DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

[Docket No. 01-22]

Preemption Opinion

AGENCY: Office of the Comptroller of the Currency, Treasury.

ACTION: Notice.

SUMMARY: The Office of the Comptroller of the Currency (OCC) is publishing its response to a written request for the OCC=s opinion of whether Federal law preempts certain provisions of the West Virginia Insurance Sales Consumer Protection Act (West Virginia Act or Act). The OCC has determined that Federal law preempts some, but not all, provisions of the West Virginia Act.

FOR FURTHER INFORMATION CONTACT: Mark Tenhundfeld, Assistant Director, or Mary Ann Nash, Counsel, Legislative and Regulatory Activities Division, (202) 874-5090.

SUPPLEMENTARY INFORMATION:

On June 2, 2000, the OCC published in the *Federal Register* notice of a request from the West Virginia Bankers Association (Requester) for the OCC's opinion concerning whether section 104 of the Gramm-Leach-Bliley Act (GLBA) preempts certain provisions of the West Virginia Act. *See* Notice of Request for Preemption Determination, 65 FR 35420 (June 2, 2000) (Notice). The OCC is publishing its response to the request as an appendix to this notice.

In the Notice, the OCC requested public comment on whether Federal law preempts the provisions of the West Virginia Act that the Requester had identified. In response, the OCC received 67 comments from 63 commenters. A number of commenters, including banks and the West Virginia banking trade association, thought that some or all of the provisions in question were preempted. Other commenters opposed preemption, generally asserting that provisions of the West Virginia Act fell within the safe harbor provisions of GLBA or did not prevent or significantly interfere with the ability of a financial institution to engage in any insurance sales, solicitation, or crossmarketing activity.

For the reasons described in the preemption opinion, the OCC has concluded that Federal law preempts some, but not all, of the provisions of the West Virginia Act. In particular, it is the OCC's opinion that Federal law *does not preempt* the following provisions of the West Virginia Act with respect to national banks:

- the Act's prohibition against requiring or implying that the purchase of an insurance product from a financial institution is required as a condition of a loan;
- the Act's provision prohibiting a financial institution from offering an insurance product in combination with other products unless all of the products are available separately; and
- the Act's requirement that, where insurance is required as a condition of obtaining a loan, the insurance and credit transactions be completed independently and through separate documents.

We also conclude that the following provision of the Act *is preempted only in part:*

- with respect to the Act's disclosure requirements, we conclude that the provisions prescribing the content of the disclosures that a financial institution is required to make in connection with the solicitation of an insurance product, and the requirement that a financial institution that sells insurance obtain a written acknowledgment, in a separate document, from its insurance customer that certain disclosures were provided are not preempted; but that the

Act's provisions regarding the manner and timing of certain required disclosures are preempted.

Finally, it is our opinion that Federal law *does preempt* the following provisions of the West Virginia Act with respect to national banks:

- the Act's provisions requiring financial institutions to use separate employees for insurance solicitations;
- the Act's restrictions on the timing of bank employees' referral or solicitation of insurance business from customers who have loan applications pending with the bank;
- the Act's restrictions on sharing with bank affiliates information acquired by a financial institution in the course of a loan transaction to solicit or offer insurance; and
- the Act's requirement that financial institutions segregate the place of solicitation or sale of insurance so that it is readily distinguishable as separate and distinct from the deposit-taking <u>and</u> lending areas.

The analysis used to reach these conclusions and the reasons for each conclusion are described in detail in our reply to the Requester.

Date: September 24, 2001

John D. Hawke, Jr.
Comptroller of the Currency

Attachment

September 24, 2001

Sandra Murphy, Esq.
Bowles Rice McDavid Graff & Love
600 Quarrier St.
Charleston, West Virginia 25301

Dear Ms. Murphy:

This letter replies to your request, on behalf of the West Virginia Bankers Association, for the opinion of the Office of the Comptroller of the Currency (OCC) concerning whether certain provisions of the West Virginia Insurance Sales Consumer Protection Act (the West Virginia Act)[1] apply to national banks.

For the reasons described in detail in this letter, we have concluded that Federal law preempts some, but not all, of the provisions of the West Virginia Act that you have asked us to review. In particular, it is our opinion that Federal law *does not preempt* the following provisions of the West Virginia Act with respect to national banks:

- the Act's prohibition, in section 8(a), against requiring or implying that the purchase of an insurance product from a financial institution is required as a condition of a loan;
- the Act's provision, in section 8(b), prohibiting a financial institution from offering an insurance product in combination with other products unless all of the products are available separately; and
- the Act's requirement, in section 11(a), that, where insurance is required as a condition of obtaining a loan, the insurance and credit transactions be completed independently and through separate documents.

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[1] The provisions of the West Virginia Act that you have asked us to review are codified at W. Va. Code §§ 33-11A-6, 33-11A-8 to-11, and 33-11A-13 and -14 (2000). For the sake of simplicity, this letter usually refers to these provisions by section number only. Thus, for example, we refer to § 33-11A-6 as "section 6."

We also conclude that the following provision of the Act *is preempted only in part*:

- with respect to the Act's disclosure requirements, we conclude that the provisions, in section 9(a), prescribing the content of the disclosures that a financial institution is required to make in connection with the solicitation of an insurance product, and the requirement, in section 9(c), that a financial institution that sells insurance obtain a written acknowledgment, in a separate document, from its insurance customer that certain disclosures were provided are not preempted; but that the Act's provisions, in section 9(a), regarding the manner and timing of certain required disclosures are preempted.

Finally, it is our opinion that Federal law *does preempt* the following provisions of the West Virginia Act with respect to national banks:

- the Act's provisions, in section 6, requiring financial institutions to use separate employees for insurance solicitations;

- the Act's restrictions, in section 10(a), on the timing of bank employees' referral or solicitation of insurance business from customers who have loan applications pending with the bank;

- the Act's restrictions, in sections 13(b) and 13(c), on sharing with bank affiliates information acquired by a financial institution in the course of a loan transaction to solicit or offer insurance; and

- the Act's requirement, in section 14, that financial institutions segregate the place of solicitation or sale of insurance so that it is readily distinguishable as separate and distinct from the deposit-taking <u>and</u> lending areas.

In reaching these conclusions, we have reviewed each of the provisions of the West Virginia Act under the applicable legal standards, including the provisions of the Gramm-Leach-Bliley Act (GLBA)[2] that govern the applicability of State law to national banks. We also have relied on our experience in supervising national banks that engage in insurance activities to evaluate the effects of the State law provisions under consideration here on national banks' ability to conduct an insurance business.

Where the text of the West Virginia Act left some doubt about how a particular provision would be administered or applied as a practical matter, we have relied on the written comment submitted by the Insurance Commissioner for the State of West Virginia and on discussions with the staff of the West Virginia Insurance Department.

[2] *See* Pub. L. No. 106-102, 113 Stat. 1338 (Nov. 12, 1999).

In addition, we note that the National Association of Insurance Commissioners (NAIC) has recently adopted revisions to the NAIC's Model Unfair Trade Practices Act (the Model Act) intended to implement the insurance functional regulation framework established by the GLBA. None of the conclusions reached in this letter result in a finding that any of the provisions of the Model Act that were adopted to implement the GLBA would be preempted.

The first section of this letter provides background on the process we used to develop our opinion and addresses the significant comments that we received in response to our publication of notice of your request. The second section describes the framework that governs our legal analysis. Finally, the third section analyzes each of the provisions of the West Virginia Act that you have asked us to review under the applicable principles of Federal preemption.

I. Background: The West Virginia Bankers' Association Request

On April 14, 1997, the State of West Virginia enacted the West Virginia Insurance Sales Consumer Protection Act. The West Virginia Act imposes a number of requirements that affect the insurance sales, solicitation, or cross-marketing activities of financial institutions, including national banks.

By letter dated May 8, 2000, you requested the OCC's opinion on whether section 104 of the GLBA[3] preempts the specific provisions of the West Virginia Act that your letter identified. In support of your request, you asserted that the West Virginia provisions do not fall within the express safe harbor provisions of the GLBA (Safe Harbors),[4] or are more burdensome or restrictive than the Safe Harbors, and impose requirements that prevent or significantly interfere with the ability of national banks to exercise their authority to engage in insurance sales, solicitation, or crossmarketing activities.

On June 2, 2000, the OCC published notice of your request in the *Federal Register* and requested comments on whether Federal law preempts the West Virginia Act provisions.[5] We received a total of 67 comments from 63 different commenters.[6] Several commenters, primarily banks and West Virginia banking trade associations, supported preemption of some or all of the West Virginia provisions. Commenters opposing preemption generally said that some or all of the provisions under review fall within the Safe Harbors and are therefore protected from preemption. These commenters also asserted that the provisions not covered by a Safe Harbor nevertheless are protected from preemption because they do not "prevent or significantly

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[3] *Id*. at § 104, 113 Stat. 1352 (1999). Section 104 of the GLBA is codified at 15 U.S.C. § 6701. In this letter, we cite section 104 of the GLBA rather than to the provision as codified.

[4] *See* GLBA § 104(d)(2)(B).

[5] *See* 65 Fed. Reg. 35420 (June 2, 2000).

[6] The Independent Insurance Agents of Louisiana submitted five identical letters signed by five different officers; ten organizations representing insurance agents filed identical, or substantially similar, letters; and two organizations representing banks that sell insurance filed virtually identical comments.

interfere" with the ability of a financial institution or its affiliate to engage in any insurance sales, solicitation, or crossmarketing activity. The discussion in Section III addresses these points with respect to each State law provision that we conclude is preempted by Federal law.

Some of the commenters opposed to preemption also argued more generally that the OCC lacks the authority to determine whether Federal law preempts the West Virginia provisions. As these comments suggest, Federal courts, rather than the OCC, are the ultimate arbiters of whether Federal law preempts State law in a particular case. There are, nonetheless, sound reasons why the OCC should provide its opinion about the likely outcome of consideration of these issues by Federal courts. As the primary supervisor of national banks, the OCC is uniquely positioned to evaluate the effect of the West Virginia Act on national banks' ability to exercise their Federal authority to sell insurance.

Further, from the practical perspective, in the absence of interpretive advice, national banks that sell, or wish to sell, insurance in West Virginia will face added cost, burden, and uncertainty. Those banks would either have to comply with the provisions of the Act, whether or not they apply under the relevant Federal preemption standards, or risk adverse action by the State. The costs of either alternative, measured both directly and in lost business opportunities, could well be substantial.

A few commenters opposed to preemption asserted that the OCC should not find that Federal law preempts the West Virginia Act provisions because State insurance regulators are, pursuant to the GLBA, responsible for the functional regulation of the business of insurance. Several commenters made the related argument that West Virginia's interest in protecting consumers pursuant to its insurance sales practices statute should compel the conclusion that Federal law does not preempt the West Virginia Act.

As we discuss fully in the next section of this opinion, however, the GLBA provides that the States' functional regulation authority over insurance activities is subject, in certain respects, to Federal preemption standards. In particular, the question whether a State insurance sales law applies to national banks is resolved by application of the Federal standards to the State provision in question. The next section describes the applicable Federal standards.

II. Federal Preemption Standards

The GLBA provisions that govern how State law applies to national banks (and other depository institutions) are complex. In some respects, the statute retains established standards, together with important judicial precedents. In other respects, it replaces existing standards with new rules. Because the GLBA expressly incorporates the decision of the United States Supreme Court in *Barnett Bank of Marion County, N.A. v. Nelson*[7] for certain purposes, we first review the *Barnett* decision, then describe the relevant statutory provisions.

[7] 517 U.S. 25 (1996).

A. The *Barnett* Decision

Since the inception of the national bank charter, Federal courts have decided questions about the applicability of State law to a national bank's exercise of its Federally authorized powers by applying principles derived from the Supremacy Clause of the United States Constitution. In *Barnett*, the Supreme Court considered a Florida law that prohibited a licensed insurance agent from engaging in insurance agency activities if the agent was "associated with, . . . owned or controlled by"[8] a financial institution. The Court held that the Florida statute was preempted by the Federal statute -- 12 U.S.C. § 92 -- that authorizes national banks to sell insurance in small towns without regard to affiliation or control.

To reach this conclusion, the Court first reviewed the Federal authority provided to national banks by section 92. It held that section 92 granted to national banks "a broad, not a limited, permission" to sell insurance.[9] In this context, the Court then applied traditional Federal preemption standards,[10] concluding that the Florida statute at issue conflicted with section 92

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[8] *See* Fla. Stat. Ann. ' 626.988(2) (1996).

[9] The Court considered a national bank's authority to sell insurance in the historical context of the Federal statutory scheme of national bank regulation.

> [T]he Federal Statute [*i.e.*, section 92] says that its grant of authority to sell insurance is in "addition to the *powers* now vested by law in national [banks]." In using the word "powers," the statute chooses a legal concept that, in the context of national bank legislation, has a history. That history is one of interpreting grants of both enumerated and incidental "powers" to national banks as grants of authority not normally limited by, but rather ordinarily pre-empting, contrary state law.

Barnett, 517 U.S. at 32 (citations omitted).

[10] The Court summarized the three traditional constitutional bases for Federal preemption of State law -- express preemption, preemption because Congress has "occupied the field" of regulation, and preemption on account of a conflict between Federal and State law -- as follows:

> Sometimes courts, when facing the pre-emption question, find language in the federal statute that reveals an explicit congressional intent to pre-empt state law. More often, explicit pre-emption language does not appear, or does not directly answer the question. In that event, courts must consider whether the federal statute's "structure and purpose," or nonspecific statutory language, nonetheless reveal a clear, but implicit, pre-emptive intent. A federal statute, for example, may create a scheme of federal regulation "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." Alternatively, federal law may be in "irreconcilable conflict" with state law. Compliance with both statutes, for example, may be a "physical impossibility," or, the state law may "stan[d] as an obstacle to the accomplishment and execution of the full purposes of and objectives of Congress."

Id. at 31 (citations omitted).

because the Florida law was "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress"[11] in granting national banks the power to sell insurance and was, therefore, preempted.

The Court went on to note that, while Congress's grant of a Federal power cannot be made subject to State-imposed conditions, State statutes having only a small effect on the national bank's exercise of that power may still apply:

> In defining the pre-emptive scope of statutes and regulations granting a power to national banks, [prior preemption] cases take the view that normally Congress would not want States to forbid, or to impair significantly, the exercise of a power that Congress explicitly granted. To say this is not to deprive States of the power to regulate national banks, where (unlike here) doing so does not prevent or significantly interfere with the national bank's exercise of its powers.[12]

The Court cited three cases to illustrate the point that State laws will not be preempted if they do not, for example, "unlawfully encroach" upon, "hamper," or "impair" the bank's ability to engage in the authorized activity.[13] The State laws that were found to apply to national banks in these cases did not serve to limit the exercise of bank powers.

Under the standards used by the Court in *Barnett*, a conflict between a state law and Federal law need not be complete in order for Federal law to have preemptive effect. Where a Federal grant of authority is unrestricted, State law that attempts to place limits on the scope and exercise of that authority will be preempted.[14] Thus, Federal law preempts not only State laws that purport to prohibit a national bank from engaging in an activity permissible under Federal law but also State laws that condition or confine the exercise by a national bank of its express or incidental powers.

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[11] *Id*. at 31 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

[12] *Id.* at 33 (citations omitted).

[13] *Id.* at 33-34 (*citing* "*Anderson Nat. Bank v. Luckett*, 321 U.S. 233, 247-252 (1944) (state statute administering abandoned deposit accounts did not 'unlawful[ly] encroac[h] on the rights and privileges of national banks'); *McClellan v. Chipman*, 164 U.S. 347, 358 (1896) (application to national banks of state statute forbidding certain real estate transfers by insolvent transferees would not 'destro[y] or hampe[r]' national banks' functions); *National Bank v. Commonwealth*, 9 Wall. 353, 362 (1870) (national banks subject to state law that does not 'interfere with, or impair [national banks'] efficiency in performing the functions by which they are designed to serve [the Federal] Government').").

[14] *See*, *e.g.*, *New York Bankers Ass'n, Inc.* v. *Levin*, 999 F. Supp. 716, 719 (W.D.N.Y. 1998) (holding that a New York statute that restricted the types of insurance banks could sell to their customers was preempted on the grounds that the State law "constitutes an interference with [banks'] rights" to sell insurance).

The *Barnett* case is clear, moreover, that State law does apply when a Federal grant of power to national banks is accompanied by an "explicit statement that the exercise of that power is subject to state law."[15] We next review the relevant provisions of the GLBA to evaluate the extent to which that statute subjects national banks' power to engage in the insurance sales, solicitation, and cross-marketing activities covered to State law.

B. The GLBA's Federal Preemption Standards

The GLBA actually contains several different preemption standards for different aspects of the operations of banks and their affiliates. First, section 104(c)(1) of the GLBA broadly preempts any State law that "prevents or restricts" the ability of a national bank (or other depository institution), or its affiliate, from being affiliated with any entity if the affiliation is authorized or permitted by Federal law.[16] Similarly, section 104(d)(1) preempts any State law that "prevents or restricts" a national bank (or other depository institution), or its affiliate, from engaging in any activity -- other than insurance sales, solicitation, or cross-marketing -- that is permissible for that entity to engage in under the GLBA.[17]

With respect to insurance sales, solicitation, or cross-marketing activities, section 104(d)(2) precludes any State action that "prevents or significantly interferes" with those activities when conducted by a depository institution or its affiliate.[18] However, the statute expressly protects from preemption 13 specified types of restrictions on insurance sales, solicitation, and cross-marketing activities.[19] The *Barnett* standards for preemption continue to apply, however, to State laws regarding insurance sales, solicitation, and cross-marketing activities that are not covered by (or substantially the same as) these 13 "Safe Harbors."[20]

These provisions of section 104 require a three-step analysis in order to determine whether a particular State law applies to a national bank. First, if the State law in question is of a type addressed by section 104, it is necessary to determine which preemption standard -- that is,

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[15] *Barnett*, 517 U.S. at 34.

[16] *See* GLBA § 104(c)(1). Section 104(c)(2) contains exceptions to this preemption standard for certain types of State regulation of insurance underwriters that are not relevant to our analysis of the West Virginia Act.

[17] *See id.* § 104(d)(1), (2)(B). Section 104(d)(3) excepts from preemption under the "prevent or restrict" standard in section 104(d)(1) certain State laws regulating the activities (other than sales-related activities) of insurance companies (and depository institutions providing savings bank life insurance). *See id.* § 104(d)(3).

[18] *See id.* § 104(d)(2)(A).

[19] *See id.* § 104(d)(2)(B)(i) - (xiii).

[20] State statutes that were enacted after September 3, 1998, also must meet certain non-discrimination standards with respect to those provisions not covered by the Safe Harbors. *See id.* § 104(e). The West Virginia law was enacted on April 14, 1997, and therefore these nondiscrimination provisions are not applicable to this analysis.

Section 104(d)(4) addresses financial activities other than insurance, and thus also is not relevant for purposes of this analysis.

which subsection of section 104 -- governs. Second, if the State law pertains to an insurance sales, solicitation, or cross-marketing activity, then we must determine whether it is protected from preemption by any of the 13 Safe Harbors set forth in section 104(d)(2)(B). Finally, if the State law pertains to insurance sales, solicitation, or cross-marketing but is not protected by any Safe Harbor, the third step is to determine whether Federal law preempts the West Virginia provision under the *Barnett* standards, as incorporated by section 104(d)(2)(A).

Section 104(d)(2)(A) provides:

> In accordance with the legal standard for preemption set forth in the decision of the Supreme Court of the United States in Barnett Bank of Marion County N.A. v. Nelson, 517 U.S. 25 (1996), no State may, by statute, regulation, order, interpretation or other action, prevent or significantly interfere with the ability of a depository institution, or an affiliate thereof, to engage, directly or indirectly, either by itself or in conjunction with an affiliate or any other person, in any insurance sales, solicitation, or crossmarketing activity.[21]

The text of section 104 makes clear that its "prevent or significantly interfere" standard is the same as the standard that was applied by the Supreme Court in the *Barnett* case. The standard itself expressly incorporates *Barnett*. Moreover, language that appears later in the same paragraph -- paragraph (2) of subsection (d) -- expressly preserves the *Barnett* decision. That language says that:

> Nothing in this paragraph shall be construed (I) to limit the applicability of the decision of the Supreme Court in Barnett Bank of Marion County N.A. v. Nelson, 517 U.S. 25 (1996) with respect to any State statute, regulation, order, interpretation, or other action that is not referred to or described in subparagraph (B); or (II) to create any inference with respect to any State statute, regulation, order, interpretation, or other action that is not described in this paragraph.[22]

The effect of this language is to preserve both the standards that the Supreme Court articulated in the *Barnett* decision and also the analysis that the Court used in that case. Thus, the standard for preemption used by the Court in *Barnett* before enactment of GLBA is the same standard that applies today with respect to State insurance sales, solicitation, or cross-marketing laws that are not covered by a Safe Harbor.

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[21] *Id.* § 104(d)(2)(A).

[22] *Id.* § 104(d)(2)(C)(iii). The reference in the first clause to subparagraph (B) is to the Safe Harbors. We construe the "no inference" language in the second clause to mean that a State law may not be inferred to be preempted under the "prevent or significantly interfere standard" solely because it is excluded from coverage by one of the Safe Harbors. Accordingly, our analysis in Section III draws no such inferences.

The Senate Report accompanying the GLBA, in commenting on a provision prescribing the "prevent or significantly interfere" standard, using language that was almost identical to the language of section 104(d)(2) as ultimately enacted, confirms this view. The Senate Report states that:

> The Committee believes that State insurance sales, solicitation, and cross-marketing laws adopted prior to September 3, 1998 should be subject to preemption under the preemption standards applicable when such laws were adopted. Thus, it is the Committee's intent that such laws may be subject to preemption under applicable case law, and the statutory preemption standard set forth in subsection 104(d)(2)(A), which is patterned after such case law. There is an extensive body of case law related to the preemption of State law. For example, in *Barnett Bank of Marion County, N.A. v. Nelson,* 116 S.Ct. 1103 (1996), the U.S. Supreme Court noted that Federal courts have preempted State laws that "prevent or significantly interfere" with a national bank's exercise of its powers; that "unlawfully encroach" on the rights and privileges of national banks; that "destroy or hamper" national banks' functions; or that "interfere with or impair" national banks' efficiency in performing authorized functions.[23]

The limitation on the application of this standard to State laws adopted prior to September 3, 1998 was deleted in the final legislation.

III. <u>Application of Federal Preemption Standards to the West Virginia Act</u>

A. Summary of the Framework for the Preemption Analysis

As we have described in discussing the applicable Federal preemption standards, we use a three-step analysis to determine whether Federal law preempts the provisions of the West Virginia Act that you have requested us to review. First, we determine which preemption standard in section 104 of the GLBA is applicable.

Each of the West Virginia provisions that you have asked us to review regulates the sales, solicitation, or cross-marketing of insurance. Accordingly, the determination whether each of the provisions applies to a national bank is governed by section 104(d)(2)(A) of the GLBA. Section 104(d)(2)(A) establishes the "prevent or significantly interfere" standard, as that standard is set forth in the Supreme Court's *Barnett* decision.

However, one of the provisions that you have identified -- section 13 of the West Virginia statute -- regulates information sharing between a financial institution and its affiliate. The area

[23] S. Rep. No. 106-44, at 13 (1999).

addressed by section 13 is also the subject of a Federal statute, the Fair Credit Reporting Act[24] (FCRA), which contains an express preemption provision. Where Congress has expressly preempted State law, there is no need to apply the standards in section 104 of the GLBA to determine that State law's applicability.[25] Accordingly, our analysis of section 13 differs from our analysis of the other provisions you have asked us to review in that it focuses on whether the West Virginia provision is covered by the FCRA's express preemption.[26]

With respect to all of those other provisions, the second step in the analysis is to consider whether the particular provision falls within one or more of the 13 Safe Harbors. A State law that is covered by a Safe Harbor, or that is "substantially the same as but no more burdensome or restrictive than"[27] a Safe Harbor, is protected from Federal preemption under the standard in section 104(d)(2)(A). No further analysis is necessary under section 104.[28] A list of the Safe Harbors is attached to this letter as Appendix A.

Finally, if the provision concerns an insurance sales, solicitation or crossmarketing activity, but is not protected by a Safe Harbor, we consider whether it is preempted under the *Barnett* standards incorporated in section 104.

The determination whether a particular State statute is preempted under the *Barnett* standards depends on the effect that the State law has on a national bank's ability to exercise its Federally authorized power to engage in insurance agency activities and on the scope of that effect. In the words of the Senate Report discussed in Section II of this letter (summarizing the *Barnett* holding), State laws are preempted if they:

> "[P]revent or significantly interfere" with a national bank's exercise of its powers; . . . "unlawfully encroach" on the rights and privileges of national banks; . . . "destroy or hamper" national banks' functions; or . . . "interfere with or impair" national banks' efficiency in performing authorized functions.[29]

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[24] 15 U.S.C. ' ' 1681-1681u (as amended by the Economic Growth and Regulatory Paperwork Reduction Act of 1996 (EGRPRA), Pub. L. No. 104-208, tit. II, subtit. D, ch. 1, ' ' 2401-2422, 110 Stat. 3009-426 to 3009-454 (1996)).

[25] The Supreme Court summarized the three bases on which a Federal statute may preempt State law -- express preemption, occupation of the field, and preemption by reason of conflict -- in the *Barnett* decision. *See supra* note10, quoting the Court's summary.

[26] The Safe Harbors protect State laws from Federal preemption only under the "prevent or significantly interfere" standard in section 104(d) of the GLBA. Therefore, we do not consider the Safe Harbors in determining whether FCRA preempts these provisions.

[27] GLBA § 104(d)(2)(B).

[28] State laws covered by a Safe Harbor, however, may not be applicable to national bank insurance activities because of other provisions of Federal law, such as the specific preemption provisions set forth in the FCRA, which are discussed in Section III of this opinion.

[29] S. Rep. No. 106-44, at 13 (1999).

Accordingly, our review under the *Barnett* standards focuses on how the West Virginia provision affects a national bank's ability to engage in insurance sales, solicitation, and cross marketing activities and on the nature and extent of that effect. This review includes, for example, consideration of the extent to which the substance of an authorized activity is affected and the costs that a bank would likely incur to comply with the State law.[30]

We also consider whether the West Virginia provision imposes requirements that have the same, or substantially the same, effect on a national bank as requirements imposed by Federal law. If, in a Federal statute, Congress has imposed conditions on a national bank's ability to exercise its insurance powers, then a Federal court is unlikely to find that the State statute "prevents or significantly interferes with" the bank's exercise of those powers within the meaning of the *Barnett* standards.

B. Analysis of the Provisions of the West Virginia Act

In this portion of our analysis, we have grouped the West Virginia provisions according to the conclusions we reach with respect to Federal preemption. We first discuss those provisions that we conclude are not preempted under the Federal preemption standards we have described. We next address one provision that we conclude is preempted only in part. Finally, we discuss the provisions that we conclude are preempted. Within that grouping, we address the provisions in the order in which they appear in the West Virginia statute.

1. West Virginia Provisions That Are Not Preempted

Section 8 -- Tying Restrictions

Section 8 of the West Virginia statute generally restricts the tying of insurance products and other products or services offered by the bank. You have asked us to review both provisions of this section, and the following discussion addresses each provision separately.[31]

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[30] In *Association of Banks in Ins., Inc. v. Duryee*, 55 F. Supp. 2d 799 (S.D. Ohio 1999), *appeal docketed*, No. 99-3917 (6th Cir. July 19, 1999), the court found that complying with the state statute "might . . . entail a substantial financial expense which could weigh significantly against the expected revenue from the sale of insurance in that small town, and therefore significantly impair the bank's ability to sell insurance." *Id.* at 809.

[31] Specifically, Section 8 of the West Virginia Act provides that:

> (a) No person shall require or imply that the purchase of an insurance product from a financial institution by a customer or prospective customer of the institution is required as a condition of the lending of money or extension of credit.
>
> (b) No financial institution may offer an insurance product in combination with its other products, unless all the products are available separately from the financial institution.

W. Va. Code ' 33-11A-8 (2000).

Section 8(a) -- Tying of Products Prohibited

Section 8(a) of the West Virginia Act prohibits a financial institution from requiring or implying that the purchase of an insurance product from that institution is required as a condition of lending money or extending credit.

The Insurance Commissioner for the State of West Virginia (the Commissioner) asserted in his comment letter that Section 8(a) is protected by Safe Harbor (viii).[32] Safe Harbor (viii) protects State laws that prohibit financial institutions from requiring a customer to obtain insurance from that institution, or an affiliate of that institution, as a condition of obtaining the extension of credit.

As we have noted, the Safe Harbors protect State provisions that are "substantially the same as but no more burdensome or restrictive than" the restrictions in the Federal statutory text. Section 8(a) prohibits a person from requiring *or implying* that an individual applying for a loan or extension of credit must purchase an insurance product from the financial institution to obtain approval of the loan or extension of credit. The provision thus includes a phrase -- Aor imply@ -- that does not appear in the language of Safe Harbor (viii). The Commissioner argues that this provision Acontains the precise restriction@ found in Safe Harbor (viii),[33] but acknowledges that Section 8(a) Amerely restricts bank employees from requiring *or suggesting* that in order to obtain loan approval, the customer must purchase insurance from that financial institution.@[34] The language of section 8(a) thus is more restrictive than the language of Safe Harbor (viii).

Moreover, Safe Harbor (viii) also includes certain exemptions that are not contained in section 8(a). The first exemption excludes from protection a State law imposing a prohibition that would prevent a bank or its affiliate from engaging in an activity "that would not violate" 12 U.S.C. § 1972[35] as interpreted by the Board of Governors of the Federal Reserve System (FRB).[36] The second exemption excludes from protection a State law that would prevent a bank from informing a customer that insurance is available from the bank, or from a subsidiary or affiliate. The scope of the West Virginia provision is broader than the scope of Safe Harbor (viii) and, therefore, we conclude that section 8(a) is not protected from preemption by the Safe Harbor.

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[32] See Comment Letter from Hanley C. Clarke, Insurance Commissioner, State of West Virginia, dated June 30, 2000, at 4 (hereinafter ACommissioner=s Letter@).

[33] *Id.*

[34] *Id*. (emphasis added).

[35] Section 106 of the Bank Holding Company Act Amendments of 1970, Pub.L. No. 91-607, § 106, 84 Stat. 1760, 1766 (1970) (codified at 12 U.S.C. § 1972).

[36] *See* 12 C.F.R. ' 225.7.

However, we also conclude that the provision is not preempted under the *Barnett* standards. National banks are already required to comply with tying restrictions in Federal law that are similar to those contained in the West Virginia provision. Section 1972 generally prohibits a bank from extending credit, leasing or selling property, furnishing services, or fixing or varying prices of these transactions, on the condition or requirement that the customer obtain additional credit, property, or service from the bank, subject to certain exceptions.[37] A bank engages in a tie for purposes of section 1972 by conditioning the availability of, or offering a discount on, one product or service (the "tying product") on the condition that the customer obtain some additional product or service.[38] For example, a national bank may not condition the extension of credit or the reduction of the price of credit on a customer purchasing insurance from the bank.

Several commenters suggested that Federal law should preempt section 8(a) because that provision would prohibit a bank employee from mentioning to the customer that the insurance products may be available at a discount as part of a package. Others questioned whether the bank employee could even tell the customer that the bank sells insurance. The West Virginia Insurance Department has advised us that it does not interpret section 8(a) to impose these restrictions. Based upon this representation, we conclude that section 8(a) of the West Virginia Act would not be preempted.

Section 8(b) -- Separate Availability Provision

Section 8(b) provides that a financial institution may not offer an insurance product in combination with its other products, unless all the products are available separately from that institution. Offering products or services in combination, often at a reduced price, is known as Abundling@ and is a common business practice among banks that sell insurance.

No Safe Harbor protects State separate availability provisions from preemption. In fact, as we have described, Safe Harbor (viii) expressly excludes from preemption protection State anti-tying provisions that prohibit conduct "that would not violate" the Federal anti-tying statute.

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[37] *See* 12. U.S.C. ' 1972(1). For example, the statutory traditional bank product exception permits a bank to extend credit, lease or sell property, furnish services, or fix or vary prices on the transactions, on the condition that the customer obtain a loan, discount, deposit, or trust service from the same bank. *See id*. § 1972(1)(A). Further, the statute authorizes the Federal Reserve Board (FRB) to permit, by order or regulation, additional exceptions to the tying prohibitions. *See id.; see also* 12 C.F.R. § 225.7(b). In 1997 the FRB adopted significant changes to its tying restrictions. *See* 62 Fed. Reg. 9290, 9312-16 (Feb. 28, 1997). As stated by the FRB, these changes are designed to enhance competition in banking and nonbanking products and allow banks and their affiliates to provide more efficient and lower cost service to customers. *See id.* at 9312; *see also* 12 C.F.R. 225.7(b)(2); Citigroup, Inc., FRB Interpretive Letter, [Current Binder] Fed. Banking L. Rep. (CCH) ¶ 80-292, at 89,220 (May 16, 2001) (describing the safe harbors for combined discount programs, where the FRB has permitted banks to vary the consideration for a product or package of products if the customer maintains a minimum balance in certain products specified by the bank, which may include insurance products.)

[38] *See* 60 Fed. Reg. 20186, 20187 (Apr. 25, 1995).

It appears that the plain language of section 1972 would permit the bundling of insurance and traditional banking products. Section 1972 prohibits a bank from conditioning the availability of, or offering a discount on, one product or service on the customer's obtaining an additional product or service. By its terms, however, the statute does not prevent a bank from conditioning the availability of, or offering a discount on, any product or service if the availability or price of the product or service depends on the customer's obtaining a "loan, discount, deposit, or trust service" from the same bank.[39] As explained by the FRB, this statutory "traditional bank product exception" permits a bank "to tie any product or service to a loan, discount, deposit, or trust service offered by that bank."[40] Because section 8(b) of the West Virginia statute contains no exception for bank insurance sales, solicitation, or crossmarketing practices that appear to be permissible under the terms of the Federal anti-tying statute, section 8(b) is more restrictive than, and thus not protected from preemption by, the Safe Harbor.

In our opinion, however, the state separate availability provision is not preempted under the *Barnett* standards. Banks' ability to package products and services together enables them to provide products and services more efficiently and, therefore, to compete more effectively with other providers of financial services.[41] Moreover, as some commenters pointed out, bundling offers consumers the benefits of lower prices, the opportunity to consider the purchase of additional products as a result of crossmarketing, and one-stop shopping. The West Virginia provision does not prevent national banks from packaging products in the way that Federal law permits in order to realize these benefits, so long as the products are also available separately. Moreover, it does not hamper a national bank from pricing its products in a way that reflects the differences in cost and efficiency that may result depending on whether insurance is sold

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[39] "A bank shall not in any manner extend credit, lease or sell property of any kind, or furnish any service, or fix or vary the consideration for any of the foregoing, on the condition or requirement --

> (A) that the customer shall obtain some additional credit, property, or service from such bank ***other than*** a loan, discount, deposit, or trust service . . . . "

12 U.S.C. § 1972(1) (emphasis added).

[40] 62 Fed. Reg. at 9314 (preamble to final rule amending the FRB's anti-tying regulation to, among other things, permit interaffiliate tying arrangements that are permissible under the statutory traditional bank product exception).

[41] The FRB has recognized the benefits and efficiencies of bundling products. The FRB's anti-tying rule formerly provided that the statutory traditional bank production exception would be available to banks (and bank holding companies and nonbank affiliates thereof) "only if all products involved in the tying arrangement were separately available for purchase." 12 C.F.R. § 225.7(c) (1997). In 1997, as part of a package of significant changes to its anti-tying regulation, the Board eliminated the "separately available" requirement. In describing its reasons for the changes made to the anti-tying provisions, the Board explained that these changes "remove Board-imposed tying restrictions on bank holding companies and their nonbank subsidiaries; create exceptions from the statutory restriction on bank tying arrangements to allow banks greater flexibility to package products with their affiliates; and establish a safe harbor from the tying restrictions for certain foreign transactions." Further, the FRB indicated that these changes "are designed to enhance competition in banking and nonbanking products and allow banks and their affiliates to provide more efficient and lower-cost service to customers." *See* 62 Fed Reg. 9290 at 9312-13. The FRB's current rules limit the availability of the statutory traditional bank product exception only by providing that the exception, and a bank's authority to use it, will terminate in a case where a tying arrangement is resulting in anti-competitive practices. 12 C.F.R. § 225.7(c) (2001).

separately or is bundled with another product. Therefore, we conclude that Federal law does not preempt subsection 8(b) under the *Barnett* test set forth in section 104(d)(2) of GLBA.

<u>Section 11(a) -- Independent Documentation of Insurance and Credit Transactions</u>

Section 11(a) provides that an extension of credit and insurance sales transaction must be completed independently and through separate documents when insurance is required as a condition of the loan.[42] Although Safe Harbor (xi) protects State restrictions requiring separate documentation for insurance and credit transactions, it excepts credit insurance and flood insurance from protection. A bank would have to maintain separate documents for credit insurance and flood insurance in order to comply with the West Virginia provision. As a result, Section 11(a) is more burdensome than Safe Harbor (xi). It covers transactions that the Safe Harbor expressly excludes and, therefore, imposes an additional paperwork burden and associated administrative costs on banks. Accordingly, the Safe Harbor does not protect section 11(a) from preemption.

Some commenters asserted that the West Virginia provision should be preempted under the *Barnett* standards because the use of the word Aindependently@ implies that an additional, undefined act must occur beyond the completion of separate documents. Many of these commenters argued, for example, that the provision requires customers to make a separate trip to the bank to sign documents. The West Virginia Insurance Commissioner, however, has stated that "[n]othing in the state statute requires a customer to make separate visits to the bank; it merely requires the credit and insurance transactions be completed independently through the signing of separate documents. . . ."[43]

Based upon this representation, we conclude that the separate documentation requirement for credit and flood insurance transactions when insurance is required as a condition of the loan is not preempted. First, section 11(a) does not affect these types of insurance transactions unless insurance is required as a condition of the loan. Second, the additional requirement for separate documentation if these types of insurance are required as a condition of a loan would not appear to substantially affect the underlying insurance activities.

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[42] Specifically, section 11(a) of the West Virginia statute provides:

> If insurance is required as a condition of obtaining a loan, the credit and insurance transactions shall be completed independently and through separate documents.

W. Va. Code ' 33-11A-11(a) (2000).

[43] Commissioner=s Letter, *supra* note 31, at 7.

2. West Virginia Provision That Is Preempted Only in Part

<u>*Section 9 -- Disclosure Provisions*</u>

<u>*Section 9(a) -- Content of Required Disclosures*</u>

Section 9 of the West Virginia Act generally contains disclosure requirements that apply when a bank solicits or sells insurance. In particular, section 9(a) of the Act requires banks soliciting or selling insurance to make certain disclosures to customers.[44] The bank must disclose that its insurance products are not deposits; are not Federally insured; are not guaranteed by any insured depository institution; and, where appropriate, that the products carry investment risk, including a potential loss of principal.

The content of the disclosures required by section 9(a) is substantially the same as that of the disclosures protected by Safe Harbor (x). Although there are some differences in wording between the West Virginia provision and Safe Harbor (x), the similarities predominate so that it is "no more burdensome or restrictive" for a bank to give the State disclosures than to give those described in the Safe Harbor. Accordingly, the West Virginia requirement that these disclosures be given is not preempted.

You have also asked us, however, to review two other aspects of the West Virginia disclosure requirements: the provisions that relate to the manner and timing of the disclosures and the provision requiring a bank to obtain acknowledgments that the disclosures have been given.

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[44] Section 9(a) of the West Virginia Act provides:

> A financial institution soliciting the purchase of or selling insurance, and any person soliciting the purchase of or selling insurance on the premises of, in connection with a product offering of, or using a name identifiable with, a financial institution, shall prominently disclose to customers, in writing, in clear and concise language, including in any advertisement or promotional material, and orally during any customer contact, that insurance offered, recommended, sponsored, or sold:
>
> (1) Is not a deposit;
> (2) Is not insured by the federal deposit insurance corporation or, where applicable, the National Credit Union Share Insurance Fund;
> (3) Is not guaranteed by any insured depository institution; and
> (4) Where appropriate, involves investment risk, including potential loss of principal.

W. Va. Code ' 33-11A-9(a) (2000).

Section 9(a) -- Manner and Timing of Required Disclosures

Section 9(a) requires that national banks soliciting or selling insurance make the disclosures in writing, including in connection with advertisements and promotional material, and orally "during any customer contact."[45]

The manner and timing requirements for the disclosures required by the West Virginia provision are more far-reaching than Safe Harbor (x). Section 9(a) requires the bank to make the disclosures "in any advertisement or promotional material, and orally during any customer contact."[46] Safe Harbor (x) is more limited in scope, protecting only State law provisions that require the bank to make the disclosure Aprior to the sale@ of an insurance policy. Moreover, section 9(a) requires disclosures to be made Aprominently . . . in clear and concise language,@ whereas Safe Harbor (x) covers State laws that require the disclosures to be Aclear and conspicuous . . . where practicable.@ Omission of the phrase, Awhere practicable,@ eliminates an important qualification on the disclosure requirement.

The West Virginia Insurance Commissioner acknowledged that requiring disclosures in advertisements and promotional material might Abe of concern,@ but the Commissioner believes they Acould arguably fall within@ Safe Harbor (iii).[47] Although Safe Harbor (iii) does apply to advertisements or other insurance promotional material, it only protects state restrictions that prohibit *misleading* advertisements or other insurance promotional material; it does not protect State laws that require disclosures in advertisements and promotional material, nor does it address oral disclosures during any customer contact. Therefore, section 9(a) is not covered by any of the Safe Harbors because it is more far-reaching than either Safe Harbor (x) or Safe Harbor (iii).

In our opinion, the manner and timing requirements of section 9(a) are preempted under the *Barnett* standards. Requiring banks to include these disclosures in all advertisements or promotional materials would increase a bank's operating costs and substantively hamper the bank's marketing activities.[48] For example, in cases where the promotional materials only mention insurance as one of several products offered the bank may nonetheless be required to provide the full panoply of disclosures. This is likely to confuse customers and, consequently, impair the bank's insurance solicitation and sales activities.[49]

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[45] *Id.*

[46] *Id.* (emphasis added).

[47] Commissioner=s Letter, *supra* note 31, at 6.

[48] One commenter noted that the additional space required for advertisements and promotional materials would add to the marketing expense.

[49] By contrast, the Federal insurance consumer protection regulations do not require the disclosures to be made in advertisements and promotional materials that are of a general nature describing or listing the services or products offered by the bank. *See* 12 C.F.R. § 14.40(d).

The requirement to provide the disclosures orally during <u>any</u> customer contact also substantially impedes the bank's ability to solicit and sell its insurance products. It places additional burdens on banks to train personnel and to develop procedures to ensure compliance with this requirement. The restriction is also impractical in that it may result in multiple disclosures to the same person - - a scenario that could be confusing and adversely affect the bank's ability to market its product.

This increased cost and burden is especially troublesome for small banks. The ability of these banks to meet community needs depends on the bank being able to provide these products and services in an affordable and efficient manner. These banks generally need to keep costs down to offer a full array of products and services in the communities they serve.

Finally, unlike the Federal insurance consumer protection regulations,[50] section 9(a) makes no exceptions for sales or solicitations that are conducted by telephone or through electronic means. This could have the effect of prohibiting insurance sales by telephone because it would be impossible to provide a written disclosure in those circumstances. Although we conclude that the manner and timing of the disclosure requirements of section 9(a) are preempted as applied to the solicitation and sale of insurance using traditional means, the potential effect of these requirements on solicitations and sales through alternative media provides an additional basis for preemption.

<u>Section 9(c) -- Written acknowledgment of required disclosures</u>

Section 9(c) requires the bank to obtain, prior to or at the time of an application for insurance, a written acknowledgment that a customer has received the disclosures.[51] It also requires the acknowledgment to be contained in a separate document.

None of the GLBA Safe Harbors applies to section 9(c). Safe Harbors (ix) and (x) address required disclosures, but neither of those Safe Harbors protects State provisions requiring that banks obtain a written acknowledgment from customers.

In our view, however, section 9(c) is not preempted under the *Barnett* standards when applied to in-person insurance applications. Several commenters suggested that the requirement

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[50] *See* 12 U.S.C. § 1831(x); 12 C.F.R. part 14.

[51] Section 9(c) of the West Virginia Act provides:

> (c) Any person required under subsections (a) or (b) of this section to make disclosures to a customer shall obtain a written acknowledgment of receipt by the customer of such disclosures, including the date of receipt and the customer's name, address, and account number, prior to or at the time of any application for insurance sold by the person. Such acknowledgment shall be in a separate document.

W. Va. Code ' 33-11A-9(c) (2000).

to provide the written acknowledgment in a separate document at or prior to the time of application for a loan significantly interferes with the bank's ability to engage in insurance activities. Federal law, however, imposes a similar requirement.

The insurance consumer protection standards required by section 305 of the GLBA include a requirement that a bank obtain an acknowledgment of the disclosures specified by section 305.[52] The implementing regulations issued by the OCC and the other Federal banking agencies require that this acknowledgment be written, unless the transaction is conducted online or over the telephone.[53] There are differences between the acknowledgment required by section 305 and the agencies' regulations and that required by section 9(c) of the West Virginia Act, including West Virginia's requirement as to the content of the acknowledgment and its requirement that the acknowledgment be contained in a separate document. These differences do not impose significant new costs or require the sacrifice of operational efficiencies because national banks are already required to adjust the way they solicit and sell insurance to allow for the obtaining of the acknowledgment required by Federal law.

We note, however, that section 9(c) does not provide any exceptions or alternatives for obtaining acknowledgements when insurance sales are conducted by means other than face-to-face contact between the sales representative and the customer. For example, it is unclear how a bank could obtain a written acknowledgement at the time of application if the sales transaction is conducted by telephone.[54] The West Virginia Insurance Commissioner's office has stated that it will consider alternatives to accommodate this concern. Our conclusion that section 9(c) is not preempted under the *Barnett* standards therefore addresses only the application of the acknowledgement to face-to-face sales transactions. We believe that section 9(c) would be preempted if applied in the context of sales transactions conducted online or over the telephone.

[52] Section 305 of GLBA directed the Federal banking agencies to promulgate certain consumer protection regulations relating to the sale, solicitation and advertising of insurance products by depository institutions and persons selling insurance on the premises of depository institutions or otherwise on behalf of such institutions. 12 U.S.C. § 1831x(a). Section 305(g)(2) explains the relationship between these regulations and State laws that are in effect in that jurisdiction. Pursuant to § 305(g)(2), these Federal regulations do not override inconsistent State laws unless the agencies jointly determine that the Federal regulations provide better consumer protections than the State provisions. The State then is given up to 3 years to override that determination. Section 305(g) relates solely to the preemptive effect to be given to Federal regulations promulgated under section 305(a). By its terms, it does not relate to the preemptive effect that is to be given to other Federal regulations or statutes. In the insurance sales area, this is determined pursuant to section 104 of the GLBA and the *Barnett* case standards incorporated therein.

[53] *See* 12 U.S.C. § 1831x(c)(1)(F); 12 C.F.R. § 14.40(c)(7) (OCC consumer acknowledgment requirement).

[54] The Federal regulations permit a national bank to obtain an electronic acknowledgment when the insurance sale occurs over the Internet and, subject to certain conditions, permit oral acknowledgment when the sale is concluded over the telephone. *See* 12 U.S.C. § 1831x(c)(1)(F); 12 C.F.R. § 14.40(c)(7) & accompanying preamble discussion at 65 Fed. Reg. 75822, 75828-29 (Dec. 4, 2000).

3. *West Virginia Provisions That Are Preempted*

<u>*Section 6 -- Use of Separate Employees for Insurance Solicitations*</u>

Section 6 generally prohibits financial institution employees with lending responsibilities from soliciting the sale of insurance. Financial institutions with locations having three or fewer individuals with lending authority may use one of these individuals to solicit insurance as long as that individual is not the person primarily responsible for making the loan. This provision also permits small institutions to seek a waiver from the state insurance commissioner where the same individual is the licensed agent or broker and the sole individual with lending authority.[55]

There is no Safe Harbor that applies to this provision. Two of the Safe Harbors -- Safe Harbor (xi) and Safe Harbor (xiii) -- address the separation of the insurance transaction from the credit transaction. However, these Safe Harbors only cover State laws involving record keeping and documentation requirements; they do not address State laws that restrict individuals with lending responsibilities from soliciting the purchase or sale of insurance. None of the Safe Harbors protect State laws that prohibit bank employees with lending responsibilities from also selling insurance.

Section 6 prevents any employee engaged in lending activities from soliciting or purchasing the sale of insurance and, conversely, precludes an employee selling insurance from also having any lending responsibilities. The restriction would apply to loan officers, customer service representatives, and branch managers, even if there is no connection between a given lending activity and the employee's insurance solicitation and sales activities. Thus, at a

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[55] Specifically, section 6 of the West Virginia Act provides that:

> (a) Solicitation for the purchase or sale of insurance by a financial institution shall be conducted only by individuals whose responsibilities do not include loan transactions or other transactions involving the extension of credit. Provided, That for a financial institution location having three or less individuals with lending authority, solicitation for the sale of insurance may be conducted by an individual with responsibilities for loan transactions or other transactions involving the extension of credit, as long as the individual primarily responsible for making the specific loan or extension of credit is not the same individual engaged in the solicitation of the purchase or sale of insurance for that same transaction.
>
> (b) In the event that in any small office, the same individual is the licensed agent or broker and the sole individual with lending authority, the commissioner may grant a waiver of the requirements of this section upon a written request. Such request shall include documentation that, due to the small office staff, compliance is not possible, and include identification of other steps which will be taken to minimize the customer confusion prohibited by this article.

W. Va. Code ' 33-11A-6 (2000).

minimum, section 6 would require national banks to maintain a separate sales force for insurance products.[56]

This requirement in essence prohibits a bank from using the bank's existing personnel resources to solicit and sell insurance, forcing it to artificially configure its operations to establish segregated personnel who sell insurance and may have no responsibilities related to extensions of credit. The requirement is thus hugely disruptive of normal bank operations since it would require the bank to specially isolate insurance sales personnel not just from typical loan applications, but also credit card applications and transactions, and even bank accounts with overdraft features. Not only does the requirement prevent the bank from operating efficiently by using the same employees to perform multiple duties, it forces the bank to operate inefficiently and to incur additional costs that undermine its ability to compete. This burden and intrusion into the substance of bank operations, in our view, cause section 6 to be preempted under the standards set forth in *Barnett*.[57]

Section 6 contains an exception from the general restriction for locations that have three or fewer individuals with lending authority. Individuals with lending authority in these locations also may sell insurance, <u>provided</u> that the same individual does not both lend and sell insurance on the same transaction. A bank also may seek a <u>waiver</u> from the general restrictions of section 6 for small offices where the same individual is the licensed agent or broker and the sole individual with lending authority.

Neither of these exceptions saves the provision from preemption under *Barnett*. First, unless a Federal statute specifically directs the application of state law, a state may not limit or condition a national bank's exercise of its Federal authority to sell insurance or to engage in other permissible banking functions.[58] Both the proviso and the waiver provision in section 6 of the West Virginia statute have the effect of imposing conditions on the exercise of those activities and both are, thus, impermissible under the *Barnett* standards.

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[56] Several commenters stated that this provision would require banks to hire additional personnel to sell insurance, incur additional expenses and limit the bank's most effective allocation of its resources.

[57] Section 6 also has subtle, but consequential, negative consumer protection implications which may substantially affect the reputation risk arising from banks' insurance sales activities. By requiring a separate insurance sales force, the provisions may effectively require many banks to use a sales force compensated through a traditional commission structure. If banks were able to use employees to sell insurance who also had other types of responsibilities within the bank, those employees would have other bases for their income and there would be less incentive for them to be overly aggressive selling insurance products. Forcing banks to use a particular type of insurance sales force thus could have safety and soundness implications by increasing a bank's reputation risk.

[58] "[W]here Congress has not expressly conditioned the grant of 'power' upon a grant of state permission, the [Supreme] Court has ordinarily found that no such condition applies." *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 34 (1996), *citing Franklin Nat'l Bank of Frankin Square v. New York*, 347 U.S. 373, 378 & n.7 (1954). *Cf.* 66 Fed. Reg. 34792, 34798 (July 2, 2001) (adding to Part 9 of the OCC's rules a new subsection, to be codified at 12 C.F.R. § 9.7(e)(2), providing that, except as made applicable by Federal statute, state laws limiting or establishing preconditions on the exercise of fiduciary powers are not applicable to national banks).

Section 10(a) -- Timing of Insurance-Related Referrals or Solicitations

Section 10(a) generally prohibits a financial institution from making an insurance-related referral or solicitation of a loan customer until after the bank has approved the loan or credit. Subsection 10(b) permits a bank to inform a customer that insurance is required to obtain a loan and to contact consumers through direct or mass mailing so long as it is not done in connection with the bank's decision on whether to grant the consumer's application.[59]

None of the Safe Harbors protects a State law that restricts the timing of bank insurance solicitations.

In our opinion, section 10(a) is preempted under the *Barnett* standards. The provision restricts the time and, therefore, the methods by which a bank may solicit an insurance sale from a customer and thus substantively affects the bank's ability to solicit and sell insurance products. For example, section 10(a) would require banks to develop databases to keep track of customers that have loans pending with the bank. Banks also will have to institute methods of communicating this information to its sales force and of apprising the sales force of changes as they occur. Solicitations through mass mailings present additional difficulties requiring bank staff to remove from the mass mailing those individuals who have loans pending with the bank. The cost of developing and maintaining these procedures would impair the bank's ability to engage in insurance activities and frustrate its ability to pursue particular sales activities.

Section 10(a) also imposes significant restrictions on the bank's ability to cross-market its products. For example, many banks offer one-stop shopping as a convenient and efficient means

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[59] Specifically, section 10 of the West Virginia Act provides that:

> (a) No individual who is an employee or agent of a financial institution, or of a subsidiary or affiliate thereof, may, directly or indirectly, make an insurance-related referral to or solicit the purchase of any insurance from a customer knowing that such customer has applied for a loan or extension of credit from that financial institution before such time as the customer has received a written commitment with respect to such loan or extension of credit, or, in the event that no written commitment has or will be issued in connection with the loan or extension of credit, before such time as the customer receives notification of approval of the loan or extension of credit by the financial institution and the financial institution creates a written record of the loan or extension of credit approval.
>
> (b) This provision shall not prohibit any individual subject to subsection (a) above from:
>
>> (1) Informing a customer that insurance is required in connection with a loan; or
>> (2) Contacting persons in the course of direct or mass mailing to a group of persons in a manner that bears no relation to the person=s loan application or credit decision.

W. Va. Code ' 33-11A-10 (2000).

of servicing customers.[60] Prohibiting the bank from soliciting insurance at this point will force the customer to shop elsewhere. For all of the foregoing reasons, therefore, in our view section 10(a) is preempted.

Section 13 -- Sharing of Insurance Information With Affiliated Entities

Section 13 generally prohibits a financial institution from using insurance information obtained in the making of a loan to solicit or offer insurance to the customer, unless the bank first obtains the customer's written consent. You have asked us to opine specifically with respect to sections 13(b) and 13(c). Section 13(b) requires the customer to consent in writing to the bank's disclosure of insurance information to an agent or broker affiliated with the bank, no less than two days after the time of application for, approval of and making of the loan or extension of credit. Section 13(b) requires the bank to obtain this consent in a separate document.[61]

As we indicated at the outset of this letter, the FCRA[62] expressly preempts any state law that restricts or prohibits the sharing of information among affiliated entities. The FCRA preemption provision states:

> No requirement or prohibition may be imposed under the laws of any State . . . with respect to the exchange of information among persons affiliated by common ownership or common corporate control . . . .[63]

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[60] Some commenters have stated that the initial face-to-face meeting at which the credit application is taken is often the principal time at which insurance is offered and may, in some cases, be the only face-to-face meeting between the bank and the customer.

[61] Specifically, section 13 of the West Virginia Act provides that:

> (a) When a financial institution requires a borrower to provide insurance information in connection with the making of a loan or extension of credit, neither such financial institution nor an insurance agent or broker affiliated with such financial institution may later use the information so obtained to solicit or offer insurance to such borrower, unless the consent required in subsection (b) below is first obtained.
>
> (b) A borrower may consent to the financial institution=s disclosure of insurance information to an agent or broker affiliated with the financial institution, but any such consent must be in writing and be given at a time subsequent, which shall be no less than two days, to the time of the application for, approval of and making of the loan or extension of credit.
>
> (c) Consent under subsection (b) of this section shall be obtained in a separate document, distinct from any other transaction, and shall not be required as a condition for performance of other services for the customer.

W. Va. Code ' 33-11A-13 (2000).

[62] 15 U.S.C. ' ' 1681-1681u (as amended by the Economic Growth and Regulatory Paperwork Reduction Act of 1996 (EGRPRA), Pub. L. No. 104-208, tit. II, subtit. D, ch. 1, ' ' 2401-2422, 110 Stat. 3009-426 to 3009-454 (1996)).

The language of this provision is broad and, on its face, appears to cover the restrictions on information sharing with affiliates contained in section 13 of the West Virginia statute. To determine whether it preempts the West Virginia provision, we first briefly review the purposes and scope of the FCRA, then consider whether the special anti-preemption rule contained in the McCarran-Ferguson Act applies.

Purpose and scope of the FCRA as amended. The purpose of the FCRA is to require consumer reporting agencies to "adopt reasonable procedures *for meeting the needs of commerce for* consumer credit, personnel, *insurance*, and other information" that operate in a fair and equitable manner to ensure accuracy and confidentiality.[64] To protect consumers, the FCRA imposes various obligations on "consumer reporting agencies"[65] and on users of "consumer reports."[66]

A "consumer report" is "any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living" that is collected or used (or expected to be used) to establish the consumer's eligibility for "credit or *insurance* to be used primarily for personal, family or household purposes; employment purposes; or any other purpose" permissible under the Act.[67] If information is not a "consumer report," any person or entity may share and use the information. Under the FCRA, a "consumer report" does not include "experience information," which is information that relates solely to transactions or experiences between the consumer and the person making the report.[68]

In addition to "experience information," Congress enacted amendments to the FCRA in September 1996 ("FCRA amendments")[69] to expand the category of non-consumer report information to include:

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[63] 15 U.S.C. ' 1681t(b)(2) (as amended by EGRPRA tit. II, subtit. D, ch. 1, ' 2419, 110 Stat. 3009-452 to 3009-453 (1996)). This preemption provision remains in effect until January 1, 2004. *See id.* ' 1681t(d)(2). The only state law not subject to this preemption is Vt. Stat. Ann. tit. 9, ' 2480e(a) or (c)(1). *See id.* ' 1681t(b)(2).

[64] *Id.* ' 1681(b) (emphasis added).

[65] A "consumer reporting agency" is any party that regularly assembles or evaluates consumer information for the purpose of furnishing consumer reports to third parties. *Id.* § 1681a(f).

[66] A national bank may be either a consumer reporting agency or a user of a consumer report.

[67] 15 U.S.C. ' 1681a(d)(1) (as amended by the EGRPRA tit. II, subtit. D, ch. 1, ' 2402(e), 110 Stat. 3009-428 (1996)) (emphasis added).

[68] *See id.* ' 1681a(d)(2)(A)(i) (as amended by the EGRPRA tit. II, subtit. D, ch. 1, ' 2402(e), 110 Stat. 3009-428 (1996)).

[69] *See* EGRPRA, Pub. L. No. 104-208, 110 Stat. 3009 (1996) (generally effective Sept. 30, 1997).

> [A]ny communication of other information among persons related by common ownership or affiliated by corporate control, if it is clearly and conspicuously disclosed to the consumer that the information may be communicated among such persons and the consumer is given the opportunity, before the time that the information is initially communicated, to direct that such information not be communicated among such persons . . . .[70]

The information that may be shared pursuant to the notice and opt-out requirements is not limited. It may include application information, medical information, consumer report information, information derived from consumer reports, and all other information. Thus, the FCRA amendments permit affiliated entities to share any or all information without becoming a "consumer reporting agency."[71] The affiliated entities must comply with the FCRA notice and opt-out requirements, however, before sharing any information other than experience information.[72]

The FCRA preemption provision ensures that affiliated entities may share customer information without interference from State law and subject only to the FCRA notice and opt-out requirements if applicable. The preemption is broad and extends beyond state information sharing statutes to preempt any State statute that affects the ability of an entity to share any information with its affiliates.[73] Congress intended the preemption provision to establish a national uniform standard in this area, noting that "credit reporting and credit granting are, in

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[70] 15 U.S.C. ' 1681a(d)(2)(A)(iii) (as amended by EGRPRA tit. II, subtit. D, ch. 1, ' 2402(e), 110 Stat. 3009-428 (1996)).

[71] For a "consumer reporting agency" furnishing reports containing medical information, additional requirements under FCRA may be applicable. *See, e.g.,* 15 U.S.C. § 1681b(g) (as amended by EGRPRA tit. II, subtit. D, ch. 1, ' 2405, 110 Stat. 3009-434 (1996)) ("A consumer reporting agency shall not furnish for employment purposes, or in connection with a credit or insurance transaction, a consumer report that contains medical information about a consumer, unless the consumer consents to the furnishing of the report."). A national bank will not become a "consumer reporting agency" simply because it shares with an affiliate experience information or other information that ordinarily would be considered consumer report information so long as the bank shares the other information in accordance with the notice and opt-out requirements.

[72] There are no notice and opt-out requirements when any entities, whether affiliated or not, share Aexperience information.@ *Id.* ' 1681a(d)(2)(A)(i) (as amended by EGRPRA tit. II, subtit. D, ch. 1, ' 2402(e), 110 Stat. 3009-428 (1996)). Prior to the FCRA amendments, a financial institution could regularly exchange consumer information between a branch or department of the financial institution, *but not between correspondent financial institutions, a holding company and its subsidiaries or between subsidiaries of a holding company* without becoming a consumer reporting agency. *See* Federal Trade Commission, Questions and Answers About the Fair Credit Reporting Act, at Qs and As Nos. 16-17, *reprinted in* 6 Consumer Cred. Guide (CCH) & 26,703 at 63,955 (May 24, 1971).

[73] Affiliate information sharing provisions of bills introduced in prior Congresses limited Federal preemption either by preserving state laws in effect on the date of proposed enactment or by preempting only state information sharing statutes. *See e.g.*, Consumer Reporting Reform Act of 1994, H. Rep. No. 103-486, at 2 (amending FCRA ' 624, 15 U.S.C. ' 1681t).

many aspects, national in scope, and that a single set of Federal rules promotes operational efficiency for industry, and competitive prices for consumers."[74]

The McCarran-Ferguson Act. Section 2(b) of the Act shields a State law from Federal preemption if the purpose of the State law is to regulate the business of insurance *and* the conflicting Federal law does not "specifically relate" to the business of insurance.[75] These key terms were analyzed by the Supreme Court in *Barnett*.[76] The Court initially noted that the word "relates" is "highly general" and has a "broad common-sense meaning."[77] More importantly, the Court found the word "specifically" to mean "explicitly."[78] In focusing on these terms, the Court observed that:

> [T]he Act does not seek to insulate state insurance regulation from the reach of all federal law. Rather, it seeks to protect state regulation primarily against *inadvertent* federal intrusion -- say, through enactment of a federal statute that describes an affected activity in broad, general terms, of which the insurance business happens to constitute one part.[79]

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[74] S. Rep. No. 104-185, at 55 (1995) (accompanying S. 650) [hereinafter A1995 Senate Report@]. The need for Federal preemption was reiterated in the floor debate by Senator Bond, who stated that the uniform federal standards Awill reduce the burdens on the credit industry from having to comply with a variety of different State requirements.@ 141 Cong. Rec. S5450 (daily ed. Apr. 6, 1995). Earlier amendments to the FCRA, proposed by the House, were described as a Acompromise@ between establishing a uniform national standard and allowing states to enact laws stricter than the FCRA. 140 Cong. Rec. H4355, H4365-66 (daily ed. June 13, 1994) (statement of Rep. McCandless); *see* H.R. 1015, 103d Cong., 2d Sess. ' ' 101-625 (1994). However, in the final legislation, Congress decided that for the next eight years, the FCRA would be Athe law of the land@ and afterwards, states may enact more stringent legislation. The FCRA amendments preserve this compromise by establishing a Asunset@ provision -- the special federal preemption provisions will not apply to any provision of state law enacted after January 1, 2004 that (i) gives greater protection to consumers than the FCRA provides and (ii) explicitly states that the provision is intended to supplement the FCRA. *See* 15 U.S.C. ' 1681t(d)(2) (added by EGRPRA tit. II, subtit. D, ch. 1, ' 2419(2), 110 Stat. 3009-452 to 3009-453 (1996)); 1995 Senate Report, *supra,* at 55.

[75] Section 2 of the Act provides:

> (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
>
> (b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance . . . .

15 U.S.C. § 1012.

[76] *See Barnett,* 517 U.S. at 38.

[77] *Id.*

[78] *Id.*

[79] *Id.* at 39.

According to the Court, the McCarran-Ferguson Act does not require the federal statute to relate *predominantly* to insurance; a statute may relate to more than one thing.[80] These observations illustrate the importance the Court places on specific, explicit references to insurance in the federal legislation.[81] In *Barnett*, the Court determined that a federal statute authorizing national banks' insurance powers, which used the word "insurance" five times, "specifically related" to the business of insurance.[82]

The affiliate information sharing provisions of the FCRA "relate" to the business of insurance and do so "specifically*."* The FCRA mentions "insurance" at least twenty-seven times. These references concern core provisions of the FCRA. For example, the FCRA defines "consumer report" expressly to include certain consumer information collected by a consumer reporting agency that is expected to be used "in connection with the underwriting of *insurance* involving the consumer . . . ."[83] The FCRA amendments also expand the list of permissible purposes for furnishing a consumer report to include "credit or *insurance* transactions that are not initiated by the consumer" -- *i.e*., prescreening potential customers for marketing credit or insurance products.[84] Congress's definition of "firm offer of credit *or insurance"* also extends the current definition of "firm offer of credit" to include insurance for prescreening purposes.[85]

These specific references to insurance unambiguously demonstrate that Congress purposefully considered the effect of the FCRA amendments on insurance activities and did not merely enact a broad, general law that inadvertently affects insurance. A plain understanding of the FCRA, under the standards set forth by the Supreme Court in *Barnett*, results in a conclusion that the FCRA "specifically relates" to insurance.

Moreover, it is questionable whether the West Virginia provision passes the threshold of the first clause of section 2(b) of the McCarran-Ferguson Act, *i.e.*, whether the State law was "enacted . . . for the purpose of regulating the business of insurance . . .."[86]

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[80] *Id.* at 41. For example, the Court in *Barnett* recognized a statute may relate to banking and insurance. Likewise, the FCRA relates to consumer reporting agencies and insurance.

[81] As recognized by the Court, these types of references Awill call the proposed legislation to the attention of interested parties@ and should guarantee that Congress has focused on the legislation=s Ainsurance-related effects.@ *Id.* at 41-42.

[82] *Id.* at 39.

[83] 15 U.S.C. ' ' 1681a(d)(1), 1681b(a)(3)(C) (emphasis added). The affiliate information sharing provisions enacted in 1996 specifically provide that when this type of information is shared between affiliated entities, it does *not* constitute a Aconsumer report,@ and thus can be shared between affiliates, subject to specified procedures. *See* 15 U.S.C. ' 1681a(d)(2)(A)(ii).

[84] 15 U.S.C. ' 1681b(c) (added by EGRPRA tit. II, subtit. D, ch. 1, ' 2404, 110 Stat. 3009-431 (1996)).

[85] *Id.* ' 1681a(l) (added by EGRPRA tit. II, subtit. D, ch. 1, ' 2402(b), 110 Stat. 3009-427 (1996) (emphasis added)).

[86] *Id.* § 1012(b).

The Supreme Court's analysis of this question has focused consistently on the impact of the State law on the relationship between the insured and the insurer.[87] Section 13 addresses a different relationship – the relationship between a financial institution and its customer. The West Virginia provision seeks to limit a financial institution's ability to use insurance information gathered in the course of a lending transaction for the purpose of soliciting or offering insurance.[88] In this sense, the provision seeks to protect borrowers from the intrusion of unauthorized insurance solicitations by financial institutions and their subsidiaries; it does not offer any protection to policyholders. State laws that relate to insurance but regulate an activity outside the relationship between the insured and the insurer are not laws enacted for the purpose of regulating the business of insurance for purposes of McCarran-Ferguson.[89] The Supreme Court made clear that to the extent a law is designed to further the interests of parties other than policyholders, it is not a law enacted for the purpose of regulating the business of insurance.[90]

The FCRA amendments thus permit a national bank and its affiliates, including insurance agency affiliates, to share and use experience information, including claims information, without any limitation and to share and use any other information, including medical information,[91]

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[87] *See e.g., SEC v. National Securities, Inc.,* 393 U.S. 453, 457 (1969) (focus of the business of insurance is on the relationship between the insurance company and the policyholder and State law enacted to protect the interests of insurance company shareholders was not protected from preemption by McCarran-Ferguson); *Barnett Bank of Marion County, N.A. v. Nelson,* 517 U.S. 25, 39 (1996) (relation of insured to insurer and the spreading of risk are matters at the core of the McCarran-Ferguson Act's concern); *U.S. Dep't of Treasury v. Fabe,* 508 U.S. 491, 503-04 (1993) (performance of an insurance contract is central to the relationship between insurer and insured and therefore within the business of insurance).

[88] Likewise, section 13 limits the activities of financial institutions even where there is no insurance policy. The law could prohibit a financial institution from using information that a borrower did not have any insurance to solicit or offer insurance.

[89] *See Autry v. Northwest Premium Services, Inc.,* 144 F.3d 1037, 1044 (7th Cir. 1998) (state statute regulating premium financing for the purchase of automobile insurance served to protect the interests of borrowers and was not a law enacted for the purpose of regulating the business of insurance); *Owensboro Nat'l Bank v. Stephens*, 44 F.3d 388, 392 (6th Cir. 1994), *cert. denied*, 517 U.S. 1119 (1996) (state statute that excluded financial institutions from certain insurance sales activities sought to regulate the conduct of the financial institutions and was not a law enacted for the purpose of regulating the business of insurance).

[90] *Fabe*, 508 U.S. at 508.

[91] Medical information may, however, be subject to the restrictions on information sharing imposed by the Health Insurance Portability Act of 1996. The Department of Health and Human Services has implemented information sharing provisions of this statute in its rule captioned "Standards for Privacy of Individually Identifiable Health Information." See 65 Fed. Reg. 82462 (December 28, 2000). This final rule, which took effect on April 14, 2001, is codified at 45 C.F.R. Parts 160 and 164. Among other things, it covers electronic billing and fund transfers that include individually identifiable health information.

pursuant to the notice and opt-out requirements.[92] National banks and their affiliates may engage in these activities even if State laws restrict or otherwise limit such activities because the FCRA amendments expressly preempt any State law requirement or prohibition "with respect to" exchange of information between affiliated entities. Accordingly, we conclude that sections 13(b) and 13(c) of the West Virginia statute are preempted.

Section 14 -- Physical Location of Insurance Sales

Section 14 generally provides that the place of solicitation or sale of an insurance product by a financial institution must be clearly signed so as to be separate and distinct from the institution=s lending and deposit-taking activities. The state law permits institutions with small physical facilities to seek a waiver from the state insurance commissioner if they do not have the physical space to comply with this provision.[93]

None of the Safe Harbors protect State provisions restricting the physical location where insurance sales take place, or requiring that insurance sales be physically separated from lending and deposit-taking activities.

The text of the West Virginia provision creates some ambiguity about whether signage distinguishing the insurance sales area from the lending and deposit taking areas would be sufficient to comply with the statute, or whether physical segregation of these activities is required. The language in the provision suggests that physical separation is required because the requirement to use signage must be done in a manner so the locations are readily distinguishable by the public as separate and distinct. The waiver for small institutions also speaks in terms of not having the physical space to comply - - a condition that should not be relevant if all that is required is signage. The West Virginia Insurance Department also has suggested in informal discussions that this provision would require physical segregation.

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[92] Although the GLBA amended certain provisions of the FCRA relating to regulatory authority, nothing in GLBA, including the privacy provisions in Title V of that statute, alters the conclusion concerning the FCRA provisions on the sharing of information between affiliates or the preemptive effect of the FCRA. GLBA ' 506(c) expressly provides that "nothing in this title shall be construed to modify, limit, or supersede the operation of the Fair Credit Reporting Act . . . ." 15 U.S.C. § 6806.

[93] Specifically, section 14 of the West Virginia Act provides that:

> The place of solicitation or sale of insurance by any financial institution or on the premises of any financial institution shall be clearly and conspicuously signed so as to be readily distinguishable by the public as separate and distinct from the financial institution=s lending and deposit-taking activities. In the event that a person which would otherwise be subject to the requirements set forth in this provision does not have the physical space to so comply, the commissioner may grant a waiver of the requirements of this section upon a written request by such person demonstrating that, due to its small physical facilities, compliance is not possible, and including identification of other steps which will be taken to minimize customer confusion.

W. Va. Code ' 33-11A-14 (2000).

We therefore assume that section 14 requires the physical separation of insurance from lending and deposit-taking activities. Accordingly, in our view, the West Virginia requirement for physical segregation of insurance sales from lending and deposit-taking is preempted under the *Barnett* standards.

In most banks, the deposit-taking area generally encompasses teller windows and teller lines. These spaces, which are different from the types of physical settings used in many other kinds of business offices, tend to be in a discrete area, characterized by a fairly quick movement through of customers. Both lending and insurance sales, on the other hand, are often done from desks in spaces apart from the teller services where the customer can speak with a representative for a longer time to discuss the transaction.

The requirement to separate lending and deposit-taking activities from insurance sales affects the banks' insurance sales efforts significantly. Many banks, both large and small, are developing ways to streamline their delivery systems, for example, by the use of more compact physical facilities and a greater reliance on technology. At the same time, banks are striving to increase convenience and product choices to consumers.[94] A restriction on the physical location of insurance activities would require the bank to devote more physical space to all three types of activities than is otherwise necessary, raising costs at bank facilities. Similar to the effect of the requirement in section 6 for a separate insurance sales force, this requirement in section 14 substantively iintrudes into and disrupts bank operations by effectively prohibiting a bank from conducting all three activities without incurring substantial, unnecessary costs to reconfigure its physical space. Higher costs will impede the bank's ability to offer insurance products and reduce the availability of those products to consumers.

The Federal insurance consumer protection statute and regulations avoid this result by requiring that the routine acceptance of deposits is kept, <u>to the extent practicable</u>, physically segregated from insurance product activity.[95] In order to comply with Federal law, national banks must separate only deposit-taking from insurance sales, and only to the extent practicable.

The West Virginia statute permits the Commissioner to grant a waiver from the physical segregation requirement upon written request. However, the request must demonstrate that "compliance is not possible," and must identify the steps the bank will take to "minimize customer confusion." As we have said in our discussion of section 6 of the West Virginia statute, a state-administered waiver provision does not erase the conflict between the state provision and Federal law. Under the Barnett standards, a state may not condition a national bank's exercise of a Federally authorized power unless a Federal statute directs that result. Here,

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[94] From a consumer's standpoint, the OCC has noted, the convenience and ease of using a streamlined facility diminishes if the facility cannot offer the full panoply of services available at a traditional brick and mortar facility.

[95] *See* 12 U.S.C. § 1831x(d); 12 C.F.R. § 14.50.

the State law imposes requirements that are expensive, disruptive of ongoing bank operations, and, in some cases, impossible to implement. Accordingly, section 14 of the West Virginia statute is preempted.

We trust the conclusions expressed in this letter are responsive to the preemption issues you have identified.

Sincerely,

Julie L. Williams
First Senior Deputy Comptroller and Chief Counsel

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