Death, Taxes, and Financial Privacy?

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As the saying goes, there are two things for certain in life, "death and taxes." When customers pass away, the bank has many issues to deal with related to the death of an accountholder, such as probate, payable on death accounts, family members, etc. One of the main questions related to death is what information the bank can divulge without violating the Right to Financial Privacy Act (RFPA) and the Gramm Leach Bliley Act (GLBA).

RFPA was enacted in 1978. The goal of RFPA is to limit the circumstances in which a government entity can access financial information. Ultimately, the government can only access financial information in response to specific authorization by the consumer, subpoena, warrant, or a formal written request from a government entity.

The RFPA does not extend past the death of the customer. While not explicitly stated in the regulation itself, there have been many court cases and opinions that solidify this point. The bank must protect this information prior to death, but it is not bound by the confines of RFPA after death.

While that may be true, this likely does not give the bank the opportunity to freely release personally identifiable information to the general public or the government. The bank will ultimately need policies and procedures in place to protect the financial information of the deceased to protect the bank, the individual's estate, and the bank's goodwill.

GLBA was enacted in 1999 and is facilitated through Regulation P. This law took RFPA a step further. Regulation P provides protections specifically for consumers who obtain financial products from financial institutions. This regulation requires banks to send certain disclosures related to privacy, information sharing, and information disclosure.

Under GLBA and Regulation P, the law and regulation are silent as to the death of an individual and whether the requirements still apply. Furthermore, this has not been litigated, so there is not a case law precedent, like there is with RFPA. Fortunately, the regulation gives some insight into this issue.

A customer under Regulation P is referred to as a "Consumer", which is defined as "**(1) Consumer** means an individual who obtains or *has obtained a financial product or service from you* that is to be used primarily for personal, family, or household purposes, or that individual's legal representative." 12 CFR § 1016.3(e)(1). Therefore, there is an argument that the Regulation may extend past death the death of a consumer due to the inclusion of the "legal representative" text.

As most bankers know, this is not the "end" of the customer relationship. There are many considerations and responsibilities for the bank. The bank must pay payable-on-death (P.O.D) accounts to the intended beneficiaries, facilitate estate accounts, communicate with executors, and comply with applicable court orders. Ultimately, this leads to the question of what information the bank may divulge and to whom may the bank divulge that information.

Under RFPA, the bank will generally be allowed to communicate with Federal government entities. For example, if the individual is receiving VA benefits, the bank has a responsibility to return those benefits after the bank receives notice of the death of the account holder. The bank would be allowed to divulge that the recipient has passed and that the funds are to be returned.

Under GLBA, while the conservative argument is to keep those Regulation P protections in place, certain exceptions apply to divulging information to interested parties.
"***a) Exceptions to opt out requirements.*** *The requirements for initial notice in § 1016.4(a)(2), for the opt out in §§ 1016.7 and 1016.10, and for service providers and joint marketing in § 1016.13 do not apply when you disclose nonpublic personal information:*

(1) *With the consent or at the direction of the consumer, provided that the consumer has not revoked the consent or direction;*

(2)

. . .

(iv) *To persons holding a legal or beneficial interest relating to the consumer; or*

(v) *To persons acting in a fiduciary or representative capacity on behalf of the consumer;*" 12 CFR 1016.15(a)(2)

Based on the above, the bank would be able to divulge information if the bank has prior consent from the consumer, if there is a beneficiary or related interest to that individual, or to a fiduciary or representative, which would include executors. The bank will likely need to verify the identity of these individuals and have appropriate due diligence procedures in place prior to revealing private banking information. This may include court orders identifying the executor or driver's licenses for P.O.D. beneficiaries. There is not a lot of regulatory guidance on what is required. Therefore, this will be more of a matter of internal policy.

As the saying goes, taxes and death are inevitable, but hopefully, the bank will be prepared to handle the death of an account holder. The bank will want to have policies and procedures in place when the bank receives notice of a deceased customer, but the bank has options to divulge information to those with interests in the applicable accounts. The bank will want to weigh those policies and procedures with safety and soundness considerations. When death inevitably arises in the banking world, the bank does have options.