Public Records Legislative Study Committee

Comments of the Department of Financial Regulation

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SECTION I: OVERVIEW / RESPONSE TO QUESTIONS

Vermont Access to Public Records Law

The Vermont Statutes contain numerous exemptions to the public records act directly related to the Department of Financial Regulation due to the nature of the persons and businesses it regulates. The Department supervises the insurance, banking, and securities industries. This includes "financial institutions, credit unions, licensed lenders, mortgage brokers, insurance companies, insurance agents, broker-dealers, investment advisers, and other similar persons subject to the provisions of [Title 8] and 9 V.S.A. chapters 59, 61, and 150." 8 V.S.A. § 11.

In exercising its supervisory responsibilities, the Department is guided by 8 V.S.A. § 10 which states "It is declared to the policy of the State of Vermont that (1) the business of organizations that offer financial services and products shall be supervised by the commissioner in a manner to assure the solvency, liquidity, stability and efficiency of all such organizations, to assure reasonable and orderly competition, thereby encouraging the development, expansion and availability of financial services and products advantageous to the public welfare and to maintain close cooperation with other supervisory authorities; and (2) all such organizations shall be supervised in such a way as to protect consumers against unfair and unconscionable practices and to provide consumer education."

The Department performed an exhaustive review of the exemptions applicable to the statutes it administers and determined that, with some exceptions, the exemptions are current, appropriate in scope, and necessary to the regulatory scheme. The Department requires the confidentiality now afforded by statute in order to fulfill the policy objectives defined by the Legislature. In recognition of the Administration's emphasis on transparency in government, the statutes continue to strike the appropriate balance in preserving the public's right to information while maintaining the confidentiality required to both effectively regulate and to preserve the viability of the financial industry in Vermont.

INSURANCE

The business of insurance is regulated primarily by the states and in this way differs from the business of banking or securities where jurisdiction may be shared with or preempted by federal authority. In the absence of a federal regulatory body, the National Association of Insurance Commissioners (NAIC) serves to provide a necessary level of consistency among states and to facilitate cooperative regulatory practices. These attributes are desirable in an industry that crosses state boundaries in order to best serve both the interest of consumers and of industry. The

insurance statutes have been adopted specifically to comply with NAIC model laws and accreditation requirements and to ensure full participation in this larger regulatory scheme.

A key to this state based regulatory system is information sharing and the associated confidentiality provisions are fundamental to these information sharing agreements. The accreditation program ensures that all states meet minimum standards with respect to regulatory practices and therefore each state can then rely on an examination by another accredited state. The purpose of this is efficiency. Each state must only examine domestic insurers rather than having to examine every insurer doing business within the state. More importantly, the standards set by the model laws and the accreditation program enable each state to rely on the ability of the other states to maintain the confidentiality of the information shared. Without the confidentiality provisions the domiciliary state conducting the exam would not share these examination records with other states and each state must then examine all insurers doing business in the state in order to adequately protect consumers. Without the confidentiality provisions the Department cannot adequately supervise the business of insurance to assure the "solvency, liquidity, stability and efficiency" of the organizations, or maintain close cooperation with other supervisory authorities. Vermont does not have the resources to perform these functions on its own.

BANKING

Banking oversight differs from insurance in that there is both federal and state jurisdiction. For practical purposes this means that the Department conducts joint examinations and shares information with federal regulators. Federal law exempts examination reports by federal examiners from disclosure under FOIA.[1] The Department cannot share information with federal regulators unless it is able to maintain the confidentiality required by federal law.[2] The Office of the Comptroller of the Currency regulations go so far as to bar the examined bank from producing the examination report without the OCC's approval. The regulation states that bank supervisory materials are "the property of the Comptroller" and are "loaned to the bank . . . for its confidential use only." 12 C.F.R. § 4.32(b)(2).

Federal authorities also rely on the bank examination privilege. The regulation of banks depends upon openness and honesty between bank examiners and the banks they regulate. The bank examination privilege is a common-law privilege justified by many courts because this relationship requires a high level of candor. *Federal Housing Finance Agency v. JPMorgan Chase & Co.*, WL 5660247, 2 - 3 (S.D.N.Y. 2013)(citation omitted). The D.C. Circuit Court of Appeals describes the privilege, finding it to be:

> [F]irmly rooted in practical necessity. Bank safety and soundness supervision is an iterative process of comment by the regulators and response by the bank. The success of the supervision therefore depends vitally upon the quality of communication between the regulated banking firm and the bank regulatory agency. This relationship is both extensive and informal . . . in the sense that it

[1] Exemption 8 of the FOIA protects matters that are "contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions." 5 U.S.C.A. § 552(b)(8)(2000).

[2] See list of Banking Division MOU's at Appendix A.

> calls for adjustment, not adjudication . . ..These conditions simply could not be met as well if communications between the bank and its regulators were not privileged.

In re Subpoena Served Upon Comptroller of Currency, 967 F.2d 630, 633 (D.C.Cir. 1992). Though the Vermont Supreme Court has not formally recognized the "bank examination privilege" the Vermont statutes currently afford the necessary protections. Though there is no comparable privilege in insurance regulation, the same rationale justifies confidentiality of insurer examinations.

SECURITIES

The securities industry is also dually regulated by federal and state authority. To assess or evaluate the Department's confidentiality provisions pertaining to securities, Legislative Counsel suggested that it may be helpful to compare to confidentiality provisions for securities at the federal level. The Securities and Exchange Commission (SEC) is our federal counterpart in that it is the federal civil regulatory agency for securities.

The SEC is subject to the Federal Freedom of Information Act (FOIA). Section 7 regarding law enforcement records, recently adopted in Vermont for criminal investigations, is applicable. The SEC considers all investigations confidential and does not reveal even the existence of an investigation. If the SEC receives a FOIA request relating to an investigation, it will then verify the existence of an investigation but it will deny the request based on one of the exemptions. Most commonly the denial is because disclosure will interfere with enforcement proceedings.

Certain SEC records are also protected from disclosure under FOIA exemption 8 (see footnote 1) for financial institutions. For some time, the courts had to determine what Congress meant by "financial institutions," but in 2010 Congress clarified that "any entity for which the Commission [SEC] is responsible for regulating, supervising, or examining under this title is a financial institution." 15 U.S.C.A. § 78x(e). This exemption has been interpreted by federal courts to be very broad in scope.

Based on the practical application of the Federal FOIA standard at the SEC, Vermont's confidentiality provisions relating to securities offer protection of confidential information comparable to that at the federal level. The Vermont confidentiality provisions are more transparent and require fewer resources to administer. The Vermont statutes are more transparent because a citizen knows that the statute exempts from disclosure all investigative records. By contrast, though the SEC investigative records are purported to be public unless one of six exemptions applies, in practice these records are not disclosed. The Department's categorical exemption requires fewer resources.

Response to Questions

Below are the specific questions posed by Legislative Counsel on behalf of the committee with the Department's response and recommendation.

Questions – Specific Statutes

1. **1 V.S.A. § 317(c)(26): Information submitted to the Department of Financial Regulation (DFR) in dispute re DFR regulated entity**

    - **Why are only complaints submitted by "individuals" confidential? Should this subdivision be amended to cover complaints submitted by "persons"?**

The Department agrees that "individuals" should be amended to "persons."

RECOMMENDATION: MODIFY AS PROPOSED

2. **1 V.S.A. § 317(c)(28) (records of external review of health care and mental health service decisions); 8 V.S.A. § 4089a(i) (health care information acquired by or provided to the independent panel of mental health involved in reconsideration of a mental health review); and 8 V.S.A. § 4089f(d)(6) (health care information acquired by an independent external review of a health benefit plan decision to deny, terminate, or reduce health care coverage or to deny payment for a health care service)**

    - **In Act 21, § 14 of 2011, 8 V.S.A. § 4089a(c)(7) was amended to replace "independent panel of mental health professionals" with "independent review organization." However, subsecs. (g) and (i) were not updated with a similar substitution. Do you agree that a technical correction is needed?**
    - **§ 4089a(i) refers to the independent panel of mental health professionals (which should read the "independent review organization"?) not being a public agency. In 8 V.S.A. § 4089f, which also discusses confidentiality of the records of IROs, it does not say that IROs are not public agencies. Should these two sections be made consistent on this point?**

The Department agrees to the proposed revisions.

RECOMMENDATION: MODIFY AS PROPOSED.

3. **1 V.S.A. § 317(c)(36): Anti-fraud plans**

    - **Should this exemption also extend to the Department of Labor, as 8 VSA § 4750(b) provides for workers' compensation insurers to file anti-fraud plans?**

The Department agrees that this exemption should extend to the Department of Labor.

RECOMMENDATION: MODIFY AS PROPOSED.

4. **8 V.S.A. § 15(b): The Commissioner of DFR can make public a portion of advisory interpretation and retain as confidential other portions**

- **As written, this exemption gives the Commissioner total discretion as to whether to "make public" all or part of an advisory interpretation. Would amending this provision to establish a presumption in favor of disclosure, while authorizing the Commissioner to withhold an advisory opinion if disclosure of the opinion would cause unfair prejudice or unfair advantage, create any issues?**

The requests for advisory opinions may contain trade secret information; may contain information about a current practice or procedure that may not be compatible with current laws or regulations for which a company is seeking advice on compliance. The Department would like to encourage this type of open communication with regulated entities as well as entities that may be looking to come into the state. A presumption in favor of disclosure would most likely discourage open communication.

RECOMMENDATION: RETAIN

5. **8 V.S.A. § 22: Information acquired by DFR pursuant to a confidentiality sharing agreement when the information is designated as confidential by the furnisher of the information**

   - **As subsec. (c) is written, it appears to give a furnisher of information unfettered discretion to designate records as confidential. Would DFR oppose the following change? "Any information furnished pursuant to this section by or to the ~~commissioner~~ Commissioner that has been designated confidential by the furnisher of the information in accordance with law shall..."**

The Department does not oppose this addition of this language, however, the language should clarify that the information furnished under this section be designated confidential by the furnisher in accordance with the law of the *furnisher's jurisdiction*. Subsection (b)(2) states that the Commissioner must maintain as confidential or privileged information received with notice or the understanding that it is confidential or privileged *under the laws of the jurisdiction that is the source of the information*. When these subsections are read together, the statute currently requires a basis in law for the confidentiality, however, we do not oppose this clarification.

RECOMMENDATION: MODIFY AS PROPOSED.

6. **8 V.S.A. § 23: All records of investigations of banks and financial institutions licensed by DFR and all records and reports of examinations by the commissioner of DFR**

   - **This exemption generally covers investigations and examinations of banks and financial institutions under Parts 2 and 5 of Title 8. Other sections separately address investigations and examinations of insurance companies, life settlement providers, and risk retention groups. See 8 V.S.A. §§ 3574, 3687, 3840, 4813m, 6008, 6048o, 6074. Does the confidentiality of investigation and examination records in these other contexts need to be separately addressed in these various**

sections, or is one consolidated exemption workable (and, if workable, preferable)?

The statutes currently provide varying degrees of confidentiality in the investigation and examinations of differing entities or licensees. Confidentiality ranges from an exemption to the Public Records Act to creating an evidentiary privilege. While it is possible to adopt standard boilerplate language for all of these sections, this would require that we adopt the most stringent standard and then apply that across the board. This may cause conflicts elsewhere in statutes, rules, caselaw, or MOUs where the higher level of confidentiality may not be allowed, necessary, or warranted.

RECOMMENDATION: RETAIN

7. **8 V.S.A. § 3683(a)(2): Notices of divestitures, acquisitions, and mergers related to domestic insurers**
   - **This section was substantially amended in Sec. 28 of Act 29 of 2013. The language of this section is confusing; it is difficult to parse out what is intended to be confidential. Do you agree? If so, could this be addressed in a technical correction bill?**
   - **What is intended to be confidential under this provision?**

This section is intended to add a provision requiring confidential notice to the Commissioner of any divestiture of a controlling interest in a domestic insurer. This confidentiality is time-limited and expires upon completion of the transaction. The Department agrees that this section is unclear. The Department will review this section and propose technical corrections for clarity.

RECOMMENDATION: REVIEW

8. **8 V.S.A. § 3687: Records obtained in the course of an examination or investigation of an insurance holding company system; registration statements and enterprise risk report of insurers part of a holding company system; prior notification of certain transactions involving a domestic insurer and a person in holding company system;**

- **Why are the provisions of this exemption different from the provisions of 8 V.S.A. § 3574(d), pertaining to examination reports of insurance companies? Should one of these sections simply cross-reference the other, or should they be made consistent in some other way?**
- **This section was amended in Sec. 33 in Act 29 to cross-reference subdivisions 3683(b)(12) and (13), which were added in Sec. 28 of Act 29, and the meaning of what records are intended to be covered under the cross-references is unclear. Do you agree? Should this be the subject of a technical correction?**

Section 3687 is specific to a holding company or a subsidiary of an insurance company. This authorizes the commissioner to look beyond the insurance company to affiliates of the insurance

company but only if the examination of the insurer under subchapter 7 is inadequate or the interests of the policyholders of such insurer may be adversely affected.

There are fundamental differences between an individual company examination and a holding company examination. Under section 3574(d), the Department discloses the results of the financial examination of individual companies. Examinations under this section pertain to facts related to past transactions. Examinations conducted under section 3686 of the holding company may contain forward-looking or insider information regarding mergers, acquisitions, divestitures, future products, etc., gleaned from discussions with management. This information merits a higher standard of confidentiality. The Department recommends retaining the language in section 3574(d) and in section 3687.

The Department agrees that the cross-reference to subdivisions 3683(b)(12) and (13) is unclear and will review and propose technical corrections as needed for clarity

RECOMMENDATION: RETAIN / REVIEW

9. **8 V.S.A. § 4488(5): Notice to DFR from a fraternal benefits society of termination of appointment of an insurance agent**
- **The language of this exemption differs substantially from the language of 8 V.S.A. § 4813m(f), addressing the termination of insurance agents generally and associated proceedings. Should § 4488(5) be amended to cross reference the provisions of § 4813m(f)?**

Yes.

RECOMMENDATION: MODIFY AS PROPOSED.

10. **8 V.S.A. §§ 6002(c)(3) (captive insurance company license applications) and 6052(c)(2) (risk retention group applications).**
- **The exemption provisions in these two sections are very different. Is there a rationale for the differences? If there is not, do you have a recommendation as how to make the two provisions consistent?**

A captive insurance company is considered a single state insurer, i.e. it is licensed in Vermont under Vermont law, conducts business only in Vermont, and is regulated solely by Vermont. In contract, a risk retention group (RRG), while still licensed only by Vermont under Vermont law may conduct business in any other state in accordance with the federal Liability Risk Retention Act (LRRA), with very limited regulation allowed by the other states.

A logical result of this difference is that all information regarding captives is confidential but information regarding the operations of a RRG shall be shared with other states in accordance with LRRA and NAIC standards, however, information about individual members of the RRG merits confidential treatment.

RECOMMENDATION: RETAIN

11. **8 V.S.A. § 6008(c): Any reports, information, or documents acquired by DFR in the course of an examination of captive insurance company**
    - **Should the language and scope of this exemption be made consistent with the language and scope of 8 V.S.A. § 6048o and 8 V.S.A. § 6074?**

Section 6008(c) applies to captive insurance companies; section 6048o to Special Purpose Financial Insurance Companies; and section 6074 to risk retention managing general agents and reinsurance intermediaries. The level of confidentiality in these sections does differ somewhat based on the entity or licensee to which it applies. The differences are due to the general versus specific nature of the section and/or the content of the information that is the subject of the section. Rather than subject all to the highest level of confidentiality, retaining the distinctions will allow for greater transparency.

RECOMMENDATION: RETAIN

12. **8 V.S.A. § 6052: Proprietary information submitted to DFR by risk retention groups**
    - **Subsec. (d) addresses examination reports, and says that the provisions of § 6008(c) apply, except that "such provisions shall not apply to final examination reports relating to risk retention groups...." I assume the intent of this language is that final examination reports be publicly available, since § 6008(c) states that examination reports are confidential? If that is the intent, what is the reason for the difference?**

The intent is that *examination reports* for risk retention groups (RRG) be publicly available. The underlying workpapers remain confidential. The difference stems from the difference in the entities. The RRG, while licensed in only one state, may operate in multiple states so the intent is that the information be publicly available.

RECOMMENDATION: RETAIN

13. **8 V.S.A. § 7041(e) (records produced in the course of DFR delinquency proceeding of domestic insurer) and § 7043 (records related to insurance delinquency proceedings)**
    - **What is the scope of the records intended to be confidential under this section - just minutes of/notices of the hearings? Does 1 V.S.A. § 317(c)(24) address the scope of the records intended to be confidential under this provision?**
    - **Are records confidential under § 7041(e) already fully covered under § 7043?**

These proceedings take place when the commissioner has reasonable cause to believe that an insurer is in a hazardous financial condition. If the proceedings were public, this information could jeopardize any ability of the insurer to recover from the hazardous financial condition or to proceed to an organized liquidation if that becomes necessary. This type of proceeding, if public, could lead to a "run on the bank." To prevent this, the intent is that the confidentiality be broad in scope, meaning that it covers the entire record of the proceeding unless the insurer requests a public hearing (or the superior court orders otherwise after a private hearing).

Sections 7041(e) provides the notice requirements and includes a statement that the hearing is private and exempt from the public records act. Section 7043 specifically identifies the information that shall remain confidential. In the interest of clarity in reading the statutes, we recommend that the two provisions remain.

RECOMMENDATION: RETAIN

14. **9 V.S.A. § 5607: Securities documents acquired by DFR, including records related to audits, inspections, and trade secrets**
    - **Who are the "designees" referenced in 5607(b)(6)?**

Under the Revised Uniform Securities Act, the "designees" referenced in this section include Web-CRD (Central Registration Depository); Investment Adviser Registration Depository (IARD) and the Securities and Exchange Commission's Electronic Data Gathering, Analysis and Retrieval System (EDGAR) or successor systems.

These databases contain a variety of information including that filed for registering securities, broker-dealers, and investment advisers. The confidentiality 5607 contemplates (1) the situation in which a broker is named in a customer-initiated arbitration and this information is required to be reported (even if the subject is allegations of wrongdoing) and (2) any other circumstance where a designee for some reason determines that a record in its files are nonpublic or nondisclosable.

Under scenario (1), FINRA provides a formal process where that broker can seek to have this information expunged from his records. If FINRA expunges the record, section 5607 protects from disclosure an earlier version of the record that may be in the Commissioner's possession that included the information.

Under scenario (2), the Commissioner has the discretion to exempt the record from disclosure if she determines the designee is correct and nondisclosure is in the public interest and for the protection of investors or to disclose if she does not agree with the designee's determination.

RECOMMENDATION: RETAIN.

General Questions

1. **Most DFR exemptions appear to be categorical rather than conditional. *See, e.g.*, 1 V.S.A. § 317(c)(26), 8 V.S.A. § 23; 8 V.S.A. § 3561. An example of a conditional exemption is the newly amended crime detection and investigation exemption, 1 V.S.A. § 317(c)(5). DFR has numerous exemptions for investigation and examination records, and these exemptions appear to be categorical. Could DFR review its exemptions with an eye toward considering whether these exemptions should be conditional rather than categorical? Does DFR oppose any movement toward conditional exemptions, and if so, why?**

The Department's authority over insurance, banking, and securities fits within a larger context—insurance within the context of the larger state-based regulatory system, banking and securities

within the context of shared federal/state jurisdiction and self-regulatory organizations. Our confidentiality statutes often need to be viewed within this broader context rather than simply within the context of the Vermont statutes. Modifying one section can have broader implications within this larger context. For example, a change in a confidentiality provision may contradict an MOU requirement or may compromise our ability to share information with other state agencies, federal agencies or self-regulatory organizations.

Beyond the concern that a change in the confidentiality provisions will threaten the interconnectedness that has been developed and relied upon in the regulation of the financial industry, is a fundamental concern regarding the Department's ability to perform its function. Financial regulation is highly dependent upon self-disclosure by the regulated entities. The regulatory system is designed to examine these entities in a way that will reveal weaknesses before they turn to crises. But exposure of these weaknesses to the public would serve no purpose and may subject the entity to unwarranted scrutiny and cause the public unwarranted concern or worse panic. A change to conditional versus categorical exemptions sends the message to industry that the Department may or may not be able to maintain the confidentiality of this information. The result would most likely be regulated entities less willing to share relevant information. The Department recommends that its exemptions remain categorical.

RECOMMENDATION: RETAIN

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2. **Likewise, could DFR review whether any of its exemptions should be time-limited?**

The general nature of the information that is exempt from disclosure under our statutes is sensitive and/or proprietary information not subject to time limits. The Department requires that these regulated entities candidly share this information so that we may do our job and in exchange we ensure the confidentiality of that information. If a regulated entity cannot count on our ability to maintain this confidentiality, that entity may withhold information the Department needs to do its job. The Department does not recommend time-limits.

RECOMMENDATION: RETAIN

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3. **The provisions related to information sharing in 8 V.S.A. § 3588(c) and (e) largely—but not word for word—duplicate the generally applicable information sharing provisions of 8 V.S.A. § 22. In general, can and should a generally applicable provision like 8 V.S.A. § 22 be relied upon, instead of laying out much of the same material again in separate sections? Does 8 V.S.A. § 22 need to be updated to include some of the new elements found in § 3588?**

Section 3588 *requires* that the commissioner enter into a written agreement with the NAIC or a third-party consultant and specifies certain requirements of that agreement. Section 22 *allows* the commissioner to enter into information sharing agreements across divisions and provides general parameters. Because Section 22 is of general applicability, it should allow for varying provisions based on the content of the agreement negotiated as opposed to the prescribed provisions required for ORSA. The difference in these provisions is due to the narrow scope of section 3588 versus the broad scope of section 22 and the sensitivity and the regulatory purpose of the information covered by section 3588.

RECOMMENDATION: RETAIN

4. **When drafting PRA exemptions, does DFR use a checklist or a similar tool in determining what confidentiality elements are needed for a particular section regarding confidentiality?**

We do not use a checklist. The guidance for the confidentiality provisions is generally from the NAIC model laws pertaining to a particular subject. These laws are designed to create consistency among the states as to that subject but not necessarily among all insurance chapters. Often content and purpose of the statute will dictate varying levels of confidential treatment.

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5. **In 2012, a trio of identical information sharing provisions was added, this time related to certain financial institutions (money services, debt adjusters, and loan servicers). See 8 V.S.A. §§ 2561, 2768, 2923. These sections are similar but not identical to 8 V.S.A. § 22. Could 8 V.S.A. § 22 have been amended to encompass this same content? Or were separate provisions needed?**

This is one instance where similar provisions appear in several different sections of chapters or subchapters. While this may seem redundant, it may make sense if viewed from the perspective of the entities we regulate. Our statutes are most likely read by these regulated entities rather than the inquiring public. The regulated entities are most likely to read the chapter or subchapter that applies to them. If all the pertinent information relating to a particular type of licensee or entity is located in one place, it makes compliance and enforcement more efficient.

RECOMMENDATION: RETAIN

6. **There are other examples of records that insurers are required to submit to DFR that do not contain all 11 elements found in 8 V.S.A. § 3588. *See, e.g.* 8 V.S.A. § 6002. Would it be useful to have consistency across such provisions, or is there a reason for the variations and nuances?**

As noted, 8 V.S.A. 3588 addresses an insurer's Own Risk and Solvency Assessment (ORSA) summary report filed with DFR. This report is highly sensitive as it requires that the insurer provide a candid assessment of its solvency and any associated risks. Insurers need the highest level of assurance that the Department will maintain the confidentiality of this information in order to ensure full disclosure and candor by the insurer.

While the Department recognizes the importance of consistency, the aim is for a level of consistency among the states in the regulation of insurers versus consistency among different chapters and subchapters governing different entities. Much of the inconsistency in the confidentiality provisions are the result of the general versus specific nature of the chapter or subchapter and the subject matter the provision pertains to. As such we recommend maintaining the varying levels of confidentiality which originate in the model laws.

RECOMMENDATION: RETAIN

SECTION II

In this section, the Department extracted from the document titled *Exemptions Reviewed by the Public Records Study Committee in 2012* the Department exemptions still under review and responds to the committee's comments and or recommendations.

1 V.S.A. § 317(c)(26)	**Information and records provided to DFR by an individual or company related to resolution of a dispute between an individual and a DFR regulated person or company**	**Continue reviewing in 2013 to consider whether the exemption should be conditional rather than categorical, and whether it should be time-limited.**

The purpose of this statute is to protect consumer information rather than to conceal complaints filed against regulated entities. The Department discloses information pertaining to any regulated entity upon request to include the number of complaints, the nature of those complaints, and the resolution of complaints. The Department does not reveal the consumer's information or the specifics of the complaint. The goal is to ensure the confidentiality necessary to encourage consumers to come forth with complaints as well as to encourage regulated entities to work with the Department to resolve consumer complaints. Removal of this exemption would have a chilling effect. Fewer consumers would seek assistance from the Department if the specific information revealed would be available to the public. Regulated entities would be reluctant to engage in open communication with the Department to resolve these complaints if this communication was subject to disclosure. This exemption is crucial to the consumer protection function of this Department and balances the Department's interest in assisting consumer's in disputes with the public's interest in obtaining information about complaints filed against regulated entities.

* * *

1. The information and records provided to the Department often include personal financial information.

2. This provision is consistent with 8 VSA §§10201 – 10203 and DFR Regulation B-2001-01, which protect the privacy of consumer financial information. It is also consistent with federal law, such as the Gramm-Leach-Bliley Act of 1999, which seeks to maintain the confidentiality of personal financial information.

3. Removal of this confidentiality provision would discourage people from filing complaints with the Department. People do not want to have their personal financial information disclosed. Also, some people are embarrassed that they made a mistake or lacked the necessary financial literacy or knowledge to prevent the problem.

4. Removal of this confidentiality provision would discourage a free flow of information between the Department and the regulated entity and would inhibit the Department's ability to resolve disputes for consumers. The candor with which the Department and regulated entities communicate will suffer if parties constantly have to be concerned that their efforts to resolve the consumer's dispute are nothing more than a free and easy discovery process for future plaintiff's counsel.

5. Release of personal financial information could lead to identity theft or fraud.

6. Removal of this confidentiality provision would have a significant chilling effect that would inhibit the Department's ability to carry out its functions.

RECOMMENDATION: RETAIN

1 V.S.A. § 317(c)(28)	**Records of independent external reviews of health care and mental health service decisions under 8 V.S.A. §§ 4089f and §4089a**	**Renew 2012 recommendation that 1 V.S.A. § 317(c)(28) and 8 V.S.A. §§ 4089a and 4089f be amended to reflect that the independent panel of mental health care providers has been eliminated. See App. B of the 2012 report.**

RECOMMENDATION: MODIFY AS PROPOSED

8 V.S.A. § 15(b)	**Financial institutions advisory interpretations**	**Recommend amending to establish a presumption in favor of public disclosure, subject to an exemption if disclosure would cause harm or unfair advantage.**

The Department offers advisory opinions for the purpose of encouraging industry to seek advice before acting. Requests necessarily include information that a company does not want disclosed because advisory opinions are most often sought when a company is seeking to offer a new service or product or when a company recognizes it may be out of compliance in some manner. Removal of the exemption will simply make it less likely that a company will choose to provide the information to the department in an effort to seek such an opinion. This is particularly true in a small state like Vermont where redacting information is unlikely to conceal the identity of those involved.

* * *

1. The requests for advisory opinions often contain trade secret information about new products or processes. This communication will be lost if companies have to worry that their trade secrets will be discovered by their competitors.

2. Some requests contain information about a current practice or procedure that may not be compatible with current laws or regulations and the company is trying to find a way to correct or adjust their product to bring it into compliance. This communication will be lost if companies trying to comply with Vermont laws and regulations have to fear that whatever they tell the Department may become grounds for a class action lawsuit.

3. The Department would like to encourage this type of open communication with current regulated entities and with those entities that are looking to come into the state.

RECOMMENDATION: RETAIN

8 V.S.A. § 22	**Confidentiality and information sharing**	**Recommend amending to clarify that commissioner of department of financial regulation may only designate information confidential in accordance with law, ~~and further review in 2013 regarding possible constitutional issues under subsec. (d).~~**

Section 22(b)(2) states that the commissioner "shall maintain as confidential or privileged any document, material, or information received with notice or the understanding that it is confidential or privileged under the laws of the jurisdiction that is the source of the document, material, or information[.]"

Section 22(c) states "Any information furnished pursuant to this section by or to the commissioner that has been designated confidential by the furnisher of the information shall not be subject to public inspection under chapter 5 of Title 1, shall not be subject to subpoena, and shall not be subject to discovery or admissible in evidence in any private civil action."

The Department does not interpret this section to give the furnisher of information "unfettered discretion to designate records as confidential" but rather to give confidential treatment to (1) any document, material or information received that is confidential or privileged under the laws of the jurisdiction that is the source of the document, material or information and (2) has been designated confidential by the furnisher of the information.

The information sharing agreements are the foundation of and are crucial to the regulatory authority of the Department. A change to this section will significantly impact our ability to execute agreements with other states, the federal government, foreign jurisdictions, national regulatory databases, and self-regulatory organizations. This in turn will have a detrimental effect on our ability to regulate. The Department would no longer have access to the information of these other entities, because these entities would not share confidential information if the Department cannot guarantee to maintain the confidentiality.

* * *

1. This provision enables the Department to enter into information sharing agreements with federal agencies and state regulatory groups such as: the Federal Deposit Insurance Corporation

(FDIC); National Credit Union Administration (NCUA); the Office of the Comptroller of the Currency (OCC); the Internal Revenue Service (IRS); the Consumer Financial Protection Bureau (CFPB); and FINCen.

2. This provision enables the Department to participate in multi-state regulatory databases such as NMLS, CRD, and IARD.

3. This provision enables the Department to do joint examinations with its federal counterparts such as the FDIC or NCUA. For example the Department may do a joint examination of a bank with the FDIC. This joint examination helps prevent a duplication of efforts and cost to both the state and federal regulator and reduces the cost to the regulated entity from have two government agencies perform the same examination at different times.

4. This provision makes it possible for the Department to combine efforts and resources with regulators and attorneys general from other states to engage in multistate examinations, investigations, and actions involving national entitles (for example, the recent multistate action involving the five largest loan servicers).

RECOMMENDATION: RETAIN (DO NOT OPPOSE CLARIFICATION)

8 V.S.A. § 23	**DFR investigation records**	~~**Continue review in 2013 regarding possible constitutional issues under subsec. (b),**~~ **and the desirability of providing a standard for the exercise of discretion.**

This section includes a standard for the exercise of discretion. It gives the Commissioner the discretion to disclose investigative and examination records but only when doing so is "in furtherance of legal or regulatory proceedings brought as a part of the commissioner's official duties."

* * *

1. Removal of this confidentiality provision would discourage a free flow of information between the Department and the regulated entity and would inhibit the Department's ability to perform investigations and examinations and to resolve disputes for consumers. The candor with which the Department and regulated entities communicate will suffer if parties constantly have to be concerned that information disclosed in an investigation or examination is nothing more than a free and easy discovery process for future plaintiff's counsel. Removal of this confidentiality provision would have a significant chilling effect that would inhibit the Department's ability to carry out its functions.

2. Removal of this confidentiality provision would have a chilling effect on the examiners ability to perform their duties.

> The memos and examinations created by the [Department] contain the thoughts and recommendations of the government. Should the government be forced to

produce these documents, it is probable that future government employees may be reluctant to capture the full breadth of their opinions and thoughts in written format for fear of future disclosure. A break in confidentiality could have a "chilling effect" on the ability of bank regulators to perform their duties in the future.

In re Bank One Securities Litigation, 209 F.R.D. 418, 428 (N.D. Ill. 2002).

3. Removal of this provision would inhibit and may eliminate the Department's ability to conduct joint examinations with federal regulatory agencies. Also, it would inhibit or eliminate the Department's ability to effectively participate in multistate state regulatory actions.

4. This provision enables the Department to do joint examinations with its federal counterparts such as the FDIC or NCUA. For example the Department may do a joint examination of a bank with the FDIC. This joint examination helps prevent a duplication of efforts and cost to both the state and federal regulator and reduces the cost to the regulated entity from have two government agencies perform the same examination at different times.

5. This provision makes it possible for the Department to combine efforts and resources with regulators and attorneys general from other states to engage in multistate examinations, investigations, and actions involving national entitles (for example, the recent multistate action involving the five largest loan servicers).

6. This provisions enables the Department to participate in multi-state regulatory databases, such as NMLS.

RECOMMENDATION: RETAIN

8 V.S.A. § 2530(j)	**Information obtained during an examination or investigation by DFR related to persons engaged in, or applying for a license to engage in, money services (Act 78 of 2012)**	**Recommend repealing exemption as duplicative of 8 V.S.A. § 23.**

Section 2530(j) reiterates that 8 VSA §23, above, applies to money servicers. This is not a separate exemption but rather a reference to an existing exemption.

RECOMMENDATION: RETAIN

8 V.S.A. § 3561	**All market conduct annual statements and other information filed by insurance companies with DFR**	**Continue review in 2013 regarding whether the exemption should conditional rather than categorical.**

A conditional as opposed to a categorical exemption will raise doubts within industry as to the Department's ability to protect sensitive information. The Department's reliance on industry to be honest and forthcoming with necessary information cannot be overstated. A regulatory evaluation of a company is highly dependent on the information provided by industry. In order to encourage disclosure of sensitive information, the regulated entity must be able to rely on our ability to maintain confidentiality. Under a conditional exemption, entities are more likely to withhold information necessary for adequate oversight.

RECOMMENDATION: RETAIN

8 V.S.A. § 3574(d)	**Examination reports of insurance companies**	**Continue review in 2013 regarding the desirability of providing a standard for the exercise of discretion.**

This provision provides the commissioner the discretion to maintain the confidentiality of records where necessary to protect the integrity of a criminal investigation conducted by another enforcement agency or authority. A standard is already written into this provision.

RECOMMENDATION: RETAIN

8 V.S.A. § 3687	**Examination reports of insurance company subsidiaries**	**Recommend amending to delete existing exemption language and inserting in lieu thereof a cross-reference to 8 V.S.A. § 3574(d).**

This provision is specific to a holding company or a subsidiary of an insurance company. This authorizes the commissioner to look beyond the insurance company to affiliates of the insurance company but only if the examination of the insurer under subchapter 7 is inadequate or the interests of the policyholders of such insurer may be adversely affected. This accounts for the different confidentiality provision.

There are fundamental differences between an individual company examination and a holding company examination. Under section 3574(d), the Department discloses the results of our financial examination of individual companies. Examinations under this section pertain to facts related to past transactions. Examinations conducted under section 3686 of the holding company may contain forward-looking or insider information regarding mergers, acquisitions, divestitures, future products, etc., gleaned from discussions with management. This information merits heightened confidential treatment.

RECOMMENDATION: RETAIN

8 V.S.A. § 3840	**Investigation and examination reports related to financial condition or market conduct of life settlement provider.**	**Direct legislative council to add to table of exemptions, and review in 2013.**

Section 3840 was adopted in 2009 and applies to life settlement providers. As in other chapters, the specificity of the statute and the subject matter led to the confidentiality provision in this statute.

RECOMMENDATION: RETAIN

8 V.S.A. § 4089a(a) & (i)	**Mental health care services review**	**Renew 2012 recommendation that 1 V.S.A. § 317(c)(28) and 8 V.S.A. §§ 4089a and 4089f be amended to reflect that the independent panel of mental health care providers has been eliminated. See App. B of the 2012 report.**

RECOMMENDATION: MODIFY AS PROPOSED

8 V.S.A. § 4089f(d)(6)	**External review of health care services decision**	**Renew 2012 recommendation that 1 V.S.A. § 317(c)(28) and 8 V.S.A. §§ 4089a and 4089f be amended to reflect that the independent panel of mental health care providers has been eliminated. See App. B of the 2012 report.**

RECOMMENDATION: MODIFY AS PROPOSED

8 V.S.A. § 4488(5)	**Notice of termination of insurance agent**	**Recommend amending to cross-reference 8 V.S.A. § 4813m(f) ~~after possible constitutional issues in that section are reviewed in 2013~~.**

RECOMMENDATION: MODIFY AS PROPOSED

8 V.S.A.§ 6002(c)(3)	**Captive insurance company license applications**	**Continue review in 2013 regarding reconciling the exemption language in this provision and § 6052(c)(2).**
8 V.S.A. § 6052(c)(2)	**Risk retention group applications**	**Continue review in 2013 regarding reconciling the exemption language in this provision and § 6002(c)(3).**

A captive insurance company is considered a single state insurer, i.e. it is licensed in Vermont under Vermont law, conducts business only in Vermont, and is regulated solely by Vermont. In contrast, a risk retention group (RRG), while still licensed only by Vermont under Vermont law, may conduct business in any other state in accordance with the federal Liability Risk Retention Act (LRRA), with very limited regulation allowed by the other states.

A logical result of this basic difference is that all information regarding captives is confidential, but information regarding the operations of a RRG shall be shared with other states in accordance with the LRRA and NAIC standards, however, information about individual members of the RRG merits confidential treatment.

RECOMMENDATION: RETAIN

8 V.S.A. § 6074	**Examination reports of risk retention groups**	**Continue review in 2013 regarding the desirability of providing a standard for the exercise of discretion.**

The statute contains a standard. The Commissioner may only disclose confidential information under this section if disclosure "is in the furtherance of any legal or regulatory action."

RECOMMENDATION: RETAIN

8 V.S.A. § 7041(e)	**Insurer hearings**	**Recommend technical amendment to eliminate reference to "private" hearings and replace it with the term "confidential.'**

RECOMMENDATION: MODIFY AS PROPOSED

APPENDIX A

Banking Division MOUs and Information Sharing Agreements

1. Information Sharing and Common Interest Agreement Between State Attorneys General and State Financial Regulators

As of March 29, 2011
- signed by 19 financial regulators
- 39 signed by Attorneys General

Each agency must protect the confidentiality of Confidential Communications (which include regulator examinations)

Confidential Communications shall only be disclosed to Agencies that have entered into this agreement

Parties must inform the other parties in they cannot protect the confidentiality of confidential Communications

Does not apply to sharing of supervisory information related to banking institutions, including supervisory information jointly owned or prepared with a federal bank regulatory agency

2. CSBS/AARMR Nationwide Cooperative Agreement for Mortgage Supervision; and CSBS/AARMR Nationwide Cooperative Protocol for Mortgage Supervision - Both dated as of May 1, 2009

"Joint Examination State Regulator" is one that can agree to the confidentiality section of the agreement

"Concurrent Examination State Regulator" is one that cannot agree to the confidentiality section of the agreement

Joint Examination State has access to information developed by any other state regulator. Concurrent Examination State does not.

A Joint Examination Team shall not share Confidential Supervisory Information with a Concurrent Examination Team

States are required to specifically identify themself as either a Joint Examination State or a Concurrent Examination State when signing the agreements. VT DFR is currently a Joint Examination State.

Joint Examination Teams are composed of states that are Joint Examination states that can maintain confidentiality. Concurrent Examination States must independently staff their own Concurrent Examination Teams.

3. Nationwide Cooperative Agreement (Supervision and examination of multi-state banks) – revised December 9, 1997

Covers supervision and examination of multi-state banks in cooperation with other states

Required to treat supervisory information as confidential

Signed by 51 state, district, and US territory regulators

4. Federal Reserve System – Access to web-based applications

Information to remain confidential

5. Financial Crimes Enforcement Network of the U.S. Department of the Treasury ("FinCEN") – Memorandum of Understanding

December 12, 2005

Requirement that DFR maintain confidentially of FinCEN materials

6. Financial Crimes Enforcement Network ("FinCEN") Electronic Access to Bank Secrecy Act Information – Memorandum of Understanding

September 24, 2013

Grants DFR direct electronic access to information collected pursuant to the reporting authority contained in the Bank Secrecy Act

Information includes: currency transaction reports; international transportation of currency and monetary instruments; reports of foreign bank and financial accounts; suspicious activity reports; Form 830s (cash payments over $10,000); and Money Services Businesses registration forms

Authorization limited to DFR Banking Division and not DFR as a whole

Special guidelines and restrictions on dissemination of BSA Information outside of Banking Division

7. Money Transmitter Regulators Cooperative Agreement

March 17, 2008

Cooperative agreement among state regulators

Information shared by the states is confidential

8. Nationwide Cooperative Agreement for Supervision and Examination of Multi-State Trust Institutions

Signed by 41 states and the District of Columbia

Provides a comprehensive nationwide system to supervise and examine multi-state trust institutions cooperatively among the states

DFR must maintain confidentiality of information shared with DFR from other states

9. National Credit Union Administration ("NCUA") – Working Guide Agreement

Jan. 1, 2007

Enables DFR to conduct independent credit union examinations that the NCUA will accept rather than having each credit union examination be a joint examination with the NCUA - or an independent examination by the NUCA in addition to the DFR Exam

10. Nationwide Mortgage Licensing System ("NMLS")

Enables DFR to use the national online licensing system

Access to information would be limited without a statutory confidentiality provision

11. Office of the Comptroller of the Currency ("OCC") – MOU

July 20, 2007

Sharing of consumer complaint information

DFR required to keep shared information confidential

12. Office of Foreign Asset Control ("OFAC") – MOU

Oct. 16, 2007

Administration and enforcement of economic and trade sanctions against targeted foreign countries, groups, and persons

OFAC advises DFR of potential violations

Must maintain confidentiality of information

13. Consumer Financial Protection Bureau – Information - Sharing MOU

March 14, 2011

Intended to preserve the confidential nature of information the parties share by and among them