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MEMORANDUM

December 8, 1999

Re: The Effect of the Gramm-Leach-Bliley Act on the
Affiliate Sharing Provisions of the Fair Credit Reporting Act

CONCLUSION

You have asked whether section 507 of the Gramm-Leach-Bliley Act (“G-L-B Act”),¹ which permits states to adopt provisions that provide protections which are greater than the protections contained in the G-L-B Act, affects section 624(b)(2) of the Fair Credit Reporting Act (“FCRA”),² which prohibits states from enacting laws affecting the exchange of information among affiliated persons. After reviewing the language of the G-L-B Act and its legislative history, as well as the language and purposes of the FCRA, it is our conclusion that the G-L-B Act does not affect section 624(b)(2) of the FCRA. Accordingly, it is our view that a court would hold that section 507 of the G-L-B Act does not authorize a state to enact a law which restricts the ability of a company to share information with its affiliates.

DISCUSSION

The FCRA

The FCRA generally relates to the exchange and use of consumer information for certain purposes, including decisions relating to the granting of credit or insurance.³ In 1996 Congress enacted amendments to the FCRA to facilitate the sharing of information among affiliated persons.⁴ At that time, Congress amended the

¹ Pub. L. 106-102.

² 15 U.S.C. §§ 1681 *et seq.*

³ 15 U.S.C. § 1681.

⁴ Economic Growth and Regulatory Paperwork Reduction Act of 1996. Pub. L. 104-208, §§ 2401 *et seq.*

SCHWARTZ & BALLEN

definition of the term “consumer report” in section 603(d) of the FCRA to exclude from that term (1) any communication of information among persons related by common ownership or affiliated by corporate control “if the information relates to transactions or experiences between the consumer and the person making the report,” and (2) any communication between affiliated persons which relates to other types of information if it is clearly and conspicuously disclosed to the consumer that such information may be communicated among affiliates, and before the information is initially communicated, the consumer is given an opportunity to direct that such information not be shared.⁵

The legislative history of the 1996 amendment to the definition of “consumer report” states that the provision “facilitates the sharing of information among entities related by common ownership or affiliated by corporate control by excluding certain information from the definition of ‘consumer report.’ ”⁶ In furtherance of this objective, Congress prohibited states from enacting laws that would affect the ability of companies to share information with affiliates by adding section 624(b)(2) to the FCRA, which provides as follows:

General exceptions. No requirement or prohibition may be imposed under the laws of any state—

* * *

(2) with respect to the exchange of information among persons affiliated by common ownership or common corporate control

* * *⁷

The legislative history of the FCRA amendment indicates that it “pre-empts any state or local law with respect to the exchange of information among affiliated persons”⁸ Congress’s intent with regard to the provision was “to provide for national uniformity in many of the disclosures and procedures required by the

⁵ Pub. L. 104-208, § 2402(e)(4).

⁶ S. Rep. 104-185, 104th Cong., 1st Sess. 33.

⁷ 15 U.S.C. § 1681t. Although not relevant here, section 624(b)(2) of the FCRA provides that the exception does not apply to title 9, section 2480e(a) and (c)(1) of Vermont Statutes Annotated, in effect on the date of enactment of the Consumer Credit Reporting Reform Act of 1996.

⁸ S. Rep. 104-185, 104th Cong., 1st Sess. 55. It should be noted that pre-emption language of § 624(b) of the FCRA will not apply to a state law that is (1) enacted after January 1, 2004; (2) states explicitly that the provision is intended to supplement the FCRA; and (3) gives greater protection to consumers than is provided under the FCRA. 15 U.S.C. § 624(d).

SCHWARTZ & BALLEN

FCRA.”⁹ It is widely acknowledged that as a result of the 1996 amendments to the FCRA, companies may share all types of information with affiliates without regard to state law.¹⁰

The G-L-B Act

Subtitle A of title V of the G-L-B Act establishes several requirements on financial institutions with regard to disclosures and sharing of nonpublic personal information (“Subtitle A”).¹¹ Generally, a financial institution may not share nonpublic personal information concerning a consumer with a nonaffiliated third party unless the financial institution provides a notice to the consumer that complies with section 503 of the G-L-B Act. Section 503 of the G-L-B Act requires a financial institution to disclose to its customers at the time the relationship is established, and at least annually, the institution’s policies and practices with respect to (1) disclosing nonpublic personal information to affiliates and nonaffiliates, (2) disclosing information relating to persons who are no longer customers, and (3) protecting nonpublic personal information. In addition, a financial institution may not disclose nonpublic personal information of a consumer to a nonaffiliated third party unless it has disclosed to the consumer that the information may be disclosed to a third party and it provides the consumer with the opportunity to direct that such information not be disclosed, as well as an explanation as to how the consumer can exercise that option.¹²

The G-L-B Act addresses the issue of what law should apply in the event the provisions of Subtitle A conflict with the provisions of state law. Section 507 of the G-L-B Act provides as follows:

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

⁹ *Id.*

¹⁰ See Comptroller of the Currency Advisory Letter No. 99-3 (March 29, 1999) and Statement of the Federal Trade Commission before the Subcommittee on Financial Institutions and Consumer Credit, Committee on Banking and Financial Services, United States House of Representatives, “Financial Privacy, the Fair Credit Reporting Act, and H.R. 10,” July 21, 1999.

¹¹ Sections 501 to 510 of the G-L-B Act.

¹² G-L-B Act § 502

SCHWARTZ & BALLEN

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

Section 507 of the G-L-B Act was added in conference. The Conference Report simply reiterates the language of section 507 and states the following:

The Conferees inserted language stating that the privacy provisions in the subtitle do not supersede any State statutes, regulations, orders, or interpretation, except to the extent that such State provisions are inconsistent with the provision of the subtitle, and then only to the extent of the inconsistency. The amendment provides that a State statute, regulation, order, or interpretation is not inconsistent with the provisions of this subtitle if the protection such statute, regulation, order, or interpretation affords any consumer is greater than the protection provided under this subtitle, as determined by the FTC in consultation with the agency or authority with jurisdiction under 505(a) over either the person that initiated the complaint or that is the subject of the complaint, on its own motion or upon the petition of any interested party.¹³

Effect of the G-L-B Act on the FCRA Affiliate Sharing Provisions

There are several reasons why section 507 of the G-L-B Act does not authorize a state to adopt laws that supersede section 624(b)(2) of the FCRA, which relates to the sharing of information among affiliated companies.

¹³ H. Rep. 106-434, 106th Cong., 1st Sess. 172.

A. The Language of Section 507 Itself Does Not Affect the FCRA

The language of section 507 of the G-L-B Act does not in any way suggest that a state may override the affiliate sharing provisions of the FCRA. Section 507 provides that the provisions of Subtitle A do not supersede or affect any state law except to the extent that the state law is inconsistent with the provisions of Subtitle A, and only to the extent of the inconsistency.¹⁴ Section 507 further states that for purposes of that section, a state law is not inconsistent with Subtitle A if the protection provided under state law is greater than the protection provided, and the amendments made, by Subtitle A.¹⁵

The purpose of section 507 of the G-L-B Act is to establish when the protections afforded by Subtitle A will pre-empt state law. That is, state law will be pre-empted by Subtitle A when the state provision is “inconsistent” with those of Subtitle A. Section 507(b) indicates that state law is not “inconsistent” with the provisions of Subtitle A if it provides protection which is greater than the protections provided under Subtitle A. Nothing in section 507 indicates that state law may address anything other than the “protections provided under this Subtitle [A].”

The FCRA provisions relating to sharing of information among affiliates are not dealt with under the G-L-B Act. They are addressed exclusively by the FCRA. Indeed, Subtitle A does not even deal with when and under what circumstances information may be shared with affiliates.¹⁶ The only requirements with respect to sharing of information with affiliates mentioned in Subtitle A are found in section 503(a) of the G-L-B Act, which requires financial institutions periodically to disclose to customers their policies and practices with respect to sharing nonpublic personal information with affiliates, and in section 503(b)(4) of the G-L-B Act, which requires financial institutions to include in their periodic disclosure statements to customers any disclosure required under the affiliate-sharing provisions of section 603(d)(2)(A)(iii) of the FCRA.¹⁷ Accordingly, nothing in the G-L-B Act provides any “protections” with regard to the sharing of information with affiliates because the act

¹⁴ G-L-B Act § 507(a).

¹⁵ G-L-B Act § 507(b).

¹⁶ During the Senate debate on the conference report, Senator Bryan (D-NV), a critic of the legislation, confirmed that nothing in the legislation dealt with the sharing of information among affiliated companies:

Now, there is absolutely no provision – none, zip, nada, zero, nothing – that prevents the sharing of information from affiliate to affiliate. No privacy at all. That is freely exchanged; it is freely exchanged.

145 *Cong. Rec.* S 13892 (November 4, 1999 daily ed.)

¹⁷ Section 603(d)(2)(A)(iii) of the FCRA provides that a company must provide a consumer with the opportunity to “opt-out” if the company intends to share with affiliates information about the customer other than experience and transaction information.

SCHWARTZ & BALLEN

does not address affiliate sharing of information.¹⁸ Consequently, the language of section 507 itself cannot be read to authorize the states to override the FCRA provisions on affiliate sharing.

B. The Language of Section 506 Precludes State Action Affecting the FCRA

Section 506 of the G-L-B Act, entitled “Protection of Fair Credit Reporting Act,” amends the FCRA to permit the Federal banking agencies and the Federal Trade Commission (“FTC”) to adopt rules under the FCRA. Previously, those agencies were precluded from promulgating any rules under the FCRA. In addition to conferring rulemaking authority on the agencies, section 506(c) of the G-L-B Act provides the following:

(c) RELATION TO OTHER PROVISIONS.— Except for the amendments made by sections (a) [rulemaking authority for the Federal banking agencies] and (b) [rulemaking authority for the FTC], nothing in this title shall be construed to modify, limit, or supersede the operation of the Fair Credit Reporting Act, and no inference shall be drawn on the basis of the provisions of this title regarding whether information is transaction or experience information under section 603 of such Act.

This provision was the subject of the following colloquy between Senator Mack (R-FL) and Senate Banking Committee Chairman Gramm (R-TX), the Senate’s major sponsor and floor manager for the legislation:

Mr. MACK. I want to confirm that section 507 is intended to apply only to the amendments made by subtitle A of title V of the bill, and that section 507 is not to be construed, under any circumstances, to apply to any provision of law other than the provisions of subtitle A. For instance, subtitle A of title V relates only to disclosure of nonpublic personal information to nonaffiliated third parties. This means that section 507 of the bill does not supersede, alter, or affect laws on the disclosure of information among affiliated entities. In particular, section 507 does not supersede, alter, or affect the provisions of the Fair Credit Reporting Act (or FCRA) regarding the communication of information among persons related by common ownership or affiliated by corporate control, not does section 507 supersede, alter, or affect the

¹⁸ In this regard, section 508 of the G-L-B Act requires the Secretary of Treasury, in conjunction with the Federal functional regulators and the FTC and in consultation with state insurance authorities, to conduct a study of information sharing practices among financial institutions and their affiliates, and report its findings, conclusions, and recommendations to Congress by January 1, 2002.

SCHWARTZ & BALLEN

existing FCRA preemption of state laws with respect to the exchange of information among affiliated entities. . . .

Mr. GRAMM. Mr. President, the understanding of the Senator from Florida is correct. Section 507 in intended to apply only to subtitle A of title V of the bill, and is not to be construed to apply to any other provision of law other than the provisions of the subtitle. Thus, section 507 does not affect the existing FCRA provisions on that statute's relationship to state laws.¹⁹

Accordingly, section 506 of the G-L-B Act, and its legislative history, clearly indicate clear Congressional intent and direction that the language of the FCRA which permits sharing of information among affiliates without interference by state law remain unaffected by section 507.

C. Rules of Statutory Construction Support the Position that the Affiliate Sharing Provisions of the FCRA Are Unaffected by Section 507

There is nothing in title V of the G-L-B Act which expressly amends or repeals section 624(b)(2) of the FCRA. Accordingly, any amendment or repeal of the pre-emption provision of section 624(b)(2) by section 507 of the G-L-B Act could only occur by implication. However, amendments and repeal by implication are not favored.²⁰ Applicable principles of statutory construction suggest that statutes are to be interpreted so that they are not in conflict.²¹ In the absence of an affirmative showing of an intention to amend or repeal, the only permissible justification for amendment or repeal by implication is when the two laws are irreconcilable, or if the later act covers the whole subject of the earlier one and is clearly intended as a substitute.²² This suggests that a court would hold that the G-L-B Act did not change the FCRA unless the terms of the G-L-B Act are so inconsistent with the provisions of the FCRA that they cannot stand together.²³

There is nothing in section 507 of the G-L-B Act which establishes an irreconcilable conflict with section 624(b)(2) of the FCRA, nor is there anything which suggests that Subtitle A was intended to replace section 624(b)(2) of the FCRA. Section 507 is intended to permit states to adopt protections that are greater than the protections established by Subtitle A. Subtitle A does not deal with the

¹⁹ 145 *Cong. Rec.* S 13901 (November 4, 1999 daily ed.)

²⁰ Sutherland Stat. Const. §§ 22.13, 23.10 (5th Ed.); *U.S. v. Welden*, 377 U.S. 95 (1964); *Morton v. Mancari*, 414 U.S. 1142 (1974); *NRDC v. Hodel*, 865 F.2d 288 (DC Cir. 1988)

²¹ *U.S. v. Barrett*, 837 F.2d 933 (10th Cir. 1988); *Commonwealth of Pennsylvania v. Department of Health and Human Services*, 723 F.2d 1114 (3d Cir. 1983)

²² *Polos v. U.S.*, 621 F.2d 385 (Ct. Cl. 1980).

²³ Sutherland § 22.13; *Evcco Leasing Corp v. Ace Trucking Co.*, 828 F.2d 188 (3d Cir. 1987).

SCHWARTZ & BALLEN

authority of a financial institution to share information with its affiliates. It relates to what requirements apply with respect to the sharing of information with nonaffiliated third parties, and disclosure of the financial institution's policies and practices regarding the handling and sharing of nonpublic personal information of customers. As indicated by the language of the statute and its legislative history, there is nothing in Subtitle A that establishes an irreconcilable conflict between section 507 of the G-L-B Act and section 624(b)(2) of the FCRA. Accordingly, it is likely that a court would conclude that the FCRA continues to pre-empt state laws that attempt to limit the exchange of information among affiliates.