[BILLING CODE 4810-33-P]

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

[Docket No. 02-03]

Preemption Determination

AGENCY: Office of the Comptroller of the Currency, Treasury.

ACTION: Notice.

SUMMARY: The Office of the Comptroller of the Currency (OCC) is publishing its response to a written request for the OCC's opinion on whether Federal law preempts certain provisions of the Massachusetts Consumer Protection Act Relative to the Sale of Insurance by Banks and regulations promulgated pursuant to that statute (the Massachusetts Law). The OCC has determined that Federal law preempts the provisions at issue.

FOR FURTHER INFORMATION CONTACT: Michele Meyer, Counsel, Legislative and Regulatory Activities Division, (202) 874-5090.

SUPPLEMENTARY INFORMATION:

On July 14, 2000, the OCC published in the *Federal Register* notice of a request from the Massachusetts Bankers Association (Requester) for the OCC's opinion concerning whether section 104 of the Gramm-Leach-Bliley (GLBA), Pub. L. 106-102, 113 Stat. 1338, 1352-59 (Nov. 12, 1999), preempts certain provisions of the Massachusetts Law. *See* Notice of Request for Preemption Determination, 65 FR 43827, (Notice). The OCC is publishing its response to the request as an appendix to this notice.

In the Notice, the OCC requested public comment on whether Federal law preempts the provisions of the Massachusetts Law that the Requester had identified. In response, the OCC received 110 comments. Many of these commenters, primarily banks and banking trade associations, supported preemption of the Massachusetts Law provisions. These commenters maintained generally that the Massachusetts Law provisions do not fall within the safe harbor provisions of GLBA (the Safe Harbors) and that they prevent or significantly interfere with the exercise of national banks' authority to engage in insurance sales, solicitation, or cross-marketing activities.

Commenters opposing preemption expressed several concerns. First, some commenters argued that some or all of the provisions under review fall within the Safe Harbors, or are substantially similar to the Safe Harbors, and are therefore protected from preemption. Several commenters asserted that the provisions not covered by a Safe Harbor nevertheless are protected from preemption because they do not "prevent or significantly interfere" with the ability of a financial institution or its affiliate to engage in any insurance sales, solicitation, or cross-marketing activity.

For the reasons described in the preemption opinion, the OCC has concluded that Federal law preempts the following provisions of the Massachusetts Law identified by the Requester:

- The Massachusetts Law provision prohibiting non-licensed bankpersonnel from referring prospective customers to a licensed insurance agent or broker except upon an inquiry initiated by the customer.

- The Massachusetts Law provision prohibiting 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 Massachusetts Law provision prohibiting banks from telling loan applicants that insurance products are available through the bank until the application is approved and, in the case of a loan secured by a mortgage on real property, until after the customer has accepted the bank's written commitment to extend credit.

The analysis used to reach these conclusions and the reasons for each conclusion are described in detail in our reply to the Requester.

Dated: March 5, 2002

John D. Hawke, Jr.
Comptroller of the Currency

March 18, 2002

Kevin F. Kiley
Executive Vice President
Massachusetts Bankers Association, Inc.
73 Tremont Street, Suite 306
Boston, MA 02108-3906

Dear Mr. Kiley:

This letter replies to your request, on behalf of the Massachusetts Bankers Association, for the opinion of the Office of the Comptroller of the Currency (OCC) concerning whether certain provisions of the Massachusetts Consumer Protection Act Relative to the Sale of Insurance by Banks and regulations promulgated pursuant to that statute apply to national banks.[1]

The provisions you have asked us to review prohibit: (1) non-licensed bank personnel from referring a prospective customer to a licensed insurance agent or broker except upon an inquiry initiated by the customer; (2) a bank from compensating an employee for such a referral; and (3) a bank from telling a loan applicant that insurance products are available through the bank until the application is approved and, in the case of a loan secured by a mortgage on real property, until after the customer has accepted the bank's written commitment to extend credit. For the reasons described in detail in this letter, we have concluded that federal law would preempt the provisions of the Massachusetts Law that you have asked us to review.

In reaching this conclusion, we have reviewed the provisions of the Massachusetts Law under the legal standards, including the provisions of the Gramm-Leach-Bliley Act (GLBA)[2], that govern the applicability of state law to national banks. We also have relied on our experience in supervising national banks that engage in insurance activities to evaluate the effects of the state law provisions under consideration here on national banks' ability to conduct an insurance agency business.

The first section of this letter provides background on the process we used to develop our opinion and addresses the significant comments that we received in response to our publication of notice of your request. Section II describes the framework that governs our legal analysis. Finally, Section III analyzes each of the provisions of the Massachusetts Law that you have asked us to review to determine whether, in our opinion, it is preempted by federal law.

I. **Background and Comments**

[1] The provisions of the Massachusetts law and implementing regulations are collectively referred to in this letter as the "Massachusetts Law."

[2] *See* Pub. L. No. 106-102, 113 Stat. 1338 (Nov. 12, 1999).

On May 22, 1998, the Commonwealth of Massachusetts enacted legislation entitled Consumer Protection Act Relative to the Sale of Insurance by Banks.[3] The Massachusetts Department of Banking and Insurance has promulgated regulations[4] pursuant to this legislation. The statute and implementing regulations impose a number of requirements that affect the insurance sales, solicitation, or cross-marketing activities of financial institutions, including national banks.

By letter dated May 30, 2000, you requested the OCC's opinion on whether the three specific provisions of the Massachusetts Law that your letter identified are preempted pursuant to section 104 of the GLBA.[5] In your request, you asserted that these state law provisions are not protected from preemption by the safe harbor provisions contained in section 104(d)(2)(B) of the GLBA ("Safe Harbors") and that they prevent or significantly interfere with the ability of national banks to exercise their authority to engage in insurance sales, solicitation, or cross-marketing activities.

On July 14, 2000, the OCC published notice of your request in the *Federal Register* and requested comments on whether federal law preempts the Massachusetts Law provisions.[6] We received a total of 110 comments in response to the notice. Many of these commenters, primarily banks and banking trade associations, supported preemption of the Massachusetts Law provisions. These commenters maintained generally that the Massachusetts Law provisions do not fall within the Safe Harbors and that they prevent or significantly interfere with the exercise of national banks' authority to engage in insurance sales, solicitation, or cross-marketing activities. For the reasons set out in greater detail in Section III of this letter, we agree that federal law preempts each of the state laws in question.

Commenters opposing preemption expressed several concerns. First, some commenters argued that some or all of the provisions under review fall within the Safe Harbors, or are substantially similar to the Safe Harbors, and are therefore protected from preemption. Several commenters asserted that the provisions not covered by a Safe Harbor nevertheless are protected from preemption because they do not "prevent or significantly interfere" with the ability of a financial institution or its affiliate to engage in any insurance sales, solicitation, or cross-marketing activity. These points are addressed in detail in Section III of this letter.

Some of the commenters opposed to preemption also argued more generally that the OCC lacks the authority to determine whether federal law preempts the Massachusetts Law. As these comments suggest, federal courts, rather than the OCC, are

[3] Chapter 129 of the Acts of 1998. The provisions at issue here are codified at MASS. GEN. L. ch. 167F, § 2A.

[4] 209 CMR 49.00, *et seq*. and 211 CMR 142.00, *et seq*.

[5] GLBA § 104, 113 Stat. At 1352. Section 104 of the GLBA is codified at 15 U.S.C. § 6701. In this letter, we cite section 104 of the GLBA rather than the provision as codified.

[6] *See* 65 Fed. Reg. 43827 (July 14, 2000).

the ultimate arbiters of whether federal law preempts state law in a particular case. Nevertheless, Congress and the federal courts have recognized that the OCC has the authority to interpret, in the first instance, federal laws affecting national bank powers. Indeed, the National Bank Act contains specific provisions governing the issuance of opinions concerning preemption of state laws by the OCC.[7] As the primary supervisor of national banks, the OCC is uniquely positioned to evaluate the effect of the Massachusetts Law on national banks' ability to exercise their federal authority to sell insurance.[8] Further, from a practical perspective, in the absence of interpretive advice, national banks that sell, or wish to sell, insurance in Massachusetts will face added cost, burden, and uncertainty. Finally, Congress clearly envisioned that the federal banking agencies would be making determinations as to whether state laws regarding insurance sales and solicitations were preempted, because section 304 of the GLBA contains detailed provisions for judicial review of conflicts between a state insurance regulator and a federal regulator arising from such a determination.[9]

A few commenters opposed to preemption asserted that the OCC should not find that federal law preempts the Massachusetts Law provisions because state insurance regulators are, pursuant to GLBA, responsible for the functional regulation of the business of insurance. The GLBA expressly provides, however, that the states' functional regulation authority over insurance activities is subject to federal preemption standards as incorporated in section 104.[10] In particular, the question whether a state insurance sales law applies to national banks is resolved by application of the federal standards to the state provision in question.[11]

[7] *See* 12 U.S.C. § 43 (requiring, under certain circumstances, that the OCC publish notice of preemption issues as well as "any final opinion letter" on such issues).

[8] *See United States v. Mead Corp.*, 121 S. Ct. 2164, 2173 n.13 (2001) (describing the weight generally given by the courts to certain OCC interpretive opinions).

[9] *See* GLBA § 304, 113 Stat. at 1338, *codified at* 15 U.S.C. § 6714.

[10] *See* GLBA § 301, 113 Stat. at 1407, *codified at* 15 U.S.C. § 6711 ("The insurance activities of any person (including a national bank exercising its power to act as agency under [12 U.S.C. § 92]) shall be functionally regulated by the States, *subject to section 104*.") (emphasis added).

[11] Several commenters also asserted that under section 305 of the GLBA, state insurance customer protection statutes may only be preempted if the federal banking agencies jointly determine that the federal regulations enacted pursuant to section 305 provide greater consumer protection than the state law. See GLBA, § 305, 113 Stat. at 1410-15, *codified at* 12 U.S.C. § 1831x. Section 305 of the GLBA directed the federal banking agencies to promulgate certain consumer protection regulations relating to the sale, solicitation, and advertising of insurance products by depository institutions and persons selling insurance on the premises of depository institutions or otherwise on behalf of such institutions. Section 305(g)(2) explains the relationship between these regulations and state laws that are in effect in that jurisdiction. Pursuant to section 305(g)(2), these federal regulations do not override inconsistent state laws unless the agencies jointly determine that the federal regulations provide better consumer protections than the state provisions. The state then is given up to 3 years to override that determination. Section 305(g) relates solely to the preemptive effect that is to be given to federal regulations promulgated under section 305(a). By its terms, it does not relate to the preemptive effect that is to be given to other federal regulations or statutes. In the insurance sales area, this is determined pursuant to section 104 of the GLBA and the *Barnett* standards it incorporates, as explained in Section II of this letter.

Commenters also expressed concerns about the impact an OCC opinion concerning the Massachusetts Law would have on similar laws enacted in at least 30 states. These commenters noted that these state laws were the products of extensive negotiations involving state regulators and the insurance and banking industries. This letter expresses no view with respect to state laws other than those specifically addressed here. We specifically note, however, that the conclusions reached in this letter do not result in a finding that any provisions of the Model Unfair Trade Practices Act adopted by the National Association of Insurance Commissioners (NAIC) would be preempted.[12]

The commenters opposed to preemption also urged the OCC to delay issuing its opinion until the Sixth Circuit resolves the appeal of the Federal District Court's decision in *Association of Banks in Insurance, Inc. v. Duryee*.[13] In *Duryee*, a national bank and trade associations with national bank members sought a declaratory judgment that certain Ohio insurance licensing statutes as applied to national banks are preempted by the federal statute -- 12 U.S.C. § 92 -- that authorizes national banks to sell insurance from agencies based in small towns without regard to affiliation or control. The District Court granted the plaintiffs' motion for summary judgment and issued the declaratory judgment and enjoined Ohio from enforcing its licensing statutes against national banks operating from small towns in the state. Commenters here asserted that the OCC should delay opining in this matter because the appellate decision in *Duryee* would clarify the parameters of the *Barnett* standards in matters involving the application of state insurance laws to national banks. However, in the time since the commenters submitted their comments on this matter, the Sixth Circuit issued its decision in the *Duryee* appeal, affirming the grant of a declaratory judgment and the issuance of a permanent injunction against the state's enforcement of the laws against national banks.[14] The Sixth Circuit's decision in *Duryee* thus strongly supports the conclusions we reach in this letter.

The next section of this letter summarizes the federal preemption standards that apply to the state laws you have asked us to review.

II. Federal Preemption Standards: The GLBA and *Barnett*

[12] The Model Unfair Trade Practices Act is available on the NAIC's website, www.NAIC.org.

[13] 55 F. Supp. 2d 799 (S.D. Ohio 1999).

[14] 270 F.3d 397 (6th Cir. 2001). The Sixth Circuit remanded the case for further consideration of whether certain corporate organizational licensing requirements are preempted in light of GLBA. However, the Sixth Circuit resolved the issues of relevance to our consideration of the Massachusetts Law, namely, the legal standards to apply when considering whether a state law is preempted. As is explained further in Section II of this letter, the Sixth Circuit was clear that section 104 requires that the entire preemption test as set out in *Barnett* -- and not one limited to a consideration of whether a state law "prevents or significantly interferes" with a federal power -- is to be applied. The remand will resolve whether the corporate organizational requirements are preempted in light of *Barnett* and the anti-discrimination provision set out in section 104(e) of GLBA. However, the outcome of that remand will not affect the conclusions reached in this letter.

In our recent letter concerning whether federal law preempts certain provisions of the West Virginia Insurance Sales Consumer Protection Act[15] (the West Virginia Letter), we set forth a detailed analysis of the GLBA preemption framework. That analysis is incorporated by reference here and is summarized below.

The GLBA establishes several different standards governing the applicability of state law to depository institutions and their affiliates, depending on whether the state law at issue affects: the institution's ability to engage in an affiliation that is "authorized or permitted by Federal law;" its ability to engage in activities "authorized or permitted" pursuant to the GLBA; or its ability to engage in insurance sales, solicitation, and cross-marketing activities.[16] With respect to *any* insurance sales, solicitation, or cross-marketing activities, section 104(d)(2) establishes the following standard governing the applicability of state law:

> 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, by statute, 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 an affiliate or any other person, in any insurance sales, solicitation, or crossmarketing activity.[17]

However, section 104 protects from preemption under this standard 13 specified types of restrictions on insurance sales, solicitation, and cross-marketing activities -- the Safe Harbors -- as well as state restrictions that are "substantially the same as but no more burdensome or restrictive than" the Safe Harbors.[18] State laws regarding any insurance sales, solicitation, and cross-marketing activities that are not covered by a Safe Harbor are subject to the standards for preemption set forth in *Barnett*, pursuant to section 104(d)(2).

The *Barnett* standards represent an application, in the national bank context, of the analysis used by the Supreme Court to determine, under the Supremacy Clause of the U.S. Constitution, whether federal law conflicts with state law such that the state law is preempted. Under this analysis, the Court reviews whether a state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of

[15] Letter from Julie L. Williams, First Senior Deputy Comptroller and Chief Counsel, to Sandra Murphy, Esq., dated September 24, 2001. This letter was published in the *Federal Register* at 66 Fed. Reg. 51502 (October 9, 2001).

[16] GLBA §§ 104(c)(1), (d)(1), and (d)(2), respectively.

[17] GLBA § 104(d)(2)(A). State statutes that were enacted after September 3, 1998, also must meet certain non-discrimination standards with respect to those provisions not covered by the Safe Harbors. *See* GLBA § 104(e). The Massachusetts Law was enacted on May 22, 1998, and therefore these nondiscrimination provisions are not applicable to this analysis.

[18] *See* GLBA §§ 104(d)(2)(B)(i) - (xiii).

Congress."[19] In the national bank context, the Court applies this analysis by looking at whether the state law at issue conflicts with the exercise of a national bank's federally authorized powers. Thus, in holding that a Florida statute restricting a national bank's ability to sell insurance in that state was preempted, the Court in *Barnett* relied upon a number of its precedents holding that a particular state statute was preempted because it "stood as an obstacle" to a national bank's exercise of those powers.[20]

The scope of the standard is illustrated by the Court's earlier decision in the *Franklin National Bank* case, which was relied upon by the Court in *Barnett*.[21] In the *Franklin* case, the Court held that a state law that prohibited national banks from using the word "savings" in their advertising was preempted. The Court's rationale was not that the state statute directly precluded national banks from engaging in the business of receiving savings deposits. The statute at issue did not have that effect. Instead, the Court said that the federal law authorizing national banks to take savings deposits must be read to authorize them to engage in the ordinary incidents of that business, such as

[19] *Barnett*, 517 U.S. at 31, *quoting Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). The Court's quotation from the *Hines* case came at the conclusion of a paragraph summarizing the 3 traditional bases for federal preemption under the Supremacy Clause:

> Sometimes courts, when facing the pre-emption question, find language in the federal statute that reveals an explicit congressional intent to pre-empt state law. More often, explicit pre-emption language does not appear, or does not directly answer the question. In that event, courts must consider whether the federal statute's "structure and purpose," or nonspecific statutory language, nonetheless reveal a clear, but implicit, pre-emptive intent. A federal statute, for example, may create a scheme of federal regulation "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." Alternatively, federal law may be in "irreconcilable conflict" with state law. Compliance with both statutes, for example, may be a "physical impossibility," or, the state law may "stan[d] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

Id. at 31 (citations omitted).

[20] In describing this analysis, the Court said:

> [T]he Federal Statute says that its grant of authority to sell insurance is in "addition to the *powers* now vested by law in national [banks]." [12 U.S.C. § 92] (emphasis added). In using the word "powers," the statute chooses a legal concept that, in the context of national bank legislation, has a history. That history is one of interpreting grants of both enumerated and incidental "powers" to national banks as grants of authority not normally limited by, but rather ordinarily pre-empting, contrary state law. See, *e.g.*, *First Nat. Bank of San Jose v. California*, 262 U.S. 366, 368-369 (1923) (national banks' "power" to receive deposits pre-empts contrary state escheat law); *Easton v. Iowa*, 188 U.S. 220, 229-230 (1903) (national banking system normally "independent, so far as powers conferred are concerned, of state legislation").

Barnett, 517 U.S. at 32 (parallel and "cf." citations omitted).

[21] *Franklin National Bank of Franklin Square v. New York*, 347 U.S. 373 (1954), cited in *Barnett*, 517 U.S. at 33.

advertising. Finding a "clear conflict" between the state and federal laws, the Court held that the state advertising restriction was preempted. The meaning of *Franklin*, expressly confirmed in *Barnett*,[22] is that a national bank's power to engage in an activity necessarily includes the power to conduct the business effectively and competitively.

The Court recognized in *Barnett* that not every state law that affects a national bank activity "stands as an obstacle" to the accomplishment of the federal purpose:

> In defining the pre-emptive scope of statutes and regulations granting a power to national banks, these cases take the view that normally Congress would not want States to forbid, or impair significantly, the exercise of a power that Congress explicitly granted. To 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. See, *e.g.*, *Anderson Nat. Bank* v. *Luckett*, 321 U.S. 233, 247-252 (1944) (state statute administering abandoned deposit accounts did not "unlawful[ly] encroac[h] on the rights and privileges of national banks"); *McClellan* v. *Chipman*, 164 U.S. 347, 358 (1896) (application to national banks of state statute forbidding certain real estate transfers by insolvent transferees would not "destro[y] or hampe[r]" national bank functions); *National Bank* v. *Commonwealth*, 9 Wall. 353, 362 (1870) (national banks subject to state law that does not "interfere with, or impair [national banks'] efficiency in performing the functions by which they are designed to serve [the Federal] Government").[23]

In this portion of its analysis, the Court describes the boundary of the preemptive scope of the federal laws authorizing powers for national banks by describing circumstances under which a state law has been found not to stand as an obstacle to the accomplishment of the federal purpose.[24]

The variety in the language that the Supreme Court used in *Barnett* to describe the conflicts analysis that governed the result there shows that the analysis cannot be

[22] *Barnett*, 517 U.S. at 35 ("Thus, the Court's discussion in *Franklin Nat. Bank*, the holding of that case, and the other precedent we have cited above, strongly argue for a similar interpretation here -- a broad interpretation of the word 'may' that does not condition federal permission upon that of the State.").

[23] *Barnett*, 517 U.S. at 33-34.

[24] Thus, under *Franklin*, *Barnett*, and other federal cases, a conflict between a state law and federal law need not amount to a whole, or even partial, prohibition in order for the federal law to have preemptive effect. *See Barnett*, 517 U.S. at 31-32. Where a federal grant of authority is unrestricted, state law that attempts to place limits on the scope and effective exercise by a national bank of its express or incidental powers will be preempted. *See*, *e.g.*, *Franklin National Bank*, 347 U.S. at 378; *Duryee*, 270 F.3d at 409 ("The intervenors' attempt to redefine 'significantly interfere' as 'effectively thwart' is unpersuasive."); *New York Bankers Ass'n, Inc.* v. *Levin*, 999 F. Supp. 716, 719 (W.D.N.Y. 1998) (holding that a New York statute that restricted the types of insurance banks could sell to their customers was preempted on the grounds that the state law "constitutes an interference with [banks'] rights" to sell insurance).

encapsulated by any one phrase. Rather, whatever words are used to describe it, the analysis requires an examination of the effect that a particular state statute has on a national bank's exercise of a federally authorized power -- here, the power to sell insurance granted by federal statutes, including 12 U.S.C. § 92.[25]

Section 104 of the GLBA follows this same approach. Though it specifically mentions the "prevent or significantly interfere" formulation quoted above, the full text of section 104(d)(1) introduces that phrase and provides its context with the words "[i]n accordance with the legal standards for preemption set forth in [*Barnett*]." This express reference to the *Barnett* decision in its entirety and without qualification and to its "standards" in the plural, rather than the singular, demonstrates that the statute imports the whole of the *Barnett* conflicts analysis as governing the preemption of state laws pertaining to insurance sales, solicitation, and cross-marketing activities. Any doubt on this point is resolved by the express preservation of the applicability of the *Barnett* case in a subsequent portion of section 104:

> (C) CONSTRUCTION.--Nothing in this paragraph shall be construed--
>
> (I) to limit the applicability of [*Barnett*] with respect to any State statute, regulation, order, interpretation, or other action that is not referred to or described in subparagraph (B) [*i.e.*, the Safe Harbors]; or
>
> (II) to create any inference with respect to any State statute, regulation, order, interpretation, or other action that is not described in this paragraph.[26]

The effect of this language is to reaffirm, following the listing of the Safe Harbors, that both the standards that the Supreme Court articulated in the *Barnett* decision and the analysis that the Court used in that case apply to state laws that are not protected by the Safe Harbors.[27] Thus, the standards for preemption used by the Court in

[25] National banks are authorized to engage in insurance activities by a number of federal statutory provisions, including: 12 USC § 24(Seventh) (*e.g.,* credit life insurance); 12 U.S.C. § 24a (authority to engage in insurance sales through a financial subsidiary); 12 U.S.C. § 92 (authority to sell insurance from "small towns"); and 15 U.S.C. § 6713 (title insurance, where permissible for state banks).

[26] GLBA, § 104(d)(2)(C)(iii). The words "this paragraph" in the lead-in language mean paragraph (2) of subsection (d). We construe the "no inference" language in the second clause to mean that a state law may not be inferred to be preempted under the "prevent or significantly interfere standard" solely because it is excluded from coverage by one of the Safe Harbors. Accordingly, our analysis in Section III draws no such inferences.

[27] As we noted in the West Virginia Letter, the legislative history of section 104 confirms that Congress intended to incorporate the whole of *Barnett* by referencing it in that section. The Senate Report accompanying the GLBA, in commenting on a provision prescribing the "prevent or significantly interfere" standard, using language that was almost identical to the language of section 104(d)(2) as ultimately enacted, states that:

Barnett before enactment of GLBA are the same standards that apply today with respect to the application of state insurance sales, solicitation, or cross-marketing laws that are not covered by a Safe Harbor to insurance activities that are authorized for national banks under federal law.

III. Application of Federal Preemption Standards to the Massachusetts Law

Application of the principles we have discussed requires that we conduct a three-step analysis of the provisions of the Massachusetts Law that you have asked us to review. We first determine which of the several standards contained in section 104 of the GLBA applies. Since all three of the provisions you have identified pertain to insurance sales, solicitation, or cross-marketing, the analysis of each provision is governed by section 104(d)(2)(A), that is, the *Barnett* standards which are incorporated by the statute. Second, we consider whether any provision of the Massachusetts Law is protected from preemption by one or more of the Safe Harbors described in section 104(d)(2)(B). Finally, if a provision is not protected by a Safe Harbor, we apply the *Barnett* standards to determine whether, in our view, the state law conflicts with a national bank's authority to sell insurance and is therefore preempted.

A. The Massachusetts Restrictions on Referrals by Bank Personnel

The Massachusetts statute and regulations prohibit non-licensed bank personnel

> The Committee believes that State insurance sales, solicitation, and cross-marketing laws adopted prior to September 3, 1998 should be subject to preemption under the preemption standards applicable when such laws were adopted. Thus, it is the Committee's intent that such laws may be subject to preemption under applicable case law, and the statutory preemption standard set forth in subsection 104(d)(2)(A), which is patterned after such case law. There is an extensive body of case law related to the preemption of State law. For example, in *Barnett Bank of Marion County, N.A. v. Nelson,* 116 S.Ct. 1103 (1996), the U.S. Supreme Court noted that Federal courts have preempted State laws that "prevent or significantly interfere" with a national bank's exercise of its powers; that "unlawfully encroach" on the rights and privileges of national banks; that "destroy or hamper" national banks' functions; or that "interfere with or impair" national banks' efficiency in performing authorized functions.

S. Rep. No. 44, 106th Cong. 1st Sess. At 13 (1999). (The limitation on the application of this standard to state laws adopted prior to September 3, 1998 was deleted in the final legislation.) The Senate Report described as affirmative preemption standards phrases that the *Barnett* Court used to describe cases in which state law was not preempted. This transposition does not change the substance of the point sought to be made in the Report, namely, that the intention of Congress was to incorporate into the statute the pre-existing standards described in the applicable caselaw and not a new standard comprising only the "prevent or significantly interfere" language. As we have previously described, it is the application of the conflicts analysis and not the particular words used to describe the effect of a state statute that comprise the *Barnett* standards. *See* H. Rep. 106-74 Part 3 at 139 ("Subsection 104(b)(2)(C) reiterates the underlying principles of subsection 104(b)(2)(A), affirming that the *Barnett* standard and case law continues to be applicable to insurance sales, solicitations, and cross-marketing activities that are not protected by the safe harbors set forth in subsection 104(b)(2)(B)."); and *Duryee*, 270 F.3d at 409 (noting that "the Barnett Bank opinion cited two cases that do not support the intervenors' interpretation of the standard").

from referring prospective customers to a licensed insurance agent or broker except upon an inquiry initiated by the customer (the Referral Prohibition). The same statute and regulations further prohibit 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). The Massachusetts statute provides:

> Officers, tellers and other employees of a bank who are not licensed as insurance agents may refer a customer of said bank to a licensed insurance agent of the bank only when such customer initiates an inquiry relative to the availability or acquisition of insurance products. No such officer, teller or other employee shall be further or additionally compensated for making said referrals.[28]

This statutory provision is implemented in regulations set forth at 211 CMR § 142.05(3) and 209 CMR § 49.06(3). Section 142.05(3) of 211 CMR provides:

> (3) Insurance sales activities conducted at the main office or at any branch location shall be conducted only by insurance agent [sic] or brokers licensed pursuant to M.G.L. c. 175, §§ 163 and 166, respectively. Non-licensed bank personnel may refer consumers to a licensed insurance agent or broker of the bank only upon an inquiry initiated by the consumer. Non-licensed bank personnel shall not be additionally compensated for such referrals.

Section 49.06(3) of 209 CMR provides:

> (3) Solicitations and Sales by Bank Personnel. The solicitation and sale of insurance by banks shall be conducted by licensed personnel of such institutions to the extent required by applicable insurance laws and regulations. Unlicensed officers, tellers and other employees, however, may refer customers to licensed personnel only where:
>
> (a) the customer initiates an inquiry as to the availability or acquisition of insurance products; and

(b) such unlicensed personnel are not additionally compensated for such referrals.

The Director of the Massachusetts Office of Consumer Affairs and Business Regulation (the Massachusetts Director), who oversees the Massachusetts Department of Banking and Insurance, asserted in her comment letter that the Referral Prohibition and

[28] MASS. GEN. L. ch. 167F, § 2A(b)(2).

the Referral Fee Prohibition are protected by two of the GLBA Safe Harbors.[29] Although the Massachusetts Director does not specify which Safe Harbors, there are two concerning referrals. Safe Harbor (iv) protects state laws that prohibit the payment of valuable consideration, such as referral fees, to unlicensed individuals for "services as an insurance agent or broker." A referral by an unlicensed person who does not discuss specific policy terms and conditions, however, is expressly excluded from the term "services as an insurance agent or broker." Safe Harbor (v) preserves state laws prohibiting referral fees based on the purchase of insurance by the customer.

As we have noted, the Safe Harbors protect state provisions that are "substantially the same as but no more burdensome or restrictive than" the restrictions in the federal statutory text. It is our opinion that the Referral Prohibition is not "substantially the same as" Safe Harbor (iv) and that it is more burdensome and restrictive than Safe Harbor (iv). The plain language of Safe Harbor (iv) protects only those state laws restricting payment for referrals by unlicensed personnel that involve discussions of specific insurance policy terms and conditions. The Massachusetts Referral Prohibition, however, restricts *all* referrals by unlicensed bank personnel (unless initiated by the customer), including those that do not involve specific insurance policy discussions. In our view, this exceeds the scope of Safe Harbor (iv), and consequently is not protected.

Similarly, in our view, the Massachusetts Referral Fee Prohibition is not protected by Safe Harbor (v). Safe Harbor (v) protects only those state restrictions on referral fees tied to a customer's purchase of insurance. The Massachusetts Referral Fee Prohibition goes further than this by prohibiting referral fees of any kind. As such, the Massachusetts Referral Fee Prohibition is more burdensome and restrictive than the restrictions contemplated in Safe Harbor (v).

Because the Referral Prohibition and Referral Fee Prohibition are not protected by the GLBA Safe Harbors, we must consider whether they are preempted by the *Barnett* standards incorporated in GLBA section 104.

The Massachusetts Referral Prohibition imposes significant limitations on a bank's ability to engage in insurance sales, solicitation, and cross-marketing activities. By limiting referrals to only those resulting from a customer's inquiry, the Massachusetts Referral Prohibition effectively deprives banks of important opportunities to offer insurance products to customers. The Referral Prohibition precludes non-licensed bank

[29] *See* Comment Letter from Jennifer Davis Carey, Director, Consumer Affairs and Business Regulation, Commonwealth of Massachusetts, dated August 10, 2000, at 3 (hereinafter "Director's Letter").

personnel, such as bank tellers and customer service personnel, from even mentioning to their customers the fact that qualified, licensed insurance agents employed by the bank are available to discuss with them their insurance needs, unless the customer happens to ask about the product. This will prevent in most cases the very bank employees likeliest to have contact with customers from engaging in the cross-marketing activities that are permissible for national banks.

By effectively eliminating cross-marketing activities by unlicensed bank staff, the Massachusetts Referral Prohibition runs afoul of the express language of section 104(d) of the GLBA. Under section 104(d)(2)(A), in accordance with the *Barnett* standards, no state may prevent or significantly interfere with the ability of a depository institution to engage in "*any* . . . crossmarketing activity" if that cross-marketing activity is not protected by the safe harbors for referrals set out in sections 104(d)(2)(B)(iv) and (v).[30] The word "any" in section 104(d)(2)(A) clearly encompasses a bank's ability to engage in a wide range of cross-marketing activities, including the referrals prohibited by Massachusetts.[31]

The Massachusetts Referral Fee Prohibition imposes a further, significant limitation on a bank's ability to cross-market insurance products. As many commenters noted, one effective way for a bank to cross-market it to offer a financial incentive for unlicensed bank personnel to refer a customer to qualified insurance personnel. By prohibiting a bank from offering that financial incentive, the Massachusetts Referral Fee Prohibition impermissibly prevents the bank from structuring its internal operations so that it can engage effectively in the cross-marketing activities permitted by GLBA.

Thus, in our view, both the Massachusetts Referral Prohibition and the Massachusetts Referral Fee Prohibition would be preempted under the *Barnett* standards incorporated in section 104(d)(2) because they frustrate the authority of national banks to engage in insurance activities and activities incidental thereto. National banks' ability to engage in insurance activities encompasses their ability to engage in activities incidental

[30] GLBA § 104(d)(2)(A) (emphasis added).

[31] We note that federal law expressly contemplates that a national bank employee may make referrals, and receive compensation for making referrals, that would be prohibited under Massachusetts Law. Section 305 of the GLBA requires the OCC and the other federal banking agencies to prescribe regulations that include, among other provisions:

> [s]tandards that permit any person accepting deposits from the public in an area where such transactions are routinely conducted in a depository institution to refer a customer who seeks to purchase any insurance product to a qualified person who sells such product, only if the person making the referral receives no more than a one-time nominal fee of a fixed dollar amount for each referral that does not depend on whether the referral results in a transaction.

See also 12 C.F.R. § 14.50(b) (OCC implementing regulations). As noted above, Safe Harbor (iv) permits bank employees who are not licensed to engage in insurance activities to make referrals under certain circumstances; and Safe Harbor (v) protects from preemption only state prohibition of referral fees based on the customer's purchase of insurance. Thus, Congress clearly contemplated that bank employees would make referrals to persons in the bank licensed to sell insurance and receive compensation for doing so.

to those insurance activities, such as marketing the availability of the insurance products. *See* 12 U.S.C. § 24(Seventh); *Franklin National Bank,* 347 U.S. at 377-378. The Massachusetts Referral Prohibition and the Massachusetts Referral Fee Prohibition conflict with these powers, in particular, with a bank's ability to engage, as described in section 104(d)(2)(A) of GLBA, in cross-marketing activities. As many commenters pointed out, the state law in question effectively deprives a bank of an important means of advertising the availability of an entire line of financial products that it is authorized to offer. Thus, consistent with the Supreme Court's holdings in *Barnett* and *Franklin National Bank*, we believe that the Massachusetts Referral Prohibition and the Massachusetts Referral Fee Prohibition are preempted because they conflict with national banks' authority to market the availability of products that the banks may offer under federal law and, therefore, to engage in the full range of insurance activities authorized by Congress.[32]

[32] The Massachusetts Director also asserted in her letter that the Referral Prohibition and Referral Fee Prohibition should not be preempted because the provisions are "consumer protective in nature and guard against inappropriate product recommendations, high pressure sales tactics and the sale of insurance products on the basis of compensation to the seller rather than the benefit to consumers." Director's Letter, *supra* note 29, at 2. As explained by the district court in the *Duryee* case, however, "[w]here state and federal laws are inconsistent, the state law is pre-empted even if it was enacted by the state to protect its citizens or consumers." *Duryee*, 55 F.Supp at 802. Agreeing with this conclusion, the Sixth Circuit stated that "the fact that the state legislature enacted the [state law at issue] to protect general insurance agents and consumers does not, for that reason alone, preclude federal preemption." *Duryee*, 270 F.3d at 408**.** *See also Franklin National Bank*, 347 U.S. at 378.

B. The Massachusetts Restrictions on the Timing of an Insurance Solicitation

The Massachusetts statute and regulations also prohibit banks from telling loan applicants that insurance products are available through the bank until the application is approved and, in the case of a loan secured by a mortgage on real property, until after the customer has accepted the bank's written commitment to extend credit (the Waiting Period Requirement).[33] There are no limits in federal law that impose conditions on a national bank's insurance activities comparable to the limits imposed by the Waiting Period Requirement. Moreover, as the Massachusetts Director acknowledged in her letter,[34] there are no GLBA Safe Harbors that would protect this requirement. Accordingly, the Waiting Period Requirement must be analyzed under the standards for preemption set forth in *Barnett* and made applicable to national banks' insurance activities by section 104(d)(2).

In our opinion, the Waiting Period Requirement is preempted under those standards because of the requirement's impact on the ability of a depository institution to engage in insurance sales, solicitation, and cross-marketing activity. The Massachusetts Director asserts that the Waiting Period Requirement does not "significantly interfere" with the ability of a bank to sell insurance because the requirement merely governs *when* the bank may solicit consumers.[35] That characterization substantially understates the

[33] MASS. GEN. L. 167F, § 2A(b)(4)(ii) and (iii), 209 CMR § 49.06(5)(b) and (c), and 211 CMR § 142.06(2) and (3)(b). Specifically, § 142.06(2) provides:

> No solicitation for the sale of insurance in conjunction with any application for the extension of credit shall be permitted until said application has been approved, such approval and the disclosures required by 211 CMR 142.06 have been provided to said applicant in writing, and the receipt of both said approval and disclosures has been acknowledged in writing by said applicant. . . .

Section 142.06(3)(b) provides:

> (3) In the instance of an application to a bank for an extension of credit to be secured by a mortgage on real estate and in which it is necessary for the applicant to obtain a policy insuring said premises against loss and designating such bank as loss payee:
>
> * * *
>
> > (b) such bank shall not, in any manner, solicit the applicant to purchase the required insurance from the bank until said commitment has been accepted by the applicant . . . .

[34] Pursuant to the Director's Letter, the Director's acknowledgement of this point "shall [not] be construed in any way to waive or concede any issues . . . that may arise in any other proceeding regarding the Massachusetts bank insurance laws." Director's Letter, *supra* note 29, at 3.

[35] We note that other Federal regulations contemplate, and in some instances require, that insurance solicitations occur *prior* to loan approval. Under the Truth-in-Lending-Act regulations, a lender must disclose to a consumer the finance charge, which in some instances includes insurance costs, associated with a loan. *See* 12 C.F.R. §§ 226.4(d) and 226.18. The estimated finance charge disclosure in connection

effect of the requirement on a bank's ability to cross-market its products, however. As we stated in the West Virginia Letter, based on our experience, restricting the timing of an insurance solicitation also restricts "the methods by which a bank may solicit an insurance sale from a customer and thus substantively affects the bank's ability to solicit and sell insurance products."[36] The Massachusetts Waiting Period Requirement, like the timing provision considered in the West Virginia letter, would preclude national banks from availing themselves of a prime opportunity to cross-market insurance products, that is, when the transaction is still in process.

It also would make subsequent cross-marketing much more costly by requiring banks to develop databases to keep track of customers that have loans pending with the bank. Banks would have to institute methods of communicating this information to its sales force and of apprising the sales force of changes as they occur. The Waiting Period Requirement also would significantly hamper a bank's mass mailing efforts since bank staff would be required to remove from the mass mailing those individuals who have loans pending with the bank. The cost of developing and maintaining these procedures would impair the bank's ability to engage in insurance activities and frustrate its ability to pursue particular sales activities.[37]

with a residential mortgage loan subject to the Real Estate Settlement Procedures Act, 12 U.S.C. 2601 *et seq.*, typically is required prior to loan approval. *See* 12 C.F.R. § 226.19(a) (disclosure must be made prior to the loan's consummation or mailed within three days of receipt of the consumer's application, whichever is earlier). Similarly, a lender must make the insurance disclosures required by the GLBA Section 305 regulations "at the time the consumer applies for an extension of credit in connection with which an insurance product is solicited, offered or sold." *See* 12 C.F.R. § 14.40(c)(1).

[36] West Virginia Letter at 25.

[37] The Massachusetts Director argues that preemption of the Waiting Period Requirement would interfere with Massachusetts insurance laws and other consumer protection laws that prohibit "tying." We have not been asked to consider these other Massachusetts laws in this letter. We note, however, that national banks are required to comply with the significant tying restrictions imposed by federal law. Twelve U.S.C. § 1972 generally prohibits a bank from extending credit, leasing or selling property, furnishing services, or fixing or varying prices of these transactions on the condition or requirement that the customer obtain additional credit, property, or service from the bank, subject to certain exceptions. Nothing in this opinion would allow national banks to engage in impermissible tying under section 1972. Moreover, section 305 of the GLBA requires that the OCC's insurance consumer protection regulations contain anti-tying provisions consistent with section 1972. *See* 12 C.F.R. § 14.30(a).

IV. **Conclusions**

The Massachusetts Referral and Referral Fee Prohibitions frustrate the ability of national banks to cross-market insurance products, an authority specifically referenced in section 104 of GLBA and recognized by the Supreme Court as essential to the conduct of modern business. The Massachusetts Waiting Period Requirement impermissibly restricts the methods by which a bank may solicit an insurance sale from a customer and would also significantly interfere with the cross-marketing of insurance products. It is therefore our opinion that the Massachusetts Referral Prohibition, the Massachusetts Referral Fee Prohibition, and the Massachusetts Waiting Period Requirement would be preempted under the *Barnett* standards incorporated in GLBA section 104(d)(2).

Sincerely,

Julie L. Williams
First Senior Deputy Comptroller and Chief Counsel