

Introduction

The Right to Financial Privacy Act (RTFPA) of 1978 became effective on March 10, 1979 (12 U.S.C. 3401). It was enacted because financial institution customers have a right to expect that their financial activities have a reasonable amount of privacy from federal government scrutiny. The Act establishes specific procedures for government authorities which seek information from a financial institution about a customer's financial records and imposes limitations and duties on financial institutions prior to the release of information sought by government agencies.

Prior to the Act, customers could not challenge government access to their financial records. Nor did the customer have any way of knowing that personal records were being turned over to a government authority. In *United States v. Miller*, 425 U.S. 435(1976), the Supreme Court held that financial records, because they are kept by the institution, are the property of the institution rather than the customer. As such, the customer had no protectable legal interest in records kept by the financial institution, nor could he or she limit government access to those accounts. It was principally in response to this decision that the RTFPA was adopted.

General Requirements

The RTFPA generally requires that the customer must receive:

- A written notice of the agency's intent to obtain financial records,
- An explanation of the purpose for which the records are sought, and
- A statement describing procedures to use if the customer does not wish such records or information to be made available.



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Certain exceptions apply which allow for delayed notice or no notice to be given to the customer.

Definitions

As defined by the Act, a customer is any person or representative of that person who utilized or is utilizing any service of a financial institution. It also includes any person for whom the financial institution is acting or has acted as a fiduciary. However, a customer does not include a corporation or a partnership of six or more individuals.

Requirements

In order to obtain access to the financial records of the customer, the Act requires, with certain exceptions, that the government authority first obtain one of the following:

1. An authorization, signed and dated by the customer, which identifies the records being sought, the reasons the records are being requested and the customer's rights under the Act;
2. An administrative subpoena or summons;
3. A search warrant;
4. A judicial subpoena; or
5. A formal written request by a government agency (to be used only if no administrative summons or subpoena authority is available).

If a financial institution receives a request for information, it may not release the financial records of a customer until the government authority seeking such records certifies in writing that it has complied with the applicable provision of the Act (§1103(b)).

The financial institution is required to maintain a record of all instances in which a customer's record is disclosed to a government authority pursuant to customer authorization. The record should include the date, the name of the government authority and

an identification of the records disclosed. Generally, the customer has a right to inspect that record (§1104(c)).

Although there are no specific record retention requirements in the Act, financial institutions should retain copies of all administrative and judicial subpoenas, search warrants and formal written requests given to them by federal government agencies or departments along with the written certification required (§1103(b)).

Under the Act, a financial institution is required to begin assembling the required information upon receipt of the agency's summons or subpoena or a judicial subpoena and must be prepared to deliver the records upon receipt of the written certificate of compliance (§1111).

Cost Reimbursements

One section of the Act, effective October 1, 1979, allows, with certain exceptions, the financial institution to receive payment from a government authority requesting information pursuant to the Act. This may include costs for assembling or providing records, reproduction and transportation costs or any other costs reasonably necessary or incurred in gathering and delivering requested information. The Federal Reserve Board's Regulation S establishes the rates and conditions under which these payments may be made.

Exceptions to Notice and Certification Requirements

The Act specifically allows for a financial institution to notify law enforcement officials if it has information relevant to a violation of the law (§1103(c)).

A financial institution may submit copies of financial records to any court or agency when perfecting a security interest, proving a claim in bankruptcy, or collecting a debt for itself or a fiduciary (§1103(d)(1)).

A financial institution may also release records that are not individually identifiable with a particular customer (§1113(a)).

The Act does not apply to records that are sought by a supervisory agency in connection with its supervisory, regulatory or monetary functions. This includes regular examinations and any investigations relating to consumer complaints (§1113(b)).

The Act does not apply where records are sought in accordance with procedures authorized by the Internal Revenue Code (for example, records which are intended to be accessed by procedures authorized by the Tax Reform Act of 1976) (§1113(c)).

A financial institution may provide records that are required to be reported in accordance with any federal statute or rule promulgated thereunder (e.g., the Bank Secrecy Act) (§1113(d)).

If the agency and the customer are parties to a suit, records are obtainable under the Federal Rules of Civil and Criminal Procedure (§1113(e)).

The Act does not apply, with the exception of cost reimbursement and the restricted use of Grand Jury information, to a subpoena issued in conjunction with proceedings before a Grand Jury (§1113(i)).

The Act does not apply to records sought by the General Accounting Office for an authorized proceeding or audit directed at a federal agency (§1113(j)).

Exception to Notice Requirements But Where Certification Is Required

The Act does not apply where a financial institution, rather than a customer, is being investigated; however, the federal agency seeking access to customer records must provide the financial institution with the certification of compliance required (§1113(h)(1)(A)).

Records may also be provided incidental to processing a government loan, loan guaranty, loan insurance agreement or default upon a government-guaranteed or insured loan. Again, the federal agency seeking access must provide the financial institution with the written certification of compli-

ance. The federal agency must also give to the loan applicant a notice of its access rights when the customer initially applies for the loan. The financial institution is then required to keep a record of all disclosures made to government authorities and the customer is entitled to inspect this record (§§1113(h)(1)(B) and 1103(d)(2)).

No notice is required and the customer does not have the right to challenge any access where the government is engaging in authorized foreign intelligence activities or where the Secret Service is conducting its protective functions. A certificate of compliance must be furnished to the institution (§1114(a)).

The Securities and Exchange Commission is covered by the Act although the Commission can obtain customer records from an institution without prior notice to the customer by obtaining an order from a United States district court. The agency must however provide the certificate of compliance to the institution along with the court order prohibiting the disclosure of the fact that the documents have been obtained. The court order will set a delay of notification date after which the customer will be notified by the institution that the SEC has obtained the customer's records (§§1122 and 1109).

Delayed Notice Requirements

Delayed notice to customers that government authorities have obtained their financial records may be given by a court under certain circumstances. Customer notice can be delayed for periods up to 90 days if the government can convince the court that notice would result in endangering the life or physical safety of any person; flight from prosecution; destruction of or tampering with evidence; intimidation of potential witnesses; or otherwise seriously jeopardizing or unduly delaying an investigation, trial or official proceeding. Delayed notice of no later than 90 days is also allowed for search warrants.

Civil Liability

Any government agency that obtains, or any financial institution or employee of the institution who

discloses information in violation of the Act is liable for: (1) actual damages; (2) \$100, regardless of the volume of records involved; (3) court costs and reasonable attorney's fees; (4) and such punitive damages as the court may allow for willful or intentional violations. A financial institution that relies in good faith upon a federal agency's certification cannot be held liable to a customer for the disclosure of financial records. An action can be brought up to 3 years after the date of violation or the date of its discovery.

Examination Objectives

To determine that the financial institution has established procedures to ensure that it is in compliance with the RTFPA.

To determine that the financial institution is in compliance with the provisions of the RTFPA.

Examination Procedures

1. Determine if the financial institution has received any requests covered by the Act for consumers' financial records since March 10, 1979. If no requests have been made the examiner should determine if the institution is aware of its responsibilities under the Act. If requests have been made the examiner should complete the remaining procedures.
2. Determine if the financial institution has established procedures and internal controls for fulfilling requests by government authorities for a consumer financial records which are adequate to ensure that all requests are handled in compliance with the Act.
3. Determine if the financial institution provides customers' financial records to government authorities only after receiving the proper written certification required by the Act.
4. Determine if the internal procedures of the financial institution require that the institution refrain from requiring a customer's authorization for disclosure of financial records as a condition of doing business.

5. Determine if the financial institution keeps appropriate records of those instances in which a customer's financial records are disclosed to the government authority, upon authorization by the customer including a copy of the request and the identity of the government authority. Determine if the institution provides customers a copy of the records upon request (unless a court order has been obtained blocking access).
6. Determine if the financial institution maintains appropriate records of all disclosures of a customer's records made to a government authority in connection with a government loan, guaranty or insurance program. Determine if the institution allows customers to examine these records upon request.

References*Laws*

12 U.S.C. 3401 Financial Institutions

et seq. Regulatory and Interest Rate Control Act,
Title XI Short Title: Right to Financial Privacy
Act

5 U.S.C. 552a Privacy Act of 1974

Regulations

12 C.F.R. Federal Reserve Board
Part 219 Regulation S