



WHAT FINANCIAL INSTITUTIONS SHOULD KNOW BEFORE ANSWERING THAT SUBPOENA

M. Ruthie Hagan*
Timothy Grooms+

This article encompasses customers' privacy rights and a financial institution's obligation to answer a subpoena and when it is necessary and safe to do so. There are three acts of importance with this issue. First, is the Gramm-Leach-Bliley Act that provides financial customers with the right to privacy regarding nonpublic personal information held at a financial institution. Second, is the Right to Financial Privacy Act which provides financial customers with the right to be informed by the government before it obtains nonpublic information from the financial institution. Third, is the USA PATRIOT Act ("the Patriot Act") which was enacted after the attacks of September 11, 2001, to strengthen anti-terrorism and the Annunzio-Wylie Anti-Money Laundering Act. The Patriot Act allows the government to obtain personal information about a financial institution's customers without the customer knowing or having any right to be informed that a suspicious activity report was made or requested.

Historical Development

Although we often view privacy as a personal freedom, legal recognition of a right to privacy in the United States is uneven and demonstrates a willingness to subordinate privacy interests to other policy interests.¹ For example, there is no express

* Associate at the Little Rock, Arkansas firm of Quattlebaum, Grooms, Tull & Burrow PLLC.

+ Partner at the Little Rock, Arkansas firm of Quattlebaum, Grooms, Tull & Burrow PLLC.

¹ Oliver Ireland and Rachel Howell, *The Fear Factor: Privacy, Fear, and the Changing Hegemony of the American People and the Right to Privacy*, 29 N.C.J. Int'l L. & Com. Reg. 671 (Summer 2004).

“right to privacy” set forth in the Constitution.² Nevertheless, in the 1965 landmark case *Griswold v. Connecticut*,³ the U.S. Supreme Court struck down a Connecticut law banning birth control, basing its decision on a zone of privacy created by several constitutional rights.⁴

The rise in concern about financial privacy has correlated strongly with the development of improved data processing and communication technologies.⁵ The first federal legislation to address the privacy of customer financial information was the Fair Credit Reporting Act (“FCRA”)⁶ in 1970.

FCRA addressed customer perception of abusive practices and lack of responsiveness on the part of some credit bureaus and other entities that collect and disseminate credit and other personal information by creating standards for the collection and maintenance of credit and other customer information by customer reporting agencies.⁷

The Fair and Accurate Credit Transactions Act of 2003 (“the FACT Act”)⁸ amended FCRA by assisting both consumers and financial institutions in the fight against identity theft.⁹ The FACT Act encourages financial institutions to know their customers, it also addresses the perceived gap left by the GLBA rules with respect to the affiliate sharing of information but does so in a unique way by focusing on the use of the

² U.S. Const; *see also* David J. Garrow, Privacy and the American Constitution, 68 Soc. Res. 55, 55 (2001) (discussing the absence of an express right to privacy in the U.S. Constitution).

³ *Griswold v. Connecticut*, 381 U.S. 479 (1965).

⁴ *Id.*

⁵ Oliver Ireland and Rachel Howell, *The Fear Factor: Privacy, Fear, and the Changing Hegemony of the American People and the Right to Privacy*, 29 N.C.J. Int'l L. & Com. Reg. 671 (Summer 2004).

⁶ The Fair Credit Reporting Act, 15 U.S.C. 1681 *et seq.* (1970).

⁷ Oliver Ireland and Rachel Howell, *The Fear Factor: Privacy, Fear, and the Changing Hegemony of the American People and the Right to Privacy*, 29 N.C.J. Int'l L. & Com. Reg. 671 (Summer 2004).

⁸ Fair and Accurate Credit Transactions Act of 2003, Pub. L. 108-159, 117 Stat. 1952 (2003).

⁹ Fair and Accurate Credit Transactions Act of 2003, Pub. L. 108-159, 117 Stat. 1952 (2003).

information rather than its disclosure. The FACT Act adds a new section 624 to FCRA which provides that an institution that receives either experience information or consumer report information on a customer from an affiliate may not use such information for marketing solicitation to the customer about the institution's products or services, unless the institution discloses to the customer that information received from affiliates may be used for marketing purposes and the customer is given an opportunity and method to opt-out of receiving such marketing solicitations.¹⁰ The legislation clarifies that this section does not limit the ability of affiliates to share information, nor does it limit their ability to establish and maintain a database of information shared by affiliates; rather, it only requires notice of such sharing before the information is used to send marketing solicitations.¹¹ Affiliates, however, are allowed to share information without limitation, so long as it is not used for marketing solicitations without first providing notice and opt-out.¹² Under this new section, the opt-out notice may be provided to the customer together with disclosures required by any other provision of law, such as those required by GLBA.

Shortly after the enactment of FCRA, in 1978, concerns over privacy increased as the federal courts issued several decisions that called into question the privacy of financial records. For example, in *California Bankers Association v. Schultz*,¹³ the U.S. Supreme Court upheld the Bank Secrecy Act¹⁴ (“BSA”) against challenges by the American Civil Liberties Union and the California Bankers Association that its recordkeeping requirements infringed upon a constitutional right to privacy. BSA

¹⁰ 15 U.S.C. 1681s-3(a)(1)

¹¹ 149 Cong. Rec. 176, at E2512 (Dec. 9, 2003).

¹² 149 Cong. Rec. 176, at E2512 (Dec. 9, 2003).

¹³ 416 U.S. 21 (1974).

¹⁴ 12 U.S.C. §§ 1730d, 1829b, 1951-1959; 31 U.S.C. 5311 to-5355.

requires financial institutions to keep records of certain financial transactions including making and retaining microfilm copies of all checks over a certain dollar amount.¹⁵ Just two years later in *United States v. Miller*,¹⁶ the Supreme Court held that a bank customer did not have a constitutionally protected right of privacy in bank account records; thus, the bank customer lacked standing to challenge, on Fourth Amendment grounds, a bank's disclosure to federal authorities. On the same day as *Miller*, the Supreme Court decided *Fisher v. United States*,¹⁷ which held that an individual has no Fifth Amendment right against compelled self-incrimination that would entitle him to prevent his attorney from producing financial records made by the individual's accountant when summoned by the I.R.S. The Court reasoned that, where records are developed by a third party as a result of an ordinary business relationship, the subject has no constitutionally protected right of privacy in those records.

Congress responded to the Court with what would become the Right to Financial Privacy Act of 1978 (“RFPA”).¹⁸ Legislative history indicates the bill that was to become RFPA was “a congressional response to the Supreme Court decision in *United States v. Miller*.”¹⁹ RFPA protects customer records maintained by financial institutions from improper disclosure to officials or agencies of the federal government.²⁰ RFPA prohibits a financial institution from disclosing to the federal government records it holds without the government giving notice to the customer whose records are being requested and requires a waiting period whereby the customer has the opportunity to challenge the

¹⁵ 12 U.S.C. §§ 1730d, 1829b, 1951-1959; 31 U.S.C. 5311 to-5355.

¹⁶ 425 U.S. 435 (1976).

¹⁷ 425 U.S. 391 (1976).

¹⁸ 12 U.S.C. §§ 3401-3422 (2004).

¹⁹ 95th Cong. 2d session, House Report No. 95-1383 (p. 34) (July 20, 1978); see also Cong. Rec. Oct. 14, 1978 S.37,570 (remarks of M. Abourezk).

²⁰ 12 U.S.C. § 3402.

request through legal action.²¹ RFPA is limited to disclosures to the federal government, and does not reach requests for customer information made by state or local governments or private parties.²² RFPA also mandates that the government, among other requirements, provide the financial institution a certificate of compliance with RFPA before requested customer information may be released.²³

In 1998, the “Know Your Customer Rule” was published for public comment. This proposed Rule required the Banking Agencies to prescribe regulations requiring depository institutions to establish and maintain procedures reasonably designed to ensure and monitor compliance with the BSA.²⁴ The Know Your Customer Rule was designed to stop illicit financial activities, such as money laundering and fraud. The Know Your Customer Rule was premised on the notion that, when financial institutions identify their customers and determine what transactions are normal and expected for these customers, they can monitor transactions to identify unusual or suspicious account activity. By identifying and reporting unusual or suspicious transactions, financial institutions could protect their integrity and assist the Banking Agencies and law enforcement authorities in illicit activities. However, the Know Your Customer Rule would have required each bank to develop a program to determine the identity of its customers; determine its customers’ sources of funds; determine, understand, and monitor the normal expected transactions of its customers; and report any transaction of its customer that appeared suspicious in accordance with the existing suspicious activity

²¹ 12 U.S.C. § 3410.

²² 12 U.S.C. § 3401.

²³ 12 U.S.C. § 3403.

²⁴ 31 U.S.C. § 5311 *et seq.*

report requirements.²⁵ When the public comment period for the regulation ended on March 8, 1999, the Banking Agencies had received an unprecedented number of comments on the proposed rule from the public, banking organizations, industry associations, and members of Congress. Of those comments received, most of the comments voiced concern over the privacy of information that would be collected and held by financial institutions.²⁶

The same year, the concern for financial privacy continued with adoption of the Gramm-Leach-Bliley Act (“GLBA”).²⁷ GLBA requires a financial institution to protect the security, integrity, and confidentiality of customer information. GLBA limits the disclosure of “nonpublic personal information” which is defined as personally identifiable information about a customer or customers and any list or grouping of customers created by using personally identifiable information.²⁸ GLBA also only protects privacy as to consumer transactions.²⁹

Concerns expressed concerning the proposed and withdrawn “Know Your Customer Rule” were disregarded after the terrorist attacks of September 11, 2001. Congress quickly responded to the terrorist attacks by enacting the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (known as the USA PATRIOT Act).³⁰ The USA PATRIOT Act (“the Patriot Act”) grants federal officials greater powers to trace and intercept terrorists’ communications both for law enforcement and foreign intelligence

²⁵ Oliver Ireland and Rachel Howell, *The Fear Factor: Privacy, Fear, and the Changing Hegemony of the American People and the Right to Privacy*, 29 N.C.J. Int’l L. & Com. Reg. 671 (Summer 2004).

²⁶ *Id.*

²⁷ 15 U.S.C. §§ 6801 *et seq.*

²⁸ 15 U.S.C. § 6809.

²⁹ 15 U.S.C. §§ 6801 *et seq.*

³⁰ 31 U.S.C. § 5315 *et seq.*

purposes.³¹ The Patriot Act also expanded the authority of the Federal Bureau of Investigation and law enforcement to gain access to business records, medical records, educational records, and library records, including stored electronic data and communications. With respect to financial information, the Patriot Act requires financial institutions to take additional steps to know their customer by verifying their identity and provides the government with more effective means to access that information.³² The implementation of a written customer identification program (“CIP”) is incredibly similar to Know Your Customer which was never enacted in 1998 due to public concern about privacy. At a minimum, the bank must obtain the following information from the customer prior to opening an account: (1) name, (2) date of birth, (3) address, and (4) an identification number which shall be for a U.S. person a taxpayer identification number, passport number and country of issuance, alien identification number or number and country of issuance of any other government-issued document that shows nationality or residence and bearing a photograph or similar safeguard.³³

Gramm-Leach-Bliley Act

The Gramm-Leach-Bliley Act (“GLBA”) contains privacy provisions relating to customers’ financial information relating to consumer transactions.³⁴ Under GLBA, financial institutions have restrictions on when they may disclose a customer’s nonpublic personal financial information to affiliated and nonaffiliated third parties.³⁵ Financial institutions are required to provide notices to their customers about their information

³¹ Charles Doyle, The USA PATRIOT Act: A Legal Analysis, CRS Report for Congress, Order Code RL 31377, at 1-2 (2002).

³² Charles Doyle, The USA PATRIOT Act: A Legal Analysis, CRS Report for Congress, Order Code RL 31377, at 1-2 (2002).

³³ Financial Recordkeeping and Recording of Currency and Foreign Transactions, 68 Fed. Reg. 25109 (May 9, 2003) (to be codified at 31 C.F.R. pt. 121(b)(2)(i)(A)).

³⁴ 15 U.S.C. § 6801 *et seq.*

³⁵ 15 U.S.C. § 6802.

collection and information sharing practices.³⁶ Customers may decide to opt-out if they do not want their information shared with nonaffiliated third parties.³⁷ GLBA provides specific exceptions under which a financial institution may share customer information with a nonaffiliated third party and the customer may not opt-out.³⁸ All financial institutions are required to provide customers with a notice and opt-out opportunity before they may disclose information to nonaffiliated third parties outside of what is permitted under the exceptions.³⁹

Banks should be aware of what content to put in the opt-out notice. First, in the bank's initial disclosures it must disclose the financial institution discloses (or reserves the right to disclose) nonpublic personal information about a customer to affiliated and

³⁶ 15 U.S.C. § 6802.

³⁷ 15 U.S.C. § 6802(b).

³⁸ 15 U.S.C. § 6802(e). The exceptions to disclosure of nonpublic personal information are “(1) as necessary to effect, administer, or enforce a transaction requested or authorized by the consumer, or in connection with (A) servicing or processing a financial product or service requested or authorized by the consumer; (B) maintaining or servicing the consumer's account with the financial institution, or with another entity as part of a private label credit card program or other extension of credit on behalf of such entity; or (C) a proposed or actual securitization, secondary market sale (including sales of servicing rights), or similar transaction related to a transaction of the consumer; (2) with the consent or at the direction of the consumer; (3) (A) to protect the confidentiality or security of the financial institution's records pertaining to the consumer, the service or product, or the transaction therein; (B) to protect against or prevent actual or potential fraud, unauthorized transactions, claims, or other liability; (C) for required institutional risk control, or for resolving customer disputes or inquiries; (D) to persons holding a legal or beneficial interest relating to the consumer; or (E) to persons acting in a fiduciary or representative capacity on behalf of the consumer; (4) to provide information to insurance rate advisory organizations, guaranty funds or agencies, applicable rating agencies of the financial institution, persons assessing the institution's compliance with industry standards, and the institution's attorneys, accountants, and auditors; (5) to the extent specifically permitted or required under other provisions of law and in accordance with the Right to Financial Privacy Act, to law enforcement agencies, self-regulatory organizations, or for an investigation on a matter related to public safety; (6) (A) to a consumer reporting agency in accordance with the Fair Credit Reporting Act, or (B) from a consumer report reported by a consumer reporting agency; (7) in connection with a proposed or actual sale, merger, transfer, or exchange of all or a portion of a business or operating unit if the disclosure of nonpublic personal information concerns solely consumers of such business or unit; or (8) to comply with Federal, State, or local laws, rules, and other applicable legal requirements; to comply with a properly authorized civil, criminal, or regulatory investigation or subpoena or summons by Federal, State, or local authorities; or to respond to judicial process or government regulatory authorities having jurisdiction over the financial institution for examination, compliance, or other purposes as authorized by law.” 15 USCS § 6802(e).

³⁹ 15 U.S.C. § 6802(b).

nonaffiliated third parties.⁴⁰ Second, the financial institution can only provide the information to nonaffiliates if the financial institution provides or has provided to the customer a notice to opt-out.⁴¹ Third, the financial institution must give reasonable means by which the customer can opt-out, for example: a toll-free telephone number, a detachable form with mailing information, or if the customer has agreed to receive notices electronically, an electronic means such as a form that can be sent via email or through the financial institution's website.⁴² However, it is *not* a reasonable means to require a customer to write his/her own letter as the *only* option.⁴³ Lastly, the financial institution must allow a "reasonable opportunity" for the customer to opt-out before sharing information,⁴⁴ with 30 days from the date the bank mailed the notice deemed reasonable.⁴⁵

Effect of GLBA on Subpoenas

With the GLBA's opt-out requirement, there is growing concern that answering a subpoena may violate the privacy provisions of GLBA. First, subpoenas should be placed in two categories (i.e. government authority and nongovernmental authority) to determine which part of GLBA to follow and if any of the other privacy acts apply (i.e. RFPA and/or the Patriot Act). The financial institution should ask who is involved in the subpoena, specifically is the federal government the issuing party? If there is government involvement then the Patriot Act and/or Right to Financial Privacy Act will also apply.⁴⁶

⁴⁰ 15 U.S.C. § 6803.

⁴¹ 15 U.S.C. § 6802.

⁴² Federal Trade Commission, Bureau of Consumer Protection Division of Financial Practices, The Gramm-Leach-Bliley Act Privacy of Consumer Financial Information (June 18, 2001).

⁴³ *Id.* at 9.

⁴⁴ *Id.*

⁴⁵ 12 C.F.R. § 40.10(a)(3).

⁴⁶ The IRS can review bank documents informally under 26 U.S.C. § 7602(a)(1), but such informal review is not exempt from disclosure requirements of RFPA. *Neece v. IRS*, 922 F.2d 573 (10th Cir. 1990). IRS

If there is no government involvement, then GLBA only applies⁴⁷ and the bank likely has to comply with the subpoena. GLBA, unlike the Patriot Act and the RFPA, does not have a “safe harbor” for the financial institution. The absence of a “safe harbor” presents several legitimate concerns for financial institutions when considering whether to answer a subpoena.

Two cases have stated that, under § 6802(e)(8) of GLBA a subpoena falls under the “judicial process” exception thus it is exempt from GLBA opt-out requirement.⁴⁸ The legislative history of GLBA predicted an independent judicial process exception independent of government regulatory authorities having jurisdiction over the financial institution for examination, compliance or other purposes authorized by law.⁴⁹

If a civil or criminal subpoena could be defined as “judicial process” in Arkansas, then the subpoena would fall under this exception.⁵⁰ While cases interpret judicial process to include subpoenas, financial institutions should still be concerned because there are cases that, instead of simply recognizing a “blanket” exemption under GLBA for subpoenas in state civil cases have required the bank to answer the subpoena, but limit the scope of the subpoena.⁵¹ These decisions have left financial institutions uncertain as to whether the financial institution should challenge the subpoena or whether the

and Grand Jury summons are exempt under 12 U.S.C. § 3413. See *U.S. v. Conte*, 2004 WL 2988567 (N.D. Cal 2004).

⁴⁷ 15 U.S.C. § 6802.

⁴⁸ See *Martino v. Barnett*, 595 S.E.2d 65 (W. Va. 2004); *Marks v. Global Mortg. Group, Inc.*, 218 F.R.D. 492 (D. W. Va. 2003).

⁴⁹ See H.R. 74, 106th Cong. 93, 108-09, 124 (1999).

⁵⁰ See *Martino v. Barnett*, 595 S.E.2d 65 (W. Va. 2004); *Marks v. Global Mortg. Group, Inc.*, 218 F.R.D. 492 (D. W. Va. 2003). *Ex parte National Western Life Ins. Co.*, 2004 WL 2260308 (Ala. 2004) (holding as a matter of first impression that the court order compelling defendants to produce nonpublic personal information, insurance policies and documents, for plaintiff, a nonaffiliated third party, was “judicial process” within the meaning of exception to GLBA permitting disclosure to respond to judicial process).

⁵¹ *Landry v. Union Planters Corp.*, 2003 U.S. Dist. LEXIS 10553 (E.D. La. 2003) (court limited scope of subpoena to only bind financial data so that the documentation would not constitute nonpublic information).

financial institution should notify the customer of the subpoena and give the customer the option to object and file a motion to quash (and possibly being able to pass the cost of the motion on to the customer).

In *Martino v. Barnett*,⁵² a driver instituted a civil action alleging he was injured in an automobile accident. His attempts to obtain an address for service of process on the other driver through requests to the insurers were refused based on the argument that an insurer was not obligated to disclose nonpublic personal information about its insureds. The court in *Martino* stated that “[a]lthough agreeing that exchange of information is inherent in our civil law, the court in *Marks v. Global Mortgage Group, Inc.*⁵³ cautioned that the judicial process exception to the general privacy purposes of the GLBA does not provide a license to undercut the express interest of Congress in protecting the privacy of customers’ financial information.”⁵⁴ In *Marks*, the plaintiffs sent interrogatories and requests for documents to defendants seeking information about loans that the defendants issued to other customers.⁵⁵ The court in *Marks* suggested that courts consider the expressed congressional strong interest in protecting the privacy of customers’ financial information and it has to be weighed by the courts when determining whether to issue protective orders and developing the contents of those orders.⁵⁶ Trial courts have a right and a duty to balance the interests at stake and to fashion protective orders which limit access to necessary information only.⁵⁷

⁵² *Martino v. Barnett*, 595 S.E.2d 65 (W. Va. 2004).

⁵³ *Marks v. Global Mortg. Group, Inc.*, 218 F.R.D. 492 (D. W. Va. 2003).

⁵⁴ *Martino v. Barnett*, 595 S.E.2d 65 (W. Va. 2004) (citing *Marks*, 218 F.R.D. at 497).

⁵⁵ *Marks*, 218 F.R.D. at 494.

⁵⁶ *Id.*

⁵⁷ *Martino v. Barnett*, 595 S.E.2d 65 (W. Va. 2004).

Another case that causes concern is *Landry v. Union Planters Corp.*,⁵⁸ plaintiffs' discovery was aimed at satisfying the class action prerequisites of Fed. R. Civ. P. 23 and sought production of all information relating to notes and loan agreements for residences with street addresses in Louisiana made, generated, or serviced by the mortgage company. Defendants objected on the basis that the discovery request sought production of bank customers' "nonpublic information" in contravention of GLBA. The court stated a subpoena for monetary gain is not "judicial process" so the court had to determine if the information requested in the subpoena was public or nonpublic information.⁵⁹ If the information sought is nonpublic information, then the customers are entitled to the right to "opt-out" under § 6802(b). The court remedied this issue by limiting the scope of the subpoena to only blind financial data so that the documentation would not constitute nonpublic information.⁶⁰

GLBA defines what is considered nonpublic personal information to include (1) nonpublic personally identifiable financial information which is any information a customer provides to obtain a financial product or service; about a customer resulting from any transaction involving a financial product or service; or otherwise obtained about a customer in connection with providing a financial product or service or (2) any list, description, or other grouping of customers (and publicly available information pertaining to them) derived using any personally identifiable financial information that is not publicly available.⁶¹ It excludes publicly available information and any list, description or other grouping of customers (including publicly available information

⁵⁸ *Landry v. Union Planters Corp.*, 2003 U.S. Dist. LEXIS 10553, 2003 WL 21355462 (E.D. La. 2003).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ Federal Trade Commission, Bureau of Consumer Protection Division of Financial Practices, The Gramm-Leach-Bliley Act Privacy of Consumer Financial Information (June 18, 2001).

pertaining to them) that is derived without using personally identifiable financial information that is not publicly available.⁶²

In *Union Planters Bank, N.A. v. Gavel*,⁶³ the court did not enforce the subpoena because it asked for nonpublic information; however, the court only applied the fraud exception in 6802(e)(3).⁶⁴ Both the *Marino* and *Marks* courts criticized this decision because it did not apply (e)(8) which contains the exception for “judicial process.”⁶⁵

Neither the courts nor Congress have given a bright line rule as to whether to answer a civil subpoena. Some courts have held civil subpoenas are within the judicial process exception in § 6802(e)(8), but if the court limits the scope of the subpoena, then financial institutions are left with uncertainty as to whether to challenge the subpoena because it may be too broad or just answer it and be subject to a lawsuit by its customer for disclosing his/her nonpublic financial information without giving him/her the option to “opt-out,” or object by filing a timely motion to quash.

Right to Financial Privacy Act

The Right to Financial Privacy Act (“RFPA”) *only* applies to requests by a “government authority,” defined as “any agency or department of the United States, or any officer, employee, or agent thereof.”⁶⁶ However, disclosure of financial records to state and local governments or to private parties is not regulated under RFPA, but may be

⁶² *Id.*

⁶³ *Union Planters Bank, N.A. v. Gavel*, 2002 U.S. Dist. LEXIS 8782 (D. La. 2002).

⁶⁴ *Union Planters Bank, N.A. v. Gavel*, 2002 U.S. Dist. LEXIS 8782 (D. La. 2002).

⁶⁵ *See Martino v. Barnett*, 595 S.E.2d 65 (W. Va. 2004); *Marks v. Global Mortg. Group, Inc.*, 218 F.R.D. 492 (D. W. Va. 2003); *see also Union Planters Bank, N.A. v. Gavel*, 2003 U.S. Dist. LEXIS 3820 (D. La., 2003) (“the information which Gavel was asked to produce was clearly ‘nonpublic personal information,’ falling within the provisions of the GLBA prohibiting disclosure without notice and the opportunity to ‘opt-out’”).

⁶⁶ 12 U.S.C. § 3401.

regulated, if at all, by state law.⁶⁷ Although several states have enacted financial privacy legislation, the Arkansas Legislature has not.

In general, if a government authority asks a bank for access to or copies of information contained in the financial records of a customer, the bank *may not* release the financial records *unless* the requesting government agency first provides the bank a written certificate of compliance.⁶⁸ The written certificate of compliance should be:

Mr./Mrs. _____,

I certify, pursuant to section 3403(b) of the Right to Financial Privacy Act of 1978, 12 U.S.C. 3401 et seq., that the applicable provisions of that statute have been complied with as to the [Customer's consent, search warrant or judicial subpoena, formal written request, emergency access, as applicable] presented on [Date], for the following financial records of [Customer's name]: [Describe the specific records].

[Official Signature Block]

Pursuant to section 3417(c) of the Right to Financial Privacy Act of 1978, good faith reliance upon this certificate relieves your institution and its employees and agents of any possible liability to the customer in connection with the disclosure of these financial records.⁶⁹

Furthermore, RFPA only protects “persons” which include individuals or partnerships of five or fewer individuals.⁷⁰ The statute requires the government authority to give notice

⁶⁷ *United States v. Zimmerman*, 957 F. Supp. 94, 96 (N.D. W.Va. 1997). The legislative history of the Act expressly reflects Congress’ intent to exempt state and local governments from the disclosure restrictions imposed upon federal agencies:

Finally, it is important to note that the scope of this title is limited to officials of Federal agencies and departments and to employees of the United States. This limitation reflects our belief that legislation affecting state and local government is the proper province of the respective State governments and of the Conference of Commissioners on Uniform State laws. We believe that grave constitutional and political issues would have been raised if this title had applied to other levels of Government. Several States, most notably California, have enacted financial privacy statutes of their own. This is a movement which deserves both our support and our forbearance.

H.R. Rep. No. 95-1383, at 247 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9273, 9376 (minority views).

⁶⁸ The Government authority seeking the records certifies in writing to the financial institution that it has complied with the provisions of RFPA. 12 U.S.C. § 3403(b).

⁶⁹ 32 C.F.R. PART 275 ENCLOSURE 4.

⁷⁰ Customer does not include a corporation for the purposes of RFPA. *Spa Flying Service, Inc. v. United States*, 724 F.2d 95 (8th Cir. 1984); *Pittsburgh Nat'l Bank v. United States*, 771 F.2d 73 (3d Cir. 1985). Furthermore, RFPA pertains only to records of individuals or partnerships of 5 or less, and not to records of

to the customer and the statute outlines what the notice should contain so that the customer generally gets notice of what is happening between the government and his/her bank, and may contest it, with some exceptions.⁷¹

So long as the bank discloses financial records in good faith reliance on a government certificate of compliance, the statute provides the bank a defense against a wrongful disclosure suit.⁷² However, a bank that responds to a government request by disclosing its customer's financial records without receiving a written certificate by the government agency that the government has complied with the provisions of RFPA may be liable to the customer for \$100, actual damages, costs, reasonable attorney's fees as determined by the court, and in some circumstances, punitive damages.⁷³

When a government authority seeks information through a subpoena, the government must follow 12 U.S.C. § 3402. Financial institutions do not have to be as concerned when a government authority requests private information because it is the duty of the government authority to provide the applicable notice to the financial institution's customer. Section 3402 provides that a government authority may not have

employee benefit plans; trustees of pension fund trust are customers for purposes of challenging subpoenas. *Donovan v. U.A. Local 38 Plumbers & Pipe Trades Pension Fund*, 569 F.Supp. 1488 (ND Cal. 1983).

⁷¹ 12 U.S.C. §§ 3408 to-3410. Like GLBA, RFPA has a number of exceptions that do not require the government to give notice to the customer. The one most relevant to this article is when the government and the customer are both parties to a lawsuit. The other exceptions include: (1) access to financial records by the banking regulatory agencies; (2) disclosure of financial records under the tax code; (3) disclosure of financial records pursuant to any federal statute or regulation; (4) disclosure of financial records in administrative, civil or criminal cases in which the government and the customer are both parties; (5) disclosure of the name, address, account number and type of account for a legitimate law enforcement inquiry in connection with a financial transaction or class of financial transactions or in connection with a foreign country where the government is exercising financial controls over foreign accounts relating to that country; (6) disclosure of financial records pursuant to a grand jury subpoena; (7) disclosure of financial records to the General Accounting Office in connection with an inquiry directed at a government entity; (8) disclosure of financial records of an employee, officer or director of any financial institution or any major customer acting in concert with such an individual in connection with any possible crime against the financial institution or a violation of the Bank Secrecy Act under 31 USC § 5311 *et seq.*

⁷² 12 U.S.C. § 3417(c).

⁷³ 12 U.S.C. § 3417(a); *United States v. Frazin*, 780 F.2d 1461, 1465-66 (9th Cir. 1986).

access to or obtain copies of, or the information contained in the financial records of any customer from a financial institution unless the financial records are reasonably described and either: (1) the customer has authorized such disclosure in accordance with 12 U.S.C. § 3404;⁷⁴ (2) the financial records sought are disclosed in response to an administrative subpoena or summons which meets the requirements of 12 U.S.C. § 3405;⁷⁵ (3) the

⁷⁴ I, [Name of customer], having read the explanation of my rights on the reverse side, hereby authorize the [Name and address of financial institution] to disclose these financial records: [List the particular financial records] to [Component] for the following purpose(s): [Specify the purpose(s)]. I understand that this authorization may be revoked by me in writing at any time before my records, as described above, are disclosed, and that this authorization is valid for no more than three months from the date of my signature.

Federal law protects the privacy of your financial records. Before banks, savings and loan associations, credit unions, credit card issuers, or other financial institutions may give financial information about you to a federal agency, certain procedures must be followed. You may be asked to consent to the financial institution making your financial records available to the Government. You may withhold your consent, and your consent is not required as a condition of doing business with any financial institution. If you give your consent, it can be revoked in writing at any time before your records are disclosed. Furthermore, any consent you give is effective for only three months, and your financial institution must keep a record of the instances in which it discloses your financial information.

Without your consent, a federal agency that wants to see your financial records may do so ordinarily only by means of a lawful subpoena, summons, formal written request, or search warrant for that purpose. Generally, the federal agency must give you advance notice of its request for your records explaining why the information is being sought and telling you how to object in court. The federal agency must also send you copies of court documents to be prepared by you with instructions for filling them out. While these procedures will be kept as simple as possible, you may want to consult an attorney before making a challenge to a federal agency's request.

In some circumstances, a federal agency may obtain financial information about you without advance notice or your consent. In most of these cases, the federal agency will be required to go to court for permission to obtain your records without giving you notice beforehand. In these instances, the court will make the Government show that its investigation and request for your records are proper.

Generally, a federal agency that obtains your financial records is prohibited from transferring them to another federal agency unless it certifies in writing that the transfer is proper and sends a notice to you that your records have been sent to another agency.

If the federal agency or financial institution violates the Right to Financial Privacy Act, you may sue for damages or seek compliance with the law. If you win, you may be repaid your attorney's fee and costs.

If you have any questions about your rights under this law, or about how to consent to release your financial records, please call the official whose name and telephone number appears below.

32 CFR PART 275 ENCLOSURE 2.

⁷⁵ A copy of the subpoena or summons has been served upon the customer or mailed to his last known address on or before the date on which the subpoena or summons was served on the financial institution together with the following notice which shall state with reasonable specificity the nature of the law enforcement inquiry:

Records or information concerning your transactions held by the financial institution named in the attached subpoena or summons are being sought by this (agency or department) in accordance with the Right to Financial Privacy Act of 1978 for the following purpose: If you desire that such records or information not be made available, you must: 1) Fill out the accompanying motion paper and sworn statement or write one of your own, stating that you are the customer whose

financial records sought are disclosed in response to a search warrant which meets the requirements of 12 U.S.C. § 3406;⁷⁶ (4) the financial records sought are disclosed in response to a judicial subpoena which meets the requirements of 12 U.S.C. § 3407;⁷⁷ or (5) such financial records are disclosed in response to a formal written request which meets the requirements of 12 U.S.C. § 3408.⁷⁸

records are being requested by the Government and either giving the reasons you believe that the records are not relevant to the legitimate law enforcement inquiry stated in this notice or any other legal basis for objecting to the release of the records. 2) File the motion and statement by mailing or delivering them to the clerk of any one of the following United States district courts _____. 3) Serve the Government authority requesting the records by mailing or delivering a copy of your motion and statement to ----- . 4) Be prepared to come to court and present your position in further detail. 5) You do not need to have a lawyer, although you may wish to employ one to represent you and protect your rights. If you do not follow the above procedures, upon the expiration of ten days from the date of service or fourteen days from the date of mailing of this notice, the records or information requested therein will be made available. These records may be transferred to other Government authorities for legitimate law enforcement inquiries, in which event you will be notified after the transfer.

12 USCS § 3405.

⁷⁶ No later than ninety days after the Government authority serves the search warrant, it shall mail to the customer's last known address a copy of the search warrant together with the following notice:

Records or information concerning your transactions held by the financial institution named in the attached search warrant were obtained by this (agency or department) on (date) for the following purpose: ----- . You may have rights under the Right to Financial Privacy Act of 1978.

12 USCS § 3406.

⁷⁷ Same notice requirements as administrative subpoenas. *See supra* note 74.

⁷⁸ The government may request financial records under 12 USCS § 3402(5) pursuant to a formal written request only if (1) no administrative summons or subpoena authority reasonably appears to be available to that Government authority to obtain financial records for the purpose for which such records are sought; (2) the request is authorized by regulations promulgated by the head of the agency or department; (3) there is reason to believe that the records sought are relevant to a legitimate law enforcement inquiry; and (4) a copy of the request has been served upon the customer or mailed to his last known address on or before the date on which the request was made to the financial institution together with the following notice which shall state with reasonable specificity the nature of the law enforcement inquiry:

Records or information concerning your transactions held by the financial institution named in the attached request are being sought by this (agency or department) in accordance with the Right to Financial Privacy Act of 1978 for the following purpose: _____. If you desire that such records or information not be made available, you must: (1) Fill out the accompanying motion paper and sworn statement or write one of your own, stating that you are the customer whose records are being requested by the Government and either giving the reasons you believe that the records are not relevant to the legitimate law enforcement inquiry stated in this notice or any other legal basis for objecting to the release of the records. (2) File the motion and statement by mailing or delivering them to the clerk of any one of the following United States District Courts: ----- . (3) Serve the Government authority requesting the records by mailing or delivering a copy of your motion and statement to ----- . (4) Be prepared to come to court and present your position in

The customer can authorize the release of his/her financial information under 12 U.S.C. § 3404 if the customer furnishes to the financial institution and to the government authority seeking to obtain such disclosure a signed and dated statement which: (1) authorizes such disclosure for a period not in excess of three months; (2) states that the customer may revoke such authorization at any time before the financial records are disclosed; (3) identifies the financial records which are authorized to be disclosed; (4) specifies the purposes for which, and the government authority to which, such records may be disclosed; and (5) states the customer's rights under this title.⁷⁹ Any authorization as condition of doing business is prohibited and no such authorization shall be required as a condition of doing business with any financial institution.⁸⁰ Additionally, the customer has the right, unless the government authority obtains a court order as provided in 12 U.S.C. § 3409, to obtain a copy of the record which the financial institution shall keep of all instances in which the customer's record is disclosed to a government authority pursuant to RFOIA, including the identity of the government authority to which such disclosure is made.⁸¹

If the government does not obtain consent or decides to use a judicial subpoena instead, then the government authority may obtain financial records under 12 U.S.C. § 3402(4) only if: (1) the subpoena is authorized by law and there is reason to believe that

further detail. (5) You do not need to have a lawyer, although you may wish to employ one to represent you and protect your rights. If you do not follow the above procedures, upon the expiration of ten days from the date of service or fourteen days from the date of mailing of this notice, the records or information requested therein may be made available. These records may be transferred to other Government authorities for legitimate law enforcement inquiries, in which event you will be notified after the transfer.

12 USCS § 3408.

⁷⁹ 12 U.S.C. § 3404.

⁸⁰ 12 U.S.C. § 3404.

⁸¹ 12 U.S.C. § 3404.

the records sought are relevant to a legitimate law enforcement inquiry and (2) a copy of the subpoena has been served upon the customer or mailed to his last known address on or before the date on which the subpoena was served on the financial institution together with a notice.⁸² The notice required by the government authority to the customer is:

Records or information concerning your transactions which are held by the financial institution named in the attached subpoena are being sought by this (agency or department or authority) in accordance with the Right to Financial Privacy Act of 1978 for the following purpose: If you desire that such records or information not be made available, you must: 1) Fill out the accompanying motion paper and sworn statement or write one of your own, stating that you are the customer whose records are being requested by the Government and either giving the reasons you believe that the records are not relevant to the legitimate law enforcement inquiry stated in this notice or any other legal basis for objecting to the release of the records. 2) File the motion and statement by mailing or delivering them to the clerk of the ____ Court. 3) Serve the Government authority requesting the records by mailing or delivering a copy of your motion and statement to _____. 4) Be prepared to come to court and present your position in further detail. 5) You do not need to have a lawyer, although you may wish to employ one to represent you and protect your rights. If you do not follow the above procedures, upon the expiration of ten days from the date of service or fourteen days from the date of mailing of this notice, the records or information requested therein will be made available. These records may be transferred to other government authorities for legitimate law enforcement inquiries, in which event you will be notified after the transfer.⁸³

After ten days have lapsed from the date of service or fourteen days from the date of mailing of the notice to the customer and the customer has not filed a sworn statement and motion to quash, or the customer challenge provisions of 12 U.S.C. § 3410 have been complied with, the financial institution shall release the requested information.⁸⁴

⁸² 12 U.S.C. § 3402.

⁸³ 12 U.S.C. § 3407.

⁸⁴ 12 U.S.C. § 3407. Note that an administrative subpoena requires the same notice as a judicial subpoena. It provides:

Records or information concerning your transactions held by the financial institution named in the attached subpoena or summons are being sought by this (agency or department) in accordance with the Right to Financial Privacy Act of 1978 for the following purpose: If you desire that such records or information not be made available, you must: 1) Fill out the accompanying motion

Upon receipt of a request for financial records made by a government authority under 12 U.S.C. § 3405 or 3407, the financial institution should proceed to assemble the records requested and be prepared to deliver the records to the government authority upon receipt of the certificate of compliance.⁸⁵

Financial institutions should be less concerned with government authority subpoenas because there is a safe harbor for financial institutions in the RFPA.⁸⁶ The safe harbor provides that any financial institution or agent or employee making a disclosure of financial records pursuant to RFPA in *good faith* reliance upon a certificate of compliance by any government authority shall not be liable to the customer for such disclosure.⁸⁷ An example lacking in good faith is an oral request for financial information, thus the financial institution should look for compliance with RSPA before complying with the subpoena (i.e. only comply if the institution receives the certificate of compliance from the government authority).⁸⁸ Additionally, a financial institution is not in good faith if the financial records sought are not reasonably described.⁸⁹

paper and sworn statement or write one of your own, stating that you are the customer whose records are being requested by the Government and either giving the reasons you believe that the records are not relevant to the legitimate law enforcement inquiry stated in this notice or any other legal basis for objecting to the release of the records. 2) File the motion and statement by mailing or delivering them to the clerk of any one of the following United States district courts:____ 3) Serve the Government authority requesting the records by mailing or delivering a copy of your motion and statement to ____ 4) Be prepared to come to court and present your position in further detail. 5) You do not need to have a lawyer, although you may wish to employ one to represent you and protect your rights. If you do not follow the above procedures, upon the expiration of ten days from the date of service or fourteen days from the date of mailing of this notice, the records or information requested therein will be made available. These records may be transferred to other Government authorities for legitimate law enforcement inquiries, in which event you will be notified after the transfer.

12 U.S.C. § 3405.

⁸⁵ 12 U.S.C. §§ 3403(b), 3411.

⁸⁶ 12 U.S.C. § 3417.

⁸⁷ 12 U.S.C. § 3417.

⁸⁸ *Anderson v. La Junta State Bank*, 115 F3d 756 (10th Cir. 1997).

⁸⁹ *Hunt v. United States Sec. & Exchange Comm.*, 520 F.Supp. 580 (N.D. Tex. 1981) (records sought must be described as specifically as possible and a blanket request for all records is insufficient).

USA Patriot Act

The USA PATRIOT Act⁹⁰ (“the Patriot Act”) was enacted after the terrorist attacks of September 11, 2001. The Patriot Act was enacted to strengthen reporting mechanisms for anti-money laundering scams found in the Bank Secrecy Act (“BSA”). It has two key provisions of importance in regard to subpoenas and customer privacy rights. First, financial institutions are required to report suspicious activities (“SAR”) without notifying the customer.⁹¹ The Annunzio-Wylie Anti-Money Laundering Act required SAR pre-September 11; however, the Patriot Act expanded who has to file a SAR by defining “financial institution” to include more than banking institutions, such as any credit union; a thrift institution; a broker or dealer registered with the Securities and Exchange Commission; a broker or dealer in securities or commodities; an investment banker or investment company; a currency exchange; an issuer, redeemer, or cashier of travelers’ checks, checks, money orders, or similar instruments; an operator of a credit card system; an insurance company; a dealer in precious metals, stones, or jewels; a pawnbroker; a loan or finance company; a travel agency; licensed sender of money or any other person who engages as a business in the transmission of funds; a telegraph company; a business engaged in vehicle sales; persons involved in real estate closings and settlements; the United States Postal Service; and certain casinos.⁹² Second, the Patriot Act enables the government to obtain information from foreign financial institutions through its corresponding US affiliate financial institution.⁹³

⁹⁰ 31 U.S.C. § 5311 *et seq.*

⁹¹ 31 U.S.C. § 5313.

⁹² 31 U.S.C. § 5312.

⁹³ 31 U.S.C. § 5314.

Banks are still required to report any suspicious transaction relevant to a possible violation of law or regulation under the Annunzio-Wylie Anti-Money Laundering Act, but the Patriot Act expanded the meaning of financial institution to require more businesses to report a SAR. If a financial institution voluntarily or pursuant to any other authority reports a suspicious transaction to a government agency, the financial institution *may not* notify any person involved in the transaction that the transaction has been reported.⁹⁴

If a financial institution receives a civil subpoena that specifically asks for the production of a SAR or a subpoena that by virtue of its breadth, would encompass a SAR, then the financial institution should object to the subpoena on the grounds that some of its responsive material consists of confidential supervisory information.⁹⁵ If the subpoena does specifically ask for the production of a SAR, the simple answer for the financial institution is to send the issuer of the subpoena a written objection referring to the regulations that have been promulgated by FinCEN and the federal regulatory agencies that state that any SAR is confidential and cannot be released.⁹⁶ In addition, when a financial institution receives a discovery request or a subpoena asking for the production of a SAR, it should contact its primary federal regulatory agency and FinCEN.⁹⁷

Like RFPA, the Patriot Act has a safe harbor for financial institutions disclosing private customer information.⁹⁸ It provides that any financial institution that makes a voluntary disclosure of any possible violation of law or regulation to a government

⁹⁴ Compare *supra* note 80 and accompanying text.

⁹⁵ The SAR Activity Review Trends, Tips & Issues, Issue 7 (August 2004).

⁹⁶ See 31 C.F.R. § 5318(g)(1); 12 C.F.R. § 21.11 (pertaining to national banks); 12 C.F.R. § 208.62 (pertaining to state chartered banks that are members of the Federal Reserve System); 12 C.F.R. § 353 (pertaining to state chartered banks that are not members of the Federal Reserve System); 12 C.F.R. § 563.180 (pertaining to Federal thrifts and savings associations).

⁹⁷ 31 C.F.R. § 103.18(e) requires banks to notify FinCEN if they receive a subpoena covering SAR.

⁹⁸ 31 U.S.C. § 5318(g).

agency or makes a disclosure pursuant to the Patriot Act or any other authority shall not be liable to any person under any law or regulation for the disclosure or for any failure to provide notice of the disclosure to the person who is the subject of such disclosure or any other person identified in the disclosure.⁹⁹ However, disclosures of account information by a financial institution in response to nothing more than the “verbal instructions” of government officials are not protected by the third safe harbor under 31 U.S.C. § 5318(g)(3).¹⁰⁰ Under existing law and regulations, a government official’s verbal instructions do not constitute legal authority.¹⁰¹

The Patriot Act also prohibits financial institutions from maintaining or administering correspondent accounts with unaffiliated foreign shell banks (i.e., banks with no physical offices or branches).¹⁰² It requires financial institutions to take reasonable steps to ensure that a correspondent account maintained or administered by a financial institution in the United States is not being used indirectly to provide services to a foreign shell bank.¹⁰³

The Patriot Act also requires financial institutions to establish due diligence policies and procedures to detect suspected money laundering through correspondent accounts and private banking accounts of foreigners.¹⁰⁴ The Patriot Act gives the Secretary of Treasury authority to impose “special measures” on financial institutions with respect to foreign jurisdictions, transactions or accounts that the Secretary

⁹⁹ 31 U.S.C. § 5318(g)(3).

¹⁰⁰ *Lopez v. First Union Nat'l Bank*, 129 F.3d 1186 (11th Cir. 1997); *see also Blakely v. United States*, 276 F.3d 853, 869 (6th Cir. 2002).

¹⁰¹ *Lopez v. First Union Nat'l Bank*, 129 F.3d 1186 (11th Cir. 1997).

¹⁰² Eric J. Gouvin, *Bringing Out the Big Guns: The USA Patriot Act, Money Laundering, and the War on Terrorism*, 55 *Baylor L. Rev.* 955, 970-72 (2003).

¹⁰³ *Id.*

¹⁰⁴ *Id.*

determines to be a “primary money laundering concern.”¹⁰⁵ These special measures could include requiring financial institutions to: (1) maintain additional records or make additional reports in connection with specific transactions; (2) identify the foreign beneficial owners of certain accounts; (3) identify the customers of a foreign bank who use interbank “payable-through” accounts; (4) identify the customers of foreign banks who use interbank correspondent accounts; and (5) restrict or prohibit the opening or maintaining of certain interbank “payable-through” or correspondent accounts.¹⁰⁶

Finally, the Patriot Act strengthens the sanctions for failure to comply with the money laundering provisions by: (1) requiring federal banking agencies to consider a financial institution’s record of combating money laundering when reviewing applications in connection with a bank merger or acquisition; (2) subjecting financial institutions to civil and criminal penalties of up to \$1 million for violations of the Patriot Act’s money laundering provisions; and (3) authorizing the Secretary to require a U.S. correspondent bank to sever correspondent banking relationships with a foreign bank that fails to comply with or contests a U.S. summons or subpoena.¹⁰⁷

The Secretary of the Treasury or the Attorney General may issue a summons or subpoena to any foreign bank that maintains a correspondent account in the United States and request records related to such correspondent account, including records maintained outside of the United States relating to the deposit of funds into the foreign bank.¹⁰⁸ The summons or subpoena may be served on the foreign bank in the United States if the foreign bank has a representative in the United States, or in a foreign country pursuant to

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ 31 U.S.C. § 5318(k)(3).

any mutual legal assistance treaty, multilateral agreement, or other request for international law enforcement assistance.¹⁰⁹

Any covered financial institution which maintains a correspondent account in the United States for a foreign bank shall maintain records in the United States identifying the owners of such foreign bank and the name and address of a person who resides in the United States and is authorized to accept service of legal process for records regarding the correspondent account.¹¹⁰ Upon receipt of a written request from a Federal law enforcement officer for information required to be maintained under this paragraph, the covered financial institution should provide the information to the requesting officer not later than 7 days after receipt of the request.¹¹¹

A covered financial institution shall terminate any correspondent relationship with a foreign bank not later than 10 business days after receipt of written notice from the Secretary or the Attorney General (in each case, after consultation with the other) that the foreign bank has failed to comply with a summons or subpoena issued or to initiate proceedings in a United States court contesting such summons or subpoena.¹¹² Failure to terminate a correspondent relationship in accordance with this subsection shall render the covered financial institution liable for a civil penalty of up to \$ 10,000 per day until the correspondent relationship is so terminated.¹¹³ Additionally, a covered financial institution shall not be liable to any person in any court or arbitration proceeding for terminating a correspondent relationship in accordance with this subsection.¹¹⁴

¹⁰⁹ 31 U.S.C. § 5318(k)(3).

¹¹⁰ 31 U.S.C. § 5318(k)(3).

¹¹¹ 31 U.S.C. § 5318(k)(3).

¹¹² 31 U.S.C. § 5318(k)(3).

¹¹³ 31 U.S.C. § 5318(k)(3).

¹¹⁴ 31 U.S.C. § 5318(k)(3).

When applying the Patriot Act, financial institutions should only be concerned when a civil subpoena asks for its SAR. SARs are private and should not be disclosed to anyone including the financial institutions customer. Similar to RFPA, financial institution's disclosure of account information to nothing more than verbal instructions by a government official will not fall within the Patriot Act's safe harbor.

Patriot Act Constitutionality Questioned

Recently, the constitutionality of the Patriot Act has been questioned in *Doe v. Ashcroft*.¹¹⁵ *Doe* involved a provision in the Patriot Act relating to the Electronic Communications Privacy Act ("ECPA") which was modeled from RFPA and has similar privacy provisions.¹¹⁶ *Doe* received a telephone call from an FBI agent informing him that he would be served with a National Security Letter ("NSL").¹¹⁷ *Doe* received a document, printed on FBI letterhead, which stated that, "pursuant to Title 18, United States Code (U.S.C.), Section 2709" *Doe* was "directed" to provide certain information to the Government. As required by the terms of 18 U.S.C. § 2709, in the NSL the FBI "certified that the information sought [was] relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities."¹¹⁸ *Doe* was "further advised," that § 2709(c) prohibited him, or his officers, agents, or employees, "from disclosing to any person that the FBI has sought or obtained access to information or records under these provisions."¹¹⁹ *Doe* was "requested to provide records responsive

¹¹⁵ 334 F.Supp.2d 471 (S.D. NY 2004).

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Doe*, 334 F.Supp.2d 471.

to [the] request personally” to a designated individual, and to not transmit the records by mail or even mention the NSL in any telephone conversation.¹²⁰

The court held 18 U.S.C.S. § 2709 violated the Fourth Amendment because, at least as currently applied, it effectively barred or substantially deterred any judicial challenge to the propriety of a NSL request.¹²¹ The court further stated that ready availability of judicial process to pursue such a challenge is necessary to vindicate important rights guaranteed by the Constitution or by statute.¹²² The court also held § 2709(c) was a prior restraint on speech and a content-based restriction and was subject to strict scrutiny.¹²³ The categorical nondisclosure mandate embodied in § 2709(c) functioned as prior restraint because of the straightforward observation that it prohibited speech before the speech occurred.¹²⁴ Section 2709(c) would have survived strict scrutiny if it was narrowly tailored to promote a compelling government interest, and there was no less restrictive alternatives which would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve.¹²⁵ The court acknowledged that the government’s interest in protecting the integrity and efficacy of international terrorism and counterintelligence investigation was a compelling one.¹²⁶ However, to place a blanket of secrecy in every case is not narrowly tailored.¹²⁷

As a result of *Doe*, there is pending legislation before the 109th Congress amending § 2709 to require the government official seeking the information to certify

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Doe*, 334 F.Supp.2d 471.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

that “specific and articulable facts giving reason to believe the person or entity to whom is a foreign power or agent of a foreign power.”¹²⁸

Suggestions/Conclusion

When a bank receives a subpoena, the bank should first determine if it is issued under government authority. Government authority does not include local or state government. If a government authority issues the subpoena, then RFPA applies. The burden is on the government to give notice to the bank’s customer and produce a certificate of compliance with RFPA to the bank before the bank can comply with the subpoena.

If local or state authority issues the subpoena, then GLBA applies, not RFPA. The bank will likely have to answer the subpoena without giving notice to the customer under 15 U.S.C. § 6802(e)(8). To be cautious, the bank should ask the local or state authority for permission to notify the bank’s customer and provide a reasonable opportunity for him/her to object to the subpoena by filing a motion to quash before complying.

If a private person issues the subpoena, then GLBA applies. Notice to customer is not likely required; however, GLBA is unclear. Again, the subpoena may fall under the “judicial process” exception in § 6802(e)(8). To be cautious, the bank should ask the subpoena issuer for the right to notify the customer and provide a reasonable opportunity to object by filing a motion to quash. The bank can mirror RFPA and give the customer ten days from the date of service or fourteen days from the date of mailing of the notice to the customer to object to the bank complying with the subpoena or the bank will release the requested information. However, if the subpoena requests information that

¹²⁸ Senate bill 317 §3 (109th Congress).

may be contained in a SAR, then the bank cannot comply with the subpoena under the Patriot Act.

The Arkansas Legislature has been silent on the issue of Right to Financial Privacy. With the confusion of financial institutions, now is the time to provide clarity. Many states have enacted their own Right to Financial Privacy Acts to provide guidance to financial institutions and to provide privacy to customers.¹²⁹ The federal enactment of the Right to Financial Privacy does not encompass state and local government. The legislative history of RFPA expressly reflects Congress' intent to exempt state and local governments from the disclosure restrictions imposed upon federal agencies:

Finally, it is important to note that the scope of this title is limited to officials of Federal agencies and departments and to employees of the United States. This limitation reflects our belief that legislation affecting state and local government is the proper province of the respective State governments and of the Conference of Commissioners on Uniform State laws. We believe that grave constitutional and political issues would have been raised if this title had applied to other levels of Government. Several States, most notably California, have enacted financial privacy statutes of their own. This is a movement which deserves both our support and our forbearance.¹³⁰

Without a state Right to Financial Privacy Act, Arkansas Banks will continue to be uncertain as to whether their customers have the right to get notice of a subpoena issued to his/her financial institution requesting his/her financial information.

¹²⁹ See e.g. Cal. Gov. Code § 7460; C.R.S. § 11-37.5-201; § 408.675 R.S.Mo.; R.S.A. § 359-C:2.

¹³⁰ H.R. Rep. No. 95-1383, at 247 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9273, 9376 (minority views); see also *American Bankers Ass'n v. Lockyer*, 2004 WL 1490432 (E.D. Cal. 2004) (holding state enacted right to financial privacy is not preempted by FCRA).