FORMAL OPINION
2002-F-07

Date Issued: May 22, 2002

Requested by: Representatives James Kasper and Dan Ruby

QUESTIONS PRESENTED

I.

What qualifies as an "agent of a financial institution" as that term is used in N.D.C.C. § 6-08.1-02(1)?

II.

If 2001 Senate Bill No. 2191 ("SB 2191") is rejected by the voters pursuant to the pending referral, may a financial institution subject to N.D.C.C. ch. 6-08.1 disclose customer information without a customer's express consent as necessary in the course of providing the customer a service inherent in the business of financial institutions either directly or through a third party?

III.

If SB 2191 is rejected, what financial institutions will be subject to N.D.C.C. ch. 6-08.1?

IV.

Which, if any, provisions of Title V of the Gramm-Leach-Bliley Financial Modernization Act of 1999 ("GLB Act"), will apply to financial institutions subject to N.D.C.C. ch. 6-08.1 if SB 2191 is rejected?

ATTORNEY GENERAL'S OPINIONS

I.

It is my opinion that an entity acting for a financial institution in providing services to the financial institution's customers pursuant to a contract is an "agent of the financial institution," regardless of how the parties characterize their relationship.

II.

It is my opinion that a financial institution is not required to obtain a customer's affirmative consent to share information with the financial institution's employees or agents in the course of providing services the customer requests, including ATM, credit card and checking services, regardless of whether SB 2191 is rejected.

III.

It is my opinion that N.D.C.C. ch. 6-08.1 applies to financial institutions physically located in North Dakota and how those institutions treat the financial information of their customers located in North Dakota. It is my further opinion that N.D.C.C. ch. 6-08.1 does not apply to financial institutions located outside of North Dakota and how those institutions treat the financial information of their customers located outside of North Dakota. Whether N.D.C.C. ch. 6-08.1 applies to other transactions or relationships between financial institutions and their customers depends on the resolution of a myriad of factual circumstances. Because the remaining issues involve questions of fact, I can not opine whether N.D.C.C. ch. 6-08.1 applies to those non-specific situations.

IV.

It is my opinion that, if SB 2191 is rejected by the voters, North Dakota financial institutions will be required to comply with all of the GLB Act provisions that are not specifically addressed by N.D.C.C. ch. 6-08.1 or that provide greater privacy protection than chapter 6-08.1. It is my further opinion that if a financial institution's customer has consented to the financial institution's sharing of the customer's information, the financial institution is required to comply with the GLB Act's information protection provisions in their entirety.

ANALYSES

I.

Chapter 6-08.1, N.D.C.C., contains the statutes relating to a financial institution's disclosure of customer information. Section 6-08.1-03, N.D.C.C., generally requires a financial institution to keep customer information confidential unless the financial institution's disclosure of customer information is allowed by an exception or exemption provided in chapter 6-08.1. Subsection 6-08.1-02(1), N.D.C.C., provides an exemption to the confidentiality requirement for "[t]he preparation, examination, handling, or maintenance of any customer information by any officer, employee, or agent of a financial institution having custody of such information." While N.D.C.C. ch. 6-08.1 does provide a definition of "financial institution,"[1] the chapter does not provide any guidance regarding the exact meaning of the phrase "agent of a financial institution."

"Agency is the relationship which results where one person, called the principal, authorizes another, called the agent, to act for him in dealing with third persons." N.D.C.C. § 3-01-01.

> An agency is either actual or ostensible. It is actual when the agent really is employed by the principal. It is ostensible when the principal intentionally or by want of ordinary care causes a third person to believe another to be his agent, who really is not employed by him.

N.D.C.C. § 3-01-03.

Thus, one may define the term "agent" as one who is legally authorized, either explicitly or implicitly, to act for a principal in dealing with third parties. Similarly, an "agent of a financial institution" is an entity that is legally authorized, either explicitly or implicitly, to act for a financial institution in dealing with third parties.

Contracting entities frequently attempt to distinguish their relationship from an agency relationship by contractually disclaiming any agency relationship. However, "'[t]he manner in which the parties designate the relationship is not controlling. If an act done by one person on behalf of another is in its essential nature one of agency, then he is an agent regardless of the title bestowed upon him.'" Belgarde v. Rosenau, 388 N.W.2d 129, 130 (N.D. 1986) (quoting Lincoln v. Fairfield-Nobel Co., 257 N.W.2d 148, 151 (Mich. 1977)). See also Fleck v. Jacques Seed Co., 445 N.W.2d 649 (N.D. 1989)

[1] "'Financial Institution' means any organization authorized to do business under state or federal laws relating to financial institutions, including, without limitation, a bank, including the Bank of North Dakota, a savings bank, a trust company, a savings and loan association, or a credit union." N.D.C.C. § 6-08.1-01(3).

(Court determined that an entity that contractually agreed it was an "independent contractor" rather than an employee was an agent nonetheless); Red River Commodities, Inc., v. Eidsness, 459 N.W.2d 805, 810 (N.D. 1990) (contractual characterization of individual as "independent" and "not an agent" was not controlling in determining whether the individual was, in fact, an agent).

Accordingly, it is my opinion that an entity acting by contract for a financial institution in providing services to the financial institution's customers is an agent of the financial institution, regardless of how the parties characterize their relationship. Since N.D.C.C. § 6-08.1-02(1) provides an exemption from a financial institution's confidentiality requirement for the "preparation, examination, handling, or maintenance of any customer information by . . . [an] agent of a financial institution," a financial institution may share customer information with entities with which it contracts to provide services to the financial institution's customers regardless of how the financial institution and its agent characterize their relationship.[2]

II.

Prior to the enactment of SB 2191, N.D.C.C. ch. 6-08.1 provided a level of confidentiality of customer information commonly known as "opt-in." "Opt-in" refers to the fact that, other than for specific, statutorily-defined purposes, a financial institution can not share customer information without the customer's affirmative consent. In contrast, "opt-out" provisions allow a financial institution to share customer information for any purpose without a customer's consent, unless and until the customer notifies the financial institution that it may not share the customer's information. A customer's actions in notifying a financial institution that it may not share the customer's information is called "opting-out" of the financial institution's sharing.

If SB 2191 is rejected by the voters, N.D.C.C. ch. 6-08.1 will revert to its status prior to the effective date of SB 2191, including requiring an opt-in by a customer in order for a financial institution to share the customer's information. However, that does not mean that a financial institution will need to acquire a customer's affirmative consent to use the customer's information for every purpose.

As stated earlier in this opinion, chapter 6-08.1 provides several exceptions and exemptions from the confidentiality requirement, specifically including the use of customer information by the financial institution's own employees and agents. N.D.C.C. § 6-08.1-02(1). This exemption would apply to sharing a customer's information with employees and agents as necessary in the course of providing the "services inherent in the business of financial institutions" specifically mentioned in your opinion request,

[2] As an agent of the financial institution, the entity would be required to comply with N.D.C.C. ch. 6-08.1 to the same extent as the financial institution. 15 U.S.C. § 6802(c).

including ATM, credit card, and checking services. The GLB Act has a specific exemption from its confidentiality requirements for information sharing necessary to provide a requested service to a financial institution's customer. 15 U.S.C. § 6802(e)(1)(A). Accordingly, it is my opinion that a financial institution is not required to obtain a customer's affirmative consent to share information with the financial institution's employees or agents in the course of providing services the customer requests, including ATM, credit card and checking services, regardless of whether SB 2191 is rejected.

III.

"[B]anks are engaged in a business affected with the public interest and . . . as such they are subject to reasonable regulation under the police power of the state." First American Bank & Trust Co. v. Ellwein, 198 N.W.2d 84, 98 (N.D. 1972). "'The police power' is the power inherent in a government to enact laws, within constitutional limits, to promote the order, safety, health, morals, and general welfare of society." Neer v. State Live Stock Sanitary Board, 168 N.W. 601, 611 (N.D. 1918). A stated purpose of the legislation creating N.D.C.C. ch. 6-08.1 is to protect the customer. See Hearing on S.B. 2386 Before the Senate Comm. On Industry, Business & Labor 1985 N.D. Leg. (Jan. 30) (Statement of Keith Magnusson). The legislation is therefore an appropriate exercise of the state's police power. Cf. Citizens State Bank, Enderlin v. Schlagel, 478 N.W.2d 364 (N.D. 1991) (citing N.D.C.C. ch. 6-08.1 as prohibiting the disclosure of customer information except in certain circumstances).

The only caveat to that conclusion involves the breadth of N.D.C.C. ch. 6-08.1. Chapter 6-08.1 applies to all "financial institutions." The definition of "financial institution," all of which is reprinted in footnote 1, *supra*, specifically includes "any organization authorized to do business under state or federal laws relating to financial institutions." N.D.C.C. § 6-08.1-01(3) (emphasis added). The term "customer" is similarly unrestricted, and, prior to SB 2191, meant "any person who has transacted or is transacting business with, or has used or is using the services of, a financial institution, or for whom a financial institution has acted as a fiduciary with respect to trust property." N.D.C.C. § 6-08.1-01(1) (1999 Supp.) (emphasis added). Determining whether the Legislature meant to cover all financial institutions and their customers or a smaller group of financial institutions and their customers involves an analysis of both the chapter's statutory construction and the constitutionality of a given construction.

Statutory interpretive aids may help in appropriately construing the chapter's applicability. Since N.D.C.C. ch. 6-08.1 may be interpreted in any number of different, yet entirely reasonable, ways, the chapter is inherently ambiguous and this office may therefore use the full range of statutory construction aids provided in N.D.C.C. § 1-02-39. The purpose of the legislation and its legislative history are two aids that may be used to interpret the chapter. N.D.C.C. § 1-02-39(1), (3). As mentioned above,

a stated purpose of the legislation creating N.D.C.C. ch. 6-08.1 is to protect the customer. See Hearing on S.B. 2386 Before the Senate Comm. On Industry, Business & Labor 1985 N.D. Leg. (Jan. 30) (Statement of Keith Magnusson). However, neither chapter 6-08.1 nor the legislative history indicate which customers the legislature sought to protect, i.e., North Dakota customers only, or customers across the nation.

Chapter 6-08.1 is not specifically restricted to North Dakota financial institutions or customers, but instead could be interpreted to apply to all financial institutions and customers, regardless of location. Interpreting chapter 6-08.1 so broadly, however, would result in significant constitutional problems. This office construes statutes to avoid constitutional conflicts. 2001 N.D. Op. Att'y Gen. L-25. If there are two reasonable statutory constructions, one that presents constitutional issues and one that does not, this office will choose the construction that does not violate constitutional provisions. Id. See also State ex rel. Heitkamp v. Family Life Services, Inc., 616 N.W.2d 826, 841 (N.D. 2000) ("If a statute may be construed in two ways, one that renders it of doubtful constitutionality and one that does not, we adopt the construction that avoids constitutional conflict.").

The chapter's application to the handling of customer information in an interstate context implicates the Commerce Clause, U.S. Const. Art. I, § 8, cl. 3, which the United States Supreme Court has said limits the power of a state to interfere with interstate commerce. Pike v. Bruce Church, 397 U.S. 137 (1970). "The Commerce Clause . . . precludes the application of a state statute to commerce that takes place wholly outside of the state's borders, whether or not the commerce has effects within the state." Edgar v. Mite Corp., 457 U.S. 624, 642-43 (1982). Whether a particular application of N.D.C.C. ch. 6-08.1 violates the Commerce Clause would be determined by applying the following test: "[w]here the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." Pike v. Bruce Church, 397 U.S. at 142. However, "[n]ot every exercise of state power with some impact on interstate commerce is invalid." Edgar, 457 U.S. at 640. Thus, an application of N.D.C.C. ch. 6-08.1 to an interstate situation may be entirely reasonable depending on the factual circumstances.

Another constitutional issue involves the Privileges and Immunities provision in Article IV, § 2, of the United States Constitution. The United States Supreme Court has interpreted the Privileges and Immunities clause to mean that "a citizen of one State who travels in other States, intending to return home at the end of his journey, is entitled to enjoy the 'Privileges and Immunities of Citizens in the several States' that he visits." Saenz v. Roe, 526 U.S. 489, 501 (1999). While this protection is not "'absolute,' . . . the Clause 'does bar discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of

other States.'" Id. at 502 (citation omitted). Thus, barring a substantial reason to the contrary, a visitor to North Dakota is entitled to the same protections under North Dakota laws as North Dakota residents enjoy.

The above analysis leads to two conclusions: First, N.D.C.C. ch. 6-08.1 specifically applies to financial institutions located within North Dakota and how those institutions treat the financial information of the customers who reside in the state or come into the state and do business with those financial institutions. Therefore, it is my opinion that N.D.C.C. ch. 6-08.1 applies to financial institutions physically located in North Dakota and how those institutions treat the financial information of their customers located in North Dakota.

Second, attempting to apply N.D.C.C. ch. 6-08.1 to wholly out-of-state transactions would present a significant constitutional issue. Accordingly, it is my opinion N.D.C.C. ch. 6-08.1 does not apply to financial institutions located outside of North Dakota and how those institutions treat the financial information of their customers who are located outside of North Dakota.

Unfortunately, clarity regarding this question ends here and we are instead pushed toward the factual abyss into which this office has historically refused to plunge. The myriad of possible transactions and relationships that may arise in an interstate banking relationship in today's global economy is simply too great. Furthermore, the constitutional analysis required to determine the applicability of N.D.C.C. ch. 6-08.1 to each of those situations involves the resolution of an even greater number of situation-dependant facts. This office will not attempt to deliver an opinion that a minor factual variation might render incorrect. See, e.g., 1999 N.D. Op. Att'y Gen. L-68 (Aug. 6) ("[T]his office will not issue an opinion when the issues presented are questions of fact rather than questions of law. See N.D.C.C. § 54-12-01(6), (8) (opinions issued to state agencies and legislators on 'legal questions')."); Letter from Attorney General Nicholas Spaeth to James Sperry (Nov. 7, 1986) ("As Attorney General, I may only issue opinions as to questions of law and cannot issue opinions as to questions of fact."); Letter from Attorney General Robert Wefald to Jerry Renner (Dec. 14, 1984) ("This office may only issue opinions as to questions of law and may not issue opinions as to questions of fact.").

For example, under the above analysis the conclusion could be reached that N.D.C.C. ch. 6-08.1 would apply to an out-of-state financial institution's treatment of their North Dakota customers' financial information because of North Dakota's interest in protecting its citizens.[3] However, a resident of another state that has an account with a financial

[3] An argument can be made that a regulation of this type of relationship would not violate the Commerce Clause because the application of chapter 6-08.1 in this manner regulates evenhandedly for a legitimate public purpose and does not appear to impose

institution in that state but later moves to North Dakota may not be protected, especially if the out-of-state financial institution has no other North Dakota customers and does not market its products in North Dakota.[4] In both cases a non-North Dakota financial institution is providing financial services to a North Dakota resident. However, whether N.D.C.C. ch. 6-08.1 applies to the specific transaction depends on the factual circumstances.

IV.

Section 507 of the GLB Act, codified as 15 U.S.C. § 6807, defines the relationship between the Act's privacy provisions and state law privacy provisions. Subsection (a) states that the GLB Act does not affect any state law "except to the extent that such statute, regulation, order, or interpretation is inconsistent with the provisions of this subtitle, and then only to the extent of the inconsistency." 15 U.S.C. § 6807(a). Subsection (b) goes on to state that a state statute is not inconsistent with the GLB Act if the state statute provides the customer greater protection than that provided by the GLB Act. 15 U.S.C. § 6807(b). The GLB Act gives the Federal Trade Commission (FTC) the authority to determine whether a state statute gives a customer greater protection than the GLB Act "on its own motion or upon the petition of any interested party." Id.

On September 12, 2000, Gary Preszler, the former Commissioner of the North Dakota Department of Banking and Financial Institutions, petitioned the FTC for a determination whether North Dakota law is preempted by the GLB Act. Letter from Gary Preszler, Commissioner of the North Dakota Department of Banking and Financial Institutions, to Robert Pitofsky, Chairman, FTC (Sept. 12, 2000) ("Letter From Gary Preszler"), available at http://www.ftc.gov/privacy/glbact/index.html. In its response, the FTC outlined its interpretation of the interaction between the GLB Act and state law as follows:

> In adopting Section 507 [of the GLB Act], Congress established the privacy protections in the GLB Act as a "floor," or minimum protections for consumer privacy, that could be exceeded by the states. *See* 145 Cong.

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an excessive burden. Further, the state's opt-in requirement has been termed an opt-out "by operation of state law." FTC Letter, *infra*, at n. 3. Thus, a financial institution doing business with North Dakota customers would have to treat those customers as having opted-out of any information sharing which, under the GLB Act, it should be prepared to do with very little inconvenience.

[4] Due Process under the Fourteenth Amendment to the United States Constitution requires an entity to have "minimum contacts" with a state before that state may exercise jurisdiction over that entity. Rodenburg v. Fargo-Moorhead Young Men's Christian Assoc., 632 N.W.2d 407 (N.D. 2001).

> Rec. S13890 (daily ed. Nov. 4, 1999) (statement of Sen. Rod Grams); 145 Cong. Rec. S13789 (daily ed. Nov. 3, 1999) (statement of Sen. Paul S. Sarbanes). State law provisions that add to the privacy protections in that subtitle will not be preempted by that subtitle. It is commonplace that where federal law does not preempt certain state law provisions, state laws and federal laws that touch on the same subject matter create a "dual regulatory scheme." *Northwest Central Pipeline Corp. v. State Corporation Commission of Kansas*, 489 U.S. 493, 516 (1989).

Letter from Donald Clark, Secretary, FTC, to Gary Preszler, Commissioner of the North Dakota Departmen of Banking and Financial Institutions 1-2 (June 28, 2001) ("Letter from the FTC"), available at http://www.ftc.gov/privacy/glbact/index.html.

In response to Banking Commissioner Preszler's specific question regarding whether North Dakota financial institutions must comply with GLB Act provisions that are not specifically addressed by N.D.C.C. ch. 6-08.1, the FTC responded in the affirmative: "Yes, financial institutions must comply with all applicable GLB Act privacy provisions, as those provisions establish a 'floor' on the level of privacy protections afforded consumers." Id. at 5. Specifically, "all financial institutions operating in North Dakota must provide initial and annual notices to customers as required under the GLB Act and must implement the administrative, technical, and physical safeguards to protect the security and confidentiality of customer records and information." Id.

The only GLB Act requirement that will be altered by the reversion to the former opt-in requirements under N.D.C.C. ch. 6-08.1 prior to the passage of SB 2191 is the requirement to notify customers of the opportunity to opt-out of information sharing. Id. at n. 3. Under the opt-in provisions, customers "are effectively opted-out by operation of state law." Id. While the opt-out notice would be unnecessary, financial institutions would still be required to provide privacy notices. Id.

One area not addressed by the FTC letter is the effect of an opt-in by a customer. Under N.D.C.C. ch. 6-08.1, if a customer opts-in, a financial institution would be free to use that customer's information as it desires. However, in that situation, the GLB Act prevents a financial institution from sharing the customer's information unless it gives the customer a notice that it may do so and the opportunity to opt-out of that information sharing. 15 U.S.C. § 6802(b)(1). Thus, if a customer opts-in, the GLB Act puts the financial institution back in the situation of being required to provide the customer an opt-out notice before the financial institution may share the customer's information.

In sum, the FTC, which is the federal agency Congress has charged with determining whether state law is preempted by the GLB Act, has determined that North Dakota financial institutions will need to comply with all of the GLB Act provisions not specifically addressed by N.D.C.C. ch. 6-08.1 or that provide privacy protections greater

than those provided by chapter 6-08.1. This office's reading of the applicable GLB Act provisions and the related regulations leads to the same conclusion. Furthermore, if a customer has given a financial institution affirmative consent, or opt-in, to share the customer's information, then all of the GLB Act's privacy provisions would apply. Accordingly, It is my opinion that, if SB 2191 is rejected by the voters, North Dakota financial institutions will be required to comply with all of the GLB Act privacy provisions that are not specifically addressed by N.D.C.C. ch. 6-08.1 or that provide greater privacy protection than chapter 6-08.1. It is my further opinion that if a financial institution's customer has consented to the financial institution's sharing of the customer's information, the financial institution is required to comply with the GLB Act's information protection provisions in their entirety.

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 questions presented are decided by the courts.[5]

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Attorney General

Assisted by: Scott A. Miller
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[5] See Johnson v. Baker, 21 N.W.2d 355 (1946).