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REMARKS OF DAVID L. GLASS

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I am pleased and honored to be part of this distinguished panel. Since having spent seven years as General Counsel of the New York Bankers Association, I've grown accustomed to representing the "bad guys!"

Seriously, I am going to take something of a devil's advocate position here. The common thread in this panel discussion, thus far, is that the new financial modernization legislation, the Gramm Leach Bliley Act (GLB Act), does not go far enough in protecting consumers' financial privacy, and that new legislation is called for. Specifically, I understand that the American Civil Liberties Union (ACLU) and various consumer advocates are seeking to replace the opt-out provisions under the GLB Act — whereby financial services companies may share information regarding their customers with affiliates and others, unless the customer opts-out of such sharing — with an opt-in approach, whereby sharing is not permitted unless affirmatively authorized by the consumer.[2]

On a personal level, I'm withholding judgment on the need for new legislation and what shape it should take. I certainly value my own privacy and share your concern that personal privacy is increasingly jeopardized by modern technology. But I do feel strongly that enacting more legislation, even before the ink is dry on the sweeping new regulations proposed by the Federal Trade Commission (FTC) and other federal agencies to implement the new

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[2] *See* Lisa Jane McGuire, Comment, *Banking on Biometrics: Your Bank's New High-Tech Method of Identification May Mean Giving Up Your Privacy*, 33 AKRON L. REV. 441, 476–80 (2000) (explaining the opt-in and opt out approaches and weaknesses in the privacy protection provisions of the GLB Act). *See also* Cecilia Kempler & Robert Woody, *Living with the Gramm-Leach-Bliley Act Privacy, in* AFTER THE GRAMM-LEACH-BLILEY ACT-A ROAD MAP FOR INS. COS, at 205, 269 (2000) (PLI Corp. Law & Pract. Course, Handbook Series No. B0-00QU, 2000) (explaining privacy under the state insurance law).

requirements, is at best premature, and at worst, wrong-headed and counterproductive. I would like to take a few minutes to tell you why I believe that.

Two caveats: First, the views I am stating are entirely my own; I am not speaking for the banking community in general or any of my clients in particular. Second, I am not going to rehash the privacy provisions of the legislation itself, which have been ably described by my fellow panelists. Rather, I would like to take an anecdotal approach, from the standpoint of my own experience, both on the legislative side and representing financial services companies in private practice — not to mention teaching banking law at this fine institution. I will also briefly review the state of the law pre-GLB Act, to place in context how we got where we are today.

At the outset, I have a bone to pick. As those of you who heard my presentation this morning know, I think it is, an overstatement to say that the GLB Act "repealed" the Glass-Steagall Act. For as long as I have been practicing bank regulatory law, there has been talk about the need to repeal Glass-Steagall.[3] Over time a broad consensus developed that Glass-Steagall is, at best, an anachronistic holdover from the Great Depression and, at worst, a serious impediment to America's financial institutions competitive ability in the world market.[4]

From 1990 to 1997, while with the New York Bankers Association, I was closely involved with both federal and state legislation aimed at repealing Glass-Steagall (and let me emphasize

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[3] *See* George W. Arnet, III, *The Death of Glass-Steagall and the Birth of the Modern Financial Services Corporation*, 203 N.J. LAW. 42 (June 2000) (describing the background of the Glass Steagall Act and its development). *See also* Geoffrey M. Connor, *The Financial Services Act of 1999- The Gramm-Leach-Bliley Act*, 71 PA. B. A. Q. 29 (January 2000) (giving the history of the GLB Act).

[4] *See* Noelle T. Heintz & Robert M. Travisano, *What is Past is Prologue: Why Congress Should Reject Current Financial Reform Bills and Breathe New Life Into Glass-Steagall*, 13 ST. JOHN'S J. LEGAL COMMENT. 373 (1998) (describing the history of the Glass-Steagall Act and its historical roots from the Great Depression). *See also*, Bruce L. Rockwood, *Interstate Banking and Nonbanking in America: A New Recipe for an Old Prescription or Why Does the Elephant Banker Wear Tennis Shoes and Waterwings, and Carry an Economist Pocket Diary?*, 12 SETON HALL LEGIS. J. 137, 152 (1989) (offering more information on the Great Depression and how it affected the Glass-Steagall Act).

that, as I tell my banking law class, despite its name I had absolutely nothing to do with writing this law in the first place — I'm not that old!).[5] If the objective was simply to repeal Glass-Steagall, I could have accomplished that with one or two well-chosen sentences. Indeed, Senator Carter Glass (D-VA), its principal drafter (and no relation), renounced it as a mistake less than a year after it was passed, and introduced a one-sentence bill to repeal it.[6]

The GLB Act, by contrast, comprises 380 pages spread over seven titles.[7] The principal reason for its loquacity is that, to an even greater extent than usual, Congress had to placate many different constituencies — three industries (banking, securities and insurance) with very different objectives, four federal and 50 state regulators fighting over turf, and so on.[8] The net result, as I illustrated in this morning's talk, is an unwieldy structure that is far from the kind of sweeping deregulation that some people would have you believe.[9] But, one of the few ways in which it is an effective deregulation is that the privacy provisions allow for cross-marketing of products and services among financial services companies.[10] This is precisely what

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[5] *See* George G. Kaufman & Larry R. Mote, *Glass-Steagall: Repeal By Regulatory and Judicial Reinterpretation*, 107 BANKING L.J. 388 (1990) (discussing the reasons to repeal the Glass-Steagall Act).

[6] *See* Laura J. Cox, *The Impact of the Citicorp-Travelers Group Merger on Financial Moderation and the Repeal of Glass-Steagall*, 23 NOVA L. REV. 899, 903–4 (1999) (citing the Congressional record where Senator Glass said, in reference to the Act, that he "thought it was a mistake and an overreaction).

[7] Gramm-Leach-Bliley Act, Pub. L. No. 106-102, 113 Stat. 1338-41 (enumerating the seven titles of the Act). *See* Adam Nguyen & Matt Watkins, *Congress Issue Recent Legislation: Financial Service Reform*, 37 HARV. J. ON LEGIS. 579, 581 (2000) (explaining that the GLB act is voluminous and a complex piece of legislation).

[8] *See* Joseph A. Smith, Jr., *Retail Delivery of Fiancial Services After the Gramm-Leach-Bliley-Act: How will Public Policy Shape the "Financial Services Supermarket"?*, 4 N.C. BANKING INST. 39 (2000) (explaining that the GLB Act covers banking, securities, and insurance industries as well as state and federal regulators). *See also* Kempler & Woody, *supra* note 2, at 111–2 (illustrating which government agencies are involved in regulating the Act).

[9] *See* David L. Glass, *The Gramm-Leach-Bliley Act: Overview of the Key Provisions Presentation Before the State of New York Banking Department*, 17 N.Y.L. SCH. J. HUM. RTS. 1 (2001).

[10] *See* Paul J. Polking & Scott A. Cammarn, *Overview of the Gramm-Leach-Bliley-Act*, 4 N.C. BANKING INST. 1, 5 (2000) (explaining how the Act allows for

the advocates of more legislation aim to eliminate, and where they and I part company.[11]

I believe that the ability of financial companies to cross-market their services is a pro-consumer provision, because vigorous competition is the best way to ensure that consumers can have the greatest possible choice among the products and services they want and need. That is the model, which has created the strongest economy the world has ever known, and for the most part, is striving to emulate.

In that regard, I'd like to pick up on a previous statement of one of my fellow panelists. In essence, he scoffed at the contention of the banks, that they want to benefit consumers. He asserted that they are only interested in making money. Well, yes; I absolutely agree. Banks, like every other profit-making enterprise, are in business to make money. As a former regulator, I know that the regulators are very concerned (and rightly so) about assuring that banks remain profitable and healthy, both because their deposits are ultimately backed by a taxpayer guarantee and they have a role in financing every other business in the United States. However, on a more basic level, I strongly believe that, in the long run, the only way any business can survive and prosper is to offer products and services that people want, need, and are willing to pay for.

Let me provide some historical background on the current privacy debate. For 19 and one-half of the 20 years during which the Glass-Steagall repeal was debated, the so-called privacy issue was not even on the radar screen. As recently as the summer of 1998, the House passed H.R. 10, the progenitor of the GLB Act, with no mention of privacy whatsoever. The only reason the Senate did not pass the bill that year was Senator Phil Gramm's (R-TX) strong

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"affiliations between bank holding companies, insurance companies, and securities firms" but only allows for limited cross-marketing).

[11] *See* Smith, *supra* note 8, at 53 (emphasizing that some advocates are calling for stricter privacy regulations); *see also* WILLIAM J. SWEET, ET AL., *Privacy Provisions of the Gramm-Leach-Bliley Act, in* FIN. SERVS. MODERNIZATION 2000, at 221, 234 (American Law Institute — American Bar Association Continuing Legal Education Course Study 2000) (citing the argument among congressman about the exceptions to non-disclosure provisions in the GLB Act, saying they are too lax and in effect undercut consumer privacy protection).

opposition to the Community Reinvestment Act (CRA) provisions. Senator Gramm may have been anticipating the opportunity to reshape the legislation as Chairman of the Senate Banking Committee, if Senator D'Amato (R-NY) lost his re-election bid that November — as indeed turned out to be the case. Thus, not the least ironic aspect of the current debate is, but for Senator Gramm's little bit of legislative legerdemain, there might not be any financial privacy legislation before us today. Talk about unintended consequences!

More to the point, I think we would have been far better off — not because privacy legislation is a bad thing, but because it could and should have been separated from financial services — as I see it, only a small component of the privacy issue, and far less important in the scheme of things than many other issues. Personally, I am much more concerned about the privacy of medical records, and the absolutely insidious ability of internet service providers to place "cookies" inside my computer, without my knowledge or consent, enabling them to track every web site I ever visit and every book I order from Amazon.com — dirty or not, Nadine! As Scott McNealy, the in-your-face (and Microsoft's) chairman of Sun Microsystems recently put it so elegantly, "You have no privacy — get over it!" It seems to me that is where the real issue is — not whether Citigroup can mail you a credit card solicitation with your insurance bill.

Let me take a moment to review the law pre-GLB Act, with respect to the opt-in, opt-out issue. Under the federal Fair Credit Reporting Act (FCRA), an entity that disseminates "consumer reports" thereby becomes a "consumer reporting agency" ("CRA," not to be confused with the Community Reinvestment Act) subject to all sorts of restrictions and compliance requirements — obviously not a desirable, or even acceptable, result.

In the mid-90's Congress had addressed this problem by creating a "safe harbor" for affiliated financial services companies. Basically, the FCRA amendments provided that a bank or other financial services company could share "experience" information — whether Ms. Smith has any late credit card payments, or Mr. Jones keeps his insurance premiums paid up — with its affiliates, without fear of being deemed a CRA. In addition, affiliates may share other information on customers, provided that the customer is given a chance to "opt out" if he or she does not want that information shared.

FCRA was silent on sharing non-experience information with unaffiliated parties. The risk, of course, is that the sharer could be deemed a CRA. But the FTC staff had interpreted the law to allow sharing of general information, such as a list of names and addresses, as long as the information was not sorted or presented in such a way as to convey information regarding the consumer's creditworthiness or lifestyle. For example, singling out only those customers in a particular zip code — Beverly Hills 90210? — might be deemed to constitute a credit report, because it conveys information about which ones are the most promising customers. Query: is information regarding, say, the customer's maximum credit line, or amount of paid-up life insurance, "experience" information? Not clear, but certainly problematic.

In March of last year, I was asked by a client financial services organization whether one of its subsidiaries could share customer information with another, new subsidiary, solely for the purpose of enabling the new subsidiary to market its products to a targeted customer list. I advised the client regarding the FCRA provisions discussed above; but in my memorandum to them, I also noted that the term "privacy" registered among the highest positive responses in consumer surveys, and this was something that the Congress could not fail to notice.

I remember well what I regard as the real watershed moment in privacy legislation. The Senate had already passed its version of what became the GLB Act last March, and the House Banking Committee had reported out a version that included an opt-out provision. It appeared that the issue was settled as the bill underwent mark-up in the House Commerce Committee. Then in June of last year, the Attorney General of Minnesota, alleging violations of FCRA as well as state law, sued U.S. Bancorp, a large bank holding company, for selling its customer list to a third-party marketing concern.

And the very next day, the House Commerce Committee — thought to be more "conservative" on this issue than the Banking Committee — abruptly reversed field and reported out the opt-in bill sought by some consumer advocates. Meanwhile, and totally predictably, U.S. Bancorp caved in within two weeks, agreeing to give some money to charity and sin no more. Having been around the

banking industry for a while, I know this decision was a no-brainer; without regard to the merits — and certainly without regard to whether it violated the law — every day the case made headlines was a loser for U.S. Bancorp. As reported at the time, the bank's CEO said the lawsuit " made the bank take a second look at information-sharing practices that he said are industry-wide. He said customer trust is the bedrock of the bank's business. 'We decided it was far more productive to contribute to the health and vitality of our communities than to spend considerable sums of money on legal bills,'" he said.[12] An attitude like that could put our profession right out of business!

Another fascinating aspect of the financial privacy issue, to one who has observed the legislative process up close, is that it has become one of those increasingly rare meeting grounds for the left and the right.[13] On the House Banking Committee, the charge has been led by Congressman Edward Markey (D-MA), generally considered among the most liberal members.[14] On the Senate side, the leading advocate of financial privacy legislation on the Banking Committee has been Senator Richard Shelby (R-AL), a conservative who consistently has been a staunch advocate of financial services deregulation.[15] And in the press, there has been no more outspoken critic of the GLB Act privacy provisions than William Safire, the *Times* columnist and former Republican speech writer, who has come

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[12] R. Christian Bruce, *Privacy: U.S. Bancorp Settles Privacy Lawsuit Brought by Minnesota Attorney General*, 73 BNA BANKING REP. 31 (1999).

[13] *See* Leslie Wayne, *A Key Senator Again Blocks the Banking Bill*, N.Y. TIMES, Oct. 22, 1999, at C8 (explaining how Senator Gramm collided with both the White House and Congressional Democrats, who are concerned with the need for financial privacy in order to end discrimination in bank lending).

[14] *See* William Safire, *The Age of Consent*, N.Y. TIMES, Apr. 3, 2000, at A21 (arguing that although internet privacy is a major topic of contention, politicians Richard Shelby and Edward Markey, recognized privacy proponents, have not addressed this issue).

[15] *See id.*; *see also* William Safire, *On Language: Opt-In: Outing the Inside Lingo of Privacy*, N.Y. TIMES, Dec. 19, 1999, § 6, at 30 (explaining how Republican Senator Richard Shelby fought for an "opt in" policy regarding banking privacy) [hereinafter Opt-In].

out four-square for opt-in rather than opt-out.[16] So I hope we can start by agreeing that this issue does not neatly divide along ideological lines.

And that is precisely where the problem lies. "Privacy" is one of those feel-good concepts that everyone favors, along with "world peace," "clean air and water," motherhood and apple pie. And, as with other high-minded goals and objectives, it is easy to favor, and much harder to translate into concrete laws and policies that have the desired impact.[17] In order to do that, we have to first be sure we are asking the right questions. I'm reminded of one of my favorite Peanuts cartoons, in which the ever-crabby Lucy insists that "crabbiness is the answer!" Linus, cuddling his blanket, assures us that "security is the answer!" Schroeder, playing Beethoven on his piano, tells us that "music is the answer!" And it is left to Charlie Brown, that perpetually befuddled Everyman, to ask plaintively, "What was the question?"

Apropos, an attorney who specializes in privacy and cross-marketing issues for a large financial institution told me that his company has extensively surveyed its customers regarding their feelings on this issue. And as all know who have ever been involved in surveys and polling — not to mention the late, lamented Charles Schulz — the answers you get differ radically, depending upon how the question is presented.[18]

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[16] *See Opt-In, supra* note 15, at 30 (explicating the differences between an "opt-in" and "opt-out" policy with regards to consumer consent to invasions of privacy, i.e. skip tracing, headers, cookies, and "Spam").

[17] The issue of privacy takes many forms, and both federal and state legislatures continuously deal with different aspects. *See e.g., Privacy Protection, Hearing of the Senate Comm. on Commerce, Science and Transportaion*, 106th Cong. (2000) (prepared testimony of Dr. Jason Catlett Presiden and CEO, Junkbusters, Corp., visiting scholar, Columbia University Department of Computer Science) (explaining that the recently introduced Consumer Privacy Protection Act will make great strides in addressing many issues concerning privacy protection); *see also Genetic Information Technology, Hearing of the Senate Comm. On Labor and Human Resources*, 105th Cong. (1998) (discussing the need for privacy in medical testing and records); *see also Hearing of the Senate Comm. On Health, Education, Labor and Pension*, 106th Cong. (2000) (prepared testimony of American Healthways, Inc.) (stating, "many states have enacted new privacy laws and almost all states have significant privacy legislation pending").

[18] *See generally, Emerging Financial Privacy Issues, Before the House Comm. On Banking and Financial Service*, 105th Cong. (1999) (prepared testimony of Dr.

Thus, my friend's company asked its customers something like, "How important is your personal privacy?" And 80-plus percent responded, "very important." Surprise, surprise. But, when the same people were asked something like, "Would you object to our sharing your name with our affiliated companies, so they can offer you products and services that may be of interest to you, at a special discount for customers only?" Well, you can guess. Some 80 percent said they would not object. Does this mean they suddenly don't care about privacy any more? I don't think so. They were simply doing what rational adults do every single day in a free society — weighing the relative advantages and disadvantages of various choices, and making an informed decision. Recognizing what my Banking Law classes have heard me describe as the TANSTAAFL principle — there ain't no such thing as a free lunch.

And in this context, I would like to differ from my colleague from the ACLU. Unrolling a sample of the lengthy disclosure form that banks and others will be providing consumers under the GLB Act, he stated — and again, please correct me if I misstate — that consumers "can't be bothered" to read all of that to determine whether they want to opt-out of having their information shared. I was struck by this, because William Safire, the great libertarian, used almost exactly the same phrase in advocating an opt-in rather than an opt-out in his *Times* column a few months back.[19]

With all due respect to the ACLU and William Safire, I submit that "can't be bothered" is not an answer for a free citizen in a free society. If you care about your privacy, you must be bothered. No one will care about protecting your privacy if you don't. And asking the government to do it — those wonderful folks who gave you the FBI and the IRS — is like asking the fox to guard the chicken coop.

Mary J. Culnan, Professor at the McDonough School of Business Georgetown University) (stating that individuals are willing to disclose "information in exchange for some economic or social benefit subject to a 'privacy calculus'").

[19] *See Opt-In*, *supra* note 15, at 32 (explaining that the burden is on the consumer to opt-out by clicking the box that prevents the sharing of personal information and that most consumers "don't know enough to care, or are easily duped into not checking the box"). *See also* William Safire, *Stop Cookie-Pushers*, N.Y. TIMES, June 15, 2000, at A27 (explaining that consumers should opt to invoke privacy laws offered by banks so as not to share their personal information).

In the case of sharing with affiliates, the logic of opt-out is compelling, in my view. In most cases, we are talking about different products and services, that legally could be offered by the same institution, placed in different affiliates for legitimate business — and regulatory — purposes.[20] Among other things, the GLB Act mandates "functional regulation" of different financial activities.[21] This means that it is easier, if not indeed necessary, for financial companies to place banking, securities and insurance activities in different affiliates, to make the regulators' and their own life easier.[22] A bank can sell insurance or securities directly to its customers under current law, but may choose to do so through a subsidiary or other affiliate, because it is easier to comply with state and federal licensing requirements and to compensate salespersons with commissions.[23] Why should these perfectly sensible business decisions be distorted by a law that inhibits cross-marketing only in the latter case?

The real problem is that we are Americans, and as such we are accustomed to believing that we are entitled to everything we want,

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[20] *See* Nguyen & Watkins, *supra* note 7, at 581 (explaining that the Gramm-Leach Bliley Act allows FHC's to "own subsidiary corporations involved in any activity deemed to be financial in nature"); *see also* Smith, *supra*, note 8, at 40 (explaining that the Act "creates[s] 'financial services supermarkets' offering to customers in one place a wide array of financial products and services rather than the relatively limited offerings allowed under prior law").

[21] *See* Polking & Cammarn, *supra* note 10, at 3 (explaining that "federal agencies regulate banks and bank holding company activities through the concept of 'functional regulation'"); *see also* James M. Cain & John J. Fahey, Survey, *Banks and Insurance Companies — Together in the New Millenium,* 55 BUS. LAW. 1409 (2000) (explaining that the Act "introduces a framework for functional regulation of the issuers and the distributors of banking, securities, and insurance products").

[22] *See* Linda Birkin Tigges, *Functional Regulation of Bank Insurance Activities: The Time has Come*, 2 N.C. BANKING INST. 455, 474 (1998) (explaining that separate regulatory bodies oversee different financial activities thereby ensuring "competitive equality, regulatory efficiency and effectiveness, and adequate consumer protection measures); *see also* Polking & Cammarn, *supra* note 10, at 14–5 (explaining "streamlined supervision and functional regulation of holding company affiliates").

[23] *See* Karol Sparks, *The State of Bank Insurance Powers After Gramm-Leach-Bliley, in* FIN. SERVS. MODERNIZATION 2000, at 351, 385 (American Law Institute — American Bar Association Continuing Legal Education Course Study 2000) (explaining that "in obtaining requisite licensing, banks find many traps for the unwary that frustrate the process").

immediately and without cost.[24] In the movie "Inherit the Wind," based on the 1927 Scopes trial (in which a teacher in Tennessee lost his teaching license for teaching Darwin's theory of evolution), there is a point at which Spencer Tracy, playing the fictional version of the great trial lawyer Clarence Darrow, is expounding to the jury on the point that progress always carries a price: Yes, he tells them, "you can have the telephone; but you lose privacy, and the charm of distance."[25]

Personally, I find myself reconsidering that particular choice every time my quiet evenings are ruined by telemarketers! But I take a deep breath and remind myself that this is one of the prices I pay for choosing to have a telephone — not to mention for free enterprise, and all the blessings it has brought to our society. So I've learned, and practiced (and practiced and practiced!) a simple and effective response: "I'm sorry, but I never respond to unsolicited telephone calls." And then I hang up. By the way, I recommend the same procedure for unsolicited calls from charities — or rather, from paid telemarketers soliciting money for charities — which I personally find especially unseemly, since they are trying to hook you on your guilt feelings before you can decide if it's really a cause you want to support.

Similarly, I am bombarded daily by mail offers for easy credit: You're already approved! Consolidate your bills! As a banking lawyer these sometimes tickle my curiosity enough that I open them, to see how long it takes me to find the annual percentage rate and the fees buried in the fine print, and to compare which is more ridiculous. But mostly, they go unopened into the wastebasket — excuse me, the "recycling bin." Actually, I like to keep a nice, biodegradable paper grocery bag ("paper, not plastic") by my desk to collect all the recyclable credit card and second mortgage offers for the weekly

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[24] *See* Lisa Hamilton, *Diamonds in the Dirt? Community Supported Agriculture Programs*, HUMANIST, Jan. 1999, at 41 (commenting on American investing, "these results don't come quickly enough for Americans; if we put out a dollar, we want something in return immediately"); *see also* Matt Zoller Seitz *CNN Seeks to Redefine Itself*, NEWHOUSE NEWS SERVICE, May 30, 2000, at 20 (referring to Ted Turner's insight into American culture, "Turner understood that all these shifts were part of the same phenomenon a drastic acceleration in the pace of life and the need for instant gratification. Americans didn't just want everything, they wanted everything now").

[25] INHERIT THE WIND (Metro Goldwyn Mayer 1960).

recycling truck. So you see, even a banking lawyer can occasionally be politically correct!

My point is that, when you get right down to it, this is what most of this debate is about: whether our names and addresses are made readily available to those who want to sell us products we may, or may not, want or need. And more particularly, whether information we may not be so eager to see disseminated is shared. Human nature being what it is, we're happy to share the good stuff; the bad gets swept under the rug.[26]

I recently spoke at a seminar on the GLB Act, at which a question from the audience illustrated this point quite nicely, if rhetorically: "If you have a serious illness, do you want Travelers sharing that information with Citibank regarding your mortgage application?" Let's ponder that one for a moment. The premise seems to be that I have an absolute entitlement to a Citibank mortgage, and I also have the absolute right to prohibit Travelers from sharing with Citibank information that might be very relevant to whether I will be able to pay it back — and furthermore, to do so with no effort on my part. Again, the premise seems to be that as an American, I am not bound by either truth or consequences. Besides, if Citibank won't give me the mortgage, there are plenty of hungry lenders out there — if you don't believe me, I'll show you that brown paper grocery bag in my office at home.[27]

In an economy as complex as ours, any comprehensive new regulation is bound to cause unintended consequences. As one

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[26] *See, e.g.*, Ellen James Martin, *Finding the Right Realtor Careful Selection Saves Time, Cash and Headaches*, CHI. TRIB., Sept.10, 1999, at 1 (stating that in finding a realtor, "human nature dictates that most references stress the affirmative rather than the negative"); *see also* Thomas Petzinger Jr., *Talking About Tommorow*, THE WALL ST. J., Dec. 31, 1999, at R16 (citing Dr. Edward O. Wilson who says that humans exhibit "A tendency toward, emphasis upon, and deep personal concern about status and recognition" and as such it can be construed that self promotion is a priority).

[27] *See* Alan J. Heavens, *Great Divide; Racial Gap In Home Ownership Narrows Only Slightly*, CHI. TRIB., Aug. 20, 2000, at 7L (emphasizing "the need for mortgages for buyers with impaired credit has resulted in a dramatic increase in the sub-prime lenders"); *see also* Shermen Fridman, *Gomez Advisors Releases Internet Mortgage* Scorecard, NEWSBYTES, Feb. 18, 2000 (explaining that "along with the surge in home sales, the home mortgage market is booming. And it's no different for internet-based mortgage lenders").

example, the provisions prohibiting the sharing of credit card numbers would have eliminated airline frequent flyer and other "affinity" credit card programs.[28] Similarly, it would have made it impossible for banks to use third-party processors to handle their credit card vouchers.[29] Fortunately, these problems were identified in time, and the regulators are addressing them in the proposed rules; but it remains to be seen what other consequences there may be.[30]

Certainly one predictable consequence is that my brown paper bag will be overflowing; I've seen estimates that the notices required to be sent by financial institutions under the privacy provisions will result in some two billion additional pieces of mail around next Christmas.[31] I suppose one will be able to determine if one needs to get a life, based on whether one gets more Christmas cards or more GLB Act privacy notices. Is the death of all those trees justified by

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[28] *See Prepared Testimony of Professor Fred H. Cate on Behalf of the Financial Services Coordinating Council*, FEDERAL NEWS SERVICE, April 12, 2000 (While financial institutions can not disclose customer credit card numbers to unrelated third parties, for purposes purely involving marketing, there has been an exception for the sharing of personal information to allow financial institutions to provide their customers with better services such as affinity credit cards as "the sharing of personal information is essential to the services that financial institutions provide to their customers").

[29] *See* Beth Givens & Tena Friery, *Opt-In to Financial Privacy*, S.F. CHRON., May 1, 2000, at A23 (explaining the Gramm-Leach-Bliley Act does not protect consumer's privacy especially about sharing personal customer information among affiliated parties); *see also* Pamela Yip, *Your Money: One-Stop Shopping for Financial Services; Some Say New Federal Law Can Save Customers Money, But Consumer Groups Raise Privacy Issues*, CHI. TRIB., Feb. 22, 2000, at 3. (explaining that the Gramm-Leach-Bliley Act does not protect consumer privacy in blocking personal information to outside agencies).

[30] *See* Friery & Givens, *supra* note 33, at A23. (explaining how lawmakers are trying to propose new legislation to protect consumer privacy); *see also Defending Your Privacy: Speak Now or Else*, S.F. CHRON., Apr. 10, 2000, at A28 (explaining how legislators are trying to make credit card companies obtain customer's permission before they share customer's personal information with third parties); *see also* Yip, *supra* note 33, at A28 (explaining that "legislation has been introduced in Congress to strengthen consumer privacy protection").

[31] *See* William J. Sweet, Jr., *Interim Rules, Final OCC Rules and Proposed Rules Under the Gramm-Leach-Bliley Act*, *in* AFTER THE GRAMM-LEACH-BLILEY ACT-A ROAD MAP FOR BANKS, SECURITY FIRMS, & INVESTMENT MANAGERS, at 219, 369 (2000) (PLI Corp. Law & Prac. Course, Handbook Series No. B0-00QT) (explaining that under the Gramm-Leach-Bliley Act, a financial institution is required to provide customers with a notice of its privacy policies and practices).

giving us the opportunity to while away our lonely evenings reading privacy notices that are incomprehensible anyway? As my ACLU colleague aptly put it, "who can be bothered?"

So in conclusion: I share your concern about privacy. But, I don't agree that privacy is really what is at issue in the opt-in, opt-out debate. What is really at issue, in my view, is the need to recognize that there are trade-offs and choices we all have to make, if we want to enjoy the benefits of modern life. And to the extent that additional privacy safeguards are needed — and I believe they are — they should be addressed outside of the narrow context of financial services reform.