

INTERPRETIVE LETTER – 04-02 (October 12, 2004)

Illinois financial privacy laws are not inconsistent with the privacy provisions of Gramm-Leach-Bliley and are not pre-empted.

Pursuant to Section 507(a) of the Gramm-Leach-Bliley Act¹, a state statute that is not inconsistent with the privacy provisions of GLB will not be disturbed or pre-empted. GLB also established a procedure, by which the Federal Trade Commission, (the “FTC”) was granted sole authority to make determinations as to whether various state statutes regarding customer privacy were inconsistent with, and therefore pre-empted by, GLB.

In July 2001, the Office of Banks and Real Estate² formally petitioned the Federal Trade Commission (the “FTC”) to determine whether financial institution privacy provisions contained in the Illinois Banking Act³, the Illinois Savings and Loan Act⁴, and the Savings Bank Act⁵ afford greater privacy protection than that provided under Subtitle A of Title V of GLB. Each of these Illinois privacy provisions require financial institutions to obtain the affirmative consent of customers before sharing non-public information to third parties. In addition, unlike GLB, the Illinois financial privacy provisions make no distinction between “commercial” and “individual consumers” with respect to those customers who are afforded privacy protection. The Office of Banks and Real Estate took the position that the affirmative “opt in” provisions and the broader universe of those who are deemed to be “customers” under the Illinois financial privacy provisions provided greater protections to non-public information than the “opt out” procedure and more restrictive “customer” definition established under GLB.

In connection with the analysis of Illinois financial privacy statutes, the FTC stated their position that an inconsistency between state and federal law, sufficient to warrant pre-emption, may be found where the state law frustrates the purpose of the federal statutory scheme or where compliance with both the state and federal laws is physically impossible. However, the FTC also recognized that GLB established minimum protections for customer privacy that could be exceeded by the states.

On August 25, 2004, the Federal Trade Commission issued a formal response in which it determined that the Illinois financial privacy provisions are not inconsistent with §6807(a) of GLB, and therefore the Illinois provisions are not pre-empted by federal law. In reaching its determination, the FTC specifically relied upon previous responses to petitions for a determination of state law pre-emption by GLB. Significantly, the FTC pointed out its prior determinations that state privacy provisions requiring customers to “opt in” to the sharing of non-public information by financial institutions do not frustrate the purpose of the federal GLB privacy scheme. The FTC declared that the purpose of

¹ 15 U.S.C. §§6801-6809, (the “GLB Act”).

² Pursuant to Executive Order 6-2004, the functions of the Commissioner of Banks and Real Estate have been transferred to the Department of Financial and Professional Regulation and the Commissioner’s title is now “Director”. In addition, the Executive Order established the Division of Banks and Real Estate.

³ 205 ILCS 5/48.1

⁴ 205 ILCS 105/3-8

⁵ 205 ILCS 205/4013

the GLB privacy provisions was to “...ensure 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....opt in requirements, if applicable, are consistent with this purpose.”⁶ Absent an inconsistency under §6807 of GLB, the FTC found it unnecessary to initiate an analysis as to whether the Illinois financial privacy provisions in fact provide a greater degree of protection.

Accordingly, the following provisions related to financial privacy are governed by Illinois law and are not pre-empted by or inconsistent with GLB:

1. Section 48.1(c)(1) of the Illinois Banking Act requires all banks doing business in the state of Illinois to obtain the affirmative consent of customers before disclosing non-public information;
2. The definition of the term “customer” as contained in Section 48.1 of the Illinois Banking Act includes both commercial and individual consumers;
3. The definition of the term “commonly owned affiliate” as contained in Section 48.1(b)(15) of the Illinois Banking Act is not pre-empted by federal regulation;
4. Section 3-8(d)(1) of the Illinois Savings and Loan Act requires all savings associations doing business in the state of Illinois to obtain the affirmative consent of customers before disclosing non-public information;
5. The definition of the term “customer” as contained in Section 3-8 of the Illinois Savings and Loan Act includes both commercial and individual consumers;
6. Section 4013(d)(1) of the Saving Bank Act requires all savings banks doing business in the state of Illinois to obtain the affirmative consent of customers before disclosing non-public information;
7. The definition of the term “customer” as contained in Section 4013 of the Saving Bank Act includes both commercial and individual consumers; and
8. Section 5-10.5 of the Corporate Fiduciary Act authorizes a corporate fiduciary to disclose non-public information to the same extent as is authorized for banks under Section 48.1 of the Illinois banking Act. Therefore, except as otherwise permitted under the Corporate fiduciary Act, Section 5-10.5 of the Corporate Fiduciary Act requires a corporate fiduciary doing business in the State of Illinois to obtain the affirmative consent of customers before disclosing no-public information.

Should you have any questions regarding the application of these Illinois financial privacy provisions, you should contact the Illinois Department of

⁶ See June 28, 2001 letter to Commissioner Gary D. Prezler (North Dakota Department of Banking and Financial Institutions).

Financial and Professional Regulation, Division of Banks and Real Estate.
Additional information related to Illinois financial privacy provisions is contained
in Interpretive letter 2001-1.⁷ All of the Division of Banks and Real Estate
Interpretive letters are available for viewing on the Department of Financial and
Professional Regulation, Division of Banks and Real Estate web site located at
www.idfpr.com

⁷ See Division of Banks and Real Estate Interpretive Letter No. 2001-01(March 9, 2001)