

PREFACE

Rapid advances in technology now permit government agencies and private organizations to collect, store, retrieve, use and disseminate information about individuals that is vastly more complete, focused and accessible than ever before. At the same time, the complexity and interdependence of such organizations have grown enormously. Both government agencies and private organizations now collect and maintain tremendous amounts of information on the financial affairs of individuals and businesses. As the volume and scope of this information have grown, so have public concerns for personal privacy and for the security of personal information. Individuals are understandably concerned about threats to their personal privacy and the increasing risk of identity theft, and a corresponding increase in the concern about how technology empowers the collection and distribution of financial information. Congress and state legislatures have responded by enacting laws to protect personal information maintained by both private organizations and government agencies.

At the same time, Congress has enacted sweeping laws designed to detect and to deter terrorist financing and money laundering, and, in so doing, has raised even more privacy issues and substantial compliance obligations. The burden of complying with these privacy, data security and anti-terrorist laws, and related agency regulations, has fallen disproportionately on financial services companies and their affiliates.

During the past four decades, I have responded to increasingly complex questions from financial institutions and other companies regarding the impact of federal and state privacy and data security laws on their operations and other activities. Increasingly, companies also request guidance on responding to a wide array of security breach incidents and possible notice obligations. Historically, efforts to address such questions were impeded by the absence of a comprehensive source of information on financial privacy. To fill this void, *The Law of Financial Privacy* provides a practical discussion of the developing federal laws affecting privacy, as well as an overview of the privacy laws and principles at the state and international levels. This treatise is a reference guide on privacy and, thus, incorporates both statutory analysis and relevant case law summaries.

Each chapter of *The Law of Financial Privacy* focuses on a particular area of financial privacy law.

Chapter 1 discusses the principles and requirements of the federal Fair Credit Reporting Act (FCRA). In enacting the FCRA, Congress acknowledged the essential nature of consumer report information and balanced the availability of this information with requirements focusing on the fairness and accuracy of information in credit report files and in consumer reports prepared and disseminated by consumer reporting agencies. Although the FCRA restricts the dissemination of consumer reports to specified permissible purposes, it does not comprehensively restrict the disclosure of personal information. Instead, it recognizes the importance of the continued availability of this information within the parameter of the statutorily identified permissible purposes. Chapter 1 also discusses the obligations of consumer reporting agencies, as well as those of other organizations, such as financial institutions, that furnish information to consumer reporting agencies and use consumer reports. And, Chapter 1 discusses the many changes and additions to the FCRA made by the Fair and Accurate Credit Transactions Act of 2003, including extensive provisions intended to address identity theft prevention and mitigation.

Chapter 2 discusses the obligations of financial institutions and government agencies under the federal Right to Financial Privacy Act (Financial Privacy Act). This chapter reviews the principal types of government demands for customer information and discusses how each might be dealt with under the Act. Chapter 2 also discusses the challenge procedures available to consumers and financial institutions under the Financial Privacy Act, and reviews the reimbursement rights of financial institutions when they respond to government demands for customer information. The Financial Privacy Act has been amended by Congress several times and the requirements of the Act have been addressed by many courts. Chapter 2 discusses these various statutory changes and judicial decisions.

Chapter 3 focuses on the third-party summons provisions of the Internal Revenue Code. Over the years, the IRS tax privacy provisions also have been modified by Congress and examined by many courts. Chapter 3 reviews the requirements of these third-party summons provisions and discusses the statutory modifications and

many of the applicable judicial decisions. Chapter 3 also discusses the challenge procedures and reimbursement opportunities available to financial institutions.

Chapter 4 reviews the extensive recordkeeping and reporting requirements of the Bank Secrecy Act. The Bank Secrecy Act has been amended extensively over the years. In particular, the currency transaction reporting requirements have been substantially modified in an effort to reduce burdensome regulatory requirements. At the same time, enhanced “suspicious-activity” reporting obligations have been imposed on financial institutions and other entities. However, Congress also enacted a broad safe-harbor provision for financial institutions reporting suspicious information to government authorities, and the effectiveness of this safe harbor is discussed in several judicial decisions. The Bank Secrecy Act also was substantially amended by the USA PATRIOT Act, in response to the September 11, 2001 terrorist attacks against the United States. Chapter 4 analyzes these statutory modifications and their impact on financial institutions and the increasing number of other entities that have become subject to the requirements of the Bank Secrecy Act. And, Chapter 4 reviews many of the judicial decisions regarding the scope and coverage of the Bank Secrecy Act.

Chapter 5 provides an overview of the expanding state efforts to address privacy and data security. In particular, Chapter 5 discusses the various common-law principles of financial privacy and compares the coverage of state privacy laws to privacy standards adopted at the federal level. Chapter 5 also analyzes the constitutional privacy rights identified and applied by state courts and reviews the interrelated compliance obligations of financial institutions and other entities under federal and state financial privacy laws. In addition, Chapter 5 discusses the complicated interaction of the state and federal laws, particularly as a result of the various applicable preemption principles. Chapter 5 also discusses the many state statutes on breach notification, credit file freezes and restrictions on Social Security numbers.

Chapter 6 focuses on technology and privacy, including the privacy-related requirements added through a variety of federal laws and corresponding state privacy statutes. For example, Chapter 6 discusses computer and technology privacy statutes, and the many amendments to these statutes made by the USA PATRIOT Act, as well as the expanding laws relating to identity theft. The chapter also discusses federal agency enforcement actions and regulatory guidance, as well as the many initiatives concerning online privacy and information security.

Chapter 7 provides a brief introduction to the extensive international efforts to address privacy issues, including laws affecting the transborder transmission of personal information.

Chapter 8 provides an overview and analysis of the Freedom of Information Act (FOIA) and its particular application to financial institutions. The chapter also describes methods of submitting FOIA requests to government agencies and discusses “offensive” and “defensive” uses of the FOIA in connection with the operations of a financial institution.

Chapter 9 discusses the obligations imposed on financial institutions by the privacy and data security provisions enacted through Title V of the Gramm-Leach-Bliley Act (GLBA). These provisions constitute the most far reaching federal financial privacy legislation ever enacted in the United States. Under this federal privacy law, financial institutions are required to disclose their policies and practices for protecting the privacy of non-public personal information, as well as to provide customers with a description of their information collection and disclosure practices. Importantly, the GLBA extended the definition of financial institution far beyond banks, insurance companies, and brokerage firms, to cover any entity engaged in financial activities as broadly defined in the federal Bank Holding Company Act, thereby subjecting thousands of additional companies to the GLBA’s extensive requirements. In addition, the GLBA altered the federal regulatory framework under the FCRA and directed federal banking agencies to issue joint regulations to implement the FCRA. Chapter 9 presents an overview and analysis of these requirements, as well as a discussion of the interrelationship between the new federal requirements and state law. In particular, section 501(b) of the GLBA established data security requirements for financial institutions which have been greatly expanded by agency rules to include risk-based programs for data security, disposal of records, and security breach notification.

Acknowledgments

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