STATE OF VERMONT
WASHINGTON COUNTY, SS.

WASHINGTON SUPERIOR COURT
DOCKET NO. 56-1-02 Wncv

AMERICAN COUNCIL OF LIFE INSURERS, AMERICAN INSURANCE ASSOCIATION, NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES, ALLIANCE OF AMERICAN INSURERS, and NATIONAL ASSOCIATION OF INDEPENDENT INSURERS,	)
Plaintiffs	)
v.	)
VERMONT DEPARTMENT OF BANKING, INSURANCE, SECURITIES, AND HEALTHCARE ADMINISTRATION and ELIZABETH R. COSTLE, in her capacity as Commissioner of Vermont Department of Banking, Insurance, Securities and Heathcare Administration,	)
Defendants	)

STATE OF VERMONT'S MEMORANDUM IN SUPPORT OF SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

This case involves a challenge by several insurance trade organizations to a rule promulgated by the Commissioner of Banking, Insurance, Securities, and Health Care Administration. The rule, Regulation IH-2001-01 (Attachment A to this Memorandum), protects the privacy of consumers by requiring insurance

companies to obtain consent before sharing consumers' personal information[1] with third parties.[2] *See* Reg. §§ 2(A)(3), 11.

The Court should enter summary judgment in favor of the State, and deny the plaintiffs' motion for summary judgment, for the following reasons: (1) the Regulation is a reasonable exercise of the Commissioner's rulemaking authority; (2) the Regulation does not violate the separation of powers under the Vermont Constitution; and (3) the Regulation does not violate the First Amendment.

INTRODUCTION

The Commissioner promulgated the Regulation and two other similar rules that apply to banks and the securities industry in an effort to protect the privacy interests of Vermont consumers and in response to developments in federal law. The sections below provide some of the background necessary for understanding the Regulation and the claims in this suit.[3]

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[1] The Regulation defines nonpublic personal information, nonpublic personal financial information and nonpublic personal health information. Reg. § 4(O), (S), (T). For ease of reading, this memorandum often refers to "personal information" or "financial and health information."

[2] The regulation allows information sharing with third parties under certain circumstances, including sharing for regulatory and law enforcement purposes and for certain business purposes. Reg. §§ 14-17. The primary issue in this case is that the Regulation requires consent for information sharing with third parties for marketing and other unauthorized purposes.

[3] The State has provided the Court with a binder containing materials on consumer privacy issues. Cites to these materials include the "tab" number from the binder, e.g., "Tab 5." Other materials are cited to widely available internet addresses. The materials support the policy bases for the Regulation and are relevant to both the administrative and First Amendment claims. *See*, *e.g.*, *Daggett v. Comm'n on Governmental Ethics*, 172 F.3d 104, 112 (1st Cir. 1999) ("legislative facts," which go to justification for a statute, usually are not proved through trial evidence but by material set forth in the briefs; ordinary limits on judicial notice have no application to legislative facts); Reporter's Notes, V.R.E. 201.

Gramm-Leach-Bliley and Opt-in vs. Opt-out

Congress passed the Gramm-Leach-Bliley Financial Modernization Act (GLB) in 1999. Pub. L. No. 106-102, 113 Stat. 1338 (1999). GLB made fundamental changes to the financial services industry. The law makes it easier for different types of financial institutions to affiliate with each other. For example, under GLB, commercial and investment banks may now affiliate with each other and with other companies, such as insurance companies. Banks and insurance companies may now compete with each other in offering similar products to consumers. GLB was expected to lead to greater integration in the financial services industry (through mergers and affiliations) and, in fact, this has happened.[4]

GLB also addressed consumer privacy. *See* 15 U.S.C. §§ 6801 *et seq*. The law generally permits financial institutions to share information about consumers[5] with unaffiliated third parties. Financial institutions must, however, provide consumers with a notice describing their privacy policies and give consumers an opportunity to

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[4] Several recent law journal articles provide a general overview of GLB and its impact on the financial services industry. One was written by the Chair of the House Banking and Financial Services Committee, who played an active role in drafting GLB. James A. Leach, *Introduction: Modernization of Financial Institutions*, 25 J. Corp. L. 681 (Summer 2000). *See also* James M. Cain & John J. Fahey, *Banks and Insurance Companies, Together in the New Millenium*, 55 Bus. Law. 1409 (2000); George W. Arnett, *The Death of Glass-Steagall and the Birth of the Modern Financial Services Corporation*, N.J. Law. Magazine, June 2000, at 42.

[5] Both federal law and the Vermont Regulation distinguish between "customers" and "consumers." Under the Regulation, for example, "customers" must generally receive a notice when the customer relationship is established, while "consumers" need only receive a notice before the entity discloses any nonpublic personal information for which consent is required. Reg. § 5(A). The distinction is not relevant to the claims in this suit, and this memorandum, for ease of reading, refers primarily to consumers.

prevent their information from being shared with these third parties.[6] 15 U.S.C. § 6802. The law does not, however, give consumers a right to prevent information sharing with affiliates[7] or pursuant to a joint marketing agreement with an unaffiliated third party. *Id.* § 6802(b).

GLB created an "opt-out" system for allowing consumers to protect some of their private information in some circumstances. Financial institutions need only provide a mechanism for consumers to prevent the sharing of their information. They do not need to obtain *consent* before sharing with third parties. A system based on consent is generally called an "opt-in" system, because sharing is not permitted unless the consumer agrees, or opts in, to the disclosure. GLB's privacy protections are limited in other ways as well. The law places no limits on information sharing pursuant to joint marketing agreements or among corporate affiliates and it gives no heightened protection to health information.

Because of the limited privacy protections contained in GLB, Congress expressly provided that the privacy provisions of federal law are a floor, not a ceiling, for the protection of consumer privacy. 15 U.S.C. 6807(b). The law allows States to provide additional protection for consumers. *Id.* (state laws not

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[6] The limitations on disclosure do not apply to sharing with third parties for certain purposes, including regulatory, law enforcement, and certain business purposes. 15 U.S.C. § 6802(e).

[7] GLB applies expressly to sharing with "nonaffiliated" third parties. 15 U.S.C. § 6802(a). GLB leaves untouched the federal Fair Credit Reporting Act, which as a matter of federal law permits the sharing of information among institutions "related by common ownership or affiliated by corporate control." 15 U.S.C. § 1681a(d)(2)(A)(ii); *see* 15 U.S.C. § 6806 (GLB provision referring to FCRA). The Vermont Fair Credit Reporting Act is, however, more protective than the federal law.

inconsistent with GLB if they provide greater protection than GLB's privacy provisions). Since opt-in policies are more protective than opt-out, States may adopt policies that require companies to obtain consumer consent before sharing personal information.

Although GLB removed many barriers to competition and integration in the financial services industry, the law leaves intact the States' authority to regulate the business of insurance. As a result, Congress delegated enforcement of the privacy provisions of GLB, as they apply to insurance companies, to state insurance regulators such as BISHCA. 15 U.S.C. § 6805(a)(1)(6). Congress also imposed a sanction for States that fail to promulgate rules in this area. *Id*. § 6805(c).[8]

Privacy Notices Under Federal Law

In 2001, after Congress enacted GLB, financial institutions began sending privacy notices to consumers. In theory, these notices were supposed to advise consumers of their rights and provide them with an opportunity to prevent financial institutions from sharing their information with third parties. *See* 15 U.S.C. § 6802(b)(1). In practice, the notices were inadequate and flawed.[9] The notices were

[8] If the state insurance authority fails to adopt regulations, the state may no longer override certain federal insurance regulations. 15 U.S.C. § 6805(c).

[9] The Chair of the Federal Trade Commission summed it up this way: "'Acres of trees died to produce a blizzard of barely comprehensible privacy notices.'" Edward W. Janger & Paul M. Schwartz, *The Gramm-Leach-Bliley Act, Information Privacy, and the Limits of Default Rules*, 86 Minn. L. Rev. 1219, 1220 (2002) [Tab 5] (quoting Timothy J. Muris, *Protecting Consumers' Privacy: 2002 and Beyond*, at http://www.ftc.gov/speeches/muris/privisp1002.htm (Oct 4, 2001)). The Janger & Schwartz article goes on to summarize much of the criticism directed at GLB notices. 86 Minn. L. Rev. at 1230-32.

difficult to read and understand[10] and rarely provided an easy mechanism for consumers to exercise their opt-out rights.[11] Few consumers responded to the notices.[12]

Under an opt-out system, financial institutions may share information about consumers that did not respond to the privacy notices.

Vermont Law

By statute, the Commissioner of Banking, Insurance, Securities, and Health Care Administration supervises "the business of organizations that offer financial services and products." 8 V.S.A. § 10. In practice, this means that the Commissioner regulates entities engaged in the business of banking, insurance, and securities in the state of Vermont (to the extent not preempted by federal law).

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[10] *See* Mark Hochhauser, *Lost in the Fine Print: Readability of Financial Privacy Notices* (April 2001) [Tab 17] (average readers will find financial privacy notices hard to understand, because they are written at 3rd-4th year college reading level); Nat'l Ass'n of Attorneys General, Letter Re: GLB Act Notice Workshop – Comment P014814, Feb. 13, 2002, at 2 [Tab 12]; Russell Gold, *Privacy Notices Offer Little Help – Mailing From Banks, Retailers Lets You Protect Your Financial Data, but It's Hard to Decipher*, Wall Street Journal May 30, 2002, at D1 [Tab 4]; Sarah Lunday, *Redone Bank Privacy Notices in the Mail*, Charlotte Observer March 14, 2002 [Tab 2] (consumers found notices difficult to understand); John Schwartz, *Privacy Policy Notices Are Called Too Common and Too Confusing*, New York Times May 7, 2001 [Tab 8] (privacy notices difficult to find and to understand; typical middle-class American will receive between 15 and 25 notices); *see also* Lutz Aff. ¶¶ 13-18, 30 (analyzing notices collected in discovery).

[11] *See* Kathy Kristoff, *Those Privacy Notices – What They Mean and How to Protect Yourself*, Los Angeles Times, July 15, 2001, at C-3 [Tab 6] (discussing difficulties associated with opt-out, including the fact that most companies only allow written opt-out responses); Gold, *supra,* [Tab 4] (many companies have made privacy policies hard to understand and opting out difficult).

[12] *See* Gold, *supra*, [Tab 4] (less than five percent of consumers responded to first round of privacy notices); Lunday, *supra*, [Tab 5] (same); Paul Wenske, *Most Americans Fail to Respond to 'Opt-Out' Privacy Notices*, Kansas City Star, Jul. 5, 2001 [Tab 10] (same). Bower Aff. ¶ 5 at Attachment A.

The Legislature has provided specific guidance for this task. The Commissioner must "assure the solvency, liquidity, stability, and efficiency of all such organizations, [and] assure reasonable and orderly competition, thereby encouraging the development, expansion and availability of financial services and products advantageous to the public welfare. *Id*. § 10(1). The Commissioner must also supervise financial services organizations "in such a way as to protect consumers against unfair and unconscionable practices and to provide consumer education." *Id*. § 10(2).

The Legislature gave the Commissioner extensive rulemaking authority to carry out her task of supervising financial services organizations. In addition to specific grants of authority in different statutes, the Commissioner has general authority to "adopt rules and issue orders as shall be authorized by or necessary to the administration of . . . and to carry out the purposes of" the banking and insurance laws. 8 V.S.A. § 15.

In keeping with its goal of protecting consumers, the Legislature has expressly limited the ability of financial institutions (primarily banks and credit unions)[13] to disclose personal financial information relating to their customers. Generally, these financial institutions may not disclose this information without the customer's authorization. The law provides some exceptions, which include disclosures for law enforcement as well as regulatory and certain business purposes. 8 V.S.A. § 10204. The law does not permit disclosure to third parties for marketing

[13] See 8 V.S.A. §§ 10201 and 11101(32) for other financial institutions governed by this law.

purposes (unless the consumer authorizes a disclosure). *Id*. §§ 10203-04. With respect to financial institutions, therefore, the Legislature adopted an opt-in system for protecting consumer privacy.

Vermont Privacy Rules

In 2001, the Commissioner promulgated rules governing the privacy of consumer financial and health information for banking institutions, insurance companies, and the securities industry. *See* Rules B-2001-01 (banking), IH-2001-01 (insurance), S-2001-01 (securities). The rules adopt an "opt-in" system for all of the regulated financial services industries. More specifically, the rules prohibit regulated entities from disclosing financial information to third parties unless the consumer authorizes the disclosure or the disclosure falls within a list of specific exemptions. *See*, *e.g.*, Reg. §§ 11, 14-16. The rules similarly prohibit disclosure of health information without consent (and with fewer exceptions). *Id*. § 17. The rules require regulated entities to provide consumers with notices that explain their privacy policies and to provide an opt-in mechanism. *Id*. §§ 5-10.

The Regulation provides greater protection for consumers than GLB in three principal ways. First, a company must obtain consent before sharing, so consumers do not need to act to protect their privacy. Reg. § 11. Second, the Regulation is more explicit and more protective of health information provided to financial institutions (which under the federal rules is treated no differently than purely financial information).[14] Reg. § 17. Third, the Regulation places greater limits on

[14] The comments on the federal GLB rules state that "The Agencies continue to believe that it is appropriate to treat any information as financial information if it is requested by a

the information that may be shared under a joint marketing agreement absent consumer consent (allowing contact information and transaction and experience information to be shared, but not other personal information). Reg. § 14(A)(1)(c).

The plaintiffs in this case, five insurance trade organizations, challenge the validity of the insurance regulation, IH-2001-01. No person has challenged either the banking or securities rule. Although the plaintiffs' complaint alleged only violations of state administrative law and the separation of powers, the plaintiffs now also claim that the Regulation violates the First Amendment.

ARGUMENT

The Court should grant summary judgment to the State on all claims, because the parties do not dispute any material questions of fact and the State is entitled to judgment as a matter of law. *See* V.R.C.P. 56(c)(3).

The plaintiffs claim that (1) the Commissioner either lacked authority to promulgate the Regulation or that she acted in an arbitrary and capricious fashion; (2) the Regulation violates the separation of powers; and (3) the Regulation violates the First Amendment. Each of these claims should be rejected.

I. The Regulation is an appropriate exercise of the Commissioner's rulemaking authority.

Plaintiffs challenge the Commissioner's exercise of her rulemaking authority on two distinct grounds. First, they argue that the Commissioner does not have authority to regulate in the area of consumer privacy. Plaintiffs are mistaken on

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financial institution for the purpose of providing a financial product or service." 65 Fed. Reg. 335162, 35171 (June 1, 2000).

this point, because the Commissioner may use her rulemaking authority to protect consumers, promote consumer education, and ensure reasonable and orderly competition in the financial services industry. Second, plaintiffs claim that the Regulation is arbitrary and capricious. Because the Regulation is reasonably related to the purposes of the insurance statutes, this latter claim fails as well.

A. The Commissioner has authority to regulate disclosures of personal consumer information by insurance companies.

The Legislature gave the Commissioner broad authority in 8 V.S.A. § 15(a) to "adopt rules and issue orders as shall be authorized by or necessary to the administration of this title . . ., and to carry out the purposes of" the banking and insurance laws. The Vermont Supreme Court has upheld this type of general rulemaking authority where the Legislature has provided a "basic standard" for the administrative agency to follow. *See Rogers v. Watson*, 156 Vt. 483, 493 (1991) (statute giving Board of Health rulemaking authority in "all matters relating to the preservation of the public health" provided sufficient standard to guide the agency's actions). As the Washington Superior Court has held, the Commissioner's discretion to promulgate rules is guided by "the specific policies and standards set forth elsewhere in Title 8." *In re Petition of Vermont Chiropractic Ass'n*, No. S126-90 WnCa, slip op. at 6 (Wash. Super. Ct. Apr. 6, 1993) (Attachment B to this Memorandum). Section 15(a) is thus an appropriate delegation of rulemaking authority to carry out the purposes of the banking and insurance laws – an issue the plaintiffs do not dispute.

The "specific policies and standards" that guide and constrain the Commissioner are found in 8 V.S.A. § 10 (as well as in other provisions of Title 8). Section 10 instructs the Commissioner to supervise "the business of organizations that offer financial services and products . . . . in such a way as to protect consumers against unfair and unconscionable practices and to provide consumer education." 8 V.S.A. § 10(2). She must also "assure reasonable and orderly competition, thereby encouraging the development, expansion and availability of financial services and products advantageous to the public welfare." *Id*. § 10(1).

In this case, the Regulation must be upheld if there is "some nexus between the agency regulation, the activity it seeks to regulate, and the scope of the agency's grant of authority." *Vermont Ass'n of Realtors, Inc. v. State*, 156 Vt. 525, 530 (1991). Here, there is a sufficient nexus between the Regulation and the Commissioner's grant of authority, for the following reasons: (1) the Regulation protects consumers and provides consumer education; and (2) the Regulation promotes reasonable and orderly competition in the industry, particularly in light of the new provisions of GLB.

1. The Regulation protects consumers against unfair practices and provides consumer education by requiring companies to obtain consumer consent for disclosures to third parties.

The Regulation both protects consumers against unfair practices and educates consumers regarding the use of their personal information. It protects consumers because the disclosure of their personal financial and health information without their informed consent is unfair. It educates consumers because it obliges

insurance companies to provide clear, easy to understand notices that inform consumers of the company's policies and the consumer's legal rights. The Commissioner's exercise of her rulemaking authority is appropriate and entirely consistent with standards set by the Supreme Court for administrative rulemaking.

The Commissioner reasonably concluded that the disclosure of personal financial and health information to third parties, without consent, is unfair to consumers. Comm'r Aff. ¶¶ 9-11. Consumers must disclose a substantial amount of personal information to obtain property, casualty, life, and health insurance. *Id.* ¶ 10. Insurance companies routinely collect detailed information about finances, health, family relationships and dependents, bank and credit accounts, and difficult or traumatic experiences (the experiences that lead to insurance claims). Consumers disclose this information – information they may not readily share with friends or relatives – for a specific purpose: to obtain the benefits of insurance. *Id.* They do not provide personal information or allow an insurance company to collect personal information so that the company may sell the information for the marketing purposes of others.

Plaintiffs do not dispute that insurance companies disclose personal information about their customers to third parties for marketing purposes. Just the opposite: they concede that in other jurisdictions, "insurers routinely share customers' personal information with affiliates and third parties . . . for marketing purposes, such as additional product and service offerings." Pls. Mem. at 2.

The nonconsensual disclosure of personal information harms consumers in many ways.[15] Telemarketing efforts that use personal information about consumers are intrusive and potentially embarrassing. Comm'r Aff. ¶ 10 ("some of the information consumers must provide to obtain benefits under their policies is extremely personal and could be embarrassing if it were made public"). Without the Regulation, nothing prevents insurance companies from selling information about recent widows to "retirement counselors" or selling information about customers who have suffered car crashes to auto manufacturers. *See id*. (recent loss of spouse and payment of large insurance benefit may make consumer a target). Persons suffering from illness or injury may be targeted for unsolicited offers to buy medical supplies.[16] Third-party marketers may use personal information about consumers to target them for discriminatory pricing – that is, charging more for particular services depending on the consumer's perceived need. Even more ordinary disclosures contribute to the onslaught of telemarketers – the intrusive phone calls and piles of junk mail that most consumers dislike. *See id*. (customers of financial

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[15] One privacy expert discusses the toll, both in time and money, that consumers pay to evade or otherwise deal with telemarketing, junk mail, and spam. R. Gellman, *Privacy, Consumers, and Cost*, March 2002, at 21-25 [Tab 20]. Another article by the Minnesota Attorney General provides an extensive discussion of consumer privacy concerns. *See* Mike Hatch, The Privatization of Big Brother: Protecting Sensitive Information from Commercial Interests in the 21st Century, at www.ag.state.mn.us/consumers/PDF/BigBrother.pdf Hatch gives examples of the broad range of information that may be tracked and marketed, *id*. at 16-19, and summarizes a wealth of survey data showing that consumers value privacy and are concerned about the privacy of their personal information, *id*. at 20-23. Hatch also discusses the property damage caused by misappropriation of personal information. *Id*. at 27-33.

[16] Federal regulations limit the disclosure of health information by health plans and health care providers but those regulations do not apply to other lines of insurance, such as property, casualty, and life insurers, who also collect health information. *See* 45 C.F.R. § 45 164.104.

services "are concerned about unwarranted intrusions into their personal information and affairs").

Even more worrisome, these telemarketing efforts may exploit particularly vulnerable segments of the population, such as the elderly. The more information a telemarketer has about a target, the easier it may be to coerce or intimidate that person. For example, a telemarketer who knows that an elderly person has recently lost a spouse, has no children, and has collected a large insurance payout could easily exploit that information for financial gain.

In light of the harm caused by the disclosure of personal consumer information, the Court should reject plaintiffs' suggestion that "privacy" is not a consumer protection issue. The Vermont Legislature does not agree with this view; the chapter on banking privacy is entitled "consumer protection." *See* 8 V.S.A. Ch. 200 (Consumer Protection), Subchapter 2 (Financial Privacy); *see also* GLB, 15 U.S.C. § 6801(a) ("protection of nonpublic personal information"). Disclosing personal information without consent is unfair to consumers who provide the information for a specific purpose and do not expect that information to be disclosed to third parties and used for marketing purposes. The Regulation protects consumers against the unfair disclosure of their personal information without their consent and thus easily satisfies the "nexus" requirement. *See Vermont Ass'n of Realtors, Inc. v. State*, 156 Vt. at 530.

The Regulation also provides for consumer education, as the Commissioner discusses in her affidavit. Comm'r Aff. ¶¶ 9, 11. An opt-in system places the

burden on insurance companies to provide clear and accessible information to consumers about their privacy policies, because companies must obtain consumer consent to disclose personal information. *Id.* ¶ 11. Under the opt-out system, companies benefit from consumer inaction, and therefore companies have an incentive to make privacy policies hard to read and to make opting-out difficult. Bower Aff. ¶ 5 (low response rate to GLB not an indication of true consumer preferences).

Experience has shown that GLB opt-out notices do not educate consumers about privacy issues.[17] The notices are not written at an appropriate grade level nor do they follow accepted standards for writing in plain English.[18] Many consumers have thrown the notices away without reading them and others complain that it is too hard to opt-out.[19] Requiring companies to obtain consumer consent encourages companies to provide better information to consumers. *See* Bower Aff. ¶ 5.

Plaintiffs cite *In re Club 107*, 152 Vt. 320 (1989) and *Lemieux v. Tri-State Lottery Comm'n*, 164 Vt. 110 (1995), but neither case supports their position. In

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[17] *See*, *e.g.*, *Financial Privacy, A Consumer Perspective*, American Banker, Sept. 4, 2001 (interviews with consumers showed that most were skeptical about the confidentiality of their personal information but few read their privacy notices, knew about GLB, or thought they could do much of anything to protect themselves); *see also* Harris Interactive, Inc., *Privacy Notices Research Final Results*, at 4 [Tab 2] (over half of poll respondents either did not look at notices or glanced at them without reading them in depth).

[18] *See* Hochhauser, *supra* [Tab 17], Lutz Aff. ¶¶ 13-18, 30; NAAG Letter Re: GLB Act Notice, *supra* [Tab 12]; Steve Blackledge, *Privacy Denied: A Survey of Bank Privacy Policies*, CALPIRG, Aug. 2002 [Tab 14]; Tena Friery & Beth Givens, *Financial Privacy Notices: Do They Really Want You to Know What They're Saying?* Privacy Rights Clearinghouse, June 2001 [Tab 15].

[19] *See* NAAG Letter Re: GLB Act Notices, *supra* [Tab 12]; Kristoff, *supra* [Tab 6] (discussing difficulties associated with opt-out and fact that few consumers responded to notices); Gold, *supra* [Tab 4] (many companies have made privacy policies hard to understand and opting out difficult).

Tri-State Lottery, the Court concluded that a lottery regulation barring assignments contradicted a specific statutory provision. *See Tri–State Lottery*, 164 Vt. at 1172 ("agency rule that compromises the intent of the authorizing statute is void"). Plaintiffs have not shown, nor could they, that the Regulation violates any provision of the banking and insurance laws. In *Club 107*, the Court held that the Liquor Board could not use its admittedly broad authority for liquor regulation to regulate "obscene, lewd or indecent entertainment," an area in which the Board had no particular expertise. *Club 107*, 152 Vt. at 324-25. Unlike the Liquor Board in *Club 107*, here the Commissioner is acting well within her area of expertise and is accomplishing the purposes of the laws regulating banking and insurance. *See* Comm'r Aff. ¶ 9 (policy goals behind regulation). *Cf. Club 107* at 326 (Board may not by regulation "expand its authority into areas of activity that are beyond the focus of Title 7").

Plaintiffs' reliance on *Consumer Credit Ins. Ass'n v. State*, 149 Vt. 305 (1988), which deals with the insurance trade practices act, is also misplaced. The Commissioner did not rely on the trade practices act, 8 V.S.A. § 4724, as independent authority to promulgate the Regulation; her authority is derived principally from §§ 10 and 15. The decision in *Consumer Credit* recognizes, however, that the Commissioner may "implement" provisions of the trade practices act through rules that define violations of particular sections of the act. *See* 149 Vt. at 313.

The Regulation implements several provisions of the trade practices act. Section 4724(11) prohibits "making false or fraudulent statements or representations on or relative to an application for an insurance policy, for the purpose of obtaining a . . . benefit from any . . . individual." This section applies to an insurer that falsely represents its privacy policy to obtain business from a customer. Similarly, § 4724(13) prohibits insurers from offering their services or products in a manner that is misleading or fails to adequately disclose the "true nature" of their services. Again, a false or misleading privacy policy could be sanctioned under this section. Finally, if a privacy policy is part of a form that is required to be approved, an insurer could violate § 4724(19) by failing to comply with the approved form. *See In re Palmer*, 17 Vt. 464, 473 (2000) (upholding sanction for violation of § 4724(19), where bail bondsmen charged an unfiled and unapproved rate).

Contrary to plaintiffs' claim, the Commissioner may rely on the specific grants of authority in § 10 and the rulemaking authority in § 15 to promulgate rules to protect consumer privacy and provide for consumer education. The Regulation is an appropriate exercise of that authority.

2. The Regulation promotes reasonable and orderly competition, particularly in light of the changes wrought in the financial services industry by GLB.

GLB brought about sweeping changes in the financial services industry. The law removed barriers that used to separate different segments of the industry.[20] It allows different types of financial institutions to affiliate with each other in ways

that were not previously possible.[21] The Commissioner must exercise her supervisory authority over the industry, including her obligation to promote "reasonable and orderly competition," 8 V.S.A. § 10, against this backdrop of federal law. The changes effected by GLB support the Commissioner's decision to promulgate the Regulation, for the following reasons: first, GLB created new opportunities for information sharing; second, by expanding opportunities for competition, GLB created a need for a "level playing field" for all segments of the financial services industry; and third, GLB leaves a gap in privacy regulation that is intended to be filled by state insurance regulators.

Without question, the increased opportunities for affiliate and joint marketing relationships in the financial services industry makes sharing personal consumer information more profitable and thus more likely.[22] *See* Comm'r Aff. ¶ 12 ("GLB contemplates the cross-selling of various financial services products"). Insurance companies that possess valuable information about their customers may be unlikely to share that information with their direct competitors, namely other insurance companies. But insurance companies may be more willing to profit from sharing information pursuant to agreements with companies that market other types of financial products – investment or credit opportunities, for example. This

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[20] *See* Cain & Fahey, *supra*, at 1409.
[21] *See* Leach, supra, at 681, 684.
[22] *See* Leslie Wayne, Ideas & Trends: *Privacy Matters: When Bigger Banks Aren't Necessarily Better*, New York Times, Oct. 11, 1998 [Tab 9] (discussing privacy concerns resulting from mergers in the financial industry, including potential sharing of personal information between affiliated insurers and banks such as Citicorp and Travelers).

change in the marketplace supports the Commissioner's decision to regulate the disclosure of personal information by insurance companies.

The change in the marketplace created a need to have uniform privacy policies for all segments of the financial services industry. Comm'r Aff. ¶¶ 9-12. Under Vermont's banking privacy statute, banks and other similar financial institutions must comply with an opt-in privacy policy. Allowing insurance companies to follow a lesser standard, such as an opt-out policy, would give them a significant competitive advantage. *See id.* ¶ 12 (Commissioner "saw no reason to provide the insurance industry with a special advantage in reaching potential markets by permitting it to use an opt-out system"). To the extent that insurance companies may now compete with other types of financial institutions, they should have to play by the same rules.[23] By extending Vermont's established "opt-in" policy to insurance companies, the Regulation creates a level playing field that promotes reasonable and orderly competition. *Id.*

The Commissioner's authority to promulgate the Regulation is further supported by GLB, which provides for state insurance regulators to enforce privacy protections in the insurance industry and imposes a sanction if they fail to do so. 15 U.S.C. §§ 6805(a)(1)(6), (c). If the Commissioner failed to promulgate rules in this area, not only would Vermont's regulatory authority be preempted in part, but also no GLB privacy regulations would apply to Vermont insurance companies that

[23] *See* Leach, *supra*, at 681 ("new legislative framework allows all financial services firms to compete head-to-head with a complete range of products and services"), 684 (following GLB, "banks can offer securities, insurance, and other financial products, and securities firms and insurance companies are authorized to offer banking products").

write only in Vermont. *Id*. Application of the GLB privacy regulations to Vermont consumers would be uneven.

Congress admittedly cannot create rulemaking authority for the Commissioner where none existed under state law. But since the Commissioner has general rulemaking authority to carry out her obligation to supervise the financial services industry, the federal law provides strong support for her decision to exercise that authority to regulate in the area of privacy.

B. The Regulation is not arbitrary or capricious.

The gist of plaintiffs' "arbitrary and capricious" argument is an unsupported assertion that the Regulation is no better at protecting consumer privacy than GLB's "opt-out" requirements. Although plaintiffs complain that the State has "presented no evidence" on this issue, they bear the burden of rebutting the presumption of validity that attaches to the Regulation. *See*, *e.g.*, *Hatin v. Philbrook*, 134 Vt. 456, 458 (1976) (regulations presumed to be valid). Yet they provide no evidence that opt-out is sufficient to protect consumer privacy.

The Commissioner reasonably decided that opt-out is inadequate because (1) it places a significant burden on consumers to protect their privacy, while allowing companies to take advantage of consumers who do not act; (2) as a practical matter, the notice and opt-out system has not worked; (3) the Vermont Legislature has consistently endorsed "opt-in" methods of protecting consumer privacy; and (4) an "opt-in" system places no significant burden on insurance companies.

Opt-out inappropriately burdens the consumer with figuring out privacy policies and taking affirmative steps to keep their private information private.[24] *See* Comm'r Aff. ¶ 11. The typical consumer deals with multiple finance and insurance companies and, under the federal opt-out system, is required to figure out which companies share information, how they share it, and how to opt-out.[25] This would be a challenge even if companies tried to make it easy. The opt-out system, however, gives companies every incentive to make opting out cumbersome or difficult, however, because companies can disclose personal information about consumers who do not act. Bower Aff. ¶ 5. Giving companies the benefit of the default does not adequately protect consumers. Comm'r Aff. ¶ 11.

Not surprisingly, GLB's "opt-out" system has done little to protect consumer privacy. Readability experts and consumers criticized the first round of privacy notices in 2001 as incomprehensible to the average reader.[26] Professor Lutz, who analyzed notices sent by a representative sample of plantiffs' members, similarly concluded that the notices were written at too high a level and violated generally accepted standards for writing in "plain English." He compared the notices, for readability purposes, to *The Wall Street Journal* and the *Harvard Business Review*. Lutz Aff. ¶¶ 14-18. Many consumers did not read the notices anyway, perhaps because they were mistaken for junk mail. And few companies made it easy to

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[24] *See also* Attorney General's Final Report to the Vermont Legislature on Financial Privacy, Feb. 2001, at 7 [Tab 19].
[25] An article in the New York Times suggested that the typical middle-class American would receive between 15 and 25 privacy notices. Schwartz, *supra* [Tab 8].
[26] *See supra* notes 9-12, 17-19, and accompanying text.

opt-out. Of the many notices collected by the State in discovery, only four provided a toll-free number for opting out and none provided an internet option. Over two dozen required the consumer to fill out and mail in a special form. Carter Aff. Ex H.

A recent survey confirmed the failure of GLB notices for Vermonters. It found that although nearly all Vermonters did not want their personal financial information shared without their consent, over half find privacy notices very or somewhat difficult to read and less than a third said that they frequently or always read the notices.[27]

As discussed in her affidavit, the Commissioner based her decision to create an opt-in system in substantial part on legislative intent. Commissioner's ¶¶ Aff. 9, 12. The Vermont Legislature has consistently endorsed "opt-in" as the appropriate way to protect consumer privacy. The banking privacy law requires consumer consent for disclosure (except for the specific exceptions). 8 V.S.A. §§ 10203, 10204(2). Vermont law, unlike federal law, also requires consumer consent for disclosure of credit information. 9 V.S.A. § 2480a-2480g. In light of the expressed legislative preference for opt-in, the Commissioner appropriately chose that path for the insurance industry. Comm'r Aff. ¶ 12.

Lastly, an "opt-in" system places no significant burden on insurance companies. GLB's "opt-out" system requires privacy notices and requires companies to keep track of whether a particular consumer's information may be disclosed. Comm'r Aff. ¶ 14. Other state laws require insurance companies to provide privacy

[27] AARP Vermont Financial Privacy Survey, 2002 [Tab 1] (http://research.aarp.org).

notices. Van Cooper Aff. ¶ 7. State by state regulation of the business of insurance means that insurers must, already, comply with a variety of different regulatory models regarding consumer privacy. *Id*. ¶¶ 6-12. For example, New Mexico has an opt-in policy, and twenty states have opt-in policies for health information. *Id*. ¶¶ 8-9; *see also* Carter Aff. ¶ 16 (notices indicating that companies do not share health information about customers located in states other than Vermont), ¶ 19 (company also offering opt-in in New Mexico and Montana). The notices collected by the State show that companies have created notices for use in multiple jurisdictions. Carter Aff. ¶ 7 & Ex. A (81 out of 168 notices, or 48%, sent both to Vermont and other jurisdictions).

Moreover, under the Regulation's "opt-in" system, information about Vermont consumers may not be shared unless they consent – meaning that, in GLB terms, Vermont consumers can be assigned automatic "opt-out" status. Industry representatives told the Commissioner that they would probably implement the Regulation in just this manner. Commissioner's Aff. ¶ 14. This is a low-cost method for complying that avoids the additional tracking costs of opt-in and opt-out. *Id*.; *see also* Bower Aff. ¶ 7. The privacy notices collected from insurers confirm that many are not sharing information about their Vermont customers (or customers in other states). Carter Aff. ¶¶ 9, 10.

Financial institutions have complied with opt-in for years in Vermont, and plaintiffs provide no basis for concluding that insurance companies will be unduly harmed by the same requirement.

II. The Commissioner's exercise of her rulemaking authority does not violate the separation of powers.

Plaintiffs' separation of powers argument is based on the mistaken premise that the legislative and executive spheres are entirely distinct. They argue that, because the Legislature has considered broadening the opt-in financial privacy statute to cover insurance companies, the Commissioner is powerless to adopt an opt-in system through regulation. Plaintiffs are incorrect.

As the Supreme Court has frequently observed, the powers of the three branches of government overlap. "Practical realities of daily government require that there must be a certain amount of overlapping or blending of the powers exercised by the different departments. . . . [and] there are many powers and functions of government that defy simple or obvious classification." *In re D.L.*, 164 Vt. 223, 229 (1995). The mere fact that the Legislature considers taking certain action by statute does not mean that an agency is powerless to take similar action by regulation. A separation of powers problem arises only where one branch "so encroaches upon another branch's power as to usurp from that branch its constitutionally defined function." *Id.* Nothing of the kind has happened here.

There are many reasons why the Legislature might take up a bill on a subject, even though the same subject could be handled by regulation. The sponsors of the bill may not realize that the matter falls within an agency's authority. Or, the sponsors may be dissatisfied with the action or lack of action taken by an agency. The potential for legislative action has no bearing on whether an agency has acted within its delegated authority.

Nor is an agency's authority affected by the Legislature's failure to pass a bill concerning the same subject. The Legislature's failure to enact a bill does not provide conclusive evidence of legislative intent. Nor does it alter an existing grant of rulemaking authority. Plaintiffs cannot rely on bills introduced but not passed in prior legislative sessions to support their narrow construction of the Commissioner's rulemaking authority.

III. The Regulation's restrictions on commercial speech are supported by a substantial government interest and do not violate the First Amendment.

The Regulation easily passes muster under the First Amendment, whether analyzed as a restriction on commercial speech or as a business regulation. The Court need not reach the merits of the First Amendment claim, however, because plaintiffs have raised this constitutional claim so late that they should be barred from asserting it.

A. Plaintiffs should not be permitted to assert a First Amendment challenge at this late date.

Plaintiffs' complaint contains no mention of a First Amendment claim. They have had ten months to seek permission to amend their complaint but have failed to do so. Although the parties sought extensions of the pretrial order, at no time did plaintiffs alert the State or the Court that they intended to press a claim under the First Amendment. As a result, the State had no opportunity to conduct discovery on this issue and only a limited opportunity to prepare its response. Leave to amend a complaint is ordinarily freely given. Rule 15(a). Here, however, where plaintiffs first raised the claim in a motion for summary judgment filed after the

close of discovery, and where plaintiffs still have not moved to amend their complaint, the Court should not permit the plaintiffs to pursue their belated First Amendment claim.

B. The Regulation is consistent with the First Amendment.

The Commissioner's efforts to protect consumer privacy are consistent with First Amendment principles governing restrictions on commercial speech. Commercial speech receives limited constitutional protection and may be regulated to a much greater extent than noncommercial speech. *See Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 623 (1995). Restrictions on commercial speech are subject to intermediate scrutiny and analyzed under the *Central Hudson* test. Under *Central Hudson*, the government must show that: (1) it has a substantial interest in regulating the speech; (2) the regulation at issue directly and materially advances the government's interest; and (3) the regulation is narrowly drawn. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980). Each requirement is met here.

1. The State has a substantial interest in protecting consumer privacy by regulating the disclosure of consumers' personal information to third parties.

The State has a substantial interest in regulating the disclosure of personal information about consumers to third parties. *See* Comm'r Aff. ¶¶ 9-11. Consumers provide a wealth of personal information to insurance companies – information about their finances, employment, health, family relationships, claims history, and more. Even plaintiffs apparently agree that consumers should be able to control the

disclosure of this information – that is, they apparently concede that consumers should be able to "opt-out" of information sharing.

As stated above, the disclosure of personal information to third parties for marketing purposes is likely to lead to intrusive and potentially embarrassing or disturbing uses of the information.[28] Survey data consistently show that consumers are concerned about the privacy of their personal information and do not want companies to sell or disclose information without their consent.[29]

The more information a marketer has about a person, the more intrusive the contact is. A telemarketer might know the names and ages of a person's children, the person's income, the fact that a person recently lost a spouse or had a serious car accident. All of this information – and countless other kinds of personal data – may be used for marketing purposes (including targeting consumers for discriminatory pricing). As previously noted, although consumers need to disclose personal information to obtain the benefits of insurance, they should not be forced

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[28] The state Attorneys General, in their collective comments on the proposed GLB rules, detailed some of the problems associated with telemarketing practices, including that the products or services sold often have little value and/or are deceptively marketed. Comments of State Attorneys General on Joint Agencies' Proposed Rules, 65 F.R. 8769, Feb. 22, 2000, at 4-7 [Tab 11]. *See also* Hatch, *supra*, at 28-33; Attorney General's Final Report, *supra*, at 3-8 [Tab 19]; Gellman, *supra*, at 21-27 [Tab 20].

[29] The AARP survey of Vermonters found that 89% say it is very important to them that their personal financial information cannot be shared without their consent. AARP Vermont Survey, *supra*, at 2-3 [Tab 1]. In addition, 88% strongly oppose changing to regulations that would permit financial institutions to share personal financial information without their consent. *Id*. at 6. The survey reported in *American Banker* found that 61% of consumers are very concerned and 28% are somewhat concerned about personal privacy; 58% are very concerned, and 28% somewhat concerned, about private companies selling information about consumers. *Financial Privacy: A Consumer Perspective*, *supra* [Tab 2]. Minnesota Attorney General Hatch summarizes other survey data. Hatch, *supra*, at 20-23.

to endure solicitations based on that personal information – information that often they might not even share with relatives or friends.

Personal data may be used in ways that are not just intrusive but harassing. Some groups of people, particularly the elderly, are more vulnerable to aggressive and even illegal marketing operations. *See* Comm'r Aff. § 10 (concern that certain consumers may be "more of a target for intrusive or abusive marketing tactics"). The more personal information a marketer has, the more trustworthy and genuine the marketer may seem to a vulnerable individual. Telemarketing scams against the elderly often begin with marketers establishing a personal relationship with the target. A marketer that has information about a target's family, finances, and personal history will likely find it easier to establish and then exploit a relationship of trust. An insurance company may not intend this kind of use of consumer information, but it may not be able to prevent it either, once information is sold to a third party.

The substantial government interest in protecting consumer privacy is reflected not just in the rules promulgated by the Commissioner but in a number of state and federal laws. Congress recognized important privacy concerns in GLB by providing that consumers must have an opportunity to prevent information sharing – and also by permitting states to adopt more stringent laws. 15 U.S.C. § 6807. The federal Fair Credit Reporting Act similarly recognizes "a need to insure that consumer reporting agencies exercise their grave responsibilities . . . with respect for the consumer's right to privacy." 15 U.S.C. § 1681(a)(4). The Vermont

Legislature passed strong privacy provisions for banks and credit unions and for all companies with respect to credit reports. 8 V.S.A. § 10101 *et seq*; 9 V.S.A. § 2480a-2480g. New Mexico recently adopted an opt-in system for protecting consumer privacy with respect to insurance information, and other states may follow. Van Cooper Aff. ¶ 8.

The United States Supreme Court has, in other contexts, recognized a substantial interest in protecting privacy, particularly in protecting people from intrusive solicitations that invade the privacy of the home. In *Florida Bar*, the Court upheld a ban on lawyer solicitation of recent accident victims based on the Bar's "substantial interest in protecting the privacy and tranquility of personal injury victims and their loved ones against intrusive, unsolicited contact by lawyers." *Forida Bar*, 515 U.S. at 624-25. The Court described the state's interest in protecting the "well-being, tranquility, and privacy of the home" as an interest "of the highest order in a free and civilized society." *Id*. at 625. And the Court noted that the state may legislate to protect the right of citizens to avoid intrusions into the privacy of their homes. *Id*.

Not surprisingly, in a case involving the Fair Credit Reporting Act, the D.C. Circuit recently rejected a First Amendment challenge to consumer privacy protections. *Trans Union Corp. v. Federal Trade Comm'n*, 245 F.3d 809 (D.C. Cir. 2001). The Federal Trade Commission, which enforces the FCRA, found that a consumer reporting agency violated the act by selling consumer information for target marketing purposes. The consumer reporting agency claimed that both the

FCRA and the FTC's decision violated the First Amendment. The D.C. Circuit found "no doubt" that the government's interest in protecting consumer privacy was substantial. *Id*. at 818; *see also Trans Union LLC v. Federal Trade Comm'n*, 295 F.3d 42, 52-53 (D.C. Cir. 2002) (court upholds FTC's GLB regulations for same reasons).

Plaintiffs ignore the *Trans Union* decision and instead rely on a Tenth Circuit opinion that declined even to decide whether protecting consumer privacy was a substantial government interest. *U.S. West, Inc. v. FCC*, 182 F.3d 1224, 1236 (10th Cir. 1999) ("we assume for the sake of this appeal that the government has asserted a substantial state interest in protecting people from the disclosure of sensitive and potentially embarrassing personal information"). The *U.S. West* court in dicta expressed some reservations about the privacy interest at stake. But the court was primarily concerned with the state of the administrative record, which did not explicitly define the privacy harm protected against and which lacked "a more empirical explanation and justification for the government's asserted interest." *Id*. at 1235.[30]

Although plaintiffs suggest the State has not articulated the privacy interest at stake in the manner required by *U.S. West*, they are mistaken, for two reasons.

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[30] The *U.S. West* court vacated the FCC's order, which required consumer consent, or "opt-in," for dissemination of customer proprietary network information (CPNI). CPNI refers to personal information about a consumer's telephone use, including who the consumer calls and when the calls are placed. 182 F.3d at 1229 & n.1, 1240. After the Tenth Circuit's decision, the FCC held further proceedings and reenacted the opt-in requirement (except for sharing with other providers of communications services). *In re Implementation of Telecommunications Act of 1996*, 17 F.C.C.R. 14860, 14862 (July 25, 2002).

First, as shown by the Commissioner's affidavit and discussed above, the Regulation protects individuals from "specific and significant harm," including "undue embarrassment or ridicule, intimidation or harassment, or misappropriation of sensitive personal information for the purposes of assuming another's identity." *See U.S. West*, 182 F.3d at 1235; Comm'r Aff. ¶ 10 (some information provided to insurers is "extremely personal and could be embarrassing if made public"; disclosure of some information could make consumers targets for "abusive or intrusive marketing tactics").

Second, plaintiffs entirely ignore the privacy interest in preventing customer intrusion caused by the broad use of personal consumer information for telemarketing purposes. The *U.S. West* court recognized this interest but refused to consider it because it was not contemplated by the agency in that case. *Id*. at 1236 & n.8. As discussed above and in the Commissioner's affidavit, this interest is substantial and is supported by the record here. Comm'r Aff. ¶ 10 (customers are "concerned about unwarranted intrusions into their personal information and affairs").

Plaintiffs' claim that the government does not have a substantial interest in protecting privacy is somewhat surprising, as plaintiffs appear to accept the privacy restrictions imposed by GLB. If plaintiffs are correct here, then the opt-out regime created by GLB must also be unconstitutional, because GLB also restricts the dissemination of consumer information for the purpose of protecting privacy. It uses a different mechanism – opt-in vs. opt-out – but the interest served is the

same, as plaintiffs recognize. Pls. Mem. 23. If in fact plaintiffs agree that the privacy provisions of GLB are constitutional, then their dispute is only with the means chosen by the Commissioner.

2. The Regulation directly and materially advances the State's interest in protecting consumer privacy.

This prong of the *Central Hudson* test requires a showing that "the harms [the government] recites are real and its restriction will in fact alleviate them to a material degree." *Florida Bar*, 515 U.S. at 626 (internal quotation marks omitted). The Regulation satisfies this prong as well, because the risk of harm is concrete and the Regulation prevents the harm.

The harm has already been described above: insurance companies collect substantial personal information about their customers and, absent the Regulation, the companies can – and some certainly will – disclose that personal information to third parties for marketing purposes. The privacy notices collected in discovery show that some insurance companies already disclose personal information to third parties, and many other companies reserve the right to do so in the future. Carter Aff. §§ 8-11, 13. Plaintiffs do not claim that insurance companies will protect consumers' personal information but in fact concede that their member companies *routinely* sell personal information for marketing purposes. Pls. Mem. at 2.

The Regulation alleviates the harm by requiring consumer consent for the sharing of personal information with third parties. No requirement could be more straightforward. If consumers do not agree that their information may be shared,

then it will not be shared, and consumers will be spared the intrusions on their privacy outlined above.

In light of the direct connection between protecting privacy and requiring consumer consent for disclosures, plaintiffs' claim that the Regulation will not protect privacy is unfounded. Since Congress passed GLB, companies have issued notices that are difficult to read and understand and that fail to provide an easy mechanism for opting out. Although consumers value privacy highly,[31] they rarely respond to the GLB notices. The Commissioner correctly concluded that GLB's opt-out provisions fail to protect consumer privacy and that additional protections are justified.

3. The Regulation is narrowly tailored.

A restriction on commercial speech must be narrowly tailored, but it need not be the "least restrictive means" of accomplishing a particular goal. *See Florida Bar*, 515 U.S. at 632 ("least restrictive means test" has no role in the commercial speech context"). The requirement of narrow tailoring is met if there is "a fit between the legislature's ends and the means chosen to accomplish those ends, a fit that is not necessarily perfect but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served." *Id.* (internal quotation marks omitted). The existence of "numerous and obviously less burdensome alternatives" is relevant to determining whether the means-end fit is reasonable. *Id.*

[31] *See supra* note 30.

On this point, plaintiffs argue only that GLB's minimum opt-out requirement is a less burdensome alternative that accomplishes substantially the same purpose. They are wrong. The minimum notice and opt-out requirements imposed by GLB do not protect consumer privacy in the same manner as the Regulation's consent requirement. As already demonstrated, the evidence unequivocally shows that privacy notices are difficult to comprehend. Pp. 5-6 & nn. 9-11; 15 & nn. 17-19; 21-22 & nn. 24-27. The evidence also shows that companies have not made it easy for consumers to opt-out. *Id*.

The shortcomings of an opt-out system are unsurprising, for two reasons. First, "opt-out" places a significant burden on consumers. Second, companies have no incentive to make it easy for consumers to protect their privacy.

"Opt-out" requires consumers to study a complicated issue – the use of their personal information by companies they do business with – and to take affirmative steps to protect their privacy interests. This burden is significant. It is not easy for a company to explain, or for an average consumer to understand, the ways that consumer information may or may not be disclosed. As Professor Lutz explains, a true mass mailing should be written at the fifth grade level. Aff. ¶ 9. Assuming a consumer understands the notice, opt-out still requires the consumer to respond to each of the perhaps ten, fifteen or even twenty notices received each year.[32] Most consumers are already besieged with mail and may not even read, much less respond to, privacy notices that are mixed in with other commercial mailings and

[32] *See* Schwartz, *supra* [Tab 8]; Attorney General's Final Report, *supra*, at 7 [Tab 19].

inserts. All of these obstacles make it less likely that consumers will take the actions necessary to protect their privacy.

Since companies lose money when consumers opt-out, they have no incentive to alleviate these obstacles and every incentive to make it less likely that consumers will opt out. Bower Aff. ¶ 5. If a consumer throws out a notice because it is mixed in with several annoying marketing inserts, the company profits. If a consumer gives up reading a notice in frustration, the company profits. If a consumer sets a notice aside for lack of pen, paper, envelope, and stamp, and neglects to go back to it, the company profits. Why would a company provide a website, or an easy check-off box on a premium payment form to allow consumers to opt-out painlessly? The company has little reason to do so.

The Regulation's opt-in approach should be sustained because it is narrowly-tailored to accomplish the purpose of protecting consumer privacy.

C. The Regulation may be upheld as a reasonable regulation of the business relationship between the insurance company and the consumer, without resort to the *Central Hudson* test.

The State has satisfied its burden under the *Central Hudson* test, so the Regulation may be sustained on that ground alone. The State nonetheless disputes whether the *Central Hudson* test even applies in this context. The Regulation is not a restriction on commercial speech in the traditional sense; it does not restrict advertising or labeling, for example. The Regulation, like GLB itself (and like the banking privacy law and the fair credit reporting laws) prevents commercial entities (insurance companies) from disclosing personal information about other

people – their customers. Customers provide that information for a specific purpose and do not authorize the information to be sold or disclosed to third parties for other purposes such as marketing.

The Regulation, like GLB, recognizes that consumers have an interest in their personal information and that the information should not be disclosed without their permission.[33] The law often protects the confidentiality of other types of personal information, including medical records, educational records,[34] and information disclosed to an attorney, by prohibiting disclosure without the person's permission. These laws are in some sense restrictions on speech but in another sense they are professional and business regulations – regulations that govern the relationship between the business and the customer by giving the customer a right to maintain privacy.

Several courts have upheld restraints on the disclosure of confidential information without resort to the *Central Hudson* test. A Rhode Island Court, for example, recently held that confidential health care information was unprotected speech for purposes of the First Amendment, and that health care providers therefore did not have a constitutional right to disclose the information. *Pitre v. Curhan*, 2001 WL 770941, at *4 (R.I. Super. Ct. July 10, 2001). The *Pitre* court

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[33] For these purposes, the only difference between the Regulation and GLB is that the Regulation requires affirmative consent while GLB allows for "implied" consent.

[34] The federal Family Education Rights and Privacy Act, 20 U.S.C. § 1232g, requires educational institutions to protect the privacy of student educational records or risk losing federal funding. The Sixth Circuit rejected a First Amendment challenge to FERPA brought by a newspaper seeking access to the records. *United States v. Miami Univ.*, 294 F.3d 797 (6th Cir. 2002).

relied in turn on a decision of the Ohio Supreme Court, which held that an attorney had no First Amendment right to disclose information protected by the attorney-client privilege. *American Motors Corp. v. Huffstutler*, 575 N.E.2d 116, 120 (Ohio 1991).

Insurance companies, like health care providers, educational institutions, and attorneys, collect and maintain a good deal of personal information about their customers. Insurance is also a pervasively regulated industry. In light of the personal information collected by insurance companies and the history of close regulation of the insurance industry, the State may reasonably impose restrictions on their disclosure of personal information without the permission of the consumer.

For this reason, the Regulation may be upheld as a reasonable regulation of the business relationship between the insurance company and the consumer, without resort to the *Central Hudson* test.

CONCLUSION

For the reasons given, the State's motion for summary judgment should be granted and the plaintiffs' motion for summary judgment should be denied.

Dated: December 6, 2002

STATE OF VERMONT

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