INTERPRETIVE LETTER 93-3 (FEBRUARY 11, 1993)

Federal law that prohibits bank from disclosing subpoena requesting customer's financial records preempts state law that requires bank to mail copy of subpoena to customer.

This is in response to your recent inquiry dated *, concerning the duty of your client, an Illinois state-chartered ("Bank") which is not a member of the Federal Reserve System, to respond to a Federal Grand Jury Subpoena (the "Subpoena") that requests certain records of one of its customers. As I understand the facts involved, the Bank received a letter from the U.S. Attorney's Office with the subpoena instructing the Bank that it was prohibited from disclosing the existence of the Subpoena pursuant to 18 U.S.C. 1510(b). This federal law makes it a federal crime to disclose the existence of a subpoena for records in certain situations. You asked whether the Bank is obligated by Section 48.1(d) of the Illinois Banking Act ("Act"), 205 ILCS 5/48.1 (formerly Ill. Rev. Stat. ch. 17, par. 360 (1991)), to inform the customer, or whether the state law is preempted by federal law.

Section 48.1 (d) provides:

> (d) A bank shall disclose financial records...pursuant to a lawful subpoena...only after the bank mails a copy of the subpoena...to the person establishing the relationship with the bank [customer]...at his last known address by first class mail, postage prepaid, unless the bank is specifically prohibited from notifying such person by order of court.

Section 962(c) of Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA"), 18 U.S.C. 1510 (b)(1), established the new federal crime "Obstruction of Criminal Investigations." That section provides:

> (b)(2) Whoever, being an officer of a financial institution, directly or indirectly notifies
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> (A) a customer of that financial institution whose records are sought by a grand jury subpoena;

or

> (B) any other person named in that subpoena; about the existence or contents of that subpoena or information that has been furnished to the grand jury in response to that subpoena, shall be fined under this title or imprisoned not more than one year, or both.

Section 48.1(d) requires the Bank to inform its customer of the subpoena, while the federal law prohibits such disclosure. Since the Illinois Banking Act and the federal law conflict, we conclude that the federal law preempts the state Act.

In the case of Fidelity Federal Savings and Loan Association v. de la Cuesta, 458 U.S. 141 73 L.Ed.2d 664 (1982), the United States Supreme Court stated as follows:

> [S]tate law is nullified to the extent that it actually conflicts with federal law. Such a conflict arises when 'compliance with both federal and state regulations is a physical impossibility, Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43, 10 L.Ed.2d 248, 83 S. Ct. 1210 (1963), or when state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress, Hines v. Davidowitz, 312 U.S. 52, 67, 85 L.Ed.2d 581, 61 S.Ct. 1305....
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> Federal Regulations have no less preemptive effect than federal statutes. Where Congress has directed an administrator to exercise his discretion, his judgments are subject to judicial review only to determine whether he has exceeded his statutory authority or acted arbitrarily. de la Cuesta, supra, at 73 L.Ed.2d 675.

In In Re Grand Jury Subpoena (Connecticut Savings Bank), 481 F.Supp. 833 (D. Conn. 1979), the court considered the effect of a similar Connecticut law which conflicted with federal law and which also provided for customer notification and the imposition of criminal penalties for violations of the state law, stating:

> This congressional intent not to impede legitimate investigations would be frustrated by the application of the state notice and challenge provisions which serve as an obstacle to the accomplishment of the congressional objective. To find otherwise gives rise to the potential that, in each of the fifty states, despite the existence of a valid congressional enactment setting forth the power of the federal grand jury to obtain documents relative to its investigation, the congressional intent could be subverted by the enactment of peculiarly local requirements. Insofar as the Connecticut statute in imposing a notice and challenge procedure would undermine the authority given the grand jury by the federal act, it is a conflict as explicated by Ray, supra [Ray v. Atlantic Richfield, Co., 435 U.S. 151 (1977)].

Connecticut Savings Bank, supra, at 481 F.Supp. 834-835. Accordingly, the Court denied a bank motion to quash the Federal Grand Jury Subpoena Duces Tecum.

In conclusion, we believe that the federal law preempts Section 48.1 (d) of the Act in this case, and that your client must comply with the federal law.