

How to Respond to a Subpoena Duces Tecum

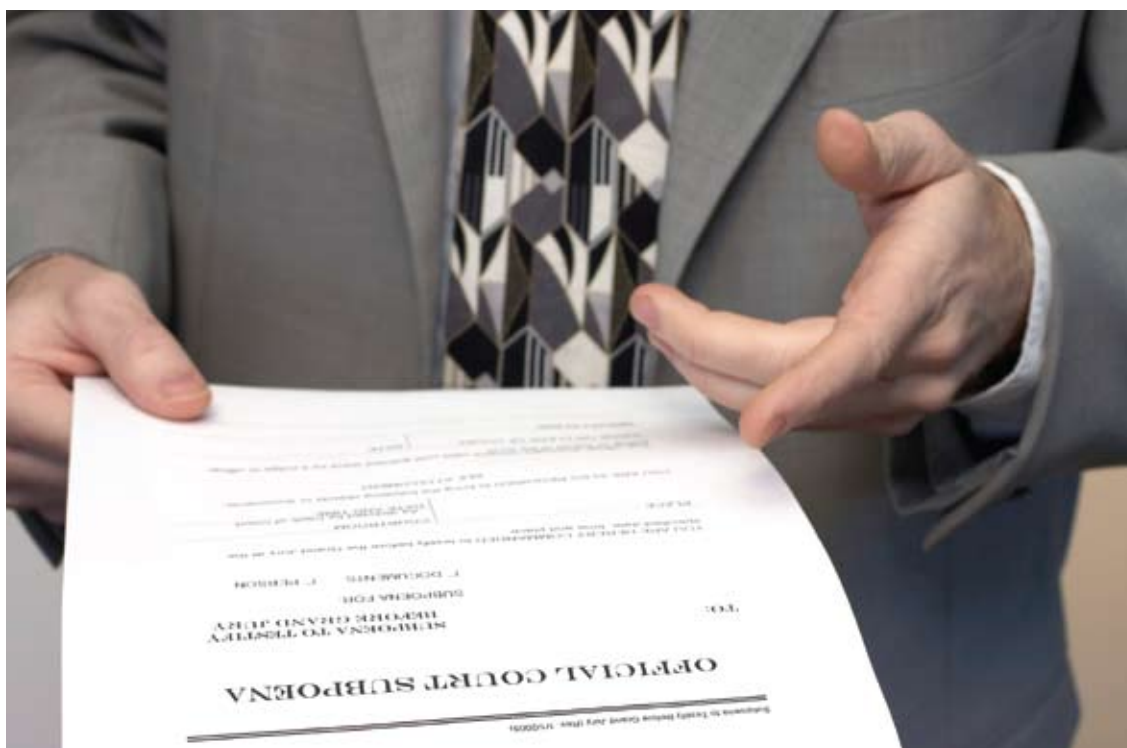
As a result of the current economic downturn, banks across the state are experiencing an increase in the service of subpoenas duces tecum, which are subpoenas for the bank's customer records. Determining how to respond to the subpoena while ensuring compliance with federal law can be a struggle.

Several federal laws exist to protect the privacy and rights of consumers. In certain circumstances, they may prevent a bank from disclosing consumer information. For example, the Fair Credit Reporting Act (FCRA), the Right to Financial Privacy Act (RFPA) and the Gramm-Leach-Bliley Act (GLBA) each limit the ability of a bank to disclose financial information. A bank must carefully consider its accountability to the courts pursuant to a subpoena and its legal responsibility to abide by consumer protection laws.

Typically, a bank may receive a subpoena duces tecum from four general parties: 1) a federal grand jury; 2) a third party to a federal suit; 3) a state grand jury; or 4) a third party to a state suit. The bank's response will vary depending

on the party issuing the subpoena and those involved in the suit; however, it will usually fit into one of three main categories. First, the bank may be required to comply with the subpoena. Secondly, it may choose to comply in order to accommodate the court. Finally, the bank may refuse to comply. Whether a particular choice is appropriate depends on the circumstances.

Ordinarily, if compliance with a subpoena duces tecum would be unreasonable or oppressive, a bank may have grounds for moving to quash or modify the subpoena. A subpoena duces tecum is considered unreasonable if the party demanding production has only a subjective belief that the subpoenaed material will lead to admissible evidence. A subpoena duces tecum is also considered unreasonable or oppressive if production of the documents is practically impossible or if it would cause the bank to violate consumer protection legislation. Moreover, a bank may be entitled to modify the subpoena by requiring, for example, the cost of production to be borne by the requesting party.



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Federal Grand Jury Subpoenas

Federal grand juries have broad investigatory powers and are entitled to issue a subpoena duces tecum without probable cause. As a general rule, compliance with a federal grand jury subpoena duces tecum is compulsory. In fact, a bank's compliance with a federal grand jury subpoena is in many cases a well-recognized exception to consumer protection legislation. A bank should turn over copies of the requested records unless grounds exist for filing a motion to quash or modify the subpoena. Additionally, if ordered by the court, a bank cannot report the disclosure to the customer.

Federal Third Party Subpoenas

A federal third party subpoena may be issued in either a criminal or civil context. When a federal criminal third party subpoena is issued, a specific offense has been identified and a particular defendant has been charged. The purpose of the subpoena duces tecum in a criminal case is to expedite the trial by providing a time and place for inspection of subpoenaed materials. In order to require production prior to trial, it has been held that the party requesting the production must show: (1) that the documents are evidentiary and relevant; (2) that they are not otherwise reasonably procurable in advance of trial by exercise of due diligence; (3) that the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial; and (4) that the application is made in good faith and is not intended as a general fishing expedition.

Compliance with a federal criminal third party subpoena may result in a violation of the FCRA, the RFPA and the GLBA. Consequently, a bank should generally file a motion to quash the subpoena on the grounds that it requires the bank to violate federal legislation or ask the court to enter an order requiring the bank to comply before it produces documents. There are additional requirements under the RFPA and a bank should check with counsel to ensure its compliance prior to producing documents subject to a subpoena duces tecum.

When dealing with a federal civil third party subpoena duces tecum, the bank is not required to appear, but is only required to produce the requested documents at the place of production or inspection. Generally, a bank should comply with this type of subpoena unless it could be considered unreasonable, oppressive, annoying or embarrassing, or if it asks for privileged records. As with every subpoena, a bank should limit its response to only the documents specified.

Nevertheless, certain documents produced pursuant to a federal civil third party subpoena may be protected by federal law. For example, the FCRA only permits disclosure of credit reporting information to a third party in response to an order of the court having jurisdiction to issue such an order. A subpoena duces tecum issued by an attorney or a

Did you know?

Reviewing "developer rights" provisions in deed restrictions that affect real property securing residential development loans should be an important part of the loan underwriting and loan documentation process.

The recent economic difficulties have caused many residential developers to go out of business. In such cases, the lender may be left to deal with an abandoned project in midstream. However, deed restrictions and master deeds were often written by the developer's lawyer without this possibility being squarely addressed and without provisions that protect the lender. The best practice would be for the lender to have required the deed restrictions and master deeds to include appropriate provisions before the development loan was made. Options do exist, however, if this was not done.



For more information, please contact Thurman Senn.

party under the Federal Civil Rules may not qualify as a court order. In this instance, a bank should file a motion to quash the subpoena on the grounds that compliance would require the bank to violate the FCRA or to request the court enter an order requiring the bank to produce the documents.

If a government agency and the bank's customer are both parties to the action, the RFPA does not apply. In addition, if the request for documents is made by a party other than a government agency, the RFPA does not apply. However, if the requesting party is a government agency and the bank's customer is not a party to the action, the RFPA requires a bank to ensure the government has complied with certain elements before disclosure under the act is proper.

The GLBA readily permits a bank to disclose nonpublic personal information to a third party in order to comply with the federal rules and law.

Kentucky Grand Jury Subpoenas

A bank must comply with the requests of a Kentucky grand jury subpoena unless the bank has evidence that the grand jury is merely engaging in a fishing expedition or believes there are grounds to quash or modify the subpoena. Complying with a Kentucky grand jury subpoena does not constitute a violation under consumer protection legislation. However, if a bank chooses to move to quash the subpoena, it must do so promptly. A bank may move to quash a subpoena duces tecum on the following grounds: 1) the subpoena is unreasonable and oppressive; or 2) the cost of producing the documents is unreasonable.

Kentucky Third Party Subpoenas

The Kentucky Rules of Criminal Procedure were modeled from the Federal Rules. Therefore, Kentucky has adopted the federal interpretation of these procedural rules. A state prosecutor is required to satisfy the same four elements set out above in order for a bank to comply with the subpoena duces tecum. Compliance with a state criminal third party subpoena may result in a violation of the FCRA, the RFPFA or the GLBA. Thus, a bank should move to quash or modify the subpoena duces tecum on the grounds that it requires the bank to violate federal legislation.

As previously stated, the FCRA requires that disclosure of credit reporting information not occur unless it is in response to the order of a court having jurisdiction to issue such an order. In Kentucky, because the clerk is required to issue a criminal subpoena, a subpoena duces tecum served by a prosecutor may constitute a court order. In order to be safe, however, a bank should consider moving to quash the subpoena on the grounds that compliance will violate the FCRA, or ask the court to enter an order requiring the bank to comply prior to producing documents.

A bank may be obliged to take additional steps beyond requesting a court order to comply with the RFPFA. Depending on the parties involved in the litigation, a bank may or may not have to make an additional disclosure.



Nevertheless, if the parties to the litigation are the government and the customer, compliance with the subpoena duces tecum is not covered by the RFPFA. However, if the consumer is not a party to the litigation and a government agency is requesting the production, the bank must ensure the government has complied with certain elements prior to producing documents. If the specific elements are not satisfied, the bank must move to quash the subpoena on the grounds that disclosure by the bank would constitute a violation of the RFPFA.

A civil third party subpoena duces tecum may be issued by either the clerk or a licensed attorney. Typically, if documents sought by the subpoena are relevant and are asked for in good faith, the subpoena will be enforced. However, if the requested documents are privileged or the subpoena duces tecum is unreasonable, oppressive, annoying or embarrassing, a bank should move to quash or modify the subpoena. The same compliance issues with the FCRA and RFPFA, as previously discussed herein, apply to a state issued civil third party subpoena duces tecum.

Regardless of who may have issued the subpoena, a bank may move to quash or modify the subpoena if it is unreasonable or oppressive. As grounds for doing so, a bank may claim, among others, (1) the requested documents are irrelevant; (2) the subpoena fails to allow reasonable time to comply; (3) the subpoena requires disclosure of privileged or other protected matter; (4) the subpoena subjects the bank to an undue burden; or (5) the subpoena duces tecum fails to identify the desired documents. If sufficient grounds exist, it is good policy to move to quash or modify the subpoena. This will allow a bank time to consult with its attorney and, if permissible, notify its customer of the request. By notifying its customer, a bank provides the customer with the opportunity to contest the disclosure. Additionally, the motion gives the bank an opportunity to argue that the cost of production should be borne by the requesting party.

A bank always has the right to refuse to comply with a subpoena duces tecum. However, if the court determines that a bank's refusal to comply is without merit, the court can punish the refusal by fine or imprisonment, or both, at its discretion as contempt of its authority. Hence, if the bank does not have a legitimate reason for refusing to comply with the subpoena, it should turn over the requested documents.

*Scott White, Shareholder
with assistance from Sara Sheeran, Law Clerk*



M&P is pleased to announce:

John McGarvey has been named a Kentucky “Super Lawyer” for 2010.

C. Edward Hastie has returned to the full time practice of law at M&P after spending the last seven years as Director of Development and General Counsel for a non-profit independent school in Fayette County. His areas of practice include Trusts and Estates, Probate, and Estate Planning. Hastie is located in M&P’s Lexington office and can be reached at (859) 253-1900 or ceh@morganandpottinger.com.

John McGarvey has been named to the Uniform Law Commission Enactment Committee for the 2010 Amendments to Revised Article 9. John is also Co-Chair of the ABA’s Task Force for the enactment of the 2010 Amendments.

Actual resolution of legal issues depends on many factors, including variations of facts and state laws. This newsletter is not intended to provide legal advice on specific subjects, but rather to provide insight into legal developments and issues. The reader should always consult with legal counsel before taking action on matters covered by this newsletter. If you have any questions about this newsletter, or suggestions for future articles, contact Mindy Sunderland, Editor.

If you would like to receive future editions of M&P InBrief electronically, please e-mail us at newsletter@morganandpottinger.com.



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In other news:

Scott White was appointed to the Board of Directors for Jubilee Jobs of Lexington.

John McGarvey has been named the Southern Region Representative of the Uniform Law Commission’s Legislative Council.

Mindy Sunderland and John McGarvey presented a seminar for the Kentucky Bankers Association on September 28, 2010. The topics were “Common Mistakes in UCC Filing” and “Default, Remedies and Enforcement Under Article 9”.

John McGarvey has been named the Chairman of the Visiting Committee for the University of Kentucky College of Law.

Trak America, one of the nation’s largest collection/debt buying companies, has named M&P its large market firm of the year.

John McGarvey has been elected to membership to the American Law Institute.

Molly Rose is now licensed to practice in the state of Indiana.

John McGarvey has been appointed to Greater Louisville Inc.’s Tax Reform Task Force.

Tyler Powell participated in Commerce Lexington’s 2010 Kentucky Regional Tour to South Central Kentucky.