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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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

[1] 5 U.S.C. §551 note, Pub.L. 106-544, § 7, 114 Stat. 2719 (2000).

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." 5 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. §3486

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

[2] *See* BERNARD SCHWARTZ, ADMINISTRATIVE LAW §3.8, at 125 (3d ed. 1991).

[3] *See* Graham Hughes, "Administrative Subpoenas and the Grand Jury: Converging Streams of Criminal and Civil Compulsory Process," 47 VAND. L. REV. 573, 584 (1994).

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 broadly[8] 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

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[4] *See, e.g.,* Exec. Order No. 12,580, Section 2(j), 52 Fed. Reg. 2923 (Jan. 29, 1987) (delegating to heads of Executive departments and agencies the authority originally delegated by Congress to the Executive in Section 104(e) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §9604(e)).

[5] The Consumer Product Safety Commission, for instance, may delegate any of its functions *except* the subpoena power of 15 U.S.C. §2076(b)(3), *see* §2076(b)(9), to any officer or employee of the Commission.

[6] *See, e.g.,* Appendix A, Department of Energy (DOE) authority under the Federal Energy Administration Act of 1974. A DOE official "may sign, issue, and serve subpoenas of persons and documents." 10 C.F.R. §§ 205.8(a), 205.8(b).

[7] *See, e.g.,* 11 C.F.R. § 111.12 (requiring that Federal Election Commission members authorize the Chairman or Vice Chairman of the Commission to issue specific subpoenas, whether subpoenas duces tecum or those requiring); 16 C.F.R. § 2.7(d) (stating that Federal Trade Commission or one of its members may issue a subpoena upon a resolution by the Commission).

[8] See the following cases for the proposition that the government need only show that the subpoena was issued for a lawfully authorized purpose and sought information relevant to the agency's inquiry: United States v. LaSalle Nat'l Bank, 437 U.S. 298, 313 (1978); United States v. Powell, 379 U.S. 48, 57 (1964); Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 209 (1946).

[9] *See* Endicott Johnson Corp. v. Perkins, 317 U.S. 501 (1943); Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946); United States v. Morton Salt Co., 338 U.S. 632 (1950). *See also* the following cases, demonstrating the lower federal courts' favorable treatment of a federal agency's investigative authorities prior to the Supreme Court decisions listed above: Fleming v. Montgomery Ward & Co., 114 F.2d 384, 388 (7th Cir.) (rejecting probable cause requirement for investigations by Wage and Hour Division of Department of Labor), *cert. denied*, 311 U.S. 690 (1940); Bartlett Frazier Co. v. Hyde, 65 F.2d 350, 351-52 (7th Cir.) (holding that disclosures sought by the Department of Agriculture under its investigatory powers were reasonably necessary for protection of public and therefore not violative of the Fourth Amendment), *cert. denied*, 290 U.S. 654 (1933); United States v. First Nat'l Bank, 295 F. 142, 143 (S.D. Ala. 1924) (holding that the privacy protections of the Fourth Amendment were not applicable where a third-party recordkeeper sought to invoke such protections in an effort to bar production of information relating to legitimate IRS investigation), *aff'd per curiam*, 267 U.S. 576 (1925).

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

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[10] While *Powell* involved an IRS subpoena, a subsequent case clarified that the analysis applied in *Powell* is relevant to all administrative subpoena authorities. *See* Securities and Exchange Com'n. v. Jerry T. O'Brien, Inc., 467 U.S. 735, 741-42 (1984).

[11] 379 U.S. 48 (1964). Some courts have excluded the last two *Powell* factors, holding that later decisions of the Supreme Court sometimes exclude such requirements and that adhering strictly to all four factors may unacceptably restrict agency action. *See, e.g.*, United States v. Bell, 564 F.2d 953, 959 (Temp. Emer. Ct. App. 1977) (stating that the last two requirements are too restrictive); United States v. Security State Bank & Trust, 473 F.2d 638, 641 (5th Cir. 1973) (stating that the governmental entity needs only the two primary requirements). Other courts, however, have applied less deferential scrutiny in analyzing whether an agency has used its subpoena authority appropriately. *See, e.g.,* Sunshine Gas Co. v. United States Department of Energy, 524 F.Supp. 834, 838 (N.D. Tex. 1981) (stating that "the agency's order should only be affirmed if a rational basis exists, but such must be supplied by the agency, not the court").

[12] Endicott Johnson Corp. v. Perkins, 317 U.S. 501, 509 (1943).

[13] 327 U.S. 186 (1946).

[14] *Id.* at 201.

[15] 338 U.S. 632, 51 (1950).

[16] *Id.* at 651.

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

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[17]United States v. Hunton & Williams, 952 F. Supp. 843, 854 (3d Cir. 1995). The Third Circuit in this instance noted that the "reasonableness" inquiry in such cases does not correspond with, and is more deferential than, the Administrative Procedures Act "arbitrary and capricious" standard of review for agency action. *Id.*

[18]Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 208 (1946).

[19]*See* Graham Hughes, "Administrative Subpoenas and the Grand Jury: Converging Streams of Civil and Criminal Compulsory Process," 47 VAND. L. REV. 573, 589 (1994).

[20]United States v. Security State Bank and Trust, 473 F.2d 638, 641 (5th Cir. 1973). The Supreme Court, however, has not specifically issued a ruling as to whether the constraints of due process preclude federal agencies from possessing the power to enforce their own subpoenas. Federal courts have generally held that due process does preclude federal agencies from enforcing such subpoenas, however. *See* Shasta Minerals & Chem. Co. v. SEC, 328 F.2d 285, 286 (10th Cir. 1964). The Court has stated in *Interstate Commerce Commission v. Brimson,* 154 U.S. 447, 484 (1894), that "the power to impose fine or imprisonment in order to compel the performance of a legal duty imposed by the United States can only be exerted, under the law of the land, by a competent judicial tribunal having jurisdiction in the premises," *Id.* at 484; however, as Congress has not tested the outer limits of *Interstate Commerce Commission v. Brimson* by conferring direct administrative subpoena enforcement authority on a federal agency, the Court has not had occasion to specifically address the constitutionality of a conferral of such enforcement authority.

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

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[21] Consider, for instance, the Secretary of Labor, who is authorized to petition directly for enforcement of an ERISA Title I subpoena. *See, e.g.,* Dole v. Milonas, 889 F.2d 885, 888 (9th Cir. 1989) (noting that the FTC Act provisions codified at 15 U.S.C. § 49 are incorporated into ERISA at 29 U.S.C. § 1134(c), thereby authorizing the Secretary of Labor to petition for enforcement of an ERISA Title I subpoena in district court). The Federal Election Commission is similarly authorized under 2 U.S.C. §437d(b) to petition a district court directly for enforcement of certain administrative subpoenas (authorizing the Federal Election Commission to petition the appropriate U.S. district court to issue an order requiring compliance with subpoena request authorized by 2 U.S.C. §437d(a)(1)-(4) and to punish any failure to obey such order).

[22] *See, e.g.,* U.S. Department of Agriculture, "Procedures Related to Administrative Hearings under the Program Fraud Civil Remedies Act of 1986" (PFCRA), 7 C.F.R. §§ 1.304, 1.319, 1.322, 1.323, 1.328 (authorized by 31 U.S.C. §3804(a)).

[23] *See, e.g.,* Foreign Shipping Practices Act, 46 App. 46 U.S.C. 1710a (authority to make information requests, but no enforcement authority, judicial or otherwise, is mentioned in the statute); *See also* Federal Maritime Commission's related submission and recommendation in Appendix A.

[24] *See* UNITED STATES ATTORNEYS MANUAL (USAM), 4-6.210 C. This section of the USAM states that "[m]ost routine subpoena enforcement actions are handled by the USAOs and are authorized by the Director in charge of Area 1." The USAM goes on to state that:

> [a] Branch attorney will review the referral and proposed pleadings, and then prepare a memorandum from the assistant director to the director, recommending whether the suit should be filed. If the subpoena enforcement action is approved by the director, the Branch attorney will write the agency and the United States Attorney, stating whether the suit has been authorized or not, and if so, that it is delegated to the United States Attorney. In cases in which suit is authorized, a referral acknowledgment form will also be sent to the United States Attorney, as well as a copy of papers received from the agency.

Id.

[25] Wearly v. FTC, 616 F.2d 662, 665 (3rd Cir. 1980).

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,

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[26]United States v. Security State Bank and Trust, 473 F.2d 638, 642 (5th Cir. 1973).

[27]*Wearly*, 616 F.2d at 665.

[28]United States v. Powell, 379 U.S. 48, 58 (1964). Federal courts have further expounded on the concept of agency "bad faith," stating that "bad faith" may be found in "circumstances involving the harassment of the recipient of a subpoena" or a "conscious attempt by the agency to pressure the recipient to settle a collateral dispute." United States v. Markwood, 48 F.3d 969, 978 (6th Cir. 1995).

[29]United States v. LaSalle Nat'l Bank, 437 U.S. 298, 316 (1978).

[30]Cobbledick v. United States, 309 U.S. 323, 330 (1940) (recognizing the immediate reviewable nature of a district court enforcement order). In contrast, grand jury enforcement orders are not appealable immediately as this would stall further court proceedings. No further proceedings in the court are necessary, however, after a court orders compliance with an administrative subpoena. *Id.* at 329-30.

[31]*See* 42 U.S.C. §9604(e) (authorizing the court to assess civil penalties of up to $25,000 for each day of continued noncompliance with subpoena issued under CERCLA authority); 15 U.S.C. §50 (FTC statute, incorporated by reference into several other agencies' subpoena authorities (*See, e.g.,* 33 U.S.C. §944, Department of Labor authority) authorizing punishment for noncompliance by "a fine of not less than $1,000 nor more then $5,000, or by imprisonment for not more than one year, or by both such fine and imprisonment").

[32]*See, e.g.,* Department of Energy authority granted in 15 U.S.C. §772(e), with subsection (i), incorporating by reference §797(a), (b)(1) and (2) (including violation of subpoena requirement among list of various other violations and prescribing disparate civil penalties based on "willful" or non-willful failure to comply); Department of Interior, 43 U.S.C. §§102-106 (stating that wilful refusal to comply with subpoena request in public lands cases may be punished as a misdemeanor); Federal Deposit Insurance Corporation, Federal Deposit Insurance Act (FDI Act), 12 U.S.C. §1818(n) (stating that any person who willfully fails or refuses to comply with an FDIC subpoena may be subject to contempt proceedings in federal district court and "shall be guilty of a misdemeanor and, upon conviction, shall be subject to a fine of not more than $1,000 or to imprisonment for a

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 RFSA 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

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term of not more than one year or both"); Internal Revenue Service authority granted in 26 U.S.C. §6420(e)(2), 6421(g)(2), 6427(j)(2), 7602, 7603, and 7604(b) (stating that a person failing to comply with a subpoena request under these sections shall "upon conviction thereof, be fined not more than $1,000, or imprisoned not more than 1 year, or both, together with costs of prosecution," 26 U.S.C. §7210).

[33] *See* 26 U.S.C. §7604 (authorizing the Secretary to request a hearing in front of a U.S. district court judge or Commissioner for contempt proceedings based on noncompliance with an I.R.S. request for information). This statute provides that the judge or commissioner shall, "upon such hearing. . . have power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience." *Id.*

[34] Contempt may be either civil or criminal in nature. A federal court is authorized under 18 U.S.C. §401 to initiate a prosecution for contempt. *See id.* (stating that "[a] court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as-- . . . (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command"). Under current law, a person found guilty of criminal contempt may be subject to a fine not to exceed the sum of $1,000, imprisonment not exceeding a term of six months, or both. 18 U.S.C. §402. In proceedings for criminal contempt where the penalty authorized by statute makes this contempt something more than a petty offense, the defendant is entitled to the right to a trial by jury under Article III, Section 2, and under the Sixth Amendment of the Constitution. *See Propriety of Imprisonment under 18 U.S.C. §401(3) for Contempt of Court Order Requiring Compliance with Statute not Authorizing Imprisonment for its Violation*, 41 A.L.R. FED. 900 (2000). In addition, federal courts have also held that a defendant is entitled to the assistance of counsel in any proceeding for criminal contempt. *See* Holt v Virginia, 381 U.S.C. 131 (1965).

[35] Section 1724 of the RSFA authorizes certain officials in the U.S. Department of Interior to issue administrative subpoenas. 30 U.S.C. §1724(d)(2)(B). In a separate provision, RSFA amends the FOGRMA. FOGRMA provides its own compulsory authorities and authorizes enforcement of those authorities. 30 U.S.C. §1717. The Department of Interior noted in its submission to the Office of Legal Policy at the Department of Justice that the issue as to whether the FOGRMA enforcement provisions apply to situations of noncompliance with RSFA subpoenas has not been litigated. *See* Appendix A, U.S. Department of Interior entry.

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 absolute[37] 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

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[36]*See* Therese Maynard, "SEC v. Jerry T. O'Brien, Inc.: Has the Supreme Court Overruled United States v. Powell?," 18 LOY. L.A. L. REV. 643, n. 112 (1985) (providing a description of the enforcement process).

[37]*See* United States v. Kis, 658 F.2d 526, 539 n. 39 (7th Cir. 1981), *cert. denied*, 455 U.S. 1018 (1982) (involving I.R.S. subpoena authority).

[38]*See id.*

[39]*See id.*

[40]*See id.* at 540.

[41]Wearly v. FTC, 616 F.2d 662, 665 (3d Cir. 1980).

[42] United States v. Security State Bank and Trust, 473 F.2d 638, 642 (5th Cir. 1973).

[43]*Id.*

[44]Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186, 202 (1946).

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

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[45] *Id.* at 203.

[46] Each of these actions meant to peripherally encourage compliance with a subpoena request are, however, subject to the disapproval of the President for "reasons of the national defense or the foreign policy of the United States." *See* 46 App. U.S.C. §1712(b)(7).

[47] *See* United States v. Security State Bank and Trust, 473 F.2d 638, 641 (5th Cir. 1973) (stating 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").

[48] *See* Donovan v. Lone Steer, Inc., 464 U.S. 408 (1984).

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

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[49] *In re* Subpoena Duces Tecum, 228 F.3d 341, 348 (4th Cir. 2000).

[50] *See* Appendices A, B, C *infra*. *See also In re* Subpoena Duces Tecum, 228 F.3d at 348; United States v. Bell, 564 F.2d 953, 959 (Temp. Emer. Ct. App. 1977) (stating 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").

[51] Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 201 (1946).

[52] *See id.* at 202.

[53] *See* 379 U.S. 48, 57-58 (1964).

[54] *See also* Securities and Exchange Comm'n v. Wheeling-Pittsburgh Steel Corp., 648 F.2d 118, 124 at n. 9 (3d Cir. 1981) (stating that "'[b]ad faith'" connotes a conscious decision by an agency to pursue a groundless allegation without hope of proving that allegation" while "abusing the court's process" connotes vigorous pursuance "of a charge because of the influence of a powerful third party without consciously and objectively evaluating the charge").

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

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[55] *Oklahoma Press Publishing Co.*, 327 U.S. at 209.

[56] *Id.* at 208.

[57] *Id.*

[58] Consider, for example, strict confidentiality protections provided under the FTC Act §6(f), 15 U.S.C. §46 (protecting confidential financial or commercial information), 15 U.S.C. § 57b-2, FTC Act §21 (protecting information obtained pursuant to compulsory process or in lieu thereof).

[59] *See, e.g.,* EPA's authority under the Safe Drinking Water Act (SDWA), P.L. 93-523 §1445(b)(1) (SDWA §1445(d) forbids the public disclosure of information obtained under §1445 administrative subpoena authority if the information would "divulge trade secrets or secret processes."); Section 15 of the Occupational Safety and Health Act of 1970, 29 U.S.C. §661(b), Pub.L. 91-596, 29 CFR §2200.57 (providing that the Occupational Safety and Health Commission may issue orders, where appropriate, to protect the confidentiality of trade secrets).

[60] *See, e.g.,* 7 U.S.C. §2(h)(5)(C)(i) (providing administrative subpoena authority to the Commodity Futures Trading Commission and requiring that the recipient of a subpoena must "promptly notify the foreign person of, and transmit to the foreign person, the subpoena in a manner reasonable under the circumstances, or as specified by the CFTC").

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).

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[61] Subsection (b) sets forth twelve circumstances under which records concerning an individual can be disclosed without the individual's prior written consent. The law enforcement exception states that

> [n]o agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be to another agency . . . for a civil or criminal law enforcement activity if the activity is authorized by law, and if the head of the agency or instrumentality has made a written request to the agency which maintains the record specifying the particular portion desired and the law enforcement activity for which the record is sought.

5 U.S.C. §552a(b)(7).

(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.

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[62]Law enforcement records exempted from the disclosure requirements of FOIA include records or information that:

> (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual.

5 U.S.C. §552(b)(7).

[63] Consider, for example, 17 C.F.R. Part 145 (2002) (providing guidelines as to the process an individual must follow in requesting that the Commodity Futures Trading Commission keep information submitted by the individual confidential, nothwithstanding the general principles of disclosure promoted under FOIA).

[64]*See* H.R. REP. NO. 95-1383, at 33, *reprinted in* 1978 U.S.C.C.A.N. 9273, 9305. *See also* the discussion regarding the legislative history surrounding RFPA in *U.S. on Behalf of Agency for Int'l. Development v. First Nat'l Bank of Maryland*, 866 F.Supp. 884 (D.Md. 1994).

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]

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[65]An agency issuing an administrative subpoena to a financial institution must also notify the customer whose records it seeks. *See* 12 U.S.C. § 3405(2). RFPA notice to the consumer must include: (1) a copy of the subpoena, including a description of the information being requested; (2) the purpose of the subpoena, (3) the customer's right to file a motion to quash the subpoena. *Id.* Together with this notice, the customer must also be provided blank customer challenge motion and sworn statement forms. *Id.*

[66] A presiding judge or magistrate judge may so order if: (1) the investigation being conducted is within the lawful jurisdiction of the Government authority seeking the financial records, (2) there is reason to believe that the records being sought are relevant to a legitimate law enforcement inquiry, and (3) there is reason to believe that such notice will result in: (a) endangering the life or physical safety of any person, (b) flight from prosecution, (c) destruction of or tampering with evidence, (d) intimidation of potential witnesses, or (e) otherwise seriously jeopardizing an investigation or official proceeding or unduly delaying a trial or ongoing official proceeding to the same extent as the circumstances previously listed. *See* 12 U.S.C. §3409.

[67]12 U.S.C. §3417(a).

[68]12 U.S.C. §3417(b).

[69]The Act provides for customer challenges (motion to quash, application to enjoin) to government access to financial records (*see* 12 U.S.C. §3410) and also provides for injunctive relief to enforce compliance with any of its provisions (*see* 12 U.S.C. §§ 3416, 3418). The Act provides for the assessment of money damages against any agency or department or private financial institution obtaining or disclosing financial records in violation of the Act's provisions, at a statutory minimum amount of $100 regardless of the volume of records involved. *See* 12

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 RFPRA 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 RFPRA 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

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U.S.C. § 3417(a)(1). Beyond this statutory minimum, both actual damages sustained by the customer as the result of a disclosure, as well as discretionary punitive damages where a violation is found to have been "willful or intentional," are allowed, together with costs and reasonable attorney fees. *See* 12 U.S.C. § 3417(a)(2),(3),(4). *See also* 12 U.S.C. § 3410(a) (discussing time limitations on a party's ability to seek injunction of intended government access).

[70]The governmental entity bears the initial burden in a challenge presented during an enforcement action. The government's initial burden in enforcement actions, however, is light, only requiring "a prima facie recital of jurisdiction and statement of the basis for enforcement." John W. Bagby, "Administrative Investigations: Preserving a Reasonable Balance Between Agency Powers and Target Rights," 23 AM. BUS. L. J. 319, 324 (1985).

[71]12 U.S.C. § 3402.

[72] 12 U.S.C. §§ 3405(1).

[73] *See*, *e.g.,* United States v. Wilson, 571 F. Supp. 1417 (S.D.N.Y. 1983) (rejecting the challenge under RFPA that records subpoenaed were not "reasonably described"); Pennington v. Donovan, 574 F. Supp. 708 (S.D. Tex. 1983) (rejecting a challenge under RFPA that the agency did not believe that the record subpoenaed were "relevant to a legitimate law enforcement inquiry").

> 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

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[74]The statute further states that "[i]n assessing good cause the court shall weigh the public interest and the need for disclosure against the injury to the patient, to the physician-patient relationship, and to the treatment services." 42 U.S.C. §290dd-2(b)(2)(C).

[75] 45 C.F.R. Parts 160, 164.

[76] 45 C.F.R. § 164.512(a)(1).

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 clearinghouses[82] 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)

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[77] 45 C.F.R. § 164.512(d)(2).

[78] 45 C.F.R. § 164.512(f)(1)(ii)(C).

[79] 45 C.F.R. § 164.512(f)(1)(ii)(a), (B).

[80] An oversight agency is defined in the regulation to include an agency authorized by law to oversee the health care system (whether public or private) or government programs in which health information is necessary to determine eligibility or compliance, or to enforce civil rights laws for which health information is relevant." 45 C.F.R. § 164.501.

[81] 45 C.F.R.§ 164.512(d)(1).

[82] 45 C.F.R. § 165.534. Most of these entities must comply with the privacy standards by April 14, 2003. Small health plans, however, need not comply until April 14, 2004. *Id.*

[83] 45 C.F.R. § 160.103.

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 adminstrative head of an education agency to take appropriate actions to enforce the provisions of FERPA.[84] 20 U.S.C. §1232(g)(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.

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[84] *See* Tarka v. Cunningham, 917 F.2d 890, 891 (5th Cir.1990); Fay v. South Colonie Cent. Sch. Dist., 802 F.2d 21, 33 (2d Cir.1986); Girardier v. Webster College, 563 F.2d 1267, 1276-77 (8th Cir.1977); Girardier v. Webster College, 563 F.2d 1267, 1277 (8th Cir.1977); Smith v. Duquesne Univ., 612 F.Supp. 72, 79-80 (W.D.Pa.1985) (applying Cort v. Ash), *aff'd*, 787 F.2d 583 (3d Cir.1986).

[85] *See* Storck v. Suffolk County Department of Social Services, 12 F.Supp.2d. 392, 402 (S.D. NY 2000) (rejecting Section 1983 action brought against county department of social services).

[86] *See, e.g.,* Appendix B, describing guidelines for FBI issuance of administrative subpoenas authorized under 21 U.S.C. §876, Comprehensive Drug Abuse Prevention and Control Act of 1970, commonly called the "Controlled Substances Act," Pub. L. No. 91-513, Title II, 84 Stat. 1242, 1236 (1970).

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 removeable only by the President.[88] The Inspector General Act requires that Inspectors General be appointed "without regard to political affiliation and solely on the basis of integrity and demonstrated ability in accounting, auditing, financial analysis, law, management analysis, public administration, or investigations." [89]

In order to fulfill their investigative responsibilities, Inspectors General are authorized to exercise certain administrative subpoena authority. 5 U.S.C. app. 3 §6(a)(4).

1. Description of the Source of Inspector General Administrative Subpoena Power and the Scope of Such Subpoena Authority.

Federal courts have generally stated that Inspectors General hold broad investigative authority[90] to carry out their responsibilities of promoting efficiency and preventing fraud, waste, abuse, and mismanagement in federal government programs. See Inspector General Act of 1978, § 1, 5 U.S.C. app. 3. Inspectors General are authorized to exercise administrative subpoena authority to obtain information required for administrative, civil and criminal investigation.[91] See 5 U.S.C.A.

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[87] 5 U.S.C. App. 3 §§ 2 (1), 4(a)(1).

[88] *See, id.* at § 3 (a). The Inspectors General in certain "federal entities" are appointed by the head of the agency. *See, id.* at § 8G(c).

[89] *Id.* at § 3(a).

[90] *See* Burlington Northern R.R. Co. v. Office of Inspector General, 983 F.2d 631, 641 (5th Cir. 1993) (citing Kurt W. Muellenberg & Harvey J. Volzer, "Inspector General Act of 1978," 53 Temp. L. Q. 473 (1985), for the proposition that "the Inspector General Act of 1978 gives Inspectors General broad--not limited--investigatory and subpoena powers"); *See also* United States v. Westinghouse Elec. Corp., 788 F.2d 164, 165 (3d Cir. 1986) (stating that "Congress gave the Inspector General broad subpoena power").

[91] Federal courts have upheld this principle in various circumstances. *See, e.g.,* United States v. Art Metal-U.S.A., Inc., 484 F.Supp. 884, 886-87 (D.N.J. 1980); *See also* U.S. v. Aero-Mayflower Transit Co., 646 F.Supp. 1467, 1471 (D.D.C. 1986) (stating that "such agency communication with prosecutors is precisely the kind of cooperation that an efficient government should encourage").

app. 3 § 6.[92] The Inspector General Act authorizes coordination between the Inspector General and other agencies. See 5 U.S.C. app. 3 §4(a)(4)(A), (B). An Inspector General is required by statute to report to the Attorney General any discovery of grounds to believe that a violation of federal law has occurred. 5 U.S.C. app. 3 § 4(d). Inspector General administrative subpoena authority has been upheld by federal courts even in situations where the Inspector General is cooperating with divisions of the Justice Department exercising criminal prosecutorial authority where there are reasonable grounds to believe a violation of federal criminal law has occurred.[93] Federal courts have also held that an Inspector General is authorized to continue using civil subpoena authority for civil and administrative investigative purposes even where he or she has referred a case to the Department of Justice for prosecution.[94]

The Inspector General Act of 1978 authorizes "each Inspector General" to "require by subpoena the production of all information, documents, reports, answers, records, accounts, papers, and other data and documentary evidence necessary in the performance of the functions assigned by [the Act]." 5 U.S.C. app. 3 §6(a)(4). The Inspector General Act solely authorizes subpoena *duces tecum*, or documentary requests. In addition, the statute requires that "procedures other than subpenas shall be used by the Inspector General to obtain documents and information from Federal agencies." 5 U.S.C. app. 3 §6(a)(4).

2. Description of Applicable Subpoena Enforcement Mechanisms for Subpoenas under the Inspector General Act.[95]

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[92]While the administrative subpoena authority held by Inspectors General is generally not limited by senior officials in a parent agency, certain agency heads are authorized to intervene in the exercise of the authority where issues of national security or other sensitive interests are involved. *See* 5 U.S.C. App. 3 §8(b) (Secretary of Defense), 5 U.S.C. App. 3 §8D(a)(1)(Secretary of Treasury), 5 U.S.C. App. 3 §8E(a)(1) (Attorney General).

[93]*See* 5 U.S.C. §4(d); United States v. Aero Mayflower Transit Co., 831 F.2d 1142, 1144-46 (D.C. Cir. 1987). The Court in this case upheld the use of the administrative subpoena authority even where the Inspector General of the Department of Defense was in cooperation with the FBI and the Antitrust Division of the Department of Justice. The court stated that "so long as the Inspector General's subpoenas seek information relevant to the discharge of his duties, the exact degree of Justice Department guidance or influence seems manifestly immaterial." *Id.* at 1146. In addition, Rule 6e does not preclude United States Attorneys from conducting joint investigations with an Inspector General or from using in a grand jury investigation information obtained by an IG investigation by the Department of Justice, even if the IG serves as a source of information for the Justice Department investigation. *See* 72 A.P.R. FLA. B.J. 34, 37 (1988). *See also* United States v. Educational Dev. Network Corp., 884 F.2d 737, 738-40, 741-43 (3d Cir. 1989), *cert. denied*, 494 U.S. 1078 (1990). 5 U.S.C. §6(a)(4) requires that "procedures other than subpoenas shall be used by the Inspector General to obtain documents and information from federal agencies," however.

[94]*See* United States v. Art Metal-U.S.A., Inc., 484 F.Supp. 884, 886 (D.N.J. 1980).

[95]Since the U.S. Supreme Court's decision in *Interstate Commerce Commission v. Brimson*, 154 U.S. 447 (1894), federal courts have generally held that, as a matter of due process, federal agencies cannot be given the power to enforce their subpoenas. *See* Shasta Minerals & Chem. Co. v. SEC, 328 F.2d 285, 286 (10th Cir. 1964). The U.S. Supreme Court has not made a specific ruling on this issue. *See* 1 KENNETH CULP DAVIS & RICHARD J. PIERCE, ADMINISTRATIVE LAW TREATISE § 4.2, at 143 (1994)) (noting that "[i]t is hard to know whether the broad holding [in *Brimson*] remains good law because Congress has not tested it").

Inspectors General may seek the enforcement of a subpoena "by order of any appropriate United States district court." 5 U.S.C. app. 3 §6(a)(4). Inspector General subpoena enforcement proceedings are prosecuted by the Department of Justice, at the request of the relevant Inspector General, as part of the Department's responsibility to conduct litigation in which the U.S. is interested. See 28 U.S.C. §§516-19. The Inspector General Act does not provide any specific sanctions for failure to comply with an Inspector General's subpoena, so federal district courts are free to exercise discretion in applying general contempt sanctions for noncompliance with a court order enforcing an Inspector General subpoena. Federal courts have enforced Inspector General administrative subpoenas where 1) the subpoena is within the statutory authority of the agency; 2) the information sought is reasonably relevant to the inquiry;[96] and 3) the demand is not unreasonably broad or burdensome.[97] In addition, federal courts have held that an Inspector General administrative subpoena is unenforceable if it is issued in "bad faith"[98] or if the petition for enforcement constitutes an abuse of the court's process.

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

The Inspector General Act contains no internal privacy protections directed specifically at the subpoena authority provided in the Act. The Inspector General Act itself, however, does forbid an Inspector General to disclose an employee's identity "after receipt of a complaint or information from an employee" except in circumstances where the "Inspector General determines such disclosure is unavoidable during the course of the investigation." 5 U.S.C. app. 3 §7(b).[99]

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[96] *See* United States v. Powell, 379 U.S. 48, 57-58 (1964); United States v. Morton Salt Co., 338 U.S. 632, 652 (1950).

[97] *See* Pickel v. United States, 746 F.2d 176, 185 (3d Cir.1984); SEC v. Wheeling Pittsburgh Steel Corp., 648 F.2d 118, 125 (3d Cir.1981) (en banc).

[98] SEC v. ESM Gov't Sec., Inc. 645 F.2d 310, 317 (5th Cir. 1981). The court in this case established a three prong test to determine whether an administrative subpoena was issued in bad faith: (1) whether the agency intentionally or knowingly misled the subject of the subpoena; (2) whether the subject was actually misled; and (3) whether the subpoena was the result of improper access to the party's records. *Id.* at 317-18.

[99] *See also* Pub. L. No. 104-134, Section 509, (h)-(i) (protecting certain information obtained by the Office of the Inspector General at the Legal Services Corporation from further disclosure):

> (h) Notwithstanding section 1006(b)(3) of the Legal Services Corporation Act (42 U.S.C. 2996e(b)(3)), financial records, time records, retainer agreements, client trust fund and eligibility records, and client names, for each recipient shall be made available to any auditor or monitor of the recipient, including any Federal department or agency that is auditing or monitoring the activities of the Corporation or of the recipient, and any independent auditor or monitor receiving Federal funds to conduct such auditing or monitoring, including any auditor or monitor of the Corporation, except for reports or records subject to the attorney-client privilege.
> (i) The Legal Services Corporation shall not disclose any name or document referred to in subsection (h), except to--
> (1) a Federal, State, or local law enforcement official; or
> (2) an official of an appropriate bar association for the purpose of enabling the official to conduct an investigation of a rule of professional conduct.

Inspector General subpoena authority is also subject to the same general statutory privacy-protective requirements applicable to other agency subpoena authorities. These privacy-protective statutes are listed and described *supra* in section II.A.3, which discusses agency subpoena authorities other than the authority provided under the Inspector General Act. Agency guidelines implementing these privacy-protective statutes are generally applicable to the Inspector General subpoena authority as well as other subpoena authorities exercised by an agency.[100] The Right to Financial Privacy Act of 1978 (RFPA), for instance, subjects an agency to certain notification requirements when issuing a subpoena subject to the RFPA. 12 U.S.C. §§ 3405.[101] RFPA also limits an agency's subpoena authority, including the authority held by Inspectors General, by allowing a government authority to access financial records only in situations where there is reason to believe that the records sought are relevant to a legitimate law enforcement inquiry.[102] Individual agencies have promulgated Inspector General policies specifically to comply with the requirements of the RFPA[103] and other privacy-protective statutes.

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

Federal courts have held that the enforceability of an Inspector General administrative subpoena authority is subject to many of the limitations imposed on other administrative subpoena authorities, including the requirements that such a subpoena: (1) be issued for a lawful purpose within the statutory authority of the Inspector General Act, (2) be reasonably relevant to that purpose, and (3) not be unduly burdensome.[104] Inspectors General must carefully comply with these requirements in order to ensure that a subpoena will be enforceable by a federal district court. In addition to these generally applicable requirements, the Offices of Inspector General in specific agencies have established and published specific intra-agency policies governing requests for and issuance of

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Id.

[100] *See, e.g.,* Appendix A for information regarding the Inspectors General at U.S. Department of Agriculture (Inspector General Directive, IG-8551 (C2-C5)) and Department of Energy (Inspector General Directive, IG-916, dated, June 24, 1986.).

[101] The Right to Financial Privacy Act (RFPA) requires Inspectors General to provide, as notice, a copy of an RFPA subpoena to a customer whose records are being requested. *See* 12 U.S.C. § 3405. The RFPA prohibits a financial institution from releasing financial records without certification of compliance with the requirements of RFPA. *See* 12 U.S.C. § 3403(b).

[102] *Id.* at § 3405. A copy of the subpoena must be served on the customer, and the customer must be given the opportunity to move to quash the subpoena. *Id.* Under the RFPA, subsequent to 1986 amendment, a financial institution or an officer or employee thereof is not precluded from notifying a government authority that they possess information that may be relevant to a violation of any statute or regulation. *Id.* at § 3403(c).

[103] *See, e.g.,* Appendix A for information regarding Inspectors General at the U.S. Department of Agriculture (Inspector General Directive, IG-8551 (C2-C5)) and Department of Energy (Inspector General Directive, IG-916, June 24, 1986).

[104] *See* Burlington Northern RR v. Office of Inspector General, R.R. Retirement Board, 983 F.2d 631, 637 (5th Cir. 1993) (applying the principles articulated in *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950), etc., to a situation involving an administrative subpoena issued by an Inspector General).

Inspector General administrative subpoenas.[105]

III. JUSTICE DEPARTMENT AND TREASURY SUBPOENA AUTHORITIES PURSUANT TO 18 U.S.C. §3486

A. Administrative Subpoena in Investigations Relating to "Any Act or Activity Involving a Federal Health Care Offense"

Administrative subpoenas have proved an effective resource in the investigation and prosecution of federal health care offenses. In enacting HIPAA in 1996, Congress targeted health care fraud as a major factor in the exploding cost of federal health care programs, and created a carefully balanced array of new criminal statutes, administrative sanctions, investigative tools and a fraud and abuse control program to be jointly promulgated by the Secretary of HHS and the Attorney General. The administrative subpoena authority for the Attorney General as enacted in 18 U.S.C. §3486 was a key element to this coordinated approach. Health care fraud administrative subpoenas facilitate a more efficient and expeditious coordinated approach to the investigation of federal criminal health care fraud offenses. First, unlike grand jury subpoenas, the evidence produced in a criminal investigation in response to such a subpoena can be shared with attorneys in the Civil Division of the Department of Justice. This enables the government to pursue parallel criminal and civil relief simultaneously and to resolve these matters in a coordinated and timely fashion. The early global resolution of all pending civil and criminal exposure is considered of great importance by many targets of health care fraud investigations who find a benefit in a relatively swift resolution which permits them to put the episode behind them and begin with a fresh start. Also, the sharing of information allowed with the use of administrative subpoenas eliminates the need of the government to otherwise serve two sets of subpoenas, one criminal and one civil, in each health care fraud investigation, and similarly avoids cost and expense which would otherwise be imposed if two sets of the same documents had to be produced. Finally, the civil investigation does not have to be suspended pending resolution of the criminal case when information can be shared as the investigation proceeds.

1. Source and Scope of Subpoena Authority under 18 U.S.C. §3486(a).

As Congress estimated in 1997 that the costs of fraud and abuse in healthcare amounted to "as much as 10 percent of total health care costs," the legislative history of the Health Insurance Portability and Accountability Act of 1996 (HIPAA) suggests that Congress granted subpoena authority to the Attorney General in investigations of healthcare fraud and abuse in order to facilitate enforcement of federal statutes and thereby to improve the "availability and affordability of health insurance in the United States." See H.R.Rep. No. 104-496, at 1, 66-67, reprinted in 1996 U.S.C.C.A.N. at 1869. Section 248 of HIPAA authorizes the Attorney General to issue subpoenas requesting production of certain documents and testimony in investigations relating to "any act or activity involving a federal health care offense." See 18 U.S.C. §3486(a)(1)(A)(i)(I). Specifically, the Attorney General is authorized to compel production of: (1) "any records or other things relevant to the investigation and (2) testimony by the custodian of the things required to be produced

[105] *See, e.g.,* FDIC OIG Policy 110.6 (May 1999).

concerning the production and authenticity of those things." 18 U.S.C. §3486(a)(1)(B)(i)-(ii).

In evaluating the scope of an administrative subpoena issued under 18 U.S.C. §3486(a)(1)(A)(i)(I), the federal courts apply the principle formulated by the Supreme Court in Oklahoma Press, generally applicable to executive branch administrative subpoenas, that an administrative subpoena must be "reasonably relevant" to an agency's investigation at issue.[106] The permissible scope of an administrative subpoena is, however, "variable in relation to the nature, purposes and scope of the inquiry."[107] In order to satisfy the general reasonableness standard, the agency issuing the subpoena, in this instance the Attorney General, must satisfy the court, in accordance with the Powell[108] factors, that: (1) "the investigation will be conducted pursuant to a legitimate purpose," (2) "the inquiry may be relevant to the purpose," (3) "that the information sought is not already within the [agency's] possession," and (4) "the administrative steps required by the Code have been followed[.]"[109] As noted in section II.A.2 *supra*, however, the courts have varied in their application of the last two factors, with some courts suggesting that the Supreme Court has obviated the requirement of considering these latter factors in decisions subsequent to Powell.[110]

2. Applicable Subpoena Enforcement Mechanisms

In cases of refusal to comply with a subpoena, the Attorney General is authorized to seek the aid of a United States district court where the investigation is occurring or where the subpoenaed person resides. 18 U.S.C. §3486(c). Failure to obey a federal court's order to comply with a subpoena issued by the Attorney General under 18 U.S.C. §3486(a) may be punished as contempt of court. 18 U.S.C. §3486(c). A district court's order requiring compliance with an administrative subpoena is generally treated as a final judgment under 28 U.S.C. §1291, and, therefore, is immediately appealable.[111]

3. Notification Provisions and Other Provisions Related to Safeguarding Privacy Interests

Subpoenas issued under §3486 in the course of investigations of Federal health care offenses are subject to all other limitations placed on the production of evidence pursuant to compulsory process. See Section II.A.3 *supra* for a description of privacy-protective statutes applicable to

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[106] *In re* Administrative Subpoena John Doe, 253 F.3d 256 (6th Cir. 2001).

[107] Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 209 (1946).

[108] United States v. Powell, 379 U.S. 48 (1964).

[109] *Id.* (evaluating §3486(a) health care offense subpoena authority and referring to standards established in *United States v. Powell,* 379 U.S. 48, 57-58 (1964)).

[110] *See, e.g.*, United States v. Bell, 564 F.2d 953, 959 (Temp. Emer. Ct. App. 1977) (last two requirements too restrictive); United States v. Security State Bank & Trust, 473 F.2d 638, 641 (5th Cir. 1973) (governmental entity need only the two primary requirements).

[111] *See* Cobbledick v. United States, 309 U.S. 323, 330 (1940) (recognizing the immediate reviewable nature of a district court enforcement order).

administrative subpoena authorities in appropriate circumstances.

In addition to extrinsic statutory limitations, 18 U.S.C. §3486 contains several internal, privacy-protective limitations. At any time before the return date specified for subpoenaed information, for instance, the person or entity subpoenaed may petition for an order modifying or quashing the summons or modifying any court nondisclosure order acquired by the government. See 18 U.S.C. §3486(a)(5). Federal courts have determined that the authority granted under 18 U.S.C. §3486(a) is "reasonable" and therefore sufficiently protective of Fourth Amendment interests, as the statute requires that: (1) subpoenaed items must be "described" in the subpoena, (2) the recipient of a subpoena is ensured "a reasonable period of time within which to comply, and (3) the subpoena "may not require production more than 500 miles from the place of service."[112] See 18 U.S.C. § 3486(a)(2), (3).

While section 3486 contains no requirement that patients be notified of impending subpoena of their health records, the subsequent use and disclosure of information gathered through compliance with such a subpoena is limited under the statute. Section 3486, for instance, protects information obtained under an administrative subpoena from disclosure "to any person for use in, any administrative, civil or criminal action or investigation directed against the individual who is the subject of the information unless the action or investigation arises out of and is directly related to receipt of health care or payment for health care or action involving a fraudulent claim related to health." 18 U.S.C. §3486(e)(1). This prohibition on disclosure may only be overcome through a court order issued after the court has determined that "good cause" has been shown by the party seeking the disclosure. 18 U.S.C. §3486(e)(1). In determining whether "good cause" exists, the court must "weigh the public interest and the need for disclosure against the injury to the patient, to the physician-patient relationship, and to the treatment services." 18 U.S.C. §3486(e)(2).

While the statute does not generally prohibit a governmental entity from notifying a person or entity of the disclosure of records under section 3486, a district court in which the subpoena is or will be served may issue an ex parte order prohibiting a person or entity from disclosing to any other person or entity (except in the course of obtaining legal advice from an attorney) the existence of a subpoena served under this section for ninety days. Such an order may only be issued upon a finding by the court that disclosure may result in: a) endangerment to the life or physical safety of any person, b) flight to avoid prosecution, c) destruction of or tampering with evidence, or d) intimidation of potential witnesses. See 18 U.S.C. §3486(a)(6)(A)-(B). This ex parte order of nondisclosure may be extended for additional periods of up to ninety days only upon a showing that the conditions recounted above still exist. See 18 U.S.C. §3486(a)(6)(C). If no case or proceeding arises from the production of the records or other things, pursuant to a §3486 subpoena, within a reasonable time, the person producing the records or things to the agency may make a written demand that the agency return the records to that person, except where the materials provided were only copies, not originals. See 18 U.S.C. §3486(a)(8).

In addition, the privacy interests of the recipient of a §3486 subpoena, as with the privacy interests of recipients of all other currently authorized administrative subpoenas, are protected in

[112] *In re* Subpoena Duces Tecum, 228 F.3d 341, 349 (4th Cir. 2000).

that enforcement of the subpoena may only be accomplished by a federal court, thus removing final action from the issuer of the subpoena and providing an independent safeguard. In evaluating subpoenas issued under 18 U.S.C. §3486, federal courts have evaluated Fourth Amendment concerns in a manner similar to all other current administrative subpoena authorities in that they are subject to a general reasonableness standard, not a probable cause standard.[113] Federal courts have held that in order to satisfy the general reasonableness standard, the agency issuing the subpoena, in this instance the Attorney General, must satisfy the court that: (1) "the investigation will be conducted pursuant to a legitimate purpose," (2) "the inquiry may be relevant to the purpose," (3) "that the information sought is not already within the Commissioner's possession," and (4) "the administrative steps required by the Code have been followed[.]"[114] The impact and application of this standard is discussed in Section II.A.2 *supra*.

4. Standards Governing the Issuance of Administrative Subpoenas

The Attorney General signed Order 2468-2001 on June 28, 2001, delegating his authority under 18 U.S.C. §3486 to issue administrative subpoenas to all United States Attorneys and the Assistant Attorney General of the Criminal Division.[115] The order also authorizes redelegation of authority from United States Attorneys to Assistant United States Attorneys as the particular United States Attorneys deem appropriate. As the Attorney General has not delegated his authority to issue administrative subpoenas related to healthcare offenses under section 3486(a) to the Director of the Federal Bureau of Investigation (FBI), the FBI relies on a district's United States Attorney to issue a subpoena on its behalf.

Attorney General guidelines related to investigations, applicable to administrative subpoena issuance, are contained in Attorney General Guidelines on General Crimes, Racketeering Enterprise and Domestic Security/Terrorism Investigations (March 21, 1989). Regulations internal to the FBI that are relevant to administrative subpoena are found in the Manual of Investigative Operations and Guidelines (MIOG), Part II, 10-8,2(1), "Access to Transactional Information: Telephone Toll Records, Subscriber Listing Information."

5. Frequency of use and usefulness of administrative subpoena authority pursuant to §3486(a)(1)(A)(i)(I).

During calendar year 2001, United States Attorneys offices issued a total of 2,102 administrative subpoenas in investigations related to health care offenses pursuant to 18 U.S.C. §3486. The Assistant Attorney General for the Criminal Division is also authorized to issue subpoenas

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[113] *See, e.g., In re* Administrative Subpoena John Doe, 253 F.3d 256, 263-4 (6th Cir. 2001) (evaluating §3486(a) health care offense subpoena authority and referring to standards established in *United States v. Powell,* 379 U.S. 48, 57-58 (1964)).

[114] *Id.* (evaluating §3486(a) health care offense subpoena authority and referring to standards established in *United States v. Powell,* 379 U.S. 48, 57-58 (1964)).

[115] Order 2486-2001 superceded an earlier order dated April 23, 1997 and issued by former Attorney General Janet Reno. *See* United States Attorney's Manual, 9-44.200. The new delegation order ratified all outstanding administrative subpoenas and any actions taken pursuant to the previous delegation order.

under this authority but issued no such subpoenas during calendar year 2001.

Section 3486 subpoenas have been used to obtain bank/financial institution records, medical records, cost reports, and other documentation typically requested in those investigations. In addition, the use of an administrative subpoena provides a mechanism for information sharing between the FBI, HHS, and other law enforcement agencies as well as the Civil Division of the Department of Justice. Therefore, documents and records obtained under the administrative subpoena can be utilized both in a civil investigation and a criminal investigation stemming from the same fraudulent scheme. Should the statutory authority provided in 18 U.S.C. §3486 be revoked, the use of a grand jury subpoena to obtain the same documents would decrease the opportunity to share information because of the protective provisions of Fed. R. Crim. P. 6(e). Loss of this information sharing capacity would hamper the efforts of the Attorney General to fulfill Congress' intent in providing the authority in HIPAA–to facilitate enforcement of federal statutes related to health care fraud and abuse and thereby improve the "availability and affordability of health insurance in the United States." See H.R.Rep. No. 104-496, at 1, 66-67, reprinted in 1996 U.S.C.C.A.N. at 1869. A grand jury subpoena remains an option in such investigations, however, and is sometimes utilized when confidentiality is important to the development of the case.

Section 3486 authority has been used in notable health care fraud investigations conducted by the FBI to obtain records and documents in major U.S. cities from various entities, such as hospitals, nursing homes and individual practitioners, including medical records, billing records, and cost reports. Through subpoenaed documents, evidence has been found of fraudulent claims and false statements such as "upcoding," which is billing for a higher level of service than that actually provided; double billing for the same visit; billing for services not rendered; and providing unnecessary services.

The incriminating information obtained via an administrative subpoena in these investigations could have been obtained by grand jury subpoena. However, because an administrative subpoena can be obtained more quickly and its use avoids the Fed. R. Crim. P. 6(e) secrecy problems, it is a more flexible investigative tool in health care fraud cases. For example, information obtained by administrative subpoena in such investigations may be used not only for criminal prosecution purposes, but also for negotiating a civil settlement.

As Congress recognized in authorizing subpoena authority for investigations relating to health care fraud and abuse in 18 U.S.C. 3486(a), the Attorney General's ability to combat such fraud and abuse without this subpoena authority would be hampered.

B. Administrative Subpoena for Investigations Relating to Child Exploitation and Abuse Investigations, 18 U.S.C. 3486(a)(1)(A)(i)(II), (a)(1)(C)

The use of administrative subpoenas, in lieu of grand jury subpoenas, has enhanced the ability of the FBI t online child exploitation offenses in an expeditious manner. Section 3486 created a speedy mechanism to identify electronic communication services or remote computing services. A timely method was needed because the infor extremely perishable. Many private and commercial online service providers maintain records on Internet usage b periods of time, sometimes two days or less. Although an investigative agency can obtain grand jury subpoenas f Attorney's Office in exigent circumstances on an expedited basis, more commonly, the agency's acquisition of gra

even weeks. As a result, the Internet service provider is often no longer able to provide the needed information. authority to the United States Attorneys, the Assistant Attorney General for the Criminal Division, and the FBI ha investigative process necessary to obtaining information that identifies subjects and victimized children. In additio investigative information can be particularly important in cases involving the abuse and exploitation of children. S broader when the information is obtained by administrative subpoena, as opposed to by grand jury subpoena, in v disclosure of grand jury information under Rule 6 of the Federal Rules of Criminal Procedure.

1. Source and Scope of Subpoena Authority under 18 U.S.C. §3486(a).

The Attorney General or the Attorney General's designee is authorized under 18 U.S.C. §3486(a) to issue administrative subpoenas for a limited category of information in criminal investigations pornography, sex abuse and transportation for illegal sexual activity offenses, where the victim was under eighteen underlying investigation must relate to an act or activity involving a violation of 18 U.S.C. §§1201, 2241(c), 2242 2260, 2421, 2422, or 2423, when the victim was a minor who had not attained the age of eighteen years. Section information that a governmental entity may request from a provider of electronic communications service or remo provider receiving a subpoena under section 3486 can be required to disclose only the subscriber or customer's: (long distance telephone toll billing records; (4) telephone number or other subscriber identity; (5) length of service customer or subscriber utilized, which may be relevant to an authorized law enforcement inquiry. 18 U.S.C. §348 administrative subpoenas to obtain testimony is limited to requiring a custodian of records to give testimony conc authentication of such records. 18 U.S.C. §3486(a)(1)(C)(ii). Administrative subpoenas issued under section 348 require production as soon as possible after service of the subpoena, but not less than twenty-four hours after such issuance. 18 U.S.C. §3486(a)(9).

2. Applicable Subpoena Enforcement Mechanisms

The Attorney General has no authority to enforce an administrative subpoena issued under 18 U.S.C. §3486(a). The Attorney General is permitted to invoke the aid of any court of the United States within the investigation is carried on or of which the subpoenaed person is an inhabitant, or in which he carries on busine compliance with the subpoena. 18 U.S.C. §3486(c). Failure to comply with a court order may be punished by the court as contempt. 18 U.S.C. § 3486(c).

3. Notification Provisions and Other Provisions Related to Safeguarding Privacy Interests

Title 18 U.S.C. 2703(c)(2) provides that a governmental entity receiving records from a provider of electr remote computing service pursuant to an administrative subpoena requesting the name, address, local and long di telephone number or other subscriber number or identity, and length and type of service does not have to provide addition, 18 U.S.C. §3486(a)(6) allows an entity issuing a subpoena under 3486 authority to obtain an ex parte order preventing the disclosure of the existence of the summons for 90 days if the court finds that: there is reason to believe that disclosure may result in: (1) endangerment to the life or physical safety of any person; (2) flight to avoid prosecution; (3) destruction of or tampering with evidence; or (4) intimidation of potential witnesses. This ex parte order is renewable for additional 90 day period based on a finding that the reasons listed above continue to exist. 18 U.S.C. §3486(a)(6)(B) and (C).

A governmental entity issuing a subpoena request under this section related to child exploitation and abuse investigations is subject to the limitations placed on the production of

evidence pursuant to compulsory process, including, but not limited to: (1) 5 U.S.C. §552a (Privacy Act) (disallowing disclosure without the prior written consent of the person to whom the record pertains, unless permitted by one of twelve exceptions), with regulations found at 28 C.F.R. Part 16, Subpart D; (2) 5 U.S.C. §552(b) (Freedom of Information Act exemptions), Regulations at 28 C.F.R. Part 16, Subpart A; (3) 42 U.S.C. §2000aa-11(a), "Guidelines for Federal officers and employees," (relevant when documents are in the possession of third parties, Regulations at 28 C.F.R. Part 59 ("Guidelines on Methods of Obtaining Documentary Materials Held by Third Parties"); (4) 20 U.S.C. §1232g(b), Family Educational Rights and Privacy Act of 1974 (FERPA) (the Buckley Amendment). Regulations are found at 34 C.F.R. Part 99. See Subsection II.A.3 *infra* for a further discussion of extrinsic privacy-protective statutes and regulations.

4. Standards Governing the Issuance of Administrative Subpoenas

The Attorney General has delegated the administrative subpoena power to all United States Attorneys, the Assistant Attorney General in charge of the Criminal Division, and the Director of the Federal Bureau of Investigation. See Attorney General Order No. 2421-2001, April 5, 2001. The Attorney General's order also authorized redelegation to Assistant U.S. Attorneys, Criminal Division trial attorneys, and FBI Special Agents in Charge (SACs), Assistant Special Agents in Charge (ASACs) and Senior Supervisory Resident Agents(SSRA). Pursuant to the Attorney General's order, the Director of the FBI redelegated his authority to all SACs, ASACs and SSRAs on April 31, 2001.

Other intra-agency guidelines relevant to the issuance of administrative subpoenas under 18 U.S.C. 3486(a) include: (1) Attorney General Guidelines on General Crimes, Racketeering Enterprise and Domestic Security/Terrorism Investigation (March 21, 1989); (2) Internal FBI regulations found in the Manual of Investigative Operations and Guidelines (MIOG), Part II, 10-8,2(1); (3) "Access to Transactional Information: Telephone Toll Records, Subscriber Listing Information;" MIOG, Part I, 7-20; and (4) "Administrative Subpoenas in Child Abuse and Child Sexual Exploitation Cases" (publication of section 7-20 is pending revision reflecting amendments to 18 U.S.C. §3486(a) by Pub. L. No. 106-544).

5. Frequency of Use and Usefulness of Administrative Subpoena Authority Pursuant to §3486(a)(1)(A)(i)(I)

During calendar year 2001, the United States Attorneys offices issued seventy-one administrative subpoenas and the FBI issued 1,802 administrative subpoenas under this authority. The Assistant Attorney General in charge of the Criminal Division issued no such subpoenas.

The use of an administrative subpoena is an important tool for the investigation of child pornography/child sexual exploitation investigations. In cases where children are at "high risk" and/or may be in imminent danger, the execution of an administrative subpoena allows immediate requests to be made to the appropriate entity. Furthermore, unlike grand jury material which is protected under Fed. R. Crim. P. 6(e), information gleaned from the service of an administrative subpoena can be shared with other law enforcement entities without delay. Delay could literally mean the difference between life and death for a threatened child. In contrast, the disclosure

limitations placed on investigators using grand jury subpoenas may not allow investigators to share information necessary to the location and apprehension of violent child sexual predators.

The Innocent Images National Initiative is based on a multi-agency, multi-disciplinary approach
to investigations. The majority of the investigations concerning child pornography/sex exploitation of children are managed jointly with the assistance of state and local authorities. Without the FBI's ability to issue administrative subpoenas to service providers to obtain information, such as the name, address, local and long distance telephone toll billing records, telephone numbers, and the length and types of services of a particular subscriber or customer, investigations of child abuse/sex exploitation offenses would be significantly hindered and would not be completed as quickly or as successfully.

C. Secret Service Presidential Threat Protection Authority to Issue Subpoenas where there is an "Imminent" Threat to Secret Service Protectee, 18 U.S.C. §3486 (a)(1)(A)(ii)

1. Source and Scope of Subpoena Authority under 18 U.S.C. §3486(a)

Section 3486 (a)(1)(A)(ii) authorizes the Secretary of Treasury to issue an administrative subpoena if the Director of the Secret Service determines that a threat against a Secret Service protectee is "imminent." Such an administrative subpoena may compel: (1) the production of any records or other things relevant to the investigation; and (2) testimony by the custodian of the things required to be produced concerning the production and authenticity of those things. 18 U.S.C. §3486(a)(1)(B). Administrative subpoenas issued under section 3486 may require production as soon as possible after service of the subpoena, but not less than twenty-four hours after such issuance. 18 U.S.C. §3486(a)(10).

2. Applicable Subpoena Enforcement Mechanisms

Subsection (10)(c) authorizes the Attorney General to seek enforcement by requesting an order from the appropriate United States district court requiring a subpoenaed person or entity to appear. Failure to appear may result in a contempt order. 18 U.S.C. §3486 (a)(10)(c). A federal court petitioned to order compliance with an administrative subpoena issued under 18 U.S.C. §3486 (a)(1)(A)(ii) must review the subpoena under the same criterion applicable to all other administrative subpoenas issued by federal agencies in other circumstances.[116]

3. Notification Provisions and Other Provisions Related to Safeguarding Privacy Interests

Subsection (a)(5) permits the recipient of an administrative subpoena to seek to modify the scope of the administrative demand, or modify any a court nondisclosure order acquired by

[116]These factors include the factors articulated in *United States v. Powell*, 379 U.S. 48, 57-58 (1964). In addition, the court must determine that the subpoena was not issued in "bad faith" or otherwise constituted an "abuse of the court's process." *Id.*

the government. 18 U.S.C. §3486 (a)(5). Subpoenas issued under §3486 in the course of investigating an imminent threat against a Secret Service protectee are subject to all other limitations placed on the production of evidence pursuant to compulsory process. See Section II.A.3 *infra* for a further discussion of privacy-protective statutes and regulations applicable to the exercise of administrative subpoena authorities.

In evaluating the scope of an administrative subpoena issued under 18 U.S.C. §3486(a), the federal courts apply the principle formulated by the Supreme Court in Oklahoma Press, generally applicable to executive branch administrative subpoenas, that an administrative subpoena must be "reasonably relevant" to an agency's investigation at issue.[117] The permissible scope of an administrative subpoena is, however, "variable in relation to the nature, purposes and scope of the inquiry."[118] In order to satisfy the general reasonableness standard, the agency issuing the subpoena, in this instance the department issuing the subpoena, in this instance the Secretary of the Treasury, must satisfy the court that: (1) "the investigation will be conducted pursuant to a legitimate purpose," (2) "the inquiry may be relevant to the purpose," (3) "that the information sought is not already within the Commissioner's possession," and (4) "the administrative steps required by the Code have been followed[.]"[119] While the specific "imminent threat" subpoena authority provided under 18 U.S.C. §3486 (a)(1)(A)(ii) has not been exercised by the Department of Treasury, and therefore has not been addressed directly in federal court, the general standard recounted above would presumably apply to an exercise of this authority.

4. Standards Governing the Issuance of Administrative Subpoenas

In order to request issuance of a subpoena by the Secretary of the Treasury under 18 U.S.C. §3486(a)(1)(A)(ii), the Director of the Secret Service must determine that a threat against a Secret Service protectee is "imminent." The Director of the Secret Service may issue an administrative subpoena under this authority in "an investigation of an imminent threat constituting an offense under 18 U..S.C. § 871 or 879 or an imminent threat against a person protected by the Secret Service under 18 U.S.C. § 3056 (5) or (6)." See Treasury Directive 15-58, November 15, 2001. Upon issuing a subpoena under 18 U.S.C. §3486(a)(1)(A)(ii), the Director of the Secret Service must notify the Attorney General of such issuance. Where a finding of "imminence" is not appropriate, the Secret Service does not seek an administrative subpoena but proceeds, instead, through the process of procuring a grand jury subpoena through a local United States Attorney's office.

Treasury Directive 15-58 authorizes the Director of the Secret Service to redelegate this authority "in writing, in whole or in part, to the Assistant Director, Office of Protective Research, who may in turn redelegate in writing, in whole or in part, to the Senior Intelligence

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[117] *In re* Administrative Subpoena John Doe, 253 F.3d 256 (6th Cir. 2001).

[118] Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 209 (1946).

[119] *In re* Administrative Subpoena John Doe, 253 F.3d 256, 263 (6th Cir. 2001) (evaluating §3486(a) health care offense subpoena authority and referring to standards established in *United States v. Powell,* 379 U.S. 48, 57-58 (1964)).

Officer/Special Agent in Charge, Intelligence Division." Id.

5. Frequency of use and usefulness of administrative subpoena authority pursuant to 18 U.S.C. §3486(a)(1)(A)(ii)

During calendar year 2001, the United States Secret Service (USSS) issued no administrative subpoenas under 18 U.S.C. §3486(a)(1)(A)(ii). On November 15, 2001, the Secretary of Treasury issued Treasury Directive 15-58, properly delegating the authority for issuance of administrative subpoenas to the USSS. While delegation is now complete, the USSS intends to use the authority only sparingly, in accordance with USSS understanding of Congress' intent upon granting such authority. The authority granted in 18 U.S.C. §3486(a)(1)(A)(ii) is essential to the Secret Service's protective function, providing expedited investigation procedures in particularly threatening and dangerous situations, particularly where an individual is en route to exercise threats made against the President.

IV. Recommendations Regarding Necessary Steps to Ensure that Administrative Subpoenas are Used and Enforced Consistently and Fairly by Executive Branch Agencies

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 differing in purpose and content, and no significant or consistent patterns emerge from a study of these authorities, making any recommendations generally applicable to these various authorities would be neither prudent nor practicable. As various agencies participating in the study 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.

Table 1

Frequency Report, 18 U.S.C. §3486 Administrative Subpoenas

Authority	Issuing Entity	Number of Subpoenas Issued During Calendar Year 2001
18 U.S.C. §3486(a)(1)(A)(I)(1) (Federal Healthcare Offenses)	Attorney General Authority Delegated to United States Attorneys	2,102

18 U.S.C. §3486(a)(1)(A)(I)(1) (Federal Healthcare Offenses)	Attorney General Authority Delegated to Assistant Attorney General for the Criminal Division, United States Department of Justice	0
18 U.S.C. §3486(a)(1)(A)(i)(II) (Federal Offense involving the Sexual Exploitation or Abuse of Children)	Attorney General Authority Delegated to Director, FBI	1,802
18 U.S.C. §3486(a)(1)(A)(i)(II) (Federal Offense involving the Sexual Exploitation or Abuse of Children)	Attorney General Authority Delegated to United States Attorneys	71
18 U.S.C. §3486(a)(1)(A)(i)(II) (Federal Offense involving the Sexual Exploitation or Abuse of Children)	Attorney General Authority Delegated to the Assistant Attorney General of the Criminal Division	0
18 U.S.C. §3486(a)(1)(A)(ii) (Imminent Threat against Secret Service Protectee)	Secretary of the Treasury Authority Delegated to Director of the Secret Service	0