STATE AND FEDERAL LAW INTERPLAY UNDER GRAMM-LEACH-BLILEY ACT

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By

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I. BACKGROUND

A. Introduction

On November 12, 1999, President Clinton signed into law S.900, the "Gramm-Leach-Bliley Act," P.L. 106-102 (113 Stat. 1338), a measure widely viewed as the most significant single piece of legislation to affect the financial services industry in decades. The Act is the product of multiple architects and it reflects the policy views of many competing, and often conflicting, political and business constituencies. As a result, it contains a number of compromises. Its impact on the structure of the industry will be significant.

The Act leaves intact a number of the laws upon which existing bank insurance businesses have been built, providing banks with a host of alternatives as to how to structure insurance sales.

Some central themes of the Act are:

- eliminating obsolete barriers in the United States to the development of affiliations, whether *de novo* or by acquisition, among representatives of different sectors of the financial services industry, so that now commercial banks, securities firms and insurance companies may acquire and be acquired by one another;

- limiting access to these new opportunities to organizations which are well capitalized and well managed and which perform at least satisfactorily under the Community Reinvestment Act;

- opting for a "functional" regulatory approach, meaning that each industry segment of a multi-industry organization will be regulated by the agency charged by law with the regulation of (and therefore presumably the most expert in) that industry;

- affording flexibility (within limits) to the regulated organization as to whether a new competitive opportunity can best be exploited at the holding company level or the level of the operating institution;

- establishing new regulatory mechanisms designed to encourage consultation and cooperation, rather than confrontation and "turf protection," among the various

federal and state agencies charged with the regulation of these evolving multi-industry organizations; and

- in general, fostering increased competition in the financial services industry within a broad framework of transparency and consumer protection.

The Act also addresses the widely felt need to increase privacy protection in the collection and use of customer information; criminalizes “pretextual” access by unauthorized persons to customer data; forecloses the future development of “diversified” unitary savings and loan holding companies; modernizes the structure, operations and capital base of the Federal Home Loan Bank System; and imposes disclosure and reporting requirements on certain agreements between community groups and depository institutions subject to the Community Reinvestment Act and their affiliates and on the use of such groups’ funds.

II. FINANCIAL SERVICES AFFILIATIONS

A. Title I of the Act repeals Sections 20 and 32 of the Banking Act of 1933 (the Glass-Steagall Act) which prohibited affiliations between banks and firms principally engaged in underwriting and dealing in securities and which generally barred officer and director interlocks between member banks and such firms.

B. New Section 4(k) is added to the Bank Holding Company Act of 1956 (the BHCA), which expands, and provides the framework for further regulatory expansion of, the activities permitted to be conducted by bank holding companies and their subsidiaries.

C. Financial Holding Companies

1. Under the new standard, a bank holding company (which generally includes foreign banking organizations with branches, agencies or commercial lending subsidiaries in the United States) filing an election to be treated as a “financial holding company” (an FHC) may engage in any activity, and may acquire shares of any company engaged in any activity, that the Board of Governors of the Federal Reserve System (the Board) determines (by regulation or order) to be either (i) financial in nature or incidental to such financial activity or (ii) complementary to a financial activity and not to pose a substantial risk to the safety or soundness of depository institutions or the financial system generally.

2. The Act identifies some specific activities which are determined *per se* to meet this test and prescribes a consultative process, involving the shared input of

both the Board and the Office of the Comptroller of the Currency (OCC), for the future definition of activities determined to meet the test.

3. New Section 4(k)(4) of the BHCA identifies a laundry list of specific additional activities deemed "financial in nature" for these purposes. Qualifying FHCs may engage in such activities without regulatory approval (except with regard to acquiring a savings association under existing authority), provided notice is given to the Board within 30 days after the activity is commenced. The listed activities include:

   (a) lending, exchanging, transferring, investing for others, or safeguarding money or securities;

   (b) insuring, guaranteeing and indemnifying against loss, as principal, agent or broker;

   (c) providing financial, investment or economic advisory services, including advising investment companies;

   (d) issuing and selling instruments representing interests in pools of assets permissible for a bank to hold directly;

   (e) securities underwriting, dealing and market making;

   (f) engaging in activities which have heretofore been determined to meet the "closely related" and "proper incident" tests under Section 4(c)(8) of the Act;

   (g) engaging in activities in the United States which the Board has previously authorized bank holding companies and their subsidiaries to conduct abroad under Section 4(c)(13);

   (h) certain "merchant banking" activities (discussed below); and

   (i) certain "insurance company portfolio investment" activities (discussed below).

(4) Certain merchant banking and insurance company portfolio activities, consisting of acquiring shares, assets or ownership interests in a company or other entity, whether or not constituting control, are also permitted if (i) the holding is not situated in a depository institution or subsidiary thereof but instead is in the

holding company or a non-bank subsidiary; (ii) the acquisition, in the case of merchant banking activities, must be made by a securities affiliate or an investment advisory affiliate of an insurance company, in either case as part of a *bona fide* underwriting, merchant banking or investment banking activity (including acquisitions for purposes of appreciation and resale); (iii) the acquisition, in the case of insurance company portfolio activities, must be made by and insurance company (other than one engaged only in credit-related insurance) in the ordinary course of its business in accordance with relevant state insurance law; (iv) the holding (in the case of merchant banking) is only for a period of time needed to enable sale or disposition on a reasonable basis; and (v) during the period of the holding the bank holding company does not engage in routine management or operation of the company or entity. After five years, the Board and the OCC may by joint rulemaking sunset the condition in clause (i) with regard to merchant banking.

(5) The Act directs the Board to define (on a basis to be prescribed by the Board) certain additional activities as "financial in nature." These include (x) the expansion of activity (i) above (lending, exchanging, etc.) to financial assets other than money or securities (*e.g.,* commodities); (y) providing any device or other instrumentality for transferring money or other financial assets; and (z) arranging, effecting or facilitating financial transactions for third parties.

(6) Conditions Precedent to New Activities

(a) A bank holding company cannot engage in the additional activities permitted to FHCs unless all of its depository institution subsidiaries are "well capitalized" and "well managed" based upon defined examination standards.

(b) The right to commence, or acquire control of a company engaged in, any of the new activities is conditioned upon the receipt by all of the holding company's depository institution subsidiaries of a "satisfactory" or better Community Reinvestment Act (CRA) rating in their most recent examinations.

(c) The Act creates a "basket" clause for certain non-conforming (but lawful) activities of a company which is not now a bank holding company or foreign bank, but hereafter becomes one (*e.g.,* an insurance company or brokerage firm acquiring a bank under the new authority), to retain the existing non-conforming activities (*i.e.,* activities not "financial" in the context of Section 4(k)) if less than 15% of

consolidated gross revenues (subsidiary depository institution revenues excluded) are derived from them.

(d) The grandfather privilege eventually sunsets and in the meantime entails, among others, restrictions on expansion of non-conforming activities through mergers, etc. and certain cross-marketing restrictions. There are other grandfather provisions, similarly conditioned, which permit the continuation of certain lawful commodities-related holdings and activities in the United States held as of September 30, 1997 if the assets in question do not exceed 5% of total consolidated assets of the bank holding company.

D. Harmonizing State Regulation

1. The Act contains detailed provisions reconciling traditional state regulation of entities such as insurance companies with the new federally granted powers.

2. It reaffirms the principle that persons engaging in the insurance business as principal or agent must be licensed under state law.

3. It prohibits the states from preventing or restricting a depository institution or affiliate from being affiliated with any person in any manner permitted by federal law (including the Act) or preventing or significantly restricting a depository institution or affiliate from engaging in any insurance sales, solicitation or cross-marketing activities.

4. Nonetheless, the Act provides as safe harbors a detailed set of thirteen provisions (see below) which can be enacted by the states free of the *Barnett* test.

5. State laws falling outside the safe harbors and enacted prior to September 3, 1998 are subject to the Supreme Court's "prevent or significantly interfere with" test contained in the *Barnett* decision.

6. State laws falling outside the safe harbors and adopted after September 3, 1998 will be evaluated under the new nondiscrimination test. The test would prohibit states from adopting any law which:

(a) Distinguishes by its terms between depository institutions, or their affiliates, and other persons engaged in insurance activities, in a manner that is in any way adverse to the institution or its affiliates (e.g., a state

may not expressly prohibit banks from selling insurance over the Internet while permitting nonbanks to do so);

(b) As interpreted or applied, has an impact on a depository institution or affiliate that is “substantially more adverse” than its impact on a nonbank providing the same products or engaged in the same activities (e.g., a state may not prohibit “any lender” -- whether or not a depository institution -- from selling insurance products over the Internet while permitting nonlenders to do so);

(c) Effectively prevents a depository institution or an affiliate from engaging in permissible insurance activities (e.g., a state may not require that a corporation be exclusively engaged in insurance activities in order to be licensed as an insurance agency); or

(d) Conflicts with the intent of the Act to permit affiliations between depository institutions and persons engaged in the business of insurance.

7. The thirteen safe harbors relating to sales, solicitation and cross-marketing activities include:

(a) Restrictions prohibiting the rejection of an insurance policy by a depository institution or an affiliate solely because the policy has been issued or underwritten by an unaffiliated entity.

(b) Restrictions prohibiting a requirement that any debtor or unaffiliated insurer or agent pay a separate charge in connection with the handling of insurance required in connection with a loan, extension of credit or other traditional bank product or service unless the same charge would be required of an affiliated insurer or agent.

(c) Restrictions prohibiting the use of any advertisement or other insurance promotional material by a depository institution or an affiliate that would cause a reasonable person to believe mistakenly that any government entity is responsible for, stands behind or guarantees any insurance product sold by the institution or affiliate.

(d) Restrictions prohibiting the payment or receipt of any commission or brokerage fee or other valuable consideration to any unlicensed person. Referral fees may be paid to an unlicensed person so long as the

referral does not include a discussion of specific insurance policy terms or conditions.

(e) Restrictions prohibiting any compensation paid to or received by an unlicensed individual for a referral, based on the purchase of insurance by the customer (i.e., compensation to unlicensed persons may not be in the form of a commission).

(f) Restrictions prohibiting the release of a customer's "insurance information" (including the premiums, terms and conditions of coverage, including expiration dates, rates and claims history) to any unaffiliated person or entity without the express consent of the customer. Notably, unlike the privacy provisions contained later in the Act, this consent procedure adopts an "opt-in" model for customer consent -- i.e., requiring depository institutions and their affiliates to seek the affirmative consent of customers to engage in such information sharing.

(g) Restrictions prohibiting the use of health information obtained from the insurance records of a customer for any purpose, other than for activities as a licensed agent or broker, with the express consent of the customer. This provision also requires customers to "opt in."

(h) Restrictions prohibiting the extension of credit or provision of any product or service on the condition or requirement that the customer obtain insurance from a depository institution or an affiliate, or a particular insurer or agent. This provision essentially restates the requirements of the anti-tying provisions of section 106 of the BHC Act. The provision expressly recognizes that a depository institution may require that loan recipients obtain insurance, and may provide loan customers with such insurance; they simply may not require that the customer purchase the policy from a particular provider.

(i) Restrictions requiring depository institutions to provide customers with "free choice" disclosures when loans are pending -- i.e., notice that the customer's choice of insurance provider will not affect the loan decision process. The depository institution may, however, impose reasonable requirements concerning the creditworthiness of the insurer and the scope of the coverage chosen.

(j) Restrictions requiring clear and conspicuous disclosures that insurance policies sold by a bank or an affiliate are (a) not deposits; (b) not FDIC

insured; (c) not guaranteed by the depository institution or an affiliate; and (d) where appropriate, involves investment risk, including potential loss of principal.

(k) Restrictions requiring that when a customer obtains insurance (other than credit or flood insurance) and credit from depository institution or an affiliate, the credit and insurance transactions be completed through separate documents.

(l) Restrictions requiring that when a customer obtains insurance (other than credit or flood insurance) and credit from a depository institution or an affiliate, inclusion of the expense of insurance premiums in the primary credit transactions cannot occur without the express written consent of the customer.

(m) Restrictions requiring maintenance of separate and distinct books and records relating to insurance transactions and requiring that such insurance books and records be made available to the appropriate State insurance regulator for inspection upon reasonable terms.

E. National Bank Subsidiaries

1. The Act expands the permissible powers of national bank subsidiaries in a manner similar to that for holding companies. Assuming the bank and all of its depository institution affiliates meet the well-capitalized, well-managed and CRA-satisfactory tests referred to above, a subsidiary of an eligible national bank, in addition to its present ability to engage in activities permissible for the bank itself and certain other activities (*e.g.,* Edge Act subsidiaries) authorized by specific statutes, may, with OCC approval, engage in any activities that are, or are incidental to activities that are, financial in nature as have been determined by the Board for FHC purposes or as are determined by the OCC in consultation and coordination with the Board.

2. A national bank subsidiary may <u>not</u> engage as principal in insurance underwriting, annuity issuance, insurance company portfolio investment activities, real estate investment or development activities generally or (at least for the first five years) merchant banking activities.

3. A national bank is eligible to have such expanded-power subsidiaries (termed “Financial Subsidiaries”) if (i) the aggregate consolidated total assets of all of its financial subsidiaries do not exceed the lesser of 45% of the parent bank’s

consolidated total assets or $50 billion (to be indexed); and (ii) when the Financial Subsidiary proposes to engage in the activity or activities as principal, the parent bank is one of the 100-largest insured banks and has at least one outstanding issue of debt securities currently rated within the three-highest investment grade rating categories. (For banks ranked 51-100 in size, the OCC and the Board may establish an alternative standard for those lacking a qualifying rated debt issue outstanding.)

4. The parent national bank for capital adequacy measurement purposes must deduct from its assets and tangible equity (essentially write off) its investment in all of its Financial Subsidiaries (including retained earnings) and may not consolidate with its assets and liabilities those of its Financial Subsidiaries.

5. Affiliate Restrictions

   (a) Sections 23A and 23B of the Federal Reserve Act restrict certain credit, asset purchase and other transactions between a bank (or subsidiary thereof) and an affiliate of the bank under a scheme designed to protect the federally insured depository institution. Subsidiaries of the bank itself have historically been exempted from these restrictions on their dealings with the bank because their subsidiary status generally obviates the affiliate risks Sections 23A and 23B were designed to control. The Act amends Sections 23A and 23B to essentially reverse this structure in the case of bank Financial Subsidiaries. Thus, transactions between a bank and one of its Financial Subsidiaries are subjected to the restrictions of Sections 23A and 23B, and, conversely, transactions between a bank Financial Subsidiary and a holding company affiliate of the parent bank are not subject to such restrictions.

6. What becomes of the “operating subsidiary” developed by the OCC in reliance upon authority found in 12 U.S.C. § 24 (Seventh) and as contained in regulations (12 C.F.R. § 5.34)? The Conference Report on the legislation expresses an intent that the Act supersede and replace the regulations, but there is no repeal of this authority in the bill, so the “op sub” may remain a viable choice for a national bank as a place to conduct activities permissible for a national bank. Section 92 of the National Bank Act, a 1916 statute which contains the “Place of 5,000" restriction, has been left intact, leaving this restriction applicable to national banks choosing to sell insurance directly or through the op sub.

F. State Chartered Banks

1. The Act adds a new Section 46 to the Federal Deposit Insurance Act essentially to conform the treatment of Financial Subsidiaries of FDIC-insured state chartered banks (insofar as federal law is concerned) to that described above as applicable in the case of national banks.

G. Federal Savings Banks

1. Federal savings banks continue to face unique restrictions under federal law with respect to the sale of annuities and insurance products not applicable to national or FDIC-insured state chartered banks. The OTS presently permits federal savings banks to engage directly only in the sale of fixed annuities and credit-related insurance (OTS Op. Acting Ch. Counsel., Oct. 17, 1994). The OTS has not yet opined on whether federal savings banks may sell variable annuities directly.[1/] A federal savings bank may sell variable and fixed annuities, as well as all lines of insurance, through a service corporation subsidiary (12 C.F.R. 559.4(f)(3)). A "service corporation" is defined as an entity organized under the laws of a state where a federal savings association's home office is located, owned by a savings association in with a home office in that state, and engaged in certain pre-approved activities listed in §§ 559.3(e)(2) and 559.4 of the OTS regulations (12 C.F.R. 559.2). Service corporations may branch into additional states and engage in sales of annuities and insurance products without geographic limitation, subject to state law considerations. Such corporations, however, in addition to being organized under the laws of the home state of the federal savings bank, are subject to various investment limitations under OTS regulations.

1/ Informal discussions with OTS staff indicate that the agency has not been asked to render an opinion regarding direct sales of variable annuities by federal savings banks, but would be willing to entertain such a request. However, for numerous practical reasons involving the securities laws and registration and capitalization requirements, this avenue for annuities sales appears to be uninviting.

III. IMPLICATIONS FOR THE BANKING AND INSURANCE INDUSTRIES

A. Continuation of State Regulation

1. The Act reaffirms the McCarran-Ferguson Act[2/], which recognizes the states' prerogative to regulate the business of insurance. States may continue to regulate changes in ownership of stock in an insurance company, provided that doing so does not lead to discriminatory results and provided also that, in the case of a proposed acquisition by an FHC, the state regulatory review period (which typically takes six months or more) is limited to 60 days.

2. The Act leaves undisturbed (subject, in some instances, to the *Barnett* standard and a nondiscrimination standard) the states' authority to regulate deceptive advertising, fee structures of insurance agents and the conditions under which customer information may be released to third parties.

3. The Act seeks to achieve shared federal and state responsibility for the regulation of insurance. Titles I and III of the Act also potentially set the stage for a series of state legislative initiatives involving the 13 "safe harbor" restrictions sanctioned by the Act. These restrictions, or "restrictions that are substantially the same as but no more burdensome or restrictive than" these restrictions, may be applied to banks free of the *Barnett Bank* "prevent or significantly interfere with" standard.

4. These 13 restrictions all relate to the manner in which banks are able to sell insurance products, from advertising, payment of commissions or fees and release of insurance information through requirements as to disclosures, acknowledgments and maintenance of separate books and records. *See* the thirteen safe harbors listed above. Section 104 of the Act (Operation of Sate Law) becomes effective immediately.

B. Other Provisions Affecting Bank Sales of Insurance

2/ The McCarran-Ferguson Act (15 U.S.C. § 1012(b)) proclaims 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, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance." Therefore, under the McCarran-Ferguson Act a state statute that regulates insurance presumptively preempts a contrary congressional statute unless the congressional statute specifically relates to insurance.

1. Federal banking agencies are charged with implementing a set of federal consumer protection regulations mandated to be in place within a year of the Act's passage. These regulations will 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. These regulations must address sales practices, disclosures and advertising, and separation of banking and nonbanking activities and must establish a consumer complaint mechanism for "receiving and expeditiously addressing consumer complaints alleging a violation of" such new regulations.

2. When federal regulations are inconsistent with state regulations, the federal guidance takes precedence only when federal regulators have jointly concluded that the federal protection is greater than that which the state has afforded.

3. This provision makes uniformity of regulation of banks' sales of insurance products, at least over the short term, a difficult goal to achieve.

4. Section 121 of the Act authorizes the conduct of insurance sales as agent in a bank subsidiary, free of "Place of 5,000" limitations.

5. Other important provisions which will impact a bank's ability to sell insurance include new litigation procedures and standards which will apply to disputes between federal banking and state insurance regulators.

   (a) In case of a regulatory conflict between a state insurance regulator and a federal regulator regarding insurance issues (including whether a state law, rule, regulation, order, or interpretation regarding any insurance sales or solicitation activity is properly treated as preempted under federal law), either regulator may seek "expedited judicial review" of such determination by a United States Court of Appeals for the circuit in which the State is located or in U.S. Court of Appeals for the District of Columbia Circuit.

   (b) The standard of review for the court is essentially a *de novo* review on the merits of all questions presented under state and federal law, including the nature of the product or activity and the history and purpose of its regulation "without unequal deference." (Section 304.)

   (c) While the court is instructed in the Act to complete its review of such a petition within sixty (60) days of filing, the appetite of an appellate court

for cases of this nature, as well as the practical import of such Congressional instruction is open to question.

C. Redomestication of Mutual Insurers

1. Title III of the Act allows a mutual insurance company whose domiciliary state does not permit conversion to the mutual holding company form to redomesticate to a jurisdiction whose state laws do allow that form of demutualization. The stock insurer may be positioned as either an indirect or a direct subsidiary of the newly formed mutual holding company.

2. To sanction such redomestication, the insurance regulator in the new domicile must determine that the mutual insurer's plan of reorganization complies with certain specified requirements, including the receipt of approval of the reorganization plan from a majority of the insurer's board of directors and policy holders.

D. Insurance Agents' Licensing Requirements

1. The Act lays the foundation for the establishment of a uniform system for the licensing of insurance agents through the creation of a private entity to be called the National Association of Registered Agents and Brokers (NARAB), which is to be managed by state insurance regulators.

2. NARAB will come into existence only if a majority of the states fail to establish, within a three-year period, uniform or reciprocal licensing provisions as determined by the National Association of Insurance Commissioners (NAIC).

3. Once it has made a determination that the states have failed in this respect, the NAIC must establish NARAB within two years thereafter. If it does not, NAIC will lose its mandate to the President, who would then appoint NARAB's board with the advice and consent of the Senate.

4. If established, NARAB's membership would be voluntary. NARAB would have the authority to receive and investigate consumer complaints and to inspect records.

5. In appropriate cases, NARAB would refer complaints against a member company to the applicable state insurance regulators for possible disciplinary action.

IV. PRIVACY PROVISIONS (TITLE V)

A. Who's Covered?

1. The privacy provisions in the Act (Title V, Subtitle A) apply to a "financial institution" which includes any institution the business of which is engaging in the laundry list of financial activities described in new Section 4(k) of the BHCA, which include the activities of banks, broker-dealers, investment advisers, investment companies, insurance companies and other forms of financial institutions.

B. What's Covered?

1. The category of information being protected ("nonpublic personal information") is quite broad and includes any personally identifiable financial information provided by a consumer to a financial institution resulting from any transaction with the consumer or any service performed for the consumer or otherwise obtained by the financial institution.

2. Section 502(e) of the Act states certain exceptions from this protection, including information being provided to a consumer reporting agency in accordance with the Fair Credit Reporting Act ("FCRA"), or in a consumer report reported by a consumer reporting agency. The Act does not prohibit the disclosure of nonpublic personal information in the following circumstances:

(a) when requested/authorized by the consumer, or in connection with (i) servicing or processing a financial product or service requested or authorized by the consumer; (ii) maintaining or servicing the consumer's account with the financial institution or with another entity as part of a private label credit card program or other extension of credit on behalf of such entity; or (iii) a proposed or actual securitization, secondary market sale (including sales of servicing rights), or similar transaction related to a transaction of the consumer;

(b) with the consent/direction of the consumer;

(c) to protect security of records, to protect against fraud;

(d) to provide information to insurance rate organizations, guaranteeing funds, bank ratings agencies, auditors, attorneys, accountants;

(e) involving government, state/federal regulators; law enforcement;

(f) to a consumer reporting agency in accordance with FCRA, or from a consumer report reported by a consumer reporting agency;

(g) in connection with the sale, merger, transfer of business; and

(h) in compliance with Federal, State or local law or subpoena.

3. For these purposes, the term "consumer" has a standard definition: an individual who obtains from a financial institution financial products or services which are to be used primarily for personal, family or household purposes. The Act prohibits disclosure of such personal information by the financial institution to any nonaffiliated third party, unless the financial institution has provided a disclosure of its privacy policy to the consumer and also given the consumer the chance to "opt out" or to direct that such information not be disclosed to such third parties.

4. Only disclosures to non-affiliates are covered by the prohibition; Subtitle A of Title V does not prohibit disclosure by a financial institution to its affiliates. An "affiliate" is any company that controls, is controlled by, or is under common control with another company.

5. The restriction against disclosure also does not prevent a financial institution from providing nonpublic personal information to a nonaffiliated third party in order for that party to perform services for or to function on behalf of the financial institution, including marketing of the financial institution's own products or services, or financial products or services offered pursuant to joint agreements between two or more financial institutions (subject to regulatory restrictions to be developed), so long as the financial institution fully discloses to the consumer that the information is being provided and the third party agrees to maintain the confidentiality of such information.

C. What Do You Need To Do?

1. Provide a notice that accurately reflects the financial institution's privacy policies and practices prior to the time an individual establishes a customer relationship.

2. Provide an "opt out" notice to a consumer explaining their right to prohibit disclosure of nonpublic personal information to a nonaffiliated party.

3. No “opt out” notice is required if financial institution does not plan to disclose any nonpublic information.

D. When Is This Provision Effective?

1. Subtitle A of Title V will take effect six months after the regulations thereunder are promulgated. Regulations are supposed to be promulgated within six (6) months of passage of the Act.

E. What’s Next in Privacy?

1. Congressional proponents of more vigorous privacy protection (such as “opt in” customer permission before any sharing of information may occur) have already introduced legislation (H.R. 3320, H.R. 3321 and S. 1903) intended to readdress the privacy issue.

2. Privacy is also a hot topic in most state legislatures. Several states including Alabama, Alaska, Arizona, California, Colorado, Delaware, Georgia, Hawaii, Kansas, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, New Hampshire, New Jersey, New York, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia and Washington are considering privacy initiatives. The privacy provisions in Title V expressly allow the states to enact laws which afford greater protection to the consumer, even if such laws conflict with the scheme provided by the Act. Thus, the benefits of the more relaxed privacy provisions reflected in the Act may be limited and temporary.

3. FCRA may also affect the interplay between federal and state law on the privacy issue.

(a) The Act states that, with the exception of two amendments expressly being made to FCRA, nothing in the Act is “intended to modify, limit or supersede the operation of” FCRA.

(b) Unlike the Act, FCRA *does* contain a federal preemption provision which could be applied to state laws which seek to regulate information between affiliates, which is a type of information sharing which is specifically dealt with in FCRA

F. Pretext Calling

1. Subtitle B of Title V imposes criminal penalties and other sanctions against persons who engage in "pretext calling." This practice consists of making false statements or representations to financial institutions in order to obtain customer information. Subtitle B is effective immediately.

V. PREVIEW OF COMING ATTRACTIONS

A. Federal/state interplay

Will mergers and potential mergers between banks and insurers set the stage for less rancor (and litigation) between agents and banks? Will agents return to the State houses to introduce legislation seeking to take advantage of the "safe harbors" or privacy laws not applicable to independent agents but restrictive as to banks selling insurance? See Massachusetts Association of Insurance Agents' correspondence to Joint Committee on Banks and Banking, H-4994 (Attachment A). What are the chances for the implementation of some new scheme of national insurance law, considered a political non-starter by many?

B. The OCC's "financial subsidiary" regulations

How will the OCC implement the conditions and restrictions set forth in Sec. 121 of the Gramm-Leach-Bliley Act?

C. The OCC's "operating subsidiary" regulations

Will the OCC press forward with approval of activities of new operating subsidiaries under 12 C.F.R. § 5.34?

D. To what extent will Federal and State privacy laws and initiatives impact banks' and insurance companies' ability to data mine customer information and cross-market insurance and bank products?

E. How will the dispute resolution mechanisms contained in the new legislation work in reality?

ATTACHMENT A