

Right to Financial Privacy Act

Background

The Right to Financial Privacy Act of 1978 was enacted to provide the financial records of financial institution customers a reasonable amount of privacy from federal government scrutiny. The act, which became effective in March 1979, establishes specific procedures that government authorities must follow when requesting a customer's financial records from a bank or other financial institution. It also imposes duties and limitations on financial institutions prior to the release of information sought by government agencies. In addition, the act generally requires that customers receive

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

Certain exceptions allow for delayed notice or no customer notice at all.

Prior to passage of the act, bank customers were not informed that their personal financial records were being turned over to a government authority and could not challenge government access to the records. In *United States v. Miller* (425 U.S. 435 (1976)), the Supreme Court held that because financial records are maintained by a financial institution, the records belong to the institution rather than the customer; therefore, the customer has no protectable legal interest in the bank's records and cannot limit government access to those records. It was principally in response to this decision that the Right to Financial Privacy Act was enacted.

Coverage

Coverage under the act specifically extends to customers of financial institutions. A *customer* is defined as any person or authorized representative of that person who uses or has used any service of a financial institution. The definition also includes any person for whom the financial institution acts as a fiduciary. Corporations and partnerships of six or more individuals are not considered customers for purposes of the act.

Requirements

To obtain access to, copies of, or information contained in a customer's financial records, a government authority, generally, must first obtain one of the following:

- An authorization, signed and dated by the customer, that identifies the records, the reasons the records are being requested, and the customer's rights under the act
- 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)

A financial institution may not release a customer's financial records until the government authority seeking the records certifies in writing that it has complied with the applicable provision of the act. In addition, the institution must maintain a record of all instances in which a customer's records are disclosed to a government authority pursuant to customer authorization. The records 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 the records.

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.

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

With certain exceptions, government entities must reimburse financial institutions for the cost of providing the information. This reimbursement may include costs for assembling or providing records, reproduction and transportation costs, or any other costs reasonably necessary or incurred in gathering and delivering the requested information. The Board's Regulation S establishes rates and the conditions under which these payments may be made.

Exceptions to Notice and Certification Requirements

In general, exceptions to the notice and certification requirements cover situations pertinent to routine banking business, information requested by supervisory agencies, and requests subject to other statutory requirements. Specific exceptions include records

- Submitted by financial institutions to any court or agency when perfecting a security interest, proving a claim in bankruptcy, or collecting a debt for itself or a fiduciary
- Requested by a supervisory agency in connection with its supervisory, regulatory, or monetary functions (including regular examinations and any investigations relating to consumer complaints)
- Sought in accordance with procedures authorized by the Internal Revenue Code (records that are intended to be accessed by procedures authorized by the Tax Reform Act of 1976)
- Required to be reported in accordance with any federal statute (or rule promulgated thereunder, such as the Bank Secrecy Act)
- Requested by the Government Accountability Office for an authorized proceeding, investigation, examination, or audit directed at a federal agency
- Subject to a subpoena issued in conjunction with proceedings before a grand jury (with the exception of cost reimbursement and the restricted use of grand jury information)
- Requested by a government authority subject to a lawsuit involving the bank customer (The records may be obtained under the Federal Rules of Civil and Criminal Procedure.)

The act also allows financial institutions to

- Release records that are not individually identifiable with a particular customer
- Notify law enforcement officials if it has information relevant to a violation of the law

Exceptions to Notice Requirements But Not to Certification Requirements

In certain cases, the act does not require the customer to be notified of the request but still requires the federal agency requesting the information to certify in writing that it has complied with all applicable provisions of the act. Exceptions to the notice provisions include

- Instances in which a financial institution, rather than a customer, is being investigated

- Requests for records incidental to the processing of a government loan, loan guaranty, loan insurance agreement, or default on a government-guaranteed or government-insured loan (In this case, the federal agency must give the loan applicant a notice of the government's rights to access financial records 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.)
- Instances in which the government is engaging in authorized foreign intelligence activities or the Secret Service is carrying out its protective functions

Although the Securities and Exchange Commission is covered by the act, it can obtain customer records from an institution without prior notice to the customer by obtaining an order from a U.S. district court. The agency must, however, provide the certificate of compliance to the institution 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 customer will be notified by the institution that the SEC has obtained his or her records.

Delayed-Notice Requirements

Under certain circumstances, a government entity may request a court order delaying the customer notice for up to ninety days. This delay may be granted if the court finds that earlier 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 up to ninety days is also allowed for search warrants.

Civil Liability

A customer may collect civil penalties from any government agency or department that obtains, or any financial institution or employee of the institution who discloses, information in violation of the act. These penalties include (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. An action may be brought up to three years after the date of the violation or the date the violation was discovered. A financial institution that relies in good faith on a federal agency's certification may not be held liable to a customer for the disclosure of financial records.

Right to Financial Privacy Act Examination Procedures

1. Determine if the financial institution has received any requests for customer financial records covered by the act since the most recent compliance examination. If no requests have been received, determine if the institution is aware of its responsibilities under the act. If requests have been received, complete the remaining procedures.
2. Determine if the financial institution has established procedures and internal controls for fulfilling requests by government authorities for consumer financial records that 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 written certification required by the act.
4. Determine if the financial institution's internal procedures 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 a 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 blocking access has been obtained).
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.

Right to Financial Privacy Act Examination Checklist

1. Has the financial institution received any requests for customer financial records covered by the Right to Financial Privacy Act since the last examination?	Yes	No
If it has, answer questions 2–7.		
2. Has the financial institution, in compliance with the act, established procedures for fulfilling requests by government authorities for customers' financial records?	Yes	No
3. Does the financial institution have adequate internal controls in place to ensure that all requests are handled in compliance with the act?	Yes	No
4. As required by section 1103(b) of the act, does the financial institution provide customers' financial records to government authorities only after receiving the written certification required by the act?	Yes	No
5. Does the financial institution refrain from requiring a customer's authorization for disclosure of financial records as a condition of doing business? (§ 1104(b))	Yes	No
6. Does the financial institution maintain records of all disclosures of customer records made to a government authority in connection with a government loan, guaranty, or insurance program? (§ 1113(h)(6))	Yes	No
a. Does the financial institution allow customers to examine these records upon request?	Yes	No
7. Does the financial institution keep adequate records of those instances in which a customer's financial records are disclosed to a government authority upon authorization by the customer, including a copy of the request and the identity of the government authority? (§ 1104(c))	Yes	No
a. Does the financial institution allow customers to examine these records upon request (unless blocked by a court order)?	Yes	No
Each question 2–7 answered "no" requires an explanation of how the financial institution intends to comply with the requirements of the act.		