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> There is a growing consensus that if the jumble of state and federal statutes, consumer pressure, and self-help is to be unified into meaningful privacy protection in the digital age, then we will have to do more than pass a law. The law in general, and each of us in particular, will have to make some fundamental adjustments in the way we think of personal information and electronic communication. In doing so, we will ultimately have to change our idea of what we can reasonably expect to keep private.
>
> Ellen Alderman and Caroline Kennedy[1]

INTRODUCTION

As financial intermediaries, banks accept deposits from customers who have money and transform them into loans to customers who need money. Yet, with each banking transaction, customers unwittingly deposit another asset, one even more valuable than money. When customers deposit money with or obtain loans from their banks, they also deposit private financial information about themselves. As a result, banks have tapped into this valuable resource, developing an industry practice that, until recently, went virtually undiscovered: selling customers' financial information.[2]

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1. ELLEN ALDERMAN & CAROLINE KENNEDY, THE RIGHT TO PRIVACY 332 (1995).

2. *See* Christine Dugas, *Banks Sell Your Secrets: Account Numbers, Names, Addresses Are All Fair Game*, USA TODAY, Oct. 21, 1999, at 1B [hereinafter Dugas, *Banks Sell Your Secrets*].

The recent publicity surrounding this practice has raised consumer consciousness about financial privacy threats and whether consumers can control how the financial services industry uses personal financial information.[3] Surprisingly, however, the Supreme Court has never recognized a legitimate expectation of privacy in one's financial information, specifically the information contained in one's checks and deposit slips.[4] Notwithstanding the Supreme Court's interpretation, Congress reacted to consumers' growing fears that banks were selling their private financial data by adopting Title V of the Gramm-Leach-Bliley Act[5] (hereinafter "the GLBA") to govern financial institutions' disclosure of such information.

Title V "contains the most comprehensive federal privacy legislation in history."[6] The GLBA's Title V framework places three general privacy requirements on a financial institution:

1) a commitment to protect and ensure the privacy of confidential consumer information; 2) a requirement to advise consumers about its information-sharing practices and to provide customers an option to 'opt-out' of providing information to third parties; and 3) implementation of comprehensive standards to ensure the confidentiality of consumer's personal information.[7]

Thus, for the first time, the GLBA gives consumers an absolute right to know whether their financial institution plans to sell or share their personal financial information with either affiliated companies or

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3. *See* Donna Tanoue, Chairman Federal Deposit Insurance Corporation, *Is It Any of Your Business? Consumer Information, Privacy and the Financial Services Industry* (Mar. 23, 2000), *at* http://www.fdic.gov/news/speeches/chairman/sp23Mar00.html.; *see also* Don Oldenburg, *Consummate Consumer; To-Do over Privacy Legislation*, WASH. POST, Apr. 5, 2000, at C04, (stating the opinions of some consumer advocates that Gramm-Leach-Bliley Act does not go far enough to protect consumers' privacy).

4. *See* United States v. Miller, 425 U.S. 435 (1976); *see also ABA Paper Says U.S. Banks Adequately Protect Consumers' Privacy*, 17 No. 14 BANKING POL'Y REP. 5, 6 (1998) (discussing the case) [hereinafter *ABA Paper*].

5. Gramm-Leach-Bliley Act of 1999, Pub. L. No. 106-102, 113 Stat. 1338 (1999) [hereinafter "GLBA"]. The Act is named after Senators Phil Gramm, head of the Senate Banking Committee, James Leach, head of the House Banking Committee and Thomas Bliley, chairman of the House Commerce Committee. The Title V privacy provisions were added relatively late in the legislative process. *See* Robert O'Harrow, Jr., *A Postscript on Privacy; Bank Bill's Late Change Gives States Last Word*, WASH. POST, Nov. 5, 199, at E1; *see also* Pamela Barnett, *Making Privacy a Partisan Affair*, CONG. DAILY, May 5, 2000, *available at* 2000 WL 21160116 (stating that the financial services industry was largely caught off guard by the level of ferocity that legislators exhibited in taking hold of the issue).

6. L. Richard Fischer & Clarke Dryden Camper, *Reform Law and Privacy: A Road Map*, AM. BANKER, Nov. 19, 1999, at 6. *See generally* Lucy Griffin, *The New Privacy Rules*, INDEP. BANKER, Mar. 1, 2000, at 2836, *available at* 2000 WL 10729709 (discussing Title V's privacy standards).

7. Richard M. Whiting, *Promises Finally Kept: Glass-Steagall Repealed . . . and More*, J. LENDING & CREDIT RISK MGMT., Feb. 1, 2000, at 48, *available at* 2000 WL 17178301.

nonaffiliated third parties.[8] Additionally, consumers can opt-out of such information sharing between financial institutions and nonaffiliated third parties.[9] However, Title V is merely the tip of the GLBA's iceberg.[10]

Prior to the enactment of the GLBA, commercial banks were confined within an antiquated, Depression-era legal framework. Banks were unable, at least directly, to affiliate with securities firms and insurance companies. Over the years however, market forces within the financial services industry and the attorneys who follow them have uncovered clever ways to bypass these legal roadblocks.[11] Nevertheless, when President Clinton signed the GLBA into law on November 12, 1999, the GLBA, also known as the Financial Services Modernization Act, eliminated many of the affiliation barriers between banks and securities and investment firms,[12] thereby enabling banks, securities firms and insurance companies to consolidate within a holding company

8. *See* GLBA § 502; Admin. of William J. Clinton, *Statement on Signing Legislation To Reform Financial System*, 35 WKLY. COMPILATION OF PRES. DOCS. 2363, 2364 (Nov. 12, 1999); *Financial Modernization Crosses the Finish Line*, CBA REP., Nov. 1, 1999, at 1, *available at* 1999 WL 20345608.

9. *See* GLBA § 502.

10. Speaking of icebergs, Ed Mierzwinski, consumer advocate with the U.S. Public Interest Research Group, referred to the federal agencies' proposed privacy regulations, required under GLBA Title V, as "rearranging deckchairs on the Titanic." *See* Amber Veverka, *New Banking Rules Keep Customer Information-Sharing in Check*, KNIGHT-RIDDER TRIB. BUS. NEWS: CHARLOTTE OBSERVER, Feb. 4, 2000, *available at* 2000 WL 12902829.

11. *See* Gibson, Dunn & Crutcher LLP, *The Gramm-Leach-Bliley Act – Financial Services Modernization Working Summary No.* 4, at i-iii (1999) [hereinafter Gibson, Dunn, *Working Summary*]. Since 1983, the financial services industry has seen several legal developments: (1) securities and insurance companies acquired "nonbank banks"; (2) regulators authorized South Dakota and Delaware banks to engage in insurance underwriting; (3) Section 20 bank affiliates could engage in investment banking; (4) national bank branches located in towns with populations equaling 5000 could sell insurance; (5) Mellon Bank acquired the Dreyfus mutual fund complex; (6) with the *Nationsbank v. Variable Annuity Life Ins. Co.*, 513 U.S. 251 (1995), and *Barnett Bank of Marion County v. Nelson*, 517 U.S. 25 (1996), decisions, the Supreme Court validated national bank insurance activities; (7) by acquiring thrifts, over fifty insurance and securities firms became "unitary" S&L holding companies; and (8) Travelers/Salomon Smith Barney and Citicorp merged to form Citigroup. *Id.*; *see also* Whiting, *supra* note 7 (providing myriad examples of how the banking industry sidestepped the Glass-Steagall Act). *See generally* Christine Dugas, *Congress OK's Bill Deregulating Financial Services Industry*, USA TODAY, Nov. 5, 1999, at 12B (providing a general summary of U.S. financial modernization up to GLBA) [hereinafter Dugas, *Congress OK's Bill*]; Daniel Kadlec, *Bank on Change in Repealing the Glass-Steagall Act, Congress Is Giving Its Blessing to What Bankers Have Already Done. Expect Fewer Banks. Hope for Better Ones*, TIME, Nov. 8, 1999, at 50; Aaron Zitner, *Consumer Bank-Bill Impact Seen Minimal: Suits, Other Challenges Have Already Brought Changes: Bank Bill Impact Seen Minimal for Consumers*, BOSTON GLOBE, Oct. 23, 1999, at A11.

12. GLBA repeals sections 20 and 32 of the *Banking Act of 1933 (Glass-Steagall Act)*, 12 U.S.C. §§ 78, 377 (1994), that restricted member bank and securities firm affiliations. *See* GLBA § 101. For a brief history of banking reform from Glass-Steagall to the GLBA, see KENNETH R. BENSON ET AL., FINANCIAL SERVICES MODERNIZATION: GRAMM-LEACH-BLILEY ACT OF 1999: LAW AND EXPLANATION 25-30 (1999).

structure called a financial holding company.[13]

Theoretically, financial holding companies can provide consumers with virtually any kind of financial product or service at lower costs.[14] For example, a financial holding company can offer services such as banking, securities underwriting, insurance (both agency and underwriting) and merchant banking, as well as other services that the Federal Reserve Board (hereinafter "FRB") and the Department of the Treasury determine are "financial in nature" or "complementary to financial activities."[15] Therefore, these financial supermarkets will offer the consumer one-stop financial shopping.[16] For all of its benefits, however, the GLBA raises a host of burdens. These resulting financial conglomerates will have access to huge databases filled with customers' personal information.[17] As a result, the GLBA's Title V privacy provisions raise several concerns, including one of constitutional proportion.

First, several congressmen and consumer groups believe that Title V does not go far enough to protect financial information.[18] Under Title V, each financial services company must provide its customers with notice of its privacy policy and an opportunity to opt out of information sharing with nonaffiliated third parties. Nevertheless, financial services companies remain free to share a customer's financial information with their affiliates. Additionally, the opt-out mechanism is subject to certain exceptions that may create an information-sharing loophole for financial services companies.

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13. *See* EDWARD D. HERLIHY ET AL., FINANCIAL INSTITUTIONS MERGERS AND ACQUISITIONS 1999: CONVERGING TOWARDS THE DAWN OF THE NEW MILLENNIUM 67 (1999).

14. *See id.*; Admin. of William J. Clinton, *supra* note 8; *see also* Mark Selinger, Christian Bruce & Mark Felsenthal, *Financial Services Reform: Conferees Tentatively Approve Landmark Financial Services Measure*, BNA BANKING DAILY, Oct. 25, 1999, at d2 (quoting President Clinton as saying that the GLBA "will bring lower costs, more choices, and better protections for consumers" and promote "continued investment in America's communities and new opportunities to for our financial institutions to compete in the global marketplace").

15. *See* HERLIHY, *supra* note 13.

16. *See* Mike McNamee et al., *Invasion of the Superbanks? Congress May Finally Be Ready to Allow a Financial Free-for-All*, BUS. WEEK, Nov. 1, 1999 (stating that, "for consumers, these superbanks will offer one-stop financial shopping, selling checking accounts, mutual funds, and car, home, or life insurance in the same branches"); Michael Schroeder, *Glass-Steagall Compromise Is Reached*, WALL ST. J., Oct. 25, 1999, at A2.

17. *See* Dugas, *Banks Sell Your Secrets*, *supra* note 2.

18. *See, e.g.*, Dean Anason, *Minn., N.Y. Vow to Keep Prosecuting Privacy Cases*, AM. BANKER, Mar. 24, 2000, at 1; Dugas, *Congress OK's Bill*, *supra* note 11; Rob Garver, *In Brief: Lawmakers Slam Proposed Privacy Rules*, AM. BANKER, Apr. 5, 2000, at 4; Brian Krebs, *Advocates, Banks Spar over Proposed Privacy Regs*, NEWSBYTES NEWS NETWORK, Apr. 3, 2000, *available at* 2000 WL 2275580; Stephen Labaton, *Republicans Propose a Deal on Financial Services*, N.Y. TIMES, Oct. 13, 1999, at C 1; Schroeder, *supra* note 16. *But see Privacy Hearing Focuses on Affiliate Sharing*, CBA REP., Aug. 1, 1999, at 1, *available at* 1999 WL 20345598 (discussing comments by privacy expert Richard Fischer that information-sharing barriers could damage consumers and the economy).

Second, Title V requires that the following federal agencies promulgate privacy rules: the FRB, the Department of the Treasury (covering the Office of the Comptroller of the Currency (hereinafter "OCC") and the Office of Thrift Supervision (hereinafter "OTS")),[19] the Federal Deposit Insurance Corporation (hereinafter "FDIC"), the National Credit Union Association (hereinafter "NCUA"), the Securities and Exchange Commission (hereinafter "SEC") and the Federal Trade Commission (hereinafter "FTC").[20] To avoid inconsistency and confusion, the National Association of Insurance Commissioners (hereinafter "NAIC") has encouraged state insurance regulators to enact a uniform system of privacy regulations.[21] As a result the SEC, FTC and NCUA have each issued separate final privacy rules, and the FRB, FDIC and the Department of the Treasury have issued joint final rules that govern the banking industry.[22] However, even with these attempts to limit the number

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19. The OCC and the OTS are both members of the Department of the Treasury. *See* JONATHAN R. MACEY & GEOFFREY P. MILLER, BANKING LAW AND REGULATION 67 (1997). The OTS is a subsidiary within the Department of the Treasury and not an independent agency. The legal status of the OCC, however, is more ambiguous. *Id.* Since the OCC is housed within the Department of the Treasury, the OCC seems to occupy a subordinate position within the chain of command leading to the President. *See id.* However, the President appoints the Comptroller for a five-year term and the Comptroller may only be removed for cause. *See id.* Thus, the OCC does have some independence from executive oversight. *See id.*

20. The OCC regulates national banks, federal branches and federal agencies of foreign banks and any subsidiaries of such entities. Similarly, the FRB regulates its member banks, branches and agencies of foreign banks, foreign bank-owned or bank-controlled commercial lending companies, organizations that operate under section 25 or 25A of the Federal Reserve Act and bank holding companies, including their non-bank subsidiaries and affiliates. The FDIC however regulates insured banks (other than members of the FRB) and insured state branches of foreign banks, including their subsidiaries. The OTS regulates savings associations with FDIC-insured deposits, including their subsidiaries. The NCUA regulates federally insured credit unions and their subsidiaries. The SEC regulates any brokers and dealers, investment companies and registered investment advisors. Subject to section 104 of GLBA, state insurance authorities, under state insurance law, regulate any person engaged in providing insurance. Finally, under GLBA, the FTC regulates any other financial institution or other person not subject to the aforementioned agencies or authorities. *See* GLBA § 505(a). More specifically, under the GLBA, the FTC's regulatory authority extends to "mortgage lenders, 'pay-day' lenders, finance companies, mortgage brokers, account services, check cashers, wire transferors, travel agencies operated in connection with financial services, debt collectors, credit counselors and other financial advisors, and tax preparation firms." FTC Final Rule, 65 Fed. Reg. 33678 (May 24, 2000) (to be codified at 16 C.F.R. pt. 313).

21. *See* Deborah Lohse, *Approval Path for Insurers May Shorten*, WALL ST. J., Mar. 14, 2000, at A3; Rodd Zolkos, *Industry Wary of States' Privacy Moves*, BUS. INS., Mar. 6, 2000, at 18H, *available at* 2000 WL 8170566 [hereinafter Zolkos, *Industry Wary*]. NAIC, a non-profit corporation, is an organization of insurance regulators representing the fifty states, District of Columbia and the four U.S. territories, and providing a forum for developing uniform insurance policies.

22. *See, e.g.*, Eileen Canning & Marc Selinger, *Financial Services: New Powers for Financial Holding Companies Present 'Two-Edged Sword,' Fed Official Says*, BNA BANKING DAILY, Jan. 21, 2000, at d3 (discussing FCRA loophole restricting states' ability to enact tougher privacy laws under the GLBA); Edward Staples, *Finance Industry Opts for 'Opt-Out' on Cross-Marketing*,

of privacy rules, the potential for fifty-one different state rules governing financial privacy may lead to significant confusion and compatibility problems.[23]

Third, in Title V of the GLBA, Congress expressly stated that its privacy rules were merely a floor, not a ceiling. Accordingly states have the right to adopt tougher privacy laws governing the financial services industry without fear of federal preemption.[24] However section 104 of the GLBA and the Fair Credit Reporting Act[25] (hereinafter "FCRA"), have significantly restrained the states' power to do so.[26]

Fourth, President Clinton raised a constitutional concern regarding the relationship between Title III and Title V of the GLBA when he signed the bill into law. President Clinton stated that "[t]he Act raises certain constitutional issues with respect to the insurance privacy provisions in Title V. The Act might be construed as contrary to Supreme Court decisions that hold that the Congress may not compel states to enact or administer a federal regulatory program."[27] These concerns raise deeper questions involving the concepts of federalism and federal preemption of state law that have absorbed the state and federal governments since the country's founding.[28]

Title III, section 305 of the GLBA amends the Federal Deposit

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ADVISOR TODAY, Mar. 1, 2000, at 32, *available at* 2000 WL 15516361 (discussing the federal agencies' generally uniform proposed privacy regulations).

23. *See, e.g.*, Rodd Zolkos, *Insurers Seek Uniform Privacy Guidelines: Trade Groups Voice Concern over Varied State Rulemaking Efforts*, BUS. INS., Mar. 20, 2000, at 20F, *available at* 2000 WL 8170652 [hereinafter Zolkos, *Insurers Seek Privacy Guidelines*].

24. *See* GLBA § 507; *see, e.g.*, Anason, *supra* note 18; *But see* Michelle Heller, *No Privacy Laws Seen in N.Y. State This Year*, AM. BANKER, Mar. 27, 2000, at 2; Theresa Miller, *Vermont Proposes Strict Privacy Provisions*, BEST'S INS. NEWS, Mar. 21, 2000, *available at* 2000 WL 4085325; Megan Ptacek, *N.Y. Lawmakers Weigh Tougher Privacy Strictures*, AM. BANKER, Mar. 22, 2000, at 1; Veverka, *supra* note 10; Zolkos, *Industry Wary*, *supra* note 21; *but see also* Theresa Miller, *Levin: Legislators Should Let Regulators Form Privacy Rules*, BEST'S INS. NEWS, Mar. 27, 2000, *available at* 2000 WL 4085417 (discussing trade groups' attempts at encouraging States to adopt uniform regulations conforming to the Federal rules); Michael Schroeder, *Business Target State Privacy Initiatives: Groups Form to Stop States on Privacy*, WALL ST. J., Feb. 10, 2000, at A2 (discussing attempts by industry groups to halt State adoption of tougher privacy laws).

25. 15 U.S.C. § 1681(a) (1994).

26. *See* GLBA § 104; 15 U.S.C. § 1681(a) (1994); *see, e.g.*, Richard Fischer & Clarke Dryden Camper, *Fair Credit Law Remains Potent*, AM. BANKER, Dec. 17, 1999, at 10; Michelle Heller, *Conflicting Federal Laws Fuel Showdown over States' Rights to Legislate Privacy*, AM. BANKER, Apr. 17, 2000, at 1; Robert O'Harrow, Jr., *A Postscript on Privacy; Bank Bill's Late Change Gives States Last Word*, WASH. POST, Nov. 5, 1999, at E1.

27. Admin. of William J. Clinton, *supra* note 8.

28. The doctrine of preemption holds that federal laws dealing with certain matters of such national, as opposed to local, character preempt or take precedence over state laws. BLACK'S LAW DICTIONARY 1177 (6th ed. 1990). Thus, states may not enact laws inconsistent with such federal laws. *See id.; see also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW, 479-508 (2d ed. 1988) (discussing federal preemption of state laws). Federalism denotes the relationship between

Insurance Act[29] (hereinafter "FDIA") by adding section 47.[30] Pursuant to section 47, federal banking agencies (FRB, OCC, OTS and FDIC) must prescribe insurance customer protection regulations that apply to a depository institution's insurance sales, solicitations, advertising and offers.[31] Under section 47(g)(2)(B)(iii) of the FDIA, the federal banking agencies' insurance customer protection regulations will preempt weaker state regulations.[32] However, states may adopt legislation to override the federal preemption, no later than three years after receiving notice of preemption.[33] Yet, under section 505(c) of the GLBA, if state insurance regulators fail to adopt regulations in accordance with the Title V privacy provisions, the states can lose their right to reverse the federal preemption.[34]

In the conference report accompanying the GLBA, Congress stated that "[i]t is the hope of the Conferees that state insurance authorities would implement regulations necessary to carry out the purposes of this title and enforce such regulations as provided in this title."[35] Thus, although the state insurance authorities are not technically required to adopt the GLBA's privacy provisions, failing to do so would force the states to accept the federal banking agencies' insurance customer protection regulations under the aforementioned amendment to the FDIA. Therefore, the issue is whether congress has unconstitutionally compelled the states to administer a federal regulatory program by conditioning the reverse override right under FDIA section 47 upon the adoption of the GLBA's Title V privacy provisions. However, a comparison of section 505(c) of the GLBA with the Supreme Court decisions in *New York v. United States*,[36] *Printz v. United States*,[37] and *Reno v. Condon*,[38] indicates that the section is not unconstitutional. President Clinton correctly interpreted the section as providing states with a constitutionally acceptable choice regarding whether or not to participate in the GLBA's rulemaking and enforcement obligations.

Since the founding of the United States, state and federal governments have clashed over the concepts of federalism and preemption; the

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the state and federal governments. *See* BLACK'S, *supra*, at 612; *see also* TRIBE, *supra*, at 378-400 (discussing the concept of federalism).

29. 12 U.S.C. § 1811 (1994).

30. GLBA § 305.

31. *Id.*

32. *Id.*

33. *Id.*

34. § 505(c).

35. H.R. REP. No. 106-434, at 265 (1999).

36. 505 U.S. 144 (1992).

37. 521 U.S. 898 (1997).

38. 120 S.Ct. 666 (2000).

GLBA provides a fertile battleground to continue this war. (A comprehensive discourse on the GLBA is beyond the scope of this Article.) Part I provides a general overview of the GLBA, outlining how it will affect the worlds of banking, securities and insurance by dismantling and/or amending the barriers erected by the Glass-Steagall Act and the Bank Holding Company Act. Part II examines federal preemption of state law under section 104 of the GLBA by untangling and explaining the section's numerous tests for preemption. Significantly, Part II exposes the extensive degree of the GLBA's federal preemption in the financial services field. Part III discusses how section 305 of the GLBA affects the states as functional regulators of the insurance industry. It also addresses how the GLBA, through section 104's implied application to section 304, will affect states' rights. While pointing out apparent loopholes and weaknesses along the way, Part IV summarizes the GLBA Title V privacy provisions; the final privacy rules issued by the FRB, OCC, OTS and FDIC, SEC, FTC and NCUA; and NAIC's state-level privacy initiatives within the insurance industry. Part IV also briefly discusses pending state privacy legislation. Part IV focuses on section 505(c) of the GLBA, and outlines the state insurance authority's role in enacting the GLBA privacy provisions and how failing to do so will affect the states' override authority under section 47 of the FDIA. Finally, Part V compares section 505(c) with the aforementioned Supreme Court decisions under a Tenth Amendment/federalism analysis. Accordingly, this Part concludes that section 505(c) would pass constitutional scrutiny.

I. The Gramm-Leach-Bliley Act: Synopsis Of The Major Changes

The circumstances leading up to the GLBA have their origin in the foremost financial crisis of the twentieth century: the Great Depression. The stock market crash of 1929 led to widespread bank failures and ultimately The Great Depression. Attempting to remedy the perceived cause of this economic depression, i.e., bank speculation in securities,[39] Congress passed the Glass-Steagall Act in 1933.[40] Under sections 20 and 32 of the Glass-Steagall Act, national banks and state banks that were members of the Federal Reserve System could not affiliate with companies that could underwrite, sell or distribute specified securities.[41]

39. *See* Macey & Miller, *supra* note 19.

40. 12 U.S.C. § 377 (1994).

41. § 335; *see also* Macey & Miller, *supra* note 19, at 497. Additionally, under section 21, investment banks (i.e., securities firms) could not engage in the business of receiving deposits (deposit or commercial banking). § 378; *see also* Macey & Miller, *supra* note 19, at 497.

Additionally, in 1956, Congress passed the Bank Holding Company Act.[42] Under section 4 of the Bank Holding Company Act, a bank could not control a non-bank company unless the FRB determined that the non-bank company's activities were "so closely related to banking or managing or controlling banks as to be a proper incident thereto."[43] In 1982, Congress amended section 4 of the Bank Holding Company Act, forbidding banks (with limited exceptions) to conduct general insurance underwriting or agency activities.[44]

Thus, by enacting the Glass Steagall and Bank Holding Company Acts, Congress effectively separated the commercial banking, securities and insurance industries. In 1999, however, Congress changed its mind; the GLBA repealed sections 20 and 32 of the Glass-Steagall Act which restricted bank and securities firm affiliations.[45]

A. *Financial Holding Companies*

Amending section 4 of the Bank Holding Company Act,[46] Title I of the GLBA created a financial holding company.[47] A financial holding company owns a commercial bank and conducts financial activities,[48] thus allowing a bank to engage in activities, including insurance and securities underwriting, that the FRB determines are "financial in nature" or "incidental to such financial activity."[49] Within this financial holding company structure, banks have gained the freedom to engage in a wider array of financial services. This freedom is tempered, however, by the FRB's regulatory oversight.

B. *FRB as Umbrella Regulator*

In addition to its role as functional regulator of bank holding companies, the FRB acts as the "umbrella" regulator of the new financial holding companies.[50] The FRB, in conjunction with the Secretary of the

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42. 12 U.S.C. § 1841 (1994).

43. 12 U.S.C. § 1843(c)(8) (1994); *see* Gibson, Dunn, *Working Summary*, *supra* note 11.

44. § 1843(c)(8).

45. GLBA § 101. *See generally* BENSON ET AL., *supra* note 12 (providing a good explanation of the GLBA); Robert Kuttner, *A Requiem for Glass-Steagall*, BUS. WEEK, Nov. 15, 1999 (stating that Congress unnecessarily and, perhaps for the wrong reasons, repealed the Glass-Steagall Act).

46. 12 U.S.C. § 1841 (1956).

47. *See* GLBA § 103.

48. *See id.*; Gibson, Dunn, *Working Summary*, *supra* note 11, at 24.

49. GLBA § 103 (amending section 4 of the Bank Holding Company Act of 1956, 12 U.S.C. § 1843 [hereinafter "BHCA"]).

50. § 113; *see also* H.R. REP. NO. 106-434, at 246, 252-54 (1999) (striking a balance between the FRB's role as "umbrella supervisor" for holding companies and the other federal and state financial authorities' roles as functional regulators); Alan Greenspan, Remarks as Prepared for Delivery at an American Council on Life Insurance Conference (Nov. 15, 1999), FED. DOC. CLEARING HOUSE TRANSCRIPTS (1999) (discussing the FRB's role under the GLBA).

Treasury, is authorized to determine whether an activity is "financial in nature" or "incidental to such financial activity."[51] A financial holding company does not need prior FRB approval before engaging in financial activities, either de novo or through an acquisition, previously deemed permissible by the FRB.[52] However, the financial holding company

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51. GLBA § 103 (amending Section 4 of the BHCA). Section 103(a)(3) states:

> (3) FACTORS TO BE CONSIDERED
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> Second, Title V requires that the following federal agencies promulgate privacy rules: the Federal Reserve Board (hereinafter "FBR"), the Department of the Treasury (covering the Office of the Comptroller of the Currency (hereinafter "OCC") and the Office of Thrift Supervision (hereinafter "OTS")),the Federal Deposit Insurance Corporation (hereinafter "FDIC"), the National Credit Union Association (hereinafter "NCUA"), the Securities and Exchange Commission (hereinafter "SEC") and the Federal Trade Commission (hereinafter "FTC"). To avoid inconsistency and confusion, the National Association of Insurance Commissioners (hereinafter "NAIC") has encouraged state insurance regulators to enact a uniform system of privacy regulations. As a result the SEC, FTC and NCUA have each issued separate final privacy rules, and the FRB, FDIC and the Department of the Treasury have issued joint final rules that governing the banking industry. However, even with these attempts to limit the number, of privacy rules, the potential for fifty-one different state rules governing financial privacy may lead to significant confusion and compatibility problems.
>
> In determining whether an activity is financial in nature or incidental to a financial activity, the Board shall take into account —
>
> (A) the purposes of this Act and the Gramm-Leach-Bliley Act;
>
> (B) changes or reasonably expected changes in the marketplace in which financial holding companies compete; (C) changes or reasonably expected changes in the technology for delivering financial services; and
>
> (D) whether such activity is necessary or appropriate to allow a financial holding company and the affiliates of a financial holding company to –
>
> (i) compete effectively with any company seeking to provide financial services in the United States;
>
> (ii) efficiently deliver information and services that are financial in nature through the use of technological means, including any application necessary to protect the security or efficacy of systems for the transmission of data or financial transactions; and
>
> (iii) offer customers any available or emerging technological means for using financial services or for the document imaging of data.

Id.

52. *See* § 103(a) (adding section 4(k)(a)(6)(A) & (B)); *see also* H.R. REP. No. 106-434, at 249; HERLIHY, *supra* note 13, at 67 (summarizing the GLBA).

Section 103(a) amends the BHCA to add section 4(k) (a) (4) which states:

> (4) ACTIVITIES THAT ARE FINANCIAL IN NATURE:— For purposes of this subsection, the following activities shall be considered to be financial in nature:
>
> (A) Lending, exchanging, transferring, investing for others, or safeguarding money or securities.
>
> (B) Insuring, guaranteeing, or indemnifying against loss, harm, damage, illness, disability, or death, or providing and issuing annuities, and acting as principal, agent, or broker for purposes of the foregoing, in any State.
>
> (C) Providing financial, investment, or economic advisory services, including advising an investment company (as defined in section 3 of the Investment Company Act of 1940).

must notify the FRB within thirty days after it has commenced the new activity or completed the acquisition.[53]

Financial holding companies may also engage in activities that the FRB determines are "complementary to financial activities" if such activities do not pose substantial safety and soundness risks to depository institutions or the financial system generally.[54] Thus, a financial holding company's freedom to engage in "complementary" activities is greatly chilled by the FRB's expansive consideration of the activities' safety and soundness impact not just on depository institutions, but also on the entire financial system. Additionally, although financial holding companies may engage in activities that are "financial in nature" or "incidental to such financial activity" without prior FRB approval, the FRB must approve "complementary" activities on a case-by-case basis.[55] Financial holding companies therefore must notify the FRB before engaging in activities that are complementary to financial

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> (D) Issuing or selling instruments representing interests in pools of assets permissible for a bank to hold directly.
> (E) Underwriting, dealing in, or making a market in securities.
> (F) Engaging in any activities that the Board has determined, by order or regulation that is in effect on the date of the enactment of the Gramm-Leach-Biley Act, to be so closely related to banking or managing or controlling banks as to be a proper incident thereto (subject to the same terms and conditions contained in such order or regulation, unless modified by the Board).
> (G) Engaging, in the United States, in activities that——
> (i) a bank holding company may engage in outside the United States: and
> (ii) the Board has determined, under regulations prescribed or interpretations issued pursuant to subsection (c)(13) (as in effect on the day before the date of the enactment of the Gramm-Leach-Bliley Act) to be usual in connection with the transaction of banking or other financial operations abroad.
> (H) Directly or indirectly acquiring or controlling, whether as principal, on behalf of 1 or more entities (including entities, other than a depository institution or subsidiary of a depository institution, that the bank holding company controls), or otherwise, shares, assets, or ownership interests (including debt or equity securities, partnership interests, trust certificates, or other instruments representing ownership) of a company or other entity, whether or not constituting control of such company or entity, engaged in any activity not authorized by pursuant to this section . . . .

See GLBA § 103. As aforementioned, the FRB, in conjunction with the Secretary of the Treasury, may add to this list. *See id.* H.R. REP. No. 106-434, at 248 (stating that "the Board has primary jurisdiction for determining what activities are financial in nature, incidental to financial in nature, or complementary"); *see also* Gibson, Dunn, *Working Summary*, *supra* note 11, at 15 (stating that "the GLB Act gives the Fed authority, by regulation or order, to expand the list of "financial" or "incidental" activities, but requires consultation with the Treasury").

53. *See* GLBA § 103(a).

54. § 103; *see also* H.R. REP. No. 106-434, at 249 (1999) (stating that FHCs may engage "in activities that are complementary to financial activities if the Federal Reserve Board determine that the activity does not pose a substantial risk to the safety or soundness of depository institution or *the financial system in general*") (emphasis added).

55. *See* H.R. REP. No. 106-434, at 250 (1999) (stating that "FHC's may engage in activities on the preapproved list of financial activities contained in section 4(k) of the BHCA and any other financial activity approved by the Board without prior notice. Complementary activities,

activities.[56]

C. *Functional Regulation*

For insurance companies, broker-dealers, investment companies and banks, the first level of supervisory authority remains with the functional regulators.[57] For insurance and securities subsidiaries/affiliates, the functional regulators would be state insurance authorities and the SEC.[58] Thus, the GLBA adopts an approach whereby the FRB must defer to these functional regulators regarding interpretations and enforcement activities within their respective industries.[59] Although in theory state and federal agencies retain their functional regulation over operating entities, in practice the FRB retains influential power over the operations of such downstream companies through its regulation of

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however, must be approved by the Board on a case-by-case basis under the notice procedures contained in section 4(j) of the BHCA").

56. *See id.*

57. *See* GLBA § 111; Gibson, Dunn, *Working Summary supra* note 11, at 24 (defining "functional regulation" as "the general retention by the state and federal regulators of their present exclusive jurisdiction and authority over operating entities"). The OCC is confident that GLBA has strengthened its role as primary supervisor of national banks. *See* Office of the Comptroller of the Currency, *Financial Modernization Law Strengthens Role of Primary Bank Regulators, Comptroller Hawke Says in Speech to New York State Bankers*, NEWS RELEASE, Apr. 6, 2000, at 1, *available at* 2000 WL 372526 (O.C.C.) (quoting Hawke as saying, "I believe the new law simply extends the existing multi-agency concept of financial supervision that we've been refining for nearly a century.").

58. *See* GLBA § 112.

59. § 111; *see also* Bill Summary & Status for the 106th Congress, Financial Services Act of 1999, (on file with author) *available at* http://www.thomas.loc.gov (summarizing the GLBA); H.R. REP. No. 106-434, at 246 (1999) (discussing how the idea behind functional regulation is to "incorporate a system . . . designed to utilize the strengths of the various Federal and State financial supervisors"); H.R. REP. No. 106-434, at 252 (1999) (stating that:

> [d]ifferent regulators have expertise at supervising different activities. It is inefficient and impractical to expect a regulator to have to develop expertise in regulating all aspects of financial services. Accordingly, the legislation intends to ensure that banking activities are regulated by banking regulators, securities activities are regulated by securities regulators, and insurance activities are regulated by insurance regulators.);

HERLIHY, *supra* note 13, at 67-68 (discussing the GLBA's major provisions as they relate to acquisitions of non-bank financial institutions). *See generally* Joseph Smith Jr., *It Looks Like Plain English Will Take a While Longer*, AM. BANKER, Apr. 10, 2000 (paraphrasing Comptroller of the Currency John Hawke Jr. as saying that the GLBA did not cede any power to the FRB, and that "[U]mbrella supervisor' is a new description for what the Fed has been doing for the last 25 years"). *See generally* Veronica Agosta, *N.Y. Fed Chief and Comptroller Brief Bank Group on New Law*, AM. BANKER, Apr. 10, 2000 (paraphrasing Federal Reserve Bank of New York President William McDonough as saying that "the Fed must rely 'to the fullest extent possible' on publicly available information and data submitted to other regulators . . . [W]e at the Federal Reserve take this aspect of our revised role – sometimes referred to as 'Fed lite' – very seriously"); *See generally* Gibson, Dunn & Crutcher LLP, *Executive Overview and Summary of the Gramm-Leach-Bliley Act*, Nov. 15, 1999, at 8-11 (discussing the Federal regulators' roles under GLBA) [hereinafter Gibson, Dunn, *Executive Overview*].

financial holding companies.[60]

For example, emphasizing traditional safety and soundness concerns, if any of a company's insured depository institution subsidiaries are not well-capitalized or well-managed, the FRB will not allow the company to form a financial holding company.[61] Additionally, if at the time of certification any bank affiliate receives a less than satisfactory Community Reinvestment Act ("CRA") rating at its most recent examination, the FRB will prohibit banks from forming a financial holding company.[62] Furthermore, if a financial holding company either loses its well-capitalized/well-managed status or receives a less than satisfactory CRA rating, the FRB may order the financial holding company to either divest control of any subsidiary depository institutions or revert to a bank holding company structure.[63]

D. *Financial Subsidiaries*

The financial holding company structure does not represent a bank's only hope for engaging in certain financial activities. the GLBA allows financial subsidiaries of national banks to engage in the same activities permissible for a financial holding company's non-bank subsidiaries.[64] Yet, such allowance is not without its limits.

Although the permissible activities include securities underwriting, the GLBA does not allow financial subsidiaries to engage in insurance underwriting, real estate investment or real estate development.[65]

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60. *See* Gibson, Dunn, *Working Summary*, *supra* note 11, at 24 (stating that [T]he GLB Act contains numerous trigger points related to legal noncompliance and other serious problems affecting bank affiliates that could lead to direct Fed involvement and to the possible exercise of remedial authority affecting both FHCs and their affiliated operating companies. In addition, the Fed will have an informal ability to affect downstream companies because of its power over the FHC parent and the tendency of other regulatory agencies to respect and accommodate Fed positions. *But see* GLBA § 111; H.R. REP. No. 106-434, at 253 (1999) (Consistent with functional regulation, the Board's authority to take indirect action against a functionally regulated affiliate is limited. The Board may not promulgate rules, adopt restrictions, safeguards or any other requirement affecting a functionally regulated affiliate unless the action is necessary to address a 'material risk' to the safety and soundness of the depository institution or the domestic or international payments system and it is not possible to guard against such material risk through requirements imposed directly upon the depository institution).

61. § 103; *see also* S. 900 *Conference Report, Statement of Managers, available at* http://business.cch.com/banking//news/confrept.htm (summarizing the major provisions of the GLBA).

62. § 103.

63. *Id. See* HERLIHY, *supra* note 13, at 69 (noting that "while most major bank holding companies qualify today as both well capitalized and well managed, the standards have proven difficult to meet during periods of industry downturns"). For a general overview of financial holding companies' regulatory structure under the GLBA, *see* Lisa I. Fried, *Financial-Industry Lawyers See Mixed Blessing*, N.Y.L.J., Apr. 6, 2000, at 5.

64. *See* GLBA § 121; H.R. REP. No. 106-434, at 254 (1999) (discussing allowable activities for a bank's "financial" subsidiaries); *see also* HERLIHY, *supra* note 13, at 71.

65. *See* FTC Premerger Notification: Reporting and Waiting Period Requirements, 65 Fed.

Regardless of this restriction, all banks and their subsidiaries can sell insurance through state-licensed bank employees.[66] Financial subsidiaries may also engage in merchant banking after a five-year waiting period, as long as the FRB and the Secretary of the Treasury jointly permit the activity.[67] Additionally, a state bank's financial subsidiaries may engage in activities permissible only for a national bank's financial subsidiaries if the state bank meets certain requirements applicable to a national bank.[68]

One cannot overstate the effect that the GLBA is having on the financial services industry. The FRB has already approved the applications of 117 bank holding companies that have elected to become financial holding companies.[69] By dismantling the Glass-Steagall Act and amending the BHCA, the GLBA gives the financial services industry precedent-setting structural freedom. Through its extensive preemption provisions, however, the GLBA takes just as much freedom away from the states.

Reg. 17880 (2000). In this action, the FTC produced Formal Interpretation 17, which interpreted the Hart-Scott-Rodino Act, 15 U.S.C. § 18(a), (c)(7)-(c)(8) (1994), reporting requirements for acquisitions involving banking and non-banking businesses. *See id. See also* HERLIHY, *supra* note 13, at 71. Additionally, the GLBA attaches other restrictions to operating subsidiary activities. The following list presents examples of these restrictions: (1) bank/operating subsidiary transactions are subject to all restrictions applicable to bank/non-bank holding company subsidiary transactions, including Federal Reserve Act, 12 U.S.C. § 371(c) (1994), section 23A requirements; (2) if the bank is a national bank that is one of the fifty largest U.S. banks, then it shall have an issue of unsecured long-term debt rated by an independent rating agency in one of the three highest rating categories; (3) a cap (at the lesser of $50 billion or 45% of the parent bank's consolidated assets) on all of the assets from the national bank's operating subsidiaries; and (4) when calculating whether it has complied with regulatory capital standards, the parent bank shall deduct not only its operating subsidiaries' assets and liabilities, but also its equity investments in the operating subsidiaries. *See id.* at 71-72. Also, national banks seeking financial subsidiaries must meet "well-capitalized"/"well-managed" and CRA tests paralleling those for financial holding companies. *See* Gibson, Dunn, *Working Summary, supra* note 11, at 60.

66. *See* GLBA §§ 104, 302-03; *see also* FTC Premerger Notification: Reporting and Waiting Period Requirements, 65 C.F.R. 17880 (2000) (discussing financial subsidiaries' allowable activities); Chuck Conlon, *Financial Services Agreement No.* 106-18, CONG. Q. HOUSE ACTION REP. at 4, 6 (1999) (summarizing GLBA); Financial Services Modernization Act, Summary of Provisions (last modified Oct. 30, 1999) *available at* http://www.senate.gov/~banking/conf/grmleach.htm (summarizing GLBA).

67. *See* GLBA § 104.

68. *See* § 121; *see also* FTC Premerger Notification: Reporting and Waiting Period Requirements, 65 C.F.R. 17880 (2000) (discussing financial subsidiaries' allowable activities); Gibson, Dunn, *Working Summary, supra* note 11, at 62 (summarizing the requirements).

69. *See Federal Reserve Board Press Release: Bank Holding Companies and Foreign Bank Organizations Which Have Effectively Elected To Become or Be Treated as Financial Holding Companies as of March 11, 2000*, (March 13, 2000) *available at* http://www.Federalreserve.gov/BoardDocs/Press/BoardActs/2000/20000313/default.htm.

II. Section 104 and Federal Preemption

The general role of section 104 is to preempt state laws that interfere with depository institutions' rights under the GLBA. To further this goal, section 104(d)(1) declares that "no state may . . . prevent or restrict a depository institution or an affiliate thereof from engaging directly or indirectly, either by itself or in conjunction with an affiliate, or any other person, in any activity authorized or permitted under [the GLBA] and the amendments made by [the GLBA]."[70] It must be noted, however, that the GLBA's reach goes far beyond the GLBA itself.

A. *Section 104 and Blanket Preemption*

Under section 104(c)(1), states may not prevent or restrict depository institutions or their affiliates from affiliating directly or indirectly or associating "with any person, as authorized or permitted by this Act *or any other provision of federal law*."[71] Thus, under sections 104(c)(1), (d)(1) and (d)(2), states cannot enact any "statute, regulation, order, interpretation, or other action" that prevents or restricts depository institution affiliations or associations authorized by any federal law.[72]

Section 104 fails to define "other action." Thus, prudent states must take a hands-off approach to depository institution affiliations and insurance activities or face a potential challenge from federal banking, insurance and securities regulators.[73]

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70. *See* GLBA § 104(d)(1); *see also* H.R. Rep. No. 106-434, at 251 (1999) (stating that "[e]xcept with respect to insurance, states may not prevent or restrict a depository institution or affiliate thereof from engaging in any activity set forth under the Gramm-Leach-Bliley Act").

71. GLBA § 104(c)(1) (emphasis added).

72. *See, e.g.*, Gibson, Dunn, *Working Summary, supra* note 11, at 38 (stating that "although developed with a focus on insurance anti-affiliation laws, [section 104(c)] is not limited to insurance, but by its terms reaches any State law that adversely affects affiliations with a [depository institution]").

73. GLBA § 104(c)(1), § 104(d)(1) & (2); *see also* Gibson, Dunn, *Working Summary, supra* note 11, at 38. The states legislative hands are truly tied by section 104:

> The preemption provisions cover not only [depository institutions] in a [financial holding company], but all insured [depository institutions], foreign banks with a U.S. branch, agency, or commercial lending company, and all affiliations with [depository institutions] permitted under the Act. It reaches persons or entities "associated" with a [depository institution] or [financial holding company] but does not define "associate." In context that term would appear to cover a joint venture, contractual, or other relationships among individuals, companies, or other persons engaged in financial or other activities covered by this subsection. Any person or entity "engaged in the business of insurance" is an "insurer" for purposes of these affiliation provisions.

Id. at 38.

Interestingly, unlike many of GLBA's sections, section 104 fails to appoint a primary regulator to interpret its provisions. Thus, the efforts of the banking and insurance regulators, coupled with foreseeable litigation, will eventually define its pervasive scope. *See* GLBA § 104; *see also* Gibson, Dunn, *Working Summary, supra* note 11, at 35. *See generally* Robert C. Eager & Cantwell F.

Additionally, although the preemption provisions reach persons or entities "associated" with either a depository institution or a financial holding company, section 104 does not define the term "associate."[74] In the context of section 104, the term would seem to cover joint venture, contractual, or other relationships between individuals, companies or other persons engaging in financial or other activities allowed under the GLBA or other federal law.[75]

1. Insurance Sales by Depository Institutions

Recognizing the right of depository institutions to engage in insurance sales, solicitation and cross - marketing activities, Congress incorporated the legal standard for preemption from *Barnett Bank of Marion County N.A. v. Nelson*[76] into section 104(d)(2).[77] Under the section, "no state may . . . prevent or significantly interfere with the ability of a depository institution, or an affiliate thereof, to engage, directly or indirectly, either by itself or in conjunction with an affiliate or any other person, in any insurance sales, solicitation, or cross marketing activity."[78] In declaring this right, however, Congress also emphasized that the McCarran-Ferguson Act,[79] recognizing the states' role as the primary regulators of the insurance industry, remains the law of the United States.[80]

Muckenfuss III, Gibson, Dunn & Crutcher LLP, *New Federal Preemption Rules Concerning Insurance and Other Affiliations of Depository Institutions: Section 104 of the Gramm-Leach-Bliley Act*, Nov. 30, 1999, at 1 (stating that "[t]hese provisions apply to any type of affiliation with any depository institution, not just the financial holding companies . . . authorized in Section 103 of the new Act"). Whether the banking, insurance and securities regulators would in fact have standing to challenge a state's overreaching is beyond the scope of this Article.

74. *See* GLBA § 104(c)(1); *see also* Eager & Muckenfuss III, *supra* note 73, at 4 (discussing the expansive preemption of state law under section 104).

75. *See id.* at 4 (discussing the reach of the term "associate").

76. 517 U.S. 25 (1996).

77. GLBA § 104(d)(2)(A). This section codifies the Supreme Court holding in *Barnett Bank of Marion County N.A. v. Nelson*, 517 U.S. 25 (1996); *see also* H.R. Rep. No. 106-434, at 251 (1999) (stating that "[w]ith respect to insurance sales, solicitations, and cross-marketing, States may not prevent or significantly interfere with the activities of depository institutions or their affiliates, as set forth in *Barnett Bank of Marion County, N. A. v. Nelson*, 517 U.S. 25 (1996)").

78. *Id.*

79. 15 U.S.C. § 1012(a) (1945).

80. GLBA § 104; *see also* H.R. Rep. No. 106-434, at 251 (stating that

> [t]his section reaffirms the McCarran-Ferguson Act, recognizing the primacy and legal authority of the States to regulate insurance activities of all persons. No persons are permitted to engage in the business of insurance unless they are licensed by the States, as required under State law. States are not allowed to prevent certain affiliations or activities or discriminate against depository institutions in providing such insurance licenses).

After section 104, it appears that the states' only remaining power to regulate insurance activities is through the states' licensing authority and privacy laws. *See infra* Part IV for a discussion of the GLBA's privacy provisions.

The McCarran-Ferguson Act states that "no Act of Congress shall be construed to invalidate, impair or supersede any law enacted by any state for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance."[81] Thus, in accordance with *Barnett Bank* and the McCarran-Ferguson Act, state law cannot override, restrict or significantly interfere with a federal law, such as section 104(d)(2)(A), that specifically relates to the business of insurance.[82] Therefore, if an entity engaged in insurance sales has a depository institution affiliate, section 104(d)(2)(A) will preempt such state rules that apply solely to the insurance sales activities of that entity.[83]

Section 104 establishes a two-part preemption test for state laws governing the insurance sales, solicitation or cross - marketing activities of depository institutions and their affiliates. The GLBA preempts state laws governing insurance sales by depository institutions if the laws either "prevent or significantly interfere with" the aforementioned activities, in accordance with *Barnett Bank*, or are discriminatory under a four-pronged test.[84] Thus, under section 104(e), a state law is discriminatory if it: (1) distinguishes by its terms between depository institutions or their affiliates and other persons engaged in insurance activities authorized by the GLBA in an adverse manner; (2) as interpreted or applied, has a substantially more adverse impact on depository institutions and their affiliates than on other persons providing the same products or services or engaging in the same activities; (3) effectively prevents depository institutions or their affiliates from engaging in insurance activities authorized by the GLBA or other federal law; or (4) conflicts with the GLBA's general intent to permit affiliations authorized by federal law between depository institutions or their affiliates and persons

81. 15 U.S.C. § 1012(b).

82. *See Barnett Bank*, 517 U.S. at 37-38; *see also* Eager & Muckenfuss III, *supra* note 73, at 3 ("[U]nder [the McCarran-Ferguson] Act, the 'business of insurance' is subject to State regulation, except to the extent that a Federal statute (such as Section 104 of the [Gramm-Leach-Bliley] Act) 'specifically relates' to insurance"). Although the GLBA reaffirms McCarran-Ferguson's protection of the states primary regulators of the insurance industry, where such regulators have tried to block certain insurance company-takeover bids, courts have denied deference to state insurance commissioners, holding that they were unduly interfering with federal securities laws or the Commerce Clause of the Constitution. *See* HERLIHY, *supra* note 13, at 105 (citing Liberty National Life Insurance Co. v. Huddleston, No. 3:90-0368, slip op. at 2 (M.D. Tenn. May 1, 1990), aff'd, No. 90-5598 (6th Cir. May 2, 1990) (motion to stay denied); Alleghany Corp. v. Pomeroy, 700 F. Supp. 460 (D.N.D. 1988) (enjoining South Dakota commissioners from blocking acquisition of St. Paul Companies, Inc.) rev'd 898 F.2d 1314 (8th Cir. 1990) (reversing on procedural grounds)).

83. *See* Eager & Muckenfuss III, *supra* note 73, at 8.

84. *See* GLBA §§ 104(d)(2)(A), 104(e).

engaged in the insurance business.[85] If a state law fails any one of the four discrimination prongs, the GLBA will preempt the law. However, the section 104(e) discrimination test generally does not apply to any state law regarding insurance sales, solicitation, or cross-marketing activities enacted before September 3, 1998, or to state laws falling within one of thirteen "safe harbors."[86]

2. Insurance Activities Other Than Sales

To avoid federal preemption, state laws that govern insurance activities other than sales must meet the following four-part test. The state laws must (1) relate to or are issued for the purpose of regulating the insurance business in accordance with the McCarran-Ferguson Act; (2) apply only to persons, not depository institutions, that are directly engaged in the insurance business; (3) not relate to or regulate either directly or indirectly insurance sales, solicitation or cross marketing activities; and (4) not be discriminatory under the aforementioned section 104(e) four-pronged test.[87] Thus, if state regulations are consistent with this test, the states may continue regulating insurance activities other than sales, solicitation and cross marketing without fearing federal preemption.[88]

3. Financial Activities Other Than Insurance

Finally, state laws governing financial activities other than insurance must meet the following four-part test to avoid preemption. The state laws must (1) not govern insurance sales; (2) not govern insurance activities other than sales; (3) not relate to securities investigations or enforcement actions addressed in section 104(f); and (4) meet approximately the same nondiscrimination test as provided in section 104(e).[89] Thus, state regulations of financial activities other than insurance that pass the nondiscrimination prong will survive federal preemption.[90]

B. *Safe Harbors*

Section 104 does include thirteen safe harbors, i.e., areas where states may regulate free from the threat of federal preemption.[91] How-

85. *See id.*
86. § 104(d)(2)(C)(ii). For a description of the applicable safe harbors, *see* § 104(d)(2)(B); *supra* Section B.
87. H.R. Rep. No. 106-434, at 251 (1999).
88. *See id.*
89. *See id.*
90. *See id.*
91. *See* GLBA § 104(d)(2)(B); *see also* Gibson, Dunn, *Working Summary, supra* note 11, at 43. Briefly, the thirteen safe harbors govern (1) protection of unassociated insurance issuers or

ever, these safe harbors conceal a rather dangerous undertow. The safe harbors are not subject to federal preemption as long as they are "substantially the same as but no more burdensome or restrictive than" those listed in section 104(d)(2)(B).[92] Thus, the GLBA does in fact preempt the states' power to regulate in the safe harbor areas because the states cannot exceed the federal ceiling. Rather than insure some level of state autonomy, section 104(d)(2)(B) merely supplies an additional preemption test.[93]

C. *Expedited Judicial Review*

If a state insurance regulator and federal regulator disagree over whether the GLBA preempts state law, either party may seek expedited review by a United States Court of Appeals.[94]

Significantly, the court shall decide the petition using a "without-unequal-deference" standard of review.[95] Thus, under these circumstances, the court is no longer obliged to give the Federal Banking Agencies deference in accordance with *Chevron v. National Resources Defense Council*[96] and *Barnett Bank*; rather, both sides will be viewed equally.[97] However, the court will not apply the without-unequal-deference standard to a state law regarding insurance sales, solicitation, or cross-marketing activities enacted before September 3, 1998, or falling within one of the aforementioned thirteen safe harbors.[98]

Therefore, by using if not vague than certainly overbroad language, Congress, through section 104, covers a wide range of state laws with a

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underwriters; (2) charging a single fee for insurance services; (3) advertising restrictions; (4) state licensing requirements; (5) referral fee restrictions; (6) privacy requirements for policy-holder information; (7) privacy requirements for policy-holders' health information; (8) restrictions on conditioning credit approval on purchasing insurance; (9) restrictions requiring notice to policy holders that their choice of insurance provider will not affect final decisions regarding pending loan or credit applications; (10) disclosing insurance risks; (11) separating credit and insurance transactions; (12) excluding the expense of insurance premiums in the primary credit transaction unless the customer consents; and (13) requiring banking institutions to maintain separate books and records for insurance transactions. *See generally* William Anderson, *State-Level Implications of Gramm-Leach-Bliley*, ADVISOR TODAY, Mar. 1, 2000 (discussing the thirteen safe harbors).

92. GLBA § 104(d)(2)(B).

93. Section 104(d)(2)(B) does not include a severability clause; thus, instead of failing only to the extent that they exceed the permissible bounds of the safe harbor, state rules or actions that exceed the boundaries of a particular safe harbor may fail in their entirety. *See* Eager & Muckenfuss III, *supra* note 73, at 10.

94. *See* GLBA § 304; *see also* Gibson, Dunn, *Working Summary supra* note 11, at 41 (summarizing GLBA).

95. GLBA § 304.

96. 467 U.S. 837 (1984).

97. *See* Gibson, Dunn, *Working Summary, supra* note 11, at 41; *see also* BENSON ET. AL., *supra* note 12 (discussing the *Chevron* and *Barnett* decisions).

98. *See* GLBA §§ 104(d)(2)(C), 304(e).

blanket federal preemption standard. Additionally, Congress' safe harbors, facially pro-state, are tied to a federal ceiling provision that limits any real state-level legislative freedom. However, section 104 merely marks the beginning of one's journey into the GLBA's labyrinth of preemption principles.

III. Insurance Activities of National Banks

The GLBA enables banks to engage in insurance activities through a financial holding company and financial subsidiary. Additionally, Title III of the GLBA enables national banks to engage in insurance activities directly, with some limitations. In authorizing these powers, Congress builds on a foundation of Supreme Court precedent supporting a national bank's right to engage in insurance activities.

A. *Judicial Rulings in the Years Leading Up to GLBA*

In the 1980s, two Supreme Court cases chipped away at the legal framework supporting insurance companies' opposition to affiliations with banks. *Nations Bank v. Variable Annuity Life Ins. Co.*[99] upheld an OCC determination that annuities do not fall within the definition of "insurance." Thus, under the National Bank Act, banks may sell annuities as a service to banking customers.[100] Additionally, *Barnett Bank* upheld another OCC determination that, under the National Bank Act's express authority, national banks may sell insurance in towns with populations of 5,000 or less.[101] The Court held that since the National Bank Act expressly allows certain national banks to sell insurance in small towns, the Act "specifically relates to the business of insurance."[102] Thus, the Court did not apply McCarran-Ferguson's anti-federal preemption rule.[103] By affirming the federal statutory authority for a national bank's insurance activities, these cases paved the way for GLBA's preemption and insurance provisions.

B. *The Title III Provisions*

Title III of the GLBA begins by declaring that states remain the functional regulators of insurance activities, including a national bank's insurance activities; however, this acknowledgement is subject to the

99. 513 U.S. 251 (1995).
100. *See id.* at 252; *see also* Macey & Miller, *supra* note 19, at 152; Gibson, Dunn, *Working Summary*, *supra* note 11, at 50 (discussing the case).
101. *See id.* at 26.
102. *See id.*
103. *See id.*

GLBA's sweeping section 104 preemption standard.[104] Thus, under section 104's broadest language, states can regulate the insurance business, as long as they do nothing to prevent or restrict depository institutions or their affiliates from affiliating directly or indirectly or (2) associating with any person, as authorized by the GLBA or any other federal law. Since the GLBA does not define the term "restrict," one can envision depository institutions and/or their affiliates litigating over whether a particular state "statute, regulation, order, interpretation, or other action"[105] restricts their affiliation rights. In fact, one can further envision litigation over what Congress meant by "other action."

As aforementioned, section 121 enables a bank's financial subsidiary to engage in certain insurance activities. Under section 302, however a national bank and its subsidiaries may not provide insurance in states as a principal except for certain "authorized products."[106] A product is authorized if (1) as of January 1, 1999, a national bank was lawfully providing the product or has the OCC's written permission to provide it; (2) a court by final judgment had not overturned the OCC's determination; and (3) the product is not subject to tax treatment as an annuity or title insurance under the Internal Revenue Code.[107] Generally, the state insurance regulators retain the discretion to define insurance.[108] Additionally, with some exceptions, a national bank may not engage in activities involving underwriting or selling title insurance.[109]

C. *The Insurance Customer Protection Regulations*

Section 305 of the GLBA amends the FDIA, adding new section 47 to govern insurance customer protections. Under section 47, the federal banking agencies (e.g., FRB, OCC, OTS and FDIC) must prescribe joint regulations that apply to "retail sales practices, solicitations, advertising, or offers of any insurance product" by a depository institution and, if the federal banking regulators so determine, a depository institution's affili-

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104. *See* GLBA § 104; *see also* H.R. REP. No. 106-434, at 261 (1999) (discussing the states' role as functional regulator of the insurance business).

105. GLBA § 104.

106. *See* § 302.

107. *See id.*

108. *See id.*; *see also* Gibson, Dunn, *Working Summary, supra* note 11, at 51 (summarizing the GLBA). Interestingly, the Act expressly includes "any annuity contract, the income of which is subject to tax treatment under section 7702 of the Internal Revenue Code" under its definition of "insurance." Thus, by including annuities within the definition of insurance, the GLBA reverses the Supreme Court's determination in *VALIC* that annuities were not "insurance." *See* GLBA § 302; *see also* Nations Bank v. Variable Annuity Life Ins. Co., 513 U.S. 251 (1995) (holding that an annuity is not insurance); Gibson, Dunn, *Working Summary, supra* note 11, at 52 (comparing GLBA's definition of "insurance" with the *VALIC* case).

109. *See* GLBA § 303.

ates; and are consistent with the GLBA and "provide such additional protections for customers to whom such sales, solicitations, advertising, or offers are directed."[110] The new section 47 specifically relates to the business of insurance, thus activating the McCarran-Ferguson preemption standard. Therefore, subject to certain federally mandated allowances, section 47 will preempt state law.[111]

In particular, section 47 expressly requires that the federal banking agencies' regulations include rules relating to (1) anti-tying and anti-coercive sales practices; (2) disclosures and advertising; (3) separation of banking and nonbanking activities; (4) domestic violence discrimination prohibitions; and (5) consumer grievance processes.[112] First, under the anti-coercion and anti-tying rules, a depository institution cannot lead a customer to believe that an extension of credit is conditioned upon purchasing insurance or agreeing not to obtain, or prohibiting the customer from obtaining, insurance from an unaffiliated entity.[113] Second, depository institutions must make the following disclosures orally and in writing with respect to initial purchases of insurance products before completion of the initial sale: (1) that the FDIC, U. S. government and the depository institution do not insure the product; and (2) the product is associated with an investment risk, if the product is a variable annuity or other insurance product involving such risk.[114] Additionally, at the time of application for an extension of credit, the depository institution must disclose that approval of such extensions is governed by the aforementioned anti-tying and anti-coercion rules.[115]

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110. § 305.

111. *See supra* page Part II.A.1; GLBA § 305 (adding section 47 to the Federal Deposit Insurance Act of 1933, 12 U.S.C. § 1811 (1994)); Bill Summary & Status for the 106th Congress, *supra* note 59, at 15. Such regulations are designed to protect customers who are offered such insurance products. The regulations contain the following four major requirements. (1) must provide antitying and anticoercion rules prohibiting a depository institution from leading a customer to believe that an extension of credit is conditioned upon either purchasing an insurance product from the institution or its affiliates; (2) must make certain disclosures in advertising; (3) must physically separate banking and nonbanking (insurance product) activities; and (4) must prohibit discrimination against domestic violence victims. Significantly, section 305(2) applies these regulations to subsidiaries of a depository institution, if necessary to ensure the required customer protection.

112. *See* GLBA § 305 (adding section 47 to the Federal Deposit Insurance Act of 1933, 12 U.S.C. § 1811 (1994)).

113. *See id.* One should note that section 47(b) uses the terms "customer" and "consumer" interchangeably. *See* Gibson, Dunn, *Working Summary, supra* note 11, at 72 (stating that "the regulations . . . shall include antitying and anticoercion rules . . . that prohibit a depository institution from engaging in any practice that would lead a *customer* to believe that an extension of credit . . . is conditioned upon . . . an agreement by the *consumer* not to obtain . . . an insurance product from an unaffiliated entity").

114. *See* GLBA § 305 (adding section 47(c)(1)(A) to the Federal Deposit Insurance Act of 1933, 12 U.S.C. § 1811 (1994)).

115. *See id.*

Third, the regulations must include provisions appropriate to ensure that routine deposit acceptance and insurance product activities are physically segregated.[116] These provisions require: (1) separate settings for deposit acceptance and insurance product transactions; (2) standards that permit persons accepting deposits to refer customers wishing to purchase insurance products to a qualified seller; and (3) standards prohibiting a depository institution from permitting inappropriately qualified or licensed persons to sell or offer for sale any insurance products.[117]

Fourth, unless state law otherwise requires or expressly permits such consideration, the depository institution shall not consider the status of an applicant or an insured as a victim of domestic violence or as a provider of services to domestic violence victims in any decision regarding "insurance underwriting, pricing, renewal, scope of coverage of insurance policies, or payment of insurance claims."[118] Fifth, the federal banking regulators must jointly create a consumer complaint mechanism to address alleged violations of the insurance customer protection regulations.[119]

Generally, the federal banking agencies' insurance customer protection regulations will not apply to states with statutes, regulations, orders or interpretations that are inconsistent with or contrary to their regulations.[120] However, section 47(g)(2)(B) expressly states that if the FRB, OCC and FDIC determine jointly that any provision of their regulations affords greater protection to customers than does the comparable state provision, they shall notify the appropriate state regulatory authority in writing of their initial determination and, after considering comments submitted by the appropriate state regulatory authorities, make a final determination concerning the status of the state provision.[121] If, after considering such comments, the federal banking agencies determine that their regulations afford greater protection than the state provisions, then they will send a written preemption notice to the appropriate state regulatory authority.[122] The notice will inform the state that the "federal provision will preempt the state provision and will become applicable unless, no later than three years after the date of such notice,

116. *See id.* (adding section 47(d)).

117. *See id.*

118. *See id.* (adopting section 47(e)).

119. *See id.* (adopting section 47(f)).

120. *See id.* (adding section 47(g)(2)(B)(iii) to the Federal Deposit Insurance Act of 1933, 12 U.S.C. § 1811 (1994)).

121. *See id.*

122. *See id.*

the state adopts legislation to override such preemption."[123]

Therefore, the federal regulations represent a floor standard for insurance customer protections. Although the federal banking agencies will not preempt state laws that provide greater customer protection than the federal regulations, they will preempt state provisions that are weaker than the federal floor. However, states can agree to adopt legislation to override the preemption within three years.[124] Thus, although Congress has the authority under the McCarran-Ferguson Act to preempt state law with federal regulations specifically related to the insurance business, the GLBA offers states the override option.[125] Even though this anti-preemption provision provides the states with some latitude, one should note that to avoid preemption, any new state insurance customer protection legislation must be equivalent to or tougher than the federal banking agencies' regulations.

D. *What About Preemption Under Section 104?*

Surprisingly, GLBA section 305 does not relate back to the preemption provisions in section 104.[126] Thus, the GLBA does not reconcile section 104's broad preemption of state law, particularly state law dealing with the insurance business, with the language that is somewhat more protective of state law in section 305. Because section 305 does not cross-reference section 104, states could argue that Congress intended section 305 to fall outside of section 104 preemption.[127] Such an argument, however, would fail against section 104's blanket preemption of state law.

Section 104's preemption standard covers any state action that prevents or restricts affiliations and associations authorized by the GLBA or any other federal law governing depository institutions. Specifically, states may not prevent or restrict a depository institution's insurance activities as authorized by the GLBA. Thus, since state insurance cus-

123. *Id.* (adding section 47(g)(2)(B)(iii) to the Federal Deposit Insurance Act of 1933, 12 U.S.C. § 1811 (1994)). This type of "choice" is constitutionally permissible "[w]here Federal regulation of private activity is within the scope of the Commerce Clause, we have recognized the ability of Congress to offer States the choice of regulating that activity according to Federal standards or having State law preempted by Federal regulation." New York v. United States, 505 U.S. 144, 173-74 (1992).

124. *See* GLBA § 305 (adding section 47(g)(2)(B)(iii) to the Federal Deposit Insurance Act of 1933, 12 U.S.C. § 1811 (1994)).

125. *See, e.g.*, U.S. CONST. art VI, cl. 2 (Supremacy Clause); Gade v. Nat'l Solid Waste Mgmt. Ass'n, 505 U.S. 88, 105-09 (1992) (discussing how the preemption doctrine evolved from the Supremacy Clause and how federal statutes can expressly or impliedly preempt state laws in the same field).

126. *See* Gibson, Dunn, *Working Summary, supra* note 11, at 71, 74.

127. *See generally id.* (discussing the failure of section 104 to cross-reference section 305).

tomer protection regulations may affect the activities of depository institutions and their affiliates, section 104 will apply to the extent that the state regulations prevent or restrict the GLBA-approved insurance activities of depository institutions and their affiliates.[128]

Since Congress did not define the word "restrict" in section 104, a depository institution could argue that a state's tougher insurance customer protection provisions "restrict" its ability to affiliate or associate with the insurance business. Therefore, although tougher state customer protection provisions are not subject to federal preemption under new section 47 of the FDIA, they could face preemption under section 104 of the GLBA. As such, states are facing a potential lose/lose situation: the federal banking regulators can preempt weaker state customer protection provisions under section 305, subject to a three-year window for the states to enact legislation to override the preemption, and section 104 could potentially preempt stronger provisions.

With the advent of the insurance customer protection regulations, the states gain an opportunity to strike back at the section 104 preemption provisions, at least in theory. However, the effect of section 104 upon Title III further strains the McCarran-Ferguson Act's declaration that the states regulate the insurance business according to state law. As a result, this declaration, once a terror, erodes toward mere tautology. Surprisingly, Title III shares a unique connection to the privacy provisions in Title V, a connection which raises questions regarding the constitutionality of Title V.

IV. Title V: Protecting Nonpublic Personal Information[129]

The privacy provisions of Title V of the GLBA begin by declaring that each financial institution owes its customers a continuing obligation to respect their privacy and the security and confidentiality of their nonpublic personal information.[130] To further this general policy, the FRB,

128. *See id.* (stating that "[t]he better reading would subject State insurance laws that may be regarded as referenced in new FDI Act section 47 to the framework for preemption regarding insurance activities under section 104").

129. Title V is broken up into two subtitles. Subtitle A, the focus of Part IV of this article, is entitled "Disclosure of Nonpublic Information." Subtitle B, entitled "Fraudulent Access to Financial Information," is not discussed in Part IV because it is beyond the scope of this article.

130. *See* GLBA § 501. Nonpublic personal information includes information obtained by the financial institution from: (1) the consumer; (2) the institution's own transactions or experiences with the customer; and (3) any third-party source. *See* Fischer & Camper, *supra* note 6. Thus, unlike the Fair Credit Reporting Act, 15 U.S.C. §§ 1681-1681t (1970), the GLBA does not exempt the disclosure of transactional or experiential information from the scope of its privacy provision. The provision, however, does not include nonfinancial demographic data, depersonalized information used for analytical purposes, or publicly available information. Significantly, the privacy provisions govern consumers, not business customers. Thus, the title applies only to those individuals who obtain from the financial institution financial products or

OCC, FDIC, NCUA, SEC and FTC, after consultation with state insurance authorities, must promulgate privacy standards for financial institutions falling within their jurisdiction.[131] Thus, the agencies and authorities must prescribe regulations to carry out the purposes of Title V.[132] Although the House bill would have required the agencies and authorities listed above to issue a joint privacy regulation,[133] the GLBA, as passed, only requires that they consult and coordinate with each other to produce, to the extent possible, consistent and comparable regulations.[134]

According to Title V, financial institutions must have privacy policies in place by November 12, 2000, one year after the GLBA was enacted into law.[135] However, the federal agencies, using their power under the GLBA to extend the deadline, have postponed the effective date for compliance until July 1, 2001.[136] Additionally, if a state insur-

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services primarily for personal, family or household purposes. *See* Fischer & Camper, *supra* note 6.

131. *See* GLBA § 501; *see also* Conlon, *supra* note 66, at 26 (summarizing the Title V privacy provisions). Congress did not specify what it meant by "standards," leaving one group of attorneys to speculate about the potential confusion caused by this oversight. *See* Gibson, Dunn, *supra* note 11, at 78 (stating that "it is not clear whether the term 'standards' necessarily requires rulemaking. It is quite possible that a regulator could issue a loose directive to protect the security and confidentiality of customer records, while another could issue detailed regulations covering a wide range of activity").

132. *See* GLBA § 504(a). Under the GLBA, a "financial" institution encompasses a wide variety of institutions, including mortgage, finance and travel agency companies. *See* Regulatory Advisory Service Practice of PriceWaterhouseCoopers, *Executive Overview and Summary of the Gramm-Leach-Bliley Act*, Nov. 15, 1999, at 15.

133. Financial Services Act of 1999, H.R. 10, 106th Cong. § 504(a) (1999).

134. *See* GLBA § 504(b) (deleting language requiring the regulators to "jointly prescribe" privacy regulations); H.R. REP. NO. 106-434, at 265 (1999) (amending the House position that called for joint rulemaking by allowing the regulators to separately prescribe privacy rules).

135. *See* GLBA §§ 504(a)(3) & 510. Federal agencies must prescribe privacy regulations within six months after the Act's enactment. Within six months after the federal agencies propose their regulations, the financial institutions must prescribe their privacy policies in accordance with their respective agency's regulations. Almost immediately after the agencies presented their proposed regulations, the banking industry requested more time, at minimum, August 2001 and, at maximum, March 2002, to implement its privacy policies. *See* Michelle Heller, *Banks Want More Time on Reform's Privacy Rules*, AM. BANKER, Apr. 12, 2000. Fascinatingly, claiming the mandated privacy notices would overwhelm the public mailing system during the already overpowering holiday season, financial services companies urged the federal regulators to extend, for as long as a year and a half, the deadline for financial institutions to give their customers mandated privacy notices. *See* Michelle Heller, *Bankers See Christmas-Mail Meltdown for Privacy Notices*, AM. BANKER, Apr. 12, 2000. However, the Postal Service has assured the financial services industry that it can handle the workload. *See id.* (stating that "[i]t wouldn't be a problem at all . . . [w]e would welcome the business").

136. *See* GLBA § 510(1). The FRB, OCC, OTS, FDIC, FTC, NCUA and SEC have all postponed the effective date of the privacy protections until July 1, 2001. *See* Joint Final Rule by the Federal Reserve System, 65 Fed. Reg. 35215 (June 1, 2000) (to be codified at 12 C.F.R. pt. 216); FDIC, 65 Fed. Reg. 35225 (June 1, 2000) (to be codified at 12 C.F.R. pt. 332); Department of the Treasury (OCC and OTS) 65 Fed. Reg. 35205, 35235 (June 1, 2000) (to be codified at 12

ance authority fails to enact legislation consistent with the GLBA privacy provisions, then new FDIA section 47(g)(2)(B)(iii) renders the state ineligible to override the federal banking agencies' insurance customer protection regulations.[137]

A. *The Privacy Provisions*

Generally, a financial institution may not disclose, directly or through an affiliate, a customer's nonpublic personal information to a nonaffiliated third party without first providing the customer with clear and conspicuous notice that such information may be disclosed and an opportunity to opt out.[138] Under the notice requirement, once a financial institution establishes its privacy policies in accordance with the applicable regulatory framework, it must clearly and conspicuously disclose these policies to its consumers at the time it establishes a customer relationship with a consumer and no less than annually during the customer relationship.[139] If a consumer never becomes a customer, then the financial institution need not provide any notices unless the institution plans to disclose the consumer's personal, nonpublic information to nonaffiliated third parties.[140]

C.F.R. pts. 40 & 573); FTC Final Rule, 65 Fed. Reg. 33687 (May 24, 2000) (to be codified at 16 C.F.R. § 313); NCUA Final Rule, 65 Fed. Reg. 31749 (May 18, 2000) (to be codified at 12 C.F.R. pts. 716 & 741); SEC Final Rule, 65 Fed. Reg. 40371 (June 29, 2000) (to be codified at 17 C.F.R. pt. 248); *see also* Dean Anason, *Privacy Rules' Effective Date Seen Delayed to Mid-2001*, AM. BANKER, May 5, 2000, at 1 (discussing the federal agencies' decision to postpone the deadline). Interestingly, section 504 does not impose a similar deadline for the states to enact privacy policies under insurance law. Thus, one could interpret Title V as allowing states a carte blanche timetable for enacting privacy policies on behalf of the insurance industry.

137. *See* GLBA § 505(c).

138. *See* §§ 502-503.

139. *See* § 503(a); *see also* Fischer & Camper, *supra* note 6 ("[O]ne of the most important features of the privacy title is the first federally mandated disclosure of a financial institution's privacy policy."). Section 509(11) directs the agencies and authorities to define "customer relationship" in their regulations. *See* GLBA § 509(11). However, section 509(11) does state that, in cases where a financial institution extends financing credit directly to consumers for purchases of goods and services, a "customer relationship" means the time that the financial institution establishes a credit relationship with a consumer. *See id.* The notice must be in writing or, if the consumer agrees, in electronic form; however, the federal agencies' proposed rules expressly forbid oral notification. *See* § 503; Joint Final Rule by the Federal Reserve System, 65 Fed. Reg. 35209-10 (June 1, 2000) (to be codified at 12 C.F.R. pts. 40 & 573); FDIC, 65 Fed. Reg. 35219-20 (June 1, 2000) (to be codified at 12 C.F.R. pt. 332); Department of the Treasury (OCC and OTS) 65 Fed. Reg. 35199-200, 35229-30 (June 1, 2000) (to be codified at 12 C.F.R. pts. 40 & 573); FTC Final Rule, 65 Fed. Reg. 33659-60 (May 24, 2000) (to be codified at 16 C.F.R. § 313); NCUA Final Rule, 65 Fed. Reg. 31742-43 (May 18, 2000) (to be codified at 12 C.F.R. pts. 716 & 741); SEC Final Rule, 65 Fed. Reg. 40368-69 (June 29, 2000) (to be codified at 17 C.F.R. pt. 248).

140. *See* GLBA § 503; Joint Final Rule by the Federal Reserve System, 65 Fed. Reg. 35209-10 (June 1, 2000) (to be codified at 12 C.F.R. pts. 40 & 573); FDIC, 65 Fed. Reg. 35219-20 (June 1, 2000) (to be codified at 12 C.F.R. pt. 332); Department of the Treasury (OCC and OTS) 65 Fed.

This disclosure must provide the financial institution's policies regarding the sharing of nonpublic personal information with affiliated and nonaffiliated third parties, including (1) the types of information subject to disclosure; (2) the disclosure of a former customer's nonpublic personal information; and (3) the protection of consumers' nonpublic personal information.[141] Importantly, when an institution discloses its privacy policy, it must include information regarding: (1) the institution's policy of disclosing personal nonpublic information to nonaffiliated third parties that are not agents of the institution, (including the categories of persons who may receive the information and the institution's disclosures regarding former customers); (2) the categories of nonpublic personal information subject to collection; (3) the policies maintained to protect the security and confidentiality of nonpublic personal information, and (4) the required affiliate disclosures under the Fair Credit Reporting Act.[142]

Under the opt-out requirement, a consumer is given an opportunity, before the financial institution discloses the information, to direct the financial institution not to disclose the information to nonaffiliated third parties.[143] Unless consumers expressly bar a financial institution from sharing their information, the opt-out model assumes that the institution will share the information.[144] Thus, if consumers neglect to respond, the financial institution may freely disclose their nonpublic personal information.[145]

Reg. 35199-200, 35229-30 (June 1, 2000) (to be codified at 12 C.F.R. pts. 40 & 573); FTC Final Rule, 65 Fed. Reg. 33659-60 (May 24, 2000) (to be codified at 16 C.F.R. § 313); NCUA Final Rule, 65 Fed. Reg. 31742-43 (May 18, 2000) (to be codified at 12 C.F.R. pts. 716 & 741); SEC Final Rule, 65 Fed. Reg. 40365-66 (June 29, 2000) (to be codified at 17 C.F.R. pt. 248).

141. Fischer & Camper, *supra* note 6; *see* GLBA § 502; *see also* H.R. REP. No. 106-434, at 266 (1999) ("The Conferees agreed to clarify that a financial institution's annual disclosure of its privacy policy to its customers must include a Statement of the institution's policies and practices regarding the sharing of nonpublic personal information with affiliated entities, as well as with nonaffiliated third parties.").

142. *See* GLBA § 503(b)(4).

143. § 502(b)(1)(A) & (B). The financial institution also must explain how the consumer may exercise the opt-out right. § 502(b)(1)(C). *See generally* William Anderson, *State-Level Implications of Gramm-Leach-Bliley*, ADVISOR TODAY, Mar. 1, 2000, *available at* 2000 WL 15516374 (discussing the privacy provisions).

144. *See* GLBA § 502(b)(1)(B). An opt-out mechanism assumes that financial institutions will share consumer information unless the consumer expressly bars such action; an opt-in model is stricter, prohibiting a financial institution from sharing consumer information without the consumer's prior consent. *See* Michelle Heller, *Calif. to Be Test Bed for Data Privacy Legislation*, AM. BANKER, Apr. 7, 2000 (discussing two California privacy bills that include opt-in mechanisms); Ren Wijnen, *Privacy Matters in the Digital Age*, BANK TECH. NEWS, Apr. 3, 2000, *available at* 2000 WL 17153362 (discussing the difference between an opt-out and opt-in mechanism).

145. *See* Congressional Privacy Caucus, Comments oh Proposed Regarding Privacy of

B. *New Phrases, Complex Definitions and the Scope of Title V*

Title V includes many new phrases and complex sets of definitions that supposedly help to define its structure and scope. Unfortunately, instead of facilitating a clean understanding of Title V, Congress' and the federal agencies' attempts at defining these new phrases have caused greater confusion. Such attempts only add to the difficulty that financial holding companies will eventually face in trying to implement the privacy regulations.[146] Indeed, Title V covers a wide range of information, financial institutions and activities. Depending on how Title V defines certain terms, the privacy regulations may or may not apply to a given financial institution.[147] Confusing or not, the definitions present the only way for a financial holding company to truly comprehend it's obligations under Title V.

1. CONSUMER VERSUS CUSTOMER

Title V distinguishes between consumers and customers. A consumer is an individual who obtains financial products or services from a financial institution primarily for personal, family, or household purposes.[148] With its focus on personal, family or household purposes, this definition of consumer arguably excludes businesses and corporations.[149]

A customer is a consumer who has a customer relationship with the

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Consumer Financial Information, (Mar. 31, 2000) *available at* http://www.house.gov/markey/cpfstat33100.htm.

146. *See* Goodwin, Procter & Hoar LLP, *Proposed Privacy Regulations Released by OCC and FRB* (Feb. 9, 2000) *available at* 2000 WL 9237979 (discussing the differences between the FRB's and OCC's definitions of "publicly- available information"); *SEC Issues Proposed Privacy Rules* (Mar. 8, 2000) *available at* 2000 WL 9238164 (discussing the differences between the SEC's proposals and those from the other Federal agencies). *See generally FTC Seeks Public Comment on Proposed Financial Privacy Rule* (Feb. 25, 2000) *available at* 2000 WL 12936223 (discussing the FTC's proposed privacy regulations). *But see* Congressional Privacy Caucus, *Comments on Proposed Rules Regarding Privacy of Consumer Financial Information* (Mar. 31, 2000) (stating that the agencies' proposed rules contain only minor differences); *but see also* Edward Staples, *Finance Industry Opts for 'Opt-Out' on Cross-Marketing*, ADVISOR TODAY, Mar. 1, 2000, at 32, *available* 2000 WL 15516361 (discussing Letter from the Electronic Financial Services Council to the Federal Agencies (Mar. 31, 2000) *available at* http://www.efscouncil.org/frames/Recent%20Activities/FINALCOM.htm ("The versions of the proposed rule . . . published so far are very similar to one another . . . .")).

147. *See* Fischer & Camper, *supra* note 6 ("To understand the effects of the privacy title, one must first grasp its key definitions.").

148. *See* GLBA § 509(9). Significantly, nothing in this definition limits its coverage to U.S. residents.

149. *See* Fischer & Camper, *supra* note 6 ("It is important to note that the privacy title governs only nonpublic personal information of consumers and does not cover an institution's business customers.").

financial institution.[150] Generally, a customer relationship exists when the financial institution and the consumer have a continuing relationship; such relationship exists when the financial institution provides the consumer with one or more financial products or services primarily for personal, family or household purposes.[151] However, this definition does not include the following situations: 1) using (either once or on repeated occasions) an automated teller machine at a bank or credit union at which a consumer transacts no other business; 2) cashing a check at such an institution; 3) purchasing travelers checks or money orders, or making a wire transfer at such an institution; 4) purchasing airline tickets; or 5) purchasing securities from a broker who has provided the service as an accommodation for a consumer when the broker does so on a one-time basis.[152] In these circumstances, the financial institution is not obligated to disclose its privacy policy to the consumer.[153]

As one might expect, the situations where a consumer would not have a continuing relationship (and thus a customer relationship) with a securities firm are more limited. According to the SEC's Final Rule on privacy of consumer financial information, a consumer does not have a continuing relationship with a securities firm if the firm "opens an account for the consumer solely for the purpose of liquidating or purchasing securities as an accommodation, i.e., on a one time basis,

150. *See* Joint Final Rule by the Federal Reserve System, 65 Fed. Reg. 35207-08 (June 1, 2000) (to be codified at 12 C.F.R. pt. 216); FDIC, 65 Fed. Reg. 35218 (proposed Feb. 22, 2000) (to be codified at 12 C.F.R. pt. 332); Department of the Treasury (OCC and OTS), 65 Fed. Reg. 35197, 35228 (June 1, 2000) (to be codified at 12 C.F.R. pts. 40 & 573); FTC Final Rule, 65 Fed. Reg. 33679 (May 24, 2000) (to be codified at 16 C.F.R. § 313); NCUA Final Rule, 65 Fed. Reg. 31741 (May 18, 2000) (to be codified at 12 C.F.R. pts. 716 & 741); SEC Final Rule, 65 Fed. Reg. 40364 (June 29, 2000) (to be codified at 17 C.F.R. pt. 248).

151. *See* Joint Final Rule by the Federal Reserve System, 65 Fed. Reg. 35207-08 (June 1, 2000) (to be codified at 12 C.F.R. pt. 216); FDIC, 65 Fed. Reg. 35218 (June 1, 2000) (to be codified at 12 C.F.R. pt. 332); Department of the Treasury (OCC and OTS), 65 C.F.R. 35197, 35228 (June 1, 2000) (to be codified at 12 C.F.R. pts. 40 & 573); FTC Final Rule, 65 C.F.R. 33679 (June 24, 2000) (to be codified at 16 C.F.R. § 313); SEC Final Rule, 65 Fed. Reg. 40364 (June 29, 2000) (to be codified at 17 C.F.R. pt. 248). In contrast to the other agencies, the NCUA defines "customer relationship" as "a continuing relationship between a consumer and a financial institution other than a credit union." NCUA Final Rule, 65 Fed. Reg. 31741 (May 18, 2000) (to be codified at 12 C.F.R. pts. 716 & 741).

152. For a more thorough discussion of the exceptions, *see* FRS/FDIC: Privacy of Consumer Financial Information, 65 Fed. Reg. 35228 (June 1, 2000) (to be codified at 12 C.F.R. pts. 40, 216, 332, 573); FRS/FDIC, 65 Fed. Reg. at 35218; FRS/FDIC: Privacy of Consumer Financial Information, 65 Fed. Reg. at 35208; FRS/FDIC: Privacy of Consumer Financial Information, 65 Fed. Reg. at 35198; FTC: Privacy of Consumer Financial Information, Fed. Reg. 33679 (May 24, 2000) (to be codified at 16 C.F.R. § 313); FTC: Privacy of Consumer Financial Information, 65 Fed. Reg. 10990 (Mar. 1, 2000) (to be codified at 12 C.F.R. pts. 716,741).

153. *See* GLBA § 503(a) ("at the time of establishing a *customer relationship* with a consumer and not less than annually during the continuation *of such relationship*, a financial institution shall provide clear and conspicuous disclosure . . . of such institution's [disclosure] policies and practices . . . .") (emphasis added).

without the expectation of engaging in other transactions."[154] However, this definitional tailoring by the SEC, as opposed to the other federal agencies, could create regulatory difficulties for financial holding companies.

2. "FINANCIAL INSTITUTION" . . . EVERYTHING BUT THE KITCHEN SINK

In general, a "financial institution" is "any institution the business of which is engaging in financial activities as described in section 4(k) of the Bank Holding Company Act."[155] Thus, any institution that engages in activities that are financial in nature, incidental to such financial activity or complementary to a financial activity, must establish privacy policies according to Title V.[156] Significantly, Title V applies to all companies that fall within the expansive definition of "financial institution," regardless of whether they own or are affiliated with a bank or thrift.[157]

3. NONAFFILIATED THIRD PARTY

A "nonaffiliated third party" is defined as "any entity that is not an affiliate of, or related by common ownership or affiliated by corporate control with, the financial institution."[158] An "affiliate" therefore, is defined as "any company that controls, is controlled by, or is under common control with another company."[159] For Title V purposes, the defi-

154. SEC: Privacy of Consumer Financial Information, 65 Fed. Reg. 40364 (June 29, 2000) (to be codified at 17 C.F.R. pt. 248).

155. *See* GLBA § 509(3).

156. § 103(a) (amending the BHCA by adding new Section 4(k)).

157. *See* Memorandum from Bob Eager et al., Gibson, Dunn & Crutcher LLP, *New Federal Privacy Requirements Affecting Any Company Engaged in "Financial" Business* 1 (Jan. 15, 2000). Obviously, the definition covers companies providing banking, lending, securities, insurance or trust activities. *See id.* This coverage extends to companies that collect consumer information from or about its customers, as well as companies that receive such information from a financial company. *See supra* note 156. Additionally, this definition's scope will very likely envelop companies that: (1) finance sales of products to consumers via credit extensions or leases; (2) provide services to banking, lending, securities, insurance or trust service providers; (3) travel agencies, data processing and financial software companies and "outsource" service providers to any financial company; and (4) companies providing economic, financial, investment, management or employee benefits consulting or advisory services. *See id.* Thus, these companies must establish privacy policies in accordance with their functional regulator's Title V regulations. *See generally* Amber Veverka, *Regulators to Distill Public Comments on Bank-Privacy Rules*, CHARLOTTE OBSERVER, Apr. 1, 2000, *available at* 2000 WL 17761514 (paraphrasing Kellie Cosgrove, FTC attorney in the financial practices division, as saying that "universities could be included, if they let students use payment plans. Tax preparers, department stores that issue credit cards, travel agencies and a long list of other businesses could have to play by the privacy rule. . . .").

158. *See* GLBA § 509(5).

159. § 509(6).

nition of an entity as an affiliate or an unaffiliated third party turns on whether the financial institution in fact "controls" the entity.[160]

4. NONPUBLIC PERSONAL INFORMATION

Title V defines "nonpublic personal information" as personally identifiable information that the consumer provides to a financial institution, results from a transaction with or service performed for the consumer, or is otherwise obtained by the financial institution.[161] "Nonpublic personal information" does not include publicly available information, including "any list, description or grouping of consumers (and publicly available information pertaining to them) that is derived without using any nonpublic personal information."[162] However, the definition does include "any list, description, or other grouping of consumers (and publicly available information pertaining to them) that is derived using any nonpublic personal information other than publicly available information."[163] Thus, a financial institution may disclose publicly available information, including information from a list, description or grouping of customers that is derived using publicly available information.

a. The Scope of Nonpublic Personal Information

In defining the scope of "nonpublic personal information," the FRB, FDIC, OCC and OTS, SEC, FTC and NCUA have adopted a two-pronged approach. According to the agencies, "nonpublic personal information" means "(i) [p]ersonally identifiable financial information; and (ii) [a]ny list, description, or other grouping of consumers (and publicly available information pertaining to them) that is derived using any personally identifiable financial information that is not publicly available."[164] Information qualifies as "publicly available" if the financial institution has a reasonable basis to believe that the information has been lawfully made available to the general public from "(i) [f]ederal, [s]tate

160. *See supra* Section B(6).

161. *See* GLBA § 509(4).

162. § 509(4)(C)(ii).

163. § 509(4)(C)(i).

164. *See* SEC: Privacy of Consumer Financial Information, 65 Fed. Reg. 40364 (June 29, 2000) (to be codified at 17 C.F.R. pt. 248); FRS/FDIC: Privacy of Consumer Financial Information, 65 Fed. Reg. 35228 (June 1, 2000) (to be codified at 12 C.F.R. pts. 40, 216, 332, 573); FRS/FDIC: Privacy of Consumer Financial Information, 65 Fed. Reg. 35219; FRS/FDIC: Privacy of Consumer Financial Information, 65 Fed. Reg. 35208; FRS/FDIC: Privacy of Consumer Financial Information, 65 Fed. Reg. 35199; FTC: Privacy of Consumer Financial Information, Fed. Reg. 33681 (May 24, 2000) (to be codified at 16 C.F.R. § 313); NCUA Privacy of Consumer Financial Information, 65 Fed. Reg. 31742 (May 18, 2000) (to be codified at 12 C.F.R. pts. 716, 741).

or local government records; (ii) [w]idely distributed media; or (iii) [D]isclosures to the general public that are required to be made by [f]ederal, [s]tate, or local law."[165]

In general, a financial institution will satisfy the reasonableness standard if it has taken steps to determine that the information is of a type that is available to the general public and whether individuals can order that the information remain unavailable to the general public and, if so, that the consumer in question has failed to do so.[166] However, the SEC's reasonableness standard takes a somewhat different route. Both the SEC's and the other federal agencies' reasonableness standards incorporate consumer information of a type that is available to the general public.[167] Yet, according to the SEC's reasonableness standard, a securities firm could not reasonably believe that it retains publicly available information if the information is of a type normally recorded with a keeper of government records, such keeper is legally required to make the information publicly available and the consumer has the legal ability to keep the information nonpublic.[168] Thus, unlike the other federal agencies, the SEC does not expressly require the consumer to actually order that the information remain unavailable to the general public.[169]

165. *See* SEC: Privacy of Consumer Financial Information, 65 Fed. Reg. 40365 (June 29, 2000) (to be codified at 17 C.F.R. pt. 248); FRS/FDIC: Privacy of Consumer Financial Information, 65 Fed. Reg. 35229 (June 1, 2000) (to be codified at 12 C.F.R. pts. 40, 216,332, 573); FRS/FDIC: Privacy of Consumer Financial Information, 65 Fed. Reg. at 35219; FRS/FDIC: Privacy of Consumer Financial Information, 65 Fed. Reg. at 35209; FRS/FDIC: Privacy of Consumer Financial Information, 65 Fed. Reg. at 35199; FTC: Privacy of Consumer Financial Information, Fed. Reg. 33681 (May 24, 2000) (to be codified at 16 C.F.R. § 313); NCUA: Privacy of Consumer Financial Information, 65 Fed. Reg. 31742 (May 18, 2000) (to be codified at 12 C.F.R. pts. 716, 741).

166. FRS/FDIC: Privacy of Consumer Financial Information, 65 Fed. Reg. 35229 (June 1, 2000) (to be codified at 12 C.F.R. pts. 40, 216, 332, 573); FRS/FDIC: Privacy of Consumer Financial Information, 65 Fed. Reg. at 35219; FRS/FDIC: Privacy of Consumer Financial Information, 65 Fed. Reg. at 35209; FRS/FDIC: Privacy of Consumer Financial Information, 65 Fed. Reg. at 35199; FTC: Privacy of Consumer Financial Information, Fed. Reg. 33680 (May 24, 2000) (to be codified at 16 C.F.R. § 313); NCUA: Privacy of Consumer Financial Information, 65 Fed. Reg. 31742 (May 18, 2000) (to be codified at 12 C.F.R. pts. 716, 741).

167. *See* SEC: Privacy of Consumer Financial Information, 65 Fed. Reg. 40365 (June 29, 2000) (to be codified at 17 C.F.R. pt. 284); FRS/FDIC: Privacy of Consumer Financial Information, 65 Fed. Reg. 35229 (June 1, 2000) (to be codified at 12 C.F.R. pts. 40, 216, 332, 573); FRS/FDIC: Privacy of Consumer Financial Information, 65 Fed. Reg. at 35219; FRS/FDIC: Privacy of Consumer Financial Information, 65 Fed. Reg. at 35209; FRS/FDIC: Privacy of Consumer Financial Information, 65 Fed. Reg. at 35199; FTC: Privacy of Consumer Financial Information, Fed. Reg. 33681 (May 24, 2000) (to be codified at 16 C.F.R. § 313); NCUA: Privacy of Consumer Financial Information, 65 Fed. Reg. 31742 (May 18, 2000) (to be codified at 12 C.F.R. pts. 716, 741).

168. *See* SEC Final Rule, 65 Fed. Reg. 40365 (2000) (to be codified at 17 C.F.R. pt. 248) (June 29, 2000).

169. *Id.*

Alternatively, by ordering the federal agencies to issue a joint regulation, Congress could have avoided this awkward situation.

Regardless of whether or not a financial institution actually obtained the information from a source other than "government records, widely distributed media, or government-mandated disclosures," all of the federal agencies' definitions consider information "publicly available" if a financial institution merely *could* obtain the information from any of those three sources.[170] If the information is lawfully available to the general public, then it falls outside the definition of "nonpublic personal information."[171] Therefore, even though a consumer provides the financial institution with information, such action does not guarantee that the information will receive protection as "nonpublic personal information." In adopting such an expansive definition for "nonpublic personal information," the agencies have granted financial institutions the freedom to share information from customer records, as long as the information is legally available from a public source.[172]

b. Personally Identifiable Information

In Title V, Congress did not define what it meant by "personally identifiable financial information," leaving the agencies with the unenviable task of defining the term. In their final privacy rules, the FRB, FDIC, OCC and OTS, SEC, FTC and NCUA have defined "personally identifiable information" to encompass information falling into one of three categories. The first category includes information that the consumer provides the financial institution in order to obtain a financial

170. *See* SEC: Privacy of Consumer Financial Information, 65 Fed. Reg. 40365 (June 29, 2000) (to be codified at 17 C.F.R. pt. 248); FRS/FDIC: Privacy of Consumer Financial Information, 65 Fed. Reg. 35229 (June 1, 2000) (to be codified at 12 C.F.R. pts. 40, 216, 332, 573); FRS/FDIC: Privacy of Consumer Financial Information, 65 Fed. Reg. at 35219; FRS/FDIC: Privacy of Consumer Financial Information, 65 Fed. Reg. at 35209; FRS/FDIC: Privacy of Consumer Financial Information, 65 Fed. Reg. at 35199; FTC: Privacy of Consumer Financial Information, Fed. Reg. 33680 (May 24, 2000) (to be codified at 16 C.F.R. § 313); NCUA: Privacy of Consumer Financial Information, 65 Fed. Reg. 31742 (May 18, 2000) (to be codified at 12 C.F.R. pts. 716, 741).

171. *See* SEC: Privacy of Consumer Financial Information, 65 Fed. Reg. 40365 (June 29, 2000) (to be codified at 17 C.F.R. pt. 248); FRS/FDIC: Privacy of Consumer Financial Information, 65 Fed. Reg. 35229 (June 1, 2000) (to be codified at 12 C.F.R. pts. 40, 216, 332, 573); FRS/FDIC: Privacy of Consumer Financial Information, 65 Fed. Reg. at 35219; FRS/FDIC: Privacy of Consumer Financial Information, 65 Fed. Reg. at 35209; FRS/FDIC: Privacy of Consumer Financial Information, 65 Fed. Reg. at 35199; FTC: Privacy of Consumer Financial Information, Fed. Reg. 33680 (May 24, 2000) (to be codified at 16 C.F.R. § 313); NCUA: Privacy of Consumer Financial Information, 65 Fed. Reg. 31742 (May 18, 2000) (to be codified at 12 C.F.R. pts. 716, 741).

172. *See id.* Congressional Privacy Caucus, *Comments on Proposed Rules Regarding Privacy of Consumer Financial Information* (Mar. 31, 2000) *available at* http://www.house.gov/markey/cpfstat33100.htm. *But see* Heller, *supra* note 135.

product or service.[173] The second category includes any information that results from transactions to obtain financial services or products between consumers and the financial institution.[174] The third category includes any other information that a financial institution obtains from a consumer resulting from a financial product or service transaction.[175]

In general, however, "personally identifiable financial information" does not include name and address lists of people who are customers of a non-financial institution.[176] Thus, subject to Title V's notice and opt-out procedure, financial institutions with access to such information may generally share it with nonaffiliated third parties.[177] However, if a financial institution includes such names and address lists as part of its list of the *institution's customers*, then those names and addresses would fall within the definition of "nonpublic personal information."[178]

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173. *See* SEC: Privacy of Consumer Financial Information, 65 Fed. Reg. 40365 (June 29, 2000) (to be codified at 17 C.F.R. pt. 248); FRS/FDIC: Privacy of Consumer Financial Information, 65 Fed. Reg. 35228, 35229 (June 1, 2000) (to be codified at 12 C.F.R. pts. 40, 216, 332, 573); FRS/FDIC: Privacy of Consumer Financial Information, 65 Fed. Reg. at 35218; FRS/FDIC: Privacy of Consumer Financial Information, 65 Fed. Reg. at 35209; FRS/FDIC: Privacy of Consumer Financial Information, 65 Fed. Reg. at 35198; FTC: Privacy of Consumer Financial Information, Fed. Reg. 33680 (May 24, 2000) (to be codified at 16 C.F.R. § 313); NCUA: Privacy of Consumer Financial Information, 65 Fed. Reg. 31742 (May 18, 2000) (to be codified at 12 C.F.R. pts. 716, 741).

174. *See* SEC: Privacy of Consumer Financial Information, 65 Fed. Reg. 40365 (June 29, 2000) (to be codified at 17 C.F.R. pt. 248); FRS/FDIC: Privacy of Consumer Financial Information, 65 Fed. Reg. 35228, 35229 (June 1, 2000) (to be codified at 12 C.F.R. pts. 40, 216, 332, 573); FRS/FDIC: Privacy of Consumer Financial Information, 65 Fed. Reg. at 35218; FRS/FDIC: Privacy of Consumer Financial Information, 65 Fed. Reg. at 35209; FRS/FDIC: Privacy of Consumer Financial Information, 65 Fed. Reg. at 35198; FTC: Privacy of Consumer Financial Information, Fed. Reg. 33680 (May 24, 2000) (to be codified at 16 C.F.R. § 313); NCUA: Privacy of Consumer Financial Information, 65 Fed. Reg. 31742 (May 18, 2000) (to be codified at 12 C.F.R. pts. 716, 741).

175. *See* SEC: Privacy of Consumer Financial Information, 65 Fed. Reg. 40365 (June 29, 2000) (to be codified at 17 C.F.R. pt. 248); FRS/FDIC: Privacy of Consumer Financial Information, 65 Fed. Reg. 35228, 35229 (June 1, 2000) (to be codified at 12 C.F.R. pts. 40, 216, 332, 573); FRS/FDIC: Privacy of Consumer Financial Information, 65 Fed. Reg. at 35218; FRS/FDIC: Privacy of Consumer Financial Information, 65 Fed. Reg. at 35209; FRS/FDIC: Privacy of Consumer Financial Information, 65 Fed. Reg. at 35198; FTC: Privacy of Consumer Financial Information, Fed. Reg. 33680 (May 24, 2000) (to be codified at 16 C.F.R. § 313); NCUA: Privacy of Consumer Financial Information, 65 Fed Reg. 31742 (May 18, 2000) (to be codified at 12 C.F.R. pts. 716, 741).

176. *See id.*

177. *See infra* Part IV. A.

178. *See* Joint Final Rule by Federal Reserve System, 65 Fed. Reg. 35208 (June 1, 2000) (to be codified at 12 C.F.R. pt. 216); FDIC, 65 Fed. Reg. 35218 (June 1, 2000) (to be codified at 65 C.F.R. pt. 332); Department of the Treasury (OCC and OTS), 65 Fed. Reg. 35198, 35228-29 (proposed June 1, 2000) (to be codified at 12 C.F.R. pts. 40 & 573); FTC Final Rule, 65 Fed. Reg. 33680 (May 24, 2000) (to be codified at 16 C.F.R. § 313); NCUA Final Rule, 65 Fed. Reg. 31742 (May 18, 2000) (to be codified at 12 C.F.R. pts. 716 & 741); SEC Final Rule, 65 Fed. Reg. 40365 (June 29, 2000) (to be codified at 17 C.F.R. pt. 248).

5. Different Standards for Agency Examples

The final rules of the Federal Banking Agencies, FTC and NCUA provide financial institutions with examples of permissible activities; if followed, these examples ensure the financial institutions that they are in fact complying with the rule.[179] However, the examples accompanying the SEC's proposed rules do not provide a similar safe harbor.[180] Thus, even if a financial institution follows the SEC's examples, such action does not guarantee that the financial institution has complied with the rule.

6. Out of "Control"

The SEC's definition of "control" differs from the definition provided by the Federal Banking Agencies, FTC and NCUA.[181] As afore-

179. *See* Joint Final Rule by Federal Reserve System, 65 Fed. Reg. 35208 (June 1, 2000) (to be codified at 12 C.F.R. pt. 216); FDIC, 65 Fed. Reg. 35218 (June 1, 2000) (to be codified at 65 C.F.R. pt. 332); Department of the Treasury (OCC and OTS), 65 Fed. Reg. 35198, 35228-29 (proposed June 1, 2000) (to be codified at 12 C.F.R. pts. 40 & 573); FTC Final Rule, 65 Fed. Reg. 33680 (May 24, 2000) (to be codified at 16 C.F.R. § 313); NCUA Final Rule, 65 Fed. Reg. 31742 (May 18, 2000) (to be codified at 12 C.F.R. pts. 716 & 741).

180. *See* SEC Final Rule, 65 Fed. Reg. 40363 (June 29, 2000) (to be codified at 17 C.F.R. pt. 248). The SEC's Final Rule states that:

> The examples in this part and the sample clauses in the Appendix of this part provide guidance concerning the rule's application in ordinary circumstances. The facts and circumstances of each individual situation, however, will determine whether compliance with an example or use of a sample clause, to the extent applicable, constitutes compliance with this part.

Id.

181. The Federal Banking Agencies define "control" to mean:

> (1) Ownership, control, or power to vote 25 percent or more of the outstanding shares of any class of voting security of the company, directly or indirectly, or acting through one or more other persons;
> (2) Control in any manner over the election of a majority of the directors, trustees or general partners (or individuals exercising similar functions) of the company; or
> (3) The power to exercise, directly or indirectly, a controlling influence over the management or policies of the company, as the [FRB, OCC, OTS or FDIC] determines.

See Joint Final Rule by Federal Reserve System, 65 Fed. Reg. 35207 (proposed Feb. 22, 2000); (to be codified at 12 C.F.R. pt. 216)FDIC, 65 Fed. Reg. 35218 (proposed Feb. 22, 2000); (to be codified at 12 C.F.R. pt. 332) Department of the Treasury (OCC and OTS), 65 Fed. Reg. 35197, 35228 (proposed Feb. 22, 2000); (to be codified at 12 C.F.R. pts. 40 & 573). The FTC's version differs from this definition only by deleting the phrase "as determined by . . ." in subsection (3). *See* FTC Final Rule, 65 Fed. Reg. 33679 (May 24, 2000); (to be codified at 17 C.F.R. § 313). The NCUA's version differs from the Federal Banking Agencies' definition only in that, "with respect to state-chartered credit unions, NCUA will consult with the appropriate state regulator prior to making its [subsection (3)] determination." NCUA Final Rule, 65 Fed. Reg. 31741 (2000) (to be codified at 12 C.F.R. 716 & 741) (proposed May 18, 2000). The SEC defines "control" to mean:

> [T]he power to exercise a controlling influence over the management or policies of a company whether through ownership of securities, by contract, or otherwise. Any person who owns beneficially, either directly or through one or more controlled

mentioned, a company's status as an "affiliate" of a financial institution depends on the definition of "control." Since the GLBA exempts financial institutions' affiliates from the Title V privacy requirements, an agency's definition of "control" greatly affects the scope of a financial institution's information-sharing capabilities.[182] Thus, since the Federal Banking Agencies, FTC and NCUA, and the SEC define "control" differently, a financial holding company that includes a bank, credit union, FTC-regulated "financial institution" and a securities firm must apply two standards for "control" when determining whether a company is a Title V-exempted affiliate.

C. *The Exceptions to Title V*

Consumers cannot restrain a financial institution from sharing consumers' private information with affiliates. As a result, consumers may misinterpret Title V and think that it gives them comprehensive privacy safeguards against information sharing between financial institutions and nonaffiliated third parties. However, Title V includes several implicit and explicit exceptions that weaken its general policy of protecting the privacy of consumers' nonpublic personal information.

1. TITLE V COVERS NONAFFILIATED THIRD PARTIES, NOT AFFILIATES

First, Title V applies only to a financial institution's disclosures to nonaffiliated third parties.[183] Thus, a consumer's only real power under Title V comes from monitoring and opting out of situations where financial institutions share consumers' private information with nonaffiliated third parties.[184] However, a financial institution remains free to disclose a consumer's nonpublic personal information to its direct affiliates or subsidiaries without providing notice or an "opt out."[185]

> companies, more than 25 percent of the voting securities of any company is presumed to control the company. Any person who does not own 25 percent of the voting securities of any company will be presumed not to control the company. Any presumption regarding control may be rebutted by evidence, but in the case of an investment company, will continue until the Commission makes a decision to the contrary according to the procedures described in section 2(a)(9) of the Investment Company Act of 1940 (15 U.S.C. 80a-2(a)(9)).

See SEC Final Rule, 65 Fed. Reg. 40364 (June 29, 2000) (to be codified at 17 C.F.R. pt. 248); *see also* Letter from the Electronic Financial Services Council to the Federal Agencies (Mar. 31, 2000) *available at* http://www.efscouncil.org/frames/Recent%20Activities/FINALCOM.htm (urging the Agencies to adopt the SEC's definition of "control").

182. *See* GLBA § 502-503.

183. *See id.*; *see also* H.R. CONF. REP. NO. 106-434, at 266 (discussing the requirements for a financial institution's annual disclosure of its privacy policy).

184. *See* GLBA § 502(a)-(b).

185. *See* Fischer & Camper, *supra* note 6. Regarding information sharing among affiliates, the GLBA only requires that the Secretary of the Treasury, in conjunction with the Secretary of the

2. Service Provider/Joint Marketing Exception

Second, Title V does not apply when a financial institution discloses consumers' nonpublic personal information to nonaffiliated third parties "to perform services for or functions on behalf of the financial institution, including the financial institution's own products or services, or financial products or services offered pursuant to joint agreements between two or more financial institutions. . . ."[186] However, this service provider/joint marketing exception only applies if (1) the financial institution fully discloses to its customers that it provides such information and (2) the financial institution and third party enter into a contract requiring the third party to maintain the confidentiality of the information.[187] Thus, a financial institution may entirely circumvent Title V by entering into such contracts with third-party service providers.[188]

3. Combining the Reuse of Information and Service Provider/Joint Marketing Exceptions

Third, if a financial institution lawfully could make a disclosure of nonpublic personal information directly to nonaffiliated third parties of either the financial institution or the receiving third party, then a nonaffiliated third party receiving nonpublic personal information from the financial institution can also disclose the information to nonaffiliated third parties of either the financial institution or the receiving third party.[189] However, the service provider/joint marketing exception allows financial institutions to lawfully transfer nonpublic personal information to nonaffiliated third party service providers or joint marketers. Therefore, by combining the reuse of information and service provider/joint marketing exceptions, third party service providers or joint marketers who receive such information from financial institutions could then retransfer the information to other nonaffiliated third parties.[190] Although one must meet the rather strict disclosure and contractual requirements of the service provider/joint marketing exception, this loophole, theoretically allowing nonaffiliated third parties to retransfer

Treasury and the federal functional regulators and after consulting representatives of state insurance authorities, "shall conduct a study the information sharing practices of financial institutions and their affiliates." *See* GLBA § 508(a). Then, on or before January 1, 2002, the Secretary must submit to Congress a report concerning the study, including recommendations for appropriate legislative or administrative action. § 508(c).

186. § 502(b)(2).

187. § 502(b)(2).

188. *See* Congressional Privacy Caucus, *Comments on Proposed Rules Regarding Privacy of Consumer Financial Information*, Mar. 31, 2000 *available at* http://www.house.gov/markey/cpfstat33100.htm [hereinafter Congressional Privacy Caucus].

189. *See* GLBA § 502(c).

190. *See supra* note 189.

information ad infinitum, completely subverts Title V's intentions.[191]

4. CONSUMER REPORTING AGENCY EXCEPTION

Fourth, "a financial institution shall not disclose, *other than to a consumer reporting agency*," a consumer's credit card, deposit or transaction account number or access number/code to nonaffiliated third parties for the purpose of "telemarketing, direct mail marketing, or other marketing through electronic mail to the consumer."[192] Thus, the GLBA does seem to place limits on the type of information that financial institutions may disclose to nonaffiliated third parties under the exceptions. However, a financial institution remains free to disclose this information to a consumer reporting agency.

5. EIGHT SAFE HARBORS FOR FINANCIAL INSTITUTIONS

Fifth, section 502(e) lists eight exceptions to the Title V disclosure prohibitions.[193] Under these eight safe harbors, financial institutions remain free to disclose a consumer's nonpublic personal information to nonaffiliated third parties without providing the consumer with either prior notice or an opportunity to opt out.[194] Together, these expansive safe harbors establish the most gaping loophole in Title V's privacy

191. *See id. But see* Regulatory Advisory Services Practice of PriceWaterhouseCoopers, *Executive Overview and Summary of the Gramm-Leach-Bliley Act*, Nov. 15, 1999, at 16 ("Unaffiliated third parties cannot share information with other unaffiliated third parties of the financial institution unless the financial institution could disclose that information to the other unaffiliated third party directly.").

192. *See* GLBA § 502(d). *See generally* H.R. REP. NO. 106-434, at 266 (1999) ("The Conferees agreed to exclude disclosures to consumer reporting agencies from section 502(d)'s limitations on the sharing of account number information.").

193. § 502(e).

194. Under these eight safe harbors, financial institutions may disclose personal nonpublic information (1) where a consumer requests or authorizes a transaction or in connection with (a) servicing or processing a requested financial service or product; (b) maintaining or servicing the consumer's account; or (c) proposed or actual securitizations, secondary market sales or similar transactions related to a consumer's transaction; (2) with the consumer's consent; (3)(a) to protect the confidentiality and security of the financial institution's records concerning the customer, service, product or transaction; (b) to prevent or protect against "actual or potential fraud, unauthorized transactions, claims, or other liability"; (c) for the institution's required risk control or to resolve customer inquiries or disputes; (d) to legal or beneficial interest-holders relating to the consumer; (e) to a consumer's fiduciaries; (4) to insurance rate advisory organizations, guaranty funds or agencies, rating agencies, persons who assess whether the institution is complying with industry standards and the financial institution's attorneys, accountants and auditors; (5) to law enforcement agencies, self-regulatory organizations, or for investigations relating to public safety matters; (6)(a) to a consumer reporting agency as required by the Fair Credit Reporting Act or (b) from a consumer report provided by a consumer reporting agency; (7) in connection with proposed or actual sales, mergers, transfers, or exchanges of all or portions of a business or operating unit; and (8) in compliance with Federal, State or local legal requirements. *See* GLBA § 502(e).

provisions.[195]

6. Agency Authority to Provide Additional Exceptions

Sixth, the agencies and authorities prescribing the privacy regulations are free to include any additional disclosure exceptions that are consistent with Title V.[196] In fact, the federal regulators may allow financial institutions to disclose "customer account numbers, or similar forms of access numbers or access codes in an encrypted, scrambled, or similarly coded form," where (1) the customer expressly authorizes the disclosure and (2) the disclosure is necessary for the financial institution to service or process a customer-requested or -authorized transaction.[197]

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195. *See* Congressional Privacy Caucus *supra* note 188, (discussing the need for language limiting the amount or type of information disclosed under the exceptions and clarifying what constitutes consumer "consent"); Letter from the Electronic Financial Services Counsel to the Federal Agencies, Mar. 31, 2000 *available at* http://www.efscouncil.org/frames/Recent%20Activities/FINALCOM.htm (requesting the Agencies to institute a reasonableness standard for consent).

196. *See* GLBA § 504(b); *see also* H.R. Conf. Rep. No. 106-434, at 266 (1999) ("The Conferees agreed to give the relevant regulatory agencies the authority to prescribe exceptions to subsections (a) through (d) of section 502, rather than just sections 502 (a) and (b), as provided for in the House bill."). Significantly, Congress "wish[ed] to ensure that smaller financial institutions are not placed at a competitive disadvantage by a statutory regime that permits certain information to be shared freely within an affiliate structure while limiting the ability to share that same information with nonaffiliated third parties." H.R. Rep. No. 106-434, at 267 (1999). Thus, in prescribing their privacy regulations, the agencies and authorities "should take into consideration any adverse competitive effects upon small commercial banks, thrifts and credit unions." *Id.* Thus, the agencies and authorities could exclude smaller financial institutions from Title V's disclosure and opt out mechanism. However, the banking agencies have not taken active steps to allow such exclusion. *See* Joint Final Rule by Federal Reserve Board, 65 Fed. Reg. 35191 (proposed Feb. 22, 2000) (codified at 12 C.F.R. pt. 216); FDIC, 65 Fed. Reg. 35192 (June 1, 2000) (to be codified at 12 C.F.R. pt. 332); Department of the Treasury (OCC and OTS), 65 Fed. Reg. 35189, 35194-95 (proposed Feb. 22, 2000) (to be codified at 12 C.F.R. pts. 40 & 573).

197. H.R. Rep. No. 106-434, at 267 (1999); *see also* Robert MacMillan, *Financial Services Ready for President Clinton*, Newsweek, Nov. 5, 1999 (stating that although "telemarketers may not use bank account information for marketing purposes, . . in some circumstances they can, provided that account data is encrypted and various other requests are met"). According to the federal agencies' final rules:

> You must not, directly or through an affiliate, disclose, other than to a consumer reporting agency, an account number or similar form of access number or access code for a consumer's credit card account, deposit account, or transaction account to any nonaffiliated third party for use in telemarketing, direct mail marketing, or other marketing through electronic mail to the consumer . . . An account number, or similar form of access number or access code, does not include a number or code in encrypted form, as long as [the financial institutions] do not provide the recipient with a means to decode the number or code.

Joint Final Rule by Federal Reserve System, 65 Fed. Reg. 35214 (June 1, 2000) (to be codified at 12 C.F.R. pt. 216); FDIC, 65 Fed. Reg. 35224 (June 1, 2000) (to be codified at 12 C.F.R. pt. 332); Department of the Treasury (OCC and OTS), 65 Fed. Reg. 35204, 35234 (June 1, 2000) (to be codified at 12 C.F.R. pts. 40 & 573); FTC Final Rule, 65 Fed. Reg. 33686 (May 24, 2000) (to be codified at 16 C.F.R. § 313); NCUA Final Rule, 65 Fed. Reg. 31747 (proposed May 18, 2000) (to be codified at 12 C.F.R. pts. 716 & 741); SEC Final Rule, 65 Fed. Reg. 40370 (June 29, 2000) (to

Thus, although contingent on obtaining consumer authorization, the federal regulators could exclude encrypted information from the scope of Title V.

D. *The Future of Federal Financial Privacy Law*

In terms of federal financial privacy law, the GLBA is not the end of the story. Even though the GLBA is barely one year old, several legislators have already mounted an effort to enact a tougher law that would give consumers the right to opt-in to information sharing between financial institutions and their affiliates and nonaffiliated third parties. Additionally, President Clinton has mounted his own campaign to enact a more customer-friendly financial privacy act. Thus, as the financial services industry awaits the success or failure of these initiatives, the fate of the GLBA hangs in the balance.

1. THE CONSUMER'S RIGHT TO FINANCIAL PRIVACY ACT

In response to what they saw as the GLBA's insufficient and unacceptable privacy protections, Representatives Edward J. Markey (D-MA) and Joe Barton (R-TX), and Senators Richard Shelby (R-AL) and Richard Bryan (D-NV) have introduced the Consumer's Right to Financial Privacy Act.[198] The legislation would give consumers the right to "opt-in" to information sharing between a financial institution and both its affiliates and nonaffiliated third parties.[199] Under this opt-in procedure, a financial institution must obtain the consumers' permission before sharing their nonpublic personal information.[200] Therefore, if the consumers object or fail to respond, the financial institution cannot dis-

be codified at 17 C.F.R. pt. 248). *But see* Veverka, *supra* note 10 (summarizing the Federal banking agencies' joint proposed privacy rules).

198. *See* H.R. 3320, 106th Cong. (1999); S. 1903, 106th Cong. (1999); *see also* Congressional Privacy Caucus, *supra* note 188 (discussing the Right to Financial Privacy Act's strong financial privacy protections); Schroeder, *supra* note 16 (discussing the Senators' intent to introduce tougher privacy legislation). Even the President is calling for extended privacy protections. *See generally* President's Statement on Signing Legislation To Reform the Financial System, 35 WEEKLY COMP. PRES. DOC. 2363 (Nov. 12, 1999) *available at* 1999 WL 24368375M2 ("Although [GLBA's privacy restrictions] are significant steps forward, we will continue to press for even greater privacy protections – especially choice about whether personal financial information can be shared within a corporate family."); Megan Ptacek, *N.Y. Lawmakers Weigh Tougher Privacy Strictures*, AM. BANKER, Mar. 22, 2000, at 4, *available at* 2000 WL 3360401 ("Peter P. Swire, the administration's chief counselor for privacy, said President Clinton would propose legislation in 'the coming weeks' that would require financial institutions to give customers the chance to block or 'opt out,' of data sharing to affiliates.")

199. *See* H.R. 3320, 106th Cong. (1999); S. 1903, 106th Cong. (1999); *see also Congressional Privacy Caucus Slams Draft Privacy Regulations*, 1 Apr. 3, 2000, *at* http://www.senate.gov/~bryan/press/00/04/2000403A06.html (discussing the Consumer's Right to Financial Privacy Act).

200. *See* Congressional Privacy Caucus, *supra* note 188.

close their information.[201]

2. THE FINANCIAL INFORMATION PRIVACY PROTECTION ACT

At his commencement address to Eastern Michigan State University, President Clinton outlined a new legislative proposal that would augment the GLBA's safeguards, and further enhance consumers' financial privacy.[202] Incorporating President Clinton's proposal, Representative John LaFalce (D-NY) sponsored the Financial Information Privacy Protection Act[203] in the House of Representatives. Senator Patrick Leahy (D-VT) introduced a companion bill in the Senate.[204]

Under the Financial Information Privacy Protection Act, consumers would have the right to choose whether a financial institution can share financial information with affiliates or third parties.[205] Thus, the Clinton proposal extends the reach of the GLBA by expanding the opt-out right

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201. *See id.* The Congressional Privacy Caucus claims that the opt-in mechanism is the norm in many other areas of law:

> [A] consumer "opt in" is required before a tax preparer could transfer information from a consumer's tax return to a financial advisory affiliate to provide the consumer with financial planning advice. An "opt-in" is required before a video rental store can provide information regarding a consumer's videocassette rentals to others. "Opt in" is required before telephone companies can transfer information about what telephone numbers a consumer calls or the whereabouts of the cellular phone the consumer is using to other parties. "Opt in" is required before cable television companies can provide information about what pay per view movies a consumer is watching to other parties.

Id. But see Brian Krebs, *Advocates, Banks Spar Over Proposed Privacy Regs*, NEWSBYTES, Apr. 3, 2000, *available at* 2000 WL 2275580 (discussing the problems with an opt-in mechanism); Dean Anason, *Privacy Battle Volleys Will Fly In Bellweather New York State*, AM. BANKER, Mar. 21, 2000, at 4, *available at* 2000 WL 3360373 (same).

202. *See* A Proclamation by the President of the United States of America, *The Clinton-Gore Plan to Enhance Consumers' Financial Privacy: Protecting Core Values in the Information Age* 1-2, May 1, 2000 *at* http://www.whitehouse.gov/WH/New/html/20000501_4.html.

203. H.R. 4380, 106th Cong. (2000); *see also* Anason, *supra* note 18 (quoting Rep. John J. LaFalce, D-N.Y., as stating that "[t]he original bill was only the first step . . . . We want to build on that and we are committed to finishing the job."); Dean Anason, *Capital Briefs: Clinton Privacy Bill To Be Offered in Congress*, AM. BANKER, May 4, 2000, at 2, *available at* 2000 WL 3361353 (discussing the House bill); Len Famiglietti, *Congress Introduces New Financial Privacy Legislation*, BEST'S INSURANCE NEWS, May 4, 2000, *available at* 2000 WL 4085985 (same); Glen Simpson, *U.S. Legislation Would Aid Privacy*, ASIAN WALL ST. J., May 5, 2000, at 24, *available at* 2000 WL-WSJA 2939272 (same).

204. S. 2513, 106th Cong. (2000); *see also* Anason, *supra* note 203 (discussing the Senate bill); Simpson, *supra* note 203 (same).

205. *See* H.R. 4380, 106th Cong. § 2 (2000); S. 2513, 106th Cong. § 2 (2000); A Proclamation by the President of the United States of America, *supra* note 202; *see also* Famiglietti, *supra* note 203 (summarizing the President's proposal); Brian Krebs, *Clinton Proposes Long Awaited Financial Privacy Regs*, NEWSBYTES, May 1, 2000, *available at* 2000 WL 2276675 (stating that the President developed his plan in tandem with the Treasury Department and the Office of Management and Budget).

to include affiliates as well as nonaffiliated third parties.[206] A financial institution would also need to obtain a consumer's consent (i.e., the consumer would need to "opt-in") before it could gain medical information from its affiliates or share detailed information regarding a consumer's particular spending habits.[207] Therefore, the House and Senate Bills eliminate the GLBA's "joint marketing" exception, by restricting an affiliate's or nonaffiliated third party's ability to redisclose and reuse a consumer's nonpublic personal information.[208] Additionally, consumers would have a right to review their information and to correct material errors.[209] Finally, upon a consumer's application or request, a financial institution would need to provide its privacy notices.[210] As a result, consumers would have the resources necessary to "comparison shop" for financial institutions' privacy policies before establishing a customer relationship with a financial institution.[211]

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206. *See* A Proclamation by the President of the United States of America, *supra* note 202.

207. *See* H.R. 4380, 106th Cong. §§ 3-4 (2000); S. 2513, 106th Cong. §§ 3-4 (2000); A Proclamation by the President of the United States of America, *supra* note 202. *But see, e.g.*, Krebs, *supra* note 205 (quoting Fred Cate, professor of business law at Indiana University, as calling the Clinton opt-in proposal "disastrous:" "When a customer defaults on an insurance policy or walks out on a loan, does that mean the insurance company can't check with their affiliate banks to find out if that person has an account with them, or vice versa?"); *but see* Famiglietti, *supra* note 203 (discussing the Representatives' reactions in the House to the President's proposal).

208. *See* H.R. 4830, 106th Cong. § 5 (2000); S. 2513, 106th Cong. § 5 (2000); A Proclamation by the President of the United States of America, *supra* note 202. Section 5 of both Bills would amend section 502 of the GLBA by (1) renumbering subsections (d) and (e) as (e) and (f), respectively and (2) inserting the following new subsection (d):

> (d) LIMITS ON REDISCLOSURE AND REUSE OF INFORMATION –
>
> (1) IN GENERAL – An affiliate or a nonaffiliated third party that receives nonpublic personal information from a financial institution shall not disclose such information to any other person unless such disclosure would be lawful if made directly to such other person by the financial institution.
>
> (2) DISCLOSURE UNDER A GENERAL EXCEPTION – Notwithstanding paragraph (1), any person that receives nonpublic personal information from a financial institution in accordance with one of the general exceptions in subsection (f) may use or disclose such information only –
>
> (A) as permitted under that general exception; or
>
> (B) under another general exception in subsection (f), if necessary to carry out the purpose for which the information was disclosed by the financial institution.

H.R. 4830, 106th Cong. § 5 (2000); S. 2513, 106th Cong. § 5 (2000).

209. *See* H.R. 4380, 106th Cong. § 6 (2000); S. 2513, 106th Cong. § 6 (2000); A Proclamation by the President of the United States of America, *supra* note 202.

210. *See* H.R. 4380, 106th Cong. § 8 (2000); S. 2513, 106th Cong. § 8 (2000); A Proclamation by the President of the United States of America, *supra* note 202.

211. *See* A Proclamation by the President of the United States of America, *supra* note 202; *see also* Anason, *supra* note 18 (predicting that Federal regulators will provide model disclosure statements to aid financial institutions in drafting their privacy notices). *But see, e.g.*, Krebs, *supra* note 205 (quoting Professor Fred Cate as saying that "the administration's proposal will likely cause consumers to pour through an average of 50 pieces of lengthy privacy disclosure

The changes outlined in the Consumer's Right to Financial Privacy Act and the Financial Information Privacy Protection Act would benefit the GLBA, but one cannot help but question the wisdom of amending the GLBA during its critical infancy.[212] Although the Acts, both decidedly pro-consumer, make great strides in safeguarding the privacy of consumers' financial information, the Representatives, Senators and the President are acting without the benefit of hindsight as to how the GLBA will affect and/or protect consumers within the financial services industry.[213] By witnessing the effects of the GLBA in practice as opposed to theory, the Representatives, Senators and the President could more precisely adjust their respective Acts to compensate for the GLBA's weaknesses.

E. *The Federal Standard Versus State Law*

Under section 507 of the GLBA, if a state statute, regulation, order or interpretation is inconsistent with the provisions in Title V, then Title V will supersede the state law, but only to the extent of the inconsistency.[214] However, a state law that provides greater privacy protection is not inconsistent with Title V; thus, Title V will not preempt tougher state privacy laws.[215] Therefore, the GLBA's privacy provisions represent a floor, not a ceiling. States can adopt stronger privacy rules that will effectively override the federal agencies' privacy regulations enacted pursuant to Title V.[216]

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mailings each year from financial companies intent on sharing their information with third parties").

212. *See* Famiglietti, *supra* note 203.

213. *See* Barnett, *supra* note 5 (quoting Bob Davis of America's Community Bankers as stating that "it's not obvious to me that the regulations being drafted are not going to adequately address the problems . . . . [Why] put blanket over blanket before even getting in bed?"); Famiglietti, *supra* note 203 (quoting Senator Phil Gramm as stating that "the rules to put [GLBA's] protections in place are still being written by regulators. . . . We need to give customers and their financial institutions time to absorb those new rules before we consider changing them."); Robert MacMillan, *Privacy Develops Into Public Issue In Congress*, NEWSBYTES, May 15, 2000, *available at* 2000 WL 21177175 (discussing the efforts of senators and Congress members to enact tougher privacy legislation); Krebs, *supra* note 205 (quoting Professor Cate as stating that "it took them 18 years to get to this point, and we're not even six months out but already the Clinton administration wants to change it").

214. *See* GLBA, Pub. L. No. 106-102, § 507(a), 113 Stat. 1338, 1442 (2000).

215. *See* §§ 507(a), (b); H.R. CONF. REP. NO. 106-434, at 266 (1999). The FTC, after consulting with the applicable agency or authority, shall determine whether GLBA supersedes State privacy law.

216. One should note that:

> A banking regulator is not required to provide confidential information to a State insurance regulator unless such State regulator agrees to keep the information in confidence and make all reasonable efforts to oppose disclosure of such information. Conversely, Federal banking regulators are directed to treat as confidential any information received from a State regulator which is entitled to

1. THE CALL FOR TOUGHER STATE PRIVACY LAWS

Before Congress enacted the GLBA's privacy provisions, they stirred a firestorm of controversy. Although some believed that the privacy provisions went too far, others believed that they did not go far enough.[217] In addition to the exceptions listed in previously, the GLBA's privacy provisions will also result in interpretive entanglements, as financial holding companies try to reconcile the subtle differences between the federal agencies' privacy regulations. In addition, the possibility of fifty-one different state privacy laws presents a potential regulatory nightmare for any bank or financial holding company with interstate operations.[218] Consequently, banks with branches in multiple states might have to contend with separate and inconsistent privacy laws.[219] Significantly, states are already gearing up to enact privacy

> confidential treatment under State law, and to make similar reasonable efforts to oppose disclosure of the information.

H.R. CONF. REP. No. 106-434, at 261-62 (1999). Thus, if a State law provides greater confidential treatment to such information, the Federal regulators must abide by the tougher State standard. Interestingly, the reverse-preemption language of Section 507 mirrors the preemption standard for the insurance customer protections found in FDIA Section 47(g); as aforementioned, GLBA Section 305 added Section 47 to the FDIA. *See* GLBA, § 305; Part III. Thus, a State may enact both insurance customer protection and privacy regulations that offer greater protection than GLBA without fear of preemption.

217. *See* Congressional Privacy Caucus, *supra* note 188 (discussing the Caucus' problems with the Agencies' privacy regulations).

218. *See* Zolkos, *supra* note 21 ("In the worst-case scenario, companies and agencies could face a regulatory nightmare of 51 different sets of conflicting privacy laws.")

219. Thus far, California and New York are considering privacy bills with a stricter opt-in mechanism for financial institutions' information sharing. *See* Ren Wijnen, *Privacy Matters in the Digital Age*, BANK TECH. NEWS, Apr. 3, 2000, *available at* 2000 WL 17153362. As of May, 2000, Alabama, Alaska, Connecticut, Idaho, Illinois, Kentucky, Mississippi, Missouri, Montana, Nebraska, North Carolina, Oklahoma, Oregon, South Carolina, Tennessee, Utah, Vermont, the Virgin Islands, Wisconsin and Washington have passed Right to Financial Privacy Acts. *See* ALA. CODE § 5-5A-43 (1996); ALASKA STAT. § 06.05.175 (Michie 1998); CAL. GOV'T CODE § 7460-7493 (West 1995); CONN. GEN. STAT. §§ 36a-41—36a-45 (West 1996); IDAHO CODE § 9-340(3)(d) (Michie 1998); 205 ILL. COMP. STAT. ANN. 5/48.1 (2000); KY. REV. STAT. ANN. § 289-271 (Michie 1998); LA. REV. STAT. ANN. § 6.333 (West 2000); ME. REV. STAT. ANN. tit. 9-B, §§ 162-163 (West 1999); MD. CODE ANN. §§1-301—305 (Michie 1998 and Supp. 1999); MINN. STAT. ANN. §§ 13A.01-13A.04, 51A.11 (West 1997 and Supp. 2000); MISS.CODE ANN. §§ 81-12-77, 81-5-55 (West 1999); MO. ANN. STAT. §§ 408.675-408.700 (West 1990 and Supp. 2000); MONT. CODE ANN. §§ 32-8-501—32-8-524 (1999); NEB. REV. STAT. § 8-1401 (1997); NEV. REV. STAT. ANN. §§ 239A.010-239A.190 (Michie 1996 and Supp. 1999); N.H. REV. STAT. ANN. §§ 359-C:1—359-C:18 (1995 and Supp. 1999); N.J. STAT. ANN. § 17:16K-3 (West 1984); N.M. STAT. ANN. §§ 14-7-1, 14-7-2 (Michie 1995); N.C. GEN. STAT. §§ 53-B-1—53B-10 (1999); N.D. CENT. CODE §§ 6-08.1-01—6-08.1-08 (1987 and Supp. 1999); OKLA.STAT. ANN. tit. 6, §§ 2201-2208 (West 2000); OR. REV. STAT. § 192.550-192.595 (1998); S.C. CODE ANN. §§ 34-28-410; 34-36-50 (West 1999); TENN. CODE. ANN. §§ 45-10-103; 45-10-112—45-10-118 (1999); UTAH CODE ANN. § 78-27-45—78-27-50.5 (1996 and Supp. 1999); VT. STAT. ANN. § 1024 (1999); V.I CODE ANN. § 6 (1998) T.1 244; WASH. REV. CODE. ANN. §§ 9.35.001—9.35.902 (West 2000); Wis. Stat. Ann. § 215.26 (West 1994 and Supp. 1999); *see also supra* note 4. California, Delaware, Florida, Georgia, Illinois, Iowa, Kansas, Maryland, Massachusetts, Michigan, Minnesota, Nevada,

laws tougher than Title V.[220]

2. The State Insurance Regulators, NAIC and Privacy – Too Many Cooks Spoil the Broth

NAIC is moving forward in its effort to develop a uniform national privacy standard for the insurance industry. Signed by forty-eight state insurance commissioners, NAIC members have approved, in light of the GLBA, a new blueprint for state insurance regulation.[221] This blueprint

New Hampshire, New Jersey, New York, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, Tennessee, Virginia, Washington and Wisconsin have passed laws that prohibit recording credit card numbers on checks. *See* Calif. Civ. Code § 1725 (West 1995); Del. Code Ann. tit. 11, §§ 914-915 (1995); Fla. Stat. Ann. § 832.075 (West 1994); Ga. Code Ann. §§ 10-1-393.3 (1994); 810 Ill. Comp. Stat. 5/3-505A (1993); Iowa Code Ann. § 537.8101 (West 2000); Kan. Stat. Ann. § 50-669 (1994); Md. Code Ann. Com. Law II § 13-318 (2000); Mass. Gen. Laws Ann. ch. 93, § 105 (West 2000); Mich. Comp. Laws Ann. § 600-2964 (West 1999); Minn. Stat. Ann. § 325F.981 (West 1995); Nev. Rev. Stat. Ann. § 597.940 (Michie 1999); N.H. Rev. Stat. Ann. § 358-M:1 (1995); N.J. Stat. Ann. § 56:11-21 (West 2000); N.Y. Gen. Bus. Law § 520-a (West 1996); N.D. Cent. Code § 51-14.1-03 (1999); Ohio Rev. Code Ann. §§ 1349.17, 1349.99 (West 1993); Or. Rev. Stat. § 646.892 (1998); 69 Pa. Cons. Stat. Ann. § 2602 (West 1994); R.I. Gen. Laws § 6-13-15 (1999); Tenn. Code Ann. § 47-22-104 (1995); Va. Code Ann. § 11-33.1, 11-34 (Michie 1999); Wash. Rev. Code Ann. § 62A.3-512 (West 1995); Wis. Stat. Ann. § 423.402 (West 1998). Arkansas, Illinois, Louisiana, Maine, Michigan, New Hampshire, New Mexico, Oregon, Rhode Island, Texas and West Virginia have passed laws limiting the uses of customer information in insurance transactions. *See* Ark. Stat. Ann. § 23-66-607 (Michie 1999); 215 Ill. Comp. Stat 5/1001-1024 (1993 and Supp. 2000); La. Rev. Stat. Ann. §§ 22:3063; 6:333 (West 2000); Me. Rev. Stat. Ann. tit. 24-A, §§ 2201-2220 (West 2000); Mich. Comp. Laws Ann. § 500.1243 (West 1999); N.H. Rev. Stat. Ann. § 406-C:9 (1998); N.M. Stat. Ann. § 59A-12-10 (Michie 1999); Or. Rev. Stat. Ann. § 716.610(g) (1998); R.I. Gen. Laws § 27-58-1—13 (1999); Tex. Code Ann. ch. 21, art. 21.48A (West 1988); W. Va. Acts ch. 47. Colorado, Michigan, New York, Ohio and Rhode Island have passed laws limiting the use of social security numbers. *See* Colo. Rev. Stat. Ann. § 13-21-109.5 (West 1999); Mich. Comp. Laws Ann. § 600.2964 (West 1999); N.Y. Gen. Bus. Law § 518-a (West 1996); Ohio Rev. Stat. Ann. §§ 1349.17, 1349.99 (West 1993); R.I. Gen. Laws § 6-13-15 (Lexis 1999). Minnesota and Montana have included financial privacy provisions in their respective Electronic Funds Transfer Acts. *See* Minn. Stat. Ann. § 47.69 (West 1995); Mont. Code Ann. § 32-6-105 (1999). Hawaii, South Dakota, Vermont and Wyoming are the only States without such laws. *See generally*, 17 No. 14 Banking Pol'y Rep. 5, *supra* note 4 (summarizing an American Bankers Association article on the scope of U.S. banks' consumer privacy protections and listing the various States' privacy laws).

220. *See ABA Paper*, *supra* note 4, at 5; *see also* Heller, *supra* note 144 (discussing two California privacy bills that include opt-in mechanisms); Zolkos, *supra* note 23 (stating that Arizona, Delaware, Massachusetts, Minnesota and Washington are considering "opt-in" bills and last year, Montana enacted such a law). *But see State Regulation: Iowa: High Road in Its Bill*, Ins. Acct. Apr. 3, 2000, *available at* 2000 WL 8650023 (stating that "the Iowa legislature has passed a financial privacy bill that won't exceed the standards set by federal regulators").

221. *See NAIC Approves Blueprint for Future of Insurance Regulation*, PR Newswire, Mar. 13, 2000, at 1. Insurance regulators from Arizona and Hawaii have not signed the Blueprint. *See* Theresa Miller, *NAIC Commissioners Overwhelmingly Approve State Regulation Revamp*, Best Wire, Mar. 13, 2000, *available at* 2000 WL 4085198. Hawaii was not represented at the meeting; Arizona Commissioner Charles Cohen has said that Arizona will likely sign it. *See id.* However, NAIC's historically slow pace in considering issues and reforms could doom its efforts to develop a uniform system. *See Full Speed Ahead On Reform*, Bus. Ins, Mar. 27, 2000, at 8, *available at*

provides the states with a skeletal outline to follow when enacting more detailed privacy protections. The NAIC states that by "[w]orking with our governors and state legislatures, we will undertake a thorough review of our respective state laws to determine needed regulatory or statutory changes to achieve functional regulation as contemplated by the Gramm-Leach-Bliley Act."[222] To facilitate such action, NAIC's Insurance Information and Privacy Protection Model Act supplies the states with a working template.[223]

Thus far, seventeen states have enacted some form of the almost-twenty-year-old Model Act.[224] Similar in certain respects to the GLBA, the Model Act requires insurance firms to (1) provide consumers with notice of their information-sharing practices and (2) allow consumers the opportunity to opt out before sharing personal information in connection with marketing products or services.[225] Like the GLBA, the Model Act also carves out exceptions enabling insurance firms to disclose consumers' personal information.[226]

2000 WL 8170840 (discussing state insurance regulators' efforts to overhaul State insurance regulations).

222. *NAIC Approves Blueprint for Future of Insurance Regulation*, *supra*, note 221, at 2.

223. *See, e.g.*, James M. Cain, et al., *The Cost of Sharing: Prepare for New Federal and State Restrictions on Consumer Financial Data*, LEGAL TIMES, Mar. 13, 2000, at 26. NAIC has also created a privacy working group to help states to implement GLBA's provisions. *See id.*

224. *See* NAIC Insurance Information and Privacy Model Act (1980) *available at* 1999 WL NAIC 670-1. As of October, 1999, Arizona, California, Connecticut, Georgia, Hawaii, Illinois, Kansas, Maine, Massachusetts, Minnesota, Montana, Nevada, New Jersey, North Carolina, Ohio, Oregon, Virginia and Wyoming have adopted the model act. *See* ARIZ. REV. STAT. ANN. §§ 20-2101—20-2120 (West 1981); CAL. INS. CODE § 791.01—791-26 (West 1989); CONN. GEN. STAT. ANN. §§ 38a-975 -38a-998 (West 1983); GA. CODE ANN. §§ 33-39-1—33-39-23 (1985); HAW. REV. STAT. ANN. §§ 431:17-101—431:17-106 (West 1988); ILL. COMP. STAT. ANN. 5/1001—5/1024 (West 1987); KAN. STAT. ANN. §§ 40-2,111—40-2,113 (1986) (adopting part of model); ME. REV. STAT. ANN. tit. 24-A §§ 2201—2220 (West 1999); MASS. GEN. LAWS ANN. ch. 1751 §§ 1—22 (West 1992); MINN. STAT. ANN. §§ 72A.49—72A.505 (West 1989); MONT. CODE ANN. §§ 33-19-101—33-19-409 (1999); NEV. ADMIN. CODE §§ 679B.560—679B.750 (1997); N.J. REV. STAT. §§ 17:23A-1—17:23A-22 (1985); N.C. GEN. STAT. §§ 58-39-1—58-39-120 (1981); OHIO REV. CODE ANN. §§ 3904.1—3904.22 (Banks-Baldwin 1997); OR. REV. STAT. §§ 746.600—746.690 (1988); VA. CODE ANN. §§ 38.2-600—38.2-620 (Michie 1987); WYO. INS. REGS. Ch. 25 (1989); *see also* NAIC Insurance Information and Privacy Model Act (1980), *supra* note 221 (listing the states that have adopted the model act).

225. *See* NAIC Insurance Information and Privacy Model Act, *supra* note 221, at 6-8. The Model Act defines "personal information" as "any individually identifiable information gathered in connection with an insurance transaction from which judgments can be made about an individual's character, habits, avocations, finances, occupation, general reputation, credit, health or any other personal characteristics." *Id.* at 5. Thus, the Model Act's definition of "personal information" covers more ground than the Federal agencies' definition of "publicly available information." Significantly, the Model Act prohibits insurance firms from sharing for marketing purposes information that relates to a consumer's "character, personal habits, mode of living or general reputation." *See* Cain, et al., *supra* note 223, at 26 (discussing the NAIC Model Act); NAIC Insurance Information and Privacy Model Act, *supra* note 221, at 15.

226. *See* NAIC Insurance Information and Privacy Model Act, *supra* note 224, at 14-16.

Although the NAIC Blueprint and the Model Act represent noble efforts toward a uniform privacy standard for the insurance industry, already twenty states have their own separate privacy bills pending in their respective legislatures.[227] Thus, as the states continue to compete individually with the federal agencies' rulemaking efforts, financial holding companies are left with the task of deciphering not only the federal agencies' already puzzling array of privacy regulations, but also the states' individual insurance privacy standards.

3. Limitations on States' Ability to Enact Tougher Privacy Laws

In theory, the states can enact tougher privacy laws without fear of preemption under the GLBA. In reality, however, two potential barriers could defeat such efforts. The federal preemption mechanism found in section 104 of the GLBA and the Fair Credit Reporting Act[228] ("FCRA") have chilling effects on state laws that attempt to exceed the Title V boundaries.

a. Section 104

First, the GLBA empowers state insurance regulators to enforce Title V and its prescribed regulations "[u]nder state insurance law, in the case of any person engaged in providing insurance, by the applicable state insurance authority of the state in which the person is domiciled,

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Significantly, the Model Act limits the way that an insurance company's affiliate may use such information. *See id.* at 15 (stating that an affiliate may only use such information "in connection with an audit of the insurance institution or agent or marketing of an insurance product or service, provided the affiliate agrees not to disclose the information for any other purpose or to unaffiliated persons . . .").

227. Pending bills in California, Massachusetts and New Jersey would ban discrimination against consumers who do not permit sharing of their financial information. *See* Rodd Zolkos, *Insurers Seek Uniform Privacy Guidelines: Trade Groups Voice Concern over Varied State Rulemaking Efforts*, Bus. Ins., Mar. 20, 2000, at 20F, *available at* 2000 WL 8170652. Washington is considering a bill to restrict information collection. And Montana passed a similar measure last year. *See id.* California, Delaware, Hawaii, Kentucky, Pennsylvania, South Carolina, Tennessee, Utah and Washington are considering measures to criminalize efforts to get personal financial information for criminal or fraudulent purposes. *See id.*; *see also* Theresa Miller, *Trade Groups Suggest Following Federal Privacy Guidelines*, Best Wire, Mar. 13, 2000, *available at* 2000 WL 4085194 (paraphrasing NAIC Vice President Kathleen Sebelius); *see also* Anason, *supra* note 203, at 1 ("If New York were to legislate additional privacy restrictions, it could very likely contribute to an inconsistent patchwork of conflicting legislation across State boarders . . . ."); Anason, *supra* note 18, at 2 (discussing Minnesota's tougher "opt in" proposed privacy legislation); Miller, *supra* note 24 (stating that Vermont's proposed bill "would allow companies to share or transfer information among company employees or agents, or affiliated companies, only while servicing a customer's account."). *But see* Heller, *supra* note 26 at 2, (stating that New York probably will not pass an encompassing consumer privacy law this year).

228. 15 U.S.C. § 1681 (1994).

subject to section 104 of [the] Act."[229] Thus, if the states choose to enact privacy legislation equivalent to, if not greater than, Title V, then section 504 empowers the state insurance authorities to enforce those state laws without fear of federal preemption.[230] However, the state insurance authorities' enforcement power is made subject to the section 104 preemption rules.

Therefore, in enacting privacy laws for persons engaged in the insurance business, states cannot prevent or restrict a depository institution or its affiliates from (1) affiliating or associating with any person authorized by the GLBA or any other federal law or (2) engaging directly or indirectly in any activities authorized by the GLBA. Arguably, a financial institution could claim that a state's privacy laws violate section 104, necessitating federal preemption, because the given regulations prevent or restrict its right to affiliate, associate or engage in allowable activities under the GLBA. Thus, although the GLBA facially allows states to enact tougher privacy laws, this freedom is severely restricted by section 104.[231]

b. Fair Credit Reporting Act

Second, the FCRA[232] prohibits states from enacting laws that prevent or restrict information sharing among affiliates. The FCRA governs the uses of credit information.[233] More specifically, the Act "governs the information practices of consumer reporting agencies, such as credit bureaus, and the use of consumer reports and the sharing of affiliate information by financial institution holding companies and other multicompany organizations."[234] To evaluate its customers' character, reputation, credit worthiness, credit standing and credit capacity, banks depend on fair and accurate credit reporting.[235] As such, inaccu-

229. *See* GLBA §505(a)(6); *see also* H.R. CONF. REP. No. 106-434, at 261 (1999) ("In general, Subtitle A of Title III reaffirms that States are the regulators for the insurance activities for all persons, including acting as the functional regulator for the insurance activities of Federally chartered banks. This functional regulatory power is subject to section 104 of Title I, however, which sets forth the appropriate balance of protections against discriminatory actions.").

230. *See* GLBA § 504.

231. *See* Gibson, Dunn & Crutcher LLP, *New Federal Preemption Rules Concerning Insurance and Other Affiliations of Depository Institutions: Section 104 of the Gramm-Leach-Bliley Act*, Nov. 30, 1999, at 5, *at* http://www.gdl_w.com/publications/up__ds ("[Section 104] does not define or characterize discrimination that might invalidate otherwise protected State action. This broad language suggests that any State rule or action concerning a proposed affiliation with a depository institution that has a discriminatory effect, even if unintended, on a depository organization may be found preempted.")

232. 15 U.S.C. § 1681 (1994).

233. § 1481(b); *see also, ABA Paper supra* note 4, at 6 (discussing the FCRA).

234. *ABA Paper, supra* note 4, at 6 (discussing the FCRA).

235. *See* 15 U.S.C. § 1681(a).

rate and unfair credit reporting impairs the efficiency of, and undermines, public confidence in the banking system.[236]

Based on this reasoning, Congress enacted the FCRA which requires consumer reporting agencies to adopt reasonable procedures that would (1) meet commerce's need for consumer credit, personnel, insurance and other information and (2) be fair and equitable to the consumer.[237] To further its goal of fair and accurate credit reporting, Congress declared that "no requirement or prohibition may be imposed under the laws of any state . . . with respect to the exchange of information among persons affiliated by common ownership or common corporate control . . . ."[238] So far, Susan Henrichsen, California's Deputy Attorney General, has argued that if shared information is not a "consumer report or application," then such information-sharing between affiliates is not governed by the FCRA's preemption provision.[239] Thus, theoretically, GLBA section 507 would trump the FCRA. However, the FCRA's preemption provision covers information-sharing among affiliates without specifically limiting the information's scope to "consumer reports."[240] Therefore, the FCRA's preemption provision trumps any state law that will prevent or restrict information exchanges between affiliates.[241]

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236. *See id.*

237. *See* 15 U.S.C. § 1681(b) Under the FCRA, a "consumer reporting agency" is

> any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.

15 U.S.C. § 1681(f).

238. 15 U.S.C. § 1481(b)(2) (Supp. IV 1998).

239. *See* Heller, *supra* note 26 (discussing the California Deputy Attorney General's contention). One should note that the preemption provision in the FCRA expires after January 1, 2004. *See id.*

240. *See* 15 U.S.C. § 1681(t); *see also* Heller, *supra* note 26 (discussing contentions that the FCRA's preemption provision is not limited to "consumer reports"). *See generally* Richard Fischer & Clarke Dryden Camper, *Fair Credit Reporting Act Remains Potent*, AM. BANKER, Dec. 17, 1999, at 10, *available at* 1999 WL 21145726 (declaring that the FCRA continues to govern information-sharing between affiliated parties, its authority remaining unaffected by GLBA's privacy title); Eileen Canning & Marc Selinger, *Financial Services: New Powers for Financial Holding Companies Present 'Two-Edged Sword,' Fed Official Says*, BNA BANKING DAILY, Jan. 21, 2000, at d3 (discussing how the FCRA could deter states' tougher privacy provisions); Robert O'Harrow Jr., *A Postscript on Privacy; Bank Bill's Late Change Gives States Last Word*, WASH. POST Nov. 5, 1999, at E9, *available at* 1999 WL 23313091 (same).

241. In its regulatory analysis of its proposed privacy regulations, the OCC states that, under the FCRA, financial institutions must provide consumers with the ability to opt out of the financial institutions' information sharing with their affiliates. According to the OCC, the financial institution must provide an opt out when (1) the financial institution shares certain consumer information with affiliates; and (2) does not want to be treated as a consumer reporting agency. *See* Joint Final Rule by Department of the Treasury (OCC), Regulatory Analysis, 65 Fed. Reg.

35189, (June 1, 2000) (to be codified at 12 C.F.R. pts. 40, 216, 332, 573). After reading the express language in the FCRA, however, one concludes that the OCC's position is, at best, an overstatement.

Under the FCRA,

> a consumer may elect to have the consumer's name and address excluded from any list provided by a consumer reporting agency under subsection (c)(1)(B) of this section in connection with a credit or insurance transaction that is not initiated by the consumer, by notifying the agency in accordance with paragraph (2) that the consumer does not consent to any use of a consumer report relating to the consumer in connection with any credit or insurance transaction that is not initiated by the consumer.

15 U.S.C. § 1681b(e)(1) (Supp. IV 1998). This opt out mechanism involves situations where a consumer reporting agency provides consumer reports

> [t]o a person which it has reason to believe — (A) intends to use the information in connection with a credit transaction involving the consumer . . . and involving the extension of credit to, or review or collection of an account of, the consumer; or . . . (C) intends to use the information in connection with the underwriting of insurance involving the consumer;

15 U.S.C. § 1681b(a)(3)(A) & (C) (Supp. IV 1998).

However, within the ambit of these situations, a consumer may have his name and address excluded from a consumer reporting agency's list in relation to any credit or insurance transaction where the consumer has not initiated the transaction only if (1) the transaction consists of a firm offer of credit or insurance; (2) the consumer reporting agency complies with subsection (e); and (3) the consumer has not elected under subsection (e) to have his or her name and address excluded from the consumer reporting agency's list of names. *See* 15 U.S.C. § 1681b(c)(1)(B)(i-iii) (Supp. IV 1998). Therefore, the opt out is limited to (1) information consisting of a consumer's name and address; (2) situations involving consumer credit transactions where there exists a firm offer of credit or insurance. *See* Cain, et al., *supra* note 223 (stating that Title V will not preempt tougher State privacy laws, "at least as far as they concern information sharing with nonaffiliated third parties."). "Under GLB, State laws may provide for greater privacy protections with respect to information sharing among nonaffiliated third parties. State laws will *not*, however, override the FCRA's rules governing information sharing among affiliates." *Id.* (Emphasis in original). *See generally* Gibson, Dunn & Crutcher, LLP, *New Federal Privacy Requirements Affecting Any Company Engaged in "Financial" Business*, Jan. 15, 2000 *at* http://gd_l_w.com/publications/814200093347.privacy.asp ("The Act calls for the Federal banking agencies to adopt rules under the FCRA, but does not supersede the FCRA provisions permitting affiliate information sharing."); Regulatory Advisory Services Practice of PricewaterhouseCoopers, *Executive Overview and Summary of the Gramm-Leach-Bliley Act*, Nov. 15, 1999, at 16 (on file with author) ("a clause in the Fair Credit Reporting Act prohibits States from legislating in the area of information sharing among affiliates."). *But see* Donna Tanoue, Chairman of the FDIC, Remarks at a Public Forum Hosted by the FDIC: "Is It Any of Your Business? Consumer Information, Privacy, and the Financial Services Industry 2 (March 23, 2000) *at* http://www.fdic.gov/news/news/speeches/chairman/sp23Mar00.html ("The banking regulators are also drafting a proposed Fair Credit Reporting Act regulation regarding certain information sharing with affiliates, which would also allow consumers to opt out of information sharing."); *but see also* Congressional Privacy Caucus, *supra* note 188 (reiterating that GLBA does not preempt State laws providing greater privacy protection). By guaranteeing that tougher state privacy laws survived preemption, those Congressional Privacy Caucus members who served as Conferees on GLBA intended to give states the freedom to

> adopt stronger privacy protections, including . . . laws giving consumers the ability to 'opt-in' to both affiliate and nonaffiliated third party disclosures of nonpublic personal information, stronger State laws regarding medical privacy, or any other additional protections which the States deemed necessary in addition to the 'floor' of protections provided under Federal law.

As aforementioned, Title V will not preempt state privacy law as long as such laws are not inconsistent with the Title V provisions. State laws that are tougher than the Title V provisions are not inconsistent. Therefore, Title V will not supersede tougher state privacy laws. However, subject to two unrelated amendments to the FCRA, the GLBA declares that nothing in Title V modifies, supersedes or limits the FCRA.[242] Significantly, the Conference Report expressly states that "disclosure of nonpublic personal information contained in a consumer report reported by a consumer reporting agency does not fall within section 502's notice and opt out requirements."[243] Therefore, states cannot enact privacy laws that prevent or restrict such information exchanges between financial institutions and their affiliates. Such state action would derogate the FCRA.[244] Although such laws would be tougher than Title V, they would effectively supersede the FCRA and violate Title V's FCRA protection. Notwithstanding the knowledge that both section 104 and the FCRA undermine their authority to enact tougher privacy laws, states face the unenviable task of deciding whether to enact regulations to carry out Title V itself. Under section 505(c), if

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Id.

242. *See* GLBA § 506(c); *see also* H.R. CONF. REP. No. 106-434, at 266 (1999) (reiterating that nothing in the title modifies, limits or supersedes the FCRA's operation). Amending the FCRA, GLBA sections 506(a) and (b) extend the Federal banking agencies greater authority to enforce and interpret the FCRA. *See* GLBA § 506(a) & (b).

243. H.R. CONF. REP. No. 106-434, at 266 (1999). Additionally, the Conference Report states that "[t]he Conferees agreed to exclude disclosures to consumer reporting agencies from section 502(d)'s limitations on the sharing of account number information." *Id.*; *see* GLBA § 502(e)(6) (exempting disclosures of nonpublic personal information "(A) to a consumer reporting agency in accordance with the Fair Credit Reporting Act, or (B) from a consumer report reported by a consumer reporting agency")

244. *See* BENSON, ET AL., *supra* note 12, at 111:

> In a colloquy with Sen. Connie Mack, Banking Committee Chairman Phil Gramm confirmed that Section 507 [Relation to State Laws] is intended to apply only to Subtitle A of Title V and is not to be construed to apply to any provision of law other than the provisions of the subtitle. Thus, Section 507 does not affect existing Federal Fair Credit Reporting Act provisions on that statute's relationship to State laws. Sen. Mack had submitted that Section 507 did not supersede, alter, or affect the existing FCRA preemption of State laws with regard to the exchange of information among affiliated entities.

Id. See generally William Anderson, *State-Level Implications of Gramm-Leach-Bliley*, ADVISOR TODAY, Mar. 1, 2000, *available at* 2000 WL 15516374, stating:

> none of the bill's privacy provisions can be interpreted to limit or supersede the Fair Credit Reporting Act. Under the FCRA, special restrictions apply to sharing information if the information will be used to make credit, insurance or employment decisions. The 'inference' provision protects these requirements and ensures that any FCRA obligations and restrictions that apply to the sharing of insurance information are not undermined.

As aforementioned, under the GLBA, an "affiliate" is a company that controls, is controlled by, or is under common control with another company. Thus, both Acts use the same basic definition of "affiliate."

state insurance authorities fail to enact regulations to carry out Title V, then the states cannot override, pursuant to new FDIA section 47(g)(2)(B)(iii), the federal banking agencies' insurance customer protection regulations.[245] Therefore, states may either (1) choose not to adopt the Act's privacy provisions or (2) override the federal banking agencies' consumer protection regulations. However, Part V of this article considers whether in constructing this interplay between sections 305 and 505 Congress has in fact (1) coerced the states to enact privacy regulations consistent with Title V or (2) provided them with a constitutionally permissible choice.

V. CONSTITUTIONALITY AND SECTION 505(c)

As innocuous as Title V of the GLBA may appear by itself, the relationship between Title III and Title V, specifically sections 305 and 505(c), raises an issue of constitutional significance. As written, the GLBA does not unconstitutionally compel state insurance authorities to enact the Title V regulations.[246] In the Conference Report accompanying the GLBA, Congress further elaborated on its intentions: "[i]t is the hope of the Conferees that state insurance authorities would implement regulations to carry out the purposes of this title and enforce such regulations as provided in this title."[247] As a result, Title V's language and Congress' legislative intent support the states' freedom of choice.

When President Clinton signed the GLBA into law, he concurred with Congress' intent.[248] He interpreted section 505(c) of the Act "as providing states with a constitutionally permissible choice of whether to participate in such a program. States that choose to participate will gain the powers listed in section 505(c); States that decline will not."[249]

245. *See* GLBA § 505(c).

246. Section 504(a)(1) states that

> The Federal banking agencies, the National Credit Union Administration, the Secretary of the Treasury, the Securities and Exchange Commission, and the Federal Trade Commission shall each prescribe, after consultation as appropriate with representatives of State insurance authorities designated by the National Association of Insurance Commissioners, such regulations as may be necessary to carry out the purposes of this subtitle with respect to the financial institutions subject to their jurisdiction under section 505.

GLBA § 504. Thus, unlike the Federal agencies, Congress does not command the state insurance authorities to enact regulations necessary to carry out Title V.

247. H.R. CONF. REP. NO. 106-434, at 265 (1999). *See generally* Cain, et al., *supra* note 223, at 26 ("The legislation allows states to adopt privacy regulations 'consistent and comparable' with those adopted by other (Federal) regulators; it cannot *require* the States to do so.")

248. *See* Statement by the President, *supra* note 8, at 2365.

249. *Id.* Interestingly, in its final rule, NCUA complied with Executive Order 13132. *See* NCUA Notice of Proposed Rulemaking, 65 Fed. Reg. 31738 (May 8, 2000) (to be codified at 12 C.F.R. pts. 716 & 741). The Executive Order encourages independent regulatory agencies to

Thus, according to the President, by giving states a choice to "adopt regulations to carry out this subtitle," Congress intended for the states "to accept or decline the rulemaking and enforcement obligations assigned to state authorities under sections 501-505 of the Act."[250] After comparing the section 305 and 505(c) requirements to (1) the preemption doctrine in *Barnett Bank of Marion County, N.A. v. Nelson*[251] and (2) the federalism principles found in *New York v. United States*,[252] *Printz v. United States*[253] and *Reno v. Condon*,[254] one concludes that Congress has not infringed upon states' rights and that the GLBA does not unconstitutionally coerce states to enact a federal regulatory program.[255]

A. *The Statutory Structure: Sections 505(c) and 305*

As discussed in Part III, section 305 amends the FDIA by adding section 47. Under section 47(g), the federal banking agencies must prescribe insurance customer protection regulations to prevent coerced tie-ins of banking and insurance products by depository institutions that sell insurance products.[256] If the federal banking regulators determine jointly that their insurance customer protection regulations offer greater protection than comparable state laws, rules, regulations, orders or interpretations, then the federal regulations will preempt the state regulations.[257] However, within three years after receiving notice from the federal agencies, the states may enact legislation to override the federal

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consider fundamental federalism principles when formulating and implementing regulations affecting on state and local interests. *See* Exec. Order No. 13132, 64 Fed. Reg. 43255 (Aug. 4, 1999); *see also* NCUA Final Rule, 65 Fed. Reg. 31738 (2000) (to be codified at 12 C.F.R. pts. 716 & 741) (May 18, 2000) (applying the Executive Order to NCUA's proposed privacy rule). The NCUA stated that its rule

> will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. . . . The NCUA has determined the proposed rule does not constitute a policy that has Federalism implications for purposes of the executive order.

NCUA Notice of Proposed Rulemaking, *supra*.

250. Statement by the President, *supra* note 8, at 2365.

251. 517 U.S. 25 (1996).

252. 505 U.S. 144 (1992).

253. 117 S. Ct. 2365 (1997).

254. 120 S. Ct. 666 (2000).

255. The concept of "federalism" refers to the division of power between the Federal and State governments. For a more thorough discussion of the concept, *see* Frank B. Cross, *Realism About Federalism*, 74 N.Y.U. L. REV. 1304 (1999).

256. *See supra* Part III; *see also* Regulatory Advisory Services Practice of PriceWaterhouseCoopers, *Executive Overview and Summary of the Gramm-Leach-Bliley Act*, Nov. 15, 1999, at 11 (on file with author) (discussing GLBA's requirement that the Federal banking regulators enact insurance customer protection regulations).

257. *See supra* Part III.

preemption.[258] Under section 505(c), if a state's insurance authorities fail to adopt privacy regulations that carry out Title V, then that state cannot override, pursuant to FDIA section 47(g)(2)(B)(iii), the federal banking agencies' insurance customer protection regulations.[259]

B. *Federalism and the Tenth Amendment*

Federalism denotes "the coordinate relationship and distribution of power between the individual States and the national government."[260] The framers of the Constitution sought to furnish the national government with enough powers to protect the nation, reserving all other powers to the states.[261] Therefore, the framers enumerated the national government's powers.[262] As a result, federalism promotes efficiency, individual choice, experimentation and participation in the democratic process.[263]

The Tenth Amendment, reserving to the states all powers that the Constitution does not delegate to the federal government, manifests the states' role as independent entities of the federal government. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."[264] Thus, the Supreme Court will not invalidate a congressional enactment without a plain showing that Congress has exceeded its constitutional boundaries.[265] The United States is built upon this principle of federalism, where the political system distributes governmental authority between state and national governments.[266]

C. *Basic Constitutional Principles for Congressional Financial Services Legislation*

In *McCulloch v. Maryland*[267] and *Osborn v. Bank of the United*

258. *See supra* Part III.

259. *See supra* Part IV.

260. Cathleen C. Herasimchuk, *The New Federalism: Judicial Legislation by the Texas Court of Criminal Appeals?*, 68 TEX. L. REV. 1481, 1485 (1990).

261. *See* JETHRO K. LIEBERMAN, A PRACTICAL COMPANION TO THE CONSTITUTION 184 (2d ed. 1999); GEOFFREY R. STONE, ET AL., CONSTITUTIONAL LAW 148 (3d ed. 1996).

262. *See* STONE, ET AL., *supra* note 261, at 149.

263. *See id.* at 149-53.

264. U.S. CONST. amend. X.; *see* TRIBE, *supra* note 28, § 5-20, at 379; LIEBERMAN, *supra* note 261.

265. *See* United States v. Morrison, 120 S.Ct. 1740, 1748 (2000) ("Every law enacted by Congress must be based on one or more of its powers enumerated in the Constitution. 'The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the constitution is written.'" (quoting Marbury v. Madison, 1 U.S. Cranch 137, 176 (1803)))

266. *See* STONE, ET AL., *supra* note 261, at 149.

267. 17 U.S. (4 Wheat.) 316 (1819).

States,[268] the Supreme Court sustained Congress' constitutional authority to establish national banks.[269] Using its broad general powers to borrow money, levy and collect taxes, pay public debts, raise and support armies, declare and conduct war and regulate commerce, Congress may constitutionally establish banks for national purposes.[270] Thus, Congress may make all necessary and proper laws that enable it to exercise such powers.[271] Indeed, Congress formed the national banking system to facilitate the government's fiscal operations.[272]

The Supreme Court has rested the constitutionality of national banking legislation on these principles.[273] In furtherance of these principles, the Constitution not only empowers Congress to establish the National Banking System, but also the Federal Reserve Bank System and other institutions in furtherance of such power.[274] Congress was therefore within its constitutional power when, by enacting the FDIA, it created the FDIC.[275] Significantly, the Supreme Court has recognized

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268. 22 U.S. (9 Wheat.) 738 (1824).

269. *See McCulloch*, 17 U.S. (4 Wheat.) at 418-420; *Osborn*, 22 U.S. (9 Wheat.) at 861.

270. *See* Smith v. Kansas City Tile & Trust Co., 255 U.S. 180, 208 (1921) (discussing *McCulloch* and *Osborn*). In *McCulloch*, the Court held that

> [i]f a corporation may be employed, indiscriminately with other means, to carry into execution the powers of the government, no particular reason can be assigned for excluding the use of a bank, if required for its fiscal operations. To use one, must be within the discretion of congress, if it be an appropriate mode for executing the powers of government.

McCulloch, 17 U.S. (4 Wheat.) at 422.

271. *See Smith*, 255 U.S. at 208 (discussing *McCulloch*). Additionally, in *Osborn*, the Court held that the bank "is an instrument which is 'necessary and proper' for carrying on the fiscal operations of the government." *Osborn*, 22 U.S. (9 Wheat.) at 861 (discussing *McCulloch*).

272. *See Smith*, 255 U.S. at 209.

273. *See id.* (citing Farmers' & Mechanics' National Bank v. Dearing, 91 U.S. 29, 33-34 (1875)).

> The national banks organized under the [National Bank] act are instruments designed to be used to aid government in the administration of an important branch of the public service. They are a means appropriate to that end. Of the degree of the necessity which existed for creating them Congress is the sole judge.... Being such means, brought into existence for this purpose, and intended to be so employed, the States can exercise no control over them, nor in any wise affect their operation, except in so far as Congress may see proper to permit.... The power to create carries with it the power to preserve. The latter is a corollary from the former.

Id.

274. *See* Weir v. United States, 92 F.2d 634, 636 (7th Cir. 1937), *cert. denied* 302 U.S. 761 (1938) (citation omitted).

275. *See id.* at 636. The court went on to state:

> And the power to inaugurate such systems and to create such institutions carries with it inevitably the power to preserve and protect them. In pursuance of this power of protection and preservation, Congress has created, as an agency of the government, the Federal Deposit Insurance Corporation to promote the soundness of banking and aid the government in the discharge of its fiscal transactions. Its

that federal regulations prescribed by administrative agencies have no less preemptive effect than federal statutes.[276]

D. *Preemption and the Supremacy Clause*

The Supremacy Clause of the Constitution requires courts to follow federal rather than state law if Congress, in enacting a statute, intended to exercise its constitutionally-permissible authority to set aside state laws.[277] "So long as Congress acts within an area delegated to it, the preemption of conflicting state or local action – and the validation of congressionally authorized state or local action – flow directly from the substantive source of power of the congressional action coupled with the Supremacy Clause of article VI . . . ."[278] Thus, federal law may expressly or impliedly supersede state law.[279] Therefore, the Supreme Court has recognized the Express and Implied Preemption doctrines, and, within the doctrine of Implied Preemption, the Supreme Court has recognized two applicable categories: (1) Field Preemption and (2) Conflict Preemption.[280]

1. THE PREEMPTION DOCTRINE AND SUPREMACY CLAUSE IN BARNETT BANK

First, under Express Preemption Congress makes clear its intent to

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> obvious intent was, by insuring deposits, to prevent runs on banks by depositors, to preserve solvency of insured banks, and thus to keep open the channels of trade and commercial exchange. Clearly, under the decisions mentioned, the creation of the corporation was within the constitutional power of the government . . . .

Id. at 636.

276. *See* Fidelity Fed. Sav. and Loan Ass'n v. de la Cuesta, 458 U.S. 141, 153-54 (1982) (citing United States v. Shimer, 367 U.S. 374, 381-82 (1961)) ("Where Congress has directed an administrator to exercise his discretion, his judgments are subject to judicial review only to determine whether he has exceeded his statutory authority or acted arbitrarily.").

277. The Supremacy Clause states that

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, § 2; *see also* Barnett Bank of Marion County, N.A. v. Nelson, 517 U.S. 25, 30 (1996) ("The supreme court requires courts to follow federal, not state law.") Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 280 (1987) ("In determining whether a State statute is pre-empted by federal law and therefore invalid under the Supremacy Clause of the Constitution, our sole task is to ascertain the intent of Congress.")

278. TRIBE, *supra* note 28, § 6-25, at 479.

279. *See de la Cuesta*, 458 U.S. at 152-53.

280. *See Guerra*, 479 U.S. at 280-81; *de la Cuesta*, 458 U.S. at 152-54 (1982); *see also* John P. C. Duncan, *The Course of Federal Pre-Emption of State Banking Law*, 18 ANN. REV. BANKING L. 221, 227 (1999) (analyzing federal preemption doctrine).

preempt state law by use of express language.[281] Second, under Field Preemption, Congress' regulatory scheme is so comprehensive that one may reasonably infer a congressional intent to preempt state law in the particular field.[282] Third, under Conflict Preemption, Congress has not entirely displaced state regulation in certain areas but, to the extent that federal law actually conflicts with state law, the federal law may preempt state law.[283] In this situation, either (1) complying with both the federal and state laws is a physical impossibility, or (2) the state law stands as an obstacle to accomplishing and executing Congress' full purposes and objectives.[284]

The Express Preemption doctrine is at issue in section 47 of the FDIA. In section 47(g)(2)(b)(i), subject to the state override clause, Congress expressly declares that the federal banking agencies' regulations will preempt state law if the state law provides weaker protection than the federal regulations.[285] Thus, if Congress can constitutionally legislate in this particular field, then section 47, expressly stating Congress' intent to preempt state law, will necessarily preempt state law.[286] Since the Supreme Court has recognized the constitutionality of Congress' national banking legislations, as well as the authority of federal agencies' to regulate according to such legislations, section 47 validly preempts state law under the Supremacy Clause.[287]

Arguably, section 47 also activates Conflict Preemption principles. Congress has explicitly delegated its implementing authority under sec-

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281. *See Guerra*, 479 U.S. at 280.

282. *See id.*

283. *See id.*

284. *See* Barnett Bank of Marion County v. Nelson, 517 U.S. 25, 31 (1996).

285. *See* GLBA § 305 (adding Section 47 to the FDIA). Congress expressly states that:

> If the Federal agencies referred to in clause (i) jointly determine that any provision of the regulations prescribed under this section affords greater protections than a comparable State law, rule, regulation, order, or interpretation, those agencies shall send a written preemption notice to the appropriate State regulatory authority to notify the State that the Federal provision will preempt the State provision and will become applicable unless, not later than 3 years after the date of such notice, the State adopts legislation to override such preemption.

Id. See also Cipollone v. Liggett Group, Inc., 505 U.S. 504, 517 (1992) (discussing the express preemption doctrine); Medtronic, Inc. v. Lohr, 518 U.S. 470 (1996) (same). *See generally* Duncan, *supra* note 280, at 303-05 (1999) (discussing Federal agencies' preemption authority).

286. *See* Duncan, *supra* note 280, at 229 (1999) (citing Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977)).

287. *See* Smith v. Kan. City Tile & Trust Co., 255 U.S. 180, 208-11 (1921) (discussing *McCulloch* and other Supreme Court cases recognizing Congress' constitutional authority to prescribe national banking legislation); *Weir*, 92 F.2d at 636 (same); *see also Medtronic*, 518 U.S. at 496 (discussing how preemption does not arise directly from the statute's enactment, but rather from the regulations prescribed by a Federal agency "to which Congress has delegated its authority to implement the provisions of the Act"). *See generally* Duncan, *supra* note 280, at 305-07 (1999) (discussing preemption under the *Medtronic* holding).

tion 47 to the federal banking agencies.[288] Thus, preemption under section 47 does not arise directly from the enactment of the GLBA.[289] Rather, if the federal banking agencies promulgate stronger federal regulations, only then will the federal regulations preempt weaker state laws.[290] Since Congress has delegated its authority to implement the provisions of section 47 to the federal banking agencies, the federal banking agencies are "uniquely qualified" to determine whether a state law (1) makes complying with both the federal and state laws a physical impossibility or (2) stands as an obstacle to accomplishing and executing Congress' full purposes and objectives under section 47.[291]

Regardless, where Congress has directed a federal agency to exercise its discretion, the federal agency's subsequent regulations have no less preemptive effect than a federal statute.[292] Thus, as long as the federal banking agencies do not exceed their statutory authority or act arbitrarily, their insurance customer protection regulations under section 47 will preempt weaker state laws. Therefore, even though Congress added an override clause to section 47, allowing states to enact legislation to override the federal preemption, this action was purely discretionary. With or without the override clause, Congress may constitutionally preempt state laws under section 47 of the FDIA.[293]

2. THE MCCARRAN-FERGUSON ACT

The McCarran-Ferguson Act[294] creates an interesting wrinkle in the preemption analysis. The Supreme Court has recognized that insurance companies conducting a substantial part of their business across state lines are engaging in interstate commerce; thus, such entities are subject to federal laws under Congress' interstate commerce power.[295] Con-

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288. *See* GLBA § 305 (adding Section 47 to the FDIA); *see also Medtronic*, 518 U.S. at 496 (discussing Congress' express delegation of its implementing authorities under the Medical Device Amendments of 1976, 21 U.S.C. § 360(k), to the FDA).

289. *See Medtronic*, 518 U.S. at 496.

290. *See id.*

291. *See id.* ("[T]he agency is uniquely qualified to determine whether a particular form of State law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,' . . . and, therefore, whether it should be preempted.") (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

292. *See de la Cuesta*, 458 U.S. at 153; *see also* Executive Order No. 13132, 64 Fed. Reg. 43255 (1999) (setting forth fundamental federalism principles that agencies must use when formulating and implementing policies with federalism implications).

293. One should note that the above reasoning applies equally to preemption challenges under either GLBA section 104 or section 305. Congress has the constitutional authority to prescribe federal banking legislation. Thus, subject to McCarran-Ferguson Act requirements, Congress may expressly preempt state laws that prevent or restrict depository institutions and their affiliates from exercising their rights under federal law to affiliate and associate with others.

294. 15 U.S.C. § 1011-1015 (1994).

295. *See* Humana Inc., v. Forsyth, 525 U.S. 299, 306 (1999); Barnett Bank of Marion County,

gress responded to this recognition with the McCarran-Ferguson Act.[296] Under the McCarran-Ferguson Act, unless federal law "specifically relates to the business of insurance," federal law will not preempt state law enacted to regulate the insurance business.[297] To determine whether a federal law "specifically relates to the business of insurance," one must consider whether the federal law (1) focuses directly on industry-specific selling practices and (2) affects risk spreading as well as the relationship between insured and insurer.[298]

FDIA section 47 satisfies both criteria. First, section 47 directs the federal banking agencies to prescribe insurance customer protection regulations that

> (A) apply to retail sales practices, solicitations, advertising, or offers of any insurance product by any depository institution or any person that is engaged in such activities at an office of the institution or on behalf of the institution; and (B) are consistent with the requirements of this Act and provide such additional protections for customers to whom such sales, solicitations, advertising, or offers are directed.[299]

Second, to facilitate its Congressional directive, section 47 requires that the federal banking agencies' regulations include (1) anti-tying and anti-coercion, uninsured status and investment risk disclosures; (2) provisions separating banking and insurance product activity; and (3) domestic violence discrimination prohibitions.[300]

Therefore, GLBA section 305, adding section 47 to the FDIA, spe-

517 U.S. at 40-41 (1996); United States v. South-Eastern Underwriters Assn, 322 U.S. 533, 542-53 (1944); *see also* Cynthia T. Andreason, *Federal Preemption and the McCarran-Ferguson Act: The Never Ending Story - Part I*, 5 No. 1 MEINSD 25 (2000) (discussing the case and the McCarran-Ferguson Act).

296. *See* Andreason, *supra* note 295.

297. 15 U.S.C. § 1012(b); *see also Barnett Bank*, 517 U.S. at 40-41 (discussing preemption of state law under the McCarran-Ferguson Act).

298. The Supreme Court in *Barnett Bank* applied the state law "business of insurance" test to the Federal law at issue in the case. *See Barnett Bank*, 517 U.S. at 39 (citing Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119, 129 (1982) (citing Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, 221-24 (1979))); *see also* UNUM Life Ins. Co. of America v. Ward, 119 S.Ct. 1380, 1386 (1999) (holding that, when determining whether state law regulates the "business of insurance," the Court considers whether (1) common sense dictates that the contested provision regulates insurance and (2) (a) the practice effectively transfers or spreads policyholders' risk; (b) the practice is an integral part of the insurer/insured policy relationship; and (c) the practice is limited to insurance industry entities); SEC v. Nat'l Sec. Inc., 393 U.S. 453, 460 (1969) (discussing the elements that comprise the "business of insurance"); *Fabe*, 508 U.S. at 502-04 (same).

299. GLBA § 305 (adding FDIA section 47(a)).

300. *See supra* Part III; *see also Barnett Bank*, 517 U.S. at 39 (stating that the McCarran-Ferguson Act "seeks to protect state regulation primarily against *inadvertent* federal intrusion - say, through enactment of a federal statute that describes an affected activity in broad, general terms, of which the insurance business happens to constitute one part."); *Ward*, 119 S.Ct. at 1386

cifically relates to the business of insurance. The scope of the federal banking agencies' insurance customer protection regulations not only focus directly on industry-specific selling practices, but also affect risk-spreading as well as the relationship between insured and insurer.[301] As such, the McCarran-Ferguson Act's anti-preemption rule does not apply to section 47.

E. *Is Section 505(c) Unconstitutional Under Supreme Court Precedent?*

Although GLBA section 305/FDIA section 47 represents a constitutional exercise of Congressional authority, section 305 does not exist in a vacuum. If, by conditioning the states' access to the section 47 override clause on the states' adopting regulations to carry out Title V, Congress has compelled the states to enact a federal regulatory program governing financial privacy, then section 505(c) unconstitutionally infringes upon states' rights. To resolve this issue, one must measure the relationship between sections 305 and 505(c) against Supreme Court precedent.

1. STRIKE ONE: *NEW YORK v. UNITED STATES*

In *New York v. United States*,[302] the Supreme Court held that Congress, through federal legislation, could neither compel states to adopt state legislation regulating the disposal of low level radioactive waste, nor compel states to assume ownership of such privately owned waste within their borders.[303] Provisions of the Low-Level Radioactive Waste Policy Act Amendments of 1985[304] (1) declared that states were primarily responsible for disposing of waste within their borders, and (2) authorized states to enter into regional compacts restricting their disposal facilities' use to states that were members of the compact.[305] Thus, Congress provided the states with three mechanisms to comply with

("First, we ask whether, from a 'common-sense view of the matter,' the contested prescription regulates insurance.") (quoting Metro. Life Ins. Co. v. Mass. 471 U.S. 724, 740 (1985)).

301. Section 47 does not need to satisfy all three factors in order to fall within the "business of insurance." *See Ward*, 119 S.Ct. at 1389. The factors are merely considerations to weigh when making the determination; none of the factors is necessarily determinative in and of itself. *See id.* (citing Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 49 (1987); *Metro. Life Ins.*, 471 U.S. at 743; Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119, 129 (1982); O'Connor v. UNUM Life Ins. Co. of Am. 146 F.3d 959, 963 (C.A.D.C. 1998)).

302. New York v. United States, 505 U.S. 144 (1992).

303. *See id.* at 188.

304. 42 U.S.C. §§ 2021(b)–2021(e) (1994).

305. *See* §§ 2021(c)(2)(1)(A), (d)(2)(2); *see also*, *New York*, 505 U.S. at 150-52 (discussing relevant statutory provisions).

their statutory waste disposal obligation.[306] Two of these mechanisms were affirmed by the Supreme Court, but the Court held that the third mechanism exceeded Congress' constitutional authority.[307]

According to the Court, Congress may encourage states to regulate in a certain way, as well as hold out incentives to the state in order to influence its policymaking, as long as such encouragement stops short of outright coercion.[308] The Court set forth two guidelines. First, under the Commerce and Spending Clauses, Congress may condition states' receipt of federal funds on the states' meeting federal goals.[309] However, such conditions must bear some relation to the purpose of the federal funds.[310] Second, where Congress has the authority to regulate private activity under its commerce power, Congress may "offer states the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation."[311] Under either of these two guidelines, the states retain ultimate decision-making power over whether or not to comply with the federal policy choices.[312]

With these guidelines in mind, the Court considered the three challenged mechanisms of the Low-Level Radioactive Waste Policy Act Amendments. Under the first mechanism, Congress authorized states with disposal sites to impose a surcharge for receiving other states' waste.[313] The Secretary of Energy would then collect a part of the surcharge and deposit it into an escrow account.[314] Finally, states that achieved a series of milestones would receive a portion of this fund.[315] As such, the Court declared that under the first mechanism Congress had

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306. *See New York*, 505 U.S. at 152.

307. *See id.* at 171-77.

308. *See id.* at 166-67.

309. *See id.* at 167.

310. *See id.*

311. *See id.* at 167-68. Many Federal statutes include this type of preemption. *See e.g.* Clean Water Act, 33 U.S.C. § 1251 (1994); Occupational Safety and Health Act of 1970, 29 U.S.C. § 651; Resource Conservation and Recovery Act of 1976, 12 U.S.C. § 6901 (1994); Alaska National Interest Lands Conservation Act; 16 U.S.C. §3101) (1994).

312. *See New York*, 505 U.S. at 168. As the court noted:

> If a State's citizens view Federal policy as sufficiently contrary to local interests, they may elect to decline a Federal grant. If State residents would prefer their government to devote its attention and resources to problems other than those deemed important by Congress, they may choose to have the Federal Government rather than the State bear the expense of a Federally mandated regulatory program, and they may continue to supplement that program to the extent State law is not preempted. Where Congress encourages State regulation rather than compelling it, State governments remain responsive to the local electorate's preferences; State officials remain accountable to the people.

Id.

313. *See id.* at 171.

314. *See id.*

315. *See id.*

constitutionally exercised its Commerce and Spending powers.[316]

Under the second mechanism, Congress authorized states and regional compacts with disposal sites to impose a discriminatory tax, and eventually a total bar, against importing radioactive waste from states that did not meet federal deadlines.[317] This mechanism fell within Congress' power to allow states to discriminate against interstate commerce.[318] Thus, under the Commerce Clause, if Congress can regulate the private activity in question, then Congress may offer states a choice of either (1) regulating the activity according to federal standards or (2) having federal regulation allowing authorized states to deny entry to their disposal sites preempt state law.[319] Therefore, the second mechanism represented a conditional exercise of Congress' power under the Commerce Clause.[320]

Under the third mechanism, the "take title provision," the Court held that Congress unconstitutionally infringed upon state sovereignty.[321] The "take title provision" allowed states to (1) adopt laws regulating storage and disposal of radioactive waste according to Congress' instructions or (2) accept ownership, possession and potential liability for their waste.[322] Reaffirming principles from *Hodel v. Va. Surface Mining and Reclamation Ass'n., Inc.*[323] and *Fed. Energy Regulatory Comm'n v. Mississippi.*[324] The Court held that Congress may

316. *See id.* at 172-73.

317. *See id.* at 173.

318. *See id.* at 173-74.

319. *See id.* at 174 (citing Hodel v. Va. Surface Mining & Reclamation Ass'n. Inc., 452 U.S. 264, 288 (1981); Fed. Energy Regulating Comm'n. v. Mississippi. 456 U.S. 742, 764-65 (1982)). The court went on to state:

> States may either regulate the disposal of radioactive waste according to federal standards . . . or their residents who produce radioactive waste will be subject to Federal regulation authorizing sited States and regions to deny access to their disposal sites. The affected States are not compelled by Congress to regulate, because any burden caused by a State's refusal to regulate will fall on those who generate waste and find no outlet for its disposal, rather than on the State as sovereign. A State whose citizens do not wish it to attain the Act's milestones may devote its attention and its resources to issues its citizens deem more worthy; the choice remains at all times with the residents of the State, not with Congress. The State need not expend any funds, or participate in any federal program, if local residents do not view such expenditures or participation as worthwhile. . . . Nor must the State abandon the field if it does not accede to federal direction; the State may continue to regulate the generation and disposal of radioactive waste in any manner its citizens see fit.

Id.

320. *See id.*

321. *See id.* at 174-75.

322. *See id.*

323. 452 U.S. 264 (1981).

324. 456 U.S. 742 (1982).

neither commandeer state governments into service for federal regulatory purposes, nor command states to implement federal legislation.[325] Thus, either instructing states to take title to waste or issuing a direct order to regulate according to Congress' instructions would exceed Congress' authority. Therefore, providing states with a choice between the two is equally unconstitutional.[326]

Unlike the first two mechanisms, the "take title provision" did not represent a conditional exercise of Congress' enumerated powers. Rather than threatening to exercise its spending or commerce power, Congress merely threatened the states with one federal instruction for failing to regulate according to another federal instruction.[327] Therefore, Congress commandeered the states' legislative processes by directly coercing them to enact a federal regulatory program.[328]

Thus, the states could not decline to administer the federal program; regardless of the alternative chosen, the states had to follow Congress' instructions.[329] But, rather than either (1) authorizing Congress to require states to regulate or (2) allowing Congress to commandeer state governments as its agents, the Constitution gives Congress the power to regulate matters directly and preempt contrary state laws. "While Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the states, the Constitution has never been understood to confer upon Congress the ability to require the states to govern according to Congress' instructions."[330] Therefore, under the

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325. *See New York*, 505 U.S. at 175-76.

326. *See id.* at 176.

327. *See id.* ("A choice between two unconstitutionally coercive regulatory techniques is no choice at all.")

328. *See id.* (quoting Hodel v. Va. 452 U.S. at 288.

329. *See id.* at 176-77.

330. *Id.* at 162 (citing Coyle v. Smith, 221 U.S. 559 (1911)); *see id.* at 178 (discussing the permissible scope of Congress' legislative authority under the Constitution). The court also noted that:

> [W]here the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished. If the citizens of New York, for example, do not consider that making provision for the disposal of radioactive waste is in their best interest, they may elect state officials who share their view. That view can always be preempted under the Supremacy Clause if it is contrary to the national view, but in such a case it is the Federal Government that makes the decision in full view of the public, and it will be federal officials that suffer the consequences if the decision turns out to be detrimental or unpopular. But where the Federal Government directs the States to regulate, it may be State officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision. Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation.

Id. at 168-69 (citing Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federal-*

Constitution, Congress may (1) preempt state laws contrary to federal interests and (2) use incentives to encourage states to adopt a federal regulatory scheme. Congress may not however direct states to enact and administer federal regulatory programs.[331]

2. STRIKE TWO: *PRINTZ V. UNITED STATES*

In *Printz v. United States*,[332] the Supreme Court held that certain provisions of the Brady Handgun Violence Prevention Act,[333] commandeering state law enforcement officers to perform background checks and other related tasks, violated the Constitution.[334] The Act required regulated arms dealers to forward forms to state law enforcement officers regarding proposed firearm transfers and within five days of receiving the form, the officers, using reasonable efforts, had to determine the legality of the proposed sale.[335] Therefore, the Brady Act temporarily directed state law enforcement officers to participate in administering a federally enacted regulatory program.[336]

Since Congress cannot compel states to enact legislation implementing federal regulatory programs, Congress may not circumvent this general prohibition by enlisting the states' officers directly.[337] Regardless of whether the federal program involves state policymaking, "the federal Government may neither issue directives requiring the states to address particular problems, nor command the states' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program."[338] This places the states in the unenviable position of having to either (1) absorb the financial burden of implementing the federal program or (2) take the blame for the Act and its defects. Moreover,

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ism for a Third Century, 88 COLUM. L. REV. 1, 61-62 (1988); D. Bruce La Pierre, *Political Accountability in the National Political Process – The Alternative to Judicial Review of Federalism Issues*, 80 NW. U. L. REV. 577, 639-65 (1985)).

331. *See New York*, 505 U.S. at 188.

332. 521 U.S. 898 (1997).

333. 18 U.S.C. § 992 (1993).

334. *See Printz*, 521 U.S. at 933 (1997). Such Congressional action is incompatible with the United States' system of federalism. *See id.* Thus, residual State sovereignty is implicit in Article I of the Constitution, conferring enumerated powers to Congress, *see* U.S CONST. art. I, § 8, *see also Printz*, 521 U.S. at 819, as well as in the language of the Tenth Amendment: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U. S. CONST. amend. X. For a thorough discussion of *Printz*, see Lang Gin, *Printz v. United States: The Revival of Constitutional Federalism*, 26 PEPP. L. REV. 631 (1999) (analyzing the case); Eric N. Waltenburg, *The Supreme Court and the States: Do Lopez and Printz Represent a Broader Pro-State Movement?*, 14 J.L. & POL. 319 (1998) (same).

335. *See Printz*, 521 U.S. at 902-03.

336. *See id.* at 904.

337. *See id.* at 935.

338. *Id.*

such federal laws do not preserve the states' independent and autonomous political character.[339] Thus, the whole object of the Brady Act was to direct the functioning of state executives; therefore, the Act compromised the framework of dual sovereignty.[340]

3. Strike Three: *Reno v. Condon*

Reno v. Condon[341] represents the Supreme Court's most recent elucidation on the subject of federalism. In *Condon*, the Supreme Court held that the Driver's Privacy Protection Act of 1994[342] (hereinafter "DDPA") represented a proper exercise of Congress' power to regulate interstate commerce and that the Act did not violate the Tenth Amendment.[343] The DDPA regulates the states' disclosure and resale of personal information contained in state motor vehicle department records. Therefore, subject to certain exceptions, the states cannot disclose such information without the driver's consent.[344] Indeed, a driver's failure to elect nondisclosure does not permit a state to infer consent rather, the state must obtain the driver's affirmative consent before disclosing his or her personal information.[345] Significantly, the DDPA is a generally applicable law; it applies not only to the states, but also to private persons who disclose and resell drivers' personal information.[346]

The Supreme Court held that Congress may use its Commerce Clause power to regulate, under the DDPA, the sale or release of personal, identifying information in interstate commerce.[347] However, Congress must regulate this information without violating the federalism principles contained within the Tenth Amendment.[348] In accordance with *South Carolina v. Baker*,[349] the Court found that the DDPA does not require the states to regulate their citizens; rather, the DDPA regu-

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339. *See id.* at 928-930.
340. *See id.* at 928.
341. 120 S.Ct. 666 (2000).
342. 18 U.S.C. §§ 2721-2725 (1994).
343. *See Condon*, 120 S.Ct. at, 671-73 (2000).
344. *See id.* at 668.
345. *See id.* at 669.
346. *See id.*
347. *See id.* at 671. The court noted:

> The motor vehicle information which the States have historically sold is used by insurers, manufacturers, direct marketers, and others engaged in interstate commerce to contact drivers with customized solicitations. The information is also used in the stream of interstate commerce by various public and private entities for matters related to interstate motoring. Because drivers' information is, in this context, an article of commerce, its sale or release into the interstate stream of business is sufficient to support congressional regulation.

Id.

348. *See id.*
349. 485 U.S. 505 (1988).

lates the states as owners of the databases.[350] In *Baker*, the Court held that the federal statute at issue "regulates state activities; it does not . . . seek to control or influence the manner in which states regulate private parties."[351] Thus, the DDPA requires neither state legislatures to enact laws or regulations, nor state officials to assist in enforcing federal statutes regulating private individuals.[352] As such, the DDPA is consistent with the Court's principles in *New York* and *Printz*.[353]

4. Comparing the Facts of the GLBA with Constitutional Law Principles

Rather than regulating state activities, Congress, through GLBA section 505(c), is seeking to influence the way that states regulate the insurance industry.[354] Thus, section 505(c) is distinguishable from the statute at issue in *Condon*, where Congress regulated state activities by restricting the release of personal information from state motor vehicle records.[355] In *Condon*, even though state legislatures will need to amend their statutes to comply with the DDPA, such "commandeering" of the state legislative and administrative processes is an inevitable consequence when Congress, properly exercising its constitutional authority, regulates a state activity.[356] However, under GLBA section 505(c), if state insurance authorities fail to enact regulations to carry out Title V, then they will lose the ability to override the federal banking agencies' insurance customer protection regulations. Thus, section 505(c) "attempts to use state regulatory machinery to advance federal goals."[357]

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350. *See Condon*, 120 S.Ct. at 672. Interestingly, the Court in *New York* does not apply *Baker* because "this is not a case in which Congress has subjected a State to the same legislation applicable to private parties. . . . This litigation instead concerns the circumstances under which Congress may direct or otherwise motivate the States to regulate in a particular field or a particular way." *New York*, 505 U.S. at 160-61 (1992).

351. *South Carolina v. Baker*, 485 U.S. at 514 (1988). Significantly, the Court recognized that a federal statute may "commandeer" state legislative and administrative processes because State legislatures will need to amend existing statutes to comply with the federal law. *See id.* However, such "commandeering" is "an inevitable consequence of regulating a State activity. Any Federal regulation demands compliance. That a State wishing to engage in certain activity must take administrative and sometimes legislative action to comply with Federal standards regulating the activity is a commonplace that presents no constitutional defect." *Id.* at 514-15.

352. *See Condon*, 120 S.Ct. at 672.

353. *See id.* For a thorough analysis of Tenth Amendment-Commerce Clause cases up to the Fourth Circuit's decision in *Condon v. Reno*, 155 F.3d 453 (4th Cir. 1998), see Stephen G. Hartzell-Jordan, Note: *Condon v. Reno and the Driver's Privacy Protection Act: Was Garcia a Bump in the Road To States' Rights?*, 78 N.C.L. REV. 217 (1999).

354. *But see Baker*, 485 U.S. 505 (1988) (upholding a statute that regulated state activities).

355. *See* 18 U.S.C. § 2721; *Condon*, 120 S.Ct. at 672.

356. *See Condon*, 120 S.Ct. at 672.

357. *Fed. Energ. Regulatory Comm'n*, 456 U.S. at 759.

Therefore, the Court's holdings in *New York* and *Printz* govern the constitutionality of section 505(c).

According to the *New York* Court, even if Congress has the constitutional authority to pass laws requiring specific acts, it cannot directly compel the states to require such acts.[358] For example, under its Commerce Clause power, Congress may directly regulate interstate commerce; however, Congress cannot regulate the state government's regulation of interstate commerce.[359] Yet, Congress may encourage states to regulate in a manner consistent with federal interests, as well as hold out incentives to influence state's policy choices.[360] In a roundabout way, this is the choice that Congress offers the states in section 505(c).

In *New York*, the Court stated that if federal regulation of a particular activity falls within Congress' Commerce Clause authority, then Congress may offer the states a choice between regulating that activity according to the federal standards or having federal regulation preempt state law.[361] Thus, according to *New York*, under the Commerce and Supremacy Clauses, Congress may preempt state law governing a specific activity, or the states may choose to regulate that specific activity according to federal standards.[362] Alternatively, under GLBA section 505(c), Congress offers the states a choice between regulating privacy of customers' financial information according to Title V standards, or having the federal banking agencies' insurance customer protection regulations preempt weaker state laws in that field.

Section 505(c) requires states to decide either to regulate one activ-

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358. *See New York*, 505 U.S. at 166 (citing *Fed. Energy Regulatory Comm'n.*, 456 U.S. at 762-66; *Hode*, 452 U.S. at 288-89).

359. *See id.*

360. *See id.*

361. *See id.* at 167, 173-74 (citing *Hodel*, 452 U.S. at 288). In Rachel F. Preiser, *Staking Out the Border Between Commandeering and Conditional Preemption: Is the Driver's Privacy Protection Act Constitutional Under the Tenth Amendment?*, 98 MICH. L. REV. 514 (1999), the author noted that:

> Some courts have read too narrowly *New York*'s exemption from its anti-commandeering imperative and, as a result, have understood that exemption as applying exclusively to laws that preempt State regulation of private parties. This error derives from a misreading of the *New York* Court's Statement that 'where Congress has the authority to regulate private activity under the Commerce Clause, we have recognized Congress' power to offer States the choice of regulating that activity according to Federal standards or having State law preempted by Federal regulation.' Although this pronouncement is concerned with laws that regulate private parties, it does not suggest, as some courts have inferred, that Federal preemption of State law is only permissible with regard to regulation of private activity.

Id. at 535.

362. *See New York*, 505 U.S. at 173-74.

ity (privacy) according to one federal standard, or have state law regulating a different activity (insurance customer protections) preempted by a different federal regulation altogether. Even so, the *New York* Court's reasoning applies to this scenario as well; section 505(c) merely extends the Court's holding in *New York* to its next logical step. Thus, through the section 505(c) mechanism, Congress uses its constitutional preemption power to encourage the states to adopt regulations consistent with federal interests. That Congress is using its preemption power over one area of state law to influence the state's policy choices in another area entirely is irrelevant; the section 505(c) mechanism does not defeat state sovereignty preserved by the Tenth Amendment.

As aforementioned, enacting the FDIA, as well as prescribing legislation that specifically relates to the business of insurance, like FDIA section 47, falls well within Congress' constitutional powers to borrow money, levy and collect taxes, pay public debts, raise and support armies, declare and conduct war and regulate commerce.[363] Thus, when acting within its constitutional limits, Congress may preempt state law.[364] As such, under the McCarran-Ferguson Act, Congress has the power to preempt state insurance law completely, if the federal law specifically relates to the business of insurance.[365]

Therefore, in enacting FDIA section 47, Congress could have preempted all state insurance customer protection regulations.[366] However, "out of deference to state authority, Congress . . . adopted a less intrusive scheme and allowed the states to continue regulating in the area" of insurance customer protections.[367] Section 505(c) does not impair the states' continued ability to function in the federal system. Instead, it provides the states with a mechanism for preserving their historic regulatory role in the field of insurance regulation, despite the fact that this field of law is subject to potential federal preemption.[368]

363. *See supra* note 270 and accompanying text.

364. *See New York*, 505 U.S. at 175-76.

365. 15 U.S.C. § 1011 (1994). *See generally Fed. Energy Regulatory Comm'n.*, 456 U.S. 742 (1982) (discussing Congress' general preemption authority).

366. *See id.* at 765 (discussing *Hodel*, 452 U.S. at 264). In *Fed. Energy Regulatory Comm'n.* the statute at issue was the Public Utility Regulatory Policies Act of 1978 Pub. L. 95-617, 92 STAT. 3117 (hereinafter "PURPA"). Titles III and V of PURPA conditioned continued state involvement in a field subject to potential preemption upon the states' *consideration* of federal proposals. *See id.* at 766. Thus, although PUPRA required the states only to consider suggested federal standards, GLBA requires states to actually enact regulations carrying out Title V, or else lose their ability to enter such a field. *Fed. Energy Regulatory Comm'n.*, however, did not condition constitutionality on the fact that states consider, rather than actually enact, suggested federal standards. *See id.* at 765, 771. Thus, the constitutional analysis in Part V merely carries the Court's holding in *Fed. Energy Regulatory Comm'n.* to its next logical step.

367. *Id.* at 765.

368. *See id.* at 766.

As such, section 505(c) does not present the states with two unconstitutionally coercive regulatory techniques "simply because Congress chose to allow the states a regulatory role" in FDIA section 47.[369] Granted, Congress cannot command state governments to enact regulations carrying out Title V.[370] However, if states fail to adopt regulations to carry out Title V, Congress may threaten to exercise its Supremacy Clause power to preempt state insurance customer protection regulations: "the Constitution instead gives Congress the authority to regulate matters directly and to pre-empt contrary state regulation."[371] Thus, Congress has constitutional authority to offer the states a choice between them.[372]

Section 505(c) constitutionally allows the states to either regulate the insurance industry's disclosure of nonpublic personal information according to the federal standards in Title V, or to refuse such standards and lose the right to override federal regulations governing a depository institution's insurance customer protections. In prescribing this mechanism, Congress is neither compelling the states to adopt regulations carrying out Title V, nor circumventing that prohibition by commanding the state insurance authorities to adopt such regulations. At all times, the choice to adopt regulations carrying out Title V remains not with Congress, but rather with the states.

Understandably, states face a difficult choice of either (1) refusing to adopt regulations to carry out Title V and abandoning the freedom to override the federal banking agencies' insurance customer protections or (2) adopting such regulations.[373] However, valid federal enactments, like FDIA section 47, can affect state policy or motivate state action in areas otherwise beyond Congress' regulatory authority without violating Tenth Amendment principles.[374]

5. Privacy and the Commerce Clause

As the Supreme Court held in *New York*, although Congress has power to govern in areas of intimate state concern, Congress cannot, under the Constitution, require states to govern according to its instructions.[375] As an example of Congress' power to regulate such areas, in

369. *Id.* at 764 (quoting *Hodel*, 452 U.S. at 290).

370. *See New York*, 505 U.S. at 175-76.

371. *Id.* at 178.

372. *See id.* at 176; *see also* Preiser, *supra* note 361, at 520 ("The *New York* and *Printz* Courts acknowledge that Federal laws that preempt State regulation, or conditionally preempt it by allowing States to choose between preemption and implementation of Federal regulations, also escape the problems posed by commandeering.")

373. *See* Federal Energy Regulatory Comm'n. v. Mississippi, 456 U.S. 742, 766 (1982).

374. *See id.*

375. *See New York*, 505 U.S. at 162, 177-80.

Condon, the Court upheld the DDPA as a constitutional exercise of Congress' authority under the Commerce Clause.[376] Specifically, the Court held that personal, identifying information is a "thin[g] in interstate commerce," thus agreeing that Congress, via the DDPA, could regulate the sale or release of personal, identifying information in interstate commerce.[377] To support its holding, the Court further stated that (1) insurers, manufacturers, direct marketers, and others engaging in interstate commerce use motor vehicle information to solicit drivers, and (2) various public and private entities use this information in interstate commerce for matters connected to interstate motoring.[378] Thus, since the driver's information is an article of commerce, selling or releasing the information into the "interstate stream of business" sufficiently supports Congress' regulatory authority under the Commerce Clause.[379]

Even though Congress, in Title V, did not choose to regulate the insurance industry's disclosure of nonpublic personal information directly, the *Condon* holding supports the proposition that such direct regulation falls within Congress' power to regulate interstate commerce. Under the Court's reasoning in *Condon*, nonpublic personal information of a financial institution's customers is also a part of interstate commerce. Financial institutions sell customers' private information to marketing companies which in turn use the information in the stream of interstate commerce.[380] Thus, Congress could regulate the sale or release of an insurance customer's nonpublic personal information in interstate commerce. Such federal legislation, specifically related to the business of insurance, is consistent with the McCarran-Ferguson Act's preemption standard.[381] However, apparently out of respect for the historic role of the state as regulator of the insurance industry, Congress chose not to pursue this constitutionally available option.

376. *See* Reno v. Condon, 120 S.Ct. 666, 671 (2000). For a detailed review of the Commerce Clause's history, see United States v. Lopez, 514 U.S. 549, 552-57 (1995). For the most recent Supreme Court Commerce Clause analysis of Congressional legislation, see United States v. Morrison, 120 S.Ct. 1740 (2000) (holding unconstitutional 42 U.S.C. § 13981, the Federal civil remedy provision of the Violence Against Women Act of 1994).

377. *See Condon*, 120 S.Ct. at 671 (quoting *Lopez*, 514 U.S. at 558-59). The DDPA defines "personal information" as "information that identifies an individual, including an individual's photograph, social security number, driver identification number, name, address (but not the five-digit zip code), telephone number, and medical or disability information, but does not include information on vehicular accidents, violations, and driver's status." 18 U.S.C. § 2725(3) (1994).

378. *See Condon*, 120 S.Ct. at 671.

379. *Id.*

380. *See* Dugas, *Banks Sell Your Secrets supra* note 2.

381. *See supra* Part II.

CONCLUSION

The GLBA will not do much to pacify those consumers who were shocked to discover that banks do in fact "sell their secrets."[382] At first glance, however, Title V makes some major strides in the area of financial privacy. Financial institutions now have an affirmative and continuing obligation to respect their customers' privacy.[383] Once merely optional, Title V now requires financial institutions to develop privacy policies.[384] In addition, financial institutions must disclose their policies to consumers, giving them an opportunity to opt out of information sharing with nonaffiliated third parties.[385] Significantly, states may enact privacy laws that are tougher than the federal standard without fear of preemption.[386] Thus, Title V is packaged to sell.

However, no matter how fancy the packaging, a defective product is still a defective product. Upon closer examination, Title V is riddled with loopholes and exceptions that severely weaken, if not paralyze, the consumers' power to opt out of information sharing between financial institutions and nonaffiliated third parties. In fact, the GLBA does not restrict financial institutions' freedom to share such information with their affiliates. Significantly, although section 507 gives states the power to enact tougher privacy laws, section 104 and the FCRA significantly restrict that power. Therefore, as far as consumers are concerned, the net result of the GLBA is glorified notice.[387]

When President Clinton signed the GLBA into law, he pressed for even greater privacy protections in the future. In doing so, he raised an important question concerning the constitutionality of the GLBA's current privacy provisions.[388] Thus, seizing upon the President's question, this writer confirms the President's tentative answer. Congress may constitutionally condition the states' freedom to override insurance customer protection regulations on their decision to adopt Title V privacy regulations. Rather than using coercive tactics, Congress, through the section 505(c) mechanism, has provided the states with a constitutionally permissible incentive to adopt the Title V privacy provisions.[389] Although the GLBA financial privacy mechanism is constitutional, such

382. See Dugas, *Banks Sell Your Secrets supra* note 2; *see, e.g.*, Barnett, *supra* note 5 ("This is a burgeoning policy issue, and to think that it isn't is to be catastrophically naïve.")

383. *See generally Griffin*, supra note 6 (defending the GLBA's privacy provisions).

384. *See id.*

385. *See id.*

386. *See id.*

387. *See generally* Krebs, *supra* note 205 (analyzing the pros and cons of GLBA's privacy provisions).

388. *See* Statement by the President, *supra* note 8.

389. *See* Printz v. United States, 521 U.S. 898, 929 (1997) (reiterating the Court's holding in Fed. Energy Regulatory Comm'n. that "the statutory provisions at issue . . . did *not* commandeer

an academic declaration does not remedy the inherent flaws embedded in the GLBA's regulatory structure. Hopefully, this time it will not take Congress sixty-six years to overhaul a malfunctioning system.

state government, but merely imposed preconditions to continued state regulation of an otherwise pre-empted field . . .").