Study B-400 August 29, 2003

Memorandum 2003-30

Financial Privacy (Discussion of Issues)

The financial privacy project was assigned to the Commission by the Legislature in 2002. The resolution calls for the Commission's report and recommendations by January 1, 2005.

To this end, the Commission commenced active consideration of the matter in early 2003. The Commission has recognized that other ongoing efforts in the area could substantially affect the direction of the project. These efforts include bills in the California Legislature, a ballot initiative, and bills in Congress that would preempt the field. The Commission's posture has been to proceed with an eye to other developments, standing prepared to shift course when necessary.

A major course shift now appears appropriate. The Legislature has passed, and the Governor has signed, SB 1 (Speier) — the California Financial Information Privacy Act. See 2003 Cal. Stat. ch. 241. The statute deals comprehensively with the topic. It is operative July 1, 2004. A copy of the statute is attached as Exhibit pp. 1-26.

This memorandum analyzes SB 1, reviews other recent developments in the financial privacy field, examines the extent to which further work by the Commission may or may not be necessary in light of enactment of SB 1, and concludes with suggestions for completing this legislative assignment.

OUTLINE OF MEMORANDUM

RECENT DEVELOPMENTS

This portion of the memorandum summarizes recent developments that affect this project. If we become aware of other significant developments between the date of issuance of the memorandum and the meeting at which it is considered, we will update the memorandum either by a supplemental memorandum or orally at the meeting.

State Activities

California Legislature

SB 1 (Speier), proposing the California Financial Information Privacy Act, has been enacted. 2003 Cal. Stat. ch. 241. The bill is analyzed in some detail below.

SJR 20 (Florez) was introduced in the Legislature in July. The measure would request Congress to investigate federal preemption of regulation of financial institutions and the effect of preemption on consumers and state chartered banks and, if necessary, to consider legislation that will prevent the unilateral expansion of jurisdiction by federal regulators without the specific endorsement of Congress. The measure is prompted by concern that federal financial regulators, particularly the Office of the Comptroller of the Currency, are attempting to extend the preemptive effect of their regulatory authority to cover the operating subsidiaries of national banks such as mortgage, insurance, and securities companies. The measure has not yet been acted on by the Legislature.

Local Public Entities

Local ordinances purporting to regulate information practices of banks within their jurisdictions have been challenged by banks in the federal district court for Northern California. The plaintiffs' arguments are based on the preemptive effect of the National Bank Act (NBA) and other provisions of federal law.

The district court has issued its decision on a summary judgment motion in *Bank of America, N.A. v. City of Daly City* (ND Cal 7/29/03). The decision upholds the ordinances to the extent they seek to control information sharing with nonaffiliated third parties, and invalidates the ordinances (under the Fair Credit Reporting Act) to the extent they seek to limit information sharing with affiliates. The opinion does not address the question of preemption by NBA, perfunctorily stating it is not necessary to reach that question since there is FCRA preemption.

Enactment of SB 1 could render any appeal of this decision moot, since SB 1 would invalidate the local ordinances (operative July 1, 2004):

> **Fin. Code § 4058.5. Local agency preemption**
>
> 4058.5. This division shall preempt and be exclusive of all local agency ordinances and regulations relating to the use and sharing of nonpublic personal information by financial institutions. This section shall apply both prospectively and retroactively.

Ballot Initiative

A proposed ballot initiative — the "California Financial Privacy Act" — has been circulated by its proponents for signature. Due to the low turnout at the last gubernatorial election, only 373,816 valid signatures are required. The sponsors of the measure have announced that they have nearly twice that number. The sponsors have indicated that they will not file the ballot initiative in light of enactment of SB 1.

The initiative measure is less finely honed but more protective of consumer privacy than SB 1. The threat of the initiative measure was undoubtedly a precipitating cause in the negotiations resulting in enactment of SB 1.

Federal Activities

Gramm-Leach-Bliley Act

H.R. 1766 (Tiberi) would enact the "National Uniform Privacy Standards Act of 2003". It would amend the Gramm-Leach-Bliley Act (GLB) to preempt any state law on the subject, without enacting greater privacy protection. Congress has not acted on the measure.

Illinois and Vermont petitions for GLB preemption determinations are pending before the Federal Trade Commission (FTC), and have been pending for quite some time.

The New York State Bar Association and the American Bar Association have brought suit in federal district court in Washington, DC, to invalidate FTC's determination that attorneys are covered by GLB. The FTC motion to dismiss for failure to state a cause of action has been denied by the court, which concluded:

> For the aforementioned reasons, the Court will deny the defendant's motions to dismiss the complaints pursuant to Rule 12(b)(6). This is because it does not appear that Congress intended for the GLBA's privacy provisions to apply to attorneys. In addition, it also appears on the record now before the Court, that the FTC's failure to provide sufficient reasoning to support its

> interpretation that attorneys are subject to the GLBA, raises concerns regarding whether the decision amounted to arbitrary and capricious agency action. Finally, even if the GLBA is applicable to attorneys engaged in the practice of law, it appears that the FTC failed to consider whether attorneys are entitled to a de minimis exemption under the GLBA, which if proven to be the case, would also amount to arbitrary and capricious agency action.

New York State Bar Ass'n v. Federal Trade Comm'n, 2003 WL 21919841 *30 (D.D.C. Aug. 11, 2003).

Fair Credit Reporting Act

The Fair Credit Reporting Act (FCRA) preempts, until January 1, 2004, state statutes governing exchange of information among affiliates and various other provisions. After that date a state may enact a statute addressed to those provisions, provided that the statute states explicitly that it is intended to supplement FCRA and that it gives greater protection to consumers than is provided under FCRA. 15 U.S.C. § 1681t(d).

Three measures pending in Congress would eliminate the January 1, 2004, sunset and make FCRA preemption permanent. See S. 660 (Johnson), to enact the "Economic Opportunity Protection Act of 2003"; H.R. 1766 (Tiberi), to enact the "National Uniform Privacy Standards Act of 2003"; and H.R. 2622 (Bachus), to enact "Uniform National Consumer Protections Standards Made Permanent". H.R. 2622 has been reported out by the House Committee on Financial Services on a 63-3 vote.

SJR 2 (Figueroa) highlights the January 1, 2004, issue and memorializes Congress not to preempt state privacy laws. The measure is pending in Senate Judiciary Committee.

The decision of the federal district court in *Bank of America, N.A. v. City of Daly City* (ND Cal 7/29/03) raises the stakes in this debate. The decision holds that laws restricting affiliate sharing by national banks are preempted by FCRA. The court found it unnecessary to rule on National Bank Act preemption of those provisions, since FCRA already preempts them. But since the preemption clause of FCRA is due to expire January 1, 2004, the situation remains murky.

Privacy Act of 2003

S. 745 (Feinstein) would enact the "Privacy Act of 2003". The measure would broadly prohibit a commercial entity from collecting personally identifiable

information and disclosing it to a nonaffiliated third party for marketing purposes or selling it to a nonaffiliated third party unless the commercial entity first discloses its intention and provides an individual an opportunity to opt out. The measure is not intended to affect the applicability or enforceability of GLB, but it would amend GLB significantly to provide greater consumer privacy protection.

While S. 745 would preserve the operation of GLB as amended, it is not clear whether the measure is intended to preempt state law that goes beyond GLB. The staff believes a strong argument could be made either way on whether S. 745 would preempt SB 1, at least with respect to disclosure of personally identifiable information for purposes of marketing or sale. Perhaps the matter will be clarified by amendment if the bill moves.

Consumer Privacy Protection Act of 2003

HR 1636 (Stearns) — the "Consumer Privacy Protection Act of 2003" — is sponsored by a bipartisan group of representatives. It is a general opt out bill. With respect to financial privacy, the measure would defer to and be superseded by GLB and FCRA.

The measure would preempt all state legislation in the area. The staff believes that despite some ambiguity, the measure as currently drafted would be construed to preempt SB 1.

Empirical Study

GLB requires the Secretary of the Treasury, in conjunction with the Federal Trade Commission and other federal regulators, to make a study and report to Congress with findings and conclusions on information sharing practices of financial institutions, and the risks and benefits of those practices. 15 USC § 6808(a). The study is overdue by a year and a half.

CALIFORNIA FINANCIAL INFORMATION PRIVACY ACT

Brief Overview

The new California law enacted by SB 1 — the California Financial Information Privacy Act — is a carefully crafted and detailed statute that comprehensively governs the field of financial information privacy. It adds a new division to the Financial Code, outlined below:

Division 1.2. California Financial Information Privacy Act

The new law includes the following salient (and oversimplified) features:

Opt in by consumer required for financial institution disclosure of nonpublic personal information to third party, except:

(1) Disclosure to affinity partner — opt out

(2) Disclosure to joint marketer — opt out

(3) Disclosure to affiliate — opt out

(4) Disclosure to wholly owned subsidiary in same line of business and with same brand and same functional regulator — no opt

(5) Disclosure between licensed insurance producers and between licensed securities sellers — no opt

(6) Disclosure for transactional, security, and law enforcement purposes — no opt

Privacy notice must meet basic standards of clarity and conspicuousness. Statutory safe harbor form is provided. Financial institution that uses its own form may obtain rebuttable presumption of compliance by obtaining approval of functional regulator.

Professionals who are prohibited from disclosing client information, and financial institutions that do not disclose to third parties, are not required to give privacy notice to clients and customers.

Exclusive remedy for disclosure in violation of the statute is a civil penalty, recoverable in an action in the name of the people of the State of California,

brought by the Attorney General or the functional regulator of the financial institution. The civil penalty may not exceed $2,500 per incident for a negligent or willful violation, and if multiple names are involved in a negligent violation, a maximum of $500,000 per incident. Penalties are doubled if the violation results in identity theft.

Operative date is July 1, 2004.

Does New Law Satisfy Legislature's Mandate to Law Revision Commission?

How does SB 1 stack up against the goal set out in the Legislature's mandate to the Law Revision Commission? The legislative resolution directing this project specifies that the Commission should propose legislation that would accomplish the following objectives:

> (1) Provide consumers with notice and the opportunity to protect and control the dissemination of their personal information.
>
> (2) Direct the preparation of regulations that recognize the inviolability and confidentiality of a consumer's personal information and the legitimate needs of entities that lawfully use the information to engage in commerce.
>
> (3) Assure that regulated entities will be treated in a manner so that, regardless of size, an individual business, holding company, or affiliate will not enjoy any greater advantage or suffer any burden that is greater than any other regulated entity.
>
> (4) Be compatible with, and withstand any preemption by, the Gramm-Leach-Bliley Act and the federal Fair Credit Reporting Act.
>
> (5) Provide for civil remedies and administrative and civil penalties for a violation of the recommended legislation.

2002 Cal. Stat. res. ch. 167. We will examine each of the objectives.

Notice and Opportunity to Control Disclosure

The main thrust of SB 1 is to provide consumers notice and an opportunity to control dissemination of their personal information to a greater degree than is provided by federal law. Whereas federal law provides an opt out opportunity for information sharing with nonaffiliated third parties and no opt for other circumstances, SB 1 requires an opt in for nonaffiliated third party sharing and allows an opt out for affiliate sharing and joint marketing. Thus it would satisfy this objective of the Commission study.

Preparation of Regulations

SB 1 does not require preparation of implementing regulations. It is more or less self-executing, with details spelled out by statute rather than by delegation to state regulatory authority for elaboration.

There is a role for functional regulators under SB 1, specifically with respect to approval of sui generis privacy notices by financial institutions and with respect to enforcing civil penalties for violation of the statute. The statute does not recognize any rulemaking authority with respect to these matters, but arguably that authority could be implied under the agencies' inherent powers.

The approach of SB 1 is at odds with the regulatory regime contemplated by the legislative direction for this study. But that does not make it any less valid an approach. The primary downside to spelling out details in the statute rather than by regulation is that if fine tuning or interpretation is necessary, legislation or litigation is required rather than a rule change.

Level Playing Field

One of the expressed objectives of SB 1 is to maintain a level playing field among different types and sizes of financial institutions. Whether the law actually achieves this goal is subject to debate.

Sharing of Information Among Divisions and Wholly Owned Subsidiaries

Under the SB 1 scheme, a financial institution may freely share personal information among its own divisions. It may also freely share personal information with its wholly owned subsidiaries in the same line of business. It is subject to an opt out scheme for other affiliates and for nonaffiliated joint marketers.

This would appear to discriminate among financial institutions based on business structure. And in fact, recent information suggests that some financial institutions may be restructuring to take advantage of the differential treatment. An article in *American Banker* indicates that Wells Fargo Bank is merging its affiliates:

> In what it called a preventive measure, Wells Fargo & Co. on Monday applied to the Office of the Comptroller of the Currency to combine its 19 national bank charters into one. The San Francisco banking company has been battling with California lawmakers who have been battling among themselves over a bill that would make the state's privacy protections stronger than federal laws.

> Stanley Stroup, Wells Fargo's chief legal officer, said in an interview Tuesday that the charter consolidation has been in the planning "for several months, but it's been prompted by the uncertainty over the outcome on the debate over privacy legislation on the state and federal level."

Mandaro, *In Focus: Wells' Privacy Fix: Cut Down on 'Affiliates'*, American Banker (Friday, August 1, 2002).

It should be noted that SB 1 as enacted would allow free exchange among wholly owned bank branches regardless of affiliate structure.

Sharing of Information Among Affiliates and Joint Marketers

The California Independent Bankers association argues that the law disadvantages small community banks that are unable to offer a full range of financial products on their own and must use a joint marketing structure, unlike a mega-financial institution that can make use of an affiliate network. SB 1 requires a financial institution to offer an opt out for affiliate sharing as well as for joint marketing, but under the ruling in *Bank of America, N.A. v. City of Daly City*, the affiliate sharing requirement is preempted by federal law. The net result is that despite best intentions, SB 1 may only impose an opt out requirement for joint marketing, thereby disadvantaging community banks.

The Bankers make an interesting argument. The *Bank of America* case declares federal preemption of affiliate sharing limitations by FCRA. But the FCRA preemption clause expires by its own terms on January 1, 2004. After that date a state may enact a statute addressed to those provisions:

> (d)(2) [Federal preemption of state law by FCRA does] not apply to any provision of State law (including any provision of a State constitution) that
>
> (A) is enacted after January 1, 2004;
>
> (B) states explicitly that the provision is intended to supplement this title; and
>
> (C) gives greater protection to consumers than is provided under this title.

15 USC § 1681t(d).

It is not clear whether SB 1 would qualify for exemption from FCRA preemption under this provision, since (A) it was not enacted after January 1, 2004, and (B) it does not state explicitly that it is intended to supplement FCRA, although (C) it would give greater protection to consumers.

It must be pointed out that although SB 1 was "enacted" before January 1, 2004, it does not become "effective" until January 1, 2004, and does not become "operative" until July 1, 2004. That may be sufficient to satisfy the "enacted after" requirement of FCRA.

Moreover, although SB 1 does not state explicitly that it is intended to supplement FCRA, it may do so by implication, since it excepts from its operation release of nonpublic personal information to a consumer reporting agency pursuant to FCRA. See Fin. Code § 4056(b)(13).

Effect of Severability Clause

If provisions of SB 1 are preempted by federal law, whether by FCRA or some other statute such as the National Bank Act, the potential for unequal treatment may be intensified. That is because SB 1 includes a severability clause:

> **Fin. Code § 4059. Severability clause**
>
> 4059. The provisions of this division shall be severable, and if any phrase, clause, sentence, or provision is declared to be invalid or is preempted by federal law or regulation, the validity of the remainder of this division shall not be affected thereby.

Suppose, for example, that SB 1 is preempted as to national banks by the National Bank Act. Due to the severability clause, SB 1 will continue to apply to state banks, but national banks will be free of state regulation, giving them a competitive advantage.

An instructive lesson may be drawn from *American Bankers Association v. Lockyer*, 239 F. Supp. 2d 1000 (E.D. Cal. 2002). In that case the court held that provisions of a California statute requiring a credit card issuer to provide a minimum payment warning and disclosures in monthly bills were preempted to varying degrees by the Home Owners' Loan Act, the National Bank Act, and the Federal Credit Union Act. The court held that the minimum payment warning is unenforceable against federally chartered savings and loans, but could be enforceable against national banks and federal credit unions, if severable. The court concluded that the intention of the California Legislature with respect to severability was unascertainable, particularly since the Legislature did not include a severability clause in the statute. Absent a clear indication of legislative intent, the court was reluctant to find severability. "For example, if the court were to sever the balance of the statute to apply the basic warning only to certain lenders, such severability may impose a competitive advantage of one federally chartered lender over another." 239 F. Supp. 2d at 1021.

Whether that result is desirable or undesirable is a question of policy. SB 1 has made the policy judgment that it is better to cover some banks even if it turns out that it cannot cover all of them. SB 1 recognizes in its statement of policy that there may be a conflict; it declares the legislative intent to provide a level playing field among types and sizes of business "to the maximum extent possible" consistent with the basic objective of providing consumers control over their nonpublic personal information. Fin. Code § 4051.5(b)(4) (legislative findings).

Be Compatible With and Withstand Preemption by GLB and FCRA

SB 1 is compatible with GLB. That is one of its expressed objectives, and the statute in fact tracks the federal law and implementing regulations with respect to definitions.

Whether SB 1 will withstand preemption is less clear. FCRA preemption issues are complex, and are discussed above. GLB preemption is somewhat easier — GLB permits states to enact more protective financial privacy legislation.

There is a glitch in the GLB preemption scheme, however. GLB refrains from preempting state law if the state law provides greater privacy protection to consumers "as determined by the Federal Trade Commission" after consultation with the applicable functional regulator, on FTC's own motion or on petition of an interested party. 15 USC § 6807(b).

Does this require an FTC determination of nonpreemption before SB 1 may apply? As usual, the answer is far from clear. GLB by its own terms does not preempt any statute "in effect" in any state, except to the extent the statute is inconsistent with GLB, and then only to the extent of the inconsistency. 15 USC § 6807(a).

A preliminary question is whether this provision is intended to save only a state law "in effect" at the time of enactment of GLB, or whether it is also intended to save future enactments. While GLB could be read narrowly, the staff thinks it should be read more broadly to apply to subsequently enacted statutes such as SB 1. There is no apparent reason why GLB would be silent as to its effect on subsequent state action, nor is there an apparent reason why the rule should be any different with respect to subsequent state action.

Assuming GLB is read to refrain from preempting "consistent" state statutes enacted after enactment of GLB, could SB 1 be viewed as consistent without the need for an FTC finding of greater protection? The argument is that under

standard preemption doctrine, a state law is not necessarily inconsistent with federal law if it is physically possible for a financial institution to comply with both. Thus the greater privacy protections of SB 1 would not be viewed as inconsistent with GLB because it is physically possible for a financial institution to comply with both by the simple device of following the state law and offering customers a more substantial opt in or opt out opportunity than is required under GLB.

And in fact, FTC has adopted that sort of analysis in finding that neither North Dakota law nor Connecticut law is preempted by GLB — it is physically possible for a financial institution to comply with both state and federal law. It is therefore unnecessary to engage in the "greater protection" analysis authorized by GLB.

Some provisions of SB 1 are less protective of the privacy of consumer financial information than GLB. For example, SB 1 includes a number of exemptions from its coverage, apparently designed to eliminate opposition from various interest groups. But under the federal analysis that would not necessarily make SB 1 inconsistent with GLB, since an entity exempted from SB 1 would nonetheless still be able (and be required) to comply with federal law.

The more significant preemption issue, in the staff's opinion, is not preemption by GLB and FCRA, but preemption by the National Bank Act and other federal regulatory statutes that could be read broadly to occupy the regulatory field. It is true that *Bank of America, N.A. v. City of Daly City* gives perfunctory attention to the NBA issue. But the staff does not think we have heard the end of it.

Civil Remedies and Administrative and Civil Penalties

The authorizing resolution for this study directs the Commission to recommend extensive remedies for privacy violations:

> Provide for civil remedies and administrative and civil penalties for a violation of the recommended legislation, including, but not limited to, attorney's fees, costs, actual and compensatory damages, and exemplary damages, including, but not limited to, relief as provided pursuant to Article 3 (commencing with Section 3294) of Chapter 1 of Title 2 of Part 1 of Division 4 of the Civil Code, and as provided in unfair business practices actions brought under Article 1 (commencing with Section 17000) of Chapter 4 of Part 2 of Division 7 of the Business and Professions Code.

2002 Cal. Stat. res. ch. 167.

SB 1 provides only one remedy for its violation — a civil penalty not exceeding $2,500 per violation, recoverable in an action by the Attorney General or the financial institution's functional regulator, in the name of the People of the State. Fin. Code § 4057. Whether that is the most efficacious remedy is questionable, but it was part of the political compromise that enabled enactment of SB 1.

Staff Evaluation

This is a well thought through and carefully articulated law. Its complexity is the result of policy decisions to track the scope and coverage of GLB and to make accommodations for varying circumstances of different financial services and products in the effort to achieve a satisfactory political compromise that would be enactable.

In general, the staff believes this is a sound piece of legislation — from a technical perspective it is one of the better pieces of legislation in both conception and execution that we have seen.

That is not to say that SB 1 is free of problems. Obviously there are many questions that either are apparent now or will surface over time concerning the interpretation and effect of such a complex, detailed, and sweeping body of law. These include questions not directly addressed by the legislation but that must inevitably arise, such as:

- Does a consumer have cause of action against a financial institution for violation of privacy rights based on the Constitution, even though SB 1 provides no remedy for the consumer?
- May a consumer waive the protections of SB 1? The statute is silent on the matter, in comparison with a number of other privacy statutes that state expressly that waiver of their provisions is contrary to public policy and void and unenforceable.
- Can a financial institution include in its contracts a choice of law rule that declares privacy rights under the contract to be governed by the law of another jurisdiction?

Although there are a number of issues in SB 1 that we might have handled differently either in terms of policy or drafting, the form and structure of the statute have been largely determined by the political and legislative process leading to its enactment. This is a matter on which the Legislature has just acted,

and is the result of an heroic effort by all concerned to achieve a workable compromise. The staff would be very reluctant to even think about proposing any revisions in the law until after it has had a chance to operate in practice.

That being said, there remain a number of issues that should be explored before the Commission is in a position to make its report back to the Legislature on this topic. These issues concern the relation of SB 1 to federal law and to other California law. The remainder of this memorandum deals with these issues.

RELATION OF SB 1 TO FEDERAL LAW

There are three types of issues involving the relation of SB 1 to federal law that are worth noting at this point — (1) GLB and FCRA preemption, (2) National Bank Act and other functional regulatory preemption, and (3) interrelation of nonpreempted state law with GLB.

GLB and FCRA Preemption

We have dealt with the issues of GLB preemption and FCRA preemption fairly extensively above. We have also indicated the potential problems of selective application of SB 1 as the possible result of the interaction of federal preemption and SB 1's severability clause. And we have noted pending federal legislation to extend the preemptive effect of GLB and FCRA.

Things are fluid in this area, and subject to change. The staff does not recommend any Commission action other than to monitor developments in the courts and in Congress. When the Commission submits the mandated report to the Legislature, we need to be able to provide a useful summary of the status of this critical matter.

NBA and Other Functional Regulatory Preemption

While issues involving GLB and FCRA preemption are significant and need to be monitored, an equally serious concern in the staff's opinion is possible preemption by other federal regulatory schemes. There are federal regulatory regimes governing all sectors of the financial industry, including oversight by the Office of Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, the National Credit Union Administration, the Securities and Exchange Commission, and the Federal Trade Commission.

Whether any of these regulatory regimes would be read to preempt the field with respect to financial privacy issues is yet to be determined. Each of the major regulatory statutes is complex and unique, and requires an independent analysis. Preemption of SB 1 by any of the governing federal statutes has the potential to create an uneven playing field, frustrating the contrary intention of SB 1.

National Bank Act

The staff has done research concerning the question whether a national bank may avoid application of state financial privacy statutes as a result of National Bank Act preemption. The Office of Comptroller of the Currency has been aggressive in its advocacy of the preemptive effect of federal law on operations of national banks.

The law on the issue is just beginning to develop. In *Bank of America, N.A. v. City of Daly City*, the court held that affiliate information sharing restrictions in local financial privacy ordinances are preempted by FCRA, and it is therefore unnecessary to reach the issue of NBA preemption. However, the court upheld, perfunctorily and without discussing the effect of NBA, local ordinance restrictions on information sharing with nonaffiliated third parties. The sum total of the court's treatment of this issue is set out below:

> As discussed above, the Court concludes that the provisions of the ordinances regarding information-sharing between affiliates is preempted under the FRCA [sic]. However, the remaining provisions of the ordinances, including those regarding disclosure to nonaffiliated third parties, are not preempted. Defendants are entitled to partial summary judgment in their favor with regard to the remaining provisions.

Bank of America, N.A. v. City of Daly City (ND Cal 7/29/03)

This is not the end of it. The National Bank Act is expansive in its grant of "incidental powers" (12 U.S.C. § 24(seventh)) that allow banks to market their services and to provide their subsidiaries the information necessary to operate competitively. The Office of the Comptroller of the Currency (OCC) has emphasized its "exclusive visitorial powers" over national banks and has alerted national banks to consult with OCC if state authorities seek to exercise enforcement powers over them. See *OCC Advisory Letter 2002-9* (11/25/02). OCC does not, in its advisory letter, expressly claim that state privacy laws are superseded by NBA, but the issue is there.

Recent federal cases have found NBA preemption of various California consumer protection laws:

- *Bank of America v. City and County of San Francisco*, 309 F.3d 551 (9th Cir. 2002), holds that a municipal ordinance prohibiting a bank from charging an ATM fee to a nondepositor is preempted by the National Bank Act and the Home Owners' Loan Act, regardless of whether such an ordinance would be permissible under the Electronic Funds Transfer Act. (A petition for certiorari was filed in that case on March 20, 2003.)
- *American Bankers Association v. Lockyer*, 239 F. Supp. 2d 1000 (E.D. Cal. 2002), holds that a California statute requiring a credit card issuer to provide a "minimum payment" warning and disclosure in monthly bills is preempted by the National Bank Act, the Home Owners' Loan Act, the Federal Credit Union Act, and implementing regulations, regardless of whether such a statute would be permissible under the Truth in Lending Act.
- *Wells Fargo Bank v. Boutris*, 2003 WL 1220131 (E.D. Cal. 2003), enjoins the California Commissioner of Corporations from enforcing the California Residential Mortgage Lending Act against a national bank's wholly owned real estate lending subsidiary, on the basis that the Office of Comptroller of the Currency has exclusive visitorial powers over national banks and their operating subsidiaries.

Case law is clear, however, that NBA preemption of state law is not absolute. States retain some power to regulate national banks in areas such as contracts, debt collection, acquisition and transfer of property, taxation, zoning, criminal, and tort law. Whether financial privacy regulation might fall within this spectrum has yet to be determined. In one tantalizing case a federal district court decided it lacked subject matter jurisdiction to consider a claim that NBA preempts state invasion of privacy law, because NBA preemption is not absolute. *Wingrave v. Hebert*, 2000 WL 3431060 (E.D.La. Civ. A. 99-3654, March 30, 2000).

In another case, a federal circuit court upheld an OCC determination that West Virginia's regulation of insurance sales by banks is preempted by federal law. The West Virginia regulatory scheme includes a requirement that a customer give separate written consent to a bank's disclosure of insurance information to an agent or broker affiliated with the bank. West Va. Ins. Sales Consumer Protection Act § 13. The court observed:

> In making its findings, the OCC reasoned that the West Virginia provisions at issue are disruptive to bank operations, increase bank

> operating costs, and substantively affect a bank's ability to solicit and sell insurance products. See Preemption Letter at 16-31 (J.A. 73-88). These effects prevent or significantly interfere with a bank's ability to engage in insurance sales, solicitation, or crossmarketing activity. Additionally, the OCC found that the requirements under Section 13 violate the Fair Credit Reporting Act, which prohibits State law that imposes requirements or prohibitions regarding "the exchange of information among persons affiliated by common ownership or common corporate control." 15 U.S.C.A. § 1681t(b)(2)(1998). Because we find the OCC's reasoning to be valid, we hold that the Preemption Letter meets the standard for persuasiveness under *Skidmore*.

Cline v. Hawke, 51 Fed. Appx. 392, 397, 2002 WL 31557392 (4th Cir. 2002).

The staff is in receipt of a preliminary analysis of the issues by the Hastings Public Law Research Institute. We will supplement this memorandum with the finished PLRI report when we have received it.

Interrelation of Nonpreempted State Law with GLB

Let us assume that SB 1 is free of GLB preemption, either because it is not "inconsistent" with GLB or because FTC determines that it provides greater privacy protections than GLB. What is the practical consequence of this situation?

SB 1 includes a number of exemptions from its coverage. Some of the exemptions are based on policy choices, others are the result of political compromise, designed to make the measure enactable.

The mere fact that a state law is free of federal preemption does not mean that state law controls the field to the exclusion of federal law. Just the opposite — in ordinary circumstances both will apply, absent a clear federal statutory provision stating otherwise. Thus an exemption from SB 1 coverage does not necessarily carry with it an exemption from GLB coverage.

Can it be argued that GLB in fact includes a clear statutory provision allowing nonpreempted state privacy law to control to the exclusion of federal law? If GLB were read to allow SB 1 to operate to the exclusion of federal law, that would free financial institutions from complying with GLB and require them only to comply with state law.

Experience under several federal statutes with preemption clauses similar to that in GLB suggests that state and federal laws were most likely intended to coexist under GLB. See, e.g., *Hillsborough County, Fla. v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 716, 105 S. Ct. 2371 (1985) (FDA blood plasma

regulations). Experience under these statutes is not completely analogous, however, because of nuances in the way the preemption clause is phrased. But experience does demonstrate the strong presumption toward coexistence of the two bodies of law in the absence of clear federal statutory language stating otherwise.

On the other hand, there is at least one argument supporting the interpretation that GLB intends to allow states to occupy the field — the fact that states and financial institutions can petition the government for a determination of whether state privacy law is stricter. 15 U.S.C. § 6807(b). This type of regulatory scrutiny is similar although not identical to the scheme adopted under the Occupational Health and Safety Act (OSHA).

Under OSHA, a state is allowed to take over the field if the appropriate federal agency sanctions the state law. 29 U.S.C. § 667. Although the statute says nothing about an approved state plan operating to the exclusion of federal law under this regulatory scheme, that is how it has been interpreted. See *AFL-CIO v. Brennan*, 390 F. Supp. 972 (D.C. 1975) ("Under ... 29 U.S.C. § 667, a State may submit a plan for the development and enforcement of occupational safety and health standards, which plan will be effective in lieu of the Federal program if specified statutory criteria are met.").

But there are major differences between the OSHA scheme and GLB's. OSHA's language explicitly allows states the option of "taking responsibility" for the field, phrasing not present in GLB. OSHA also includes extensive guidelines for federal approval of a state scheme. Comparing OSHA with GLB, it is likely that GLB is not intended to give a state the option of entirely taking over the field of privacy law. A financial institution governed by SB 1 would also have to comply with GLB, as would a financial institution exempted from SB 1.

RELATION OF SB 1 TO OTHER CALIFORNIA LAW

SB 1 is a comprehensive treatment of financial privacy, but it is not the first effort in California to protect consumer financial information. In fact, there are many statutes already on the books that overlap SB 1. (The staff wishes to express its appreciation to the State Bar Consumer Financial Services Committee and its chair, Elizabeth Huber, for their help in identifying potential statutory overlaps.)

How does SB 1 relate to the existing statutes? Do the other statutes remain in effect? Are they impliedly repealed?

SB 1 does not include conforming revisions to or repeals of other statutes. However, it does include provisions that prescribe its relationship with other statutes to some extent.

SB 1 states expressly that:

- An insurer may combine the SB 1 opt-out form with the form required pursuant to the Insurance Information and Privacy Protection Act. See Fin. Code § 4058.7.
- A financial institution may release nonpublic personal information pursuant to the Elder Abuse and Dependent Adult Civil Protection Act. See Fin. Code § 4056(b)(8).

SB 1 also states more generally that:

- A financial institution may release nonpublic personal information "to the extent specifically required or specifically permitted under other provisions of law and in accordance with the Right to Financial Privacy Act of 1978." See Fin. Code § 4056(b)(5).
- A financial institution may release nonpublic personal information "to comply with federal, state, or local laws, rules, and other applicable legal requirements." See Fin. Code § 4056(b)(7).
- SB 1 does not affect existing law relating to access by law enforcement agencies to information held by a financial institution. See Fin. Code § 4056(c).

The meaning of these general provisions is uncertain, particularly with respect to authority of a financial institution to release information to the extent specifically permitted under other provisions of law "and in accordance with the Right to Financial Privacy Act of 1978." Fin. Code § 4056(b)(5). Probably this provision is intended only to allow release of information by a financial institution to a federal agency pursuant to federal law, but it is ambiguous.

These provisions do not appear to address a multitude of statutory conflicts that will occur under state law. For example, many state statutes currently in effect provide financial privacy protections that are weaker than SB 1.

Take the Areias Credit Card Full Disclosure Act of 1986; it limits a credit card issuer's disclosure of marketing information about a cardholder. The law requires the card issuer to give the cardholder an opt out opportunity before disclosure is made to an affiliate, a joint marketer, or an unaffiliated third party. Civ. Code § 1748.12. The law is less protective of consumer privacy than SB 1, which would prohibit disclosure to a nonaffiliated third party absent the

cardholder's opt in. SB 1 probably should override the older and narrower provision, but neither the general nor special provisions contained in SB 1 address this sort of conflict.

SB 1 is also silent as to what rule may apply where another statute is more protective of consumer privacy than SB 1. For example, the Civil Code prohibits a bookkeeping service from disclosing the contents of any record of a client without the express written consent of the client. Civ. Code § 1799.1. This statute is more protective of financial information privacy than SB 1 since it requires an opt in without exception for affiliate or joint market sharing. SB 1 comprehensively governs the field but it does not address whether, as the most recent and comprehensive expression of the Legislature, it is intended to override older narrower statutes such as this.

Likewise, Revenue and Taxation Code Section 674 imposes strict confidentiality constraints on an appraiser who does contract work for a county assessor. We probably would not want enactment of SB 1 inadvertently to override those provisions, but for now the result remains a question of statutory construction.

General Presumption

We cannot possibly identify and address every potentially conflicting statute. For example, 1350 statutes alone contain the word "confidential". The task of analyzing each of those statutes to determine which may overlap SB 1 and which do not exceeds our available resources. And in those cases where an overlap is reasonably clear, it is a judgment call whether sufficient confusion will exist to warrant clarification of the interaction of the statues.

Not all statutes are couched in terms of "private" or "confidential" or "not disclose" or "personal information" or another obvious key word or phrase. The more recondite conflicts will only surface over time. But we can at least make a start on some of the more glaring issues.

Because we can only deal with a fraction of the conflicts expressly, does it make sense to add to the law a general presumption to help the courts deal with the cases that are certain to arise?

General principles of statutory construction give us a mixed message as to which statute should prevail in case of a conflict. The Uniform Statute and Rule Construction Act (1995), lays out the pertinent principles:

Section 10. Irreconcilable Statutes or Rules

(a) If statutes appear to conflict, they must be construed, if possible, to give effect to each. If the conflict is irreconcilable, the later enacted statute governs. However, an earlier enacted specific, special, or local statute prevails over later enacted general statute unless the context of the later enacted statute indicates otherwise.

...

(c) If a statute is a comprehensive revision of the law on a subject, it prevails over previous statutes on the subject, whether or not the revision and the previous statutes conflict irreconcilably.

The Comment to the Uniform Act notes:

> This section addresses the difficult problem presented where the legislature fails to make clear the relationship of a later enacted statute or rule to an earlier one. Express amendment or repeal of the earlier by the later would avoid the problem.

An approach to this problem that makes some sense to the staff is to enact a general presumption that in case of a conflict between SB 1 and a special statute, the statute that provides greater privacy protection controls. This would avoid wiping out by inadvertence an important privacy protection in an area that is particularly sensitive. On the other hand, there may be good reason to maintain the less restrictive statute in place. For example, the less restrictive statute may be part of a comprehensive scheme that provides consistent rules throughout an industry, and injection of the stronger financial privacy requirements would unduly complicate operations.

We could propose a weak presumption in favor of greater privacy protection, and individually review at least the main financial privacy statutes to determine whether different treatment may be appropriate. A weak presumption might look something like this:

Fin. Code § 4058.3 (added). Conflicting statutes

4058.3. (a) If this division conflicts with another statute that limits or prohibits disclosure by a financial institution of nonpublic personal information of a consumer, public policy generally favors application of the statute that provides greater protection from disclosure of the consumer's nonpublic personal information.

(b) This section applies only to a statute enacted before enactment of this division.

Comment. Subdivision (a) of Section 4058.3 expresses the general legislative intent to favor privacy of consumer nonpublic personal information in the event of conflicting statutes relating to

> disclosure of that information by a financial institution. Section 4058.3 does not apply to the extent a statute specifically addresses the conflict. See, e.g., Sections [to be provided]; see also Section 1056(b)(5), (7) (release of nonpublic personal information to extent necessary to comply with requirements of other statutes).
>
> Subdivision (b) limits application of this section to preexisting statutes. A statute enacted after enactment of this division is presumed to have been enacted with knowledge of the requirements of this division.
>
> The policy stated in this section is not absolute, but expresses a general constructional preference. Other public policies may prevail with respect to a particular body of law. For example, the less protective statute may be part of a comprehensive scheme that provides consistent rules throughout an industry, and injection of the stronger financial privacy requirements of this division could be unduly disruptive.

Major Privacy Statutes Governing Private Entities

There are innumerable statutes governing disclosure of personal information by private (and public) entities in varying contexts. In each case, we should determine whether it is intended that the particular statute supersedes or is superseded by SB 1, or whether the two supplement each other. That will enable us to avoid possible problems resulting from application of the general presumption that the more protective of the statutes controls.

Due to the broad coverage of SB 1, statutes that at first glance might not appear to overlap, in fact do. For example statutes governing medical privacy overlap statues governing financial privacy to the extent issues of medical insurance and coverage are involved.

Professional-Client Relationships (Bus. & Prof. Code § 5000 et seq.)

SB 1 exempts from its coverage any provider of professional services that is prohibited by rules of professional ethics and applicable law from voluntarily disclosing confidential client information without the consent of the client. Fin. Code § 4052(c) (“financial institution” defined). That would include, for example, an attorney. See Bus. & Prof. Code § 6068(e) (duty of attorney to maintain inviolate the confidence and at every personal peril to preserve the secrets of the client).

What a about profession that provides some privacy for clients, but not to a degree that qualifies the profession for an exemption from SB 1? Let’s assume, for the sake of discussion, that a certified public accountant does not qualify for the

exemption. However, the law does provide that no statement, record, schedule, working paper, or memorandum made by a CPA incident to or in the course of rendering services to a client may be sold, transferred or bequeathed to a third party without the consent of the client. Bus. & Prof. Code § 5037.

A provision such as this should supplement SB 1. But such provisions really are too numerous to list, and they are constantly changing. Our general presumption that the more protective of the two statutes applies probably would have the effect of preserving this sort of provision in the face of SB 1. But why rely on the general presumption now that we have identified the issue and can deal with it directly? The staff thinks it would be helpful to describe the interrelation of the statutes generically:

> **Fin Code § 4058.2 (added). Effect on other statutes**
>
> 4058.2. This division supplements and does not limit the application of any of the following provisions:
>
> (a) A statute protecting the confidentiality of records or other information concerning a client of the practitioner of a licensed or otherwise regulated profession or vocation.
>
> **Comment**. Section 4058.2 lists major privacy laws whose operation is not affected by this division. The omission of a law from this section should not be read to imply that this division is intended to supersede that law. The listing in this section is necessarily incomplete, and is intended to provide guidance to the extent practicable. Whether a privacy law not listed in this section is superseded by this division is determined by standard principles of statutory construction. See also Section 4058.3 (conflicting statutes).
>
> Subdivision (a) makes clear that individual confidentiality statutes applicable to professionals neither supersede nor are superseded by this division. However, this division does exempt from its application a professional who is prohibited by rules of professional ethics and applicable law from voluntarily disclosing confidential client information without the consent of the client). See Section 4052(c) ("financial institution" defined).

Disclosure of Tax Return Information (Bus. & Prof. Code § 17530.5)

It is a crime for a person to disclose information obtained in the business of preparing or assisting the preparation of income tax returns without the express written consent of the taxpayer. Bus. & Prof. Code § 17530.5. The prohibition extends to internal disclosure within the tax preparation entity, as well as to affiliates, for any purpose other than tax preparation.

It is likewise a crime for or a sales and use tax return preparer to disclose return information, or for any other person or agency, or its employees or officers, to disclose information collected for the purpose of administering the sales and use tax laws or for any purpose other than tax administration or enforcement. Rev. & Tax. Code §§ 7056.5, 7056.6.

These statutes are more protective than SB 1. They represent a legislative policy determination that tax information is particularly sensitive and deserves the strongest protection. They should not be overridden by SB 1.

Nor should they override SB 1. They are criminal statutes; SB 1 provides a civil penalty. The staff thinks a general provision preserving penal privacy statutes is appropriate:

> **Fin Code § 4058.2 (added). Effect on other statutes**
>
> 4058.2. This division supplements and does not limit the application of any of the following provisions:
>
> ...
>
> (b) A statute imposing a criminal penalty for disclosure of records or other information concerning a consumer without the consent of the consumer.
>
> **Comment**. Section 4058.2 lists major privacy laws whose operation is not affected by this division. The omission of a law from this section should not be read to imply that this division is intended to supersede that law. The listing in this section is necessarily incomplete, and is intended to provide guidance to the extent practicable. Whether a privacy law not listed in this section is superseded by this division is determined by standard principles of statutory construction. See also Section 4058.3 (conflicting statutes).
>
> ...
>
> Subdivision (b) makes clear that this division does not supersede a statute making it a crime to disclose nonpublic personal information. See, e.g., Bus. & Prof. Code § 17530.5, Rev. & Tax. Code § 7056.6 (disclosure of tax return information); cf. Rev. & Tax. Code § 7056.5 (Taxpayer Browsing Protection Act).

Confidentiality of Medical Information Act (Civ. Code §§ 56-56.37)

No provider of health care, health care service plan, or contractor may disclose medical information about a patient or an enrollee or subscriber of a plan without prior authorization by the patient, enrollee or subscriber. Civ. Code § 56.10(a). This limitation is qualified by narrowly drawn exceptions. Civ. Code §§ 56.10(b)-56.16, 56.30. The statute specifically overrides some provisions of the Information Practices Act of 1977, supplements some provisions of that Act, and

is qualified by provisions of the Insurance Information and Privacy Protection Act. Civ. Code §§ 56.27, 56.29.

The Confidentiality of Medical Information Act thus provides greater protection and more specifically tailored provisions than SB 1. It should apply notwithstanding the general provisions of SB 1 We would add clarifying language to SB 1:

> **Fin. Code § 4058.1 (added). Exemption of financial institutions covered by other privacy laws**
>
> 4058.1. This division does not apply to any of the following financial institutions:
>
> (a) A provider of health care, health care service plan, or contractor, within the meaning of the Confidentiality of Medical Information Act, Part 2.6 (commencing with Section 56) of Division 1 of the Civil Code, with respect to medical information covered by that act.
>
> **Comment**. The financial institutions identified in Section 4058.1 are exempted from coverage of this division due to the more specific privacy provisions applicable to them under other statutes. Cf. Section 4052(c) ("financial institution" defined).

Note, however, that exemption of a financial institution from SB 1 is not an exemption from GLB. Thus health care providers and plans are likely to be subjected to two bodies of conflicting privacy law, one state and one federal. GLB does provide a procedure for obtaining an FTC determination that state law provides greater protection than GLB and therefore is not preempted by GLB. But nonpreemption is not the same as nonapplicability of federal law.

Areias Credit Card Full Disclosure Act of 1986 (Civ. Code §§ 1748.10-1748.14)

Civil Code Section 1748.12 limits a credit card issuer's right to disclose marketing information (shopping patterns, spending history, or behavioral characteristics derived from account activity) about a cardholder. The law requires the card issuer to give the cardholder notice and an opt out opportunity.

The Areias Act is less protective of consumer privacy than SB 1, which precludes disclosure to a nonaffiliated third party unless the consumer opts in. The Areias Act also acknowledges the preemptive effect of FCRA with respect to affiliate sharing:

> To the extent that the Fair Credit Reporting Act preempts the requirements of this section as to communication by a credit card issuer to a corporate subsidiary or affiliate, the credit card issuer

may communicate information about a cardholder to a corporate subsidiary or affiliate to the extent and in the manner permitted under that act.

Civ. Code § 1748.12(e)(3).

The type of information disclosure covered by this statute, while narrowly focused, is also the type of information disclosure covered by SB 1. To the extent the Areias Act includes special rules governing the privacy notice to cardholders and the timing for opting out, it is redundant to but somewhat different from SB 1.

The staff believes SB 1 should supersede this special statute. We would repeal the special statute in reliance on SB 1.

Civ. Code § 1748.12 (repealed). Disclosure of marketing information

~~1748.12. (a) For purposes of this section:~~

~~(1) "Cardholder" means any consumer to whom a credit card is issued, provided that, when more than one credit card has been issued for the same account, all persons holding those credit cards may be treated as a single cardholder.~~

~~(2) "Credit card" means any card, plate, coupon book, or other single credit device existing for the purpose of being used from time to time upon presentation to obtain money, property, labor, or services on credit. "Credit card" does not mean any of the following:~~

~~(A) Any single credit device used to obtain telephone property, labor, or services in any transaction under public utility tariffs.~~

~~(B) Any device that may be used to obtain credit pursuant to an electronic fund transfer but only if the credit is obtained under an agreement between a consumer and a financial institution to extend credit when the consumer's asset account is overdrawn or to maintain a specified minimum balance in the consumer's asset account.~~

~~(C) Any key or card key used at an automated dispensing outlet to obtain or purchase petroleum products, as defined in subdivision (c) of Section 13401 of the Business and Professions Code, which will be used primarily for business rather than personal or family purposes.~~

~~(3) "Marketing information" means the categorization of cardholders compiled by a credit card issuer, based on a cardholder's shopping patterns, spending history, or behavioral characteristics derived from account activity which is provided to a marketer of goods or services or a subsidiary or affiliate organization of the company that collects the information for~~

~~consideration. "Marketing information" does not include aggregate data that does not identify a cardholder based on the cardholder's shopping patterns, spending history, or behavioral characteristics derived from account activity or any communications to any person in connection with any transfer, processing, billing, collection, chargeback, fraud prevention, credit card recovery, or acquisition of or for credit card accounts.~~

~~(b) If the credit card issuer discloses marketing information concerning a cardholder to any person, the credit card issuer shall provide a written notice to the cardholder that clearly and conspicuously describes the cardholder's right to prohibit the disclosure of marketing information concerning the cardholder which discloses the cardholder's identity. The notice shall be in 10-point type and shall advise the cardholder of his or her ability to respond either by completing a preprinted form or a toll-free telephone number that the cardholder may call to exercise this right.~~

~~(c) The requirements of subdivision (b) shall be satisfied by furnishing the notice to the cardholder:~~

~~(1) At least 60 days prior to the initial disclosure of marketing information concerning the cardholder by the credit card issuer.~~

~~(2) For all new credit cards issued on or after April 1, 2002, on the form containing the new credit card when the credit card is delivered to the cardholder.~~

~~(3) At least once per calendar year, to every cardholder entitled to receive an annual statement of billings rights pursuant to 12 C.F.R. 226.9 (Regulation Z). The notice required by this paragraph may be included on or with any periodic statement or with the delivery of the renewal card.~~

~~(d)(1) The cardholder's election to prohibit disclosure of marketing information shall be effective only with respect to marketing information that is disclosed to any party beginning 30 days after the credit card issuer has received, at the designated address on the form containing the new credit card or on the preprinted form, or by telephone, the cardholder's election to prohibit disclosure. This does not apply to the disclosure of marketing information prior to the cardholder's notification to the credit card issuer of the cardholder's election.~~

~~(2) An election to prohibit disclosure of marketing information shall terminate upon receipt by the credit card issuer of notice from the cardholder that the cardholder's election to prohibit disclosure is no longer effective.~~

~~(e) The requirements of this section do not apply to any of the following communications of marketing information by a credit card issuer:~~

~~(1) Communications to any party to, or merchant specified in, the credit card agreement, or to any person whose name appears on the credit card or on whose behalf the credit card is issued.~~

~~(2) Communications to consumer credit reporting agencies, as defined in subdivision (d) of Section 1785.3.~~

~~(3) To the extent that the Fair Credit Reporting Act preempts the requirements of this section as to communication by a credit card issuer to a corporate subsidiary or affiliate, the credit card issuer may communicate information about a cardholder to a corporate subsidiary or affiliate to the extent and in the manner permitted under that act.~~

~~(4) Communications to a third party when the third party is responsible for conveying information from the card issuer to any of its cardholders.~~

~~(f) If the laws of the United States require disclosure to cardholders regarding the use of personal information, compliance with the federal requirements shall be deemed to be compliance with this section.~~

~~(g) This section shall become operative on April 1, 2002.~~

Comment. Former Section 1748.12 is superseded by the California Financial Information Privacy Act. See, e.g., Fin. Code §§ 4052(c) ("financial institution" defined), 4050(a) ("nonpublic personal information" defined), 4053 (consent to disclosure), 4052.5 (limitation on disclosure to nonaffiliated third party).

Identity Theft (Civ. Code § 1748.95, Fin. Code §§ 4002, 22470, Pen. Code § 530.8)

Various identity theft statutes allow law enforcement and victim access to records in the hands of a financial institution. See, e.g., Pen. Code § 530.8 (unauthorized account); Fin. Code §§ 4002 (supervised financial organization), 22470 (finance lender of consumer loan); Civ. Code § 1748.95 (credit card issuer). Clearly these provisions should override SB 1. And in fact SB 1 would exempt from its coverage, among other matters:

- Release of information to protect against or prevent actual or potential identity theft. Fin. Code § 4056(b)(3)(B).
- Release of information to comply with a properly authorized civil or criminal investigation. Fin. Code § 4056(b)(7).

Given the broad exemptions already in SB 1 that cover identity theft, the staff does not see the need to refer to individual identity theft statutes. This is particularly true as the Legislature becomes more active in the identity theft area — a reference to a specific identify theft statute could arguably be read not to

include other identity theft statutes not referred to, even though enacted later. A Comment to that effect might be useful:

> **Fin Code § 4058.2 (added). Effect on other statutes**
>
> 4058.2. This division supplements and does not limit the application of any of the following provisions:
>
> ...
>
> **Comment**. Section 4058.2 lists major privacy laws whose operation is not affected by this division. The omission of a law from this section should not be read to imply that this division is intended to supersede that law. The listing in this section is necessarily incomplete, and is intended to provide guidance to the extent practicable. Whether a privacy law not listed in this section is superseded by this division is determined by standard principles of statutory construction. See also Section 4058.3 (conflicting statutes).
>
> For example, a financial institution must also comply with provisions of identity theft statutes relating to disclosure of information to victims and to law enforcement authorities. See, e.g., Pen. Code § 530.8; Fin. Code § 4002 (identity theft). See also Section 4056 (transactional exemptions).

Consumer Credit Reporting Agencies Act (Civ. Code 1785.1-1785.36)

The transfer of information to and from a consumer credit reporting agency is highly regulated under state law, as it is under federal law. This regulatory scheme should operate independently of, and be unaffected by, SB 1.

> **Fin Code § 4058.2 (added). Effect on other statutes**
>
> 4058.2. This division supplements and does not limit the application of any of the following provisions:
>
> ...
>
> (c) The Consumer Credit Reporting Agencies Act, Title 1.6 (commencing with Section 1785.1) of Part 4 of Division 3 of the Civil Code.
>
> **Comment**. Section 4058.2 lists major privacy laws whose operation is not affected by this division. The omission of a law from this section should not be read to imply that this division is intended to supersede that law. The listing in this section is necessarily incomplete, and is intended to provide guidance to the extent practicable. Whether a privacy law not listed in this section is superseded by this division is determined by standard principles of statutory construction. See also Section 4058.3 (conflicting statutes).

Investigative Consumer Reporting Agencies Act (Civ. Code § 1786-1786.60)

A similar analysis would apply to investigative consumer reporting agencies as applies to consumer credit reporting agencies (above). An investigative consumer reporting agency compiles information on a consumer for potential employment, insurance, leasing, licensure, and other purposes. While it is not clear that such an agency would be a financial institution within the meaning of SB 1, the staff thinks such an interpretation is likely. It is easy enough to list the California statute and avoid constructional questions.

> **Fin Code § 4058.2 (added). Effect on other statutes**
>
> 4058.2. This division supplements and does not limit the application of any of the following provisions:
>
> ...
>
> (d) The Investigative Consumer Reporting Agencies Act, Title 1.6A (commencing with Section 1786) of Part 4 of Division 3 of the Civil Code.
>
> **Comment**. Section 4058.2 lists major privacy laws whose operation is not affected by this division. The omission of a law from this section should not be read to imply that this division is intended to supersede that law. The listing in this section is necessarily incomplete, and is intended to provide guidance to the extent practicable. Whether a privacy law not listed in this section is superseded by this division is determined by standard principles of statutory construction. See also Section 4058.3 (conflicting statutes).

Confidentiality of Social Security Numbers (Civ. Code §§ 1798.85-1798.86)

Statutes restricting public posting or display of social security numbers appear to operate in a different realm from SB 1. Under the social security number privacy statutes, a financial institution that has a consumer's social security number is prohibited from intentionally communicating or otherwise making the number available to the general public. Civ. Code § 1798.85. The financial institution is not, however, limited in its ability to disclose that information to a third party.

Suppose, though, that a financial institution makes social security numbers in its possession available for purchase by anyone who puts up cash. That practice would arguably fall within the "making available to the general public" prohibition, although that interpretation is far from clear. If disclosure or sale of a social security number to a third party is considered making it available to the general public, then the statute is more protective of privacy than SB 1; if it is not considered making it available to the general public, then it is less protective.

Given the uncertainty of interpretation, perhaps the best approach is to make clear that the SB 1 does not affect the social security number statute:

> **Fin Code § 4058.2 (added). Effect on other statutes**
>
> 4058.2. This division supplements and does not limit the application of any of the following provisions:
>
> ...
>
> (e) Title 1.81.1 (commencing with Section 1798.85) of Part 4 of Division 3 of the Civil Code, relating to confidentiality of social security numbers.
>
> **Comment**. Section 4058.2 lists major privacy laws whose operation is not affected by this division. The omission of a law from this section should not be read to imply that this division is intended to supersede that law. The listing in this section is necessarily incomplete, and is intended to provide guidance to the extent practicable. Whether a privacy law not listed in this section is superseded by this division is determined by standard principles of statutory construction. See also Section 4058.3 (conflicting statutes).

Bookkeeping Services, Income Tax Returns, Video Cassette Sales and Rentals (1799-1799.3)

Civil Code Sections 1799-1799.3 are lumped together under the Title heading "Business Records". The statutes deal disparately with disclosure of information derived by a bookkeeping service, by a person with access to income tax returns, and by video sales and rental establishments. The one thing they have in common is that each requires the affirmative consent of the person whose information is at issue before that information may be disclosed to a third party.

These provisions cut across SB 1 in different ways. The overlap with respect to booking service providers is complete, since those providers would be considered financial institutions under GLB. See Civ. Code §§ 1799-1799.1.

The income tax return provisions involve a substantial overlap with SB 1 coverage. The income tax return provisions apply to any person that has obtained a copy of a consumer's income tax return. See Civ. Code § 1799.1a. Often that will be a financial institution, but not necessarily. It may be a local merchant seeking assurance of financial security before extending credit, or a landlord before executing a lease.

The video cassette sale or rental provisions operate in a different field entirely. See Civ. Code § 1799.3. A merchant engaged in that business would not ordinarily be deemed a financial institution within the meaning of SB 1.

Because of the broader scope of coverage of these provisions than SB 1, they should continue to operate independently of SB 1. In addition, because of the greater level of protection provided by the bookkeeping services statute, and the sensitivity of information involved, that statute should continue in effect. We would preserve the entire set of provisions:

> **Fin Code § 4058.2 (added). Effect on other statutes**
>
> 4058.2. This division supplements and does not limit the application of any of the following provisions:
>
> ...
>
> (f) Title 1.82 (commencing with Section 1799) of Part 4 of Division 3 of the Civil Code, relating to confidentiality of business records.
>
> **Comment**. Section 4058.2 lists major privacy laws whose operation is not affected by this division. The omission of a law from this section should not be read to imply that this division is intended to supersede that law. The listing in this section is necessarily incomplete, and is intended to provide guidance to the extent practicable. Whether a privacy law not listed in this section is superseded by this division is determined by standard principles of statutory construction. See also Section 4058.3 (conflicting statutes).

Subpoena Duces Tecum for Production of Personal Records (Code Civ. Proc. § 1985.3)

A litigant may subpoena a financial institution for production of the financial records of a consumer. Under Code of Civil Procedure Section 1985.3, the subpoenaing party must serve on the consumer a copy of the subpoena and notice to the consumer of the opportunity to protect the consumer's privacy rights. The consumer may move to quash or modify the subpoena or otherwise file a written objection. Although the statute does not specify the grounds on which the consumer's personal information is entitled to protection from disclosure pursuant to a subpoena duces tecum, case law makes clear that the constitutional privacy right is at stake and a court must balance the consumer's interest in privacy against a demonstrably compelling need for discovery. See, e.g., *Lantz v. Superior Court*, 28 Cal. App. 4th 1839, 34 Cal. Rptr. 2d 358 (1994).

Does SB 1 protect a consumer's personal information from discovery under Code of Civil Procedure Section 1985.3, independent of any constitutional balancing tests? Suppose a consumer has opted in to third party sharing under SB 1 — could that be considered a waiver of constitutional privacy rights for purposes of the Section 1985.3 balancing test?

The staff does not think a consumer's exercise of privacy rights under SB 1 should immunize the consumer's financial records from discovery in court proceedings. Nor should a consumer's waiver of rights under SB 1 for marketing or other reasons have the effect of a general waiver of privacy rights to the extent that a private litigant may obtain the consumer's personal information without restraint.

SB 1 permits disclosure of nonpublic personal information to comply with "subpoena or summons by Federal, State, or local authorities". Fin. Code § 4056(b)(7). This provision is sufficiently specific that it is unnecessary to add language to the discovery statute making clear that it applies notwithstanding SB 1, at least with respect to a government subpoena. However, coordination of SB 1 with private litigation subpoenas is still necessary.

The staff would make clear that:

Code Civ. Proc. § 1985.4 (amended). Subpoena for production of personal records

1985.4. The procedures set forth in Section 1985.3 are applicable to a subpoena duces tecum for records ~~containing~~ :

(a) Containing "personal information," as defined in Section 1798.3 of the Civil Code which are otherwise exempt from public disclosure under Section 6254 of the Government Code which are maintained by a state or local agency as defined in Section 6252 of the Government Code. For the purposes of ~~this section~~ application of Section 1985.3 to this subdivision, "witness" means a state or local agency as defined in Section 6252 of the Government Code and "consumer" means any employee of any state or local agency as defined in Section 6252 of the Government Code, or any other natural person. Nothing in this ~~section~~ subdivision shall pertain to personnel records as defined in Section 832.8 of the Penal Code.

(b) Containing nonpublic personal information otherwise protected from disclosure under the California Financial Information Privacy Act, Division 1.2 (commencing with Section 4050) of the Financial Code. A consumer's exercise or nonexercise of rights under the California Financial Information Privacy Act does not affect the grounds for a motion to quash, modify, or condition a subpoena duces tecum, or for a written objection to production of personal records, under Section 1985.3 as an undue invasion of the right to privacy.

Comment. Section 1985.4 is amended to make clear that the procedures of Section 1985.3 are applicable to a subpoena duces tecum for financial information that would otherwise be protected from disclosure under the California Financial Information Privacy Act, Division 1.2 (commencing with Section 4050) of the Financial

> Code. See also Fin. Code § 4056(b)(7) (consumer may not preclude disclosure of nonpublic personal information pursuant to a subpoena by federal, state, or local authorities). Moreover, a consumer's actions under that Act should not be construed as a waiver of the consumer's privacy rights granted under California's discovery statutes. See, e.g., Section 1987.1 (protective orders, including protection against unreasonable violation of privacy rights).

California Right to Financial Privacy Act (Gov't Code §§ 7460-7493)

The California Right to Financial Privacy Act was enacted in 1976. Its purpose is to "clarify and protect the confidential relationship between financial institutions and their customers and to balance a citizen's right of privacy with the governmental interest in obtaining information for specific purposes and by specified procedures." Gov't Code § 7461(c).

The statute prohibits a financial institution from disclosing a customer's financial records to a governmental entity or officer in connection with a civil or criminal investigation, except (1) with the customer's consent or (2) pursuant to an administrative subpoena or summons, search warrant, or judicial subpoena that meets specified standards. Gov't Code § 7470. These requirements are not waivable, and they override all other statutes except those that make specific reference to them. Gov't Code §§ 7490-7491.

The statute does not prohibit a financial institution from disclosing financial records of a customer incidental to a transaction in the normal course of business if the financial institution has no reasonable cause to believe that the information will be used in connection with an investigation of the customer. Gov't Code § 7471.

Unlike SB 1, this statute only affects one segment of the "financial institution" spectrum — banks, savings associations, trust companies, industrial loan companies, and credit unions. Gov't Code § 7465(a). It feeds into the SB 1 exception to comply with a "properly authorized" civil, criminal, or regulatory investigation or subpoena or summons by federal, state, or local authorities. 4056(b)(7).

The staff does not believe any statutory adjustment is necessary to allow both SB 1 and the special requirements of the California Right to Financial Privacy Act to coexist. There is perhaps a little confusion in the similarity of their short titles, but we would not worry about that. It wouldn't hurt, however, for SB 1 to reference the special statute for educational purposes:

Fin Code § 4058.2 (added). Effect on other statutes

4058.2. This division supplements and does not limit the application of any of the following provisions:

...

(g) The California Right to Financial Privacy Act, Chapter 20 (commencing with Section 7460) of Division 7 of Title 1 of the Government Code.

Comment. Section 4058.2 lists major privacy laws whose operation is not affected by this division. The omission of a law from this section should not be read to imply that this division is intended to supersede that law. The listing in this section is necessarily incomplete, and is intended to provide guidance to the extent practicable. Whether a privacy law not listed in this section is superseded by this division is determined by standard principles of statutory construction. See also Section 4058.3 (conflicting statutes).

Insurance Information and Privacy Protection Act (Ins. Code §§ 791-791.27)

The Insurance Information and Privacy Protection Act was enacted in 1980 for the purpose of establishing standards for the collection, use, and disclosure of information gathered in connection with insurance transactions. See Ins. Code §§ 791-791.27. The disclosure limitations are extensive and detailed:

Ins. Code § 791.13. Disclosure of personal or privileged information

791.13. An insurance institution, agent, or insurance-support organization shall not disclose any personal or privileged information about an individual collected or received in connection with an insurance transaction unless the disclosure is:

(a) With the written authorization of the individual, and meets either of the conditions specified in paragraph (1) or (2):

(1) If such authorization is submitted by another insurance institution, agent, or insurance-support organization, the authorization meets the requirement of Section 791.06.

(2) If such authorization is submitted by a person other than an insurance institution, agent, or insurance-support organization, the authorization is:

(A) Dated;

(B) Signed by the individual.

(C) Obtained one year or less prior to the date a disclosure is sought pursuant to this section.

(b) To a person other than an insurance institution, agent, or insurance-support organization, provided such disclosure is reasonably necessary:

(1) To enable such person to perform a business, professional or insurance function for the disclosing insurance institution, agent, or

insurance-support organization or insured and such person agrees not to disclose the information further without the individual's written authorization unless the further disclosure:

(A) Would otherwise be permitted by this section if made by an insurance institution, agent, or insurance-support organization; or

(B) Is reasonably necessary for such person to perform its function for the disclosing insurance institution, agent, or insurance-support organization.

(2) To enable such person to provide information to the disclosing insurance institution, agent or insurance-support organization for the purpose of:

(A) Determining an individual's eligibility for an insurance benefit or payment; or

(B) Detecting or preventing criminal activity, fraud, material misrepresentation or material nondisclosure in connection with an insurance transaction.

(c) To an insurance institution, agent, insurance-support organization or self-insurer, provided the information disclosed is limited to that which is reasonably necessary under either paragraph (1) or (2):

(1) To detect or prevent criminal activity, fraud, material misrepresentation or material nondisclosure in connection with insurance transactions; or

(2) For either the disclosing or receiving insurance institution, agent or insurance-support organization to perform its function in connection with an insurance transaction involving the individual.

(d) To a medical-care institution or medical professional for the purpose of any of the following:

(1) Verifying insurance coverage or benefits.

(2) Informing an individual of a medical problem of which the individual may not be aware.

(3) Conducting operations or services audit, provided only such information is disclosed as is reasonably necessary to accomplish the foregoing purposes.

(e) To an insurance regulatory authority; or

(f) To a law enforcement or other governmental authority pursuant to law.

(g) Otherwise permitted or required by law.

(h) In response to a facially valid administrative or judicial order, including a search warrant or subpoena.

(i) Made for the purpose of conducting actuarial or research studies, provided:

(1) No individual may be identified in any actuarial or research report.

(2) Materials allowing the individual to be identified are returned or destroyed as soon as they are no longer needed.

(3) The actuarial or research organization agrees not to disclose the information unless the disclosure would otherwise be permitted by this section if made by an insurance institution, agent or insurance-support organization.

(j) To a party or a representative of a party to a proposed or consummated sale, transfer, merger or consolidation of all or part of the business of the insurance institution, agent or insurance-support organization, provided:

(1) Prior to the consummation of the sale, transfer, merger, or consolidation only such information is disclosed as is reasonably necessary to enable the recipient to make business decisions about the purchase, transfer, merger, or consolidation.

(2) The recipient agrees not to disclose the information unless the disclosure would otherwise be permitted by this section if made by an insurance institution, agent or insurance-support organization.

(k) To a person whose only use of such information will be in connection with the marketing of a product or service, provided:

(1) No medical-record information, privileged information, or personal information relating to an individual's character, personal habits, mode of living, or general reputation is disclosed, and no classification derived from such information is disclosed; or

(2) The individual has been given an opportunity to indicate that he or she does not want personal information disclosed for marketing purposes and has given no indication that he or she does not want the information disclosed; and

(3) The person receiving such information agrees not to use it except in connection with the marketing of a product or service.

(l) To an affiliate whose only use of the information will be in connection with an audit of the insurance institution or agent or the marketing of an insurance product or service, provided the affiliate agrees not to disclose the information for any other purpose or to unaffiliated persons.

(m) By a consumer reporting agency, provided the disclosure is to a person other than an insurance institution or agent.

(n) To a group policyholder for the purpose of reporting claims experience or conducting an audit of the insurance institution's or agent's operations or services, provided the information disclosed is reasonably necessary for the group policyholder to conduct the review or audit.

(o) To a professional peer review organization for the purpose of reviewing the service or conduct of a medical-care institution or medical professional.

(p) To a governmental authority for the purpose of determining the individual's eligibility for health benefits for which the governmental authority may be liable.

(q) To a certificate holder or policyholder for the purpose of providing information regarding the status of an insurance transaction.

(r) To a lienholder, mortgagee, assignee, lessor, or other person shown on the records of an insurance institution or agent as having a legal or beneficial interest in a policy of insurance. The information disclosed shall be limited to that which is reasonably necessary to permit the person to protect his or her interest in the policy and shall be consistent with Article 5.5 (commencing with Section 770).

Under this scheme, an opt in is required for information sharing generally. Subdivision (a). Lesser standards apply for specified purposes enumerated in the statute. Those provisions are either generally consistent with SB 1 or unique to the insurance context. Particularly noteworthy is subdivision (k), which provides an opt out scheme for third party information sharing for marketing purposes.

The remedy for violation of Section 791.13 is actual damages sustained as a result of the violation, plus costs and reasonable attorney's fees to the prevailing party. There is a two year limitation period from the date the violation was, or could have been, discovered. No other remedies are allowed. Sections 791.20-791.21.

The Insurance Commissioner has made an effort to reconcile this statute with GLB in regulations promulgated in 2002. See 10 CA Code Regs. § 2689.1 et seq. Under GLB, the state insurance commissioner, and not a federal authority, is the functional regulator. The California regulations focus on the privacy notice and information security procedures. The basic disclosure regulation does not attempt any real reconciliation — "Nonpublic personal information shall not be disclosed in a manner not permitted by California law or these regulations." 10 CA Code Regs. § 2689.3.

Under SB 1 an insurer may combine the opt-out form with the form required pursuant to the Insurance Information and Privacy Protection Act. See Fin. Code § 4058.7.

The Insurance Information and Privacy Protection Act is supplemented by numerous statutes in the Insurance Code imposing confidentiality requirements on insurers, interinsurance exchanges, ratings organizations, etc., in one context or another. In a word, the situation is complex and defies easy summary.

The staff does not feel that at present we have sufficient knowledge of the intricacies of the insurance statutes to be able to make an informed

recommendation to the Commission on integration of SB 1 with insurance privacy statutes. We will make a more thorough analysis for the Commission at an appropriate time.

Other Privacy Statutes Governing Private Entities

In addition to state statutes whose principle function is privacy protection, there are also many statutes that have an incidental effect on financial privacy. A few of these are analyzed here.

Fair Debt Collection Practices (Civ. Code §§ 1788-1788.33)

The Rosenthal Fair Debt Collection Practices Act has as its purpose to prohibit debt collectors from engaging in unfair or deceptive acts or practices in the collection of consumer debts and to require debtors to act fairly in entering into and honoring debts. Among the practices prohibited by the act is communication of information about the debtor and debt with various persons:

> 1788.12. No debt collector shall collect or attempt to collect a consumer debt by means of the following practices:
>
> (a) Communicating with the debtor's employer regarding the debtor's consumer debt unless such a communication is necessary to the collection of the debt, or unless the debtor or his attorney has consented in writing to such communication. A communication is necessary to the collection of the debt only if it is made for the purposes of verifying the debtor's employment, locating the debtor, or effecting garnishment, after judgment, of the debtor's wages, or in the case of a medical debt for the purpose of discovering the existence of medical insurance. Any such communication, other than a communication in the case of a medical debt by a health care provider or its agent for the purpose of discovering the existence of medical insurance, shall be in writing unless such written communication receives no response within 15 days and shall be made only as many times as is necessary to the collection of the debt. Communications to a debtor's employer regarding a debt shall not contain language that would be improper if the communication were made to the debtor. One communication solely for the purpose of verifying the debtor's employment may be oral without prior written contact.
>
> (b) Communicating information regarding a consumer debt to any member of the debtor's family, other than the debtor's spouse or the parents or guardians of the debtor who is either a minor or who resides in the same household with such parent or guardian, prior to obtaining a judgment against the debtor, except where the purpose of the communication is to locate the debtor, or where the

debtor or his attorney has consented in writing to such communication;

(c) Communicating to any person any list of debtors which discloses the nature or existence of a consumer debt, commonly known as "deadbeat lists", or advertising any consumer debt for sale, by naming the debtor; or

(d) Communicating with the debtor by means of a written communication that displays or conveys any information about the consumer debt or the debtor other than the name, address and telephone number of the debtor and the debt collector and which is intended both to be seen by any other person and also to embarrass the debtor.

(e) Notwithstanding the foregoing provisions of this section, the disclosure, publication or communication by a debt collector of information relating to a consumer debt or the debtor to a consumer reporting agency or to any other person reasonably believed to have a legitimate business need for such information shall not be deemed to violate this title.

The disclosure of personal information prohibited by this statute is specifically tailored to the circumstances of debt collection. The statute should continue to apply notwithstanding general disclosure provisions of SB 1. The staff would make clear that the debt collection provisions are not overridden by SB 1:

Fin Code § 4058.2 (added). Effect on other statutes

4058.2. This division supplements and does not limit the application of any of the following provisions:

...

(h) The Rosenthal Fair Debt Collection Practices Act, Title 1.6C (commencing with Section 1788) of Part 4 of Division 3 of the Civil Code.

Comment. Section 4058.2 lists major privacy laws whose operation is not affected by this division. The omission of a law from this section should not be read to imply that this division is intended to supersede that law. The listing in this section is necessarily incomplete, and is intended to provide guidance to the extent practicable. Whether a privacy law not listed in this section is superseded by this division is determined by standard principles of statutory construction. See also Section 4058.3 (conflicting statutes).

Abstract of Judgment (Code Civ. Proc. § 674)

The statute governing the contents of an abstract of judgment requires a significant amount of personal information to be included in the abstract, such as

the name and last known address of the judgment debtor, the social security number and driver's license of the judgment debtor if known to the judgment creditor, and other names by which the judgment debtor is also known. Code Civ. Proc. § 674. The abstract may be recorded to establish a judgment lien. See, e.g., Code Civ. Proc. § 697.310 et seq.

There are many potential conflicts between the statutes governing recordation of an abstract of judgment and SB 1. Suppose, for example, a borrower has declined to opt in to the lender's disclosure of the borrower's personal information to a nonaffiliated third party. If the borrower fails to repay the loan, is the lender precluded from obtaining a judgment lien because SB 1 precludes the lender from disclosing personal information about the borrower?

Under SB 1, it is only "nonpublic" personal information that is protected, and all the information required in the abstract of judgment might be publicly available from one source or another. Cf. Fin. Code § 4052(a) ("nonpublic personal information" defined). Other possible SB 1 exceptions are that:

- Disclosure is "necessary to effect, administer, or enforce" the transaction. Fin. Code § 4052(h).
- Disclosure is authorized as a "securitization" of the transaction. Fin. Code § 4056(b)(1).
- Disclosure is "to comply with Federal, State, or local laws, rules, and other applicable legal requirements". Fin. Code § 4056(b)(7).

It may be that the current abstract of judgment statute requires more information than is reasonably necessary to identify the property of the judgment debtor for judgment lien purposes. And it may be that some other approach is called for to ensure the privacy of a judgment debtor's personal information. But that is beyond the scope of our present inquiry which is — How does SB 1 relate to existing law?

Interestingly, the Information Practices Act of 1977 specifically exempts an abstract of judgment from its coverage:

> **Civ. Code § 1798.67. Lien or encumbrance on real property**
>
> 1798.67. Where an agency has recorded a document creating a lien or encumbrance on real property in favor of the state, nothing herein shall prohibit any such agency from disclosing information relating to the identity of the person against whom such lien or encumbrance has been recorded for the purpose of distinguishing such person from another person bearing the same or a similar name.

The staff believes that the SB 1 exemption for disclosure of information "necessary to effect, administer, or enforce" a financial institution's rights against a consumer is adequate to allow recordation of the kinds of information required by the abstract of judgment law. See Fin. Code §§ 4056(b)(1) (exemption for disclosure necessary to effect, administer, or enforce rights of financial institution); 4052(h)(2) ("necessary to effect, administer, or enforce" includes disclosure that is required or is one of the lawful or appropriate methods to enforce the rights of the financial institution).

Ideally, we would add express language to SB 1 to eliminate any uncertainty and perhaps avoid litigation over the matter. However, we are reluctant to expose Financial Code Section 4052 (definitions) to amendment so soon after its enactment — it is a lengthy section that, while technically definitional, is replete with substantive provisions. The same concern applies to Section 4056 (transactional exemptions). Perhaps a Comment to one of the provisions we're proposing to add would be a sufficient indicium of legislative intent:

> **Fin Code § 4058.2 (added). Effect on other statutes**
>
> 4058.2. This division supplements and does not limit the application of any of the following provisions:
>
> ...
>
> **Comment**. Section 4058.2 lists major privacy laws whose operation is not affected by this division. The omission of a law from this section should not be read to imply that this division is intended to supersede that law. The listing in this section is necessarily incomplete, and is intended to provide guidance to the extent practicable. Whether a privacy law not listed in this section is superseded by this division is determined by standard principles of statutory construction. See also Section 4058.3 (conflicting statutes).
>
> For example, a financial institution may include in a recorded abstract of judgment pursuant to Code of Civil Procedure Section 674 nonpublic personal information that would otherwise be protected from disclosure by this division. See Section 4056(b)(1) (financial institution may release financial information necessary to effect, administer, or enforce transaction, service, or account).

Accounting of Guardian or Conservator (Prob. Code § 2620)

There is little doubt that a guardian or conservator of property would be a financial institution within the meaning of SB 1. There may be a question whether SB 1 is intended to cover an individual, as opposed to a corporate, fiduciary, due to the statute's use of the term financial "institution". The staff

does not think this is a serious concern — SB 1 states expressly its intent to track GLB definitions, and GLB makes clear its coverage extends to individuals as well as artificial persons. See Fin. Code § 4051.5(b)(5) (legislative findings); 16 CFR 313.3(k) ("financial institution" defined).

These fiduciaries must file periodic accountings with the superior court. The filings are a public record. The Probate Code seeks to protect the confidentiality of these public records to some extent:

> If any document to be filed with the court under this section contains the ward or conservatee's social security number or any other personal information regarding the ward or conservatee that would not ordinarily be disclosed in a court accounting, an inventory and appraisal, or other nonconfidential pleadings filed in the action, the account statement shall be attached to a separate affidavit describing the character of the document in proper form for filing, captioned "CONFIDENTIAL FINANCIAL STATEMENT" in capital letters. Except as otherwise ordered by the court, the clerk of the court shall keep the document confidential except to the court and subject to disclosure only upon an order of the court.

Prob. Code § 2620(d).

There are any number of SB 1 exceptions this filing could fall under. See, e.g., Fin. Code §§ 4052(h) ("necessary to effect, administer, or enforce" defined), 4056(b)(3) (protect against or prevent actual or potential fraud, etc.), 4056(b)(7) (compliance with state law). Thus the fiduciary should be able to make the required filing without obtaining the ward's or conservatee's opt in. It might be useful to recognize this explicitly at least in commentary:

> **Fin Code § 4058.2 (added). Effect on other statutes**
>
> 4058.2. This division supplements and does not limit the application of any of the following provisions:
>
> ...
>
> **Comment**. Section 4058.2 lists major privacy laws whose operation is not affected by this division. The omission of a law from this section should not be read to imply that this division is intended to supersede that law. The listing in this section is necessarily incomplete, and is intended to provide guidance to the extent practicable. Whether a privacy law not listed in this section is superseded by this division is determined by standard principles of statutory construction. See also Section 4058.3 (conflicting statutes).
>
> For example, a guardian or conservator may include in court filings required financial information relating to a ward or

conservatee. See Section 4056(b)(7) (financial institution may release financial information necessary to comply with state law). In that case, other privacy protections may apply. See, e.g., Prob. Code § 2620(d) (confidentiality of financial information in court filing).

Financial Institution Match System (Rev. & Tax. Code § 19271.6)

The Financial Institution Match System is a method by which the Franchise Tax Board issues orders to financial institutions to withhold amounts due from accounts of past due child support obligors. The system involves transmission by a financial institution to the Franchise Tax board of the name, record address, social security number, and other identifying information concerning an account holder with the financial institution. A financial institution is immunized from liability for furnishing the required information to the Franchise Tax Board. Rev. & Tax. Code § 19271.6(f).

The law makes clear that the California Right to Financial Privacy Act (which restrains a financial institution from transmitting customer information to a governmental agency in connection with a civil or criminal investigation of the customer) does not preclude a transfer of information pursuant to the child support match system. It probably makes sense also to make clear that enactment of SB 1 does not affect the match system, although the general SB 1 exception for compliance with state laws (Fin. Code § 4056(b)(7)) undoubtedly would be held to apply.

Rev. & Tax. Code § 19271.6 (amended). Financial institution match system

19271.6. ...

(b) The Financial Institution Match System shall not be subject to any limitation set forth in the following statutes:

(1) The California Right to Financial Privacy Act, Chapter 20 (commencing with Section 7460 of Division 7 of Title 1 of the Government Code. ~~However, any use~~

(2) The California Financial Privacy Act, Division 1.2 (commencing with Section 4050) of the Financial Code.

Use of the information provided pursuant to this section for any purpose other than the enforcement and collection of a child support delinquency, as set forth in Section 19271, shall be a violation of Section 19542.

...

Comment. Section 19271.6(b) is amended to make clear that its operation is not affected by enactment of the California Financial Information Privacy Act. See also Fin. Code § 4056(b)(7) (financial

institution may release nonpublic personal information to comply with state law).

Privacy Statutes Governing Public Entities

A number of the major California privacy statutes protect citizens from disclosure of personal information in the hands of a public entity. The key California statutes are the Public Records Act (making records in the possession of a public entity open to inspection, subject to some privacy limitations) and the Information Practices Act of 1977 (limiting state agency collection and dissemination of personal information). There are a number of more narrowly crafted statutes affecting disclosure of information by public entities that are of marginal relevance for our purposes because they are remote from financial privacy concerns.

SB 1 regulates disclosure of nonpublic personal information by a "financial institution." As such, does it interact at all with laws that regulate disclosure of personal information by a public entity?

The definition of a financial institution is quite broad under SB 1 — any institution the business of which is engaging in financial activities as described in 12 USC Section 1843(k) (Bank Holding Company Act). Financial activities within the meaning of that act include, among other matters:

- Lending, exchanging, transferring, investing for others, or safeguarding money or securities.
- Insuring, guaranteeing, or indemnifying against loss, harm, damage, illness, disability, or death, or providing and issuing annuities, and acting as principal, agent, or broker for purposes of the foregoing.
- Providing financial, investment, or economic advisory services, including advising an investment company.
- Issuing or selling instruments representing interests in pools of assets permissible for a bank to hold directly.
- Underwriting, dealing in, or making a market in securities.

While most public entities would not qualify as a financial institution under this definition, a number are significantly engaged in financial activities to the extent they could readily fall within the terms of the definition. For example, the Franchise Tax Board, State Controller, State Lottery Commission, California Earthquake Authority, and various student loan and student aid entities are all

significantly engaged in financial activities and collect personal information relating to California consumers.

But SB 1 only limits disclosure of "nonpublic" personal information. Could disclosure of personal information by a public entity ever run afoul of the "nonpublic" limitation — isn't information in the possession of a public entity necessarily public information? Under the SB 1 definition, publicly available information is that which a financial institution has a reasonable basis to believe is lawfully made available to the general public from various sources, including government records. Fin. Code § 4052(a) ("nonpublic personal information" defined).

California Public Records Act (Gov't Code §§ 6250-6276.48)

The California Public Records Act is the key statute regulating the extent to which information in the hands of a state or local public entity in California may be disclosed. The statute is liberal in providing public access to information in the hands of public entities. In enacting the statute, the Legislature, "mindful of the right of individuals to privacy, finds and declares that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state." Gov't Code § 6250. To this end the law requires that each state or local agency must make public records available on request, except with respect to a public record exempt from disclosure by an express provision of law. Gov't Code § 6253(b).

The Public Records Act includes a number of significant exceptions that have relevance for us, such as:

- Personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy. Gov't Code § 6254(c).
- Information contained in an application filed with a state agency responsible for regulation or supervision of the issuance of securities or of financial institutions. Gov't Code § 6254(d)(1).
- Information required from a taxpayer in connection with collection of local taxes that is received in confidence and the disclosure of which to other persons would result in unfair competitive disadvantage to the person supplying the information. Gov't Code § 6254(i).
- Records the disclosure of which is exempted or prohibited pursuant to federal or state law. Gov't Code § 6254(k).

- Where the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record. Gov't Code § 6255(b).

Information Practices Act of 1977 (Civ. Code §§ 1798-1798.78)

The Information Practices Act of 1977 limits the maintenance and dissemination of personal information by state government in order to protect the privacy of individuals. Its interaction with the Public Records Act is complex and defies ready explanation. See, e.g., Civ. Code §§ 1798.24(g) (no disclosure of personal information subject to various exceptions, including pursuant to Public Records Act), 1798.70 (statute supersedes Public Records Act exemptions), 1798.75 (statute does not supersede Public Records Act except as to certain provisions).

In fact, a major project on the Law Revision Commission's calendar of topics is to reconcile and clarify the interrelation of these two major bodies of law. We have not yet begun that project.

A significant aspect of the Information Practices Act is its similarity to the operation of SB 1 — it would preclude a state agency from disclosing personal information in its possession without the consent of the person, subject to various exceptions. Civ. Code § 1798.24. There are numerous exceptions including, in addition to the Public Records Act, mandates of state and federal laws, law enforcement and regulatory requirements, judicial and administrative discovery practice. An individual's name and address may not be distributed for commercial purposes, sold, or rented by an agency unless that action is specifically authorized by law. Civ. Code § 1798.60.

Electronically Collected Personal Information (Gov't Code § 11015.5)

A state agency may not distribute or sell any electronically collected personal information about an individual who communicates with the agency electronically without prior written permission from the individual, except as authorized by the Information Practices Act of 1977. Gov't Code § 11015.5.

Other State Agency Confidentiality Requirements

State law is also peppered with special statutes that protect the confidentiality of consumer information collected by a governmental agency. For example,

- The Secretary of State maintains a registry of distinguished women and minorities available to serve on corporate boards of directors.

The directory includes extensive personal information on each registrant. The governing statute includes strict controls on disclosure of information by the Secretary of State for appropriate purposes. See Corp. Code § 318.

- The county tax assessor is subject to strict controls on public disclosure of information in the assessor's possession relating to property ownership, homeowner's exemptions, assessments, etc. See, e.g., Rev. & Tax. Code § 408. A private contractor who does appraisal work for the county assessor is subject to the same constraints on confidentiality of assessment information and records as the assessor. Rev. & Tax. Code § 674.
- Similar confidentiality controls apply to the State Board of Equalization tax assessment information (Rev. & Tax. Code § 833) and to sales and use tax return information (Rev. & Tax. Code § 7056).

Exemption for State Agency

The statutes governing disclosure of personal information by a state agency are extensive and appear to be at least as protective of privacy rights as SB 1. Although it is not clear that SB 1 would necessarily be construed to cover disclosure of financial information by a state agency, there is certainly a plausible argument for it.

The staff recommends that the matter be settled by adding to SB 1 a provision along the following lines.

Fin. Code § 4058.1 (added). Exemption of financial institutions covered by other privacy laws

4058.1. This division does not apply to any of the following financial institutions:

...

(b) An agency of the state. As used in this subdivision, "agency of the state" includes an officer, employee, or other agent of the state acting in that capacity.

Comment. The financial institutions identified in Section 4058.1 are exempted from coverage of this division due to the more specific privacy provisions applicable to them under other statutes. Cf. Section 4052(c) ("financial institution" defined).

Even though the definition of "financial institution" under Section 4052(c) is potentially broad enough to include a state agency substantially involved in financial activities, subdivision (b) makes clear that such an agency is exempted from coverage of this division. Specific limitations on disclosure of information by a state agency may be found in other statutes, including the Public

Records Act (Gov't Code § 6250 et seq.), the Information Practices Act of 1977 (Civ. Code § 1798 et seq.), and statutes governing electronically collected personal information (Gov't Code § 11015.5).

CONCLUSION

The staff believes that the enactment of SB 1 satisfies the major objectives of the Legislature's charge to the Commission. It provides consumers with notice and an opportunity to protect their personal information, it seeks to provide a level playing field for financial institution competition, it is compatible with and seeks to avoid preemption by GLB and FCRA to the extent practical, and it provides civil penalties for its violation. It does not satisfy all aspects of the legislative directive to the Commission, but to a great extent that is the result of political compromises necessary to obtain its enactment.

While there are various details of the new law that we might have handled differently, the staff believes that SB 1 is a carefully drafted and competent treatment of the subject. We think it would be a mistake for the Commission to recommend any changes in the statute until the statute has had a chance to operate and any problems become apparent. The staff recommends that the Commission so report to the Legislature.

The most significant threat to the viability of the SB 1 scheme is the potential for federal preemption of some or all of its provisions. That could occur as a result of interpretation of existing statutes such as the National Bank Act, or as a result of new congressional action to preempt the field. There is nothing we can do about this, since it is controlled by federal rather than state law.

The major issue on which the Commission may be of use at this point is to help clarify the interrelation of SB 1 with existing state laws affecting financial privacy. Whether SB 1 is intended to override those laws, or whether those laws are intended to remain in effect, is unclear in many instances. We can perhaps prevent some unnecessary litigation by specifying the effect of SB 1 on other laws.

The staff in this memorandum proposes a number of clarifying revisions. However, due to the broad scope of SB 1, and the extensive body of existing statutes, it is impossible to ferret out and address more than a fraction of the potential conflicts. The staff has restricted itself in this memorandum to the most obvious matters that have come to our attention.

If the Commission agrees with the staff that it is worth the effort to clarify the interrelation of these statutes, we would put them together in a draft tentative recommendation to circulate for comment. Our objective should be to have a statute in place by the July 1, 2004, operative date of SB 1. However, that would necessitate an urgency clause in legislation introduced in 2004, which requires a two-thirds vote for adoption. Given the intense politics surrounding this area, it is not obvious that a two-thirds vote would be achievable.

Moreover, nearly every statutory conflict we seek to address is the result of variant privacy standards between SB 1 and a special statute relating to privacy in a particular sector. It is predictable that in each sector, whichever interest group stands to be disadvantaged by the proposed resolution of the conflict will object. We could end up with a bill full of conforming changes that is opposed by one or another group as to every one of its provisions.

But we cannot know that until we have at least circulated a tentative recommendation for comment. The staff recommends that the Commission proceed along those lines.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

Senate Bill No. 1

CHAPTER 241

An act to add Division 1.2 (commencing with Section 4050) to the Financial Code, relating to financial privacy.

[Approved by Governor August 27, 2003. Filed with Secretary of State August 28, 2003.]

LEGISLATIVE COUNSEL'S DIGEST

SB 1, Speier. Financial institutions: nonpublic personal information.

Existing law provides for the regulation of banks, savings associations, credit unions, and industrial loan companies by the Department of Financial Institutions and by certain federal agencies. Existing federal law, the Gramm-Leach-Bliley Act, requires financial institutions to provide a notice to consumers relative to the use by the financial institution of nonpublic personal information, and in that regard authorizes consumers to direct that the information not be shared with nonaffiliated third parties.

This bill would enact the California Financial Information Privacy Act, which would require a financial institution, as defined, to provide a specified written form to a consumer relative to the sharing of the consumer's nonpublic personal information, as defined. The bill would generally allow a consumer to direct the financial institution to not share the nonpublic personal information with affiliated companies or with nonaffiliated financial companies with which the financial institution has contracted to provide financial products and services, but would not restrict or prohibit the sharing of nonpublic personal information between a financial institution and its wholly owned financial institution subsidiaries or in certain other cases if both entities are regulated by the same functional regulator and are engaged in the same line of business, among other requirements. The bill would require the permission of the consumer before the financial institution could share the nonpublic personal information with other nonaffiliated companies. The bill would provide that a financial institution is not required to provide this written form to its consumers if the financial institution does not disclose any nonpublic personal information to any nonaffiliated 3rd party or to any affiliate.

This bill would provide that a financial institution shall not discriminate against or deny an otherwise qualified consumer a financial product or service because the consumer has not provided the necessary

consent that would authorize the financial institution to disclose or share nonpublic personal information. The bill would require a financial institution to comply with the consumer's request regarding nonpublic personal information within 45 days of receipt of the request.

This bill would provide that a financial institution may disclose nonpublic personal information to an affiliate or a nonaffiliated 3rd party in order for it to perform certain services on behalf of the financial institution if specified requirements are met. The bill would provide other exceptions from its provisions applicable to particular situations.

This bill would provide that nonpublic personal information may be released in order to identify or locate missing children, witnesses, criminals and fugitives, parties to lawsuits, and missing heirs and that it would not change existing law regarding access by law enforcement agencies to information held by financial institutions.

This bill would also provide for disclosure of nonpublic personal information under various other specified circumstances.

This bill would provide that enactment of these provisions preempts all local agency ordinances and regulations relating to this subject.

This bill would enact other related provisions.

This bill would also provide various civil penalties for negligent, or knowing and willful violations of these provisions. The bill would become operative on July 1, 2004.

The people of the State of California do enact as follows:

SECTION 1. Division 1.2 (commencing with Section 4050) is added to the Financial Code, to read:

DIVISION 1.2. CALIFORNIA FINANCIAL INFORMATION PRIVACY ACT

4050. This division shall be known and may be cited as the California Financial Information Privacy Act.

4051. (a) The Legislature intends for financial institutions to provide their consumers notice and meaningful choice about how consumers' nonpublic personal information is shared or sold by their financial institutions.

(b) It is the intent of the Legislature in enacting the California Financial Information Privacy Act to afford persons greater privacy protections than those provided in Public Law 106-102, the federal Gramm-Leach-Bliley Act, and that this division be interpreted to be consistent with that purpose.

4051.5. (a) The Legislature finds and declares all of the following:

(1) The California Constitution protects the privacy of California citizens from unwarranted intrusions into their private and personal lives.

(2) Federal banking legislation, known as the Gramm-Leach-Bliley Act, which breaks down restrictions on affiliation among different types of financial institutions, increases the likelihood that the personal financial information of California residents will be widely shared among, between, and within companies.

(3) The policies intended to protect financial privacy imposed by the Gramm-Leach-Bliley Act are inadequate to meet the privacy concerns of California residents.

(4) Because of the limitations of these federal policies, the Gramm-Leach-Bliley Act explicitly permits states to enact privacy protections that are stronger than those provided in federal law.

(b) It is the intent of the Legislature in enacting this division:

(1) To ensure that Californians have the ability to control the disclosure of what the Gramm-Leach-Bliley Act calls nonpublic personal information.

(2) To achieve that control for California consumers by requiring that financial institutions that want to share information with third parties and unrelated companies seek and acquire the affirmative consent of California consumers prior to sharing the information.

(3) To further achieve that control for California consumers by providing consumers with the ability to prevent the sharing of financial information among affiliated companies through a simple opt-out mechanism via a clear and understandable notice provided to the consumer.

(4) To provide, to the maximum extent possible, consistent with the purposes cited above, a level playing field among types and sizes of businesses consistent with the objective of providing consumers control over their nonpublic personal information, including providing that those financial institutions with limited affiliate relationships may enter into agreements with other financial institutions as provided in this division, and providing that the different business models of differing financial institutions are treated in ways that provide consistent consumer control over information-sharing practices.

(5) To adopt to the maximum extent feasible, consistent with the purposes cited above, definitions consistent with federal law, so that in particular there is no change in the ability of businesses to carry out normal processes of commerce for transactions voluntarily entered into by consumers.

4052. For the purposes of this division:

(a) ‘‘Nonpublic personal information’’ means personally identifiable financial information (1) provided by a consumer to a financial institution, (2) resulting from any transaction with the consumer or any service performed for the consumer, or (3) otherwise obtained by the financial institution. Nonpublic personal information does not include publicly available information that the financial institution has a reasonable basis to believe is lawfully made available to the general public from (1) federal, state, or local government records, (2) widely distributed media, or (3) disclosures to the general public that are required to be made by federal, state, or local law. Nonpublic personal information shall include any list, description, or other grouping of consumers, and publicly available information pertaining to them, that is derived using any nonpublic personal information other than publicly available information, but shall not include any list, description, or other grouping of consumers, and publicly available information pertaining to them, that is derived without using any nonpublic personal information.

(b) ‘‘Personally identifiable financial information’’ means information (1) that a consumer provides to a financial institution to obtain a product or service from the financial institution, (2) about a consumer resulting from any transaction involving a product or service between the financial institution and a consumer, or (3) that the financial institution otherwise obtains about a consumer in connection with providing a product or service to that consumer. Any personally identifiable information is financial if it was obtained by a financial institution in connection with providing a financial product or service to a consumer. Personally identifiable financial information includes all of the following:

(1) Information a consumer provides to a financial institution on an application to obtain a loan, credit card, or other financial product or service.

(2) Account balance information, payment history, overdraft history, and credit or debit card purchase information.

(3) The fact that an individual is or has been a consumer of a financial institution or has obtained a financial product or service from a financial institution.

(4) Any information about a financial institution’s consumer if it is disclosed in a manner that indicates that the individual is or has been the financial institution’s consumer.

(5) Any information that a consumer provides to a financial institution or that a financial institution or its agent otherwise obtains in connection with collecting on a loan or servicing a loan.

(6) Any personally identifiable financial information collected through an Internet cookie or an information collecting device from a Web server.

(7) Information from a consumer report.

(c) ‘‘Financial institution’’ means any institution the business of which is engaging in financial activities as described in Section 1843(k) of Title 12 of the United States Code and doing business in this state. An institution that is not significantly engaged in financial activities is not a financial institution. The term ‘‘financial institution’’ does not include any institution that is primarily engaged in providing hardware, software, or interactive services, provided that it does not act as a debt collector, as defined in 15 U.S.C. Sec. 1692a, or engage in activities for which the institution is required to acquire a charter, license, or registration from a state or federal governmental banking, insurance, or securities agency. The term ‘‘financial institution’’ does not include the Federal Agricultural Mortgage Corporation or any entity chartered and operating under the Farm Credit Act of 1971 (12 U.S.C. Sec. 2001 et seq.), provided that the entity does not sell or transfer nonpublic personal information to an affiliate or a nonaffiliated third party. The term ‘‘financial institution’’ does not include institutions chartered by Congress specifically to engage in a proposed or actual securitization, secondary market sale, including sales of servicing rights, or similar transactions related to a transaction of the consumer, as long as those institutions do not sell or transfer nonpublic personal information to a nonaffiliated third party. The term ‘‘financial institution’’ does not include any provider of professional services, or any wholly owned affiliate thereof, that is prohibited by rules of professional ethics and applicable law from voluntarily disclosing confidential client information without the consent of the client. The term ‘‘financial institution’’ does not include any person licensed as a dealer under Article 1 (commencing with Section 11700) of Chapter 4 of Division 5 of the Vehicle Code that enters into contracts for the installment sale or lease of motor vehicles pursuant to the requirements of Chapter 2B (commencing with Section 2981) or 2D (commencing with Section 2985.7) of Title 14 of Part 4 of Division 3 of the Civil Code and assigns substantially all of those contracts to financial institutions within 30 days.

(d) ‘‘Affiliate’’ means any entity that controls, is controlled by, or is under common control with, another entity, but does not include a joint employee of the entity and the affiliate. A franchisor, including any affiliate thereof, shall be deemed an affiliate of the franchisee for purposes of this division.

(e) ‘‘Nonaffiliated third party’’ means any entity that is not an affiliate of, or related by common ownership or affiliated by corporate control with, the financial institution, but does not include a joint employee of that institution and a third party.

(f) ‘‘Consumer’’ means an individual resident of this state, or that individual’s legal representative, who obtains or has obtained from a financial institution a financial product or service to be used primarily for personal, family, or household purposes. For purposes of this division, an individual resident of this state is someone whose last known mailing address, other than an Armed Forces Post Office or Fleet Post Office address, as shown in the records of the financial institution, is located in this state. For purposes of this division, an individual is not a consumer of a financial institution solely because he or she is (1) a participant or beneficiary of an employee benefit plan that a financial institution administers or sponsors, or for which the financial institution acts as a trustee, insurer, or fiduciary, (2) covered under a group or blanket insurance policy or group annuity contract issued by the financial institution, (3) a beneficiary in a workers’ compensation plan, (4) a beneficiary of a trust for which the financial institution is a trustee, or (5) a person who has designated the financial institution as trustee for a trust, provided that the financial institution provides all required notices and rights required by this division to the plan sponsor, group or blanket insurance policyholder, or group annuity contractholder.

(g) ‘‘Control’’ means (1) ownership or power to vote 25 percent or more of the outstanding shares of any class of voting security of a company, acting through one or more persons, (2) control in any manner over the election of a majority of the directors, or of individuals exercising similar functions, or (3) the power to exercise, directly or indirectly, a controlling influence over the management or policies of a company. However, for purposes of the application of the definition of control as it relates to credit unions, a credit union has a controlling influence over the management or policies of a credit union service organization (CUSO), as that term is defined by state or federal law or regulation, if the CUSO is at least 67 percent owned by credit unions. For purposes of the application of the definition of control to a financial institution subject to regulation by the United States Securities and Exchange Commission, a person who owns beneficially, either directly or through one or more controlled companies, more than 25 percent of the voting securities of a company is presumed to control the company, and a person who does not own more than 25 percent of the voting securities of a company is presumed not to control the company, and a presumption regarding control may be rebutted by evidence, but in the case of an investment company, the presumption shall continue until the

United States Securities and Exchange Commission makes a decision to the contrary according to the procedures described in Section 2(a)(9) of the federal Investment Company Act of 1940.

(h) ''Necessary to effect, administer, or enforce'' means the following:

(1) The disclosure is required, or is a usual, appropriate, or acceptable method to carry out the transaction or the product or service business of which the transaction is a part, and record or service or maintain the consumer's account in the ordinary course of providing the financial service or financial product, or to administer or service benefits or claims relating to the transaction or the product or service business of which it is a part, and includes the following:

(A) Providing the consumer or the consumer's agent or broker with a confirmation, statement, or other record of the transaction, or information on the status or value of the financial service or financial product.

(B) The accrual or recognition of incentives, discounts, or bonuses associated with the transaction or communications to eligible existing consumers of the financial institution regarding the availability of those incentives, discounts, and bonuses that are provided by the financial institution or another party.

(C) In the case of a financial institution that has issued a credit account bearing the name of a company primarily engaged in retail sales or a name proprietary to a company primarily engaged in retail sales, the financial institution providing the retailer with nonpublic personal information as follows:

(i) Providing the retailer, or licensees or contractors of the retailer that provide products or services in the name of the retailer and under a contract with the retailer, with the names and addresses of the consumers in whose name the account is held and a record of the purchases made using the credit account from a business establishment, including a Web site or catalog, bearing the brand name of the retailer.

(ii) Where the credit account can only be used for transactions with the retailer or affiliates of that retailer that are also primarily engaged in retail sales, providing the retailer, or licensees or contractors of the retailer that provide products or services in the name of the retailer and under a contract with the retailer, with nonpublic personal information concerning the credit account, in connection with the offering or provision of the products or services of the retailer and those licensees or contractors.

(2) The disclosure is required or is one of the lawful or appropriate methods to enforce the rights of the financial institution or of other

persons engaged in carrying out the financial transaction or providing the product or service.

(3) The disclosure is required, or is a usual, appropriate, or acceptable method for insurance underwriting or the placement of insurance products by licensed agents and brokers with authorized insurance companies at the consumer's request, for reinsurance, stop loss insurance, or excess loss insurance purposes, or for any of the following purposes as they relate to a consumer's insurance:

(A) Account administration.

(B) Reporting, investigating, or preventing fraud or material misrepresentation.

(C) Processing premium payments.

(D) Processing insurance claims.

(E) Administering insurance benefits, including utilization review activities.

(F) Participating in research projects.

(G) As otherwise required or specifically permitted by federal or state law.

(4) The disclosure is required, or is a usual, appropriate, or acceptable method, in connection with the following:

(A) The authorization, settlement, billing, processing, clearing, transferring, reconciling, or collection of amounts charged, debited, or otherwise paid using a debit, credit or other payment card, check, or account number, or by other payment means.

(B) The transfer of receivables, accounts, or interests therein.

(C) The audit of debit, credit, or other payment information.

(5) The disclosure is required in a transaction covered by the federal Real Estate Settlement Procedures Act (12 U.S.C. Sec. 2601 et seq.) in order to offer settlement services prior to the close of escrow (as those services are defined in 12 U.S.C. Sec. 2602), provided that (A) the nonpublic personal information is disclosed for the sole purpose of offering those settlement services and (B) the nonpublic personal information disclosed is limited to that necessary to enable the financial institution to offer those settlement services in that transaction.

(i) ''Financial product or service'' means any product or service that a financial holding company could offer by engaging in an activity that is financial in nature or incidental to a financial activity under subsection (k) of Section 1843 of Title 12 of the United States Code (the United States Bank Holding Company Act of 1956). Financial service includes a financial institution's evaluation or brokerage of information that the financial institution collects in connection with a request or an application from a consumer for a financial product or service.

(j) ‘‘Clear and conspicuous’’ means that a notice is reasonably understandable and designed to call attention to the nature and significance of the information contained in the notice.

(k) ‘‘Widely distributed media’’ means media available to the general public and includes a telephone book, a television or radio program, a newspaper, or a Web site that is available to the general public on an unrestricted basis.

4052.5. Except as provided in Sections 4053, 4054.6, and 4056, a financial institution shall not sell, share, transfer, or otherwise disclose nonpublic personal information to or with any nonaffiliated third parties without the explicit prior consent of the consumer to whom the nonpublic personal information relates.

4053. (a) (1) A financial institution shall not disclose to, or share a consumer’s nonpublic personal information with, any nonaffiliated third party as prohibited by Section 4052.5, unless the financial institution has obtained a consent acknowledgment from the consumer that complies with paragraph (2) that authorizes the financial institution to disclose or share the nonpublic personal information. Nothing in this section shall prohibit or otherwise apply to the disclosure of nonpublic personal information as allowed in Section 4056. A financial institution shall not discriminate against or deny an otherwise qualified consumer a financial product or a financial service because the consumer has not provided consent pursuant to this subdivision and Section 4052.5 to authorize the financial institution to disclose or share nonpublic personal information pertaining to him or her with any nonaffiliated third party. Nothing in this section shall prohibit a financial institution from denying a consumer a financial product or service if the financial institution could not provide the product or service to a consumer without the consent to disclose the consumer’s nonpublic personal information required by this subdivision and Section 4052.5, and the consumer has failed to provide consent. A financial institution shall not be liable for failing to offer products and services to a consumer solely because that consumer has failed to provide consent pursuant to this subdivision and Section 4052.5 and the financial institution could not offer the product or service without the consent to disclose the consumer’s nonpublic personal information required by this subdivision and Section 4052.5, and the consumer has failed to provide consent. Nothing in this section is intended to prohibit a financial institution from offering incentives or discounts to elicit a specific response to the notice.

(2) A financial institution shall utilize a form, statement, or writing to obtain consent to disclose nonpublic personal information to nonaffiliated third parties as required by Section 4052.5 and this

subdivision. The form, statement, or writing shall meet all of the following criteria:

(A) The form, statement, or writing is a separate document, not attached to any other document.

(B) The form, statement, or writing is dated and signed by the consumer.

(C) The form, statement, or writing clearly and conspicuously discloses that by signing, the consumer is consenting to the disclosure to nonaffiliated third parties of nonpublic personal information pertaining to the consumer.

(D) The form, statement, or writing clearly and conspicuously discloses (i) that the consent will remain in effect until revoked or modified by the consumer; (ii) that the consumer may revoke the consent at any time; and (iii) the procedure for the consumer to revoke consent.

(E) The form, statement, or writing clearly and conspicuously informs the consumer that (i) the financial institution will maintain the document or a true and correct copy; (ii) the consumer is entitled to a copy of the document upon request; and (iii) the consumer may want to make a copy of the document for the consumer's records.

(b) (1) A financial institution shall not disclose to, or share a consumer's nonpublic personal information with, an affiliate unless the financial institution has clearly and conspicuously notified the consumer annually in writing pursuant to subdivision (d) that the nonpublic personal information may be disclosed to an affiliate of the financial institution and the consumer has not directed that the nonpublic personal information not be disclosed. A financial institution does not disclose information to, or share information with, its affiliate merely because information is maintained in common information systems or databases, and employees of the financial institution and its affiliate have access to those common information systems or databases, or a consumer accesses a Web site jointly operated or maintained under a common name by or on behalf of the financial institution and its affiliate, provided that where a consumer has exercised his or her right to prohibit disclosure pursuant to this division, nonpublic personal information is not further disclosed or used by an affiliate except as permitted by this division.

(2) Subdivision (a) shall not prohibit the release of nonpublic personal information by a financial institution with whom the consumer has a relationship to a nonaffiliated financial institution for purposes of jointly offering a financial product or financial service pursuant to a written agreement with the financial institution that receives the nonpublic personal information provided that all of the following requirements are met:

(A) The financial product or service offered is a product or service of, and is provided by, at least one of the financial institutions that is a party to the written agreement.

(B) The financial product or service is jointly offered, endorsed, or sponsored, and clearly and conspicuously identifies for the consumer the financial institutions that disclose and receive the disclosed nonpublic personal information.

(C) The written agreement provides that the financial institution that receives that nonpublic personal information is required to maintain the confidentiality of the information and is prohibited from disclosing or using the information other than to carry out the joint offering or servicing of a financial product or financial service that is the subject of the written agreement.

(D) The financial institution that releases the nonpublic personal information has complied with subdivision (d) and the consumer has not directed that the nonpublic personal information not be disclosed.

(E) Notwithstanding this section, until January 1, 2005, a financial institution may disclose nonpublic personal information to a nonaffiliated financial institution pursuant to a preexisting contract with the nonaffiliated financial institution, for purposes of offering a financial product or financial service, if that contract was entered into on or before January 1, 2004. Beginning on January 1, 2005, no nonpublic personal information may be disclosed pursuant to that contract unless all the requirements of this subdivision are met.

(3) Nothing in this subdivision shall prohibit a financial institution from disclosing or sharing nonpublic personal information as otherwise specifically permitted by this division.

(4) A financial institution shall not discriminate against or deny an otherwise qualified consumer a financial product or a financial service because the consumer has directed pursuant to this subdivision that nonpublic personal information pertaining to him or her not be disclosed. A financial institution shall not be required to offer or provide products or services offered through affiliated entities or jointly with nonaffiliated financial institutions pursuant to paragraph (2) where the consumer has directed that nonpublic personal information not be disclosed pursuant to this subdivision and the financial institution could not offer or provide the products or services to the consumer without disclosure of the consumer's nonpublic personal information that the consumer has directed not be disclosed pursuant to this subdivision. A financial institution shall not be liable for failing to offer or provide products or services offered through affiliated entities or jointly with nonaffiliated financial institutions pursuant to paragraph (2) solely because the consumer has directed that nonpublic personal information

not be disclosed pursuant to this subdivision and the financial institution could not offer or provide the products or services to the consumer without disclosure of the consumer's nonpublic personal information that the consumer has directed not be disclosed to affiliates pursuant to this subdivision. Nothing in this section is intended to prohibit a financial institution from offering incentives or discounts to elicit a specific response to the notice set forth in this division. Nothing in this section shall prohibit the disclosure of nonpublic personal information allowed by Section 4056.

(5) The financial institution may, at its option, choose instead to comply with the requirements of subdivision (a).

(c) Nothing in this division shall restrict or prohibit the sharing of nonpublic personal information between a financial institution and its wholly owned financial institution subsidiaries; among financial institutions that are each wholly owned by the same financial institution; among financial institutions that are wholly owned by the same holding company; or among the insurance and management entities of a single insurance holding company system consisting of one or more reciprocal insurance exchanges which has a single corporation or its wholly owned subsidiaries providing management services to the reciprocal insurance exchanges, provided that in each case all of the following requirements are met:

(1) The financial institution disclosing the nonpublic personal information and the financial institution receiving it are regulated by the same functional regulator; provided, however, that for purposes of this subdivision, financial institutions regulated by the Office of the Comptroller of the Currency, Office of Thrift Supervision, National Credit Union Administration, or a state regulator of depository institutions shall be deemed to be regulated by the same functional regulator; financial institutions regulated by the Securities and Exchange Commission, the United States Department of Labor, or a state securities regulator shall be deemed to be regulated by the same functional regulator; and insurers admitted in this state to transact insurance and licensed to write insurance policies shall be deemed to be in compliance with this paragraph.

(2) The financial institution disclosing the nonpublic personal information and the financial institution receiving it are both principally engaged in the same line of business. For purposes of this subdivision, ''same line of business'' shall be one and only one of the following:

(A) Insurance.

(B) Banking.

(C) Securities.

(3) The financial institution disclosing the nonpublic personal information and the financial institution receiving it share a common brand, excluding a brand consisting solely of a graphic element or symbol, within their trademark, service mark, or trade name, which is used to identify the source of the products and services provided.

A wholly owned subsidiary shall include a subsidiary wholly owned directly or wholly owned indirectly in a chain of wholly owned subsidiaries.

Nothing in this subdivision shall permit the disclosure by a financial institution of medical record information, as defined in subdivision (q) of Section 791.02 of the Insurance Code, except in compliance with the requirements of this division, including the requirements set forth in subdivisions (a) and (b).

(d) (1) A financial institution shall be conclusively presumed to have satisfied the notice requirements of subdivision (b) if it uses the form set forth in this subdivision. The form set forth in this subdivision or a form that complies with subparagraphs (A) to (L), inclusive, of this paragraph shall be sent by the financial institution to the consumer so that the consumer may make a decision and provide direction to the financial institution regarding the sharing of his or her nonpublic personal information. If a financial institution does not use the form set forth in this subdivision, the financial institution shall use a form that meets all of the following requirements:

(A) The form uses the same title (''IMPORTANT PRIVACY CHOICES FOR CONSUMERS'') and the headers, if applicable, as follows: ''Restrict Information Sharing With Companies We Own Or Control (Affiliates)'' and ''Restrict Information Sharing With Other Companies We Do Business With To Provide Financial Products And Services.''

(B) The titles and headers in the form are clearly and conspicuously displayed, and no text in the form is smaller than 10-point type.

(C) The form is a separate document, except as provided by subparagraph (D) of paragraph (2), and Sections 4054 and 4058.7.

(D) The choice or choices pursuant to subdivision (b) and Section 4054.6, if applicable, provided in the form are stated separately and may be selected by checking a box.

(E) The form is designed to call attention to the nature and significance of the information in the document.

(F) The form presents information in clear and concise sentences, paragraphs, and sections.

(G) The form uses short explanatory sentences (an average of 15-20 words) or bullet lists whenever possible.

(H) The form avoids multiple negatives, legal terminology, and highly technical terminology whenever possible.

(I) The form avoids explanations that are imprecise and readily subject to different interpretations.

(J) The form achieves a minimum Flesch reading ease score of 50, as defined in Section 2689.4(a)(7) of Title 10 of the California Code of Regulations, in effect on March 24, 2003, except that the information in the form included to comply with subparagraph (A) shall not be included in the calculation of the Flesch reading ease score, and the information used to describe the choice or choices pursuant to subparagraph (D) shall score no lower than the information describing the comparable choice or choices set forth in the form in this subdivision.

(K) The form provides wide margins, ample line spacing and uses boldface or italics for key words.

(L) The form is not more than one page.

(2) (A) None of the instructional items appearing in brackets in the form set forth in this subdivision shall appear in the form provided to the consumer, as those items are for explanation purposes only. If a financial institution does not disclose or share nonpublic personal information as described in a header of the form, the financial institution may omit the applicable header or headers, and the accompanying information and box, in the form it provides pursuant to this subdivision. The form with those omissions shall be conclusively presumed to satisfy the notice requirements of this subdivision.

PRINTER PLEASE NOTE: TIP-IN MATERIAL TO BE INSERTED HERE

(B) If a financial institution uses a form other than that set forth in this subdivision, the financial institution may submit that form to its functional regulator for approval, and for forms filed with the Office of Privacy Protection prior to July 1, 2007, that approval shall constitute a rebuttable presumption that the form complies with this section.

(C) A financial institution shall not be in violation of this subdivision solely because it includes in the form one or more brief examples or explanations of the purpose or purposes, or context, within which information will be shared, as long as those examples meet the clarity and readability standards set forth in paragraph (1).

(D) The outside of the envelope in which the form is sent to the consumer shall clearly state in 16-point boldface type ''IMPORTANT PRIVACY CHOICES,'' except that a financial institution sending the form to a consumer in the same envelope as a bill, account statement, or application requested by the consumer does not have to include the wording ''IMPORTANT PRIVACY CHOICES'' on that envelope. The form shall be sent in any of the following ways:

(i) With a bill, other statement of account, or application requested by the consumer, in which case the information required by Title V of the Gramm-Leach-Bliley Act may also be included in the same envelope.

(ii) As a separate notice or with the information required by Title V of the Gramm-Leach-Bliley Act, and including only information related to privacy.

(iii) With any other mailing, in which case it shall be the first page of the mailing.

(E) If a financial institution uses a form other than that set forth in this subdivision, that form shall be filed with the Office of Privacy Protection within 30 days after it is first used.

(3) The consumer shall be provided a reasonable opportunity prior to disclosure of nonpublic personal information to direct that nonpublic personal information not be disclosed. A consumer may direct at any time that his or her nonpublic personal information not be disclosed. A financial institution shall comply with a consumer's directions concerning the sharing of his or her nonpublic personal information within 45 days of receipt by the financial institution. When a consumer directs that nonpublic personal information not be disclosed, that direction is in effect until otherwise stated by the consumer. A financial institution that has not provided a consumer with annual notice pursuant to subdivision (b) shall provide the consumer with a form that meets the requirements of this subdivision, and shall allow 45 days to lapse from the date of providing the form in person or the postmark or other postal

verification of mailing before disclosing nonpublic personal information pertaining to the consumer.

Nothing in this subdivision shall prohibit the disclosure of nonpublic personal information as allowed by subdivision (c) or Section 4056.

(4) A financial institution may elect to comply with the requirements of subdivision (a) with respect to disclosure of nonpublic personal information to an affiliate or with respect to nonpublic personal information disclosed pursuant to paragraph (2) of subdivision (b), or subdivision (c) of Section 4054.6.

(5) If a financial institution does not have a continuing relationship with a consumer other than the initial transaction in which the product or service is provided, no annual disclosure requirement exists pursuant to this section as long as the financial institution provides the consumer with the form required by this section at the time of the initial transaction. As used in this section, ''annually'' means at least once in any period of 12 consecutive months during which that relationship exists. The financial institution may define the 12-consecutive-month period, but shall apply it to the consumer on a consistent basis. If, for example, a financial institution defines the 12-consecutive-month period as a calendar year and provides the annual notice to the consumer once in each calendar year, it complies with the requirement to send the notice annually.

(6) A financial institution with assets in excess of twenty-five million dollars ($25,000,000) shall include a self-addressed first class business reply return envelope with the notice. A financial institution with assets of up to and including twenty-five million dollars ($25,000,000) shall include a self-addressed return envelope with the notice. In lieu of the first class business reply return envelope required by this paragraph, a financial institution may offer a self-addressed return envelope with the notice and at least two alternative cost-free means for consumers to communicate their privacy choices, such as calling a toll-free number, sending a facsimile to a toll-free telephone number, or using electronic means. A financial institution shall clearly and conspicuously disclose in the form required by this subdivision the information necessary to direct the consumer on how to communicate his or her choices, including the toll-free or facsimile number or Web site address that may be used, if those means of communication are offered by the financial institution.

(7) A financial institution may provide a joint notice from it and one or more of its affiliates or other financial institutions, as identified in the notice, so long as the notice is accurate with respect to the financial institution and the affiliates and other financial institutions.

(e) Nothing in this division shall prohibit a financial institution from marketing its own products and services or the products and services of

affiliates or nonaffiliated third parties to customers of the financial institution as long as (1) nonpublic personal information is not disclosed in connection with the delivery of the applicable marketing materials to those customers except as permitted by Section 4056 and (2) in cases in which the applicable nonaffiliated third party may extrapolate nonpublic personal information about the consumer responding to those marketing materials, the applicable nonaffiliated third party has signed a contract with the financial institution under the terms of which (A) the nonaffiliated third party is prohibited from using that information for any purpose other than the purpose for which it was provided, as set forth in the contract, and (B) the financial institution has the right by audit, inspections, or other means to verify the nonaffiliated third party's compliance with that contract.

4053.5. Except as otherwise provided in this division, an entity that receives nonpublic personal information from a financial institution under this division shall not disclose this information to any other entity, unless the disclosure would be lawful if made directly to the other entity by the financial institution. An entity that receives nonpublic personal information pursuant to any exception set forth in Section 4056 shall not use or disclose the information except in the ordinary course of business to carry out the activity covered by the exception under which the information was received.

4054. (a) Nothing in this division shall require a financial institution to provide a written notice to a consumer pursuant to Section 4053 if the financial institution does not disclose nonpublic personal information to any nonaffiliated third party or to any affiliate, except as allowed in this division.

(b) A notice provided to a member of a household pursuant to Section 4053 shall be considered notice to all members of that household unless that household contains another individual who also has a separate account with the financial institution.

(c) (1) The requirement to send a written notice to a consumer may be fulfilled by electronic means if the following requirements are met:

(A) The notice, and the manner in which it is sent, meets all of the requirements for notices that are required by law to be in writing, as set forth in Section 101 of the federal Electronic Signatures in Global and National Commerce Act.

(B) All other requirements applicable to the notice, as set forth in this division, are met, including, but not limited to, requirements concerning content, timing, form, and delivery. An electronic notice sent pursuant to this section is not required to include a return envelope.

(C) The notice is delivered to the consumer in a form the consumer may keep.

(2) A notice that is made available to a consumer, and is not delivered to the consumer, does not satisfy the requirements of paragraph (1).

(3) Any electronic consumer reply to an electronic notice sent pursuant to this division is effective. A person that electronically sends a notice required by this division to a consumer may not by contract, or otherwise, eliminate the effectiveness of the consumer's electronic reply.

(4) This division modifies the provisions of Section 101 of the federal Electronic Signatures in Global and National Commerce Act. However, it does not modify, limit, or supersede the provisions of subsection (c), (d), (e), (f), or (h) of Section 101 of the federal Electronic Signatures in Global and National Commerce Act, nor does it authorize electronic delivery of any notice of the type described in subsection (b) of Section 103 of that federal act.

4054.6. (a) When a financial institution and an organization or business entity that is not a financial institution (''affinity partner'') have an agreement to issue a credit card in the name of the affinity partner (''affinity card''), the financial institution shall be permitted to disclose to the affinity partner in whose name the card is issued only the following information pertaining to the financial institution's customers who are in receipt of the affinity card: (1) name, address, telephone number, and electronic mail address and (2) record of purchases made using the affinity card in a business establishment, including a Web site, bearing the brand name of the affinity partner.

(b) When a financial institution and an affinity partner have an agreement to issue a financial product or service, other than a credit card, on behalf of the affinity partner (''affinity financial product or service''), the financial institution shall be permitted to disclose to the affinity partner only the following information pertaining to the financial institution's customers who obtained the affinity financial product or service: name, address, telephone number, and electronic mail address.

(c) The disclosures specified in subdivisions (a) and (b) shall be permitted only if the following requirements are met:

(1) The financial institution has provided the consumer a notice meeting the requirements of subdivision (d) of Section 4053, and the consumer has not directed that nonpublic personal information not be disclosed. A response to a notice meeting the requirements of subdivision (d) directing the financial institution to not disclose nonpublic personal information to a nonaffiliated financial institution shall be deemed a direction to the financial institution to not disclose nonpublic personal information to an affinity partner, unless the form containing the notice provides the consumer with a separate choice for disclosure to affinity partners.

(2) The financial institution has a contractual agreement with the affinity partner that requires the affinity partner to maintain the confidentiality of the nonpublic personal information and prohibits affinity partners from using the information for any purposes other than verifying membership, verifying the consumer's contact information, or offering the affinity partner's own products or services to the consumer.

(3) The customer list is not disclosed in any way that reveals or permits extrapolation of any additional nonpublic personal information about any customer on the list.

(4) If the affinity partner sends any message to any electronic mail addresses obtained pursuant to this section, the message shall include at least both of the following:

(A) The identity of the sender of the message.

(B) A cost-free means for the recipient to notify the sender not to electronically mail any further message to the recipient.

(d) Nothing in this section shall prohibit the disclosure of nonpublic personal information pursuant to Section 4056.

(e) This section does not apply to credit cards issued in the name of an entity primarily engaged in retail sales or a name proprietary to a company primarily engaged in retail sales.

4056. (a) This division shall not apply to information that is not personally identifiable to a particular person.

(b) Notwithstanding Sections 4052.5, 4053, 4054, and 4054.6, a financial institution may release nonpublic personal information under the following circumstances:

(1) The nonpublic personal information is necessary to effect, administer, or enforce a transaction requested or authorized by the consumer, or in connection with servicing or processing a financial product or service requested or authorized by the consumer, or in connection with maintaining or servicing the consumer's account with the financial institution, or with another entity as part of a private label credit card program or other extension of credit on behalf of that entity, or in connection with a proposed or actual securitization or secondary market sale, including sales of servicing rights, or similar transactions related to a transaction of the consumer.

(2) The nonpublic personal information is released with the consent of or at the direction of the consumer.

(3) The nonpublic personal information is:

(A) Released to protect the confidentiality or security of the financial institution's records pertaining to the consumer, the service or product, or the transaction therein.

(B) Released to protect against or prevent actual or potential fraud, identity theft, unauthorized transactions, claims, or other liability.

(C) Released for required institutional risk control, or for resolving customer disputes or inquiries.

(D) Released to persons holding a legal or beneficial interest relating to the consumer, including for purposes of debt collection.

(E) Released to persons acting in a fiduciary or representative capacity on behalf of the consumer.

(4) The nonpublic personal information is released to provide information to insurance rate advisory organizations, guaranty funds or agencies, applicable rating agencies of the financial institution, persons assessing the institution's compliance with industry standards, and the institution's attorneys, accountants, and auditors.

(5) The nonpublic personal information is released to the extent specifically required or specifically permitted under other provisions of law and in accordance with the Right to Financial Privacy Act of 1978 (12 U.S.C. Sec. 3401 et seq.), to law enforcement agencies, including a federal functional regulator, the Secretary of the Treasury with respect to subchapter II of Chapter 53 of Title 31, and Chapter 2 of Title I of Public Law 91-508 (12 U.S.C. Secs. 1951-1959), the California Department of Insurance or other state insurance regulators, or the Federal Trade Commission, and self-regulatory organizations, or for an investigation on a matter related to public safety.

(6) The nonpublic personal information is released in connection with a proposed or actual sale, merger, transfer, or exchange of all or a portion of a business or operating unit if the disclosure of nonpublic personal information concerns solely consumers of the business or unit.

(7) The nonpublic personal information is released to comply with federal, state, or local laws, rules, and other applicable legal requirements; to comply with a properly authorized civil, criminal, administrative, or regulatory investigation or subpoena or summons by federal, state, or local authorities; or to respond to judicial process or government regulatory authorities having jurisdiction over the financial institution for examination, compliance, or other purposes as authorized by law.

(8) When a financial institution is reporting a known or suspected instance of elder or dependent adult financial abuse or is cooperating with a local adult protective services agency investigation of known or suspected elder or dependent adult financial abuse pursuant to Article 3 (commencing with Section 15630) of Chapter 11 of Part 3 of Division 9 of the Welfare and Institutions Code.

(9) The nonpublic personal information is released to an affiliate or a nonaffiliated third party in order for the affiliate or nonaffiliated third party to perform business or professional services, such as printing, mailing services, data processing or analysis, or customer surveys, on

behalf of the financial institution, provided that all of the following requirements are met:

(A) The services to be performed by the affiliate or nonaffiliated third party could lawfully be performed by the financial institution.

(B) There is a written contract between the affiliate or nonaffiliated third party and the financial institution that prohibits the affiliate or nonaffiliated third party, as the case may be, from disclosing or using the nonpublic personal information other than to carry out the purpose for which the financial institution disclosed the information, as set forth in the written contract.

(C) The nonpublic personal information provided to the affiliate or nonaffiliated third party is limited to that which is necessary for the affiliate or nonaffiliated third party to perform the services contracted for on behalf of the financial institution.

(D) The financial institution does not receive any payment from or through the affiliate or nonaffiliated third party in connection with, or as a result of, the release of the nonpublic personal information.

(10) The nonpublic personal information is released to identify or locate missing and abducted children, witnesses, criminals and fugitives, parties to lawsuits, parents delinquent in child support payments, organ and bone marrow donors, pension fund beneficiaries, and missing heirs.

(11) The nonpublic personal information is released to a real estate appraiser licensed or certified by the state for submission to central data repositories such as the California Market Data Cooperative, and the nonpublic personal information is compiled strictly to complete other real estate appraisals and is not used for any other purpose.

(12) The nonpublic personal information is released as required by Title III of the federal United and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA Patriot Act; P.L. 107-56).

(13) The nonpublic personal information is released either to a consumer reporting agency pursuant to the Fair Credit Reporting Act (15 U.S.C. Sec. 1681 et seq.) or from a consumer report reported by a consumer reporting agency.

(14) The nonpublic personal information is released in connection with a written agreement between a consumer and a broker-dealer registered under the Securities Exchange Act of 1934 or an investment adviser registered under the Investment Advisers Act of 1940 to provide investment management services, portfolio advisory services, or financial planning, and the nonpublic personal information is released for the sole purpose of providing the products and services covered by that agreement.

(c) Nothing in this division is intended to change existing law relating to access by law enforcement agencies to information held by financial institutions.

4056.5. (a) The provisions of this division do not apply to any person or entity that meets the requirements of paragraph (1) or (2) below. However, when nonpublic personal information is being or will be shared by a person or entity meeting the requirements of paragraph (1) or (2) with an affiliate or nonaffiliated third party, this division shall apply.

(1) The person or entity is licensed in one or both of the following categories and is acting within the scope of the respective license or certificate:

(A) As an insurance producer, licensed pursuant to Chapter 5 (commencing with Section 1621), Chapter 6 (commencing with Section 1760), or Chapter 8 (commencing with Section 1831) of Division 1 of the Insurance Code, as a registered investment adviser pursuant to Chapter 3 (commencing with Section 25230) of Part 3 of Division 1 of Title 4 of the Corporations Code, or as an investment adviser pursuant to Section 202(a)(11) of the federal Investment Advisers Act of 1940.

(B) Is licensed to sell securities by the National Association of Securities Dealers (NASD).

(2) The person or entity meets the requirements in paragraph (1) and has a written contractual agreement with another person or entity described in paragraph (1) and the contract clearly and explicitly includes the following:

(A) The rights and obligations between the licensees arising out of the business relationship relating to insurance or securities transactions.

(B) An explicit limitation on the use of nonpublic personal information about a consumer to transactions authorized by the contract and permitted pursuant to this division.

(C) A requirement that transactions specified in the contract fall within the scope of activities permitted by the licenses of the parties.

(b) The restrictions on disclosure and use of nonpublic personal information, and the requirement for notification and disclosure provided in this division, shall not limit the ability of insurance producers and brokers to respond to written or electronic, including telephone, requests from consumers seeking price quotes on insurance products and services or to obtain competitive quotes to renew an existing insurance contract, provided that any nonpublic personal information disclosed pursuant to this subdivision shall not be used or disclosed except in the ordinary course of business in order to obtain those quotes.

(c) (1) The disclosure or sharing of nonpublic personal information from an insurer, as defined in Section 23 of the Insurance Code, or its affiliates to an exclusive agent, defined for purposes of this division as a licensed agent or broker pursuant to Chapter 5 (commencing with Section 1621) of Part 2 of Division 1 of the Insurance Code whose contractual or employment relationship requires that the agent offer only the insurer's policies for sale or financial products or services that meet the requirements of paragraph (2) of subdivision (b) of Section 4053 and are authorized by the insurer, or whose contractual or employment relationship with an insurer gives the insurer the right of first refusal for all policies of insurance by the agent, and who may not share nonpublic personal information with any insurer other than the insurer with whom the agent has a contractual or employment relationship as described above, is not a violation of this division, provided that the agent may not disclose nonpublic personal information to any party except as permitted by this division. An insurer or its affiliates do not disclose or share nonpublic personal information with exclusive agents merely because information is maintained in common information systems or databases, and exclusive agents of the insurer or its affiliates have access to those common information systems or databases, provided that where a consumer has exercised his or her rights to prohibit disclosure pursuant to this division, nonpublic personal information is not further disclosed or used by an exclusive agent except as permitted by this division.

(2) Nothing in this subdivision is intended to affect the sharing of information allowed in subdivision (a) or subdivision (b).

4057. (a) An entity that negligently discloses or shares nonpublic personal information in violation of this division shall be liable, irrespective of the amount of damages suffered by the consumer as a result of that violation, for a civil penalty not to exceed two thousand five hundred dollars ($2,500) per violation. However, if the disclosure or sharing results in the release of nonpublic personal information of more than one individual, the total civil penalty awarded pursuant to this subdivision shall not exceed five hundred thousand dollars ($500,000).

(b) An entity that knowingly and willfully obtains, discloses, shares, or uses nonpublic personal information in violation of this division shall be liable for a civil penalty not to exceed two thousand five hundred dollars ($2,500) per individual violation, irrespective of the amount of damages suffered by the consumer as a result of that violation.

(c) In determining the penalty to be assessed pursuant to a violation of this division, the court shall take into account the following factors:

(1) The total assets and net worth of the violating entity.

(2) The nature and seriousness of the violation.

(3) The persistence of the violation, including any attempts to correct the situation leading to the violation.

(4) The length of time over which the violation occurred.

(5) The number of times the entity has violated this division.

(6) The harm caused to consumers by the violation.

(7) The level of proceeds derived from the violation.

(8) The impact of possible penalties on the overall fiscal solvency of the violating entity.

(d) In the event a violation of this division results in the identity theft of a consumer, as defined by Section 530.5 of the Penal Code, the civil penalties set forth in this section shall be doubled.

(e) The civil penalties provided for in this section shall be exclusively assessed and recovered in a civil action brought in the name of the people of the State of California in any court of competent jurisdiction by any of the following:

(1) The Attorney General.

(2) The functional regulator with jurisdiction over regulation of the financial institution as follows:

(A) In the case of banks, savings associations, credit unions, commercial lending companies, and bank holding companies, by the Department of Financial Institutions or the appropriate federal authority; (B) in the case of any person engaged in the business of insurance, by the Department of Insurance; (C) in the case of any investment broker or dealer, investment company, investment advisor, residential mortgage lender or finance lender, by the Department of Corporations; and (D) in the case of a financial institution not subject to the jurisdiction of any functional regulator listed under subparagraphs (A) to (C), inclusive, above, by the Attorney General.

4058. Nothing in this division shall be construed as altering or annulling the authority of any department or agency of the state to regulate any financial institution subject to its jurisdiction.

4058.5. This division shall preempt and be exclusive of all local agency ordinances and regulations relating to the use and sharing of nonpublic personal information by financial institutions. This section shall apply both prospectively and retroactively.

4058.7. Nothing in this division shall prevent an insurer, as defined in Section 23 of the Insurance Code, from combining the form required by subdivision (d) of Section 4053 with the form required pursuant to Article 6.6 (commencing with Section 791) of Chapter 1 of Part 2 of Division 1 of the Insurance Code and state regulations implementing the provisions of that article, provided that the combined form meets the requirements contained in paragraph (1) of subdivision (d) of Section 4053.

4059. The provisions of this division shall be severable, and if any phrase, clause, sentence, or provision is declared to be invalid or is preempted by federal law or regulation, the validity of the remainder of this division shall not be affected thereby.

4060. This division shall become operative on July 1, 2004.

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