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Confidentiality and Disclosure: The Money Laundering Control Act of 1986 and Banking Secrecy

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"Banking secrecy" means that financial institutions must keep information received about their clients in the course of business secret and confidential. In the United States a variety of legal doctrines, grounded in contract,[1] agency,[2] and tort[3] theory, recognize and protect the interest of individuals in financial privacy.[4] Some of these rights are codified in the Right to Financial Privacy Act, which protects individual financial privacy rights from interference by the state.[5]

Records of financial transactions are highly useful in ascertaining physical transactions, and are often the only evidence of their occurrence. Moreover, the financial proceeds of crime usually find their way to those who commissioned the crime. Many financial transactions, because of

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1. An English case, Tournier v. National Provincial & Union Bank of England, [1924] 1 K.B. 421 (C.A. 1923) is credited with establishing the common-law principle that a banker owes an implied contractual duty of confidentiality to his customer. Compendium, *Bank Secrecy, Financial Privacy, and Related Restrictions*, 2 INT'L BUS. LAW. 281 (1979). *Tournier* lists four qualifications to this duty: (a) when disclosures are compelled by law; (b) when there is a duty to the public to disclose; (c) when the interest of the bank requires disclosure; (d) when the disclosure is made with the express or implied consent of the customer.

2. Peterson v. Idaho First Nat'l Bank, 83 Idaho 578, 367 P.2d 284 (1961) included agency as a legal basis for asserting a duty of confidentiality on the part of a bank. Grainy Dev. Corp. v. Taksen, 400 N.Y.S.2d 717 (Ct. App.), *aff'd*, 411 N.Y.S.2d 756 (1978), refined the agency concept that an agent is subject to a duty to his principal not to use or communicate confidential information given to him by his principal or acquired by him during the course of or on account of his agency.

3. The tort theories of invasion of privacy and defamation, though containing fundamental deficiencies, may provide some protection of financial privacy. *See* L. FISCHER, THE LAW OF FINANCIAL PRIVACY ¶ 5.04 (1983).

4. "The banking transactions of an individual give a fairly accurate account of his religion, ideology, opinion, and interest. . . ." California Bankers Ass'n v. Shultz, 416 U.S. 21, 85 (1974) (Statement of Justice William O. Douglas).

5. Title XI of the Financial Regulatory Interest Control Act of 1978, Pub. L. No. 95-630, 92 Stat. 3641.

bookkeeping entries, required records, or the instruments themselves, reveal the identities of the payor and the payee, leaving a ready "audit trail." Criminals conceal this evidence from law enforcement authorities by "laundering" their funds through financial institutions,[6] allowing criminals to fund other legal or illegal ventures.[7] Consequently, the interest of individuals in financial privacy competes with the interest of government in requiring disclosure of financial information to assist in law enforcement.

This competition between individual and law enforcement interests has spawned three major pieces of federal legislation. The Bank Secrecy Act,[8] enacted in 1970, imposes recordkeeping and reporting requirements on financial institutions in order to supply law enforcement with evidence of financial transactions.[9] The Right to Financial Privacy Act of 1978, enacted in response to the Supreme Court's decision to allow the requirements of the Bank Secrecy Act to override the protections of the fourth amendment in *United States v. Miller,* [10] protects the rights of individuals to financial privacy. The Money Laundering Control Act of 1986 (the Act),[11] enacted to prevent parts of the Bank Secrecy Act from being circumvented by money launderers, supplements the Bank Secrecy Act and the Right to Financial Privacy Act, and creates new substantive criminal offenses for money laundering.

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6. Money laundering is a process whereby one conceals the existence, illegal source, or illegal application of income, and then disguises that income to make it appear legitimate. *See* COMMISSION ON ORGANIZED CRIME, THE CASH CONNECTION: ORGANIZED CRIME, FINANCIAL INSTITUTIONS, AND MONEY LAUNDERING (1984). Illegal enterprises frequently employ money laundering as a vital link in criminal operations. S. REP. No. 433, 99th Cong., 2d Sess. 43 (1986) [hereinafter SENATE JUDICIARY REPORT]. Complex schemes are devised to conceal the true source of income and disguise its illegal nature. *Id.* at 28.

7. H.R. REP. No. 855, 99th Cong., 2d Sess., pt. 1, at 8 (1986) [hereinafter HOUSE JUDICIARY REPORT].

8. Amendments to Federal Deposit Insurance Act, Pub. L. No. 91-508, 84 Stat. 1114 (1970).

9. The disclosure requirements may be imposed upon financial institutions because they constitute a regulated industry, deriving their charter to operate from state and national government. California Bankers Ass'n v. Schultz, 416 U.S. 21 (1974), upheld the validity of imposing reporting requirements on financial institutions.

10. 425 U.S. 435 (1976); *see infra* note 170.

11. Subtitle H of Title I of the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (introduced Sept. 8, 1986 as H.R. 5484) (codified as amended in scattered sections of 18 U.S.C. and 31 U.S.C.). *See* 132 CONG. REC. H6739 (Sept. 11, 1986) (passage in House); 132 CONG. REC. S14302 (Sept. 30, 1986) (passage in Senate). Earlier bills were proposed by Senator Alfonse D'Amato (R-N.Y.), S. 571, 99th Cong., 2d Sess. (1986), and S. 2306, 99th Cong., 2d Sess. (1986).

The Act is a part of the Anti-Drug Abuse Act, which addresses the problem of drug abuse with a battery of legislation. Various provisions of the Act define new crimes, increase penalties and enforcement authority, attempt to control the international supply of narcotics, enhance the ability of the government to interdict narcotics trafficking, and strive to reduce the demand for narcotics in schools, among federal employees, and in national parks.

I. New Offenses

Prior to the passage of the Act, the Bank Secrecy Act dealt with the problem of money laundering only indirectly by requiring the filing of various reports and punishing the failure to do so. The Act approaches the problem of money laundering directly by proscribing certain types of transactions commonly used to launder funds derived from illegal activity. The Act creates two new federal crimes of money laundering, which may be referred to as the "Money Laundering Crime" and the "Monetary Transactions Crime."

A. The Money Laundering Crime

The Money Laundering Crime involves activities that the drafters considered "the core of money laundering"[12] namely (1) promoting "specified unlawful activity,"[13] a term of art used to describe crimes commonly associated with narcotics trafficking, financial misconduct, and organized crime; (2) designing transactions or transporting monetary instruments to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of "specified unlawful activity";[14] and (3) avoiding transaction reporting requirements under state or federal law.[15] To reach these activities, the Act prohibits certain specific financial transactions (the "Transaction Offense")[16] and certain transportation activities (the "Transportation Offense").[17]

1. *Scienter*

Scienter standards under the Money Laundering Crime require a high degree of proof of the defendant's specific intent or knowledge of the underlying activity. As with other white collar crimes, the focus of most money laundering cases will be on scienter, rather than on the prohibited acts themselves (as is the focus of most drug offenses, where scienter is implied from the natural consequences of one's prohibited acts).

To be guilty of either of the Money Laundering Crime's two component offenses, the Transaction Offense and the Transportation Offense, the defendant must have conducted the prohibited acts either:

12. Senate Judiciary Report, *supra* note 6, at 36.

13. "Specified unlawful activity" is discussed *infra* text accompanying note 35.

14. The language is intended to include transactions designed to conceal the identity of the participants to a transaction, when it can also be proved that the funds involved in the transaction are in fact the proceeds of crime. Senate Judiciary Report, *supra* note 6, at 36.

15. 18 U.S.C.A. § 1956(a)(1) (West Supp. 1987).

16. *Id.*

17. *Id.*

(A) having the intent to promote the carrying on of specified unlawful activity; or

(B) knowing that the transaction or transportation[18] is designed in whole or in part

  (i) to conceal or disguise the nature, the location, the source, the ownership or the control of the proceeds of specified unlawful activity; or

  (ii) to avoid a transaction reporting requirement under state or federal law.[19]

The scienter standards of both the Transaction Offense and the Transportation Offense may be summarized as "intent to promote" or "knowing."

The "intent to promote" standard adopted by the Act apparently is a higher standard than "intent to facilitate," the standard initially proposed by the Senate Judiciary Committee. "Facilitate" has been interpreted in some contexts as meaning "to make easy or less difficult,"[20] whereas "promote" has been defined as "to contribute to the growth, enlargement, or propensity of, to further encourage, to bring or help to bring (as a business enterprise) into being."[21] While the word "promote" may connote more concrete or positive action than "facilitate," the legislative history provides no guidance as to the possible distinctions between the two forms. The Senate Judiciary Report indicates that the "intent to facilitate" language was intended to encompass situations similar to those prosecuted under the federal aiding and abetting statute.[22] Thus, in interpreting the intent to promote standard, the aiding and abetting cases in which the facts do not demonstrate concretely positive action may prove inapposite.

"Knowing," as currently interpreted,[23] is a high scienter standard. The legislative history makes it clear that negligent involvement in a money

18. The Transportation Offense contains an additional scienter requirement that the defendant know that the monetary instrument or funds involved in the transportation represent the proceeds of specified unlawful activity. *Id.* § 1956(a)(2)(B).

19. 18 U.S.C.A. § 1956(a) (West Supp. 1987).

20. United States v. Judkins, 428 F.2d 333, 335 (6th Cir. 1970); United States v. Miller, 379 F.2d 483, 486 (7th Cir. 1967); United States v. Barrow, 212 F. Supp. 837, 840 (E.D. Pa. 1962).

21. Ricci v. United States, 507 F.2d 1390, 1398 (Ct. Cl. 1974) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (unabr. ed. 1971)).

22. 18 U.S.C.A. § 2 (West Supp. 1986); *see, e.g.*, Backun v. United States, 112 F.2d 635 (4th Cir. 1940) (guilt as an accessory depends on aiding and assisting the perpetrators, those who make a profit by furnishing to criminals the means to carry on undertakings as though actual partners having a stake in the enterprise).

23. United States v. Hernando Ospina, 798 F.2d 1570, 1580 (11th Cir. 1986); United States v. Heyman, 794 F.2d 788 (2d Cir. 1986).

laundering scheme is not punishable.[24] However, "willful blindness"—such as intentional and knowing disregard of the nature of the funds involved—is punishable.[25] Conducting a legitimate and ordinary transaction with the mere suspicion that it may be part of a laundering activity or that the funds are proceeds of a crime is not proscribed. By way of contrast, particular knowledge of a fact or circumstance surrounding the transaction may satisfy the scienter requirements if the fact or circumstance clearly indicates the illegal nature of the transaction. Because of the high scienter standards of the offenses, business people can have some assurance that they are not likely to face prosecution merely because the transaction was suspect in nature, unless they have some specific knowledge of their acts and omissions which would amount to "willful blindness."

A defendant must know that the transaction or transportation is designed either (1) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity, or (2) to avoid a transaction reporting requirement under state or federal law.[26] The defendant must also know that the monetary instrument or funds involved in the transportation represent the proceeds of some form of unlawful activity.[27] The defendant need not know that the crime that generated the funds was "specified unlawful activity,"[28] nor even exactly what crime generated the funds involved in the transaction, only that the

24. A "reason to know" standard proposed earlier in the history of the Act, by S. 572, 99th Cong., 2d Sess. (1986), the Organized Crime Commission's bill, and S. 1385, 99th Cong., 2d Sess. (1986), Senator DeConcini's bill, was criticized as being susceptible to the construction that negligent involvement in a money laundering transaction might be punishable. SENATE JUDICIARY REPORT, *supra* note 6, at 32. A "reckless disregard" standard, proposed by the Administration bill, S. 1335, 99th Cong., 2d Sess. (1986), also was rejected in favor of the higher "knowing" standard in the Senate Judiciary bill.

25. SENATE JUDICIARY REPORT, *supra* note 6, at 35; *see also* United States v. Jewel, 532 F.2d 697 (9th Cir.), *cert. denied,* 426 U.S. 951 (1976). Thus, a currency exchanger who participates in a transaction with a known drug dealer involving hundreds of thousands of dollars in cash and accepts a commission far above the market rate, could not escape conviction simply by claiming that he did not know for sure that the currency involved in the transaction was derived from crime. On the other hand, an automobile dealer who sells a car at market rate to a person whom he merely suspects has involvement with crime, cannot be convicted of this offense in the absence of a showing that he knew something more about the transaction or the circumstances surrounding it.

26. Where intent to promote is not involved. For further clarification of the "knowing" standard *see* HOUSE JUDICIARY REPORT, *supra* note 7, at 13-14.

27. Though this stipulation is not required in a Transportation Offense when intent to promote is involved.

28. This restriction precludes the allegation that the defendant thought that the property involved represented the proceeds of a crime not covered within the term "specified unlawful activity." It was reported to the Senate Judiciary Committee that such a defense had been successfully raised in other countries whose statutes do not draw the distinction. SENATE JUDICIARY REPORT, *supra* note 6, at 37.

funds are proceeds of some kind of crime that is a felony under federal or state law.[29]

2. *Prohibited Acts*

Presumably to prevent easy evasion, the acts prohibited by the Transaction Offense and the Transportation Offense are extremely broad. Because few limiting principles emerge from the prohibited acts themselves, the scienter and jurisdictional requirements are the primary limitations to the law's application. The limitations on the prohibited acts themselves are principally in the definitions of the terms "financial transaction," "proceeds of specified unlawful activity," and "monetary instrument or funds."

a. Transacting

Fundamentally, the Transaction Offense prohibits conducting[30] financial transactions in property[31] that represent the proceeds of specified unlawful activity.[32] Though the term "transaction" is defined very broadly,[33] the term "financial transaction" is limited to transactions involving movements of funds by wire or other means, to transactions involving monetary instruments, and to transactions involving the use of a financial institution.[34] Though potentially applicable to any commercial

29. 18 U.S.C.A. § 1956(c)(1) (West Supp. 1987). *See infra* text accompanying note 28.

30. The term "conducts" is defined to include initiating, concluding, or participating in initiating or concluding a transaction. 18 U.S.C.A. § 1956(c)(2) (West Supp. 1987). This definition ensures that the Transaction Offense applies not only to a person who deposits cash in a bank knowing that the cash represents the proceeds of crime, but also to a bank employee who accepts the cash if the employee knows that the money represents the proceeds of crime. SENATE JUDICIARY REPORT, *supra* note 6, at 38.

31. The Senate Judiciary Report states that the term "property" is intended to be construed liberally to encompass any form of tangible or intangible assets. SENATE JUDICIARY REPORT, *supra* note 6, at 39. The term "involved" as used in the phrase "property involved in a financial transaction" is not defined.

32. 18 U.S.C.A. § 1956(b) (West Supp. 1987).

33. The term includes various activities involving financial institutions, such as a deposit, a withdrawal, an exchange of currency, a transfer between accounts, and the purchase or sale of certificates of deposit. *Id.* § 1956(c)(3). The term also includes a loan, extension of credit, purchase or sale of any stock, bond, or other monetary instrument, or any other payment, transfer, or delivery by, through, or to a financial institution, by whatever means effected. *Id.* The term also includes activities not involving banks, such as the purchase, sale or other disposition of property of all kinds. "Transaction" also includes any loan, pledge, gift, transfer, or delivery. *Id.* Thus a lawyer who deposits funds or exchanges stock in the course of creating a dummy corporation for the purchase or sale of property, or aids in the sale of property, knowing that such actions are part of someone's scheme to conceal the proceeds of a crime could be charged with money laundering. HOUSE JUDICIARY REPORT, *supra* note 7, at 15.

34. 18 U.S.C.A. § 1956(c)(4) (West Supp. 1987). For the definition of "monetary instrument," *see infra* text accompanying note 43.

activity, transactions in property that are not monetary instruments or funds and that do not involve financial institutions may escape the proscriptions of the Transaction Offense.

"Specified unlawful activity" is central to the Transaction Offense and is perhaps the most significant limitation to its application. "Specified unlawful activity" defines the particular crimes from which the property involved in the transaction must derive.[35] The Transaction Offense requires that the property involved in a transaction must in fact be proceeds of "specified unlawful activity," and that the defendant must intend to promote "specified unlawful activity" or know that the transaction is designed either to conceal or disguise proceeds of "specified unlawful activity" or to avoid a reporting requirement. The requirement that the property in fact be derived from specified unlawful activity is important because the elements of the particular specified unlawful activity become essential elements of the Transaction Offense to be proved by the prosecution.

"Specified unlawful activity" is defined by reference to several federal statutes. The crimes encompassed in the term are those crimes most commonly associated with organized crime, drug trafficking, and financial misconduct. Crimes associated with organized crime and drug trafficking include continuing criminal enterprise offenses[36] and the Racketeer Influenced and Corrupt Organizations Act (RICO) offenses.[37] Crimes associated with financial misconduct include such crimes as embezzlement, bank bribery, and illegal arms sales.[38] Bank Secrecy Act offenses are not included as a "specified unlawful activity" on the theory that there are no identifiable "proceeds" of Bank Secrecy Act violations as there are for RICO offenses.[39]

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35. The crimes comprising "specified unlawful activity" are detailed in new § 1956(a)(7). This section attempts to strike a balance between the Organized Crime Commission bill and the Administration bill by covering the proceeds of federal financial offenses and foreign drug offenses as well as RICO offenses. SENATE JUDICIARY REPORT, *supra* note 6, at 36.

36. Covered under 21 U.S.C.A. § 848 (West Supp. 1986) and 18 U.S.C.A. § 1956(c)(7)(C) (West Supp. 1987).

37. Listed in 18 U.S.C.A. § 1961(e) (West Supp. 1987) or in *id.* § 1956(c)(7)(A).

38. 22 U.S.C.A. 2778 (West Supp. 1986) (embezzlement); 50 U.S.C.A. app. § 2401 (West Supp. 1986) (bank bribery); 50 U.S.C.A. § 1702 (West Supp. 1986); 50 U.S.C.A. app. § 3 (West Supp. 1986).

39. 18 U.S.C.A. § 1956(c)(7)(A) (1987); *see also* SENATE JUDICIARY REPORT, *supra* note 6, at 39. The Senate Judiciary Committee viewed violations of the reporting requirements of the Bank Secrecy Act as more appropriately covered by inclusion directly in the operative language of both the Transaction Offense and the Transportation Offense. Because the Act states that nothing contained therein supersedes any provision of state or federal law imposing criminal penalties or affording civil remedies in addition to those provided for in the Act, a person can be charged with both violation of the Act and violation of the Bank Secrecy Act for causing a financial institution to fail to fill out the proper forms or fill them out improperly. SENATE JUDICIARY REPORT, *supra* note 6, at 40.

b. Transporting

The Transportation Offense applies to actions in which money is laundered by transferring it into or out of the United States.[40] The Transportation Offense prohibits the act of transporting or attempting to transport a monetary instrument or funds, either with intent to promote a crime or with knowledge that the transportation is designed to conceal a crime.[41] Many transactions prohibited by this offense could also be punishable as financial transactions under the Transaction Offense. Thus the Transportation Offense is essential to reach activities that avoid being financial transactions or financial transactions that are conducted outside the United States.

The term "transportation" is not defined.[42] Thus the most significant limitation to the statute's application is that the transportation must involve a "monetary instrument" or "funds." The term "monetary instrument" is defined to include coin or currency[43] of the United States or of any other country, travelers' checks, personal checks, bank checks, money orders, investment securities in bearer form or other forms in which title passes upon delivery, and negotiable instruments in bearer form or other form in which title passes upon delivery. The definition would include

40. Even prior to the Act, when cash was transported out of the country, the IRS had the authority to seize the cash because customs regulations had been violated. Prior to amendment, however, if the cash transaction occurred in the U.S., and the cash was then wired to other countries, the restrictive provisions of the Bank Secrecy Act made it virtually impossible for the IRS to seize the cash. *See* Hanlon, *Senate Banking Committee Continues Hearings on Money Laundering Bills*, 31 TAX NOTES 446 (1986). The offense supports recent efforts by the United States to obtain international cooperation to halt the flow of drug money, and to prevent the United States from becoming a haven in which foreign drug traffickers can keep or invest their earnings. SENATE JUDICIARY REPORT, *supra* note 6, at 37. See discussion of international attempts to halt the flow of drug money in H. R. REP. No. 746, 99th Cong., 2d Sess. (1986) [hereinafter HOUSE BANKING REPORT].

41. The knowledge requirement of this section should also be construed to encompass instances of "willful blindness"; the "intent to promote" language should also be construed in accord with Backun v. United States 112 F.2d 635 (4th Cir. 1940). SENATE JUDICIARY REPORT, *supra* note 6, at 37. *See supra* text accompanying notes 23-26. This section is not triggered by mere receipt of property or by the recipient's mere "belief" that the property represented the proceeds of crime.

42. *See* H.R. REP. No. 984, 98th Cong., 2d Sess., pt. 1, 4 (1984) (addition of "about to transport" language); United States v. Gomez-Londono, 442 F. Supp. 519 (E.D.N.Y. 1976), *rev'd on other grounds*, 553 F.2d 805 (2d Cir. 1977) (confusing "time of departure" with "transports").

43. The phrase "coin or currency" is intended to include gold or other precious metal coins, which are the legal tender of a country but which do not normally circulate as such, or whose value is determined by the worth of their metallic content rather than by the operation of normal currency exchange markets. SENATE JUDICIARY REPORT, *supra* note 6, at 39.

cashier checks.[44] "Monetary instruments" are a subset of the term "property."[45]

3. *Jurisdiction*

The provisions of the Money Laundering Crime are designed to exercise the full extent of Congress's powers under the commerce clause of the U.S. Constitution.[46] Conscious of the controversy surrounding United States extraterritorial enforcement efforts, however, the Act self-imposes limits to extraterritorial application. First, the Act's extraterritorial jurisdiction applies only to transactions or series of related transactions involving more than $10,000.[47] Second, the Act applies only to situations in which the interests of the United States are involved, either because the defendant is a U.S. citizen or because the transaction occurred in whole or in part in the United States.[48]

The first limitation may be the only concrete limitation of extraterritorial jurisdiction. The limits of extraterritorial enforcement of United States criminal laws are not well defined in the law,[49] and the limitations on the application of the Money Laundering Crime offer only a small measure of certainty. International law recognizes three fundamental bases of ex-

44. 18 U.S.C.A. § 1956(c)(7)(A) (West Supp. 1987); *see also* SENATE JUDICIARY REPORT, *supra* note 6, at 39; 51 Fed. Reg. 30233 (1986) (proposed rules); 52 Fed. Reg. 11436 (1987) (final rules on definition of "monetary instruments").

45. SENATE JUDICIARY REPORT, *supra* note 6, at 39; *see supra* text accompanying note 31.

46. SENATE JUDICIARY REPORT, *supra* note 6, at 39. As described in the legislative history, the use of the proceeds of unlawful activity to purchase a residence would be covered if any of the materials used in the construction of the house could be shown to have come from out of state. The transactions must involve "interstate or foreign commerce" or be conducted by or through a financial institution, as defined in 31 U.S.C.A. § 5312(a)(2) (West Supp. 1986) and regulations. 18 U.S.C.A. § 1956(c)(6) (West Supp. 1987); *see* 52 Fed. Reg. 11436 (1987) (revising definitions of "bank" and "financial institution"); *see also* United States v. Penagaricano-Soler, 646 F. Supp. 75 (D.P.R. 1986) (discussing the term "financial institution"). The financial institution must be engaged in, or its activities must affect, interstate or foreign commerce, "in any way or degree." 18 U.S.C.A. 1956(c)(4) (West Supp. 1987). The term "affect commerce in any way or degree" is derived from the Hobbs Act, 18 U.S.C.A. § 1951 (West Supp. 1986).

47. 18 U.S.C.A. § 1956(f)(2) (West Supp. 1987).

48. *Id.* § 1956(f)(1); *see also* SENATE JUDICIARY REPORT, *supra* note 6, at 40. An example of the latter is a situation in which a person transfers by wire the proceeds of a drug transaction from a bank in the United States to a bank in a foreign country. Another example is a situation in which a person telephones instructions from the United States to one foreign bank to transfer such proceeds to another foreign bank. *Id.* The Senate Judiciary Committee did not intend to impose a duty on foreign citizens operating wholly outside of the United States to become aware of U.S. laws.

49. *See* Commodities Futures Trading Comm'n v. Nahas, 738 F.2d 487, 493 (D.C. Cir. 1984); Dam, *Economic and Political Aspects of Extraterritoriality*, 19 INT'L LAW. 887 (1985); Rosenthal, *Jurisdictional Conflicts Between Sovereign Nations*, 19 INT'L LAW. 487 (1985).

traterritorial jurisdiction: (1) jurisdiction based on territoriality, (2) jurisdiction based on nationality, and (3) jurisdiction based on the effects doctrine.[50] Though conduct involving United States citizens is legitimately subject to jurisdiction, conduct occurring in part in the United States may be problematic. It is usually not enough that the conduct merely have some connection to the United States; the assumption of jurisdiction must be "reasonable."[51] There is no such reasonableness modifier in the statute, and in fact the legislative history indicates that a wire transfer into or through the United States is sufficient. The Act conceivably could apply to an extraterritorial money laundering transaction in which a criminal wires money from one country to another, but the wire transfer system inadvertently routes the funds through the United States. Whether a court would read a reasonableness requirement into the Act remains to be seen.[52]

4. *Penalties*

Persons violating the Transaction Offense are to be sentenced to a fine of not more than $500,000, or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both.[53] The same is true for the Transportation Offense, except that the fine cannot be less than $500,000.[54]

Civil penalties may be imposed on those found to have committed a Money Laundering Crime.[55] The standard of proof for imposition of such a penalty is a preponderance of the evidence.[56] The maximum amount of such a civil penalty is the value of the property involved in the illegal transaction, or $10,000, whichever is greater. A civil penalty, if imposed, is payable to the United States. The Act does not create a private civil remedy under which penalties would be payable to prevailing private litigants.[57]

50. *See* RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 17 (1965) [hereinafter RESTATEMENT (SECOND)].

51. *See* RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) § 402 (Tent. Draft No. 6, April 12, 1985) [hereinafter REVISED RESTATEMENT].

52. To determine reasonableness, the Revised Restatement would require balancing of numerous factors, including: the extent to which the activity has substantial, direct, and foreseeable effects upon and in the regulating state; the connections (such as nationality, residences, or economic activity) between the regulating state and the persons principally responsible for the activity to be regulated; the character of the activity to be regulated; the extent to which such regulation is consistent with traditions of the international system; and other considerations. REVISED RESTATEMENT § 403(2).

53. 18 U.S.C.A. § 1956(a)(1) (West Supp. 1987).

54. *Id.* § 1956(a)(2).

55. *Id.* § 1956(b).

56. *Id.*

57. SENATE JUDICIARY REPORT, *supra* note 6, at 38.

Civil penalties may be imposed in addition to any fine imposed for the criminal offense. The forfeiture provisions of new chapter 46 of title 18 of the United States Code[58] may be applied in addition to civil and criminal penalties.[59] For payment of a criminal fine and civil penalty, the government may look to assets of the defendant not involved in the offense.[60]

B. The Monetary Transaction Crime

The Monetary Transaction Crime is one of the House Judiciary Committee's contributions to the legislation. Of the new crimes, the Monetary Transaction Crime has potentially the broadest application. Simply, the Monetary Transaction Crime prohibits monetary transactions in criminally derived property. "Monetary transaction" is defined as the deposit, withdrawal, transfer, or exchange, in or affecting interstate or foreign commerce, of funds or a monetary instrument[61] by, through, or to a financial institution.[62] "Criminally derived property" is any property[63] constituting, or derived from, proceeds obtained from a criminal offense.[64] The property must in fact have been derived from "specified unlawful activity"[65] and must have a value of greater than $10,000.[66]

The scienter requirement for the Monetary Transaction Crime is that the defendant "knowingly engages" or "attempts to engage" in a prohibited monetary transaction. To be guilty of the offense, the defendant must know that he is engaging in a monetary transaction and also know that the property involved is criminally derived.[67] The government is not required to prove that the defendant knew the offense from which the property was derived was specified unlawful activity, but merely that the defendant knew the offense was a criminal one.[68]

58. *See infra* text accompanying note 80.

59. Senate Judiciary Report, *supra* note 6, at 38. Thus, a person who commits a Money Laundering Crime by laundering $250,000 might have the commissions earned for the laundering civilly forfeited, be subject to a fine of another $250,000 if convicted of the criminal offense, and pay a civil penalty of another $250,000. *Id.*

60. *Id.*

61. *See supra* text accompanying note 43.

62. 18 U.S.C.A. § 1957(f)(1) (West Supp. 1987). The term "financial institution" is defined by reference to 31 U.S.C.A. § 5312(a)(2) (West Supp. 1986) and the regulations thereunder, as may be amended.

63. *See supra* text accompanying note 31.

64. 18 U.S.C.A. § 1957(f)(2) (West Supp. 1987).

65. *See supra* text accompanying note 35.

66. 18 U.S.C.A. § 1957(a) (West Supp. 1987).

67. *See* 132 Cong. Rec. S16921 (Oct. 17, 1986) (remarks of Senator DeConcini), suggesting that the defendant must also know that the property is derived from specified unlawful activity.

68. 18 U.S.C.A. § 1957(c) (West Supp. 1987).

The potential breadth of application of this crime was recognized in the early versions of the bill.[69] It is intended to put at risk any person who does business with a drug trafficker. Certain applications of the Act, for example to a grocer who is paid for his produce by the proceeds of a crime, are beyond the legislative intent, but limitations are not expressly incorporated in the statute. The crime's application to attorneys representing narcotics traffickers was expressly limited in an earlier draft, but the limitation did not survive enactment. Any limitations on the scope of this crime must be evolved judicially.

The Monetary Transaction Crime also has the potential to be applied expansively extraterritorially. The offense must either occur within U.S. territorial jurisdiction[70] or the defendant must be a "U.S. person,"[71] defined to be either a U.S. national,[72] an alien lawfully admitted for permanent residence,[73] any person within the U.S.,[74] a business association composed principally of U.S. nationals or permanent resident aliens,[75] or a U.S. corporation or a foreign subsidiary of a U.S. corporation.[76] The nationality basis is broader than for the Money Laundering Crime, which is limited to U.S. citizens. Although broad, the nationality bases of jurisdiction are generally acceptable. The territorial designations may be applied exceedingly broadly, however it is possible to maintain, as the United States has, that the effects doctrine is merely an exercise of territorial jurisdiction.[77] Extending the Monetary Transaction Crime to conduct that has effects in the United States, without more, very likely would be perceived by other nations as overreaching.

The punishment for violation of the Monetary Transaction Crime is a fine under title 18, or imprisonment for not more than ten years, or both.[78] The court may impose an alternative fine to the title 18 fine of not more than twice the amount of the criminally derived property involved in the transaction.[79]

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69. *See* HOUSE JUDICIARY REPORT, *supra* note 7, at 13.

70. 18 U.S.C.A. § 1957(d)(1) (West Supp. 1987).

71. *Id.* § 1957(d)(2). Within the meaning of *id.* § 3077, excluding those defined in subsection (2)(d).

72. As defined in 8 U.S.C.A. § 1101(a)(22) (West Supp. 1986).

73. As defined in *id.* § 1101(a)(20).

74. 18 U.S.C.A. § 3077(2)(C) (West Supp. 1986).

75. *Id.* § 3077(2)(E).

76. *Id.* § 3077(2)(F).

77. *See* Laker Airways v. Sabena Belgian World Airlines, 731 F.2d 909 (D.C. Cir. 1984); *see also* Griffin, *United States Antitrust Laws*, 21 INT'L LAW. 307 (1987); Sennet & Gavil, *Antitrust Jurisdiction, Extraterritorial Conduct and Interest-Balancing*, 19 INT'L LAW. 1185 (1985).

78. 18 U.S.C.A. § 1957(b)(1) (West Supp. 1987). As with the Money Laundering Crime, both the Attorney General and the Secretary of State are given investigative jurisdiction. *Id.* § 1957(e).

79. 18 U.S.C.A. § 1957(b)(2) (West Supp. 1987).

C. Forfeiture

If the Money Laundering Crime or the Monetary Transaction Crime is committed, the money launderer's gross receipts, and property traceable to such receipts, are subject to civil forfeiture.[80] Coin or currency[81] or any interest in other property[82] traceable to the coin or currency involved in a transaction[83] in violation of certain Bank Secrecy Act reporting requirements[84] is similarly subject to forfeiture.[85] If the owner or lien-holder of such property can establish that he did not act affirmatively, by act or omission, to violate the Money Laundering Crime, Monetary Transaction Crime, or Bank Secrecy Act provisions, and that the violations were committed without his knowledge,[86] his property may be spared from forfeiture.[87]

To deter the laundering of foreign crime proceeds in the United States, the proceeds of an offense against a foreign nation are also forfeitable.[88] Not all foreign offenses are covered, only those involving the manufacture, importation, sale, or distribution of a controlled substance,[89] and which are punishable by death or imprisonment of more than one year both in the foreign country and in the U.S.[90] The forfeited receipts of a money launderer[91] and proceeds of an offense against a foreign nation[92] may be transferred to federal, state or local authorities,[93] or to foreign countries[94]

80. *Id.* § 981(a)(1)(A). By use of the word "receipts" the Senate Judiciary Report contemplated that only the commission earned by the money launderer would be subject to forfeiture, and not the laundered corpus itself. Senate Judiciary Report, *supra* note 6, at 49.

81. Or other monetary instruments to be defined by Regulations.

82. Including any deposit in a financial institution.

83. Or attempted transaction.

84. 31 U.S.C.A. §§ 5313(a), 5324 (West Supp. 1987). The Senate bill required that the owner know that the property was involved in the transaction.

85. To the United States, 18 U.S.C.A. § 981(a)(1)(C) (West Supp. 1987), provided that the property is owned by a regulated bank or brokerage firm, which is protected when innocently acquiring the property. Senate Judiciary Report, *supra* note 6, at 49. Puzzlingly, this section provides no forfeiture if the violation is by a regulated domestic financial institution or brokerage firm. 18 U.S.C.A. § 981(a)(1)(c) (West Supp. 1987). This is a marked change from the Senate Judiciary bill.

86. 18 U.S.C.A. § 981(a)(2) (West Supp. 1987).

87. Senate Judiciary Report, *supra* note 6, at 49.

88. 18 U.S.C.A. § 981(a)(1)(B) (West Supp. 1987).

89. As defined in the Controlled Substances Act, 21 U.S.C.A. § 848 (West Supp. 1986).

90. If the offense had occurred in the U.S. The Act also removes the restriction to financial transactions in the Senate Judiciary bill. S. 2683, 99th Cong., 2d Sess. (1986).

91. 18 U.S.C.A. § 951(a)(1)(A) (West Supp. 1987).

92. *Id.* § 951(a)(1)(B).

93. *Id.* § 981(e).

94. *Id.* § 981(i). This provision, along with *id.* § 981(a)(1)(b), implements in part article 18 of the treaty between the United States and Italy on mutual assistance in criminal matters. Article 18 of that treaty provides that both countries are to have the authority to seize assets

participating in any acts that lead to the seizure or forfeiture of such property. The launderer's gross receipts must be criminally forfeited.[95] In contrast to the civil forfeiture provisions, the criminal forfeiture provisions are mandatory and the judge must order the forfeiture of the property described above when imposing sentence on a convicted person.

II. Amendments to the Bank Secrecy Act

A. Background

The Bank Records and Foreign Transaction Act (the Records Act)[96] was enacted into law on October 26, 1970. The Records Act requires financial institutions[97] to make reports and keep records designed to identify the sources, volumes, and movements of United States currency being transported into and out of the United States and being deposited in financial institutions. The resulting audit trail is meant to be used by law enforcement agencies in the detection and investigation of criminal activities.[98]

Title I of the Records Act, Financial Recordkeeping,[99] requires financial institutions to make and retain certain records.[100] Title II of the Records

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found within their borders and to forfeit such assets for the benefit of the other country based upon a violation of the other country's laws. The U.S. Senate advised and consented to the ratification of this treaty on June 18, 1984. Treaty on Extradition and Mutual Assistance in Criminal Matters, June 18, 1984, United States-Italy. *See* Megozzi, *The 1982 Mutual Assistance Treaty*, 18 N.Y.U. J. INT'L L. & POL. 813 (1986); *see also* Treaty on Mutual Assistance in Criminal Matters, May 25, 1973, United States-Switzerland, 27 U.S.T. 2019, T.I.A.S. No. 8302.

95. 18 U.S.C.A. § 982(a) (West Supp. 1987). The forfeiture of substitute assets is a controversial provision, which threatens a defendant's right to counsel (*see* NAT'L L.J., Mar. 2, 1987, at 3 (reluctance of attorneys to take Carlos Lehder Rivas's case); Note, *Attorney Fee Forfeiture*, 86 COLUM. L. REV. 1021 (1986)), though it is not intended to do so. *See* 132 CONG. REC. H9472 (Oct. 8, 1986) (remarks of Mr. Edwards); HOUSE JUDICIARY REPORT, *supra* note 6, at 14 (bona fide attorneys' fees).

96. Pub. L. No. 91-508, 84 Stat. 1114 (1970). For legislative history, *see* 1970 U.S. CODE CONG. & ADMIN. NEWS 4394.

97. And sometimes individuals. *See infra* text accompanying note 46.

98. The recordkeeping and reporting requirements are intended to reduce the use of secret foreign bank accounts by white-collar criminals. Such accounts serve as the financial underpinning of organized crime in the U.S. and are used by U.S. citizens and residents to evade the payment of income taxes. 1970 U.S. CODE CONG. & ADMIN. NEWS 4395.

Other purposes of the Records Act are to facilitate the supervision of financial institutions properly subject to federal supervision, to aid duly constituted authorities and lawful investigations, and to provide for the collection of statistics necessary for the formulation of monetary and economic policy. *Id.*

99. Pub. L. No. 91-508, 84 Stat. 1114 (1970).

100. Some banks had limited or abolished the practice of photocopying checks, drafts, and similar instruments, thus frustrating law enforcement. Identification of bank employees or officers who actually dealt with accounts also could not be ascertained. A subpoena might produce only a record of the activity in an account without anything more.

Records Act, the Currency and Foreign Transactions Reporting Act,[101] commonly known as the Bank Secrecy Act, requires individuals and financial institutions to report to the federal government certain foreign and domestic financial transactions. Failure to make the required reports can lead to criminal[102] and civil penalties,[103] and civil forfeiture.[104]

The Department of the Treasury has promulgated regulations implementing the Bank Secrecy Act. These regulations require three kinds of reports. First, a Currency Transaction Report (CTR) must be filed by financial institutions on all currency transactions exceeding $10,000.[105] Second, a Report of International Transportation of Currency or Monetary Instruments (CMIR) must be filed by institutions and individuals when moving over $10,000 in currency or monetary instruments into or out of the United States.[106] Third, a Report of Foreign Bank and Financial Accounts (FBAR)[107] must be filed annually by individuals who have a financial interest in or signature authority over bank accounts, securities accounts, or other financial accounts in a foreign country.

As a general matter, the amendments by the Act enhance enforcement provisions at little cost to the financial privacy of the individuals involved. The amendments prohibiting evasive structuring and attempted unreported transportation significantly strengthen the capability of law enforcement without interfering with legitimate transactions. The amendments to the change in control statutes, on the other hand, may interfere with legitimate acquisitions of control with few enforcement gains.

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101. Pub. L. No. 91-508, § 201, 84 Stat. 1114, (1970), *reprinted in* 1970 U.S. CODE CONG. & ADMIN. NEWS 1305.

102. 31 U.S.C.A. § 5322 (West Supp. 1986).

103. *Id.* § 5321.

104. *Id.* § 5317; *see infra* note 161.

105. A CTR is required to be filed by financial institutions for each deposit, withdrawal, exchange of currency, or other payment or transfer by, through, or to such financial institution that involves a transaction in currency of more than $10,000. 31 C.F.R. § 103.22 (1986); 31 U.S.C.A. § 5315 (West Supp. 1986).

The Tax Reform Act of 1984, Pub. L. No. 98-369, § 146(a), 98 Stat. 685, added new Code § 6050I requiring individuals to report cash in excess of $10,000 received in a trade or business. I.R.C. § 6050I (1987). *See* 51 Fed. Reg. 31610 (1986) (implementing regulations). Initially, information on capital flows was collected under § 5(b) of the Trading With the Enemy Act, 50 U.S.C.A. app. § 5(b) (West Supp. 1986) and § 8 of the Bretton Woods Agreement Act, 22 U.S.C.A. § 286f (West Supp. 1986).

106. 31 C.F.R. § 103.23 (1986); 31 U.S.C.A. § 5316 (West Supp. 1986).

107. The FBAR is required of individuals who have a financial interest in or signature authority over bank accounts, securities accounts, or other financial accounts in a foreign country. 31 C.F.R. § 103.24 (1986). Chapter 4 authorizes recordkeeping and reporting requirements with respect to relationships and transactions with foreign financial agencies. *See* 31 U.S.C.A. § 5314 (West Supp. 1986).

B. Transactions Reporting Requirements

1. *Prohibition of Evasive Structuring*

Prior to the Act, federal courts were split on whether the Bank Secrecy Act was violated when an individual structured currency transactions to prevent a financial institution from reporting the transactions, thus circumventing the purpose of the reporting provision.[108] In some federal circuits money launderers were successfully prosecuted for such structured transactions under federal statutes imposing derivative liability, such as aiding and abetting or causing another to commit an offense,[109] or concealing from the government a material fact by a trick, scheme, or device.[110] Other circuits, however, had held that structuring currency transactions to avoid the reporting requirements did not violate the concealment statute because the reporting duties were placed solely on financial institutions, and therefore only financial institutions could directly violate the reporting requirements.[111]

108. Either by causing financial institutions not to file reports on multiple currency transactions totaling more than $10,000 or by causing financial institutions to file incorrect reports.

109. 18 U.S.C.A. § 2 (West Supp. 1986).

110. *Id.* § 1001. The concealment statute is designed "to protect the authorized functions of governmental departments and agencies from the perversion which might result from the deceptive practices described." United States v. Gilliland, 312 U.S. 86, 93 (1941). *See also* Goldstein, *Conspiracy to Defraud the United States*, 68 Yale L. J. 405 (1959).

Other charges include 18 U.S.C.A. § 371 (West Supp. 1986) for conspiracy to conceal and for concealing material facts in a matter within the jurisdiction of the Internal Revenue Service, *id.* § 1343 for wire fraud, and *id.* § 1951, the Hobbs Act.

In United States v. Tobon-Builes, 706 F.2d 1092 (11th Cir. 1983), the Eleventh Circuit upheld a conviction under 18 U.S.C.A. § 1001 (with support from 18 U.S.C.A. § 2(b) to substitute knowingly and willfully element for element of legal duty, *see* United States v. McClanahan, 230 F.2d 919 (5th Cir.), *cert. denied*, 352 U.S. 824 (1956)). In *Tobon-Builes*, the defendant concealed the existence, source, and transfer of over $100,000 by purchasing cashier's checks in amounts less than $10,000 from several financial institutions. The court held that the defendant was not explicitly required to report any transaction in currency (though the Secretary of the Treasury is authorized under 31 U.S.C.A. § 1082 to require both private individuals and financial institutions to file currency reports, at the time of the case the Secretary only required such reports from financial institutions, 31 C.F.R. § 103.22(a) (1983)). Nevertheless, the transactions were within the ambit of the reporting requirements imposed on financial institutions, and therefore the transactions represented a knowing and willful scheme to prevent the financial institutions from fulfilling their legal duty to file reports for these transactions, in violation of the federal statute prohibiting concealment from the government, 18 U.S.C.A. § 1001. *See also* United States v. Heinemann, 801 F.2d 86 (2d Cir. 1986); United States v. Giancola, 783 F.2d 1549 (11th Cir. 1986); United States v. Massa, 740 F.2d 629, 645 (8th Cir. 1984), *cert. denied*, 463 U.S. 1229 (1985); United States v. Thompson, 603 F.2d 1200 (5th Cir. 1979); United States v. Sanchez Vazquez, 585 F. Supp. 990, 993 (N.D. Ga. 1984); United States v. Konefal, 566 F. Supp. 698 (N.D.N.Y. 1983).

111. *E.g.*, United States v. Varbel, 780 F.2d 758 (9th Cir. 1986); United States v. Denemark, 779 F.2d 1559 (11th Cir. 1986); United States v. Anzalone, 766 F.2d 676 (1st Cir. 1985).

The Act amends the Bank Secrecy Act to codify the former line of cases and negate the latter[112] by expressly subjecting to potential liability a person who causes or attempts to cause a domestic financial institution to fail to file a required report[113] or who causes a domestic financial institution to file a required report that contains a material omission or misstatement of fact.[114] In addition, the amendment creates the offense of structuring, or assisting in structuring, or attempting to structure or to assist in structuring a transaction for the purpose of evading the reporting requirements, without regard to whether an individual transaction is, itself, reportable under the Bank Secrecy Act.[115] The creation of this new offense is a powerful new enforcement weapon, but the breadth of its definition threatens many legitimate transactions.

The Secretary of the Treasury may impose a civil money penalty on any person who willfully violates the structured transaction prohibition.[116] The penalty may not exceed the amount of coins or currency or other monetary instruments involved in the transaction.[117] The civil money penalty is to be reduced by the amount of any forfeiture to the United States under section 5317(d).[118]

2. *Bank Secrecy Act Attempt Provisions*

Prior to amendment, the Bank Secrecy Act did not require a financial institution to report a currency transaction until fifteen days after the transaction had taken place, thus impairing the investigation and prosecution of structured laundering transactions.[119] The Act adds attempt

112. The effective date of this amendment was January 27, 1987. Act § 1364(a). It applies to transactions for the payment, receipt, or transfer of United States coins or currency or other monetary instruments completed after this date. *Id.*; *see* United States v. Shearson Lehman Brothers, 650 F. Supp. 490 (E.D. Pa. 1986) (transitional rule).

113. 31 U.S.C.A. § 5324(1) (West Supp. 1987).

114. *Id.* § 5324(2).

115. *Id.* § 5324(3). SENATE JUDICIARY REPORT, *supra* note 6, at 48. For example, a person who converts $18,000 in currency to cashiers checks by purchasing two $9,000 cashiers checks at two different banks or on two different days with the specific intent that the participating bank or banks not be required to file currency transaction reports for those transactions, would be subject to potential civil and criminal liability. A person conducting the same transactions for any other reason or persons splitting up an amount of currency that would not be reportable if the full amount were involved in a single transaction (for example, splitting $2,000 in currency into four transactions of $500 each), would not be subject to liability under this section.

116. 31 U.S.C.A. § 5321(a)(4)(A) (West Supp. 1987).

117. *Id.* § 5321(a)(4)(B).

118. *Id.* § 5321(a)(4)(C).

119. Reporting violations would not occur unless the financial institution failed to file the report following the expiration of 15 days from the time of the transaction. As a result, prosecutions of persons who structured their transactions to avoid the reporting requirements of the Bank Secrecy Act were impeded when, after 15 days, the money launderers had fled or the investigative trail had grown stale.

provisions that permit the rapid implementation of procedures for seizure and forfeiture of funds. These provisions permit pursuit of violations from transaction reporting requirements at the time of their attempt rather than fifteen days later.[120]

3. *Exemptions*

Existing section 5318 of the Bank Secrecy Act authorizes the Secretary of the Treasury to delegate compliance authority,[121] regulate compliance procedures, and prescribe exemptions from the requirements of the Bank Secrecy Act. The exemption authority granted by this section was designed to reduce unnecessary reports from retail enterprises, such as grocery stores, that deal directly with consumers and normally generate large volumes of cash.[122] New section 5318(f) provides that no person may qualify for an exemption unless the relevant financial institution prepares and maintains a statement that describes in detail the reasons why such person is qualified for such exemption and such statement is signed by the person seeking exemption.[123]

C. IMPORTS AND EXPORTS OF CURRENCY AND MONETARY INSTRUMENTS

Existing section 5316 of the Bank Secrecy Act requires reports[124] of transportation of currency or its equivalent into or out of the United States[125] by any person in an amount exceeding $10,000 "at one time."

120. 31 U.S.C.A. § 5324 (West Supp. 1987). On March 18, 1987, the Internal Revenue Service opened a regulation project concerning property seized under the Act. *See Report on Status of Regulations Projects as of March 31, 1987*, 75 DAILY EXEC. REP. S-6 (Apr. 21, 1987).

121. 31 U.S.C.A. § 5318(a) (West Supp. 1986); *see* United States v. Deak-Perera & Co., 566 F. Supp. 1398 (D.C. Cir. 1983).

122. 31 U.S.C.A. § 5318 (West Supp. 1986).

123. Act § 1356(b). For regulations issued under this section, *see* 51 Fed. Reg. 45108 (West Supp. 1986); 52 Fed. Reg. 11436 (West Supp. 1987).

124. If a report is required under § 5316 and is not filed or contains a material omission or misstatement of fact, the instrument and any interest in property traceable to that instrument may be seized and forfeited to the United States. 31 U.S.C.A. § 5317(c) (West Supp. 1987). The civil penalties are reduced by the amount forfeited. *Id.* § 5321. The amendments are effective January 27, 1987, Act § 1364(b), as is Act § 1357(a). *See supra* note 112.

125. Section 1362(b) of the Act amends the definition of "United States" in 31 U.S.C.A. § 5312(a)(5) (West Supp. 1987). Prior to amendment, the definition referred to "territories and possessions" of the United States. The amended definition includes the territories, possessions, and the trust territory of the Pacific Islands.

If pending legislation is enacted to change the status of the divisions of the trust territory of the Pacific Islands, this provision may no longer pertain to those jurisdictions. Laws enacted pursuant to the United States, authority as trustee will no longer be applicable to divisions of the trust territory other than the northern Mariana Islands. SENATE JUDICIARY REPORT, *supra* note 6, at 47.

The Act grants the Secretary of the Treasury authority to issue regulations to define "at one time" and to require the cumulation of closely related events for purposes of the reporting requirements.[126] Section 5316 is also modified by requiring a report when one is about to transport a monetary instrument, rather than when one attempts transportation.[127] This broadens the scope of the reporting requirement to allow earlier apprehension of offenders before they leave the United States.[128] Customs officers may stop and search at the border without a search warrant any vehicle, container, or person entering or departing the United States to assure compliance.[129]

D. BANK SECRECY ACT ENFORCEMENT PROVISIONS

1. *Penalties*

Amendments to the Bank Secrecy Act enhance the criminal penalty for violations of the Act occurring in conjunction with violations of other laws of the United States, or with other illegal activity involving more than $100,000, when the two violations occur within a twelve-month period.[130] The amendments increase the maximum term of imprisonment from five to ten years.[131]

The Act also expands the civil penalties available for violations of the Bank Secrecy Act. New or increased penalties are available for negligent violations of the recordkeeping and reporting requirements,[132] willful re-

126. The Secretary of the Treasury is authorized to prescribe regulations defining the term "at one time." 31 U.S.C.A. § 5316(d) (West Supp. 1987). *See* 52 Fed. Reg. 11436 (West Supp. 1987) (reporting of multiple, same-day currency transactions of which financial institutions are aware total more than $10,000).

127. 31 U.S.C.A. § 5316(a)(1) (West Supp. 1987).

128. *See* 1984 U.S. CODE CONG. & ADMIN. NEWS 3482 (legislative history of amendment adding attempt provision).

129. 31 U.S.C.A. § 5317(b) (West Supp. 1987); *see* United States v. Fitzgibbon, 576 F.2d 279 (10th Cir. 1978).

130. 31 U.S.C.A. § 5322(b) (West Supp. 1987).

131. Act § 1357(g)(2). The language is also amended to correct the interpretation problem that arose in the case of United States v. Dickenson, 706 F.2d 88 (2d Cir. 1983), in which the Second Circuit Court of Appeals held that the requirement of other illegal activities in excess of $100,000 referred only to reporting violations under the Bank Secrecy Act. The amended section is designed to make explicit that illegal activities involving more than $100,000 are not restricted to violations under the Bank Secrecy Act itself, but may include any illegal activity involving the requisite amount. SENATE JUDICIARY REPORT, *supra* note 6, at 46. The term "illegal activities" means activities constituting an offense whether or not the person has been charged or convicted of the offense. *Id.*

132. Act § 1357(d). The Secretary of the Treasury may impose a civil money penalty of not more than $500 on any financial institution that negligently violates the reporting requirements of the Bank Secrecy Act. Prior to amendment, sanctions existed only for willful violations. The amendments reflect congressional concern that negligent nonfiling by banks deprived the government of important law enforcement information. SENATE JUDICIARY

porting violations,[133] and willful violations of the foreign financial agency transaction prohibitions.[134] The amendments extend the statute of limitations for assessment of civil penalties under the Bank Secrecy Act from five years[135] to six years.[136] Criminal penalties[137] and civil penalties[138] imposed with respect to the same violation are cumulative.[139]

2. *Treasury's Compliance Authority*

The ordinary money laundering case involves two primary jurisdictional issues: whether the United States has jurisdiction to compel a summons or subpoena duces tecum, and whether the United States has jurisdiction to attach criminal liability to the suspect conduct. The Act amendments

REPORT, *supra* note 6, at 45. The committee indicated that it did not intend to apply the sanction to occasional clerical errors. The penalty is imposed per violation, and not each day a violation continues. *Id.* at 46.

133. Prior to amendment, the civil penalty for willful violations of the Bank Secrecy Act reporting requirements was $10,000 per violation, with an additional penalty for international transaction reporting violations. 31 U.S.C.A. § 5321 (West Supp. 1986). Effective October 27, 1986, the Act increases the amount of the penalty for financial institutions to the greater of the amount of the transaction up to $100,000, or $25,000 for all willful reporting violations. 31 U.S.C.A. § 5321(a)(1) (West Supp. 1987).

134. 31 U.S.C.A. § 5314 (West Supp. 1985). These violations relate to records and reports of foreign financial agency accounts and transactions. 31 U.S.C.A. § 5321(a)(5) (West Supp. 1987); *see* 52 Fed. Reg. 11436 (1987) (correcting civil penalty that can be assessed for willful violations of recordkeeping requirements). The penalty for violations involving transactions is limited to the greater of the amount of the transaction, not exceeding $100,000, or $25,000, 31 U.S.C.A. § 5321(a)(5)(B)(i) (West Supp. 1987), and in the case of a violation involving failure to report the existence of an account or any identifying information required to be provided, the civil penalty is limited to the greater of an amount equal to the balance in the account at the time of the violation not exceeding $100,000, or $25,000. *Id.* § 5321(a)(5)(B)(ii).

135. 28 U.S.C.A. § 2462 (West Supp. 1987).

136. 31 U.S.C.A. § 5321(b)(1) (West Supp. 1987). The Senate Judiciary Committee believed that the change was needed because many civil penalty cases have corresponding criminal actions, which take many months to conclude. Because it was not unusual for civil proceedings to be stayed pending the resolutions of the criminal proceedings, or for the Department to delay its decision to assess the civil penalty until the conclusion of the criminal proceedings, many civil proceedings were not assessed within the period of limitations. SENATE JUDICIARY REPORT, *supra* note 6, at 46. In addition to the general six-year limitation period, the Secretary may bring an action to recover an assessed civil penalty at any time before the end of the two-year period beginning on the later of the penalty's assessment or the conclusion of a criminal action under 31 U.S.C.A. § 5322 (West Supp. 1987). *Id.* § 5321(b)(2).

137. 31 U.S.C.A. § 5322 (West Supp. 1986).

138. *Id.* § 5321.

139. 31 U.S.C.A. § 5321(d) (West Supp. 1987). If the Secretary of the Treasury assesses a civil penalty in a case and then refers the case to the Department of Justice for criminal prosecution, a court should decide whether or not to impose criminal penalties without regard to whether a civil penalty previously has been imposed. Likewise, if a criminal conviction preceded the assessment of a civil penalty, the Secretary of the Treasury is free to impose the full measure of civil penalties available without regard to any criminal sanction imposed. SENATE JUDICIARY REPORT, *supra* note 6, at 46.

to the Bank Secrecy Act address the first question by granting the Secretary of the Treasury expansive new authority to summon both testimonial and documentary evidence.[140] The new summons authority[141] may be used against any financial institution, whether foreign or domestic, regulated by the Treasury Department.[142]

The issuance of a subpoena to the U.S. branch of a predominantly offshore financial institution to obtain records of foreign financial activity has been a source of considerable controversy. Compliance with such a subpoena may force the institution to violate strict secrecy and blocking laws of other nations from which records may be sought.[143] United States courts are split on the application of extraterritorial jurisdiction to subpoenas. One line of cases, culminating in *United States v. Bank of Nova*

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140. Before amendment, compliance by financial institutions with the Bank Secrecy Act was monitored by the Internal Revenue Service. The Treasury Department is assigned overall responsibility for implementing the Bank Secrecy Act. *See* Vetco, 81-1 U.S. Tax Cas. (CCH) ¶ 9428 (I.R.S. summons); Olsen, *Discovery in Federal Criminal Investigations*, 16 N.Y.U. J. INT'L L. & POL. 999 (1984).

The Internal Revenue Service was forced to rely on voluntary cooperation of these institutions to ensure compliance, since the Internal Revenue Service's summons authority does not extend beyond tax matters. *See* I.R.C. § 7602 (1986) (examination of books and witnesses); *Id.* § 982 (admissibility of documentation maintained in foreign countries).

141. 31 U.S.C.A. § 5318(a)(4) (West Supp. 1987).

142. SENATE JUDICIARY REPORT, *supra* note 6, at 43.

143. The Bahamas and the Cayman Islands have such strict secrecy laws. *See* CRIMINAL DIVISION, U.S. DEP'T OF JUSTICE, INVESTIGATION AND PROSECUTION OF ILLEGAL MONEY LAUNDERING: A GUIDE TO THE BANK SECRECY ACT 3 (1983).

Secrecy laws are confidentiality laws that protect private interests in bank records, such as the identity of a bank customer. They generally may be waived with the express or implied consent of the customer. Honegger, *Demystification of the Swiss Bank Secrecy and Illumination of the United States-Swiss Memorandum of Understanding*, 9 N.C. J. INT'L L. & COMM. REG. 1 (1983).

Blocking laws generally embody the national interest in prohibiting the disclosure, copying, inspection, or removal of documents located in the territory of the enacting state in compliance with orders of foreign authorities. They cannot be waived by private parties because they protect national rather than private interests.

The area is of concern to the Securities and Exchange Commission in policing internationalized U.S. capital markets. *See* 49 Fed. Reg. 31300 (1984); Auber, *The Limits of Swiss Banking Secrecy Under Domestic and International Law*, 2 INT'L TAX & BUS. LAW. 273 (1984); Elinger, *Aspects of Bank Secrecy*, 1985 J. BUS. L. 439; Hurd, *Insider Trading and Foreign Bank Secrecy*, 24 AM. BUS. L.J. 25 (1986); Navickas, 2 INT'L TAX & BUS. LAW. 159 (1984); Nelson, *Insider Trading and Waiver by Conduct*, 19 INT'L LAW. 817 (1985); Weiland, *The Use of Offshore Institutions to Facilitate Criminal Activity in the U.S. and the Concomitant Problems Posed to Law Enforcement Personnel in Obtaining Pre-Indictment and Pre-Trial Disclosure*, 16 N.Y.U. J. INT'L L. & POL. 1115 (1984); Comment, *Piercing Offshore Bank Secrecy Laws Used to Launder Illegal Narcotic Profits: The Cayman Islands Example*, 2 TEX. INT'L L.J. 133 (1985); Note, *The Effect of Swiss Bank Secrecy on the Enforcement of Insider Trading and the Memorandum of Understanding Between the United States and Switzerland*, 7 B.C. INT'L & COMP. L. REV. 541 (1984); Note, *Offshore Financial Centers in the Caribbean Basin and Secrecy Jurisdictions: Current Trends and Developments in U.S. Anti-Tax Haven Policy*, 12 SYRACUSE J. INT'L COMP. L. 520 (1986); Note, *S.E.C. Waiver by Conduct Proposal: A Critical Appraisal*, 71 VA. L. REV. 1411 (1985).

Scotia,[144] calls for an expansive application of U.S. law to all persons deemed present or having contacts within the United States. The minority line of cases, led by *United States v. First National Bank*,[145] is more deferential to foreign sovereignty.

Because of the importance of the grand jury in the investigation of possible criminal violations, courts generally hold that restrictions upon a grand jury's investigative powers should be held to a minimum.[146] Moreover, as the Third Circuit Court of Appeals has noted, "[c]ourts traditionally give wide latitude in determining relevancy in the context of an administrative subpoena."[147] Thus the expanded authority increases the potential for conflicts with other nations.[148] The Senate Judiciary Com-

144. *In Re* Grand July Proceedings of the Bank of Nova Scotia (*Nova Scotia II*), 740 F.2d 817 (11th Cir. 1984). *See also* Bank of Nova Scotia v. United States, 691 F.2d 1384 (11th Cir. 1982). *Bank of Nova Scotia* is primarily significant because it established the role of the courts in enforcing grand jury subpoenas *duces tecum*. *Bank of Nova Scotia* declined to impose restrictions on the grand jury investigative process on the grounds that federal courts should not impinge on the political prerogatives of the government in foreign relations. The court held this notwithstanding that compliance with the summons would require the Bank of Nova Scotia to violate Bahamian and Cayman Island bank secrecy laws. This conflict of concurrent jurisdiction was resolved in *Nova Scotia II*, 740 F.2d 817 (11th Cir. 1984), by balancing the interest of the United States in upholding the grand jury subpoena against the interest of the Cayman Islands in bank secrecy, as recommended by § 40 of the RESTATEMENT (SECOND). *See* Houck, *Restatement of the Foreign Relations Law of the United States (Revised): Issues and Resolutions*, 20 INT'L LAW. 1361 (1986). Thus, both *Bank of Nova Scotia* and *Nova Scotia II* illustrate the reluctance of the judiciary to impose limits on extraterritorial grand jury subpoenas.

145. 699 F.2d 341 (7th Cir. 1983). *First National Bank* utilizes the same balancing test as *Bank of Nova Scotia*, but reaches an opposite conclusion. *First National Bank* weighed the competing interests of the United States and of Greece and declined to grant enforcement of an Internal Revenue Service summons. The court distinguished *Bank of Nova Scotia* by noting that in *Bank of Nova Scotia* the information was sought by a grand jury conducting tax and narcotics investigations, so that the interest of the United States in the grand jury process of investigation and enforcement of its criminal laws was involved, in addition to the United States interests identified in *First National Bank*.

146. *See In re* Grand Jury Proceedings, United States v. Field, 532 F.2d 404, 407 (5th Cir.), *cert. denied*, 429 U.S. 940 (1976). Thus, absent a strong showing of illegality or impropriety, grand jury subpoenas *duces tecum* will be afforded great deference by United States courts. Each decision is strictly limited to the attendant facts and circumstances, however. For example, *Bank of Nova Scotia* does not hold that all banking activity or operations of the Bank of Nova Scotia are subject to the jurisdiction of a federal grand jury or a federal court. 691 F.2d at 1388.

147. United States v. O'Neill, 619 F.2d 222, 228 (3d Cir. 1980). Under judicial formulations of relevancy standards, a summons issued under this authority would be valid "if the inquiry is within the authority of the agency, the demand not too indefinite, and the information sought is reasonably relevant." United States v. Morton Salt Co., 338 U.S. 632, 652 (1950). Administrative bodies like the Treasury Department are not limited to the more stringent relevancy standard applied in judicial tribunals in seeking information to discharge their duties properly. *Id.* at 642; *see, e.g.* United States v. Powell, 379 U.S. 48, 57-58 (1964).

148. In determining the relevance of a summons request, courts apply the same general standard used in determining the validity of administrative subpoenas. 31 U.S.C.A. § 5318(a)(3)(4) (West Supp. 1987). A summons may direct production of "such books, papers,

mittee intended that such conflicts between U.S. law enforcement interests and foreign secrecy and blocking laws should first be approached through diplomatic efforts, then by the balancing of competing interests as courts have done in the *Nova Scotia* cases.[149]

International conflicts are also sought to be avoided by limiting the new summons power of the Secretary of the Treasury to civil enforcement of the Bank Secrecy Act,[150] by limiting issuance authority to the Secretary of the Treasury or "a supervisory level delegate,"[151] and by providing that a summons may not require that documents requested be produced in a place more than 500 miles distant from any place where the financial institution operates or conducts business in the United States.[152]

3. *Supervisory Compliance Authority*

The Act charges banking regulatory agencies with expanding their supervision of the recordkeeping systems of the financial institutions they oversee. Agencies are required to prescribe regulations requiring the financial institutions they regulate to establish and maintain procedures reasonably designed to assure and monitor compliance with the Bank Secrecy Act.[153] The agencies are also required to review such procedures

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records or other data," and provide for testimony under oath, "as may be relevant or material" to an investigation for civil enforcement of the Bank Secrecy Act. *Id.*; Act § 1356(a)(6).

149. 691 F.2d 1384 (11th Cir. 1982). *See* Commentary, Bank of Nova Scotia II: *The American Subpoena and the Multinational Enterprise*, 19 CANADIAN BUS. L.J. 497 (1984); Olsen, *Discovery in Federal Criminal Investigations*, 16 N.Y.U. J. INT'L L. & POL. 999 (1984). *Nova Scotia II*, 740 F.2d 817 (11th Cir. 1984); *see also* United States v. First National Bank, 699 F.2d 341 (7th Cir. 1983); Garpeg, Ltd. v. United States, 583 F. Supp. 799 (D.C.N.Y. 1984).

150. 31 U.S.C.A. § 5318(b)(1) (West Supp. 1987).This limitation to civil enforcement is not intended to be read as a restriction on using information developed from a civil summons in any criminal investigation or proceeding relating to the Bank Secrecy Act or any other matter. SENATE JUDICIARY REPORT, *supra* note 6, at 44. The Committee intended that procedures that Treasury currently uses to convey information with respect to corresponding civil and criminal Bank Secrecy Act cases will not be affected.

151. 31 U.S.C.A. § 5318(b)(2) (West Supp. 1987). The Senate Judiciary Report expresses the Committee's intention that the delegation authority will not extend to persons with levels of responsibility less than those currently exercised by the District Chief, Examination Division, or District Chief, Criminal Investigation Division, of the Internal Revenue Service. SENATE JUDICIARY REPORT, *supra* note 6, at 44. This delegated summons authority includes not only the authority to issue summons, but also the authority to administer oaths and affirmations, receive evidence, and examine witnesses pursuant to the summons.

152. 31 U.S.C.A. § 5318(c)(1) (West Supp. 1987).

153. Act § 1359. A General Accounting Office report found that compliance examinations of financial institutions do not detect serious violations and that the Treasury Department needs more information about compliance examination efforts. *See* GENERAL ACCOUNTING OFFICE, BANK SECRECY ACT REPORTING REQUIREMENTS HAVE NOT YET MET EXPECTATIONS, SUGGESTING NEED FOR AMENDMENT (1981); *see also* GENERAL ACCOUNTING OFFICE, BANK SECRECY ACT: FINANCIAL INSTITUTION REGULATORS' COMPLIANCE EXAMINATIONS (1986).

during the course of their examinations.[154] The Act authorizes agencies to issue civil money penalties and cease and desist orders in the event that a financial institution fails to establish such procedures or to correct problems with regard to its procedures after an agency has notified the institution that problems exist.[155] Initial regulations require that a financial institution's compliance program must, at minimum, consist of a system of internal controls to assure ongoing compliance and provide for independent testing of compliance by the institution's personnel or by an outside person.[156] The financial institutions must also designate an individual responsible for coordinating and monitoring day-to-day compliance and provide training for appropriate personnel.[157]

The Act amends provisions relating to supervisory compliance of two other federal Acts, the Change in Bank Control Act[158] and the Change in Savings and Loan Control Act.[159] The Acts authorize banking agencies to disapprove changes of control of financial institutions within their jurisdictions. The acts are designed to prevent dishonest persons, especially those with a prior history of insider abuse or those who may have a criminal background, from gaining control of financial institutions.[160] Amendments to the Change in Bank Control Act and the Change in Savings and Loan Control Act require banking regulatory agencies to conduct investigations of persons proposing to acquire control of financial insti-

154. Act § 1359.

155. *Id.*

156. 52 Fed. Reg. 2858 (1987); 52 Fed. Reg. 3207 (1987) (procedures for monitoring Bank Secrecy Act compliance).

157. *Id.*

158. Pub. L. No. 95-630, 92 Stat. 3641 (1978) (codified in scattered sections of 12 U.S.C.).

159. *Id.*, passed as titles 6 and 7 of the Financial Institutions Regulatory and Interest Rate Control Act of 1978.

160. HOUSE BANKING REPORT, *supra* note 40, at 43. In 1984 the House Committee on Government Operations issued a report that was highly critical of the regulatory agencies' handling of applications under the change in control acts. HOUSE COMM. ON GOV'T OPERATIONS, FEDERAL RESPONSE TO CRIMINAL MISCONDUCT AND INSIDER ABUSE IN THE NATION'S FINANCIAL INSTITUTIONS (1984). The report found that the "banking agencies generally fail to investigate or verify information furnished by applicants under the Change in Bank Control Act or the Change in Savings and Loan Control Act. Consequently, persons lacking in integrity, experience, and financial ability—and even persons with criminal records—have acquired control of financial institutions." The report further stated that the agencies rarely disapprove applications unless an applicant is a convicted felon, even if other adverse information is uncovered.

Concerned by the Government Operations Committee's findings, the House Banking Committee proposed several modifications to the Change in Bank Control Act. It was particularly troubled by the possibility that organized criminals or drug traffickers might acquire a financial institution and use it for unlimited money laundering operations. HOUSE BANKING REPORT, *supra* note 40, at 43.

tutions.[161] Amendments also require the federal banking agencies to publish the name of the institution proposed to be acquired and the identity of the proposed acquirer within a reasonable period of time after receipt of the notice of a proposed acquisition.[162] A specific exemption to the publication requirement is created for situations in which the safety and soundness of the institution is threatened.[163]

The Act also requires the Secretary of the Treasury, in consultation with the Federal Reserve Board, to initiate discussions with central banks or other appropriate government officials of other countries, in order that an information exchange system may be established to assist participating countries in their efforts to eliminate the international flow of money derived from illicit drug operations and other criminal activities.[164] The House Banking Committee report urges the Federal Reserve to use its membership on the Basle Committee to encourage these efforts.[165] The Secretary of the Treasury is required to report the results of its efforts to the House and Senate Banking Committees.[166]

The Act also requires the Secretary of the Treasury, in consultation with the Board of Governors of the Federal Reserve System to conduct a study of money laundering through foreign branches of domestic financial institutions.[167]

161. Act § 1360(b) (change in bank control); Act § 1361(b) (change in savings and loan control). The agencies are also required to verify independently the accuracy and completeness of the information contained in a notice of proposed acquisition, at least to the extent that such information is relevant to determination of a person's competence, experience, integrity, and financial ability. In making this verification, it is expected that the agencies will be guided by a "reasonableness standard." HOUSE BANKING REPORT, *supra* note 40, at 43. Further, the agencies are required to prepare written reports containing a summary of the results of each investigation and maintain that report as a record of the agency.

162. HOUSE BANKING REPORT, *supra* note 40, at 43. The agencies are directed to solicit public comment, particularly from persons in the geographic area where the financial institution proposed to be acquired is located. The publication must occur within a "reasonable" time after receipt of the notice to ensure that sufficient time is allowed for meaningful public comment before expiration of the notice review period.

163. *Id.* That exception is considered broad enough to encompass emergency acquisitions or infusions of capital.

164. Act § 1363(a); *see* Crinon, *Information Gathering on Tax Evasion in Tax Haven Countries*, 20 INT'L LAW. 1209 (1986).

165. HOUSE BANKING REPORT, *supra* note 40, at 43. The Basle Committee, also known as the Cooke Committee, is an unofficial arm of the Bank for International Settlements. Since the Committee's inception in 1974, it has become the premier forum for improvement and cooperation in international banking regulation. *See* Friesen, *The Regulation and Supervision of International Lending*, 20 INT'L LAW. 153 (1986).

166. Act § 1363(b).

167. *Id.* § 1363(c).

III. Amendments to the Right to Financial Privacy Act

A. Background

The Right to Financial Privacy Act of 1978 (RFPA)[168] was enacted to restore the balance between an individual's right to privacy and the exigencies of law enforcement. In restrictive interpretations of the fourth amendment in *Schultz*[169] and *United States v. Miller*,[170] the Supreme Court failed to recognize that individuals have a reasonable expectation of privacy in financial records even though the records are not owned or possessed by the individual.

The RFPA provides, with a number of very important exceptions, that where the United States government requires a financial institution to provide information relating to its customers' financial records, the government must first obtain a subpoena, search warrant, or other appropriate authorization, comply with certain prior notice requirements,[171] and certify to the financial institution that it has complied with the provisions of

168. Title XI of the Financial Institution Regulatory and Interest Rate Control Act of 1978, Pub. L. No. 95-630, 92 Stat. 3641, *reprinted in* 1978 U.S. Code Cong. & Admin. News 9305 (codified in scattered sections of 31 U.S.C.); *see* 31 C.F.R. § 14 (1986) (implementing regulations).

169. *See supra* note 9.

170. 425 U.S. 435 (1976); *see Banking Decisions*, 93 Banking L.J. 838 (1976). *United States v. Miller* was decided two years after *Schultz*. In *Miller* the defendant bank customer had petitioned unsuccessfully to suppress production of copies of checks and other bank records obtained pursuant to allegedly defective subpoenas served on the presidents of two banks where the defendant maintained accounts. The subpoenas were allegedly defective because they were issued by a United States attorney rather than by a court, no return was made to a court, and the subpoenas were returnable prior to the time of the meeting of the grand jury investigating the charges. In sum, the bank records had been requested, obtained, and used for investigative purposes solely on the initiative of the enforcement officials and without any judicial supervision. *Miller*, 425 U.S. at 440. The banks kept the records in compliance with the requirements of the Bank Secrecy Act. Without giving notice of the subpoenas to the defendant, the banks ordered their employees to make the records available to the federal agents for inspection and reproduction.

The Supreme Court held that the defendant had no protectible fourth amendment interest in the subpoenaed documents. The Supreme Court reasoned that the documents subpoenaed were owned and possessed by the banks, not the customer. Although the customer may have been a party to the transactions reflected by the documents, the bank was also a party. The Court held that the Bank Secrecy Act does not, by virtue of requiring banks to keep records that the customer might himself otherwise keep and allowing law enforcement officials access thereto in accordance with legal process, expand the concept of a protectible fourth amendment interest beyond traditional notions of ownership and possession. The Court reasoned that, though precedent exists for so expanding that concept, expansion is justified only where there is a "legitimate expectation of privacy." *Miller* at 442 (quoting Couch v. United States, 409 U.S. 322, 335 (1973)).

171. Notice may be delayed when it would endanger any person, result in the destruction of evidence, or jeopardize the investigation. Agencies are required to follow the procedures of the RFPA when they seek an individual's records.

the RFPA. If the government fails to fulfill any of these requirements, the financial institution is prohibited from complying with its request for disclosure.[172]

The exceptions to the application of the RFPA provide that the RFPA does not apply to records not identified with particular customers, to records required pursuant to the exercise of supervisory or regulatory authority, or to various other classes of records, including those requested by subpoena or court order issued in connection with proceedings before a grand jury.[173] Records of corporations are not protected, as corporations are deemed not to have privacy rights.[174]

B. Amendments to the Right to Financial Privacy Act

Section 1353 of the Act is designed to correct particular problems with the RFPA that have arisen in money laundering investigations. First, the amendments make clear that suspected violations of laws may be reported, and lists three items of information that may be disclosed without fear of private suits. Second, the amendments clarify particular circumstances under which notice to the customer is not required or may be delayed.

1. *Reporting Suspected Violations*

Even prior to amendment, the RFPA did not preclude a financial institution from notifying authorities that it "has information which may be relevant to a possible violation of any statute or regulation."[175] Moreover,

172. 1978 U.S. Code Cong. & Admin. News at 9278.

173. One of the most controversial features of the RFPA is the provision that permits governmental access to financial records upon the submission of a formal written request, that must meet certain requirements, by the investigating authorities. Some view this as a broadening rather than a limiting of the government's investigatory powers, because they read this provision as being an effective grant of an administrative subpoena power to those government agencies that do not otherwise have such powers. Others seem to feel that the statute is not intended to create such a power and that a financial institution that merely receives such a request is under no obligation to comply.

174. The RFPA protects only "persons," defined to mean an individual or a partnership of five or fewer individuals. 12 U.S.C.A. § 3401(4) (West Supp. 1985).

175. 12 U.S.C.A. § 3403(c) (West Supp. 1987). The provision does not authorize wholesale disclosure of financial records, but the financial institution must be able to give a government authority enough information about the nature of the possible violation and parties involved in order for that authority to proceed with the summons, subpoena, or search warrant for additional information. The RFPA provides protection for the financial institution that does respond to a request for information in § 1110(e) and further in § 1117(c). The Fair Credit Reporting Act, 15 U.S.C.A. § 1681 West Supp. 1986; Peet, *Bank Secrecy, Financial Privacy and Related Restrictions*, 7 Int'l Bus. Law. 259, 284 (1979). The RFPA does not impose restrictions on the information required by Criminal Referral Forms. *See* 51 Fed. Reg. 25866, 25869 (West Supp. 1986).

The legislative history of the RFPA indicates that under this provision "a bank could, and should, report to appropriate officials information pertaining to the cashing of a forged

section 1113(d)[176] states that nothing in the RFPA authorizes withholding "information required to be reported in accordance with any federal statute or rule promulgated thereunder."[177] Once the government authority has received such a notification, it is required to comply with the provisions of the RFPA with respect to obtaining financial records and the information contained in them.[178]

Prior to the Act a great deal of confusion existed among financial institutions regarding how much information relating to the possible violation of law could be given to a government authority under existing section 1113(d) without notice to the affected customers. New section 1353(a) of the Act identifies three specific pieces of information that may be released: the name or other identifying information concerning any individual involved in the conduct of a suspect transaction,[179] any account number or other identifying information concerning the account involved, and the nature of any suspected illegal activity.[180] Any disclosure is en-

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check, the passing of counterfeit currency or bonds, or the use of its services to facilitate a fraudulent scheme." H.R. REP. No. 1383, 95th Cong., 2d Sess. 218 (1978), *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 9273, 9348. The office of the Comptroller of the Currency is of the opinion that its regulations are in compliance with the RFPA. *See* 51 Fed. Reg. 25866, 25869 (West Supp. 1986).

176. 12 U.S.C.A. § 3413(d) (West Supp. 1987).

177. As clarification, H.R. REP. No. 1383, 95th Cong., 2d Sess. 226, *reprinted in* 1978 U.S. CONG. & ADMIN. NEWS 9273, 9356, provides that Congress intended this provision to apply to such reports required under statutes as the Federal Deposit Insurance Act.

178. 1978 U.S. CODE CONG. & ADMIN. NEWS at 9322. *See also* Clayton Brokerage Co. v. Clement, 87 F.R.D. 569 (D.C. Md. 1980) (discovery); Suburban Trust Co. v. Waller, 44 Md. App. 335, 408 A.2d 758 (1979) (expectation of confidentiality).

179. The institution may disclose the name of any corporate entity, partnership, or other organization in which an account is listed, as well as the name of any individual involved in a suspected transaction. SENATE JUDICIARY REPORT, *supra* note 6, at 41. Other identifying information that may be disclosed about individuals includes the individual's home or business addresses or social security number. Identifying information about accounts includes, in addition to the account number, the type of account (checking, savings, securities) or the interest rate paid on the account. It also includes the location of the branch or office in which the account is maintained. *Id. See* 51 Fed. Reg. 16485 (1986) (reports of apparent crimes affecting FDIC insured nonmember banks); 12 C.F.R. § 21 (1986) (Office of the Comptroller of the Currency (OCC) minimum security devices and procedures); 12 C.F.R. § 326 (1986) (FDIC minimum security devices and procedures); 51 Fed. Reg. 25860 (1986) (OCC rules for reports of crimes and suspected crimes).

180. 12 U.S.C.A. § 3404(c) (West Supp. 1987). The financial institution may specify the offense that the financial institution believes is being perpetrated or provide a description of the activities giving rise to the bank's suspicions. SENATE JUDICIARY REPORT, *supra* note 6, at 41. Thus, for instance if a customer of a bank comes into the bank with regularity, every Monday, Wednesday, and Friday, to obtain a cashiers check with $5,000 in small denomination bills, the bank could describe this pattern in the information it submits to law enforcement officials, even if the bank does not know precisely what law might be violated. *Id.*

tirely voluntary on the part of the disclosing bank.[181] The section preempts state and local privacy laws to the extent that such laws prohibit voluntary disclosure of the information specified above.[182]

A limited "good faith defense" is provided for financial institutions that provide voluntary disclosure.[183] The good faith defense protects officers, employees, and agents of financial institutions, as well as financial institutions themselves, from liability for disclosure or for failure to notify the customer of the disclosure.[184] Under previously existing law, a financial institution that in good faith relied on certification that the governmental authority had complied with the applicable procedures of the RFPA was immune from civil suit by the customer whose records have been disclosed.[185] This exemption extends to disclosure of the above three items.[186]

2. *Exemption From Notice to Customer*

Grand jury subpoenas and related court orders are exempt from the RFPA.[187] Despite clear legislative intent to the contrary, several courts had refused government requests to order financial institutions to delay

181. The Senate Judiciary Committee encourages financial institutions to provide voluntary disclosure wherever they legitimately suspect illegal activity, consistent with the privacy rights of their customers, and to establish a formal policy that encourages officers and employees promptly to report illegal activity. SENATE JUDICIARY REPORT, SUPRA note 6, at 41.

182. Including, presumably, cases such as Suburban Trust Co. v. Waller, 44 Md. App. 335, 408 A.2d 758 (1979).

183. Act § 1353(a). Good faith compliance with a regulation is a legal defense against civil suits for defamation where, for example, an individual named in a criminal referral form as a subject is ultimately exonerated and initiates an action against the referring bank. *See* Wilson v. Retail Credit Co., 438 F.2d 1043, 1045 (5th cir. 1971); W PROSSER & P. KEETON, LAW OF TORTS § 115 (4th ed. 1984). Federal regulations promulgating in this regard probably preempt inconsistent state laws. *See* 51 Fed. Reg. 25860, 25869 (West Supp. 1986).

184. All suits are precluded by this defense, including suits brought under any theory of federal, state, or local law, common law as well as statutory, and suits brought under constitutional provisions. SENATE JUDICIARY REPORT, *supra* note 6, at 42.

185. 12 U.S.C.A. § 3417(c) (West Supp. 1985). Section 1117(c), 12 U.S.C.A. § 3417(c) (West Supp. 1985), provides that a financial institution will not be liable for disclosures made in good faith reliance upon a § 1103(b), 12 U.S.C.A. § 3403(b) (West Supp. 1985), certificate provided by a government authority. Section 1103(b) provides that a financial institution may not release financial records until the government authority seeking the records certifies in writing that it has complied with the provisions of the title. Government employees who submit false certificates may be subject to criminal prosecution or administrative sanctions.

186. Because no government certificate changes hands in the voluntary disclosure allowed by § 1353(a) of the Act, however, the only way an institution can assure itself of protection from civil suit is if it limits its disclosures to the above three items of information. SENATE JUDICIARY REPORT, *supra* note 6, at 42.

187. Act § 1353(b). This exemption was designed to avoid diminishing grand jury secrecy due to expanded customer notice protections and challenge rights of the RFPA. The drafters believed the grand jury to be the single most effective investigative tool in criminal law enforcement. 1978 U.S. CODE CONG. & ADMIN. NEWS at 9358, 9376.

notifying their customer of the receipt of a grand jury subpoena.[188] The Act reaffirms this legislative intent by authorizing a court to order a financial institution not to notify the customer of the existence of a subpoena or of the fact that information has been furnished to a grand jury.[189]

IV. Conclusion

Sophistication in criminal financial activity requires proportionately sophisticated enforcement mechanisms. Unless enforcement mechanisms keep pace, the rule of law will be undermined. Enforcement mechanisms, however, must not be allowed to invade the province of individual liberties. Perfect subordination of the law enforcement authority of the government to the fundamental rights of individuals directs the optimum course for laws governing confidentiality and disclosure of financial information.

Legislation reveals present policy choices, and when contrasted with the past throws light on the future. Analysis of the Money Laundering Control Act of 1986 reveals that an era of increasing disclosure of financial information threatens us. Money laundering, because of its integration with criminal activity, ordinarily is not an activity that legitimately may claim confidentiality. Boundaries between criminality and legitimacy are constantly changing, however. Expanding conceptions of criminality may justify further intrusions into the public's privacy. Criminal laws, however, must respect the privacy of individuals or respect for the criminal laws is lost. Knowledge by the state of all of the financial activities of an individual preponderates the safe cession of information to the state.

188. *See, e.g., In re* Grand Jury Subpoena No. GJ 31, 628 F. Supp. 580 (W.D. Ark. 1986); *In re* Grand Jury Subpoena Duces Tecum, 575 F. Supp. 1219 (E.D. Pa. 1983). According to the President's Commission on Organized Crime, *supra* note 6, the effect of these decisions has been to jeopardize many significant organized crime investigations because financial institutions that have received record subpoenas have proceeded to notify their customers of the pendency of investigation against them.

189. Act § 1353(b). This amendment was adopted to address the problem in *In re* Grand Jury Subpoena, No. GJ 31, 628 F. Supp. 580 (W.D. Ark. 1986). The court ruled that it had no authority under the RFPA, in the All Writs Act, 28 U.S.C.A. § 1651 (West Supp. 1986), or in the inherent powers of the court to issue an order that the receipt of a subpoena from a grand jury be kept secret.