



**OFFICE OF BANKS AND REAL ESTATE**

**RECEIVED**

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**OFFICE OF THE CHAIRMAN**

July 16, 2001

Honorable Timothy Muris, Chairman  
Federal Trade Commission  
600 Pennsylvania Avenue, NW  
Washington, DC 20580

Dear Mr. Muris:

The Illinois Office of Banks and Real Estate ("Agency"), as an interested party, is seeking a determination pursuant to 15 U.S.C. 6807 as to whether Section 48.1 of the Illinois Banking Act<sup>1</sup>, Section 3-8 of the Illinois Savings and Loan Act<sup>2</sup>, and Section 4013 of the Savings Bank Act<sup>3</sup> afford consumers greater privacy protection than the Gramm-Leach-Bliley Act and the corresponding privacy regulations. As the chartering authority and primary regulator of state chartered banking and thrift institutions and the Agency charged with the responsibility of supervising these institutions and administering these statutes, we have a significant interest in the Federal Trade Commission's ("FTC") determination.

It is our position that the general privacy protections contained in Section 48.1, Section 3-8 and Section 4013 of the described statutes provide greater protection to consumers and are not preempted by federal law. The privacy requirements of these sections apply respectively to all state banks operating in Illinois; Illinois branches of out of state banks; state savings and loan associations; out of state associations operating in Illinois ("foreign associations" under Article 2B of the Illinois Savings and Loan Act); and state savings banks. Furthermore, section 48.1 of the Illinois Banking Act does not appear to exempt national banks from compliance with that section's privacy provisions. Similarly, section 3-8 of the Illinois Savings and Loan Act, read in light of section 1-3(b) of that Act, does not appear to exempt federal savings associations and savings banks from compliance with the privacy provisions of section 3-8.

<sup>1</sup> 205 ILCS 5/48.1

<sup>2</sup> 205 ILCS 105/3-8

<sup>3</sup> 205 ILCS 205/4013

Mr. Timothy Muris  
July 10, 2001  
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The Illinois privacy provisions described above were enacted long prior to the Gramm-Leach-Bliley Act's 1999 enactment. Section 48.1 of Illinois Banking Act became law in 1976, section 3-8 of the Savings and Loan Act in 1985, and section 4013 of the Savings Bank Act in 1990.

We recently issued a series of interpretive letters that addressed the key distinctions between the described statutes and the federal privacy regulations promulgated pursuant to the Gramm-Leach-Bliley Act. We have enclosed a copy of these interpretive letters and relevant provisions of the described statutes for your review.

Specifically, we are seeking a determination that:

1. Section 48.1(c)(1) of the Illinois Banking Act requiring banks to obtain the affirmative consent of customers before disclosing financial information is not preempted by the federal regulations;
2. The Agency's interpretation to include both commercial and individual consumers within the term "customer" as utilized in section 48.1 is not preempted by the federal regulations;
3. The Agency's interpretation of the term "commonly owned affiliate" in Section 48.1(b)(15) is not preempted by the federal regulations;
4. Section 3-8(d)(1) of the Illinois Savings and Loan Act requiring savings and loan associations to obtain the affirmative consent of customers before disclosing financial information is not preempted by the federal regulations;
5. The Agency's interpretation to include both commercial and individual consumers within the term "customer" as utilized in Section 3-8 is not preempted by the federal regulations;
6. Section 4013(d)(1) of the Savings Bank Act requiring savings banks to obtain the affirmative consent of customers before disclosing financial information is not preempted by the federal regulations; and
7. The Agency's interpretation to include both commercial and individual consumers within the term "customer" as utilized in Section 4013 is not preempted by the federal regulations.

We look forward to your response. In the meantime, should you have any questions regarding this letter, please do not hesitate to contact Agency personnel as follows: with regard to the Illinois Banking Act, Michael D. Morehead, Chief Counsel, at (217) 782-5103; and with regards to the Illinois Savings and Loan Act or Savings Bank Act, Robert Stearn, Senior Counsel, at (312) 793-1454.

Sincerely,



William A. Darr  
Commissioner

(205 ILCS 5/48.1)

Sec. 48.1. Customer financial records; confidentiality.

(a) For the purpose of this Section, the term "financial records" means 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.

(b) This Section does not prohibit:

(1) The preparation, examination, handling or maintenance of any financial records by any officer, employee or agent of a bank having custody of the records, or the examination of the records by a certified public accountant engaged by the bank to perform an independent audit.

(2) The examination of any financial records by, or the furnishing of financial records by a bank to, any officer, employee or agent of (i) the Commissioner of Banks and Real Estate, (ii) after May 31, 1997, a state regulatory authority authorized to examine a branch of a State bank located in another state, (iii) the Comptroller of the Currency, (iv) the Federal Reserve Board, or (v) the Federal Deposit Insurance Corporation for use solely in the exercise of his duties as an officer, employee, or agent.

(3) The publication of data furnished from financial records relating to customers where the data cannot be identified to any particular customer or account.

(4) The making of reports or returns required under Chapter 61 of the Internal Revenue Code of 1986.

(5) Furnishing information concerning the dishonor of any negotiable instrument permitted to be disclosed under the Uniform Commercial Code.

(6) The exchange in the regular course of business of (i) credit information between a bank and other banks or financial institutions or commercial enterprises, directly or through a consumer reporting agency or (ii) financial records or information derived from financial records between a bank and other banks or financial institutions or commercial enterprises for the purpose of conducting due diligence pursuant to a purchase or sale involving the bank or assets or liabilities of the bank.

(7) The furnishing of information to the appropriate law enforcement authorities where the bank reasonably believes it has been the victim of a crime.

(8) The furnishing of information under the Uniform Disposition of Unclaimed Property Act.

(9) The furnishing of information under the Illinois Income Tax Act and the Illinois Estate and Generation-Skipping Transfer Tax Act.

(10) The furnishing of information under the federal Currency and Foreign Transactions Reporting Act Title 31, United States Code, Section 1051 et seq.

(11) The furnishing of information under any other statute that by its terms or by regulations promulgated thereunder requires the disclosure of financial records other than by subpoena, summons, warrant, or court order.

(12) The furnishing of information about the existence of an account of a person to a judgment creditor of that person who has made a written request for that information.

(13) The exchange in the regular course of business of information between commonly owned banks in connection with a transaction authorized under paragraph (23) of Section 5 and conducted at an affiliate facility.

(14) The furnishing of information in accordance with the federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996. Any bank governed by this Act shall enter into an agreement for data exchanges with a State agency provided the State agency pays to the bank a reasonable fee not to exceed its actual cost incurred. A bank providing information in accordance with this item shall not be liable to any account holder or other person for any disclosure of information to a State agency, for encumbering or surrendering any assets held by the bank in response to a lien or order to withhold and deliver issued by a State agency, or for any other action taken pursuant to this item, including individual or mechanical errors, provided the action does not constitute gross negligence or willful misconduct. A bank shall have no obligation to hold, encumber, or surrender assets until it has been served with a subpoena, summons, warrant, court or administrative order, lien, or levy.

(15) 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.

(16) The furnishing of information to law enforcement authorities, the Illinois Department on Aging and its regional administrative and provider agencies, the Department of Human Services Office of Inspector General, or public guardians, if the bank suspects that a customer who is an elderly or disabled person has been or may become the victim of financial exploitation. For the purposes of this item (16), the term: (i) "elderly person" means a person who is 60 or more years of age, (ii) "disabled person" means a person who has or reasonably appears to the bank to have a physical or mental disability that impairs his or her ability to seek or obtain protection from or prevent financial exploitation, and (iii) "financial exploitation" means tortious or illegal use of the assets or resources of an elderly or disabled person, and includes, without limitation, misappropriation of the elderly or disabled person's assets or resources by undue influence, breach of fiduciary relationship, intimidation, fraud, deception, extortion, or the use of assets or resources in any manner contrary to law. A bank or person furnishing information pursuant to this item (16) shall be entitled to the same rights and protections as a person furnishing information under the Elder Abuse and Neglect Act and the Illinois Domestic Violence Act of 1986.

(c) Except as otherwise provided by this Act, a bank may not disclose to any person, except to the customer or his duly authorized agent, any financial records or financial information obtained from financial records relating to that customer of that bank unless:

- (1) the customer has authorized disclosure to the person;
  - (2) the financial records are disclosed in response to a lawful subpoena, summons, warrant or court order which meets the requirements of subsection (d) of this Section; or
  - (3) the bank is attempting to collect an obligation owed to the bank and the bank complies with the provisions of Section 21 of the Consumer Fraud and Deceptive Business Practices Act.
- (d) A bank shall disclose financial records under paragraph (2) of

subsection (c) of this Section under a lawful subpoena, summons, warrant, or court order only after the bank mails a copy of the subpoena, summons, warrant, or court order to the person establishing the relationship with the bank, if living, and, otherwise his personal representative, if known, at his last known address by first class mail, postage prepaid, unless the bank is specifically prohibited from notifying the person by order of court or by applicable State or federal law. A bank shall not mail a copy of a subpoena to any person pursuant to this subsection if the subpoena was issued by a grand jury under the Statewide Grand Jury Act.

(e) Any officer or employee of a bank who knowingly and willfully furnishes financial records in violation of this Section is guilty of a business offense and, upon conviction, shall be fined not more than \$1,000.

(f) Any person who knowingly and willfully induces or attempts to induce any officer or employee of a bank to disclose financial records in violation of this Section is guilty of a business offense and, upon conviction, shall be fined not more than \$1,000.

(g) A bank shall be reimbursed for costs that are reasonably necessary and that have been directly incurred in searching for, reproducing, or transporting books, papers, records, or other data of a customer required or requested to be produced pursuant to a lawful subpoena, summons, warrant, or court order. The Commissioner shall determine the rates and conditions under which payment may be made.

(Source: P.A. 90-18, eff. 7-1-97; 90-665, eff. 7-30-98; 91-330, eff. 7-29-99; 91-929, eff. 12-15-00.)

## **ARTICLE 1. GENERAL PROVISIONS**

(205 ILCS 105/1-1)

### **Sec. 1-1. Short title.**

This Act shall be known and may be cited as the "Illinois Savings and Loan Act of 1985".

(Source: P.A. 84-543.)

(205 ILCS 105/1-2)

### **Sec. 1-2. Policy of Act.**

The General Assembly has found and declares:

(a) That the savings and loan business has so expanded in recent years and has become so integrated with the financial institutions of this State and is so important as a method of promoting home ownership and thrift that such business is affected with a public interest and should continue to be supervised as a business affecting the economic security and general welfare of the people of this State;

(b) That such business should be organized and conducted in accordance with the authority provided in this Act;

(c) That the public interest requires the promotion and fostering of the savings and loan business and the assurance of its financial stability; and

(d) That in order to further the policies herein expressed, the provisions of this Act shall be liberally construed to promote and foster the savings and loan business.

(Source: P.A. 84-543.)

(205 ILCS 105/1-3)

### **Sec. 1-3. Scope of Act; application to federal associations.**

(a) This Act applies to all existing savings and loan associations, and other similar associations, including savings banks, by whatever name called, organized under this or any prior Act, and to the business conducted in Illinois by all foreign associations or savings banks duly authorized to do business in this State.

(b) Unless Federal laws or regulations provide otherwise, Federal Associations and their members shall possess all of the rights, powers, privileges, immunities and exemptions granted by this Act to associations operating hereunder and to the members thereof, or by any other Act or Section thereof, to such associations or members, whether or not specifically mentioned in the Section or Sections granting such rights, powers, privileges, immunities and exemptions.

(Source: P.A. 86-137; P.A. 86-210; P.A. 86-952.)

(205 ILCS 105/1-4)

### **Sec. 1-4. Effect on existing associations.**

With respect to any existing association:

(a) The by-laws, shares and contracts of such association shall continue in full force and effect, but the association shall be operated in accordance with the provisions of this Act;

(b) If the association accepts the benefits of, or avails itself of the powers given by this Act, the association shall be subject to the provisions and requirements of this Act in every particular, as if the association had been organized under this Act; and

(c) That portion of the statement of incorporation, charter or certificate of complete organization of an existing association which corresponds to the contents of articles of incorporation, as defined in Section 2-8 of this Act, shall be deemed to be the articles of incorporation of such association; and that portion of its statement of incorporation, charter and certificate of complete organization corresponding to the contents of by-laws, as defined in Section 2-9 of this Act, shall be deemed to be the by-laws of such existing association.

(Source: P.A. 84-543.)

(205 ILCS 105/1-5)

### **Sec. 1-5. Prohibitions.**

(a) No person or group of persons, except an association duly incorporated under this Act or a prior Act or a Federal association or a foreign association duly authorized to do business in this State, shall transact business within the scope of this Act or do any business under any name or title or circulate or use any advertising or make any representation or give any information to any person which indicates or reasonably implies the operation of a business which is within the scope of this Act.

(b) A circuit court may issue an injunction to restrain any person from violating or continuing to violate any of the foregoing provisions of this Section.

(c) Any person who violates any provision of this Section commits a business offense and shall be fined not to exceed \$5,000.

(Source: P.A. 84-543.)

(205 ILCS 105/1-6)

### **Sec. 1-6. General corporate powers.**

An association operating under this Act shall be a body corporate and politic and shall have all of the powers conferred by this Act, including, but not limited to, the following powers:

(a) To sue and be sued, complain and defend in its corporate name, and to have a common seal, which it may alter or renew at pleasure;

(b) To obtain and maintain insurance of the asso-

an action on his behalf to enforce any order made under this subsection.

(d) The board of directors shall designate and determine the management structure of the association and elect or appoint all officers. Each of the officers elected or appointed by the board of directors shall serve at the pleasure of the board of directors or pursuant to a written employment contract between the officer and the association.

(e) Whenever the Commissioner determines that any officer, director or employee of an association or a holding company operating under this Act has committed a violation of any law, rule, regulation or order of the Commissioner, and that such violation or continued violation may result in a substantial financial loss or other substantial damage to the association or holding company or that the interests of its members may be seriously prejudiced by such violation or continued violation, the Commissioner shall notify such officer, director or employee of his intention to issue an order and may thereafter issue an order suspending such person from office or prohibiting his participation in the conduct of the affairs of the association or holding company, or both. The notice to such person shall contain a statement of facts constituting the grounds for such order; shall fix a time when such order will be issued; and shall state the effective date of such order, which shall be not less than 10 days after the date of the order. A copy of such notice and order shall be sent to the association or holding company. Such order shall be and remain in effect from the effective date specified in the notice provided for under this Section until such time as the order is removed by the Commissioner or until the order is removed, modified or stayed pursuant to the Administrative Review Law.

(f) Officers and directors of any entity operating under this Act shall also disclose to the Commissioner any and all criminal proceedings in which they have been a party or participated which resulted in a grant of immunity from prosecution, a conviction, a plea of nolo contendere or its equivalent, or which are currently pending. (Source: P.A. 86-137.)

(205 ILCS 105/3-7)

**Sec. 3-7. Bonds of officers and employees.**

(a) Every person appointed or elected to any position requiring the receipt, payment, management or use of money belonging to an association, or whose duties permit him to have access to or custody of any of its money or securities or whose duties permit him regularly to make entries in the books or other records of the association, before assuming his duties shall become bonded in some trust or company authorized to issue

bonds in this state, or in a fidelity insurance company licensed to do business in this State. Each such bond shall be on a form or forms as the Commissioner shall require and in such amount as the board of directors shall fix and approve. Each such bond, payable to the association, shall be an indemnity for any loss the association may sustain in money or other property through any dishonest or criminal actor omission by any person required to be bonded, committed either alone or in concert with others. Such bond shall be in the form and amount prescribed by the Commissioner, who may at any time require one or more additional bonds. A true copy of every bond, including all riders and endorsements executed subsequent to the effective date of the bond, shall be filed at all times with the Commissioner. Each bond shall provide that a cancellation thereof either by the surety or by the insured shall not become effective unless and until 30 days notice in writing first shall have been given to the Commissioner, unless he shall have approved such cancellation earlier.

(b) Nothing contained herein shall preclude the Commissioner from proceeding against an association as provided in this Act should he believe that it is being conducted in an unsafe manner in that the form or amount of bonds so fixed and approved by the board of directors is inadequate to give reasonable protection to the association.

(Source: P.A. 85-1271.)

(205 ILCS 105/3-8)

**Sec. 3-8. Access to books and records; communication with members.**

(a) Every member or holder of capital shall have the right to inspect the books and records of the association that pertain to his account. Otherwise, the right of inspection and examination of the books and records shall be limited as provided in this Act, and no other person shall have access to the books and records or shall be entitled to a list of the members.

(b) For the purpose of this Section, the term "financial records" means any original, any copy, or any summary of (i) a document granting signature authority over a deposit or account; (ii) a statement, ledgercard, or other record on any deposit or account that shows each transaction in or with respect to that account; (iii) a check, draft, or money order drawn on an association or issued and payable by an association; or (iv) any other item containing information pertaining to any relationship established in the ordinary course of an association's business between an association and its customer.

c) This Section does not prohibit:

(1) The preparation, examination, handling, or maintenance of any financial records by any officer,

employee, or agent of an association having custody of those records or the examination of those records by a certified public accountant engaged by the association to perform an independent audit;

(2) The examination of any financial records by, or the furnishing of financial records by an association to, any officer, employee, or agent of the Commissioner of Banks and Real Estate, Federal Savings and Loan Insurance Corporation and its successors, Federal Deposit Insurance Corporation, Resolution Trust Corporation and its successors, Federal Home Loan Bank Board and its successors, Office of Thrift Supervision, Federal Housing Finance Board, Board of Governors of the Federal Reserve System, any Federal Reserve Bank, or the Office of the Comptroller of the Currency for use solely in the exercise of his duties as an officer, employee, or agent;

(3) The publication of data furnished from financial records relating to members or holders of capital where the data cannot be identified to any particular member, holder of capital, or account;

(4) The making of reports or returns required under Chapter 61 of the Internal Revenue Code of 1986;

(5) Furnishing information concerning the dishonor of any negotiable instrument permitted to be disclosed under the Uniform Commercial Code;

(6) The exchange in the regular course of business of credit information between an association and other associations or financial institutions or commercial enterprises, directly or through a consumer reporting agency;

(7) The furnishing of information to the appropriate law enforcement authorities where the association reasonably believes it has been the victim of a crime;

(8) The furnishing of information pursuant to the Uniform Disposition of Unclaimed Property Act;

(9) The furnishing of information pursuant to the Illinois Income Tax Act and the Illinois Estate and Generation-Skipping Transfer Tax Act;

(10) The furnishing of information pursuant to the federal "Currency and Foreign Transactions Reporting Act", (Title 31, United States Code, Section 1051 et seq.);

(11) The furnishing of information pursuant to any other statute that by its terms or by regulations promulgated thereunder requires the disclosure of financial records other than by subpoena, summons, warrant, or court order;

(12) The exchange of information between an association and an affiliate of the association; as used in this item, "affiliate" includes any company, partnership, or organization that controls, is controlled by, or is under common control with an association.

(13) The furnishing of information in accordance with the federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996. Any association governed by this Act shall enter into an agreement for data exchanges with a State agency provided the State agency pays to the association a reasonable fee not to exceed its actual cost incurred. An association providing information in accordance with this item shall not be liable to any account holder or other person for any disclosure of information to a State agency, for encumbering or surrendering any assets held by the association in response to a lien or order to withhold and deliver issued by a State agency, or for any other action taken pursuant to this item, including individual or mechanical errors, provided the action does not constitute gross negligence or willful misconduct. An association shall have no obligation to hold, encumber, or surrender assets until it has been served with a subpoena, summons, warrant, court or administrative order, lien, or levy.

(14) The furnishing of information to law enforcement authorities, the Illinois Department on Aging and its regional administrative and provider agencies, the Department of Human Services Office of Inspector General, or public guardians, if the association suspects that a customer who is an elderly or disabled person has been or may become the victim of financial exploitation. For the purposes of this item (14), the term: (i) "elderly person" means a person who is 60 or more years of age, (ii) "disabled person" means a person who has or reasonably appears to the association to have a physical or mental disability that impairs his or her ability to seek or obtain protection from or prevent financial exploitation, and (iii) "financial exploitation" means tortious or illegal use of the assets or resources of an elderly or disabled person, and includes, without limitation, misappropriation of the elderly or disabled person's assets or resources by undue influence, breach of fiduciary relationship, intimidation, fraud, deception, extortion, or the use of assets or resources in any manner contrary to law. An association or person furnishing information pursuant to this item (14) shall be entitled to the same rights and protections as a person furnishing information under the Elder Abuse and Neglect Act and the Illinois Domestic Violence Act of 1986.

(d) An association may not disclose to any person, except to the member or holder of capital or his duly authorized agent, any financial records relating to that member or holder of capital of that association unless:

(1) The member or holder of capital has authorized disclosure to the person; or

(2) The financial records are disclosed in response to a lawful subpoena, summons, warrant, or court

order that meets the requirements of subsection (e) of this Section.

(e) An association shall disclose financial records under subsection (d) of this Section pursuant to a lawful subpoena, summons, warrant, or court order only after the association mails a copy of the subpoena, summons, warrant, or court order to the person establishing the relationship with the association, if living, and, otherwise, his personal representative, if known, at his last known address by first class mail, postage prepaid, unless the association is specifically prohibited from notifying that person by order of court.

(f) (1) Any officer or employee of an association who knowingly and willfully furnishes financial records in violation of this Section is guilty of a business offense and, upon conviction, shall be fined not more than \$1,000.

(2) Any person who knowingly and willfully induces or attempts to induce any officer or employee of an association to disclose financial records in violation of this Section is guilty of a business offense and, upon conviction, shall be fined not more than \$1,000.

(g) However, if any member desires to communicate with the other members of the association with reference to any question pending or to be presented at a meeting of the members, the association shall give him upon request a statement of the approximate number of members entitled to vote at the meeting and an estimate of the cost of preparing and mailing the communication. The requesting member then shall submit the communication to the Commissioner who, if he finds it to be appropriate and truthful, shall direct that it be prepared and mailed to the members upon the requesting member's payment or adequate provision for payment of the expenses of preparation and mailing.

(h) An Association shall be reimbursed for costs that are necessary and that have been directly incurred in searching for, reproducing, or transporting books, papers, records, or other data of a customer required to be reproduced pursuant to a lawful subpoena, warrant, or court order.

(Source: P.A. 88-222; P.A. 89-508; P.A. 90-18; P.A. 91-0929.)

(205 ILCS 105/3-9)

**Sec. 3-9. Conduct of directors and officers.**

(a) Directors and officers occupy a fiduciary relationship to the association of which they are directors or officers, and a director or officer shall not engage or participate, directly or indirectly, in any business or transaction conducted on behalf of or involving the association which would result in a conflict of his own personal interests with those of the association which he

serves, unless: (i) the business or transactions are conducted in good faith and are honest, fair and reasonable to the association; (ii) a full disclosure of the business or transaction and the nature of the director's or officer's interest is made to the board of directors; and (iii) the business or transaction is approved in good faith by the board of directors with any interested director abstaining. The approval of the business or transaction shall be recorded in the minutes. Any profits inuring to the officer or director shall not be at the expense of the association. The business or transaction shall not represent a breach of the officer's or director's fiduciary duty and shall not be fraudulent or illegal. Notwithstanding any other provisions of this Section, the Commissioner may require the disclosure by directors, officers and employees of their personal interest, directly or indirectly, in any business or transaction on behalf of or involving the association and of their control of or active participation in enterprises having activities related to the business of the association. The following restrictions governing the conduct of directors and officers expressly are specified, but such specification does not excuse such persons from the observance of any other aspect of the general fiduciary duty owed by them to the association which they serve:

(1) An officer or director of a mutual association shall not hold office or status as a director or officer of another mutual association to which this Act applies;

(2) A director shall only receive as remuneration reasonable fees for services as a director or for service as a member of a committee of directors. A director who is also an officer or employee of the association may receive compensation for service as an officer or employee;

(3) A director or officer shall not have any interest, direct or indirect, in the purchase at less than its face value of any evidence of a savings account, deposit or other indebtedness issued by the association;

(4) An association or director or officer thereof shall not directly or indirectly require, as a condition to the granting of any loan or the extension of any other service by the association, or its affiliates, that the borrower or any other person undertake a contract of insurance or any other agreement or understanding with respect to the furnishing of any other goods or services, directly or indirectly, with any specific company, agency or individual;

(5) An officer or director acting as proxy for a member of a mutual association shall not exercise, transfer or delegate such right in any consideration of a private benefit or advantage, direct or indirect, accruing to himself nor surrender control or pass his office to any other for any consideration of a private benefit or advan-

(3) An amendment of the articles of incorporation that materially and adversely affects rights in respect of a dissenter's shares because it:

(A) alters or abolishes a preferential right of shares;

(B) alters or abolishes a right in respect of redemption, including a provision respecting a sinking fund for the redemption or repurchase, of shares;

(C) limits or eliminates cumulative voting rights with respect to shares.

(4) Any other action taken pursuant to a shareholder vote if the articles of incorporation, bylaws, or a resolution of the board of directors provide that shareholders are entitled to dissent and obtain payment for their shares in accordance with the procedures set forth in this Act or as may be otherwise provided in the articles, bylaws, or resolution.

(b) A shareholder entitled to dissent and obtain payment for his shares under this Section may not challenge the corporate action creating his entitlement unless the action is fraudulent with respect to the shareholder or the corporation or constitutes a breach of a fiduciary duty owed to the shareholder.

(c) A record owner of shares may assert dissenters' rights as to fewer than all the shares recorded in the person's name only if the person dissents with respect to all shares beneficially owned by any one person and notifies the savings bank in writing of the name and address of each person on whose behalf the record owner asserts dissenters' rights. The rights of a partial dissenter are determined as if the shares as to which dissent is made and the other shares were recorded in the names of different shareholders. A beneficial owner of shares who is not the record owner may assert dissenters' rights as to shares held on that person's behalf only if the beneficial owner submits to the savings bank the record owner's written consent to the dissent before or at the same time the beneficial owner asserts dissenters' rights.

(Source: P.A. 86-1213.)

(205 ILCS 205/4012)

**Sec. 4012. Procedure to dissent.**

(a) If the action giving rise to the right to dissent is to be approved at a meeting of shareholders, the notice of meeting shall inform the shareholders of their right to dissent and the procedure to dissent. Prior to the meeting, the savings bank shall furnish to the shareholders material information with respect to the transaction that will enable a shareholder to objectively vote on the transaction and to determine whether or not to exercise dissenters' rights. A shareholder may assert dissenters' rights only if the shareholder delivers to the savings bank, before the vote is taken, a written demand for payment for his shares if the

proposed action is consummated and the shareholder does not vote in favor of the proposed action.

(b) If the action giving rise to the right to dissent is not to be approved at a meeting of shareholders, the notice to shareholders describing the action taken shall inform the shareholders of their right to dissent and the procedure to dissent. Prior to, or concurrently with, the notice the savings bank shall furnish to the shareholders material information with respect to the transaction that will enable a shareholder to objectively determine whether or not to exercise dissenters' rights. A shareholder may assert dissenters' rights only if he delivers to the savings bank within 30 days from the date of mailing the notice a written demand for payment for his shares.

(c) The Commissioner shall promulgate rules to govern the procedure to be used by savings banks and dissenters in arriving at a value and price for dissenters' shares, as well as how distribution shall be made. In no case shall the rules be more restrictive than the provisions applicable to ordinary corporations under the Business Corporation Act of 1983.

(Source: P.A. 86-1213.)

(205 ILCS 205/4013)

**Sec. 4013. Access to books and records; communication with members and shareholders.**

(a) Every member or shareholder shall have the right to inspect books and records of the savings bank that pertain to his accounts. Otherwise, the right of inspection and examination of the books and records shall be limited as provided in this Act, and no other person shall have access to the books and records nor shall be entitled to a list of the members or shareholders.

(b) For the purpose of this Section, the term "financial records" means 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 that shows each transaction in or with respect to that account; (3) a check, draft, or money order drawn on a savings bank or issued and payable by a savings bank; or (4) any other item containing information pertaining to any relationship established in the ordinary course of a savings bank's business between a savings bank and its customer.

(c) This Section does not prohibit:

(1) The preparation, examination, handling, or maintenance of any financial records by any officer, employee, or agent of a savings bank having custody of records or examination of records by a certified public accountant engaged by the savings bank to perform an independent audit.

(2) The examination of any financial records by, or the furnishing of financial records by a savings bank to,

any officer, employee, or agent of the Commissioner of Banks and Real Estate or the Federal Deposit Insurance Corporation for use solely in the exercise of his duties as an officer, employee, or agent.

(3) The publication of data furnished from financial records relating to members or holders of capital where the data cannot be identified to any particular member, shareholder, or account.

(4) The making of reports or returns required under Chapter 61 of the Internal Revenue Code of 1986.

(5) Furnishing information concerning the dishonor of any negotiable instrument permitted to be disclosed under the Uniform Commercial Code.

(6) The exchange in the regular course of business of credit information between a savings bank and other savings banks or financial institutions or commercial enterprises, directly or through a consumer reporting agency.

(7) The furnishing of information to the appropriate law enforcement authorities where the savings bank reasonably believes it has been the victim of a crime.

(8) The furnishing of information pursuant to the Uniform Disposition of Unclaimed Property Act.

(9) The furnishing of information pursuant to the Illinois Income Tax Act and the Illinois Estate and Generation-Skipping Transfer Tax Act.

(10) The furnishing of information pursuant to the federal "Currency and Foreign Transactions Reporting Act", (Title 31, United States Code, Section 1051 et seq.).

(11) The furnishing of information pursuant to any other statute which by its terms or by regulations promulgated thereunder requires the disclosure of financial records other than by subpoena, summons, warrant, or court order.

(12) The furnishing of information in accordance with the federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996. Any savings bank governed by this Act shall enter into an agreement for data exchanges with a State agency provided the State agency pays to the savings bank a reasonable fee not to exceed its actual cost incurred. A savings bank providing information in accordance with this item shall not be liable to any account holder or other person for any disclosure of information to a State agency, for encumbering or surrendering any assets held by the savings bank in response to a lien or order to withhold and deliver issued by a State agency, or for any other action taken pursuant to this item, including individual or mechanical errors, provided the action does not constitute gross negligence or willful misconduct. A savings bank shall have no obligation to hold, encumber, or surrender assets until it has been served with a subpoena, summons, warrant, court or administrative order, lien, or levy.

(13) The furnishing of information to law en-

forcement authorities, the Illinois Department on Aging and its regional administrative and provider agencies, the Department of Human Services Office of Inspector General, or public guardians, if the savings bank suspects that a customer who is an elderly or disabled person has been or may become the victim of financial exploitation. For the purposes of this item (13), the term: (i) "elderly person" means a person who is 60 or more years of age, (ii) "disabled person" means a person who has or reasonably appears to the savings bank to have a physical or mental disability that impairs his or her ability to seek or obtain protection from or prevent financial exploitation, and (iii) "financial exploitation" means tortious or illegal use of the assets or resources of an elderly or disabled person, and includes, without limitation, misappropriation of the elderly or disabled person's assets or resources by undue influence, breach of fiduciary relationship, intimidation, fraud, deception, extortion, or the use of assets or resources in any manner contrary to law. A savings bank or person furnishing information pursuant to this item (13) shall be entitled to the same rights and protections as a person furnishing information under the Elder Abuse and Neglect Act and the Illinois Domestic Violence Act of 1986.

(d) A savings bank may not disclose to any person, except to the member or holder of capital or his duly authorized agent, any financial records relating to that member or shareholder of the savings bank unless:

(1) the member or shareholder has authorized disclosure to the person; or

(2) the financial records are disclosed in response to a lawful subpoena, summons, warrant, or court order that meets the requirements of subsection (e) of this Section.

(e) A savings bank shall disclose financial records under subsection (d) of this Section pursuant to a lawful subpoena, summons, warrant, or court order only after the savings bank mails a copy of the subpoena, summons, warrant, or court order to the person establishing the relationship with the savings bank, if living, and otherwise, his personal representative, if known, at his last known address by first class mail, postage prepaid, unless the savings bank is specifically prohibited from notifying the person by order of court.

(f) Any officer or employee of a savings bank who knowingly and willfully furnishes financial records in violation of this Section is guilty of a business offense and, upon conviction, shall be fined not more than \$1,000.

(g) Any person who knowingly and willfully induces or attempts to induce any officer or employee of a savings bank to disclose financial records in violation of this Section is guilty of a business offense and, upon conviction, shall be fined not more than \$1,000.

(h) If a member or shareholder desires to commu-

nicate with the other members or shareholders of the savings bank with reference to any question pending or to be presented at an annual or special meeting, the savings bank shall give that person, upon request, a statement of the approximate number of members or shareholders entitled to vote at the meeting and an estimate of the cost of preparing and mailing the communication. The requesting member shall submit the communication to the Commissioner who, upon finding it to be appropriate and truthful, shall direct that it be prepared and mailed to the members upon the requesting member's or shareholder's payment or adequate provision for payment of the expenses of preparation and mailing.

(i) A savings bank shall be reimbursed for costs that are necessary and that have been directly incurred in searching for, reproducing, or transporting books, papers, records, or other data of a customer required to be reproduced pursuant to a lawful subpoena, warrant, or court order.

(j) Notwithstanding the provisions of this Section, a savings bank may sell or otherwise make use of lists of customers' names and addresses. All other information regarding a customer's account are subject to the disclosure provisions of this Section. At the request of any customer, that customer's name and address shall be deleted from any list that is to be sold or used in any other manner beyond identification of the customer's accounts. (Source: P.A. 89-508; P.A. 90-18; P.A. 91-0929.)

(205 ILCS 205/4014)

**Sec. 4014. Waiver of notice.**

Whenever any notice whatsoever is required to be given under this Act or under the provisions of the articles of incorporation or bylaws of a savings bank, a waiver thereof in writing signed by the person entitled to the notice, whether before or after the time stated therein, shall be deemed equivalent to the giving of the notice. Attendance at any meeting shall constitute waiver of notice thereof unless the person at the meeting objects to the holding of the meeting because proper notice was not given.

**ARTICLE 5. CAPITAL**

(205 ILCS 205/5001)

**Sec. 5001. Minimum Capital.**

(a) A saving bank may be organized to exercise the powers conferred by this Act with minimum capital, surplus, and reserves for operating expenses as determined by the Commissioner. In no case may the Commissioner establish requirements for insured savings banks at a level less than that required for insurance of accounts. For any savings bank other than those resulting from conversion from an existing financial institution to one operating un-

der this Act, the Commissioner must establish capital requirements no less stringent than those required of banks chartered under the Illinois Banking Act.

(b) No savings bank may commence business until it has capital as required by the Federal Deposit Insurance Corporation.

(c) Each depository institution converting to a savings bank, before declaration of a dividend on its capital stock, must maintain the minimum capital standards as required by the Federal Deposit Insurance Corporation. (Source: P.A. 86-1213; P.A. 90-301.)

(205 ILCS 205/5002)

**Sec. 5002. Types of capital; personal property.**

(a) The capital of a stock savings bank shall be represented by capital stock and noncumulative perpetual preferred stock as authorized by the articles of incorporation, related paid-in surplus, retained earnings, and other forms of capital deemed to be qualifying capital by the insurance corporation providing insurance of the savings bank's deposits.

(b) The capital of a mutual savings bank shall be represented by retained earnings and other forms of capital deemed to be qualifying capital by the insurance corporation providing insurance of the savings bank's deposits.

(c) All shares and capital accounts shall be personal property and transferable as provided in this Act and the bylaws of the savings bank. (Source: P.A. 86-1213.)

(205 ILCS 205/5003)

**Sec. 5003. Capital stock; nature.**

Capital stock shall constitute a secondary reserve out of which losses shall be paid after all other available reserves have been exhausted and shall have a par value of \$1 each or a greater amount as the articles of incorporation may prescribe. The shares shall be:

(1) Nonwithdrawable, except as provided in Section 5005, until all liabilities of the savings bank have been satisfied in full, including payment of the withdrawal value of all deposit accounts.

(2) Entitled to dividends only as provided in Section 5008.

(3) Issued only upon cash payment of not less than the par value thereof; in connection with a merger, sale of all assets, or conversion; or as stock dividends as provided in Section 5008. (Source: P.A. 86-1213.)

(205 ILCS 205/5004)

**Sec. 5004. Capital stock; authorization of issuance.**

A savings bank may provide for the issuance of capital

## **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.<sup>1</sup> 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.<sup>2</sup>

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

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<sup>1</sup> 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).

<sup>2</sup> 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).

March 9, 2001

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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.<sup>3</sup> 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.<sup>4</sup> State banks and bank counsel should monitor the continuing development of the federal regulations as they relate to customer lists.

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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.<sup>5</sup> 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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<sup>5</sup> 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.<sup>6</sup> (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*.<sup>7</sup> (Emphasis added).

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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:<sup>8</sup>

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.<sup>9</sup> 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, 79<sup>th</sup> General Assembly, 149<sup>th</sup> Legis. Day (1976) (enacted).

<sup>8</sup> 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.

<sup>9</sup> 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.<sup>10</sup> 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.<sup>11</sup> 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.<sup>12</sup> 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.<sup>13</sup> 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

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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.



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March 29, 2001

[REDACTED]  
[REDACTED]  
[REDACTED] buildings  
[REDACTED]  
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Re: Savings Bank Act Privacy Provisions (Section 4013)

[REDACTED]

In light of the recently adopted federal privacy regulations,<sup>1</sup> you have asked the Office of Banks and Real Estate (Agency) to provide guidance regarding the privacy provisions of section 4013 of the Savings Bank Act (SBA).<sup>2</sup>

### *Scope of section 4013 versus federal privacy regulations*

Since the enactment of the federal privacy regulations, several questions have been raised regarding the current scope and application of section 4013. Pursuant to the federal regulations, state law is not preempted if state law affords consumers greater privacy protections. Sections 4013(d) and (j) of the SBA generally require a state savings bank to obtain the consent of its customer before that customer's financial information may be disclosed; an affirmative act by the customer.<sup>3</sup> In contrast, the federal privacy

<sup>1</sup> The federal privacy regulations were adopted jointly by the federal depository institution regulators. 65 Fed. Reg. 35161 (2000). The FDIC regulations apply to state savings banks. 12 CFR Part 332.

<sup>2</sup> 205 ILCS 205/4013.

<sup>3</sup> Section 4013(d) expressly applies to the financial information of "members and holders of capital." And, consistent with section 4013's purpose of protecting privacy, section 4013(j), brings all "customers" under the privacy protection provided by section 4013(d). Specifically, section 4013(j), in relevant part, requires:

All other information [i.e. other than name and address] regarding a customer's account are [sic] subject to the disclosure provisions of this Section.

Thus, a state savings bank must obtain consent prior to disclosing financial information of any of its customers, not just customers who are savings bank members. Section 4013(b) also shows that all customers are intended to come within the scope of section 4013(d)'s requirement of consent prior to disclosure of financial records. Section 4013(b) prescribes the kinds of information protected by section 4013(d). In this connection, section 4013(b) identifies "any ... information pertaining to any relationship ... between a savings bank and its customer" as financial information protected by section 4013 (emphasis added). Consequently,

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 4013 clearly provides enhanced protection to customers of state savings banks and should not be preempted by the federal privacy regulations.

Also, possible confusion has been noted concerning the privacy protection afforded a "financial record" under section 4013(b) compared to protection afforded "nonpublic personal information"<sup>4</sup> under the federal regulations. The source of confusion appears to be the different terms used in section 4013 of the SBA and the federal privacy regulations. Despite different terms, the protections for customer financial records contained in the Act appear generally consistent with the restrictions on the use of nonpublic personal information described in the federal privacy regulations.

Sections 4013 of the SBA restricts state savings banks from sharing customer "financial records" with non-affiliated parties without the consent of the customer. A "financial record" is defined to include:

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 savings bank or issued and payable by a savings bank; or
- 4) *any other item containing information pertaining to any relationship established in the ordinary course of a savings bank's business between a savings bank and its customer.*<sup>5</sup>

The language of item 4 above (in italics) has an expansive scope. It covers "any" information pertaining to "any" relationship between a savings bank and its customer. The phrase clearly includes information included within the relevant federal term, "nonpublic personal information."<sup>6</sup>

"Financial record" as defined in section 4013(b) includes information that a customer provides to a financial institution when seeking a financial product or service, transaction information, and customer information that a state savings bank obtains in connection with a transaction providing a financial product or service. Examples of information that would constitute "financial information" include:

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because section 4013(d) expressly applies to the disclosure of financial information identified by section 4013(b), section 4013(d) necessarily applies to the financial information of all customers.

No other reading of section 4013 is reasonable. Limiting to members only the application of the requirement to obtain prior consent would have clearly unintended consequences. For example, in the case of a stock savings bank, all customer financial information would be wholly unprotected because members of a stock savings bank are only its stockholders. And, in the case of mutual savings bank, all borrower financial information would be unprotected because the members of a mutual savings bank are only its depositors.

Therefore, section 4013 generally requires a state savings bank to obtain the consent of its customer before that customer's financial information may be disclosed.

<sup>4</sup> See 12 CFR 332.3(n).

<sup>5</sup> 205 ILCS 205/4013(b). (Emphasis added.)

<sup>6</sup> See 12 CFR 332.3(n).

- 1) Information a customer provides to the savings 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 savings 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 savings bank;
- 5) Information a customer provides to the savings bank or that the savings bank obtains in connection with collecting on a loan or servicing a loan; and
- 6) Information from a consumer report.

Furthermore, under section 4013(b), a financial record would 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.<sup>7</sup>

Although similar, there are some important distinctions between section 4013 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 depository institution that is used primarily *for personal, family, or household purposes*, while a "customer" is a consumer who has established a continuing relationship with the depository institution.<sup>8</sup> In contrast, section 4013 only uses the term "customer" (of which "members" are a subset) 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 savings bank or *seek to obtain* such product or service *for personal or commercial purposes*.<sup>9</sup> Thus, even commercial customers of a savings bank would be protected under section 4013. Examples of customers for purposes of section 4013 include:<sup>10</sup>

- 1) Applicants for a loan, credit card, or other financial product or service for personal or business purposes, even if the savings bank declines to extend the loan, credit card, or other financial product;

<sup>7</sup> The fact that section 4013(j) of the SBA provides a specific exception for customer lists further confirms that "financial records under 4013(b) include "customer lists." 205 ILCS 205/4013(j). The authority granted under section 4103(j) is discussed elsewhere in this letter.

<sup>8</sup> 12 C.F.R. 332.3(e)(1) and 12 C.F.R. 332.3(h), respectively. (Emphasis added.)

<sup>9</sup> See remarks of Senator Daley (noting that the bill protects [a customer's] checking account, savings account, or any other transaction with a bank), Senate Transcription Debates at 85, S.B. 2010, 79<sup>th</sup> General Assembly, 149<sup>th</sup> Legis. Day (1976) (enacted).

<sup>10</sup> This list is not exhaustive. For the comprehensive list of individuals who would qualify as "customers" for purposes of section 4013 of the SBA, see 12 C.F.R. 332.3(e)(2) and 12 C.F.R. 332.3(h)(2). Note, however, that the limitations, in the federal regulations on "personal, family, or household purposes" do not apply to the section 4013 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 state savings bank acts as trustee will not be deemed "customers" for purposes of section 4013. However, a savings bank acting as trustee in those instances will assume fiduciary obligations, including the duty to protect the confidentiality of beneficiaries' information.

- 2) Users that obtain a financial product or service at the savings bank's ATM;
- 3) Account holders;
- 4) Borrowers who obtained a loan from the savings bank;
- 5) Borrowers whose loan is subject to servicing rights of the savings bank; and
- 6) Purchasers of an insurance product from the savings bank.

Another distinction between section 4013 and the federal privacy regulations is the method through which a customer exercises his or her right to opt in or opt out. The federal regulations require a depository institution 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 institutions and their counsel should review carefully.<sup>11</sup> In contrast to the federal regulations, section 4013 does not require that a state savings bank provide its customer a specific method to authorize disclosure or to opt in. For instance, section 4013 does not prohibit savings banks from incorporating a customer's consent to disclosure into the terms of an account or loan agreement. However, if a savings bank chooses to use such a method to obtain a customer's consent pursuant to section 4013, 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 savings 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 4013 of the SBA*

Section 4013 of the SBA and the federal regulations include different exceptions to their respective privacy provisions. Section 4013 contains numerous exceptions to the general restrictions on sharing information. Subpart C of the federal regulations, sections 13, 14, and 15, contains different exceptions to the notice and opt-out requirements than those contained in section 4013 of the SBA.<sup>12</sup> 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.<sup>13</sup> Although section 4013 of the SBA 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 4013 of the SBA. Thus, we believe that a state savings 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.

<sup>11</sup> See 12 C.F.R. 332.7(a).

<sup>12</sup> 12 C.F.R. 332.13-15.

<sup>13</sup> For the complete list of "other exceptions" covered under section 15 of the federal regulations, see 12 C.F.R. 332.15.

*Customer lists: Section 4013(j) versus the federal privacy regulations*

Both section 4013 of the SBA and the federal privacy regulations include provisions on a state savings bank's use of its customer lists, respectively: section 4013(j) of the SBA<sup>14</sup> and the FDIC privacy regulations. Because section 4013(j), among other things, does not require a savings bank to provide prior customer notice and permits a savings bank to share list of names and addresses on a unrestricted basis, the agency interprets section 4013(j) as providing less privacy protection than the federal privacy regulations. Therefore, with respect to lists that include personal financial nonpublic information or financial records, federal privacy regulations shall govern disclosure by savings banks.

However, for lists including only information pertaining to commercial customers, section 4013(j) remains in effect. Section 4013(j) reads:

Notwithstanding the provisions of this Section [4013], a savings bank may sell or otherwise make use of lists of customers' names and addresses. All other information regarding a customer's account are [sic] subject to the disclosure provisions of this Section. At the request of any customer, that customer's name and address shall be deleted from any list that is to be sold or used in any other manner beyond identification of the customer's accounts.<sup>15</sup>

Thus, section 4013(j) of the SBA permits a state savings bank to sell or otherwise use certain customer lists on an opt-out basis. Section 4013(j) constitutes an exception to section 4013(d)'s general rule requiring customer consent prior to disclosure of financial records. As an exception, section 4013(j) must be construed narrowly. In tracing the scope of this customer list exception, reasonable expectations of privacy that the opt-in requirement of section 4013(d) creates must not be upset. Customer financial information that receives opt-in privacy protection may not lose opt-in protection merely because a savings bank places that information on a list with other customers' financial information. This is especially important because the SBA does not require savings banks to provide customers with notice of the section 4013's privacy provisions.

In this light, the Agency believes that section 4013(j) permits a state savings bank to use customer lists, as follows:

- 1) On a customer opt-out basis, a savings bank may sell lists of customer name and address;
- 2) On an unrestricted basis, may share customer names and addresses;
- 3) On an unrestricted basis, a savings bank may share with affiliates information that identifies customer accounts (i.e. accounts numbers) or any information that it reasonably deems as equally or more publicly accessible than information that identifies accounts; and
- 4) On a customer opt-out basis, a savings bank may share with affiliates information that goes beyond identification of customer accounts.

<sup>14</sup> 205 ILCS 205/4013(j).

<sup>15</sup> Id.

### *Sharing customer information with affiliates<sup>16</sup>*

A state savings bank may share customer financial information with its affiliates notwithstanding the restrictions otherwise imposed by section 4013 of the SBA. The authority to share this information derives from three sources: section 4013(j) of the SBA; a state savings bank's power to maintain parity with state savings associations; and a state savings bank's authority to avail itself of any power granted under FDIC regulations that apply to state savings banks. Note, though, as described below, affiliates are subject to restrictions on reuse and redisclosure of financial information received from a savings bank.

*Section 4013(j) of the SBA* As stated above, section 4013(j) of the SBA permits a state savings bank share information with affiliates as follows:

- 1) On an unrestricted basis, a savings bank may share with affiliates information that identifies customer accounts (i.e. accounts numbers) or any information that is reasonably deems as equally or more publicly accessible than information that identifies accounts; and
- 2) On a customer opt-out basis, a savings bank may share with affiliates information that goes beyond identification of customer accounts.

*Parity with savings associations* In addition to authority provided by section 4013(j) of the SBA, under section 1008(a)(25) of the SBA, a state savings bank has "... the powers granted to a savings association organized under the Illinois Savings and Loan Act of 1985...."<sup>17</sup> In this connection, section 3-8(c)(12) of the Illinois Savings and Loan Act (ISLA) permits "the exchange of information between an association and an affiliate of the association" regardless of restrictions on disclosure of financial information otherwise imposed by the ISLA.<sup>18</sup>

For purposes of section 3-8(c)(12), the term, affiliate, includes "any company, partnership, or organization that controls, is controlled by, or is under common control with an association."<sup>19</sup> The term, control, however, is not defined specifically for purposes of section 3-8(c)(12). Nonetheless, depository institution law and regulation almost uniformly deems ownership, control, or power to vote 25% or more of any class of voting shares of an entity to constitute "control."<sup>20</sup> Given these definitions of affiliate and

<sup>16</sup> Prior to the enactment of the Gramm-Leach-Bliley Act (GLBA), a savings bank could become affiliated with a commercial enterprise pursuant to section 1467a of the Home Owners Loan Act which permitted unitary savings and loan holding companies to engage in commercial enterprises. While no state savings bank has ever been owned by or affiliated with a commercial enterprise, such affiliation would have been possible, and, as a result, a savings bank would have been able to share information with its commercial affiliate. Now, however, such information sharing would not be permitted. Under GLBA, affiliation of a state savings bank with a commercial enterprise is no longer permitted. 12 U.S.C. 1476a. Thus, a savings bank's affiliates may only be other financial services entities and a savings bank is permitted to share information only with financial service affiliates.

<sup>17</sup> 205 ILCS 105/1008(a)(25). This parity authority is subject to regulations of the Commissioner. The Commissioner has adopted no regulations affecting a savings bank's power to share information with its affiliates.

<sup>18</sup> 205 ILCS 105/3-8(c)(12).

<sup>19</sup> Id.

<sup>20</sup> For example, 12 U.S.C. 1467a(a), 1813(w)(5), 1817(j), and 1841(a); 12 CFR 303.81 and 332.3; 205 ILCS 105/1A-1 and 205/1007.35, 2001.05, and 8015; and 38 IAC 1075.200 and 1075.1700. Other indicia of control exist such as holding proxies, ability to influence management, and ability to elect a majority of directors. In these cases, control determinations would be made on a case by case basis.

control, section 3-8(c)(12) permits a state savings association to share information with any entity of which it owns 25% or more of any class of voting shares (e.g. a subsidiary), any entity that owns 25% or more of any class of voting shares of the savings association (e.g. a holding company), or with any entity that is also controlled by the same entity that controls the savings association (e.g. entities controlled by the same holding company). (In the case of a partnership or other organization not in stock form, an equivalent ownership stake must exist.)

Therefore, pursuant to the parity authority of section 1008(a)(25) of the SBA, a state savings bank has the same authority as a state savings association to share information with its affiliates. Thus, a savings bank may share information with any entity of which it owns 25% or more of any class of voting shares (e.g. a subsidiary), any entity that owns 25% or more of any class of voting shares of the savings bank (e.g. a holding company), or with any entity that is also controlled by the same entity that controls the savings bank (e.g. entities controlled by the same holding company). (In the case of a partnership or other organization not in stock form, an equivalent ownership stake must exist.)

*Authority derived from FDIC regulations* In addition to any authority provided by section 1008(a)(25) and 4013(j), a state savings bank may derive powers from FDIC regulations. Section 1006(a) of the SBA states:

Subject to the regulation of the Commissioner and in addition to the powers granted by this Act, each savings bank operating under this Act shall possess those powers granted by regulation promulgated under the Federal Deposit Insurance Act for state savings banks.<sup>21</sup>

With respect to financial information, applicable FDIC privacy regulations permit banks to share nonpublic financial information with affiliates.<sup>22</sup> Therefore, section 1006(a) of the SBA permits a savings bank to likewise share financial information.

*Reuse and redisclosure by lawful recipients of financial records* While a state savings bank may share customer financial information with affiliates as described above, the shared information may only be used by an affiliate to the extent the savings bank could use the information. Thus, an affiliate may only disclose information constituting "customer financial records" to other affiliates of the savings bank from which it received the information. Any other conclusion would seriously erode the protection afforded to customer financial records.<sup>23</sup> A savings bank may not evade the general prohibition on disclosing financial information by indirectly disclosing the information to outside parties through affiliates. If, however, a customer authorizes the savings 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.

<sup>21</sup> 205 ILCS 205/1006(a).

<sup>22</sup> 12 CFR 332.1, 4, and 7.

<sup>23</sup> 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).

### *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.<sup>24</sup> Section 4013 of the SBA does not require a notice. However, the federal regulations require state savings banks to describe all privacy policies and practices which would include those required by section 4013. Thus, a savings bank should be certain that its privacy policies and practices are conducted in accordance with Section 4013 and are properly disclosed as required by the federal regulations.

### *Web Site privacy*

Internet use presents unique issues regarding a state savings bank's privacy policies and compliance with privacy standards. Savings banks should adopt internal measures to ensure compliance with privacy requirements when they provide service or otherwise communicate with their customers using the Internet.<sup>25</sup> 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 savings bank's privacy policies. When the savings bank is conducting a transaction, such as an on-line credit application, it should display its privacy policy at the point at which the customer is asked to submit personal information. The privacy statement itself should contain clear and understandable disclosures. Savings banks should use plain language when describing electronic data collected and electronic security measures undertaken.

State savings 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 savings 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 savings bank personnel. Procedures should be designed to train savings 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, state savings banks are required to maintain privacy policies and practices that comply with both section 4013 of the Act and the federal privacy regulations. Savings banks are still required to comply with the opt in requirements of section 4013 if the information they wish to disclose constitutes a

<sup>24</sup> 12 C.F.R. 332.4-5. See FDIC Financial Institution Letter FIL-3-2001 (Jan. 27, 2001).

<sup>25</sup> 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).

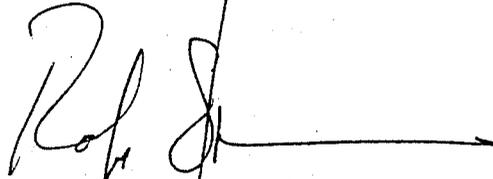
March 29, 2001

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financial record, unless an exception applies. For example, as described above, state savings banks may share financial records with affiliates. The term "financial records" in section 4013 protects the documents and information enumerated in section 4013(b) as well as information covered in the federal regulations' definition of "nonpublic personal information." The privacy protections in section 4013 are also afforded to all "customers" of the savings bank. This includes any person or entity that obtains a financial product or service from the savings bank, for personal or business purposes regardless whether the person establishes an ongoing relationship with the savings bank. Although the SBA does not require savings 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, state savings banks must clearly and accurately describe all such policies in compliance with the federal regulations.

I hope this letter is responsive to your inquiry. If you have any questions regarding the matters discussed in this letter, please contact me.

Very truly yours,

A handwritten signature in black ink, appearing to read "Rob A. Stearn", with a long horizontal line extending to the right.

Robert A. Stearn  
Senior Counsel



Bureau of Residential Finance  
Thrift Division

Writer's telephone/email  
312/793-1454  
rstearn@bre.state.il.us

April 27, 2001

Re: Illinois Savings and Loan Act of 1985 Privacy Provisions (Section 3-8)

In light of the recently adopted federal privacy regulations,<sup>1</sup> you have asked the Office of Banks and Real Estate (Agency) to provide guidance regarding the privacy provisions of section 3-8 of the Illinois Savings and Loan Act of 1985 (ISLA).<sup>2</sup>

*Scope of section 3-8 versus federal privacy regulations*

Since the enactment of the federal privacy regulations, several questions have been raised regarding the current scope and application of section 3-8 of the ISLA. Pursuant to the federal regulations, state law is not preempted if state law affords consumers greater privacy protections. Section 3-8(d) of the ISLA generally require an association to obtain the consent of its customer before that customer's financial information may be disclosed; an affirmative act by the customer.<sup>3</sup> In contrast, the federal privacy regulations require only that consumers be given notice and the opportunity to opt out of disclosures;

<sup>1</sup> The federal privacy regulations were adopted jointly by the federal depository institution regulators. 65 Fed. Reg. 35161 (2000). The OTS regulations apply to associations. 12 CFR Part 573.

<sup>2</sup> 205 ILCS 105/3-8.

<sup>3</sup> Section 3-8(d) expressly applies to the financial information of "members and holders of capital" of the association. However, in light of the privacy protection purpose of section 3-8 and the language of section 3-8(b), all customers of an association are intended to come within the scope of section 3-8(d)'s requirement of consent prior to disclosure of financial records. Section 3-8(b) prescribes the kinds of information protected by section 3-8(d). In this connection, section 3-8(b) identifies "any ... information pertaining to any relationship ... between an association and its customer" as financial information protected by section 3-8 (emphasis added). Because section 3-8(d) expressly applies to the disclosure of financial information identified by section 3-8(b), section 3-(d) necessarily applies to the financial information of all customers. Therefore, section 3-8 generally requires an association to obtain the consent of its customer before that customer's financial information may be disclosed.

inaction equals assent. The affirmative authorization required by section 3-8 clearly provides enhanced protection to customers of associations and should not be preempted by the federal privacy regulations.<sup>4</sup>

Also, possible confusion has been noted concerning the privacy protection afforded a "financial record" under section 3-8(b) of the ISLA compared to protection afforded "nonpublic personal information" under the federal regulations. The source of confusion appears to be the different terms used in section 3-8 and the federal privacy regulations. Despite different terms, the protections for customer financial records contained in the ISLA appear generally consistent with the restrictions on the use of nonpublic personal information described in the federal privacy regulations.

Sections 3-8 of the ISLA restricts associations from sharing customer "financial records" with non-affiliated parties without the consent of the customer. A "financial record" is defined to include:

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 an association or issued and payable by an association; or
- 4) *any other item containing information pertaining to any relationship established in the ordinary course of an association's business between an association and its customer.*<sup>6</sup>

The language of item 4 above (in italics) has an expansive scope. It covers "any" information pertaining to "any" relationship between an association and its customer. The phrase clearly includes information included within the relevant federal term, "nonpublic personal information."<sup>7</sup>

<sup>4</sup> 12 CFR 573.17. It appears that customers of federal associations may also be entitled to the right to opt-in as provided by section 3-8 of the ISLA as described in this letter. Section 1-3(b) of the ISLA grants members of federal associations the same rights as state association members unless federal law or regulation provide otherwise. Specifically, section 1-3(b) states:

Unless Federal laws or regulations provide otherwise, Federal Associations *and their members* shall possess all of the rights, powers, privileges, immunities and exemptions granted by this Act to associations operating hereunder and to the members thereof, or by any other Act or Section thereof, to such associations or members, whether or not specifically mentioned in the Section or Sections granting such rights, powers, privileges, immunities and exemptions. 205 ILCS 105/1-3(b). (Emphasis added.)

Under this section, members of federal associations are entitled to "all of the rights, powers, privileges, immunities and exemptions" granted by the ISLA to members of state associations unless federal law or regulation provides otherwise. With respect to privacy protection, federal privacy regulations do not preempt more protective state provisions. 12 CFR 573.17. As stated above, section 3-8's opt in requirement is more protective of customer privacy than the federal privacy regulation's opt out provision. (Federal associations include federal savings and loan associations and federal savings banks chartered pursuant to Home Owners Loan Act of 1933 (12 U.S.C. 1461 et seq.) whose principal place of business is located in Illinois. 205 ILCS 105/1-10.07.)

<sup>5</sup> See 12 CFR 573.3(n).

<sup>6</sup> 205 ILCS 105/3-8(b). (Emphasis added.)

<sup>7</sup> See 12 CFR 573.3(n).

"Financial record" as defined in section 3-8(b) includes information that a customer provides to a financial institution when seeking a financial product or service, transaction information, and customer information that an association 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 association 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 association;
- 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 association;
- 5) Information a customer provides to the association or that the association obtains in connection with collecting on a loan or servicing a loan; and
- 6) Information from a consumer report.

Furthermore, under section 3-8(b), a financial record would 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.

Although similar, there are some important distinctions between section 3-8 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 depository institution that is used primarily *for personal, family, or household purposes*, while a "customer" is a consumer who has established a continuing relationship with the depository institution.<sup>8</sup> In contrast, section 3-8 only uses the term "customer" (of which "members" are a subset) 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 an association or *seek to obtain* such product or service *for personal or commercial purposes*.<sup>9</sup> Thus, even commercial customers of an association would be protected under section 3-8. Examples of customers for purposes of section 3-8 include:<sup>10</sup>

- 1) Applicants for a loan, credit card, or other financial product or service for personal or business purposes, even if the association declines to extend the loan, credit card, or other financial product;

<sup>8</sup> 12 C.F.R. 573.3(e)(1) and 12 C.F.R. 573.3(h), respectively. (Emphasis added.)

<sup>9</sup> See remarks of Senator Daley (noting that the bill protects [a customer's] checking account, savings account, or any other transaction with a bank), Senate Transcription Debates at 85, S.B. 2010, 79th General Assembly, 149th Legis. Day (1976) (enacted).

<sup>10</sup> This list is not exhaustive. For the comprehensive list of individuals who would qualify as "customers" for purposes of section 3-8 of the ISLA, see 12 C.F.R. 573.3(e)(2) and 12 C.F.R. 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 3-8 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 association acts as trustee will not be deemed "customers" for purposes of section 3-8. However, an association acting as trustee in those instances will assume fiduciary obligations, including the duty to protect the confidentiality of beneficiaries' information.

- 2) Users that obtain a financial product or service at the association's ATM;
- 3) Account holders;
- 4) Borrowers who obtained a loan from the association;
- 5) Borrowers whose loan is subject to servicing rights of the association; and
- 6) Purchasers of an insurance product from the association.

Another distinction between section 3-8 and the federal privacy regulations is the method through which a customer exercises his or her right to opt in or opt out. The federal regulations require a depository institution 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 institutions and their counsel should review carefully.<sup>11</sup> In contrast to the federal regulations, section 3-8 does not require that an association provide its customer a specific method to authorize disclosure or to opt in. For instance, section 3-8 does not prohibit associations from incorporating a customer's consent to disclosure into the terms of an account or loan agreement. However, if an association chooses to use such a method to obtain a customer's consent pursuant to section 3-8, 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 association 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 3-8 of the ISLA*

Section 3-8 of the ISLA and the federal regulations include different exceptions to their respective privacy provisions. Section 3-8 contains numerous exceptions to the general restrictions on sharing information. Subpart C of the federal regulations, sections 13, 14, and 15, contains different exceptions to the notice and opt-out requirements than those contained in section 3-8 of the ISLA.<sup>12</sup> 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 association 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.<sup>13</sup> Although section 3-8 of the ISLA 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 3-8 of the ISLA. Thus, we believe that an association need not obtain a customer's authorization to make disclosures permitted by one of the exceptions contained in Subpart C of the federal regulations.

<sup>11</sup> See 12 C.F.R. 573.7(a).

<sup>12</sup> 12 C.F.R. 573.13-15.

<sup>13</sup> For the complete list of "other exceptions" covered under section 15 of the federal regulations, see 12 C.F.R. 573.15.

### *Sharing customer information with affiliates*<sup>14</sup>

An association may share customer financial information with its affiliates notwithstanding the restrictions otherwise imposed by section 3-8 of the ISLA. Specifically, section 3-8(c)(12) of the ISLA permits "the exchange of information between an association and an affiliate of the association" regardless of restrictions on disclosure of financial information otherwise imposed by the ISLA.<sup>15</sup>

For purposes of section 3-8(c)(12), the term, affiliate, includes "any company, partnership, or organization that controls, is controlled by, or is under common control with an association."<sup>16</sup> The term, control, however, is not defined specifically for purposes of section 3-8(c)(12). Nonetheless, depository institution law and regulation almost uniformly deems ownership, control, or power to vote 25% or more of any class of voting shares of an entity to constitute "control."<sup>17</sup> Given these definitions of affiliate and control, section 3-8(c)(12) permits a savings association to share information with any entity of which it owns 25% or more of any class of voting shares (e.g. a subsidiary), any entity that owns 25% or more of any class of voting shares of the savings association (e.g. a holding company), or with any entity that is also controlled by the same entity that controls the savings association (e.g. entities controlled by the same holding company). (In the case of a partnership or other organization not in stock form, an equivalent ownership stake must exist.)

*Reuse and redisclosure by lawful recipients of financial records* While an association may share customer financial information with affiliates as described above, the shared information may only be used by an affiliate to the extent the association could use the information. Thus, an affiliate may only disclose information constituting "customer financial records" to other affiliates of the association from which it received the information. Any other conclusion would seriously erode the protection afforded to customer financial records.<sup>18</sup> An association may not evade the general prohibition on disclosing financial information by indirectly disclosing the information to outside parties through affiliates. If, however, a customer authorizes the association 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.

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<sup>14</sup> Prior to the enactment of the Gramm-Leach-Bliley Act (GLBA), an association could become affiliated with a commercial enterprise pursuant to section 1467a of the Home Owners Loan Act which permitted unitary savings and loan holding companies to engage in commercial enterprises. As a result, an association would have been able to share information with its commercial affiliate. Now, however, such information sharing would not be permitted. Under GLBA, affiliation of an association with a commercial enterprise is no longer permitted. 12 U.S.C. 1476a. Thus, an association's affiliates may only be other financial services entities and an association is permitted to share information only with financial service affiliates.

<sup>15</sup> 205 ILCS 105/3-8(c)(12).

<sup>16</sup> *Id.*

<sup>17</sup> For example, 12 U.S.C. 1467a(a), 1813(w)(5), 1817(j), and 1841(a); 12 CFR 303.81 and 332.3; 205 ILCS 105/1A-1 and 205/1007.35, 2001.05, and 8015; and 38 IAC 1075.200 and 1075.1700. Other indicia of control exist such as holding proxies, ability to influence management, and ability to elect a majority of directors. In these cases, control determinations would be made on a case by case basis.

<sup>18</sup> 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).

### *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.<sup>19</sup> Section 3-8 of the ISLA does not require a notice. However, the federal regulations require associations to describe all privacy policies and practices which would include those required by section 3-8. Thus, an association should be certain that its privacy policies and practices are conducted in accordance with section 3-8 and are properly disclosed as required by the federal regulations.

### *Web Site privacy*

Internet use presents unique issues regarding an association's privacy policies and compliance with privacy standards. Associations should adopt internal measures to ensure compliance with privacy requirements when they provide service or otherwise communicate with their customers using the Internet.<sup>20</sup> 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 association's privacy policies. When the association is conducting a transaction, such as an on-line credit application, it should display its privacy policy at the point at which the customer is asked to submit personal information. The privacy statement itself should contain clear and understandable disclosures. Associations should use plain language when describing electronic data collected and electronic security measures undertaken.

Associations 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 association to handle customer privacy-related questions or complaints over the Internet or telephone. In addition, senior management should adopt procedures to ensure compliance by association personnel. Procedures should be designed to train association 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 association maintains its privacy promises to customers, and in turn, complies with applicable privacy standards.

### *Conclusion*

In conclusion, associations are required to maintain privacy policies and practices that comply with both section 3-8 of the ISLA and the federal privacy regulations. Associations are still required to comply with the opt in requirements of section 3-8 if the information they wish to disclose constitutes a financial

<sup>19</sup> 12 C.F.R. 573.4-5. See FDIC Financial Institution Letter FIL-3-2001 (Jan. 27, 2001).

<sup>20</sup> 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).

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record, unless an exception applies. For example, as described above, associations may share financial records with affiliates. The term "financial records" in section 3-8 protects the documents and information enumerated in section 3-8(b) as well as information covered in the federal regulations' definition of "nonpublic personal information." The privacy protections in section 3-8 are also afforded to all "customers" of the association. This includes any person or entity that obtains a financial product or service from the association, for personal or business purposes regardless whether the person establishes an ongoing relationship with the association. Although the ISLA does not require associations to provide notices of their privacy policies and practices to customers, the federal regulations require associations to provide notices of all privacy-related policies and practices, including those derived from state law. As a result, associations must clearly and accurately describe all such policies in compliance with the federal regulations.

I hope this letter is responsive to your inquiry. If you have any questions regarding the matters discussed in this letter, please contact me.

Very truly yours,

A handwritten signature in black ink, appearing to read "Robert A. Stearn", with a long horizontal line extending to the right.

Robert A. Stearn  
Senior Counsel