REGULAR STATE BANKING BOARD MEETING
OFFICE OF THE COMMISSIONER
DEPARTMENT OF FINANCIAL INSTITUTIONS
2000 SCHAFER STREET, SUITE G
BISMARCK, NORTH DAKOTA

July 18, 2002

The regular meeting of the State Banking Board was held in the Office of the Commissioner, Department of Financial Institutions, 2000 Schafer Street, Suite G, Bismarck, North Dakota. Chairman Karsky called the meeting to order at 9:12 a.m., Thursday, July 18, 2002.

MEMBERS PRESENT: Timothy J. Karsky, Chairman
Ron Braseth, Member
Bill Daniel, Member
Launa Moldenhauer, Member
Roger Monson, Member
Gary Petersen, Member
Terry Zeltinger, Member *(Minot)*

MEMBERS ABSENT: None

ALSO PRESENT: Robert J. Entringer, Assistant Commissioner
Jeff Jungman, Chief Examiner – Banks
Gerry Gunderson, Trust Center of America
Marilyn Foss, NDBA
Joel Gilbertson, ICBND
Jerry Galloway, American State Bank, Dickinson
Russ Schank, American State Bank, Dickinson
Thecla Olhauser, Trust Center of America

FIRST SOUTHWEST BANK – APPLICATION TO PURCHASE THE BOND REGISTRARS, INC.

Assistant Commissioner Entringer indicated included with his Memorandum is a letter from Fred Manuel, CPA, requesting approval for First Southwest Bank,

Bismarck, to invest $440,000 in the purchase of The Bond Registrars, which is currently owned by Franklin G. Larson, Chairman of the Board of First Southwest Bank. Also enclosed is an independent valuation report conducted by Eide Bailly, LLP. The valuation report uses the income approach, market approach, and asset approach to arrive at a value and concludes that the income approach is the most appropriate value, and arrives at a value of $440,000. Assistant Commissioner Entringer indicated the Memorandum also included a copy of the Stock Purchase Agreement between Franklin G. Larson and First Southwest Bank, for the Board's review.

Section 6-03-38, North Dakota Century Code, prohibits a bank from employing or investing any of its assets or funds in the stock of any corporation, limited liability company, bank, partnership, firm, or association, except as otherwise authorized by this Section. The statute goes on to authorize a state bank to invest in subsidiary organizations, when the activities of such organizations are incidental or complementary to the bank's activities, with the specific approval of the State Banking Board for each subsidiary. Assistant Commissioner Entringer indicated the language for this statute is taken from Section 103 of the Gramm-Leach-Bliley Financial Modernization Act of 1999. Section 4(k)(4) of the Bank Holding Company Act specifies a number of activities that are allowed, one of which includes activities that are deemed "closely related to banking". Pages 4 and 5 of the valuation report discuss the services provided by The Bond Registrars, Inc., all of which are activities that a bank with trust powers could perform.

Assistant Commissioner Entringer reminded the Board that First Southwest Bank had been granted limited trust powers in December 2000, which was related to acting as a trustee for bond issues, which were handled by The Bond Registrars, Inc.

Mr. Manuel indicated that Frank Larson bought The Bond Registrars, Inc., several years ago and had been operating it out of Colorado. The operation was then moved to Fargo, as well as increasing the amount of personnel. The reason for the purchase, according to Mr. Manuel, is really two-fold: in the State of Minnesota in order to act as a bond registrar the registrar must be affiliated with a trust company or a bank with trust powers. Secondly, the bond registrar can use the bank as backup personnel for the people that are employed at The Bond Registrars, Inc.

Mr. Manuel discussed the purchase price, and indicated that Alton Nitschke, Eide Bailly, LLP, conducted the independent valuation since it was necessary because of the affiliation between Mr. Larson and the two companies. Mr. Manuel indicated when Frank Larson acquired The Bond Registrars, Inc., he paid $800,000; however, the fact is the bank can only purchase it when there has been an independent fair market valuation. Mr. Manuel indicated when The Bond Registrars, Inc., was acquired they did assume liability so the end result is that Mr. Larson lose approximately $60,000 on the transaction. Mr. Manuel also explained that because First Southwest Bank is an S Corporation for income tax filing purposes, according to IRS rules the bank must purchase the entire subsidiary or not be able to use the S Corporation for the subsidiary.

After further discussion, **it was moved by Member Zeltinger, seconded by Member Braseth, and unanimously carried to authorize the First Southwest Bank, Bismarck, to invest $440,000 in The Bond Registrars, Inc.**

WELCOME NEW BOARD MEMBER

Chairman Karsky indicated that Member DeeAnn Baertsch had not been reappointed to the State Banking Board, and wanted to officially welcome Roger Monson, President of The Citizens State Bank of Finley, to the State Banking Board.

APPROVAL OF MINUTES

Chairman Karsky indicated the Board received copies of the minutes of the regular meeting held on May 9, 2002. **It was moved by Member Moldenhauer, seconded by Member Braseth, and carried by voice vote to dispense with the reading of the minutes and approve the minutes as published.**

PROPOSAL TO AMEND NORTH DAKOTA ADMINISTRATIVE CODE CHAPTER 13-02-14, LIFE INSURANCE

Rick Miller from Clark Bardes Consulting joined the meeting by conference call at 9:35 a.m.

Chairman Karsky explained that at the last State Banking Board meeting Larry Kemmintz from Eide Bailly, LPP, and Scott Richardson from Clark Bardes Consulting, discussed the need to amend the rules. As a result of that meeting, Mr. Richardson submitted suggested language to amend the North Dakota Administrative Code, which the Board has before them presently.

Chairman Karsky reviewed the proposed changes as submitted by Mr. Richardson and discussed the process for amending the rules.

Assistant Commissioner Entringer reviewed the proposed changes as offered by Mr. Richardson. After reviewing the proposed changes, Chairman Karsky asked if there were any questions or concerns from the Board regarding the proposed language changes. **It was moved by Member Moldenhauer and seconded by Member Petersen, to adopt the amendments to Chapter 13-02-14, North Dakota Administrative Code, subject to approval by the Attorney General's Office.** Chairman Karsky asked for any discussion and Member Monson indicated as a result of the examination of his bank, the proposed changes to the rules came forth, and he felt that the proposed changes would modernize the language and eliminate the competitive disadvantage that North Dakota banks face with surrounding states, as well as harmonize the language with the Office of the Comptroller of the Currency. There being no further discussion, **the motion was unanimously carried.**

ABSTAINING FROM VOTING

Chairman Karsky indicated he felt now was a good time to discuss the subject of abstaining from voting because of the previous item on the agenda, whereby Member Monson noted that the item was on the agenda because of a situation at his bank. Chairman Karsky asked Assistant Attorney General Miller to review the information that had been provided to the State Banking Board regarding abstaining from voting.

Assistant Attorney General Miller indicated there is a Supreme Court case that addresses whether a Board member can abstain from voting when that member has a conflict of interest. Assistant Attorney General Miller explained that essentially what the Supreme Court indicated was if there is no other venue for that issue, dispute, or question to be resolved, then the member cannot abstain. The supreme court stated that you have a responsibility to the Board that you are

serving on to vote, especially on this Board since the State Banking Board is the Board that makes the decisions on all applications, and the only place you can go from here is to court which is obviously dependent on what the State Banking Board said, and there is no real other venue for applications to be heard. Assistant Attorney General Miller indicated if you refuse to vote or abstain, you will be deemed to have voted with the majority. If a member were to leave the room, there could be an issue with a lack of quorum or there could be a tie vote, which would produce an issue.

Chairman Karsky indicated there will frequently be competitive issues that appear to conflicts of interest, and as long as those are noted for the record, the Board should be okay.

CHANGE OF CONTROL APPLICATION – TRUST CENTER OF AMERICA, BISMARCK, TO BE ACQUIRED BY BANK CENTER FIRST, BISMARCK, AND AMERICAN STATE BANK AND TRUST OF DICKINSON, DICKINSON; AND TO AUTHORIZE THE INVESTMENT IN A SUBSIDIARY CORPORATION FOR BANK CENTER FIRST AND AMERICAN STATE BANK AND TRUST OF DICKINSON

Assistant Commissioner Entringer reviewed his Memorandum dated July 10, 2002, and noted that attached to the Memorandum were copies of the application for change of control, as well as letter requests for permission to invest in a subsidiary corporation pursuant to Section 6-03-38, North Dakota Century Code.

Assistant Commissioner Entringer stated the application was received on June 7, 2002, and was deemed complete on June 14, 2002. Pursuant to North Dakota Administrative Code Section 13-02-17-01, notice of the proposed change of control application was published in The Bismarck Tribune and The Dickinson Press on June 19, 2002. The public comment period ended on July 1, 2002, and no comments or requests for copies of the application had been received.

Assistant Commissioner Entringer stated the approval criteria set forth under North Dakota Century Code Section 6-08-08.1(4) is included in the Memorandum. The proposal as outlined in the application indicates the acquirers are Bank Center First, Bismarck, and American State Bank and Trust of Dickinson, each of which will own 50% of Trust Center of America. The purchase price is outlined in Item 3 of the change of control application, as well as paragraph 1.3 of the Stock Purchase

Agreement, which is included in the application. Item 10 of the application sets forth the managerial information and includes attached resumes of the individuals which will comprise the management of the trust company.

Assistant Commissioner Entringer noted that with the exception of President Pfeifle, all of the individuals are presently working in the trust area of their respective employers. President Pfeifle does have prior experience in the insurance business, as well as serving on boards of trustee, and was the first bank to have an investment center located in its banking facility.

Assistant Commissioner Entringer noted that Section 6-03-38, North Dakota Century Code, provides that no bank, except as otherwise authorized in this Title, may employ its money or other assets as principal, directly or indirectly, in trade or commerce, nor may it employ or invest any of its assets or funds in the stock of any corporation, limited liability company, bank, partnership, firm, or association. This Section further states that it is unlawful for a bank to invest in subsidiary corporations when the activities of such corporations are incidental or complimentary to the bank's activities, with the specific approval of the State Banking Board for each such subsidiary. Based on the fact that a bank may offer trust services directly, the activities are certainly authorized.

Assistant Commissioner Entringer noted that as far as the language found in Section 6-03-38, North Dakota Century Code, again that language comes from Section 104 of Gramm-Leach-Bliley. Assistant Commissioner Entringer also noted that currently American State Bank and Trust of Dickinson does presently have trust powers and has a very active trust department.

Assistant Commissioner Entringer asked Mr. Galloway to offer any comments he may have on the change of control, explaining the 50/50 ownership, as well as the reason for purchasing Trust Center of America. Mr. Galloway indicated the Board might recall that recently the bank holding companies which owned the respective banks merged and also that the owners were looking for the ability to offer trust services at the Bank Center First offices. Mr. Galloway noted that Trust Center of America has been operating in this area for some time and that things have changed in their operation, such that the company is actively looking to sell. The owners of Bank Center First and American State Bank and Trust of Dickinson saw this purchase as an opportunity to be able to offer trust services in the Bank Center First location. Mr. Galloway noted during the merger process the banks were closely scrutinized to make sure all pertinent ratios were maintained,

and in order to do that the bank had the company's accounting firm and legal firm review the application to make sure they are in compliance with all the pertinent ratios, which they believe they are. Mr. Galloway noted that the individuals that will be involved in the trust operation are experienced trust professionals, as well as banking professionals.

Chairman Karsky questioned what the size of the trust department of American State Bank and Trust of Dickinson is at the present time, and Mr. Galloway indicated presently it is $100 million. Mr. Galloway indicated that Trust Center of America has been operating at approximately $50 million; Mr. Gunderson concurred that was an accurate estimation of the trust assets. Mr. Galloway indicated in the future American State Bank and Trust of Dickinson may request approval from the Board to transfer the trust assets into the Trust Center of America for economies of operation and efficiencies of systems; however, this was not a part of the present application.

Assistant Commissioner Entringer brought up the topic of the location of the main office since Trust Center of America is being acquired by both banks, and Mr. Galloway indicated it is presently located on 4th Street in Bismarck; however, once the remodeling is completed at Bank Center First, the main office will be located on the second floor of the main office of Bank Center First.

Mr. Galloway answered Member Moldenhauer's question by indicating that the operation will be manned by Thecla Olhauser and an individual who is currently employed with Trust Center of America, and that Russ Schank will be their immediate supervisor.

Assistant Commissioner Entringer indicated based on the criteria for approval found in the statute, the applicants have demonstrated the character, reputation, general fitness, financial standing, responsibility, and qualifications; also the activities of the trust company are permitted for a bank to engage in directly. Therefore, the Department recommends approval for the change of control and authorization of the investment in the subsidiary. **It was moved by Member Petersen, seconded by Member Daniel, and unanimously carried to approve the change of control of Trust Center of America, Bismarck, by Bank Center First, Bismarck, and American State Bank and Trust of Dickinson, Dickinson; and authorize the investment in the subsidiary.**

Member Zeltinger left the meeting by conference call at 10:10 a.m.

SECURITY FIRST BANK OF NORTH DAKOTA, NEW SALEM – APPLICATION FOR LIMITED TRUST POWERS

Chairman Karsky asked President Goetz if he could explain for the Board the rationale as to why the bank was applying for trust powers, the need for limited trust powers, and the type of trusts they anticipate engaging. President Goetz indicated the reason the bank is applying for limited trust powers is the local nursing home is floating two bond issues and someone is needed to collect the payments and distribute the monies to the bond holders. The entity must have trust powers and, therefore, the bank is applying for these limited trust powers. As far as an income impact to the bank, President Goetz indicated it would be a very modest income for the bank. President Goetz indicated the reason the bank included personal trust powers is that periodically he is asked to be a personal representative for estates and some of the bank's staff must do secretarial type work for that, and this way the bank's liability insurance can cover this and be more appropriately handled. As far as the employee benefit trust powers, currently President Goetz is the trustee of the bank's employee 401K and profit sharing plans. This way the bank could act as trustee for those plans.

Assistant Commissioner Entringer reviewed the application for Consent to Exercise Limited Trust Powers which includes a certified copy of a Resolution of the bank's Board of Directors adopting the Statement of Principles of Trust Department Management. The application indicates James M. Goetz would be the primary trust officer and assisted by Steven K. Morris and Douglas Roness. Resumes for Messrs. Morris and Roness are included the application and both indicate previous limited trust experience. The application notes the trust committee would be comprised of Messrs. Goetz, Roness, and Morris, and that trust counsel would be the Olson, Lee and Burns Law Firm, Minot, North Dakota, to serve on an as needed basis. The application contemplates initially two tax exempt bond issues of $1,150,000 in the aggregate, in addition to consumer type trust activities in the future, but that the bank's trust activities are expected to minimal, nor will they contribute materially to the income or expense of the bank.

Assistant Commissioner Entringer reviewed the proposed Order which he noted specifically identifies the types of trust powers as outlined or requested in the application: the bank would be authorized to exercise personal trust powers as executor, trustee, or agent; employee benefit trust powers as trustee; and corporate trust powers as trustee, paying agent, escrow agent, and agent. Assistant

Commissioner Entringer noted this language is identical to the approval granted by the Federal Deposit Insurance Corporation. **It was moved by Member Braseth, seconded by Member Monson, and carried by a vote of 6 to 0, with Member Zeltinger absent, to approve the application by Security First Bank of North Dakota, New Salem, to exercise limited trust powers.**

The Board recessed at 10:25 a.m., and reconvened at 10:30. Member Daniel left the meeting at 10:30 a.m.

PRIVACY

Chairman Karsky indicated the Board would be considering a Petition from the North Dakota Bankers Association and Independent Community Banks of North Dakota for determination of incidental powers. Chairman Karsky indicated in the past the Department had not received a lot of inquiry about the privacy statute; however, with the change in the federal law, Gramm-Leach-Bliley Act of 1999, and the change to the North Dakota Century Code Section 6-08-08.1, as well as the referral vote on June 11, 2002, the Department has received a great deal of questions. Chairman Karsky indicated he would like to draft a Memorandum to be sent out to all financial institutions indicating this is how the Department interprets the application of our privacy law.

At this time, Marilyn Foss, General Counsel for North Dakota Bankers Association, discussed her petition for determination of incidental powers. Ms. Foss indicated when the trade associations went before the legislative assembly in 2001, the associations were operating from the perspective that the disclosure statutes did not meet operating needs in light of Gramm-Leach-Bliley. The North Dakota statute did not have exceptions that were entirely consistent with the no opt-out exceptions of Gramm-Leach-Bliley, which are those exceptions that deal with information sharing where customers do not have the opportunity to opt-out. Those exceptions are primarily sharing in the context of ordinary business operations for such things as loan participations and selling mortgages, carrying out customer transactions with customer consent. Another category of exceptions deals with state and government law enforcement entities and there is a category which allows institutions to enter into joint marketing arrangements. Ms. Foss indicated the incidental power that the associations are asking the Board to adopt today under its authority under Section 6-03-02(7), North Dakota Century Code, are characterized as the operational no opt-out exceptions. The North Dakota

Bankers Association, Independent Community Bank of North Dakota and the North Dakota Credit Union League have concluded that it would be beneficial but not conclusive to have the respective Boards adopt as incidental powers the no opt-out exceptions which are considered to be operational. Ms. Foss indicated the Interim Family Law Committee is taking up legislation to put into our disclosure statute, the no opt-out exceptions. Ms. Foss said the respective associations do not expect legislative resistance to the inclusion of the no opt-out exceptions during the next legislative session, based on contacts with supporters as well as opponents of Senate Bill No. 2191, both of whom indicated they would not take exception to the State Banking Board and State Credit Union Board adopting these exceptions as incidental powers. Ms. Foss indicated the supporters as well as the opponents agree that North Dakota law does not include the exceptions found in Gramm-Leach-Bliley, and these are items that have come to be considered ordinary banking practices. Ms. Foss stated that she and Chairman Karsky have had numerous conversations as to what does and does not fit into the exceptions, and two of the items they have concluded definitely do not fit in the exceptions are the recording of a real estate mortgage and the filing of a UCC 1 financing statement. Ms. Foss stated she became aware of the problem regarding real estate mortgages when she came across a letter from one of the federal agencies which indicated the filing of a real estate mortgage would not violate someone's privacy under Gramm-Leach-Bliley; however, North Dakota's exceptions do not contain that language, therefore it is certainly a problem. Ms. Foss stated she feels they will very likely be successful in getting the exceptions into the law during the next legislative session; however, they will not take effect for another year. Therefore, in the interim, what this Order does for the banks is give them, if they are sued, more argument to carry them through court proceedings and to carry the banks through to the next legislative session. Additionally, what might be considered is to make the legislation retroactive as well as proactive so as to protect them during the interim when the exception was not available. The Joint Marketing Agreement Exception is not in the request or petition for determination of incidental powers because it is such a hot button, and Ms. Foss indicated that if that is the case it should be considered by the legislature and not the State Banking Board. Ms. Foss indicated she herself would have trouble concluding that the sharing of information under a joint marketing agreement could be concluded as an incidental power, which is defined as powers that are inherent and connected to what we all understand as the banking operation. Not having this in our statute does not preclude a bank from marketing its own products to its own customers, which has traditionally been deemed to be an incidental power.

Ms. Foss reviewed the no opt-out exceptions which are being requested through the petition: a customer transaction disclosure, a service provider disclosure, a secondary market disclosure, the exception for the purpose of protecting against or preventing fraud or potential fraud, disclosures to financial institution rating agencies and those persons assessing an institution's compliance with industry standards, and disclosures in connection with a proposed or actual sale, merger, transfer, or exchange of all or a portion of a business or business unit if the disclosure is limited to customers of the business or unit. Two of the most important exceptions not in our statute are one that is available to resolve a customer complaint and to persons acting in a fiduciary or representative capacity on behalf of the customer, which is included in number 4 of the petition. The petition does not ask for an exception for joint marketing agreements or marketing at all, as the authority in connection with marketing to customers has to come under the current law.

Ms. Foss stated that North Dakota Bankers Association and Independent Community Banks of North Dakota questioned if it would be appropriate if the State Banking Board chose to condition any of the disclosures being requested if there is contractual agreement to maintain confidentiality.

Ms. Foss did indicate that the associations would be meeting with Representative Mahoney to discuss his Interim Family Law Committee proposed bill because not all of the no opt-out exceptions are included in the proposed bill, and Ms. Foss indicated Representative Mahoney was responsive to that concern.

Upon question by Member Petersen, Chairman Karsky indicated it was his perception that the proposed bill did not include exceptions that should be included, but also that there are items in there that are going out. One of the biggest problems with regard to our present law is applicability: does it apply to in-state banks, out-of-state banks, out-of-state banks with branches in North Dakota, in-state banks with branches outside of North Dakota, banks that issue credit cards to residents outside of North Dakota as well as North Dakota residents. Chairman Karsky indicated it is his contention that the way we want to handle this is to be the most conservative and apply it to protect North Dakota consumers. Chairman Karsky indicated when you read the definition of a customer of a financial institution it is not clear as to whether it includes a customer whom is not a resident of North Dakota but banks at an out-of-state branch of a North Dakota bank. Chairman Karsky also indicated he would like to make the argument if you are an out-of-state bank but you are soliciting North Dakota residents, then you will have

to follow North Dakota's privacy law so that we are protecting North Dakota residents. Chairman Karsky stated he would like to see the Board adopt a policy that addresses the two issues which are paramount to this statute, which are exportation and importation of our privacy statute.

Chairman Karsky reviewed the definition of customer under Representative Mahoney's proposed bill, which appears to define customer as any person regardless of the state of residence or domicile transacting business with a financial institution. If you look at the definition of financial institution means any organization physically located in this state. Chairman Karsky felt this would have the effect of exporting our privacy law to every state in the nation, which is exactly against what he is asking the Board to adopt as a policy.

Chairman Karsky stated the exceptions added in Representative Mahoney's proposed bill under item 12 need to be amended to address the exceptions found in Gramm-Leach-Bliley and included in the Petition for Determination of Incidental Powers. He stated he thought Representative Mahoney and Representative Kasper were both willing to amend the bill to include those no opt-out exceptions.

Ms. Foss indicated the issue of exportation and importation has to be dealt with by legislative intent, and Mr. Gilbertson added that there really are two separate issues: exportation and importation, and the third party processing which in a separate issue. The Gramm-Leach-Bliley exceptions should be taken care with Representatives Kasper and Mahoney's proposed bill, which Mr. Gilbertson indicated is his priority for his independent community banks.

Chairman Karsky stated he wanted to make the point that the items included in the Petition are items that are being done on a daily basis today. Ms. Foss added these items have to be done to operate as banks.

Chairman Karsky asked Assistant Attorney General Miller if the Board does approve the Petition, what will that do for the banks under North Dakota's privacy law. Assistant Attorney General Miller indicated one item not addressed which he felt would be addressed in the Memorandum in support of the Petition was under Section 6-08.1-08(2) which states that a financial institution that takes any action pursuant to this Chapter (Chapter 6-08.1) relying in good faith on any provision in this Chapter may not be held liable to any person for its actions. The Petition asks the Board to adopt as an incidental power under Section 6-03-02, which is obviously a different Chapter under the North Dakota Century Code and therefore

the connection is not made. Ms. Foss agreed there was no connection and indicated that is why the banking and credit union trade associations need legislative action to fix the problem, but that they felt the Petition provided the financial institutions another defense.

Ms. Foss stated there is a question as to whether the Petition gives enough protection and that is a question that cannot be answered unless there is litigation, but added that she does know as a practical matter when you have more laws that say what you want them to say, you have better odds of succeeding in your defense. This does not mean that you always win, the analysis can be that as you are pointing out for the Board the fact that it is a power does not mean that you can share the information; however, it does recognize that the practicalities of the decision or impracticalities of the decision and does give you a basis for arguing that the decision before the legislative action will make the decision proactive. Ms. Foss stated if you are faced with having to defend a lawsuit you are going to try to use the exceptions found in Chapter 6-08.1, but you don't know that someone will accept your interpretation. Mr. Gilbertson added that the concern the associations and banks have is that there are judges who favor form over substance, and when faced with a lawsuit, going through the analysis of the exceptions that are in Chapter 6-08.1, when you say to a judge that the State Banking Board has looked at this and determined that what this bank is doing is an incidental power, a modern bank has to do this to survive, that will be persuasive. Ms. Foss stated what we are talking about is the realities as they are, not as they should be in working with the field dealing with judges and the practical matters of how you succeed for your client, the financial institution.

Assistant Attorney General Miller stated it seems it would be more helpful if the Petition was asking the State Banking Board to say that this type of disclosure is an exemption under Chapter 6-08.1, or at least in good faith included in one of the exemptions in Chapter 6-08.1. Assistant Attorney General Miller stated he believes some of them could be, but at least one or two you would have a tough time arguing are within the exceptions of Chapter 6-08.1. Assistant Attorney General Miller stated that defining an incidental power is a factual determination for the Board, and if it does rise to that, then you can certainly say that it is or make that determination.

Member Petersen stated there is some implied authority; therefore, the State Banking Board can make the determination that it is activity that is incidental to banking. Assistant Attorney General Miller agreed it is a factual determination.

Chairman Karsky indicated he noticed Chapter 6-08.1, which was not included in the agenda, but distributed today, and the exemptions are found in Section 6-08.1-02.

Chairman Karsky indicated the exemptions distributed today for Representative Mahoney's bill are not as long. Ms. Foss stated that is because these exemptions are not all-inclusive of exceptions in the Petition. Mr. Gilbertson indicated that Representative Mahoney told him that they would put in the bill what the banking and credit union trade associations want for the opt-out exceptions.

Chairman Karsky indicated he has talked to Representative Kasper, who has indicated he has no problem with those exceptions. Ms. Foss stated part of the problem is that the Federal Trade Commission has not been helpful with respect to how banks and people are supposed to go between state and federal law, with regard to the no opt-out exception. In the response from the FTC regarding the Department's request, the FTC said you are entirely consistent, but in the footnote, if North Dakota had not passed Senate Bill No. 2191, you would just be regarded as a state opt-out. An opt-out state would have been okay, because then you would have the no opt-out exceptions; however, Ms. Foss added in discussing this with an attorney for the FDIC, he indicated you can not be sure the FTC would take that position, even though that was stated in their letter. The Connecticut Department's letter request to the FTC is answered by saying no, you just have both laws working, which do not discuss what happens with a no opt-out exception – do they preempt or not preempt? Ms. Foss said she felt one could argue a federal preemption to the no opt-out exemption, so that could be an argument also, since it is a reality that it must be included in our law to have conclusive protection.

Member Petersen asked what the process is to draft an administrative rule relative to this, and Assistant Attorney General Miller indicated the Board has the authority to do this by Order. Ms. Foss added when the State Banking Board did this for insurance, it was done by Order. Assistant Attorney General Miller indicated this could be done by administrative rule, but it would take much longer. Member Petersen indicated he is somewhat concerned by adopting an Order when Representative Kasper was not present, because he did not want to be blind sighted by this issue again. Both Mr. Gilbertson and Chairman Karsky indicated they had talked to Representative Kasper and he did not indicate any problems with what the proposal was asking the Board to do.

Member Monson asked Assistant Attorney General Miller about a situation where the bank is acting as liaison between its bank and a larger metropolitan bank, for example for a real estate loan where the rural bank may take the application and close the loan, but the loan is actually funded by the larger metropolitan bank. Member Monson questioned if the rural bank is considered a marketer, an agent, or what. Chairman Karsky stated if someone asked him that question and why the Department never cited a violation, his response would be that the Department's interpretation was that the rural bank is an agent of the larger bank.

Chairman Karsky asked Assistant Attorney General Miller if the Board was to adopt the Order what protection would the banks be given under Chapter 6-08.1. Assistant Attorney General Miller stated he would have to argue that there is a reading of the exemptions or exceptions under Chapter 6-08.1 that would cover that activity.

Chairman Karsky indicated to Member Petersen he agreed with his concerns regarding the fact that the referral vote was so one-sided, but the fact is that these are things banks are doing today and have been doing for years; however, whether or not it is an exemption or exception under the privacy statute is a whole other issue. Member Petersen indicated he is concerned we are attempting to do something that the legislature should do; however, he does recognize that these are things the banks are doing on a daily basis. Member Braseth agreed with Member Petersen's comments, but stated by the same token we could reduce the level of ambiguity in terms of what banks do in the normal course of business. Member Moldenhauer asked what the repercussions are if we do something like this, will there be something published, etc. Chairman Karsky stated he would pose the question to Member Moldenhauer, as to what are we doing to harm the privacy statute. Member Moldenhauer stated she is also concerned that we had a referral election where 72% of the voters said they felt it was wrong, and we did not get that across to them. Chairman Karsky indicated there is a big difference between that and the exemptions.

Chairman Karsky went through the Petition and the exceptions which were being requested as determined to be incidental powers. Chairman Karsky indicated he felt the language in the first exception was taken from Gramm-Leach-Bliley, and that he does not have a problem with this exception. Ms. Foss indicated the language was taken from Gramm-Leach-Bliley.

Chairman Karsky indicated the second exception was also language from Gramm-Leach-Bliley.

Chairman Karsky stated the third exception is referred to as a secondary market disclosure, and is primarily for selling mortgages to the secondary market.

Chairman Karsky stated the first part of the fourth exception is something the public expects the bank to do in order to protect their records and protect the customer against unauthorized transactions. Ms. Foss indicated she agreed, but that the public does not realize there is information sharing when that is happening. Chairman Karsky stated the exception dealing with customer complaints could involve investigating a complaint where you talk to a third party in order to investigate the complaint.

Chairman Karsky stated the fifth exception deals with exceptions for accounting firms. This is currently in the statute, but does not address anyone hired to do compliance work for the bank.

Chairman Karsky stated the sixth exception is in connection with the sale or merger of a bank, and the proposed acquirer would need to perform its due diligence.

It was moved by Member Monson and seconded by Member Braseth that the State Banking Board issuing an Order granting the Petition for Determination of Incidental Powers as submitted by the North Dakota Bankers Association and supported by the Independent Community Banks of North Dakota. Member Petersen disclosed for the record that he is currently Treasurer for the North Dakota Bankers Association. The motion was carried by a vote of 5 to 0, with Members Daniel and Zeltinger absent.

Chairman Karsky indicated he would like the Department to send a Memorandum to all banks indicating how the Department will interpret Chapter 6-08.1, which will state that the Department will not export our privacy law. Ms. Foss suggested that the Memorandum state that the Department will assess how each bank is handling its privacy for its North Dakota customers; however, recognizing we do not have oversight authority and responsibility of out-of-state banks. If a bank is dealing with a North Dakota customer, the Department will certainly investigate the complaint. Chairman Karsky indicated he would draft the policy, as well as send it to Representative Kasper for his review and comments.

Ms. Foss also suggested the Department put together a question and answer document for the public which address questions the Department has received.

ITEMS TO BE NOTED

Department of Financial Institutions

Security State Bank, Dunseith, to change its number of directors from not less than three nor more than five, to the exact number of 4.

Comptroller of the Currency

Wells Fargo Bank North Dakota, National Association, to establish a branch at the vicinity of 1401 13th Avenue East, West Fargo, received 4-23-02.

Chairman Karsky noted included in the Items for Discussion is a 1985 Attorney General's Opinion dealing with disclosure to a business of the sufficiency of a customer's account to cover a check issued by the customer to the business, which falls within the exception of Section 6-08.1-02(6), North Dakota Century Code.

The Board recessed at 11:41 a.m., and reconvened in closed session at 12:05 p.m.

Timothy J. Karsky, Chairman	Robert J. Entringer, Secretary