#B-400

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

TENTATIVE RECOMMENDATION

Financial Privacy

April 2004

This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be a part of the public record and will be considered at a public meeting when the Commission determines the provisions it will include in legislation the Commission plans to recommend to the Legislature. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you believe revisions should be made in the tentative recommendation.

COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN **July 31, 2004.**

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

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SUMMARY OF TENTATIVE RECOMMENDATION

Resolution Chapter 167 of the Statutes of 2002 directs the California Law Revision Commission to study, report on, and prepare recommended legislation concerning the protection of personal information relating to, or arising out of, financial transactions. The report is due January 1, 2005.

This report analyzes Senate Bill 1 (Speier) — the California Financial Information Privacy Act, operative July 1, 2004. The report concludes that the new law largely achieves the objectives of the Legislature. Although clarification or improvement is possible, the Law Revision Commission does not recommend revision of the new law before there is experience under it.

The report notes that the preemptive effect of federal law on the California Financial Information Privacy Act is not yet clear. The Commission believes it is premature to amend the new law to accommodate federal preemption.

The report recommends statutory revisions to integrate the California Financial Information Privacy Act with existing California privacy statutes. The recommendation addresses only major privacy statutes. Numerous other statutes may also require adjustment.

The report concludes that further legislative work is necessary with respect to federal preemption and coordination with existing state privacy statutes. The Commission is not in a position to do the required work due to diminished resources and a heavy workload of other projects. A budget augmentation and staffing increase, as well as an extension of the report deadline, would be necessary to enable the Commission to accomplish the additional work.

FINANCIAL PRIVACY

INTRODUCTION

The Legislature has directed the California Law Revision Commission to study, report on, and prepare recommended legislation concerning the protection of personal information relating to, or arising out of, financial transactions.[1]

The Legislature's directive specifies that the proposed legislation should 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.

Since then the Legislature has enacted Senate Bill 1 (Speier) — the California Financial Information Privacy Act.[2] The new law is operative on July 1, 2004.

This report analyzes the new law in light of the specific objectives identified by the Legislature. The report concludes that the new law largely achieves those objectives. Although clarification or improvement is possible, the Commission does not recommend revision of the new law before there is experience under it.

The report notes that the preemptive effect of federal law on the California Financial Information Privacy Act is not yet clear. The Commission believes that amendment of the new law to accommodate federal preemption is premature.

The report recommends statutory revisions to integrate the new law with existing California privacy statutes. The recommendation addresses only major privacy statutes. Numerous other statutes may also require adjustment.

The report concludes that further legislative work is necessary with respect to federal preemption and coordination with existing state privacy statutes. The Commission is not in a position to do the required work due to diminished resources and a heavy workload of other projects. A budget augmentation and

1. ACR 125 (Papan), enacted as 2002 Cal. Stat. res. ch. 167. The report is due January 1, 2005.

2. Fin. Code §§ 4050-4060, enacted by 2003 Cal. Stat. ch. 241.

staffing increase, as well as an extension of the report deadline, would be necessary to enable the Commission to accomplish the additional work.

BACKGROUND

Gramm-Leach-Bliley Act

In 1999 Congress enacted the Gramm-Leach-Bliley Financial Modernization Act.[3] This statute overturned depression-era laws that had erected legal barriers between commercial banking, securities, and insurance industries. The Gramm-Leach-Bliley Act repealed essential elements of both the Glass-Steagall Act (which had prevented banks from affiliating with securities companies), and the Bank Holding Company Act (which had blocked a bank from controlling a nonbank company and from conducting insurance activities). For the first time since the depression a financial institution may now engage in banking, insurance, and securities businesses simultaneously.

The intention of the Gramm-Leach-Bliley Act is to benefit consumers by enhancing competition in domestic financial services. It also is intended to strengthen the ability of domestic companies to compete internationally. In effect, it allows the establishment of financial supermarkets by means of financial holding companies created by merger of different types of financial service entities.

The possibility of such a concentration of financial power carries with it the potential for significant erosion of privacy. Congress dealt with the privacy concern by including in the Gramm-Leach-Bliley Act limitations on the extent to which a financial institution may transfer to a third party personal financial information that it has collected concerning a customer.[4]

The Gramm-Leach-Bliley Act requires a financial institution annually to send a notice to its customers describing its privacy policy and any nonpublic personal information it intends to disclose to an affiliate or nonaffiliated third party. The law also requires a financial institution to provide a method for its customers to prevent, or opt out of, the disclosure of some types of information to some types of third parties in some circumstances. The law further requires a financial institution to develop policies to promote data security. In addition, the law creates a right of enforcement — not in individuals but in a number of governmental agencies, including the Federal Trade Commission, the Board of Governors of the Federal Reserve System, the Comptroller of Currency, the Securities and Exchange Commission, and state insurance commissioners.

The Gramm-Leach-Bliley Act also allows a state to provide greater privacy protection for consumers than the Act provides.

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3. Pub. L. No. 106-102 (November 12, 1999).

4. See Gramm-Leach-Bliley Act, Title V, 15 U.S.C. §§ 6801-6810.

Public Policy

This study stems from the Gramm-Leach-Bliley Act's invitation to the states to provide greater privacy protection for consumers than the Act provides.

Financial institutions have pointed out the benefits of liberal information sharing in helping to create a more efficient and lower-cost financial marketplace and in directing the consumer to advantageous financial product opportunities.[5]

These benefits are balanced by the strong public policy in favor of financial privacy. The legislative resolution directing this study makes the policy clear:[6]

> WHEREAS, The Financial Services Modernization Act, commonly known as the Gramm-Leach-Bliley Act, became law in 1999, and reformed the laws that define and regulate the structure of the financial services industry; and
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> WHEREAS, The Gramm-Leach-Bliley Act greatly liberalized the ways that financial institutions were permitted to share nonpublic personal information, and has, in turn, highlighted the extent to which various entities buy, sell, and use nonpublic personal information; and
>
> WHEREAS, The Gramm-Leach-Bliley Act does not provide a comprehensive framework by which citizens may control access to their nonpublic personal information, but instead explicitly permits the states to enact laws that provide for greater protection of the privacy of nonpublic personal information; and
>
> WHEREAS, The citizens of California have indicated their great concern with this issue, and have made clear their overwhelming desire to have control over the disclosure of their nonpublic personal information; now, therefore, be it
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> *Resolved by the Assembly of the State of California, the Senate thereof concurring,* That the Legislature authorizes and requests that the California Law Revision Commission study, report on, and prepare recommended legislation by January 1, 2005, if funding is provided in the 2002-03 Budget Act specifically for this purpose, concerning the protection of personal information relating to, or arising out of, financial transactions.

Privacy Practices of Financial Institutions

The nature and extent of information sharing practices of financial institutions has not been well documented. The Gramm-Leach-Bliley Act 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.[7] The report was due January 1, 2002; it has never been released.

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5. See, e.g., Cate, *Personal Information in Financial Services: The Value of a Balanced Flow* (March 2000).

6. 2002 Cal. Stat. res. ch. 167.

7. 15 U.S.C. § 6808(a).

The Education Foundation of the Consumer Federation of California has compiled a survey of the privacy practices of 55 of the largest financial institutions doing business in California.[8] The survey indicates:[9]

- All but a handful of the largest financial institutions share customer information with their affiliates. The great majority give their customers no opt out opportunity.
- Most of the largest financial institutions share customer information with other financial institutions for joint marketing purposes. They do not typically offer their customers an opt out opportunity.
- Most of the largest financial institutions do not share information with unrelated third parties, although a substantial minority do. Of those that share customer information with unrelated third parties, a few offer their customers an opt in opportunity; the remainder share information unless the customer opts out.
- A few of the major financial institutions offer their customers significantly greater control over disclosure of nonpublic personal information than the Gramm-Leach-Bliley Act requires.

LEGAL LANDSCAPE

Constitutional Considerations

The First Amendment to the United States Constitution is a fundamental source of consumer privacy protection. It has been argued that the First Amendment also protects the right of a financial institution to share customer information. Courts that have considered that argument to date have disagreed. Financial information sharing is commercial speech that entails reduced constitutional protection. The governmental interest in protecting the privacy of consumer credit information is substantial and governmental restrictions are warranted.[10]

At the state level, Section 1 of Article I of the California Constitution protects the right of privacy. The Constitution declares that among the inalienable rights of all people is the right to pursue and obtain privacy. The courts have held that confidential information given to a financial institution is protected by the Constitution.[11] "Thus there is a right to privacy in confidential customer information whatever form it takes, whether that form be tax returns, checks, statements, or other account information."[12]

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8. Consumer Federation of California, Education Foundation, *Financial Privacy Report Card* (Jan. 2004).

9. The findings are generally consistent with those of an earlier and smaller survey conducted by the California Public Interest Research Group, focusing exclusively on banks. See CALPIRG, *Privacy Denied: A Survey of Bank Privacy Policies* (Aug. 2002).

10. See, e.g., Trans Union LLC v. Federal Trade Commission, 295 F. 3d 42 (D.C. Cir. 2002).

11. Valley Bank of Nevada v. Superior Court, 15 Cal. 3d 652, 125 Cal. Rptr. 553, 542 P. 2d 977 (1975).

12. Fortunato v. Superior Court, 114 Cal. App. 4th 475, 481, 8 Cal. Rptr. 3d 82 (2003).

State Statutes

The California Financial Information Privacy Act is not California's first major financial privacy statute. The Legislature has enacted a number of privacy laws affecting financial institutions over the course of many years.[13] A significant objective of this report is to recommend legislation to integrate the new law with existing statutes.[14]

Local Ordinances

A number of Bay Area cities and counties have enacted ordinances that seek to regulate the information sharing practices of financial institutions operating within their jurisdictions.[15] The ordinances are similar in character to the California Financial Information Privacy Act.

The ordinances have been challenged in court on the basis of federal preemption. The United States District Court for the Northern District of California has ruled that the local ordinances, to the extent that they seek to limit information sharing among affiliates, are preempted by the Fair Credit Reporting Act, but are enforceable to the extent that they seek to control information sharing with nonaffiliated third parties.[16] The decision has been appealed to the United States Court of Appeals for the Ninth Circuit.[17]

Meanwhile, the ordinances are invalidated in their entirety by the California Financial Information Privacy Act, effective July 1, 2004.[18]

Ballot Initiative

Initiative measures are proposed from time to time with the intent to deal comprehensively with the subject of privacy generally and financial privacy specifically. As of the date of this report, several proposed ballot measures dealing with disclosure of consumer information, identity theft, social security numbers, and telemarketing are in process. Proponents of the measures have until July 23, 2004, to gather the required number of signatures. The measures would appear on the November 2004 ballot. It is premature to analyze the impact of the proposed initiative measures on California financial privacy law.

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13. The state's Office of Privacy Protection maintains a website that includes a listing of major privacy statutes, both state and federal, along with other privacy information. See www.privacy.ca.gov.

14. See discussion under "Relation of California Financial Information Privacy Act to Other California Statutes" *infra*.

15. Ordinances have been adopted by the counties of Alameda, Contra Costa, Marin San Francisco, San Mateo, and Santa Clara, as well as by the city of Daly City.

16. Bank of America, N.A. v. City of Daly City, 279 F. Supp. 2d 1118 (N.D. Cal. 2003).

17. Docket No. 03-016689.

18. Fin. Code § 4058.5.

Federal Law

At the federal level, the key financial privacy statutes are the Gramm-Leach-Bliley Act and the Fair Credit Reporting Act. Other major statutes that have an impact on state privacy law include (1) the USA PATRIOT Act and (2) the National Bank Act (and other functional regulatory regimes).

Gramm-Leach-Bliley Act

The Gramm-Leach-Bliley Act was enacted in 1999.[19] The provisions of that Act relating to disclosure of personal information[20] are implemented by federal regulations.[21]

The Gramm-Leach-Bliley Act governs the activities of "financial institutions." That term is broadly defined and includes, for example, a lender or broker, check casher, credit counselor, investment advisor, credit card issuer, collection agency, and a government agency that provides a financial product such as a student loan. The Federal Trade Commission has taken the position that an attorney significantly engaged in tax advice or estate planning is a financial institution within the meaning of the Gramm-Leach-Bliley Act, but the United States District Court for the District of Columbia has disagreed.[22]

A financial institution's customers are entitled to an annual privacy notice and a reasonable opportunity to opt out before their nonpublic personal information is shared with a nonaffiliated third party. The Gramm-Leach-Bliley Act includes major exceptions to the notice and opt out provisions. A financial institution may share nonpublic personal information freely with its affiliates without notice or an opportunity to opt out. A financial institution may also disclose nonpublic personal information to a nonaffiliated third party in a number of circumstances where a consumer does not have the right to opt out of the sharing, including sharing with another financial institution with which it has a joint marketing agreement and sharing with another party whose involvement is necessary for transactional purposes.

The Gramm-Leach-Bliley Act does not override state financial privacy law except to the extent that the state law is inconsistent with federal law. For this purpose, a state law providing greater privacy protection for a consumer's personal information than the Gramm-Leach-Bliley Act is not considered inconsistent with the Act.[23]

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19. See discussion under "Background" *supra*.
20. See Title V, 15 U.S.C. §§ 6801 et seq.
21. See, e.g., 16 C.F.R. 313 (May 24, 2002) (Federal Trade Commission).
22. New York State Bar Ass'n v. Federal Trade Comm'n, 276 F. Supp. 2d 110 (D.D.C. 2003).
23. See discussion under "Relation of California Financial Privacy Act to Federal Law" *infra*.

Fair Credit Reporting Act

The Fair Credit Reporting Act was enacted in 1970.[24] Its purpose is to require credit bureaus to adopt reasonable procedures for meeting the needs of commerce for credit information in a manner that is fair and equitable to the consumer with regard to the confidentiality, accuracy, relevancy, and proper use of credit information.

To the extent that the Fair Credit Reporting Act authorizes financial institutions and credit bureaus to disclose personal financial information to each other, their affiliates, and third parties, it cuts across provisions of the Gramm-Leach-Bliley Act. In case of a conflict between the two laws, the Gramm-Leach-Bliley Act defers to the Fair Credit Reporting Act.[25]

In general terms, the Fair Credit Reporting Act regulates communication of information that bears on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living. A credit bureau may provide information about a consumer to a person with a need recognized by the Act — usually to consider an application with a creditor, insurer, employer, landlord, or other business. The consumer's consent is required before a credit bureau may provide information to an employer, or make a report that includes medical information to a creditor, insurer, or employer.

The Fair Credit Reporting Act regulates consumer reports — i.e., the communication of credit information about a consumer. The statute excludes from the definition of a consumer report the following types of communications:[26]

- Any report containing information solely as to transactions or experiences between the consumer and the person making the report.
- Any communication of that information among persons related by common ownership or affiliated by corporate control.
- Any communication of other information among persons related by common ownership or affiliated by corporate control, if it is clearly and conspicuously disclosed to the consumer that the information may be communicated among such persons and the consumer is given the opportunity, before the time that the information is initially communicated, to direct that such information not be communicated among such persons.

To the extent the Gramm-Leach-Bliley Act regulates those types of communications, there is no conflict between the two laws, and the Gramm-Leach-Bliley Act controls.[27]

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24. 15 U.S.C. § 1681, enacted by Pub. L. No. 91-508 (October 26, 1970).

25. 15 U.S.C. § 6806.

26. 15 U.S.C. § 1681a(d)(2)(A).

27. See, e.g., Individual Reference Services Group, Inc. v. FTC, 145 F. Supp. 2d 6 (D.D.C. 2001), aff'd Trans Union LLC v. FTC, 295 F.3d 42 (D.C. Cir. 2002).

The newly enacted Fair and Accurate Credit Transactions Act of 2003[28] adds provisions to the Fair Credit Reporting Act augmenting consumer opt out rights for some aspects of information sharing among affiliates. The new legislation also more aggressively preempts state statutes with respect to matters covered by the Fair Credit Reporting Act. The potential preemptive effect of these provisions on the California Financial Information Privacy Act is analyzed below.[29]

USA PATRIOT Act

The USA PATRIOT Act was enacted in the wake of the September 11, 2001, attacks.[30] The Act exempts banks from privacy laws in order to share information concerning terrorism and money laundering.[31]

This is one of many laws that override privacy statutes for law enforcement and related purposes. The California Financial Information Privacy Act makes clear that release of nonpublic personal information is not prohibited if made pursuant to USA PATRIOT Act, among others.[32]

National Bank Act and Other Functional Regulatory Regimes

Federal regulatory regimes govern all sectors of the financial services 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 will be read to preempt the field with respect to financial privacy issues is not yet determined. Each of the major regulatory statutes is complex and unique. Preemption of the California Financial Information Privacy Act by any of the governing federal statutes has the potential to create an uneven playing field, frustrating the contrary intention of the new law.

The National Bank Act,[33] for example, gives the Office of the Comptroller of the Currency broad supervisory jurisdiction over national banks, largely free of state control. That Act is expansive in its grant of "incidental powers" that allow banks to market their services and to provide their subsidiaries the information necessary to operate competitively.[34] The potential preemptive effect of this Act on the California Financial Information Privacy Act is analyzed below.[35]

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28. Pub. L. No. 108-159.
29. See "Relation of California Financial Privacy Act to Federal Law" *infra*.
30. Pub. L. No. 107-56, 115 Stat. 272.
31. See, e.g., USA PATRIOT Act § 314(b).
32. Fin. Code § 4056((b)(12).
33. 12 U.S.C. § 1.
34. 12 U.S.C. § 24(seventh).
35. See "Relation of California Financial Information Privacy Act to Federal Law" *infra*.

CALIFORNIA FINANCIAL INFORMATION PRIVACY ACT

Overview

The California Financial Information Privacy Act[36] comprehensively governs the field of financial information privacy. The new law is operative on July 1, 2004.

Under the new law, a consumer's affirmative consent (opt in) is required before a financial institution may disclose nonpublic personal information to a third party, except that in the following circumstances information may be disclosed unless the consumer prohibits it (opt out), or regardless of the consumer's wishes (no opt):

- Disclosure to affinity partner – opt out
- Disclosure to joint marketer – opt out
- Disclosure to affiliate – opt out
- Disclosure to wholly owned subsidiary in same line of business and with same brand and same functional regulator – no opt
- Disclosure between licensed insurance producers and between licensed securities sellers – no opt
- Disclosure for transactional, security, and law enforcement purposes – no opt

The financial institution must give the consumer a privacy notice that meets basic standards of clarity and conspicuousness. A statutory safe harbor form is provided. A financial institution that uses its own form may obtain a rebuttable presumption of compliance by approval of the functional regulator of the financial institution.

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

The 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.

Legislative Mandate

Does the California Financial Information Privacy Act satisfy the goals set out in the Legislature's mandate to the Law Revision Commission? The Legislature specified that proposed legislation should accomplish the following objectives:[37]

36. Fin. Code §§ 4050-4060.

37. 2002 Cal. Stat. res. ch. 167.

(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.

Notice and Opportunity to Control Disclosure

The main thrust of the new law 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 a nonaffiliated third party and no opt in other circumstances, the California statute requires an opt in for nonaffiliated third party sharing and allows an opt out for affiliate sharing and joint marketing. It satisfies the notice and opportunity to control disclosure objective of the Legislature.

Preparation of Regulations

The new law 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 the new law, specifically with respect to approval of a sui generis privacy notice of a financial institution and with respect to enforcing civil penalties for violation of the statute. The new law does not recognize rulemaking authority with respect to these matters.[38]

The approach of the new law is at odds with the regulatory regime contemplated by the Legislature. The new law achieves a comparable result by incorporating bodily the substance of federal regulations adopted under the Gramm-Leach-Bliley Act. The primary disadvantage of spelling out details in the statute rather than by regulation is that if fine tuning or interpretation is necessary, legislation or litigation, rather than a rule change, is required.

38. That authority might be implied under the agencies' inherent powers.

Level Playing Field

One of the expressed objectives of the California Financial Information Privacy Act is to maintain a level playing field among different types and sizes of financial institutions. Whether the new law actually achieves this goal is explored below.

Sharing of information among divisions and wholly owned subsidiaries. Under the new law, a financial institution may freely share personal information among its own divisions. It may also share personal information with its wholly owned subsidiaries in the same line of business. The financial institution is subject to an opt out scheme for other affiliates and for nonaffiliated joint marketers. This scheme appears to discriminate among financial institutions based on business structure.[39]

Sharing of information among affiliates and joint marketers. It has been argued that the new law disadvantages a small community bank unable to offer a full range of financial products on its own that must use a joint marketing structure, unlike a large financial institution that can make use of an affiliate network. The new law requires a financial institution to offer an opt out for affiliate sharing as well as for joint marketing, but under the decision in *Bank of America, N.A. v. City of Daly City*,[40] the affiliate sharing requirement may be preempted by federal law. The net result is that the new law may in effect impose an opt out requirement only for joint marketing and not for affiliate sharing, thereby disadvantaging a community bank.

Effect of severability clause. If a provision of the California Financial Information Privacy Act is preempted by federal law, whether by the Fair Credit Reporting Act or another statute such as the National Bank Act, the potential for unequal treatment may be aggravated due to the California statute's inclusion of a severability clause.[41] If, for example, the California statute is preempted as to national banks by the National Bank Act, the California statute will continue to apply to state banks, but national banks will be free of state regulation, yielding them a competitive advantage.[42]

Whether that result is desirable or undesirable is a question of policy. The new law embodies the judgment that it is better to cover some financial institutions

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39. Some financial institutions may be restructuring to take advantage of the differential treatment. See, e.g., Mandaro, *In Focus: Wells' Privacy Fix: Cut Down on 'Affiliates'*, American Banker (August 1, 2002).

40. 279 F. Supp. 2d 1118 (ND Cal 2003).

41. Fin. Code § 4059.

42. In *American Bankers Association v. Lockyer*, 239 F. Supp. 2d 1000 (E.D. Cal. 2002), 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. 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.

even if it turns out that the law cannot cover all of them. The new law recognizes in its statement of policy that there may be a conflict; the legislative intent is 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.[43]

Gramm-Leach-Bliley Act and Fair Credit Reporting Act Compatibility and Preemption

The Legislature requests legislation that is compatible with, and withstands preemption by, the Gramm-Leach-Bliley Act and the federal Fair Credit Reporting Act. The extent to which the new law achieves these goals is dealt with briefly here, and in greater depth below.[44]

In determining whether federal preemption exists, the principal inquiry is the intention of Congress. State law may be preempted if it would stand as an obstacle to the accomplishment and execution of the purposes and objectives of Congress, or if it conflicts with federal law such that compliance with both state and federal law is impossible.[45]

Gramm-Leach-Bliley Act. The California Financial Information Privacy Act is compatible with the Gramm-Leach-Bliley Act; the new law tracks the federal law and implementing regulations with respect to scope and manner of regulation while providing greater protection to consumers. The Gramm-Leach-Bliley Act refrains from preempting state law except to the extent that state law is inconsistent with it.[46] A state law is not inconsistent if the protection the state law affords any person is greater than the protection provided under the Gramm-Leach-Bliley Act.[47]

While there is not yet a definitive court decision, it is likely that the Gramm-Leach-Bliley Act does not preempt the California statute. The California statute is consistent with the purposes and objectives of Congress to provide for protection of consumer privacy, and it is physically possible for a financial institution to comply with both laws 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 the Gramm-Leach-Bliley Act.[48]

Some provisions of the new law are less protective of the privacy of consumer financial information than the Gramm-Leach-Bliley Act. For example, the

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43. Fin. Code § 4051.5(b)(4).

44. See "Relation of California Financial Information Privacy Act to Federal Law" *infra*.

45. See, e.g., English v. General Elec. Co., 496 U.S. 72, 78-79 (1990).

46. 15 U.S.C. § 6807(a), Pub. L. No. 106-102, tit. V, § 507 (Nov. 12, 1999), 113 Stat. 1442.

47. 15 U.S.C. § 6807(b), Pub. L. No. 106-102, tit. V, § 507 (Nov. 12, 1999), 113 Stat. 1442.

48. The Federal Trade Commission has adopted this sort of analysis in finding that neither North Dakota law nor Connecticut law is preempted by the Gramm-Leach-Bliley Act — it is physically possible for a financial institution to comply with both state and federal law.

California statute includes a number of exemptions from its coverage.[49] But that would not necessarily make the California statute inconsistent with the Gramm-Leach-Bliley Act, since an entity exempted from the California Financial Information Privacy Act would nonetheless be able (and be required) to comply with federal law.

Fair Credit Reporting Act. The affiliate sharing preemption clause of the Fair Credit Reporting Act is sweeping.[50] It is conceivable that Act will be determined to preempt all of the affiliate sharing provisions of the new law. The United States District Court for the Northern District of California has held that affiliate sharing provisions of local ordinances comparable in nature to the California statute are preempted by the Fair Credit Reporting Act.[51] The case is on appeal to the United States Court of Appeals for the Ninth Circuit.[52] It is premature to determine whether the new law is subject to Fair Credit Reporting Act preemption.

Civil Remedies and Administrative and Civil Penalties

The Legislature has requested extensive civil and administrative remedies for privacy violations.[53] The new law 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 by the financial institution's functional regulator, in the name of the People of the State.[54]

Assessment

The California Financial Information Privacy Act is a carefully articulated statute. Its complexity is the result of a policy decision to track the scope and manner of regulation of the Gramm-Leach-Bliley Act and to make accommodation for varying circumstances of different financial services and products in an effort to achieve a satisfactory resolution of issues among stakeholders. The new law achieves many of the major objectives of the Legislature's referral of the financial privacy study to the Law Revision Commission.

That is not to suggest that the new law is free of problems. This is a complex, detailed, and sweeping enactment, and there are questions concerning its

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49. See. e.g., Fin. Code §§ 4056-4056.5.

50. "No requirement or prohibition may be imposed under the laws of any State ... with respect to the exchange of information among persons affiliated by common ownership or common corporate control ...." Fair Credit Reporting Act § 625(b)(2).

51. Bank of America, N.A. v. City of Daly City, 279 F. Supp. 2d 1118 (ND Cal 2003).

52. Docket No. 03-016689.

53. "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.

54. Fin. Code § 4057.

implementation and operation.[55] However, the Commission believes practical experience under the operation of the new law is necessary before the Commission would be in a position to recommend corrections, clarifications, or revisions of the new law.

The Commission has identified two general areas that require further attention. These are the interrelation of the California Financial Privacy Act with federal law and its interrelation with other California statutes. These matters are addressed in the balance of this report.

RELATION OF CALIFORNIA FINANCIAL INFORMATION PRIVACY ACT TO FEDERAL LAW

The principal federal laws that have an impact on the California Financial Information Privacy Act are the Gramm-Leach-Bliley Act, the Fair Credit Reporting Act, and the National Bank Act.

Gramm-Leach-Bliley Act

The Gramm-Leach-Bliley Act includes a comprehensive scheme of protection of nonpublic personal information in the hands of a financial institution.[56] The policy expressed in the Act is that each financial institution has an affirmative and continuing obligation to respect the privacy of its customers and to protect the security and confidentiality of those customers' nonpublic personal information.[57]

In furtherance of this policy, the Gramm-Leach-Bliley Act does not preempt any statute in effect in any state, except to the extent that the statute is inconsistent with the Gramm-Leach-Bliley Act, and then only to the extent of the inconsistency.[58] State law is not inconsistent if the protection afforded a person by state law is greater than the protection provided by the Gramm-Leach-Bliley Act, as determined by the Federal Trade Commission.[59]

Federal Trade Commission determinations pursuant to the Gramm-Leach-Bliley Act have construed this standard so as to avoid preemption of state financial privacy statutes. To date, the Federal Trade Commission has ruled on preemption determination petitions concerning financial privacy laws of North Dakota and

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55. See, e.g., Huber & Tortarolo, *New Privacy Rights for Californians*, 23 Business Law News 9 (No. 4, 2003).

56. See discussion of "Legal Landscape" *supra*.

57. 15 U.S.C. § 6801(a).

58. 15 U.S.C. § 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 the Gramm-Leach-Bliley Act, or whether it is also intended to save future enactments. While the Gramm-Leach-Bliley Act could be read narrowly, the Commission believes it will be read more broadly to apply to subsequently enacted statutes such as the California Financial Information Privacy Act. There is no apparent reason why the Gramm-Leach-Bliley Act 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.

59. 16 C.F.R. § 313.17(b).

Connecticut.[60] Neither statute was found to be inconsistent with the Gramm-Leach-Bliley Act.[61]

The Federal Trade Commission's analysis of the Connecticut statute is instructive.[62] Connecticut requires a customer's opt in for disclosure of certain financial records by certain financial institutions.[63] The Federal Trade Commission reasoned that this law does not frustrate the purpose of the Gramm-Leach-Bliley Act to protect consumer financial privacy. Moreover, it is not physically impossible to comply with both Connecticut law and the Gramm-Leach-Bliley Act since a Connecticut financial institution could comply with both by not disclosing a consumer's nonpublic personal information. Therefore the Connecticut law is not inconsistent with the Gramm-Leach-Bliley Act, and it is unnecessary to engage in a "greater protection" analysis.

The California Financial Information Privacy Act is not inconsistent with the Gramm-Leach-Bliley Act if it is physically possible for a financial institution to comply with both. The Law Revision Commission believes the greater privacy protections of the California statute would not be viewed as inconsistent with the federal law because it is physically possible for a financial institution to comply with both — the financial institution could follow the state statute and offer customers a more substantial opt in or opt out opportunity than is required under federal law.

A few provisions of the California statute are less protective of the privacy of consumer financial information than the Gramm-Leach-Bliley Act. For example, the California statute includes a number of exemptions from its coverage. That does not necessarily render the California statute inconsistent with the Gramm-Leach-Bliley Act, since an entity exempted from the California statute would nonetheless still be able (and be required) to comply with federal law.[64]

The Commission believes that the California Financial Information Privacy Act is not inconsistent with the Gramm-Leach-Bliley Act and therefore not preempted by it. There is no need to petition the Federal Trade Commission for a

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60. Petitions concerning Illinois and Vermont law are pending before the Federal Trade Commission.

61. The Federal Trade Commission determination concerning the North Dakota Disclosure of Customer Information Law was issued on June 28, 2001. The North Dakota ruling does not provide a good test since the North Dakota statute had been amended to exempt from state law any financial institution that complies with the Gramm-Leach-Bliley Act.

62. The Federal Trade Commission determination concerning the Connecticut statute was issued on June 7, 2002.

63. Conn. Gen. Stat. §§ 36a-41, 42.

64. The 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 California Financial Information Privacy Act coverage does not necessarily carry with it an exemption from Gramm-Leach-Bliley Act coverage. It is likely that the Gramm-Leach-Bliley Act does not intend to give a state the option of entirely taking over the field of privacy law. A financial institution governed by the California statute would also have to comply with the Gramm-Leach-Bliley Act, as would a financial institution exempted from the California statute.

determination whether the California statute provides greater privacy protection than the federal law.

Fair Credit Reporting Act

Like the Gramm-Leach-Bliley Act, the Fair Credit Reporting Act does not preempt a state statute governing collection, distribution, or use of information about consumers, except to the extent the state statute is inconsistent with the Act.[65] Under the Fair Credit Reporting Act, preemption is not determined by the Federal Trade Commission; inconsistency of a state law is tested in court.[66]

The Fair Credit Reporting Act expressly preempts a state statute that governs exchange of information among affiliates, regardless of whether the state statute is "consistent" with the federal law.[67] The affiliate sharing preemption provision was due to sunset on January 1, 2004, but the Fair and Accurate Credit Transactions Act of 2003 makes affiliate sharing preemption permanent.[68]

The Fair Credit Reporting Act's preemption of state law affecting affiliate sharing is broadly phrased: "No requirement or prohibition may be imposed under the laws of any State ... with respect to the exchange of information among persons affiliated by common ownership or common corporate control ...."[69] The extent to which federal law may override the affiliate sharing provisions of the California Financial Information Privacy Act is not clear.

Statutory Construction

The Fair Credit Reporting Act defines none of the operative terms of the affiliate sharing preemption clause.[70] Nor does the law include a general scope provision

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65. 15 U.S.C. § 1681t(a).

66. Courts have held, for example:

• Provisions of a local ordinance, including a requirement that sources of consumer credit report information be disclosed, were inconsistent with the Fair Credit Reporting Act and therefore preempted by it. Retail Credit Co. v. Dade County, Fla., 393 F. Supp. 577 (S.D. Fla. 1975).

• A state law that prohibits a credit bureau from charging a fee for disclosing a credit denial to a consumer is not preempted by the provision of the Fair Credit Reporting Act that allows a credit bureau to charge a reasonable fee. "The philosophy behind both statutes is the protection of the consumer and it is clear that the Federal Act permits Arizona to go further than the Federal Act does to protect consumers as long as the Arizona Act is not inconsistent with the Federal Act." Credit Data of Ariz. v. State of Ariz., 602 F.2d 195, 198 (9th Cir. 1979).

• A state law that requires a customer's separate written consent to a bank's disclosure of insurance information to an affiliated agent or broker was determined by the Office of the Comptroller of the Currency to be preempted by the Fair Credit Reporting Act, and that determination is valid. Cline v. Hawke, 51 Fed. App. 392 (4th Cir. 2002) (unreported).

67. 15 U.S.C. § 1681t(b)(2).

68. Pub. L. No. 108-159.

69. Fair Credit Reporting Act § 625(b)(2).

70. The statute does define "state" (any State, the Commonwealth of Puerto Rico, the District of Columbia, and any territory or possession of the United States) and "person" (any individual, partnership, corporation, trust, estate, cooperative, association, government or governmental subdivision or agency, or other entity). Fair Credit Reporting Act §§ 603(b), (n).

that restricts its application.[71] On its face, the preemption clause is so broadly phrased that it could invalidate every California law that affects exchange of information of any type among affiliated business or nonbusiness entities of every type. Other provisions of the Fair Credit Reporting Act distinguish among types of information.[72] The failure to discriminate among types of information with respect to state preemption carries an inference that no limitation is intended.

Other preemption provisions within the Fair Credit Reporting Act are more narrowly focused. The Act preempts a state statute that imposes a requirement or prohibition with respect to exchange and use of information to make a solicitation for marketing purposes.[73] The Act also makes clear that a state statute relating to any use of information that has been shared among affiliates is preempted.[74] These provisions likewise create an inference that the general affiliate sharing preemption clause is to be broadly construed.[75]

Federal Regulations

The Fair Credit Reporting Act now requires various federal regulatory authorities to prescribe regulations as necessary to carry out the purposes of the Act.[76] The Federal Trade Commission and Federal Reserve Board have acted jointly to adopt regulations that make Fair Credit Reporting Act preemption of state affiliate sharing laws permanent effective December 31, 2003.[77]

There is no direct authority for a federal agency to adopt regulations that interpret the meaning of the Fair Credit Reporting Act's affiliate sharing preemption clause. However, the Fair Credit Reporting Act now restricts use of

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71. There is general purpose language in the Fair Credit Reporting Act that could be read to imply a narrow intent:

> It is the purpose of this title to require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information in accordance with the requirements of this title.

Fair Credit Reporting Act § 602(b).

72. E.g., transaction or experience information.

73. Fair Credit Reporting Act § 625(b)(1)(H).

74. Fair Credit Reporting Act § 624(c):

> Requirements with respect to the use by a person of information received from another person related to it by common ownership or affiliated by corporate control, such as the requirements of this section, constitute requirements with respect to the exchange of information among persons affiliated by common ownership or common corporate control, within the meaning of section 625(b)(2).

75. There is scant evidence in the record of congressional intent on the matter. Remarks of California's congressional delegation seeking to save the affiliate sharing restrictions of the California Financial Information Privacy Act from federal preemption suggest that the California delegation, at least, views the Fair Credit Reporting Act preemption expansively. See, e.g., Statement of Sen. Feinstein, 149 Cong. Rec. § 13848 (Nov. 4, 2003).

76. Fair Credit Reporting Act § 621(e).

77. *Effective Dates for the Fair and Accurate Credit Transactions Act of 2003*, 12 C.F.R Pt. 222, 16 C.F.R Pt. 602.

information shared among affiliates for marketing purposes.[78] The federal regulatory agencies are required to prescribe implementing regulations for that provision, and it is likely that they will define an "affiliate," and perhaps also a "person" and "information," for that purpose. The implementing regulations must be issued in final form by September 4, 2004.[79] Such a regulation would be evidence of the meaning of those terms as used in the general affiliate sharing preemption statute.

Case Law

The few cases that interpret the Fair Credit Reporting Act affiliate sharing preemption clause construe it broadly.

The case most directly on point is the local ordinance case — *Bank of America, N.A. v. City of Daly City*.[80] The federal district court squarely addressed the scope of the affiliate sharing preemption clause.[81] Local entities argued that the clause must be read narrowly to preempt only state laws that seek to regulate affiliate sharing within the consumer reporting industry. The court disagreed. "States and local governments are free to enact law affording some protection to consumer privacy greater than that provided by federal law, but not with regard to the disclosure of information to affiliates."[82] The court allayed the concern of amicus Attorney General of California that such a broad construction would improperly preempt a large number of the state's tort and criminal laws relating to trade secrets, conspiracy, and other issues in situations involving information sharing among affiliates. The court limited its holding to information related to a consumer.[83] The decision has been appealed to the United States Court of Appeals for the Ninth Circuit.[84]

An unpublished United States Court of Appeals decision likewise concludes that Fair Credit Reporting Act preemption is broad. *Cline v. Hawke*[85] involved the West Virginia Insurance Sales Consumer Protection Act. That Act limits the ability of a financial institution that acquires personal information in the course of a loan transaction to share the information with its affiliates for the purpose of soliciting or offering insurance. The Office of the Comptroller of the Currency made a determination that the Fair Credit Reporting Act preempts the West

78. Fair Credit Reporting Act § 624.

79. Fair and Accurate Credit Transactions Act § 214(b) (affiliate sharing).

80. 279 F. Supp. 2d 1118 (N.D. Cal. 2003).

81. "The question the Court must resolve is the breadth of this preemption provision and whether it encompasses the ordinances at issue in this case." 279 F. Supp. 2d at 1122.

82. *Id*. at 1126.

83. "The Court discerns no intent by Congress that the FCRA preempt State tort and criminal laws unrelated to consumer information." *Id*. at 1124 n.5.

84. Docket No. 03-016689.

85. 51 Fed. Appx. 392 (4th Cir. 2002).

Virginia affiliate sharing provision. The preemption letter notes that, "The FCRA preemption provision ensures that affiliated entities may share customer information without interference from State law and subject only to the FCRA notice and opt-out requirements if applicable. The preemption is broad and extends beyond state information sharing statutes to preempt any State statute that affects the ability of an entity to share any information with its affiliates." The Court of Appeals denied the state's challenge to the preemption letter, finding the reasoning of the Office of the Comptroller of the Currency valid.[86]

Conclusion

The California Financial Information Privacy Act requires a financial institution to offer a consumer an opt out opportunity before the financial institution shares information with an affiliate. The provision appears on its face to be a "requirement or prohibition with respect to the exchange of information among entities affiliated by common ownership or common control" within the meaning of the Fair Credit Reporting Act preemption clause.

Case law interpreting the preemption clause to date suggests a broad preemptive effect. The preemption clause could completely swallow the affiliate sharing limitations of the California statute.

Although the scope of the Fair Credit Reporting Act's preemption clause is not yet definitively resolved, there is an argument for acting now to adjust the California statute to eliminate the affiliate sharing provisions that appear to be preempted. Otherwise, the new law will be confusing and misleading for consumers as well as for financial institutions.

A major purpose of the Legislature in enacting the new law was to provide "to the maximum extent possible" a level playing field among types and sizes of businesses. Elimination of the statute's affiliate sharing restrictions could favor larger financial institutions (with affiliate structures) over smaller financial institutions (which must rely on joint marketing arrangements). On the other hand, the Fair Credit Reporting Act provides its own limitations on the use to which an affiliate may put shared information.[87] The practical effect of the California statute's joint marketing restriction in conjunction with the Fair Credit Reporting Act's affiliate marketing restriction could in effect maintain a level playing field.

The Law Revision Commission believes it is premature to make adjustments to the California statute for possible federal preemption. When the federal regulations are promulgated they may be helpful in illuminating the scope of federal preemption. The appeal in *Bank of America* may yield a more definitive appellate

86. *Id*. at 397.

87. The Fair Credit Reporting Act prohibits an affiliate from using "consumer report" type information for marketing purposes about its products or services unless the consumer is given an opt out opportunity. Fair Credit Reporting Act § 624(a).

level determination of the scope of federal preemption. Any changes to the California statute should be made advisedly.

National Bank Act and Other Federal Functional Regulatory Laws

Federal regulatory regimes govern all sectors of the financial services 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 will be read to preempt the field with respect to financial privacy issues is not yet determined. Each of the major regulatory statutes is complex and unique. Preemption of the California Financial Information Privacy Act by any of the governing federal statutes has the potential to create an uneven playing field, frustrating the contrary intention of the California Financial Information Privacy Act.

The National Bank Act,[88] for example, gives the Office of the Comptroller of the Currency broad supervisory jurisdiction over national banks, largely free of state control. That Act is expansive in its grant of "incidental powers" that allow banks to market their services and to provide their subsidiaries the information necessary to operate competitively.[89]

The Office of the Comptroller of the Currency has emphasized its "exclusive visitorial powers" over national banks, has issued rules under the National Bank Act that broadly preempt state law seeking to control activities of a national bank, and has alerted national banks to consult with the Office if a state authority seeks to exercise enforcement powers over them.[90] The preemption rules are addressed to state law that obstructs, impairs, or conditions a national bank's ability to conduct activity authorized under federal law.[91] However, the rules neither

88. 12 U.S.C. § 1.

89. 12 U.S.C. § 24(seventh).

90. See 12 C.F.R. § 7.4007 (deposit-taking power), 12 C.F.R. § 7.4008 (non-real estate lending power), and 12 C.F.R. § 7.4009 (power to conduct activity authorized under federal law); see also *OCC Advisory Letter 2002-9* (11/25/02).

91. 12 C.F.R. § 7.4009 provides:

§ 7.4009. Applicability of state law to national bank operations

(a) *Authority of national banks.* A national bank may exercise all powers authorized to it under Federal law, including conducting any activity that is part of, or incidental to, the business of banking, subject to such terms, conditions, and limitations prescribed by the Comptroller of the Currency and any applicable Federal law.

(b) *Applicability of state law.* Except where made applicable by Federal law, state laws that obstruct, impair, or condition a national bank's ability to fully exercise its powers to conduct activities authorized under Federal law do not apply to national banks.

(c) *Applicability of state law to particular national bank activities.*

(1) The provisions of this section govern with respect to any national bank power or aspect of a national bank's operations that is not covered by another OCC regulation specifically addressing the applicability of state law.

expressly preempt nor expressly exempt a state law governing information sharing by a national bank with its affiliates or others.[92]

National Bank Act preemption of state law is not absolute, and a state retains 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 falls within this spectrum is yet to be determined.[93] Recent cases have found National Bank Act preemption of various California consumer protection laws.[94]

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(2) State laws on the following subjects are not inconsistent with the powers of national banks and apply to national banks to the extent that they only incidentally affect the exercise of national bank powers:

(i) Contracts;

(ii) Torts;

(iii) Criminal law;

(iv) Rights to collect debts;

(v) Acquisition and transfer of property;

(vi) Taxation;

(vii) Zoning; and

(viii) Any other law the effect of which the OCC determines to be incidental to the exercise of national bank powers or otherwise consistent with the powers set out in paragraph (a) of this section.

92. Both the deposit taking regulation and the lending regulation specifically preempt a state limitation concerning "disclosure requirements." On the other hand, both those regulations, as well as the general authorized activity regulation, specifically exempt state law governing "torts" and "acquisition and transfer of property." See 12 C.F.R. §§ 7.4007-7.4009.

93. In *Bank of America, N.A. v. City of Daly City*, 279 F. Supp. 2d 1118 (N.D. Cal. 2003), the court held that affiliate information sharing restrictions in local agency financial privacy ordinances are preempted by the Fair Credit Reporting Act, and it was therefore unnecessary to reach the issue of National Bank Act preemption. The court upheld, without discussing the effect of the National Bank Act, local ordinance restrictions on information sharing with nonaffiliated third parties.

In an unpublished case, a federal district court decided that it lacked subject matter jurisdiction to consider a claim that the National Bank Act preempts state invasion of privacy law, because National Bank Act 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).

94. See, e.g., Bank of America v. City and County of San Francisco, 309 F.3d 551 (9th Cir. 2002) (municipal ordinance prohibiting bank from charging ATM fee to nondepositor preempted by National Bank Act and the Home Owners' Loan Act); American Bankers Association v. Lockyer, 239 F. Supp. 2d 1000 (E.D. Cal. 2002) (statute requiring a credit card issuer to provide "minimum payment" warning and

It is too speculative for the Law Revision Commission to predict whether the California Financial Information Privacy Act will be determined to be preempted by the National Bank Act or another federal functional regulatory regime. The state should continue to monitor the situation. If federal preemption effectively renders the California statute a patchwork of enforceability, the Legislature should revisit the policy behind the California statute to determine whether it in fact creates an uneven playing field.

RELATION OF CALIFORNIA FINANCIAL INFORMATION PRIVACY ACT TO OTHER CALIFORNIA STATUTES

The California Financial Information Privacy Act comprehensively treats financial privacy, but it is not the first effort in California to protect consumer financial information. Other statutes narrowly protect specific types of personal information in the hands of various types of financial institutions. Some of the statutes are more protective of consumer privacy than the new law, some less.

The California Financial Information Privacy Act does not include conforming revisions to or repeals of other statutes. It does include provisions that prescribe its relationship with other statutes to some extent. The new law provides expressly that:

- An insurer may combine the California opt-out form with the form required pursuant to the Insurance Information and Privacy Protection Act.[95]
- A financial institution may release nonpublic personal information pursuant to the Elder Abuse and Dependent Adult Civil Protection Act.[96]

The new law provides 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.[97]
- A financial institution may release nonpublic personal information to comply with federal, state, or local laws, rules, and other applicable legal requirements.[98]

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disclosure in monthly bills preempted by National Bank Act, Home Owners' Loan Act, Federal Credit Union Act, and implementing regulations); Wells Fargo Bank v. Boutris, 265 F. Supp. 2d 1162 (E.D. Cal. 2003) (enjoining California Commissioner of Corporations from enforcing California Residential Mortgage Lending Act against national bank's wholly owned real estate lending subsidiary, on the basis that Office of Comptroller of the Currency has exclusive visitorial powers over national banks and their operating subsidiaries).

95. Fin. Code § 4058.7.

96. Fin. Code § 4056(b)(8).

97. Fin. Code § 4056(b)(5). The meaning of this provision is uncertain. It is likely that it is intended only to allow release of information by a financial institution to a federal agency pursuant to federal law.

98. Fin. Code § 4056(b)(7).

- The statute does not affect existing law relating to access by law enforcement agencies to information held by a financial institution.[99]

These provisions do not appear to address a multitude of statutory conflicts under state law.[100] The law should provide clear guidance to financial institutions and consumers concerning their rights and obligations. The Law Revision Commission recommends further revision of the California statutes to clarify their interrelation with the new law.

General Presumption

The Commission does not have the resources to identify and address all statutes that may conflict with the California Financial Information Privacy Act.[101] In addition to facial conflicts among the statutes, more recondite conflicts will surface over time.

General principles of statutory construction provide a mixed message as to which statute will prevail in case of a conflict. The pertinent principles are:[102]

- If statutes appear to conflict, they must be construed, if possible, to give effect to each.
- An earlier enacted specific, special, or local statute prevails over a later enacted general statute unless the context of the later enacted statute indicates otherwise.
- If a statute is a comprehensive revision of the law on a subject, it prevails over previous statutes on the subject, regardless of whether the revision and the previous statutes conflict irreconcilably.

The Commission recommends that, as a matter of principle, in case of a conflict between the California Financial Information Privacy Act and a specific statute, the statute that provides greater privacy protection should prevail. This approach will avoid inadvertent destruction of an important privacy protection in an area that may be particularly sensitive.

The policy favoring greater privacy protection should be implemented by a "weak presumption."[103] Under this approach, the law would declare the public policy in favor of application of the statute that provides greater protection from

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99. Fin. Code § 4056(c).

100. In addition, new potentially conflicting provisions are constantly added to the law. See, e.g., Assembly Bill 664 (Correa), which would regulate disclosure of information sharing practices with respect to information transmitted outside the country.

101. For example, about 1350 statutes contain the word "confidential." Thousands of others deal with "personal information," "privacy," or another relevant concept.

102. See Uniform Statute and Rule Construction Act § 10 (1995). The Comment to the Uniform Act notes that "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."

103. See proposed Fin. Code § 4058.3 *infra*.

disclosure of the consumer's nonpublic personal information, but would not mandate strict adherence to the rule, allowing the courts leeway to consider countervailing policies in the circumstances of a particular case.[104]

A disadvantage of this approach is that it does not provide an absolute rule as guidance to a business or a consumer faced with a conflict. Moreover, even in a case where it is appropriate to apply the general policy, it is not necessarily obvious which of the conflicting statutes provides the greater protection of privacy.[105] The Commission believes that, despite potential problems in applying the standard, some guidance is better than none.

The Commission particularly solicits comment on whether a general constructional preference for greater privacy protection would be helpful.

Major Privacy Statutes Applicable to Private Entities

Innumerable statutes govern disclosure of personal information by a private entity in varying contexts. In each case, it is necessary to determine whether it is intended that the particular statute supersede or be superseded by the California Financial Information Privacy Act, or whether the two supplement each other.

Due to the broad coverage of the new law, two statutes that on the surface do not appear to overlap may in fact conflict. For example, a statute governing medical privacy may overlap the financial privacy statute to the extent that an issue of medical insurance and coverage is involved.

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

The California Financial Information Privacy Act 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.[106] That would include, for example, an attorney.[107]

The law governing a profession may provide some privacy protection for clients, but not to a degree that qualifies that profession for an exemption from the new law. Such a statute should supplement the new law.[108]

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104. 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.

105. For example, one statute may provide greater protection from disclosure of a consumer's personal information, but also include a greater number of exceptions.

106. Fin. Code § 4052(c).

107. 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).

108. See, e.g., Bus. & Prof. Code § 5037 (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). The general opt in and out choices of the new law should apply to the CPA as to any other "financial institution," but in case of a conflict with the special opt in rule of Section 5037, the special rule should continue to apply.

Provisions such as this are too numerous to itemize in a statute, and they are constantly changing. The Commission recommends that a provision be added to the California Financial Information Privacy Act to make clear that it supplements and does not limit the application of 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.[109]

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.[110] 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 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.[111]

These statutes are more protective of consumer privacy than the California Financial Information Privacy Act. They represent a legislative policy determination that tax information is particularly sensitive and deserves the strongest protection. They should not be overridden by the new law.

Nor should they override the new law. They are criminal statutes; the new law provides a civil penalty. The Commission recommends adding a general provision that would preserve a statute that imposes a criminal penalty for disclosure of records or other information concerning a consumer without the consent of the consumer.[112]

The extent to which the Fair Credit Reporting Act's preemption of state affiliate sharing statutes may affect these provisions is unknown. The provisions explicitly prohibit disclosure of information by an entity to any of its subsidiaries or affiliates.[113] If the Fair Credit Reporting Act is construed broadly, the affiliate sharing prohibitions of these statutes may fall.[114] That issue is beyond the scope of this report.[115]

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109. See proposed Fin. Code § 4058.2(a) *infra*.

110. Bus. & Prof. Code § 17530.5.

111. Rev. & Tax. Code §§ 7056.5, 7056.6.

112. See proposed Fin. Code § 4058.2(b) *infra*.

113. See, e.g., Bus. & Prof. Code § 17530.5.

114. It should be noted that the *Bank of America* court seems to distinguish criminal laws, but only if the criminal law does not relate to consumer information: "The Court discerns no intent by Congress that the FCRA preempt State tort and criminal laws unrelated to consumer information." 279 F. Supp. 2d at 1124 n.5.

115. The Commission recommends further study of the matter. See "Conclusion" *infra*.

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.[116] This limitation is qualified by narrowly drawn exceptions.[117] 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.[118]

The Confidentiality of Medical Information Act thus provides greater protection and more specifically tailored provisions than the California Financial Information Privacy Act. It should apply notwithstanding the general provisions of the new law. The Commission recommends addition of clarifying language to the new law that it does not apply to 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.[119]

It should be noted that exemption of an entity from the California Financial Information Privacy Act is not an exemption from the Gramm-Leach-Bliley Act, the Fair Credit Reporting Act, or any other federal or state law. Thus a health care provider or plan is likely to be subjected to one or more bodies of conflicting privacy law, at state and federal levels. That issue is beyond the scope of this report.[120]

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

The Areias Credit Card Full Disclosure Act of 1986 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.[121] The law requires the card issuer to give the cardholder notice and an opt out opportunity.

The type of information disclosure covered by the Areias Act, while narrow in focus, is also the type of information disclosure covered by the California Financial Information Privacy Act. 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 than the new law. Moreover, the Areias Act

116. Civ. Code § 56.10(a).

117. Civ. Code §§ 56.10(b)-56.16, 56.30.

118. Civ. Code §§ 56.27, 56.29.

119. See proposed Fin. Code § 4058.1(a) *infra*.

120. The Commission recommends further study of the matter. See "Conclusion" *infra*.

121. Civ. Code § 1748.12.

is less protective of consumer privacy than the new law, which precludes disclosure to a nonaffiliated third party unless the consumer opts in.[122]

The Commission believes the new law should supersede this special statute. The special statute should be repealed in reliance on the new law.

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.[123] These provisions should override the California Financial Information Privacy Act.[124]

Given the broad exemptions already in the new law that cover identity theft, the Commission does not believe there is a need to refer to individual identity theft statutes. Such a reference could actually be counterproductive. A reference to a specific identify theft statute might be read impliedly to exclude other identity theft statutes not referenced.

The California identity theft disclosure statutes could also run afoul of Fair Credit Reporting Act preemption. That Act includes provisions for release of information by a financial institution for identity theft investigation.[125] The Act specifically preempts state law governing this matter.[126] It is possible that the California identity theft statutes are preempted in whole or part by federal law. However, that determination is beyond the scope of this project.[127]

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122. The Areias Act also acknowledges the preemptive effect of the Fair Credit Reporting Act with respect to affiliate sharing. See Civil Code Section 1748.12(e)(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.

123. 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).

124. The new law exempts 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).

125. Fair Credit Reporting Act § 609(e).

126. "No requirement or prohibition may be imposed under the laws of any State ... with respect to any subject matter regulated under ... section 609(e), relating to information available to victims under section 609(e)." Fair Credit Reporting Act § 625(b)(1)(G).

127. The Commission recommends further study of the matter. See "Conclusion" *infra*.

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,[128] as it is under federal law.[129] The state regulatory scheme should operate independently of, and be unaffected by, the California Financial Information Privacy Act. The Commission recommends addition of a provision stating explicitly that the new law supplements and does not limit the application of the Consumer Credit Reporting Agencies Act.[130]

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

An investigative consumer reporting agency compiles information about consumers for potential employment, insurance, leasing, licensure, and other purposes. The transfer of information to and from an investigative consumer credit reporting agency is subject to strict state and federal controls.

While it is not clear that an investigative consumer reporting agency is a financial institution within the meaning of the California Financial Information Privacy Act, the Commission believes such an interpretation is likely. The regulatory scheme governing such entities[131] should operate independently of, and be unaffected by, the new law. The Commission recommends addition of a provision stating explicitly that the new law supplements and does not limit the application of the Investigative Consumer Reporting Agencies Act.[132]

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

The Rosenthal Fair Debt Collection Practices Act has as its purpose to prohibit a debt collector from engaging in unfair or deceptive acts or practices in the collection of a consumer debt and to require a debtor to act fairly in entering into and honoring a debt. Among the practices prohibited by the Act is communication of information about the debtor and debt with various persons.[133]

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 the general disclosure provisions of the California Financial Information Privacy Act. The Commission recommends that the law make clear that the debt collection provisions are not overridden by the new law.[134]

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128. See Consumer Credit Reporting Agencies Act, Title 1.6 (commencing with Section 1785.1) of Part 4 of Division 3 of the Civil Code.

129. Surprisingly, although the Fair Credit Reporting Act appears to preempt aspects of California law in many areas unrelated to credit reporting, it appears specifically to allow California law to stand on many core issues relating to credit reporting. See, e.g., Fair Credit Reporting Act § 625(b)(1)(F)(ii), (b)(3)(A).

130. See proposed Fin. Code § 4058.2(c) *infra*.

131. Investigative Consumer Reporting Agencies Act, Title 1.6A (commencing with Section 1786) of Part 4 of Division 3 of the Civil Code.

132. See proposed Fin. Code § 4058.2(d) *infra*.

133. Civ. Code § 1788.12.

134. See proposed Fin. Code § 4058.2(e) *infra*.

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 the California Financial Information Privacy Act. 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."[135] It is not clear whether the statutes are more protective of privacy than the California Financial Information Privacy Act or less protective.[136] Given the uncertainty of interpretation, the Commission recommends that it be made clear that the California Financial Information Privacy Act does not affect the social security number statutes.[137]

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

Civil Code Sections 1799-1799.3 are grouped 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 feature 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 intersect with the California Financial Information Privacy Act in different ways. The overlap with respect to booking service providers is complete, since such a provider would be considered a financial institution.[138]

The income tax return provisions involve a substantial overlap with the new law's coverage.[139] The income tax return provisions apply to any person that has obtained a copy of a consumer's income tax return.[140] 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 arena entirely.[141] A merchant engaged in that business would not ordinarily be deemed a financial institution within the meaning of the new law.

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135. Civ. Code § 1798.85.

136. *Cf.* Senate Bill 1822 (Figueroa) (2003-04 Regular Session), as introduced, imposing liability for damages resulting from sale of a social security number, and exempting a sale that is part of a transaction regulated by state or federal law that restricts dissemination of personal identifying information.

137. See proposed Fin. Code § 4058.2(f) *infra*.

138. See Civ. Code §§ 1799-1799.1.

139. Income tax returns are also protected from disclosure by other statutory provisions and by the California Constitution. See, e.g., Fortunato v. Superior Court, 114 Cal. App. 4th 475, 481, 8 Cal. Rptr. 3d 82 (2003).

140. See Civ. Code § 1799.1a.

141. See Civ. Code § 1799.3.

Because these provisions have a broader scope of coverage than the new law, they should continue to operate independently of it. 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. The Commission would make clear that the entire set of provisions is unaffected by the California Financial Information Privacy Act.[142]

It should be noted that the information sharing restrictions in these statutes require the consumer's opt in. In the case of income tax return information, the restriction applies specifically to affiliate sharing.[143] There is a prima facie case for Fair Credit Reporting Act preemption of these provisions to the extent that they seek to regulate affiliate sharing. The extent of Fair Credit Reporting Act preemption of these provisions, particularly as it relates to disclosure of video shop sales and rental information, is beyond the scope of this study.[144]

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

The statute governing the contents of an abstract of judgment requires a significant amount of personal information, 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.[145] The abstract may be recorded to establish a judgment lien.[146]

A number of potential conflicts between the statutes governing recordation of an abstract of judgment and the California Financial Information Privacy Act could be resolved by exemptions found in the new law:

- The Act protects only "nonpublic" personal information, and all information required in the abstract of judgment might be publicly available from one or another source.[147]
- Disclosure is "necessary to effect, administer, or enforce" the transaction.[148]
- Disclosure is authorized as a "securitization" of the transaction.[149]
- Disclosure is "to comply with Federal, State, or local laws, rules, and other applicable legal requirements."[150]

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142. See proposed Fin. Code § 4058.2(g) *infra*.

143. *Cf.* Civ. Code § 1799.1a(c)(1)(A) ("affiliate" means entity that controls, is controlled by, or is under control with, another entity).

144. The Commission recommends further study of the matter. See "Conclusion" *infra*.

145. Code Civ. Proc. § 674.

146. See, e.g., Code Civ. Proc. § 697.310 et seq.

147. *Cf.* Fin. Code § 4052(a) ("nonpublic personal information" defined).

148. Fin. Code § 4052(h).

149. Fin. Code § 4056(b)(1).

150. Fin. Code § 4056(b)(7).

The Commission believes that the new law's 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.[151] Further amendment of the new law is unnecessary.[152]

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.[153]

It is unclear whether the California Financial Information Privacy Act protects a consumer's personal information from discovery under Code of Civil Procedure Section 1985.3. It is likewise unclear whether a consumer's opt in to third party sharing under the new law would constitute a waiver of privacy rights for purposes of Code of Civil Procedure Section 1985.3.

The Commission does not believe a consumer's exercise of privacy rights under the new law should immunize the consumer's financial records from discovery in court proceedings. Nor should a consumer's waiver of rights under the new law for other purposes 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.

The new law permits disclosure of nonpublic personal information to comply with a "subpoena or summons by Federal, State, or local authorities."[154] This provision is sufficiently specific with respect to a government subpoena.

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151. 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).

152. It is arguable 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. It is also possible that another approach is called for to ensure the privacy of a judgment debtor's personal information. But that is beyond the scope of this endeavor to integrate the new law with existing statutes. It should be noted that the Information Practices Act of 1977 specifically exempts an abstract of judgment from its coverage. Civ. Code § 1798.67.

153. See, e.g., Lantz v. Superior Court, 28 Cal. App. 4th 1839, 34 Cal. Rptr. 2d 358 (1994).

154. Fin. Code § 4056(b)(7).

Comparable protection is also necessary to safeguard personal records from an undue invasion of the right to privacy by a private litigation subpoena.[155]

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."[156]

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.[157] These requirements are not waivable, and they override all other statutes except those that make specific reference to them.[158]

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.[159]

Unlike the California Financial Information Privacy Act, this statute affects only one segment of the financial institution spectrum — banks, savings associations, trust companies, industrial loan companies, and credit unions.[160] It dovetails with the new law's exemption for compliance with a "properly authorized" civil, criminal, or regulatory investigation or subpoena or summons by federal, state, or local authorities.[161]

The Commission believes no statutory adjustment is necessary to allow both the California Financial Information Privacy Act and the special requirements of the California Right to Financial Privacy Act to coexist. There is perhaps some confusion in the similarity of their short titles. A cross reference in the new law to the special statute would be informative.[162]

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155. See proposed amendment to Code Civ. Proc. § 1985.4 (subpoena for production of personal records) *infra*.

156. Gov't Code § 7461(c).

157. Gov't Code § 7470.

158. Gov't Code §§ 7490-7491.

159. Gov't Code § 7471.

160. Gov't Code § 7465(a).

161. Fin. Code § 4056(b)(7).

162. See proposed Fin. Code § 4058.2(h) *infra*.

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.[163] The disclosure limitations are extensive and detailed.[164]

In general, the Act requires an opt in for information sharing.[165] Lesser standards apply for specified purposes enumerated in the statute. Those provisions are either consistent with the new law or unique to the insurance context.[166] The remedy for violation of the Act 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.[167]

The Insurance Commissioner has made an effort to reconcile this statute with the Gramm-Leach-Bliley Act in regulations promulgated in 2002.[168] The regulations focus on the privacy notice and information security procedures. The basic disclosure regulation does not attempt any significant reconciliation.[169]

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, and others. Under the California Financial Information Privacy Act an insurer may combine the opt-out form with the form required pursuant to the Insurance Information and Privacy Protection Act.[170]

The Commission proposes no further revisions in this area. The new law already includes integrative provisions for insurance regulations. Unlike the banking and securities industries where federal agencies are the primary regulatory authorities, in the insurance industry the California Insurance Commissioner is the functional regulator. The Insurance Commissioner is in a position to promulgate any necessary regulations or propose any necessary conforming legislation.

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163. See Ins. Code §§ 791-791.27.

164. See Ins. Code § 791.13.

165. Ins. Code § 791.13(a).

166. Particularly noteworthy is Section 791.13(k), which provides an opt out scheme for third party information sharing for marketing purposes.

167. Ins. Code §§ 791.20-791.21.

168. See 10 Cal. Code Regs. § 2689.1 et seq. Under the Gramm-Leach-Bliley Act, the state insurance commissioner, and not a federal authority, is the functional regulator.

169. "Nonpublic personal information shall not be disclosed in a manner not permitted by California law or these regulations." 10 Cal. Code Regs. § 2689.3.

170. See Fin. Code § 4058.7.

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

A guardian or conservator of property would qualify as a financial institution within the meaning of the California Financial Information Privacy Act.[171] 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.[172]

A number of the new law's exceptions could come into play with respect to this filing.[173] The fiduciary should be able to make the statutorily required filing without obtaining the ward's or conservatee's opt in. The Commission does not believe any statutory adjustment is required.

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.[174]

The statute 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. The statute should be amended to include a parallel provision to the effect that enactment of the California Financial Information Privacy Act does not affect the match system.[175]

Privacy Statutes Applicable to 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

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171. There may be a question whether the new law is intended to cover an individual fiduciary, as opposed to a corporate fiduciary, due to the statute's use of the term financial "institution." This does not appear to be a serious concern — the new law expressly states its intent to track Gramm-Leach-Bliley Act definitions, and the Gramm-Leach-Bliley Act makes clear that its coverage extends to individuals as well as artificial persons. See Fin. Code § 4051.5(b)(5) (legislative findings); 16 C.F.R. 313.3(k) ("financial institution" defined).

172. Prob. Code § 2620(d).

173. 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).

174. Rev. & Tax. Code § 19271.6(f).

175. See proposed amendment to Rev. & Tax. Code §19271.6(b) *infra*. This would supplement the new law's general exception for compliance with state laws. Fin. Code § 4056(b)(7).

Information Practices Act of 1977 (limiting state agency collection and dissemination of personal information). There are other more narrowly crafted statutes affecting disclosure of information by public entities that are of some relevance for present purposes.

The California Financial Information Privacy Act regulates disclosure of nonpublic personal information by a "financial institution." It appears the new law could conflict with laws that regulate disclosure of personal information by a public entity.

The definition of a financial institution is broad under the new law[176] — any institution the business of which is engaging in financial activities as described in the Bank Holding Company Act.[177] 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 that they could readily fall within the terms of the definition.[178]

The new law limits disclosure of "nonpublic" personal information.[179] It is arguable that information in the possession of a public entity is necessarily "public" information.[180]

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 a public entity. 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."[181] 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.[182]

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176. See Fin. Code § 4052(c).

177. See 12 U.S.C. § 1843(k).

178. 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.

The new law expressly states its intent to track the Gramm-Leach-Bliley Act definitions. See Fin. Code § 4051.5(b)(5) (legislative findings). The Federal Trade Commission has given as an example of a financial institution for purposes of the Gramm-Leach-Bliley Act, "Government entities that provide financial products such as student loans or mortgages." Federal Trade Commission, *The Gramm-Leach-Bliley Act: Privacy of Consumer Financial Information* (June 18, 2001).

179. Fin. Code § 4052(a) ("nonpublic personal information" defined).

180. Under the new law's 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.

181. Gov't Code § 6250.

182. Gov't Code § 6253(b).

The Public Records Act includes a number of significant exceptions that have relevance for the California Financial Information Privacy Act, such as:

- Personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy.[183]
- Information contained in an application filed with a state agency responsible for regulation or supervision of the issuance of securities or of financial institutions.[184]
- 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.[185]
- Records the disclosure of which is exempted or prohibited pursuant to federal or state law.[186]
- Where the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record.[187]

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.[188]

A significant feature of the Information Practices Act is its similarity in operation to the California Financial Information Privacy Act — it would preclude a state agency from disclosing personal information in its possession without the consent of the person, subject to various exceptions.[189] The Act contains numerous exceptions including, in addition to the Public Records Act, mandates of state and federal laws, law enforcement and regulatory requirements, and 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.[190]

A state agency may not distribute or sell any electronically collected personal information about an individual who communicates with the agency electronically

183. Gov't Code § 6254(c).

184. Gov't Code § 6254(d)(1).

185. Gov't Code § 6254(i).

186. Gov't Code § 6254(k).

187. Gov't Code § 6255(b).

188. 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).

189. Civ. Code § 1798.24.

190. Civ. Code § 1798.60.

without prior written permission from the individual, except as authorized by the Information Practices Act of 1977.[191]

Other State Agency Confidentiality Requirements

State law is peppered with special statutes that protect the confidentiality of personal 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.[192]
- 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.[193]
- Similar confidentiality controls apply to the State Board of Equalization tax assessment information[194] and to sales and use tax return information.[195]

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 the California Financial Information Privacy Act. Although it is not certain that the new law will be construed to cover disclosure of financial information by a state agency, there is a reasonable likelihood that it will be.

The Commission recommends that the matter be settled by adding to the new law a provision exempting the state from its application.[196]

CONCLUSION

The Legislature has directed the Law Revision Commission to study, report on, and prepare recommended legislation concerning the protection of personal information relating to or arising out of financial transactions. The Commission believes that the enactment of the California Financial Information Privacy Act fulfills the major objectives of the Legislature's charge. It provides consumers with notice and an opportunity to protect their personal information, it seeks to

191. Gov't Code § 11015.5.

192. See Corp. Code § 318.

193. Rev. & Tax. Code § 674.

194. Rev. & Tax. Code § 833.

195. Rev. & Tax. Code § 7056.

196. See proposed Fin. Code § 4058.1(b) *infra*.

provide a level playing field for financial institution competition, it is compatible with and seeks to avoid preemption by the Gramm-Leach-Bliley Act and the Fair Credit Reporting Act to the extent practical, and it provides civil penalties for its violation. It does not satisfy all aspects of the legislative directive, but to a great extent that appears to be the result of compromises necessary to obtain its enactment.

While there are clarifications and improvements that could be made, the Commission does not at this time recommend revision of the new law. Experience under it will demonstrate any real problems that need to be addressed.

The most significant threat to the viability of the new law is the potential for federal preemption of some or all of its provisions. That could occur as a result of congressional action to preempt the field, such as the Fair Credit Reporting Act preemption, or by interpretation of an existing regulatory statute such as the National Bank Act.

There is little the state can do to affect federal preemption of the California statute, since that is controlled by federal rather than state law. If federal preemption occurs, the new law should be revised so that it is not in conflict with federal law. However, as of the date of issuance of this report, the extent of federal preemption remains unclear.

The Commission believes that Gramm-Leach-Bliley Act preemption is probably minimal, and no significant adjustment to the California statute is necessary. The Commission believes that Fair Credit Reporting Act preemption is likely to be more substantial, significantly impacting the affiliate sharing provisions of the California statute. However, because of the breadth and ambiguity of the Fair Credit Reporting Act's preemption clause, this interpretation is subject to a high degree of uncertainty. The Commission also believes that there is a potential for significant preemptive effect from the National Bank Act and other federal functional regulatory regimes. That, too, is unclear at present.

The Commission believes that the new law should not be adjusted for federal preemption until the full scope of preemption is clear. At that time, the Legislature should review the consequences of federal preemption and make a determination whether further changes to the California statute are required in order to maintain a level playing field. This approach is not wholly satisfactory, since in the interim the financial services industry will be uncertain whether it must comply with suspect provisions of the California statute.[197] However, the Commission does not recommend adjustment for possible federal preemption at this time.

The Commission does recommend clarification of the interrelation of the California Financial Information Privacy Act with existing state laws affecting financial privacy. It should be clear whether the new law is intended to override

197. The practical options available to a financial institution will be either to challenge the new law in court and get a definitive ruling on preemption, or to comply with the new law even though perhaps not required.

those laws, or whether those laws are intended to remain in effect. Both financial institutions and consumers should know what their rights and duties are in case of a conflict; it should not be necessary to resort to litigation to resolve the matter.

The Commission in this recommendation proposes a number of clarifying revisions. However, due to the broad scope of the new law, the extensive body of existing statutes, and limitations on the Commission's resources, it is not possible to identify and address more than a fraction of the potential conflicts. The Commission has limited this recommendation to the most obvious matters that have come to its attention.

The Commission seeks public comment on the proposed harmonization of conflicting statutes. Nearly every statutory conflict is the result of variant privacy standards between the new law and a special statute relating to privacy in a particular sector of the financial industry. **The Commission particularly solicits comment on the proposed general statutory presumption in favor of greater privacy protection.**

The deadline for this report is January 1, 2005. The Commission's authority to study and report on this subject terminates at that time. This report identifies a number of tasks that need to be done after that date:

- The implementation and operation of the new law should be monitored, and any necessary clarifying or corrective adjustments made.
- The preemptive effect of federal laws should be monitored, and the new law and other affected state statutes adjusted for conformity.[198]
- The body of California statutes should be reviewed for conflicts with the new law and conforming revisions made.[199]

The Commission recommends that its authority be extended beyond January 1, 2005, in order to carry out these tasks. There should be no deadline for completion of these tasks due to the uncertainty of timing on the federal issues. This recommendation assumes provision of adequate resources for this purpose.

The Commission has suffered a major funding and resource reduction over the past several years, and a simultaneous increase in workload, which have hindered the Commission's ability to take on additional projects such as this.[200] The Legislature's original assignment of this project to the Commission was made contingent on provision of adequate funding for it in the state budget.[201] The

198. In this connection, the Commission notes that many California statutes may be subject to Fair Credit Reporting Act preemption, particularly with respect to such matters as credit reporting and identity theft. The Commission has not attempted to analyze and propose conforming revisions to those statutes, primarily because that lies outside the scope of this inquiry. Some statutory cleanup ultimately will need to be done.

199. The Commission in this report addresses some conflicts directly. See "Proposed Legislation" *infra*.

200. See *2003-2004 Annual Report*, 33 Cal. L. Revision Comm'n Reports 569, 595-96 (2003).

201. 2002 Cal. Stat. res. ch. 167. Funding was provided for the first year of this two-year project, but not the second. The Commission completed the project nonetheless, diverting resources from other legislative assignments.

Commission recommends that it be authorized to study and propose resolution of conflicting state and federal statutes that affect financial privacy, contingent on an authorized increase of one staff position, supported by a budget appropriation.[202]

202. See the proposed uncodified statute, "Proposed Legislation" *infra*.

PROPOSED LEGISLATION

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).

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).

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.

(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).

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.

(b) A statute imposing a criminal penalty for disclosure of records or other information concerning a consumer without the consent of the consumer.

(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.

(d) The Investigative Consumer Reporting Agencies Act, Title 1.6A (commencing with Section 1786) of Part 4 of Division 3 of the Civil Code.

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

(f) 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.

(g) Title 1.82 (commencing with Section 1799) of Part 4 of Division 3 of the Civil Code, relating to confidentiality of business records.

(h) 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).

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).

Likewise, a financial institution must comply with provisions of identity theft statutes relating to disclosure of information to victims and to law enforcement authorities to the extent not preempted by federal law. See, e.g., Pen. Code § 530.8; Fin. Code § 4002 (identity theft). See also Section 4056 (transactional exemptions).

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).

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).

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).

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., Fin. Code § 4058.2 (effect on other statutes), Code Civ. Proc. § 1985.4 (subpoena for production of personal records), Rev. & Tax. Code § 19271.6 (financial institution match system); 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.

☞ **Note.** The Commission particularly solicits comment on the proposed general statutory presumption in favor of greater privacy protection.

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).

Uncodified (added). Continuing study and recommendations

(a) The California Law Revision Commission shall study the law governing sharing and disclosure of a consumer's nonpublic personal information by a financial institution and shall from time to time make recommendations to the Governor and Legislature for any revisions of California law necessary for any of the following purposes:

(1) The proper implementation and operation of the California Financial Information Privacy Act, Division 1.2 (commencing with Section 4050) of the Financial Code.

(2) To adjust California statutes to the extent necessary to recognize any federal preemption, and any further revisions necessary to balance the rights and interests of interested persons adversely affected by federal preemption.

(3) To coordinate California statutes with each other.

(b) This section applies only to the extent and so long as the California Law Revision Commission is provided funding and staffing adequate to accomplish the purposes of this section.

(c) The appropriation for the California Law Revision Commission in the 2005-2006 Budget Act is augmented in the amount of $80,000 for the purpose of implementing this section, and the number of positions authorized for the California Law Revision Commission in the 2005-2006 Budget Act is increased by one for the purpose of implementation of this section. It is the intent of the Legislature that this augmentation and increase be continuing.
