



OFFICE OF ATTORNEY GENERAL
STATE OF NORTH DAKOTA

Heidi Heitkamp
ATTORNEY GENERAL

October 30, 2000

FEDERAL TRADE COMMISSION
RECEIVED

Ms. Debra A. Valentine
Federal Trade Commission
600 Pennsylvania Avenue NW
Washington, DC 20580

NOV 3 2000

GENERAL COUNSEL

CAPITOL TOWER
State Capitol
600 E. Boulevard Ave.
Dept. 125
Bismarck, ND 58505-0040
701-328-2210
701-328-3409 (TDD)
FAX 701-328-2226

RE: Gramm-Leach-Bliley Act

Dear Ms. Valentine:

**Consumer Protection
and Antitrust Division**
701-328-3404
800-472-2600
Toll Free in North Dakota
FAX 701-328-3535

I am general counsel for the North Dakota Department of Banking and Financial Institutions. Commissioner Gary Preszler asked me to respond to your letter dated October 18, 2000. I will respond to your questions in order.

Gaming Division
701-328-4848
FAX 701-328-3535

You first question what entities are covered by the definition of "financial institution" in N.D.C.C. § 6-08.1-01(3), other than those specifically listed. Whether an entity is a "financial institution" would most likely be a question of fact, the determination of which would be left to either the Commissioner from a regulatory perspective, or the ultimate finder of fact from a judicial perspective. Nonetheless, I believe the definition would include all financial institution affiliates that are controlled by a financial institution. The affiliate would be restricted in the same manner as the controlling entity.

Licensing Section
701-328-2329
FAX 701-328-3535

Your second question is what information is included in the definition of "customer information." In a January 10, 1986, letter opinion, the North Dakota Attorney General stated that "'[c]ustomer information' . . . contemplates virtually any information derived from a financial institution concerning a particular customer." Letter from Attorney General Nicholas Spaeth to John Fox (Jan. 10, 1986). "The existence of an account, and the corresponding account number, clearly fall within the scope of 'customer information' as defined by the legislature." Id. The breadth of that statement indicates that every piece of information received by a financial institution from a customer would be protected by the confidentiality requirement.

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Civil Litigation
701-328-3640

Natural Resources
701-328-3640

Racing Commission
701-328-4290

**Bureau of Criminal
Investigation**
P.O. Box 1054
Bismarck, ND 58502-1054
701-328-5500
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Your third question is whether financial institutions are required to provide any disclosures to customers regarding any potential consent, and whether any consent is revocable. I do not believe there is any disclosure

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Ms. Debra A. Valentine
October 31, 2000
Page 2

requirement, other than the need for consent to be in written form. I would presume the customer would inquire of the need for the consent prior to executing that consent.

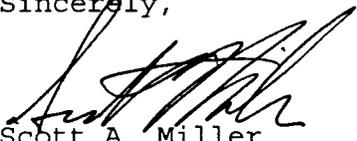
Since a financial institution may not require any consent or waiver from a customer, I believe a customer could revoke a consent by merely sending the financial institution written notification that the consent is revoked. I do not believe the financial institution could refuse to honor that revocation.

Finally, you inquire whether the Department or courts have construed the terms "customer credit information" or "regular course of business." The Department has not formally interpreted that language, and I can find no court decision interpreting that language. The Department would most likely interpret that provision to be applicable to the ability of a financial institution to find other lenders or investors to participate in a credit facility, or to sell a loan in its entirety. The Department would also interpret that provision to apply to situations where there is a business need for the information, such as in a potential mortgage situation where the parties and creditors may have a need for the credit information.

The North Dakota Attorney General has opined that "whether the exchange of credit information is in the 'regular course of business' necessarily depends on the factual circumstances of each particular case." 1985 N.D. Op. Att'y Gen. 132, 134 (Oct. 11 to John Olson). To guide that determination, the Attorney General suggested that the phrase would involve an exchange necessary "in the inherent nature of the business in question, and in the method systematically employed for the conduct of the business as a business." Id.

Please do not hesitate to contact me if you need any further information. My direct line is (701) 328-3148.

Sincerely,


Scott A. Miller
Assistant Attorney General

Citation/Title
8538

*5537 Office of the Attorney General
State of North Dakota

Opinion No. 85-38
Date Issued: October 11, 1985

Senator John M. Olson

--QUESTIONS PRESENTED--

I.

Whether a financial institution's disclosure to a realtor or closing agent of a customer's outstanding indebtedness on specific real property in relation to the sale or transfer of the property falls within the exception of N.D.C.C. § 6-08.1-02(6).

II.

Whether a financial institution's disclosure to a business of the sufficiency of a customer's account to cover a check issued by the customer to the business falls within the exception of N.D.C.C. § 6-08.1-02(6).

--ATTORNEY GENERAL'S OPINION--

I.

It is my opinion that a financial institution's disclosure to a realtor or closing agent of a customer's outstanding indebtedness on specific real property in relation to the sale or transfer of the property falls within the exception of N.D.C.C. § 6-08.1-02(6).

II.

It is my further opinion that a financial institution's disclosure to a business of the sufficiency of a customer's account to cover a check issued by the customer to the business falls within the exception of N.D.C.C. § 6-08.1-02(6).

--ANALYSES--

I.

N.D.C.C. Ch. 6-08.1 was enacted by the Legislative Assembly with the purpose of establishing specific statutory guidelines for financial institutions

in responding to requests for disclosure of customer information. Generally, N.D.C.C. Ch. 6-08.1 prohibits disclosure of customer financial information in the absence of express customer consent or valid legal process. However, the requirements of N.D.C.C. Ch. 6-08.1 do not apply to:

***5538** 6. The exchange in the regular course of business of customer credit information between a financial institution and other financial institutions or commercial entities, directly, or through a customer reporting agency.

N.D.C.C. § 6-08.1-02(6).

The absence of a statutory definition of 'commercial entity' necessitates a determination of its ordinary meaning. N.D.C.C. § 1-02-02. Although the legislature has not defined 'commercial entity,' it has articulated a definition of 'business entity' in N.D.C.C. Ch. 51-22. Inasmuch as 'commerce' is generally considered to be synonymous with 'business,' Webster's New World Dictionary, 285 (2d Ed. 1982), the legislature's definition of 'business entity' is persuasive in determining the ordinary meaning of 'commercial entity.'

N.D.C.C. § 51-22-01(1) provides:

51-22-01. DEFINITIONS. As used in this chapter:

1. 'Business entity' means a sole proprietorship, partnership, corporation, association, or other group, however organized and whether or not organized to operate at a profit, doing business in this state.

Apart from N.D.C.C. § 51-22-01(1), the ordinary meanings of 'commercial' and 'entity' yield an equally broad definition of 'commercial entity.' The word commercial may be defined as 'of, or connected with commerce or trade.' Webster's New World Dictionary, 285 (2d Ed. 1982). Entity has been defined as 'a thing that has a definite, individual existence. . . .' Id. at 467.

The ordinary meaning of 'commercial entity,' thus, contemplates virtually any organization doing business. As such, the plain meaning of 'commercial entity' would include realtors and closing agents transacting business in this state.

A further requirement of N.D.C.C. § 6-08.1-02(6) is that the exchange of credit information be made in the 'regular course of business.' 'Regular course

8538

of business' has been interpreted as meaning 'in the inherent nature of the business in question, and in the method systematically employed for the conduct of the business as a business.' Missouri Valley Walnut Co. v. Snider, 569 S.W.2d 324, 328 (Mo. Ct. App. 1978). Hence, whether the exchange of credit information is in the 'regular course of business' necessarily depends on the factual circumstances of each particular case. However, it is my opinion that disclosure of a customer's outstanding principal and interest balances to a realtor or closing agent participating in the sale or transfer of the customer's mortgaged property would fall within the scope of 'regular course of business.'

***5539** It is my opinion that a financial institution's disclosure to a realtor or closing agent of a customer's outstanding indebtedness on specific real property in relation to the sale or transfer of the property falls within the exception of N.D.C.C. § 6-08.1-02(6). Although a financial institution is excepted from the general requirements of N.D.C.C. Ch. 6-08.1 in such a situation, N.D.C.C. § 6-08.1-02(6) does not mandate that the financial institution comply with the disclosure request. Rather, disclosure pursuant to N.D.C.C. § 6-08.1-02(6) is strictly a discretionary matter for each individual financial institution.

II.

The above interpretative analysis of 'commercial entity' and 'regular course of business' would also apply in determining whether the exception of N.D.C.C. § 6-08.1-02(6) encompasses a financial institution's disclosure to a business regarding the sufficiency of a customer's account to cover a check issued by the customer to the business. The broad interpretation of 'commercial entity' would undoubtedly comprehend the typical business. Furthermore, it is my opinion that a business' request for the adequacy of a customer's account balance, and the financial institution's response thereto, would fall within the scope of 'regular course of business.'

Therefore, it is my opinion that a financial institution's disclosure to a business of the sufficiency of a customer's account to cover a check issued by the customer to the business falls within the exception of N.D.C.C. § 6-08.1-02(6). As mentioned above, disclosure pursuant to N.D.C.C. § 6-08.1-02(6) is discretionary and not mandated by law.

--EFFECT--

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.

Nicholas J. Spaeth

Attorney General

ND-AG-OPINION2

Citation/Title
86fox01

*7255 January 10, 1986

Mr. John J. Fox
Assistant State's Attorney
Burleigh County Courthouse
514 East Thayer
Bismarck, ND 58501

Dear Mr. Fox:

Thank you for your letter of October 3, 1985, in which you ask whether sheriffs' inquiries of financial institutions to determine whether judgment debtors have bank accounts, and the corresponding account numbers, for the purpose of facilitating the levying process on behalf of judgment creditors are subject to the restrictions of N.D.C.C. Ch. 6-08.1.

N.D.C.C. Ch. 6-08.1 was enacted by the legislative assembly with the purpose of establishing specific statutory guidelines for financial institutions in responding to requests for disclosure of customer information. N.D.C.C. Ch. 6-08.1 mandates that specific legal process be employed by a law enforcement or governmental agency to obtain customer information from a financial institution.

N.D.C.C. § 6-08.1-05 provides in relevant part as follows:

6-08.1-05. GOVERNMENT ACCESS.

1. A governmental agency or law enforcement agency may obtain customer information from a financial institution pursuant to either of the following:

- a. The consent of the customer, in accordance with this chapter.
- b. Valid legal process, in accordance with this section.

2. A governmental or law enforcement agency may obtain customer information from a financial institution pursuant to a judicial or administrative subpoena duces tecum served on the financial institution, if all of the following are met:

Mr. John J. Fox
January 10, 1986

a. There is reason to believe that the customer information sought is relevant to a proper law enforcement objective or is otherwise authorized by law.

b. A copy of the subpoena has been personally served on the customer, or his

86fox01

legal representative, or has been *7256 mailed to the customer or his legal representative at his last-known address on or before the date of the subpoena, together with a notice that describes the nature of the inquiry, the specific customer information sought, and a description of the customer's right to challenge the sub-poena pursuant to this chapter.

c. Ten days have passed from the date of personal service of the subpoena on the customer or his legal representative, or fourteen days have passed from the date the subpoena was mailed to the customer or his legal representative, and the customer has not exercised his right to challenge the subpoena pursuant to this section.

A sheriff's request for customer information from a financial institution clearly falls within the scope of the statute. Furthermore, a sheriff's request for information does not fall within the exemptions enumerated in N.D.C.C. § 6-08.1-02.

The scope of "customer information" as defined by N.D.C.C. Ch. 6-08.1 is extremely broad. N.D.C.C. § 6-08.1-01(2) provides:

6-08.1-01. DEFINITIONS. As used in this chapter:

* * *

2. "Customer information" means either of the following:

Mr. John J. Fox
January 10, 1986
Page 3

a. Any original or any copy of any records held by a financial institution pertaining to a customer's relationship with the financial institution.

b. Any information derived from a record described in this subsection.

"Customer information," thus, contemplates virtually any information derived from a financial institution concerning a particular customer. The existence of an account, and the corresponding account number, clearly fall within the scope of "customer information" as defined by the legislature.

It is my opinion, therefore, that sheriffs' inquiries of financial institutions to determine whether judgment debtors have bank accounts, and the corresponding account numbers, for the purpose of facilitating the levying process on behalf of judgment creditors are subject to the restrictions of N.D.C.C. Ch. 6-08.1. Failure to comply therewith subjects the law enforcement agency to the liability provisions of N.D.C.C. § 6-08.1-08.

It is unfortunate that the legislature failed to exempt the levying process from the requirements of N.D.C.C. Ch. *7257 6-08.1. The legislative history indicates that the legislature did not contemplate the negative impacts that

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this legislation would have on the effectiveness of the levying process in North Dakota. It appears that North Dakota law enforcement was generally unaware of the bill and consequently, did not actively participate in the drafting process. Hopefully, the regrettable consequences of the legislation will not prove to be an insurmountable burden for North Dakota law enforcement and the appropriate remedial measures can be pursued in 1987.

Sincerely,

Nicholas J. Spaeth

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