February 13, 2009

The Coase Theorem and the Power to Increase Transaction Costs

Jeff Sovern

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ABSTRACT

The Coase Theorem maintains that in the absence of transaction costs, in Francesco Parisi's words, "regardless of the initial allocation of property rights and choice of remedial protection, the market will determine ultimate allocations of legal entitlements, based on their relative value to different parties." The paper explores the consequences for Coase's Theorem when a party without the initial allocation of a property right can manipulate the transaction costs of the party with the initial allocation in asserting that right. A party wishing to obtain the ultimate entitlement may find it preferable not to purchase the entitlement but to increase the transaction costs faced by the party with the initial entitlement in asserting that entitlement. The paper uses the example of the sale of consumer financial information in connection with the Gramm-Leach-Bliley Act as a vehicle for showing that in some cases the power to manipulate transaction costs will not interfere with parties bargaining to reach the highest-valued use of property, but that in other cases it will. Indeed, in some circumstances, someone contracting with a party with the power to inflate transaction costs will be better off without the initial allocation of rights. The paper also provides other examples of inflated consumer transaction costs. Finally, it discusses how federal regulators have attempted to address the problem of inflated consumer transaction costs under Gramm-Leach-Bliley and suggests another solution to the problem.

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The Coase Theorem maintains that in the absence of transaction costs, “regardless of the initial allocation of property rights and choice of remedial protection, the market will determine ultimate allocations of legal entitlements, based on their relative value to different parties.”

Twenty-eight years after publication of the paper that explained the Coase Theorem, Coase expressed disappointment that his paper had not inspired more study of situations in which contracting parties face positive transaction costs. The purpose of this paper is to explore the consequences for Coase’s Theorem in one situation in which parties face positive transaction costs: specifically, when a firm without the initial allocation of a property right can manipulate the transaction costs of consumers who have the initial allocation in asserting their property rights.

A firm wishing to obtain the ultimate entitlement may find it preferable not to purchase the entitlement but to increase the transaction costs faced by consumers with the initial entitlement in asserting that entitlement. This paper first gives an example of such a situation. It then explores how the power to inflate transaction costs can affect the ultimate allocation of legal entitlements. It concludes that in some cases the power to manipulate transaction costs will not prevent the party which values the right most highly from ending with the final allocation of rights, but that in other cases it will. Indeed, in some circumstances, a consumer contracting with a firm with the power to inflate transaction costs will be better off without the initial allocation of rights. The paper also provides another argument—if such an argument is needed--for limiting the power of parties to increase transaction costs.

The sale of financial information presents an example of a situation in which a firm may find it more advantageous to inflate the transaction costs of consumers than to enter into a contract to buy the entitlement. In 1999 Congress enacted the Gramm-Leach-Bliley Act, which had the effect of allocating to consumers the initial property right in certain information about their financial transactions.


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this information to others; thus, Coase’s Theorem predicts that in a world without transaction costs, if the information was of greater value to financial institutions than consumers, a market would develop in which financial institutions would purchase from consumers the right to trade in the information. But such a market has not developed. While it is possible that this market has not come into existence because the information is more valuable to consumers than to financial institutions or because the cost of creating such a market exceeds the gains to be derived thereby, a more plausible explanation for the absence of such a market is that financial institutions have been able to obtain the right to transfer the information without negotiating for it.


This article proceeds on the assumption that because the consumer has the right to demand that financial institutions not transfer information about a consumer’s transactions to unaffiliated companies, the consumer has the initial allocation of the right. While it is possible to argue that the financial institution has the initial allocation of the right because financial institutions may transfer consumer information until the consumer insists that they stop, that seems not to be consistent with Coase’s use of the idea. Coase clearly contemplated that the initial allocation rests with parties who could demand cessation of a practice, or alternatively have the right to engage in the conduct. Thus, in Coase’s example of the cattle-raiser whose cattle destroys the crops on the land of a neighboring farmer, discussed in Part III of his article, Coase explored the impact imposition of liability on the cattle-raiser would have, even though liability is unlikely to be imposed unless the farmer demands compensation based on the right not to have the crops damaged. Coase, Social Cost, supra note 1. Similarly, in his discussion in Part V of the case of Sturges v. Bridgeman, 11 Ch.D. 852 (1879), Coase reported that a doctor sued to prevent a confectioner from operating machinery which interfered with the doctor’s ability to use a consulting room. Coase then wrote about the impact of the doctor’s victory and on what the consequences would have been if the confectioner had won.


It seems likely that many consumers would find the information less valuable than many financial institutions and so would be willing to sell their entitlement. While some consumers object to the transfer of information about their transactions, many seem not to. Surveys consistently show that consumers are divided in their view of privacy, with about a quarter wanting very much to preserve the privacy of their transactions; about a sixth unconcerned with the privacy of their transactions; and the remaining sixty percent willing to share information depending on the circumstances. This can be seen from the survey data collected in Jeff Sovern, Opting In, Opting out, or No Options at All: The Fight for Control of Personal Information, 74 WASH. L. REV. 1033, 1056-64 (1999). Thus, depending on the nature of an offer for the information, somewhere between 16 and 76% of consumers should be willing to permit the sale of information.

It appears that few consumers have directed their banks not to transfer their information, see Testimony of John C. Dugan, Partner at Covington and Burling on behalf of the Financial Services Coordinating Council, Before the U.S. Sen. Com. On Banking, Housing and Urban Affairs, Sept. 19, 2002 (“opt-out rates have generally been low, and in nearly all cases under 10 percent.”); W.A. Lee, Opt-Out Notices Give No One A Thrill, 166 AM. BANKER 1 (July 10, 2001) (“5% opt-out rate . . . has been circulating as the unofficial industry figure . . . ”); ACB Survey, supra note 4 (60% of financial institutions report that less than one percent of customers opted out); . Cf. Randall Akee, Checkerboard and Coase: Transactions Costs and Efficiency in Land Markets 16 (Nov. 2006 Discussion Paper), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=947459 (study of Palm Springs land market finds that “transactions costs can effectively halt bargaining and economic efficiency”).

It seems unlikely that the cost of creating the market would exceed the gains from having the market. The transaction costs in creating the market are likely to be small, in light of the fact that financial institutions
GLB requires financial institutions to notify customers of their practices concerning the sharing of certain customer information and to allow customers to “opt-out” of the sharing of certain of that information with non-affiliated companies. The information that is publicly-available indicates that few consumers have opted out, and so financial institutions seem not to have suffered significant revenue losses from opt-outs. It appears that financial institutions have increased the transaction costs consumers incur in learning about and exercising their opt-out rights to produce that result. Thus, some financial institutions have increased the transaction costs consumers incur in learning about and exercising their opt-out rights to produce that result. Thus, some

already communicate their privacy policies at least annually under GLB, see 15 U.S.C. 6803(a)—and probably communicate with most customers at least monthly—and can easily credit their customers’ accounts with any sum agreed to.

Another possible explanation for the lack of a market is that consumers do not care if their information is available or perhaps even want it to be available. But this supposition is belied by the survey evidence described supra in note 5. See also Mike Hatch, The Privatization of Big Brother: Protecting Sensitive Personal Information from Commercial Interests in the 21st Century, 27 Wm. Mitchell. L. Rev. 1457, 1477-81 (2001). While what people say in surveys does not always correspond with their actions, and indeed it appears many consumers, despite what they say, are willing to sacrifice their privacy if they receive something in exchange, some experiments confirm that at least some consumers value privacy. See Janice Tsai, Serge Egelman, Lorrie Cranor, & Alessandro Acquisti, The Effect on Online Privacy Information on Purchasing Behavior: An Experimental Study i (2007), available at http://weis2007.econinfosec.org/papers/57.pdf ("once privacy information is made more salient, some consumers are willing to pay a premium to purchase from more privacy protective websites"). Similarly, many consumers have paid to have their telephone numbers unlisted. See Eli M. Noam, Privacy and Self-Regulation: Markets for Electronic Privacy, in Privacy and Self-Regulation in the Information Age, available at http://www.ntia.doc.gov/reports/privacy/selfreg1.htm (reporting that 55% of California residents have unlisted numbers).

The fact that some consumers have opted out suggests that consumers differ in their assessment of the relative value of opting out and the transaction costs incurred in doing so.

It may perhaps be argued that consumers have not opted out because they are unwilling to depart from defaults, whatever those defaults may be. This argument finds support in phenomena in other circumstances. Different default rules in automobile insurance in the neighboring states of New Jersey and Pennsylvania provide an example. Pennsylvania policies provided that consumers could bring a certain claim, but offered consumers the option to pay lower rates if they would surrender the right to bring the claim. New Jersey chose the opposite default—denying consumers the right to assert the claim—but permitted them to pay higher rates if they wanted the right to assert the claim. In New Jersey, about 75% of motorists chose the default while in Pennsylvania approximately 80% did. Eric J. Johnson, John Hershey, Jacqueline Meszaros and Howard Kunreuther, Framing, Probability Distortions, and Insurance Decisions 224-40 in D. Kahneman and A. Tversky, eds. CHOICES, VALUES, AND FRAMES (2000). Similar psychology may indeed account for the failure of some consumers to opt out of the sale of their financial information. But the situations are not exactly parallel. In the insurance example, consumers received something no matter which choice they made: either lower rates or the right to assert a claim. Accordingly, consumers genuinely uncertain about which was the best choice might have felt that the default implied a recommendation. In contrast, in the privacy context consumers do not receive anything from not opting out, except the time freed by not reading the form and opting out—which is, of course (as discussed more fully below), a transaction cost that the financial institution controls to some extent by, for example, making the form more or less readable. In addition, based on the information publicly available, it appears that more consumers departed from the default in both New Jersey and Pennsylvania, when consumers received some value for staying with the default, than in the GLB situation. Consequently, it appears that at best the explanation that consumers stay with the default explains only some failures to opt out.
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critics have found the notices in which financial institutions explain to consumers their rights to be unreadable,\textsuperscript{10} while others claim they require a college-level education to understand.\textsuperscript{11} For example, Capital One’s notice, provides in part:

We may share the information described on Page 1 under “information we may collect” with companies in the Capital One family or with business partners such as financial service providers (including credit bureaus, mortgage bankers, securities broker-dealers and insurance agents); nonfinancial companies (including retailers, online and offline advertisers, membership list vendors, direct marketers, airlines and publishers); companies that perform marketing services on our behalf, or other financial institutions with which we have joint marketing agreements; and others, such as non-profit organizations and third parties that you direct us to share information about you.

In a speech, Julie Williams, the then-Acting Comptroller of the Currency, explained why financial institutions might wish to inflate the transaction costs consumers incur in opting out:


\textsuperscript{10} See John Schwartz, Privacy Policy Notices are Called Too Common and Too Confusing, N. Y. TIMES, May 7, 2001 at A1; Mark Hochhauser, LOST IN THE FINE PRINT: READABILITY OF FINANCIAL PRIVACY NOTICES (2001) (available at http://www.privacyrights.org/ar/GLB-Reading.htm) (“Consumers will have difficulty reading and understanding the privacy notices . . . ”); Rob Blackwell, FTC Unveils Stepped-Up Privacy Plan, Am. Banker, Oct. 5, 2001 at 3 (then-FTC Chair Timothy J. Muris calls GLB privacy notices “barely comprehensible”); Mike Hatch, The Privatization of Big Brother: Protecting Sensitive Personal Information from Commercial Interests in the 21st Century, 27 William Mitchell Law Review 1457 (2001) (Minnesota Attorney General comments that “[t]he notices are dense and impenetrable.”); Confusing Privacy Notices Leave Consumers Exposed, USA Today, July 9, 2001 at 13A (“the instructions are so confusing, many [consumers] unwittingly threw them away”). ACB Survey, supra note 4 (“Of those institutions that reported receiving customer feedback, the majority indicated that their customers did not find the privacy policies useful.”). Not all agree. An American Bankers Association telephone survey reported that two-thirds of the consumers who said they had received the notices claimed to have read them. See W.A. Lee, Opt-Out Notices Give No One A Thrill, 166 AM. BANKER 1 (July 10, 2001). Similarly, a Securities Industry Association survey found that 60% of the people surveyed recalled receiving the notices, two-thirds of those claimed to have read them, and 84% of those believed they understood them. In Brief: SIA Survey Finds Privacy Notices Work, 166 AM. BANKER 5 (Aug. 14, 2001).

\textsuperscript{11} Steve Sheng & Lorrie Faith Cranor, An Evaluation of the Effect of US Financial Privacy Legislation Through the Analysis of Privacy Policies, 2 I/S 943 (2006). GLB privacy policies seem not to be a unique response to the need to create privacy policies. Thus, a study of online privacy policies found that only six percent were accessible to those with less than or equal to a high school education and thirteen percent would require a post-graduate education to understand. The study also found that some privacy policies used “second-level pages” “to obscure significant privacy vulnerabilities (disclosure and opt-out of web-bugs and spy-ware being one example . . . ).” Carlos Jensen and Colin Potts, Privacy Policies as Decision-Making Tools: An Evaluation of Online Privacy Notices, 6 Proceedings of the SIGCHI Conference on Human Factors in Computing Systems, Vienna Austria 471, 473, 475 (2004).
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[W]hen presented with the prospect of lessening burden and saving costs by providing a streamlined, short form privacy notice containing only certain key information – some in the industry seem to balk. Marketing departments get uneasy because simple and straightforward disclosure of a bank’s information sharing policies and an easy means for customers to opt out of that sharing might mean – *that customers will actually understand those policies – and decide to opt out!* The tension here is that shorter, focused consumer disclosures can meaningfully reduce regulatory burden, but, if they are done well, they will also empower consumers to make some decisions that a particular bank may not like.\(^\text{12}\)

Rational financial institutions that wish to obtain the right to transfer consumer information should choose the least expensive way of obtaining that right. If it is cheaper for them to obtain the right by inflating consumer transaction costs than by entering into agreements with consumers, they should choose to inflate consumer transaction costs.\(^\text{13}\) It appears that they have done just that.\(^\text{14}\)

In this context—in which the right is worth more to the financial institution than to consumers and financial institutions can obtain the right more cheaply by increasing consumer transaction costs than by purchasing the right—neither the power to inflate transaction costs nor the initial allocation of the right would affect the ultimate allocation of the right. If, contrary to GLB, the financial institution possessed the initial allocation, consumers would not be able to pay financial institutions enough to persuade them to sell the right, and financial institutions would simply retain the right. If, as provided under GLB, consumers possess the initial right, financial institutions could obtain the right by inflating the transaction costs consumers face in asserting the right.\(^\text{15}\) What does change, however, is the manner in which the financial institution obtains the right, and that in turn has consequences. When financial institutions obtain the right by inflating transaction costs

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\(^\text{12}\) The speech, which was given on January 12, 2005, speech is available at http://www.occ.treas.gov/ftp/release/2005-1a.pdf (emphasis in original). See also *Confusing Privacy Notices Leave Consumers Exposed*, USA Today, July 9, 2001 at 13A (“financial institutions made the notices as confusing as possible,” noting that Wells Fargo’s notice was ten pages long).

\(^\text{13}\) While the case that financial institutions have deliberately inflated consumer transaction costs is based largely on the types of notices they have produced rather than on, say, internal statements indicating an intent to cause the privacy notices to slip past consumers unnoticed, such internal statements have become available in other contexts. Thus, in Ting v. AT&T, 319 F.3d 1126, 1134 (9TH Cir.), cert. denied, 540 U.S. 811 (2003), AT&T mailed a consumer services agreement containing an arbitration clause to its customers. The court explained:

> AT&T’s market study concluded that most customers “would stop reading and discard the letter” after reading [certain sentences in its cover letter]. AT&T did not change the substance of the letter as a result of its market research—indeed internal AT&T documents indicate that the letter was specifically intended to make customers less alert to the details of the [agreement].

\(^\text{14}\) Conceivably, the desire to retain customer good will might restrain financial institutions from inflating consumer transaction costs, but this seems not to have been the case.

\(^\text{15}\) This assumes that the cost to the bank of inflating consumer transaction costs is less than the gain to the bank from inflating the costs.
costs rather than purchasing it, consumers lose their gains from exchange, and financial institutions obtain theirs, and a bit more.

Suppose by contrast that the right is more valuable to the consumer than to the financial institution and the consumer possesses the initial right, as provided for by GLB. If the financial institution can inflate the consumer’s transaction costs to the point that they exceed the right’s value to the consumer, the financial institution can still end up with the allocation of rights, simply because the cost to the consumer of asserting her rights will exceed the benefits to the consumer of doing so. Theoretically, however, a rational financial institution should not do so if the value of the right to the consumer exceeds the total of the value of the right to the financial institution plus the transaction costs incurred by the parties in entering into an agreement. That is because the financial institution would maximize its profits by agreeing with the consumer not to inflate the consumer’s transaction costs in return for a payment from the consumer, and the consumer should be willing to make such a payment because the consumer would be better off paying the financial institution for the right.  

An example may make it more concrete. Suppose the right to sell consumer information is worth one dollar to a bank and the right not to have the information sold is worth three dollars to consumers. Absent transaction costs, Coase’s Theorem predicts that if the consumer has the initial allocation, the bank will not find it worthwhile to purchase the right to use the information from the consumer, while if the bank has the initial allocation, the parties will find it desirable for the bank to sell the right to the consumer for a sum between one and three dollars.

But now suppose that the consumer has the initial allocation but the bank, without materially increasing its own costs, can inflate the consumer’s transaction costs in asserting the right to four dollars. In that case, the consumer should forego asserting the right, and the bank would be left with the right. But because the right is worth only one dollar to the bank, the bank would be better off not raising the consumer’s transaction costs and again bargaining with the consumer for an amount between one and three dollars. The result, then, would be the same as in the situation in which the financial institution did not have the power to inflate transaction costs—the party that values the use most highly would end up with it.

Theoretically, such a circumstance is possible in the financial information situation. A financial institution, could, for example, make it so difficult for consumers seeking to assert their privacy rights that the value of doing so is outweighed by the

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16 To be sure, this payment by the consumer would qualify as a transaction cost, but the consumer would still be better off incurring this transaction cost because the value of the right to the consumer would exceed the transaction cost.

17 If the bank could raise the consumer’s transaction costs to less than three dollars—that is, the value of the right to the consumer—a rational consumer should still assert her right and the result should be the same as in the situation where the bank lacks the power to inflate consumer transaction costs.
transaction costs, while simultaneously offering consumers an arrangement in which, say, for a fee, the bank would complete the required paperwork for the consumer, thus reducing consumer transaction costs to the point where it made sense for consumers to pay the fee.

However realistic such an agreement might be in some contexts, it would, however, not be feasible in the financial information example. Because one of the ways financial institutions inflate consumer transaction costs is by reducing the likelihood that consumers will even notice that they have rights at issue, it is not practical for financial institutions both to inflate consumer transaction costs and to offer to reduce those costs for a fee. Put another way, it is not feasible for financial institutions both to increase consumer transaction costs by reducing the likelihood that consumers will notice that they have a right to opt out, and to draw consumers’ attention to that right. Accordingly, financial institutions must choose between obscuring consumer rights, in which case the financial institutions will often retain the right, or not obscuring the rights, in which case it is likely that more consumers will assert the right, though the financial institution could attempt to purchase the right. It appears that financial institutions have, by and large, chosen to obscure consumer rights.

Returning to the example above, the result will be that the bank will possess the right to use the consumer information—a right worth one dollar—instead of consumers having the higher-valued right, worth three dollars. Thus, the financial institutions’ ability to manipulate transaction costs produces an inefficient result. Coase’s Theorem, of course, presupposes the absence of transaction costs, much less transaction costs deliberately created by one party, and so this result should not be surprising. But it is troubling nonetheless. The consumer has lost all the gains from exchange.

Now assume once again that instead of giving the initial allocation to the consumer, GLB had provided it to financial institutions, so that consumers could prevent the sale of information pertaining to them only by persuading financial institutions to sell them the right. In that situation, the financial institution would have no incentive to inflate the consumer’s transaction costs in asserting the right, because the consumer does not possess the initial allocation. Instead, banks should refuse to sell the right if it is more valuable to them than to consumers, and be willing to sell the right if it is more valuable to consumers—exactly what Coase’s Theorem predicts. Accordingly, the consumer is better off when the financial institution possesses the initial allocation of rights than when the consumer does, because when the financial institution possesses the initial allocation it has no incentive to inflate consumer transaction costs, and so the

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18 This is especially true because the principal way financial institutions increase consumer transaction costs in the consumer information context is by obscuring the notice. Though empirical information is not publicly available, it seems likely that consumers who become aware of their privacy rights do not find it difficult to assert those rights. GLB’s implementing regulations require financial institutions to provide consumers a “reasonable means” to exercise the opt out right. 16 C.F.R. § 313.7(a)((1)(iii). The regulations specify that financial institutions provide such a reasonable means if they supply a check off box on a form that consumers can return, provide a form that can be sent via email, or provide a toll-free number that consumers can use to opt out. 16 C.F.R. § 313.7(a)((2)(ii).
consumer has the possibility of obtaining the benefits of exchange, something that is not true when the consumer possesses the initial allocation. In other words, the initial allocation of the property right will sometimes lead to a different final allocation if one party has the power to inflate the other’s transaction costs. Table One illustrates the outcomes in the situation in which the financial institution can inflate consumer transaction costs, and contrasts with Table Two, which illustrates application of Coase’s Theorem under the assumption of no transaction costs.

The different outcomes are entirely consistent with Coase’s Theorem. As Carl J. Dahlman has written, “when there are transaction costs and informational differences between traders, then it may very well matter to whom liabilities and rights are assigned.” What is perhaps surprising is that the consumer is sometimes better off when the financial institution has the initial allocation than when the consumer does.

The ability of financial institutions to inflate consumer transaction costs is not unique. Other examples of inflated transaction costs are common. Thus, sellers notoriously make it difficult for consumers to collect on mail-in rebates. Similarly, sellers obscure contract terms by using small print, unreadable clauses, and lengthy contracts. Online sellers sometimes hide unattractive terms in privacy notices. Some sellers do not provide contract terms until after the consumer has received the item purchased, directing consumers to return the item if they are dissatisfied, thus giving consumers a significant incentive to retain the item. Others change contract terms by including drab “bill-stuffers” in an envelope with a more noticeable and seemingly more significant bill, thus reducing the likelihood that the consumer will focus on the change in terms. Forum selection clauses which provide for a distant forum, arbitration clauses which provide for expensive procedures or bar the use of class actions, or combinations of such devices may increase the cost of dispute resolution to the point where a party is better off foregoing assertion of a claim. Even litigation can involve the inflation of transaction costs, as for example when litigants inflict onerous discovery demands on an adversary solely to encourage a more favorable settlement.

How should policy-makers respond to the inflation of consumer transaction costs? Coaseans have sometimes argued that in formulating rules, government should presume that parties will improve their situation through bargaining to the extent possible. For example, Elizabeth Hoffman and Mathew L. Spitzer have written that “in choosing a legal rule to govern [certain] disputes . . . a judge or legislator should start his analysis by presuming that the parties can and will, in general, exhaust the gains from trade through private bargaining.” But they add:

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20 This example, and the others described in the text, are discussed more fully in Jeff Sovern, Toward a New Model of Consumer Protection: The Problem of Inflated Transaction Costs, 47 Wm. & Mary L. Rev. 1635 (2006).
21 See supra note 11.
Someone who claims the opposite, that bargaining breakdown will generally occur in some particular setting, must bear the burden of proof. He must point to some phenomenon, such as very high transaction costs, and show how the phenomenon is likely to prevent bargaining between the parties. Only if the person who predicts bargaining breakdown makes his case should the judge or legislator act with the presumption of bargaining breakdown.\textsuperscript{23}

Situations in which a party can inflate the other’s transaction costs present just such a situation, and so intervention is called for.

Policy-makers have attempted such interventions in the case of financial information by trying to restrain financial institutions from inflating consumer transaction costs. Thus, GLB requires that opt-out notices be clear and conspicuous.\textsuperscript{24} Regulations implementing GLB direct that the notice be “reasonably understandable and designed to call attention to the nature and significance of the information in the notice.”\textsuperscript{25} In examples, the regulations offer further clarification: something is reasonably understandable if it is presented in “clear concise sentences, paragraphs, and sections;” uses “short explanatory sentences,” and “definite, concrete, everyday words;” and avoids “multiple negatives” and legal and business terminology.\textsuperscript{26} A writing is designed to call attention if it uses plain-language headings and an easy-to-read typeface and type size.\textsuperscript{27} But those provisions have been in effect since the first GLB privacy notices were produced, and have not solved the problem.\textsuperscript{28} More recently, regulatory agencies have proposed adoption of a model form which is intended to be more readable.\textsuperscript{29} If regulators adopt the form, GLB provides that financial institutions that use it would be deemed in compliance with the statute.\textsuperscript{30} It is not clear whether that will be sufficient incentive to use the form and risk forgoing the revenue stream from selling consumer information that use of the model form might dam. Indeed, if it is true that financial institutions prefer that consumers not opt out of the sale of information pertaining to them, financial institutions might eschew use of the model form, if regulators approve it, in favor of less readable and noticeable forms which the financial institutions believe satisfy the statutory mandate.\textsuperscript{31}

\textsuperscript{23} Id. at 162-63.
\textsuperscript{25} 16 C.F.R. §313.3(b)(1).
\textsuperscript{26} 16 C.F.R. §313.3(b)(2)(i).
\textsuperscript{27} 16 C.F. R. §313.3(b ) (2)(ii).
\textsuperscript{28} See supra notes 8-12 and accompanying text.
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The fact that attempts to restrain financial institutions from inflating consumer transaction costs in connection with financial information by addressing their specific conduct have not succeeded does not mean that such attempts cannot succeed. Perhaps policy-makers have not been specific enough, or have left financial institutions too much discretion, and some tinkering with the regulations would produce a better result. But a preferable approach would be to adopt explicitly a norm against the inflation of consumer transaction costs, and use that norm in evaluating attempts by financial institutions to comply with disclosure regulations. The implementation of such a norm and what it might look like have been addressed elsewhere. Ideally, if parties responded to such a norm by not inflating consumer transaction costs, the parties could engage in Coasean bargaining, reach an efficient result, and further government intervention would be unnecessary.

It has long been recognized that transaction costs function as grit in the machinery of transactions. This article has argued that giving firms an incentive to toss more grit into the machinery by increasing transaction costs can produce an inefficient result by preventing parties from reaching the highest-valued uses of items and information.

Coase began his famous article, “[t]his paper is concerned with those actions of business firms which have harmful effects on others,” and proceeded to show that sometimes those harmful effects were worth incurring. Unfortunately, when firms have the power to inflate consumer transaction costs, that seems not to be so. In Frank J. Tipler’s words, “a general and quite useful moral principle is suggested [by] Coase’s Theorem itself: Thou shalt not increase human transaction costs[.] Or better, Thou shalt act to reduce transaction costs for others[.]” Unfortunately, this “moral principle,” in common with

31 The risks for a financial institution found to have violated GLB’s privacy provisions are unclear but probably not significant. Consumers do not have a private claim for violations of GLB. See, e.g., Borinski v. Williamson, 2004 WL 433746 (N.D. Tex. 2004). Perhaps a violation of GLB would give rise to a negligence per se claim, see, Anthony E. White, Comment, The Recognition of a Negligence Cause of Action for Victims of Identity Theft: Someone Stole My Identity, Now Who is Going to Pay for It? 88 Marq. L. Rev. 847 (2005), or a claim under a state unfair or deceptive acts statute. But see Smith v. Chase Manhattan Bank, 293 A.D.2d 598 741 N.Y.S.2d 100 (2d Dept. 2002) (court dismissed plaintiffs’ UDAP claim against bank for disclosing financial information to third parties in violation of its written confidentiality commitment on the ground that the complaint failed to allege actual injury. The court explained: ‘the ‘harm’ at the heart of this purported class action, is that class members were merely offered products and services which they were free to decline. This does not qualify as actual harm.’). GLB is enforced by various financial institution regulators, see 15 U.S.C. § 6805, but it remains unclear how vigorously they will enforce GLB.

32 See Sovern supra, note 20.

33 Coase, Social Cost, supra note 1 at 1.

34 Frank J. Tipler, The Value/Fact Distinction: Coase’s Theorem Unifies Normative and Positive Economics, available at http://ssrn.com/abstract=959855 (italics in original). See also Carl. J. Dahlman, The Problem of Externality, 22 J. L. & Econ. 141, 160 (1979) (“the Coase analysis implies one of two corrective measures: (i) find out if there is a feasible way to decrease the costs of transacting between market agents through government action, or (ii) if that is not possible, the analysis would suggest employing taxes, legislative action, standards, prohibitions, agencies, or whatever else can be thought of that will achieve the allocation of resources we have already decided is preferred.”). But see David Gilo & Ariel Porat, The Unconventional Uses of Transaction Costs, in Boilerplate: The Foundation of Market Contracts (Omri Ben-Shahar, ed. 2007) (listing arguably beneficial uses of transaction costs).
many others, is not always followed.
TABLE ONE

The Final Allocation When Financial Institutions Can Inflate Consumer Transaction Costs

<table>
<thead>
<tr>
<th>Who Values Right More?</th>
<th>Who Possesses Initial Allocation?</th>
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<td>Financial Institution</td>
<td>Consumer</td>
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<td>Financial Institution</td>
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### TABLE TWO

The Final Allocation Under Coase’s Theorem (No transaction costs)

<table>
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<tr>
<th>Who Values Right More?</th>
<th>Who Possesses Initial Allocation?</th>
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