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Note

Grocery Store Frequent Shopper Club Cards: A Window into Your Home

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Grocery Store Frequent Shopper Club Cards: A Window into Your Home[†]

Christine Anthony*

I. INTRODUCTION

1. “May I have your Frequent Shopper Card, please?” asks the cashier. The shopper hands the card to the cashier only thinking of the savings and rewards she will receive by using the card. The shopper is not necessarily aware that as each item passes over the scanner, a computer records information about the purchase, including the items bought, time of purchase, and the prices paid.¹ Nor is she necessarily aware that passing the Shopper Card over the scanner enables a computer to match her grocery purchase data with her name, address, and other household information.² This compilation of her grocery purchase data reveals significant facts about her as an individual, outside the context of her favorite foods, and, consequently, raises serious privacy issues.³ Because the database stores much information about the purchaser’s lifestyle, preferences, and purchasing habits, the amount of access to and use of this database is critically important in defining the proper balance between individual privacy and appropriate uses for this type of data.

2. This Note seeks to address this core privacy issue relative to two different categories of potential users: market participants and the government. The Note contends that invasion of privacy by market participants is unlikely because the competitive advantage created by the grocery purchase information serves as an incentive for the supermarket to protect that information as a trade secret. In

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¹ See Frank Hammel, *Data Base Dividends*, SUPERMARKET BUS., Mar. 1, 1996, available in 1996 WL 9742441 (noting that only 50 of 100,000 people raised privacy as an issue when asked about using the cards).

² See *id.*

³ See ERIK LARSON, THE NAKED CONSUMER 158-60 (1992) (noting that the purchase of expensive, unusual produce could reveal an affluent or adventurous cook, whereas a first time purchase of Huggies “For Him” may indicate the birth of a son).

contrast, the Note posits that invasion of privacy by the government is more likely because grocery purchase data contains information useful to legitimate law enforcement activities. Nevertheless, the government's use creates a tension between the individual's right to privacy and law enforcement duties by using data given voluntarily to a private market actor for entirely separate, and typically legal, commercial purposes.

3. This Note seeks to resolve the tension between privacy and governmental use of data by comparing the grocery purchase database to credit card reports and bank statements. By exposing the similarities across these three information compilations, this Note argues that the appropriate action is to expand the Right to Financial Privacy Act⁴ ("RFPA"), which currently restricts government access to credit card reports and bank statements, to restrict access to grocery purchase databases as well. If adopted, this proposal would enable the government to access grocery purchase data necessary for legitimate law enforcement activity without unduly invading grocery store customers' privacy.

II. FREQUENT SHOPPER CLUB CARD TECHNOLOGY

A. Description of the Technology

4. Supermarkets across the country are implementing marketing programs centered around the concept of a Frequent Shopper Club (the "Club").⁵ To become a member of this Club, the consumer must fill out an application providing her name, address, and additional information which may relate to her demographic characteristics or banking arrangements.⁶ The supermarket then issues her a card with a unique bar code or magnetic strip. The shopper presents this card to the cashier every time she makes a purchase in the supermarket.

5. When the cashier swipes the card through the scanner, an electronic payment system records every transaction.⁷ The information collected includes the item, price, time of day, lane number, discounts used, payment method, and

⁴ 12 U.S.C. §§ 3401-3422 (1994).

⁵ See Hammel, *supra* note 1 ("As frequent shopper programs proliferate, more supermarket companies are transforming their data base-linked systems from simple devices that dispense discounts to sophisticated competitive weapons.").

⁶ See, e.g., STOP & SHOP, NEW CARD APPLICATION, Form No. 73-2007 (Rev. 5/96) (on file with the *Journal of Science & Technology Law*). At the time this Note was completed, Stop & Shop was in the process of revising the application. This version of the application was the version publicly available as of March 25, 1998.

⁷ See Michael Garry, *The Best and Brightest*, PROGRESSIVE GROCER, Mar. 1, 1996, available in 1996 WL 8831625.

customer name.⁸ Every purchase made by each shopper can be tracked.⁹ This point-of-sale information is then entered into a database, from which the grocery company can extract and evaluate¹⁰ the purchase history of each customer, such as the volume of weekly purchases, specific purchases, and how frequently the consumer shops at the store.¹¹

B. Utility of the Technology to Food Industry

1. Internal Use by Retail Supermarkets

6. Supermarkets use the shoppers' purchase database as part of a "measured marketing" plan.¹² According to Brian Woolf, president of the Retail Strategic Center, measured marketing plans use the purchase information as a basis for assessing and improving marketing programs by accurately identifying target markets and providing households with the right offer based on a more precise profile.¹³

7. This approach to grocery marketing is the reverse of the traditional "shotgun" approach,¹⁴ which offers deep discounts to all shoppers, using the regular customers to subsidize the occasional shoppers.¹⁵ The profits lost in deep-discount sales to customers who shop in that particular store only when they can obtain a discount are recovered through the profit made from regular loyal customers who pay full price on many other items week after week.¹⁶ Conversely, the Club's measured marketing approach offers the best discounts only to the most loyal customers and

⁸ See *id.*

⁹ See Hammel, *supra* note 1.

¹⁰ See Denise Zimmerman, *Marsh Card IDEA Nears Completion*, SUPERMARKET NEWS, Aug. 28, 1996, available in 1995 WL 8314710 (explaining how data from card holders is collected).

¹¹ See Jane Palmer, *Baker's Shoppers Sign Up for New Program*, OMAHA WORLD HERALD, Aug. 30, 1995, at 20, available in 1995 WL 4086104 (outlining the information grocers hope to collect).

¹² See Hammel, *supra* note 1 (identifying the purpose behind collecting grocery purchase data).

¹³ See *id.* (quoting Brian Woolf, President of the Retail Strategic Center).

¹⁴ See *id.* (comparing the measured marketing approach with traditional marketing strategies).

¹⁵ See *id.*

¹⁶ See *id.*

uses the other customers to subsidize those targeted incentives.¹⁷ The supermarket offers discounts only to the customers identified through the grocery purchase database as the most valuable.¹⁸ Thus, the profits lost through discount sales to the most loyal customers are recovered through profits made from sales to less frequent shoppers.

2. External Use by Other Market Participants

8. Some supermarkets have taken the incentives a step beyond those that can be offered by the grocery store itself. These supermarkets have expanded their reward programs to include discounts from external sources. For example, Safeway, Inc.¹⁹ created “database marketing partnerships with manufacturers”²⁰ in 1995. After masking customer names with codes, Safeway provides the manufacturer with its database information.²¹ The manufacturer then selects the customers it wants Safeway to include in their joint discount program.²² Safeway implements the discount program through a targeted mailing of coupons, and then reports to the manufacturer which customers used the coupons and in what manner.²³

9. Similarly, Clemens²⁴ is opening its Club program to all manufacturers.²⁵ The grocery chain is marketing the program to manufacturers by providing access to its grocery purchase database and allowing manufacturers to select from several

¹⁷ See *id.*

¹⁸ See Garry, *supra* note 7.

¹⁹ Safeway, Inc. is a retail grocery store chain that had \$16.3 billion in sales in 1996. See 3 WARD'S BUSINESS DIRECTORY OF U.S. PRIVATE & PUBLIC COMPANIES 3237 (1997) [hereinafter WARD'S BUSINESS DIRECTORY].

²⁰ Claudia Montague, *Right on Target*, MARKETING TOOLS, Sept. 1, 1995, available in 1995 WL 10399928.

²¹ See *id.*

²² For example, manufacturers participating in the “Families with Children” program may scan for purchases of diapers and child-targeted snacks. See *id.*

²³ See *id.*

²⁴ Clemens Markets, Inc. is a retail grocery store chain that had \$2.6 billion in sales in 1996. See 1 WARD'S BUSINESS DIRECTORY, *supra* note 19, at 806.

²⁵ See Chris O'Leary, *Clemens to Profile Frequent Shopper*, SUPERMARKET NEWS, May 22, 1995, available in 1995 WL 8313957.

ways to use the data to sell their products.²⁶ For example, for a fee, manufacturers can have instant coupons for their products issued at the point-of-sale to customers identified in the database as meeting a certain profile.²⁷ Alternatively, the manufacturers can elect to participate in direct mailings sent out by the supermarket to customers based on information in the grocery purchase database.²⁸

III. PRIVACY CONCERNS ASSOCIATED WITH THE COMPILATION OF GROCERY PURCHASE DATABASES

10. The emerging use of grocery purchase databases by manufacturers raises privacy concerns²⁹ because these databases contain an amazing amount of raw information about a sizable portion of American households. A promo study noted in a Food Institute³⁰ report determined that 44% of American grocery store customers participate in these discount programs.³¹ The Food Institute estimated that 15% of shoppers participate in a frequent shopper club virtually “every” time they visit the store, 8% take part “fairly often,” and 17% use the programs “occasionally.”³²

²⁶ See *id.* (describing the options, including issuing instant point-of-sale coupons and supermarket-generated direct mailings).

²⁷ As an illustration, O’Leary points out the advantages a dog food manufacturer could gain by using supermarket data to identify dog owners, through either the customers’ self-reporting on the application or their individual histories of buying dog products, and having a dog food coupon issued automatically at the cash register. See *id.*

²⁸ See *id.*

²⁹ See generally Kathleen A. Linert, Note, *Database Marketing and Personal Privacy in the Information Age*, 18 SUFFOLK TRANSNAT’L L. REV. 687, 707 (1995) (explaining that technology has made private information widely available, thus stimulating a need for laws that protect that sensitive information).

³⁰ The Food Institute is a nonprofit organization providing information and research to food processors, wholesalers, food-service operators, and food importers on a weekly basis. See *Corporate Profile for the Food Institute*, BUS. WIRE, Feb. 20, 1998, available in LEXIS, Market Library, Bwire File. The Food Institute publishes the Food Institute Report on a weekly basis. See *The Food Institute Online* (visited Apr. 11, 1998) <<http://www.foodinstitute.com/>>.

³¹ See *Databases Key to Customer Retention Says New Report*, FOOD INST. REP., May 13, 1996, available in 1996 WL 8766029.

³² *Frequent Shopper Programs Take Off*, FOOD INST. REP., July 1, 1996, available in 1996 WL 10489604.

11. In the hands of marketing and advertising specialists, this translates into frighteningly accurate profiles of family life. The purchase of “fresh ginger, fresh basil, a handful of deadly hot serrano peppers, a little radicchio, arugula, [and] jicama” may reveal an adventurous cook with considerable disposable income.³³ A change in buying habits from weekly purchases of high fat foods such as red meat to weekly purchases of low fat granola or skinless chicken may reveal a recent heart attack or diagnosis of high cholesterol.³⁴ A first time purchase of diapers may indicate the birth of a child.³⁵

A. Wide Public Dissemination of Grocery Purchase Information Through Sharing Among Market Participants is Unlikely

12. The prospect of this purchase information and the personal information embedded within it falling into the hands of the general retail market may appear ominous, but it is unlikely that such information will be disseminated widely. The grocery purchase database can be characterized as a private market database.³⁶ A private market database includes all the data a business collects about its customers and their purchases.³⁷ Typically, these databases are not fully shared with outsiders.³⁸ A grocer invests a considerable sum to collect this information in order to gain a marketing advantage.³⁹ The grocer loses any advantage gained by sharing all the information with the manufacturers or other grocery stores.⁴⁰ To get a return on its investment in the technology, the supermarket needs to limit access to the total database.⁴¹ Thus, a supermarket hoping to sell the grocery purchase

³³ LARSON, *supra* note 3, at 159 .

³⁴ *See id.* at 160.

³⁵ *See id.*

³⁶ *See* Jennifer T. Barrett, *Playing in the Data Sandbox*, COMPUTER LAW., Sept. 1993, at 10, 11-12.

³⁷ *See id.*

³⁸ *See id.*

³⁹ *See* Garry, *supra* note 7 (quoting William Brodbeck, Chief Executive Officer of Dick’s Supermarkets, that it is “very expensive to ‘go from nowhere to a viable program,’” but his chain is seeing a return on its initial investment in the program).

⁴⁰ *See* Priscilla A. Walter, *Databases: Protecting an Asset; Avoiding a Liability*, COMPUTER LAW., Mar. 1991, at 10, 11 (explaining that to derive a competitive advantage through the use of information, the information may need to be kept confidential).

data to manufacturers will package the information so that only the supermarket has access to the actual raw data.⁴² The manufacturers will pay the supermarket to use the grocery purchase database to target the manufacturer's customer incentives.⁴³

13. By limiting access, a supermarket takes a first step in obtaining legal protection for the grocery purchase database through trade secret law. A trade secret is defined as "any information that can be used in the operation of a business or other enterprise that is sufficiently valuable and secret to afford an actual or potential economic advantage over others."⁴⁴ The grocery purchase database is eligible for trade secret protection because it is a customer list enhanced with preference information that provides an advantage over competitors. Customer lists with only names and addresses can also qualify as trade secrets under certain circumstances.⁴⁵ However, to ensure protection, the customer list must also match those names with marketing data indicating a particular client's interests.⁴⁶ By

⁴¹ See *id.*

⁴² See Montague, *supra* note 20 (observing that Safeway does not release the names and addresses of frequent shoppers to its vendor partners; it uses a unique bar code to reveal relevant data).

⁴³ See *id.* (emphasizing that while the manufacturers do not get direct access to the grocery purchase data, they are assured that their offers will be disseminated to customers who will respond favorably to their incentives).

⁴⁴ RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 39 (1995) (providing the model definition used in those states adopting the Restatement approach). Not all states adopt the Restatement approach; some states look to the Uniform Trade Secret Act ("U.T.S.A."). See Uniform Trade Secret Act Table of Jurisdictions Wherein Act has been Adopted, 14 U.L.A. 153 (Supp. 1998) (listing the states following the U.T.S.A. approach). Under the U.T.S.A., a trade secret is defined as

information including, a formula, pattern, compilation, program, device, method, technique, or process that:

- (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and
- (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. Uniform Trade Secrets Act § 1(4), 14 U.L.A. 438 (1990) [hereinafter U.T.S.A.].

This U.T.S.A. definition departs from the Restatement definition only to the extent that the U.T.S.A. protects trade secrets not yet in use. See *id.*; *id.* at cmt. This distinction is not relevant in the context of this Note because the grocery purchase databases under consideration are in use and fall within both the broader U.T.S.A. definition and the narrower Restatement definition.

⁴⁵ See, e.g., *American Credit Indem. Co. v. Sacks*, 262 Cal. Rptr. 92, 93, 97-98 (Cal. Ct. App. 1989) (finding that a customer list of a credit insurer underwriter constitutes a trade secret under the common law and the U.T.S.A.'s two-pronged economic value and reasonableness test).

design, the grocery purchase database matches names with preferences. Therefore, if treated as a trade secret by the supermarket, a court could protect the grocery purchase database by preventing competitors from using any information misappropriated from the grocery purchase database.⁴⁷

14. Misappropriation occurs when a trade secret is acquired through *improper means* by a person who knows, or has reason to know, that the information obtained is a trade secret.⁴⁸ Improper means include theft, fraud, participation in a breach of confidence, and espionage.⁴⁹ Therefore, a court could enjoin a competitor's use of grocery purchase data obtained by unauthorized copying of files from the supermarket's computer system.⁵⁰ A competitor cannot circumvent the misappropriation doctrine by having someone else do the dirty work for it.⁵¹ Thus, a

⁴⁶ Compare *Allen v. Johar*, 823 S.W.2d 824, 825, 827 (Ark. 1992) (protecting customer lists and files containing information about a rubber grinding company customers' "personality traits, hobbies and likes, credit history, buying habits and pricing agreements" as trade secrets) with *Ruesch v. Ruesch Int'l Monetary Servs.*, 479 A.2d 295, 298 (D.C. App. 1984) (refusing to protect a customer list with no marketing data projecting the needs of the customers).

⁴⁷ See RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 40 (defining misappropriation); U.T.S.A. § 1(2), *supra* note 44, at 438 (defining misappropriation).

⁴⁸ According to the Restatement, "[o]ne is subject to liability for the appropriation of another's trade secret if: (a) the actor acquires by means that are improper [information] . . . that the actor knows or has reason to know is the other's trade secret." RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 40. According to the U.T.S.A., "[m]isappropriation' means: (i) the acquisition of a trade secret of another by a person who knows or has reason to know the trade secret was acquired by improper means." U.T.S.A. § 1(2), *supra* note 44, at 438.

⁴⁹ The Restatement defines "'improper' means" as including "theft, fraud, unauthorized interception of communications, inducement of or knowing participation in a breach of confidence, and any other means either wrongful in themselves or wrongful under the circumstances of the case." RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 43. The U.T.S.A. defines "improper means" as including "theft, bribery, misrepresentation, breach or inducement of a breach of duty to maintain secrecy, or espionage through electronic or other means." U.T.S.A. § 1(1), *supra* note 44, at 437.

⁵⁰ See U.T.S.A. § 1(2)(ii), *supra* note 44, at 438 (explicitly stating that use or disclosure of a trade secret acquired through improper means constitutes misappropriation); RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 40(b) (clarifying that use or disclosure of a trade secret without consent falls within misappropriation).

⁵¹ Under the U.T.S.A., misappropriation includes

disclosure or use of a trade secret of another without express or implied consent by a person who . . . (B) at the time of disclosure or use, knew or had reason to know that his knowledge of the trade secret was (I) derived from or through a person who had utilized improper means to acquire it; . . . [or](III) derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use. U.T.S.A. § 1(2)(ii), *supra* note 44, at 438.

court could enjoin a competitor's knowing use of grocery purchase data bought from an employee of another supermarket who did not have authority to release such data.⁵²

15. Consequently, trade secret law could adequately protect the confidentiality of an individual's grocery purchase information in the private sector. Reliance on trade secret law as a means of safeguarding privacy, however, is inherently risky. A supermarket's decision to keep the grocery purchase data a secret derives from financial incentive,⁵³ but finances could change, resulting in a decision to disclose the grocery purchase data. For example, the price a manufacturer is willing to pay for the grocery purchase data could increase. If the level of profit from selling data to manufacturers increases beyond the profit generated from less frequent shoppers who do not take advantage of the deep discounts in the Club, then the supermarket would be motivated to sell all of its data. At that point the only legal bar to disclosure of that information to market participants comes from a contractual confidentiality agreement between the shopper and the supermarket. Such an agreement could be incorporated into the Shopper Club card application.

B. Potential Uses for Government Access to Grocery Purchase Databases

16. Competitors are not the only entities potentially interested in the grocery purchase database. The government may wish to access an individual's grocery purchase database for a variety of reasons. Possible uses include examining the efficacy of government assistance programs, monitoring fraud in those programs, and investigating criminal activities.

Under the Restatement, liability for the appropriation of another's trade secret is incurred if

(b) the actor uses or discloses the other's trade secret without the other's consent and, at the time of the use or disclosure, (1) the actor knows or has reason to know that the information is a trade secret that the actor acquired from or through a person who acquired it by means that are improper . . . or whose disclosure of the trade secret constituted a breach of a duty of confidence owed to the other. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 40(b).

⁵² See *Data Gen. Corp. v. Digital Computer Controls, Inc.*, 357 A.2d 105, 111, 113-14 (Del. Ch. 1975) (holding that courts protect trade secrets from unauthorized duplication and use by granting injunctive relief).

⁵³ See Walter, *supra* note 40, at 11 (explaining that supermarkets keep the information confidential to gain a competitive advantage).

1. Measuring Efficacy of Government Assistance Programs

17. Consider the Food Stamp Program.⁵⁴ The Food Stamp Program assists low-income families in obtaining nutritious foods.⁵⁵ To measure its efficacy in achieving this stated purpose, the Department of Agriculture studies nutrient availability and nutrient intake in foods purchased by food stamp recipients.⁵⁶ Analysis of the grocery purchase record of a food stamp recipient provides direct, objective nutrient availability data. Access to this information would eliminate the need to issue questionnaires or conduct interviews to learn what foods recipients used in meal preparation. An accurate and complete ingredient list for meals prepared by at least a percentage of Food Stamp clients would now be available with the push of a few buttons.

18. The government may also wish to access the grocery purchase database to measure the administrative efficiency of the Food Stamp Program. Clients of the Food Stamp Program receive food coupons on a monthly basis⁵⁷ in an amount determined by the size of their household⁵⁸ and their net income⁵⁹ available to purchase food.⁶⁰ The food coupons are “in-kind” benefits because their fungibility

⁵⁴ The Food Stamp Program was first established in 1964. *See* Food Stamp Act of 1964, Pub. L. 88-525, 78 Stat. 703 (1964). The Program has been revised and refined to its modern form as it appears at 7 U.S.C. §§ 2011-2032 (1994).

⁵⁵ *See* 7 U.S.C. § 2011.

⁵⁶ *See* JAMES C. OHLS & HAROLD BEEBOUT, *THE FOOD STAMP PROGRAM: DESIGN TRADEOFFS, POLICY AND IMPACTS 2* (1993). Nutrient availability is the “nutrient contents of foods used in preparing meals.” *Id.* at 107. Nutrient intake is the “nutrient content of the foods actually eaten.” *Id.*

⁵⁷ *See* 7 C.F.R. § 271.2 (1998) (defining allotment as the total value of monthly coupons issued to a household).

⁵⁸ *See id.* § 273.1 (defining a household as composed of individuals or groups of individuals who live together and customarily purchase food and prepare meals together for home consumption, provided they are not boarders, residents of an institution, or residents of a commercial boarding house).

⁵⁹ To calculate net monthly income the state agency adds 80% of the gross monthly income earned by all household members to the total monthly unearned income of all household members and then subtracts income exclusions to arrive at a base figure. *See id.* § 273.10(e)(1). The standard deduction, any excess medical deductions, allowable monthly dependent care expenses, allowable monthly child support payments, and allowable shelter expenses are then subtracted from the base. *See id.*

⁶⁰ *See* 7 U.S.C. § 2017(a) (1994) (stating that the value of a household’s allotment is “equal to the cost of . . . the thrifty food plan reduced by an amount equal to [30%] of the household’s

and negotiability are limited, in that they are only valuable in exchange for a specific good.⁶¹ Recipients can only exchange them for an equivalent value of food,⁶² and the coupons cannot be used to purchase non-food items, such as cleaning supplies.⁶³ After the food outlet accepts the coupons and redeems them for cash at a local bank,⁶⁴ the Federal Reserve System reimburses the local bank.⁶⁵

19. Through the Food Stamp Program, federal and state governments spend approximately \$22 billion to assist approximately 25 million participants annually.⁶⁶ All benefits are paid by the federal government,⁶⁷ whereas the administrative costs are generally shared equally by the federal and state governments.⁶⁸ The federal government also assumes a large proportion of the administrative costs associated with initiatives encouraged by Congress, including computer system development,⁶⁹ training programs,⁷⁰ and fraud control.⁷¹

income”); 7 C.F.R. § 271.2 (1997). The thrifty food plan is “the diet required to feed a family of four persons consisting of a man and a woman 20 through 50, a child 6 through 8, and a child 9 through 11.” 7 C.F.R. § 271.2. This hypothetical family of four is used as the “basis” for all households regardless of their unique make-up. *Id.* That “basis” is then adjusted for size and other factors. *Id.*

⁶¹ See 7 U.S.C. § 2016(b) (allowing food coupons to be used to purchase food in pre-approved retail stores only); 7 C.F.R. § 271.2 (1998) (defining coupons as any “coupon, stamp, access device or type of certification provided . . . for the purchase of eligible food”).

⁶² See 7 U.S.C. § 2016(b); 7 C.F.R. § 271.2.

⁶³ See OHLS & BEEBOUT, *supra* note 56, at 48.

⁶⁴ See 7 U.S.C. § 2019 (1994); 7 C.F.R. § 278.4 (1998) (explaining that retail food stores “shall use redemption certificates to present coupons to insured financial institutions for credit or for cash”).

⁶⁵ Coupons submitted for cash or credit must be properly endorsed and accompanied by redemption certificates. See 7 C.F.R. §§ 278.5(a)-(b). “All verified and encoded redemption certificates accepted by [the financial institution] shall be forwarded with the corresponding coupon deposits to the Federal Reserve Bank.” *Id.* The Federal Reserve Bank then credits the financial institution’s Federal Reserve account and “charges the items to the general account of the Treasurer of the United States.” *Id.*

⁶⁶ See OHLS & BEEBOUT, *supra* note 56, at 1.

⁶⁷ See 7 C.F.R. § 278.5(a)-(b) (1998).

⁶⁸ The Agriculture Secretary is authorized to pay each state agency 50% of all administrative costs incurred by the state in operating the Food Stamp Program. See 7 U.S.C. § 2025(a) (1994).

⁶⁹ The Secretary is authorized to pay 50% of the costs incurred by the state in “planning, design, development or installation of automatic data processing and informational retrieval systems.” *Id.* § 2025(g).

20. Because the government disburses such a significant amount of benefits, it seeks to ensure that the eligible people receive the correct level of benefits while eliminating fraud.⁷² In an effort to increase administrative accuracy and reduce administrative costs, the Food Stamp Program imposes financial penalties on states with high error rates.⁷³ To illustrate the magnitude of the error problem, consider that in 1988, the Food Stamp Program paid out \$763 million more than required.⁷⁴

21. Accessing the grocery purchase database of food stamp benefit recipients could aid the government in these efficacy evaluations. Examining a recipient's grocery purchase record provides some indication of the fit of the level of benefit with actual need. For example, if the total in grocery bills for the month is less than the value of food coupons issued to the household, that may indicate an overpayment. Purchases of amounts of food far in excess of the amount a household of that size could consume may also indicate an overpayment. Conversely, if the total grocery bills for a particular recipient family are greater than the combination of the value of the food coupons issued to them and the amount estimated the household can contribute to its food costs, there may be an underpayment. An underpayment may also be indicated if the amount of food purchased is equivalent to the value of food coupons disbursed but far below the amount a household of that size would be expected to consume.

2. Monitoring Fraud in Government Assistance Programs

22. The goal of matching benefits paid with actual need is sharpened by the fact that the benefits are "in-kind." "In-kind" benefits encourage illegal activities, such as sale of the coupons for cash and the use of the coupons for non-food items.⁷⁵ The Food and Consumer Service of the Department of Agriculture ("FCS") is responsible for ensuring that food stamp coupons are not exchanged for non-food items or for cash.⁷⁶ The agency performs this function by monitoring the redemption

⁷⁰ The Secretary is obligated to reserve funds for allocation to state agencies for use in carrying out employment and training programs. *See id.* § 2025(h).

⁷¹ The Secretary may pay each state a minimum of 50% of Food Stamp Program investigation and prosecution costs. *See id.* § 2025(a).

⁷² *See* OHLS & BEEBOUT, *supra* note 56, at 9.

⁷³ *See* 7 U.S.C. § 2025(c) (outlining state incentives for reducing error).

⁷⁴ *See* OHLS & BEEBOUT, *supra* note 56, at 78.

⁷⁵ *See id.* at 50.

volumes of individual food outlets.⁷⁷ A particularly high redemption volume indicates the store may be accepting coupons illegally.⁷⁸ To confirm this suspicion, an FCS investigator goes to the food outlet and attempts to purchase non-food items with food stamp coupons.⁷⁹ A very high number of these investigations uncover violations: in 1988, 4,350 of 4,875 investigations confirmed fraud.⁸⁰

23. This data suggests that the FCS is only scratching the surface of fraud and that devoting additional resources to detect fraud may be appropriate.⁸¹ One fraud detection approach is to access recipient grocery purchase databases in order to correlate the value of food purchased by the recipients with the value of the food stamp coupons redeemed by the store.⁸² By comparing the aggregate value of food purchased by all the Food Stamp recipients shopping at the store, it may be possible to establish an estimated maximum value the store could redeem in coupons.

24. For example, if the grocery purchase database indicated 100 food stamp recipients shopped at the store that month, spending a total of \$10,000 on food stuffs, then the estimated maximum value the store could redeem in coupons would be \$10,000. It may not be possible to obtain an absolute maximum as every food stamp coupon recipient may not participate in a Club program such that her household's purchases are identifiable within the database. This method for estimating a maximum, however, seems to be just as likely to reveal fraud as the higher redemption volume method now used. Thus, the grocery purchase database may be of interest to the government in monitoring fraud in its public assistance programs.

⁷⁶ The FCS may disqualify any authorized retail food store from participation in the Food Stamp Program if it fails to comply with the Food Stamp Act. *See* 7 C.F.R. § 278.6(a) (1998). An individual may be ineligible for further participation in the Food Stamp Program if the individual intentionally violates the provisions of the Food Stamp Act. *See* 7 U.S.C. § 2015(b)(1) (1994); 7 C.F.R. § 273.16. It is a violation of the Food Stamp Act to sell coupons for cash or consideration other than eligible food. *See* 7 C.F.R. § 271.2 (1997).

⁷⁷ *See* OHLS & BEEBOUT, *supra* note 56, at 94 (describing one method by which the FCS carries out its duty to ensure food stamps are exchanged for food).

⁷⁸ *See id.* (describing the criteria FCS uses to identify potential fraud).

⁷⁹ *See id.* (describing the method used by FCS to confirm fraudulent activity).

⁸⁰ *See id.* (employing statistics to highlight the high incidence of fraud in the Food Stamp Program).

⁸¹ *See id.* (interpreting fraud statistics).

⁸² *See* 7 C.F.R. § 278.6(e)(2)(ii) (1998) (permitting the disqualification of a firm if its coupon redemption for a specified time period exceeds its food sales during that same time period).

3. Investigating Criminal Activities

25. By using the grocery purchase database to track fraud, the government is essentially using the information as a tool for law enforcement. The government could also use the information to investigate a suspected criminal's purchases and activities. For example, an inspection of a terrorist's purchase record could reveal the gradual purchase of enough fertilizer to create a moderate explosion or could reveal the purchase of a unique item found at a crime scene. Perhaps the time of purchase could place an individual at a crime scene or preclude the possibility of his presence at another location. While this may seem a bit far fetched, it has been done within the context of credit card reports.⁸³ The United States Army accessed an individual's American Express⁸⁴ record as part of an audit of his company's business, which included expenditures for which he was reimbursed by the Army.⁸⁵ In the private sector, the Amoco Oil Co.⁸⁶ ("Amoco") accessed an employee's credit card report to determine if he abused his sick leave.⁸⁷ From these records, Amoco confirmed its suspicions and learned that the employee had used his credit card at various restaurants and bars on the days he called in sick.⁸⁸

IV. GOVERNMENT ACCESS TO GROCERY PURCHASE DATABASE DEPENDS ON CHARACTERIZATION OF INFORMATION

26. As discussed in this Note, the government may have an interest in obtaining the information collected at the point of sale by Frequent Shopper Club

⁸³ See, e.g., *Pulla v. Amoco Oil Co.*, 72 F.3d 648, 652-54 (8th Cir. 1995) (noting that a jury had found that a co-worker's review of Pulla's credit card records to verify his abuse of sick leave was an invasion of privacy); *Duncan v. Belcher*, 813 F.2d 1335, 1336-37 (4th Cir. 1987) (considering the legality of the Department of the Army's accessing Duncan's American Express record as part of an audit).

⁸⁴ American Express Company is a securities brokerage firm that also issues credit cards. See 1 WARD'S BUSINESS DIRECTORY, *supra* note 19, at 178.

⁸⁵ See *Duncan*, 813 F.2d at 1337.

⁸⁶ Amoco Corp. is a mining, manufacturing, transportation, and retail company that had \$27 billion in sales in 1996. See 1 WARD'S BUSINESS DIRECTORY, *supra* note 19, at 210.

⁸⁷ See *Pulla v. Amoco Oil Co.*, 882 F. Supp. 836, 844 (S.D. Iowa 1994), *aff'd in part and rev'd in part* 72 F.3d 648 (8th Cir. 1995) (affirming jury's finding that employer's access to credit card reports was an invasion of employee's privacy but questioning the constitutionality of a large punitive damage award).

⁸⁸ See *id.* at 847.

cards. The procedure the government must follow to legally obtain that information depends upon the characterization of that information. The information may be characterized as a compilation of consumer preference information or as financial information.

A. Characterization as Compilation of Consumer Preference Information

27. The grocery purchase database could be considered a compilation of consumer preference information kept as a trade secret. As such, the government could obtain the grocery purchase information under its regulatory authority.⁸⁹ The Department of Agriculture has a general authority to regulate under 7 U.S.C. § 2013(c).⁹⁰ Congress empowered the Secretary of Agriculture to issue regulations necessary for the administration of the Food Stamp Program.⁹¹ Included in this delegation is the authority to promulgate enforcement procedures.⁹² With this general regulatory and enforcement authority comes permission to employ methods of investigation required to execute that authority.⁹³ Congress invests an agency with the power to use the techniques necessary to fulfill its statutory mission even though each permissible technique is not explicitly identified.⁹⁴ Therefore, FCS can access trade secret grocery purchase data characterized as consumer preference information because such access furthers the Food Stamp Program's mission by monitoring the administrative efficiency and incidence of fraud.

28. Trade secret law would not bar the government from accessing the information. Trade secret law applies to acquisition of information for the purposes

⁸⁹ Cf. *Dow Chemical Co. v. United States*, 476 U.S. 227, 234 (1986) (holding that the EPA was within its statutory authority when using aerial observation and photography of manufacturing equipment protected as a trade secret to ensure compliance with clean air and water regulations).

⁹⁰ 7 U.S.C. § 2013(c) (1994).

⁹¹ See *id.* ("The Secretary shall issue such regulations consistent with this chapter as the Secretary deems necessary or appropriate for the efficient and effective administration of the food stamp program.").

⁹² See *Compton v. Tennessee Dep't of Pub. Welfare*, 532 F.2d 561, 563-64 (6th Cir. 1976) (describing the nature of the authority delegated to the Department of Agriculture under 7 U.S.C. § 2013(c)).

⁹³ See *Dow Chemical Co.*, 476 U.S. at 233 ("Regulatory or enforcement authority generally carries with it all the modes of inquiry and investigation traditionally employed or useful to execute the authority granted.").

⁹⁴ See *id.* ("When Congress invests an agency with enforcement and investigatory authority, it is not necessary to identify explicitly each and every technique that may be used in the course of executing the statutory mission.").

of competing with the secret holder, not to the acquisition of information for regulatory purposes.⁹⁵ Without a competitive purpose, the government could access the grocery purchase database to use the information for regulatory and law enforcement purposes only.

B. Characterization as Financial Information

29. The database could also be characterized as financial information similar to a credit card report or a bank statement because all three track which items are purchased, where they are purchased, and for what price. Justice Brennan, in his dissent in *United States v. Miller*, found that this transactional information “can reveal much about a person’s activities, associations, and beliefs.”⁹⁶

1. No Constitutional Right of Privacy in This Type of Information

30. The Constitution protects the access to information about personal affairs through the right to privacy.⁹⁷ This right to privacy encompasses two different interests—an interest in “avoiding disclosure of personal matters” and an interest in making certain important decisions independently.⁹⁸ The reproductive rights debate involves an individual’s interest in decision making, the autonomy branch of the right to privacy,⁹⁹ and emphasizes the importance of the availability of all alternatives to making an independent decision.¹⁰⁰

31. The threat to the interest in available alternatives by the dissemination of financial transactional data, such as that compiled in credit card reports, bank statements, and grocery purchase databases does not create a constitutional

⁹⁵ See *id.* at 232 (clarifying that only access to trade secrets for the purpose of using them in the same manner as the trade secret holder is proscribed).

⁹⁶ See *United States v. Miller*, 425 U.S. 435, 453 (1976) (Brennan, J., dissenting). Congress promulgated the Right to Financial Privacy Act in response to *Miller*. See *infra* note 113.

⁹⁷ See *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

⁹⁸ *Whalen v. Roe*, 429 U.S. 589, 598-600 (1977) (defining the nature and scope of the right to privacy to determine the constitutionality of a statute requiring doctors to disclose information about prescription drugs with high potential for abuse).

⁹⁹ See *Plante v. Gonzalez*, 575 F.2d 1119, 1128 (5th Cir. 1978) (designating the interest in independent decision making as an interest in autonomy).

¹⁰⁰ See *id.* at 1130 (identifying the essence of the autonomy branch as an interest in preventing the removal of alternatives from the decision making process).

concern, however.¹⁰¹ Disclosure of financial information will not directly influence intimate decision making to the point that an individual is “deprived of control over . . . [the] intimacies of . . . body and mind.”¹⁰² For example, knowing that the government may access one’s grocery purchase record will not affect an individual’s decision to purchase birth control to the same extent that a ban against abortion could.

32. The interest in avoiding disclosure of personal matters, the confidentiality branch of the right of privacy,¹⁰³ includes an interest in maintaining the confidentiality of personal papers.¹⁰⁴ In particular, the Fourth Amendment¹⁰⁵ prohibits warrantless compulsory production of private papers in order to establish a criminal charge.¹⁰⁶ Because the transactional financial data collected by credit card companies, banks, and the grocery purchase database reveal an individual’s personal affairs,¹⁰⁷ they could be considered private papers and, thus, not subject to production for law enforcement purposes.

33. In *United States v. Miller*, however, the Supreme Court disagreed with this reasoning within the context of bank records.¹⁰⁸ The Supreme Court considered these records to be business records of the bank because the bank held the records and they pertained to transactions in which the bank participated.¹⁰⁹ Furthermore,

¹⁰¹ See *id.* at 1131-32 (“While disclosure may have some influence on intimate decision-making, we conclude that any influence does not rise to the level of a constitutional problem.”).

¹⁰² Tom Gerety, *Redefining Privacy*, 12 HARV. C.R.-C.L. L. REV. 233, 268 (1977) (defining privacy from a control perspective).

¹⁰³ See *Plante*, 575 F.2d at 1128 (designating the interest in avoiding disclosure of personal matters as an interest in confidentiality).

¹⁰⁴ See *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 456-65 (1977) (considering explicitly the confidentiality branch of the right to privacy in determining whether government archivists may screen materials collected by former President Nixon).

¹⁰⁵ See U.S. CONST. amend IV.

¹⁰⁶ Compare *Boyd v. United States*, 116 U.S. 616, 621-22 (1886) (finding a relationship between the Fourth Amendment’s limitation on investigative techniques and the Fifth Amendment’s privilege against self-incrimination as relates to the ability of papers to reveal the inner workings of a person’s mind) with *Fisher v. United States*, 425 U.S. 391, 405-12 (1976) (drawing a thin line between the evidentiary uses of papers which were voluntarily prepared and those compelled to be prepared).

¹⁰⁷ See *United States v. Miller*, 425 U.S. 435, 453 (1976) (Brennan, J., dissenting).

¹⁰⁸ See *id.* at 440-443 (stating that records of accounts are not private papers).

¹⁰⁹ See *id.* at 440-41.

because the bank records reflected negotiable transactions, and not confidential communications, the customer had no “legitimate ‘expectation of privacy’” in them.¹¹⁰ Thus, by revealing her financial affairs to the bank, the customer assumed the risk that the bank would convey the information to the government.¹¹¹ Therefore, the government need not overcome a barrier of constitutional protection to obtain financial transactional information,¹¹² such as that maintained by banks, credit card companies, or grocery purchase databases.

2. Expanding Statutory Right to Privacy Under the Right to Financial Privacy Act to Include Grocery Purchase Databases

a. Right to Financial Privacy Act Does Not Encompass Grocery Purchase Databases

34. In response to *Miller*, Congress enacted the Right to Financial Privacy Act (“RFPA”).¹¹³ The RFPA is meant to fill the void left by *Miller* regarding statutory protection against the government’s unrestricted access to third-party records.¹¹⁴ The RFPA does not insulate private accounts from investigation by government agencies. It merely establishes the procedures that the government must follow in conducting its investigation.¹¹⁵ Section 3402 of the RFPA outlines those procedures.¹¹⁶ The government may obtain financial records from a financial institution pursuant to a judicial or administrative subpoena or search warrant, the customer’s written consent, or with a formal written request.¹¹⁷ The government can

¹¹⁰ *Id.* at 442.

¹¹¹ *See id.* at 443.

¹¹² *See id.* at 437.

¹¹³ *See* Financial Institutions Regulatory & Interest Rate Control Act of 1978, Pub. L. 95-630, 92 Stat. 3641 (codified as amended at 12 U.S.C. §§ 3401-3422 (1994)). “This title is a congressional response to the Supreme Court decision in [sic] *United States v. Miller*.” Financial Institutions Regulatory & Interest Rate Control Act of 1978, H.R. REP. NO. 95-1383, at 34 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9273, 9306.

¹¹⁴ *See* H.R. REP. NO. 95-1383, at 34 (remarking that “the Court did not [adequately recognize] the sensitive nature of financial records” and, therefore, Congress may provide protection for individual rights beyond that supplied by the Constitution).

¹¹⁵ *See* 12 U.S.C. § 3402 (1994); *see also* *Duncan v. Belcher*, 813 F.2d 1335, 1339 (4th Cir. 1987) (summarizing 12 U.S.C. §§ 3402, 3414).

¹¹⁶ *See* 12 U.S.C. § 3402.

also obtain the financial records if access to the information contained therein is necessary to prevent injury, property damage, or flight from prosecution, or is necessary to the conduct of intelligence activities or the protective functions of the Secret Service.¹¹⁸ There are also explicit exceptions to the rule's applicability.¹¹⁹

35. RFPA § 3402 details the threshold requirements for the application of these procedural requirements.¹²⁰ First, the information requested must constitute a financial record.¹²¹ A financial record is defined as “an original of, a copy of, or information known to have been derived from, any record held by a financial institution pertaining to a customer’s relationship with the financial institution.”¹²² Courts emphasize the word “any” when interpreting whether a document turned over by a bank qualifies as a financial record.¹²³ A financial record need not chronicle the relationship the customer has with the financial institution over any length of time; reflection of a single interaction with the financial institution is sufficient.¹²⁴ Therefore, as long as a shopper meets the definition of a customer and the supermarket meets the definition of financial institution, the grocery purchase database is a financial record. The database pertains to the customer’s relationship with the supermarket in that it provides a detailed history of most, if not all, transactions between the customer and the supermarket since the shopper became a Club member.

36. If a supermarket is a financial institution, a shopper meets the definition of a customer. Customer “means any person or authorized representative of that person who utilized or is utilizing any service of a financial institution, or for whom a financial institution is acting or has acted as a fiduciary, in relation to an account

¹¹⁷ *See id.*

¹¹⁸ *See id.* § 3414.

¹¹⁹ *See id.* § 3413 (including, *inter alia*, exceptions for disclosure of financial records not identified with particular customers, disclosure pursuant to an administrative subpoena issued by an administrative law judge, and disclosure pursuant to the Federal Rules of Civil or Criminal Procedure).

¹²⁰ *See id.* § 3402.

¹²¹ *See id.*

¹²² *Id.* § 3401(2).

¹²³ *See, e.g.,* Neece v. I.R.S., 922 F.2d 573, 574 n.2 (10th Cir. 1990) (italicizing the word “any” when quoting 12 U.S.C. § 3401(2)).

¹²⁴ *See id.* at 574 (finding that a loan application and a letter from the bank denying loan application qualify as financial records); *Waye v. First Citizen’s Nat’l Bank*, 846 F. Supp. 310, 316 (M.D. Pa. 1994) (rejecting bank’s argument that canceled checks are not financial records).

maintained in the person's name."¹²⁵ The RFPA defines a person as "an individual or a partnership of five or fewer individuals."¹²⁶ A shopper is a person who has availed herself of the supermarket's services. She purchases her food at the supermarket and enjoys the incentives and rewards associated with the Club program.

37. The supermarket, however, is not a financial institution. According to the statute, a financial institution

means any office of a bank, savings bank, card issuer . . . , industrial loan company, trust company, savings association, building and loan, or homestead association . . . , credit union, or consumer finance institution, located in any State or territory of the United States, the District of Columbia, Puerto Rico, Guam, American Samoa, or the Virgin Islands.¹²⁷

38. The only listed category a supermarket could fall within is "card issuer." A supermarket meets a common usage definition of card issuer in that it issues Frequent Shopper Cards. Congress, however, gave special meaning to the term within the context of the RFPA.¹²⁸ Under the RFPA, to qualify as a card issuer a person must issue a credit card or act as an agent for one who issues a credit card.¹²⁹ Credit card is also specifically defined.¹³⁰ A credit card is a "card, plate, or coupon book or other credit device" for use in obtaining cash, goods, or services on credit.¹³¹ The term "credit" requires payment be deferred.¹³² A supermarket does not meet this statutory definition of card issuer because the supermarket does not issue credit cards. The Club card does not permit the shopper to defer payment of her

¹²⁵ 12 U.S.C. § 3401(5).

¹²⁶ *Id.* § 3401(4).

¹²⁷ *Id.* § 3401(1).

¹²⁸ See 31 C.F.R. § 14.1(a) (1997) (explaining that, for purposes of the RFPA, the term "card issuer" is defined in § 103 of the Consumer Credit Protection Act, 15 U.S.C. § 1602(n) (1994)).

¹²⁹ See 15 U.S.C. § 1602(n) (1994).

¹³⁰ See *id.* § 1602(k).

¹³¹ See *id.*

¹³² See *id.* § 1602(e) (defining credit as "the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment").

grocery bill. Therefore, grocery purchase databases fall outside the purview of the RFPA.

b. Redefinition of “Financial Records” Under the Right to Financial Privacy Act Would Not Upset the Balance Struck by Congress

39. Redefinition of financial records to include grocery purchase databases would be consistent with the legislative intent underlying the RFPA. Congress intended the RFPA to protect customers from needless disclosure of their records without curtailing legitimate law enforcement activity.¹³³ The Act “seeks to strike a balance between [the] customer’s right of privacy and the need of law enforcement agencies to obtain financial records pursuant to legitimate investigations.”¹³⁴ Congress chose to define “financial record” by reference to the institution holding the record.¹³⁵ Alternatively, financial record could be defined by reference to the information contained therein.¹³⁶ The financial institutions identified by Congress in the RFPA all keep the same information on file: a history of each customer’s financial transactions with that institution. Banks¹³⁷ and savings and loan associations¹³⁸ record all deposits and withdrawals, providing an overall picture of how an individual spends money over the course of months and years.¹³⁹ Consumer

¹³³ See Financial Institutions Regulation & Interest Rate Control Act of 1978, H.R. REP. NO. 95-1383, at 33 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9273, 9305 (stating that Congress “intended to protect the customers of financial institutions from unwarranted intrusions into their records while at the same time permitting legitimate law enforcement activity”).

¹³⁴ *Id.*

¹³⁵ See 12 U.S.C. § 3401(1) (1994).

¹³⁶ *Cf., e.g.,* BARRON’S DICTIONARY OF FINANCE AND INVESTMENT TERMS 148 (3rd ed. 1991) [hereinafter BARRON’S] (defining a “financial statement” as a “written record of the financial status of an individual, association or business organization”).

¹³⁷ See 12 U.S.C. § 1813(a)(1) (1994) (defining “bank” for the purposes of this title as “any national bank, state bank, district bank or any federal branch”).

¹³⁸ See *id.* § 1813(b) (defining a “savings association” to include a building and loan association, a savings and loan association, a homestead association, and a cooperative bank).

¹³⁹ Each bank or savings association insured by the FDIC must maintain records identifying each person with an account and a record of the persons authorized to sign checks, make withdrawals, and otherwise transact business through the account. See *id.* § 1829b(c) (1994). Each insured bank and savings association must also make a copy of each instrument drawn on the account or presented for payment and of each instrument received for deposit or collection. See *id.* §

financing institutions keep records of the money borrowed by a given individual and her repayment schedule, providing a perspective on the timing and character of her large purchases and her ability to make payments.¹⁴⁰ Credit card companies also maintain a history of each customer's spending habits, a record of items purchased, and the time and place of the purchases.¹⁴¹

40. A grocery purchase database records the history of financial transactions by creating a profile of each customer's spending habits over months and years, similar to the profile created by a bank, savings and loan, or credit company. The information does not deserve less protection merely because it is stored by a supermarket. Therefore, instead of defining a financial record by reference to the institution holding it, Congress should define a financial record by reference to the information contained therein. Such a definition could be drafted as follows:

A financial record is an original of, a copy of, or information known to have been derived from or detailing a customer's financial transactions with, or financial relationship with, the holder of the record.¹⁴²

Because the privacy interest in the grocery purchase data is not appreciably different from that in bank statements and credit card reports, this alternative definition of financial information could include grocery purchase records without expanding the intended scope of the right to privacy and without disturbing the privacy interest side of the balance struck by the RFPA. On the other side of the balance, requiring the government to meet the RFPA standards to access the grocery purchase database will not significantly hinder its ability to enforce the law.

41. Consider the Food Stamp Program under this new definition of financial record. Auditing the Food Stamp Program's success could be accomplished with all identifying information obscured. By "blinding" the records, supermarkets can cooperate with the government to create meaningful data about the Food Stamp program, based on the RFPA exemption for financial records, without providing identifying information.¹⁴³ Allowing the government to use aggregated or

1829b(d). These copies must be identified as to whose account they are to be applied. *See id.* These records must be retained for five years. *See* 12 C.F.R. § 219.24 (1997).

¹⁴⁰ A consumer finance company is an institution that lends money to individuals under state small loan laws. *See* BARRON'S, *supra* note 136, at 145. To manage such accounts they must keep records of the terms of the loan and the amounts outstanding and repaid. *See id.*

¹⁴¹ *See id.* at 91.

¹⁴² The RFPA would also have to be amended such that "financial institution" is replaced with "record holder" throughout.

¹⁴³ *See* 12 U.S.C. § 3413(a) (1994) (providing an exception for the disclosure of financial records not identified with a particular customer).

undifferentiated information to evaluate the efficacy of its programs does not defeat the RFPA's purpose.

42. Nor would government access to the grocery purchase database for the purposes of monitoring fraud perpetrated by the supermarket upset the RFPA balance. As in the context of efficacy determinations, fraud monitoring could be accomplished without associating a name to a particular record. The interested agency would submit the names of clients; the supermarket would retrieve those records and disburse them to the agency without the identifiers. The agency would then compare the maximum possible value of food stamp coupons the supermarket was eligible to redeem with the value actually presented for conversion into cash. Once again, this type of disclosure by the supermarket does not run afoul of the restrictions in the RFPA because it is within the exemption for financial records not identified with particular customers.¹⁴⁴

43. This method of identifying potential fraud, exempt from the strictures of the RFPA, provides an alternative to accessing the redeeming bank's food stamp log. In *Bailey v. United States Department of Agriculture* ("USDA"), the RFPA was applied to bank disclosures of redeemed food stamps and the logs of the bank's daily food stamp redemptions.¹⁴⁵ A bank employee noticed that Bailey and another deposited "large amounts of coupons in their account and immediately [withdrew] a corresponding amount of cash."¹⁴⁶ The employee contacted the USDA and showed the agency the redeemed food stamps and the food stamp log.¹⁴⁷ The court determined that the food stamp log qualified as financial information maintained by a financial institution and, consequently, the information was subject to the RFPA's provisions.¹⁴⁸ Because the bank *volunteered* the information out of suspicion of illegal activities, however, the disclosure fell within RFPA § 3403(c),¹⁴⁹ permitting the disclosure of financial information under the bank's authority to reveal the "nature of suspected [illegal] activity."¹⁵⁰ While obtaining the food stamp log from

¹⁴⁴ See *id.*

¹⁴⁵ See *Bailey v. United States Dep't of Agric.*, 59 F.3d 141, 143 (10th Cir. 1995).

¹⁴⁶ *Id.* at 142.

¹⁴⁷ See *id.*

¹⁴⁸ See *id.* at 143.

¹⁴⁹ See *id.* (agreeing with the district court that the information could be disclosed under 12 U.S.C. § 3403(c)).

¹⁵⁰ Section 3403(c) of the RFPA states:

the bank is a more accurate measure of fraud than accessing the grocery purchase database, it requires the FCS to rely on the bank to monitor the log closely and affirmatively report suspected fraud or to meet the requirements of the RFPA. In contrast, accessing the grocery purchase database without matching the records to an individual client enables the government itself to obtain the information without having to comply with the RFPA's procedural safeguards.

44. If the government sought to pursue individual recipients, and not just the supermarkets, who defraud the Food Stamp Program, disclosure of the grocery purchase record *with* identifiers would fit within an amended RFPA. The RFPA defines a law enforcement inquiry as “a lawful investigation or official proceeding inquiring into a violation of, or failure to comply with, any criminal or civil statute or any regulation, rule, or order issued pursuant thereto.”¹⁵¹ Investigation of fraud on the Food Stamp Program meets the definition of law enforcement in that it is an inquiry into a violation of, or a failure to comply with, a regulation.

45. Therefore, FCS could access the information by meeting the requirements of RFPA § 3402 through an administrative subpoena pursuant to RFPA § 3405.¹⁵² *McGloshen v. United States Department of Agriculture* outlines the administrative subpoena process.¹⁵³ An administrative subpoena may be issued if there is a reasonable belief that the records “sought are relevant to a legitimate law enforcement inquiry.”¹⁵⁴ A copy of the subpoena, along with a “motion paper,” is then

Nothing in this chapter shall preclude any financial institution, or any officer, employee, or agent of a financial institution, from notifying a Government authority that such institution, or officer, employee, or agent has information which may be *relevant to a possible violation of any statute or regulation*. Such information may include only the name or other identifying information concerning any individual, corporation, or account involved in and the *nature of any suspected illegal activity*. Such information may be disclosed notwithstanding any constitution, law or regulation of any State or political subdivision thereof to the contrary.

¹² U.S.C. § 3403(c) (1994) (emphasis added).

¹⁵¹ *Id.* § 3401(8).

¹⁵² “A Government authority may obtain financial records under section 3402(2) of this title pursuant to an administrative subpoena or summons otherwise authorized by law only if—

- (1) there is reason to believe that the records sought are relevant to a legitimate law enforcement inquiry;
- (2) a copy of the subpoena or summons has been served upon the customer or mailed to his last known address on or before the date on which the subpoena or summons was served on the financial institution together with the following notice which shall state with reasonable specificity the nature of the law enforcement inquiry.” *Id.* § 3405.

¹⁵³ *See McGloshen v. United States Dep't of Agric.*, 480 F. Supp. 247, 247 (W.D. Ky. 1979).

¹⁵⁴ 12 U.S.C. § 3405; *id.*

served personally or mailed to the customer.¹⁵⁵ The customer completes the motion paper if she objects to the disclosure of the financial records requested.¹⁵⁶

Accordingly, the Department of Agriculture would issue a subpoena requesting access to the client grocery purchase record and then serve it upon the supermarket and the client. By meeting the procedural requirements of the RFPA, the FCS could obtain the information necessary to pinpoint individual customers suspected of defrauding the Food Stamp Program without unduly invading the individual customer's privacy, thereby maintaining the balance the RFPA intended.

46. Application of an amended RFPA also accomplishes the same goal in the context of using the grocery purchase database to track criminal activities. Linking a suspect to a crime scene or unearthing evidence of participation, attempt, or complicity in a crime are law enforcement inquiries. Therefore, if the RFPA was amended to include supermarkets owning grocery purchase databases, the government would have to meet the standards of RFPA § 3402 to gain disclosure of an individual's grocery purchase record. The government could fulfill these requirements through a judicial subpoena pursuant to RFPA § 3407.¹⁵⁷ Section 3407 parallels § 3405 for administrative subpoenas, requiring that there be reason to believe the records sought are "relevant to a legitimate law enforcement inquiry"¹⁵⁸ and that appropriate steps are taken to provide notice of an intended information disclosure.¹⁵⁹

47. Though the amended RFPA would provide statutory privacy protection to people whose personal purchasing data are retained by supermarkets, it is not a perfect solution. An amended RFPA would not permit government access for all legitimate purposes. As discussed, the government seeks to fit the level of food stamp benefits with actual need.¹⁶⁰ Determination of benefit allotment currently requires a calculation of net income available to purchase food by reference to a formula.¹⁶¹ The government may wish to fine tune this estimation process by reviewing the recipient's past grocery purchase records. Based on past expenditures, the government could adjust the calculated allotment up or down. An amended

¹⁵⁵ See *McGloshen*, 480 F. Supp. at 247.

¹⁵⁶ See *id.*

¹⁵⁷ 12 U.S.C. § 3407 (1994).

¹⁵⁸ Compare *id.* § 3407(1) with *id.* § 3405(1).

¹⁵⁹ Compare *id.* § 3407(2) with *id.* § 3405(2).

¹⁶⁰ See *supra* Part III(B)(1) for additional discussion.

¹⁶¹ See *supra* Part III(B)(1) for additional discussion.

RFPA would not enable the government to access an identified recipient's grocery purchase data for this purpose. Access to financial records without the individual's consent could be obtained only if the records were relevant to a law enforcement inquiry.¹⁶² An evaluation for the purpose of allotting food stamps is an attempt by the government to provide a social benefit, not a law enforcement inquiry.¹⁶³ Moreover, a law enforcement inquiry uses records retrospectively,¹⁶⁴ whereas investigating past purchases to determine need is prospective and neutral on the issue of violation or compliance.

V. CONCLUSION

48. Frequent Shopper Clubs, designed to implement a new marketing approach, will be valuable beyond the grocer-shopper relationship. The detailed information collected at the point-of-sale serves the grocer by finely tuning and focusing her marketing efforts. This added value for the grocer provides an incentive to treat the information as a trade secret, thus mitigating the possibility of wide dissemination of personal data among market participants. The information also serves the shopper through targeted rewards and incentives. In addition, this type of data compilation also will be able to serve a purpose outside of the voluntary grocer-shopper relationship without the sorts of checks and balances that apply in other similar circumstances.

49. These emerging databases provide the government with a new approach for examining the efficacy of its public assistance programs, monitoring fraud within those programs, and investigating criminal activity. By capturing the fundamental profile of each household through the items purchased, the prices paid, and what time of day they were purchased, the information available in supermarket databases provides the government with a close and surreptitious look into the lives and habits of individuals. Nothing currently prevents the government from tapping into that information because the law has not caught up to the challenges provided by technology that makes point-of-sale data capturing easy.

50. The limits placed on governmental uses of other types of commercial information suggest that a workable solution, balancing legitimate law enforcement and individual privacy concerns, is possible for supermarket data. This information is almost indistinguishable from the financial information in bank statements and

¹⁶² See 12 U.S.C. § 3402 (stating that the government may access financial records only if authorized by the customer or in response to an administrative subpoena meeting the requirements of § 3405, in response to a judicial subpoena under § 3407, or pursuant to a search warrant).

¹⁶³ See *id.* § 3401(8) (defining law enforcement inquiry).

¹⁶⁴ See *id.*

credit card reports, which are already governed by the Right to Financial Privacy Act. With the RFPA, Congress intended to protect the average person from having her privacy invaded simply by engaging in routine commerce, whether at a bank or the grocery store. Therefore, the grocery data compilations should be protected in the same manner as bank statements and credit card reports.

51. Congress can achieve this parity simply by redefining the meaning of “financial records” under the RFPA to include information collected by retail stores, including grocery stores. In doing so, Congress would continue to support the RFPA’s initial purpose of protecting individual privacy interests from the fast-moving technology that makes it easy to gather, correlate, and analyze previously unexamined data. This Note contends that Congress not only intended this privacy protection by passing the RFPA, but expected that legislation would be able to respond swiftly and definitively to beneficial new technologies and challenges to individual freedom.