UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NEW YORK STATE BAR ASSOCIATION,
One Elk Street
Albany, New York 12207

Plaintiff,

v.

THE FEDERAL TRADE COMMISSION,
600 Pennsylvania Avenue, N.W.
Room 570
Washington, D.C. 20580

Defendants.

CASE NUMBER 1:02CV00810
JUDGE: Reggie B. Walton
DECK TYPE: Administrative Agency Revie
DATE STAMP: 04/29/2002

COMPLAINT FOR DECLARATORY RELIEF

April 29, 2002

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NEW YORK STATE BAR ASSOCIATION, **One Elk Street** **Albany, New York 12207** **Plaintiff,** **v.** **THE FEDERAL TRADE COMMISSION,** **600 Pennsylvania Avenue, N.W.** **Room 570** **Washington, D.C. 20580** **Defendants.**	)	**Civil Action No. _____** **Complaint For Declaratory Relief**

I. PRELIMINARY STATEMENT

1. This action is brought by the New York State Bar Association (hereinafter "NYSBA" or "the Bar") on behalf of its more than 70,000 members to challenge the application of the term "Financial Institution," as used in connection with the "Section V" privacy provisions of the Gramm-Leach-Bliley Act. 15 U.S.C. §§ 6801 et seq. ("GLBA" or "the Act"), to members of the Bar acting in their capacities as practicing lawyers, each of whom is also subject to the strict confidentiality, licensing and ethical requirements set forth in the New York Lawyers' Code of Professional Responsibility and the Disciplinary Rules issued thereunder.

2. The defendant, Federal Trade Commission ("FTC"), is an independent agency of the United States to which Congress has delegated the responsibility for issuing and enforcing rules, including those regarding application of the GLBA. The FTC was given the specific responsibility by Congress for granting exceptions to the Act where such exceptions are

consistent with the purposes of Section V and would result in greater privacy protection for consumers than that provided under the GLBA.

3. Notwithstanding formal requests made to the FTC on behalf of numerous bar associations, including plaintiff NYSBA, the FTC, by final action set forth in a letter of April 8, 2002 has declined to grant an exemption to or interpretation of the GLBA, which would make clear that members of the bars of the various states, when acting in their capacities as practicing lawyers, do not come within the definition of "Financial Institution" as this term was intended by Congress to apply in the GLBA, and are not subject to the privacy provisions of the Act.

4. In addition to failing and refusing to issue the exemption as contemplated by Congress when it enacted the GLBA, the FTC, by and through its various senior enforcement officials has, for all practical purposes, confirmed the agency's belief that practicing lawyers, even though subject to the New York Lawyers' Code of Professional Responsibility and the ethical and licensing requirements of the various states, are nonetheless also covered by the confidentiality and privacy aspects of the GLBA because they are purportedly "Financial Institutions" as defined in the Act. By virtue of the FTC's position, attorneys are subject to enforcement and sanctions for failing to comply with the substantive and procedural provisions of the GLBA, even though such provisions are inconsistent with and significantly less protective than the obligation of strict confidentiality universally applicable to lawyers in the various states of the United States, including New York.

5. In passing the GLBA and enacting the definition of "Financial Institution" contained therein, Congress manifestly did not intend for that definition or the privacy provisions of the GLBA to apply to practicing lawyers or to the confidential relationship between clients and lawyers. The text, structure, and legislative history of the GLBA make it unmistakably clear

that the term "Financial Institution" does not apply to entities such as practicing lawyers who are not within the well-established definition of "Financial Institution" contained in the laws and regulations pertaining to the banking, securities and insurance industries. Accordingly, the FTC's actions and failures to act, contrary to the manifest intent of Congress, are arbitrary, capricious, and contrary to law.

6. Alternatively, the GLBA, to the extent it purports to extend the definition of "Financial Institution" to practicing lawyers licensed by and in the various states and territories, is violative of the Tenth Amendment to the Constitution of the United States because it infringes on an area of lawmaking and regulation historically committed and reserved solely to the States — the regulation of the confidential nature of the relationship between clients and practicing lawyers subject to State licensure. Even federal judges and lawyers employed by federal agencies are subject to state ethical and licensing requirements as a condition of maintaining their federal positions. Accordingly, to this extent, Section V of the GLBA is unconstitutional, void, and unenforceable by the FTC.

7. Application of the privacy provisions of the GLBA, with its lower standard of protection of client confidences, to practicing lawyers subject to state licensure, regulatory and disciplinary authority, would provide a defense of "federal preemption" for lawyers who seek to take advantage of its more liberal provisions, in the face of state efforts to enforce historic norms, ethical rules and privileges that have pertained to the confidentiality of the attorney-client relationship for centuries.

8. When enacting the GLBA, the Congress did not convey any intent, let alone an "unmistakable" intent, to supplant, sub silentio, the body of state jurisprudence which has

provided the exclusive source of lawyer ethical conduct in both state and federal courts since inception of the American judicial system.

9. To the contrary, when enacting the GLBA, Congress expressly charged the FTC with the responsibility for determining whether state statutes, regulations, orders, or interpretations are "consistent" or "inconsistent" with Title V for the purpose of determining whether the privacy protection afforded under a state scheme is greater than the protection provided under Title V. 15 U.S.C. § 6807. The manifest intent of Congress was to preserve state regulatory schemes that provided greater privacy protection to consumers than the GLBA.

10. By failing to issue the requested exemption for practicing attorneys, the FTC has acted in a manner that is arbitrary, capricious, and contrary to law by failing to acknowledge and clarify that state ethical rules and licensing requirements concerning the confidentiality of the attorney-client relationship provide greater privacy protection to consumers than the GLBA. In addition, the rationale asserted by the FTC to justify its refusal to grant the required exemption, a putative "lack of clarity" regarding its own authority to do so, is in direct conflict with the delegation of authority contained in the plain text of the GLBA. In addition, the FTC's letter of April 8, 2002, on its face, is internally inconsistent and contradictory. It is, for these reasons as well, arbitrary, capricious, and contrary to law.

11. Both the actions and the refusal to act on the part of the FTC have resulted and will result in immediate, irreparable, and irreversible harm to plaintiffs' members, their millions of clients, and the American public by virtue of the material dilution, diminution, and threat to a client's expectations of strict confidentiality and privacy in the relationship between a lawyer and her client, which expectation is a part of the bedrock foundation of the historic, state-regulated attorney-client relationship.

12. The actions and failures to act on the part of the FTC also threaten to vitiate, impair and impede the administration of state ethical and disciplinary rules affecting attorney-client confidentiality, by presumptively providing a defense of "federal preemption" to lawyers who violate state codes of ethics in this regard.

13. The actions and inactions of the FTC also place all practicing lawyers, including those in the State of New York, in jeopardy of civil prosecution and liability under the GLBA if they continue to conscientiously comply with the ethical rules and professional obligations that govern their conduct and licensure under state law, and fail or refuse to comply with the substantive and procedural provisions of the GLBA, which either authorize or require conduct not permitted or authorized under state ethical proscriptions.

14. Accordingly, as matters currently stand, absent appropriate intervention by this Court, practicing lawyers throughout America, including members of the NYSBA, are in immediate threat of being subject to inconsistent legal requirements at the state and federal levels, so that compliance with one set of rules will result in such lawyers, including members of the NYSBA, being subject to severe and immediate sanctions, including potential loss of livelihood, under the other.

II. JURISDICTION AND VENUE

15. This Court possesses Federal Question jurisdiction under 28 U.S.C. § 1331. The disputed questions of federal law include, but are not limited to, the following:

a. Whether the Congress has exceeded its authority under the Tenth Amendment to the Constitution by purporting to impose the GLBA's privacy requirements on attorneys, whose oversight has been historically committed and reserved to the States through,

inter alia, the regulation of the confidential nature of the relationship between clients and practicing lawyers subject to state licensure and ethical sanctions.

b. Whether the FTC acted arbitrarily, capriciously, and contrary to law insofar as it refused to grant attorneys an exemption from the statute and effectively threatens prosecution of attorneys under the GLBA even though the GLBA was not intended to apply to practicing attorneys and expressly permits the FTC to grant "exceptions . . . as are deemed consistent with the purposes of" the privacy provisions of the GLBA when state laws and regulatory schemes are more protective of privacy that the GLBA. 15 U.S.C. § 6804(b).

16. Venue is proper in this judicial district under 28 U.S.C. § 1391(e) because the FTC is an agency of the United States, its headquarters are located in the District of Columbia, and a substantial part of the events and omissions giving rise to the claims in this lawsuit occurred or failed to occur at the FTC's headquarters.

17. This Court is authorized to award declaratory relief under the APA, 5 U.S.C. §§ 701-706, and the Federal Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202.

III. PARTIES

18. Plaintiff NYSBA is incorporated in 1877 by act of the New York State Legislature and is a state-wide association of lawyers headquartered in Albany, New York. With over 70,000 members, it is the largest voluntary state bar association in the nation. The purposes of the NYSBA are, among others, to uphold and defend the Constitution of the United States, to promote reform in the law, to facilitate the administration of justice, and to apply its knowledge and experience in the field of the law to promote the public good.

19. The defendant Federal Trade Commission is an independent agency of the United States. It is one of eight enumerated entities that Congress has authorized to enforce the privacy provisions of the GLBA. 15 U.S.C. §§ 6805(a). The FTC has taken the position that it has authority to enforce the GLBA against attorneys because attorneys fall within the category of "any other financial institution or other person that is not subject to the jurisdiction of any agency or authority" under 15 U.S.C. §§ 6805(a)(1-6).[1]

20. The FTC is designated by Congress under the GLBA with the responsibility to conduct rulemaking under the GLBA; to grant exceptions under the GLBA where the exceptions are consistent with the GLBA's privacy purposes; and to bring enforcement actions against certain noncompliant "Financial Institutions" not otherwise supervised by federal financial regulatory agencies. 15 U.S.C. § 6805(a).

IV. FACTS

A. The Privacy Provisions of the Gramm-Leach-Bliley Act

21. On November 12, 1999, President Clinton signed PL 106-102, the "Gramm-Leach-Bliley Act," into law, which, among other things, permits banks, insurers, and securities firms to affiliate with one another. Subtitle A of Title V of the Act (hereinafter referred to as "Title V"), entitled "Disclosure of Nonpublic Personal Information" and codified at 15 U.S.C. §§ 6801-6810, limits the instances in which a "financial institution" may disclose consumers' nonpublic personal information to nonaffiliated third parties. The same section

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[1] The other enumerated agencies and authorities include (1) the Office of the Comptroller of the Currency; (2) the Board of Governors of the Federal Reserve System; (3) the Board of Directors of the Federal Deposit Insurance Corporation; (4) the Director of the Office of Thrift Supervision; (5) the Board of the National Credit Union Administration; (6) the Securities and Exchange Commission; and (7) state insurance authorities. 15 U.S.C. § 6805(a).

requires a financial institution to disclose to all of its customers the institution's privacy policies and practices as they relate to information-sharing with affiliates of the institution as well as nonaffiliated third parties.

22. The articulated policy of the Act is to assure that "each financial institution has an affirmative and continuing obligation to respect the privacy of its customers and to protect the security and confidentiality of those customers' nonpublic personal information." 15 U.S.C. § 6801(a).

23. The Act purports to impose substantive requirements on how, when, and under what circumstances a "Financial Institution," as defined in the Act, may disclose to a third party "any nonpublic personal information" of a "customer."

24. "Non-public personal information" is defined under the Act, in relevant part, as personally identifiable financial information that is provided by a consumer to a financial institution; that results from any transaction with the consumer or any service performed for the consumer; or that otherwise is obtained by the financial institution. 15 U.S.C. § 6809(4)(A). (e.g. bank accounts, loans, securities transactions, purchase of insurance, provision of financial advisory services).

25. "Financial Institution" is defined, in relevant part, under the Act as any institution the business of which is engaging in financial activities as described in section 4(k) of the Bank Holding Company Act of 1956. 15 U.S.C. § 6809(3); 16 C.F.R. § 313.3(k)(1). Section 4(k) of the Bank Holding Company Act of 1956, as amended, is found at 12 U.S.C. § 1843(k). Relevant examples of covered financial activities include banks; saving associations; credit unions; lenders such as credit card companies; stockbrokers; financial, investment, and economic

advisory services; real estate settlement services; and tax planning and return preparation services. See 12 U.S.C. §§ 1843(k)(4)(C), (G); 12 C.F.R. §§ 225.28(b)(2)(viii), (6)(vi).

26. The GLBA encompasses substantive, procedural, and notice requirements providing extensive and detailed affirmative conditions on the relationship between any entity defined as a "Financial Institution" and its "customer." Under the Act, a financial institution must send notices to its customers who are individuals describing, among other things, its privacy policy, any nonpublic personal information that the company intends to disclose to affiliates and third parties, and a method for the customer to "opt out" of the disclosure of personal information. 15 U.S.C. §§ 6802-6803.

27. The Act also contains several provisions entitled "exemptions," one of which affirmatively authorizes "Financial Institutions" to share a "consumer's" nonpublic personal information "as necessary to effect, administer, or enforce a transaction" requested by the consumer under certain circumstances. 15 U.S.C. § 6802(e). However, a practicing lawyer subject to the ethical obligations that are a precondition of the right to practice law in New York (and elsewhere) may not ethically disclose such information of a client without exposing herself to severe sanctions under state laws, including suspension, disbarment, and potential liability to clients for malpractice and breach of fiduciary duty.

28. There are a number of express exceptions in the GLBA that similarly permit a financial institution to disclose or share a consumer's non-public personal information with a third party in a way that practicing lawyers may not. In addition to the category described in the preceding paragraph, nonpublic personal information may be disclosed without the consumer's consent:

(1) to protect the confidentiality or security of the financial institution's records;

(2) to protect against or prevent actual or potential fraud;

(3) for required institutional risk control or for resolving consumer disputes or inquiries;

(4) to persons holding a legal or beneficial interest relating to the consumer;

(5) to persons acting in a fiduciary or representative capacity on behalf of the consumer;

(6) to provide information to insurance rate advisory organizations, persons assessing compliance with industry standards, the financial institution's attorneys, accountants, or auditors;

(7) to law enforcement entities or self-regulatory groups as permitted or required by law;

(8) to comply with federal, state, or local law;

(9) to comply with subpoena or other judicial process;

(10) to respond to summons or other requests from authorized government authorities;

(11) pursuant to the Fair Credit Reporting Act, to a consumer reporting agency or from a consumer report reported by the consumer reporting agency;

(12) in connection with a proposed or actual sale, merger, transfer, or exchange of all or a portion of a business or operating unit.

15 U.S.C. § 6802(8); 16 C.F.R. § 313.15. Many of these categories represent a type of disclosure permitted under the GLBA but prohibited under the attorney-client confidentiality

rules of the various states, including New York. Under the FTC's interpretation, the federal law presumably preempts state law and now authorizes an attorney to make numerous disclosures of protected and privileged information notwithstanding the stricter state law prohibition against doing so. Alternatively, the federal law does not preempt state attorney confidentiality strictures, but requires lawyers to nevertheless give initial and annual notice about "permitted" disclosures.

29. Section 503 of the Act contains a requirement which, if applied to practicing lawyers, would require an attorney, at the time of entering into an attorney-client relationship with a "consumer" seeking legal advice or representation and annually thereafter, to give written notice to the "consumer" of the lawyer's "policies and practices" with respect to disclosure of "nonpublic personal information," including disclosure of such information about persons "who have ceased to be customers of the financial institution," all in accordance with the regulations issued or to be issued by the FTC under the GLBA. 15 U.S.C. § 6803(a); 16 C.F.R. § 313.4 et seq. The information to be given under the GLBA to clients of practicing attorneys about the disclosure of nonpublic personal information conflicts directly and irreconcilably with the more stringent ethical rules applicable to attorneys under state law regarding such disclosure, with state law requirements being much more protective of client privacy than the GLBA. The notice requirements, therefore, would be meaningless, confusing, or misleading to clients as well as intrusive upon the historically strict assurance of confidentiality in the attorney-client relationship.

30. Once written notice as described in paragraph 25 is given to a "consumer" under the GLBA and, where an opt-out provision is included, the consumer fails to utilize the affirmative "opt out" procedure described in the Act, the "Financial Institution" becomes free to share certain "nonpublic personal information" about the "consumer" with "nonaffiliated third

parties" including, e.g., commercial enterprises that sell or rent such information for a broad range of commercial marketing initiatives. Practicing lawyers in the State of New York and elsewhere are prohibited from doing so and, again, would be subject to suspension, disbarment, and potential civil liability to clients if such information gathered in the course of attorney-client communications was disclosed in the manner prescribed in the GLBA. Under the FTC's interpretation of the GLBA, federal law would putatively authorize what state law now strictly forbids.

31. The notice provisions of the GLBA, if applied to practicing lawyers and their clients, are both highly misleading and confusing and affirmatively misstate the scope and nature of a lawyer's obligations to her clients. Alternatively, if a lawyer provides the GLBA notice, states that her policy is to not share information, but fails to provide a full and complete explanation of applicable ethical rules, the lawyer would be affirmatively misleading the client regarding the scope of client protection.

32. Enforcement by the FTC against an entity defined as a "Financial Institution" for non-compliance with the substantive and procedural requirements of the GLBA is authorized under the FTC Act. 15 U.S.C. § 6805(a)(7). Violations of the GLBA are treated as "unfair or deceptive acts or practices." Under the FTC Act, the FTC may issue cease-and-desist orders to any "person, partnership, or corporation" that engages in unfair or deceptive acts or practices. 15 U.S.C. §§ 45(b), (m). After a cease-and-desist order becomes final, further violations of the order expose the subject of the order to civil penalties of up to $10,000 per violation. 15 U.S.C. §§ 45(l), (m). A court may also issue "mandatory injunctions" and "such other and further equitable relief" as is deemed appropriate. 15 U.S.C. § 45(1). In addition, the FTC may seek consumer redress, including rescission of contracts, refund of money, payment of damages, and

public notification of the unfair or deceptive act or practice. 15 U.S.C. § 57b. Further, lawyers who decide to engage in practices permitted under the GLBA but prohibited under state law could assert federal preemption as a defense to a disciplinary action or private lawsuit.

B. The Rules Promulgated By The FTC To Implement The GLBA

33. The GLBA requires certain federal agencies, including the FTC, to issue final rules that "may be necessary to carry out the purposes of [Subtitle A] with respect to the financial institutions subject to their jurisdiction under section 6805 of this title." 15 U.S.C. § 6804(a)(1). Section 6805 authorizes the FTC to enforce the Act and its implementing regulations as to financial institutions and other persons not subject to the jurisdiction of the enumerated financial, banking, and securities agencies. (The phrase "other persons" refers to persons who are not financial institutions but who receive protected information from financial institutions. 16 C.F.R. 313.1(b).)

34. On March 1, 2000, the FTC published a notice of proposed rulemaking in the Federal Register. Privacy of Consumer Financial Information, 65 Fed. Reg. 11,174 (proposed Mar. 1, 2000) (codified at § 16 C.F.R. 313) (hereinafter "Proposed Rule"). In response to the notice, the FTC received 640 comments to the Proposed Rule. Privacy of Consumer Financial Information, 65 Fed. Reg. 33,646 (May 24, 2000) also (codified at § 16 C.F.R. 313) (hereinafter "Final Rule"). According to the FTC, most of the comments were from businesses or their representatives concerned about the Act and included creditors of various types and well as representatives from the health care industry, retail merchants, insurance companies, securities firms, private investigators, debt collection agencies, consumer reporting agencies, institutions of higher education, tax professionals, and others.

35. In fact, language in both the Proposed Rule and the Final Rule strongly suggests that the rule ought not apply to attorneys. Section 313.11 of the Proposed Rule lists certain exceptions to the notice and opt-out requirements relating to consumers, one of which is "[t]o persons acting in a fiduciary or representative capacity on behalf of the consumer." Proposed Rule, 65 Fed. Reg. 11,195. This exception was codified in the Final Rule at 16 C.F.R. § 313.15(a)(2)(v). In other words, a financial institution need not provide a consumer with notice or the option to opt-out if it is going to be providing the consumer's nonpublic personal information to a person acting on behalf of the consumer as her fiduciary or representative, such as her attorney.

36. After considering public comments, the FTC issued its Final Rule on May 24, 2000. The Final Rule generally became effective on July 1, 2001. 16 C.F.R. § 313.18. The Final Rule did not specifically exempt lawyers from the impact of the regulation.

C. The FTC's Position on Coverage of Practicing Lawyers and Its Letter Decision of April 8, 2002

37. By early-mid 2001, it was widely reported in the professional and trade regulation press that the FTC and its enforcement staff had affirmatively decided that lawyers were covered by the GLBA. See, e.g., Center for Regulatory Effectiveness, "FTC Determines Attorneys to be Subject to Notice Requirements of Gramm-Leach-Bliley Act" (reprinting February 23, 2001, letter to FTC from the Boston Bar Association) (found at http://www.thecre.com/emerging/).

38. The issuance of final regulations without an express exemption for lawyers generated a formal series of objections on the part of bar associations around the country.

39. In June 2001, NYSBA's Executive Committee adopted a resolution calling upon the FTC to formally exclude the practice of law from the definition of "the provision of financial

services" under the GLB Act. That position was communicated to FTC Chairman Timothy Muris by letter dated, June 22, 2001. The Chair of the NYSBA's Tax Section independently sent a similar letter. Peggy Twohig, Assistant Director of the Division of Financial Practices of the Bureau of Consumer Protection at the FTC, responded on August 1, 2001, that the Commission would consider the NYSBA's views.

40. In letters of July 2 and July 10, 2001, to FTC Chairman Muris, as supplemented in an August 22, 2001, letter to Bureau of Consumer Protection Director Howard Beales, the American Bar Association ("ABA") also urged that lawyers and law firms be declared outside the Act's purview. An ABA working group met with several FTC representatives over the summer of 2001. Additional meetings were held with Director Beales on February 15, 2002, and with four of the five FTC Commissioners in March 2002.

41. Numerous other bar associations from many jurisdictions around the country filed similar objections and requests for specific exemption of attorneys, pointing out the incongruity, lack of rationality, and legal impropriety of the FTC's decision to bring lawyers and their client relationships under the GLBA, when Congress clearly did not intend such a result or the dilution of privacy protection that would necessarily follow.

42. The ABA argued in written and oral communications that Congress never intended to cover lawyers under the provisions of Title V and, alternatively, that lawyers should be deemed to be in compliance with the GLBA because the ethical strictures of every disciplinary jurisdiction already mandate that lawyers maintain client information in strict confidence.

43. At a February 15, 2002, meeting with Director Beales, representatives of the ABA were advised that the FTC intended to issue a letter in response to the various requests it had received from bar associations and individuals.

44. On April 8, 2002, the Director of the FTC Bureau of Consumer Protection issued a letter to the American Bar Association ("the Letter") in reply to the formal objections and requests for exemption lodged by the ABA. The Letter applies equally to the June 22, 2001 letter of the NYSBA.

45. The Letter states that the ABA questions "the appropriateness and utility of applying the GLB Act's privacy provisions to attorneys engaged in the practice of law. Specifically, you request that the Commission exempt attorneys at law from the application of the Privacy Rule."

46. The Letter further states the FTC's affirmative view as to coverage of lawyers is that "the GLB Act itself states that entities engaged in 'financial activities' are subject to the Act."

47. However, instead of substantively addressing <u>any</u> of the serious policy, legal, and jurisdictional issues raised in the formal objections and requests lodged by various bar associations, or even explaining the rationale for its rejection of those petitions, the FTC declined to fulfill its statutory obligation to review state schemes that provide "greater protection" to consumers and simply stated that "there are significant questions as to the legal authority of the Commission to grant the exemption you request."

48. In all of the circumstances described herein, including the requirements of the GLBA, and in the context of the events that preceded the issuance of this Letter, the Letter

constitutes a "final decision" of the FTC on the issue. There are no further administrative avenues available to plaintiff for redress or appeal.

49. The Letter goes on to explain the Agency's perceived "questionable" authority by citation to an interpretation of provisions of the Act which are not reasonably supported by the text of the Act, or even by the FTC's own statements describing its authority.

50. The Letter states, as the sole basis for denying the requested exemption:

> Although the Commission has express authority under the GLB Act to grant exceptions, that authority is limited to providing exceptions to the requirements of Section 502. The Act does not provide the Commission with express authority to grant exemptions from the other provisions of the GLB Act, including the initial and annual notice provisions. See GLB Act § 504(b), 15 U.S.C. 6804(b).

51. The statement of the FTC's authority recited in the Letter is manifestly inconsistent with the text of the statute cited. Section 504(b) authorizes the FTC (and other agencies) to "include such additional exceptions to subsections (a-d) of § 6802 of this title as are deemed consistent with the purposes of this subchapter."

52. In all events, the operative and definitional sections of a statute must necessarily be read together as a whole, and the FTC's position that it has authority to issue regulations and exemptions as to one integrated section of the Act but not another is disingenuous. It is the paradigm of a regulatory pronouncement that is arbitrary, capricious, contrary to law, and an offense to common sense.

53. In addition, the FTC's description of its authority is internally inconsistent. The Letter states that the Agency "has express authority under the GLB Act to grant exceptions . . . to the requirements of Section 502" but "[t]he Act does not provide the Commission with express authority to grant exemptions from . . . the initial and annual notice provisions."

54. The "initial and annual notice provisions" are part and parcel of Section 502. Thus, the FTC Letter contradicts itself.

55. At a minimum, the FTC is compelled by the plain language of the statute to give substantive consideration to the merits of the legal, constitutional, and policy issues raised by the NYSBA and other bar associations, which it did not do, and if state law protection is found to be greater than that provided under the GLBA, state law must be given deference and exempted.

56. Section 507(a) of the GLB Act expressly preserves a state "statute, regulation, order, or interpretation" that is not "inconsistent" with the provisions of the GLB Act. 15 U.S.C. § 6807(a).

57. Under Section 507(b), a determination that a state law provides "greater protection" to consumer privacy as compared to the federal act deems such statute to be "not inconsistent" with provisions of Subtitle A of Title V, and it is thereby not preempted by that subtitle. 15 U.S.C. § 6807(b).

58. Where "greater protection" is afforded under a state scheme, the FTC has no legal authority either to deprive citizens of that greater level of protection, or evade its delegated responsibility for doing so by contriving a non-existent absence of authority in the face of a direct grant of both authority and responsibility.

59. In adopting Section 507, Congress established the privacy protections in the GLB Act as a "floor," or minimum protections for consumer privacy, that could be exceeded by the states. See 145 Cong. Rec. S13890 (daily ed. Nov. 4, 1999) (statement of Sen. Rod Grams); 145 Cong. Rec. S13789 (daily ed. Nov. 3, 1999) (statement of Sen. Paul S. Sarbanes). State law

provisions that add to the privacy protections in that subtitle will not be preempted by that subtitle.

60. Section 507 of the GLB Act provides:

> (a) In general -- This [subtitle and the amendments made by this subtitle] shall not be construed as superseding, altering, or affecting any statute, regulation, order, or interpretation in effect in any State, except to the extent that such statute, regulation, order, or interpretation is inconsistent with the provisions of this [subtitle], and then only to the extent of the inconsistency.
>
> (b) Greater protection under State law. -- For purposes of this section, a State statute, regulation, order, or interpretation is not inconsistent with the provisions of this [subtitle] if the protection such statute, regulation, order, or interpretation affords any person is greater than the protection provided under this [subtitle and the amendments made by this subtitle], as determined by the Federal Trade Commission, after consultation with the agency or authority with jurisdiction under [section 505(a)] of either the person that initiated the complaint or that is the subject of the complaint, on its own motion or upon the petition of any interested party.

61. A state law is "inconsistent" under Section 507(a) only (1) if it frustrates the purpose of the federal law or (2) if compliance with both laws is physically impossible. State regulation of the confidential relationship between clients and attorneys is not "inconsistent" with the purposes of the GLBA and they provide "greater protection" to consumers.

62. Even if the two schemes were "inconsistent," the state regulatory requirements clearly provide "greater protection" under § 507(b) of the GLBA, and must be exempted under the GLBA.

63. The FTC does not have the authority to ignore the statutory directive to consider and, when appropriate, issue an exemption that comes within the statutory definition of activities to be exempted. Here, the FTC has refused even to undertake the substantive analysis mandated by Congress for the protection of consumers.

D. The Substantive and Procedural Requirements of the GLBA, if Applied to Lawyers, Would Materially Diminish the Privacy and Confidentiality Protection of Consumers of Legal Services And Authorize Lawyers to Violate Their Professional and Ethical Obligations Under State Licensure Laws, Which are "More Protective" of Privacy Than the GLBA

64. New York lawyers, like all American lawyers, are subject to strict rules that require them to preserve the confidences and secrets of their clients. DR 4-101 of the New York Lawyers' Code of Professional Responsibility, which is promulgated by the Appellate Divisions of the Supreme Court of the State of New York and has the force of law in New York State, provides:

> DR 4-101 [22 N.Y.C.R.R. § 1200.19] Preservation of Confidences and Secrets of a Client
>
> A. "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.
>
> B. Except when permitted under DR 4-101(C), a lawyer shall not knowingly:
>
> 1. Reveal a confidence or secret of a client.
> 2. Use a confidence or secret of a client to the disadvantage of the client.
> 3. Use a confidence or secret of a client for the advantage of the lawyer or of a third person, unless the client consents after full disclosure.

C. A lawyer may reveal:

1. Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.
2. Confidences or secrets when permitted under Disciplinary Rules or required by law or court order.
3. The intention of a client to commit a crime and the information necessary to prevent the crime.
4. Confidences or secrets necessary to establish or collect the lawyer's fee or to defend the lawyer or his or her employees or associates against an accusation of wrongful conduct.
5. Confidences or secrets to the extent implicit in withdrawing a written or oral opinion or representation previously given by the lawyer and believed by the lawyer still to be relied upon by a third person where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud.

D. A lawyer shall exercise reasonable care to prevent his or her employees, associates, and others whose services are utilized by the lawyer from disclosing or using confidences or secrets of a client, except that a lawyer may reveal the information allowed by DR 4-101(C) through an employee.

These rules survive the termination of the attorney-client relationship as a matter of law and ethics.

65. The personal information that any lawyer or law firm obtains from a client, or even a potential client, is already protected under the Disciplinary Rules, and a lawyer who discloses protected information may be subject to discipline by the court, with sanctions including public censure, suspension, or disbarment. Clients are notified of their right to privacy in their dealings with lawyers and the lawyers' duty of confidentiality; pursuant to court rule (22 N.Y.C.R.R. Part 1210), lawyers are required to display in their offices a "Statement of Client's

Rights and Responsibilities." The Statement provides, in pertinent part, "You have the right to privacy in your dealings with your lawyer and to have your secrets and confidences preserved to the extent permitted by law." In view of the strict provisions already in place through the Disciplinary Rules and other court rules, the privacy provisions of the New York rules are clearly "more protective" of the privacy interests of clients than the GLBA.

66. Requiring lawyers to provide privacy notices to their clients — along with banks and credit card companies that are not subject to the strict confidentiality rules that apply to lawyers — will serve only to confuse clients and to seriously dilute the public's expectation of privacy in their dealings with counsel. Other organizations may be permitted to disclose personal information if they meet the criteria set forth in the Act, if they have provided a consumer with the opportunity to "opt out," and if the consumer does not exercise that option. Some clients, having seen other privacy notices that contain "opt out" provisions, are highly likely to misinterpret a lawyer's privacy notice as seeking some type of waiver of confidentiality from the client. It clearly would be unethical for a lawyer, from New York or any other state, to seek some type of "blanket" waiver of confidentiality from a client.

67. In view of the fact that New York rules and regulations governing the conduct of lawyers provide for a greater protection of clients' personal information and subject a lawyer who violates these regulations to professional discipline — potentially including disbarment or suspension of the lawyer's license to practice law — application of the GLBA to New York lawyers is unnecessary, provides no benefit to the public, and is arbitrary, capricious, and contrary to law.

E. The Notice and Substantive Requirements of the GLBA, if Applied to Lawyers, Would Materially Impair State Regulation of the Confidential Attorney-Client Relationship

68. The regulation of the attorney-client relationship by the states is plenary and pervasive. It is the subject, in every state, of complex and nuanced codes of conduct, disciplinary rules, ethics opinions, and case law.

69. Attorneys regularly provide legal services which incidentally but necessarily include legal advice on "financial" matters such as trusts, estates and tax matters. This does not make them "Financial Institutions."

70. The notice, "opt-out," and other procedural elements of the GLBA are especially designed to accommodate the typical commercial relationship between a customer and a "financial institution," as that term is defined in the Act by reference to banking, securities, and insurance organizations.

71. The imposition and overlay of the notice and procedural aspects of the GLBA upon the attorney-client relationship, in addition to being ill-fitted, would be highly confusing to the consumers of legal services, and affirmatively false and misleading by stating or implying that the lawyer whom they have consulted is subject to some regimen of permitted disclosures outside those permitted and enforced by state ethical and licensure requirements.

72. Each year the regulatory and disciplinary authorities in the various states receive and process thousands of complaints, inquiries, and requests for advice from lawyers and clients, with respect to the confidentiality obligations of lawyers.

73. Each year the regulatory and disciplinary authorities in the various states collectively issue thousands of corrective actions, ranging in severity from private reprimands and cautions to public censure, suspension and disbarment, for violation by lawyers of some

element of the attorney-client relationship. Each of these actions is accompanied by procedural and due process measures established in every state for the purpose of carefully evaluating complaints and defenses regarding breach of confidentiality by lawyers.

74. Each year, former clients who believe that a lawyer's conduct was violative of state-imposed confidentiality requirements file civil lawsuits under state common law for malpractice, negligence, breach of fiduciary duty, or breach of the duty of loyalty. Courts in such cases generally rely upon the body of decisional precedent (and expert opinion) regarding a lawyer's compliance with the standards imposed by the state disciplinary authorities in deriving the minimum norms of lawyer conduct that should apply in these cases.

75. If the GLBA were held to apply to lawyers, providing a defense of "federal presumption" by a lawyer who claimed to be operating as a "Financial Institution" under the Act, it would vitiate this intricate scheme of lawyer regulation established in the various states.

F. The Text and Structure of the GLBA Demonstrate that Congress Did Not Intend to Include Lawyers Within the Definition of "Financial Institution."

76. Title V of the GLBA is intended to govern the relationship between "Financial Institutions" and their "customers" or "consumers," which differs so substantially from the attorney-client relationship that common sense, as well as precepts of statutory construction, make it entirely clear that the Act is not intended to govern attorney conduct.

77. As noted above, a "Financial Institution" is any institution the business of which is engaging in financial activities as described in section 4(k) of the Bank Holding Company Act of 1956, including banks; saving associations; credit unions; lenders such as credit card companies; stockbrokers; financial, investment and economic advisory services; real estate

settlement services; and tax planning and return preparation services. Legal services plainly are not included in the list of covered activities. Under the regulations, a business that engages in one or more of the listed financial activities is treated as a "Financial Institution" only if it is "significantly engaged" in those activities. 16 C.F.R. § 313.3(k)(1).

78. Common sense dictates that lawyers and firms primarily engaged in the practice of law are not financial institutions as that phrase is used in the regulation of banks and securities firms and thus should not fall within the scope of Section V.

79. Title V's definition of "consumer" provides further insight into Congress's lack of intent to include lawyers in the definition of "Financial Institution." The definition states that a consumer is "an individual who obtains, from a financial institution, financial products or services which are to be used primarily for personal, family, or household purposes, and also means the legal representative of such an individual." 15 U.S.C. § 6809(9). This definition conjures up an arms'-length relationship between consumer and commercial entity that is in stark contrast to the manner in which states view the fiduciary character of the attorney-client relationship — one whose private communications are already thoroughly protected by the unique, state-enforced rules of conduct that apply to attorneys.

G. The Legislative History of the GLBA Confirms that Congress Did Not Intend to Include Lawyers Within the Definition of "Financial Institution."

80. The stated purpose of the GLBA is to "enhance competition in the financial services industry by providing a prudential framework for the affiliation of banks, securities firms, insurance companies and other financial service providers." H.R. Rep. No. 106-434, at 1 (1999). The GLBA focuses on the financial services industry and permits combinations of

various types of financial service providers. As emphasized in the Act's legislative history, "These [privacy] provisions apply to banks, securities companies and insurance firms. They also apply to mortgage companies, finance companies, travel agencies and credit card companies." 145 Cong. Rec. H11543 (daily ed. Nov. 4, 1999) (statement of Rep. Leach). These enumerated entities have the primary purpose, unlike law firms or practitioners, of providing financial services.

81. The legislative path of the Act provides further evidence that it was not intended to apply to lawyers. When the Act was introduced in the House of Representatives, it was not referred to the House Judiciary Committee, which has jurisdiction over matters pertaining to the legal profession. Nor was it referred to the Senate Judiciary Committee. Further, neither committee chairman sought to exercise jurisdiction over Title V of the legislation. Instead, it was referred to the House Banking and Financial Services Committee and the House Commerce Committee. The fact that the legislation was not referred to or considered by either of the committees with jurisdiction over matters relating to the legal profession indicates that Congress likely did not intend that law firms and/or individual practitioners be treated as financial institutions subject to the Act's privacy provisions.

82. The distinction between the commonly accepted notion of "financial institution" and lawyers is reflected in comments found in the GLBA conference report and made by legislators considering the bill prior to its enactment:

> I think most of us have this vague concept that when we are dealing with our bank, when we are dealing with our insurance company, when we are dealing with our stockbroker, that stuff is confidential. Isn't it? Isn't that similar to talking with your lawyer about a legal problem or your doctor about a medical problem or

> even sharing with your local pastor, your rabbi, your minister, your religious advisor?

145 Cong. Rec. S13891 (daily ed. Nov. 4, 1999) (statement of Sen. Bryan).

> Paramount to our freedom is the right to privacy; to be left alone and to be secure in the belief that our business is just that, ours and no one else's. When we do share our personal business information with others, it is with the real and reasonable expectation that it remains our property. When dealing with our doctor or lawyer we know that the communication is privileged. Traditionally, when providing information to our banker or insurance agent or our stockbroker, we similarly believe that the information provided was specific to that transaction.

145 Cong. Rec. S13908 (daily ed. Nov. 4, 1999) (statement of Sen. Burns) (emphasis added). These statements indicate a legislative perception that attorneys who provide legal services occupy an entirely distinct category of entities than banks, insurance agents, and stockbrokers -- entities that clearly are within the scope of the GLBA.

H. Congress Provided Expressly For Exemption from the GLBA for State Laws that are Deemed to Provide Greater Privacy Protection than the GLBA

83. Congress clearly intended that Title V of the GLBA not interfere with appropriate state regulation of a business or activity and that the FTC fully credit state regulation in implementing Title V, where the state scheme provides "greater protection" of consumer privacy. Section 507(a) of the Act expressly provides that Title V "shall not be construed as superseding, altering, or affecting any statute, regulation, order, or interpretation in effect in any State, except to the extent that such statute, regulation, order, or interpretation is inconsistent with the provisions of this subtitle, and then only to the extent of the inconsistency." 15 U.S.C. § 6807(a); 16 C.F.R. § 313.17(a).

84. A state statute, regulation, order, or interpretation is "not inconsistent" with the provisions of Title V if the protection afforded by the state scheme is greater than the protection provided under Section V. 15 U.S.C. § 6807(b); 16 C.F.R. § 313.17(b).

85. Furthermore, Congress expressly granted the FTC the authority to issue exceptions to, inter alia, the GLBA's notice and opt-out requirements when such exceptions are "deemed consistent with the purposes of" Section V. 15 U.S.C. § 6804(b). The purpose of Section V is to require a financial institution to "respect the privacy of its customers and to protect the security and confidentiality of those customers' nonpublic personal information." 15 U.S.C. § 6801(a).

86. The FTC is not without experience in granting exceptions to Section V, having done so for colleges and universities that comply with the Federal Educational Rights and Privacy Act.. 16 C.F.R. § 313.1(b). Those institutions are deemed by the FTC to be in compliance with the GLBA regulations.

87. Attorneys are in a similar situation to the exempted education institutions in that attorneys must comply with their states' professional codes, which emphatically prohibit and sanction the disclosure of a client's personal information gleaned in the course of communications that arise within the attorney-client relationship.

I. The Regulation of the Attorney-Client Relationship, Including Especially the Privacy and Confidentiality Obligations of Lawyers, Is and Has Been Historically Reserved to the States

88. States have a compelling interest in the practice of lawyers within their boundaries and have broad powers to establish standards for licensing practitioners and regulating the practice of law. States' interest in regulating the practice of law is especially great

since attorneys, as "officers of the court," are essential to the state's function of administering justice.

89. Since the founding of the Republic, the plenary regulation of lawyers has been left exclusively to the states. Over the centuries, an extensive system of judicial supervision of lawyers has emerged, including admission requirements, minimum competency requirements, character requirements, ethical codes, and disciplinary rules, that governs virtually every aspect of a lawyer's professional life. These rules and regulations are promulgated and enforced by the legislature and/or judicial system of each state.

90. As part of the regulation of the profession, each of the fifty states closely regulates the non-disclosure of all information, including "nonpublic personal information" provided by clients to lawyers.

91. Although a parallel system of federal courts exists in each of the fifty states (in addition to specialized federal courts and quasi-judicial or administrative federal forums which maintain their own minimum requirements for practice before them), each such court or forum (i) requires a lawyer to be licensed by one of the states as a condition of appearing in the federal forum, and (ii) generally defers to state regulation when it comes to lawyer discipline and sanctions for violation of state ethical proscriptions regarding client confidentiality. This deference by the legislative, judicial, and executive branches of the federal government has been in place since adoption of the Constitution itself. Even federal judges and federal prosecutors, including FTC lawyers, are required to be members in good standing of one or more state bars or admitted before the highest court of a state, as a precondition of their federal appointments.

92. Based on the plain language of the GLBA, Congress did not intend that Title V interfere with the longstanding and historic state regulation of attorneys and certainly did not

intend to do so sub silentio. The GLBA is wholly devoid of evidence of such an intent, let alone an "unmistakable" one, to radically alter more than 200 years of jurisprudential history and federal/state comity.

J. Both Lawyers and Their Clients Will Suffer Immediate, Severe, and Irreparable Harm as a Result of the Mere Threat of Enforcement of the GLBA Against Lawyers.

93. Compliance with the GLBA will force law firms and solo practitioners to develop and administer costly mechanisms for sending initial and annual privacy notices to "consumers" even though such notices should not be required of lawyers under the plain language of the GLBA.

94. Noncompliance will expose attorneys to enforcement by the FTC, which could result in stiff, potentially debilitating, penalties and other sanctions, including being branded in public as a lawyer accused of violating federal law "regulating" lawyers.

95. Compliance will also result inexorably and inevitably in serious confusion and misunderstanding on the part of clients who will view privacy notices from lawyers in the same light as they view privacy notices received from their banks — as putting them on notice that their information can be shared unless they opt out. Confusion (and misinformation) of this sort will impair the cornerstone of the attorney-client relationship: trust in the attorney's discretion, circumspection, and restraint.

96. Preemption of state law by the GLBA would also radically alter the historic comity between state and federal regulation of the bar and cause havoc in the regulation of attorney-client relationships.

97. Most seriously, the purported applicability of the GLBA to the ethical confidentiality obligations of lawyers will effectively undermine the well-developed system of

state regulation and state schemes for the protection of clients and their confidential and privileged information, and subvert rather than advance the articulated purpose of the privacy provisions of the GLBA.

V. DEMAND FOR DECLARATORY AND OTHER RELIEF

WHEREFORE, plaintiff NYSBA, on behalf of its more than 70,000 members and their millions of clients, respectfully prays for entry of an order declaring that:

(i) Congress has exceeded its authority under the Tenth Amendment to the Constitution of the United States to the extent it intended the definition of "Financial Institution" in Title V of the GLBA (15 U.S.C. § 6809(3) to apply to practicing attorneys subject to the licensing and ethical requirements of the various states, including the State of New York;

(ii) Alternatively, the text, structure, and legislative history of the GLBA make it abundantly and manifestly clear that Congress did not intend for the GLBA to cover the attorney-client relationship and the Act fails to contain any evidence of an "unmistakable intention" by Congress to radically alter the balance of federal-state authority and responsibility in the regulation of the attorney-client relationship;

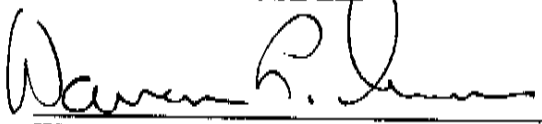
(iii) The Federal Trade Commission, by failing and refusing to issue the requested exemption for the purpose of unambiguously clarifying that the GLBA does not apply to practicing lawyers, and by maintaining the very real threat of prosecution of lawyers under the GLBA, has acted and is acting in a manner violative of and inconsistent with the authority and responsibility granted to it under the GLBA by Congress, and is, thereby, acting in a manner that is arbitrary, capricious, and contrary to law;

(iv) The prospect of prosecution of practicing lawyers by the FTC under the GLBA causes and threatens to cause immediate and irreparable harm to practicing lawyers and their clients by virtue of lawyers being simultaneously required to comply with two ostensibly conflicting sets of legal obligations, in that compliance with the GLBA will cause (or authorize) lawyers to violate their ethical obligations to clients under the regulatory schemes of the various states, thereby subjecting them to severe sanctions, malpractice litigation, and potential loss of the license to practice law; and

(v) Awarding plaintiff such other and further relief as the Court deems just and proper.

Date: April 29, 2002

PROSKAUER ROSE LLP



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