OPINION NO. 2005-041

Syllabus:

1. R.C. 3953.21(B) prohibits a bank or any subsidiary of a bank from acting as an agent for a title insurance company.
2. Sections 6701(d)(2)(A) and 6701(e) of Title 15 of the U.S. Code, which are part of the federal Gramm-Leach-Bliley Act (GLBA), do not preempt R.C. 3953.21(B) as applied to state banks and their subsidiaries, whether in-state or out-of-state.
3. R.C. 3953.21(B), as applied to out-of-state state banks and their subsidiaries, is not in conflict with the reciprocity standards of the GLBA, 15 U.S.C. § 6751.
4. As applied to state banks and their subsidiaries seeking licensure as nonresident title insurance agents, R.C. 3953.21(B) supersedes R.C. 3905.07, which provides generally for licensing nonresident insurance agents.
5. The Director of Insurance is not required under R.C. 3905.08, or au-

thorized by R.C. 3905.081, to waive the application of R.C. 3953.21(B) to state banks or their subsidiaries seeking licensure as nonresident title insurance agents.

To: Ann Womer Benjamin, Director, Ohio Department of Insurance, Columbus, Ohio
By: Jim Petro, Attorney General, November 18, 2005

You have asked whether a state law that prohibits banks and their subsidiaries from selling title insurance is preempted by federal law, and thus may not be applied to a subsidiary of a North Carolina state-chartered bank that is seeking licensure in Ohio as a title insurance agent. For the reasons set forth below, we conclude that the state prohibition against banks and their subsidiaries selling title insurance is not preempted by federal law and may be applied to deny licensure to an out-of-state title insurance agency that is a subsidiary of a state bank.

We turn first to a brief description of state law governing the licensure of agents to sell insurance in Ohio. Natural persons whose home state is Ohio and business entities that are either domiciled in Ohio or maintain their principal place of business in Ohio are entitled to receive from the Superintendent (or Director) of Insurance a "resident insurance agent license" to sell insurance if they meet certain statutory requirements. R.C. 3905.06. *See also* R.C. 3905.05. Ohio law also offers reciprocity (as discussed further, *infra*), to nonresident persons and out-of-state business entities that are licensed and in good standing in their home state and meet other specified criteria. They are entitled to receive from the Director a "nonresident insurance agent license" to sell insurance in Ohio. R.C. 3905.07. We will assume that, in this instance, the applicant, which is licensed as a title insurance agent in North Carolina, would meet the qualifications for a nonresident insurance agent license set forth in R.C. 3905.07.

As a general rule, an agent may be licensed to sell title insurance, "which is insurance coverage against loss or damage suffered by reason of liens against, encumbrances upon, defects in, or the unmarketability of, real property." R.C. 3905.06(B)(8).[1] In Ohio, however, "*[n]o bank*, trust company, bank and trust company, or other lending institution, mortgage service, brokerage, mortgage guaranty company, escrow company, real estate company *or any subsidiaries thereof* or any individuals so engaged shall be permitted to act as an agent for a title insurance company" (emphasis added).[2] R.C. 3953.21(B). This prohibition against

[1] Title insurance agents are licensed in the same manner as insurance agents generally. R.C. 3953.22(A). *See* R.C. 3905.06(A), (B)(8); R.C. 3905.07; R.C. 3905.20; R.C. 3953.21(A).

[2] *See* Joyce D. Palomar, *Bank Control of Title Insurance Companies: Perils to the Public that Bank Regulators Have Ignored,* 44 Sw. L.J. 905, 931 (1990-1991) (explaining how title insurance is unique among classes of insurance, and that "lenders acting as or controlling title insurers raises several concerns for the public

banks and their subsidiaries acting as title insurance agents would appear to bar the Director from issuing a nonresident insurance agent license to the North Carolina title insurance agency since it is a subsidiary of a bank. Application of R.C. 3953.21(B) has been challenged, however, on two, related bases—both stemming from the provisions of the federal Gramm-Leach-Bliley Act (GLBA), P.L. 106-102, 113 Stat. 1352 (eff. Nov. 12, 1999):

1. R.C. 3953.21(B) conflicts with, and thus is pre-empted by, the GLBA prohibiting States from discriminating against banks engaged in the sale of insurance.

2. R.C. 3953.21(B) conflicts with the provisions of the GLBA that steer States toward the adoption of uniform and reciprocal schemes for licensing and regulating insurance agents, and Ohio's statutes enacted to carry out Congress' intent.

We will address each assertion in turn. Before doing so, however, we must first examine the application of federal and state laws to the authority of a *national bank* to act as an insurance agent, since an understanding of such is essential to a complete analysis of the manner in which federal law, including the *Barnett Bank*[3] preemption standard which has been explicitly incorporated into the GLBA (15 U.S.C. § 6701(d)(2)(A), *infra*), relates to the authority of States to regulate the insurance activities of state-chartered banks.

Authority of National Banks to Engage in Insurance Activities

National banks, which are chartered under federal law, originally were given, in addition to their express powers, the authority to exercise "all such incidental powers as shall be necessary to carry on the business of banking." 12 U.S.C. § 24 (Seventh) (National Banking Act of 1864). Courts considering the issue consistently held that the sale of insurance was *not* an incidental power necessary to carry on "the business of banking" for purposes of § 24 (Seventh).[4] *See Independent Insurance Agents of America, Inc. v. Hawke,* 211 F.3d 638, 644 (D.C. Cir. 2000) ("§ 24 (Seventh) unambiguously does not authorize national banks to engage in the general sale of insurance as 'incidental' to 'the business of banking'"). *See also American Land Title Association v. Clarke,* 968 F.2d 150 (2nd Cir. 1992); *Saxon v. Georgia Association of Independent Insurance Agents, Inc.,* 399 F.2d 1010 (5th Cir. 1968).

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that are not raised by lender control of general insurers.... potential conflicts of interest, decline in the integrity of title insurance underwriting, retrogression of title insurance's role as eliminator of risks, degeneration of our nation's real property records, and decreased availability of mortgage money throughout the United States").

[3] *Barnett Bank of Marion County, N.A. v. Nelson,* 517 U.S. 25 (1996).

[4] Limited exceptions were recognized, such as credit life insurance written to protect a loan and naming the bank as beneficiary. *See Independent Insurance Agents of America, Inc. v. Hawke,* 211 F.3d 638 (D.C. Cir. 2000); *Independent Bankers Association of America v. Heimann,* 613 F.2d 1164 (D.C. Cir. 1979).

In the 1916 Federal Reserve Act, however, Congress provided an exception for national banks that were "located and doing business in any place the population of which does not exceed five thousand inhabitants"—these banks were authorized to "act as the agent for any fire, life, or other insurance company authorized by the authorities of the State in which said bank is located to do business in said State, by soliciting and selling insurance and collecting premiums on policies issued by such company." 12 U.S.C. § 92. As explained by the court in *Alabama Association of Insurance Agents v. Board of Governors,* 533 F.2d 224, 243 (5th Cir. 1976), 12 U.S.C. § 92 "was enacted not out of a belief that there was any significant connection between banking and the sale of insurance in small communities, but merely because it was believed that banks needed an additional source of income to improve their stability and profitability." *See also American Land Title Association v. Clarke*; *Saxon v. Georgia Association of Independent Insurance Agents, Inc.* Section 92 was read as reflecting Congress' intention at the time, that national banks located and doing business in places with *over* 5,000 inhabitants not engage in selling insurance. *American Land Title Association v. Clarke,* 968 F.2d at 156 ("Congress intended to withhold from national banks, located in towns with over 5,000 inhabitants, the authority to sell insurance," including title insurance); *Saxon v. Georgia Association of Independent Insurance Agents, Inc.,* 399 F.2d at 1013 ("national banks have no power to act as insurance agents in cities of *over* 5,000 population").[5] *But see Nationsbank of North Carolina, N.A. v. Variable Annuity Life Insurance Co.,* 513 U.S. 251, 260-61 (1995) (declining to reach the question).

In 1945, Congress enacted the "McCarran-Ferguson Act," which reiterated that the "business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business." 15 U.S.C. § 1012(a). [6] *See also* 15 U.S.C. § 1011 ("Congress hereby declares that the continued regulation and taxation by the several States of the busi-

[5] *But see generally* 12 C.F.R. § 7.1001 (2005) (the exception of § 92 applies to an office of a national bank located in a place with a population of 5,000 or less even though the bank's principal office is located in a place with over 5,000 inhabitants); *Independent Insurance Agents of America, Inc. v. Ludwig,* 997 F.2d 958, 961 (D.C. Cir. 1993) (the promulgation of [what is now § 7.1001] "appears to be the crucial step away from the constraints on the activities of major banks that Congress may well have intended"). *See also NBD Bank, N.A. v. Bennett,* 67 F.3d 629, 632 (7th Cir. 1995) (upholding Comptroller's order that § 92 imposes no geographic limits on customers and "permits small-town banks to act as insurance agents without regard to the location of customers"); *Independent Insurance Agents of America, Inc. v. Ludwig* (upholding same order—so long as a national bank is located in a small town, the bank is free to solicit and serve insurance customers everywhere, even where the bank is a subsidiary of a major banking corporation).

[6] Enactment of the McCarran-Ferguson Act was a congressional response to the Supreme Court's decision in *United States v. South-Eastern Underwriters Ass'n,* 322 U.S. 533 (1944), wherein the Court held that the business of insurance falls within the scope of interstate commerce and thus is subject to federal regulation (such as the federal antitrust act). *See United States Dept. of the Treasury v. Fabe,*

ness of insurance is in the public interest''). McCarran-Ferguson ''transformed the legal landscape by overturning the normal rules of pre-emption''[7] through enactment of the following language: ''[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance,'' 15 U.S.C. § 1012(b). *See generally United States Dept. of the Treasury v. Fabe,* 508 U.S. 491 (1993) (contrasting the first and second clauses of § 1012(b)). *See also Commander Leasing Co. v. Transamerica Title Insurance Co.,* 477 F.2d 77 (10th Cir. 1973) (the ''business of insurance'' includes the business of title insurance for purposes of the McCarran-Ferguson Act).

This brings us to *Barnett Bank of Marion County, N.A. v. Nelson,* 517 U.S. 25 (1996), which deals with the interplay of the ''place of 5,000'' exception of 12 U.S.C. § 92 and the ''anti-preemption'' rule of 15 U.S.C. § 1012(b), and how that interplay relates to the preemption of state law. At issue in *Barnett Bank* was a state statute prohibiting banks from selling insurance (unless a bank was not a subsidiary or affiliate of a bank holding company and was located in a city of less than 5,000). Initially putting aside the ''anti-preemption'' rule of 15 U.S.C. § 1012(b), the Court found that, under ''ordinary legal principles of preemption,''[8] 12 U.S.C. § 92 preempted the state law because ''the Federal Statute means to grant small town national banks authority to sell insurance, whether or not a State grants its own state banks or national banks similar approval.'' *Id.* at 37. In other words the federal and state statutes were in irreconcilable conflict: ''the Federal Statute authorizes national banks to engage in activities that the State Statute expressly forbids. Thus, the State's prohibition of those activities would seem to 'stan[d] as an obstacle to the accomplishment' of one of the Federal Statute's purposes.'' *Id.* at 31.

The Court turned next to determine whether the ''anti-preemption'' rule of

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508 U.S. 491, 499-500 (1993). *See also Commander Leasing Co. v. Transamerica Title Insurance Co.,* 477 F.2d 77, 82 (10th Cir. 1973); Danielle F. Waterfield, *Insurers Jump on Train for Federal Insurance Regulation: Is it Really What They Want or Need?,* 9 Conn. Ins. L.J. 283, 286-91 (2002).

[7] *United States Dept. of the Treasury v. Fabe,* 508 U.S. at 507.

[8] The Court explains in *Barnett Bank* that, under general principles of preemption, the ''question is basically one of congressional intent.'' 517 U.S. at 30. Elaborating, the Court states that, sometimes congressional intent is expressed through explicit pre-emption language, but ''[m]ore often, explicit pre-emption language does not appear,'' and the courts ''must consider whether the federal statute's 'structure and purpose,' or nonspecific statutory language, nonetheless reveal a clear, but implicit, preemptive intent.'' *Id.* at 31. Or, ''federal law may be in 'irreconcilable conflict' with state law,''—for example where compliance with both statutes is a ''physical impossibility,'' or ''the state law may 'stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.''' *Id.* The Court found ''irreconcilable conflict'' to be at play in *Barnett Bank. See also Association of Banks in Insurance, Inc. v. Duryee,* 270 F. 3d 397 (6th Cir. 2001).

§ 1012(b) applied. The Court found that § 92 ''specifically relate[d] to the business of insurance''—the exception to the anti-preemption rule—and unanimously held therefore, that the anti-preemption rule of McCarran-Ferguson did not apply to save the state statute from federal preemption. In so holding, the Court rejected the State's argument that § 92 specifically related to banking, not to insurance: ''a statute may specifically relate to more than one thing.... a statute permitting banks to sell insurance can specifically relate to banks and to insurance. Neither the McCarran-Ferguson Act's language, nor its purpose, requires the Federal Statute to relate *predominantly* to insurance.'' *Id.* at 41. The Court concluded, accordingly, that the State could not prohibit national banks that fell within the ''place of 5,000'' exception of § 92 from selling insurance.

Then, in 1999, Congress enacted the GLBA, ''landmark'' legislation intended to ''reform the regulation of financials services.''[9] As summarized by the court in *Bowler v. Hawke,* 320 F.3d 59, 61 (1st Cir. 2003), ''[a]mong its many goals, the GLBA sought to facilitate affiliations between banks and insurance companies and to permit depository institutions and their affiliates to offer insurance products,'' and ''[b]ecause the states have historically regulated the insurance industry, *see, e.g.,* the McCarran-Ferguson Act of 1945 ..., the GLBA includes a number of provisions specifying whether and how much it preempts otherwise applicable state insurance laws.''

The GLBA speaks to the authority of national banks to sell insurance, including title insurance. Although it did not repeal the § 92 limitation on direct sales of insurance by national banks, the Act created a new business entity through which national banks may sell insurance, including title insurance, without regard to geographic location—the financial subsidiary of a national bank.[10] If a national bank meets certain standards, it may control or hold an interest in a financial subsidiary, which is ''any company that is controlled by 1 or more insured depository institutions,'' and engages in ''activities that are financial in nature or incidental to a financial activity.'' 12 U.S.C. § 24a(a); 12 U.S.C. § 24a(g)(3). (A financial subsidiary may also engage in those activities in which a national bank may engage directly, but cannot do so exclusively. 12 U.S.C. § 24a(a)(2)(A); 12 U.S.C.

[9] Lissa L. Broome and Jerry W. Markham, *Banking and Insurance: Before and After the Gramm-Leach-Bliley Act,* 25 Iowa J. Corp. L. 723, 724 (Summer, 2000). This article provides a comprehensive overview of the GLBA.

[10] The GLBA also created the financial holding company, a type of bank holding company meeting certain standards. 12 U.S.C. §§ 1841(p), 1843(l)(1). A financial holding company may engage in any activity that is ''financial in nature or incidental to such financial activity.'' 12 U.S.C. § 1843(k)(1)(A). The activities of ''insuring, guaranteeing, or indemnifying against loss, harm, damage, illness, disability, or death, or providing and issuing annuities, and acting as principal, agent, or broker for purposes of the foregoing, in any State'' are activities that are financial in nature. 12 U.S.C. § 1843(k)(4)(B). Thus, financial holding companies may sell insurance, including title insurance. Unlike financial subsidiaries, *see* note 12, *infra,* financial holding companies may insure against loss as well as sell insurance as agents.

§ 24a(g)(3)(A).)[11] The sale of insurance as agent is considered ''financial in nature'' and thus is an activity in which a financial subsidiary may engage. 12 U.S.C. § 24a(b)(1); 12 U.S.C. § 1843(k)(4)(B).[12] Specifically, financial subsidiaries of national banks are authorized to sell title insurance as agent. 12 C.F.R. § 5.39(e)(1)(ii) (2005). *See also* 2002 OCC Enf. Dec. LEXIS 289; OCC NR 2002-54 (June 24, 2002) (a national bank's financial subsidiary is not subject to the ''place of 5,000'' limitation of § 92).

Although a national bank's financial subsidiary is authorized to sell title insurance, the bank itself is prohibited by the GLBA from doing so. 15 U.S.C. § 6713(a). *See also* 15 U.S.C. § 6712.[13] Significant for our purposes is the exception from this general rule, found in 15 U.S.C. § 6713(b)(1):

> Notwithstanding any other provision of law (including section 6701 of this title), in the case of any State in which banks organized under the laws of such State are authorized to sell title insurance as agent, a national bank may sell title insurance as agent in such State, but only in the same manner, to the same extent, and under the same restrictions as such State banks are authorized to sell title insurance as agent in such State.[14] (Footnote added.)

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[11] A national bank may also establish operating subsidiaries pursuant to the ''incidental powers clause'' of 12 U.S.C. § 24 (Seventh), but an operating subsidiary may conduct *only* those activities that are permissible for a bank to engage in directly. 12 C.F.R. §§ 5.34(e), 7.4006 (2005). *See Wells Fargo Bank N.A. v. Boutris,* 419 F.3d 949 (9th Cir. 2005); *Wachovia Bank, N.A. v. Burke,* 414 F.3d 305 (2nd Cir. 2005), *petition for cert. filed, No. 05-431*; *National City Bank of Indiana v. Turnbaugh,* 367 F. Supp. 2d 805 (D. Md. 2005).

[12] A financial subsidiary may not, however, insure against loss except to the extent permitted under § 6712 (authorized products) and § 6713(c) (the ''grandfather'' exception) of Title 15. 12 U.S.C. § 24a(a)(2)(B); 12 C.F.R. § 5.39(f)(1) (2005). *See notes* 13 and 14, *infra.*

[13] 15 U.S.C. § 6712 prohibits a national bank and its subsidiaries from underwriting insurance except as provided in § 6713 (discussed *infra*), and except for ''authorized products.'' An ''authorized product'' is a product that the Comptroller of the Currency had determined, as of January 1, 1999, could be provided as principal by national banks, so long as the determination had not been judicially overturned, or a product that, as of January 1, 1999, ''national banks were in fact lawfully providing'' as principal. 15 U.S.C. § 6712(b)(1),(2). Title insurance is explicitly excluded from what may constitute an ''authorized product.'' 15 U.S.C. § 6712(b)(3).

[14] Also, Section 6713(c) ''grandfathers,'' with certain exceptions, a national bank or subsidiary that was ''actively and lawfully conducting'' title insurance activities before November 12, 1999, the date of the enactment of the GLBA. *See also* 2000 OCC Ltr. LEXIS 41 (Aug. 17, 2000) (financial subsidiaries are not subject to the restrictions that apply to national banks under 15 U.S.C. § 6713).

Therefore, a national bank may not sell title insurance in a State where state-chartered banks are not authorized to do so.[15] In a State where state-chartered banks may sell title insurance, national banks in that State are subject to the same restrictions that state banks must observe. We will return to § 6713(b) in conjunction with our discussion of what the GLBA, 15 U.S.C. § 6701(d)(2)(A), means with regard to the authority of States to regulate the sale of title insurance by state-chartered banks.

We turn now to your first question:

Does R.C. 3953.21(B) discriminate against banks in violation of the Gramm-Leach-Bliley Act?

The out-of-state title agent argues that the GLBA preempts R.C. 3953.21(B) and thus bars the Director from denying it a license to sell title insurance on the grounds that it is a subsidiary of a bank. (The same argument could be made by Ohio-chartered banks and their subsidiaries.) The two provisions of the GLBA that primarily are at issue are 15 U.S.C. § 6701(d)(2)(A) and 15 U.S.C. § 6701(e).

Does 15 U.S.C. § 6701(d)(2)(A) preempt R.C. 3953.21(B)?

15 U.S.C. § 6701(d)(2)(A) reads:

> 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.

For purposes of 15 U.S.C. § 6701, the term, ''depository institution,'' includes national banks and state banks. 15 U.S.C. § 6701(g)(3) (incorporating definition found in 12 U.S.C. § 1813). The term, ''affiliate,'' is defined to mean ''any company that controls, is controlled by, or is under common control with another company,'' 15 U.S.C. § 6701(g)(1), and thus would include a subsidiary. Therefore, a state law that ''prevents'' or ''significantly interferes'' with the ability of a state bank or its subsidiary to engage in insurance sales would be subject to preemption under the legal standards of *Barnett Bank.*

If we were to apply 15 U.S.C. § 6701(d)(2)(A) and the preemption principles of *Barnett Bank,* without considering other provisions of the GLBA, we

[15] The grant of authority to a state bank to sell title insurance must be clear. A State's ''wildcard'' statute is insufficient authority for a national bank to sell title insurance in that State. 15 U.S.C. § 6713(b)(2). A wildcard provision is one that authorizes state banks to engage in any activities in which a national bank may engage. *Id. See, e.g.,* W. Va. Code § 33-11A-11 (2005) (''[i]n no event shall the authority of a state-chartered bank to sell title insurance exceed the authority of a nationally chartered bank to do so'').

might well conclude that § 6701(d)(2)(A) preempts the prohibition in R.C. 3953.21(B) against banks and their subsidiaries selling title insurance: R.C. 3953.21(B) prevents banks and their subsidiaries from engaging in insurance sales, and the anti-preemption rule of 15 U.S.C. § 1012(b) is inapplicable since R.C. 3953.21(B) is a state law regulating the business of insurance, and § 6701(d)(2)(A) specifically relates to the business of insurance.

But we cannot apply § 6701(d)(2)(A) in a vacuum. *See generally McCarthy v. Bronson,* 500 U.S. 136, 139 (1991) (''statutory language must always be read in its proper context. 'In ascertaining the plain meaning of [a] statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole'''') (citation omitted)). We must consider the ''parity'' exception of § 6713(b)(1), which, ''*notwithstanding any other provision of law (including section 6701[of Title 15])*'' authorizes a national bank to sell title insurance as agent in any State where state banks are authorized to sell title insurance, subject to the same restrictions as state banks. Congress has thus recognized the authority of States to determine whether—and under what limitations—state banks and their subsidiaries may sell title insurance. The GLBA does not preempt the States' authority under *Barnett Bank*—to the contrary, it adopts each State's demarcation of authority for state banks to sell title insurance as the standard for national banks in that respective State.[16] The inescapable inference from § 6713 is that States may continue to regulate the sale of title insurance by state-chartered banks and their subsidiaries. *See also* 15 U.S.C. § 6766 (exempting title insurance from the provisions of the GLBA urging States to adopt reciprocal agent licensing laws) (discussed, *infra*).

[16] The Office of the Comptroller of the Currency (OCC) has advised that, since the enactment of the GLBA, national banks are not authorized to sell title insurance under § 92, but must rely on 15 U.S.C. § 6713 for any authority to do so. 2002 OCC Enf. Dec. LEXIS 289; OCC NR 2002-54 (June 24, 2002). *See also* 2000 OCC Ltr. LEXIS 21 (March 20, 2000) (in those States where state banks may sell title insurance, a national bank may also sell title insurance (subject to the same restrictions applicable to state banks) without regard to the ''place of 5,000'' limitation in 12 U.S.C. § 92). We are unaware of any judicial decision that has addressed the relationship between § 6713 and § 92.

In *Association of Banks in Insurance, Inc. v. Duryee,* 270 F. 3d 397, 402, n.3 (6th Cir. 2001), the Sixth Circuit observed that, during the district court proceedings, conducted prior to the enactment of the GLBA: ''The defendants [state superintendent of insurance] agreed that 12 U.S.C. § 92 preempts O.R.C. § 3953.21(B),'' and the ''intervenor-defendants [insurance trade organizations] do not appeal the district court's grant of summary judgment to plaintiffs [national banks] on this issue.'' *See also Valley National Bank v. Lavecchia,* 59 F. Supp. 2d 432 (D.N.J. 1999) (12 U.S.C. § 92 preempts, as to the national banks it covers, a state statute prohibiting a bank from being licensed to act as an insurance producer for a title insurance company). The question remains whether a court today would hold that § 92 preempts R.C. 3953.21(B) in light of 15 U.S.C. § 6713.

We conclude, therefore, that 15 U.S.C. § 6701(d)(2)(A) does not preempt R.C. 3953.21(B) as applied to state banks and their subsidiaries (whether in-state or out-of-state).

Does 15 U.S.C. § 6701(e) preempt R.C. 3953.21(B)?

15 U.S.C. § 6701(e), requiring "nondiscrimination," reads as follows:

> . . . *no State may, by statute, regulation, order, interpretation, or other action, regulate the insurance activities authorized or permitted under this Act* or any other provision of Federal law of a depository institution, or affiliate thereof, to the extent that such statute, regulation, order, interpretation, or other action—
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> (1) distinguishes by its terms between depository institutions, or affiliates thereof, and other persons engaged in such activities, in a manner that is in any way adverse to any such depository institution, or affiliate thereof;
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> (2) as interpreted or applied, has or will have an impact on depository institutions, or affiliates thereof, that is substantially more adverse than its impact on other persons providing the same products or services or engaged in the same activities that are not depository institutions, or affiliates thereof, or persons or entities affiliated therewith;
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> (3) effectively prevents a depository institution, or affiliate thereof, from engaging in insurance activities authorized or permitted by this Act or any other provision of Federal law; or
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> (4) conflicts with the intent of this Act generally to permit affiliations that are authorized or permitted by Federal law between depository institutions, or affiliates thereof, and persons engaged in the business of insurance. (Emphasis added.)

In addition to general principles of preemption and the preemption principles of *Barnett Bank,* state law may be subject to preemption under the nondiscrimination provisions of 15 U.S.C. § 6701(e). Section 6701(e) does not apply in this instance, however, for two reasons.

First, the GLBA does not affirmatively authorize or permit state-chartered banks or their subsidiaries to sell title insurance—that authority comes from state law. To the contrary, provisions of the GLBA limit the authority to sell insurance that a state bank and its subsidiaries may enjoy under state law. For example, 12 U.S.C. § 1831w, which was added to the Federal Deposit Insurance Corporation Act by the GLBA, provides that a state bank insured by the Federal Deposit Insurance Corporation (FDIC)[17] must meet certain conditions before any of its subsidiaries may engage in activities that only a financial subsidiary of a national bank could

[17] All North Carolina state banks are required to be insured by the Federal Deposit Insurance Corporation (FDIC). N.C. Gen. Stat. § 53-9.1 (2005).

conduct—such as act as an agent for the sale of title insurance. These conditions are similar to those a national bank must meet to control a financial subsidiary, and are designed to protect banks from financial risk and instability.[18] *See* 12 U.S.C. § 24a(a),(c),(d); 12 U.S.C. § 1831w(a).

We assume, of course, that the North Carolina bank meets these conditions, but mention 12 U.S.C. § 1831w to demonstrate that federal law does not authorize state banks or their subsidiaries to engage in the sale of title insurance, but rather, limits that authority in some respects. Therefore, R.C. 3953.21(B) does not regulate an activity that is authorized or permitted under the GLBA.

Second, even if it did, § 6701(d)(2)(C)(ii) states that "Subsection (e) does not apply with respect to any State statute, regulation, order, interpretation, or other action regarding insurance sales, solicitation, or cross marketing activities described in subparagraph (A) [§ 6701(d)(2)(A)] that was *issued, adopted, or enacted before September 3, 1998.*" R.C. 3953.21 was enacted in 1967. 1967-1968 Ohio Laws, Part I, 1366 (Am. S.B. 224, eff. Dec. 12, 1967), and thus is exempt from preemption by 15 U.S.C. § 6701(e).[19]

Multi-State Uniformity and Reciprocity

The applicant also argues that R.C. 3953.21(B) conflicts with that part of the GLBA, 15 U.S.C. §§ 6751-6766, steering States toward the adoption of uniform or reciprocal schemes for licensing and regulating insurance agents, and Ohio's statutes carrying out Congress' intent, *see* 2001-2002 Ohio Laws, Part I, 1540 (Am. Sub. S.B. 129, eff. Sept. 1, 2002), *infra*.

The GLBA provided that, if at least a majority of the States, *see* 15 U.S.C. § 6766(4), did not enact uniform or reciprocity laws governing the licensure of individuals and entities authorized to sell insurance,[20] within three years after the GLBA was enacted (on November 12, 1999), the National Association of Registered

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[18] *See also* 12 U.S.C. § 1831a(b)(1) (a state bank insured by the FDIC "may not engage in insurance underwriting except to the extent that activity is permissible for national banks"); 12 U.S.C. § 1831a(d)(2) (a subsidiary of an insured State bank may not "engage in insurance underwriting except to the extent such activities are permissible for national banks," unless it is a subsidiary of an insured state bank that "was required, before June 1, 1991, to provide title insurance as a condition of the bank's initial chartering under State law," and "control of the insured State bank has not changed since that date"). In keeping with the discussion above, a state law that permitted a state bank or its subsidiaries to engage in conduct prohibited by the GLBA or other federal law likely would be deemed preempted.

[19] Section 6701(d)(2)(C)(ii) does not exempt laws enacted prior to September 3, 1998 from preemption under general principles of law or *Barnett Bank* preemption principles.

[20] For example, in order to be deemed to have established the necessary uniformity, a State was required, *inter alia,* to "establish uniform criteria regarding the integrity, personal qualifications, education, training, and experience of licensed

Agents and Brokers (NRAB) would be created to develop a multi-state licensing system. 15 U.S.C. §§ 6751-6766. The National Association of Insurance Commissioners (NAIC) was to determine, at the end of the three-year period, whether the required uniformity or reciprocity had been achieved. 15 U.S.C. § 6751(d). By November 12, 2002, more than thirty States, including Ohio, *see* Am. Sub. S.B. 129, had been deemed compliant by the NAIC, and thus the establishment of NARAB was averted. The requirements of reciprocity and uniformity are continuing ones, however—the failure of States to maintain reciprocity or uniformity will result in the establishment of NARAB. 15 U.S.C. § 6751(e).

Your question whether the denial of licensure, based on R.C. 3953.21(B), to an out-of-state title insurance agency licensed in its own State (and presumably meeting all other pertinent Ohio licensing requirements), violates GLBA's reciprocity standards is resolved by 15 U.S.C. § 6766, which defines ''insurance'' for purposes of 15 U.S.C. §§ 6751-6766 to exclude title insurance. Thus, the uniformity and reciprocity standards of § 6751 simply do not apply to the States' licensure and regulation of title insurance agents. This exemption is consistent with NAIC's recognition of Ohio as a reciprocal state with R.C. 3953.21(B) intact, just as it has recognized as compliant other states with varying bank/title insurance laws. [21]

We must also examine whether state law that was enacted to implement the

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insurance producers,'' 15 U.S.C. § 6751(b)(1). Also a State could not ''impose any requirement upon any insurance producer to be licensed or otherwise qualified to do business as a nonresident that has the effect of limiting or conditioning that producer's activities because of its residence or place of operations,'' § 6751(b)(5).

States would be deemed to have established the necessary reciprocity requirements if, *inter alia,* at least a majority permitted ''a producer that has a resident license for selling or soliciting the purchase of insurance in its home State to receive a license to sell or solicit the purchase of insurance in such majority of States as a nonresident to the same extent that such producer is permitted to sell or solicit the purchase of insurance in its State, if the producer's home State also awards such licenses on such a reciprocal basis, without satisfying any additional requirements other than submitting—(A) a request for licensure; (B) the application for licensure that the producer submitted to its home State; (C) proof that the producer is licensed and in good standing in its home State; and (D) the payment of any requisite fee to the appropriate authority.'' 15 U.S.C. § 6751(c)(1). Also a majority of States could impose no ''requirement upon any insurance producer to be licensed or otherwise qualified to do business as a nonresident that has the effect of limiting or conditioning that producer's activities because of its residence or place of operations.'' 15 U.S.C. § 6751(c)(3). And, each of the States satisfying the specified reciprocity requirements must grant reciprocity to residents of all of the other States satisfying these requirements. 15 U.S.C. § 6751(c)(4).

[21] *See, e.g.,* Conn. Gen. Stat. § 36a-250(a)(39) (2004) (a Connecticut bank may sell insurance directly or indirectly through a subsidiary, except ''insurance'' does not include title insurance) and Conn. Gen. Stat. § 36a-250(a)(41) (2004) (a Connecticut bank may ''[e]ngage in any activity that a federal bank or an out-of-state-

GLBA supersedes R.C. 3953.21(B). In 2002, the Ohio General Assembly enacted Am. Sub. S.B. 129 in order to comply with the reciprocity standards of GLBA. 2001-2002 Ohio Laws, Part I, 1540 (Am. Sub. S.B. 129, eff. Sept. 1, 2002). *See* The Agent Licensing Model Act: Hearing on S.B. 129 Before the H. Comm. on Insurance, 124th Gen. A. (Ohio 2002) (statement of Lee Covington, Director, Ohio Department of Insurance). You have asked specifically about R.C. 3905.07, R.C. 3905.08, and R.C. 3905.081, which were enacted by Am. Sub. S.B. 129.

R.C. 3905.07, as noted above, requires the Director to issue a nonresident insurance agent license to a person or business entity that is licensed and in good standing in the applicant's home state and meets other prescribed requirements. R.C. 3905.08 requires the Director to "waive all requirements under this chapter [except for those in R.C. 3905.07-.072] for a nonresident applicant with a valid license from the applicant's home state . . . if the applicant's home state awards nonresident agent licenses to residents of this state on the same basis." R.C. 3905.081 states that, "[n]otwithstanding any other provision of this chapter, the superintendent of insurance may waive any licensing requirement for nonresident persons that the superintendent determines is in violation of the reciprocity requirements set forth in" 15 U.S.C. § 6751.

The General Assembly has indicated its intent that the legislation it enacted

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bank may be authorized to engage in under federal or state law," but the "provisions of this subdivision do not authorize a Connecticut bank or a subsidiary of a Connecticut bank to sell title insurance"); 5 Del. C. § 761(a)(14) (2005) (a state bank has the power to "[a]ct as an insurer and transact the business of insurance," except that no bank "shall have power to act as a title insurer and transact the business of title insurance"); O.C.G.A. § 33-3-23 (2005) (a "lending institution, bank holding company, or subsidiary or affiliate of either . . . may be licensed to sell insurance," but shall not be permitted to sell title insurance if it "was not in the business of selling title insurance on or before April 1, 2000"); N.J. Stat. § 17:46B-30.1 (2005) ("[e]xcept for a State or federally chartered bank, savings bank, savings and loan association or its subsidiary or any officer or employee of any of the foregoing, no other lending institution, mortgage service, mortgage brokerage or mortgage guaranty company or service company . . . shall be licensed as or permitted to act as an insurance producer for a title insurance company"); W. Va. Code § 33-11A-11 (2005) ("[i]n no event shall the authority of a state-chartered bank to sell title insurance exceed the authority of a nationally chartered bank to do so"). *Cf.* Burns Ind. Code Ann. § 28-1-11-2 (2005) (any bank has the power "to solicit and write insurance as an insurance producer or broker for any insurance company authorized to do business in the state or states where the insurance producer or broker operates," without exception for title insurance); KRS § 287.030(4) (2004) ("Kentucky chartered banks, or their subsidiaries, are specifically authorized to engage in the sale of insurance," without exception for title insurance); MCLS § 487.14101(2)(d) (2005) (a Michigan bank may "engage in any aspect of the insurance and surety business as an agent, broker, solicitor, or insurance counselor . . . and to own an insurance agency in whole or in part," without exception for title insurance).

in order to implement § 6751, including the above provisions, do not supersede R.C. 3953.21(B). In addition to enacting R.C. 3905.07, R.C. 3905.08, and R.C. 3905.081, Am. Sub. S.B. 129 amended R.C. 3953.21(B)—by changing the number of a code section referred to in R.C. 3953.21 to reflect numbering changes made by the bill. Am. Sub. S.B. 129 did not, however, eliminate the bar against banks and other specified persons and entities from selling title insurance. The General Assembly obviously was aware of R.C. 3953.21(B) when it undertook legislation to comply with GLBA, but did nothing to omit or otherwise change the substantive prohibition.

Also, R.C. 3905.08 requires the Director to "waive all requirements *under this chapter*" for a nonresident applicant that is licensed in a state affording reciprocity to Ohio residents, and R.C. 3905.081 authorizes the Director to waive a licensing requirement deemed to violate § 6751, "notwithstanding any other provision *of this chapter*." R.C. 3953.21 does not fall within R.C. Chapter 3905, and thus the Director is not required under R.C. 3905.08 or authorized under R.C. 3905.081 to waive the application of R.C. 3953.21(B) to nonresident title agent applicants.

R.C. 3905.07 is a general scheme for licensing nonresident applicants as insurance agents, while R.C. 3953.21(B) deals with specific types of persons and entities, such as banks, and specifically with the sale of title insurance. R.C. 1.51 states that, if a general statutory provision irreconcilably conflicts with a special provision, the special provision "prevails as an exception to the general provision, unless the general provision is the later adoption and the manifest intent is that the general provision prevail." R.C. 3905.07 is the more general provision, but the more recent enactment. The "manifest intent," however, is not that R.C. 3905.07 prevail since R.C. 3953.21(B) was left intact by Am. Sub. S.B. 129 (and because the federal scheme triggering the enactment of R.C. 3905.07 exempts title insurance). We conclude, therefore, that the Director must deny an out-of-state state-chartered bank and its subsidiaries licensure as a nonresident title insurance agent, despite R.C. 3905.07's provisions for licensing nonresident applicants.[22]

The imposition of R.C. 3953.21(B) on nonresident title insurance applicants and the Director's lack of authority to waive R.C. 3953.21(B) under R.C. 3905.08 or R.C. 3905.081, again, do not jeopardize Ohio's status as a reciprocal state under the GLBA in light of the exclusion of title insurance from §§ 6751-6766.

In conclusion, it is my opinion, and you are advised, that:

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[22] You have also asked whether R.C. 3905.07 and R.C. 3905.08 require the Director to issue a nonresident title agent license to a real estate company that is prohibited from acting as an agent for a title insurance company by R.C. 3953.21. Because R.C. 3953.21(B) is the more specific statute, because Am. Sub. S.B. 129 left R.C. 3953.21(B) intact, and because R.C. 3905.08 authorizes the Director to waive only R.C. Chapter 3905 requirements, we conclude that R.C. 3953.21(B) bars the Director from issuing a title insurance agent license to out-of-state real estate companies (as well as in-state real estate companies).

1. R.C. 3953.21(B) prohibits a bank or any subsidiary of a bank from acting as an agent for a title insurance company.
2. Sections 6701(d)(2)(A) and 6701(e) of Title 15 of the U.S. Code, which are part of the federal Gramm-Leach-Bliley Act (GLBA), do not preempt R.C. 3953.21(B) as applied to state banks and their subsidiaries, whether in-state or out-of-state.
3. R.C. 3953.21(B), as applied to out-of-state state banks and their subsidiaries, is not in conflict with the reciprocity standards of the GLBA, 15 U.S.C. § 6751.
4. As applied to state banks and their subsidiaries seeking licensure as nonresident title insurance agents, R.C. 3953.21(B) supersedes R.C. 3905.07, which provides generally for licensing nonresident insurance agents.
5. The Director of Insurance is not required under R.C. 3905.08, or authorized by R.C. 3905.081, to waive the application of R.C. 3953.21(B) to state banks or their subsidiaries seeking licensure as nonresident title insurance agents.