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OFFICE OF BANKS AND REAL ESTATE

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[Privacy
Customer Information
Savings Banks]

March 29, 2001

Re: Savings Bank Act Privacy Provisions (Section 4013)

Dear Mr []:

In light of the recently adopted federal privacy regulations,[1] 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).[2]

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.[3] In contrast, the federal privacy

[1] 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.
[2] 205 ILCS 205/4013.
[3] 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, 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.

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"[4] 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.*[5]

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."[6]

"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:

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.

[4] See 12 CFR 332.3(n).

[5] 205 ILCS 205/4013(b). (Emphasis added.)

[6] 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.[7]

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 purpose*s, while a "customer" is a consumer who has established a continuing relationship with the depository institution.[8] 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*** *purpose*s.[9] Thus, even commercial customers of a savings bank would be protected under section 4013. Examples of customers for purposes of section 4013 include:[10]

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;

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[7] 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.

[8] 12 C.F.R. 332.3(e)(1) and 12 C.F.R. 332.3(h), respectively. (Emphasis added.)

[9] *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 th General Assembly, 149 th Legis. Day (1976) (enacted).

[10] 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.[11] 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.[12] 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.[13] 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.

[11] See 12 C.F.R. 332.7(a).
[12] 12 C.F.R. 332.13-15.
[13] 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[14] 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.[15]

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.

[14] 205 ILCS 205/4013(j).
[15] Id.

Sharing customer information with affiliates[16]

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…."[17] 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.[18]

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."[19] 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."[20] Given these definitions of affiliate and

[16] 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.

[17] 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.

[18] 205 ILCS 105/3-8(c)(12).

[19] Id.

[20] 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.[21]

With respect to financial information, applicable FDIC privacy regulations permit banks to share nonpublic financial information with affiliates.[22] 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.[23] 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.

[21] 205 ILCS 205/1006(a).
[22] 12 CFR 332.1, 4, and 7.
[23] 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.[24] 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.[25] 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

[24] 12 C.F.R. 332.4-5. See FDIC Financial Institution Letter FIL-3-2001 (Jan. 27, 2001).
[25] 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).

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,

/s/
Robert A. Stearn
Senior Counsel

Note: Please see also Interpretive Letter 04-02 (October, 12, 2004).