

SUBJECT: Right to Financial Privacy Act

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INTRODUCTION

This release applies to all credit unions, state or federally-chartered.

EXECUTIVE SUMMARY

The Right to Financial Privacy Act of 1978 (“RFPA”) became effective on March 10, 1979. It was enacted because customers of financial institutions (including members of credit unions) have a right to expect that their financial activities have a reasonable amount of privacy from federal government scrutiny. RFPA establishes specific procedures for government authorities that seek information about a customer's financial records from a financial institution. It also imposes limitations and duties on financial institutions prior to the release of information sought by federal government agencies. Finally, it generally requires that the customer receive the following:

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

There are certain exceptions that allow for delayed notice or no notice to the customer.

Prior to RFPA, customers of financial institutions could not challenge government access to their financial records, nor did they 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, customers had no protectable legal interest in records kept by the financial institution, nor could they limit government access to those accounts. It was principally in response to this court decision that the Right to Financial Privacy Act was adopted by the United States Congress.

DEFINITIONS (§ 1101)

As defined by RFPA, 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 partnership of six or more individuals or a corporation. 12 USC §3401

REQUIREMENTS (§§ 1102–1108)

With certain exceptions, RFPA requires that a government authority first obtain one of the following to obtain access to a customer's financial records:

- an authorization for a period not in excess of three months stating that the customer may revoke the authorization at any time before the financial records are disclosed and that:
 - is signed and dated by the customer;
 - identifies:

- the records to be disclosed; and
 - the federal government agency, department or official to which the records may be disclosed;
 - the reasons the records are being requested;
 - the customer's rights under RFPA;
- an administrative subpoena or summons;
 - a search warrant,
 - a judicial subpoena,
 - 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 RFPA.

Sometimes a credit union may find that it holds information relevant to a violation of a statute or regulation. In such a case, the credit union may notify a government authority that it has such information – without violating RFPA. However, the credit union is limited to releasing only the name or other identifying information concerning the individual, corporation, or account involved, and the nature of any suspected illegal activity. The Suspicious Activity Report is typically required for this purpose. See *ii Release 0109*. The credit union may not voluntarily disclose records under this exception to RFPA.

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.

Although there are no specific record-retention requirements in RFPA, financial institutions should retain copies of all administrative and judicial subpoenas, search warrants, and formal written requests received from federal agencies or departments along with the written certification required.

Under RFPA, a financial institution must 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.

COST REIMBURSEMENT (§ 1115)

One section of RFPA, effective October 1, 1979, allows the financial institution, with certain exceptions, to receive payment from a government authority requesting information pursuant to RFPA. 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 (§ 1113)

- RFPA specifically allows a financial institution to notify law enforcement officials if it has information relevant to a violation of the law.
- 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.
- A financial institution may also release records that are not individually identifiable with a particular customer.
- Financial institutions must comply with a request for a customer's or entity's financial records when the Director of the FBI, or the Director's designee, certifies in writing that the records are sought for foreign counterintelligence purposes and that there are specific facts giving reason to believe that a customer is a foreign power, or an agent of a foreign power. No financial institution, officer, employee, or agent may disclose to any person that the FBI has sought or obtained access to the records.
- RFPA 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.
- RFPA does not apply when records are sought in accordance with procedures authorized by the Internal Revenue Code (for example, records that are intended to be accessed by procedures authorized by the Tax Reform Act of 1976).

- A financial institution may provide records that are required to be reported in accordance with any federal statute (for example, the Bank Secrecy Act) or rule promulgated thereunder.
- If the agency and the customer are parties to a suit, records are obtainable under the Federal Rules of Civil and Criminal Procedure.
- With the exception of cost reimbursement and the restricted use of grand jury information, RFPA does not apply to a subpoena issued in conjunction with proceedings before a grand jury.
- RFPA does not apply to records sought by the General Accounting Office for an authorized proceeding or audit directed at a federal agency.

EXCEPTION TO NOTICE REQUIREMENTS BUT WHERE CERTIFICATION IS REQUIRED (§§ 1114 AND 1122)

RFPA does not apply when 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.

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 compliance. 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.

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

Although the Securities and Exchange Commission (SEC) is covered by RFPA, it can obtain a customer's records from an institution, without prior notice to the customer, by obtaining an order from a United States district court. It must provide the institution with a certificate of compliance, along with the court order prohibiting disclosure of the fact that the documents have been obtained. The court order will set a delay-of-notification date after which the institution will notify the customer that the SEC has obtained his or her records.

DELAYED-NOTICE REQUIREMENTS (§ 1109)

Under certain circumstances, a court may give customers delayed notice that government authorities have obtained their financial records. 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, or intimidation of potential witnesses, or would otherwise seriously jeopardize or unduly delay an investigation, trial or official proceeding. Delayed notice of no later than 90 days is also allowed for search warrants.

CIVIL LIABILITY (§ 1117)

Any government agency that obtains, or any financial institution or employee of the institution who discloses, information in violation of RFPA is liable for:

- (1) actual damages;
- (2) \$100, regardless of the volume of records involved;
- (3) court costs and reasonable attorney's fees; and
- (4) 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 three years after the date of violation or the date of its discovery.

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Legal Affairs Department

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