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Financial Privacy Laws Affecting Sharing of Customer Information Among Affiliated Institutions

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Summary

The privacy provisions of the Gramm-Leach-Bliley Act of 1999 (P.L. 106-102) do not permit customers to preclude financial institutions from sharing nonpublic personal information with affiliated companies; they merely require companies to notify their customers of their practices of information sharing with affiliates. Until the Fair Credit Reporting Act (FCRA) was amended in 1996, sharing of such information with affiliates might have subjected a company to being regulated as a credit reporting agency. Under provisions added in 1996, 15 U.S.C. §§ 1681a(d)(2)(A)(ii) and (iii), which preempt inconsistent state law until January 1, 2004, companies have been permitted to share among their corporate family a broad range of data they have collected on their customers provided they have given the customers the opportunity to preclude, i.e., opt out of, the information sharing. After January 1, 2004, states may act to override this FCRA provision. While information sharing among affiliates would, thus, not automatically become impermissible on January 1, 2004, the possibility of enactment of state overrides on a piecemeal and inconsistent basis raises concerns among large nationwide conglomerates. This report provides an analysis of the current federal law and a brief description of state laws that appear to provide more consumer protection with respect to the issue of information sharing among affiliates. It will be updated to reflect action on major legislation.

Background. Although confidentiality standards for businesses dealing in consumer information have traditionally been a matter of state law, both the Fair Credit Reporting Act of 1970 (FCRA)¹ and the privacy title of the Gramm-Leach-Bliley Act of 1999 (GLBA)² have meant that federal law generally controls the dissemination of

¹ P.L. 91-508, tit. VI, §§ 601 et seq.; 88 *Stat.* 1521; 15 U.S.C. §§ 1681 - 1681u.

² P.L. 106-102, 113 *Stat.* 1338 (1999).

consumer credit information and governs the disclosing and safeguarding of nonpublic personal information held by a wide array of financial institutions.³

GLBA generally prohibits the disclosure of nonpublic personal information on a customer or consumer by financial institutions unless the consumer is given an opportunity to prevent disclosure, i.e., opt-out; but it contains no prohibition on sharing of customer information among affiliates. It requires each financial institution to notify customers of its privacy policies and practices including those related to information sharing with affiliates.⁴ FCRA prescribes standards that address information collected by businesses that provide information used to determine eligibility of consumers for credit, insurance, or employment. It imposes requirements for accuracy, limits purposes for which such information may be disseminated, allows certain rights for consumer access, and includes civil and criminal penalties for its violation. It generally defines “consumer reports” and limits the purposes and conditions under which “consumer reports” may be furnished by entities that it refers to and regulates as “consumer reporting agencies.”⁵

Apparently, in response to concern that information sharing among affiliated companies might be interpreted as providing consumer reports, thereby subjecting banks, insurance companies, and securities firms to all of the obligations imposed upon consumer reporting agencies under the FCRA,⁶ the FCRA was amended by the Consumer Credit Reporting Reform Act of 1996.⁷ Under these amendments,⁸ the FCRA’s definition of “consumer report” was amended to exclude communication of transaction and experience information among corporate affiliates and, – provided the consumer was afforded an opportunity to prevent it, i.e., opt out -- communication of other information

³ “Financial institution” is defined to mean “any institution the business of which is engaging in financial activities as defined under section 103 of GLBA, § 4k [12 U.S.C. §1843(k)] of the Bank Holding Company Act of 1956.” Essentially, these include banking, securities, and insurance activities as enumerated in GLBA and other activities found by the Board of Governors of the Federal Reserve Board, with the concurrence of the Secretary of the Treasury, either (1) to be financial in nature or (2) not posing a risk to the safety or soundness of depository institutions or the financial system generally and complementary to a financial activity. There are, however, exceptions for persons subject to regulation by the Commodity Futures Trading Commission under the Commodity Exchange Act, entities chartered under the Farm Credit Act of 1971, and entities engaged in secondary market operations as long as they do not transfer nonpublic personal information to a nonaffiliated third party.

⁴ 15 U.S.C. § 6803.

⁵ 15 U.S.C. § 1681b. See generally, CRS Report RL31666, *Fair Credit Reporting Act: Rights and Responsibilities*.

⁶ See, e.g., Joseph L. Seidel, “The Consumer Credit Reporting Reform Act: Information Sharing and Preemption,” 2 *North Carolina Banking Institute* 78, 82-83 (1998) (hereinafter, “Seidel”). L. Richard Fischer, Michel F. McEneny, and Clarke D. Camper, “Fair Credit Reporting Act Amendments: Compliance Issues for Banks,” 18 *ABA Bank Compliance* 7 (1997) (available in LEXIS, BANKNG Library, ARCNWS file).

⁷ P.L. 104-208, Div. A, Tit. II, Subtitle D, Ch. 1, § 2401 2422,2419, 110 *Stat.* 3009, 3009-396 to 3009 - 454.

⁸ P.L. 104-208, Div. A, Tit. II, Subtitle D, Ch. 1, § 2419, 110 *Stat.* 3009-452, adding 15 U.S.C. § 1618t(b)(2).

concerning the consumer among affiliates.⁹ Essentially, these provisions permit companies to share with their affiliates certain customer information respecting their transactions and experience with a customer without any notification requirements.¹⁰ Other information about their customers, such as credit reports and application information, may not be shared with other companies in the corporate family unless the customers are given “clear and conspicuous” notice about the sharing and an opportunity to direct that the information not be shared.¹¹

FCRA and GLBA Preemption Language. The FCRA preemption of state law regarding affiliate sharing of information is stated in terms of an exception to the rule¹² that the FCRA preempts state law only to the extent of the inconsistency. It reads:

No requirement or prohibition may be imposed under the laws of any State...(2) with respect to the exchange of information among persons affiliated by common ownership or common corporate control, except that this paragraph shall not apply with respect to subsection (a) or (c)(1) of section 2480e of title 9, Vermont Statutes Annotated (as in effect on September 30, 1999)....¹⁴

After January 1, 2004, states may override the FCRA authorization for interaffiliate sharing of customer information by enacting a provision of state law or of the state’s constitution that states explicitly that it is intended to supplement the FCRA provision and that provides greater protection to consumers than the FCRA provision provides.¹⁵ The legislative history of these amendments indicates a Congressional intent to establish a national standard for interaffiliate sharing of information pertinent to the consumer

⁹ 15 U.S.C. § 1681a(d)(2)(A).

¹⁰ 15 U.S.C. § 1681a(d)(2)(A)(ii). Notice is required under GLBA, 15 U.S.C. § 6803, which requires disclosure when the customer relationship is formed and annually thereafter of a financial institution’s privacy policies and practices, including those relating disclosures to affiliates.

¹¹ 15 U.S.C. § 1681a(d)(2) (A)(iii).

¹² The FCRA’s general preemption clause reads::

Except as provided in subsections (b) and (c) of this section, this subchapter does not annul, alter, affect, or exempt any person subject to the provisions of this subchapter from complying with the laws of any State with respect to the collection, distribution, or use of any information on consumers, except to the extent that those laws are inconsistent with any provision of this subchapter, and then only to the extent of the inconsistency.

15 U.S.C. § 1681t(a).

¹⁴ 15 U.S.C. § 1681t(2). The Vermont statute prohibits anyone from obtaining a consumer’s credit report without consent or a court order.

¹⁵ 15 U.S.C. § 1681t(d)(2). This specifies that the general exceptions (including that relating to sharing of information among affiliates) to the rule on preemption “do not apply to any provision of State law (including any provision of a State constitution) that—(A) is enacted after January 1, 2004; (B) states explicitly that the provision is intended to supplement this subchapter [15 U.S.C. §§ 1681 - 1671u, i.e., the FCRA]; and (C) gives greater protection to consumers than is provided under this subchapter.”

credit industry in the interest of “operational efficiency for industry ... and competitive prices for consumers” in the credit reporting and credit granting [industries that] are, in many aspects, national in scope.”¹⁶

GLBA’s prohibitions deal only with sharing of nonpublic personal information by financial institutions with nonaffiliated third parties. There is no direct authorization of sharing such information among affiliated financial institutions. In essence, therefore, GLBA indirectly authorizes interaffiliate sharing of information by a provision disavowing an intent to supercede the FCRA.¹⁷ It, therefore, preserves the conditions placed upon interaffiliate sharing of information in the FCRA: (1) that information other than experience or transaction information may be shared only upon providing customers an opportunity to opt-out; and (2) state laws may not preempt until January 1, 2004, and, then, only upon specified conditions. This preservation of the FCRA runs counter to GLBA’s general preemption provision under which GLBA preempts state laws only to the extent that they provide less protection than GLBA.¹⁸ Whether or not a state law provides more protection than GLBA and is not preempted, however, must be determined by the Federal Trade Commission (FTC).¹⁹

Generally, state laws that provide more protection than GLBA, e.g., that require a specific form of notice respecting an institution’s privacy policy, for example, would not automatically be enforceable, without an FTC determination as required under GLBA.²⁰ That would not appear to be true for a state law limiting interaffiliate information sharing, provided that it is enacted after January 1, 2004, and otherwise meets requirements specified in the FCRA.²¹ Such state laws would appear to be covered by the GLBA provision specifying that “nothing [subject to unrelated exceptions] in this chapter shall be construed to modify, limit or supersede the operation of the Fair Credit Reporting Act.”²²

Current State Laws and Legislative Activity. Since enactment of GLBA, there has been considerable activity in state legislatures on financial privacy issues, particularly in terms of making reference to the changes wrought by GLBA. Some states have laws that are more protective of consumer privacy. For example, at least four states, Alaska,²³

¹⁶ See S. Rep. 104-185, 104th Cong., 1st Sess. (1995), reporting on S. 650 in the 104th Congress, the immediate predecessor of the legislation enacted in 1996. The time limitation derived from a manager’s amendment offered by Senator Bryan in an earlier Congress. 140 *Cong. Rec.* S5027 (May 3, 1993 daily ed.).

¹⁷ 15 U.S.C. § 6806.

¹⁸ 15 U.S.C. § 6807.

¹⁹ 15 U.S.C. § 6807(b).

²⁰ 15 U.S.C. § 6807(b).

²¹ 15 U.S.C. § 1681t(d)(2). See n. 15 *supra*.

²² 15 U.S.C. § 6806.

²³ Alaska Stat. § 6.01.028 generally requires customer consent for a financial institution to disclose customer information, with no blanket exception or authorization for sharing information (continued...)

Connecticut,²⁴ North Dakota,²⁵ and Vermont,²⁶ have current laws that would require an opt-in or in some way hamper the sharing of customer information among affiliates. None of these would, of course, operate to override the FCRA authorization of interaffiliate information sharing without further legislative action. In other states, since GLBA, there have been provisions enacted modifying stringent financial privacy laws to accommodate GLBA.²⁷ In the only state holding a referendum on such a statute, North Dakota, the voters by a 73% majority, voted to repeal the new law.²⁸ In the 2003 legislative session, the legislatures of at least two states, California²⁹ and New Jersey,³⁰ are considering enacting laws that would appear to be directed at limiting the ability of financial institutions to share customer information should the FCRA preemption provision not be renewed. Another, New York,³¹ is considering legislation to require affirmative consent for disclosing nonpublic personal information to nonaffiliated third parties.

Legislative Issues. The issue of whether or not and under what circumstances to renew the FCRA preemption of state restrictions on affiliate sharing of customer information is likely to be joined with issues relating to other FCRA provisions also

²³ (...continued)

among affiliated companies, although there is permission for sharing with marketing partners.

²⁴ Connecticut Gen. Stat. Anno. §§ 36a-41 to 36a-44 require consent for disclosure by financial institutions, authorize disclosures in various circumstances, but contain no blanket exception for sharing of information among affiliates and place restrictions on sharing of information with broker-dealers.

²⁵ N.D. Cent. Code §§ 6.08.1-01 to 6-08.1-08, requires customer written consent for sharing of information among affiliates.

²⁶ Vermont Stat. Anno. §§ 10201 - 10205 prohibits disclosure of customer financial information by financial institutions except as provided in a list of exceptions, none of which appear to permit interaffiliate sharing of customer information.

²⁷ See, e.g., Florida Stat. §655.059(2)(b). (Amended to that effect in 2001). This states that “nothing...[in the financial privacy statute] shall prohibit a financial institution from disclosing financial information ...as permitted by [GLBA].”

²⁸ See Mark Wolski, “North Dakota Voters Tounce Bid to Let Banks Use ‘Opt-Out’ on Financial Privacy,” 78 *BNA’s Banking Report* 1051 (June 17, 2002).

²⁹ California Senate Bill 1, introduced December 2, 2002, would provide a customer opt-out for information sharing among affiliates and an affirmative opt-in for sharing with nonaffiliated third parties. A previous version of the measure had been vetoed by Governor Davis. See Laura Mahoney, “California Senate Kicks off New Session by Bringing Back Financial Privacy Measure,” 79 *BNA’s Banking Report* 926 (December 9, 2002).

³⁰ New Jersey Senate Bill No. 2245, introduced January 16, 2003, would prohibit financial institutions from requiring more information than reasonably necessary and prohibits disclosure of confidential consumer information to affiliates or unaffiliated third parties without obtaining affirmative consent and specifying the types of information that will be disclosed and the conditions under which it will be disclosed. The bill would also provide consumer access to information and opportunity to dispute the accuracy of the information.

³¹ New York Assembly Bill 869, introduced January 8, 2003. This legislation would also provide greater protection than GLBA in other ways, such as providing a private right of action.

subject to the January 1, 2004, expiration date.³² Consideration of these topics may engender debate on other consumer credit issues—such as preempting state predatory lending laws or state laws restricting insurance companies’ use of credit scoring.³³ It may also provoke questions as to whether or not to alter GLBA’s privacy provisions. Some of the policy issues that might be considered are: (1) Should GLBA require opt-out for information sharing among affiliates, similar to the FCRA provisions? (2) Should GLBA be modified to require opt-in for sharing with nonaffiliated third parties? (3) Should GLBA be modified to require opt-ins for sharing of sensitive information? (4) If so, how should such sensitive information be defined? and (5) Should the same standards apply to sharing of information among affiliates and to sharing pursuant to joint ventures or marketing agreements—as is the case under GLBA? Underlying these policy issues, of course, are questions that are more general – such as what is to be gained by these privacy laws in terms of effectiveness in preventing unauthorized access or dissemination of personal data, deterring identity theft, and meeting justifiable public expectations of privacy.³⁴ There are also practical matters – such as the relative cost of compliance both to the industry and to its customers. Some of these issues have been addressed in Congressional hearings in the 107th Congress³⁵ and may resurface in hearings as legislation is developed in the 108th Congress.

³² Without extension of the preemptions, “states could individually determine when a loan would be deemed delinquent, what borrower information a lender could report to credit bureaus, and what fines could be imposed for providing inaccurate information.” Rob Blackwell, “Greenspan Is 1st Regulator to Endorse FCRA Extension,” *American Banker* 1 (February 13, 2003). (Available in LEXIS, News Library, Curnws file.) Other provisions that are subject to the same conditions for state overrides after January 1, 2004, are provisions relating to: furnishing credit reports in connection with preapproved unsolicited offers of insurance; timing in connection with disputed accuracy of credit reports; certain duties in connection with adverse actions taken on the basis of a credit report; duties in connection with unsolicited, preapproved credit card or insurance offers; certain specifications as to what may and may not be included in consumer reports; and duties of persons furnishing information to credit reporting agencies. 15 U.S.C. § 1681t(b) and (c).

³³ See ; e.g., “Expiring Info Sharing Pre-Emption May Spark Fight, *National Journal’s Congress Daily* (January 23, 2003).

³⁴ See CRS Report RS21163 , “Remedies Available to Victims of Identity Theft,” and CRS Report RS21803, “Identity Theft and the Fair Credit Reporting Act: An Analysis of *TRW v. Andrews* and Current Legislation.”

³⁵ See, U.S.Senate Comm. on Banking, Housing, and Urban Affairs, “Hearing on ‘Financial Privacy and Consumer Protection,’” [<http://banking.senate.gov/hrg02.htm#sep02>]; The House Committee on Energy and Commerce held hearings covering a wide variety of topics. [<http://energycommerce.house.gov/107/action/action.htm>]. Included are: EU Data Protection Directive; privacy in the commercial world, and existing federal statutes addressing information privacy.