

RECEIVED
SUPREME COURT
STATE OF WASHINGTON

2009 AUG -6 P 2:49

BY RONALD R. CARPENTER

NO. 82690-1

CLERK

SUPREME COURT OF THE STATE OF WASHINGTON

AMERIQUEST MORTGAGE COMPANY,

Respondent,

v.

WASHINGTON STATE OFFICE OF THE ATTORNEY GENERAL,

Petitioner.

SUPPLEMENTAL BRIEF OF ATTORNEY GENERAL

ROBERT M. MCKENNA
Attorney General

ALAN D. COPSEY
Deputy Solicitor General
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
360-664-9018

SHANNON E. SMITH
Assistant Attorney General
800 5th Ave., Suite 2000
Seattle, WA 98104-3188
206-892-0093

ORIGINAL

FILED AS
ATTACHMENT TO EMAIL

FILED

AUG 06 2009

CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	ISSUE PRESENTED	2
III.	STATEMENT OF THE CASE	2
IV.	STANDARD OF REVIEW.....	5
V.	ARGUMENT	5
	A. The Gramm-Leach-Bliley Act Does Not Expressly Preempt The Public Records Act.....	5
	B. The Public Records Act Is Not Preempted Because Of Conflict With Gramm-Leach-Bliley Act	9
	C. The AGO’s Subsequent Disclosure Of Nonpublic Information Is Permitted Under the Gramm-Leach-Bliley Act.....	14
	D. The Public Records Act Does Not Mandate Notice To Affected Persons	15
	E. Remand Should Be Limited.....	18
VI.	CONCLUSION	19

TABLE OF AUTHORITIES

Cases

<i>Altria Group, Inc. v. Good</i> , ___ U.S. ___, 129 S. Ct. 538, 172 L. Ed. 2d 398 (2008).....	10
<i>Ameritrust Mortgage Co. v. State Attorney General</i> , 148 Wn. App. 145, 199 P.3d 468 (2009).....	4, 5, 9, 11, 16, 17
<i>C.S. v. United Bank, Inc.</i> , 2009 WL 777643 (S.D.W.Va., Mar. 20, 2009)	6
<i>Crosby v. Nat’l Foreign Trade Coun.</i> , 530 U.S. 363, 120 S. Ct. 2288, 147 L. Ed. 2d 352 (2000).....	9
<i>English v. General Elec. Co.</i> , 496 U.S. 72, 110 S. Ct. 2270, 110 L. Ed. 2d 65 (1990).....	5, 9
<i>Hodes v. U.S. Dep’t of Housing & Urban Dev.</i> , 532 F. Supp. 2d 108 (D.D.C. 2008).....	17, 18
<i>Individual Reference Servs. Group, Inc. v. Fed. Trade Comm’n</i> , 145 F. Supp. 2d 6 (2001), <i>aff’d sub nom. Trans Union LLC v.</i> <i>Fed. Trade Comm’n</i> , 295 F.3d 42 (2002).....	12
<i>McKee v. AT&T Corp.</i> , 164 Wn.2d 372, 191 P.3d 845 (2008).....	5, 9
<i>Medtronic, Inc. v. Lohr</i> , 518 U.S. 470, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996).....	7
<i>Pennsylvania State Univ. v. State Employees’ Retirement Bd.</i> , 594 Pa. 244, 935 A.2d 530 (2007).....	11
<i>Progressive Animal Welfare Soc’y v. Univ. of Wash.</i> , 125 Wn.2d 243, 884 P.2d 592 (1994).....	7, 8, 11, 19
<i>Trans Union LLC v. Fed. Trade Comm’n</i> , 295 F.3d 42 (2002).....	17

<i>Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.</i> , 122 Wn.2d 299, 858 P.2d 1054 (1993).....	8
-------------------------------------------------------------------------------------------------------------------------	---

Statutes

12 U.S.C. § 1843(k).....	17
12 U.S.C. § 1843(k)(4).....	17
15 U.S.C. § 6701(d)(2)(A).....	6
15 U.S.C. § 6715.....	6
15 U.S.C. § 6733.....	6
15 U.S.C. § 6763.....	6
15 U.S.C. §§ 6801-6809.....	1, 2
15 U.S.C. § 6802(a).....	16, 17
15 U.S.C. § 6802(b).....	16, 17
15 U.S.C. § 6802(c).....	10
15 U.S.C. § 6802(e).....	16, 17
15 U.S.C. § 6802(e)(8).....	11, 14, 15
15 U.S.C. § 6804.....	12, 13
15 U.S.C. § 6807.....	5, 6, 7, 8, 9
15 U.S.C. § 6807(a).....	6
15 U.S.C. § 6807(b).....	7
15 U.S.C. § 6809(3).....	17
15 U.S.C. § 6809(4).....	12

15 U.S.C. § 6809(5)	10
RCW 19.86.020	2
RCW 42.56	1, 2, 12
RCW 42.56.070(1).....	10, 11, 14
RCW 42.56.080	3
RCW 42.56.210(1).....	1, 12
RCW 42.56.520	3
RCW 42.56.540	4, 16, 18, 19, 20
RCW 42.56.550	18, 19, 20
RCW 42.56.550(3).....	5, 18

Other Authorities

65 Fed. Reg. 33646 (May 24, 2000)	15, 17
H.R. 1766, 108th Cong. § 3 (2003).....	6
Letter from Donald S. Clark, Secretary of the Federal Trade Commission, to the Hon. Gary D. Preszler, Commissioner, Department of Banking and Financial Institutions, State of North Dakota (June 28, 2001).....	7, 8, 14
Letter from Donald S. Clark, Secretary of the Federal Trade Commission, to the Hon. John P. Burke, Commissioner, Department of Banking, State of Connecticut (June 7, 2002)	8
Letter from Donald S. Clark, Secretary of the Federal Trade Commission, to the Hon. John P. Crowley, Commissioner, Department of Banking, Insurance, Securities, and Health Care Administration, State of Vermont (August 25, 2004)	8

Letter from Donald S. Clark, Secretary of the Federal Trade Commission, to the Hon. Johnn. D. Lorenzo Padron, Commissioner, Office of Banks and Real Estate, State of Illinois (August 25, 2004)	8
--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---

Letter from C. Landis Plummer, Acting Secretary of the Federal Trade Commission, to Albert Gladner, Sr. Vice President and General Counsel of Flagstar Bank, State of Michigan (May 12, 2005)	8
-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---

Regulations

12 C.F.R. § 40.3(n)(2)(i), (p)(1), (p)(3)	13
12 C.F.R. § 40.3(o)(2)(ii)(B)	12
12 C.F.R. § 216.3(n)(2)(i), (p)(1), (p)(3)	13
12 C.F.R. § 216.3(o)(2)(ii)(B)	12
12 C.F.R. § 332.3(n)(2)(i), (p)(1), (p)(3)	13
12 C.F.R. § 332.3(o)(2)(ii)(B)	12
12 C.F.R. § 573.3(n)(2)(i), (p)(1), (p)(3)	13
12 C.F.R. § 573.3(o)(2)(ii)(B)	12
12 C.F.R. § 716.3(q)(2)(i), (s)(1), (s)(3)	13
12 C.F.R. § 716.3(r)(3)(ii)(B)	12
16 C.F.R. § 313.3(k)	17
16 C.F.R. § 313.3(k)(1)	17
16 C.F.R. § 313.3(n)(2)(i)	13
16 C.F.R. § 313.3(o)(2)(ii)(B)	12
16 C.F.R. § 313.3(p)(1)	13

16 C.F.R. § 313.3(p)(3).....	13
16 C.F.R. § 313.3(q)	17
16 C.F.R. § 313.11(a)(1)(iii).....	15
16 C.F.R. § 313.11(c).....	15
16 C.F.R. § 313.15(a)(7).....	17
16 C.F.R. Subpart A.....	17

I. INTRODUCTION

The Office of the Attorney General (AGO) complied with the Public Records Act in responding to a request for records obtained and generated in a Consumer Protection Act investigation into the mortgage lending practices of Ameriquest and two related entities. Having determined that certain records and information were exempt from public disclosure under the Public Records Act, RCW 42.56, the AGO properly disclosed those records from which information was redacted as necessary to protect personal privacy or vital government interests, as provided in RCW 42.56.210(1). Information redacted included nonpublic financial information and nonpublic identifying information of customers in financial records obtained from Ameriquest. The AGO chose not to assert work product privilege as to certain records developed in its investigation.

Ameriquest sought an injunction, arguing that disclosure of the records is prohibited by the privacy provisions in the federal Gramm-Leach-Bliley Act (GLBA), 15 U.S.C. §§ 6801-6809, and that the GLBA preempts the Public Records Act. The trial court denied the injunction, upheld the AGO's disclosure decision under the Public Records Act, and rejected Ameriquest's argument that the AGO had acted arbitrarily and capriciously by disclosing its work product. The court of appeals reversed, holding the GLBA preempts the Public Records Act, and it

remanded for further proceedings. This court accepted review of the preemption issue.

II. ISSUE PRESENTED

On July 7, 2009, this court accepted review of a single issue:

Whether federal law preempts or precludes disclosure of information in the client loan files held by the Office of the Attorney General.

The federal law at issue is the Gramm-Leach-Bliley Act, 15 U.S.C. §§ 6801-6809.¹ The state law at issue is the Public Records Act, RCW 42.56.

III. STATEMENT OF THE CASE

In 2003, the Office of the Attorney General and the state Department of Financial Institutions began an investigation into the mortgage lending practices of Ameriquest and two related entities for possible violation of Washington's Consumer Protection Act, RCW 19.86.020. CP at 164, ¶ 7. The investigation, which was part of a multistate effort, ultimately culminated in a \$325 million settlement between Ameriquest and 49 states and the District of Columbia. CP at 164, ¶ 6. Washington's participation in the settlement was memorialized in a consent judgment filed in King County Superior Court in March 2006.

¹ For the court's convenience, 15 U.S.C. §§ 6801-6809, the privacy provisions in the GLBA, are attached as Appendix A to this brief.

At the AGO's insistence, the consent judgment contained an explicit provision permitting the AGO to comply with the Public Records Act while also allowing Ameriquest notice and opportunity to be heard if the AGO received a request for documents from the investigation. CP at 168.

During its investigation of Ameriquest, the AGO compiled a large number of documents. The documents fall into three broad categories: (1) confidential customer loan files and internal email obtained from Ameriquest; (2) documents provided by third parties, including complaints about Ameriquest filed with the AGO; and (3) documents generated internally by the AGO during its investigation and prosecution of Ameriquest. CP at 164, ¶¶ 7-8. The preemption issue now before this court implicates only a subset of the first category of documents: client loan files the AGO obtained from Ameriquest.

In February 2007, the AGO received a public records request from the Law Offices of Melissa Huelsman for "all records relating to [the] investigation of Ameriquest." CP at 164, ¶ 4. Because of the request's breadth, the AGO immediately contacted the requester to focus the request and set priorities for staged disclosure, as authorized in RCW 42.56.080 and .520. CP at 164, ¶¶ 9-11. Working with the requester, the AGO identified documents to be produced in the initial stage of disclosure; then, consistent with the consent judgment and as authorized in RCW

42.56.540, the AGO notified Ameriquest of the public records request. CP at 165, ¶ 13; 168 Ex. 1; 171 Ex. 2. Ameriquest thereupon filed this action for permanent injunction under RCW 42.56.540 and obtained a stipulated temporary restraining order against disclosure. CP at 4-9; 36-38. Melissa Huelsman intervened in opposition. CP at 149-54.

In preparation for disclosing the requested documents, the AGO redacted personal information from category one documents (confidential customer loan files and internal email), consistent with the privacy provisions of the Public Records Act.² CP at 166, ¶ 20; 179-80 Ex. 5. At the close of the hearing, the trial court directed the AGO to disclose category two documents to the requester. VRP (May 18, 2007) at 53:13-55:17. The AGO did so and also provided the requester with a list describing all remaining documents in its possession that it believed were responsive to the public records request. CP at 166, ¶ 19.

Although the trial court denied Ameriquest's motion for a preliminary injunction, the court of appeals imposed an emergency stay on disclosure of the customer loan files. *Ameriquest Mortgage Co. v. State Attorney General*, 148 Wn. App. 145, 154, ¶ 11, 199 P.3d 468 (2009).

² Information redacted included bank account numbers, Social Security numbers, account balances, dates of birth, bank statements, salary or wage information, driver license numbers, credit scores, and credit reports. Names and addresses were not redacted because they already were a matter of public record for the mortgages at issue in the investigation.

That stay remains in effect pending this court's review. The AGO remains ready to disclose all requested documents, as redacted in compliance with the Public Records Act, as soon as it is permitted to do so by the courts.

IV. STANDARD OF REVIEW

Agency actions taken or challenged under the Public Records Act are reviewed de novo. RCW 42.56.550(3). Whether federal law preempts the Public Records Act also is a question of law reviewed de novo. *McKee v. AT&T Corp.*, 164 Wn.2d 372, 387, ¶ 23, 191 P.3d 845 (2008).

V. ARGUMENT

A. The Gramm-Leach-Bliley Act Does Not Expressly Preempt The Public Records Act

As the court of appeals noted, a state law may be preempted by Congress through express preemption, field preemption, or conflict preemption. *Ameriquest*, 148 Wn. App. at 158, ¶ 23. *Accord English v. General Elec. Co.*, 496 U.S. 72, 78-80, 110 S. Ct. 2270, 110 L. Ed. 2d 65 (1990). The court of appeals held the GLBA expressly preempts the Public Records Act. *Ameriquest*, 148 Wn. App. at 158-59, ¶ 23, 168, ¶ 50. This was error. The GLBA does not expressly preempt state public disclosure laws in general or the Public Records Act specifically.

The court of appeals characterized 15 U.S.C. § 6807 as addressing preemption. *Ameriquest*, 148 Wn. App. at 159, ¶ 25. In fact, § 6807 of

the GLBA is a savings clause for state laws that are not inconsistent with the GLBA's privacy provisions:

[The GLBA's privacy protection provisions] shall not be construed as superseding, altering, or affecting any statute, regulation, order, or interpretation in effect in any State, except to the extent that such statute, regulation, order, or interpretation is inconsistent with the provisions of this subchapter, and then only to the extent of the inconsistency.

15 U.S.C. § 6807(a). This is not express preemption language.³ Until the court of appeals' decision in this case, no court has found this language to expressly preempt any state law.⁴ The language in § 6807(a) leaves open

³ In contrast to § 6807(a), other sections of the GLBA expressly preempt certain state laws. *See, e.g.*, 15 U.S.C. § 6701(d)(2)(A) ("In accordance with the legal standards for preemption set forth in . . . *Barnett Bank of Marion County N.A. v. Nelson*, 517 U.S. 25 (1996), no State may, by statute, regulation, order, interpretation, or other action, prevent or significantly interfere with the ability of a depository institution, or an affiliate thereof, to engage, directly or indirectly, either by itself or in conjunction with an affiliate or any other person, in any insurance sales, solicitation, or crossmarketing activity."). *See also* 15 U.S.C. §§ 6715, 6733, 6763.

At least some members of Congress apparently recognized that 15 U.S.C. § 6807 does not expressly preempt state laws. Legislation was introduced in Congress in 2003 to provide express preemption; it would have rewritten § 6807 as follows: "No requirement or prohibition may be imposed under the law of any State, or any political subdivision of any State, with respect to any subject matter regulated under or addressed by any provision of this subtitle." H.R. 1766, 108th Cong. § 3 (2003) (full text available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_cong_bills&docid=f:h1766ih.txt.pdf) (last visited Aug. 5, 2009). The bill did not pass.

⁴ Apart from the court of appeals decision here, the AGO is aware of only one decision addressing the preemptive effect of § 6807 on a state law. In *C.S. v. United Bank, Inc.*, 2009 WL 777643 (S.D.W.Va., Mar. 20, 2009), plaintiffs brought state law claims against the bank alleging damages resulting from the theft of financial information from the bank. The district court ruled plaintiffs' state law claims were not preempted by the GLBA because § 6807(a) "expressly preserves state statutes, regulations, orders and interpretations that are not inconsistent with the GLBA." *Id.* at *5. In other words, the court read § 6807(a) as a savings clause.

the possibility of conflict preemption, but it does not articulate any sort of express or field preemption.

The Federal Trade Commission, which is charged under 15 U.S.C. § 6807(b) with determining the preemptive effect of § 6807 in the first instance, has found no express preemption in § 6807.⁵ The Commission first addressed the preemptive effect of the GLBA privacy provisions in a letter to North Dakota (North Dakota Ltr.).⁶ The Commission began with the traditional presumption against preemption:

In interpreting Section 507 of the GLB Act, our starting point is traditional preemption jurisprudence, which favors the preservation of state laws. *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654 (1995) (“the starting presumption [is] that Congress does not intend to supplant state law”). . . .

North Dakota Ltr. at 2. *See also Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996) (reiterating presumption against preemption). *Accord Progressive Animal Welfare Soc’y v. Univ.*

⁵ 15 U.S.C. § 6807(b) provides:

For purposes of this section, a State statute, regulation, order, or interpretation is not inconsistent with the provisions of this subchapter if the protection such statute, regulation, order or interpretation affords any person is greater than the protection provided under this subchapter . . . as determined by the Federal Trade Commission

⁶ Letter from Donald S. Clark, Secretary of the Federal Trade Commission, to Hon. Gary D. Preszler, Commissioner, Department of Banking and Financial Institutions, State of North Dakota (June 28, 2001) (available at <http://www.ftc.gov/os/2001/06/northdakotaletter.htm> (last visited August 5, 2009)) (footnote omitted). A copy of this letter is attached as Appendix B to this brief. Ameriquest cited this letter at page 22 of its opening brief.

of Wash., 125 Wn.2d 243, 265, 884 P.2d 592 (1994) (*PAWS*) (“[T]here is a strong presumption against finding preemption in an ambiguous case and the burden of proof is on the party claiming preemption”) (quoting *Washington State Physicians Ins. Exch. & Ass’n v. Fisons Corp.*, 122 Wn.2d 299, 327, 858 P.2d 1054 (1993)).

After summarizing express preemption, field preemption, and conflict preemption, the Commission concluded § 6807 can be analyzed only for conflict preemption:

It is clear that Section 507 of the GLB Act does not expressly preempt all state laws on financial privacy nor does it intend to preempt the field, which are the first two preemption options outlined above in *English*. Here, federal preemption of a state law provision is limited to the third option, conflict preemption, where the state law “conflicts with federal law” or is “inconsistent” with federal law.

North Dakota Ltr. at 3. The Commission has applied conflict preemption analysis in each instance in which it has been asked to address whether the GLBA’s privacy provisions preempt state law, and to date it has never found preemption.⁷

⁷ See North Dakota Ltr. at 4. See also letters to Connecticut in 2002, Illinois in 2004, Vermont in 2004, and Flagstar Bank in 2005 regarding California (available at http://www.ftc.gov/privacy/privacyinitiatives/financial_rule_preemption.html (last visited August 5, 2009)).

B. The Public Records Act Is Not Preempted Because Of Conflict With Gramm-Leach-Bliley Act

The Supreme Court has found conflict preemption “where it is impossible for a private party to comply with both state and federal law” and “where, under the circumstances of [a] particular case, [the challenged state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Crosby v. Nat’l Foreign Trade Coun.*, 530 U.S. 363, 372-73, 120 S. Ct. 2288, 147 L. Ed. 2d 352 (2000) (citations omitted); *English*, 496 U.S. at 79. *Accord McKee*, 164 Wn.2d at 387-88, ¶ 23. Applying these tests and giving effect to the Supreme Court’s presumption against preemption, as noted above, the Federal Trade Commission has not found any state statute addressing the confidentiality of financial information to be inconsistent with § 6807, which would invoke conflict preemption. The Commission has found it possible in each case to comply with both the GLBA and the state law.⁸

In this case, notwithstanding its erroneous conclusion regarding express preemption, the court of appeals appears to have conducted a partial conflict preemption analysis. The court’s analysis proceeded in four steps: (1) The GLBA prohibits a “nonaffiliated third party” from disclosing “nonpublic personal information” to any other person.

⁸ See footnote 7, above.

Ameriquest, 148 Wn. App. at 158, ¶ 21, 160, ¶ 27 (citing 15 U.S.C. § 6802(c)). (2) The GLBA defines “nonaffiliated third party” broadly to include any nonaffiliated entity, not just financial institutions (citing 15 U.S.C. § 6809(5)), so the AGO is a “nonaffiliated third party.” *Id.* at 160-62, ¶¶ 29-31. (3) The AGO therefore cannot publicly disclose any “nonpublic personal information” received from Ameriquest “unless such disclosure would be lawful if made directly” by Ameriquest to the requester. *Id.* at 160, ¶ 27 (citing 15 U.S.C. § 6802(c)). (4) The GLBA therefore directly conflicts with the Public Records Act and preempts it. *Id.* at 162, ¶ 31. It appears that the “conflict” perceived by the court of appeals is its conclusion that the GLBA prohibits disclosure of documents that otherwise would be disclosed under the Public Records Act.

Even if the first three steps of this analysis are correct, the conclusion reached in the fourth step is error. The court failed to address whether it is possible for the AGO to comply with both the GLBA and the Public Records Act. As a matter of law, RCW 42.56.070(1) makes it possible to comply with both statutes and allows the GLBA and the Public Records Act to be harmonized. *See Altria Group, Inc. v. Good*, ___ U.S. ___, 129 S. Ct. 538, 543, 172 L. Ed. 2d 398 (2008) (“[W]hen the text of a pre-emption clause is susceptible of more than one plausible reading,

courts ordinarily ‘accept the reading that disfavors pre-emption.’” (citation omitted)).⁹

RCW 42.56.070(1) requires each agency to “make available for public inspection and copying all public records, unless the record falls within . . . [an] *other statute which exempts or prohibits disclosure of specific information or records.*” (emphasis added). The GLBA’s privacy protection provisions comprise an “other statute” under RCW 42.56.070(1), and the GLBA prohibitions on disclosure therefore are incorporated into the Public Records Act as an exemption from public disclosure. *See PAWS*, 125 Wn.2d at 261.

In this case, the GLBA protects “nonpublic personal information” provided to the AGO by Ameriquest under 15 U.S.C. § 6802(e)(8).¹⁰ The GLBA defines “nonpublic personal information” to include “personally

⁹ The court of appeals dismissed the AGO’s reliance on *Pennsylvania State Univ. v. State Employees’ Retirement Bd.*, 594 Pa. 244, 935 A.2d 530 (2007), stating that information at issue in that case “is not of the same nature as here and cannot realistically be compared to the private loan information” at issue in this case. *Ameriquest*, 148 Wn. App. at 162 n.8. Despite the difference in information, what the Pennsylvania decision does show is how the GLBA can be analyzed as an exception to a state public disclosure act where the act contains an “other statutes” exception. *See Pennsylvania State Univ.*, 594 Pa. at 254. The Pennsylvania decision is relevant to show that the GLBA can be harmonized with a state public disclosure act that contains such an exemption.

¹⁰ Section 6802(e)(8) allows disclosure of nonpublic personal information to comply with Federal, State, or local laws, rules, and other applicable legal requirements; to comply with a properly authorized civil, criminal, or regulatory investigation or subpoena or summons by Federal, State, or local authorities; or to respond to judicial process or government regulatory authorities having jurisdiction over the financial institution for examination, compliance, or other purposes as authorized by law.

identifiable financial information” of a “consumer” that is received or obtained by a financial institution. 15 U.S.C. § 6809(4). Acknowledging such information must be “personally identifiable,” the Federal Trade Commission adopted a regulation specifically excluding “[i]nformation that does not identify a consumer, such as aggregate information or blind data that does not contain personal identifiers such as account numbers, names, or addresses.” 16 C.F.R. § 313.3(o)(2)(ii)(B).¹¹ Identical language is found in the regulations adopted by the other federal agencies named in the GLBA at 15 U.S.C. § 6804.¹² Contrary to Ameritrust’s assertion in its opening brief at pages 25-26, the GLBA, as implemented, allows disclosure of records containing financial information if those records do not contain personal identifiers.

Financial information also may be disclosed if it is publicly available. The implementing regulations define “nonpublic personal information” to exclude “publicly available information” except for

¹¹ Although RCW 42.56.210(1), by its own terms, does not apply to exemptions outside of chapter 42.56, the federal regulation allowing disclosure without personal identifiers is consistent with the requirement in RCW 42.56.210(1) that public records should be disclosed if exempt information can be redacted.

¹² See 12 C.F.R. § 40.3(o)(2)(ii)(B) (Comptroller of the Currency); 12 C.F.R. § 216.3(o)(2)(ii)(B) (Federal Reserve System); 12 C.F.R. § 332.3(o)(2)(ii)(B) (Federal Deposit Insurance Corporation); 12 C.F.R. § 573.3(o)(2)(ii)(B) (Office of Thrift Supervision); 12 C.F.R. § 716.3(r)(3)(ii)(B) (National Credit Union Administration). The regulations adopted under 15 U.S.C. § 6804 were upheld in *Individual Reference Servs. Group, Inc. v. Fed. Trade Comm’n*, 145 F. Supp. 2d 6 (2001), *aff’d sub nom. Trans Union LLC v. Fed. Trade Comm’n*, 295 F.3d 42 (2002).

certain lists compiled from otherwise confidential records. 16 C.F.R. § 313.3(n)(2)(i). “Publicly available information” means information a financial institution has a “reasonable basis to believe is lawfully made available to the general public from: (1) Federal, State or local government records . . . or (iii) Disclosures to the general public that are required to be made by Federal, State, or local law.” 16 C.F.R. § 313.3(p)(1). “Publicly available information” includes information in government real estate records and security interests filings and mortgage information that is recorded as a matter of public record. 16 C.F.R. § 313.3(p)(3).¹³

Under the regulations, therefore, if personal identifiers have been deleted or obliterated in financial information, or if financial information is publicly available from government records, that information is not “nonpublic personal information” under the GLBA.

In the North Dakota Letter, the Federal Trade Commission found no inconsistency between the GLBA and a state statute that directly governed financial institutions, because the state statute exempted a

¹³ Again, identical language is found in the regulations adopted by the other federal agencies named in 15 U.S.C. § 6804. See 12 C.F.R. § 40.3(n)(2)(i), (p)(1), (p)(3); 12 C.F.R. § 216.3(n)(2)(i), (p)(1), (p)(3); 12 C.F.R. § 332.3(n)(2)(i), (p)(1), (p)(3); 12 C.F.R. § 573.3(n)(2)(i), (p)(1), (p)(3); 12 C.F.R. § 716.3(q)(2)(i), (s)(1), (s)(3).

financial institution from its requirements if the institution complied with the GLBA. “[C]ompliance with both federal and state law is clearly possible, and state law does not frustrate the purpose of federal law.” North Dakota Ltr. at 4.

An analogous situation is present here. Through operation of RCW 42.56.070(1), the GLBA’s prohibitions on public disclosure are incorporated into the Public Records Act; the two statutes therefore are not inconsistent and the Public Records Act is not preempted. The court of appeals erred in holding there was a conflict.

C. The AGO’s Subsequent Disclosure Of Nonpublic Information Is Permitted Under the Gramm-Leach-Bliley Act

As just explained, this court need not find preemption to apply the GLBA’s restrictions on the disclosure and use of nonpublic personal information to the disputed documents. Those restrictions may be applied through operation of RCW 42.56.070(1), under which the GLBA, to the extent it prohibits public disclosure of specific records or information, is incorporated as an exemption under the Public Records Act.

There is no dispute that Ameriquest provided “nonpublic personal information” to the AGO in compliance with 15 U.S.C. § 6802(e)(8) during the investigation of Ameriquest’s mortgage lending practices. The issue is whether the AGO complied with the GLBA when it prepared to

disclose the disputed documents with all “nonpublic personal information” redacted. As explained above, the federal regulations implementing the GLBA’s privacy provisions consider the disclosure of such redacted documents not to be the disclosure of “nonpublic personal information.” Moreover, as the Federal Trade Commission explained in adopting its regulations, a nonaffiliated third party receiving nonpublic personal information may redisclose that information pursuant to one of the exceptions in 15 U.S.C. § 6802(e)(8), including the exception allowing disclosure “to comply with Federal, State, or local laws” 65 Fed. Reg. 33646, 33667 (May 24, 2000). *See also* 16 C.F.R. §§ 313.11(a)(1)(iii), 313.11(c). The public disclosure of such information with “nonpublic personal information” redacted therefore complies with the GLBA, and the AGO’s decision to disclose the disputed documents with redactions complied with both the Public Records Act and the GLBA. The court of appeals erred in holding otherwise.

D. The Public Records Act Does Not Mandate Notice To Affected Persons

The court of appeals ordered the trial court on remand to make reasonable provision for notifying Ameriquest customers whose information is at issue and to give them an opportunity to be heard or

intervene. *Ameriquest*, 148 Wn. App. at 168, ¶ 49. The court did not cite any authority for this notice requirement.

No such requirement is found in the Public Records Act. RCW 42.56.540, under which the present action was brought, does not *mandate* notice to any person before public disclosure; rather the plain language of that section makes it *discretionary*: “An agency *has the option* of notifying persons named in the record or to whom a record specifically pertains, that release of a record has been requested.” RCW 42.56.540 (emphasis added).

RCW 42.56.540 acknowledges the possibility that some other law may require an agency to provide notice before disclosure. The only other law at issue in this case is the GLBA. While the GLBA includes specific notice requirements, they are imposed only on financial institutions. A financial institution is prohibited from disclosing a consumer’s nonpublic personal information to a nonaffiliated third party unless it first has provided specified notice to the consumer. 15 U.S.C. § 6802(a). Generally, the consumer must be given an opportunity to opt out of any such disclosure before it can be made. 15 U.S.C. § 6802(b). These notice provisions do not apply, however, where disclosure is made under the exceptions in 15 U.S.C. § 6802(e), which includes the exception under

which Ameriquest provided records to the AGO.¹⁴ Nor do they apply to the AGO, which is not a “financial institution” under the GLBA.¹⁵

The court of appeals did not hold that the AGO is a “financial institution” under the GLBA, nor could it so hold in light of the definition provided in 15 U.S.C. § 6809(3). *See also* 16 C.F.R. § 313.3(k) (defining “financial institution” and giving examples).¹⁶ The notice provisions in 15 U.S.C. § 6802(a) and (b) do not apply to the AGO.¹⁷

¹⁴ *See* footnote 10, above. *See also* 16 C.F.R. § 313.15(a)(7) (notice requirements do not apply when a financial institution discloses nonpublic personal information under an exception in 15 U.S.C. § 6802(e)). As the Commission explained, such disclosures “are exempt from the notice and opt out protections altogether. A customer has no right to prohibit those disclosures or even to know more than that the disclosures are being made ‘as permitted by law.’” 65 Fed. Reg. 33646, 33667 (May 24, 2000).

¹⁵ *See* 16 C.F.R. Subpart A (privacy and opt-out notice requirements imposed on financial institutions). Note also the definition of “you” in 16 C.F.R. § 313.3(q), which includes “financial institution[s]” and excludes “any ‘other person.’”

¹⁶ Both 15 U.S.C. § 6809(3) and 16 C.F.R. § 313.3(k)(1) define “financial institution” as one engaged in “financial activities” as described in 12 U.S.C. § 1843(k). *See especially* 12 U.S.C. § 1843(k)(4), which lists “[a]ctivities that are financial in nature”, none of which are engaged in by the AGO. *See also Trans Union LLC v. Fed. Trade Comm’n*, 295 F.3d 42, 48 (2002) (activities must be “so closely related to banking or managing or controlling banks as to be a proper incident thereto” (quoting 12 U.S.C. § 1843(k)(4)(F))).

¹⁷ Citing *Hodes v. U.S. Dep’t of Housing & Urban Dev.*, 532 F. Supp. 2d 108, 115 (D.D.C. 2008), the court of appeals suggested that if the AGO were not subject to the GLBA’s privacy provisions, it could freely disclose nonpublic consumer information, unbound by the GLBA’s restrictions on the use of that information, thereby rendering the GLBA’s privacy provisions “largely meaningless.” *Ameriquest*, 148 Wn. App. at 161-62, ¶¶ 31-32. The AGO does not now contest the court of appeals’ holding that under the facts of this case it is a nonaffiliated third party subject to the GLBA. *Id.* at 162, ¶ 32. Accordingly, the concern raised by the court of appeals no longer has viability, since the AGO has not and is not proposing to disclose any “nonpublic personal information” and thus is acting in compliance with the GLBA’s privacy protection provisions.

With respect to the GLBA’s notice requirements, moreover, the AGO is readily distinguished from the nonaffiliated third party in *Hodes*: the Government National

Accordingly, there is no authority for the court of appeals to require notice to potentially affected Ameriquest customers before the disputed documents may be publicly disclosed. This court should vacate that requirement imposed by the court of appeals on remand. The AGO agrees, however, that disagreements as to what constitutes “nonpublic personal information” in a particular record properly may be resolved by the trial court in *in camera* review under RCW 42.56.550(3).

E. Remand Should Be Limited

The Public Records Act contemplates a summary procedure for judicial review of an agency determination as to whether requested public records should be disclosed. RCW 42.56.550. On judicial review, the primary question is one of applied law: Do the records or information at issue fall within a statutory exemption from disclosure? That question can be answered with briefing from the parties, supported by affidavits if necessary, and through *in camera* review of the records by the trial court. RCW 42.56.540, .550. Except in extraordinary cases, the pertinent record for judicial review consists only of the public records request, the agency’s response(s) to that request, any other relevant communications between the requester and the agency, and the records themselves. In a motion for

Mortgage Association (Ginnie Mae). Ginnie Mae is a financial institution under the GLBA, as the court noted in dictum. *Hodes*, 532 F. Supp. 2d at 116 n.3.

an injunction under RCW 42.56.540, as here, briefing and affidavits by affected third parties appropriately may be considered.

The court of appeals' decision, by invoking the court's inherent authority to review a claim that disclosure in response to a particular request is arbitrary and capricious, has bypassed the summary procedure provided in the Public Records Act, created a non-statutory judicial exception to disclosure, and disregarded the Public Records Act's strong mandate favoring broad public disclosure. In doing so, and by inviting discovery and additional fact-finding regarding such a claim, the court of appeals erects a procedure that could substantially delay and frustrate public disclosure in the future. As this Court explained in *PAWS*, 125 Wn.2d at 259-60, courts should not be "wielding broad and malleable exemptions" to public disclosure that can be used to "render the carefully crafted exemptions of [the Public Records Act] superfluous."

This court should limit the scope of the remand and provide direction to the trial court as to the procedure, scope, and finality of the summary review provided in RCW 42.56.550.

VI. CONCLUSION

This court should hold (1) the Public Records Act and the Gramm-Leech-Bliley Act can be harmonized and the federal statute does not preempt the Public Records Act; (2) the disputed records may be disclosed

as long as all “nonpublic personal information” is redacted; (3) neither the GLBA nor the Public Records Act mandates the notice to Ameriquest consumers the court of appeals ordered; and (4) remand should be limited to the judicial review process set out in RCW 42.56.540 and .550, including *in camera* review of contested documents as appropriate.

RESPECTFULLY SUBMITTED this 6th day of August, 2009.

ROBERT M. MCKENNA
Attorney General

s/ Alan D. Copsey
Alan D. Copsey, WSBA #23305
Deputy Solicitor General
PO Box 40100
Olympia, WA 98504-0100
(360) 664-9018
alanc@atg.wa.gov

s/ Shannon E. Smith
Shannon E. Smith, WSBA #19077
Assistant Attorney General
800 5th Ave., Suite 2000
Seattle, WA 98104-3188
206-892-0093
shannons@atg.wa.gov

RECEIVED
SUPREME COURT
STATE OF WASHINGTON

2009 AUG -6 P 2:49

CERTIFICATE OF SERVICE

BY RONALD R. CARPENTER

I certify, under penalty of perjury under the laws of the state of

Washington, that on this date I have caused a true and correct copy of
CLERK

Supplemental Brief of Attorney General to be served on the following

parties listed below via e-mail and First Class United States Mail, postage

prepaid:

Erik Price, Esq.
Lane Powell PC
111 Market Street NE, Suite 360
Olympia, Washington 98501-1070
pricee@lanepowell.com
Attorney for Ameriquet Mortgage Company

Joanne N. Davies, Esq.
Buchalter Nemer
18400 Von Karman Avenue, Suite 800
Irvine, California 92612-0514
jdavies@buchalter.com
Attorney for Ameriquet Mortgage Company

Melissa A. Huelsman, Esq.
Law Offices of Melissa A. Huelsman, P.S.
705 Second Avenue, Suite 501
Seattle, Washington 98104
mhuelsman@predatorylendinglaw.com
Attorney for Intervener

William John Crittenden
Attorney at Law
927 N. Northlake Way, Suite 301
Seattle, WA 98103
wjcrittenden@comcast.net
Attorney for WCOG

ORIGINAL

FILED AS
ATTACHMENT TO EMAIL

Patrick D. Brown, J.D., Ph.D.
Seattle University School of Law
Sullivan Hall, Room 410
900 Broadway
Seattle, WA 98122
brownp@seattleu.edu

DATED this 6th day of August, 2009.

s/ Alan D. Copsey
Alan D. Copsey

APPENDIX A

Gramm-Leach-Bliley Act
15 USC, Subchapter I, Sec. 6801-6809
Disclosure of Nonpublic Personal Information

- Sec.**
- 6801. Protection of nonpublic personal information.**
- (a) Privacy obligation policy.
 - (b) Financial institutions safeguards.
- 6802. Obligations with respect to disclosures of personal information.**
- (a) Notice requirements.
 - (b) Opt out.
 - (c) Limits on reuse of information.
 - (d) Limitations on the sharing of account number information for marketing purposes.
 - (e) General exceptions.
- 6803. Disclosure of institution privacy policy.**
- (a) Disclosure required.
 - (b) Information to be included.
- 6804. Rulemaking.**
- (a) Regulatory authority.
 - (b) Authority to grant exceptions.
- 6805. Enforcement.**
- (a) In general.
 - (b) Enforcement of section 6801.
 - (c) Absence of State action.
 - (d) Definitions.
- 6806. Relation to other provisions.**
- 6807. Relation to State laws.**
- (a) In general.
 - (b) Greater protection under State law.
- 6808. Study of information sharing among financial affiliates.**

- (a) In general.
- (b) Consultation.
- (c) Report.

6809. Definitions.

Sec. 6801. Protection of nonpublic personal information

(a) Privacy obligation policy

It is the policy of the Congress 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.

(b) Financial institutions safeguards

In furtherance of the policy in subsection (a) of this section, each agency or authority described in section 6805(a) of this title shall establish appropriate standards for the financial institutions subject to their jurisdiction relating to administrative, technical, and physical safeguards -

- (1) to insure the security and confidentiality of customer records and information;
- (2) to protect against any anticipated threats or hazards to the security or integrity of such records; and
- (3) to protect against unauthorized access to or use of such records or information which could result in substantial harm or inconvenience to any customer.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 6803, 6805 of this title.

NOTE: Pub. L. 106-102, title V, Sec. 510, Nov. 12, 1999, 113 Stat. 1445, provided that: "This subtitle (subtitle A (Sec. 501-510) of title V of Pub. L. 106-102, enacting this subchapter and amending section 1681s of this title) shall take effect 6 months after the date on which rules are required to be prescribed under section 504(a)(3) (15 U.S.C. 6804(a)(3)), except -

"(1) to the extent that a later date is specified in the rules prescribed under section 504; and

"(2) that sections 504 (15 U.S.C. 6804) and 506 (enacting section 6806 of this title and amending section 1681s of this title) shall be effective upon enactment (Nov. 12, 1999)."

Sec. 6802. Obligations with respect to disclosures of personal information

(a) Notice requirements

Except as otherwise provided in this subchapter, a financial institution may not, directly or through any affiliate, disclose to a nonaffiliated third party any nonpublic personal information, unless such financial institution provides or has provided to the consumer a notice that complies with section 6803 of this title.

(b) Opt out

(1) In general

A financial institution may not disclose nonpublic personal information to a nonaffiliated third party unless -

(A) such financial institution clearly and conspicuously discloses to the consumer, in writing or in electronic form or other form permitted by the regulations prescribed under section 6804 of this title, that such information may be disclosed to such third party;

(B) the consumer is given the opportunity, before the time that such information is initially disclosed, to direct that such information not be disclosed to such third party; and

(C) the consumer is given an explanation of how the consumer can exercise that nondisclosure option.

(2) Exception

This subsection shall not prevent a financial institution from providing nonpublic personal information to a nonaffiliated third party to perform services for or functions on behalf of the financial institution, including marketing of the financial institution's own products or services, or financial products or services offered pursuant to joint agreements between two or more financial institutions that comply with the requirements imposed by the regulations prescribed under section 6804 of this title, if the financial institution fully discloses the providing of such information and enters into a contractual agreement with the third party that requires the third party to maintain the confidentiality of such information.

(c) Limits on reuse of information

Except as otherwise provided in this subchapter, a nonaffiliated third party that receives from a financial institution nonpublic personal information under this section shall not, directly or through an affiliate of such receiving third party, disclose such information to any other person that is a nonaffiliated third party

of both the financial institution and such receiving third party, unless such disclosure would be lawful if made directly to such other person by the financial institution.

(d) Limitations on the sharing of account number information for marketing purposes

A financial institution shall not disclose, other than to a consumer reporting agency, an account number or similar form of access number or access code for a credit card account, deposit account, or transaction account of a consumer to any nonaffiliated third party for use in telemarketing, direct mail marketing, or other marketing through electronic mail to the consumer.

(e) General exceptions

Subsections (a) and (b) of this section shall not prohibit the disclosure of nonpublic personal information

(1) as necessary to effect, administer, or enforce a transaction requested or authorized by the consumer, or in connection with -

(A) servicing or processing a financial product or service requested or authorized by the consumer;

(B) maintaining or servicing the consumer's account with the financial institution, or with another entity as part of a private label credit card program or other extension of credit on behalf of such entity; or

(C) a proposed or actual securitization, secondary market sale (including sales of servicing rights), or similar transaction related to a transaction of the consumer;

(2) with the consent or at the direction of the consumer;

(3)(A) to protect the confidentiality or security of the financial institution's records pertaining to the consumer, the service or product, or the transaction therein; (B) to protect against or prevent actual or potential fraud, unauthorized transactions, claims, or other liability; (C) for required institutional risk control, or for resolving customer disputes or inquiries; (D) to persons holding a legal or beneficial interest relating to the consumer; or (E) to persons acting in a fiduciary or representative capacity on behalf of the consumer;

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

(5) to the extent specifically permitted or required under other provisions of law and in

accordance with the Right to Financial Privacy Act of 1978 (12 U.S.C. 3401 et seq.), to law enforcement agencies (including a Federal functional regulator, the Secretary of the Treasury with respect to subchapter II of chapter 53 of title 31, and chapter 2 of title I of Public Law 91-508 (12 U.S.C. 1951-1959), a State insurance authority, or the Federal Trade Commission), self-regulatory organizations, or for an investigation on a matter related to public safety;

(6)(A) to a consumer reporting agency in accordance with the Fair Credit Reporting Act (15 U.S.C. 1681 et seq.), or (B) from a consumer report reported by a consumer reporting agency;

(7) in connection with a proposed or actual sale, merger, transfer, or exchange of all or a portion of a business or operating unit if the disclosure of nonpublic personal information concerns solely consumers of such business or unit; or

(8) to comply with Federal, State, or local laws, rules, and other applicable legal requirements; to comply with a properly authorized civil, criminal, or regulatory investigation or subpoena or summons by Federal, State, or local authorities; or to respond to judicial process or government regulatory authorities having jurisdiction over the financial institution for examination, compliance, or other purposes as authorized by law.

(Pub. L. 106-102, title V, Sec. 502, Nov. 12, 1999, 113 Stat. 1437.)

REFERENCES IN TEXT

This subchapter, referred to in subsecs. (a) and (c), was in the original "this subtitle", meaning subtitle A (Sec. 501 et seq.) of title V of Pub. L. 106-102, Nov. 12, 1999, 113 Stat. 1436, which enacted this subchapter and amended section 1681s of this title.

For complete classification of subtitle A to the Code, see Tables.

The Right to Financial Privacy Act of 1978, referred to in subsec. (e)(5), is title XI of Pub. L. 95-630, Nov. 10, 1978, 92 Stat. 3697, as amended, which is classified generally to chapter 35 (Sec. 3401 et seq.) of Title 12, Banks and Banking. For complete classification of this Act to the Code, see Short Title note set out under section 3401 of Title 12 and Tables.

Chapter 2 of title I of Public Law 91-508, referred to in subsec. (e)(5), is chapter 2 (Sec. 121-129) of title I of Pub. L. 91-508, Oct. 26, 1970, 84 Stat. 1116, which is classified generally to chapter 21 (Sec. 1951 et seq.) of Title 12, Banks and Banking. For complete classification of chapter 2 to the Code, see Tables.

The Fair Credit Reporting Act, referred to in subsec. (e)(6)(A), is title VI of Pub. L. 90-321, as added by Pub. L. 91-508, title VI, Sec. 601, Oct. 26, 1970, 84 Stat. 1127, as amended, which is classified generally to subchapter III (Sec. 1681 et seq.) of chapter 41 of this title. For complete classification of this Act to the Code, see Short Title note set out under section 1601 of this title and Tables.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 6803, 6804, 6809 of this title.

Sec. 6803. Disclosure of institution privacy policy

(a) Disclosure required

At the time of establishing a customer relationship with a consumer and not less than annually during the continuation of such relationship, a financial institution shall provide a clear and conspicuous disclosure to such consumer, in writing or in electronic form or other form permitted by the regulations prescribed under section 6804 of this title, of such financial institution's policies and practices with respect to -

- (1) disclosing nonpublic personal information to affiliates and nonaffiliated third parties, consistent with section 6802 of this title, including the categories of information that may be disclosed;
- (2) disclosing nonpublic personal information of persons who have ceased to be customers of the financial institution; and
- (3) protecting the nonpublic personal information of consumers.

Such disclosures shall be made in accordance with the regulations prescribed under section 6804 of this title.

(b) Information to be included

The disclosure required by subsection (a) of this section shall include -

- (1) the policies and practices of the institution with respect to disclosing nonpublic personal information to nonaffiliated third parties, other than agents of the institution, consistent with section 6802 of this title, and including -

(A) the categories of persons to whom the information is or may be disclosed, other than the persons to whom the information may be provided pursuant to section 6802(e) of this title; and

(B) the policies and practices of the institution with respect to disclosing of nonpublic personal information of persons who have ceased to be customers of the financial institution;

- (2) the categories of nonpublic personal information that are collected by the financial

institution;

(3) the policies that the institution maintains to protect the confidentiality and security of nonpublic personal information in accordance with section 6801 of this title; and

(4) the disclosures required, if any, under section 1681a(d)(2)(A)(iii) of this title.

(Pub. L. 106-102, title V, Sec. 503, Nov. 12, 1999, 113 Stat. 1439.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 6802 of this title.

Sec. 6804. Rulemaking

(a) Regulatory authority

(1) Rulemaking

The Federal banking agencies, the National Credit Union Administration, the Secretary of the Treasury, the Securities and Exchange Commission, and the Federal Trade Commission shall each prescribe, after consultation as appropriate with representatives of State insurance authorities designated by the National Association of Insurance Commissioners, such regulations as may be necessary to carry out the purposes of this subchapter with respect to the financial institutions subject to their jurisdiction under section 6805 of this title.

(2) Coordination, consistency, and comparability

Each of the agencies and authorities required under paragraph (1) to prescribe regulations shall consult and coordinate with the other such agencies and authorities for the purposes of assuring, to the extent possible, that the regulations prescribed by each such agency and authority are consistent and comparable with the regulations prescribed by the other such agencies and authorities.

(3) Procedures and deadline

Such regulations shall be prescribed in accordance with applicable requirements of title 5 and shall be issued in final form not later than 6 months after November 12, 1999.

(b) Authority to grant exceptions

The regulations prescribed under subsection (a) of this section may include such additional exceptions to subsections (a) through (d) of section 6802 of this title as are deemed consistent with the purposes of

this subchapter.

(Pub. L. 106-102, title V, Sec. 504, Nov. 12, 1999, 113 Stat.1439.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 6802, 6803, 6809 of this title.

Sec. 6805. Enforcement

(a) In general

This subchapter and the regulations prescribed thereunder shall be enforced by the Federal functional regulators, the State insurance authorities, and the Federal Trade Commission with respect to financial institutions and other persons subject to their jurisdiction under applicable law, as follows:

(1) Under section 1818 of title 12, in the case of -

(A) national banks, Federal branches and Federal agencies of foreign banks, and any subsidiaries of such entities (except brokers, dealers, persons providing insurance, investment companies, and investment advisers), by the Office of the Comptroller of the Currency;

(B) member banks of the Federal Reserve System (other than national banks), branches and agencies of foreign banks (other than Federal branches, Federal agencies, and insured State branches of foreign banks), commercial lending companies owned or controlled by foreign banks, organizations operating under section 25 or 25A of the Federal Reserve Act (12 U.S.C. 601 et seq., 611 et seq.), and bank holding companies and their nonbank subsidiaries or affiliates (except brokers, dealers, persons providing insurance, investment companies, and investment advisers), by the Board of Governors of the Federal Reserve System;

(C) banks insured by the Federal Deposit Insurance Corporation (other than members of the Federal Reserve System), insured State branches of foreign banks, and any subsidiaries of such entities (except brokers, dealers, persons providing insurance, investment companies, and investment advisers), by the Board of Directors of the Federal Deposit Insurance Corporation; and

(D) savings associations the deposits of which are insured by the Federal Deposit Insurance Corporation, and any subsidiaries of such savings associations (except brokers, dealers, persons providing insurance, investment companies, and investment advisers), by the Director of the Office of Thrift Supervision.

(2) Under the Federal Credit Union Act (12 U.S.C. 1751 et seq.), by the Board of the National Credit Union Administration with respect to any federally insured credit union, and any subsidiaries of such an entity.

(3) Under the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.), by the Securities and Exchange Commission with respect to any broker or dealer.

(4) Under the Investment Company Act of 1940 (15 U.S.C. 80a-1 et seq.), by the Securities and Exchange Commission with respect to investment companies.

(5) Under the Investment Advisers Act of 1940 (15 U.S.C. 80b-1

et seq.), by the Securities and Exchange Commission with respect to investment advisers registered with the Commission under such Act.

(6) Under State insurance law, in the case of any person engaged in providing insurance, by the applicable State insurance authority of the State in which the person is domiciled, subject to section 6701 of this title.

(7) Under the Federal Trade Commission Act (15 U.S.C. 41 et seq.), by the Federal Trade Commission for any other financial institution or other person that is not subject to the jurisdiction of any agency or authority under paragraphs (1) through (6) of this subsection.

(b) Enforcement of section 6801

(1) In general

Except as provided in paragraph (2), the agencies and authorities described in subsection (a) of this section shall implement the standards prescribed under section 6801(b) of this title in the same manner, to the extent practicable, as standards prescribed pursuant to section 1831p-1(a) of title 12 are implemented pursuant to such section.

(2) Exception

The agencies and authorities described in paragraphs (3), (4), (5), (6), and (7) of subsection (a) of this section shall implement the standards prescribed under section 6801 (b) of this title by rule with respect to the financial institutions and other persons subject to their respective jurisdictions under subsection (a) of this section.

(c) Absence of State action

If a State insurance authority fails to adopt regulations to carry out this subchapter, such State shall not be eligible to override, pursuant to section 1831x(g)(2)(B)(iii) of title 12, the insurance customer

protection regulations prescribed by a Federal banking agency under section 1831x(a) of title 12.

(d) Definitions

The terms used in subsection (a)(1) of this section that are not defined in this subchapter or otherwise defined in section 1813(s) of title 12 shall have the same meaning as given in section 3101 of title 12.

(Pub. L. 106-102, title V, Sec. 505, Nov. 12, 1999, 113 Stat. 1440.)

REFERENCES IN TEXT

Section 25 of the Federal Reserve Act, referred to in subsec. (a)(1)(B), is classified to subchapter I (Sec. 601 et seq.) of chapter 6 of Title 12, Banks and Banking. Section 25A of the Federal Reserve Act is classified to subchapter II (Sec. 611 et seq.) of chapter 6 of Title 12.

The Federal Credit Union Act, referred to in subsec. (a)(2), is act June 26, 1934, ch. 750, 48 Stat. 1216, as amended, which is classified generally to chapter 14 (Sec. 1751 et seq.) of Title 12, Banks and Banking. For complete classification of this Act to the Code, see section 1751 of Title 12 and Tables.

The Securities Exchange Act of 1934, referred to in subsec. (a)(3), is act June 6, 1934, ch. 404, 48 Stat. 881, as amended, which is classified principally to chapter 2B (Sec. 78a et seq.) of this title. For complete classification of this Act to the Code, see section 78a of this title and Tables.

The Investment Company Act of 1940, referred to in subsec. (a)(4), is title I of act Aug. 22, 1940, ch. 686, 54 Stat. 789, as amended, which is classified generally to subchapter I (Sec. 80a-1 et seq.) of chapter 2D of this title. For complete classification of this Act to the Code, see section 80a-51 of this title and Tables.

The Investment Advisers Act of 1940, referred to in subsec. (a)(5), is title II of act Aug. 22, 1940, ch. 686, 54 Stat. 847, as amended, which is classified generally to subchapter II (Sec. 80b-1 et seq.) of chapter 2D of this title. For complete classification of this Act to the Code, see section 80b-20 of this title and Tables.

The Federal Trade Commission Act, referred to in subsec. (a)(7), is act Sept. 26, 1914, ch. 311, 38 Stat. 717, as amended, which is classified generally to subchapter I (Sec. 41 et seq.) of chapter 2 of this title. For complete classification of this Act to the Code, see section 58 of this title and Tables.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 6801, 6804, 6807 of this title.

Sec. 6806. Relation to other provisions

Except for the amendments made by subsections (a) and (b), nothing in this chapter shall be construed

to modify, limit, or supersede the operation of the Fair Credit Reporting Act (15 U.S.C. 1681 et seq.), and no inference shall be drawn on the basis of the provisions of this chapter regarding whether information is transaction or experience information under section 603 of such Act (15 U.S.C. 1681a).

(Pub. L. 106-102, title V, Sec. 506(c), Nov. 12, 1999, 113 Stat. 1442.)

REFERENCES IN TEXT

Amendments made by subsections (a) and (b), referred to in text, means amendments made by section 506(a) and (b) of Pub. L. 106-102, which amended section 1681s of this title.

This chapter, referred to in text, was in the original "this title", meaning title V of Pub. L. 106-102, Nov. 12, 1999, 113 Stat. 1436, as amended, which enacted this chapter and amended section 1681s of this title. For complete classification of title V to the Code, see Tables.

The Fair Credit Reporting Act, referred to in text, is title VI of Pub. L. 90-321, as added by Pub. L. 91-508, title VI, Sec. 601, Oct. 26, 1970, 84 Stat. 1127, as amended, which is classified generally to subchapter III (Sec. 1681 et seq.) of chapter 41 of this title. For complete classification of this Act to the Code, see Short Title note set out under section 1601 of this title and Tables.

Sec. 6807. Relation to State laws

(a) In general

This subchapter and the amendments made by this subchapter shall not be construed as superseding, altering, or affecting any statute, regulation, order, or interpretation in effect in any State, except to the extent that such statute, regulation, order, or interpretation is inconsistent with the provisions of this subchapter, and then only to the extent of the inconsistency.

(b) Greater protection under State law

For purposes of this section, a State statute, regulation, order, or interpretation is not inconsistent with the provisions of this subchapter if the protection such statute, regulation, order, or interpretation affords any person is greater than the protection provided under this subchapter and the amendments made by this subchapter, as determined by the Federal Trade Commission, after consultation with the agency or authority with jurisdiction under section 6805(a) of this title of either the person that initiated the complaint or that is the subject of the complaint, on its own motion or upon the petition of any interested party.

(Pub. L. 106-102, title V, Sec. 507, Nov. 12, 1999, 113 Stat. 1442.)

REFERENCES IN TEXT

This subchapter, referred to in text, was in the original "this subtitle", meaning subtitle A (Sec. 501-510)

of title V of Pub. L. 106-102, Nov. 12, 1999, 113 Stat. 1436, which enacted this subchapter and amended section 1681s of this title. For complete classification of subtitle A to the Code, see Tables.

Sec. 6808. Study of information sharing among financial affiliates

(a) In general

The Secretary of the Treasury, in conjunction with the Federal functional regulators and the Federal Trade Commission, shall conduct a study of information sharing practices among financial institutions and their affiliates. Such study shall include -

- (1) the purposes for the sharing of confidential customer information with affiliates or with nonaffiliated third parties;
- (2) the extent and adequacy of security protections for such information;
- (3) the potential risks for customer privacy of such sharing of information;
- (4) the potential benefits for financial institutions and affiliates of such sharing of information;
- (5) the potential benefits for customers of such sharing of information;
- (6) the adequacy of existing laws to protect customer privacy;
- (7) the adequacy of financial institution privacy policy and privacy rights disclosure under existing law;
- (8) the feasibility of different approaches, including opt-out and opt-in, to permit customers to direct that confidential information not be shared with affiliates and nonaffiliated third parties; and
- (9) the feasibility of restricting sharing of information for specific uses or of permitting customers to direct the uses for which information may be shared.

(b) Consultation

The Secretary shall consult with representatives of State insurance authorities designated by the National Association of Insurance Commissioners, and also with financial services industry, consumer organizations and privacy groups, and other representatives of the general public, in formulating and conducting the study required by subsection (a) of this section.

(c) Report

On or before January 1, 2002, the Secretary shall submit a report to the Congress containing the findings and conclusions of the study required under subsection (a) of this section, together with such recommendations for legislative or administrative action as may be appropriate.

(Pub. L. 106-102, title V, Sec. 508, Nov. 12, 1999, 113 Stat.1442.)

Sec. 6809. Definitions

As used in this subchapter:

(1) Federal banking agency

The term "Federal banking agency" has the same meaning as given in section 1813 of title 12.

(2) Federal functional regulator

The term "Federal functional regulator" means -

(A) the Board of Governors of the Federal Reserve System;

(B) the Office of the Comptroller of the Currency;

(C) the Board of Directors of the Federal Deposit Insurance Corporation;

(D) the Director of the Office of Thrift Supervision;

(E) the National Credit Union Administration Board; and

(F) the Securities and Exchange Commission.

(3) Financial institution

(A) In general

The term "financial institution" means any institution the business of which is engaging in financial activities as described in section 1843(k) of title 12.

(B) Persons subject to CFTC regulation

Notwithstanding subparagraph (A), the term "financial institution" does not include any person or entity with respect to any financial activity that is subject to the jurisdiction of the Commodity Futures Trading Commission

under the Commodity Exchange Act (7 U.S.C. 1 et seq.).

(C) Farm credit institutions

Notwithstanding subparagraph (A), the term "financial institution" does not include the Federal Agricultural Mortgage Corporation or any entity chartered and operating under the Farm Credit Act of 1971 (12 U.S.C. 2001 et seq.).

(D) Other secondary market institutions

Notwithstanding subparagraph (A), the term "financial institution" does not include institutions chartered by Congress specifically to engage in transactions described in section 6802(e)(1)(C) of this title, as long as such institutions do not sell or transfer nonpublic personal information to a nonaffiliated third party.

(4) Nonpublic personal information

(A) The term "nonpublic personal information" means personally identifiable financial information -

(i) provided by a consumer to a financial institution;

(ii) resulting from any transaction with the consumer or any service performed for the consumer; or

(iii) otherwise obtained by the financial institution.

(B) Such term does not include publicly available information, as such term is defined by the regulations prescribed under section 6804 of this title.

(C) Notwithstanding subparagraph (B), such term -

(i) shall include any list, description, or other grouping of consumers (and publicly available information pertaining to them) that is derived using any nonpublic personal information other than publicly available information; but

(ii) shall not include any list, description, or other grouping of consumers (and publicly available information pertaining to them) that is derived without using any nonpublic personal information.

(5) Nonaffiliated third party

The term "nonaffiliated third party" means any entity that is not an affiliate of, or related by common ownership or affiliated by corporate control with, the financial institution, but does not include a joint employee of such institution.

(6) Affiliate

The term "affiliate" means any company that controls, is controlled by, or is under common control with another company.

(7) Necessary to effect, administer, or enforce

The term "as necessary to effect, administer, or enforce the transaction" means -

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

(i) providing the consumer or the consumer's agent or broker with a confirmation, statement, or other record of the transaction, or information on the status or value of the financial service or financial product; and

(ii) the accrual or recognition of incentives or bonuses associated with the transaction that are provided by the financial institution or any other party;

(B) the disclosure is required, or is one of the lawful or appropriate methods, to enforce the rights of the financial institution or of other persons engaged in carrying out the financial transaction, or providing the product or service;

(C) the disclosure is required, or is a usual, appropriate, or acceptable method, for insurance underwriting at the consumer's request or for reinsurance purposes, or for any of the following purposes as they relate to a consumer's insurance: Account administration, reporting, investigating, or preventing fraud or material misrepresentation, processing premium payments, processing insurance claims, administering insurance benefits (including utilization review activities), participating in research projects, or as otherwise required or specifically permitted by Federal or State law; or

(D) the disclosure is required, or is a usual, appropriate or acceptable method, in connection with -

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

(ii) the transfer of receivables, accounts or interests therein; or

(iii) the audit of debit, credit or other payment information.

(8) State insurance authority

The term "State insurance authority" means, in the case of any person engaged in providing insurance, the State insurance authority of the State in which the person is domiciled.

(9) Consumer

The term "consumer" means an individual who obtains, from a financial institution, financial products or services which are to be used primarily for personal, family, or household purposes, and also means the legal representative of such an individual.

(10) Joint agreement

The term "joint agreement" means a formal written contract pursuant to which two or more financial institutions jointly offer, endorse, or sponsor a financial product or service, and as may be further defined in the regulations prescribed under section 6804 of this title.

(11) Customer relationship

The term "time of establishing a customer relationship" shall be defined by the regulations prescribed under section 6804 of this title, and shall, in the case of a financial institution engaged in extending credit directly to consumers to finance purchases of goods or services, mean the time of establishing the credit relationship with the consumer.

(Pub. L. 106-102, title V, Sec. 509, Nov. 12, 1999, 113 Stat. 1443.)

REFERENCES IN TEXT

The Commodity Exchange Act, referred to in par. (3)(B), is act Sept. 21, 1922, ch. 369, 42 Stat. 998, as amended, which is classified generally to chapter 1 (Sec. 1 et seq.) of Title 7, Agriculture. For complete

classification of this Act to the Code, see section 1 of Title 7 and Tables.

The Farm Credit Act of 1971, referred to in par. (3)(C), is Pub. L. 92-181, Dec. 10, 1971, 85 Stat. 583, as amended, which is classified generally to chapter 23 (Sec. 2001 et seq.) of Title 12, Banks and Banking. For complete classification of this Act to the Code, see Short Title note set out under section 2001 of Title 12 and Tables.

APPENDIX B

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of the Secretary

June 28, 2001

The Honorable Gary D. Preszler
Commissioner
Department of Banking and Financial Institutions
State of North Dakota
2000 Schafer Street, Suite G
Bismarck, ND 58501-1204

Dear Commissioner Preszler:

This letter responds to your September 12, 2000 petition to the Federal Trade Commission ("Commission") for a determination, under 15 U.S.C. § 6807, whether the North Dakota Disclosure of Customer Information law, N.D. Cent. Code, ch. 6-08.1-01 to 6-08.1-08 (amended 2001) ("the North Dakota statute"), is superseded, altered, or affected by Subtitle A of Title V of the Gramm-Leach-Bliley Act, 15 U.S.C. §§ 6801-6809 ("GLB Act"). You also asked whether North Dakota state-chartered financial institutions must comply with the provisions of state law that are determined to afford any person greater protection than the federal law as well as with GLB Act provisions not addressed under the North Dakota statute. We note that on April 19, 2001 the Governor of North Dakota signed into law significant amendments to the North Dakota statute that will be effective on July 1, 2001. *See* S. Bill 2191, 57th Leg., Reg. Sess. (N.D. 2001). You stated in your letter of April 23, 2001, enclosing a copy of the signed law, that your request for a Commission determination "remains unchanged."

In reaching our determination, in addition to your September 12, 2000 petition and your April 23, 2001 letter, we have also considered information contained in your November 27, 2000 letter to Debra A. Valentine, General Counsel of the Federal Trade Commission, and in the October 30, 2000 letter from North Dakota Assistant Attorney General Scott A. Miller to Ms. Valentine. In addition, the Commission has consulted with the staff of the federal banking agencies, the Securities and Exchange Commission, the National Credit Union Administration, and the Commodity Futures Trading Commission about your petition.

Section 507(a) of the GLB Act, 15 U.S.C. § 6807, preserves a state "statute, regulation, order, or interpretation" that is not "inconsistent" with the provisions of the GLB Act. 15 U.S.C. § 6807(a). Under Section 507(b), a determination that a state law provides "greater protection" to consumer privacy as compared to the federal act deems such statute to be "not inconsistent" with provisions of Subtitle A of Title V, and it is thereby not preempted by that subtitle. 15 U.S.C. § 6807(b). As

discussed below, because the Commission concludes that the North Dakota statute and federal law are not "inconsistent," there is no need to reach the Section 507(b) "greater protection" analysis.

In adopting Section 507, Congress established the privacy protections in the GLB Act as a "floor," or minimum protections for consumer privacy, that could be exceeded by the states. *See* 145 Cong. Rec. S13890 (daily ed. Nov. 4, 1999) (statement of Sen. Rod Grams); 145 Cong. Rec. S13789 (daily ed. Nov. 3, 1999) (statement of Sen. Paul S. Sarbanes). State law provisions that add to the privacy protections in that subtitle will not be preempted by that subtitle. It is commonplace that where federal law does not preempt certain state law provisions, state laws and federal laws that touch on the same subject matter create a "dual regulatory scheme." *Northwest Central Pipeline Corp. v. State Corporation Commission of Kansas*, 489 U.S. 493, 516 (1989).

In enacting Subtitle A of Title V, Congress expressly declared that the intent of the GLB Act privacy provisions is to ensure 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." 15 U.S.C. § 6801(a). To further that objective, Subtitle A of Title V of the GLB Act restricts when a financial institution may disclose a consumer's or a customer's nonpublic personal information to nonaffiliated third parties. Financial institutions are required to provide notices to their customers about their information-sharing practices, and both consumers and customers may "opt out" if they do not want their information shared with nonaffiliated third parties. However, the GLB Act provides specific exceptions whereby a financial institution may share nonpublic personal information with a nonaffiliated third party and the consumer or customer cannot opt out, such as to market the financial institution's own products or services. *See* 15 U.S.C. §§ 6802 (b)(2), (e); 12 C.F.R. §§ 313.13 to 313.15.

The North Dakota statute imposes a duty of confidentiality upon its financial institutions to ensure the protection of "customer information." N.D. Cent. Code, ch. 6-08.1-03. Thus, unless the disclosure falls within one of twelve specific exemptions, N.D. Cent. Code, ch. 6-08.1-02, the North Dakota statute prohibits a financial institution from disclosing such information unless the customer has expressly consented or "opted in." Since you filed your original petition, North Dakota enacted a new exemption to its state confidentiality law. The new exemption excepts from the requirements of the state statute "[a] disclosure of customer information by a financial institution to a nonaffiliated third party, if the disclosure is subject to federal law on the date of disclosure and the financial institution complies with applicable federal law in making the disclosure." *See* S. Bill 2191, Section 2. Thus, a North Dakota financial institution's disclosures of customer information that comply with the GLB Act and its implementing regulations fall within the new exemption.⁽¹⁾

I. The North Dakota statute is not inconsistent with the GLB Act.

A. Traditional preemption principles guide preemption analysis under Section 507 of the GLB Act.

In interpreting Section 507 of the GLB Act, our starting point is traditional preemption jurisprudence, which favors the preservation of state laws. *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654 (1995) ("the starting presumption [is] that Congress does not intend to supplant state law").⁽²⁾ As the Supreme Court has explained:

[S]tate law is pre-empted under the Supremacy Clause, U.S. Const. Art. VI, cl. 2, in three circumstances. First, Congress can define explicitly the extent to which its enactments pre-empt state law. Pre-emption fundamentally is a question of congressional intent, and when Congress has made its intent known through explicit statutory language, the courts' task is an easy one.

Second, in the absence of explicit statutory language, state law is pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively. . . .

Finally, state law is pre-empted to the extent that it actually conflicts with federal law. Thus, the Court has found pre-emption where it is impossible for a private party to comply with both state and federal requirements, or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *English v. General Elec. Co.*, 496 U.S. 72, 78-79 (1990) (citation omitted).

Section 507 of the GLB Act provides:

(a) In General.--This subtitle and the amendments made by this subtitle shall not be construed as superseding, altering, or affecting any statute, regulation, order, or interpretation in effect in any State, except to the extent that such statute, regulation, order, or interpretation is inconsistent with the provisions of this subtitle, and then only to the extent of the inconsistency.

(b) Greater Protection Under State Law. -- For purposes of this section, a State statute, regulation, order, or interpretation is not inconsistent with the provisions of this subtitle if the protection such statute, regulation, order or interpretation affords any person is greater than the protection provided under this subtitle and the amendments made by this subtitle, as determined by the Federal Trade Commission, after consultation with the agency or authority with jurisdiction under section 505(a) of either the person that initiated the complaint or that is the subject of the complaint, on its own motion or upon the petition of any interested party.

15 U.S.C. § 6807; *see also* 16 C.F.R. § 313.17.

It is clear that Section 507 of the GLB Act does not expressly preempt all state laws on financial privacy nor does it intend to preempt the field, which are the first two preemption options outlined above in *English*. Here, federal preemption of a state law provision is limited to the third option, conflict preemption, where the state law "conflicts with federal law" or is "inconsistent" with federal

law.

B. A state law is "inconsistent" under Section 507(a) only (1) if it frustrates the purpose of the federal law or (2) if compliance with both laws is physically impossible.

The U.S. Supreme Court has held through a long line of preemption cases that a finding of inconsistency between state and federal laws must meet a high threshold. One of two specific standards must be met before a state law can be found inconsistent. Federal law will preempt state law if it frustrates the purpose of the federal statutory scheme or if compliance with both the state and federal laws is physically impossible. *See Crosby v. National Foreign Trade Council*, 530 U.S. 363, ___, 120 S.Ct. 2288, 2294 (2000).

The first standard, frustration of purpose, has been defined as "stand[ing] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). This analysis explores whether the state law works at a cross-purpose to or otherwise thwarts the objectives of the federal law.

The second standard -- whether compliance with both the state and federal laws is physically impossible -- requires a showing of "inevitable collision between the [state and federal] schemes of regulation." *See Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 143 (1963). As explained in *Florida Lime* and its progeny, "physical impossibility" is a high standard, reflecting the strong presumption against preemption. Thus, if a state law permits, but does not require, conduct that a federal law prohibits, it is not physically impossible to comply with both statutes. *See California Fed. Savings & Loan Ass'n v. Guerra*, 479 U.S. 272, 291 (1987); *see also Florida Lime*, 373 U.S. at 143. Conversely, if a state law precludes what federal law merely permits but does not require, that state law does not make it physically impossible to comply with federal law. *See Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 218-19 (1983) (declining to preempt California law that imposed conditions, not required under federal law, upon the construction of nuclear power plants).

C. The North Dakota statute is not inconsistent with the GLB Act under Section 507(a) because the state law does not frustrate the purpose of the federal law and compliance by financial institutions with both statutory schemes is possible.

In the present case, under the new exemption, the North Dakota statute exempts a financial institution from the state law requirements if the financial institution complies with the GLB Act. Since compliance with federal law exempts a financial institution from the state law, a North Dakota financial institution is free simply to comply with the federal requirements. Thus, compliance with both federal and state law is clearly possible, and state law does not frustrate the purpose of federal law. Nor do the North Dakota "opt-in" requirements, which come into play if a North Dakota financial institution falls outside the exemption, in this case frustrate the purpose of federal law. The purpose of Title V, Subtitle A, is to ensure 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." 15 U.S.C. § 6801(a). The North Dakota opt-in requirements, if applicable, are consistent with this purpose.⁽³⁾ For these reasons, the North Dakota statute is not "inconsistent" under Section 507(a) and the state law is therefore not superseded, altered, or affected by Subtitle A of Title V of the GLB Act.

D. Since the two laws are not inconsistent, there is no need to consider whether the North Dakota statute provides greater protection under Section 507(b).

The Commission does not need to reach the Section 507(b) "greater protection" analysis unless, as provided in subsection (a), the state and federal laws are inconsistent. As set forth above, the two statutes are not inconsistent. Thus, in accordance with Section 507 and with the Supreme Court's cautious approach to preempting state law, the Commission concludes that the GLB Act does not preempt the North Dakota statute.

II. North Dakota financial institutions must comply with GLB Act privacy provisions since federal law establishes the minimum privacy protections for consumers.

You also inquired whether North Dakota state-chartered financial institutions must comply with GLB Act provisions that are not covered under North Dakota law. Yes, financial institutions must comply with all applicable GLB Act privacy provisions, as those provisions establish a "floor" on the level of privacy protections afforded consumers.

Here, for example, the GLB Act will place new notice and security requirements on all financial institutions (as defined in the GLB Act) in North Dakota. North Dakota law does not require financial institutions to provide notices regarding financial privacy policies to their customers, according to your September 12, 2000 letter. In contrast, the GLB Act requires financial institutions to provide notices to customers not later than when a customer relationship is established and annually thereafter.⁽⁴⁾ 15 U.S.C. § 6803(a); *see also* 16 C.F.R. § 313.4(a). Thus, all financial institutions operating in North Dakota must provide initial and annual notices to customers as required under the GLB Act and must implement the administrative, technical, and physical safeguards to protect the security and confidentiality of customer records and information. *See* 15 U.S.C. §§ 6803, 6801(b). This is so even if these financial institutions do not share nonpublic personal information without the customers' affirmative consent.

In addition, the definition of "financial institution" under the state law appears to be narrower than under the federal statute. *Compare* 15 U.S.C. § 6809(3)(A) *with* N.D. Cent. Code, ch. 6-08.1-01(3).⁽⁵⁾ In Mr. Miller's October 30, 2000 letter, he explained that other than the entities specified in the North Dakota definition of "financial institution" and their affiliates, the scope of entities covered by the North Dakota statute "would most likely be a question of fact." Thus, there may be "financial institutions" as defined in the GLB Act that need not comply with the state law, but must comply with the federal statute.

By direction of the Commission.

Donald S. Clark
Secretary

1. We also note additional privacy provisions in the amended state law, such as privacy protections for "agricultural and commercial accounts." S. Bill 2191, Section 3. Private information that does not relate to an individual's personal, family or household use is not protected under the GLB Act.

2. Federal agency regulations as well as statutes may preempt state law. "The statutorily authorized regulations of an agency will preempt any state or local law that conflicts with such regulations or frustrates the purposes thereof." *City of New York v. FCC*, 486 U.S. 57, 63-64 (1988).

3. In the Commission's opinion, financial institutions that comply with the state law opt-in provisions are deemed to be in compliance with the opt-out provisions in the federal law. Customers of such financial institutions are effectively opted-out by operation of state law. Where financial institutions comply with the opt-in provisions and do not share customer information absent written and express consent, the GLB Act opt-out notice is unnecessary, although, as discussed below, such financial institutions are required to provide privacy notices.

4. The North Dakota amendments changed the definition of "customer" to be congruent with "consumer" under the GLB Act and do not distinguish between these terms as regards a financial institution's obligations. The GLB Act requires financial institutions to provide notices to consumers who are not customers prior to sharing consumers' nonpublic personal information with nonaffiliated third parties. 15 U.S.C. § 6802(a); *see also* 16 C.F.R. § 313.4(a).

5. Under the GLB Act, the definition of "financial institution" includes a broad spectrum of entities that engage in activities that are deemed to be "financial in nature," such as loan brokers, check guaranty services, check cashers, collection agencies and credit bureaus. *See* GLB Act Section 509(3)(A), 15 U.S.C. § 6809(3)(A) (citing section 4(k) of the Bank Holding Company Act (12 U.S.C. § 1843(k)). *See also* 65 Fed. Reg. 33647 (2000). The definition of "financial institution" in N.D. Cent. Code ch. 6-08.1-01(3) is "any organization authorized to do business under state or federal laws relating to financial institutions, including, without limitation, a bank, including the Bank of North Dakota, a savings bank, a trust company, a savings and loan association, or a credit union." This definition would also include affiliates of such financial institutions. *See* Oct. 30, 2000 letter from Assistant Attorney General Scott Miller to Debra A. Valentine.

OFFICE RECEPTIONIST, CLERK

To: Waldron, Becky (ATG); pricee@lanepowell.com; jdavies@buchalter.com;
mhuelsman@predatorylendinglaw.com; wjcrittenden@comcast.net; brownp@seattleu.edu
Cc: Copsey, Alan (ATG)
Subject: RE: Ameriquest Mortg. v. Office of Attorney General, No. 82690-1

Rec. 8-6-09

From: Waldron, Becky (ATG) [mailto:BeckyW@ATG.WA.GOV]
Sent: Thursday, August 06, 2009 2:39 PM
To: OFFICE RECEPTIONIST, CLERK; pricee@lanepowell.com; jdavies@buchalter.com;
mhuelsman@predatorylendinglaw.com; wjcrittenden@comcast.net; brownp@seattleu.edu
Cc: Copsey, Alan (ATG)
Subject: Ameriquest Mortg. v. Office of Attorney General, No. 82690-1
Importance: High

Attached for filing in .pdf format is the Supplemental Brief of Attorney General in *Ameriquest Mortgage Co. v. Washington State Office of the Attorney General*, Cause No. 82690-1. The attorney filing the attached document is Alan Copsey, Deputy Solicitor General, WSBA #23305.

Thank you.