

RESOLUTION 7-10-03

DIGEST

Financial Institutions: Restricting Disclosure of Personal Information

Adds Financial Code section 4050 et seq. to restrict financial institutions' disclosure of personal financial information without the consumer's consent.

RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

History:

None known.

Reasons:

This resolution adds Financial Code section 4050 et seq. to restrict financial institutions' disclosure of personal financial information without the consumer's consent. This resolution should be approved in principle because Californians should be able to control dissemination of their personal information.

Under federal law (the Gramm-Leach Bliley Act, 15 U.S.C., § 6801 et seq.), financial institutions may disclose their customers' nonpublic personal information to affiliates of the institution and, unless the consumer directs otherwise (i.e., "opts out"), to unaffiliated third parties. Under this resolution (which contains complex definitions, qualifications, and exceptions), financial institutions must give consumers an opportunity to elect what disclosures are permissible. Having properly afforded that opportunity, financial institutions generally (a) may disclose to affiliates unless the consumer opts out but (b) may not disclose to unaffiliated others unless the consumer affirmatively consents (i.e., "opts in"). Failure to comply is punishable by civil penalties up to \$2,500 per violation, but not to exceed \$500,000 per occurrence, for negligent disclosures. Civil penalties double if a violation results in identity theft.

Our information age poses privacy risks and increases hazards like identity theft. All other things being equal, individuals should be able to control dissemination of their personal information. Therefore, unless the burdens of compliance are demonstrably too great, the presumption should be in favor of empowering Californians to choose.

This resolution is similar to Senate Bill No. 1, Regular Session 2002-2003, which passed the Senate with amendments on March 3, 2003, and has been further amended in the Assembly, where it is pending as of June 15, 2003.

SECTION/COMMITTEE REPORT

BUSINESS LAW SECTION, STATE BAR OF CALIFORNIA

Resolution 7-10-03 advocates the adoption of financial privacy legislation in California in the form of SB1 (2003) that was introduced by State Senator Jackie Speier. The Financial Institutions Committee of the Business Law Section (the "Committee") believes that it would be inappropriate for the Conference of Delegates California Bar Associations ("CDCBA"), or the State Bar to take sides in the debate on this extremely political issue. SB1 is the subject of powerful and varied efforts to shape the final legislation by numerous factions with wildly differing points of view. Many consumer-oriented organizations have endorsed SB1 or the concepts behind it. Even the financial services industry itself does not speak with one voice. The Chairman of E-Loan, Inc. is backing an initiative that is even more privacy-protective than SB1, while some banking companies are extremely concerned that SB1 in its current form will damage their business and deny customers such benefits as interstate banking and convenient access to an

array of investment options.

In this politically charged and rather noisy debate, the Committee believes it is inappropriate for the CDCBA, or the State Bar to endorse one group's point of view. This is not a matter in which the expertise of attorneys in the drafting of laws and the administration of justice is of any particular significance. Whether affiliated financial services companies should be able to trade customer information easily, and whether it should be easy or hard for third parties to market to bank, brokerage and insurance customers, are questions resolved by considerations of privacy, personal autonomy and economic efficiency. We believe that broad-based attorney organizations will only squander their credibility by leaping into a political fray that has little to do with the special skills and experience of attorneys.

Accordingly, the Committee strongly recommends that the CDCBA not adopt this proposed resolution.

TEXT OF RESOLUTION

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that legislation be sponsored to add Financial Code Division 1.2, sections 4050, 4051, 4051.5, 4052, 4053, 4053.5, 4054, 4054.6, 4056, 4056.5, 4057, 4058, 4058.5 and 4059 to read as follows:

- 1 §4050
2 This division shall be known and may be cited as the California Financial Information
3 Privacy Act.
4
5 §4051
6 (a) The Legislature intends for financial institutions to provide their consumers notice and
7 meaningful choice about how consumers' nonpublic personal information is shared or sold by their
8 financial institutions.
9 (b) It is the intent of the Legislature in enacting the California Financial Information Privacy
10 Act to afford persons greater privacy protection than those provided in Public Law 106-102, the
11 federal Gramm-Leach-Bliley Act, and that this division be interpreted to be consistent with that
12 purpose.
13
14 §4051.5
15 (a) The Legislature finds and declares all of the following:
16 (1) The California Constitution protects the privacy of California citizens from unwarranted
17 intrusions into their private and personal lives.
18 (2) Federal banking legislation, known as the Gramm-Leach-Bliley Act, which breaks down
19 restrictions on affiliation among different types of financial institutions, increases the likelihood that
20 the personal financial information of California residents will be widely shared among companies.
21 (3) The policies intended to protect financial privacy imposed by the Gramm-Leach-Bliley
22 Act are inadequate to meet the privacy concerns of California residents.
23 (4) Because of the limitations of these federal policies, the Gramm-Leach-Bliley Act
24 explicitly permits states to enact privacy protections that are stronger than those provided in federal
25 law.
26 (b) It is the intent of the Legislature in enacting this division:
27 (1) To ensure that Californians have the ability to control the disclosure of personally
28 identifiable financial information for purposes other than those of the transactions into which they
29 have entered.
30 (2) To achieve that control for California consumers by requiring that financial institutions
31 that want to share information with third parties and unrelated companies seek and acquire the

32 affirmative consent of California consumers.

33 (3) To further achieve that control for California consumers by providing consumers with the
34 ability to prevent the sharing of financial information among affiliated companies through a simple
35 opt-out mechanism.

36 (4) To provide a level playing field among types and sizes of businesses, including providing
37 that those financial institutions with limited affiliate relationships may enter into agreements with
38 other financial institutions on an “affiliate-equivalent” basis, as defined in statute, and providing
39 that the different business models of differing financial institutions are treated in ways that provide
40 consistent consumer control over information-sharing practices.

41 (5) To adopt to the maximum extent feasible, definitions consistent with federal law, so that
42 in particular there is no change in the ability of businesses to carry out normal processes of
43 commerce for transactions voluntarily entered into by consumers.

44
45 §4052

46 For the purposes of this division:

47 (a) “Nonpublic personal information” means personally identifiable financial information
48 (1) provided by a consumer to a financial institution, (2) resulting from any transaction with the
49 consumer or any service performed for the consumer, or (3) otherwise obtained by the financial
50 institution. Nonpublic personal information does not include publicly available information that the
51 financial institution has a reasonable basis to believe is lawfully made available to the general public
52 from (1) federal, state, or local government records, (2) widely distributed media, or (3) disclosures
53 to the general public that are required to be made by federal, state, or local law. Nonpublic personal
54 information shall include any list, description, or other grouping of consumers, and publicly
55 available information pertaining to them that is derived using any nonpublic personal information
56 other than publicly available information, but shall not include any list, description, or other
57 grouping of consumers, and publicly available information pertaining to them that is derived without
58 using any nonpublic personal information.

59 (b) “Personally identifiable financial information” means information (1) that a consumer
60 provides to a financial institution to obtain a product or service from the financial institution, (2)
61 about a consumer resulting from any transaction involving a product or service between the financial
62 institution and a consumer, or (3) that the financial institution otherwise obtains about a consumer in
63 connection with providing a product or service to that consumer. Any personally identifiable
64 information is financial if it was obtained by a financial institution in connection providing a
65 financial product or service to a consumer, including the fact that a consumer is a customer of a
66 financial institution or has obtained a financial product or service from a financial institution.
67 Personally identifiable financial information includes all of the following:

68 (1) Information a consumer provides to a financial institution on an application to obtain a
69 loan, credit card, or other financial product or service.

70 (2) Account balance information, payment history, overdraft history, and credit or debit card
71 purchase information.

72 (3) The fact that an individual is or has been a consumer of a financial institution or has
73 obtained a financial product or service from a financial institution.

74 (4) Any information about a financial institution’s consumer if it is disclosed in a manner
75 that indicates that the individual is or has been the financial institution’s consumer.

76 (5) Any information that a consumer provides to a financial institution or that a financial
77 institution or its agent otherwise obtains in connection with collecting on a loan or servicing a loan.

78 (6) Any personally identifiable financial information collected through an Internet cookie or
79 an information collecting device from a Web server.

80 (7) Information from a consumer report.

81 (c) “Financial institution” means any institution the business of which is engaging in
82 financial activities as described in Section 1843(k) of Title 12 of the United States Code and doing

83 business in this state. An institution that is not significantly engaged in financial activities is not a
84 financial institution. The term “financial institution” does not include the Federal Agricultural
85 Mortgage Corporation or any entity chartered and operating under the Farm Credit Act of 1971 (12
86 U.S.C. Sec. 2001 et seq.), provided that the entity does not sell or transfer nonpublic personal
87 information to an affiliate or a nonaffiliated third party. The term “financial institution” does not
88 include any provider of professional services, or any wholly owned affiliate thereof, that is
89 prohibited by rules of professional ethics or applicable law from voluntarily disclosing confidential
90 client information without the consent of the client.

91 (d) “Affiliate” means any entity that controls, is controlled by, or is under common control
92 with, another entity, but does not include a employee of the entity and the affiliate. A franchisor,
93 including any affiliate thereof, shall be deemed an affiliate of the franchisee for purposes of this
94 division. A financial institution and one or more of its affiliated entities shall be deemed a single
95 entity for purposes of this division to the extent that (1) the financial institution and its affiliated
96 entities are offering financial products or services in conjunction with and as part of a business that is
97 significantly engaged in at least the following financial activities: (A) investment management
98 services, (B) portfolio advisory services, and (C) financial planning, and (2) the operations of the
99 financial institution and its affiliated entities are integrated and that integration facilitates the
100 provision of those services.

101 (e) “Nonaffiliated third party” means any entity that is not an affiliate of, or related by
102 common ownership or affiliated by corporate control with, the financial institution, but does not
103 include a joint employee of that institution and a third party.

104 (f) “Consumer” means an individual resident of this state who obtains or has obtained a
105 financial product or service from a financial institution, or that individual’s legal representative. For
106 purposes of this division, an individual resident of this state is someone whose last known mailing
107 address, other than an Armed Forces Post Office or Fleet Post Office address, as shown in the
108 records of the financial institution, is located in this state. For purposes of this division, an
109 individual is not a consumer of a financial institution solely because he or she is (1) a participant or
110 beneficiary of an employee benefit plan that a financial institution administers or sponsors, or for
111 which the financial institution acts as a trustee, insurer, or fiduciary, (2) covered under a group or
112 blanket insurance policy or group annuity contract issued by the financial institution, (3) a
113 beneficiary in a workers’ compensation plan, (4) a beneficiary of a trust for which the financial
114 institution is a trustee, or (5) a person who has designated the financial institution as trustee for a
115 trust provided that (A) the financial institution provides all required notices and rights required by
116 this division to the plan sponsor, group or blanket insurance policyholder, or group annuity
117 contractholder and (B) the financial institution does not disclose to any affiliate or any nonaffiliated
118 third-party nonpublic personal information about the individual except as authorized in Section 4056.

119 (g) “Control” means (1) ownership or power to vote 25 percent or more of the outstanding
120 shares of any class of voting security of a company, acting through one or more persons, (2) control
121 in any manner over the election of a majority of the directors, or of individuals exercising similar
122 functions, or (3) the power to exercise, directly or indirectly, a controlling influence over the
123 management or policies of a company. However, for purposes of the application of the definition of
124 control as it relates to credit unions, a credit union has a controlling influence over the management
125 or policies of a credit union service organization (CUSO), as that term is defined by state or federal
126 law or regulation, if the CUSO is at least 67 percent owned by credit unions. For purposes of the
127 application of the definition of control to a financial institution subject to regulation by the United
128 States Securities and Exchange Commission, a person who owns beneficially, either directly or
129 through one or more controlled companies, more than 25 percent of the voting securities of a
130 company is presumed to control the company, and a person who does not own more than 25 percent
131 of the voting securities of a company is presumed not to control the company, and a presumption
132 regarding control may be rebutted by evidence, but in the case of an investment company, the
133 presumption shall continue until the United States Securities and Exchange Commission makes a

134 decision to the contrary according to the procedures described in Section 2(a)(9) of the federal
135 Investment Company Act of 1940.

136 (h) “Necessary to effect, administer, or enforce” means the following:

137 (1) The disclosure is required, or is a usual, appropriate, or acceptable method to carry out
138 the transaction or the product or service business of which the transaction is a part, and record or
139 service or maintain the consumer’s account in the ordinary course of providing the financial service
140 or financial product, or to administer or service benefits or claims relating to the transaction or the
141 product or service business of which it is a part, and includes the following:

142 (A) Providing the consumer or the consumer’s agent or broker with a confirmation,
143 statement, or other record of the transaction, or information on the status or value of the financial
144 service or financial product.

145 (B) The accrual or recognition of incentives or bonuses associated with the transaction or
146 communications to eligible existing consumers of the financial institution regarding the availability
147 of those incentives and bonuses that are provided by the financial institution or another party.

148 (2) The disclosure is required or is one of the lawful or appropriate methods to enforce the
149 rights of the financial institution or of other persons engaged in carrying out the financial transaction
150 or providing the product or service.

151 (3) The disclosure is required, or is a usual, appropriate, or acceptable method for insurance
152 underwriting or the placement of insurance products by licensed agents and brokers with authorized
153 insurance companies at the consumer’s request, for reinsurance, stop loss insurance, or excess loss
154 insurance purposes, or for any of the following purposes as they relate to a consumer’s insurance:

155 (A) Account administration.

156 (B) Reporting, investigating, or preventing fraud or material misrepresentation.

157 (C) Processing premium payments.

158 (D) Processing insurance claims.

159 (E) Administering insurance benefits, including utilization review activities.

160 (F) Participating in research projects.

161 (G) As otherwise required or specifically permitted by federal or state law.

162 (4) The disclosure is required, or is a usual, appropriate, or acceptable method, in connection
163 with the following:

164 (A) The authorization, settlement, billing, processing, clearing, transferring, reconciling, or
165 collection of amounts charged, debited, or otherwise paid using a debit, credit or other payment card,
166 check, or account number, or by other payment means.

167 (B) The transfer of receivables, accounts, or interests therein.

168 (C) The audit of debit, credit, or other payment information.

169 (i) “Financial product or service” means any product or service that a financial holding
170 company could offer by engaging in an activity that is financial in nature or incidental to a financial
171 activity under subsection (k) of Section 1843 of Title 12 of the United States Code (the United States
172 Bank Holding Company Act of 1956). Financial service includes a financial institution’s evaluation
173 or brokerage of information that the financial institution collects in connection with a request or an
174 application from a consumer for a financial product or service.

175 (j) “Clear and conspicuous” means that a notice is reasonably understandable and designed
176 to call attention to the nature and significance of the information contained in the notice.

177 (k) “Widely distributed media” means media available to the general public and includes a
178 telephone book, a television or radio program, a newspaper, or a Web site that is available to the
179 general public on an unrestricted basis.

180
181 §4053

182 (a) A financial institution shall not disclose to, or share a consumer’s nonpublic personal
183 information with, any nonaffiliated third party, unless the financial institution has provided written
184 notice pursuant to subdivision (c) to the consumer to whom the nonpublic personal information

185 relates and unless the financial institution has obtained a consent acknowledgment from the
186 consumer pursuant to subdivision (c) that authorizes the financial institution to disclose or share the
187 nonpublic personal information. Nothing in this section shall prohibit the disclosure of nonpublic
188 personal information as allowed in Section 4056. A financial institution shall not deny a consumer a
189 financial product or a financial service because the consumer has not provided the consent required
190 by this subdivision to authorize the financial institution to disclose or share his or her nonpublic
191 personal information with any nonaffiliated third party. Nothing in this section is intended to
192 prohibit a financial institution from offering incentives to elicit a specific response to the notice.

193 (b)(1) A financial institution shall not disclose to, or share a consumer's nonpublic personal
194 information with, an affiliate unless the financial institution clearly and conspicuously notifies the
195 consumer annually in writing pursuant to subdivision (c) that the nonpublic personal information
196 may be disclosed to an affiliate of the financial institution and the consumer has not directed that the
197 nonpublic personal information not be disclosed. A financial institution does not disclose
198 information to, or share information with, its affiliate merely because information is maintained in
199 common information systems or databases, and employees of the financial institution and its affiliate
200 have access to those common information or databases, or a consumer accesses a Web site jointly
201 operated or maintained under a common name by or on behalf of the financial institution and its
202 affiliate, provided that nonpublic personal information is used or otherwise disclosed only as
203 permitted by this division.

204 (2) Subdivision (a) shall not prohibit the release of nonpublic personal information by a
205 financial institution with whom the consumer has a relationship to a nonaffiliated financial institution
206 for purposes of jointly offering a financial product or financial service pursuant to a written
207 agreement with the financial institution that receives the nonpublic personal information provided
208 that all of the following requirements are met:

209 (A) The financial product or service offered is a product or service of, and is provided by, at
210 least one of the financial institutions that is a party to the written agreement.

211 (B) The financial product or service is jointly offered, endorsed, or sponsored, and clearly
212 and conspicuously identifies for the consumer the financial institutions that release the nonpublic
213 personal information and the financial institutions that receive that information.

214 (C) The written agreement provides that the financial institution that receives that nonpublic
215 personal information is required to maintain the confidentiality of the information and is prohibited
216 from disclosing or using the information other than to carry out the joint offering or servicing of a
217 financial product or financial service that is the subject of the written agreement.

218 (D) The financial institution that releases the nonpublic personal information has complied
219 with subdivision (c) and the consumer has not directed that the nonpublic personal information not
220 be disclosed. The financial institution may, at its option, choose instead to comply with the
221 requirements of subdivision (a).

222 (E) Notwithstanding this section, until January 1, 2005, a financial institution may disclose
223 nonpublic personal information to a nonaffiliated financial institution pursuant to a preexisting
224 contract with the nonaffiliated financial institution, for purposes of offering a financial product or
225 financial service, if that contract was entered into on or before January 1, 2004. Beginning on
226 January 1, 2005, no nonpublic personal information may be disclosed pursuant to that contract unless
227 all the requirements of this subdivision are met.

228 (3) Nothing in this subdivision shall prohibit a financial institution from disclosing or
229 sharing nonpublic personal information as otherwise specifically permitted by this division.

230 (c)(1) The form set forth in this subdivision or one substantially similar shall be sent by the
231 financial institution to the consumer so that the consumer may make a decision and provide direction
232 to the financial institution regarding the sharing of his or her nonpublic personal information. A
233 form shall not be deemed substantially similar for purposes of this subdivision unless at least all of
234 the following requirements are met:

235 (A) The form uses the same title ("IMPORTANT PRIVACY CHOICES FOR

236 CALIFORNIANS’’) and headers (headings designated in all capital letters in the form set forth
237 below, such as ‘‘SHARING INFORMATION WITH AFFILIATED COMPANIES’’).

238 (B) The titles and headers in the form are clearly and conspicuously displayed, and no text in
239 the form is smaller than 10-point type.

240 (C) The form is a separate document.

241 (2)(A) None of the instructional items appearing in parentheses in the form set forth below
242 shall appear in the form provided to the consumer, as those items are for explanation purposes only.
243 If a financial institution does not disclose or share nonpublic personal information as described in
244 any one or more of the first three headers of the form, the financial institution is not required to
245 include the applicable header or headers, and the accompanying information and box, in the form it
246 provides pursuant to this subdivision.

247
248 IMPORTANT PRIVACY CHOICES FOR CALIFORNIANS

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250 California consumers have rights beyond those offered under federal law to control the
251 sharing of some personal information by financial institutions. Please read the following information
252 carefully before making your choices below.

253 Consumers have the following rights to restrict the sharing of personal and financial
254 information with affiliates (companies we own or control) and nonaffiliated third parties:

255 SHARING INFORMATION WITH AFFILIATED COMPANIES: Unless you prohibit us
256 from doing so, we may share personal and financial information about you with our affiliates.

257 () I prohibit you from sharing personal and financial information with affiliated companies.

258 SHARING INFORMATION WITH FINANCIAL COMPANIES WITH WHOM WE
259 CONTRACT: Unless you prohibit us from doing so, we may share personal and financial
260 information about you with nonaffiliated financial companies with whom we contract to provide
261 financial products and services.

262 () I prohibit you from sharing personal and financial information with financial companies
263 with whom you contract to provide financial products and services.

264 SHARING INFORMATION WITH NONAFFILIATED COMPANIES: Unless you
265 authorize us to do so, we may not share personal and financial information about you with third party
266 companies with whom we have not entered into a contract.

267 () I authorize you to share my personal and financial information with nonaffiliated
268 companies.

269 I WANT TO RESTRICT THE SHARING OF MY INFORMATION TO THE GREATEST
270 EXTENT ALLOWED BY LAW.

271 () I prohibit you from sharing my personal and financial information with affiliates,
272 nonaffiliated financial institutions, or other third parties. This may lead to my being offered fewer
273 products and services.

274 Nothing in this form prohibits the sharing of information as necessary to administer your
275 account or policy or as allowed by, or required to comply with, state or federal law, nor does it
276 prohibit us from sending you information to market other products or services.

277 You may return this form at any time and your choices will remain in effect unless you
278 request a change. However, if we do not hear from you within 45 days of sending this notice to you,
279 we may share some of your information with affiliated companies and other nonaffiliated financial
280 institutions with whom we have contracts.

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282 Name:

283 Account or Policy Number(s):[to be filled in by consumer]

284 Signature:

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To exercise your choices do one of the following:
(1) Fill out, sign, and send back this form to us using the envelope provided (you may want to make a copy for your records); [or]
(2) Call this toll-free number (800)xxx-xxxx: or (xxx)xxx-xxxx; [or]
(3) Reply electronically by contacting us through the following Internet option: xxx@xxx.

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(B) If a consumer selects the box associated with the header restricting information sharing to the greatest extent allowed by law, that choice shall supersede all other choices.

(C) A financial institution shall not be in violation of this subdivision solely because it includes in the form one or more brief examples or explanations of the purpose or purposes, or context, within which information will be shared.

(D) The outside of the envelope in which the form is sent shall clearly state in 16-point boldface type “IMPORTANT PRIVACY CHOICES,” except that a financial institution sending the form to a consumer in the same envelope as a bill or account statement does not have to include the wording “IMPORTANT PRIVACY CHOICES” on that envelope. The form shall be sent in any of the following ways:

(i) With a bill or other statement of account, in which case the information required by Title V of the Gramm-Leach-Bliley Act may also be included.

(ii) As a separate notice or with the information required by Title V of the Gramm-Leach-Bliley Act, and including only information related to privacy.

(iii) With any other mailing, in which case it shall be the first page of the mailing.

(3) The consumer shall be provided an opportunity, before disclosure of information pursuant to this division, for 45 days from the date of postmark or other postal verification of mailing of the initial notice required by this subdivision, to direct that the nonpublic personal information not be disclosed except as otherwise permitted by this division. A consumer may direct at any time his or her nonpublic personal information not be disclosed, except as otherwise permitted by this division. A financial institution shall comply with a consumer’s directions concerning the sharing of his or her nonpublic personal information within 45 days of receipt by the financial institution. When a consumer directs that nonpublic personal information not be disclosed, that direction is in effect until otherwise stated by the consumer.

(4) A financial institution shall not deny a consumer a financial product or a financial service because the consumer has directed pursuant to subdivision (b) that his or her nonpublic personal information not be disclosed provided that nothing in this section shall prohibit the disclosure of nonpublic personal information allowed by Section 4056. Nothing in this section is intended to prohibit a financial institution from offering incentives to elicit a specific response to the notice.

(5) A financial institution may elect to comply with the requirements of subdivision (a) with respect to disclosure of nonpublic personal information to an affiliate or with respect to nonpublic personal information disclosed pursuant to paragraph (2) of subdivision (b).

(6) If a financial institution does not have a continuing relationship with a consumer other than the initial transaction in which the product or service is provided, no annual disclosure requirement exists pursuant to this section as long as the financial institution provides the consumer with the form required by this section at the time of the initial transaction. As used in this section, “annually” means at least once in any period of 12 consecutive months during which that relationship exists. The financial institution may define the 12-consecutive-month period, but shall apply it to the consumer on a consistent basis. If, for example, a financial institution defines the 12-consecutive-month period as a calendar year and provides the annual notice to the consumer once in each calendar year, it complies with the requirement to send the notice annually.

(7) A financial institution with assets in excess of twenty-five million dollars (\$25,000,000) shall include a self-addressed postage paid return envelope with the notice. A financial institution

338 with assets of up to and including twenty-five million dollars (\$25,000,000) shall include a self-
339 addressed return envelope the notice. In addition to the return envelope required by this paragraph, a
340 financial institution may offer additional means for consumers to communicate their privacy choices,
341 including, but not limited to, calling a toll-free number, sending a facsimile, or using electronic
342 means. A financial institution shall clearly and conspicuously disclose in the form required by this
343 subdivision the information necessary to direct the consumer on how to communicate his or her
344 choices, including the toll-free or facsimile number or Web site address that may be used, if those
345 means of communication are offered by the financial institution.

346 (8) A financial institution shall file a copy of the initial notice or notices required by this
347 subdivision with the Attorney General. No subsequent filing is required until the financial institution
348 modifies the notice, in which case a copy of the notice as modified shall be filed with the Attorney
349 General. Nothing in this paragraph shall be construed to require that a financial institution file with
350 the Attorney General a copy of the notice or notices it provides to consumers more often than once in
351 each calendar year. The interpretations of functional regulators regarding the form required by this
352 subdivision are not entitled to deference by a court.

353 (d) Nothing in this division shall prohibit a financial institution from marketing its own
354 products and services or the products and services of affiliates or nonaffiliated third parties to
355 customers of the financial institution as long as (1) nonpublic personal information is not disclosed in
356 connection with the delivery of the applicable marketing materials to those customers except as
357 permitted by Section 4056 and (2) in cases in which the applicable nonaffiliated third party may
358 extrapolate nonpublic personal information about the consumer responding to those marketing
359 materials, the applicable nonaffiliated third party has signed a contract with the financial institution
360 under the terms of which (A) the nonaffiliated third party is prohibited from retaining or using that
361 information for any purpose, and (B) the financial institution has the right by audit, inspections, or
362 other means to verify the nonaffiliated third party's compliance with that contract.

363 §4053.5

364 Except as otherwise provided in this division, an entity that receives nonpublic personal
365 information from a financial institution under this division shall not disclose this information any
366 other entity, unless the disclosure would be lawful if made directly to the other entity by the financial
367 institution. An entity that receives nonpublic personal information pursuant to any exception set
368 forth in Section 4056 shall not use or disclose the information except in the ordinary course of
369 business to carry out the activity covered by the exception under which the information was
370 received.

371 §4054

372 (a) Nothing in this division shall require a financial institution to provide a written notice to
373 a consumer pursuant to Section 4053 if the financial institution does not disclose nonpublic personal
374 information to any nonaffiliated third party or to any affiliate, except as allowed in this division.

375 (b) A notice provided to a member of a household pursuant to Section 4053 shall be
376 considered notice to all members of that household unless that household contains another individual
377 who also has a separate account with the financial institution.

378 (c)(1) The requirement to send a written notice to a consumer may be fulfilled by electronic
379 means if the following requirements are met:

380 (A) The notice, and the manner in which it is sent, meets all of the requirements for notices
381 that are required by law to be in writing, as set forth in Section 101 of the federal Electronic
382 Signatures in Global and National Commerce Act.

383 (B) All other requirements applicable to the notice, as set forth in this division, are met,
384 including but not limited to, requirements concerning content, timing, form, and delivery.

385 (C) The notice is delivered to the consumer in a form the consumer may keep.

386 (2) A notice that is made available to a consumer, and is not delivered to the consumer, does
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389 not satisfy the requirements of paragraph (1).

390 (3) Any electronic consumer reply to an electronic notice sent pursuant to this division is
391 effective. A person that electronically sends a notice required by this division to a consumer may not
392 by contract, or otherwise, eliminate the effectiveness of the consumer's electronic reply.

393 (4) This division modifies the provisions of Section 101 of the federal Electronic Signatures
394 in Global and National Commerce Act. However, it does not modify, limit, or supersede the
395 provisions of subsection (c), (d), (e), (f), or (h) of Section 101 of the federal Electronic Signatures in
396 Global and National Commerce Act, nor does it authorize electronic delivery of any notice of the
397 type described in subsection (b) of Section 103 of that federal act.

398

399 §4054.6

400 When a financial institution and a membership organization, tax-exempt organization, not-
401 for-profit organization, or a professional sports team that is not a financial institution have an
402 agreement to issue a credit card in the name of the membership organization, tax-exempt
403 organization, not-for-profit organization, or the professional sports team ("affinity card"), the
404 financial institution shall be permitted to disclose to the entity in whose name the card is issued, the
405 names and addresses, including electronic mail addresses, of the financial institution's consumers in
406 receipt of the affinity card if all of the following requirements are satisfied:

407 (a) The financial institution has provided the notice required by this division to the
408 consumer, and the consumer has not directed that confidential consumer information not be
409 disclosed.

410 (b) The financial institution has a contractual agreement with the membership organization,
411 tax-exempt organization, not-for-profit organization, or professional sports team that requires the
412 entity in whose name the affinity card is issued to maintain the confidentiality of the nonpublic
413 personal information and prohibits the entity in whose name the affinity card is issued from using the
414 information for any purposes other than verifying membership, verifying the affinity cardholder's
415 address, or offering the entity's own products or services to the cardholder. Nothing in this section
416 shall prohibit the disclosure of nonpublic personal information allowed by Section 4056.

417 (c) The customer list is not disclosed in any way that reveals or permits extrapolation of any
418 additional nonpublic personal information about any customer on the list.

419 (d) If the entity in whose name the card is issued sends any message to any electronic mail
420 addresses obtained pursuant to this section, the message shall include at least both of the following:

421 (1) The identity of the sender of the message.

422 (2) A cost-free means for the recipient to notify the sender not to electronically mail any
423 further messages to the recipient.

424

425 §4056

426 (a) This division shall not apply to information that is not personally identifiable to a
427 particular person.

428 (b) Sections 4053 and 4054 shall not prohibit the release of nonpublic personal information
429 under the following circumstances:

430 (1) The nonpublic personal information is necessary to effect, administer, or enforce a
431 transaction requested or authorized by the consumer, or in connection with servicing or processing a
432 financial product or service requested or authorized by the consumer, or in connection with
433 maintaining or servicing the consumer's account with the financial institution, or with another entity
434 as part of a private label credit card program or other extension of credit on behalf of that entity, or in
435 connection with a proposed or actual securitization or secondary market sale, including sales of
436 servicing rights, or similar transactions related to a transaction of the consumer.

437 (2) The nonpublic personal information is released with the consent of or at the direction of
438 the consumer.

439 (3) The nonpublic personal information is:

440 (A) Released to protect the confidentiality or security of the financial institution's records
441 pertaining to the consumer, the service or product, or the transaction therein.

442 (B) Released to protect against or prevent actual or potential fraud, identity theft,
443 unauthorized transactions, claims, or other liability.

444 (C) Released for required institutional risk control, or for resolving customer disputes or
445 inquiries.

446 (D) Released to persons holding a legal or beneficial interest relating to the consumer,
447 including for purposes of debt collection.

448 (E) Released to persons acting in a fiduciary or representative capacity on behalf of the
449 consumer.

450 (4) The nonpublic personal information is released to provide information to insurance rate
451 advisory organizations, guaranty funds or agencies, applicable rating agencies of the financial
452 institution, persons assessing the institution's compliance with industry standards, and the
453 institution's attorneys, accountants, and auditors.

454 (5) The nonpublic personal information is released to the extent specifically required or
455 specifically permitted under other provisions of law and in accordance with the Right to Financial
456 Privacy Act of 1978 (12 U.S.C. Sec. 3401 et seq.), to law enforcement agencies, including a federal
457 functional regulator, the Secretary of the Treasury with respect to subchapter II of Chapter 53 of
458 Title 31, and Chapter 2 of Title I of Public Law 91-508 (12 U.S.C. Secs. 1951-1959), the California
459 Department of Insurance or other state insurance regulators, or the Federal Trade Commission, and
460 self-regulatory organizations, or for an investigation on a matter related to public safety.

461 (6) The nonpublic personal information is released in connection with a proposed or actual
462 sale, merger, transfer, or exchange of all or a portion of a business or operating unit if the disclosure
463 of nonpublic personal information concerns solely consumers of the business or unit.

464 (7) The nonpublic personal information is released to comply with federal, state, or local
465 laws, rules, and other applicable legal requirements; to comply with a properly authorized civil,
466 criminal, administrative, or regulatory investigation or subpoena or summons by federal, state, or
467 local authorities; or to respond to judicial process or government regulatory authorities having
468 jurisdiction over the financial institution for examination, compliance, or other purposes as
469 authorized by law.

470 (8) When a financial institution is reporting a known or suspected instance of elder or
471 dependent adult financial abuse or is cooperating with a local adult protective services agency
472 investigation of known or suspected elder or dependent adult financial abuse pursuant to Article 3
473 (commencing with Section 15630) of Chapter 11 of Part 3 of Division 9 of the Welfare and
474 Institutions Code.

475 (9) The nonpublic personal information is released to an affiliate or a nonaffiliated third
476 party in order for the affiliate or nonaffiliated third party to perform services, such as mailing
477 services, data processing or analysis, or customer surveys, on behalf of the financial institution,
478 provided that all of the following requirements are met:

479 (A) The services to be performed by the affiliate or nonaffiliated third party could lawfully
480 be performed by the financial institution.

481 (B) There is a written contract between the affiliate or nonaffiliated third party and the
482 financial institution that prohibits the affiliate or nonaffiliated third party, as the case may be, from
483 disclosing using the nonpublic personal information other than to carry out the purpose for which the
484 financial institution disclosed the information, as set forth in the written contract.

485 (C) The nonpublic personal information provided to the affiliate or nonaffiliated third party
486 is limited to that which is reasonably necessary for the affiliate or nonaffiliated third party to perform
487 the services contracted for on behalf of the financial institution.

488 (D) The financial institution does not receive any payment from or through the affiliate or
489 nonaffiliated third party in connection with, or as a result of, the release of the nonpublic personal
490 information.

491 (10) The nonpublic personal information is released to identify or locate missing and
492 abducted children, witnesses, criminals and fugitives, parties to lawsuits, parents delinquent in child
493 support payments, organ and bone marrow donors, pension fund beneficiaries, and missing heirs.

494 (11) The nonpublic personal information is released to a real estate appraiser licensed or
495 certified by the state for submission to central data repositories such as the California Market Data
496 Cooperative, and the nonpublic personal information is compiled strictly to complete other real
497 estate appraisals and is not used for any other purpose.

498 (12) The nonpublic personal information is released as required by Title III of the federal
499 United and Strengthening America by Providing Appropriate Tools Required to Intercept and
500 Obstruct Terrorism Act of 2001 (USA Patriot Act; P.L. 107-56).

501 (c) Nothing in this division is intended to change existing law relating to access by law
502 enforcement agencies to information held by financial institutions.

503
504 §4056.5

505 (a) The provisions of this division do not apply to any person or entity that meets the
506 requirements of paragraph (1) or (2) below. However, when nonpublic personal information is being
507 or will be shared by a person or entity meeting the requirements of paragraph (1) or (2) with an
508 affiliate or nonaffiliated third party, this division shall apply.

509 (1) The person or entity is licensed in one or both of the following categories and is acting
510 within the scope of the respective license or certificate:

511 (A) As an insurance producer, licensed pursuant to Chapter 5 (commencing with Section
512 1621), Chapter 6 (commencing with Section 1760), or Chapter 8 (commencing with Section 1831) of
513 Division 1 of the Insurance Code, as a registered investment adviser pursuant to Chapter 3
514 (commencing with Section 25230) of Part 3 of Division 1 of Title 4 of the Corporations Code, or as
515 an investment adviser pursuant to Section 202(a)(11) of the federal Investment Advisers Act of 1940.

516 (B) Is licensed to sell securities by the National Association of Securities Dealers (NASD).

517 (2) The person or entity meets the requirements in paragraph (1) and has a written
518 contractual agreement with another person or entity described in paragraph (1) and the contract
519 clearly and explicitly includes the following:

520 (A) The rights and obligations between the licensees arising out of the business relationship
521 relating to insurance or securities transactions.

522 (B) An explicit limitation on the use of nonpublic personal information about a consumer to
523 transactions authorized by the contract and permitted pursuant to this division.

524 (C) A requirement that transactions specified in the contract fall within the scope of
525 activities permitted by the licenses of the parties.

526 (b) The restrictions on disclosure and use of nonpublic personal information, and the
527 requirement for notification and disclosure provided in this division, shall not limit the ability of
528 insurance producers and brokers to respond to written or electronic, including telephone, requests
529 from consumers seeking price quotes on insurance products and services or to obtain competitive
530 quotes to renew an existing insurance contract, provided that any nonpublic personal information
531 disclosed pursuant to this subdivision shall not be used or disclosed except in the ordinary course of
532 business in order to obtain those quotes.

533
534 §4057

535 (a) An entity that negligently discloses or shares nonpublic personal information in violation
536 of this division shall be liable, irrespective of the amount of damages suffered by the consumer as a
537 result of that violation, for a civil penalty not to exceed two thousand five hundred dollars (\$2,500)
538 per violation. However, total civil penalty awarded pursuant to this subdivision shall not exceed five
539 hundred thousand dollars (\$500,000) per occurrence.

540 (b) An entity that knowingly and willfully obtains, discloses, shares, or uses nonpublic
541 personal information in violation of this division shall be liable for a civil penalty not to exceed two

542 thousand five hundred dollars (\$2,500) per violation.
543 (c) In determining the penalty to be assessed pursuant to a violation of this division, the court
544 shall take into account the following factors:
545 (1) The total assets and net worth of the violating entity.
546 (2) The nature and seriousness of the violation.
547 (3) The persistence of the violation, including any attempts to correct the situation leading to
548 the violation.
549 (4) The length of time over which the violation occurred.
550 (5) The number of times the entity has violated this division.
551 (6) The harm caused to consumers by the violation.
552 (7) The level of proceeds derived from the violation.
553 (8) The impact of possible penalties on the overall fiscal solvency of the violating entity.
554 (d) In the event a violation of this division results in the identity theft of a consumer, as
555 defined by Section 530.5 of the Penal Code, the civil penalties set forth in this section shall be
556 doubled.
557 (e) This section shall become operative on and after July 1, 2004, for acts in violation of this
558 division that occur on and after July 1, 2004.
559
560 §4058
561 Nothing in this division shall be construed as altering or annulling the authority of any
562 department or agency of the state to regulate any financial institution subject to its jurisdiction.
563
564 §4058.5
565 This division shall preempt and be exclusive of all local agency ordinances and regulations
566 relating to the use and sharing of nonpublic personal information by financial institutions. This
567 section shall apply both prospectively and retroactively.
568
569 §4059
570 The provisions of this division shall be severable, and if any phrase, clause, sentence, or
571 provision is declared to be invalid or is preempted by federal law or regulation, the validity of the
572 remainder of this division shall not be affected thereby.

(Proposed new language underlined; language to be deleted stricken.)

PROPONENT: Bar Association Of San Francisco

STATEMENT OF REASONS

Existing Law: Provides for the regulation of financial institutions by the Department of Financial Institutions and by certain federal agencies. Federal law, the Gramm-Leach-Bliley Act, requires financial institutions to provide a notice to consumers concerning the use by the financial institution of nonpublic personal information, and authorizes consumers to direct that the information not be shared with nonaffiliated third parties. The burden is on the consumer to “opt out” of the financial institution’s information sharing practices.

This Resolution: Duplicates Senate Bill 1 (Speier), presently pending in the California Legislature. SB1 enacts the California Financial Information Privacy Act, which would require financial institutions to provide a specified written form to consumers concerning the sharing of the consumer’s nonpublic personal information. The bill would allow a consumer to direct the financial institution not to share the nonpublic personal information with affiliated companies or with nonaffiliated financial companies. The bill would require the permission of the consumer before the financial institution could share the

nonpublic personal information with other nonaffiliated companies.

The Problem: Present law allows consumers to instruct financial institutions not to share non-public personal information with affiliates or third parties. The financial institutions can share the information unless the consumer instructs the institution to the contrary. This resolution would prohibit the financial institutions from disclosing the consumer's information unless it had obtained the consumer's consent. The proposal would require the institution to obtain permission rather than requiring the consumer to make the request as is now the case.

IMPACT STATEMENT

This resolution does not affect any other law, statute or rule. This resolution has been introduced in the Legislature as SB1 (Speier) 2003.

AUTHOR AND/OR PERMANENT CONTACT: Patrick H. Fabian, Law Office of Patrick H. Fabian
One Embarcadero Center, Suite 500, San Francisco, CA 94111, voice (415) 296-9400, fax (510) 525-5517, e-mail phf@phfabian.com

RESPONSIBLE FLOOR DELEGATE: Patrick H. Fabian