Interpretive Letter No. 01-01 (March 9, 2001)

Scope and effect of Section 48.1 of the Illinois Banking Act as compared to the federal privacy regulations promulgated pursuant to the Gramm-Leach-Bliley Act

This is in response to your inquiry asking whether a state bank may share customer financial records with its parent bank holding company, with its subsidiaries, and with other entities in which it has an equity interest, without first obtaining the customer's consent. You also asked the Office of Banks and Real Estate (the "Agency") to clarify certain issues regarding the privacy provisions of the Act and previous interpretations of those provisions.

Section 48.1(c)(1) of the Illinois Banking Act (the "Act") generally prohibits banks from disclosing financial records or financial information of a customer unless authorized by the customer. 205 ILCS 5/48.1(c)(1). Section 48.1(b) of the Act, however, includes several exceptions to the general prohibition against disclosing customer financial information. In 1998, Section 48.1(b) was amended to add an exception for, "… the exchange in the regular course of business of information between a bank and any *commonly owned affiliate* of the bank, subject to the provisions of the Financial Institutions Insurance Sales Law." 205 ILCS 5/48.1(b)(15) (Emphasis added).

What constitutes a "commonly owned affiliate" for purposes of Section 48.1(b)(15)

You first asked whether the term "commonly owned affiliate" would include a bank's parent holding company, its subsidiaries, and any other entities in which the bank owns an equity interest. [1] The term "commonly owned affiliate" is not defined for purposes of Section 48.1 of the Act, nor is it defined generally in the Act. The Agency must therefore determine its meaning in a manner that achieves the intended purpose of Section 48.1.[2]

It is clear that Section 48.1(b)(15) was intended to reach a limited category of entities that are linked by common ownership with the bank. The exception was not intended to undermine the important protections provided for customer financial information. The phrase "commonly owned" underscores the fact that the General Assembly intended the exception to extend only to those business entities that share a true commonality of interests. Although "commonly owned" is not defined generally in the Act, it is defined in the context of "commonly owned banks" to mean "2 or more banks that each qualify as a bank subsidiary of the same bank holding company pursuant to Section 18 of the Federal Deposit Insurance Act." 205 ILCS 5/2. FDIC regulations implementing Section 18 state that institutions are commonly owned if "more than 50% of the

1 A "bank holding company" is defined in the Illinois Bank Holding Company Act, 205 ILCS 10/1 et seq. The Commissioner has defined a subsidiary of a bank as an entity in which the bank owns a majority of stock (i.e. 50% plus 1 share). Interpretive Letter 96-6 (October 3, 1996).

2 People v. Selby, 698 N.E.2d 1102 (1998) (A fundamental rule of statutory construction is to ascertain the intent of lawmakers); LaBelle v. State Employees Retirement System of Illinois, 638 N.E.2d 412 (1994) (Administrative agencies have broad discretion when making decisions based on the statutes they must enforce).

voting stock of each of the institutions is owned by the same company, individual, or group of closely-related individuals acting in concert." 12 C.F.R. 303.61(b).

Applying this threshold requirement of common ownership, the Agency concludes that the phrase "commonly owned affiliate" includes subsidiaries owned, directly or indirectly, by the bank. In addition, companies which own, directly or indirectly, more than 50% of the bank, and companies which are more than 50% owned, directly or indirectly, by the company that owns a majority of the bank are also deemed to be "commonly owned affiliates." Therefore, a state bank may share customer financial information pursuant to Section 48.1(b)(15) with a subsidiary, a holding company that owns a majority of the bank, and with a sister subsidiary that is majority owned by the holding company. Entities in which the bank owns a minority interest or that the common ownership is only a minority interest are not "commonly owned affiliates."

Interpretive Letter 93-010

You also asked whether the Agency's Interpretive Letter 93-10 ("IL 93-10") has been superceded. IL 93-10 was issued on July 6, 1993, and predated the 1998 amendment to Section 48.1(b) that added paragraph (15) to authorize disclosure of customer information to "commonly owned affiliates." Therefore, the conclusion in IL 93-10 that a bank may not share information with an insurance affiliate has been superceded, and the Agency hereby rescinds IL 93-10.

IL 93-10 also discussed sharing customer lists with non-affiliates of a bank provided "those customer lists are limited to information that is not uniquely identifiable with the customer's bank account activity and status." You requested that we clarify the meaning of that language. Based on the Agency's determination to rescind IL 93-10, that language is now obsolete.

Section 48.1 of the Act contains no specific statutory provision governing the sharing of customer lists by banks. However, the recently enacted federal privacy regulations adopted pursuant to the Gramm-Leach-Bliley Act address the circumstances under which customer lists may be shared with non-affiliated third parties.[3] These federal regulations permit a bank to disclose a list containing customers' names, addresses, and telephone numbers that it reasonably believes to be publicly available and that have not been derived from personally identifiable financial information, provided that in sharing, the bank does not disclose the existence of a customer relationship.[4] State banks and bank counsel should monitor the continuing development of the federal regulations as they relate to customer lists.

3 12 C.F.R. 40, 12 C.F.R. 216, 12 C.F.R. 332, 12 C.F.R. 573.

4 *See* 12 C.F.R. 40.3(n)(3)(ii), 216.3(n)(3)(ii), 332.3(n)(3)(ii), 573.3(n)(3)(ii) and "Section-by-Section Analysis."

Reuse and redisclosure by lawful recipients of financial records

You also asked the Agency to comment on the reuse and re-disclosure of customer financial records that a state bank has properly shared with a recipient. The shared information may only be used by a commonly owned affiliate to the extent the bank could use the information. Thus, a commonly owned affiliate may only disclose information constituting "customer financial records" to other commonly owned affiliates of the state bank from which it received the information. Any other conclusion would seriously erode the protection afforded to customer financial records.[5] A bank may not evade the general prohibition on disclosing financial information by indirectly disclosing the information to outside parties through commonly owned affiliates. If, however, a customer authorizes the bank to disclose customer financial records to an unaffiliated entity, the entity that receives such information may then disclose the information to other third parties, but only to the extent authorized by the customer and not further.

Scope of Section 48.1 versus federal privacy regulations

In addition to the specific questions raised in your letter, you also asked the Agency to provide guidance regarding the privacy provisions of the Act. Since the enactment of the federal privacy regulations, several questions have been raised regarding the current scope and application of Section 48.1 of the Act. Pursuant to the federal regulations, state law is not preempted if state law affords consumers greater privacy protections. Section 48.1(c) of the Act generally requires a state bank to obtain the consent of its customer before that customer's financial information may be disclosed; an affirmative act by the customer. In contrast, the federal privacy regulations require only that consumers be given notice and the opportunity to opt out of disclosures; inaction equals assent. The affirmative authorization required by Section 48.1 clearly provides enhanced protection to customers of state banks and should not be preempted by the federal privacy regulations.

You also pointed out possible confusion concerning the privacy protection afforded a "financial record" under Section 48.1(a) compared to protection afforded "nonpublic personal information" under the federal regulations. The obvious source of confusion appears to be the different terms used in Section 48.1 of the Act and the federal privacy regulations. Despite different terms, it appears that the protections for customer financial records contained in the Act generally are consistent with the restrictions on the use of nonpublic personal information described in the federal privacy regulations.

Section 48.1 of the Act restricts banks from sharing customer "financial records" with non-affiliated parties without the consent of the customer. A "financial record" is defined to include:

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5 *See* Village of Fox River Grove v. The Pollution Control Board et al., 702 N.E.2d 656 (1998) (An administrative agency has the power to construe its own rules and regulations to avoid absurd or unfair results).

any original, any copy, or any summary of:

1) a document granting signature authority over a deposit or account;
2) a statement, ledger card, or other record on any deposit or account, which shows each transaction in or with respect to that account;
3) a check, draft, or money order drawn on a bank or issued and payable by a bank; or
4) *any other item containing information pertaining to any relationship established in the ordinary course of a bank's business between a bank and its customer, including financial statements or other financial information provided by the customer.*
   205 ILCS 5/48.1(a) (Emphasis added).

The Agency interprets the phrase highlighted above to include any list, description, or grouping of customers and any publicly available information pertaining to them that is derived using financial information that is not publicly available. The phrase "other financial information" in Section 48.1(a) includes information that a customer provides to a financial institution when seeking a financial product or service, transaction information, and customer information that a financial institution obtains in connection with a transaction providing a financial product or service. Examples of information that would constitute "financial information" include:

1) Information a customer provides to the bank to obtain a loan, credit card, or other financial product or service;
2) Account balance information, payment history, overdraft history, and credit or debit card purchase information;
3) The fact that an individual is or has been a customer of the bank;
4) Any information about a customer if it is disclosed in a manner that indicates that the individual is or has been a customer of the bank;
5) Information a customer provides to the bank or that the bank obtains in connection with collecting on a loan or servicing a loan; and
6) Information from a consumer report.

Although similar, there are some important distinctions between Section 48.1 and the federal privacy regulations. The federal privacy regulations distinguish between a "customer" and a "consumer" and provide customers enhanced privacy protections. Under the federal regulations, a "consumer" is any individual who obtains a financial product or service from a bank that is used primarily *for personal, family, or household purposes*, while a "customer" is a consumer who has established a continuing relationship with the bank.[6] (Emphasis added). In contrast, Section 48.1 only uses the term "customer" but does not define the term for purposes of the section. However, the plain language is clear. All customers (individuals, corporations and other entities) are protected whether they *receive* a financial product or service from a state bank or *seek to obtain* such product or service *for personal or **business** purposes*.[7] (Emphasis added).

6 12 C.F.R. 40.3(e)(1), 216.3(e)(1), 332.3(e)(1), 573.3(e)(1); 12 C.F.R. 40.3(h), 216.3(h), 332.3(h), 573.3(h).

7 *See* remarks of Senator Daley (noting that the bill protects [a customer's] checking account, savings account, or

Thus, even commercial customers of a state bank would be protected under Section 48.1. Examples of customers for purposes of Section 48.1 include:[8]

1. Applicants for a loan, credit card, or other financial product or service for personal or business purposes, even if the bank declines to extend the loan, credit card, or other financial product;
2. Users that obtain a financial product or service at the bank's ATM;
3. Account holders;
4. Borrowers who obtained a loan from the bank;
5. Borrowers whose loan is subject to servicing rights of the bank; and
6. Purchasers of an insurance product from the bank;

Another distinction between Section 48.1 and the federal regulations is the method through which a customer exercises his or her right to opt in or opt out. The federal regulations require a bank to provide a consumer with a reasonable means to exercise an opt out right. The regulations identify specific methods that will be deemed "reasonable" and "unreasonable" that banks and bank counsel should review carefully. [9] In contrast to the federal regulations, Section 48.1 does not require that a bank provide its customer a specific method to authorize disclosure or to opt in. For instance, Section 48.1 does not prohibit banks from incorporating a customer's consent to disclosure into the terms of an account or loan agreement. However, if a bank chooses to use such a method to obtain a customer's consent pursuant to Section 48.1, it must also comply with the federal regulations by providing the customer with a reasonable opportunity to exercise the right to opt out. Thus, if a customer opts in when a customer relationship is established, the bank may only begin sharing information if and when the customer chooses not to exercise his or her right to opt out provided by the federal regulations.

Exceptions to federal privacy regulations also applicable to Section 48.1 of the Act

Section 48.1 of the Act and the federal regulations include different exceptions to their respective privacy provisions. Section 48.1 contains numerous exceptions to the general restrictions on sharing information. Subpart C of the federal regulations, Sections 13, 14, and 15,

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any other transaction with a bank), Senate Transcription Debates at 85, S.B. 2010, 79th General Assembly, 149th Legis. Day (1976) (enacted).

8 This list is not exhaustive. For the comprehensive list of individuals who would qualify as "customers" for purposes of Section 48.1 of the Act, see 12 C.F.R. 40.3(e)(2), 216.3(e)(2), 332.3(e)(2), 573.3(e)(2) and 12 C.F.R. 40.3(h)(2), 216.3(h)(2), 332.3(h)(2), 573.3(h)(2). Note, however, that the limitations in the federal regulations on "personal, family, or household purposes" do not apply to the Section 48.1 definition of customer. Consistent with the federal regulations, grantors and beneficiaries of a trust where the financial institution is acting as trustee, and participants or beneficiaries of an employee benefit plan for which the bank acts as trustee will not be deemed "customers" for purposes of Section 48.1. However, a state bank acting as trustee in those instances will assume fiduciary obligations, including the duty to protect the confidentiality of beneficiaries' information.

9 *See* 12 C.F.R. 40.7(a), 216.7(a), 332.7(a), 573.7(a).

contains different exceptions to the notice and opt-out requirements than those contained in Section 48.1 of the Act.[10] Section 13 provides an exception to the opt out requirements for the disclosure of information to a nonaffiliated third party for marketing on behalf of the bank services, or for services offered pursuant to a joint marketing agreement. Section 14 provides an exception to the notice and opt out requirements for the disclosure of information to a nonaffiliated third party to or to process and service transactions. Section 15 provides several other exceptions to the notice and opt-out provisions, including disclosures of information to fiduciaries or representatives of the customer or disclosures made to protect against fraud and unauthorized transactions. [11] Although Section 48.1 of the Act does not explicitly include these exceptions to its opt in requirement, the exceptions enumerated in the federal regulations are consistent with the purpose of Section 48.1 of the Act. Thus, we believe that a state bank need not obtain a customer's authorization to make disclosures permitted by one of the exceptions contained in Subpart C of the federal regulations.

Notice regarding privacy policy

The federal privacy regulations require financial institutions to send their customers initial and annual notices describing their privacy policies in a clear and conspicuous manner.[12] Section 48.1 of the Act does not explicitly require a notice. However, the federal regulations require banks to describe all privacy policies and practices which would include those required by Section 48.1. Thus, an Illinois bank should be certain that its privacy policies and practices are conducted in accordance with Section 48.1 and are properly disclosed as required by the federal regulations.

Web Site privacy

Internet use presents unique issues regarding a bank's privacy policies and compliance with privacy standards. State-chartered banks should adopt internal measures to ensure compliance with privacy requirements when they provide service or otherwise communicate with their customers using the Internet.[13] To ensure compliance, privacy statements should be displayed prominently on an electronic site. Privacy notices should be placed at locations where they will be most meaningful to customers. For instance, placing the notice on a frequently accessed screen or placing a link from a homepage that connects the customer directly to a privacy notice are effective ways of communicating the bank's privacy policies. When the bank is conducting a transaction, such as an on-line credit application, it should display its privacy

10 12 C.F.R. 40.13-15, 216.13-15, 332.13-15, 573.13-15.

11 For the complete list of "other exceptions" covered under Section 15 of the federal regulations, see 12 C.F.R. 40.15, 216.15, 332.15, 573.15.

12 12 C.F.R. 40.4-5, 216.4-5, 332.4-5, 573.4-5.

13 *See* OCC Advisory Letter 99-6, Guidance on Web Site Privacy Statements (May 4, 1999). *See also* Interagency Financial Institution Web Site Privacy Survey Report (November 1999).

policy at the point at which the customer is asked to submit personal information. The privacy statement itself should contain clear and understandable disclosures. Banks should use plain language when describing electronic data collected and electronic security measures undertaken.

Banks should also take steps to ensure that their internal policies and procedures are consistent with their privacy statements. For instance, there should be a mechanism for the bank to handle customer privacy-related questions or complaints over the Internet or telephone. In addition, senior management should adopt procedures to ensure compliance by bank personnel. Procedures should be designed to train bank personnel in the handling of financial information and to deter employee violations of the privacy policy. These and other steps taken by senior management and staff will ensure that the bank maintains its privacy promises to customers, and in turn, complies with applicable privacy standards.

Conclusion

In conclusion, Illinois banks are required to maintain privacy policies and practices that comply with both Section 48.1 of the Act and the federal privacy regulations. Illinois banks are still required to comply with the opt in requirements of Section 48.1 if the information they wish to disclose constitutes a financial record, unless an exception applies. For example, Section 48.1(b)(15), allows banks to share financial records with "commonly owned affiliates," which includes subsidiaries of the bank, parent holding companies which own more than 50% of the bank, and sister subsidiaries of the bank. The term "financial records" in Section 48.1 protects the documents and information enumerated in Section 48.1(a) as well as information covered in the federal regulations' definition of "nonpublic personal information." The privacy protections in Section 48.1 are also afforded to all "customers" of the bank. This includes any person or entity that obtains a financial product or service from the bank, for personal or business purposes regardless whether the person establishes an ongoing relationship with the bank. Although the Act does not require banks to provide notices of their privacy policies and practices to customers, the federal regulations require banks to provide notices of all privacy-related policies and practices, including those derived from state law. As a result, Illinois banks must clearly and accurately describe all such policies in compliance with the federal regulations.