

California Bankers Association
36th Annual Regulatory Compliance Conference

I. Overview

Types of Legal Process

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II. Legal Process to Obtain Customer Information

A. Background

1. *Reasonable Expectation of Privacy*. Under California law, financial institution customers have a reasonable expectation that their financial records will not be disclosed by their financial institution unless the disclosure authorized by law (e.g., compulsion by legal process). Consequently, financial institutions must not voluntarily disclose their customers' financial records without a specific legal right to do so. See *Burrows v. Superior Court of San Bernardino County*, 118 Cal. Rptr. 166 (1974).
2. *California Financial Privacy Act*. The CFPA (Cal. Fin. Code §4050 et seq.) prohibits the disclosure of consumer non-public personal information to unaffiliated third parties unless the consumer has opted-in to that disclosure or an exception applies. An exception to the CFPA's disclosure prohibition is when the non-public personal information is disclosed in order to comply with judicial process or an authorized civil, criminal, or regulatory subpoena. Cal. Fin. Code §4056(b)(7).
3. *Gramm-Leach-Bliley Act*. The GLBA, as implemented by Regulation P (12 CFR 1016), prohibits the disclosure of consumer non-public personal information to unaffiliated third parties unless the financial institution has given notice in its privacy policy that it makes such disclosures or an exception applies. An exception to the GLBA's disclosure prohibition is when the non-public personal information is disclosed in order to comply with judicial process or an authorized civil, criminal, or regulatory subpoena. 12 CFR 1016.15(a)(7).
4. *California Right to Financial Privacy Act*. The Cal. RFPA (Cal. Govt. Code §7460 et seq.) was enacted to protect the privacy of financial institution customers by limiting the access that state and local government agencies have to their financial information. The Cal. RFPA does not apply to federal government agencies or litigants in civil court. The Cal. RFPA is discussed in further detail below.
5. *Right to Financial Privacy Act*. The RFP (12 USC §3401 et seq.) was enacted to protect the privacy of financial institution customers by limiting the access that federal government agencies have to their financial information. The RFP does not apply to state governments or litigants in civil court. Portions of the RFP have been implemented by the Federal Reserve Board as Regulation S (12 CFR 219). The RFP is discussed in further detail below.

B. Overview of Different Sources for Legal Process

1. *Litigants in Civil Court (California)*
2. *Litigants in Civil Court (Federal)*
3. *State and Local Government Agencies (California)*
4. *Federal Government Authorities*

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C. Litigants in Civil Court (California)

1. *Subpoenas*. A subpoena may be issued in a California civil lawsuit to compel a witness to (i) appear at a specific location, (ii) submit to a deposition, and/or (iii) produce documents and other things. The action required of the witness will depend upon the type of subpoena issued. The types of subpoenas that may be issued in California civil litigation include the following:
 - a. *Civil Subpoena (For Personal Appearance At Trial or Hearing)*. Compels the witnesses to appear at trial or a court hearing.
 - b. *Civil Subpoena (Duces Tecum)*. Compels the witnesses to appear trial or a court hearing and produce identified documents and things. It may also be used to compel only the production of documents and things at trial or a court hearing.
 - c. *Deposition Subpoena (For Personal Appearance)*. Compels the witness to appear at a deposition.
 - d. *Deposition Subpoena (For Personal Appearance and Production of Documents and Things)*. Compels the witness to appear at a deposition and produce identified documents and things.
 - e. *Deposition Subpoena (For Production of Business Records)*. Compels the witness to produce identified documents and things. The subpoena will specify whether production should be done by (i) delivering copies of the records to the deposition officer at a specified location, or (ii) making the original documents and things available for inspection and photocopying by the attorney or its representative.
2. *Notice to Customer (Bank)*. Except when prohibited by court order, the financial institution must promptly notify its customer upon receipt of a subpoena requesting the customer's financial information. The notification should be given in writing by first-class mail and include a copy of the subpoena requesting the customer's financial information. Where possible, the notice should also be given by telephone.
3. *Notice to Consumer (Subpoenaing Party)*. If the subpoena seeks the production of personal records pertaining to a consumer, the subpoena must be served with a proof of service attesting that the subpoenaing party has served a "Notice to Consumer" on the consumer whose records are sought in compliance with Cal. Civil Code §1985.3.
 - a. The subpoena and Notice to Consumer must be served on the consumer (i) at least 10 days (15 days if served by mail) prior to the production date, and (ii) at least 5 days (10 days if served by mail) prior to service on the financial institution.
 - b. The production date must be no sooner than 20 days after issuance of the subpoena or 15 days after service on the financial institution, whichever is later.

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- c. If the consumer whose records are sought is not a party to the civil litigation, the consumer may notify the financial institution in writing that the consumer objects to the production of his/her records at any time prior to the production date. Once the financial institution receives the consumer's written objection, it must not produce the consumer's financial records without further order from the court.
 - d. If the consumer whose records are sought is a party to the civil litigation, the consumer may bring a motion to quash or modify the subpoena at any time prior to the production date. Once the financial institution receives notice of the consumer's motion to quash, it must not produce the consumer's financial records without further order from the court.
4. *Affidavit Accompanying Records.*
- a. In responding to a subpoena that requires the production of records, the records must be accompanied by an affidavit of the custodian or other qualified witness stating that (i) the affiant is the duly authorized custodian of records or other qualified witness and has authority to certify the records, (ii) the copy is a true copy of all records described in the subpoena or the records were delivered to the attorney or its representative for copying at the custodian's or witness' place of business, as the case may be, (iii) the records were prepared by the personnel of the business in the ordinary course of business at or near the time of the act, condition, or event, (iv) the identity of the records, and (v) a description of the mode of preparation of the records.
 - b. If the financial institution has none or only some of the records described in the subpoena, the custodian or witness must state that fact in the affidavit and deliver those records that are available.
5. *Cost Reimbursement.*
- a. When a witness from the financial institution is required to attend a civil action or proceeding, the witness is entitled to receive \$35/day for each day of actual attendance and \$0.20/mile for mileage traveled. See Cal. Govt. Code §68093.
 - b. Where the subpoena requires delivery of records (and the financial institution is not a party to the litigation), all reasonable costs incurred by the financial institution in producing those records must be paid by the party serving the subpoena. Reasonable costs include: \$0.10 per page for standard photocopies; \$0.20 per page for copying documents from microfilm; up to \$24/hr. for clerical costs in locating and making the records available; actual postage charges; and actual costs charged to the financial institution by a third person for retrieval and return of records held offsite by the third party. The party serving the subpoena cannot be required to pay the financial institution's reasonable costs prior to the time the records are available for delivery, but the financial institution may demand payment of costs simultaneous with actual delivery of the subpoenaed records. See Cal. Evidence Code §1985.3.
 - c. Where the subpoena requires records to be made available to the attorney or its representative for inspection or photocopying at the financial institution's place of business, the fee for complying with the subpoena shall not exceed \$15, plus any actual

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costs charged to the financial institution by a third person for retrieval and return of records held offsite by the third party. If the records are retrieved from microfilm, the financial institution may also be reimbursed for reasonable costs of retrieving and copying those records. See Cal. Evidence Code §1985.3(b)(6).

D. Litigants in Civil Court (Federal)

1. *Subpoena*. A subpoena may be issued in a federal civil lawsuit to compel a witness to appear at a specific location and/or produce documents and records. Federal civil subpoenas are governed by Rule 45 of the Federal Rules of Civil Procedure.
2. *Notice to Customer (Bank)*. Except when prohibited by court order, the financial institution must promptly notify its customer upon receipt of a subpoena requesting the customer's financial information. The notification should be given in writing by first-class mail and include a copy of the subpoena requesting the customer's financial information. Where possible, the notice should also be given by telephone.
3. *Objection*. A party serving a federal civil subpoena must take reasonable steps to avoid imposing undue burden or expense on the person subject to the subpoena. A person commanded to produce documents may object to the subpoena by serving its written objection on the subpoenaing party within 14 days after service. Once the written objection is served, the party serving the subpoena is not entitled to inspect or copy the documents without first obtaining a court order.
4. *Motion to Quash*. A person commanded to produce documents pursuant to a subpoena may file a motion to quash or modify the subpoena. In addition, the customer whose records are sought by the subpoena may also file a motion to quash to prevent production of the records.
5. *Cost Reimbursement*.
 - a. A subpoena that requires the witness' attendance must be served with 1 days' attendance fees, plus mileage allowed by law. See FRCP §45(b)(1).
 - b. The Federal Rules of Civil Procedure do not directly provide for reimbursement to a non-party witness for production of documents in response to a subpoena. However, the rules do require the person who serves the subpoena to take reasonable steps to avoid imposing undue burden or expense on the person subject to the subpoena. To avoid undue burden or expense, a financial institution subject to the subpoena may reasonably request reimbursement of the costs and expenses it incurred in responding to the subpoena. If the person who issued the subpoena refuses to pay, the institution may file a motion to request costs incurred in responding to the subpoena. See FRCP §45(c).

E. State and Local Agencies (California)

1. *California Right to Financial Privacy Act*
 - a. The Cal. RFPFA prohibits financial institutions from disclosing "customer" financial information to a state or local agency unless certain safeguards are followed. Each state

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and local agency is likewise prohibited from obtaining customer financial information unless it complies with the Act.

- b. The term “customer” means any individual, partnership, corporation, limited liability company, association, trust, or other legal entity.
- c. Unless an exception applies, a state or local agency must supply one of the following to the financial institution before it can have access to the financial records or information of a financial institution customer:
 - (1) An authorization signed by the customer that meets the requirements of Cal. Govt. Code §7473,
 - (2) An administrative subpoena or summons that meets the requirements of Cal. Govt. Code §7474,
 - (3) A search warrant that meets the requirements of Cal. Govt. Code §7475, or
 - (4) A judicial subpoena or subpoena duces tecum that meets the requirements of Cal. Govt. Code §7476.
- d. Some disclosures are *exempt* from requirements of the Cal. RFP. A *partial list* of exempt disclosures include the following:
 - (1) A disclosure of financial information that is not identified with a particular customer,
 - (2) When a police department or district attorney certifies in writing that a crime report has been filed involving the alleged fraudulent use of drafts, checks, access cards, or other orders drawn upon the financial institution, the police department, district attorney, county adult protective services office (when investigating the financial abuse of an elder or dependent adult), or long-term care ombudsman (when investigating the financial abuse of an elder or dependent adult) may request and obtain from the financial institution certain information about the customer’s account,
 - (3) Disclosure pursuant to a request from certain state or local agencies as to whether a person has an account(s) at a particular branch or office of the financial institution and, if so, any identifying numbers for such accounts,
 - (4) The examination by, or disclosure to, any supervisory agency of financial records that relate solely to the exercise of its supervisory function,
 - (5) Disclosure to a local child support agency regarding accounts held, account holder names, account numbers and balance,
 - (6) Disclosure by the financial institution to appropriate state or local agencies concerning a suspected violation of law.

See Cal. Govt. Code §7480 for a more complete list of exempt disclosures. Exemptions under other code provisions may also apply.
- e. The financial institution must keep a record of all examinations or disclosures of the customer’s financial records pursuant to the Cal. RFP. The record must include (i) the identity of the person examining the financial records, (ii) the state or local agency which the person represents, and (iii) a copy of the customer’s authorization, subpoena, summons or search warrant. The financial institution must maintain the record for a period of 5 years.

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2. *Customer Authorization.* In order to be effective for disclosure under the Cal. RFPFA, a customer authorization must (i) authorize the disclosure of records for a period of time, (ii) specify the name of the agency or department to which disclosure is authorized and, if applicable, the statutory purpose for which the information is being obtained, (iii) identify the financial records that may be disclosed, (iv) include written notification that the customer has the right at any time to revoke the authorization, and (v) be signed and dated by the customer.

3. *Administrative Subpoena or Summons.* In order to be effective for disclosure under the Cal. RFPFA, an administrative subpoena or summons must (i) have had a copy served on the customer by an employee of the state or local agency, (ii) include the name of the agency or department issuing the subpoena or summons and the statutory purpose for which information is being obtained, and (iii) have had at least 10 days pass without the customer giving notice to the financial institution that the customer has moved to quash the subpoena.
 - a. Except when prohibited by court order, the financial institution must promptly notify its customer upon receipt of a subpoena or summons requesting the customer's financial information. The notification should be given in writing by first-class mail and include a copy of the summons or subpoena requesting the customer's financial information. Where possible, the notice should also be given by telephone.
 - b. The financial institution is prohibited from disclosing customer financial information pursuant to the subpoena or summons if it receives notice from the customer within 10 days that the customer has moved to quash the summons or subpoena.
 - c. After a motion to quash has been filed, the financial institution may only release the customer's financial information pursuant to a court order (e.g., the court's order on the motion to quash).

4. *Search Warrant.* In order to be effective for disclosure under the Cal. RFPFA, a search warrant must be issued pursuant to Chapter 3 (commencing with Section 1523) of Title 12 of Part 2 of the Cal. Penal Code.
 - a. Except when prohibited by court order, the financial institution must promptly notify its customer upon receipt of a search warrant requesting the customer's financial information. The notification should be given in writing by first-class mail and include a copy of the search warrant requesting the customer's financial information. Where possible, the notice should also be given by telephone.
 - b. Records produced pursuant to a search warrant must be made available to the officer within 10 days of the date the search warrant was served. That time may be extended if prior to expiration of the 10-day period the institution makes a written showing to the court that issued the warrant that records cannot reasonably be made available within the 10-day period and that additional time is required.
 - c. Cal. RFPFA does not include a provision for reimbursement of copying and clerical costs in connection with a search warrant.

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5. *Judicial Subpoena or Subpoena Duces Tecum*. Three types of subpoenas may be used to obtain financial records pursuant to Cal. Govt. Code §7476. They include:
- *Judicial Subpoena*. A subpoena/subpoena duces tecum issued pursuant to Chapter 2 (commencing with Section 1985) of Title 3 of Part 4 of the Cal. Code of Civil Procedure,
 - *Grand Jury Subpoena*. A judicial subpoena duces tecum issued by a judge of the superior court after showing by a deputy district attorney, deputy attorney general, or other person authorized to present evidence to a grand jury in connection with a criminal investigation, or
 - *476a Subpoena*. A judicial subpoena issued in connection with a criminal case charging a violation of Section 476a of the Cal. Penal Code.
- a. *Judicial Subpoena*. In order to be effective for disclosure under the Cal. RFPFA, a Judicial Subpoena must (i) be issued and served on the financial institution and customer in compliance with Chapter 2 (commencing with Section 1985) of Title 3 of Part 4 of the Cal. Code of Civil Procedure, and (ii) either of the following occurs (A) at least 10 days pass without the customer giving notice to the financial institution that the customer has moved to quash the subpoena or (B) the judge in a judicial proceeding to which the customer is a party rules that the subpoena should not be quashed.
- (1) Except when prohibited by court order, the financial institution must promptly notify its customer upon receipt of a subpoena requesting the customer's financial information. The notification should be given in writing by first-class mail and include a copy of the subpoena requesting the customer's financial information. Where possible, the notice should also be given by telephone.
 - (2) The financial institution is prohibited from disclosing customer financial information pursuant to the subpoena if it receives notice from the customer within 10 days that the customer has moved to quash the subpoena.
 - (3) After a motion to quash has been filed, the financial institution may only release the customer's financial information pursuant to a court order (e.g., the court's order on the motion to quash).
 - (4) If the financial institution officer served with the subpoena is required to appear at court in a civil case, he/she is entitled to witness fees and mileage expenses. See Cal. Code of Civ. Procedure §1987(b). In addition, the financial institution should seek recovery of the costs of production (e.g., hourly rates, photocopies) at the rates set forth in Cal. Evidence Code §1563.
 - (5) If appearance is required in a criminal case, the court may order the county to pay witness fees at a rate of \$12 per each day of attendance and a reasonable sum for the witnesses' expenses. See Cal. Penal Code §1329.
- b. *Grand Jury Subpoena*. In order to be effective for disclosure under the Cal. RFPFA, a Grand Jury Subpoena must (i) be issued and served on the financial institution and the customer, and (ii) any of the following occurs (A) at least 10 days pass without the customer giving notice to the financial institution that the customer has moved to quash the subpoena,

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(B) the judge in a judicial proceeding to which the customer is a party rules that the subpoena should not be quashed, or (C) the court orders the financial institution and grand jury to withhold notification to the customer for 30 days from receipt of the subpoena.

- (1) Except when prohibited by court order, the financial institution must promptly notify its customer upon receipt of a subpoena requesting the customer's financial information. The notification should be given in writing by first-class mail and include a copy of the subpoena requesting the customer's financial information. Where possible, the notice should also be given by telephone.
 - (2) The financial institution is prohibited from disclosing customer financial information pursuant to the subpoena if it receives notice from the customer within 10 days that the customer has moved to quash the subpoena.
 - (3) After a motion to quash has been filed, the financial institution may only release the customer's financial information pursuant to a court order (e.g., the court's order on the motion to quash).
 - (4) If appearance is required, the court may order the county to pay witness fees at a rate of \$12 per each day of attendance and a reasonable sum for the witnesses' expenses. See Cal. Penal Code §1329.
- c. *476a Subpoena.* In order to be effective for disclosure under the Cal. RFP, a 476a Subpoena must (i) be issued and served on the financial institution in compliance with Chapter 2 (commencing with Section 1985) of Title 3 of Part 4 of the Cal. Code of Civil Procedure, (ii) seek only financial records for accounts as to which the defendant is alleged to have violated Section 476a of the Penal Code, and (iii) provide for the records to be produced at a preliminary hearing or trial at which the defendant will have the opportunity to move to quash the subpoena prior to disclosure of the information and move to suppress any portion of the records which the court finds irrelevant to the charges.
- (1) If the financial institution officer served with the subpoena is required to appear at court, the court may order the county to pay witness fees at a rate of \$12 per each day of attendance and a reasonable sum for the witnesses' expenses. See Cal. Penal Code §1329. In addition, the financial institution should seek recovery of the costs of production (e.g., hourly rates, photocopies) at the rates set forth in Cal. Evidence Code §1563.

F. Federal Authorities

1. *Right to Financial Privacy Act*

- a. The RFP prohibits financial institutions from disclosing "customer" financial information to a federal government authority unless certain safeguards are followed. Each government authority is likewise prohibited from obtaining customer financial information unless it complies with the Act.

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- b. The RFPA prohibits financial institutions from disclosing the financial information of a “customer” to a federal government authority unless certain safeguards are followed. Each government authority is likewise prohibited from obtaining customer financial information unless it complies with the Act.
- c. The term “customer” means any individual or partnership of five or fewer individuals. It does not include corporations, limited liability companies, associations, trusts, or other legal entities.
- d. Unless an exception applies, a government authority must supply one of the following to the financial institution before it can have access to the financial records or information of a financial institution customer:
 - (1) An authorization signed by the customer,
 - (2) An administrative subpoena or summons,
 - (3) A search warrant,
 - (4) A judicial subpoena, or
 - (5) A formal written request by the government authority.
- e. Some disclosures are exempt from requirements of the RFPA. A partial list of exempt disclosures include the following:
 - (1) Disclosure of financial records or information not individually identifiable with a particular customer,
 - (2) Disclosure to any supervisory agency in connection with its supervisory, regulatory, or monetary functions (this includes regular examinations and any investigation relating to a consumer complaint),
 - (3) Disclosure of financial records in accordance with procedures authorized by the Internal Revenue Code,
 - (4) Disclosure of financial records or information required to be reported in accordance with any federal statute or rule promulgated thereunder (e.g. the Bank Secrecy Act),
 - (5) Disclosure by a financial institution to notify a government authority that it has information which may be relevant to a possible violation of any statute or regulation (in this instance, the financial institution may report the name and other identifying information concerning the individual or accounts involved and the nature of the suspected illegal act),

See 12 USC §§3403(d) and 3413 for a more complete list of exempt disclosures.
- f. When disclosure requires a formal customer authorization, administrative subpoena or summons, search warrant, judicial subpoena, or formal written request, the financial institution may not release the customer’s financial records until the government authority seeking records certifies in writing that it has complied with applicable provisions of the RFPA.
- g. The Bank must keep a record of all instances in which the customer's records are disclosed to a government authority, including the identity of the government agency to which such disclosure is made. The Bank’s records must also indicate each instance

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where the customer's records are disclosed to a government authority pursuant to the customer's authorization.

2. *Customer Authorization.* In order to be effective for disclosure under the RFP, a customer authorization must (i) authorize the disclosure of records for a period not in excess of three months, (ii) contain a statement that the customer may revoke the authorization at any time prior to disclosure, (iii) identify the financial records that may be disclosed, (iv) specify the government authority to which the records may be disclosed and the purpose for which they may be disclosed, (v) contain a statement of the customer's rights under the RFP, and (vi) be signed and dated by the customer.
3. *Administrative Subpoena or Summons.* In order to be effective for disclosure under the RFP, an administrative subpoena or summons must (i) comply with the rules and regulations of the government agency issuing the subpoena or summons, (ii) request only records that are relevant to a legitimate law enforcement inquiry, (iii) indicate that a copy of the subpoena or summons has been served on the customer, together with a notice stating the customer's rights and the nature of the law enforcement inquiry, and (iv) at least 10 days have expired from the date of service of the notice or 14 days have expired from the date of mailing the notice to the customer.
 - a. An administrative subpoena or summons should also include (i) the name of the federal authority who issued the summons or subpoena, (ii) the statutory purpose for which the request is made, and (iii) a description of the records to be disclosed.
 - b. The financial institution should not respond by mail to an administrative subpoena unless specifically authorized by the subpoena to do so.
4. *Search Warrant.* In order to be effective for disclosure under the RFP, the search warrant must be issued pursuant to Rule 41 of the Federal Rules of Criminal Procedure.
5. *Judicial Subpoena.* In order to be effective for disclosure under the RFP, the judicial subpoena must (i) identify records relevant to a legitimate law enforcement inquiry, (ii) be mailed or served on the customer together with the notice outlining the customer's rights, and (iii) at least 10 days have expired from the date of service of the notice or 14 days have expired from the date of mailing the notice to the customer.
6. *Formal Written Request.* In order to use the formal written request mechanism, (i) no administrative summons or subpoena authority can be reasonably available to the government authority for the purpose of obtaining the desired records, (ii) the request must be authorized under regulations issued by the head of the agency, (iii) there must be reason to believe that the records sought are relevant to a legitimate law enforcement inquiry, (iv) a copy of the request must be served on or mailed to the customer, together with notice of the customer's rights before the date the request is made to the institution, and (v) at least 10 days have expired from the date of service of the notice or 14 days have expired from the date of mailing the notice to the customer.
7. *Customer Notification.* In general, the financial institution should promptly notify its customer upon receipt of legal process from a government authority requesting the

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customer's financial information. There are, however, some exceptions including the following:

- a. A court may order the financial institution not to notify its customer of certain legal process. In such case, the financial institution must refrain from notifying its customer of the legal process and otherwise comply with the order.
 - b. A government authority authorized to conduct intelligence activities (such as the FBI or CIA) and the Secret Service may request financial information in connection with its intelligence activities. If that government authority or the Secret Service certifies that there may result (a) a danger to the national security of the United States, (b) interference with a criminal, counterterrorism, or counterintelligence investigation, (c) interference with diplomatic relations, or (d) danger to the life or physical safety of any person, the financial institution must not disclose to any person (other than those to whom disclosure is necessary to comply with the legal process) that the government authority or Secret Service has sought or obtained access to the customer's financial records. *See* 12 USC §3414(a).
8. *Cost Reimbursement.* Unless an exception applies, government authorities are required to pay the financial institution for the reasonable costs of providing a customer's financial records. Payment is to be made after the government authority receives the customer's financial records and an itemized bill or invoice from the institution. Costs may include those costs incurred in searching for, reproducing, and transporting books, papers, or other data required or requested. Applicable rates are established by the Board of Governors of the Federal Reserve System and are addressed in Regulation S. *See* 12 CFR 219.3 and the Reimbursement Schedule shown as Appendix A to 12 CFR 219.3.

III. Legal Process to Obtain Customer Property

- A. Background. Financial institutions are commonly used by creditors to attach or impound on property (generally personal property) belonging to the financial institution's customer. Specifically, legal process, such as civil writs and orders and government notices and orders, are commonly served on financial institutions. Time is of the essence and financial institutions must act immediately once properly served. It is important to follow the principles of law applicable to the particular type of legal process that is served. This includes, but is not limited to, determining whether any amounts are subject to an automatic exemption (meaning the debtor does not have to take any steps and automatically qualifies for the amount to be excluded) and therefore excluded from the legal process in question.
 1. *State Protections.* California Code of Civil Procedure Section 704.080 provides that a deposit account, in which payments of public benefits or social security benefits are directly deposited by the government or its agent, is exempt, from certain types of legal process, without making a claim in the following amounts:
 - a. \$1,525.00, where one depositor is the designated payee of a directly deposited public benefit payments;

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- b. \$3,050.00, where one depositor is the designated payee of directly deposited Social Security benefit payments;
 - c. \$2,275.00, where two or more depositors are the designated payees of directly deposited public benefit payments; and
 - d. \$4,575.00, where two or more depositors are the designated payees of directly deposited Social Security benefit payments.
2. *Federal Protections.* There are several federal statutes that provide that certain types of benefits are protected against attachment by creditors. However, these exemptions may not be *automatic* (for example, federal law does not provide an automatic exemption for accounts with direct deposit of some state benefits; however, federal law does provide for an automatic exemption for direct deposit of social security, VA, RRB and OPM benefit payments). This means that the debtor may have to come forward and take steps to claim a federal exemption.
- a. Type of federal benefits exempt from levy. The following types of benefits, which is not an exhaustive list, are exempt from certain types of legal process:
 - (1) Social Security benefits;
 - (2) Supplemental Security Income (SSI) benefits;
 - (3) Veteran's benefits;
 - (4) Federal railroad retirement benefits;
 - (5) Federal railroad unemployment and insurance benefits;
 - (6) Federal civil service retirement system benefits; and
 - (7) Federal employees retirement system benefits.
 - b. Garnishment of accounts containing federal benefit payments. Treasury has federal rules regarding garnishment orders received by financial institutions for an account into which federal benefit payments have been directly deposited. See 31 CFR Part 212. On May 29, 2013, Treasury published a final rule amending 31 CFR Part 212. This final rule became effective May 1, 2011 (the new changes are highlighted below in bold). The Treasury issues its guidelines in the Treasury/Bureau of the Fiscal Service's (BFS) Green Book, A Guide to Federal Government Automated Clearing House (ACH) Payments.
 - (1) General Rule. Financial institutions that receive a garnishment order are required to determine the sum of protected federal benefits deposited to the account during a two month period, and to ensure that the account holder has access to an amount equal to that sum or to the current balance of the account, whichever is lower.
 - (2) Key definitions. The following are some of the key definitions set forth in the Green Book:

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- (a) Benefit agency means the Social Security Administration (SSA), the Department of Veterans Affairs (VA), the Office of Personnel Management (OPM), or the Railroad Retirement Board (RRB).
 - (b) Benefit payment means a federal benefit payment paid by direct deposit to an account with the character "XX" encoded in positions 54 and 55 of the Company Entry Description field **and the number "2" encoded in the Originator Status field**, both in the Batch Header Record of the direct deposit entry.
 - (c) **Garnishment order or order means a writ, order, notice, summons, judgment, levy or similar written instruction issued by a court, a State or State agency, a municipality or municipal corporation or a State child support enforcement agency, including a lien arising by operation of law for overdue child support or an order to freeze the assets in an account, to effect a garnishment against a debtor.**
 - (d) Lookback period means the two month period that: (i) begins on the date preceding the date of account review; and (ii) ends on the corresponding date of the month two months earlier, or on the last date of the month two months earlier if the corresponding date does not exist (e.g. June 31st).
 - (e) Protected amount means the lessor of: (i) the sum of all benefit payments posted to an account between the close of business on the beginning date of the lookback period and the open of business on the ending date of the lookback period; or (ii) **the balance in an account when the account review is performed.**
- (3) Notice Requirement. The financial institution shall send the notice in cases where: (i) a benefit agency deposited a benefit payment into an account during the lookback period; (ii) the balance in the account on the date of the account review was above zero dollars and the financial institution established a protected amount; **and (iii) there are funds in the account in excess of the protected amount.**
- (4) Impermissible Garnishment Fee. **The financial institution may not charge or collect a garnishment fee against a protected amount. The financial institution may charge or collect a garnishment fee up to five (5) business days after the account review if funds other than a federal benefit payment are deposited to the account within this period provided the fee may not exceed the amount of the non-benefit deposited funds. For example, an account contains a protected amount of \$500 on the date of the account review, which constitutes the entire balance of the account. Two business days later \$50 in non-benefit funds are deposited in the account. The financial institution can impose a garnishment fee not exceeding \$50.**

B. Overview of Different Types of Request and Orders.

1. *Writ of Attachment.* A writ of attachment may be issued only in action on a claim or claims for money, each of which is based upon a contract, express or implied, whether the total

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amount of the claim or claims is a fixed or readily ascertainable amount not less than five hundred dollars (\$500) exclusive costs, interests and attorney's fees. CCP Section 483.010.

Generally, it is issued prior to judgment and permits the levying officer to seize specific personal property in possession of the defendant or the defendant's agent. Basically, the levying officer is giving notice to the financial institution that the levying officer may be required to take custody of property.

A financial institution would hold the monies until all the proper documents are supplied. However, a financial institution may attach the amount to the levying officer before the time the financial institution otherwise is required to the pay the amount. CCP Section 488.455(h).

2. *Writ of Execution.* A writ of execution is issued after a court order issued a money judgment and the debtor does not pay the judgment. Specifically, the judgment creditor files an application for writ of execution in order for the levying officer to levy the bank accounts of the debtor. Generally, once the application for writ of execution is properly filed, the levying officer will serve a copy of the writ, notice of levy and memorandum of garnishee on the financial institution.
3. *Levy.* A levy is a legal seizure of property to satisfy a debt. Generally, we tend to think of levies as legal process used to seize funds in deposit accounts. However, a levy can be used to seize wages, funds and other property held by the financial institution.
4. *Garnishment.* A garnishment is a type of levy. Meaning, a garnishment is a legal seizure of property to satisfy a debt. Generally, we tend to think of garnishments as legal process used to seize a portion of wages out of a paycheck. However, a garnishment can be used to seize funds in deposit accounts.
5. *Notice/Order to Withhold.* A notice/order to withhold is a type of levy. The purpose is to seize the property of the debtor. Generally, we see this type of legal process from CA state agencies seeking to levy on property for delinquent taxes or child support payments.

C. Specific Legal Process.

1. *Civil Court Judgment Holder- Writ of execution*
 - a. *General description.* Generally, a writ of execution, along with a notice of levy, is issued after trial by a levying officer to enforce payment of a money judgment. The financial institution needs the writ of execution, the notice of levy, the court order authorizing the levy, and, if applicable, an affidavit of spouse of judgment debtor.
 - b. *Service.* A copy of the writ of execution along with the notice of levy must be personally served on the financial institution. However, if the writ of execution is a support obligation pursuant to Division 17 of the Family Code, then the local child support agency may deliver or mail the writ of execution to a centralized location designated by the financial institution.

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- c. Effect on office. Generally, the service is only effective on the branch or office served. However, if the financial institution designated a centralized location within the state, then the levy will be effective at all branches. Also, if the writ of execution is a support obligation and it is received at the centralized location designated by the financial institution, then it will apply to all deposits and credits and personal property held by the financial institution regardless of the location of that property.
 - d. Notice to levying officer. The financial institution is required to fill out the Memorandum of Garnishee and return it to the levying officer within 10 days unless the levy is fully satisfied.
 - e. Notice to customer. The financial institution must give the affected customers notice.
 - f. Exemption. Financial institutions must check to see if there are direct deposits of social security and public benefit payments in order to avoid issues with missing the application of an automatic exemption.
2. *EDD Notice of Levy.*
- a. General description. The Employment Development Department (EDD) administers the Unemployment Insurance (UI) and Disability Insurance (DI) programs for the State of California. The Tax Branch also collects the California Personal Income Tax (PIT) that employers withhold from their employee's wages. A notice of levy is issued to attach the credits or personal property of a delinquent account.
 - b. Service. May be served personally or by certified mail.
 - c. Effect on office. Generally, the service is only effective on the branch or office served.
 - d. Notice to the EDD. The financial institution is required to respond to the EDD, using the form supplied by the EDD, within five days of service.
 - e. Notice to customer. Immediate notice should be sent to the non-tax debtor that jointly owns the property with the tax debtor. Also, the financial institution must give the affected customers notice.
 - f. Exemption. Financial institutions must check to see if there are direct deposits of social security and public benefit payments in order to avoid issues with missing the application of an automatic exemption.
3. *BOE Notice of Levy.*
- a. General description. The California State Board of Equalization (BOE) administers California's sales and use, fuel, alcohol, tobacco, and other taxes. A notice of levy, is a collection tool used by the BOE when a taxpayer has not voluntarily resolved a liability after it becomes due and payable.
 - b. Service. May be served personally or by first class mail.

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- c. Effect on office. Service is only effective on the branch or office served (unless the financial institution designated another branch to receive the levy).
- d. Notice to levying officer. The financial institution is required to fill out the reverse side of the notice of levy and return it to the levying officer within 10 days unless the levy is fully satisfied.
- e. Notice to customer. The financial institution must give the affected customers notice.
- f. Exemption. Financial institutions must check to see if there are direct deposits of social security and public benefit payments in order to avoid issues with missing the application of an automatic exemption.

4. *BOE Notice to Withhold.*

- a. General description. BOE can issue a notice to withhold or an earnings withholding order to collect various unpaid business taxes.
- b. Service. May be served personally or by first class mail.
- c. Effect on office. Service is only effective on the branch or office served (unless the financial institution designated another branch to receive the notice).
- d. Process. Just hold two times the amount and do not remit any funds. Wait for a renewal of the notice or a levy.
- e. Notice to the levying officer. Report the description of the property subject to the State Board of Equalization immediately.
- f. Notice to customer. The financial institution must give the affected customers notice.
- g. Exemption. The California automatic exemption for direct deposit of social security and public benefit payments may not apply (however, the federal automatic exemption applies to all state orders and levies). Contact your legal counsel.

5. *DCSS Order to Withhold.*

- a. General description. The Department of Child Services (DCSS) works with parents - custodial and noncustodial - and guardians to ensure children and families receive court-ordered financial and medical support. An order to withhold is a collection tool used by DCSS to collect delinquent child support payments.
- b. Service. May be served personally or by first class mail.
- c. Effect on office. Generally, the service is only effective on the branch or office served. However, if the financial institution designated a centralized location within the state, then the levy will be effective at all branches.

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- d. Notice of levying officer. The financial institution must remit an answer, which is the page that says “Complete This Page and Return It To Our Office” (page 2 of the order), to the DCSS along with remitting the funds (remit after 10 business days).
 - e. Notice to customer. The financial institution must mail the debtor’s copy (page 3) of the order to the customer affected.
 - f. Exemption. The California automatic exemption for direct deposit of social security and public benefit payments may not apply (however, the federal automatic exemption applies to all state orders and levies). Contact your legal counsel.
6. *FTB Order to Withhold.*
- a. General description. The California Franchise Tax Board (FTB) administers California’s personal income tax and corporation tax programs. An order to withhold is collection tool used by the FTB to collect delinquent taxes.
 - b. Service. May be served: (i) personally; (ii) by first class mail; (iii) electronically (magnetic media, electronic transmission or other electronic technology); and (iv) by fax.
 - c. Effect on office. To be effective, the notice shall state the amount due from the taxpayer and shall be delivered or mailed to the branch or office reported in information returns filed with the Franchise Tax Board, or the branch or office where the credits or other property is held, unless another branch or office is designated by the financial institution. If the FTB serves notice at the branch or office set forth in information returns or at a location designated by the financial institution, then the financial institution should hold property at all branches if it has knowledge of the property.
 - d. Notice of levying officer. The financial institution must remit a completed questionnaire to the FTB along with remitting the funds (remit after 10 business days).
 - e. Notice to customer. The financial institution should notify the affected customers on the business day which the order is received.
 - f. Exemption. The California automatic exemption for direct deposit of social security and public benefit payments does not apply (however, the federal automatic exemption applies to all state orders and levies).
7. *IRS Notice of Levy.*
- a. General description. The Internal Revenue Service is responsible for the collection and enforcement of taxes owed to the United States government. A notice of levy is a collection tool issued by the IRS to collect taxes owed.
 - b. Service. May be served by mail or by fax.

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- c. Effect on office. Service on any one branch or office is considered by the IRS to be service on all branches or offices.
- d. Notice of levying officer. The financial institution must provide a response on the reverse of Part 1 of the notice of levy and remit with the applicable interest and funds (which must be held for 21 calendar days after service of the levy).
- e. Notice to customer. The financial institution should notify the affected customers on the day the levy is received.
- f. Exemption. The California state automatic exemption for direct deposit of social security and public benefit payments does not apply. However, there may be federal law that provides various exemptions (which may not be automatic).

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