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THE GRAMM-LEACH-BLILEY ACT
AND STATE REGULATION OF THE BUSINESS OF INSURANCE – PAST, PRESENT AND . . . FUTURE?

SCOTT A. SINDER*

In an overview of the Gramm-Leach-Bliley Act (GLBA) that was published in this Journal last year, the authors proclaimed that the Act "represents the culmination of Congressional financial reform efforts spanning more than 30 years" and that it signifies "the completion of financial modernization efforts . . ." Maybe. Many would argue, however, that – especially with respect to regulation of the business of insurance – the Act marks the beginning of the reform process rather than the end.

The initial three sections of the Act accomplish the intended modernization objectives by repealing the anti-affiliation provisions of the 1933 Glass-Steagall Act, which imposed barriers between the banking and securities industries, and of the 1982 amendments to the Bank Holding Company Act of 1956, which erected barriers between the banking and insurance industries. The Act therefore removes barriers that have existed between these three industries for over sixty years and allows financial companies to offer banking, insurance and securities products all under one roof – either through the newly created financial

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4. Id. §§ 102-103 (amending Section 4(c)(8) of, and adding Section 4(k) to, the Bank Holding Company Act of 1956, 12 U.S.C. §§ 1841-1850 (Supp. V 1999)).
holding company structure or through financial subsidiaries.

The Act, however, is incredibly complicated in its details. Although it now permits all financial services entities to participate in financial service activities beyond their core activities, its other 138 sections essentially were designed to preserve the regulatory regimes that have been developed over the course of the last 150 years to oversee the individual activities. In other words, under the bill, federal banking regulators will continue to regulate banking activities (regardless of who is engaging in those activities), securities regulators will continue to regulate securities activities (regardless of who is engaging in those activities), and state insurance regulators will continue to regulate insurance activities (regardless of who is engaging in such activities).

Although this approach to regulation – commonly referred to as “functional” regulation because the function rather than the entity determines the regulatory treatment – sounds simple in concept, legislating the limits on the authority of each of the interested regulators proved to be an enormous task.

With respect to insurance regulation, the task was complicated by the fact the States have historically functioned as the virtually exclusive regulators of all insurance activities. From the vantage point of insurance agents, brokers and insurers, however, full functional regulation was essential to ensure a level playing field on which the States would remain the primary regulators of all insurance activities – including those of national banks and their subsidiaries. For the reasons explained in more detail below, national banks could have engaged in virtually unlimited insurance activities, and the Office of the Comptroller of the Currency (OCC) could have assumed the role of sole regulator of those activities had it chosen to do so, if no legislation had been enacted at all.5

Now that enactment of a financial services reform act has become a reality, however, many in the insurance industry have turned their attention back to what they perceive to be the fundamental flaws inherent in the current state-based insurance regulatory system. New bank entrants into the insurance

5. See infra notes 50-51 and accompanying text.
business—led by the American Bankers Association Insurance Association ("ABAIA")—are at the forefront, demanding uniform federal regulatory alternatives that mirror the optional federal charter on which the National Bank Act is grounded for banking activities.6

This Article is divided into three parts. Part I explains the history of insurance regulation in the United States and state dominance of that regulation. Part I also explains the history of national bank involvement in insurance activities and the significance of the Supreme Court's 1996 decision in Barnett Bank of Marion Co., N.A. v. Nelson.7 Part II then outlines the GLBA rules that now govern regulation of the insurance business and incorporate the Barnett preemption test to limit the scope of the States' regulatory authority over that business.8 Finally, Part III identifies the current challenges to the perpetuation of a strictly state-based insurance regulatory system, and briefly discusses several potential alternatives to, or modifications of, that system that may be the focus of Congressional activity in the near future.9

I. FROM WHENCE WE CAME

A. Insurance Regulation

"Perhaps no modern commercial enterprise directly affects so many persons in all walks of life as does the insurance business. Insurance touches the home, the family, and the occupation or the business of almost every person in the United States."10 "It is practically a necessity to business activity and enterprise."11 Insurance serves a broad public interest far beyond its role in business affairs and its protection of a large part of the country's wealth. It is the essential means by which the "disaster to an

8. See infra, notes 64-118 and accompanying text.
9. See infra, notes 119-150 and accompanying text.
individual is shared by many, the disaster to a community shared by other communities; great catastrophes are thereby lessened, and, it may be, repaired." Thus, it is "the conception of the lawmaking bodies of the country without exception that the business of insurance so far affects the public welfare as to invoke and require governmental regulation."

1. Historically, States Exclusively Regulated Insurance

To meet the "imperative need" for regulation, state legislatures have enacted comprehensive bodies of law, dating back over one hundred years, to "control the insurance business." State insurance law regulates every aspect of the business: insurance companies (including assets, liabilities, and investments), insurance policies and rates, the agents who solicit the sale of insurance on behalf of companies and the brokers who represent the insured on their purchase of insurance.

Until 1944, it was universally understood that the States maintained exclusive control over the regulation of insurance. This axiom of state regulation had existed since 1869 when the Supreme Court decided Paul v. Virginia, a case involving an appeal by an insurance agent from a fine imposed for selling coverage for a New York insurer who was not properly licensed in Virginia. In rejecting the agent's argument that the Virginia licensing laws violated the Commerce Clause of the U.S. Constitution, the Court held that "issuing a policy of insurance is not a transaction of commerce" and is "governed by the local law." Subsequent cases have held the entire business of insurance was not interstate commerce subject to regulation by Congress. Like Paul v. Virginia itself, many of these cases

12. Id. at 413.
13. Id. at 412.
15. See generally EDWIN PATTERSON, THE INSURANCE COMMISSIONERS IN THE UNITED STATES (1927).
17. 75 U.S. (8 Wall.) 168 (1869).
18. Id. at 183.
involved state statutes governing licensure of insurance companies and their agents.\textsuperscript{19}

Consistent with this case law and understanding, Congress has routinely refused to extend federal authority over the conduct of the insurance business. Between 1902 and 1906, for example, numerous bills were introduced providing for federal regulation of various aspects of the insurance industry, but the judiciary committees of both the House and Senate concluded such regulation was beyond Congress' constitutional power.\textsuperscript{20} In 1914, in recognition of Congress' lack of authority, resolutions were introduced in both the House and Senate proposing the Constitution be amended to give Congress the power to regulate the insurance industry.\textsuperscript{21}

Thus, prior to 1944, Congress did not even believe it had the constitutional authority to regulate the general conduct of the private-sector insurance business in this country; that power resided solely with the States. Consequently, "the States enjoyed a virtually exclusive domain over the insurance industry."\textsuperscript{22}

2. Congress Affirmatively Declares a Policy of Not Regulating Insurance

All this changed in 1944 with the Supreme Court's decision in \textit{South-Eastern Underwriters}, which held that insurance companies are engaged in interstate commerce and are therefore


\textsuperscript{20} E.g., S. REP. No. 59-4406 (1906); H.R. REP. No. 59-2491 (1906).

\textsuperscript{21} S.J. Res. 103, 63d Cong. 2d Sess. (1914); H.R.J. Res. 194, 63d Cong., (2d Sess. 1914).

\textsuperscript{22} St. Paul Fire & Marine Ins. Co., 438 U.S. 531, 539 (1978). During World War I, Congress established the Bureau of War Risk Insurance within the Treasury Department, which acted as an underwriter issuing life and disability insurance to all persons in active military service. These federally issued policies were convertible to U.S. Government Life Insurance. \textit{See also} Wissner v. Wissner, 338 U.S. 655 (1950) (establishing similar programs through the National Service Insurance Act of 1940). \textit{See generally} J. OWEN STALSON, MARKETING LIFE INSURANCE 571-73 (1969) (discussing federal involvement in insurance). But this insurance system stood, self-contained, separate and apart from the private-sector insurance business.
subject to the federal antitrust laws. The decision, "naturally, was widely perceived as a threat to state power to tax and regulate the insurance industry." Congress quickly enacted the McCarran-Ferguson Act. Passed at the urging of the state insurance regulators directly affected by South-Eastern, McCarran "provides that regulation of the insurance industry is generally a matter for the States."

In McCarran, Congress "not only has eschewed regulation; it has affirmatively declared a policy of not regulating the business of insurance." The first section of the statute makes Congress' intention clear:

Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business.

The statute then sets out both a rule confirming that in general federal law does not preempt state laws regulating the insurance industry, and a more specific rule governing the interaction of federal antitrust laws and state insurance regulation. Section 2 of the Act provides:

(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
(b) No Act of Congress shall be construed to

29. Id.
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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 . . . known as the Sherman Act, and the Act . . . known as the Clayton Act, and the Act . . . known as the Federal Trade Commission Act . . . shall be applicable to the business of insurance to the extent that such business is not regulated by State law.30

As the Supreme Court has noted, “[o]bviously Congress’ purpose was broadly to give support to the existing and future state systems for regulating and taxing the business of insurance.”31

B. National Banks and Insurance

The national banking system grew out of the particular needs and nationalist fervor of the Civil War. At that time, there was no federal control of the monetary system. Coins supplied by the federal government were far surpassed in volume and aggregate value by circulating notes of state banks, whose value was not determined by Congress and varied widely.32 In 1863, Congress responded by enacting the National Bank Act (NBA), which created federally chartered banks empowered to issue and accept a uniform national currency.

National banks possess only those powers conferred by federal law.33 But “regulation of [national] banking has been one of dual control since the passage of the first National Bank Act in 1863.”34 As the Supreme Court explained in *McClellan v. Chipman,* “[n]ational banks . . . are governed in their daily course

30. *Id.* at § 1012.
of business far more by the laws of the State than of the nation.\textsuperscript{35}

Prior to the enactment of the GLBA, federally regulated banking institutions were generally prohibited from engaging in non-banking activities, including the business of insurance. Section 24 of the NBA,\textsuperscript{36} which sets forth the banking powers of national banks, has consistently been interpreted as strictly limiting banks' permissible insurance agency activities.\textsuperscript{37} In 1916, then-Comptroller of the Currency, John Skelton Williams, urged Congress to enact a narrow exception to this general prohibition to provide a modicum of financial assistance to national banks located in small "country communities."\textsuperscript{38} In the Comptroller's judgment, empowering these "small national banks" to sell insurance would enable them to "better compete" with those state-chartered banks that were permitted to sell insurance and "provide them with additional sources of revenue..."\textsuperscript{39} Comptroller Williams noted that under the NBA, national banks were not then empowered to sell insurance, even if state law would permit them to do so.\textsuperscript{40} Comptroller Williams drafted proposed legislation authorizing national banks located in towns with a population less than 3,000 to act as insurance agents.\textsuperscript{41} Senator Owen introduced the Comptroller's proposed legislation (changing the 3,000 figure to 5,000) as an amendment to a banking bill already under consideration by the 1916 Congress.\textsuperscript{42} It was enacted without discussion or debate.\textsuperscript{43}

The provision, added as Section 13 to the Federal Reserve

\textsuperscript{35} 164 U.S. 347, 356-57 (1896) (quoting Nat'l Bank v. Commonwealth, 76 U.S. (9 Wall) 362 (1869)).
\textsuperscript{37} See, e.g., American Land Title Ass’n v. Clarke, 968 F.2d 150 (2d Cir. 1992), cert. denied, 508 U.S. 971 (1993); Saxon v. Geor. Ass’n of Indep. Ins. Agents, Inc., 399 F.2d 1010, 1016 (5th Cir. 1968).
\textsuperscript{38} Letter from John Skelton Williams, Comptroller of the Currency to Sen. Robert Owen, reprinted in 53 CONG. REC. 11,001 (1916).
\textsuperscript{39} Id.
\textsuperscript{40} Id.
\textsuperscript{41} Id.
\textsuperscript{42} This was the only apparent change from the Comptroller's proposal. 53 CONG. REC. 11,153 (1916). Senator Owen stated that "[t]he matter is unimportant either way." Id.
Act and commonly called “Section 92,” authorizes national banks “located and doing business in places with populations not exceeding 5,000” residents to act as agents in the sale of insurance. It specifically provides as follows:

In addition to the powers now vested by law in national banking associations organized under the laws of the United States any such association located and doing business in any place the population of which does not exceed five thousand inhabitants, as shown by the last preceding decennial census, may, under such rules and regulations as may be prescribed by the Comptroller of the Currency, act as the agent for any fire, life, or other insurance company authorized by the authorities of the State in which said bank is located to do business in said State, by soliciting and selling insurance and collecting premiums on policies issued by such company; and may receive for services so rendered such fees or commissions as may be agreed upon between the said association and the insurance company for which it may act as agent: Provided, however, That no such bank shall in any case assume or guarantee the payment of any premium on insurance policies issued through its agency by its principal: And provided further, That the bank shall not guarantee the truth of any statement made by an assured in filing his application for insurance.

Both before the enactment of the McCarran-Ferguson Act and after, national banks were routinely subject to state laws that did not merely regulate bank insurance sales activities but completely prohibited them. In 1996, however, the Supreme Court in Barnett Bank of Marion Co., v. Nelson invalidated a

45. Id.
Florida statute that generally prohibited banks from selling insurance in small towns. The Barnett Court held the Florida prohibition on bank insurance sales activity was preempted by Section 92, because it directly conflicted with Section 92's federal authorization for small-town national banks to engage in insurance agency activities. The Barnett Court also concluded the Florida prohibition was not "saved" from preemption by Section 2(b) of the McCarran-Ferguson Act because Section 92 "specifically relates to the business of insurance." In reaching this conclusion, though, the Barnett Court made clear that "[t]o say this is not to deprive States of the power to regulate national banks, where (unlike here) doing so does not prevent or significantly interfere with the national bank's exercise of its powers." At the same time, the Barnett Court made clear the States' regulatory authority over small-town national bank insurance agency activities is subject to one important caveat – Section 92's directive that small-town national banks may act as agents "under such rules and regulations as may be prescribed by the Comptroller of the Currency." The Court indicated this limitation empowers the Comptroller to appropriate complete regulatory authority over such insurance activities at any time – and thus become the sole regulator of national bank insurance sales activities – if the Comptroller chooses to do so. Prior to the enactment of GLBA, however, the Comptroller never chose to exercise the full extent of that authority. Indeed, there has never been a federal licensing system; and, prior to the enactment of the GLBA, there were never any federal consumer protection requirements applicable to small-town national banks acting as insurance agents pursuant to their Section 92 authority.

47. Id. at 32-33.
48. Id. at 38 (alterations in original) (citing 15 U.S.C. §1012(b)).
49. Id. at 33.
51. Id. at 32.
In response to the *Barnett* decision, every State that had prohibited bank sales of insurance from small-town offices enacted legislation to repeal the provisions and to grant their state-chartered banks parallel small-town office sales authority. At the same time, the majority of these States also enacted requirements designed to address the unique consumer protection concerns that arise when federally-insured banks also are permitted to engage in insurance sales activities. The requirements generally addressed three particular concerns: (1) the confusion that arises when consumers purchase non-insured products from insured depository institutions; (2) the coercion to purchase insurance products from a bank to which consumers may believe that they are subject when they are applying for a loan from a bank and the bank also is selling insurance products required to obtain the loan; and (3) the misuse of confidential information that may occur when banks collect non-public consumer information in conjunction with banking services they also may use to market non-banking products. Twenty-four states enacted such consumer protection provisions.  

Prior to the enactment of GLBA in 1999, the Comptroller also issued a number of rulings and interpretive letters in an effort to greatly expand the scope of national banks' insurance authority. With respect to Section 92, the Comptroller first ruled that national banks located and doing business in places with populations not exceeding 5,000 residents could sell insurance to customers located anywhere, without any geographic restriction; the ruling was upheld by the District of Columbia and the Seventh Circuit. Later, the Comptroller also concluded that bank-employed agents could engage in insurance sales activities from anywhere, provided they were managed from the small-town office.

The Comptroller also issued a decision defining "place" under Section 92 as including all "census designated places."
Neither of the latter two decisions was challenged.

At the same time, the Comptroller also issued determinations attempting to expand the scope of national banks' insurance authority pursuant to their general "incidental powers as shall be necessary to carry on the business of banking" pursuant to Section 24(Seventh) of the NBA. The first such effort was initiated in the 1960s when then-Comptroller of the Currency James Saxon, issued a ruling authorizing any national bank to act as agent in the sale of property and casualty insurance that insured collateral securing a loan issued by that bank; the Fifth Circuit struck down the authorization, concluding that Section 92's affirmative grant of agency authority to small-town national banks precluded banks located outside of places with a population of less than 5,000 from exercising such authority. Almost thirty years later, the Comptroller issued a ruling purporting to authorize any national bank to act as agent in the sale of title insurance provided the title insurance was related to a mortgage issued by the national bank; the Second Circuit, relying on the Fifth Circuit's opinion issued thirty years earlier, struck down the authorization. Just four years later, the Comptroller attempted to use the same logic underlying the property/casualty and title insurance sales authorization to permit any national bank to sell crop insurance provided that the sale was related in some way to a loan issued by the bank; the District of Columbia Circuit, relying in part on the earlier holdings from both the Second Circuit and Fifth Circuit, struck the authorization down just six months after GLBA was enacted.

The Comptroller however, was able, however, to expand successfully the insurance sales authority of all national banks in three respects, as his authorizations under Section 24(Seventh) for national bank sales of annuities, debt cancellation contracts, and


credit insurance limited to insuring the repayment of the outstanding balance of a debt all were upheld.\footnote{61}

Finally, in 1996, the Comptroller revised Part 5 of the regulations governing national banks to provide affirmative authorization to national bank operating subsidiaries to engage in activities that are incidental to the business of banking even if the parent bank itself is prohibited from engaging in such activities. The revision also invited national bank operating subsidiary applications to engage in general lines of insurance underwriting activities.\footnote{62}

Hence, prior to the enactment of GLBA in November 1999, state authority over the insurance activities of everyone but national banks and their operating subsidiaries was firmly entrenched. National banks with a single small-town office, however, were authorized to act as agents in the sale of insurance from anywhere, to customers located anywhere, and the Comptroller of the Currency could have completely wrested regulation over those activities from the states at any time, if the Comptroller so chose. National banks also were poised to expand their insurance activities without regard to the establishment of a

\footnote{61. \textit{See} NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co., 513 U.S. 251 (1995) (holding that, as a matter of federal law, the Comptroller's determination that annuities are an investment product and not insurance was entitled to deference, and therefore affirming the Comptroller's authorization to engage in the sale of annuities as an investment product pursuant to national banks' Section 24 incidental banking powers); First Nat'l Bank v. Taylor, 907 F.2d 775, 780 (8th Cir. 1990) (affirming the Comptroller's authorization of debt cancellation contract sales under Section 24 because debt cancellation contracts are not insurance within the meaning of Section 92); Indep. Bankers Ass'n of Am. v. Heimann, 613 F.2d 1164, 1170 (D.C. Cir. 1979) (affirming the Comptroller's authorization to sell credit insurance products pursuant to Section 24 because "credit life insurance is a limited special type of coverage written to protect loans" and "[i]n no way does [the sale of credit life insurance] involve the operations of a general life insurance business insurance business [pursuant to Section 92] whether written in a town of over or under 5,000 inhabitants."); cert. denied, 449 U.S. 823 (1980).

small-town presence with respect to investment-oriented insurance products like annuities and with respect to the underwriting of all insurance products. In addition, many in the banking community had begun to question whether the McCarran state insurance regulatory mandate applied to national banks at all, and the Comptroller had begun to publicly advise national banks that compliance with state insurance agent licensing requirements was strictly optional.63

II. THE PRESENT: GLBA, BANK INSURANCE POWERS, AND STATE FUNCTIONAL INSURANCE REGULATION

A. Bank Insurance Powers


As noted at the outset, the primary purpose of GLBA is to enable banks, securities firms, and insurance companies to affiliate with one another and to engage in an expanded array of specified financial activities, including traditional banking activities, insurance sales and underwriting, financial and investment services, securities underwriting and dealing, and merchant banking. GLBA also permits affiliated entities to engage in activities that are complementary to the listed activities if the Federal Reserve Board determines the activity does not pose a substantial risk to the safety or soundness of depository institutions or to the financial system in general.64 GLBA thus permits subsidiaries of bank holding companies that qualify as "financial holding companies" to engage in both insurance agency and underwriting activities. To qualify as a "financial holding company," all banks affiliated under a holding company must be

63. See, e.g., 60 Fed. Reg. 11,924, 11,930 (Mar. 3, 1995) (to be codified at 12 C.F.R. pts. 7 and 31) (stating "a state may not require a national bank to obtain a state license to exercise the powers authorized for national banks under Federal law.")

well capitalized, well managed, and have at least a “satisfactory” Community Reinvestment Act rating.\(^65\)


GLBA does not authorize national banks to engage in any activities directly. Instead, national bank “financial subsidiaries” are generally permitted to engage in any activity in which a direct Financial Holding Company subsidiary can engage, except for insurance underwriting, real estate investment and development, merchant banking, and insurance company portfolio investment activities.\(^66\) To be eligible to exercise these powers, the subsidiary’s parent bank and all of its depository institution affiliates must be well-capitalized, well-managed, and have a satisfactory Community Reinvestment Act rating in their most recent examination.\(^67\) In addition, the aggregate assets of all of a national bank’s subsidiaries may not exceed forty-five percent of the parent bank’s assets or fifty billion dollars, whichever is less.\(^68\) State bank operating subsidiaries are subject to the same requirements and restrictions.\(^69\)


Except for title insurance, small-town national banks may continue to act directly as agents in the sale of insurance if they are eligible to do so under the Section 92 “small-town” insurance sales authorization. The Act, however, specifically prohibits all national banks from engaging in title insurance sales activities unless either they were actively and lawfully engaged pursuant to their Section

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65. See Polking and Cammarn, supra note 2 (discussion of the minimal requirements for a bank holding company to qualify as a “financial holding company”).


67. Id. See also, Polking and Cammaran, supra note 2 (describing the minimal requirements for a national bank to qualify to establish a “financial subsidiary” and how these requirements mirror the Section 103 “financial holding company” requirements).


69. Id.
92 authority in the sale of title insurance products on November 12, 1999 (the date of enactment of the Act) (the “grandfather” provision), or they are located and doing business in a State in which state-chartered banks are authorized to engage in title insurance sales activities (the “parity” provision). If a national bank seeks to utilize the “parity” power, however, it may sell title insurance in a state only “in the same manner, to the same extent, and under the same restrictions” as the state-chartered banks are authorized to engage in such sales activities in that State.

4. Providing Insurance As Principal.

Insurance underwriting thus is limited essentially to non-bank “financial holding company” subsidiaries. National banks generally are prohibited from “provid[ing] insurance as principal” – i.e., they generally may not engage in insurance underwriting activities either directly or through a subsidiary. The Act however, does permit national banks to continue to engage in underwriting credit insurance products to the extent the activity has been authorized previously by the OCC.

Title insurance products and annuities are specifically exempted from this authorization. Special “grandfather” rules apply to any bank that currently is engaged in title insurance

71. Id.
72. Id.
74. Id. § 302(a), 15 U.S.C. §§ 6712-6713.
75. Id. § 302(b), 15 U.S.C. § 6712(b). Under the Act, national banks and their subsidiaries may continue to underwrite “authorized products.” Id. § 302(a), 15 U.S.C. § 6712(a). “Authorized products” are defined as “products that, as of January 1, 1999, the Comptroller had determined in writing that national banks may provide as principal.” Id. § 302(b), 15 U.S.C. § 6712(b). “Authorized products” also include any product first offered after January 1, 1999, that is, in essence, functionally equivalent to a traditional banking product, regardless of whether such product also is regulated as insurance under state law. Id. § 302(c), 15 U.S.C. § 6712(c).
76. Gramm-Leach-Bliley Act § 302(b)(3), 15 U.S.C. § 6712 (b)(3) (Supp. V 1999). It is this author’s understanding, however, that no national bank was engaged in title insurance underwriting activities either directly or through a subsidiary as of the date of enactment of GLBA, and it thus does not appear that any national bank is “grandfathered” in any way under this provision.
underwriting activities. These rules permit the continuation of such activities but require that such activities be conducted first in a financial holding company affiliate and second in a subsidiary if either is engaged in other underwriting activities. The insurance industry viewed these underwriting limitations as an important victory, because they prohibit banks from using their Federal Deposit Insurance Corporation subsidization to defray any of the costs associated with assuming underwriting risks. It thus ensures that banks have no special advantages in underwriting or selling insurance by virtue of their federal subsidy.

B. State Functional Regulation of the Business of Insurance

1. Empowering the States

GLBA explicitly "recogniz[es] the primacy and legal authority of the States to regulate the insurance activities of all persons." The Act thus generally mandates that all insurance activities will be "functionally regulated" by the States regardless of the nature of the entity that is engaging in those activities. To implement this requirement, the Act specifically provides that:

- The McCarran-Ferguson Act remains good law;
- No person or entity may provide insurance as principal or agent in any State unless they are properly licensed to do so in accordance with the laws of that State;

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77. Id. § 303(c), 15 U.S.C. § 6713 (c).
79. Gramm-Leach-Bliley Act § 104(a), 15 U.S.C. §6701(a) (Supp. V 1999). As noted in Part I, the command of McCarran is unequivocal: "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." 15 U.S.C. § 1012(a) (emphasis added).
80. Gramm-Leach-Bliley Act § 104(b), 15 U.S.C. §6701(b). This provision was necessary to clarify that the Comptroller's position that national banks are not required to obtain an insurance agency license from the pertinent state regulators
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- "The insurance activities of any person or entity shall be functionally regulated by the States," subject to the preemption provisions discussed below; and
- Small-town national banks selling insurance as agents under their Section 92 authority are fully subject to state regulation of those activities (thus eliminating the OCC's power to serve as the sole regulator of national bank insurance sales activities).

2. Preemption and the "Safe Harbors"

Section 104 of the Act limits the scope of permissible state "functional regulation" of insurance activities by establishing preemption standards. The Act thus generally prohibits any State from preventing or restricting any affiliation among bank holding company subsidiaries that is authorized under the Act.

a. Insurance Activities Other Than Sales.

The Act also generally dictates that a state non-sales insurance requirement cannot be preempted as long as it does not apply to the activities of insured depository institutions (except those selling savings bank life insurance). Although at first blush this limitation seems broad, the Act limits the insurance authority for national bank subsidiaries to sales activities. It also specifically prohibits bank subsidiaries from engaging in insurance activities "as principal," and it prohibits national banks from engaging in underwriting-related activities. The remaining question is whether

was incorrect.

83. Id.
84. Id. § 104(c), 15 U.S.C. §6701(c). This provision does, however, empower state insurance regulators to review insurance company affiliations and the domicile state of the company may prohibit an affiliation based on solvency or managerial competency concerns. Id.
there is some insurance activity in which the Comptroller could authorize national banks to engage “as principal” that is not underwriting-related. None have been identified to date.

b. Non-Discrimination.

Although the Act clarifies that State requirements of “general applicability” relating to corporate governance or antitrust concerns are generally preserved, it also establishes a “nondiscrimination” preemption standard that prohibits a State from regulating the insurance activities authorized or permitted under the Act or any other provision of law in a manner that –

(1) overtly distinguishes between insured depository institutions and other persons engaged in insurance sales activities in any way adverse to an insured depository institution;
(2) as interpreted or applied, has or will have an impact on insured depository institutions that is substantially more adverse than its impact on other persons providing similar products and services;
(3) effectively prevents an insured depository institution from exercising its powers under this Act or federally law; or
(4) conflicts with the purpose of the GLBA.

c. Insurance Sales Activities.

For insurance sales, solicitation and cross-marketing activities, the primary rule is as follows:

In accordance with the legal standards for preemption set forth in the decision of the Supreme Court in Barnett Bank of Marion County N.A. v. Nelson, [citation omitted] no State may, by statute, 

87. Id. § 104(e), 15 U.S.C. §6701(e).
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 any other person, in any insurance sales, solicitation, or cross-marketing activity.  

There are two noteworthy facets of this provision. First, it is not national bank specific in any way. It instead governs state regulation of all depository institutions and their affiliates. Second, the Act expressly incorporates the “prevent or significantly interfere” preemption standard articulated in Barnett and explicitly dictates that nothing in the Act is intended to amend or modify that standard in any way. Both the explicit reference to Barnett in the preemption provision itself and the subsequent construction provision declaring that “nothing in this paragraph [Section 104(d)] shall be construed . . . to limit the applicability of the decision” in Barnett make this absolutely clear.

The Act’s preservation of the Barnett “prevent or significantly interfere” preemption standard is, however, subject to two important caveats. First, state insurance sales requirements enacted after September 3, 1998 also are subject to the “nondiscrimination” requirement discussed above. Second, any state consumer protection law that falls within one of the thirteen “safe harbor” provisions included in the Act and discussed below is specifically exempted from preemption under the Act.

d. The Safe Harbors.

The thirteen separate “safe harbor” provisions essentially permit a State to impose restrictions that are substantially the same as but no more burdensome or restrictive than the “safe harbor” provisions of the GLBA. Any state law that falls within a

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safe harbor cannot be preempted. The "safe harbors" apply to laws already in place as well as those that may be enacted in the future. They protect state restrictions—

- Prohibiting the rejection of an insurance policy required in connection with a loan because it was sold by an unaffiliated agent.\(^{92}\)
- Prohibiting the imposition of extra charges on insurance policies required in connection with a loan that are purchased from unaffiliated agents.\(^{93}\)
- Prohibiting misrepresentations regarding the insured or guaranteed status of any insurance product.\(^{94}\)
- Requiring that commissions can be paid only to licensed insurance agents.\(^{95}\)
- Prohibiting any referral fees paid to non-licensed individuals to be based on whether the referral results in a transaction.\(^{96}\)
- Prohibiting the release of insurance information to third parties without the express written consent of the customer.\(^{97}\)
- Prohibiting the use of health information obtained from insurance records without the express written consent of the customer.\(^{98}\)
- Prohibiting tying arrangements.\(^{99}\)
- Requiring the disclosure, prior to any insurance sale, that the product is—(1) not a deposit; (2) not insured by the FDIC; (3) not guaranteed by the financial institution or its subsidiaries or affiliates; and (4) where appropriate, involves investment risk,

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including loss of principal. This disclosure may be required to be in writing where a writing is practicable.\footnote{100}

- Requiring the disclosure, when insurance is required in connection with a loan, that the purchase of insurance from an unaffiliated agent will not affect the loan decision or the credit terms in any way.\footnote{101}
- Requiring the completion of credit and insurance transactions through separate documents.\footnote{102}
- Prohibiting the inclusion of insurance premiums in a primary credit transaction without the express consent of the customer.\footnote{103}
- Requiring the maintenance of separate insurance books and records that must be made available to state insurance regulators for inspection.\footnote{104}

It is important to note that the Act precludes the drawing of any inference regarding whether a state insurance sales, solicitation or cross-marketing regulation is preempted under the \textit{Barnett} "prevent or significantly interfere" standard by virtue of the fact that the regulation falls outside one of the thirteen "safe harbor" provisions. The Act thus makes absolutely clear that "[n]othing in this [Section 104(d)(2)] shall be construed . . . to limit the applicability of \textit{Barnett} . . . or to create any inference with respect to any State statute, regulation, order, interpretation, or other action that is not described in this paragraph."\footnote{105} In addition,
as Senator Richard Bryan – the Senate sponsor of the amendment that included the Section 104(d) provisions – noted in comments on the Senate floor that the intent of the provision was to do nothing more than codify the Barnett standard, and Congress "intended to leave the development of the interpretation of that standard to the courts."  

The new law thus has absolutely no impact on any of the bank sales of insurance consumer protection requirements already in place that are not protected by one of the safe harbor provisions; they are subject to the same "prevent or significant interference" Barnett test to which they were subject before enactment of the GLBA.

106. 145 CONG. REC. S6046-02 (May 26, 1999). In the course of these comments, Senator Bryan noted that his objective in drafting the Section 104(d) preemption provisions was to ensure that "the extensive regulatory systems that have been developed to protect consumer interests in each area of financial services should be retained" and that "the States are the sole repository of regulatory expertise" in the insurance context. Id.

107. Unfortunately, the parameters of the "prevent or significantly interfere with" preemption standard are not yet clear. The United States Court of Appeals for the Sixth Circuit currently is grappling with the issue in Association of Banks in Insurance v. Duryee, and its decision in that case will be the first appellate court decision to rule on what may – or may not – constitute a "significant interference." Association of Banks in Insurance v. Duryee, No. 99-3917 (6th Cir. oral arguments heard Aug. 2, 2000). In Duryee, several bank-member trade associations are seeking preemption of two insurance agency licensing requirements imposed by the State of Ohio – a requirement that prohibits licensure as an insurance agent if the "principal purpose" in becoming licensed is to sell insurance with whom the applicant has a family or fiduciary-type relationship, and a requirement that all insurance agent licensure applicants that are business entities satisfy specified, ministerial "corporate registration" requirements. Id. The OCC also is considering this question in its review of three separate requests by national banks for preemption of insurance consumer protection insurance regulations in Massachusetts, Rhode Island and West Virginia. See 65 Fed. Reg. 57,427 (Sept. 22, 2000) (third request for Rhode Island comments); 65 Fed. Reg. 43,827 (July 14, 2000) (Massachusetts); 65 Fed. Reg. 35,420 (June 2, 2000) (West Virginia); 62 Fed. Reg. 12,883 (March 18, 1997) (second Rhode Island request for comments); 62 Fed. Reg. 1950 (Jan. 14, 1997) (initial Rhode Island request for comments).

In both the Duryee case and in response to the OCC's requests for comments on the state law preemption questions, the parties – the Independent Insurance Agents of America, Inc., the National Association of Insurance and Financial Advisors, and the National Association of Professional Insurance Agents (and their respective state affiliates) – argued that the Supreme Court made clear in both Barnett and other cases that the "significant interference" standard imposes a high threshold – state laws cannot be preempted under that standard unless the requirements that regulate the manner in which insurance sales powers are exercised in some way incapacitate national banks from exercising that power or pose a direct
e.  "Without Unequal Deference."

The Act also establishes a new "expedited dispute resolution" process that applies to any dispute between a State insurance commissioner and federal banking regulators on any insurance issues, including whether a state insurance sales requirement is preempted by this Act. Either regulator may bring a case in the appropriate U.S. Court of Appeals or U.S. Court of Appeals for the District of Columbia Circuit, and the court is required to act on the petition within 60 days. The Section also establishes an appeal right to the United States Supreme Court that must be taken "as soon as practicable." The appellate courts are required to decide all disputes "on their merits," without giving "unequal deference" to either regulator. This "standard of review" section is intended to clarify that the opinions of state insurance regulators are entitled to as much consideration as those of federal banking regulators in resolving these disputes.
C. Federal Insurance Sales Consumer Protection Requirements

In addition to the "safe harbor" protections for many state insurance sales consumer protections, the Act also includes several consumer protection requirements that apply to the insurance sales activities of all insured depository institutions that the federal banking agencies were required to implement within one year from the date of enactment of the Act. These requirements establish federal minimum consumer protections that:

- Prohibit discrimination against non-affiliated agents by providing expedited or enhanced treatment if insurance is purchased from affiliated agents.
- Prohibit tying and other coercive practices.
- Prohibit misrepresentations regarding the federally insured or guaranteed status of any insurance product.
- Prohibit any action could mislead a consumer to believe that they were required to purchase an insurance product from a bank in order to receive a

[PREEMPTION STANDARD APPLIES TO ALL DEPOSITORY INSTITUTIONS AND THEIR AFFILIATES; IT IS NOT NATIONAL BANK SPECIFIC IN ANY WAY NOR IS THERE ANY PROVISION THAT DELEGATES INTERPRETIVE AUTHORITY OVER THIS PROVISION TO THE COMPTROLLER OR FOR THAT MATTER TO ANY OTHER FEDERAL BANKING REGULATOR. INDEED, THE PROVISION IS NOT EVEN A "BANKING" PROVISION BUT HAS BEEN CODIFIED AS PART OF TITLE 15. SEE 15 U.S.C. § 6801 (CODIFYING GRAMM-LEACH-BLILEY ACT § 104). SECOND, THE SUPREME COURT HAS MADE CLEAR THAT, ABSENT AN EXPRESS DELEGATION OF AUTHORITY, A FEDERAL AGENCY MAY NOT BE PRESUMED TO HAVE BEEN DELEGATED THE POWER TO DETERMINE THE SCOPE OF A FEDERAL STATUTE'S PREEMPTIVE REACH EVEN IF THE AGENCY IS CHARGED WITH INTERPRETING OTHER COMPONENTS OF THAT STATUTE. ADAMS FRUIT CO. V. BARRETTE, 494 U.S. 638, 649 (1990). IN ADAMS FRUIT CO. V. BARRETTE, THE SUPREME COURT SQUARELY HELD, FOR EXAMPLE, THAT, ABSENT AN EXPRESS DELEGATION OF AUTHORITY, WHETHER OR NOT A FEDERAL STATUTE PREEMPTS A STATE REQUIREMENT IS NOT A "STATUTORY 'GAP' . . . THAT CONGRESS INTENDED [THE AGENCY] TO FILL." ID. THIS IS BECAUSE PREEMPTION IS NOT A QUESTION OF STATUTORY CONSTRUCTION, BUT RATHER A CONSTITUTIONAL QUESTION. ID. CONGRESS CERTAINLY HAS THE POWER TO DECIDE THE PREEMPTIVE EFFECT OF LAWS IT ENACTS, BUT IT HAS NOT GENERALLY DELEGATED THAT AUTHORITY TO ADMINISTRATIVE AGENCIES. ID.

loan from that bank or that could mislead a consumer to believe that they were required to purchase insurance from any particular agent or broker.

- Require the separation of insurance and deposit-taking activities.
- Limit the payment of referral fees to a nominal amount that may not be based on whether the referral results in a transaction.
- Require the disclosure, prior to any insurance sale, that the insurance is—(1) not a deposit; (2) not insured by the FDIC; (3) not guaranteed by the financial institution or its subsidiaries or affiliates; and (4) where appropriate, involves investment risk, including loss of principal.
- Require that an acknowledgment be obtained whenever a disclosure is required from the customer verifying receipt of the disclosure.
- Prohibit any discrimination against an applicant for, or an insured under, any insurance product based on the fact that the person was a victim of domestic violence.114

The Act clarifies that the federal insurance sales consumer protection provisions are not intended to be construed as limiting state insurance regulatory authority, and federal banking regulators are required to coordinate their efforts with those of state officials.115 Moreover, the Act also makes clear that if any State maintains a consumer protection requirement applicable to insured financial institutions that offers more consumer protection than the parallel federal requirement, the state requirement "preempts" the application of the federal requirement in that

114. See Gramm-Leach-Bliley Act § 305, 12 U.S.C. 1831x (Supp. V 1999). The federal banking agencies also were required to ensure that the regulations promulgated under Section 305 do not have the effect of discriminating against any insurance agent that is not affiliated with a depository institution, and they also were required (and did) jointly establish a consumer complaint mechanism. See id.
115. Gramm-Leach-Bliley Act § 305, 12 U.S.C. 1831x (adding FDIA § 47(g)).
The federal banking regulators are required to determine jointly whether any parallel state consumer protection requirement is more protective; if it is not, the federal banking regulators must advise the State that the federal requirement will apply. The State may then “opt-out” of this preemption if it enacts a statute dictating that its less-restrictive state consumer protection requirement should apply in lieu of the federal requirement.

III. GLBA CHALLENGES AND THE FUTURE OF STATE REGULATION OF THE BUSINESS OF INSURANCE?

A. The Challenges

Enactment of the GLBA essentially poses four challenges to the state-based system of insurance regulation it purportedly sought to preserve.

1. Freezing State Regulation of Bank Insurance Activities

First, as noted above, the Act’s “nondiscrimination” preemption provisions essentially prohibit any state from enacting statutes or regulations that are intended to address any bank specific insurance-related issues that may arise in the future. This limitation is essentially unprecedented, and ultimately could prove to be too restrictive to allow the States to properly regulate the insurance activities of depository institutions and their affiliates.

2. The Multiplicity of State Insurance Requirements

Second, the nature of state regulation itself may pose the most insurmountable challenge. Every State certifies, supervises, and otherwise regulates insurance companies, agents and brokers

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116. Id. (adding FDIA § 47(g)(2)).
117. Id.
118. Id.
119. Id. § 104(e), 15 U.S.C. 6701(e).
who seek to sell insurance to state residents or to insure risks located in the State. Although these state rules are oftentimes similar or overlapping, each State has its own unique set of rules and licensing requirements with which all those who seek to engage in the business of insurance in that State must comply.

This means, for example, that insurance companies which must get their insurance contract rates and forms approved prior to their usage must obtain such approval from each State in which the contract will be offered. Insurance agents and brokers that seek to insure risks in all fifty States also must – as another in an endless series of examples – be separately licensed by each State and must be separately appointed by the insurance companies with which they do business in each State. In testimony before the House Commerce Committee in 1997, Albert “Skip” Counselman, the president of a large insurance agency, explained that an insurance broker who is selling fifty-state policies must obtain up to 100 licenses (because many States require several licenses to be fully authorized to sell all forms of insurance) and up to 1,000 company appointments. Mr. Counselman testified that his agency spends over $100,000 per year on licensing compliance and that larger agencies typically spend over $500,000 per year to ensure that all of their agents and brokers are fully licensed and properly appointed in each State.

3. GLBA-Mandated State Privacy Regulation

Third, the Act imposes three new privacy protection requirements on all “financial institutions,” including all insurance companies, agents and brokers.

First, the Act requires all financial institutions to disclose

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121. Id.
123. Id.
their policies for collecting and protecting confidential information.\textsuperscript{125}

Second, the Act establishes a customer information-sharing "opt out" right.\textsuperscript{126} Under this "opt-out" right, a financial institution must inform its consumers they have the right to prohibit it from sharing their nonpublic personal information with nonaffiliated third parties for non-exempted purposes.\textsuperscript{127} The right is qualified to the extent it does not prohibit financial institutions from sharing the information for the exempted purposes of: completing the transaction for which the information was provided (or a related transaction); protecting certain delineated legal rights or obligations; providing information to insurance rating organizations, guaranty funds, or to the institution's attorneys, accountants or auditors; complying with any legal obligation or to the extent explicitly permitted under other laws; or completing a sale or merger of the institution.\textsuperscript{128}

There are two additional major exceptions to the "opt-out" right. First, the Act does not require financial institutions to let customers "opt-out" of information sharing between the financial institution and a third-party that is done under a joint marketing agreement. Second, the Act permits financial institutions to disclose nonpublic personally identifiable customer information to nonaffiliated third parties to market the institution's own products and services.\textsuperscript{129}

Third, the Act imposes new data security and integrity requirements under which all "financial institutions" that collect or maintain nonpublic personal information must institute mechanisms for protecting the security and integrity of that information.\textsuperscript{130} Security mechanisms are designed to protect the information from inadvertent disclosures. Integrity mechanisms, in contrast, are intended to protect nonpublic personal information that is maintained in an electronic medium from becoming

\begin{itemize}
\item \textsuperscript{125} Gramm-Leach-Bliley Act § 503, 15 U.S.C §6803.
\item \textsuperscript{127} \textit{Id.} § 502, 15 U.S.C. §6802.
\item \textsuperscript{128} \textit{Id.} § 502(e), 15 U.S.C. §6802(e).
\item \textsuperscript{129} \textit{Id.} § 502(b) (2), 15 U.S.C. §6802(b) (2).
\item \textsuperscript{130} \textit{Id.} § 501, 15 U.S.C. § 6801.
\end{itemize}
THE REGULATION OF INSURANCE

corrupted. The rules do not, however, dictate that any specific mechanisms be instituted.

Although the scope of the new GLBA privacy obligations is more properly the focus of a separate article, one point warrants emphasis here. Under the enforcement provisions of the Act's new privacy requirements, the GLBA privacy obligations are to be enforced under State insurance law for "any person engaged in providing insurance." The Act also specifically dictates that any state privacy requirement that "affords any person" privacy protection that is "greater than the protection provided under" the GLBA Title V privacy provisions is not preempted by the GLBA.

In response, two associations of state insurance officials—the National Association of Insurance Commissioners ("NAIC") and the National Conference of Insurance Legislatures ("NCOIL")—have issued proposed model privacy acts that would satisfy the GLBA's privacy requirements. Almost every state is expected to consider enactment by statute or regulation of one of these models or of other GLBA-implementing privacy provisions this year. All of these provisions are expected to apply to all insurance companies and producers that are selling insurance to each state or insurance risks located in each state. This means that the state insurance multiplicity problem could be deepened if states enact privacy requirements that do not impose uniform obligations. If financial services providers are confronted with fifty separate sets of state privacy obligations, the industry desire for a federal solution will be rampant.


132. Gramm-Leach-Bliley Act § 507(b), 15 U.S.C. 6807(b) (Supp. V 1999). Under this reverse preemption provision, the Federal Trade Commission is charged with determining whether a State privacy protection is more protective than the GLBA privacy requirements. Id.


134. Each of the federal financial services regulators – the OCC, the Office of Thrift Supervision (OTS), the Board of Governors of the Federal Reserve (Federal Reserve), the National Credit Union Administration (NCUA), the Securities and Exchange Commission (SEC), and the Federal Trade Commission—also was charged
Finally, the Act contains a set of provisions designed to alleviate the onerous and duplicative burdens associated with the multi-state licensing of insurance agents and brokers. To accomplish this, the Act contains provisions that would establish the National Association of Registered Agents and Brokers (NARAB) as a voluntary licensing clearinghouse for insurance agents and brokers seeking licensure in states in which they are not residents. Under the terms of the legislation, however, if twenty-nine states enact fully uniform or reciprocal licensing statutes within five years (three years, and then an additional two-year grace period), NARAB's creation will be averted. NARAB thus creates a strong incentive for the states to streamline multi-state licensing requirements.

If NARAB does come into existence, it would operate in the following manner. First, an agent or broker must be licensed in his or her own state. Only then could the applicant apply for NARAB membership. Under the terms of the Act, the NAIC would be empowered to establish the criteria and categories of membership in NARAB. According to the subtitle, the standard of professionalism for each of those categories must exceed the highest standard that currently exists in any state. Once a NARAB applicant meets those requirements, the applicant may use NARAB as a “clearinghouse” for multi-state licensing. NARAB would not actually be a federal “license” but, rather, would allow the NAIC to issue state licenses to NARAB.


members. NARAB members would have to indicate the states in which they wish to be licensed and remit state licensing fees to those states. All other areas of state insurance regulation – such as conformance with all unfair trade practices acts—would remain fully in force with no preemption granted to NARAB members. Membership in NARAB would be purely voluntary and self-funding, and would be open to all state-licensed insurance producers.

If created under the terms of the legislation, NARAB thus would be authorized to:

- Create a clearinghouse for processing insurance producer licenses, thus avoiding duplication of paperwork and efforts state-by-state;
- Issue uniform insurance producer applications and renewal applications that may be used to apply for the issuance or renewal of state licenses, while preserving the ability of each state to impose some conditions on the issuance or renewal of a license;
- Develop uniform continuing education standards and/or establish a reciprocity process for continuing education credits;
- Create a national licensing exam process; and
- Utilize a national database for the collection of regulatory information concerning the activities of insurance producers.

Whether the states can avert the creation of NARAB is the pressing issue. In many ways, this is the most immediate threat to the perpetuation of a state-dominated insurance regulatory system. State insurance regulators are taking the threat seriously, as evidenced by the unprecedented speed with which they adopted

139. Id.
140. Id.
141. Id.
142. Id.
a model-licensing act through the NAIC.\textsuperscript{143} State regulators believe that adoption of the NAIC model in at least twenty-nine states would satisfy the statutory threshold and avert the creation of NARAB. Now the question is whether at least twenty-six states will be able to enact the model provisions without fundamentally altering any of their substance in a way that destroys the ultimate reciprocity objective.

For the NAIC, this is not a new task. Indeed, at the very first meeting of the NAIC in 1871, George W. Miller, the New York Insurance Commissioner and chair of the inaugural meeting of the NAIC, declared at the closing session that "[t]he Commissioners are now fully prepared to go before their various legislative committees with recommendations for a system of insurance law which shall be the same in all States - not reciprocal, but identical; not retaliatory, but uniform."\textsuperscript{144} Unfortunately, although some progress has been made over the course of the last 130 years to harmonize the different insurance regulatory requirements imposed by each state, the overall effort to date has largely been a failure.

\section*{B. The Future?}

It is impossible to predict what lies ahead for the regulation of the insurance business. What can be said with certainty is that the new (and expanded) bank presence in the industry, combined with increasing demands from abroad to reduce our insurance regulatory burdens (and the multiple state requirements), has sparked new interest in the development of a more streamlined insurance regulatory system. There are at least four principal regulatory options that could be pursued; each is discussed in turn below.

\begin{itemize}
\item \textsuperscript{143} PRODUCER LICENSING MODEL ACT (Nat'l Ass'n of Ins. Comm'rs 2000), \textit{available at} http://www.naic.org/GLBA/narab_wg/PLMA-218.doc (last visited Feb. 24, 2001).
\item \textsuperscript{144} NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS, 1995 NAIC ANNUAL REPORT 1 (1996) (quoting \textit{Baltimore Underwriter}, June 1871) (on file with author) [hereinafter 1995 NAIC REPORT].
\end{itemize}
1. Perpetuation of the Status Quo – Virtually Exclusive State Regulation.

To many, perpetuation of the current regulatory status quo is the most unpalatable option. Yet to scores of others—including the state regulators themselves and the many small and regional companies and agencies that have tailored their business practices to the unique regulatory demands in each of the states in which they engage in insurance activities defense of that system has become a holy grail. One of the strongest arguments in support of the perpetuation of that system, however, is the strong contract performance consumer protection role that almost every state insurance commissioner’s office plays. Because federal agencies are so far removed from the day-to-day world of most people’s lives, many question whether a federal insurance regulator could ever defend insureds’ interest in insurance company insurance policy performance as state insurance commissioners currently do on a daily basis.

The biggest obstacles these defenders of the grail must overcome are the banks’ desire for a federal system (discussed below), enactment of potentially conflicting state requirements implementing the GLBA privacy provisions that could exacerbate and expand the demand for a federal solution, and the immediate NARAB licensing threat which would now be self-implementing.


The immediate focus of those who are pandering for a federal solution is on the creation of a new, optional federal charter for insurance companies and agencies. The American Bankers Association Insurance Association (“ABAIA”) has, for example, drafted a proposed “National Insurance Act” that would create two new federal charters – one for insurance companies and a second for insurance agencies – and a new bureau within the Department of the Treasury to regulate these two new types of entities that would be called the “Office of the National Insurance
The ABAIA draft Act also would create a new obligation for the United States Treasury by creating the "National Insurance Guaranty Corporation." The ABAIA describes the draft Act as "cradle to grave" regulation for insurance companies and agencies that opt to obtain a federal charter. This means that all state laws and regulations would be preempted by the draft Act and would be inapplicable to national insurance companies and agencies unless the draft Act or the National Insurance Commissioner specifically required compliance with a specific set of state requirements.

Under the ABAIA proposal, a new federal bureaucracy would be created to regulate the "cradle to crave" insurance regulatory scheme. This appears to be directly counter to the GLBA "functional regulation" mandate under which the regulation of the business of insurance was specifically left to the states.

There is strong sentiment for pursuit of a federal insurance regulatory option, especially among those in the banking community. At the same time, proposals such as the ABAIA's draft "National Insurance Act" would overturn completely the state-based system that Congress worked so hard to preserve less than eighteen months ago. Moreover, although "optional" federal chartering based on a banking solvency model may be desirable for company regulation, it may not be the most efficient form of regulation for insurance agents or brokers whose primary contact with their regulators is through the licensing process.


Many of the advantages the banking community seeks through the creation of an optional federal chartering authority could be attained if the current state regulatory systems were harmonized as Commissioner Miller had promised in 1871.

146. Id.
147. Id.
148. See 1995 NAIC REPORT, supra note 144.
Although the prospects for state-initiated reform appear somewhat bleak in light of the historical lack of success, renewed industry threats to seek federal action could be enough to motivate reform, much as the enactment of NARAB has done in the agent/broker licensing context.

Alternatively, federal legislative efforts could focus on creating NARAB-like incentives for streamlining company regulation, or on dictating that the primary responsibility for regulating the activities of an insurer will reside with the regulator in the insurer's state of domicile. The problem with NARAB-like solutions is that they create pressure for future reform; many federal regulation advocates will not be satisfied with such an approach.

The problem with dictating the manner in which state regulation will be conducted under the latter-type approach is two-fold. First, it would require the establishment of minimum regulation standards that may be virtually impossible to reduce to legislation capable of enactment. Second, it may create Tenth Amendment issues that would have to be carefully navigated. 149


As noted above, although any purely federal approach may be a viable regulatory solution for insurers, a bank-solvency based model of regulation may not be the most viable approach for agents and brokers. Indeed, as a general matter, the federal government has virtually no experience licensing individuals to engage in professional activities.

For insurance agents and brokers, a securities industry-type authorization for the creation of self-regulatory organizations ("SRO") may be the most desirable option. Under this approach, any association of insurance agents or brokers could apply to establish an SRO if they satisfied the eligibility requirements that would be established under the authorization legislation. The legislation also could dictate the responsibilities of such SRO and

the oversight authority to which their activities would be subject.\textsuperscript{150} This approach allows full federal agency involvement in the creation of the regulatory rules and in oversight of their implementation and enforcement.

At the same time, SROs can be quite flexible regulatory tools, as different SROs could be created to respond to the needs of different segments of the insurance agent and broker community. In many cases, for example, life insurance agents must now obtain licenses both from their state insurance departments and from the National Association of Securities Dealers (the primary securities industry SRO licensing authority), because they sell life insurance products that include a securities component. If federal law authorized the creation of SROs to license and regulate the activities of insurance agents and brokers, an SRO theoretically could apply to both the federal insurance regulator and to the SEC for approval to license individuals and firms who sell products in both market sectors.

IV. CONCLUSION

The regulation of the insurance business—despite various threats that have arisen over the years—has remained the exclusive province of the states since its inception. Enactment of GLBA both bolsters that state-based system by specifically incorporating the “functional regulation” mandate and creates new challenges to the perpetuation of a solely state-based system of insurance regulation. Because of the unique demands of insurance regulation and the concomitant need to represent actively the interests of consumers when insurers disclaim insurance policy performance obligations, the future of insurance regulation may be more complicated than the mere creation of a competing federal system. Although it is undoubtedly true that the need for local control of the overarching rules that govern insurance activities has greatly abated over the course of the last 130 years, it also is undoubtedly still true there are great advantages to ensuring that

\textsuperscript{150} See, e.g., 15 U.S.C. § 78s (1994) (authorizing the creation of SROs to license and otherwise regulate securities broker/dealers and establishing the rules governing their registration, responsibilities and oversight).
regulatory enforcement activities remain under local control. Finding the right balance between these two (potentially competing) objectives may become the ultimate grail for those who seek to bring insurance regulation into the 21st Century.