

# Developments in the Gramm-Leach-Bliley Act During 2005-06: An Overview of Important Changes in Case Law and Pending Legislation

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## ABSTRACT

*Financial privacy is an extremely important issue for governments, businesses, and individuals, both in the United States of America and around the world. The importance of this issue in the United States today is well illustrated by the unusually large amount of legislation that has been passed or is currently pending in this area. Perhaps the most important and comprehensive federal financial privacy law is the Gramm-Leach-Bliley Act ("GLB Act"). Some other important pieces of legislation that cover financial privacy include the Fair Credit Reporting Act ("FCRA"), the Fair and Accurate Credit Transactions Act ("FACT"), the Health Information Portability and Accountability Act ("HIPAA"), and Section 326 of the Patriot Act. All of these laws have brought about significant discussion and litigation but likely none more than the Gramm-Leach-Bliley Act. The GLB Act is an evolving piece of legislation. In the year 2005, case law developments have helped clarify some issues under the GLB Act, but it has also complicated others. These issues include: whether there is a private right of action under the GLB Act; how to handle the conflicts between the privacy rights created under the GLB Act and the need for disclosure during discovery in litigation; and what state laws may be preempted under the GLB Act and other financial privacy laws. In addition, proposals for an amendment currently pending in both the House of Representatives and the Senate, if passed, could significantly reshape financial privacy law. This article will clarify these developments.*

## I. INTRODUCTION

Financial privacy laws and the changes in them merit significant attention because they affect a large range of interests from individuals to large financial corporations. If public opinion is any indication, these laws are likely to increase in relevance and number. Americans are increasingly becoming concerned with their privacy. This trend is displayed in the results of public opinion polls compiled by the

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Electronic Privacy Information Center.<sup>1</sup> These polls also show that Americans favor government-enacted legislation over self-regulation to protect their privacy rights.

In numerous polls listed below, Americans report the current self-regulatory framework is insufficient to protect privacy. A February 2002 Harris Poll showed that 63% of respondents thought current law inadequate to protect privacy. A June 2001 Gallup poll indicated that two-thirds of respondents favored new federal legislation to protect privacy online. A July 2001 Markle Foundation study concluded that 64% favored rules to protect consumers on the Internet, and 58% reported that self-regulation wasn't enough to ensure adequate accountability. A March 2000 Business Week/Harris Poll found that 57% of respondents favored laws that would regulate how personal information is used. In that same poll, only 15% supported self-regulation.<sup>2</sup>

In recent years, it seems that Congress has agreed with the public's call for federal regulation and a number of financial privacy laws have been passed.<sup>3</sup>

Financial Privacy laws cover a broad spectrum of privacy related topics. The most prominent of these includes Section 326 of the USA PATRIOT Act, which "provides stricter mechanisms to combat money laundering domestically and abroad."<sup>4</sup> In addition, the "Fair Credit Reporting Act ('FCRA') and the Fair and Accurate Credit Transactions Act ('FACT Act') attempt to protect the consumer against legitimate and growing harms such as identity theft."<sup>5</sup> Finally,

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<sup>1</sup> See Electronic Privacy Information Center, *Public Opinion on Privacy*, <http://www.epic.org/privacy/survey/> (last visited Jan. 2, 2006).

<sup>2</sup> *Id.* (quoting headers).

<sup>3</sup> Steven Robert Roach & William R. Schuerman, Jr., *Privacy Year in Review: Recent Developments in the Gramm-Leach-Bliley Act, Fair Credit Reporting Act, and Other Acts Affecting Financial Privacy*, 1 ISJLP 385, 386 (2005).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

Congress has passed the Gramm-Leach-Bliley Act, which “support[s] the sharing of information between institutions while protecting consumer information through disclosure and notice requirements.”<sup>6</sup> In a recent decision, issued on October 4, 2005, Judge Morrison C. England Jr. of The United States District Court for the Eastern District of California summed up the purpose of these laws:

In FCRA, FACTA and GLBA, Congress created a statutory framework that seeks to strike a balance between providing citizens affordable financial services while protecting them against invasions of privacy and the misuse of personal information.<sup>7</sup>

This article will focus on the GLB Act.

## II. THE GRAMM-LEACH-BLILEY ACT

The Gramm-Leach-Bliley Act can be found in titles twelve and fifteen of the United States Code.<sup>8</sup> This law works as a part of the larger framework of privacy laws discussed above.<sup>9</sup> It was passed to “to enhance competition in the financial services industry by providing a prudential framework for the affiliation of banks, securities firms, insurance companies, and other financial service providers.”<sup>10</sup> A proponent of the law has given the following assessment:

By establishing a three-way street whereby banks can offer securities, insurance, and other financial products, and securities firms and insurance companies are authorized to offer banking products, the legislation puts the consumer in

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<sup>6</sup> *Id.*

<sup>7</sup> *Am. Bankers Ass’n v. Lockyer*, No. Civ. S 04-0778 MCE KJM, 2005 WL 2452798, \*1 (E.D. Cal. Oct. 5, 2005).

<sup>8</sup> Gramm-Leach-Bliley Act, Pub. L. No. 106-102, 113 Stat. 1338 (1999) (codified in Titles 12 and 15 of the United States Code).

<sup>9</sup> See generally Roach & Schuerman, *supra* note 3.

<sup>10</sup> Julia C. Schiller, *Informational Privacy v. The Commercial Speech Doctrine: Can the Gramm-Leach-Bliley Act Provide Adequate Privacy Protection?*, 11 COMM.LAW CONSPPECTUS 349, 355 (2003); see also H.R. CONF. REP. NO. 106-434 (1999).

the driver's seat. By legislating a prudential framework in which these financial products can be offered, Gramm-Leach-Bliley ensures that the banking system remains independent and sound, credit is provided to all segments of America, and consumers and their personal financial information are protected.<sup>11</sup>

The GLB Act is perhaps the most important piece of financial privacy legislation as it “contains the most comprehensive financial privacy provisions of any federal legislation ever enacted.”<sup>12</sup> The background of the GLB Act and current developments in its enforcement and interpretation are discussed in this article.

#### A. BACKGROUND: THE GRAMM-LEACH-BLILEY ACT

The GLB Act was passed in 1999.<sup>13</sup> It was signed into law by then President Bill Clinton.<sup>14</sup> The GLB Act “repeal[ed] sections of the Glass-Steagall Act, a New Deal regulation that had restricted affiliations between commercial banks and securities firms.”<sup>15</sup> Banks and financial institutions are now allowed to engage in a number of activities that they were previously forbidden from participating in, including merging with insurance companies and stock brokerages.<sup>16</sup> Lifting these barriers lowers costs for individuals and institutional organizations. “With such barriers lifted, financial institutions can effectively satisfy all a customer’s investment needs at a lower net cost than would otherwise be available, due in large part to the ready access the affiliated entities have to the various customers’ personal and

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<sup>11</sup> James A. Leach, *Introduction: Modernization of Financial Institutions*, 25 IOWA J. CORP. L. 681, 684 (2000).

<sup>12</sup> Roach & Schuerman, *supra* note 3, at 387.

<sup>13</sup> Christopher Wolf, *2005 Overview of the Gramm-Leach-Bliley Act*, 828 PLI/PAT 761, 765 (2005).

<sup>14</sup> Roach & Schuerman, *supra* note 3, at 387.

<sup>15</sup> Wolf, *supra* note 13 (citing Paul J. Polking & Scott A. Cammarn, *Overview of the Gramm-Leach-Bliley Act*, 4 N. C. BANKING INST. 1, 1-2 (2000)).

<sup>16</sup> *Id.*

financial information.”<sup>17</sup> This unprecedented access to information does pose privacy concerns.<sup>18</sup>

Consumers would have a lot to fear if financial institutions were given access to volumes of consumer information without restriction. If consumers were not provided with some form of protections, they could be subjected “to a heightened risk of unwanted solicitation, credit fraud, and identity theft.”<sup>19</sup> Privacy advocates have successfully petitioned Congress for limits on the use of nonpublic personal information.<sup>20</sup> Such curbs on the use of this nonpublic personal information are built into the GLB Act.

The privacy provisions of the GLB Act are located in Title V (the Financial Privacy Law).<sup>21</sup> Within this framework there are two separate subtitles. “Subtitle A creates new substantive obligations relating to the disclosure of customers’ nonpublic personal information by financial institutions to nonaffiliated third parties.”<sup>22</sup> The GLB Act and the regulations issued pursuant to the act require financial institutions to “implement procedures to ensure the confidentiality of personal information and to protect against unauthorized access to such information.”<sup>23</sup> In addition, under the GLB Act financial institutions must provide customers with notice annually regarding: “1) the institutions’ policies on protecting nonpublic personal information, and 2) the institutions’ policies regarding the disclosure of nonpublic personal information with affiliated and non-affiliated entities.”<sup>24</sup>

The second important provision of Subtitle A of Title V is the “opt-out” provision. Under 15 U.S.C. § 6802(b)(1) (1999), prior to disclosing financial information, financial institutions must provide their customers and certain other consumers with a chance to “opt-out”

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<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *See* 15 U.S.C. §§ 6801-6827 (2000).

<sup>22</sup> Roach & Schuerman, *supra* note 3, at 387 (citing 15 U.S.C. §§ 6801-6809 (1999)).

<sup>23</sup> Wolf, *supra* note 13, at 766.

<sup>24</sup> *Id.*

of the disclosure of some specified information to third parties.<sup>25</sup> However, even if a customer affirmatively “opts-out,” the institution can still share information in some limited situations. For example: “the [financial] institution may disclose a customer’s information as part of the sale of its business, or where the disclosure is necessary to effectuate a certain transaction requested by the customer.”<sup>26</sup> Finally, “opting out” does not prevent the disclosure of information “to credit reporting agencies, to certain regulatory agencies or when otherwise required by law.”<sup>27</sup>

The other important privacy-related provision of the GLB Act is Subtitle B of Section V. Subtitle B was enacted to thwart so called “information brokers” who obtain customer information to defraud the customers themselves and financial institutions.<sup>28</sup> Subtitle B creates “new federal criminal penalties relating to the fraudulent obtainment of customer information from financial institutions.”<sup>29</sup> These provisions encompass the main privacy topics in the GLB Act, but who is covered by these provisions?

The privacy provisions of Section V of the GLB Act apply to “financial institutions.” By the language of the GLB Act, “financial institution” is defined as “any institution the business of which is engaging in financial activities as described in section 4(k)” of the Bank Holding Company Act.<sup>30</sup> Financial activities are defined by section 4(k) of the Bank Holding Company Act to include “[e]ngaging in any activity that the [Federal Reserve] Board has determined, by order or regulation that is in effect on November 12, 1999, to be so closely related to banking or managing or controlling banks as to be a proper incident thereto.”<sup>31</sup> In addition, through authority granted to it by the GLB Act, the Board of Governors of the Federal Reserve

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<sup>25</sup> Roach & Schuerman, *supra* note 3, at 388.

<sup>26</sup> Wolf, *supra* note 13, at 766.

<sup>27</sup> *Id.*

<sup>28</sup> Roach & Schuerman, *supra* note 3, at 388.

<sup>29</sup> *Id.* (citing L. Richard Fischer, *Disclosure of Nonpublic Personal Information*, THE LAW OF FINANCIAL PRIVACY, ¶ 9.02 SUBTITLE A (A.S. Pratt & Sons 2004); see 15 U.S.C. §§ 6821-6827 (1999)).

<sup>30</sup> 15 U.S.C. § 6809 (2000).

<sup>31</sup> Wolf, *supra* note 13, at 767-768.

System has issued regulations for financial holding companies and non-bank affiliates to expand the definition of “financial institutions” to include a number of entities that are not traditionally considered financial entities.<sup>32</sup> The language of the bill and enforcement actions by agencies have spurred some litigation. While not every fight has been hashed out, there are three categories of institutions or professionals for which we have a clear ruling as to whether they are covered. The courts have determined that credit reporting agencies are covered by the GLB Act.<sup>33</sup> Credit counseling services are also covered by the GLB Act.<sup>34</sup> Finally, the courts have said that lawyers are not included in the term “financial institutions,” and therefore not covered by the GLB Act.<sup>35</sup> This background of the GLB Act allows us to now examine the parts of the framework that are in flux.

## B. 2005 CASE LAW SUMMARY

In 2005, the major case law developments concerning the GLB Act focused on three major areas. The first, and perhaps most important, is preemption of state laws by federal financial privacy law. The second involved the conflict between the protections created by the GLB Act and the need for disclosure during discovery. The last major issue handled by the courts concerned whether a private right of action is created by the GLB Act.

### 1. STATE LAW PREEMPTION

One of the most heavily litigated areas of law involving the GLB Act is the preemption of state law. Specifically, some states have tried to enact laws that they felt were complementary to or tougher than the relevant federal laws. “The states passing stricter legislation have focused upon limiting disclosure of information to affiliated entities, and upon requiring a customer’s affirmative consent to disclose to

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<sup>32</sup> Kyle Thomas Sammin, Note, *Any Port in a Storm: The Safe Harbor, The Gramm-Leach-Bliley Act, and the Problem of Privacy in Financial Services*, 36 GEO. WASH. INT’L L. REV. 653, 667 (2004) (providing examples on non-traditional financial institutions).

<sup>33</sup> *Trans Union L.L.C. v. FTC*, 295 F.3d 42, 48 (D.C. Cir. 2002).

<sup>34</sup> *FTC v. AmeriDebt, Inc.*, 343 F. Supp. 2d 451, 461-462 (D. Md. 2004).

<sup>35</sup> *Am. Bar Ass’n v. FTC*, 430 F.3d 457, 468 (D.C. Cir. 2005).

nonaffiliated entities.”<sup>36</sup> The GLB Act seems to favor such laws. It has a provision which states that the privacy protections of the GLB Act “shall not be construed as superseding, altering, or affecting any statute, regulation, order, or interpretation in effect in any State” if the State statute is not inconsistent with the federal law.<sup>37</sup> The GLB also states that a provision is not inconsistent with the GLB if it provides greater protection than that provided by the GLB Act.<sup>38</sup> Even with these specific provisions the courts have struggled with which state laws are preempted by the GLB Act and other related privacy laws.

#### a. CALIFORNIA

Perhaps the best case study in the conflict between State law and the GLB Act comes from California. The law involved is the 2003 California Financial Information Privacy Act (commonly known as SB1).<sup>39</sup> It has spurred a line of cases that has recently reached the Ninth Circuit Court of Appeals.

##### i. THE CALIFORNIA FINANCIAL INFORMATION PRIVACY ACT (SB1)

The California Financial Information Privacy Act was enacted on July 1, 2004.<sup>40</sup> The principal purpose of the California law is to further restrict financial institutions’ use of consumers’ nonpublic personal information.<sup>41</sup> “SB1 deals with the sharing of nonpublic information by affiliates of financial institutions, as well as by unaffiliated third parties with which these institutions may choose to do business.”<sup>42</sup> The main difference between this law and the federal provisions is that it uses an “opt-in” provision instead of an “opt-

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<sup>36</sup> Wolf, *supra* note 13, at 772.

<sup>37</sup> 15 U.S.C. § 6807(a) (2000).

<sup>38</sup> *Id.* § 6807(b).

<sup>39</sup> See CAL. FIN. CODE §§ 4050-4060 (West 2004).

<sup>40</sup> CAL. FIN. CODE § 4060 (West 2004).

<sup>41</sup> Jason Shroff, *California: A Privacy Statute Meets the GLBA & FCRA*, 9 N.C. BANKING INST. 223, 223 (2005).

<sup>42</sup> *Id.*



out.”<sup>43</sup> Under SB1 financial institutions cannot share nonpublic personal information with nonaffiliated third parties unless the consumer allows the financial institution to do so by “opting in” to the program.<sup>44</sup> The California law also prevents sharing among affiliates unless the consumer is given an opportunity to “opt-out.”<sup>45</sup> In passing this law, the California legislature intended to provide consumers with more protection than was available under the GLB Act.<sup>46</sup>

## ii. THE DISTRICT COURT DECISION

The issue of whether SB1 was preempted by federal law was first tackled by the United States District Court for the Eastern District of California.<sup>47</sup> In the 2004, case of *Am. Bankers Ass’n v. Lockyer*, three financial services trade associations brought an action that asked the court to declare the affiliate sharing provision of SB1 void and unenforceable because they believed that it was preempted by the Fair Credit Reporting Act.<sup>48</sup> The primary issue in the case was “whether the California Financial Information Privacy Act (SB1) could require certain financial institution disclosures regarding privacy policies and that customers be given optional participation rights with regard to those information sharing policies.”<sup>49</sup> For a variety of reasons the court refused to rule that the law was preempted.

The trial court in this case, the United States District Court for the Eastern District of California, granted summary judgment on behalf of Lockyer.<sup>50</sup> The court said that the American Bankers Association had failed to show that SB1 was expressly preempted.<sup>51</sup> The court could

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<sup>43</sup> Wolf, *supra* note 13, at 773.

<sup>44</sup> Shroff, *supra* note 41, at 223-224.

<sup>45</sup> *Id.*

<sup>46</sup> CAL. FIN. CODE § 4051 (West 2004).

<sup>47</sup> *Am. Bankers Ass’n v. Lockyer*, No. Civ. S 04-0778 MCE KJM, 2004 WL 1490432 (E.D. Cal. June 30, 2004).

<sup>48</sup> *Id.* at \*1.

<sup>49</sup> Shroff, *supra* note 41, at 230.

<sup>50</sup> *Am. Bankers Ass’n*, 2004 WL 1490432, at \*1.

<sup>51</sup> *Id.* at \*6.

also find no inference of preemption by federal regulation in the area.<sup>52</sup> The court used a narrow construction when reading the preemption clause of the FCRA. From this reading, the court concluded that the preemption clause of the FCRA was not applicable to SB1.<sup>53</sup> Because the preemption clause of the FCRA did not apply, SB1 was not preempted.<sup>54</sup> The court also held that the GLB Act expressly allowed for laws like SB1 to be passed by the states, and the GLB Act allows the states to pass more restrictive laws on the sharing of such information generally.<sup>55</sup> This decision was immediately appealed to the United States Court of Appeals for the Ninth Circuit.<sup>56</sup>

This decision had very different potential consequences for individual consumers and the banking industry.<sup>57</sup> "The main benefit to individual consumers and states as a result of *Lockyer* is more control over the sharing of financial information."<sup>58</sup> One criticism of the decision is that it establishes "a national banking industry which also allow[s] states to provide a patched framework of privacy rules to which these banks were required to comply."<sup>59</sup> According to Jason Shroff's article, *California: A Privacy Statute Meets the GLBA & FCRA*, such a framework is what Congress meant to prevent by enacting federal legislation.<sup>60</sup> The decision would also have led to "banks in different states [being] on different playing fields" and added to the costs of compliance.<sup>61</sup>

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<sup>52</sup> *Id.* at \*5.

<sup>53</sup> *Id.* at \*4.

<sup>54</sup> *Id.* at \*6.

<sup>55</sup> *Id.*

<sup>56</sup> Roach & Schuerman, *supra* note 3, at 401.

<sup>57</sup> Shroff, *supra* note 41, at 236-237.

<sup>58</sup> *Id.* at 237.

<sup>59</sup> *Id.* at 241.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

## iii. THE NINTH CIRCUIT APPEAL

On December 6, 2004, the United States Court of Appeals for the Ninth Circuit heard the appeal of *Am. Bankers Ass'n v. Lockyer* as *Am. Bankers Ass'n v. Gould*.<sup>62</sup> It issued its decision on June 20, 2005.<sup>63</sup> The United States Court of Appeals for the Ninth Circuit saw the case very differently than the trial court. This led the Ninth Circuit to reverse the lower court and rule that the California Financial Information Privacy Act was preempted by federal law.<sup>64</sup>

The Ninth Circuit opinion issued by Judge William A. Fletcher stated the issue on appeal as follows:

[W]hether the federal Fair Credit Reporting Act ("FCRA") preempts the California Financial Information Privacy Act (commonly known as "SB1") insofar as it regulates the exchange of information among financial institutions and their affiliates.<sup>65</sup>

On appeal, the associations that brought suit argued that the district court's grant of summary judgment was improper and again argued "that SB1's opt-out provisions for affiliate information sharing are preempted by the FCRA, and allege that they would suffer irreparable injury if SB1 were enforced against them."<sup>66</sup>

In analyzing this case, the court examined two subparts. The first involved the scope of the FCRA's Affiliate Sharing Preemption Clause.<sup>67</sup> The court started its interpretation of the affiliate sharing provision of the FCRA, § 1681t(b)(2) "with the premise that 'the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'"<sup>68</sup> The court also applied the

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<sup>62</sup> *Am. Bankers Ass'n v. Gould*, 412 F.3d 1081 (9th Cir. 2005).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 1083.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 1085.

<sup>67</sup> *Id.* at 1086.

<sup>68</sup> *Am. Bankers Ass'n*, 412 F.3d at 1086 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)).

principle that the “goal in interpreting a statute is to understand the statute ‘as a symmetrical and coherent regulatory scheme’ and to ‘fit, if possible, all parts into a . . . harmonious whole.’”<sup>69</sup> Applying these principles the court “constru[ed] the affiliate-sharing preemption clause to preempt all state ‘requirement[s]’ and ‘prohibition[s]’ on the communication of ‘information’ between affiliated parties.”<sup>70</sup> However, the court then turned to the meaning of “information” as used in the Act. The court interpreted the term “information” in the FCRA preemption clause to be the same as the “the information described in the definition of a ‘consumer report’ contained in § 1681a(d)(1).”<sup>71</sup> Using this interpretation the court held:

[T]hat the affiliate-sharing preemption clause preempts SB1 insofar as it attempts to regulate the communication between affiliates of “information,” as that term is used in § 1681a(d)(1). That is, SB1 is preempted to the extent that it applies to information shared between affiliates concerning consumers’ “credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living” that is used, expected to be used, or collected for the purpose of establishing eligibility for “credit or insurance,” employment or other authorized purpose.<sup>72</sup>

The court then remanded the case to determine whether under this interpretation of “information” any portion of the affiliate sharing provision could survive preemption.<sup>73</sup>

The second issue the court examined was the applicability of the Gramm-Leach-Bliley Act.<sup>74</sup> The court noted that the GLB Act has language that states that it shall not be construed “to modify, limit, or

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<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 1086 (citing 15 U.S.C. § 1681t(b)(2)).

<sup>71</sup> *Id.* at 1087.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Am. Bankers Ass’n*, 412 F.3d at 1087.

supersede the operation of the Fair Credit Reporting Act.”<sup>75</sup> The court therefore concluded that the GLB Act did not affect the preemptive scope of the FCRA.<sup>76</sup> Therefore, the court found that the GLB Act was irrelevant in this case.<sup>77</sup>

It appears that many of the concerns about the *Lockyer* case undermining congressional intent have been put to rest. *Lockyer* is no longer good law, and the preemptive power of the federal legislation in areas where Congress wanted a federal statutory scheme seems to have been restored. In terms of the GLB Act, *Gould* stands for the proposition that the GLB Act does not affect the preemptive scope of the FCRA.<sup>78</sup> This is important because the FCRA and the GLB Act often interact. That leaves the question, what became of SB1 on remand?

#### iv. THE CASE ON REMAND: THE CURRENT STATE OF SB1

The United States District Court for the Eastern District of California issued its ruling in the remand of *Am. Bankers Ass’n v. Gould* on Oct. 5, 2005.<sup>79</sup> The issue the court addressed on remand was “whether any part of SB1’s affiliate sharing provision survives preemption and, if so, can that surviving portion be severed from the remainder of SB1?”<sup>80</sup> The court found that in fact no portion of the provision could survive preemption and “even if some limited applications could be saved, they cannot be severed from the remainder of the statute.”<sup>81</sup>

Using the Ninth Circuit’s definition of “information,” the court in this case found that because the same “information” could be gathered for both FCRA authorized and unauthorized purposes:

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<sup>75</sup> *Id.* at 1087-88 (citing 15 U.S.C. § 6806).

<sup>76</sup> *Id.* at 1088.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Am. Bankers Ass’n v. Lockyer*, No. S04-0778MCE KJM, 2005 WL 2452798, \*1 (E.D. Cal. Oct. 5, 2005).

<sup>80</sup> *Id.* at \*1.

<sup>81</sup> *Id.*

Imposing SB1's requirements on the collection or use of this dual purpose information necessarily violates FCRA's preemption clause because California would be imposing a requirement with respect to the exchange of information among affiliates as expressly prohibited by the FCRA.<sup>82</sup>

Because of this reading, the court ruled that no portion of the affiliate sharing provision of SB1 could stand.<sup>83</sup> Finally, the court ruled that it could not sever any portion of SB1 were it to survive preemption. This is because the defendants were asking the court "to 'dissect an unconstitutional measure and reframe a valid one out of it by inserting limitations it does not contain. This is legislative work beyond the power and function of the court.'"<sup>84</sup> The court, therefore, could not sever any portion of SB1 even if it were to survive preemption. This means that as of now the affiliate sharing provision of SB1 is preempted and no portion of it survives.

#### b. OTHER STATES

State law preemption issues have also been tackled by courts in Massachusetts<sup>85</sup> and Vermont.<sup>86</sup> The Massachusetts case arose after the Massachusetts Bankers Association, Inc. ("MBA") asked the Office of the Comptroller of the Currency ("OCC") to issue an opinion as to whether the GLB Act preempted certain provisions of the Massachusetts Consumer Protection Act Relative to the Sale of Insurance by Banks.<sup>87</sup> On March 18, 2002, the OCC responded and opined that the provisions were preempted by federal law.<sup>88</sup> The

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<sup>82</sup> *Id.* at \*3.

<sup>83</sup> *Id.* at \*3 (citing 15 U.S.C. § 168t(b)(2)).

<sup>84</sup> *Id.* at \*4 (citing *Hill v. Wallace*, 259 U.S. 44, 70 (1922)).

<sup>85</sup> See *Mass. Bankers Ass'n v. Bowler*, 392 F. Supp. 2d 24 (D. Mass. 2005).

<sup>86</sup> See *Am. Council of Life Insurers v. Vt. Dep't of Banking*, No. 50-1-02 Wncv, 2004 WL 578737 (Vt. Super. Ct. Feb. 12, 2004).

<sup>87</sup> *Mass. Bankers Ass'n*, 392 F. Supp. 2d at 25 (discussing Mass. Consumer Protection Act Relative to the Sale of Insurance by Banks, MASS. GEN. LAWS ANN. ch. 167F, § 2A (West 2005)).

<sup>88</sup> *Id.*

Massachusetts Commissioners of Insurance and Banks and the Commonwealth of Massachusetts sought review in the First Circuit Court of Appeals of the “regulatory conflict” resulting from the OCC opinion.<sup>89</sup> However, the First Circuit dismissed the case for lack of jurisdiction as there was not a “regulatory conflict.”<sup>90</sup>

After this ruling was issued, the MBA and some Massachusetts banks individually filed a complaint in the United States District Court for the District of Massachusetts.<sup>91</sup> The Plaintiffs challenged four provisions of the Massachusetts law, which they labeled the Referral Prohibition,<sup>92</sup> the Referral Fee Prohibition,<sup>93</sup> the Waiting Period Restriction,<sup>94</sup> and the Separation Restriction.<sup>95</sup> The Referral Prohibition “allows officers, tellers, and other bank employees who are not licensed insurance agents to refer a bank customer to a licensed insurance agent only when the customer inquires about insurance.”<sup>96</sup> The Referral Fee Prohibition “forbids banks from paying their employees for making the referrals to their insurance agents.”<sup>97</sup> The Waiting Period Restriction,

allows banks to solicit insurance sales to loan applicants only after the application for the extension of credit is approved, and such approval and required disclosures have been communicated to and acknowledged by the applicant in

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<sup>89</sup> *Id.*

<sup>90</sup> *Bowler v. Hawke*, 320 F.3d 59, 63-64 (1st Cir. 2003).

<sup>91</sup> *Mass. Bankers Ass’n*, 392 F. Supp. 2d at 26.

<sup>92</sup> Mass. Consumer Protection Act, MASS. GEN. LAWS ANN. ch. 167F, § 2A(b)(2) (West 2005), *invalidated by* *Mass. Bankers Ass’n v. Bowler*, 392 F. Supp. 2d 24 (D. Mass. 2005).

<sup>93</sup> Mass. Consumer Protection Act, MASS. GEN. LAWS ANN. ch. 167F, § 2A(b)(2) (West 2005).

<sup>94</sup> *Id.* § 2A(b)(4).

<sup>95</sup> *Id.* § 2A(b)(3); *Mass. Bankers Ass’n*, 392 F. Supp. 2d at 26.

<sup>96</sup> *Mass Bankers Ass’n*, 392 F. Supp. 2d at 26.

<sup>97</sup> *Id.*

writing. The banks are required to retain the solicitation, approval, and acknowledgment as a permanent record.<sup>98</sup>

Finally, the Separation Restriction “requires insurance solicitation to be conducted in a physically separate area of the bank, with a few exceptions.”<sup>99</sup> The Bankers Association argued that the provisions were preempted by the GLB Act, specifically 15 U.S.C. § 6701(d)(2)(A).

The District court recognized that the GLB Act contains specific language indicating that the Act is intended to preempt some state laws.<sup>100</sup> The court saw the issue in the case to be “whether the challenged provisions ‘prevent or significantly interfere’ with the ability of banks to sell, solicit, or cross market insurance.”<sup>101</sup> This language came from the decision of the Supreme Court of the United States in *Barnett Bank of Marion County, N.A. v. Nelson*, where the court gave a standard for examining “the preemptive scope of statutes and regulations granting a power to national banks.”<sup>102</sup> The court ruled that the Referral Prohibition and the Referral Fee Prohibition were preempted because they significantly curtailed the bank’s ability to cross-market, solicit, and thereby sell insurance products.<sup>103</sup> The Waiting Period Restriction was also preempted because it significantly interfered with the banks’ ability to solicit, cross-market and sell their insurance products. Finally, the Separation Restriction was preempted because it required plaintiffs to incur more costs, since they needed more physical space to comply and, therefore, seriously impeded the banks’ ability to solicit, cross-market, and sell insurance products.

In 2001 in Vermont, the Department of Banking, Insurance, Securities, and Healthcare Administration (“BISHCA”) promulgated Regulation IH-2001-01, which created an “opt-in” provision for the disclosure of nonpublic financial and health information by

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<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 27 (citing 15 U.S.C. § 1012 (1999)).

<sup>101</sup> *Id.*

<sup>102</sup> *Barnett Bank of Marion County v. Nelson*, 517 U.S. 25, 33 (1996).

<sup>103</sup> *Id.* at 28.



licensees,<sup>104</sup> which was similar to California's SB1 discussed above. Five insurance trade organizations sought a court ruling that the regulation fell outside the BISHCA's statutory authority and that it violated constitutional provisions.<sup>105</sup> The court looked at the GLB Act and found that the GLB's "opt-out"<sup>106</sup> set a floor for consumer protection, which superseded state law except where they provided greater protections.<sup>107</sup> The court then held that the Vermont Regulation provided greater protection than the parallel GLB Act provisions, and therefore it was not superseded and so was enforceable.<sup>108</sup> In the second part of its ruling relevant to the validity of "opt-in" provisions, the court ruled that such provisions do not impermissibly burden the First Amendment right to free speech.<sup>109</sup> In doing so, the court applied the four part test for commercial speech from *Central Hudson Gas & Electric Corp. v. Pubic Service Comm. of New York*.<sup>110</sup> The court applied this test and found that an "opt-in" provision passes this constitutional test.<sup>111</sup>

The case law on preemption to this point gives some mixed messages on the preemption of tougher state laws when they conflict with federal financial privacy statutes. The lower courts in *Lockyer* and *Am. Council of Life Insurers* have issued rulings favorable to stricter state laws. However, other courts, including the highest court to rule on the subject, the Ninth Circuit Court of Appeals, have interpreted the preemption clauses of the federal legislation in a way more friendly to preemption by federal law. In fact, "opt-in" provisions in general may be preempted, if other circuits follow the decision of the Ninth Circuit Court of Appeals. Even if these

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<sup>104</sup> See *Am. Council of Life Insurers v. Vt. Dep't of Banking*, No. 50-1-02 Wncv, 2004 WL 578737, at \*1 (Vt. Super. Feb. 12, 2004).

<sup>105</sup> *Id.*

<sup>106</sup> 15 U.S.C. § 6802(b) (2000).

<sup>107</sup> *Am. Council of Life Insurers*, 2004 WL 578737, at \*2.

<sup>108</sup> *Id.* at \*6-7.

<sup>109</sup> *Id.* at \*5.

<sup>110</sup> *Id.* at \*5 (citing *Central Hudson Gas & Electric Corp. v. Pubic Service Comm. of New York*, 447 U.S. 557, 566 (1980)).

<sup>111</sup> *Id.* at \*7.

provisions are not directly preempted by the provisions of the GLB Act, the FCRA as interpreted by the Ninth Circuit in *Gould*, seems to disallow them to the extent that any such provision:

[a]pplies to information shared between affiliates concerning consumers' "credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living" that is used, expected to be used, or collected for the purpose of establishing eligibility for "credit or insurance," employment or other authorized purpose.<sup>112</sup>

What is clear is that allowing stricter state statutes tends to be more favorable to consumers looking for more privacy protections. However, such laws also cause headaches for the financial services industry and can cause an increase in the price of conducting business. In addition, if these state laws are found not to be preempted by the laws that make up the federal framework, Congress' intent to create a uniform national system of privacy laws could be frustrated. This is an area where the case law needs to be monitored closely in the future.

## 2. THE IMPACT OF THE GLB ACT ON DISCOVERY IN LITIGATION

Another area of the GLB Act that was litigated in 2005 was whether it is a violation of the GLB Act for financial institutions to disclose nonpublic personal information during the discovery process in a court proceeding.<sup>113</sup> This issue had been addressed by the courts a number of times before, but to this point there is no case that serves as binding precedent in all jurisdictions.

In 2005, the Superior Court of Connecticut decided this issue in *McGuire v. Rawlings Co., L.L.C.* In an opinion issued on March 14, 2005, the court ruled that the GLB Act does not prevent disclosure of nonpublic personal information in the discovery process.<sup>114</sup> To reach this conclusion, the Superior Court of Connecticut discussed the decisions of the other courts around the country that had decided the

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<sup>112</sup> *Am. Bankers Ass'n v. Gould*, 412 F.3d 1081, 1087 (9th Cir. 2005).

<sup>113</sup> *See McGuire v. Rawlings Co.*, No. CV000375212S, 2005 WL 895870 (Conn. Super. Ct. Mar. 14, 2005).

<sup>114</sup> *Id.* at \*7.

issue. In doing so, the court cited the Supreme Court of West Virginia which had stated, "even if the GLBA included no exception for civil discovery, the mere fact that a statute generally prohibits the disclosure of certain information does not give parties to a civil dispute the right to circumvent the discovery process."<sup>115</sup> Other courts have also held that the GLB Act does not prevent disclosure.

A number of courts recognized a judicial process exception to the GLB Act prior to 2005. The United States District Court for the Southern District of West Virginia recognized this exception in *Marks v. Global Mortgage Group, Inc.*<sup>116</sup> In so holding, the court stated that because a party who is responding to a discovery request is responding to judicial process, the party may disclose its customer's nonpublic personal information.<sup>117</sup> In *Ex parte Mutual Savings Life Insurance Company*, the Supreme Court of Alabama also recognized the judicial process exception.<sup>118</sup> The court found that there was a congressionally created exception for situations where, "the trial court orders the disclosure of a customer's nonpublic personal information during discovery in a civil action."<sup>119</sup> However, the court did create a safeguard when it stated that courts "should also issue a comprehensive protective order to guard the customers' privacy."<sup>120</sup> The final court that has recognized the judicial process exception is the Supreme Court of Appeals of West Virginia. The West Virginia court recognized the exception in *Martino v. Barnett*.<sup>121</sup> In that case, the court held that nonpublic personal information can be disclosed under the exceptions to the GLB Act, when tempered by judicial involvement that protects the customers during the discovery process.<sup>122</sup> The majority of jurisdictions that have ruled on the issue have recognized the judicial process exemption to the GLB Act.

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<sup>115</sup> *Marks v. Global Mgmt Group, Inc.*, 218 F.R.D. 492, 496 (S.D. W.Va. 2003).

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 492.

<sup>118</sup> *Ex parte Mutual Savings Life Ins. Co.*, 899 So. 2d 986, 992 (Ala. 2004).

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 993.

<sup>121</sup> *Martino v. Barnett*, 215 W.Va. 123 (2004).

<sup>122</sup> *Id.* at 131.

At least one court has ruled that the GLB Act does in fact prevent disclosure of nonpublic personal information in the discovery process.<sup>123</sup> In *United Planters Bank, N.A. v. Gavel*, the United States District Court for the Eastern District of Louisiana granted a permanent injunction against disclosure on the grounds that:

The GLBA is written with the protection of the customers of the financial institutions in mind. This protection continues in all aspects of the GLBA. Such protection can be seen when financial institutions are allowed to provide nonpublic personal information to nonaffiliated third parties, whereupon the nonaffiliated third party must maintain confidentiality.<sup>124</sup>

Where does this leave the judicial process exception? The majority of jurisdictions that have ruled on the issue have recognized a judicial process exception to the GLB Act. It is important to remember that even the courts that have allowed the disclosure of this information have provided judicially created privacy protections. There are still a few jurisdictions that have refused to allow an exception for discovery. This means that one must pay close attention to the rule of the jurisdiction in which they are practicing when attempting to invoke this exception.

### 3. A PRIVATE RIGHT OF ACTION UNDER THE GLB ACT?

The final major issue the courts considered in 2005 involving the GLB Act involved whether or not the GLB Act creates a private right of action. This issue had been addressed a number of times before by the courts. The United States District Court for the District of Kansas followed the precedent set by other courts and ruled that the GLB Act does not provide a private right of action.<sup>125</sup>

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<sup>123</sup> See *Union Planters Bank, N.A. v. Gavel*, Civ. A. 02-1224, 2003 WL 1193671 (E.D. La. Mar. 11, 2003) (vacated on other grounds by *Union Planters Bank Nat'l Ass'n v. Salih*, 369 F.3d 457 (5th Cir. 2004)).

<sup>124</sup> *Id.* at \*9.

<sup>125</sup> See *Briggs v. Emporia State Bank and Trust Co.*, No. 05-2125-JWL, 2005 WL 2035038 (D. Kan. Aug. 23, 2005).

In 2003, in the case of *Menton v. Experian Corp.*, the United States District Court for the Southern District of New York ruled that 15 U.S.C. § 6805(a) did not provide for a private right of action because it limited the GLB Act to government action.<sup>126</sup> Then in 2004, two more rulings were issued that held that the Gramm-Leach-Bliley Act “does not provide a private right of action for a financial privacy institution’s violation of the [GLB Act’s] privacy provisions.”<sup>127</sup> The court in both *Borinski v. Williamson* and *Lacerte Software Corp. v. Profession Tax Services, L.L.C.* cited the *Menton* decision as authority in reaching their conclusions.

In 2005, in the case of *Briggs v. Emporia State Bank and Trust Co.*, the United States District Court for the District of Kansas followed suit and ruled that there is no private right of action under the GLB Act.<sup>128</sup> Specifically, the court said that the GLB Act does not expressly provide for a private right of action.<sup>129</sup> The court found that Congress did not mean to imply a private right of action.<sup>130</sup> The court, therefore, concluded that there could be no private right of action.<sup>131</sup> No court to date has been willing to find a private right of action under the GLB Act.

### C. PENDING LEGISLATION

A number of bills introduced before Congress in 2005 could potentially affect the Gramm-Leach-Bliley Act. These include four bills currently pending before the House of Representatives<sup>132</sup> and

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<sup>126</sup> *Menton v. Experian Corp.*, No. 02 Civ. 4687 (NRB), 2003 WL 21692820, at \*3 (S.D.N.Y. July 21, 2003).

<sup>127</sup> *Borninski v. Williamson*, No. Civ. A. 3:02-CV-1014, 2004 WL 433746, at \*3 (N.D. Tex. Mar. 1, 2004); *see also* *Lacerte Software Corp. v. Prof'l Tax Serv., L.L.C.*, No. Civ. 3:03-CV-1551-H (N.D. Tex. Jan. 6, 2004).

<sup>128</sup> *Briggs*, 2005 WL 2035038, at \*2-3.

<sup>129</sup> *Id.* at \*2.

<sup>130</sup> *Id.* at \*3.

<sup>131</sup> *Id.*

<sup>132</sup> *See* Community Banks Serving Their Communities First Act, H.R. 2061, 109th Cong. § 203 (1st Sess. 2005); Privacy Protection Act of 2005, H.R. 2387, 109th Cong. § 2 (1st Sess. 2005); Consumer Data Security and Notification Act of 2005, H.R. 3140, 109th Cong. § 3 (1st

three Senate bills.<sup>133</sup> These bills vary in importance and likelihood of passage, but all must be monitored closely.

### 1. THE FINANCIAL PRIVACY ACT OF 2005

Of all the pieces of financial privacy legislation currently pending before Congress, perhaps the most important is the Financial Privacy Act of 2005, also known as S. 116.<sup>134</sup> S. 116 was proposed by Senator Dianne Feinstein on January 24, 2005.<sup>135</sup> The bill was introduced to change the fact that the GLB Act does not draw a distinction between the sale of information to an affiliated entity and the mere sharing of information.<sup>136</sup> The bill's purpose is to "require the consent of an individual prior to the sale and marketing of such individual's personally identifiable information."<sup>137</sup> A second provision of the bill would change the GLB Act's "opt-out" provision to an "opt-in" provision like that which California attempted to implement in SB1 discussed above.<sup>138</sup> If passed, this bill will bring about major changes in how the GLB Act operates.

### III. CONCLUSION

The Gramm-Leach-Bliley Act is a comprehensive and complicated piece of financial privacy legislation. It is also relatively new. This means that all of the wrinkles of its enforcement have yet to be ironed out. There were a number of developments involving the law in 2005. A number of GLB Act issues were brought to the courts for interpretation in 2005. The most visible cases involved state law

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Sess. 2005); Financial Services Regulatory Relief Act of 2005, H.R. 3505, 109th Cong. (1st Sess. 2005).

<sup>133</sup> Privacy Act of 2005, S. 116, 109th Cong. (1st Sess. 2005); Safeguarding Americans From Exporting Identification Data Act, S. 810, 109th Cong. (1st Sess. 2005); Communities First Act, S. 1568, 109th Cong. § 203 (1st Session 2005).

<sup>134</sup> See Privacy Act of 2005, S. 116, 109th Cong. (1st Sess. 2005).

<sup>135</sup> Wolf, *supra* note 13, at 775.

<sup>136</sup> *Id.*

<sup>137</sup> Privacy Act of 2005, S. 116, 109th Cong. (1st Sess. 2005).

<sup>138</sup> Wolf, *supra* note 13, at 775.

preemption, the judicial process exemption, and whether a private right of action exists under the GLB. Some of these rulings brought significant changes and others followed previous precedent. These areas will have to be watched for any further changes in the future.

In addition to the changes arising through judicial interpretation, the GLB Act may also be changing through legislative amendment. S. 116 is currently the most important piece of legislation pending involving the GLB Act. However, practitioners must also be prepared for other legislative changes.

A number of developments involving the GLB Act occurred in 2005, and it is likely that there will be more in the future. The GLB Act is subject to change through judicial interpretation, legislative amendment, and changes in enforcement decisions made by government agencies. As a result, those who are affected by the provisions of the GLB Act must be especially vigilant and continue to watch for any such changes.

