

## **PREEMPTION OF STATE CONSUMER LAWS: FEDERAL INTERFERENCE IS A MARKET FAILURE**

By Edmund Mierzwinski

In January 2001, President-elect George W. Bush told a gathering of governors, “While I believe there’s a role for the federal government, it’s not to impose its will on states and local communities.” But on a growing number of issues, powerful special interests are persuading Congress and the White House to do just that. When it comes to consumer protection and the environment, they’re imposing federal law while wiping out the states’ ability to pass stronger standards.

In December, the President signed the Fair and Accurate Credit Transactions (FACT) Act,<sup>1</sup> a major law derived from numerous recent state privacy, credit reporting, and identity theft initiatives. Its price, however, was unacceptable: Congress permanently restricted states from enacting most future laws in the area. Then, in January, a previously obscure federal banking regulator—the little-noticed Office of the Comptroller of the Currency (OCC)—eliminated application of all state consumer protection and predatory lending laws, as well as state enforcement authority, over national banks, even when no federal law protected consumers at all.

Congress and the executive branch, backed by the courts, have failed to learn what may be the most important lesson of the federalist system: competition for public policy ideas fosters accountability. A marketplace of public policy ideas is no different than a marketplace of consumer products—when you have only one seller, you have a monopoly. A monopoly of ideas is a market failure that leads to bad public policy.<sup>2</sup>

Congress rarely acts to protect consumers unless the states act first, unless there is a scandal. Even the epic Enron scandal didn’t guarantee passage of a corporate reform law in 2002. Without the follow-on WorldCom scandal, the accountants and Wall Street would have blocked significant reforms.<sup>3</sup> We cannot wait for more scandals; we need to ensure that the states remain as sellers in the marketplace of ideas. And, of course, the states, led by New York Attorney General Eliot Spitzer and Massachusetts Secretary of State William Galvin, have also shown the U.S. Securities and Exchange Commission (SEC) the way when it comes to fighting investment and mutual fund scandals.

### **I. THE OCC TAKES THE FIELD, WANTS NO TEAM AGAINST IT**

It’s easiest to win when you have no opponents. In January 2004 the Treasury Department’s OCC<sup>4</sup> issued two related and sweeping rules, one preempting nearly all consumer laws and the other restricting nearly all enforcement powers of states. The OCC asserted it had authority to take the field over virtually all matters pertaining to national banks, even when no federal law protected consumers from unfair or predatory financial practices.

In its new “preemption rule,”<sup>5</sup> the OCC re-wrote and weakened the applicable Supreme Court preemption test from the 1996 *Barnett* decision.<sup>6</sup> In its “visitorial powers rule,”<sup>7</sup> OCC rolled-back long-standing authority of state attorneys general and other officials to investigate or enforce violations by national banks. OCC also boldly asserted that these new limits extended even to actions against a national bank’s state-licensed operating subsidiaries.

The issuance of the OCC rules has sparked a bipartisan storm of protest from state legislatures,<sup>8</sup> state financial regulators,<sup>9</sup> and state attorneys general, who criticized the OCC’s characterization that the “National Bank Act ‘protect[s] national banks from potential state hostility.’”<sup>10</sup>

Even the normally complacent House Financial Services Committee has weighed in. In addition to holding OCC oversight hearings, it has passed a bipartisan budget resolution on a vote of 34-28, stating that the OCC action “may represent an unprecedented expansion of Federal preemption authority” and “comes without congressional authorization, and without a corresponding increase in budget resources for the agency.” The committee also pointed out that without a budget increase, the OCC cannot really expect its modest staff of forty consumer-complaint specialists to both continue their own work and also take over much of the work of an estimated 700 state consumer enforcers and examiners. “In the area of abusive mortgage lending practices alone, State bank supervisory agencies initiated 20,332 investigations in 2003 in response to consumer complaints, which resulted in 4,035 enforcement actions.”<sup>11</sup>

Throughout the 1990s, financial deregulation had resulted in skyrocketing bank fees as well as the imposition of new fees. The growth of risk-based pricing in mortgage lending triggered a rapid growth in predatory lending practices. In the absence of federal action to prevent abuses, and based on clear anti-preemptive language in the Truth In Lending Act, Electronic Funds Transfer Act, and other laws,<sup>12</sup> states and sometimes cities enacted laws that required banks to offer low-cost checking accounts (New Jersey and New York); banned certain fees, including fees for non-customers to cash checks drawn on the bank itself (Texas) or surcharges imposed by owners of ATMs on non-customers (Iowa and Connecticut by administrative order, the cities of Santa Monica and San Francisco, California by local ordinance); required additional credit card disclosures (California); and restricted predatory lending.<sup>13</sup> A series of unfortunate court decisions<sup>14</sup> that paid too much deference to the OCC held that the National Bank Act preempted some of these actions; the OCC issued preemption determinations over-ruling others. These victories buoyed the agency to take its January actions, essentially “taking the field” over all matters regarding both national banks and their operating subsidiaries.

Unless overturned,<sup>15</sup> the OCC’s power play will also have a chilling effect on state regulatory and legislative actions aimed at state-chartered institutions. No rational state would impose stricter rules or take strong enforcement actions against its regulated-entities if its actions would place them at a competitive disadvantage to federally-regulated entities.

II. STATE LABORATORIES PROVIDE INNOVATE IDEAS TO PROTECT PRIVACY, FIX CREDIT REPORT ERRORS, AND DEVELOP CURES FOR IDENTITY THEFT

Since the mid-1990s, the crime of identity theft had been growing. Identity theft occurs for the same reason that mistakes in credit reports do: sloppy bank, department store, and credit bureau practices. Yet major 1996 amendments to the Fair Credit Reporting Act (FCRA) had no provisions on identity theft. While that year Congress did finally complete a seven-year effort to clear up credit bureau errors, the last four years of that fight had largely been a back-room fight over the scope of proposed preemption, not a public debate over substance.<sup>16</sup> As enacted in 1970, only inconsistent state laws were preempted. The 1996 revision included a provision specifically preempting the states in some, but not all, areas. But, Congress set the preemption to expire on January 1, 2004, unless it acted affirmatively to renew. The expiration of preemption, not the rise of identity theft, was the spark that kindled the FACT Act's passage.

Despite the growing threat of identity theft, until 2003 Congress had done virtually nothing to prevent identity theft or make it easier for its victims to clean up. In 1998, it did follow the lead of several states and enact legislation criminalizing financial identity theft. The 1998 law also, importantly, required the Federal Trade Commission (FTC) to establish a consumer clearinghouse and increase its surveillance of the crime.<sup>17</sup> Yet, the threat of increased jail time did little to deter growth of the crime, which involves no physical risk and little criminal skill.

As early as 1996, however, the FTC had held a workshop to discuss identity theft solutions.<sup>18</sup> The problems only grew while Congress dawdled. In September 2003, the FTC released a study that revealed to the nation what advocates, and the credit bureaus and credit card companies, had known all along. The cost to consumers and the nation was staggering. Over twenty-seven million Americans, or one in eight of all adults, had been victims in the past five years and the estimated cost to consumers and the economy was over fifty billion dollars.<sup>19</sup>

*A. States Take the Lead*

So, while they waited for Congress to enact the 1996 accuracy amendments and then in areas where the 1996 amendments were deficient, the states took the lead first to improve the accuracy of credit reports and then to fight identity theft. Vermont (1992) and California (1994) adopted omnibus credit reporting and privacy reforms before Congress acted in 1996.

Ultimately, prior to the 2003 enactment of the FACT Act, seven states granted consumers the right to obtain free annual credit reports. Two states gave consumers the right to obtain business records from firms where the thief had used their identity. Others enacted laws to truncate the number of digits of an account number that could appear on a receipt. California, which has enacted an estimated thirty separate identity theft and credit reporting laws, required creditors to increase the standard for matching the identity of a credit applicant to a credit report.<sup>20</sup>

California in 2000,<sup>21</sup> following a joint campaign by consumer groups, realtors, and an upstart Internet bank E-Loan, became the first state to prohibit contractual restrictions on showing consumers their credit scores, ending a decade of stalling by Congress and the FTC.<sup>22</sup> This reform didn't *merely* give consumers rights; it changed the industry's business model. Now, the sale of credit scores to consumers is a profit center for the company and its competitors.

Contrary to the specious balkanization theories<sup>23</sup> expounded by supporters of preemption, the development of these credit reporting and identity theft reforms by the states throughout the 1990s demonstrates that states don't generally enact or consider fifty different conflicting laws—instead one state acts and then other states consider similar or identical provisions, if that state law is good enough to export.

### *B. State Financial Privacy Laws, GLB, and FCRA*

The states also acted throughout this period to preserve financial privacy. Unlike European countries, which had largely adopted over-arching privacy laws applying to all transactions, U.S. privacy law had been enacted sector-by-sector. Not surprisingly, the two most important sectors—health privacy and financial privacy—were the last to gain privacy rights.

Enactment of the 1999 Gramm-Leach-Bliley Financial Services Modernization Act (GLB) repealed portions of the 1933 Glass-Steagall Act and allowed mergers between banks, brokerages and insurance firms. But GLB's debates occurred against a backdrop of well-publicized privacy invasions, so Congress included a modest privacy provision in the final bill.

GLB required firms to safeguard or secure customer information and to provide customers annual notices of information-sharing policies. Advocates argued that “notice was not enough” to protect privacy.<sup>24</sup> So, the final law also gave consumers a limited right to opt out of sharing with unaffiliated third party firms, but allowed unfettered sharing of detailed “transactions or experiences” information among corporate affiliates, and among third parties with certain marketing relationships, regardless of a consumer's privacy preference.

Then, during conference consideration of the bill, Senator Paul Sarbanes (D-MD) added an amendment allowing states to enact stronger financial privacy laws (15 U.S.C. § 6807(b)).

Following enactment of the Sarbanes amendment, dozens of states sought in their 2000 and 2001 legislative sessions to protect financial privacy and limit information sharing among affiliates and third-parties.<sup>25</sup> California State Senator Jackie Speier pushed the hardest. Various versions of her bill passed the State Senate several times between 2000 and 2002 but industry lobbyists were able to defeat it in the State Assembly.

Advocates tried two mechanisms to bypass the assembly logjam. First, several local jurisdictions, led by San Mateo County and Daley City, passed local ordinances protecting financial privacy. Second, with financial backing from Chris Larson, founder of E-Loan Bank, advocates collected over 600,000 voter signatures, enough to qualify an even stronger ballot initiative and referendum. The ballot question would have provided for express consent, or an opt-in, before any sharing between either affiliates or third-parties. On the deadline for filing the signatures to qualify the ballot question, the industry agreed to a legislative compromise.

As enacted and signed in August 2003, California's SB 1 provides for an opt-out for sharing of information among affiliates and some third-parties, with some affiliated company exceptions. GLB provides only notice in these circumstances. In other third-party sharing circumstances, SB 1 requires an opt-in.<sup>26</sup> GLB provides only an opt-out. During consideration of the federal FACT Act, an additional provision was added. Consumers cannot block the sharing of their information with affiliates, but they can block the use of that information for marketing, subject to numerous exceptions.

Throughout the debate over the Speier bills, industry had argued that the so-called FCRA savings clause of GLB limited the effect of the Sarbanes amendment so that state financial privacy laws could not be enacted affecting affiliate sharing. In July 2003, a U.S. district court judge agreed with this view as it applied to the California local ordinances.<sup>27</sup> Consumer advocates and state attorneys general disagree with the court's interpretation, believing that the purpose of the FCRA savings clause was to preserve only the "operation" of the FCRA, not preserve its exceptions from coverage. Until *Daley City* is appealed, we won't know which interpretation is correct.<sup>28</sup>

#### *C. Nearly All FACT Act's Good Features Derived from States*

While FACT Act's engine was the industry drive to renew permanent preemption of state law, the train included numerous cars of state-produced legislative ideas. Arguably, only one significant provision of the new law—its concept of "risk-based pricing disclosures"—had not been previously developed in state public policy laboratories.<sup>29</sup> Much of the rest of the bill had been stalled in the House Financial Services Committee since 2000 with no action. In 2002, the Senate had passed a bill including other parts of the reforms, but only because industry opponents knew it had no chance to become law.<sup>30</sup>

#### *D. Industry's FACT Act Preemption Campaign*

To win on preemption, the industry mounted a multi-million dollar campaign featuring massive campaign donations and lobbying expenditures as well as an unprecedented radio, magazine, newspaper, and subway ad campaign. It gained the support of Federal Reserve Chairman Alan Greenspan and Treasury Secretary John T. Snow.<sup>31</sup> Yet, every major consumer group and nearly every state attorney general opposed the final version of the law<sup>32</sup> because of the permanent limits it imposed on some state activities.

Fortunately, while the FACT Act extends the 1996 preemption in certain areas and expands them in some ways, the expansion of preemption is tempered in the area of identity theft, where the FTC and others admitted that Congress might not have all the answers. For example, the act only limits states from enacting new identity theft laws when their laws would affect “conduct required under specific provisions” of the new federal law.<sup>33</sup>

*E. Congress Made a Second Mistake: It Preempted Permanently*

Congress actually made two mistakes in consideration of the FACT Act. First, it extended preemption. Second, it extended that preemption permanently. The 1996 imposition of temporary preemption forced Congress and the industry back to the table in 2003 for an unprecedented series of hearings. Those hearings featured 109 witnesses on both credit reporting accuracy and identity theft related issues.

During floor consideration of the House bill, a moderate to conservative senior Democrat, Rep. Paul Kanjorski (D-PA), argued unsuccessfully for extending the preemption only for another nine years with another sunset provision. Kanjorski said his amendment would allow Congress to “trust but verify,” as President Reagan did with the Soviet Union.<sup>34</sup>

III. PREEMPTION AND STATES’ RIGHTS

The detailed examples of the negative effect of administrative and Congressional preemption above are illustrative. Many more exist.<sup>35</sup> States and even local jurisdictions have long been the laboratories for innovative public policy, particularly in the realm of environmental and consumer protection. The federal Clean Air Act grew out of a growing state and municipal movement to enact air pollution control measures. The national organic labeling law, enacted in October 2002, was passed only after several states, including Oregon, Washington, Texas, Idaho, California, and Colorado, passed their own laws. In 1982, Arizona enacted the first “Motor Voter” law to allow citizens to register to vote when applying for or renewing drivers’ licenses; Colorado placed the issue on the ballot, passing its Motor Voter law in 1984. National legislation followed suit in 1993. The 1988 federal law limiting abusive bank policies on deposited check holding was adapted from previously enacted laws in Massachusetts and other states. Cities and counties have long led the smoke-free indoor air movement, prompting states to begin acting, while Congress has proven itself virtually incapable of adequately regulating the tobacco industry. A recent and highly successful FTC program—the National Do Not Call Registry to which fifty-eight million consumers have added their names in one year—had already been enacted in forty states.<sup>36</sup>

Recently, one of the last hold-outs against federal regulation, the insurance industry, has launched a campaign to preempt stronger state insurance regulations and establish an “optional” federal chartering system that would allow companies to export home-state regulations to any state where they do business, creating yet another race to the bottom.<sup>37</sup>

While Congress rarely learns from its mistakes, perhaps the OCC's actions, however wrong, will continue to focus sunlight on the growing threat that preemption poses to the development of good consumer protection policy. Perhaps that sunlight, said by Brandeis "to be the best of disinfectants,"<sup>38</sup> will cure the preemption "disease" sweeping Washington.

Efficient federal public policy is one that is balanced at the point where even though the states have the authority to act, they feel no need to do so. Since we cannot guarantee that we are ever at that optimum, setting federal law as a floor of protection as the default—without also preempting the states—allows us to retain the safety net of competition to guarantee the best public policy.

<sup>1</sup> See Fair and Accurate Credit Transactions Act of 2003, Pub. L. 108-159, 117 Stat. 1952. The amended text of the Fair Credit Reporting Act, 15 U.S.C. §§ 1681-1681x (2004), is available at <http://www.ftc.gov/os/statutes/031224fcra.pdf> (last visited Apr. 5, 2004). For a detailed discussion of the act's provisions, prepared by a consortium of consumer groups, see U.S. Public Interest Research Group et al., *2003 Changes to the Fair Credit Reporting Act: Important Steps Forward at a High Cost* (Jan. 7 2004), available at <http://www.pirg.org/consumer/pdfs/fcrafinalsumm.pdf> (last visited Apr. 5, 2004).

<sup>2</sup> As Roderick Hills has articulated:

The value of federalism, if any, will result from the often competitive interaction of the levels of government. In particular . . . the presumption against preemption makes sense not because states are necessarily good regulators of conduct within their borders but rather because state regulation makes Congress a more honest, more democratically accountable regulator of conduct throughout the nation. To reverse the usual formula, national values are well-protected by the states' political process.

Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, John M. Olin Center for Law & Economics, University of Michigan Law School, available at <http://www.law.umich.edu/CentersAndPrograms/olin/abstracts/03-007.htm> (last visited Apr. 5, 2004).

<sup>3</sup> When the Worldcom scandal broke, it forced President Bush to do a speech on corporate accountability at the New York Stock Exchange. The corporate scandal-a-thon gave Senator Paul Sarbanes (D-MD), then chairman of the Senate Banking Committee, enough bi-partisan support to move a strong reform bill through the Senate floor on a series of unanimous floor votes—with only strengthening amendments added, including a broad corporate crime provision authored by Pat Leahy (D-VT)—and prevented industry from pursuing a strategy of weakening the bill in favor of the much weaker House bill in conference committee. See Sarbanes-Oxley Act of 2002, Pub. L. 107-204, 116 Stat. 745 (codified as amended in scattered sections of 15 U.S.C.).

<sup>4</sup> OCC regulates all nationally-chartered banks; its companion, the Office of Thrift Supervision (OTS) regulates nationally-chartered thrifts and savings-and-loans.

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<sup>5</sup> See OCC Preemption Rule, 69 Fed. Reg. 1904 (Jan. 13, 2004); see also *Congressional Review of OCC Preemption: Hearing Before the Subcomm. on Oversight and Investigations of the House Comm. on Financial Services*, 108th Cong. (2004) (statement of Julie L. Williams, First Senior Deputy Comptroller and Chief Counsel, Office of the Comptroller of the Currency).

<sup>6</sup> Professor Arthur Wilmarth recently summarized for the California legislature the Supreme Court jurisprudence supporting applicability of states laws to national banks, when not in conflict with federal laws, from the beginnings of the National Bank Act in the 1860s:

In *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 33 (1996), the Supreme Court held that a state may not ‘forbid, or impair significantly, the exercise of a power that Congress explicitly granted’ to national banks. However, immediately after that statement, the Court added that ‘[t]o say this is not to deprive States of the power to regulate national banks, where . . . doing so does not prevent or significantly interfere with the national bank’s exercise of its powers.’ *Id.* at 33-34. . . . The Supreme Court has also affirmed that states have a legitimate role in regulating financial services generally, because ‘banking and related financial activities are of profound local concern.’

*Joint Hearing Before the S. Comm. on Banking, Commerce and International Trade and the Assemb. Banking and Finance Comm.*, 2001-2002 Leg. Sess. (Cal. 2002) (statement of Professor Arthur E. Wilmarth, Jr., George Washington University Law School) (footnotes omitted), available at <http://www.corp.ca.gov/pressrel/03/fmf/itnfmf052103Wilmarth.htm> (last visited Apr. 5, 2004).

<sup>7</sup> See OCC Visitorial Powers Rule, 69 Fed. Reg. 1895 (Jan. 13, 2004).

<sup>8</sup> See Letter from the National Conference of State Legislatures to the Honorable John D. Hawke, Jr., Comptroller of the Currency (Oct. 6, 2003), available at <http://www.ncsl.org/standcomm/scfin/occ031006.htm> (last visited Apr. 5, 2004).

<sup>9</sup> “These regulations are not minor or incremental changes. Their scope is nearly unlimited, and their implications are potentially enormous. These regulations exceed the OCC’s statutory authority and disregard Congressional intent.” *Congressional Review of OCC Preemption: Hearing Before the Subcomm. on Oversight and Investigations of the House Comm. on Financial Services*, 108th Cong. (2004) (written statement of Diana Taylor, Superintendent, State of New York Banking Department), available at <http://www.banking.state.ny.us/sp040128.htm> (last visited Apr. 5, 2004). Taylor was appointed by Republican Governor George Pataki.

<sup>10</sup> “The OCC declares in the Federal Register comment that the National Bank Act ‘protect[s] national banks from potential state hostility . . .’ When we as Attorneys General enforce the laws on behalf of the

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residents of our States, we do not undermine banks but rather protect both consumers and business competitors from those that engage in deceptive acts and practices and unfair competition.” National Association of Attorneys General, Forty-Seven Attorneys General and the District of Columbia Corporation Counsel Submits Comments Objecting to the OCC’s Reinterpretation of its Visitorial Powers 2 (Apr. 8, 2003), *available at* <http://www.naag.org/issues/pdf/20030408-comments-occ.pdf> (last visited Apr. 5, 2004).

<sup>11</sup> See COMM. ON FIN. SERV., 108TH CONG., VIEWS AND ESTIMATES OF THE COMMITTEE ON FINANCIAL SERVICES ON MATTERS TO BE SET FORTH IN THE CONCURRENT RESOLUTION ON THE BUDGET FOR FISCAL YEAR 2005, at 15–16 (Comm. Print 2004).

<sup>12</sup> The state law savings clause of the Electronic Funds Transfer Act is illustrative of many consumer banking laws (although see discussion *infra* regarding Fair Credit Reporting Act): “This subchapter does not annul, alter, or affect the laws of any State relating to electronic fund transfers, except to the extent that those laws are inconsistent with the provisions of this subchapter, and then only to the extent of the inconsistency. A State law is not inconsistent with this subchapter if the protection such law affords any consumer is greater than the protection afforded by this subchapter.” 15 U.S.C. § 1693q (2004).

<sup>13</sup> The Congressional response to predatory mortgage lending, the 1994 Home Ownership and Equity Protection Act (HOEPA), is non-preemptive. 15 U.S.C. § 1640(e). In 2001, North Carolina was the first state to enact a comprehensive predatory lending law. Others followed, including California, Georgia, Illinois, Massachusetts, New Jersey, New Mexico, New York, and South Carolina. When the secondary market raised concerns about the tough assignee liability provisions in Georgia’s and New Jersey’s laws, those states acted quickly to modify their laws. For a discussion of predatory lending issues and the states, see *Protecting Homeowners: Preventing Abusive Lending While Preserving Access to Credit: Joint Hearing Before the House Subcommittees on Financial Institutions and Consumer Credit and Housing and Community Opportunity*, 108th Cong. (2003) (statement of George Brown, Senior Vice President, Self Help, Spokesperson, Coalition for Responsible Lending), *available at* <http://financialservices.house.gov/hearings.asp?formmode=detail&hearing=267> (last visited Apr. 5, 2004).

<sup>14</sup> See, for example, on ATM surcharges, *Bank of America vs. City and County of San Francisco*, 309 F.3d 551 (9th Cir. 2002), *cert. denied* 123 S. Ct. 2220 (2003), in which the ninth circuit upheld a district court decision invalidating local ATM surcharge bans. See *Wells Fargo Bank of Texas NA vs. James*, 321 F.3d 488 (5th Cir. 2003), in which the fifth circuit preempted a Texas law requiring banks to cash checks for non-customers at “par value” or without fees. In both of these cases, OCC filed as an *amicus* on the side of the national banks.

<sup>15</sup> Unfortunately, as Wilmarth, *supra* note 6, points out:

I believe that the OCC’s recent preemption efforts, including those proposed in OCC Dockets 03-02 and 03-04, far exceed the lawful boundaries of the OCC’s authority under federal banking statutes and the U.S. Constitution. However, recent federal court

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decisions have not required the OCC to observe the limits established by Congress and the Constitution. I therefore encourage state officials in California and elsewhere to redouble their efforts to persuade Congress that it must pass new legislation to clarify the limits on the OCC's power to preempt state law.

<sup>16</sup> The Fair Credit Reporting Act, 15 USC §§ 1681 *et seq.*, was enacted in 1970. Congress began efforts to address its deficiencies in 1989 and bills similar to the 1996 final law were considered on the House floor as early as 1992. Major amendments were finally enacted in 1996. *See* Consumer Credit Reporting Reform Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009, 3009-426–3009-454; *see also* discussion *infra* of the battle over the 2003 amendments resulting in passage of the Fair and Accurate Credit Transactions Act.

<sup>17</sup> Identity Theft and Assumption Deterrence Act of 1998, Pub. L. No. 105-318, 112 Stat. 3007. At least forty-eight states have also criminalized identity theft.

<sup>18</sup> *See* Official Transcript, Consumer Identity Fraud Workshop, Federal Trade Commission (Aug. 20 1996), *available at* <http://www.ftc.gov/opp/cf082096.pdf> (last visited Apr. 5, 2004).

<sup>19</sup> Press Release, Federal Trade Commission, FTC Releases Survey of Identity Theft in U.S. 27.3 Million Victims in Past 5 Years, Billions in Losses for Businesses and Consumers, (Sept. 3, 2003), *available at* <http://www.ftc.gov/opa/2003/09/idtheft.htm> (last visited Apr. 5, 2004). The U.S. General Accounting Office (GAO) has released several reports on identity theft. Its first major report, released in 1998, helped document that identity theft was not an anecdotal problem. *See* U.S. GEN. ACCT. OFF., NO. GAO/GGD-98-100BR, IDENTITY FRAUD: INFORMATION ON PREVALENCE, COST, AND INTERNET IMPACT IS LIMITED (1998), *available at* <http://www.gao.gov/archive/1998/gg98100b.pdf> (last visited Apr. 5, 2004).

<sup>20</sup> *See* Privacy Rights Clearinghouse & Consumers Union, West Coast Regional Office, California Identity Theft Laws, *at* <http://www.privacyrights.org/ar/ITLawsCA.htm> (providing a compilation of identity theft laws in California) (last visited Apr. 5, 2004).

<sup>21</sup> *See* 2000 Cal. Legis. Serv. 978 (West). This session law was authored by State Senator Liz Figueroa. “An act to amend Sections 1785.10, 1785.15, and 1785.16 of, and to add Sections 1785.15.1, 1785.15.2, and 1785.20.2 to, the Civil Code, relating to consumer credit.”

<sup>22</sup> Throughout the 1990s, the industry had fought a holding action against disclosing credit scores, aided by flip-flopping by the FTC, which in 1992 had proposed that scores be disclosed as part of reports but then reneged. Industry arguments ranged from the disingenuous, “Credit scores change all the time,” to the disgraceful, “Consumers won’t understand them.” *See Hearing on H.R. 2856 Before the Subcomm. on*

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*Financial Institutions and Consumer Credit of the House Comm. on Banking and Financial Services*, 106th Cong. (2000) (statements of Edmund Mierswinski, Consumer Program Director, U.S. Public Interest Research Group and Chris Larsen, Chief Executive Officer, E-Loan, Inc.), *available at* <http://financialservices.house.gov/banking/92100toc.htm> (last visited Apr. 5, 2004).

<sup>23</sup> See Partnership to Protect Consumer Credit, Research/Resources (establishing a link to studies performed by the industry-funded coalition), *at* <http://www.protectconsumercredit.org/> (last visited Apr. 6, 2004). *But cf.* Elizabeth Warren, *The Market for Data: The Changing Role of Social Sciences in Shaping the Law*, 2002 WIS. L. REV. 1 (providing a critical view of industry-funded “academic” studies), *available at* <http://ssrn.com/abstract=332162> (last visited Apr. 6, 2004).

<sup>24</sup> The GLB privacy notices have been widely belittled by consumers, the media, and even by many of the Washington lawyers who presumably wrote them. A “readability” expert commissioned by the Privacy Rights Clearinghouse found that the notices required a graduate school education to understand. Of course, another problem with the notices is that even if you could understand them, they essentially provide a right without a remedy, since your right to opt-out is very limited. Recently, the financial agencies proposed simplifying the notices. See Interagency Proposal to Consider Alternative Forms of Privacy Notices Under the Gramm-Leach-Bliley (GLB) Act, 68 Fed. Reg. 75164 (Dec. 30, 2003), *available at* <http://www.ftc.gov/os/2003/12/031223anprfinalglbnotices.pdf> (last visited Apr. 6, 2004). For a summary of consumer group positions on the proposal, see Privacy Rights Clearinghouse et al., Federal Agencies’ Joint Request for Comment: Alternative Forms of Privacy Notices (Mar. 26, 2004), *available at* <http://www.privacyrights.org/ar/ftc-noticeANPR.htm> (last visited Apr. 6, 2004).

<sup>25</sup> Most other states were unsuccessful in enacting financial privacy laws regarding bank information sharing. By citizen referendum in 2002, however, North Dakota overturned a bank-sponsored 2001 law weakening its “no-sharing” law for certain third party sharing. See *Financial Privacy and Consumer Protection, Hearing Before the S. Comm. on Banking, Housing, and Urban Affairs*, 107th Cong. (2002) (statement of James M. Kasper, Representative, North Dakota House of Representatives), *available at* [http://banking.senate.gov/02\\_09hr/091902/kasper.htm](http://banking.senate.gov/02_09hr/091902/kasper.htm) (last visited Apr. 6, 2004). Because insurance is still regulated by the states, GLB required states to enact companion regulations. At least thirty-five states have enacted opt-in rules for health information. Vermont and New Mexico have enacted opt-in laws for all information held by insurance companies. For discussion of this and additional rationale against preemption of state affiliate sharing laws, see *Affiliate Sharing Practices and their Relationship with the Fair Credit Reporting Act, Hearing Before the S. Banking Comm. on Banking, Housing, and Urban Affairs*, 108th Cong. (2003) (statement of Julie Brill, Assistant Attorney General, State of Vermont), *available at* [http://banking.senate.gov/\\_files/brill.pdf](http://banking.senate.gov/_files/brill.pdf) (last visited Apr. 6 2004).

<sup>26</sup> For a chronology and timeline of the California and federal efforts, see Privacy Rights Clearinghouse *at* <http://www.privacyrights.org/califfinpriv.htm> (last visited Apr. 6, 2004).

<sup>27</sup> The third-party opt-in was not over-turned by the court, only the affiliate sharing provision. San Mateo Supervisor Mike Nevin led this fight and maintains a webpage archiving the history of the debate, including links to the District Court of the United States for the Northern District of California decision in

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*Bank of America vs. Daly City*, 279 F. Supp. 2d 1118 (N.D. Cal. 2003). See Supervisor Mike Nevin, County of San Mateo, *Financial Privacy Information Ordinance*, at [http://www.co.sanmateo.ca.us/smc/departments/home/0,,1864\\_4318241\\_4513009,00.html](http://www.co.sanmateo.ca.us/smc/departments/home/0,,1864_4318241_4513009,00.html) (last visited Apr. 6, 2004). “During the long debate by state legislature over adopting California financial privacy legislation, the Association of Bay Area Governments (ABAG) took the position of strongly supporting efforts by Bay Area local governments to ensure consumer financial privacy.” See Ass’n of Bay Area Gov’ts Online, at <http://www.abag.ca.gov/privacy/index.html> (last visited Apr. 6, 2004).

<sup>28</sup> For a discussion of why consumer advocates believe that the *Daly City* court decision is wrong, see *Affiliate Sharing Practices and their Relationship to the Fair Credit Reporting Act: Hearing Before the S. Comm. on Banking, Housing, and Urban Affairs*, 108th Cong. (2003) (statements of Edmund Mierzwinski, Consumer Program Director, U.S. Public Interest Research Group; Julie Brill, Assistant Attorney General, State of Vermont; and Joel R. Reidenberg, Professor of Law and Director of the Graduate Program, Fordham University), available at <http://banking.senate.gov/index.cfm?Fuseaction=Hearings.Detail&HearingID=46> (last visited Apr. 6, 2004).

<sup>29</sup> The Federal Trade Commission deserves credit for helping to convince the Congress to enact one *de novo* reform. Section 615 of the FCRA had generally provided that any “adverse action” based on a credit report triggered an “adverse action notice,” which described a consumer’s rights. One exception to the adverse action notice requirement had been when a consumer accepts a “counter-offer,” which is a prevalent outcome with the growing use of risk-based pricing. The exception is based on the FCRA’s cross-reference to the Equal Credit Opportunity Act (ECOA). Section 311 of FACTA requires development of a risk-based pricing notice.

<sup>30</sup> See Identity Theft Prevention Act of 2000, H.R. 4311, 106th Cong. (2000); Identity Theft Prevention Act of 2001, H.R. 3053, 107th Cong. (2001). Both of these bills were introduced by Rep. Darlene Hooley of Oregon. The Hooley bills included the following FACT Act reforms: free credit reports, fraud alerts, address change verification, and credit card number truncation. See also Restore Your Identity Act of 2001, S. 1742, 107th Cong. (2001). This bill was introduced by Sen. Maria Cantwell of Washington. Industry supporters allowed this bill to pass the full Senate only when they saw it had no hopes in the House. It gave identity theft victims the following rights included in the FACT Act: the right to obtain business records and to block fraudulent trade lines. It also partially restored a longer statute of limitations for bringing lawsuits against credit bureaus. A stronger version of this provision reversing the Supreme Court’s ruling in *TRW, Inc. v. Andrews*, 534 U.S. 19 (2001), was included in the FACT Act Section.

<sup>31</sup> The author of this article, one of the lead consumer negotiators on the FCRA bill, requested a meeting with the United States Treasury’s point man on FCRA, Assistant Secretary Wayne Abernathy, and was referred instead to staff. The Electronic Privacy Information Center (EPIC) has compiled a series of documents based on a FOIA request (examples of which may be found on EPIC’s website at <http://www.epic.org/privacy/preemption/treasfcrafoia.pdf>) to the Treasury that EPIC says allege that the department biased its decision-making on preemption and met with many more industry representatives than consumer representatives. See Electronic Privacy Information Center, FOIA Doc’s Show Bias Towards Preemption at Treasury (Jan. 28, 2004), at <http://www.epic.org/privacy/preemption/> (last visited

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Apr. 6, 2004). Conversely, consumer groups enjoyed good, regular communication with staff of the FTC, an independent agency.

<sup>32</sup> While the National Conference of State Legislatures is against OCC preemption, *see supra* note 4, consumer advocates were disappointed that it supported continued FCRA preemption in a resolution adopted in 2003. “However, NCSL acknowledges the benefit of a uniform national credit reporting system to the nation's economy. Therefore, NCSL does not oppose the reauthorization of the seven limited areas that were subject to federal preemption by the 1996 Amendments of the Fair Credit Reporting Act of 1970 (FCRA).” *See* National Conference of State Legislatures, Financial Information Policy, *available at* <http://www.ncsl.org/statefed/Financialsc.htm#FinancialInformationPrivacy> (last visited Apr. 6, 2004).

<sup>33</sup> For a detailed analysis, see GAIL HILLEBRAND, CONSUMERS UNION, AFTER THE FACT ACT: WHAT THE STATES CAN STILL DO TO PREVENT IDENTITY THEFT (2004), *available at* <http://www.consumersunion.org/pdf/FACT-0104.pdf> (last visited Apr. 6, 2004).

<sup>34</sup> *See* CONG. REC. H8158 (daily ed. Sept. 10, 2003). The Kanjorski amendment No. 391 to HR 2622 failed 112-310.

<sup>35</sup> This section is derived from ALISON CASSADY, U.S. PIRG EDUCATION FUND, THE POLITICS OF PREEMPTION: THE ROLE OF STATE AND FEDERAL GOVERNMENT IN ENVIRONMENTAL AND CONSUMER PROTECTION UNDER THE BUSH ADMINISTRATION (2003), *available at* <http://uspirg.org/reports/politicsofpreemption.pdf> (last visited Apr. 6, 2004).

<sup>36</sup> *See* Direct Marketing Association, State Do Not Call List Laws—March 2004 (maintaining a website linking to forty state laws as of March 2004), *at* <http://www.the-dma.org/government/donotcalllists.shtml> (last visited Apr. 6, 2004).

<sup>37</sup> *See Working with State Regulators to Increase Insurance Choices for Consumers: Hearing Before the Subcomm. on Capital Markets, Insurance and Government Sponsored Enterprises of the House Comm. on Financial Services*, 108th Cong. (2004) (statement of J. Robert Hunter, Director of Insurance, Consumer Federation of America), *available at* <http://financialservices.house.gov/hearings.asp?formmode=detail&hearing=288> (last visited Apr. 6, 2004).

“Intransigent” state legislatures would be cut out of the process, because Chairman Oxley has stated that “we can’t rely on all 50 state legislatures to adopt exact uniform compliance.” State Insurance Commissioners would become mere federal functionaries in preempted areas, acting as tools to carry out federal edicts. Chairman Oxley would take this preemptive approach despite his praise for the states as “laboratories for reform” and as “more responsive to the local marketplace as well as to local consumers.”

*Id.*

<sup>38</sup> “Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.” LOUIS BRANDEIS, *OTHER PEOPLE’S MONEY AND HOW THE BANKERS USE IT* 92 (1971). Brandeis, of course, even more famously praised our federal system, since it allowed states to act as laboratories and “try novel social and economic experiments without risk to the rest of the country.” *See New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).