DORSEY
always ahead

All The President's Loan Documents: Responding To Subpoenas For Financial Records

Eric Sherman and Jaime Stilson

February 28, 2020

Subpoena Responses and Enforcement

- Governing Law
  - Federal Rule of 45
  - State laws
- Validity
  - Service
  - Location of compliance
- Scope
  - Objections
  - Costs
- Exemptions
- Application in the RFPA Context
- *Trump v. Deutsche Bank*

Is it Valid?

DORSEY always ahead

Federal Subpoenas - Initial Inquiry into Validity

- **Notice on all parties under F.R.C.P. 45(a)(4)**
  - Opportunity for parties to object
- **Service under F.R.C.P. 45(b)**
  - "Delivery" – what does it mean?
  - If the subpoena compels an appearance, it must tender fees for 1 day's attendance and mileage
- **Location of Compliance under F.R.C.P. 45(c)**
  - For a document subpoena to be valid, it can only compel production of documents within 100 miles of where the person or entity "resides" or "regularly transacts business"

DORSEY always ahead

BANK COUNSEL ROUNDTABLE: RESPONDING TO SUBPOENAS FOR FINANCIAL RECORDS

Are There Limits and Who Pays?

Federal Subpoenas – Limiting Scope and Expense

- **F.R.C.P. 45(d)(1)**
  - A party or attorney responsible for issuing and serving a subpoena must ***take reasonable steps to avoid imposing undue burden or expense*** on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.
- **F.R.C.P. 45(d)(2)(B)(ii)**
  - Order compelling production after objection must ***protect a person who is neither a party nor a party's officer from significant expense resulting from compliance***.

Federal Subpoenas – Limiting Scope and Expense

- **It may pay to object or move for a protective order**
  - Valid objections both with respect to scope and cost for third-party litigants
  - Objections - 14 days of receipt or before compliance (whichever is earlier) (FRCP 45(d)(2)(B))
  - Motions for a protective order/quash the subpoena
- **Costs of production (including attorneys' fees) can be shifted if "significant"**
  - Multi-factor test includes consideration of non-party's financial condition, non-party's interest in the case, and public importance of the litigation
- **Some courts have held such shifting is mandatory**
  - *Cahoo v. SAS Inst., Inc.*, 377 F. Supp. 3d 769, 776 (E.D. Mich. 2019)
  - *Legal Voice v. Stormans, Inc.*, 738 F.3d 1178 (9th Cir. 2013)

Federal Subpoenas – Fee Shifting

- **If the scope of ESI production is substantial, evaluate seeking reimbursement of costs from the issuing party**
  - Courts have awarded ESI vendor costs and attorney review time. *See Walt Disney Co. v. Peerenboom*, 2019 N.Y. Misc. LEXIS 337 (N.Y. Super. Ct. Jan. 17, 2019)
- **Attorneys' fees not *per se* excluded from costs of compliance**
- **Cooperation generally rewarded**
  - Courts have awarded attorneys' fees where non-party counsel worked cooperatively to protect client confidentiality while avoiding motion practice. *Nitsch v. Dreamworks Animation SKG, Inc.*, 2017 U.S. Dist. LEXIS 34106 (N.D. Cal. Mar. 9, 2017)
  - Efforts to limit the scope of production by counsel can also be the basis for reimbursement of attorneys' fees. *Linglong Americas, Inc. v. Horizon Tire, Inc.*, 2018 U.S. Dist. LEXIS 57777 (N.D. Ohio Apr. 4, 2018)

Federal Subpoenas – Fee Shifting

BUT . . .

- **Obstreperousness generally punished**
  - "Concomitantly, the efforts that [Non-Party] undertook to litigate fiercely and to expend significant resources on the document review effort are not 'significant expenses resulting from compliance.' Therefore, they are, in large part, not compensable." *G&E Real Estate, Inc. v. Avison Young – Washington, D.C., LLC*, 317 F.R.D. 313, 318 (D.D.C. 2016)
- **Fees have to be reasonable**
  - "[I]t is far from clear that [Non-party] needed to retain one of New York's largest and most expensive firms to respond to a straightforward non-party subpoena." *In re Aggrenox Antitrust Litig.*, 2017 U.S. Dist. LEXIS 172231 (D. Conn. Oct. 18, 2017) (requested award slashed from $73,000 to $20,000)

Don't Forget About State Subpoenas

- **Some state statutes specific to financial institution subpoenas impose cost-shifting, but general subpoena rules also apply**
- **Minnesota R. Civ. P. 45.03(d)**
  - **"**A witness who is not a party to the action or an employee of a party . . . and who is required to give testimony or produce documents . . . is ***entitled to reasonable compensation for the time and expense involved in preparing for and giving such testimony or producing such documents*****."**
- **New York - CPLR 3111 & 3122(d)** – The reasonable production expenses of a non-party witness shall be defrayed by the party seeking discovery.

And speaking of New York

The CLE code is . . .

DORSEY™ always ahead

What about regulatory compliance and subpoenas?

DORSEY™ always ahead

Exceptions to Regulatory Compliance for Subpoena Responses

- **Some notable exemptions that are important for financial institutions for valid subpoenas**
- **The Gramm-Leach-Bliley Act (GLBA)**
  - Its privacy provisions prohibit a financial institution from disclosing a consumer's non-public financial information ("NPI") to any third party unless Act's notice or consent requirements are met (the "Privacy Rule").
  - Subpoena exception – disclosure is permitted to comply with "properly authorized" subpoenas. 15 U.S.C. § 6802(e); 16 C.F.R. § 313.15.
- **The California Consumer Privacy Act (CCPA)**
  - The CCPA became effective earlier this year, with broad requirements applicable to entities "doing business" to protect consumer privacy.
  - BUT Section 1795.145(a) excepts from its compliance "a civil, criminal or regulatory inquiry, investigation, subpoenas or summons by federal, state, or local authorities."

What do we produce?

State laws

- **Too many and diverse to cover comprehensively in this session**
- **State constitutions may cover privacy rights**
- **State statutes requiring notice to customer and waiting period before production**
- **Under some statutes, court can waive notice requirement**
- **Under some statutes, burden is on party serving subpoena, must provide proof of notice to customer**
- **Sanctions sometimes available for violation**

Bank Secrecy Act

- Suspicious Activity Report ("SAR") Privilege
  - 12 C.F.R. § 21.11(k)(1)
  - "No national bank, and no director, officer, employee, or agent of a national bank, shall disclose a SAR or any information that would reveal the existence of a SAR. Any national bank, and any director, officer, employee, or agent of a national bank that is subpoenaed or otherwise requested to disclose a SAR, or any information that would reveal the existence of a SAR, shall decline to produce the SAR or such information, citing this section and 31 U.S.C. 5318(g)(2)(A)(i), and shall notify the following of any such request and the response thereto: (A) Director, Litigation Division, Office of the Comptroller of the Currency; and (B) The Financial Crimes Enforcement Network (FinCEN)."

Bank Secrecy Act

- Suspicious Activity Report ("SAR") Privilege
  - Covers both the SAR itself and all "documents that indirectly suggest the existence or non-existence of a SAR." *In re JP Morgan Chase Bank, N.A.*, 799 F.3d 36, 43 (1st Cir. 2015).
    - Draft SARs
    - Documents reflecting decision-making process whether to file
    - Explaining content of SAR after filing
  - "[U]nderlying facts, transactions, and documents upon which a SAR is based" not covered
  - Courts sometimes require production of policies and procedures relating to suspicious activity reporting. *Compare Norton v. U.S. Bank Nat'l Ass'n*, 324 P.3d 693 (Wash. Ct. App. 2014) (order denying protective order reversed), *with Ackner v. PNC Bank, N.A.*, 2017 U.S. Dist. LEXIS 60500 (S.D. Fla. Apr. 12, 2017) (production compelled).

The Right to Financial Privacy Act

Under the RFPA, the federal government is prohibited from obtaining customer records from financial institutions unless the government first obtains:

1. A search warrant supported by probable cause;
2. The customer's consent; or
3. A specifically proscribed procedural device such as a subpoena, served upon the customer.

12 U.S.C. § 3402.

The Right to Financial Privacy Act

- Enacted in 1978; effective in March 1979
- The impetus for the RFPA was the Supreme Court's decision in *United States v. Miller*, 425 U.S. 435 (1976), in which the Court held that bank records are not subject to privacy protections under the Fourth Amendment.

The Right to Financial Privacy Act

- The RFPA requires customer notice as a prerequisite to enforcement
- Some courts have held that oral communications between the government and a financial institution concerning a customer's accounts are subject to the requirements of the RFPA
- Notice is the responsibility of the government
- Financial institution may rely in good faith on government's certificate of compliance
- Cost reimbursement available

The Right to Financial Privacy Act

- The notice requirements of the RFPA only apply to "customers" who are individuals or partnerships of fewer than five individuals.
  - Courts have recognized that prospective customers such as loan applicants are entitled to protection under the RFPA
  - Corporations, large partnerships, partnerships with entity partners, ERISA plans, trusts, etc., are not "customers"

The Right to Financial Privacy Act

- Various exceptions
  - Anonymized data
  - Cases where government and customer are both parties
  - Security interest filings / bankruptcy claims
  - Federal loan programs
  - Reports to law enforcement
  - IRS summonses
  - Supervisory proceedings

The Right to Financial Privacy Act

- Customers can enjoin the disclosure of their financial records by showing either:
  - That the government failed to comply with the RFPA's procedures; or
  - The materials sought by the government are not relevant to the government's inquiry.
- Financial institutions subject to civil penalties, actual damages, costs, and attorneys' fees for violations

The Right to Financial Privacy Act

- By the terms of the RFPA, its requirements only apply to the federal government. State and local authorities are immune from its requirements
- However, virtually all fifty states have enacted statutes akin to the RFPA
- In Minnesota, the disclosure of customers' financial information to the government is covered by Minn. Stat. §§ 13A.01-13A.04
  - Under the statute, customer records cannot be released unless: (1) the customer has authorized the release; (2) the government has a search warrant; (3) the government has a subpoena; (4) the records are released in relation to the investigation of the exploitation of a vulnerable adult; or (5) the records are disclosed pursuant to another statute.
  - Within 180 days after the government authority obtains access to the records pursuant to a search warrant or a judicial or administrative subpoena, the government must notify the customer.

Trump v. Deutsche Bank AG, et al.

Background:

- The case concerns three subpoenas issued by committees of the United States House of Representatives on April 11, 2019.
  - Two subpoenas to Deutsche Bank; one subpoena to Capital One Financial Corporation
- The subpoenas sought a range of financial records of President Donald J. Trump, members of his family, and affiliated entities.
- In response, President Trump, his three oldest children, the Trump Organization, and six other affiliates filed a complaint in the Southern District of New York on April 29, 2019.
- The complaint, which named Deutsche Bank and Capital One as defendants, claimed that the subpoenas violated the U.S. Constitution and the Right to Financial Privacy Act, the "RFPA." It sought a declaratory judgment that the subpoenas were invalid and an injunction quashing them.
- The House committees successfully intervened in the case.

Trump v. Deutsche Bank AG, et al.

Plaintiffs' RFPA Arguments

- Under the RFPA, a "government authority" cannot access "the financial records of any customer" of a bank via subpoena unless it complies with certain procedures and requirements:
  - (1) the government authority must have "reason to believe" that the records are "relevant to a legitimate law enforcement inquiry"
  - (2) the government authority must give the customer a copy of the subpoena, summons, or request along with the proper statutory notice; and
  - (3) wait at least ten days so the customer can file a motion to quash. §§3405, 3408.
- If the government fails to follow these procedures, the customer can obtain "injunctive relief … to require that [they] are complied with."

Trump v. Deutsche Bank AG, et al.

Plaintiffs' RFPA Arguments

- The Plaintiffs argued that House committees failed to comply with the RFPA's requirements.
- The committees did not provide a copy of any of the subpoenas to the Plaintiffs.
  - The banks also refused to turn over copies of the subpoenas to the Plaintiffs.
- The committees did not certify to the banks that they had complied with the RFPA's procedures.

Trump v. Deutsche Bank AG, et al.

Opposition:

- Both Deutsche Bank and Capital One filed notices of non-opposition in response to the Plaintiffs' motion for preliminary injunction. Because the House committees had intervened in the case, the banks stated that the dispute was between the Plaintiffs and the government.
- The House committees argued, that the Plaintiffs could not show a likelihood of success on the merits because, among other things, the RFPA did not apply to Congress.
  - 12 U.S.C. § 3401(3): "Government authority" means any agency or department of the United States, or any officer, employee, or agent thereof
  - Citing Supreme Court precedent, the committees argued that the phrase "department or agency of the United States" refers only to Executive Branch entities, not Congress.

Trump v. Deutsche Bank AG, et al.

District Court Opinion

- On May 22, 2019, the district court held a hearing on the motion for preliminary injunction.
- The court denied the motion with an extensive opinion on the record at the hearing, but did not issue a written order.
- The court found that while the plaintiffs had shown that they will suffer irreparable harm absent a preliminary injunction, they were unlikely to succeed on the merits of their claims. Furthermore, the questions presented in their motion were not sufficiently serious in light of Supreme Court precedent and the plain text of the RFPA. The balance of hardships and equities, in conjunction with consideration of the public interest, did not weigh in their favor.

Trump v. Deutsche Bank AG, et al.

The Second Circuit Appeal

- A divided panel of the Second Circuit affirmed the denial of a preliminary injunction.
- The panel concluded that the House committees, had valid legislative purposes for the subpoenas.
  - The investigations involved the enforcement of laws against money laundering and terrorism financing, as well as determining the scope of the Russian government's operations to influence the political process in the United States, and determining whether the President was vulnerable to foreign exploitation.

Trump v. Deutsche Bank AG, et al.

The Second Circuit's Decision with Respect to the RFPA

- House of Representatives committees were not "agencies or departments of United States," and thus were not required to comply with the RFPA before seeking the financial records
- The interests of Congress in pursuing investigations substantially overbalanced any privacy interests invaded by the disclosure of financial documents, including the President's non-official documents, even if the subpoenas were intended to discover evidence of crimes, and disclosure might distract the President in the performance of his official duties

Trump v. Deutsche Bank AG, et al.

- The Supreme Court took the somewhat unusual step of granting review in without receiving a formal cert petition. Instead, the Justices treated the Plaintiffs' request to stay the Second Circuit mandate as a request for cert.
- **Question Presented**: Whether three committees of the House of Representatives had the constitutional and statutory authority to issue subpoenas to third-party custodians for the personal records of the sitting President of the United States.
- Scheduled for argument on Tuesday, March 31, 2020.


DORSEY
always ahead
Questions?
33