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THE CONSUMER CREDIT REPORTING REFORM ACT: INFORMATION SHARING AND PREEMPTION

JOSEPH L. SEIDEL†

I. INTRODUCTION

The Consumer Credit Reporting Reform Act, enacted October 1, 1996, contains the most comprehensive reform of the Fair Credit Reporting Act (FCRA) since its enactment in 1968. Particularly, newly enacted amendments to the FCRA that became effective October 1, 1997 contain provisions that modify requirements regarding information sharing between affiliated companies and that provide federal preemption of state laws in this area. These new statutory FCRA provisions appear quite broad and would seem on their face to override virtually all relevant state laws. This result provides opportunities for financial companies to create greater synergies among their affiliates by sharing customer information and to take full advantage of technological advancements in seamlessly offering financial products to their customers, including banking, securities and insurance products. As the financial marketplace develops into a national marketplace and evolves even further beyond that to an “Internet” marketplace, the ability to share information among the different affiliates of a company without restriction will be critical. The information sharing provisions of the 1996 law are an important first step that will foster the further development of a national consumer credit market with efficiencies and convenience resulting for financial consumers.

In order to analyze the intent and breadth of these newly enacted provisions, this Article traces their legislative history during the lengthy consideration of the FCRA amendments from 1990 until

their enactment in the Omnibus Consolidated Appropriations Bill in 1996.\(^1\) Then, the Article examines post-enactment developments, Model Privacy legislation passed in several states, as well as Uniform Privacy Guidelines promoted by the banking industry that seek to strike a balance between the consumer benefits from sharing customer information versus customer’s privacy interests.

Based on a review of the legislative history of the new affiliate FCRA information sharing and the preemption provisions, support exists for an aggressive reading of the statute. The final statutory language, on its face, appears to preempt all state laws. Although parts of the early Congressional discussion related to preemption are somewhat unfocused, the later legislative history, beginning with the 103d Congress in 1993, distinctly states a Congressional intent to preempt any state law that may conflict with the federal standard concerning affiliate information sharing. Senate Banking Committee Reports in 1993 and 1995, as well as the 1994 House Banking Committee Report, all appear to support the precept that Congress intended a “national uniform standard” to occupy the field so as to create “a single set of Federal rules [to] promote operational efficiency for industry and competitive prices for consumers.”\(^2\) There was a strong belief by proponents that financial consumers would be the ultimate beneficiary of a more efficient marketplace that could be created through the unrestricted use of customer information within a family of companies.

While the view supporting broad federal preemption of any state law concerning affiliate information sharing by the FCRA has been publicly supported by legal commentators\(^3\) and in public

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\(\text{[T]he revised law preempts all state and local laws (both as to requirements and prohibitions) in a number of important areas for banks. By preemption all such provisions, the amended statute establishes itself as the national uniform standard . . . . It also preempts any state or local law regarding the sharing of information among affiliated companies, such as members of the same holding company family, with the exception of one narrow Vermont law.}\) 

\(\text{Id.}\)
comments, practitioners have been generally taking a cautious view toward applying the new statute. Although the issue has not been litigated to date, it may come up in the near future related to the issue of national bank insurance sales under the decision in *Barnett Bank of Marion County v. Nelson* and also related to state information sharing restrictions that have been enacted post-*Barnett*. Specifically, national banks may be challenging state information sharing restrictions in Rhode Island and Florida using the newly enacted FCRA preemption provisions as a basis.

Part II of this Article briefly outlines the newly enacted statutory provisions of the FCRA passed as part of the 1996 Omnibus Consolidated Appropriations Act. Part III provides a survey of the legislative history of the FCRA amendments related to affiliate information sharing and preemption from the initial introduction of FCRA legislation in 1990 until its enactment in 1996. Part IV describes post-enactment developments related to the implementation of the new FCRA standards. Part V reviews the National Association of Insurance Commissioner’s (NAIC) Insurance Information and Privacy Protection Model Act in relation to the FCRA’s new affiliate information sharing and preemption standards as well as in relation to the McCarran-Ferguson Act (McCarran). Part VI outlines uniform privacy guidelines currently proposed by a group of bank trade associations. Finally, Part VII concludes by stating that the amendments to the FCRA will have a major impact on the consumer credit market and are a key step in fully utilizing today’s technology to benefit financial consumers.

II. NEWLY ENACTED STATUTORY FCRA PROVISIONS

The new FCRA amendments entitled the Consumer Credit Reporting Reform Act of 1996 were passed as subtitle D of the Economic Growth and Regulatory Paperwork Reduction Act of 1996 (EGA) and were contained in the Omnibus Consolidated Appropriations Act, which was enacted on the last day of the 104th Congress. The FCRA provisions were part of a larger bank

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regulatory relief package designed to benefit the financial industry (particularly commercial banks) as a tradeoff for administration proposals to recapitalize the Savings Association Insurance Fund.

As background related to affiliate information sharing, prior to the 1996 bill, there was an open question under the FCRA as to whether information exchanged among affiliated companies was a "credit report" and thereby limited as to its use under the Act. A general concern existed within the financial industry that the Federal Trade Commission (FTC), as the primary interpreter of the Act, would take a restrictive view toward this question. Therefore, in the legislative consideration of FCRA reform, the issue of ensuring that information shared among affiliates was not a credit report became a top priority of the financial industry. As a result, section 2402(e) of the EGA amended section 603(d) of the FCRA dealing with the definition of "credit report." Section 2402(e)(4) of the EGA specifically lists items not considered credit reports.\(^6\) Section 603(d)(2)(A) generally exempts shared information from the statutory duties surrounding the use of a "credit report" in the event that proper disclosures are made and the consumer has the ability to "opt-out" of having the information shared.\(^7\) In addition, the new section 603(d)(2)(A) of the FCRA provides an exclusion for information shared among affiliates. Shared information could

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6. The new section 603(d)(2) provides:

(2)EXCLUSIONS. — The term 'consumer report' does not include —

(A) any —

(i) report containing information solely as to transactions or experiences between the consumer and the person making the report;

(ii) communication of that information among persons related by common ownership or affiliated by corporate control; or

(iii) 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 . . . .


7. As a practical matter, the opportunity for a consumer to "opt-out" of information sharing under the new section 603(d)(2)(A)(iii) of the FCRA could be presented through an additional disclosure and an acknowledgment under the general signature line of an application.
include experience, transactional, application and credit report information.

Section 2411(e) of the EGA amends section 615(b) of the FCRA by inserting a new section 615(b)(2) entitled "Duties of Person Taking Certain Actions Based on Information Provided By Affiliate." This provision generally requires a credit grantor to provide an Equal Credit Opportunity Act type of adverse action notice in cases where an action is taken based on shared information, such as application information. The adverse action notice would not be required if the adverse action was based on experience, transactional or credit report information. In addition, notice would be required, but the reinvestigation requirements of section 615 of the FCRA would not apply.

Finally, section 2419 of the EGA amends the preemption provisions contained in section 624 of the FCRA. The language of

8. The new paragraph states:

(2) DUTIES OF PERSON TAKING CERTAIN ACTIONS BASED ON INFORMATION PROVIDED BY AFFILIATE. —

(A) DUTIES, GENERALLY. — If a person takes an action described in subparagraph (B) with respect to a consumer, based in whole or in part on information described in subparagraph (C), the person shall —

(i) notify the consumer of the action, including a statement that the consumer may obtain the information in accordance with clause (ii) and

(ii) upon a written request from the consumer received within 60 days after the transmittal of the notice required by clause (i), disclose to the consumer the nature of the information upon which the action is based by not later than 30 days after receipt of the request.

(B) ACTION DESCRIBED. — An action referred to in subparagraph (A) is an adverse action described in section 1681a(k)(1)(A), taken in connection with a transaction initiated by the consumer, or any adverse action described in clause (i) or (ii) of section 1681(k)(1)(B).

(C) INFORMATION DESCRIBED. — Information referred to in subparagraph (A) —

(i) except as provided in clause (ii), is information that —

(I) is furnished to the person taking the action by a person related by common ownership or affiliated by common corporate control to the person taking the action; and

(II) bears on the credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living of the consumer; and

(ii) does not include —

(I) information solely as to transactions or experiences between the consumer and the person furnishing the information; or

(II) information in a consumer report.

new section 624(d)\textsuperscript{9} appears broad on its face and would seem to override any state law "with respect to the exchange of information among persons affiliated by common ownership or common corporate control." In addition, the FCRA amendments appear to indicate that preemption would continue past January 1, 2004, unless a state after that date passes a new affiliate information sharing law that expressly states an intent to supplement the federal FCRA and provides greater consumer protection.

The combination of the amendments to the definition of a "credit report" under section 603(d) along with the preemption provision of new section 624(b) appear to give financial companies a powerful new tool in providing services to their customers. Practically speaking, information can now be shared among companies within the same family so that the customer's needs can be optimally served whether the customer needs a deposit product, credit card, mortgage, mutual fund, annuity or other insurance product. The information sharing provisions permit the company to communicate the customer's needs to the full range of affiliated companies, and the preemption provisions are designed to ensure a uniform national marketplace that cannot be impeded by geographic restrictions.

\textsuperscript{9} New section 624(b) states:

(b) . . . No requirement or prohibition may be imposed under the laws of any State . . . .

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(2) with respect to the exchange of information among persons affiliated by common ownership or common corporate control, except that this paragraph shall not apply with respect to subsection (a) or (c)(1) of section 2480e of title 9, Vermont Statutes Annotated (as in effect on the date of enactment of the Consumer Credit Reporting Reform Act of 1996) . . . .

\textit{Id.} § 1681t(b).

The new section 624(d) goes on to state that the preemption provisions do not apply to state laws (i) enacted after January 1, 2004; (ii) that state specifically that they are designed to supplement the federal FCRA; and (iii) that "give greater protection to consumers." \textit{Id.} § 1681t(d).
A. Introduction

FCRA reform took four complete Congresses and close to seven full years (March 1990 to October 1996) to enact. At times FCRA reform was hotly contested and was the subject of some of the closest floor votes in recent Congressional history. The affiliate information sharing and preemption provisions evolved over this time frame and by the end of the process were met with general agreement. The final language of these provisions, after being debated for almost seven years, was quite precise and represented one of the big “wins” in the bill for the financial industry. At the time there was wide-spread agreement that the effect of the provisions was to create a uniform national standard so as to engender a more efficient and responsive consumer credit market. The legislative history below charts the long and sometimes tortuous path taken to get to this welcome, final resting point.

B. 101st Congress (1989-1990)

FCRA Reform legislation (H.R. 4213—the Consumer Credit Protection Amendments of 1990) was originally introduced in March 1990 during the 101st Congress by Representative Lehman (D-CA). Representative Lehman was Chairman of the House Banking Committee’s Consumer Affairs & Coinage Subcommittee with jurisdiction over consumer credit matters. The legislation as introduced was generally opposed by financial industry groups and, after a hearing in June 1990, no further action occurred on the bill. The Lehman bill did not include either affiliate information sharing or preemption provisions. Senator Cranston (D-CA) introduced companion legislation in the Senate, but no action occurred on the bill.

1. Summary

During the 102d Congress, FCRA legislation took a high profile in the House and was filled with controversy as well as procedural anomalies. During this Congress, the affiliate information sharing provisions were first introduced into the FCRA debate. More importantly, protracted battles developed concerning federal preemption. The floor vote of 203 to 207 against an amendment offered by Banking Committee Chairman Gonzalez to strike the preemption provision from the bill was one of the closest votes of the entire Congress. The vote in favor of preemption ultimately caused the House Democratic Leadership to suspend consideration of the bill, effectively killing it for the Congress. Companion legislation was introduced in the Senate, but no action was taken.

2. Congressional Action

During the 102d Congress, FCRA reform legislation took a twisted and contentious path. In October 1991, FCRA reform legislation was re-introduced by new Consumer Affairs Subcommittee Chairman Torres (D-CA). Hearings were held on the bill, and ultimately a Subcommittee mark-up was scheduled for March 1992. During the March 1992 Subcommittee mark-up, amendments related to preemption and affiliate information sharing were first introduced into the FCRA debate. The preemption amendment was far different in scope than the language ultimately enacted into law several years later. The initial amendment likely was intended to preempt only state credit reporting laws or mini-FCRAs. While it is unclear from some of the broad-based rhetoric, there does not appear to be any discussion of the amendment's impact on state laws that were unrelated to credit reporting. In fact, provisions were added to "clarify" that the preemption amendment did not extend to state unfair trade practice acts. Both the affiliate information sharing and preemption amendments were met with
strong opposition by the Democratic Leadership of the Committee, and the issue of preemption engendered strong and emotional debate. The preemption amendment was initially offered by Representatives Barnard (D-GA) and Wylie (R-OH) and involved preemption of all conflicting state FCRA laws. The explanation of the amendment prepared by the Wylie staff expressly stated that "(t)his amendment provides that the Fair Credit Reporting Act preempts conflicting state fair credit reporting laws." This appears to be a limiting explanation of the original preemption amendment, but is consistent with Representative Wylie's position throughout the debate during the 102d Congress. The amendment prevailed at the subcommittee on a nine to seven vote.

Separately, Representative Wylie then offered the affiliate information sharing amendment as the last amendment of the markup. Again, the amendment met with opposition from the Subcommittee Chair and again the amendment prevailed by a ten to six vote.10 The bill was then sent to the full Banking Committee where the preemption provisions became the source of considerable controversy. Representative Gonzalez (D-TX), Chairman of the House Banking Committee, indicated that his top priority was to delete the preemption provision. At the full Committee markup occurring on March 25, 1992, Chairman Gonzalez and Subcommittee Chairman Torres engaged in fierce opposition11 to the preemption provisions. Both Members read the preemption provisions broadly.12

10. During the debate Representative Wylie, the amendment's sponsor, stated: I think I can explain this amendment very quickly and easily by simply reading it. What it does is provide that it is permissible for exchange of information between subsidiaries of a holding company. It would suggest that, if information is obtained in an application from a person who wants credit, that information, as I say, can be exchanged within the subsidiaries of the holding company. It's an attempt to reduce cost, and it cannot be done, though, unless the consumer's consent is given in advance.

Mark-up of H.R. 3596, Before the House Banking Subcomm. on Consumer Affairs & Coinage, 102d Cong. 100 (Mar. 5, 1992).

11. Chairman Gonzalez stated: "[O]ne can put lipstick on a hog, but it is still a pig ... [the preemption amendment] does preempt, the plain reading of this will show, stronger state fair credit laws." Id. at 39.

12. Representative Torres stated: "The subject matter is quite expansive, and it includes the collection, dissemination ... and the furnishing of any information—any information on consumers ... so while [the preemption] amendment does clarify the scope of the
Supporters of preemption initially offered an amendment to clarify the preemption language by providing that the section was not intended to override state unfair or deceptive trade practice acts. This attempt at clarification again implies an amendment that was more limited in scope and tailored directly to overriding state credit reporting statutes, while failing to impact other state laws. Ultimately, this revised form of the preemption provision was preserved, and Chairman Gonzalez’s attempt to delete the provision failed by a twenty-four to twenty-seven vote. Because of this failure, Chairman Gonzalez subsequently suspended the Committee’s consideration of the bill and did not permit the Committee to report the bill to the House floor.

The Banking Committee reconvened on June 18, 1992, to approve the FCRA bill including the preemption amendments. At that time, Chairman Gonzalez again indicated his opposition and broadly described the preemption provisions. The bill was then sent to the House floor under a modified closed rule with the first amendment being an amendment offered by Chairman Gonzalez to strike the bill’s preemption provisions. The amendment was generally opposed by industry groups and supported by both consumer groups and state attorney generals. After a contentious floor fight on the issue, the Gonzalez amendment failed by a 203 to 207 margin. Representative Gonzalez then moved that the House “rise” and suspend further consideration of FCRA reform on the House floor. This procedural development effectively ended Congressional consideration of the issue during the 102d Congress.

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13. Chairman Gonzalez stated:
   In its present form . . . the doors of the state legislatures in effect would be padlocked to prevent consumers, that is our constituents, from seeking additional protection at the state level. It is unbelievable that this committee and the Congress have been called upon to provide a special interest shield for the industry against state consumer protection laws . . . no rational or substantive reason has been put forward to justify taking the states out of the picture.

Mark-up of H.R. 3596, Before the House Banking Comm., 102d Cong., at 7-8 (June 18, 1992).

3. Committee Reports

Pursuant to reporting H.R. 3596, the House Banking Committee issued House Report Number 102-692, outlining the Committee’s views on the legislation. Like most elements of FCRA legislation during the 102d Congress, the Committee Report sparked a certain level of controversy. In particular, an unusual situation had developed such that the Chairmen of the full Committee and the relevant Subcommittee who were charged with preparing the report had lost votes on the major substantive issues involved in the legislation, including votes on preemption and information sharing. This unusual situation led to the rather extraordinary development of the Republican minority filing its own separate section-by-section analysis.\(^5\)

Given this controversy, the Committee Report gives limited additional guidance on the affiliate information sharing and preemption provisions. The Committee Report does give guidance in determining what is a consumer report.\(^6\) While this gives the

\(^{15}\) Representatives Wylie and McCandless of the Minority stated:

In view of that, and as the Ranking Republican of the Banking Committee, and as the Ranking Republican of the Subcommittee on Consumer Affairs who was a co-sponsor of the underlying text which is now H.R. 3596, we felt constrained to call attention to the fact that not all aspects of the ‘Explanation of Legislation’ in an earlier part of this report accurately reflect the intended meaning of the statutory language.

In fact, we are concerned that some sections have been construed in a manner which we believe to be outside of the purpose and intent of the statutory language. In some cases, the explanation is actually inconsistent with provisions as drafted and approved. . . . The issue is that those provisions and other interpretations are far beyond the intention and consensus of the drafters of legislation, and are not consistent with the actions of the Subcommittee on Consumer Affairs and the full Banking Committee.


\(^{16}\) The House Report states:

The Bill excludes from the definition of ‘consumer report’ the sharing of information on a consumer among related entities if the information is comprised solely of transactions of experiences between one of the entities and the consumer. The exclusion covers any communication of such information among related organizations whether the information is transferred directly between two related organizations or is communicated through a third related organization. This exclusion from the definition of the term ‘consumer report’ does not broaden the type of information that is currently exempted from the definition (i.e., transaction or experience with a consumer), but rather
general direction of the Committee’s intent, the provisions of the Report on the disclosures required for affiliate information sharing, specifically the “knowingly” requirement and the concept of a separate disclosure, were disputed by the sponsors of the amendment.17

Related to preemption, the House Report offered a view that the proposed new section would only preempt state FCRA laws directly dealing with the subject of credit reporting. The language of the Report appears to state an intent that only state credit reporting laws, not any other state laws, including insurance privacy laws, would be preempted.18

permits the sharing of that information in a broader range of corporate settings without triggering the conditions governing the sharing of consumer reports.

Additionally, the bill treats information from a credit application as excluded from the definition of ‘consumer report’ where that information is shared among related entities and the consumer has specifically and knowingly consented to that sharing of information. The bill requires that the entity intending to share such information provide the consumer with a clear and conspicuous disclosure indicating that intent. This requirement will be satisfied where the entity provides a separate notice and consent form with the application to be signed by the consumer.

Current interpretation suggests that a report containing information provided on a credit application may not fall within the ‘transaction’ or ‘experience’ exclusion from the definition of consumer report. See United States v. Puntorieri, 379 F. Supp. 332 (E.D.N.Y. 1974); 5 CCH Cons. Cred. Guide ¶11,202 (1971). Thus, under current law an entity that shares application information may be considered a consumer reporting agency. It is the Committee’s intent to permit the sharing of application information among related entities outside of the structures surrounding the furnishing of a consumer report, but only where those entities strictly adhere to the specific conditions in the bill after the effective date of the bill.

Additionally, the bill excludes from the definition of ‘consumer report’ information from a consumer report which is shared among related entities for prescreening activities where (1) the consumer whose report is procured is given a separate, clear and conspicuous notice by the person obtaining the report that the report could be provided to and used by affiliated entities, and (2) the consumer consents in writing to the sharing of the report.


17. See id. at 49-50 (supplemental views of Representative Barnard); see also id. at 51 (supplemental views of Mr. Wylie and Mr. McCandless).

18. The Report stated:

This section provides for the federal preemption of any state law that relates to the subject matter of the FCRA. However, any state may employ or establish state laws to enforce the provisions of the FCRA.
Debate on H.R. 3596 was often confused and inconclusive. There is little beyond Representative Wylie’s initial statement related to affiliate information sharing. Concerning the preemption issue that became the focal point of the legislation, there appears to be at least three theories on the scope of the provision. Representative Barnard, as the primary sponsor of the amendment, believed that its intent was to preempt all conflicting state laws. During debate Representative Barnard often cited the preemption provision of the Fair Charge and Credit Card Disclosure Act as being a model for FCRA preemption.\(^{19}\) Under the credit card legislation, the federal legislation occupied the field related to disclosure, and Representative Barnard produced two Congressional Research Service Memorandums supporting this position.\(^{20}\) Representative Barnard’s clear intent was a broad based preemption provision.\(^{21}\)

Likewise, Representatives Gonzalez and Torres, as major opponents of preemption, offered a broad based view of the scope of the provisions, presumably to dramatize their impact. They continually spoke in terms that implied that the preemption provision overrode all state consumer-protection laws. Only Representative Wylie appeared to state a different view. In attempting to understate the significance of the amendment, Representative Wylie stated,


\[^{21}\] During the House Banking Subcomm. on Consumer Affairs & Coinage, Representative Sanders stated: “But Mr. Barnard, then, what you have just told us — please correct me if I am wrong — is that you have now wiped out all state laws —” and Mr. Barnard responded “That’s true. I don’t deny that.” Mark-up of H.R. 3596, Before the House Banking Subcomm. on Consumer Affairs & Coinage, 102d Cong., at 94 (1992). See also Representative Darden’s House Floor Statement on behalf of Representative Barnard, “The Committee on Banking voted to make these (credit reporting law) protections and duties uniform, and I urge my colleagues to uphold the committee’s bipartisan judgment.” 138 CONG. REC. at H9399 (daily ed. Sept.24, 1992).
"[w]hat the amendment does is preempt conflicting—and I use the word 'conflicting' advisedly—state credit reporting laws." Representative Wylie appeared to carry that view throughout the considerable debate on the bill, and his view is reflected in the Republican section-by-section analysis filed in the Committee Report.

D. 103d Congress (1993-1994)

1. Summary

Congressional activity resumed on FCRA reform during the 103d Congress. The Senate took a far more active role, and legislation was introduced and passed by Senators Bryan (D-NV) and Bond (R-MO). The Senate provisions related to affiliate information sharing and preemption ultimately converged with amendments adopted in the House Banking Committee which led to final compromises on these issues. The form of the federal preemption provision changed from a format designed to override only state credit reporting laws to a format designed to override any state law related to certain operational areas. These operational areas included adverse action notices, prescreening and most importantly, affiliate information sharing. Despite widespread support for the legislative package that ultimately emerged, final passage did not occur during the 103d Congress due to isolated opposition in the Senate.

2. Congressional Action

During the 103d Congress, two parallel tracks for FCRA legislation developed in the House and the Senate ultimately leading to a compromise package that narrowly missed enactment due to last minute opposition. FCRA legislation was initially introduced by new Consumer Affairs & Coinage Chairman Kennedy (D-MA) in February 1993. H.R. 1015, as introduced, was a substantial revision of legislation considered in the previous Congress. In particular, Representative Kennedy had removed both affiliate information sharing and preemption provisions from the bill. Companion legislation (S.783) was introduced in the Senate by Senator Bryan in
April 1993 and hearings were held in the Senate Banking Committee in May 1993.

The Senate Banking Committee initially marked up the bill on October 28, 1993, and ordered reported legislation, which included affiliate information sharing as well as preemption provisions, by a vote of fifteen to four. Unlike the controversial House bill of the previous Congress, the preemption provisions added by the Senate Banking Committee focused on operational concerns and were designed to occupy the field in these specific areas. The previous House preemption amendment was broad and applied only to state credit reporting laws. The 1993 Senate preemption amendment focused specifically on occupying the field related to several operational concerns of credit grantors, including affiliate information sharing, and the language was far more precise toward these areas. Unlike the 1992 House bill that focused simply on state credit reporting laws, the 1993 Senate bill, as passed by the Senate Banking Committee, expressly stated that "[n]o 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." Beginning with the 1993 Senate Banking mark-up, this construction became the standard form for affiliate information sharing preemption in all subsequent FCRA legislative efforts.

Motivated by Senate Committee action, the House Consumer Affairs & Coinage Subcommittee proceeded to mark-up its version of the legislation on November 19, 1993. Unlike the Senate, House consideration remained contentious, and Subcommittee amendments to the Kennedy bill dealing with both affiliate information sharing and preemption were withdrawn when faced with defeat.

The full House Banking Committee took up the bill on February 9, 1994. At the full Committee mark-up, an amendment offered by Representatives Dooley (D-CA), Baker (R-LA) and McCollum (R-FL) authorizing affiliate information sharing was passed by a thirty to nineteen vote. During the Committee mark-up

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23. 140 CONG. REC. at S4971 (daily ed. May 2, 1994).
session, the sponsors indicated a broad based intent behind the information sharing provisions.\textsuperscript{24} Subsequently, a preemption amendment modeled on the Senate provision was adopted by voice vote. Importantly, Representative Kennedy sought to offer an amendment to expressly exclude affiliate information sharing from the preemption provisions. Opponents remarked that the whole purpose of the Kennedy amendment was to limit affiliate information sharing.\textsuperscript{25} The amendment met with considerable opposition and the Committee rejected the amendment on a voice vote. After considerable procedural rancor, the bill was then reported from the Committee on a twenty-nine to twenty party line vote on March 3, 1994.

The full Senate took up FCRA reform on May 4, 1994. With limited discussion, the Senate passed a manager's amendment that left the affiliate information sharing provisions intact, but sunset the preemption provision after six years. The Senate then passed S.783 by an eighty-seven to ten bipartisan vote. The size and bipartisan nature of the Senate vote effectively broke the logjam related to the

\textsuperscript{24} Representative Dooley, the primary sponsor, stated:

This amendment builds on the manager's amendment, which would allow subsidiaries to share experience information with each other, as well as information from a consumer's credit application, providing that sharing is clearly and conspicuously disclosed to the consumer and the consumer consents by signing and returning the application form to establish their own credit bureaus and that if any information is shared outside the affiliated entities, the entities would then be defined as a credit reporting agency, subject to the provisions of the Fair Credit Reporting Act.

Mark-up of the Fair Credit Reporting Act, Before the House Banking Comm., 103d Cong. 195-96 (Feb. 9, 1994); see also id. at 197-98 (statements of Representatives Baker and McCollum).

Representative Bereuter (R-NE) in offering perfecting amendments to the information sharing provisions stated:

The affiliate amendment is offered, it seems to me, largely because we want not to treat the affiliate corporate organization differently than from a bank that decides not to go to the affiliate structure. Now, any bank that opts not to go to the affiliate structure can share information freely from department to department under existing law. But if a bank decides to adopt an affiliate kind of structure, a bank holding company, then unless we adopt this legislation, we're saying that they cannot do what a bank under a different corporate structure has the ability to do and is doing today.

Id. at 208.

\textsuperscript{25} See Mark-up of the Fair Credit Reporting Act, Before the House Banking Comm., 103d Cong. 231 (statements of Representatives Dooley and Baker).
bill in the House. A compromise package set the preemption period at eight years. The package revised the information sharing provisions which provided that affiliated entities taking an “adverse action” based on shared information were required to provide a consumer with an Equal Credit Opportunity Act type of adverse action notice and with an opportunity to request the nature of the information shared. The House passed the compromise FCRA bill on June 14, 1994 by a voice vote.

Over the course of the summer of 1994, the respective House and Senate Banking Committees were consumed with Interstate Branching and Community Development legislation, as well as the “Whitewater” hearings. Discussions to reconcile the relatively minimal differences between the House and Senate bill did not occur until September 1994. At that point, a global agreement was reached, and the affiliate information sharing provisions were only slightly modified from the House and Senate bills. The preemption time period was set at eight years, but the text of the provision remained unchanged as it applied to affiliate information sharing. The House then passed this package twice by voice vote, on September 27, 1994, and on October 5, 1994. However, due to

26. See Memorandum to Republican Members of the House Banking Committee from the Minority Staff (June 9, 1994).

27. On the House floor, Representative Kennedy, the Subcommittee Chairman with jurisdiction, described the package by stating:

This legislation does not only benefit consumers. It also benefits credit bureaus and credit grantors. In the areas of prescreening and information-sharing among affiliates, it extends new liberties to industry. Hopefully, those liberties will result in new credit opportunities for consumers. The bill also carefully ensures that grantors will not be the subject of frivolous lawsuits.

In addition, H.R. 1015 gives industry an 8-year federal preemption of State laws. This compromise provision is the product of a careful effort to balance industry’s desire for nationwide uniformity with States’ vital interest in protecting their citizens. As many of my colleagues are aware, this has been a contentious issue for quite some time, and has impeded the progress of this bill in the past. I would have preferred that there be no Federal preemption in this bill. Federal law usually sets a floor, not a ceiling, for consumer protection-allowing States to adopt added measures to protect their citizens. I see no reason to depart from this precedent. Nevertheless, the 8-year preemption mandated by this will test the viability of a uniform national standard. If after 8 years the Federal law is not adequately protecting consumers, then I would expect States to step in once again and do the job.

isolated Senate opposition related to the civil liability provisions, the bill died in the Senate.

3. Committee Reports

Senate Report 103-209 filed on December 9, 1993 contains several items relating to affiliate information sharing and preemption. Given the fact that the 1993 Senate Banking Committee bill formed the underlying basis for the ultimate compromise legislation, this Report should be given great weight in determining Congressional intent.28

The section-by-section analysis of the Senate bill provides the clearest statement of the interaction of the preemption provision and the affiliate information sharing section.29 The preemption of "any
state law” evidences a clear Congressional intent to federally occupy the field. The operational concerns that Congress was seeking to address could only be met by a single uniform federal standard designed to supersede any conflicting state laws. The companion House Report for the legislation was filed on April 28, 1994. The House Report does not cover much new ground related to affiliate information sharing or preemption.

this manner; and (2) that the consumer does not prohibit such sharing of information in writing . . . . The Committee also intends that the consumer’s election to prohibit such sharing will not be a factor in the consideration of the application.

Finally, the Committee bill provides that the definition of ‘consumer report’ does not include information from a consumer report which is shared among related entities in connection with a credit or insurance transaction not initiated by the consumer, if prior to the sharing of the information, one of the affiliated entities clearly and conspicuously disclosed to the consumer the fact that the information might be shared with affiliates, and the consumer consents in writing to the sharing of the information.

Id. at 8.

Related to the preemption provisions, the Senate Committee Report provides: Recognizing the national scope of the consumer reporting industry and the benefits of uniformity, the Committee bill includes provisions preempting state law in several key areas of the FCRA. The bill provides preemption for the sections involving sharing of information among affiliates and prescreening.

Id. at 7.

30. Section 116 provides for the Federal preemption of any state law that relates to the following provisions of the FCRA:

2. Affiliate sharing:

Section 116 preempts any state law related to the exchange of information among persons affiliated by common ownership or common corporate control. The Committee intends that this provision will be applied to the modifications made by section 101 of the Committee bill which amends section 603 of the FCRA pertaining to exclusions from the definition of consumer report that permit, subject to certain restrictions, the sharing of information among affiliates.

Id. at 27-28.

31. The most relevant passage states:

Section 624, as amended by section 120 of the bill, also preempts any state law relating to . . . the exchange of information among persons affiliated by common ownership or common corporate control. The Committee intends that the provision regarding the exchange of information among affiliates will be applied to the modifications made [by] section 102(e) of the bill to section 603(d) and section 615(d)(4) of the FCRA.


Compared to prior Congresses, there was much less activity related to FCRA reform during the 104th Congress. With the change in political control of Congress, the FCRA legislation was a much lower priority, particularly in the House. While bills were introduced in the House, the House Banking Committee had no hearings or mark-ups of legislation. In the Senate the compromise legislative package from the 103d Congress was included as an amendment to a Regulatory Relief bill in the Senate Banking Committee during late 1995. Ultimately, the regulatory relief package was included in the massive Omnibus Consolidated Appropriations Act on the last day of the Congress in October, 1996, with virtually no debate.

The only legislative history on the package from the 104th Congress was the Senate Banking Report on the Regulatory Relief bill, S. Rep. No. 104-185, filed on December 14, 1995. The Senate Banking Report seems to fully capture Congressional intent behind the legislation.  

32 The bill was designed to create a uniform federal

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32 The most relevant part of the Senate Report states:

(S)ection 624 preempts any state or local law with respect to the exchange of information among affiliated person and preempts any state or local law with respect to the form and content of any disclosures required to be made under section 609(c). Finally, section 624 preempts any state or local law relating to section 623(b)(2), except that such preemption does not apply to any state law in effect on the date of enactment of this Act.

By preempting state and local provisions relating to the subject matter regulated by these provisions of the FCRA, section 624 establishes the FCRA as the national uniform standard in these areas. This section recognizes the fact that credit reporting and credit granting are, in many aspects, national in scope, and that a single set of Federal rules promotes operational efficiency for industry, and competitive prices for consumers. However, section 624 does not supersede any settlement, agreement, or consent judgment between any state attorney general and any consumer reporting agency in effect on the date of enactment of this Act, and does not supersede any provision of state law which is enacted after January 1, 2004, states explicitly that the provision is intended to supplement this Act, and gives greater protection to consumer than is provided under this Act.


In addition, on the Senate floor, Senator Bond stated:

This bill also contains limited Federal preemption to ensure that there are uniform Federal standards to govern a number of procedural issues which are part of credit reporting and which will reduce the burdens on the credit industry from having to comply with a variety of different
standard to occupy the field in key operational areas such as information sharing. This creation of a uniform federal standard was done to bring operational efficiency for industry and competitive prices for financial consumers.

IV. DEVELOPMENTS POST-ENACTMENT

In the time since the enactment of the FCRA reform legislation, there have been certain developments related to state statutes and regulations, one in Rhode Island and another in Florida, that both deal with state insurance laws. The ultimate result of both of these situations may help define the practical effect of the FCRA preemption provisions.

First, the State of Rhode Island enacted the Financial Institution Insurance Sales Act designed to regulate the insurance activities of banks in the state after the Barnett decision. Section 10 of the Act expressly prohibits “financial institutions from using or disclosing certain customer information for the purpose of selling or soliciting insurance.”33 The Rhode Island state statute was immediately challenged by bank trade associations as being contrary to 12 U.S.C. § 92 and the OCC was petitioned to preempt the law.

The OCC filed a request for comment dated December 16, 1997, in the Federal Register34 and reopened the comment period on March 11, 1997.35 As part of the extended comment period, the OCC asked the specific question: “[W]hat effect do recent amendments to the FCRA have on the FIISA provision limiting the ability of a bank to use its customer information to solicit and sell insurance?” It is speculated that the OCC could preempt section 10 of the Rhode Island law, not on 12 U.S.C. § 92 or Barnett grounds, but due to the FCRA’s affiliate information sharing preemption provisions under section 624. MasterCard and Visa filed a comment

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35. See id. at 12,883.
letter arguing in favor of broad FCRA preemption and should the Comptroller rule on these grounds, it will likely be challenged in court, with the OCC accorded agency deference. Some speculate that this would be a highly favorable test case for preemption proponents. Unfortunately, the agency has delayed a final decision on this matter at this time, and it remains a pending matter at the Comptroller's Office.

Second, the Florida Department of Insurance, in response to the Barnett decision, proposed bank insurance sales regulations. These regulations also contain provisions restricting information exchanges between banks and their affiliates. As of January 1998, the Florida regulations are still subject to a state administrative process, but they will become final sometime during the 1998 calendar year. Given the stormy history of banks and the Florida department of insurance, some currently speculate that the Florida information sharing regulations could be the source of litigation unless changed in the administrative process. In addition, some currently speculate that a bank or bank trade association will likely file suit to overturn these regulations should the information restrictions remain, and that they will argue that § 624 of the FCRA overrides the state insurance regulations.

V. THE NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS
INSURANCE INFORMATION & PRIVACY PROTECTION MODEL ACT

In October 1992, NAIC issued an Insurance Information and Privacy Protection Model Act (Model Act) for the purpose of "establish[ing] standards for the collection, use and disclosure of information gathered in connection with insurance transactions by insurance institutions, agents or insurance support organizations . . ." Where states have adopted a Model Act, the question arises whether such a state law or the FCRA would prevail. In addition, the McCarran-Ferguson Act (McCarran) which provides, generally, for the regulation of "the business of insurance" on the

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state level, must be considered. Therefore, if the Act’s information sharing restrictions are not preempted by the amended FCRA, particular problems will develop for diversified companies with insurance operations that operate over a multi-state area.

A. **NAIC Provisions Regarding Affiliate Information Sharing**

The NAIC Model Act contains a series of restrictions on the use of customer information by insurance institutions, agents or insurance support organizations. Section 13 of the Model Act establishes the general rule that an insurance institution “shall not disclose any personal or privileged information about an individual collected or received in connection with an insurance transaction . . . .” The section then outlines eighteen exceptions. One of these exceptions, subsection (L), permits limited affiliate information sharing. While the general rule of the Model Act prohibits all affiliate information sharing, subsection (L) provides an exception. Subsection (L) permits disclosures “[t]o an affiliate whose only use of the information will be in connection with an audit of the insurance institution or agent or the marketing of an insurance product or service, provided the affiliate agrees not to disclose for any other purpose or to unaffiliated persons.”

A question exists, then, whether section 624 of the federal FCRA, as amended, preempts section 13, or would a company defined as an insurance institution be limited under the Model Act to affiliate information sharing only as permitted under subsection (L). Section 624 of the FCRA provides that “[n]o 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 . . . .” Section 13 appears to conflict with section 624 on its face. Section 13 is clearly a State requirement concerning the exchange of information designed to restrict information exchanges among affiliates. It appears that

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39. At this time the NAIC Model Act has been enacted in 17 states.
section 13 fits clearly under section 624 of the FCRA and could be preempted.

As previously discussed, the legislative history of the 1996 FCRA amendments appears to indicate a Congressional intent to establish uniform national standards for affiliate information sharing. Based on the ultimate statutory language, the legislative history in both the House and Senate states a direct intent to preempt any state law that may operationally impede affiliate information sharing.

Moreover, subsection (L)’s exception permits affiliate sharing limited to “audits” or the “marketing of an insurance product or service.” During the 1994 House Banking consideration of FCRA legislation, Representative Kennedy offered an amendment to the bill’s affiliate information sharing preemption provisions, seeking to limit them to only “marketing” purposes. This amendment met with strong opposition and was defeated on a voice vote. Based on this failed Kennedy amendment, one can argue that Congress specifically considered limited information sharing as proposed under the Model Act and affirmatively decided to preempt it for purposes of a uniform national standard.

It should be noted that section 624, as amended in 1996, preempts laws enacted before January 1, 2004. This would include states that have already adopted the Model Act. The Model Act could restrict affiliate information sharing in any state that complies with the requirements of new section 624(d)(2) of the FCRA. This would require that: (1) the Model Act be enacted after January 1, 2004; (2) that the Model Act would have a new provision added stating explicitly that the affiliate information sharing provisions were intended to supplement the federal FCRA; and (3) the Model Act’s affiliate information sharing provisions give greater protection to consumers than is provided under the federal FCRA. For states that have already passed the Model Act, this would require re-enactment after January 1, 2004, in accordance with section 624(d)(2).

B. Conflict of Laws: FCRA and the McCarran-Ferguson Act

As a general proposition, the business of insurance is regulated by the states under McCarran. Based on this general rule,
an argument may be constructed that if the business of insurance is regulated by the states, then any state laws derived from the NAIC Model Act should override the federal FCRA. Such a result would again cause significant problems for diversified, multi-state financial operations. Thus, it is appropriate to evaluate the status of the amended FCRA vis-a-vis McCarran.

Based on an initial review of the statutes and relevant case law, it appears that under McCarran, the NAIC Model Act passed by a state would not override the federal FCRA. The NAIC Model Act technically does not appear to qualify as a law "regulating the business of insurance" for purposes of section 2(b) of McCarran. Moreover, assuming that the NAIC Model Act would be considered a law "regulating the business of insurance," the federal FCRA would likely fall under the exception contained in section 2(b) of McCarran that permits federal preemption by any federal law that "specifically relates to the business of insurance."  

For purposes of examining the inter-relationship between a state law version of the NAIC Model Act and the Federal FCRA, the key section of the statute is the first clause of section 2(b) as underlined above. Courts have divided the clause into two sections, with the first section being the general rule against Federal preemption followed by the second section of the clause which provides an exception to the rule.  

40. The relevant section of McCarran, section 2, provides:

(a) STATE REGULATION

The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) FEDERAL REGULATION

No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: Provided, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.


41. See generally Paul B. Mengedoth, Annual Survey of the U.S. Supreme Court and Federal Law: Casenote: Business of Insurance: National Banks, the "business of
Any statutory analysis under the first clause of section 2(b) is divided into two parts. First, a determination must be made of whether a state statute is a “law enacted by any State for the purpose of regulating the business of insurance” and thereby prohibited from being overridden by federal law under section 2(b)’s general rule. Specifically, any state statute in question must deal with the core business of insurance and not merely the business of insurance companies.42 Second, a determination must then be made of whether the federal law “specifically relates to the business of insurance” and thereby becomes exempted from the general rule of section 2(b) for purposes of federal preemption. “By its terms . . . the [McCarran] Act does not apply when the conflicting federal statute ‘specifically relates to the business of insurance.’”43

1. State Laws Regulating the Business of Insurance

Under McCarran, the definition of “the business of insurance” has been heavily litigated. The Supreme Court analysis of this provision has evolved into a three part test to determine whether a state statute involves “regulating the business of insurance.”44 In determining what constitutes the “business of insurance,” the Court outlined the following three part test in the leading case of Union Labor Life Ins. Co. v. Pireno.45 The test consists of the following three parts: “first, whether the practice has the effect of transferring or spreading a policyholder’s risk; second, whether the practice is an integral part of the policy relationship

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42. The Supreme Court stated:

The statute did not purport to make the States supreme in regulating all activities of insurance companies; its language refers not to the persons or companies who are subject to state regulation, but to laws ‘regulating the business of insurance.’ Insurance companies may do many things which are subject to paramount federal regulation; only when engaged in the ‘business of insurance’ does the statute apply.


between the insurer and the insured; and third, whether the practice is limited to entities within the insurance industry.\textsuperscript{46} Further, in evaluating whether a state law regulating a particular practice involves the "business of insurance," the \textit{Pireno} decision went on to note that no single criteria stands alone and that they must be evaluated in their entirety.

In applying the three part test to the NAIC model statute, particularly relating to its affiliate information sharing limitations, it appears that the NAIC Model Act largely fails to satisfy the \textit{Pireno} test. While the NAIC Model Act is intended to regulate the business activities of insurance companies, it may fall short of "regulating the business of insurance" for purposes of section 2(b) of McCarran under the Court prescribed test. In order to satisfy the "business of insurance" test, the Model Act must be evaluated under each branch of the \textit{Pireno} analysis. The first element of the \textit{Pireno} test is a determination of whether the Model Act has the effect of transferring or spreading policyholder risk. This appears to be a difficult test to satisfy. The NAIC Model Act is a privacy statute. For example, the Act deals with privacy concerns, affiliate information sharing and general handling of customer information. It bears no relation to activities involved in the normal underwriting and related activities of insurance companies intended to be covered by this part of the Court's test. Thus, the Model Act clearly fails this element of the "business of insurance" test as outlined under \textit{Pireno}.

The second element of the \textit{Pireno} test is whether the practice is integral to the policy relationship between the insurer and the insured. It would appear that consumer information and privacy considerations could be a gray area under this branch of the \textit{Pireno} test. On one hand, information given by the insured to the insurer could be considered an integral part of that relationship because that information is the likely basis for underwriting decisions by the insurer. How this information is handled would seem of some importance to the relationship. Alternatively, one could argue that the sharing of the information is less integral to the relationship and is incidental or ancillary to the main policy relationship. In judging the relationship between the insured and insurer, the Court has

\textsuperscript{46} Id.
looked to whether a practice impacts upon "the type of policy which could be issued, its reliability, interpretation, and enforcement."\(^{47}\)

While contrary arguments may be made, it appears that affiliate information sharing as regulated by a state statute has little or no impact on the issuance of any insurance policy, its terms, reliability, interpretation or enforcement. Therefore, affiliate information sharing and its regulation would only fall, at best, as an ancillary part of the insured/insurer relationship and would not be an integral part of the relationship related to the core "business of insurance" as determined by the courts.\(^{48}\)

Finally, the third element of the *Pireno* test is whether the practice is limited to entities within the insurance industry. Under this portion of the test, the NAIC Model Act appears to be inherently flawed. An affiliate information sharing provision by its very nature involves entities outside of the insurance industry. Diversified financial companies controlling insurance companies generally have non-insurance affiliates conducting a wide array of activities, including activities such as credit card operations, mortgage banking and real estate operations. These affiliates are not regulated as insurance companies, nor would they generally be considered as part of the insurance industry. Therefore, an insurance privacy statute, such as the NAIC Model Act, that would have the general effect of limiting the exchange of information between insurance and non-insurance affiliates, would *per se* fail the third element of the *Pireno* test requiring that the activity be limited to entities within the insurance industry.

In summary, the NAIC Model Act does not satisfy "business of insurance" test under *Pireno*. While the state regulation of insurance information may impact upon insurance companies, it does not appear that the regulation of consumer information is related to the core "business of insurance" as required under section 2(b) of McCarran. Thus, the general rule against federal preemption should not apply.


\(^{48}\) See *Union Labor Life Ins.*, 458 U.S. at 134 n.8.
Under section 2(b) of McCarran, the second half of the first clause contains an exception to McCarran's general rule that state laws prevail over conflicting federal laws. The exception provides that a federal law which "specifically relates to the business of insurance" may override a conflicting state law. Assuming arguendo, that the NAIC Model Act would be a state law regulating the business of insurance, then it appears that the FCRA would be a federal law that "specifically relates to the business of insurance" and thereby falls within section 2(b)'s exception.

In examining the FCRA, including the 1996 amendments, the statute is filled with examples of express federal regulation of consumer information related to insurance transactions. FCRA sections 602, 603, 604, 605, 609, 615 and 624 all provide federal regulation of consumer information related to insurance. The critical elements of the federal statutory scheme under the FCRA all expressly cover insurance related information or practices, including the affiliate information sharing provisions.

FCRA section 604(2)(C), describing the permissible purposes to obtain a credit report, provides that such a report may be sent to a person that "intends to use the information in connection with the

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49. For example, section 602(b) describes the purposes of the FCRA and states:
(b) 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 49.
50. FCRA section 603(k)(1)(B)(I) describing "adverse actions," a key definition under the Act, provides:
(1) ACTIONS INCLUDED.— The term ‘adverse action’—
** * *

(B) means—
(I) a denial or cancellation of, an increase in any charge for, or a reduction or other adverse change in the terms of coverage or amount of, any insurance, existing or applied for, in connection with the underwriting of insurance . . .
underwriting of insurance." The statutory scheme for prescreening, established as part of the 1996 amendments, is entirely framed to cover firm offers of "credit or insurance."

Finally, the key definition of "consumer report" under section 603(d)(1) expressly includes as a federally regulated consumer report, information to determine eligibility for "insurance to be used as primarily for personal, family, or household purposes" as well as insurance information described under section 604. The exception from the definition of a federally regulated "consumer report" for affiliate information sharing immediately follows under section 603(d)(2)(A). The relevant sections of section 603(d) provide that to the extent that the heart of the "consumer report" definition in section 603(d)(1) covers information about insurance, the affiliate information sharing exception in section 603(d)(2) must also apply to insurance information.

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51. Id. § 1681b(2)(C) (emphasis added).
52. Id. § 1681a(f).
53. Section 603(d) states:
   (d) CONSUMER REPORT.—
   (1) IN GENERAL. — The term "consumer report" means any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for—
   (A) credit or insurance to be used primarily for personal, family, or household purposes;
   (B) employment purposes; or
   (C) any other purpose authorized under section 604.

54. The following exclusions are available:
   (2)EXCLUSIONS. — The term "consumer report" does not include—
   (A) any—
   (i) report containing information solely as to transactions or experiences between the consumer and the person making the report;
   (ii) communication of that information among persons related by common ownership or affiliated by corporate control; or
   (iii) 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....

Id. § 1681a(d)(2) (emphasis added).
As demonstrated by these key sections, the statutory scheme under the FCRA directly regulates consumer information related to insurance transactions. It would appear that through the express inclusion of insurance in the statutory scheme Congress intended that the federal FCRA would not be preempted by conflicting state laws. The legislative history of the recently passed FCRA amendments is also filled with references to the statute's federal regulation of consumer information related to insurance. While these references largely track and explain the statutory language, the Senate Report from the 103d Congress indicates the Congressional intent to use the FCRA to federally regulate insurance information.55

Finally, while the FCRA preemption provision under section 624(b)(2) dealing with affiliate information sharing does not specifically use the word “insurance,” Congress’ intent was for purposes of preemption to include the affiliate sharing exemption from the base definition of “consumer report” under section 603(d)(1), which covers insurance information, so as to foster a uniform national standard.

Based on the express terms of the FCRA, as amended in 1996, Congress clearly intended to federally regulate consumer information related to the business of insurance under the FCRA.56 Assuming that the NAIC Model Act is considered a state law “regulating the business of insurance,” then the FCRA and its preemption provisions are a federal law “specifically related to the business of insurance.” Thus, FCRA would fall under the exception

55. The Report states:
   The consumer reporting agencies sell the information from their files to their customers. Customers include retailers, insurance companies, lenders, businesses that sell mailing lists, prospective employers, and government agencies. Thus, a consumer report can be a decisive factor in whether a consumer’s application for credit, an apartment, a job, or insurance will be accepted or rejected.

56. Senate Report 103-209 states:
   Section 116 [amending section 624] preempts any state law related to the exchange of information among persons affiliated by common ownership or common corporate control. The Committee intends that this provision will be applied to the modifications . . . of the Committee bill which amend section 603 of the FCRA pertaining to exclusions from the definition of consumer report that permit, subject to certain restrictions, the sharing of information among affiliates.
contained in clause 1 of section 2(b) of McCarran and the preemption outlined under section 624 of the Act should prevail over conflicting state laws.

VI. UNIFORM PRIVACY PRINCIPLES

While information sharing should have profound consumer benefits, concerns have been raised regarding protecting the legitimate privacy interests of financial consumers. If an institution is looking to establish a corporate-wide policy on privacy, one item worth noting is the model privacy principles recently published by a group of bank trade associations.

On September 18, 1997, the American Bankers Association, the Bankers Roundtable, the Banking Industry Technology Secretariat, the Consumer Bankers Association and the Independent Bankers Association jointly issued a press release regarding the creation of a "Uniform Set of Privacy Principles." The "Privacy Principles" relate to eight separate areas:

(1) Recognition of a customer's expectation of privacy. Financial institutions should recognize and respect the privacy expectations of their customers and explain principles of financial privacy to their customers in an appropriate fashion.

(2) Use, collection and retention of customer information. Financial institutions should collect, retain and use information about individual customers only where the institution reasonably believes it would be useful (and allowed by law) to administering that organization's business and to provide products, services and other opportunities to its customers.

(3) Maintenance of accurate information. Financial institutions should establish procedures so that a customer's financial information is accurate, current and complete in accordance with reasonable commercial standards. Financial institutions should also respond to requests to correct inaccurate information in a timely manner.

57. Joint Statement of the American Bankers Association, the Bankers Roundtable, the Banking Industry Technology Secretariat, the Consumer Bankers Association, and the Independent Bankers Association (Sept. 18, 1997) (on file with the Bankers Roundtable).
(4) **Limiting employee access to information.** Financial institutions should limit employee access to personally identifiable information to those with a business reason for knowing such information and educate those employees with such access regarding the importance of confidentiality and customer privacy.

(5) **Protection of information via established security procedures.**

(6) **Restrictions on the disclosure of account information.** Financial institutions should not reveal specific information about customer accounts or other personally identifiable data to unaffiliated third parties for their independent use, except for exchanging information with reputable information reporting agencies the accuracy of such information, or in the performance of bona fide corporate due diligence, unless a) the information is provided to help complete a customer initiated transaction, b) The customer requests it, c) the disclosure is required by/or allowed by law or d) the customer has been informed about the possibility of disclosure for marketing or similar purposes through a prior communication and is given the opportunity to decline (opt out).

(7) **Maintaining customer privacy in business relationships with third parties.** If personally identifiable customer information is provided to a third party, the financial institutions should insist that the third party adhere to similar privacy principles that provide for keeping such information confidential.

(8) **Disclosure of privacy principles to customers.** Financial institutions should devise methods of providing a customer with an understanding of their privacy policies. In addition, each financial institution should make its privacy policy available to customers.

The "Uniform Set of Privacy Principles" also provide an implementation plan for financial institutions which includes: (1) approving the plan at the level of the Board of Directors or the Office of the Chair of the bank; (2) communicating bank policies related to customer privacy will be communicated to bank customers; (3) informing and educating employees about the bank's plan to implement the privacy principles; (4) banks will obtain agreements from third party vendors on a case-by-case basis to comply with the bank's privacy principles; (5) notifying customers of their right to opt-out from the bank providing customer information to those third
parties where a bank provides information to unrelated and unaffiliated third parties for their independent use for marketing or similar purposes; and (6) establishing and maintaining procedures by which customers can correct inaccurate customer information.

The American Bankers Association, the Bankers Roundtable, the Banking Industry Technology Secretariat, the Consumer Bankers Association and the Independent Bankers Association strongly urged its membership to adopt these “Privacy Principles.”

VII. CONCLUSION

The amendments made to the FCRA in 1996 and implemented in October 1997 will have a major impact on the consumer credit market. Relieving the uncertainty concerning the sharing of information between affiliates and preempting any state laws will permit companies to offer their customers financial services in a more efficient and beneficial manner. Congress intended to create a uniform national standard for affiliate information sharing and intended to preempt contrary state laws. Moreover, Congress believed that this result would lead to operational efficiency, better customer service and more competitive prices for consumers. The amendments made to the FCRA are a key step in fully utilizing today’s technology to benefit financial consumers.