

U.S. Department of Justice

**Report to Congress on the Use of
Administrative Subpoena
Authorities by Executive Branch
Agencies and Entities**

Pursuant to Public Law 106-544



**U.S. Department of Justice
Office of Legal Policy**

**Report to Congress on the Use of Administrative Subpoena
Authorities by Executive Branch Agencies and Entities,
Pursuant to P.L. 106-544, Section 7**

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Report to Congress on the Use of Administrative Subpoena Authorities by Executive Branch Agencies and Entities, Pursuant to P.L. 106-544, Section 7

I. EXECUTIVE SUMMARY

Section 7(a) of the Presidential Threat Protection Act of 2000 (Presidential Threat Protection Act), enacted on December 19, 2000, requires the Attorney General, in consultation with the Secretary of the Treasury, to conduct "a study on the use of administrative subpoena power by executive branch agencies or entities" and report the findings of that study "to the Committees on the Judiciary of the Senate and the House of Representatives."¹ Section 7(b) of the Presidential Threat Protection Act requires the Attorney General and the Secretary of the Treasury to present data regarding the frequency of issuance of administrative subpoenas authorized by 18 U.S.C. §3486.

A. Summary of Report on Administrative Subpoena Authorities Held by Agencies under Authorities Other Than 18 U.S.C. §3486

As directed in section 7(a) of the Presidential Threat Protection Act, Section II of this report contains: "(1) a description of the sources of administrative subpoena power and scope of such subpoena power within executive agencies; (2) a description of applicable subpoena enforcement mechanisms; (3) a description of any notification provisions and any other provisions relating to safeguarding privacy interests; (4) a description of the standards governing the issuance of administrative subpoenas." Section IV presents the Attorney General's recommendations regarding "necessary steps to ensure that administrative subpoena power is used and enforced consistently and fairly by executive branch agencies." 5 U.S.C. §551 note, Pub.L. 106-544, § 7(a), Dec. 19, 2000, 114 Stat. 2719.

Definitions and Methodologies. For purposes of this report, "administrative subpoena" authority has been defined to include all powers, regardless of name, that Congress has granted to federal agencies to make an administrative or civil investigatory demand compelling document production or testimony. Civil compulsory process authorities with provision for judicial enforcement are included. Grand jury subpoenas, administrative law judge subpoenas, and investigative authorities requiring judicial approval are not within the scope of the report. Appendices A, B, and C of this report contain the full responses submitted by executive branch entities, as supplemented by legal research.

Findings. Congress grants the subpoena power held by executive branch entities, and the scope and exercise of these authorities are bound by statute. As the single most significant source of administrative subpoena power is granted by the Inspector General Act of 1978, the Inspector General subpoena authority is discussed in a separate, detailed Subsection II.B. The study reveals a complex proliferation of widely varying subpoena powers authorized by Congress. Submissions from executive branch entities and legal research identified approximately 335 existing administrative subpoena authorities held by various executive branch entities under current law.

Some of these subpoena authorities lack clear enforcement mechanisms. All federal executive branch administrative subpoenas are enforced by the courts. Statutes granting administrative subpoena authorities, however, generally fall into three enforcement-type categories: (1) statutes authorizing an agency official to apply directly to an appropriate U.S. district court for enforcement assistance, (2) statutes requiring an agency official to request the Attorney General's aid in applying to a U.S. district court for enforcement assistance, and (3) statutes containing no identified enforcement mechanism.

Agencies are limited in their exercise of administrative subpoena authority by: (1) judicial review of subpoena orders prior to potential judicial enforcement; (2) notice or nondisclosure requirements imposed in an agency's organic statutes; (3) privacy-protective constraints or notice requirements internal to the statute authorizing the subpoena power; (4) generally applicable privacy-protective statutes, prohibiting certain disclosures and requiring notice under certain circumstances; and (5) agency promulgated guidelines limiting or directing subpoena issuance.

Appendices A, B, and C of this report contain an individualized description of particular administrative subpoena authorities held by the various agencies. The appendices contain information related to: (1) sources of administrative subpoena authority and scope of such subpoena authority, (2) applicable subpoena enforcement mechanisms, (3) notification provisions and other provisions related to safeguarding privacy interests, and (4) standards governing issuance of administrative subpoenas. The report itself also briefly discusses each of these four topics. The information provided in the appendices is derived from submissions from individual agencies in response to a survey issued by the Office of Legal Policy of the Department of Justice as well as some independent legal research. Appendix A contains information related to authorities held by federal governmental entities other than the Departments of Justice or Treasury. Appendix B contains information related to authorities held by the Department of Justice. Appendix C contains information related to authorities held by the Department of Treasury. As most entries in the Appendices were submitted by individual agencies, commissions, and other governmental entities, they do not necessarily reflect the view or recommendation of the Attorney General or Secretary of the Treasury.

Recommendations. The Department of Justice notes that despite inconsistencies in the formulation of the many authorizing statutes, judicial involvement in enforcement ensures a good degree of fairness—especially where enforcement actions must be initiated and coordinated by the Department of Justice. As administrative subpoena authorities are created by separate statutes, which differ in their purpose and content, and no consistent patterns emerge from a study of these authorities, making any recommendations generally applicable to these various authorities would be neither prudent nor practical. As various agencies referred to suggestions regarding authority-specific changes, the Department of Justice looks forward to working with Congress and other agencies in the future to evaluate these potential changes.

B. Summary of Report on Justice Department and Treasury Subpoena Authorities Held Pursuant to 18 U.S.C. §3486

Section 7(b) of the Presidential Threat Protection Act requires the Attorney General and the Secretary of the Treasury to “report in January of each year to the Committee on the Judiciary of the Senate and the House of Representatives on the number of administrative subpoenas issued by them under [18 U.S.C. §3486] and the identity of the agency or component of the Department of Justice or the Department of Treasury issuing the subpoena and imposing the charges.”

U.S.C. §551 note, Pub.L. 106-544, § 7, 114 Stat. 2719 (2000). The reporting requirement of section 7(b) terminates in December of 2003, “3 years after the date of the enactment,” which occurred on December 19, 2000. Pub.L. 106-544, §7(b)(2), 114 Stat. 2719 (2000). Section III of this report contains a description of the authorities provided under 18 U.S.C. §3486(a), as well as data regarding the frequency of use during Calendar Year 2001. Frequency data for subpoenas issued under 18 U.S.C. §3486 is also included in tabular form in Table 1 *infra*.

II. ADMINISTRATIVE SUBPOENA AUTHORITIES HELD BY AGENCIES UNDER AUTHORITIES OTHER THAN 18 U.S.C. §348

A. General Subpoena Authorities Held by the Various Agencies

1. Description of the Sources of Administrative Subpoena Power and the Scope of Such Subpoena Authority.

As administrative agencies are established through statute, a statute must also authorize their issuance of administrative subpoenas.² Administrative subpoena authorities allow executive branch agencies to issue a compulsory request for documents or testimony without prior approval from a grand jury, court, or other judicial entity. Without sufficient investigatory powers, including some authority to issue administrative subpoena requests, federal governmental entities would be unable to fulfill their statutorily imposed responsibility to implement regulatory or fiscal policies.³ Congress has granted some form of administrative subpoena authority to most federal agencies, with many agencies holding several such authorities. The authority most commonly used, the authority provided to all Inspectors General, is discussed in detail in Subsection II.B *infra*. While the Inspector General authority is mainly used in criminal investigations, specific administrative subpoena authorities may be exercised in civil or criminal investigations. While federal authorizing statutes

generally grant subpoena authorities directly to a particular agency head, a few statutory authorities authorize the President to exercise a subpoena authority, and the President has generally delegated that authority to a specific agency head through Executive Order.⁴ Most administrative subpoena authorities have been redelegated by the entity head to subordinate officials within the entity. Some statutes granting administrative subpoena authorities, however, limit or forbid delegation of the authority to lower-ranking officials within the agency.⁵ In some instances, the decision to issue a subpoena is made unilaterally by an agency official;⁶ in other instances, the issuance of a subpoena requires the vote, approval, or resolution of multiple individuals.⁷

The Supreme Court has construed administrative subpoena authorities broadly⁸ and has consistently allowed expansion of the scope of administrative investigative authorities, including subpoena authorities, in recognition of the principle that overbearing limitation of these authorities would leave administrative entities unable to execute their respective statutory responsibilities.⁹ While an agency's exercise of administrative subpoena authority is not subject to prior judicial approval, a subpoena issuance is subject to judicial review upon a recipient's motion to modify or quash the subpoena or upon an agency's initiation of a judicial enforcement action.

Federal courts subject the exercise of administrative subpoena authority to a reasonableness analysis, not the more stringent Fourth Amendment "probable cause" analysis applied in situations involving search and seizure and issuance of a warrant. In *United States v. Powell*,¹⁰ the Court articulated the deferential standard for judicial review of administrative enforcement actions in a four-factor evaluation of "good faith" issuance, requiring that: (1) the investigation is conducted pursuant to a legitimate purpose, (2) the information requested under the subpoena is relevant to that purpose, (3) the agency does not already have the information it is seeking with the subpoena, and (4) the agency has followed the necessary administrative steps in issuing the subpoena.¹¹ The federal courts have construed the *Powell* factors broadly, allowing greater flexibility for government action.

While federal agencies are dependent upon the courts to enforce administrative subpoena requests, U.S. district courts must enforce an agency's subpoena authority unless the evidence sought by the subpoena is "plainly incompetent or irrelevant to any lawful purpose of the [requesting official] in the discharge" of his or her statutory duties.¹² The Supreme Court noted in *Oklahoma Press Publishing Company v. Walling*¹³ that "[t]he very purpose of the subpoena . . . is to discover and procure evidence, not to prove a pending charge or complaint, but upon which to make one if . . . the facts thus discovered should justify doing so."¹⁴ In other words, a federal court may not condition enforcement of an agency's subpoena upon a showing of probable cause because the agency may be using the very subpoena at question to make an initial determination as to whether such probable cause does, in fact, exist. The Supreme Court has stated in *United States v. Morton Salt*¹⁵ that, in evaluating the appropriateness of an administrative subpoena request, a court must simply determine that "the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant."¹⁶ The courts are generally deferential to the agency's determination that the information sought is "reasonably relevant," noting that a court must "defer to the agency's appraisal of relevancy in connection with an investigative subpoena as long as it is not 'obviously wrong.'"¹⁷

The Supreme Court has declined to establish universally applicable standards of reasonableness for evaluating the scope of administrative subpoena issuance, leaving room for lower courts to tailor their analysis to the unique circumstances of a particular investigation. The Court has provided some guidance, however, stating that lower courts should require at minimum that an agency's "specification of the documents to be produced [is] adequate, but not excessive, for the purposes of the relevant inquiry" and that the agency use "particularity in 'describing the place to be searched, and the persons or things to be seized.'"¹⁸

In addition to challenges based on the Fourth Amendment, the Supreme Court has recognized several potential grounds for challenge or modification of an administrative subpoena authority in certain instances. These grounds include, but are not limited to, the: (1) privilege against self incrimination, (2) free exercise of religion, (3) freedom of association, (4) attorney-client privilege.¹⁹

2. Description of Applicable Subpoena Enforcement Mechanisms.

Congress has consistently required that agencies and departments seek enforcement of administrative subpoenas through a federal district court. Federal courts have generally recognized that "[b]ifurcation of the power, on the one hand of the agency to issue subpoenas and on the other hand of the courts to enforce them, is an inherent protection against abuse of subpoena power."²⁰

Statutes granting administrative subpoena authorities generally fall into three enforcement-related categories: (1) statutes authorizing an agency official to apply directly to an appropriate U.S. district court for enforcement assistance,²¹ (2) statutes requiring an agency official to request the Attorney General's aid in applying to a U.S. district court for enforcement assistance,²² and (3) statutes containing no stated enforcement mechanism.²³ Where an agency requests the assistance of the Attorney General through a United States Attorney's office to seek enforcement of an administrative subpoena in federal district court, the United States Attorney's office plays a role that is more than ministerial, exercising discretion in determining whether to seek enforcement by a court. In evaluating such requests, the United States Attorney's office evaluates the subpoena issued by the agency to determine whether the scope of the request is in keeping with the agency's statutory authority and the agency has followed proper procedures in issuing the subpoena.²⁴ In short, the United States Attorney's office evaluates the subpoena request to determine whether the requirements of *Powell* and *Oklahoma Press* (good faith and reasonableness) have been satisfied.

When a federal court acts in regard to an agency's enforcement petition, whether presented by the agency directly or through a United States Attorney, "the district court's role is not that of a mere rubber stamp, but of an independent reviewing authority called upon to insure the integrity of the proceeding."²⁵ Federal courts have noted that "[t]he system of judicial enforcement is designed to provide a

meaningful day in court for one resisting an administrative subpoena,²⁶ and that “the court has the power to condition enforcement upon observance of safeguards to the respondent's valid interests.”²⁷ The burden of proof imposed on a challenger to an administrative subpoena is steep, however. A challenge based on an agency's failure to satisfy one of the four factors establishing “good faith” under *Powell*,²⁸ for instance, will only be successful upon a showing of “institutionalized bad faith,” not mere bad faith on the part of a particular individual issuing the subpoena.²⁹ A district court's order requiring compliance with an administrative subpoena or refusing to quash a subpoena request is immediately appealable, however, as such an order is generally treated as a final judgment under 28 U.S.C. §1291.³⁰

Most statutes authorizing administrative subpoena enforcement in federal district court authorize the court to impose contempt sanctions upon a recipient who continues to refuse to comply even after a court order of compliance. Certain statutes authorizing enforcement by a federal district court also provide for specific penalty ranges or limitations for findings of criminal or civil contempt of court based on noncompliance with a court order to comply with an administrative subpoena request. In some instances, these penalties are particularly stringent.³¹ Statutes prescribing specific penalties for noncompliance with an administrative subpoena and subsequent court order occasionally provide more severe penalties for “willful contempt,” as compared to mere “contempt.”³² Other statutes authorizing district court enforcement action, either at the request of the agency itself or through petition of the Attorney General, contain no specific contempt penalty provisions.³³ Under such statutes, the U.S. district courts are free to apply penalties for civil and criminal contempt otherwise available at law where a party refuses to comply with a court's order that the party submit to an agency's subpoena request.³⁴ In still other instances, it is unclear whether a particular statutory subpoena authority is accompanied by a particular statutory penalty or penalty limitation to be imposed for contempt based on failure to comply with a court's order for compliance. The Department of Interior, for instance, holds a specific subpoena authority under Section 1724 of the Royalty Simplification and Fairness Act (RSFA) but has not yet had occasion to litigate the question as to whether a civil penalty prescribed for a violation of the Federal Oil and Gas Management Act (FOGRMA), a statute amended by the RSFA, is also applicable as a penalty for contempt of court in failing to comply with the court's order to submit to an RSFA subpoena.³⁵

Proceedings in U.S. district court brought to compel compliance with an administrative subpoena are summary proceedings. In general, the agency issuing a subpoena requests the court's assistance in enforcing the agency's previous subpoena order, or requests the Attorney General's intervention in petitioning the appropriate district court for enforcement assistance.³⁶ The district court generally issues an order to the subpoena recipient to show cause for nonenforcement of the subpoena. If the recipient does not present sufficient reason that the subpoena should not be enforced, including a showing of noncompliance with the *Powell* “good faith” factors, “abuse of the court's process,” or the “unreasonableness” of the agency's request, the court will issue an order of compliance. While a subpoena recipient may be entitled to some opportunity for discovery and an evidentiary hearing prior to judicial enforcement of an administrative subpoena, this entitlement is not absolute³⁷ and is dependent upon the recipient's presentation of a certain “threshold showing” of facts supporting the need for such hearing.³⁸ The level of this threshold showing varies among the federal courts.³⁹ Should a hearing be provided, the subpoena recipient may present a successful challenge by showing by a preponderance of the evidence that the administrative agency did not act in “good faith” in issuing the subpoena, was otherwise unreasonable in its subpoena request, or “abused the processes of the court” in seeking enforcement.⁴⁰

While the federal courts have generally been somewhat deferential to federal agencies in enforcing administrative subpoenas, case law notes that the courts do not merely “rubber stamp” an agency's use of subpoena authority.⁴¹ Several courts have noted that “[t]he system of judicial enforcement is designed to provide a meaningful day in court for one resisting an administrative subpoena,”⁴² and that “[i]n the discharge of that duty, the court has the power to condition enforcement upon observance of safeguards to the respondent's valid interests.”⁴³ As the Supreme Court noted in 1946 in *Oklahoma Press Publishing Company v. Walling*, however, the responsibility of the federal courts in administrative subpoena enforcement proceedings is to remain “fully alive to the dual necessity of safeguarding adequately the public and the private interest” involved in such situations.⁴⁴ Therefore, the lower federal courts have been instructed to balance the public's interest in law enforcement, order, and basic fairness with the personal or corporate interest in absolute privacy.⁴⁵

As federal agencies are not currently authorized under statute to enforce administrative subpoena compliance directly, certain agencies have recognized that they are capable of taking action separate and apart from a U.S. district court's enforcement action in an indirect effort to encourage compliance. The Federal Maritime Commission, for instance, states that, in addition to requesting the Attorney General's assistance in seeking judicial enforcement, the Commission may: (1) suspend a common carrier's tariff or use of a tariff for failure to supply information, 46 App. U.S.C. §1712(b)(2), (2) impose a penalty of up to \$50,000 per shipment for carriers subsequently operating under a suspended tariff, 46 App. U.S.C. §1712(b)(3), and (3) request that the Secretary of the Treasury refuse clearance to carriers in noncompliance with a subpoena request, 46 App. U.S.C. §1712(b)(4). Shipping Act of 1984, 46 U.S.C. §13(b)(2)-(4).⁴⁶

3. Description of Any Notification Provisions and Any Other Provisions Relating to Safeguarding Privacy Interests.

The privacy interests of administrative subpoena recipients are protected to some degree by the maintenance of enforcement authority in the judiciary and the statutory ability of recipients to motion a court to quash or modify a subpoena request.⁴⁷ See discussion of judicial review in enforcement proceedings in subsection II.A.3.a *infra* and section II.A.2 *supra*. In addition, agencies and departments are limited in exercising their administrative subpoena authorities by (1) nondisclosure requirements imposed in an agency's organic statutes, (2) privacy-protective constraints internal to the statute authorizing the subpoena power, (3) generally applicable privacy-protective statutes, and (4) agency-promulgated guidelines limiting or directing subpoena issuance. See discussion of various

statutory/regulatory privacy-protective provisions in subsection II.A.3.b *infra*. Subsection II.A.3.c *infra* discusses privacy-protective guidelines and directives established internally in agencies holding administrative subpoena authorities.

a. Privacy-protective impact of maintaining administrative subpoena enforcement authority in judiciary.

While the privacy interests of an individual or entity are protected by maintaining administrative subpoena enforcement authority in the federal courts, the courts have consistently held that the issuance of an administrative subpoena without a showing of probable cause does not violate the Fourth Amendment.⁴⁸ The federal courts have recognized that a showing of probable cause is unnecessary in issuing and enforcing an administrative subpoena as the exercise of such authority is significantly less intrusive than a search and seizure carried out under a warrant.⁴⁹ After all, statutes authorizing administrative subpoenas are generally enforceable through judicial process,⁵⁰ and the subject of the subpoena is not subject to the possible physical invasion that a search and seizure may impose. In addition, as the Supreme Court has recognized, the issuance of an administrative subpoena may not be subjected to a probable cause requirement as the administrative subpoena is often issued for the very purpose of determining whether such probable cause exists.⁵¹

In place of a probable cause requirement, the federal courts in enforcement proceedings have imposed basic requirements as to the scope, necessity, and authority to issue an administrative subpoena in addition to evaluating the reasonableness of an administrative subpoena request. A recipient of an administrative subpoena may challenge the issuance or enforcement of an administrative subpoena in court by presenting sufficient evidence that the agency has not acted in accordance with the basic standards of reasonableness as articulated in *Oklahoma Press Publishing Co. v. Walling*,⁵² has not issued an administrative subpoena in “good faith” demonstrated by a failure to satisfy factors articulated in *United States v. Powell*,⁵³ or has abused the judicial process in petitioning a court for enforcement.⁵⁴ While a judicial challenge on these grounds is only available to the subpoena recipient either (1) through a petition to quash a subpoena or (2) in the course of challenging an administrative subpoena enforcement order, an agency must consider the strictures of each of these possible grounds for nonenforcement before issuing an administrative subpoena. While the courts are deferential in evaluating an agency’s issuance of an administrative subpoena, a court does not merely “rubber stamp” an agency’s exercise of issuance authority.

In *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (1946), the Supreme Court discussed the necessity of balancing the importance of the public interest in the information being requested with the importance of the interest in personal or organizational privacy. See 327 U.S. 186, 202 (1946). The Court noted in *Oklahoma Press* that a court should evaluate a challenge to an administrative subpoena by considering whether: (1) the investigation is for a lawfully authorized purpose, (2) the subpoena authority at issue is within the power of Congress to command, and (3) the “documents sought are relevant to the inquiry.”⁵⁵ The Court also noted that an administrative subpoena request must be “reasonable” in nature. The Court declined to strictly define the applicable reasonableness inquiry, however, stating that the inquiry in such situations cannot be “reduced to formula; for relevancy, adequacy or excess in the breadth of subpoena are matters variable in relation to the nature, purposes, and scope of the inquiry.”⁵⁶ The Court noted that reasonableness requires, in summary, “specification of the documents to be produced adequate, but not excessive, for the purposes of the relevant inquiry,” including “particularity in ‘describing the place to be searched, and the persons or things to be seized.’”⁵⁷

b. Statutorily imposed privacy limitations or notice provisions.

(i) Nondisclosure requirements imposed in an agency’s organic statutes.

The organic statutes of certain agencies contain internal provisions restricting the disclosure of particular information regularly accessed by the agency. The Federal Trade Commission Act, for instance, contains strict nondisclosure requirements, protecting confidential financial or commercial information.⁵⁸ A full description of the privacy-related provisions contained in the organic statutes of the federal agencies is beyond the scope of this report.

(ii) Internal statutory constraints in the subpoena-authorizing statute.

Certain of the statutes authorizing exercise of administrative subpoena authority contain internal privacy limitations.⁵⁹ Other authorizing statutes contain internal notification requirements.⁶⁰ Many of these internal statutory constraints are referenced in the attached Appendices. A full description of each of these internal statutory constraints is beyond the scope of this report.

(iii) Generally applicable privacy or notice statutes.

Many privacy-protective statutory schemes have been enacted to protect specific categories of information, personal or organizational. These statutes are applicable, in certain circumstances, to information collected in response to administrative subpoena authorities. Subsections II.A.3.b.(aa) through II.A.3.b.(ll) *infra* provide a brief description of several of these privacy-protective provisions and their potential relation to administrative subpoena requests.

(aa) Privacy Act, 5 U.S.C. §552a.

The Privacy Act regulates to some degree the sharing of information among federal agencies and the disclosure of information to third parties. See 5 U.S.C. § 552a. The Act was intended, among other things, to safeguard an individual’s privacy by preventing the misuse of federal records.

Subject to some exceptions, including an exception for records released as part of an authorized civil or criminal law enforcement investigation, federal agencies are required to obtain an individual’s consent before releasing protected records to another federal agency

or other third party.⁶¹ 5 U.S.C. §552a(b). Records protected by the Act include, but are not limited to, those containing specific reference to an individual's "education, financial transactions, medical history, and criminal or employment history" and that contain the individual's "name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph." 5 U.S.C. §552a(a)(4).

Agencies may share information protected by the Act if they do so through a "routine use," an information sharing relationship disclosed through advance notice in the Federal Register and to Congress and the Office of Management and Budget (OMB). By requiring the agencies to provide Congress and OMB with advance notice of such information sharing, Congress and OMB are able to evaluate "the probable or potential effect of such proposal[s] on the privacy or other rights of individuals." 5 U.S.C. section 552a(r).

(bb) Freedom of Information Act, 5 U.S.C. §552.

The Freedom of Information Act (FOIA) generally requires the disclosure of certain government information to the public at the request of an individual or entity. FOIA, however, contains a number of exceptions, allowing governmental entities to withhold information obtained in response to an administrative subpoena under certain circumstances. Particular types of information exempted from FOIA's general disclosure requirements include, but are not limited to: (1) "trade secrets and commercial or financial information obtained from a person and privileged or confidential," (2) "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;" and, (3) to a certain extent, "records or information compiled for law enforcement purposes."⁶² In addition, agency regulations sometimes contain provisions allowing parties to petition for confidential treatment of information provided at the request of an agency in carrying out its statutory responsibilities.⁶³

(cc) Right to Financial Privacy Act (RFPA), 12 U.S.C. §3401 *et seq.* (customer financial records)

The legislative history of the Right to Financial Privacy Act (RFPA) denotes that it was intended to balance the privacy interests of customers of financial institutions with the public's interest in effective and legitimate law enforcement investigations.⁶⁴ 12 U.S.C. §3402. RFPA limits both the access/disclosure and the interagency transfer of a customer's personal financial information.

RFPA prohibits any agency or department from obtaining (or any private "financial institution" as defined in 12 U.S.C. § 3401(1) from disclosing) the financial records of a financial institution's "customer" as defined in 12 U.S.C. § 3401(5) without prior customer consent, except where access is authorized by one of the express exceptions to the Act or is accomplished through one of the five access mechanisms mandated by the Act, including "administrative subpoena or summons." See 12 U.S.C. § 3412 (regarding restrictions on interagency transfer of protected information). Under 12 U.S.C. §3405, a government authority may obtain financial records protected by RFPA pursuant to an administrative subpoena only if: (1) there is reason to believe that the records sought are relevant to a legitimate law enforcement inquiry and (2) a copy of the subpoena or summons has been served upon the customer or mailed to his last known address on or before the date on which the subpoena or summons was served on the financial institution together with a notice stating with reasonable specificity the nature of the law enforcement inquiry. See 12 U.S.C. §3405. The statute provides specific language for the agency to use in the notice it provides to the customer.⁶⁵ A financial institution is forbidden under RFPA from releasing the financial records of a customer "until the Government authority seeking such records certifies in writing to the financial institution that it has complied with the applicable provisions" of the Act, including the notice provision. 12 U.S.C. § 3403(b). Pursuant to 12 U.S.C. §3409, however, a governmental entity may under certain enumerated circumstances seek a court order allowing delayed notification to the customer.⁶⁶

Federal agencies may be subject to civil penalties for violation of RFPA requirements,⁶⁷ and federal agents or employees are subject to disciplinary action for willful or intentional violation of the Act,⁶⁸ thus providing incentive to protect the privacy of consumer financial records requested by an agency under its subpoena authority.⁶⁹

The customer receiving notice of an administrative subpoena request has ten days after the receipt of that notice, or fourteen days after the notice was mailed to the consumer, to provide consent or to challenge the government access to their records in U.S. district court. 12 U.S.C. §3410(a). In bringing an RFPA challenge to a subpoena, however, the customer bears the initial burden of proof.⁷⁰ In order for a customer to challenge a subpoena, he or she may make a procedural argument that the proper notice was not provided as required by the act or a substantive argument that either the information sought by the agency was not "reasonably described"⁷¹ or the agency did not have "reason to believe that the records sought are relevant to a legitimate law enforcement inquiry."⁷² Lower federal courts have generally accorded agencies wide latitude in imposing administrative subpoenas, however, and the two bases for substantive challenge under RFPA rarely prove fruitful for challengers in court.⁷³ Administrative subpoenas issued in relation to inquiries not related to law enforcement inquiries are subject to the general requirement of RFPA that customer consent must be gained prior to receipt/disclosure of the subpoenaed information protected by the Act.

(dd) Trade Secrets Act, 18 U.S.C. §1905

While 18 U.S.C. §1905, a provision of the Trade Secrets Act, does not place restrictions on information requests, it is intended to prevent a federal employee from publicly divulging particular information derived from "examination or investigation." The provision states in full that:

Whoever, being an officer or employee of the United States or of any department or agency thereof, any person acting on behalf of the Office of Federal Housing Enterprise Oversight, or agent of the Department of Justice as defined in the Antitrust Civil Process

Act (15 U.S.C. 1311-1314), publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be fined under this title, or imprisoned not more than one year, or both; and shall be removed from office or employment.

Id.

The language of the statute clearly requires federal employees to protect certain personal and business information obtained under an issued administrative subpoena from public disclosure, and the consequences for a statutory violation—including fine, imprisonment, or both—are stringent. *Id.*

(ee) Limitations in Regard to Substance Abuse and Mental Health Information— 42 U.S.C. §290dd-2, regulations at 42 C.F.R. Part 2

The disclosure of medical records of substance abuse patients obtained through administrative subpoena compliance is strictly limited by operation of 42 U.S.C. §290dd-2, which prohibits the disclosure of such medical records unless disclosure is specifically permitted by the statute, or by the implementing regulations, which may be found at 42 C.F.R. Part 2. Section 290dd-2 of Title 42 of the United States Code requires that “records of the identity, diagnosis, prognosis, or treatment of any patient which are maintained in connection with the performance of any program or activity relating to substance abuse education, prevention, training, treatment, rehabilitation, or research, which is conducted, regulated, or directly or indirectly assisted by any department or agency of the United States shall . . . be confidential and be disclosed only for the purposes and under the circumstances expressly authorized” by the statute. The statute authorizes disclosure in a limited number of circumstances. Prohibitions on disclosure under the statute continue to apply to a patient’s records, regardless of “whether or when the individual ceases to be a patient. 42 U.S.C. §290dd-2(d).

An agency or department may disclose such information with the consent of the person who is the subject of the records. 42 U.S.C. §290dd-2(b)(1). Even with patient consent, however, the information may only be disclosed to (1) medical personnel to meet a “bona fide medical emergency,” (2) “qualified personnel for the purpose of conducting scientific research, management audits, financial audits, or program evaluation, but such personnel may not identify, directly or indirectly, any individual patient in any report of such research, audit, or evaluation, or otherwise disclose patient identities in any manner,” or (3) “if authorized by an appropriate order of a court of competent jurisdiction granted after application showing good cause therefor, including the need to avert a substantial risk of death or serious bodily harm.”⁷⁴ The information disclosed under the statute may not be used to initiate or substantiate criminal charges against a patient or to conduct any investigation of the patient. In criminal investigations, a special court order must be obtained before the holder of the substance abuse patient medical records may produce such records, even in response to compulsory process, whether a search warrant, grand jury subpoena, or a health care fraud administrative subpoena.

A person violating these provisions is subject to fine under Title 18 of the United States Code. *See* 42 U.S.C. §290dd-2(f). The Secretary of Health and Human Services has promulgated extensive regulations related to 42 U.S.C. §290dd-2 at 42 C.F.R. Part 2.

(ff) HHS Medical Privacy Regulations authorized under the Health Insurance Portability and Accountability Act (HIPAA)

The Health Insurance Accountability and Portability Act (1996) required Congress to enact privacy standards in relation to patients’ health information by August 21, 1999. 42 U.S.C. §1320d-2 note (2000), Pub. L. 104-191, §264(a)-(b), 110 Stat. 2033. HIPAA also authorized the Secretary of Health and Human Services to promulgate rules if Congress failed to meet its statutory deadline. 42 U.S.C. §1320d-2 note (2000), Pub. L. 104-191, §§264. As Congress failed to meet its statutory deadline, the Secretary of Health and Human Services (HHS) promulgated a regulation, which is scheduled to take effect on April 14, 2003.⁷⁵

Under this regulation, no disclosure of patient health information may be made by health care providers or other covered entities or their associates unless the patient authorizes it, the disclosure is required by law, or the disclosure is specifically permitted by the rule. A disclosure is considered “required by law” when the disclosure “complies with and is limited to the relevant requirements of such law.”⁷⁶ This broad provision is limited by the caveat in §164.512(a)(2) that “[a] covered entity must meet the requirements described in paragraph (c), (e), or (f) of this section for uses or disclosures required by law.” The requirements imposed in those sections relate to disclosures arising from adult abuse and neglect or domestic violence (§164.512(c)), disclosures in judicial or administrative proceedings (§164.512(e)), or disclosures for law enforcement purposes (§164.512(f)).

To qualify as a disclosure for law enforcement purposes, the subject of the protected health information must be the target or subject of the investigation and the activity or investigation may *not* relate to: (a) the receipt of health care; (b) a claim for public benefits related to health; or (c) qualification for or receipt of public benefits or services where the subject’s health is integral to the claim for benefits or services.⁷⁷ In such cases, a covered entity may disclose protected health information to law enforcement pursuant to an administrative request only when the material sought is (1) relevant and material to a law enforcement inquiry, (2) the request is limited in scope in light of the purpose for which it is sought, and (3) de-identified information could not be used by law enforcement for the same purpose.⁷⁸ However, law enforcement may still acquire records from covered entities without meeting these three requirements through the use of a court order, a subpoena issued by a judicial officer, or a grand jury subpoena.⁷⁹

The regulation recognizes that there may be occasions when law enforcement organizations perform health oversight activities, thereby increasing the need for access to protected health information. Examples of this are occasions when the Department of Justice, Federal Bureau of Investigations, or the Department of Health and Human Services, Office of Inspector General, investigate allegations of fraud against the Medicare program or other government and private health care plans.⁸⁰ These oversight activities, which are granted much broader access to protected health information under the regulation, include audits, investigations, inspections, civil, criminal, or administrative proceedings or actions, and other activities necessary for oversight of: the nation's health care system; government benefit programs for which health information is relevant to beneficiary eligibility; government regulatory programs for which health information is necessary for determining compliance with program standards; and entities subject to civil rights laws for which health information is necessary for determining compliance.⁸¹ In such oversight activities, the covered entity is permitted to make a disclosure to an authorized oversight agency without the patient's consent.

Entities subject to the requirements of the final rule include: (1) health care providers, (2) health plans, (3) health clearinghouses⁸² and (4) business associates of these entities who assist with their performance, including lawyers and consultants.⁸³

(gg) Electronic Communications Privacy Act (ECPA), 18 U.S.C. §2701 *et seq.* (stored electronic communications and customer records)

The provisions of the Electronic Communications Privacy Act (ECPA) limit the disclosure of certain "wire or electronic communications" pertaining to a subscriber to or customers of a "provider of electronic communication service or remote computing service." 18 U.S.C. §2703. The Act limits a service provider's ability to disclose the contents of electronic communications that have been in electronic storage for less than 180 days or in a remote computing service, unless sought under a valid warrant. *Id.* Communications that have been in electronic storage for more than 180 days or in a remote computing service, however, may be released to a governmental entity when the entity seeks the communications under a valid warrant without prior notice to the customer or subscriber or with prior notice to the customer of subscriber by use of "an administrative subpoena authorized by a Federal or State statute." *Id.*

Section 2703 of the ECPA requires that a governmental agency give prior notice to the service's subscriber or customer if the agency issues a subpoena seeking disclosure of communications covered by the Act. Section 2705 allows the agency or governmental entity to delay notification of a subpoena to the subscriber/customer in some circumstances for ninety days upon written certification by a supervisory official that timely notice may have an "adverse result." Under the language of the statute, such "adverse result[s]" may include: "(a) endangering the life or physical safety of an individual, (b) flight from prosecution, (c) destruction of or tampering with evidence, (d) intimidation of potential witnesses; or (e) otherwise seriously jeopardizing an investigation or unduly delaying a trial." 18 U.S.C. §2705. In addition, the ECPA authorizes an agency to seek a court order prohibiting an electronic service provider from notifying a user of the existence or compliance with an administrative subpoena. A court is required to issue such an order "for such period as the court deems appropriate" if there is reason to believe that notification will cause any of the five "adverse results" listed above. 18 U.S.C. §2705(b).

(hh) Fair Credit Reporting Act (FCRA), 15 U.S.C. §1681 *et seq.* (consumer reports).

The Fair Credit Reporting Act generally limits permissible disclosures of consumer reports by consumer reporting agencies. While consumer reporting agencies are authorized to disclose consumer reports in response to grand jury subpoena requests or court order, consumer reporting agencies may not disclose such reports in response to administrative subpoena requests. Consumer reporting agencies are, however, authorized to disclose such information to the Federal Bureau of Investigation or other governmental agencies for counterterrorism purposes when "presented with a written certification by such government agency that such information is necessary for the agency's conduct or such investigation, activity or analysis." 15 U.S.C. §1681u. A consumer reporting agency may only "disclose the name, address, former addresses, places of employment, or former places of employment, to the Federal Bureau of Investigation when presented with a written request, signed by the Director or the Director's designee in a position not lower than Deputy." 15 U.S.C. §1681u(b). The Director, or the Director's designee, may only certify such a request of he or she has "determined in writing that such information is sought for the conduct of an authorized investigation to protect against international terrorism or clandestine intelligence activities, provided that such an investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution of the United States." 15 U.S.C. §1681u(b). Consumer reporting agencies and their agents are prohibited from disclosing to third parties any information that would alert them to the fact that the FBI had requested such information. 15 U.S.C. §1681u(d).

(ii) Protection of Cable Subscriber Privacy, 47 U.S.C. §551.

The Cable Act requires prior subscriber consent for any disclosure of personally identifiable information from a cable provider except in the instance of a court order for production of the information. Exercise of administrative subpoena authority is not sufficient to justify the release of certain personally-identifiable information from a cable provider, including the "(i) extent of any viewing or other use by the subscriber of a cable service or other service provided by the cable operator, or (ii) the nature of any transaction made by the subscriber over the cable system of the cable operator." 47 U.S.C. §551(c)(2)(C)(i)-(ii).

(jj) 26 U.S.C. §6103 (tax return information).

Disclosure of tax return information accessed through administrative subpoenas is limited by 26 U.S.C. §6103. Section 6103(b)(2) defines tax return information to include, among other things, a "taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments." Section 6103(p)(4) requires an agency receiving tax return information to establish and maintain adequate procedures to safeguard the confidentiality of information disclosed. Disclosing non-taxpayer information in a manner prohibited by 26 U.S.C. §6103 is currently a felony, punishable by five years imprisonment, a fine of five thousand dollars, and dismissal from employment. 26 U.S.C. 7213.

(kk) Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. §1232g(b)(2)(B).

FERPA generally prohibits the dispersal of federal funds to student educational agencies or institutions that have a policy or practice of permitting the release of a student's educational records or personally identifiable information contained therein to any individual, agency or organization without the written consent of the student's parents. 20 U.S.C. §1232g(b)(1). Entities responding to subpoena requests, however, are exempt from the general prohibition. 20 U.S.C. §1232g(b)(1)(J)(ii). The agency issuing the subpoena may, upon showing good cause, order the disclosing educational entity not to disclose the "the existence or contents of the subpoena" or "any information furnished in response to the subpoena" to the student or her parents. Where "good cause" is not shown, entities disclosing information in response to a subpoena are required to give notice of the subpoena to parents and the student prior to the compliance date. 20 U.S.C. §1232g(b)(2)(B). Government agencies accessing "records which may be necessary in connection with the audit and evaluation of Federally-supported education programs, or in connection with the enforcement of the Federal legal requirements which relate to such programs" are required to protect the information "in a manner which will not permit the personal identification of students and their parents by other than those officials, and such personally identifiable data shall be destroyed when no longer needed for such audit, evaluation, and enforcement of Federal legal requirements." 20 U.S.C. §1232g(b)(3). In addition, 20 U.S.C. §1232g(b)(2)(B) and (4)(B) require that the information submitted in response to a subpoena request be transferred to third parties only upon the condition that the third party will not permit access to any other party without the consent of the parents or the student.

Federal courts have held that FERPA does not provide a private right of action against an entity seeking educational records, however, as the statute only authorizes the Secretary of Education or an administrative head of an education agency to take appropriate actions to enforce the provisions of FERPA.⁸⁴ 20 U.S.C. §1232g(f). In addition, at least one federal court has held that FERPA prohibits the disclosure but not the act of accessing such records.⁸⁵

(ll) Wrongful Disclosure of Video Tape Rental or Sale Records, 18 U.S.C. §2710

Video tape service providers are prohibited from disclosing "personally identifiable information," except in certain circumstances including the issuance of a law enforcement warrant, grand jury subpoena, or court order. 18 U.S.C. §2710(b)(2)(C). Permissible disclosure in other circumstances, including, presumably, in response to an administrative subpoena request, is limited to include only the names and addresses of subscribers. Disclosure of such names and addresses may only be provided if: "(i) the video tape service provider has provided the consumer with the opportunity, in a clear and conspicuous manner, to prohibit such disclosure; and (ii) the disclosure does not identify the title, description, or subject matter of any video tapes or other audio visual material. . . ." 18 U.S.C. §2710(b)(2)(D).

c. Intra-agency Regulations, Guidelines, and Directives

See Appendices A, B, and C for references to intra-agency regulations, guidelines and directives related to administrative subpoena issuance. Brief descriptions of such regulations and guidelines are included in the appendices where provided by the agency holding the subpoena authority.

4. Description of the Standards Governing the Issuance of Administrative Subpoenas

In addition to being governed by statutory issuance standards, agencies issuing administrative subpoenas are also governed by internal agency regulations and guidelines. Most agencies holding statutory administrative subpoena authorities have a structured system of issuance in place, requiring pre-approval from various agency officials as to the legality of issuance based on scope, necessity, and other considerations.⁸⁶ See Appendices A, B, and C (column entitled "standards governing the issuance of administrative subpoena authorities") for further description of internal agency standards governing the issuance of administrative subpoenas under specific authorities.

B. Administrative Subpoena Authority Held By Inspectors General of the Various Agencies

On October 12, 1978, Congress enacted the Inspector General Act (IGA), 5 U.S.C.App. 3, creating an Office of Inspector General (OIG) within several federal agencies. The Inspector General Act has since been amended multiple times to create an Office of Inspector General within most federal agencies and other entities. The Offices of Inspector General are authorized to conduct audits and investigations "to conduct and supervise audits and investigate relative to the programs and operations of the establishments listed in section 11(2)."⁸⁷ Inspectors General are authorized not only to conduct investigations within their respective agencies but also to investigate situations of potential fraud involving recipients of federal funding. Inspectors General are intended to function independent of the agency head. They are appointed by the President, subject to the advice and consent of the Senate, and removable only by the President.⁸⁸ The Inspector General Act requires that Inspectors General be appointed "without regard to political affiliation and solely