**Subpoenas and Requests for Production - How can you safely respond?**

In determining whether a customer's banking records may be disclosed in response to a subpoena or request for production of documents, a bank must consider the privacy provisions of both federal and state law. By their nature, federal privacy provisions remain consistent throughout the country. In contrast, state privacy laws can vary substantially. These materials address only federal law and Georgia law. If a bank has operations in other states in addition to Georgia, it must familiarize itself with the laws of those states as well.

In summary, when looking to federal and Georgia law, there are three potentially applicable bank privacy laws that must be considered: (1) the privacy provisions of the federal Gramm-Leach-Bliley Act; (2) the federal Right to Financial Privacy Act; and (3) Georgia's bank privacy statute.

**The Federal Gramm-Leach-Bliley Act**

The privacy provisions of the Gramm-Leach-Bliley Act prohibit a financial institution from disclosing a consumer's financial information (whether relating to a loan, a deposit account, or any other relationship with the bank) to any third party unless the Act's consent or notice requirements are met, or unless an exception applies. The primary purpose of these privacy provisions is to restrict a bank's for-profit sale or transfer of the customer's information without notice to the customer, rather than to restrict a bank's ability to respond to a subpoena or similar request. Nonetheless, because the literal language of the Act's provisions restricts any disclosure to third parties, it is necessary to assure that one of the Act's exceptions applies to allow disclosure.

Importantly, the Act's exceptions state that the privacy provisions do not apply to prohibit the following disclosures:

1. disclosures made to comply with a civil, criminal, or regulatory investigation, subpoena, or summons by federal, state, or local authorities; and

2. disclosures made to comply with federal, state, or local laws or "other applicable legal requirements."

Taken together, courts have determined that the exceptions permit disclosure to comply with a criminal or administrative investigation by an authorized government authority, or to comply with a validly issued subpoena or discovery request compelling disclosure under some applicable law.

It is also worth noting that the Act's privacy provisions only affect disclosure of financial information of a "consumer." The Act defines a *consumer* as an individual who obtains financial products or services for personal, family, or household use, or the legal representative of such an individual. This means that the Act will not impact on disclosure of the financial information of a legal entity such as a corporation or limited liability company, or of a business customer. However, practically speaking, a financial institution should not be disclosing its customers' information outside of a government investigation, subpoena, or discovery request in any event; thus, limitation of the provisions to "consumers" should only be an additional bit of comfort when disclosure is made in non-consumer cases.

**The Federal Right to Financial Privacy Act**

The Right to Financial Privacy Act ("RFPA") is the most frequently misunderstood of the privacy laws affecting banks operating in Georgia. The RFPA prohibits a bank from disclosing a customer's

financial records to any federal government authority unless certain notice requirements are met or one of the (many) RFPA exceptions applies. The most frequently misunderstood aspect of the RFPA is that it **only** applies if the records are sought by a **department or agency of the federal government**. It does not apply if records are sought by a private individual or entity, even if the records are sought as part of a case pending in federal court. Moreover, it does not apply if records are sought by a state, county, or city government authority (such as a county sheriff's department, a city police department, the Georgia Department of Revenue, or the Georgia Bureau of Investigation).

Another aspect of the RFPA is that it can only apply where the customer is an individual or a partnership of five or fewer individuals. Thus, if the customer is a corporation or limited liability company, the RFPA will not impact a federal request for the customer's financial records.

In addition to the above limitations, the effect of the RFPA on federal government requests is severely limited by several exceptions that will cover most federal requests a bank will encounter. For our purposes, the most important exceptions are that the RFPA does not apply to:

1. federal grand jury subpoenas;

2. subpoenas or summonses issued under the Internal Revenue Code (which gives the IRS broad authority to investigate taxpayers' financial records); or

3. validly issued discovery requests or subpoenas arising in a civil or criminal case to which both the requesting authority and the customer are parties (often called the "litigation exception").

The requesting federal authorities are usually well aware of the RFPA and its exceptions, and make efforts to structure their requests so that the RFPA will not apply. For example, while it is common for state and county law enforcement officials to simply send letters to banks requesting documents as part of a criminal investigation, federal law enforcement authorities usually utilize grand jury subpoenas to obtain the documents they desire in their investigations. This is because a letter requesting documents would be covered by the RFPA, but a grand jury subpoena would not.

In those instances where the RFPA does apply and no exceptions are available, most of the burden is placed upon the requesting authority rather than the bank. Generally speaking, the requesting authority will be required to deliver a copy of the document request to the customer, along with a statement regarding the customer's right to object. In most instances, the customer is given a ten to fourteen day period to object.

The bank is not involved with issuing the notice to the customer. The bank's sole duties are to assemble the requested documents once the request is received, and then hold those documents until the requesting authority gives the bank written certification that any applicable requirements of the RFPA have been satisfied. Once the certificate is received, the bank can then turn over the requested documents to the authority.

A customer can authorize the bank to turn over documents to a federal authority, but there are specific requirements for such an authorization. The authorization must:

1. be dated and signed by the customer;

2. state that it is revocable by the customer;

3. identify the records that can be disclosed;

4. identify the authority to which disclosure can be made, and the purpose for disclosure; and

5. be effective for a period of three months or less.

As one can see, it will not be permissible for a bank to simply insert broad authorization language in an account agreement or signature card in expectation that RFPA requirements will thereby be avoided. The authorization must be limited in duration and scope. Practically speaking, if the customer wants a federal authority to review financial records it would be a much better approach for the bank to provide any necessary documents directly to the customer. The customer can then provide those documents to any authority he may wish, without concern over whether RFPA authorization requirements have been met.

**Georgia's Bank Privacy Law (O.C.G.A. § 7-1-360)**

Georgia has its own privacy law affecting financial institutions' disclosure of customer records. In practice, this law will usually have a bigger impact on the financial institution than the federal laws discussed above. Georgia's privacy law prohibits a financial institution from disclosing a customer's financial records except in the following instances:

1. where the records are requested in conjunction with an ongoing criminal or tax investigation of a customer by a grand jury, taxing authority, or law enforcement agency;

2. where the records are sought through a subpoena or administrative process issued by a federal, state, or local administrative agency with jurisdiction over the customer; or
3. where the records are requested through a subpoena or discovery request in connection with an ongoing civil court case.

One may notice that the scope of permitted disclosure under Georgia law is quite similar to that permitted under the privacy provisions of the Gramm-Leach-Bliley Act as discussed above. Essentially, the bank can disclose records to an investigating tax or law enforcement authority in conjunction with an ongoing investigation, even without a subpoena. As mentioned above, it is common for local law enforcement agencies to request documents by written correspondence verifying that the records are sought in conjunction with an ongoing criminal investigation. Of course, the bank can disclose records in response to a grand jury subpoena. In ordinary civil cases (divorce cases, business disputes, etc.), the bank can disclose records in response to a valid subpoena or discovery request.

Where records are sought by a discovery request or subpoena in a civil case, Georgia's privacy law requires that the customer be notified by the requestor of the request. The customer is then permitted to file in court a written motion asking that the subpoena or discovery request be limited in some manner or be nullified in whole ("quashed"). If the customer does file such a motion, the bank should withhold producing the requested documents until the court subsequently orders that documents be produced, or until the customer agrees in writing for the documents to be produced (the parties often work disputes out themselves before the court ever decides the customer's motion). Further, if the customer files such a motion, it would be wise for the bank to have legal counsel file an objection on the bank's own behalf stating that compliance with the subpoena or discovery request should not be required until the customer's motion is decided by the court.

If the customer receives notice of the subpoena or discovery request but does not file a motion with the court prior to the deadline for the bank to comply, then per Georgia's bank privacy law the customer has legally consented to the bank's production of the requested documents. To give the consent concept its greatest effect, the bank should withhold producing documents until very near the deadline for

production as stated in the subpoena or discovery request. In this manner, the customer gets as much time as possible to file its motion with the court.

Although the privacy statute places the burden on the requestor to notify the customer of the subpoena or document request, prudence dictates that the bank should protect itself by requiring verification that the customer has been notified. Georgia's privacy law expressly states that a bank can conclusively rely upon the requesting party's "certification or written assurances" that the customer has been notified, and in doing so will be relieved of liability relating to any failure to notify. Usually, sufficient assurance will be found in the form of a "certificate of service" document attached to the subpoena or discovery request, verifying that a copy of the subpoena or request was served on the customer or its attorney. Assurance may also be found by a letter from the requesting party or its attorney stating that a copy of the subpoena or request was sent to the customer or its attorney. In the event the bank receives a subpoena or discovery request but there is no certificate of service or letter attached to verify that the customer has received a copy, the bank (or its counsel) should contact the requesting party's attorney and request written verification that the customer was given a copy of the subpoena or request.

The privacy law's notice requirements do not apply where the records are requested by a grand jury subpoena or as part of a criminal or tax investigation. In these circumstances the requestor is not required to give notice to the customer. Importantly, the bank itself is legally prohibited from notifying the customer of the subpoena or request unless the requestor expressly authorizes the bank to notify the customer. As a matter of practice, grand jury subpoenas and investigative requests often direct the bank not to notify the customer, and threaten criminal consequences if the customer is notified by the bank. These directions should not be ignored. If the bank receives a grand jury subpoena or law enforcement request regarding a customer, the customer should not be informed in any fashion.

**What is a "Valid" Subpoena?**

Per the privacy laws discussed above, a bank can usually produce a customer's records outside of a criminal or tax investigation only if the bank receives a valid subpoena or discovery request. The obvious question is how one determines whether a subpoena is "valid."

It is important to understand that a large number of different federal and state laws authorize many different government agencies to issue valid subpoenas (also sometimes called "summonses") under specific circumstances, often without involvement of any court. For instance, the department of labor may have authority to issue a valid subpoena in one instance, the department of consumer affairs in another. Each law may have its own requirements as to subpoena form, timing, and service. These subpoenas cannot be simply ignored or dismissed because they were not issued by a court, or because they have different content or appearance from the types of subpoenas one may ordinarily see in a grand jury proceeding or divorce case. When received, it is necessary to examine the specific legal authority for the subpoena at issue, and any form, service, or notice requirements that may apply. Thankfully, many agency subpoenas do feature an express reference to the federal or state law that authorizes the agency to issue the subpoena. This can help point the bank (or its counsel) in the right direction.

Fortunately, the majority of subpoenas that a financial institution receives are issued within the context of a pending court case, rather than as part of some administrative process. For these subpoenas, the minimum content requirements for validity are rather basic. The subpoena must state the name of the court where the case is pending; state the name of the case (i.e., "Dan Jones v. John Smith," "In the Matter of John Smith," or whatever the situation may be); describe the documents that are to be produced; and state the place and date at which the documents are to be produced. For subpoenas issuing from a Georgia court, the subpoena should also state the name of the clerk of court. Minor errors in one or more

of these elements will not necessarily render the subpoena invalid, so a financial institution should not simply ignore a subpoena because of an apparent defect or error. If the bank believes some error renders a subpoena invalid, the bank should issue a written objection to the subpoena on the basis of the error.

Aside from minimal content requirements, a subpoena arising in a court proceeding must also be issued by the proper person. There is a common misconception that subpoenas must always be issued and signed by the clerk of court in order to be valid. This is not true in most cases. In Georgia courts, and in federal civil cases, a subpoena can be signed and issued by an attorney for one of the parties, **or** by the clerk of court. Grand jury subpoenas can be issued by the district attorney (in Georgia courts) or the U.S. attorney (in federal court). Thus, the major limitation is that a subpoena cannot be issued under authority of a person who is neither an attorney in the case nor a clerk (or deputy clerk) of court. In other words, a "pro se" party who is not a licensed attorney cannot himself issue a subpoena; it would be necessary for that party to obtain a subpoena issued by the clerk of court.

In federal cases, a subpoena can be served anywhere in the country—regardless of where the case is pending. Thus, a bank that only has locations in Georgia can be subjected to a subpoena issued in relation to a case pending in federal court in any other state. For cases in Georgia courts, the subpoena can be served anywhere throughout the state. The primary limitation to note is that a subpoena from the courts of one state cannot generally be served in another state. A state's subpoena authority is ordinarily restricted to within its own state lines. There is a process to permit service of state subpoenas across state lines, which involves getting approval from the courts of both states. In short, in situations of subpoenas from outside of the state, a financial institution should consult counsel to determine if there are issues of validity.

Although federal subpoenas can be served throughout the country, and state subpoenas can be served throughout the state, there are sometimes limitations on where a financial institution can be required to appear or produce documents. In civil cases in state courts, a subpoena can only require a person to appear or produce documents at a location within 30 miles of the county seat for any county where the person resides or transacts business. In civil cases in federal court, a subpoena can only require a person to appear or produce documents at a location within 100 miles of any place where the person resides or transacts business. A person can, of course, consent to producing documents at a location beyond these boundaries. If a subpoena asks for documents to be produced outside of the permissible boundaries, the bank should not simply ignore the subpoena. If the bank does not consent to producing the documents at the stated location, it should issue a written objection to the subpoena on the basis that the stated location is improper.

In contrast, grand jury subpoenas are not strictly limited as to where appearance or document production can be required. A state grand jury subpoena can require appearance or document production anywhere throughout the state. A federal grand jury subpoena can require appearance or document production anywhere throughout the country. In most cases, the subpoena really only requires the bank to submit documents by mail or email—so sending them to Oregon is no less convenient than sending them to Macon. If for some reason a bank employee is required to actually appear before the grand jury along with the documents, the bank's only real option is to try to work with the prosecuting authority to minimize inconvenience.

**What is a Valid Discovery Request?**

In federal courts and in the courts of most states, the only way to legally require a non-party (someone who is not actually a party in the case) to produce documents is to use a subpoena. Georgia is somewhat unique in that it allows a party to a civil case to serve a "Request for Production of Documents"—a type of discovery request—on persons and entities that are not parties to the case. A

valid request for production of documents is binding on the non-party in a similar manner to a valid subpoena. In other words, like a subpoena, if the non-party improperly ignores or refuses the request then the non-party may be subjected to court sanction.

Requests for production of documents are sometimes referred to as "subpoenas," but the two devices are different in terms of format, issuance, response and objection deadlines, and permissible locations for production (as discussed below). A subpoena can usually be easily distinguished from a request for production of documents merely by the label or title of the document. A subpoena almost always uses the word "subpoena" in conspicuous type on the first page, while a request for production of documents will usually be conspicuously labeled on its first page as a "request for production," "request for documents," or "request for production of documents."

There are very minimal requirements for a valid request for production of documents. Primarily, the request has to be issued in relation to an actual civil court case. A person cannot simply issue a request for documents and have a court compel the bank to produce them where no case has been filed with the court. Otherwise, the only real requirements are that the request has to describe the documents that are requested, and state where the documents are to be produced.

Requests for production of documents are not issued by a judge or by the clerk of court—they are issued only by a party or the party's attorney. Unlike a subpoena, a person does not have to be a licensed attorney to issue a request for production of documents. A pro se party can issue a valid request.

A request for production of documents has to allow at least 30 days to respond (either by producing the documents or by objecting). Ordinarily, the request itself will state that the non-party must respond within 30 days of the date of the request. This is different than a subpoena, which will ordinarily state a specific time and date by which production must occur.

A request for production of documents can require the non-party to produce documents at any location that is "reasonable." There are no firm guidelines for determining reasonableness. Generally, the location must be near either a place where the non-party transacts business, or where the case is actually pending. As requests for production of documents almost always allow a non-party to comply by simply mailing or emailing the documents to the location, reasonableness of the location is not usually a concern. If for some reason location is an important concern, the bank or its counsel should confer with the requestor in an attempt to agree on a more convenient location. If no agreement can be reached, the bank should issue an objection to the request on the basis that the location for production is unreasonable.

**In Almost All Cases, Subpoenas and Requests Should Not be Ignored**

If a financial institution refuses to comply with a valid subpoena or request for production of documents and has no reasonable basis for its refusal, a court may impose sanctions as a result. The sanction will usually be that the financial institution is required to pay the attorney fees incurred by the requesting party in its efforts to make the financial institution comply. These can easily add up to thousands of dollars.

If there is a reasonable basis for refusal to comply, or if the validity of the subpoena or request is uncertain, then the bank should take affirmative action to object and, in its counsel's discretion, ask the court to modify or quash the subpoena or request. The bank should not simply ignore the subpoena or request because of some defect or error. The result of failing to object will often be that any potential error or defect is waived by the bank, and compliance (and perhaps sanctions) will be required.

It is true that most courts are quite accommodating to non-party financial institutions with respect to subpoenas and document requests, and are quite sensitive to the customers' concerns for privacy of bank records. Courts might be willing to stretch or bend the rules when it appears the bank has made an honest mistake or oversight. However, accommodation has its limits and proper procedure must be followed. If the bank portrays itself as "above the law," or too important to be bothered by the legal process, courts can (and often will) act strongly to sanction the bank back to reality. By recognizing and following appropriate requirements and procedures, a financial institution can both protect itself from liability to the customer and avoid the wrath of the courts.