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**M E M O R A N D U M**

March 20, 2002

To Our Clients and Friends

Re: OCC's Opinion that Gramm-Leach-Bliley Act Preempts  
Selected Provisions of Massachusetts Insurance Law

The Office of the Comptroller of the Currency ("OCC") has issued an opinion that certain provisions of Massachusetts insurance law and regulations relating to the sale of insurance by banks<sup>1</sup> are preempted under Section 104 of the Gramm-Leach-Bliley Act (GLBA) and therefore do not apply to national banks. While the OCC only addresses preemption in terms of national banks, Section 104 of the GLBA applies to all depository institutions.

In July 2000 the Massachusetts Bankers Association (the "Association") asked the OCC for a determination that Federal law preempts certain provisions of the Massachusetts insurance law.<sup>2</sup> The specific provisions of the Massachusetts insurance law (and corresponding regulations) that OCC was asked to consider were:

- a prohibition on non-licensed bank personnel from referring prospective customers to a licensed insurance agent or broker except upon an inquiry initiated by the customer (the "Referral Prohibition")
- a prohibition on non-licensed bank personnel from receiving any additional compensation for making a referral, even if the compensation is not conditioned upon the sale of insurance (the "Referral Fee Prohibition")
- a requirement that banks refrain from making an insurance solicitation in connection with an application for an extension of credit until after the application has been approved and, in the case, of an extension of credit secured by a mortgage on real estate, until after the customer has accepted the bank's written commitment to extend credit (the "Waiting Period Requirement")

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<sup>1</sup> Mass. Gen. Laws Ann. Ch. 167F, §2A; 209 CMR 49.06(3) and 211 CMR 142.05(3).

<sup>2</sup> 65 Federal Register 43827 (July 14, 2000).

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GLBA provides that a state may not prevent or significantly interfere with the ability of a depository institution to engage in any insurance sales, solicitation, or crossmarketing activity.<sup>3</sup> GLBA provides Safe Harbors for thirteen specific actions a state may take to limit the sale of insurance by depository institutions and does not preempt state actions that are “substantially the same as but no more burdensome or restrictive than” these Safe Harbors.<sup>4</sup>

The Association contended that both the Referral Prohibition and the Referral Fee Prohibition were broader than the Safe Harbors of the GBLA. The Safe Harbors 1) protect restrictions prohibiting the payment of commissions for services as an insurance agent to any person other than licensed insurance personnel and 2) protect limitations upon insurance commissions to unlicensed personnel based on the purchase of insurance by a prospective customer.<sup>5</sup> However, the Safe Harbors do not limit a referral by an unlicensed person of a customer to a licensed insurance agent or broker that does not include a discussion of specific insurance policy terms and conditions. The Association contended that the Referral Prohibition and The Referral Fee Prohibition significantly interfere with the ability of a national bank to engage in insurance sales, solicitation and crossmarketing activities.

Similarly, the Massachusetts Bankers Association argued that none of the Safe Harbors protected the Waiting Period Requirement. It also argued that as the Waiting Period Requirement requires a national bank to complete the processing of a credit application before informing an applicant that insurance is available through the institution, the institution may never have an opportunity to markets its products to loan customers. Thus, the Waiting Period Requirement significantly interferes with the ability of a national bank to engage in insurance sales, solicitation and crossmarketing activities.

The OCC determined that the Referral Prohibition, Referral Fee Prohibition and Waiting Period Requirement “frustrate the ability of national banks to solicit and cross-market products,” and are preempted under the standards of Section 104 of the GLBA. The OCC also specifically noted that none of its conclusions would result in a finding that any provision of the model Unfair Trade Practices Act developed by the National Association of Insurance Commissioners would be preempted.

If you have any questions concerning OCC’s opinion please call Gilbert Schwartz, Robert Ballen or Tom Fox at (202) 776-0700.

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<sup>3</sup> 15 U.S.C. § 6701(d)(2)(A).

<sup>4</sup> 15 U.S.C. § 6701(d)(2)(B).

<sup>5</sup> 15 U.S.C. § 6701(d)(2)(B)(iv), (v).