July 28, 2023

Ms. Katie Johnson
Chair
NAIC Privacy Protections Working Group
NAIC Central Office
1100 Walnut Street, Suite 1500
Kansas City, MO. 64106

Attn: Ms. Lois Alexander, NAIC Market Regulation Manager

Sent via email: lalexander@naic.org

RE: Draft Insurance Consumer Privacy Protection Model Law #674 – Comments of the American Bankers Association’s Office of Insurance Advocacy

Dear Ms. Johnson:

Thank you for the opportunity to comment on Version 1.2 of proposed Model Law #674 (the “Exposure Draft”). The American Bankers Association (“ABA”) appreciates the Privacy Protection Working Group’s (“PPWG” or “Working Group”) efforts in trying to address some of the issues we raised in our April 3, 2023, comment letter, our one-on-one meeting in early May, and our oral comments at the PPWG’s meeting in Kansas City.

However, we remain concerned that the application of the opt-out requirements for joint marketing to depository institutions and their insurance affiliates is preempted under the Gramm-Leach-Bliley Act (“GLBA”) and the Supreme Court’s decision in Barnett Bank.1 While we are still reviewing Version 1.2, we believe similar federal preemption issues exist with respect to several other provisions. We are again bringing these issues to you so the lack of an exemption for depository institutions and their insurance affiliates does not impede your work as a whole.

Barnett Bank was a watershed for the banking industry. It recognized the public benefits associated with national bank entry into insurance sales, and it stopped other discriminatory State insurance laws aimed at national banks. Congress subsequently codified the Barnett Bank decision in GLBA and applied the Barnett Bank standard to all depository institutions and their affiliates. If implemented in its current form, Model Law #674 would disrupt the delicate balance Congress put in place over 30 years ago between the preservation of state insurance regulatory powers and the establishment of limits on those powers with respect to depository institutions.

For these reasons, we urge the Working Group to exempt depository institutions and their affiliates from the Exposure Draft.

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For Depository Institutions and their Insurance Affiliates, the Barnett Bank Case and GLBA Govern When a State Law is Preempted

While the GLBA permits states to provide greater privacy protections under state law in certain circumstances, it created separate preemption standards for state laws that apply to depository institutions engaged in the sale, solicitation or cross-marketing of insurance.

In the 1996 Barnett Bank case, the United States Supreme Court held that a federal banking law that permits national banks to sell insurance from small towns preempted a Florida insurance law that prohibited affiliations between financial institutions and insurance agencies. To determine whether preemption was appropriate, the Court examined the authority for national banks to sell insurance. The Court said that the authority was “a broad, not a limited, permission.” The Court then said that the Florida statute is preempted, because it stood as “an obstacle to the accomplishment and execution of the full purposes and objectives of Congress” in permitting national banks to sell insurance. Further, the Court said that a state may not “prevent or significantly interfere” with a national bank’s authority to sell insurance. The Court did not leave the meaning of the phrase “prevent or significantly interfere” solely to the imagination. Instead, the Court placed that phrase within the context of several other preemption cases previously decided by the Supreme Court. In those cases, the Supreme Court said that state laws that unlawfully encroach, destroy, hamper, or impair the operation of a national bank are subject to preemption. Thus, when the phrase – prevent or significantly interfere is read in conjunction with the entire decision, it is clear that this “Barnett Bank preemption standard” is a broad and flexible one intended to override any state law that stands as “an obstacle” to the exercise of a national bank’s legitimate powers.

In response to the discriminatory regulatory treatment of banks engaged in insurance sales by the States, Congress codified the decision in Barnett Bank in GLBA — including all favorably cited preemption standards — not just four words taken from the case. The relevant provisions of GLBA state:

In accordance with the legal standards for preemption set forth in the decision of the Supreme Court of the United States in Barnett Bank of Marion County N.A. v. Nelson, 517 U.S. 25 (1996), no State may . . . prevent or significantly interfere with the ability of a depository institution . . . to engage . . . in any insurance sales, solicitation, or crossmarketing activity. (Emphasis added)

To preserve state insurance powers, Congress also provided thirteen “safe harbors” from preemption for state regulatory authority over bank insurance sales activities. State laws that

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2 15 U.S.C.S. § 6807
3 Ass'n of Banks in Ins. v. Duryee, 270 F.3d 397, 405 (6th Cir. 2001).
4 In Association of Banks in Insurance (ABI) v. Duryee, the Federal District Court of the 5th District of Ohio further explained that preemption under Barnett Bank is not limited to state laws that prohibit bank-affiliated insurance agencies from engaging in an authorized insurance agency activity, but also is warranted when the statute harms bank operations; increases a bank’s costs of operating; requires a bank to operate inefficiently; or places obstacles in front of banks – all principles it derived from the Barnett Bank case.
imposed restrictions substantially the same as the safe harbors, but not more restrictive, are protected from federal preemption. Only two of the thirteen safe harbors relate to information sharing. One of these safe harbors relates to sharing health information and the other safe harbor relates to sharing insurance information.\(^7\) Specifically, a state may impose restrictions that are substantially the same but no more burdensome than the following with respect to the sharing of insurance information:

\begin{quote}
(vi) Restrictions prohibiting the release of the insurance information of a customer (defined as information concerning the premiums, terms, and conditions of insurance coverage, including expiration dates and rates, and insurance claims of a customer contained in the records of the depository institution or an affiliate thereof) to any person other than an officer, director, employee, agent, or affiliate of a depository institution, for the purpose of soliciting or selling insurance, without the express consent of the customer, other than a provision that prohibits \ldots the release of information as otherwise authorized by State or Federal law.\(^8\)
\end{quote}

(Emphasis added)

As an initial matter, this is a narrow safe harbor that is related solely to insurance information. The Exposure Draft would impose information sharing limitations on depository institutions regarding categories of information much broader than insurance information. Moreover, the GLBA explicitly authorizes sharing nonpublic personal information under a joint marketing agreement without an opt-out notice and the safe harbor provision does not apply to the release of insurance information authorized by Federal law, which would include information released under a joint marketing agreement. This principle is also reiterated in Section 6701(d)(1):

\begin{quote}
[N]o State may, by statute, regulation, order, interpretation, or other action, prevent or restrict a depository institution or an affiliate thereof from engaging directly or indirectly, either by itself or in conjunction with an affiliate, or any other person, in any activity authorized or permitted under this Act and the amendments made by this Act.\(^9\) (Emphasis added)
\end{quote}

The word “Act” in Section 6701(d)(1) refers to the entirety of the Gramm-Leach-Bliley Act. Accordingly, given that depository institutions are permitted under the GLBA to share nonpublic personal information pursuant to a joint marketing agreement without providing consumer’s a right to opt-out, the current joint marketing provision (and likely other provisions) in the Exposure Draft are preempted with respect to depository institutions and their insurance affiliates.

**II. Like Other NAIC Model Laws, the Exposure Draft Should Recognize the Unique Regulatory Framework Depository Institutions are Subject To**

Following enactment of GLBA, the NAIC recognized the need for action and established a Working Group to amend the model Unfair Trade Practices Act to recognize the GLBA

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preemption standards. The working group’s efforts were designed to ensure that any amendments to the model act that might later be adopted by a state were consistent with the preemption standards outlined in GLBA. The proceeding citations to the Unfair Trade Practices Act evidence these efforts and specifically acknowledge that the safe harbors serve as a ceiling and not a floor with respect to state regulation of insurance sales by depository institutions:

GLBA provided 13 ‘safe harbors’ from preemption for state regulatory authority over bank sales activities. State laws that imposed restrictions that are substantially the same as the safe harbors, but not more restrictive, were protected from federal preemption. 2000 Proc. 1st Quarter 985.

The proceeding citations to the Unfair Trade Practices Act also illustrate that the working group only addressed 11 of the 13 safe harbors in the amendments to the model Unfair Trade Practice Act as the remaining safe harbors were addressed in the current model laws the Working Group now seeks to amend:

During development of the 2001 amendments, regulators addressed 11 of the 13 safe harbors in the proposed amendments to the Unfair Trade Practices Act. They decided not to address the two safe harbors related to privacy, as the NAIC’s privacy regulations adequately addressed privacy disclosures. 2001 Proc. 2nd Quarter 836.

The following drafting note to the Unfair Trade Practices Act was also specifically included to ensure that states adopted legislation that was consistent with the preemption standards outlined in GLBA:

The Gramm-Leach-Bliley Act contains two ‘safe harbors’ that relate to information sharing. Section 104(d)(2)(B)(vi) describes the circumstances surrounding the release of a customer’s insurance information. Section 104(d)(2)(B)(vii) describes the circumstances surrounding the use of a customer’s health information obtained from the insurance records of the customer. If a state has adopted the NAIC’s Privacy of Consumer Financial and Health Information Model Regulation, no further action is needed. If not, language implementing the two safe harbors should be considered.

In short, after passage of the GLBA, the NAIC expended significant resources and time to ensure that model laws were consistent with the preemption standards outlined in the GLBA and Barnett Bank. We urge the Working Group to not unravel the NAIC’s past efforts in this regard.

III. To Avoid Preemption Challenges, the Working Group Should Exempt Depository Institutions and their Affiliates from the Exposure Draft

The entire framework for state regulation of bank-insurance activities is set forth in the GLBA. The NAIC and the states have been on notice since enactment of GLBA in November 1999 that

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not only was Barnett Bank the law of the land, but that its application has been broadened to all depository institutions and their insurance affiliates. To date, the Working Group has not given adequate attention to these issues and as a result, has released an Exposure Draft that effectively amends the GLBA and unravels the NAIC’s prior efforts in ensuring that state laws are consistent with GLBA preemption standards. For these reasons, we believe the Working Group should revise the Exposure Draft to exempt depository institutions and their affiliates. Specifically, we request that the Working Group add a new subsection “D” under Section 1 (titled Purpose and Scope) that states:

The obligations imposed by this Act shall not apply to depository institutions or affiliates of depository institutions that are subject to Title V of the federal Gramm-Leach-Bliley Act (15 U.S.C. § 6801 et seq.).

We have every confidence that the Working Group will adopt our recommended revisions in recognition of the unique regulatory framework depository institutions and their insurance affiliates are subject to.

Thank you for your consideration.

Respectfully,

J. Kevin A. McKechnie
Executive Director