Advertising purposes without Consent.

2. Withdrawing Consent — Service Providers that have obtained Consent for collection and use of such data for Online Behavioral Advertising purposes should provide an easy to use means to withdraw Consent to the collection and use of that data for Online Behavioral Advertising.

Source: Self-Regulatory Principles for Online Behavioral Advertising
http://www.aboutads.info/obaprinciples

[1] The full text of DAA's *Self-Regulatory Principles for Online Behavioral Advertising* is available at http://www.aboutads.info/resource/download/OBA%20Self-Reg%20Implementation%20Guide%20-%20Full%20Text.pdf

Network Advertising Initiative (NAI)

Member companies of the NAI must provide a "conspicuous link" to an opt-out mechanism for internet-based advertising. Opt-in consent is required for certain types of information in certain circumstances.

Opt-out is to be used for:

- use of non-personally identifiable information (PII); or
- use of PII that is to be merged with non-PII going forward;

Opt-in is to be used for:

- use of PII to be merged with previously collected non-PII;
- use of precise location data;
- use of sensitive data; and
- any interest-based advertising if the consumer has at any time set the consumer's computer browser to "opt-out".

The 2015 NAI code of conduct states:

C. USER CONTROL

1. The level of choice that members must provide is commensurate with the sensitivity and intended use of the data. Specifically:
    a. Use of Non-PI I for Interest-Based Advertising purposes shall require an Opt-Out Mechanism, which shall be available both on the NAI website and on the member's website.

    b. Use of PII to be merged with Non-PII on a going-forward basis for Interest-Based Advertising purposes (prospective merger) shall require provision of an Opt-Out Mechanism, accompanied by robust notice of such choice.

    c. Use of PII to be merged with previously collected Non-PII for Interest-Based Advertising purposes (retrospective merger) shall require a user's Opt-In Consent.

    d. Use of Precise Location Data for Interest-Based Advertising purposes shall require a user's Opt-In Consent.

    e. Use of Sensitive Data for Interest-Based Advertising purposes shall require a user's Opt-In Consent.

2. When a user has opted out of Interest-Based Advertising from a particular member or members, those member companies must honor the user's choice as to the particular browser. Member companies may continue to collect data for other purposes, including Ad Delivery and

Reporting. However, any data collected by a member company while a browser is opted out may not be used for Interest-Based Advertising purposes, regardless of the future opt-out status of the browser and regardless of the technology or technologies used for Interest-Based Advertising by the member company, absent Opt-In Consent.

3. The technologies that members use for Interest-Based Advertising purposes must provide users with an appropriate degree of transparency and control.

Sensitive Data includes:

- Social Security Numbers or other government-issued identifiers.
- Insurance plan numbers.
- Financial account numbers.
- Information about any past, present, or potential future health or medical conditions or treatments, including genetic, genomic, and family medical history, based on, obtained, or derived from pharmaceutical prescriptions or medical records, or similar health or medical sources that provide actual knowledge of a condition or treatment (the source is sensitive).
- Information, including inferences, about sensitive health or medical conditions or treatments, including, but not limited to, all types of cancer, mental health-related conditions, and sexually transmitted diseases (the condition or treatment is sensitive regardless of the source).
- Sexual orientation.

Source: 2015 Update to the NAI Code of Conduct
https://www.networkadvertising.org/code-enforcement

Interactive Advertising Bureau (IAB)

The IAB code of conduct mirrors the DAA code and specifies that consumers should consent to the collection and use of data but does not specify how that consent should be exercised.

Source: IAB Code of Conduct
http://www.iab.com/guidelines/understanding-iab-compliance-programs/

Examples of choice mechanisms

Murdoch's Ranch & Home Supply

http://www.murdochs.com/

- Link to it's privacy policy at the bottom of its home page.
- Privacy policy states website uses Google Analytics and that the consumer may opt-out by visiting the Google ad policy help pages.
- The consumer may then click on additional links to get more information about exactly how to opt-out.
- The consumer then sees a list of those companies that may customize ads for the consumer's particular web browser.
- The consumer may then opt-out of being tracked by all of the companies listed or may opt-out on a company-by-company basis.

As the consumer reads further in the privacy policy, the consumer will be informed as follows:

> Murdoch's does not facilitate the merging of personally-identifiable information with non-personally identifiable information previously collected from Display Advertising features that is based on the DoubleClick cookie **unless we have notice of and your prior affirmative (i.e., opt-in) consent to, that merger.**

Walmart

http://www.walmart.com/store/1872/whats-new

- Link to privacy policy at bottom of web page
- Policy has section on consumer choices
- Next page - consumers select type of information (health, financial, electronic products, ads)
- About Our Ads section offers information about how to opt out through the NAI website, through Ad Choices, through browser-based opt outs, or mobile devises.

Little Bear Interiors, Bozeman, MT

http://www.littlebearinteriors.com/

- Link to privacy policy at bottom of web page
- Notice is provided about the collection and use of information
- Non-PII may be provided to third parities for marketing, advertising, or other uses.
- Use of the website means consent.

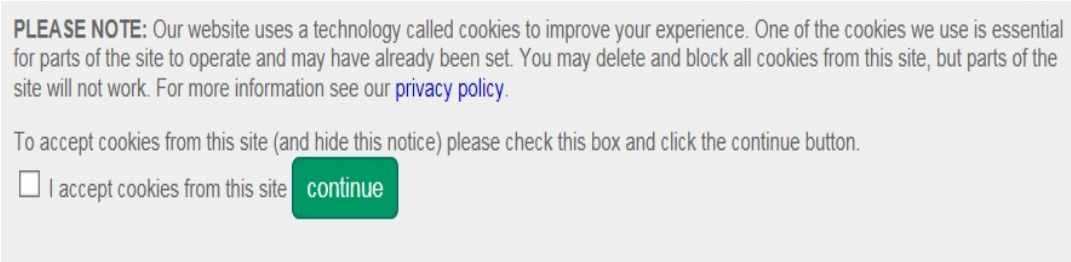
Opt-4: International Marketing Consulting Firm - UK company

"Helping marketers conduct permission based marketing that complies with Data Protection Act and Electronic Communications Privacy Regulations."
http://www.opt-4.co.uk/default.aspx

- Notice about cookies is provided when the consumer first visits the page. (See Figure 1)

- Privacy policy explains optional cookies are Google Analytics cookies (to obtain statistics and that last for 90 days) and session cookies used when a website visitor logs in to read the white papers.

Figure 1

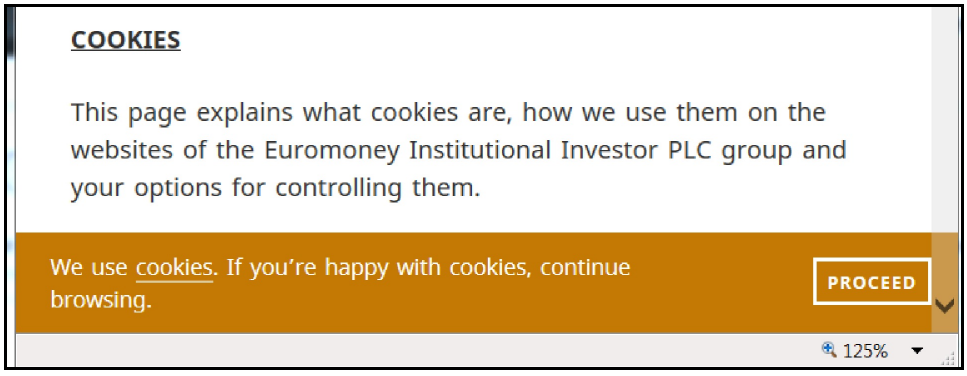


Institutional Investor - UK company

http://www.institutionalinvestor.com/

- Notice about cookies is provided when the consumer first visits the page. (See Figure 2)

Figure 2



- Privacy policy explains:
  3. Marketing:

     Some of your personal data collected under paragraphs 1 and 2 above may be used by us and/or our other group companies and third party service providers to contact you by email, fax, telephone and/or post for sending information or promotional material on our products and/or services and/or those of our other group companies.

     We give you the opportunity to opt-out of receiving marketing communications and will in certain circumstances need to obtain your consent before sending such communications to you. Further detail can be found on the applicable Site and in each marketing communication sent by us, our group companies or service providers. See also "Consents and opt-outs" section below.

  4. Trading in Personal Data:

     Some of your personal data may be collected and processed with the intention of selling it to other organizations, but this will not be done unless you have given your consent (separately to this privacy statement).

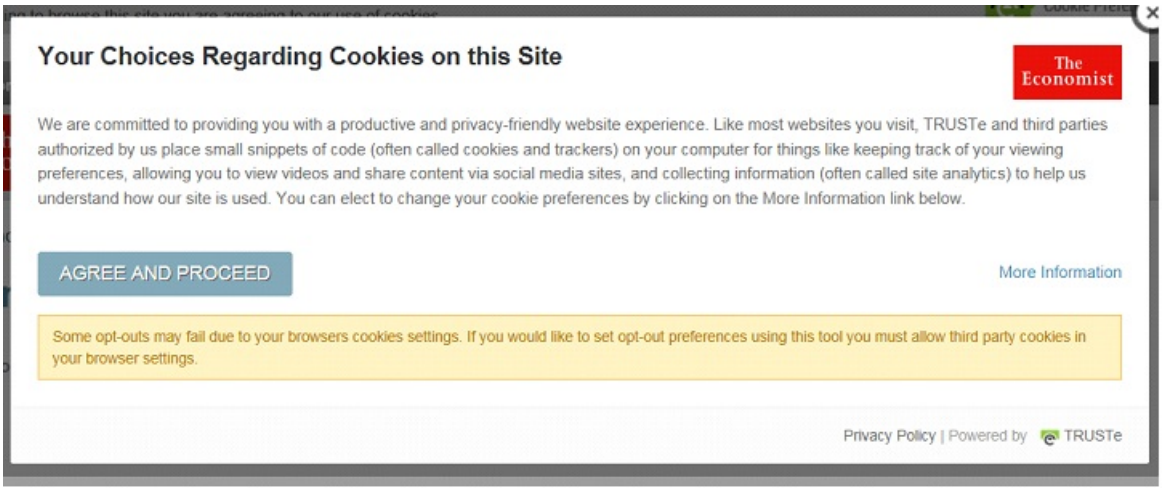
The Economist - UK company

http://www.economist.com/

- Link to bottom of web page to a privacy policy, cookies info. and a Trust-e icon about cookie preferences. The consumer may exercise choice related to required, functional, and advertising cookies.

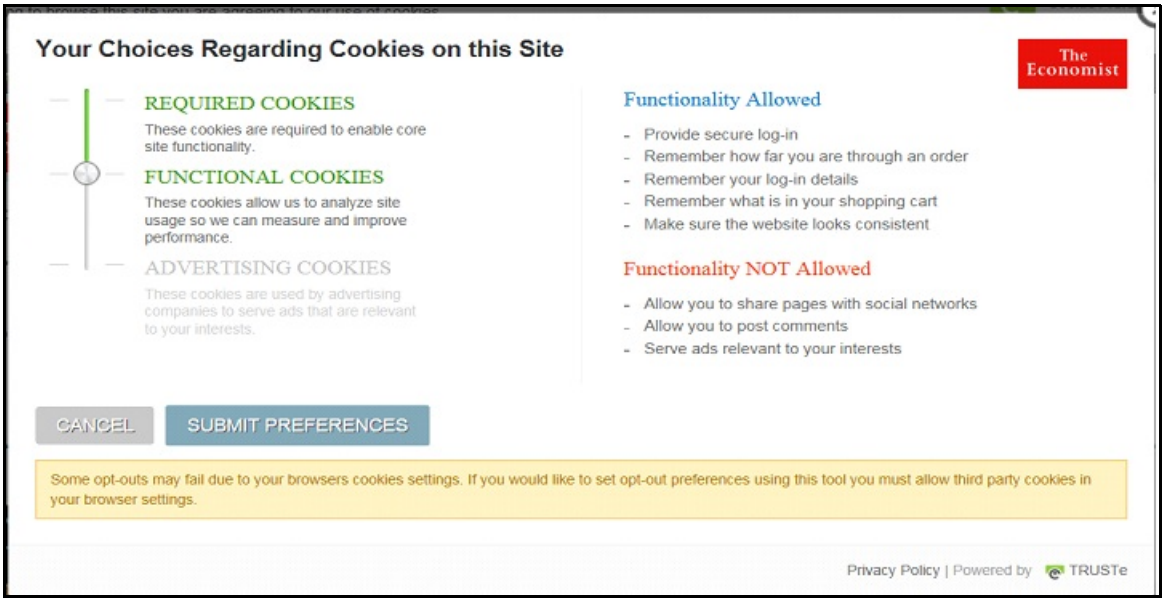
- Figure 3 is what a consumer seeks after clicking on the Trust-e icon.

Figure 3



- Figure 4 is what the consumer sees after clicking on "more information" in the figure above.

Figure 4



Proponents of Opt-In

Consumer rights and privacy advocates who support opt-in rather than opt-out practices say:

- Opt-in policies better protect consumer privacy because requiring affirmative consent draws the consumer's attention to the company's information management practices.

- Opt-in policies make it easier for consumers who do not want their information collected to exercise their choice.

- An Opt-out policy means the consumer who does not want their information collected or their web surfing tracked must jump through numerous hoops to exercise their choices.

- Without federal or state mandates requiring opt-in protocols, businesses have an incentive to make it difficult for consumers who wish to opt-out.[2]

[2] Marc Rotenberg, Khaliah Barns, Claire Gartland, Electronic Privacy Information Center, Letter to Tom Wheeler, Chairman, Federal Communications Commission, January 20, 2016. See also

Some business sector proponents of opt-in protocols say:

- Requiring affirmative consent will improve ad targeting, provide clarity for both the consumer and the business, cultivate loyalty and trust, and actually have a positive economic impact for businesses.

- Requiring consumers to opt-in will reverse the trend toward "ad blindness", which is when consumers simply begin to ignore all ads. However, business sector proponents tend to support voluntary opt-in policies rather than federal or state mandates.[3]

Opponents of Opt-In

Opponents of opt-in requirements say opt-in:

- Does not increase privacy protection.
- Is more expensive to implement.
- Decreases economic opportunities for businesses.
- Actually hurts consumers by limiting opportunities.
- Reduce competition and raises prices.
- Is contrary to some consumer opinion polls.
- Will increase unsolicited contacts from advertisers.
- May be unconstitutional if mandated.[4]

[3] Russell Glass, "Mandated Opt-In Could Improve Ad Targeting," *Adweek*, Advertizing and Branding, August 18, 2009. Accessed online at http://www.adweek.com/news/advertising-branding/mandated-opt-could-improve-ad-targeting-100151

[4] Fred H. Cate and Michael E. Staten, "Protecting Privacy in the New Millennium: The Fallacy of "Opt-in" available at home.uchicago.edu/~mferzige/fallacyofoptin.pdf. Cited in numerous articles.

Potential Economic Impacts

MIT/University of Toronto Study

An MIT/University of Toronto study on ad effectiveness in Europe after companies had to comply with the European Union Privacy Directive requiring "consumer knowledge"[5] before a website could track a consumer's past web browsing: "Our analysis suggests that after the Privacy Directive was passed, advertising effectiveness decreased on average by around 65 percent in Europe relative to the rest of the world."

[More Research To Do]

Other States

This section summarizes staff research findings on other states' statutes requiring consumer consent or choices. The states listed here may not be the only states with similar statutes. However, staff reviewed research by the National Conference for State Legislature's on state laws related to Internet Privacy and found that these states were the only ones mentioned whose statutes contained language relevant to this issue brief.

NCSL webpage on state laws related to Internet privacy
http://www.ncsl.org/research/telecommunications-and-information-technology/state-laws-related-to-internet-privacy.aspx

[5] According to the authors of the MIT/University of Toronto study, some have interpreted the directive that consumers have "knowledge" that they are being tracked for marketing purposes to mean the consumer must opt-in before tracking technology is used and that others say "knowledge" means that the consumer must simply be able to access a privacy policy or information management policy that informs them that by using the website they are agreeing to the tracking.

California

California does not require that a website owner offer the consumer choices, only notice of how consumer choice is handled.

The following is an extract related to the principle of choice:

Business and Professions Code - BPC
DIVISION 8. SPECIAL BUSINESS REGULATIONS [18400 - 22948.25]
CHAPTER 22. Internet Privacy Requirements [22575 - 22579]

22575. ...

(5) Disclose how the operator responds to Web browser "do not track" signals or other mechanisms that provide consumers the ability to exercise choice regarding the collection of personally identifiable information about an individual consumer's online activities over time and across third-party Web sites or online services, if the operator engages in that collection.

. . . .

(7) An operator may satisfy the requirement of paragraph (5) by providing a clear and conspicuous hyperlink in the operator's privacy policy to an online location containing a description, including the effects, of any program or protocol the operator follows that offers the consumer that choice.

Source: California Legislative Information website at
http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=BPC&division=8.&title=&part=&chapter=22.&article=

Delaware

Delaware's statutes mirror California's.

See Source: Delaware Code Online
http://delcode.delaware.gov/title6/c012c/index.shtml

TITLE 6 - Commerce and Trade
SUBTITLE II - Other Laws Relating to Commerce and Trade
CHAPTER 12C. ONLINE AND PERSONAL PRIVACY PROTECTION

Montana Statutes

Montana does not currently require online commercial entities to offer consumer choice. Rather, Montana mirrors the FTC approach by prohibiting unfair and deceptive trade practices.

Montana's Consumer Protection Act is Part 1, of Chapter 14, in Title 30 (Trade and Commerce). The key statute is:

> **30-14-103. Unlawful practices.** Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are unlawful.