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THE BANK SECRECY ACT AND THE COMMON LAW: IN SEARCH OF FINANCIAL PRIVACY

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Resumen

El "Bank Secrecy Act" ha cambiado las concepciones que se tienen de la relación entre los bancos, sus clientes, y el gobierno. En los Estados Unidos de America, los bancos no gozan de la relación confidencial con sus clientes que antes poseían. Los clientes de instituciones bancarias ya no poseen la protección contra la intromisión gubernamental en sus records financieros. El artículo discute la cambiante relación entre los bancos y sus clientes y la historia del "Bank Secrecy Act." En adición, el artículo discute las reglas del "common law" en cuanto a la naturaleza confidencial del rol que juegan los bancos hacia sus clientes. Se incluye un análisis de los postulados del "Bank Secrecy Act," y una discusión de tanto las actuales como las propuestas enmiendas a la ley. El artículo también discute el efecto que el "Bank Secrecy Act" ha tenido en los Estados de la nación, tomando las leyes de la Florida como modelo. La autora concluye con un análisis de los efectos que el "Bank Secrecy Act" ha tenido sobre el cliente promedio y la empresa privada.

I. INTRODUCTION

The Bank Secrecy Act has changed perceptions of the relationships between banks, their customers and the federal government. The United States government no longer recognizes an intrinsic confidential relationship

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between domestic banks and their customers. Bank customers no longer have the protection against government intrusion into their financial records. In part, this change in attitude is the result of the government's efforts to curtail the drug trade through the prevention of money laundering.¹

This Article discusses the changing relationship between banks and their customers. It also addresses the common law rules of the confidential nature of the bank's role toward its customers and the history of the Bank Secrecy Act. Included is an analysis of the provisions of the Bank Secrecy Act and a discussion of both the proposed and actual amendments to the Act. Additionally, this Article discusses the effect of the Bank Secrecy Act on the states, using Florida law as a model. It concludes with an analysis of the Bank Secrecy Act's effect on average bank customers and businesses.

II. THE COMMON LAW ON FINANCIAL PRIVACY

The implications of the Bank Secrecy Act can be best understood in light of common law rules regarding the confidential nature of the relationship between the bank and its customer.² According to the common law, there is an implied term of contract between the bank and its customer that the bank will not divulge information to third persons concerning a customer's accounts.³ *Tournier v. National Provincial and Union Bank of England*,⁴ set forth the four qualifications to this rule: (1) disclosure under compulsion of law;⁵ (2) disclosure arising from a duty to the public;⁶ (3) disclosure to protect

1. The term money laundering comes from the argot of criminals. It is the process by which the source or existence of illegally obtained money is concealed to make it appear legitimate. Criminals hire people to "launder" this ill-gotten money in order to insulate the underlying criminal conspiracy from being connected to the profits of the crime. See PRESIDENT'S COMMISSION ON ORGANIZED CRIME, INTERIM REPORT TO THE PRESIDENT & ATTORNEY GENERAL 7 (1984) (*The Cash Connection: Organized Crime, Financial Institutions, & Money Laundering*) [hereinafter *The Cash Connection*].

2. The confidential nature of the relationship between the bank and its customer is embodied in banking custom. See *Tournier v. National Provincial and Union Bank of England*, [1924] 1 K.B. 461 (1923); *Milohnich v. First National Bank of Miami*, 224 So. 2d 759 (Fla. Dist. Ct. App. 1969).

3. 10 AM. JUR. 2d *Banks* § 332 (1963); *Milohnich*, 224 So. 2d 759, 761.

4. [1924] 1 K.B. 461 (1923).

5. Documents subpoenaed by a court are an illustration of the bank's duty of disclosure under compulsion of law. There is no restriction on a banker's ability to testify as to the status of a customer's account. See 81 AM. JUR. *Witnesses* § 363 (1976).

6. The bank's duty to the public is higher than the duty to its customer when the customer's actions threaten the State or its citizens. While banks are under no duty at law to warn the investing public of the financial condition of a depositor, they may have a duty to the community in which they do business to use reasonable care to insure depositors do not commit fraud upon the public. See *Cunningham v. Merchants' Nat'l Bank*, 4 F.2d 25, (1st Cir. 1925), *cert. denied*, 268 U.S. 691 (1925).

the bank's interest;⁷ and (4) disclosure by the express or implied consent of the customer.⁸

The common law rule of confidentiality is significant because a bank account can reveal important information about an individual or a business. For example, an account may disclose the price of the depositor's house, the bookstores they frequent and the religious, political or charitable organizations to which they subscribe.⁹ Potentially, a business could lose its strategic position if the cost of supplies, and date and amount of purchase, were revealed to its competitors.¹⁰ For many reasons, a banker cannot indiscriminately reveal information concerning a customer's account to third persons unless disclosure falls under one of the four qualifications.

III. THE BANK SECRECY ACT AND RELATED LEGISLATION

A. *The History of the Bank Secrecy Act*

In the late 1960's, federal agencies and Congress recognized two major problem areas for law enforcement. The first was the use of foreign financial institutions to hide unreported income and the proceeds of criminal activity.¹¹ The second was the abolition or limitation by some financial institutions of the practice of photocopying certain items which are of use in a criminal investigation.¹² These two factors prevented law enforcement from pursuing and prosecuting many cases involving financial institutions.

Many foreign jurisdictions are ideal places to hide unreported or illegally obtained money. Some foreign jurisdictions prevent the release of account

7. The customer cannot rely upon the common law duty of confidentiality to the detriment of the bank. For example, the bank can have a writ issued claiming the non-payment of an overdraft by a customer and state the amount of the overdraft on the face of the writ. See *Tournier*, [1924] 1 K.B. 461, 473.

8. The customer can expressly or implicitly agree to a waiver of this confidentiality. An example of an implicit waiver is where the customer authorizes a reference to his banker. *Id.*

9. See *California Bankers Association v. Schultz*, 416 U.S. 21, 79 (1974) (Douglas, J., dissenting). See also Brandeis & Warren, *The Right to Privacy*, 4 HARV. L. REV. 193 (1893). This article argues that there is "the right to be let alone." *Id.* at 193. Using the rationale of Supreme Court decisions and this article, courts have upheld an individual's right to sue for "invasion of privacy." L.R. FISCHER, *THE LAW OF FINANCIAL PRIVACY* 5-7 (1983).

10. See *XAG v. A bank*, [1983] 2 All E.R. 464, 473.

11. L.R. FISCHER, *supra* note 9, at 4-2.

12. Bank Records and Foreign Transactions, Pub. L. No. 91-508, 84 Stat. 1114 (1970) [hereinafter Pub. L. No. 91-508].

information by the use of secrecy¹³ or blocking¹⁴ laws. Even if the foreign jurisdiction cooperates with the prosecution in the investigation, obtaining documents is a lengthy process in which evidence can disappear or become stale.¹⁵ Thus, foreign bank accounts became effective tools in thwarting federal law enforcement.

Perhaps coincidentally, many large banks altered their record keeping procedures when the use of foreign bank accounts increased.¹⁶ The practice of photocopying checks, drafts, and similar instruments drawn on the bank and presented for payment was abolished by some banks.¹⁷ This practice prevented law enforcement from securing evidence necessary for criminal, tax, and regulatory investigations and prosecutions.¹⁸ Numerous cases were either dropped or delayed due to the difficulty or impossibility of obtaining the records.¹⁹

B. Adoption of the Bank Secrecy Act

The Bank Secrecy Act was designed to address the problems in obtaining information relevant to criminal, tax and regulatory proceedings and

13. A "secrecy" jurisdiction is a jurisdiction in which laws have been enacted to protect the confidentiality of financial information. SECRETARY OF THE TREASURY, REPORT TO THE COMMITTEE ON BANKING, FINANCE AND URBAN AFFAIRS AND THE COMMITTEE ON THE JUDICIARY OF THE UNITED STATES HOUSE OF REPRESENTATIVES AND TO THE COMMITTEE ON BANKING, HOUSING AND URBAN AFFAIRS AND THE COMMITTEE ON THE JUDICIARY OF THE UNITED STATES SENATE 43 (July 29, 1987) (Money Laundering and the Bank Secrecy Act: The Question of Foreign Branches of Domestic Financial Institutions) [hereinafter *Money Laundering and the Bank Secrecy Act*]. These laws make it illegal for a bank to abide by the request of a foreign court to disclose information. *Id.* In a secrecy jurisdiction the customer has the authority to waive the host country's secrecy law. *Id.* at 44. Countries with secrecy laws are: Switzerland, Luxembourg, Austria, Germany, Greece, Hong Kong and Panama. *Id.* at 43.

14. Blocking statutes are enacted to protect the sovereignty of the enacting state. *Money Laundering and the Bank Secrecy Act*, *supra* note 13, at 44. In jurisdictions which have enacted blocking statutes, judicial orders of foreign states which compel disclosure are not honored. *Id.* Blocking statutes are distinguished from secrecy laws in that blocking statutes are triggered by the action of a foreign minister who has discretion on how the law will be applied. *Id.* at 44-45. Countries with such laws include Canada, the United Kingdom, France, Australia, and the Netherlands. *Id.* at 45.

15. *International and Domestic Money Laundering (An Analysis for the Western Hemisphere) Before the Committee on Banking, Finance and Urban Affairs, United States House of Representatives* 62 (Nov. 7, 1989) (statement of James E. Preston) [hereinafter Statement of J. Preston].

16. Law enforcement agencies found that the increasing growth of financial institutions was paralleled by an increase in criminal activity utilizing these institutions. H.R. REP. NO. 975, 91st Cong., 2d Sess. 2, reprinted in 1970 U.S. CODE CONG. & ADMIN. NEWS 4395 [hereinafter 1970 U.S. CODE CONG. & ADMIN. NEWS (NO. 975)].

17. *Id.*

18. *Id.* at 4396.

19. *See id.* at 4395-96.

prosecutions²⁰ by requiring that records be kept and reports be filed by the financial institution. The Bank Secrecy Act contains three titles. Title I requires the Secretary of the Treasury ("Secretary") to promulgate regulations requiring insured banks, insured institutions, and other financial institutions to maintain appropriate records which have, or may have, a high degree of usefulness in criminal, tax or regulatory investigations or proceedings.²¹ Title II authorizes the Secretary of the Treasury to issue regulations concerning records and reports of domestic currency transactions; exports and imports of monetary instruments and records and reports of foreign transactions by citizens or residents of the United States or people doing business in the United States.²²

Generally, the Bank Secrecy Act is not self-executing.²³ Instead, Congress chose to let the Secretary implement the Act by regulations or other administrative acts. The following discussion of Titles I and II will necessarily involve a discussion of both the statutes and some of the implementing regulations.²⁴

1. Title I- Financial Record Keeping

Title I requires designated financial institutions to maintain certain records for up to six years.²⁵ The original purpose of Title I was to require financial institutions to maintain records in accordance with the practice of the banking industry.²⁶

Chapter 1, "Insured Banks and Insured Institutions," requires federally insured banks and other insured institutions, such as savings and loan

20. *Id.* at 4395. The reporting of unusually large deposits and withdrawals of currency or monetary instruments under unusual circumstances also assists prosecutors in their investigations. "The money in many of these transactions may represent anything from the proceeds of a lottery racket to money for the bribery of public officials." *Id.* at 4396. The statutory precedent relied upon to justify domestic reporting was a Treasury Department regulation (31 C.F.R. § 102 (1988)) issued under the Trading with the Enemy Act. See 31 U.S.C. 427 (1988).

21. 1970 U.S. CODE CONG. & ADMIN. NEWS (No. 975), *supra* note 16, at 4395.

22. The Act contains a third section not addressed in this Article. Title III amends the Securities and Exchange Act of 1934, to make it unlawful for persons to obtain or retain credit in violation of certain rules or regulations. This Article will examine only Titles I and II.

23. Zagaris, *The Bank Secrecy Act, Money Laundering and Law Enforcement*, in INTERNATIONAL SYMPOSIUM ON MONEY LAUNDERING - THE BRIEFING BOOKLET: BANKERS, BUSINESSMEN & ACCOUNTANTS 2-3 (U. Miami, Graduate School of International Studies, October 26-28, 1989).

24. This section of the Article will discuss the original statutes proposed by the Bank Secrecy Act. The discussion of the implementing regulations will concern the regulations as they presently exist and not how they have evolved since first promulgated.

25. Pub. L. No. 91-508, *supra* note 12, tit. 1, § 101(g).

26. 1970 U.S. CODE CONG. & ADMIN. NEWS (No. 975); *supra* note 16, at 4395.

associations, to maintain records as the Secretary may require.²⁷ Additionally, these institutions must identify customers who hold, or have authority over, an account at the bank, and who engage in transactions reportable under Title II.²⁸ Chapter I requires these records have a "high degree of usefulness in criminal, tax, or regulatory investigations or proceedings."²⁹ These records must be retained for a specific period of time not exceeding six years.³⁰

Chapter 1 is incorporated into the Federal Deposit Insurance Act which applies to all federally insured banks.³¹ Incorporation of Chapter 1 provides the mechanism for enforcing the Act.³² Also, incorporation of Chapter 1 makes it clear that Federal examiners and supervisory agencies are responsible for determining compliance with the Act.³³

Chapter 2, "Other Financial Institutions," concerns banks not insured by the FDIC. It also applies to businesses that transfer or transmit funds or credits domestically or internationally, issue or redeem checks, operate a currency exchange, operate a credit card system or perform similar functions.³⁴ Chapter 2 requires these institutions to maintain a compliance program. It also contains enforcement provisions and gives the Secretary the authority to supervise or delegate supervision of these institutions.³⁵

27. An example of these instruments is a check for \$200 drawn on the bank and presented to it for payment. Pub. L. No. 91-508, *supra* note 12. See also 31 C.F.R. §§ 103.31-103.39 (1989) (regulations concerning the maintenance of records).

28. Pub. L. No. 91-508, *supra* note 12, §§ 101, 102. This provision is known as the "know your customer" provision. The Act has evolved to require certain minimum standards for identifying customers. 1970 U.S. CODE CONG. & ADMIN. NEWS (No. 975), *supra* note 16, at 4401-4402. If the financial institution is "willfully blind" to a possible money laundering situation, it may be charged with promoting the money laundering scheme. U.S. DEPARTMENT OF JUSTICE (CRIMINAL DIVISION), HANDBOOK ON THE ANTI-DRUG ABUSE ACT OF 1986, at 65-66 (March 1987) (willful blindness standard for money laundering prosecutions) [hereinafter HANDBOOK ON THE ANTI-DRUG ABUSE ACT OF 1986]. It is the opinion of this author from research on this subject and interviews with prosecutors and personnel of federal government agencies that the "know your customer" idea has developed into an important tool in the prevention of money laundering and tax evasion. It has evolved from simply getting information on record for law enforcement to encouraging financial institutions to actually investigate customers. Currently, financial institutions must know their customers to the extent that the bank must take steps to insure the customer is engaged in a legitimate business. This may include driving to the place of business to see if it actually exists. This places responsibility on financial institutions to find and report customers that are shell corporations.

29. Pub. L. No. 91-508, *supra* note 12.

30. *Id.*

31. *Id.*

32. 1970 U.S. CODE CONG. & ADMIN. NEWS (No. 975), *supra* note 16, at 4399.

33. See *id.* at 4403-4404.

34. Pub. L. No. 91-508, *supra* note 12, tit. 1, § 123.

35. See *id.* § 128. Enforcement includes both civil and criminal penalties. Institutions within Chapter 2 must notify the Secretary of a change in ownership, control or management. 1970 U.S. CODE CONG. & ADMIN. NEWS (No. 975), *supra* note 16, at 4403.

Title I only applies to financial institutions, and only requires the maintenance of certain records. Institutions falling within Title I will be examined for compliance with the Act and penalized for violations.

2. Title II- Reports of Currency and Foreign Transactions

Title II is known as the "Currency and Foreign Transactions Reporting Act."³⁶ Title II concerns not only financial institutions, but also individuals and businesses. It requires both the filing of forms and the maintenance of records by entities falling within the title. There are four chapters in this title.

Chapter 1 sets forth the general provisions applicable to the entire Title. The stated purpose of Title II is to require certain entities to file reports or records when these reports or records would be of a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings.³⁷ The definitions section grants the Secretary the authority to expand the list, via the regulations, of people and institutions who must comply with Title II.³⁸ The Secretary is given rule making authority and the responsibility for assuring compliance.³⁹ The Secretary is also given the authority to allow exemptions from any of the reporting requirements of the Act.⁴⁰ Chapter 1 also allows for criminal and civil penalties.⁴¹

Chapter 2 permits the Secretary to require the filing of reports of transactions involving currency or monetary instruments. Domestic financial in-

36. Pub. L. No. 91-508, *supra* note 12, tit. 2, § 123.

37. Pub. L. No. 91-508, *supra* note 12, tit. 2, § 202.

38. The definitions for the Bank Secrecy Act are very important. The definitions set forth in the statute establish the parameters of the Act's jurisdiction while the definitions in the regulations, are narrower and set forth to whom the executing requirements of the regulations apply. *Cf.* 31 C.F.R. § 103.11 (1989). Also, certain words and phrases found in either the statute or the regulations are defined in Chapter I. Not all definitions are obvious from a reading of the statute. For example, the term "financial institution" includes a pawnbroker, a travel agent and a telegraph company. Pub. L. No. 91-508, *supra* note 12, § 203(e).

39. Pub. L. No. 91-508, *supra* note 12, tit. 1, § 205.

40. The exemptions are granted to make the reporting requirements as broad or as narrow as the Secretary deems appropriate. 1970 U.S. CODE CONG. & ADMIN. NEWS (No. 975), *supra* note 16, at 4405. The exemptions apply to reports of domestic currency transactions, 31 C.F.R. § 103.22 (1989), reports of the imports and exports of monetary instruments, 31 C.F.R. § 103.23 (1989), and general exemptions contained in 31 C.F.R. § 103.45 (1989). For example, a small "mom & pop" grocery store which makes weekly deposits of over \$10,000 cash into its account may be covered by the exemption. In order to claim an exemption, the grocery store must complete a detailed statement as to the reason for its exemption and give certain identifications. The exemption will only apply to weekly deposits and cover no other transactions. If the deposits go over the customary amount set for the exemption, form 4789 must be completed and filed. 31 C.F.R. §§ 103.22, 103.45 (1989).

41. 31 C.F.R. §§ 103.47, 103.48 - 103.50 (1989). The civil and criminal penalties apply to the reporting and record keeping requirements alone, and not to criminal money laundering prosecutions unless those prosecutions involve a violation of 31 C.F.R. § 103 (1989).

stitutions⁴² are required to file reports of any payment, receipt, or transfer of United States currency, or such other monetary instruments as the Secretary may specify, in such amounts, denominations, or both under such circumstances as the Secretary may prescribe.⁴³

The Secretary requires that financial institutions⁴⁴ file reports of transactions in currency⁴⁵ which amount to over \$10,000.⁴⁶ Financial institutions must also file reports of multiple currency transactions if the financial institution has knowledge⁴⁷ that the transactions are made by, or on behalf of, any person⁴⁸ and result in either a deposit or withdrawal of more than \$10,000 during any one business day.⁴⁹ This report is made on Currency

42. "Domestic" is defined as doing business within the United States, and limits the applicability of the provision to institutions or agencies operating within the United States. 31 C.F.R. § 103.11(f) (1989). "Financial institution" includes each agent, agency, branch or office within the United States, regardless of whether the entity engages in business on a regular basis. 31 C.F.R. § 103.11(g) (1989). Other organized business concerns include, brokers and dealers of securities, casinos, and the United States Postal Services. 31 C.F.R. § 103.11(g) (1989). "Foreign bank" is defined as a bank organized under foreign law, or an agency, branch or office of the bank located outside the United States. 31 C.F.R. § 103.11(h) (1989). The term does not include an agent, agency, branch or office within the United States of a bank organized under foreign law. 31 C.F.R. § 103.11(h) (1989).

43. Pub. L. No. 91-508, *supra* note 12, tit. 1, § 221.

44. Casinos and the U.S. Postal Service have separate filing requirements so this section concerning financial institutions does not apply to these two institutions. 31 C.F.R. § 103.22(a)(2, 3) (1989).

45. "Transaction in currency" means a transaction involving the physical transfer of currency from one person to another. It does not include transfer of funds by means of check, wire transfer, bank draft, or other written order. 31 C.F.R. § 103.11(p) (1989).

46. An example of this reporting requirement occurs when payment is made by wiring funds to a seller's account. The wiring of the funds to the account is not reportable (unless a geographic targeting order is in place or the transaction is suspicious) at the time of this writing, but proposed rules concerning wire transfers are being studied. If payment is made by the financial institution to the seller in a cashier's check it also is not reportable (unless a geographic targeting order is in place or the transaction is suspicious). The only reporting requirement occurs when cash is physically handed from the teller to the seller and the cash amounts to over \$10,000 in one 24 hour period. 31 C.F.R. § 103.22 (1989). Conversely, if the seller deposits over \$10,000 in cash within 24 hours by handing it to a teller, a CTR form must be completed. *Id.*

47. "Knowledge" may be gained from a partner, director, officer, or employee of a financial institution, or by a system operated by the institution which permits it to aggregate transactions. AMERICAN BANKERS ASSOCIATION, THE BANK SECRECY ACT REGULATIONS AND THE MONEY LAUNDERING CONTROL ACT MANUAL 8.1.27 (1987) [hereinafter AMERICAN BANKERS ASSOCIATION]. "Knowledge" also includes the legal standard of "willful blindness," so a suspicious bank employee who chooses not to investigate to determine whether a report should be filed is deemed to have knowledge of a reportable transaction. *Id.* at 8.1.27. The financial institution is not required to poll its employees, and therefore, is not responsible for the cumulative knowledge of its employees. An example of reportable multiple transactions is when a customer comes to a bank several times within a 24 hour period and deposits over \$10,000.

48. As long as a transaction in currency of more than \$10,000 has occurred, it does not matter if it was done by one person with one account, several persons with the same account, or one person with several accounts. *Id.* at 8.1.28.

49. Deposits made at night or over a weekend or holiday shall be treated as if received on the next business day following the deposit. 31 C.F.R. § 103.22(a)(1) (1989).

Transaction Report (CTR) Internal Revenue Service Form 4789 and is filed within 15 days of the transaction⁵⁰ with the Internal Revenue Service.⁵¹

Chapter 3 provides for the filing of reports of exports and imports of monetary instruments⁵² moving into or out of the United States⁵³ and exceeding a certain dollar amount.⁵⁴ This chapter provides that monetary instruments which are being transported may be subject to forfeiture when either a report has not been filed, or is materially false.⁵⁵ Chapter 3 also provides for civil liability,⁵⁶ remission by the Secretary,⁵⁷ and enforcement authority.⁵⁸

Chapter 4 provides the Secretary with the authority to require the filing of reports and maintenance of records of transactions⁵⁹ or relationships with foreign financial agencies.⁶⁰ Each person subject to the jurisdiction of the United States⁶¹ having a financial interest in or authority over a financial account in a foreign country shall report such relationship to the Internal Revenue Service for each year that the relationship exists.⁶² The Secretary may issue regulations requiring further reports of transactions with foreign institutions.⁶³ Chapter 4 also establishes extensive record keeping require-

50. 31 C.F.R. § 103.26 (1989).

51. AMERICAN BANKERS ASSOCIATION, *supra* note 47, at 8.1.24.

52. "Monetary instrument" includes: currency; negotiable instruments; incomplete instruments; and securities. 31 C.F.R. § 103.11(k) (1989). This term does not include warehouse receipts or bills of lading. *Id.*

53. Pub. L. No. 91-508, *supra* note 12, tit. 2, § 231. Whoever knowingly transports or causes to be transported monetary instruments from any place within the United States to or through any place outside the United States, or to any place within the United States from or through any place outside the United States must file a report. *Id.* This reporting requirement also applies to whoever receives monetary instruments at the termination of the transportation to the United States from or through any place outside the United States. *Id.* For example, a filing is required if over \$10,000 is either in a car or a private plane and is taken outside the borders of the United States. The form must be completed by the time of departure from the United States. 31 C.F.R. § 103.26 (1989).

54. Pub. L. No. 91-508, *supra* note 12, tit. 2, §§ 231-235.

55. *See id.* § 232; 31 C.F.R. § 103.48 (1989). Forfeiture of property for failure to follow filing requirements is proper, even though the property is not a profit of a crime. *United States v. \$1,497,081.78 in U.S. Currency*, 777 F.2d 1451 (11th Cir. 1985). Such proceeding is *in rem*. The power of the court is derived entirely from its control of the *res*, even if the *res* is currency. *United States v. \$57,480.05 U.S. Currency and Other Coins*, 772 F.2d 1457 (9th Cir. 1984).

56. Pub. L. No. 91-508, *supra* note 12, tit. 2, § 233; 31 C.F.R. § 103.47(d) (1989).

57. Pub. L. No. 91-508, *supra* note 12, tit. 2, § 234; 31 C.F.R. § 103.48 (1989).

58. Pub. L. No. 91-508, *supra* note 12, tit. 2, § 235; 31 C.F.R. §§ 103.46, 103.50 (1989).

59. "Transaction" includes physical transfers of currency and transfers of funds by wire, check, draft or other order. *See* 31 C.F.R. § 103.11(p) (1989); HANDBOOK ON THE ANTI-DRUG ABUSE ACT OF 1986, *supra* note 28, at 63.

60. Pub. L. No. 91-508, *supra* note 12, tit. 2, § 241.

61. "Person" in this context does not include a foreign subsidiary of a U.S. person. *See* 31 C.F.R. § 103.24 (1989).

62. 31 C.F.R. § 103.24 (1989). If a person holds 25 or more foreign accounts, this fact is noted on the form; the Secretary may request more detailed information. *Id.*

63. 31 C.F.R. § 103.25 (1989).

ments for transactions involving persons, accounts, or places outside the United States.⁶⁴

C. The Constitutionality of the Bank Secrecy Act

In *California Bankers Association v. Schultz*,⁶⁵ the Bank Secrecy Act was challenged by the California Bankers Association, the American Civil Liberties Union, a bank, and some depositors. Although the Act was challenged on numerous grounds, the Supreme Court upheld its constitutionality. The Supreme Court held that because banks are not mere bystanders to transactions involving negotiable instruments, but, rather, are easily identifiable parties to the transactions, it is appropriate that they be responsible for maintaining records required of such transactions as required by the Act.⁶⁶ The financial burden imposed on financial institutions by the regulations was not so unreasonable as to deny banks due process of law.⁶⁷

The Supreme Court rejected a fourth amendment challenge to the Bank Secrecy Act. The Court held that since records would not be available to law enforcement through existing legal process, neither the bank's nor the depositors' fourth amendment rights had been violated.⁶⁸ It further reasoned that there was no violation of the depositors' fourth amendment rights since the documents were business records of transactions to which the banks were parties.⁶⁹ In addition, the Court held that reporting requirements concerning foreign financial transactions and accounts do not offend the fourth amendment because such laws merely single out transactions having the greatest potential for avoiding enforcement of the laws.⁷⁰ Finally, the Court held the domestic reporting requirements also do not abridge the bank's fourth amendment rights because banks are actively involved in, and earn profits from, transactions which they are required to record and report.⁷¹ As a result, the Court reasoned that the reports required by the Bank Secrecy Act should be subject to a relaxed rule of relevance for access by regulatory agencies to information kept by regulated entities.⁷²

64. Records of the report required to be filed must be retained for 5 years. 31 C.F.R. § 103.32 (1989). Banks have extensive record keeping responsibilities, such as keeping records of each remittance or transfer of funds, or of currency, other monetary instruments, checks, investment securities, or credit of more than \$10,000 to a person, account or place outside the United States. 31 C.F.R. § 103.34(b)(6) (1989).

65. 416 U.S. 21 (1974).

66. *Schultz*, 416 U.S. 21, 48-49.

67. *See id.* at 50. The Court found that as to insured banks, "Congress is simply imposing a condition on the spending of public funds." *Id.*

68. *Id.* at 52-54.

69. *Id.* at 52-54.

70. *Id.* at 55.

71. *Id.* at 62-63.

72. *Id.* at 63-67.

The Court also rejected a fifth amendment challenge to the Act because incorporated banks have no privilege against self-incrimination, so a party incriminated by evidence produced by a third party sustains no violation.⁷³ Justice Powell, joined by Justice Blackmun, wrote the concurring opinion which gave the court the necessary votes to uphold the constitutionality of the Act.⁷⁴

In *United States v. Miller*, the constitutionality of the Bank Secrecy Act's record keeping provisions was upheld against a fourth amendment search and seizure challenge.⁷⁵ The Court found that depositors have no fourth amendment privacy rights in records maintained by a financial institution pursuant to the Bank Secrecy Act.⁷⁶ Whether the records at issue consisted of account activity or copies or originals of checks or deposit slips was not relevant to the constitutionality of the record keeping provisions.⁷⁷ The provision is constitutional even if the bank records were obtained by a defective subpoena served on the bank.⁷⁸ According to the Court, a person has no expectation of privacy in records which are in the possession of a bank.

73. L.R. FISCHER, *supra* note 9, at 4-30. "Moreover, the Court found the reporting requirements consistent with the reasonableness requirements of the Fourth Amendment because they are reasonably restricted to the statutory purposes." *Schultz*, 416 U.S. 21, 67.

74. In concurrence, Justice Powell expressed concern over domestic reporting requirements. *Schultz*, 416 U.S. 21, 78-79 (Powell, J., concurring). He agreed that the Act as narrowed by the regulations did not infringe on any constitutional right. *Id.* Justice Powell was concerned with the significant extension of the regulation's reporting requirements.

In their full reach, the reports apparently authorized by the open-ended language of the Act touch upon intimate areas of an individual's personal affairs. Financial transactions can reveal much about a person's activities, associations, and beliefs. At some point, governmental intrusion upon these areas would implicate legitimate expectations of privacy. Moreover, the potential for abuse is particularly acute where, as here, the legislative scheme permits access to this information without invocation of the judicial process. In such instances, the important responsibility for balancing societal and individual interests is left to unreviewed executive discretion, rather than the scrutiny of a neutral magistrate.

Id.

75. 425 U.S. 435 (1976).

76. 425 U.S. 435, 440-43.

77. *See id.* at 442-43. Justice Powell, writing for the court, found that even if original checks were seized rather than copies, there is no expectation of privacy. *Id.* The voluntary conveyance on negotiable instruments to banks and the routine exposure of these instruments to employees weighed on the Court's decision. *Id.*

[T]he Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed.

Id. at 443.

78. *Id.*

D. The Right to Financial Privacy Act

In 1978, the Right to Financial Privacy Act was enacted which supplements the Bank Secrecy Act.⁷⁹ Generally, the Financial Privacy Act prohibits disclosure of a customer's bank records to the federal government unless the customer is notified and a statutory "waiting period" expires. The customer may challenge and prevent disclosure through legal action.⁸⁰

The Right to Financial Privacy Act was enacted, in part, as a response to the Supreme Court's opinions in *California Bankers' Association* and *Miller*, as well as the implications of these decisions on the public.⁸¹ The Right to Financial Privacy Act contains important exceptions which apply to records and reports filed and maintained pursuant to the Bank Secrecy Act. One important exception states that "[n]othing in this Title shall authorize the withholding of financial records or information required to be reported in accordance with any Federal statute or rule promulgated thereunder."⁸² Another important provision permits examination by, or disclosure to, any supervisory agency of financial records or information in the exercise of its supervisory, regulatory, or monetary functions with respect to a financial institution.⁸³ The Right to Financial Privacy Act was amended to accommodate changes to the Bank Secrecy Act.

IV. THE BANK SECRECY ACT - AMENDMENTS AND RELATED LEGISLATION

Amendments to the Bank Secrecy Act have strengthened penalties, enforcement, and exemptions from liability for civil prosecution. Additionally, the Bank Secrecy Act has influenced Congress to pass similar and related

79. Right to Financial Privacy Act of 1978, Pub. L. No. 95-630, tit. 11, 92 Stat. 3697 (1978) (codified as amended at 12 U.S.C. §§ 3401-3422 (1989)).

80. L.R. FISCHER, *supra* note 9, at 2-3.

81. *See id.* at 2-5, 2-6. Fischer discusses other reasons for passage of this Act. The first reason is the technical advancements which facilitated the storage, indexing and retrieval of information. *Id.* at 2-4. New technologies allowed government and business to maintain records on individuals which were accurate, complete, accessible, and could also be interchanged quickly. As a result, these systems could access the intimate details of an individual's life with relative ease. *Id.* Individual loss of control hastened public concern regarding the reach of the Bank Secrecy Act. In response, Congress passed the Privacy Act of 1974. *Id.* This Act regulated information systems operated or controlled by the federal government. *Id.* at 2-5. It also set up the Privacy Protection Study Commission which researched privacy protection throughout the United States and recommended future legislation. *Id.*

82. 12 U.S.C. § 3413(d) (1989).

83. *Id.*

legislation.⁸⁴ This legislation will be outlined only to the extent that it concerns the Bank Secrecy Act and financial institutions.

A. Crime Control Act of 1984⁸⁵

In 1984, Title II of the Bank Secrecy Act was amended to increase the Secretary's discretionary authority to impose civil and criminal penalties for violations of the reporting and record keeping provisions.⁸⁶ The statutory provision concerning reporting requirements for imports or exports of monetary instruments was amended to allow for reports of attempted transportation of monetary instruments.⁸⁷ This same provision was also amended to increase the threshold amount of the monetary instrument from \$5,000 to \$10,000. Finally, a violation of the Currency and Foreign Transactions Reporting Requirements was added to the list of predicate RICO offenses.⁸⁸

B. Anti-Drug Abuse Act of 1986- Subtitle H-Money Laundering Control Act of 1986.

The Anti-Drug Abuse Act contains extensive amendments which concern both the Bank Secrecy Act and The Right to Financial Privacy Act. Under the Anti-Drug Abuse Act, for the first time, money laundering became a crime.⁸⁹ In short, it became a crime to conduct a transaction or transportation

84. For example, the creation of the crime of money laundering is only a close cousin to the Bank Secrecy Act's reporting and record keeping requirements. The Bank Secrecy Act is an administrative law (even though it has criminal penalties) requiring the filing of reports and keeping of records, regardless of the origin or destination of the currency or monetary instruments. Money laundering, on the other hand is not governed by administrative law, but rather, by criminal law that makes the laundering of money or the failure to file a report on illegally obtained money a crime. The records and reports provide evidence for criminal prosecutions. The threat of criminal prosecution for money laundering is an incentive to file the forms. Although related, these are two different areas of the law.

85. Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837 (1984).

86. Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 2135, § 901 (1984) (codified at 31 U.S.C. §§ 5321-22 (1988)).

87. Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 2135, § 901 (1984) (codified at 31 U.S.C. § 5316 (1988)).

88. Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 2136, § 901 (1984) (codified at 31 U.S.C. § 5316 (1988)).

89. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986). It is interesting to note that the focus of and justification for the Bank Secrecy Act has turned to fighting drugs. Narcotics was cited as only one item in a laundry list of reasons for the necessity of reporting foreign transactions. H.R. REP. NO. 1449, 91st Cong., 2d Sess. 2, reprinted in 1970 U.S. CODE CONG. & ADMIN. NEWS 4381, 4397. Many of the reasons cited in the House Report involved some type of tax evasion. The volume of money illegally moved to evade taxes and exchange controls exceeds \$300 billion. Naylor, *Drug Money, Hot Money, and Debt*, 2 (no. 3) EUR. J. INT'L AFF. 55 (1989), reprinted in INTERNATIONAL SYMPOSIUM ON MONEY LAUNDERING - THE BRIEFING BOOKLET: BANKERS, BUSINESSMEN & ACCOUNTANTS (U. Miami, Graduate School of

of any kind knowing that the property involved is the proceeds of a felony. The launderer must intend: to promote the carrying on of the felony; to conceal the nature, location, source, ownership or control of the assets; or to avoid a transaction reporting requirement.⁹⁰ A separate section makes it a crime to engage in transactions involving a financial institution where the assets are from criminally-derived property in an amount of more than \$10,000.⁹¹ Forfeiture provisions were enacted to accompany these new criminal statutes,⁹² and these offenses became predicate RICO crimes.⁹³

The Anti-Drug Abuse Act amended the Right to Financial Privacy Act to give a financial institution, or its employees or its officers, immunity from federal prosecution for reporting suspicious activity regarding any individual or account.⁹⁴ The financial institution, officer or employee must make such report in good faith, and the information that may be disclosed is specified in the statute.⁹⁵

Structuring transactions to evade transaction reporting requirements also became a crime under the Act.⁹⁶ The Secretary was given rule making authority to define the term "at one time" for purposes of reporting transportation of monetary instruments.⁹⁷ This amendment also provided for seizures

International Studies, October 26-28, 1989). Not all of the profits of narcotics sales are placed in financial institutions. In order to avoid attracting attention, only a fraction of ill-gotten money is placed in the bank. The object of many of the street dealers is to buy luxury items instead. Statement of J. Preston, *supra* note 15, at 12. The drug trafficker that accumulates large amounts of money is a rarity. *Id.* at 14. It is the rare cases, however, which is used by the government to illustrate to the public the need for reporting transactions and government access to those records.

90. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 110 Stat. 3207-18 to 3207-20 (1986) (codified at 18 U.S.C. § 1956 (1988)).

91. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207-21 (1986) (codified at 18 U.S.C. § 1957 (1988)).

92. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207-35 to 3207-39 (1986) (codified at 18 U.S.C. §§ 981, 982 (1988)). Under current law, the commission a person earns from laundering illegally obtained money is forfeitable. *See* 18 U.S.C. § 981 (1988). Also, the property involved in the offense and the property traceable thereto is subject to forfeiture. 18 U.S.C. § 982 (1988).

93. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207-35 (1986) (codified at 18 U.S.C. §§ 981, 982 (1988)).

94. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207-21, 3207-22 (1986) (codified at 12 U.S.C. § 3403(c) (1988)). This is the first time that state law is expressly preempted by a provision directly or indirectly involving the Bank Secrecy Act. State law is implicitly preempted by the terms of the Bank Secrecy Act because it is imperative to the provisions of the Act that all financial institutions in the country comply with it regardless of whether they are insured by the federal government. Preemption does not mean that state law is disregarded. For example, a state created expectation of privacy has application to financial institutions in the enacting state. *See In re East Nat'l Bank of Denver*, 517 F. Supp. 1061 (D. Col. 1981).

95. 12 U.S.C. § 3403 (1988).

96. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207-22 (1986) (codified at 31 U.S.C. § 5313 (1988)).

97. This rule was enacted to prevent individuals from structuring transportation to avoid the reporting requirement.

and civil forfeitures of monetary instruments for failing to report exports or imports of instruments.⁹⁸ In addition, the Secretary of the Treasury was given the summons authority to examine books, records, and other papers of financial institutions.⁹⁹ The Secretary could also summon a bank officer to testify¹⁰⁰ and penalize those who refuse to comply.¹⁰¹

The provision relating to exemptions for monetary transaction reporting requirements was amended to require a statement signed by the customer explaining the reasons why a person is granted an exemption.¹⁰² The civil and criminal penalties for violations of some of the reporting requirements were increased.¹⁰³

Each financial institution supervisory agency was required to enact regulations requiring the establishment of compliance programs in insured institutions.¹⁰⁴ Furthermore, the supervisory agency was required to insure compliance programs were enacted.¹⁰⁵

There are other important amendments. The Secretary, in consultation with the Board of Governors of the Federal Reserve System, is directed to initiate discussions with central banks or governments of other countries and propose that an information exchange be established.¹⁰⁶ The Secretary is also directed to study the use of foreign branches of domestic institutions to evade U.S. laws.¹⁰⁷ The Secretary must report to Congress on both studies.¹⁰⁸ Finally, the change in control statutes for financial institutions

98. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207-22, 3207-23 (1986) (codified at 31 U.S.C. § 5316 (1988)).

99. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207-23, 3207-24 (1986) (codified at 31 U.S.C. § 5318 (1988)).

100. *Id.*

101. *Id.*

102. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207-24, 3207-25 (1986) (codified at 31 U.S.C. § 5318 (1988)).

103. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207-25, 3207-26 (1986) (codified at 31 U.S.C. § 5321 (1988)).

104.

In response, the Comptroller of the Currency (OCC), Federal Reserve Board (FRB), Federal Deposit Insurance Corporation (FDIC), Federal Home Loan Bank Board (FHLBB), and the National Credit Union Administration (NCUA), jointly issued final regulations on January 27, 1987 that require the financial institutions under their respective jurisdiction to establish and maintain procedures for monitoring compliance with the record keeping and reporting requirements of the Bank Secrecy Act. Under these regulations, each financial institution is required to develop and provide for the continued administration of a program to monitor and ensure compliance with the record keeping and reporting requirements of the Bank Secrecy Act and the related regulations of the Treasury Department.

L.R. FISCHER, *supra* note 9, *supp.*, at 4-26 (footnotes omitted).

105. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207-27 to 3207-29 (1986) (codified at 12 U.S.C. §§ 1464, 1818, 1730, 1786 (1988)).

106. *Id.*

107. *Id.*

108. *Id.*

were amended to keep violators of the Bank Secrecy Act out of financial institutions.¹⁰⁹

C. Bank Secrecy Act Amendments

The amendments to the Bank Secrecy Act were not as comprehensive as the Anti-Drug Abuse Act of 1986. The list of businesses that can be included in the definition of a "financial institution" was extended.¹¹⁰ By statute, financial institutions are prohibited from selling or issuing bank checks,¹¹¹ cashier's checks,¹¹² traveler's checks¹¹³ or money orders¹¹⁴ to anyone who does not present such identification as the Secretary specifies. The Secretary was given additional authority to require domestic reports of currency transactions. Pursuant to this authority, the Secretary can issue orders to geographic areas of the country¹¹⁵ and require reports of transactions¹¹⁶ for up to sixty days, which period may be renewed.¹¹⁷ The penalties for banks under the Federal Deposit Insurance Act were increased. The United States Postal Service was given more enforcement authority.¹¹⁸

D. Right To Financial Privacy Act Amendments

There have been two amendments to the Right to Financial Privacy Act. The first amendment allows any financial institution or supervisory agency to provide information to appropriate state or federal law enforcement about insiders who may be acting in concert to violate the Bank Secrecy Act or any

109. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207-29 to 3207-33 (1986) (codified at 12 U.S.C. § 1818 (1988)).

110. The list now includes: businesses that sell vehicles; the United States Postal service; any state, local, or federal agency engaged in activities specified in the paragraph; people who do real estate closing; businesses engaged in related activity; any other business the Secretary finds whose cash transactions have a high degree of usefulness in criminal, tax, or regulatory matters. Anti-Drug Abuse of 1988, Pub. L. No. 100-690, 102 Stat. 4354, 4355, § 6185 (1988) (codified at 31 U.S.C. § 5312 (1988)).

111. Anti-Drug Abuse of 1988, Pub. L. No. 100-690, 102 Stat. 4355, § 6185 (1988) (codified at 31 U.S.C. § 5325 (1989)).

112. *Id.*

113. *Id.*

114. *Id.*

115. The area can be as big as a region or as small as a city block, a single institution, or one account. *Id.*

116. The transactions may be of any kind and of any amount. *Id.*

117. Anti-Drug Abuse of 1988, Pub. L. No. 100-690, 102 Stat. 4356, § 6185 (1988) (codified at 31 U.S.C. § 4356 (1989)).

118. Anti-Drug Abuse of 1988, Pub. L. No. 100-690, 102 Stat. 4357, § 6186 (1988) (codified at 31 U.S.C. § 5318 (1989)) and 102 Stat. 4362-63, § 6251 (1988) (codified at 18 U.S.C. § 3061, 21 U.S.C. § 881 (1989)) and 102 Stat. 4377-78 (1988) (codified at 18 U.S.C. § § 1956, 1957, 981 (1989)).

law regarding financial institutions.¹¹⁹ Any person who reports suspicious transactions or illegal insider activity may be given a certificate of good faith which exempts them from state prosecution.¹²⁰

The second amendment to the Right to Financial Privacy may be the most important development for bank customers since *Miller*. This amendment allows for the interagency transfer of financial records to the Attorney General's Office and exempts such transfer from the provisions of the Right to Financial Privacy Act.¹²¹ The supervisory level of an agency or department may transfer records obtained in the exercise of its supervisory or regulatory functions if there is reason to believe that the records may be relevant to a violation of Federal criminal law. The only limitation on the use of these records is that they shall only be used for criminal investigative or prosecutive purposes by the Department of Justice and shall be returned upon completion of the investigation or prosecution (including appeals).¹²² For the first time, the access to Bank Secrecy Act records has been altered.¹²³

The enactment of the money laundering statutes and some legislative history were the impetus for this amendment. In 1980, the Justice Department interpreted the section of the Right to Financial Privacy Act concerning interagency transfers of information¹²⁴ as giving an implied exception from the notice requirements to information referred pursuant to a criminal prosecution.¹²⁵

The new money laundering statutes facilitate Justice Department prosecutions. In prosecuting these cases, the Justice Department must obtain information held by the Secretary of the Treasury. This amendment clarifies the legitimacy of such transfers without notice to the customers of the financial institution.

There is a distinction between regulatory inspections and criminal investigations. Regulatory inspections to determine compliance with the Bank

119. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4357, 4358, § 6186 (1988) (codified at 12 U.S.C. § 3413 (1989)).

120. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4358, § 6186 (1988) (codified at 12 U.S.C. § 3413 (1989)).

121. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4357, 4358, § 6186 (1988) (codified at 12 U.S.C. § 3412 (1989)).

122. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4357, 4358, § 6186 (1988) (codified at 12 U.S.C. § 3412 (1989)).

123. The U.S. Supreme Court found the fact that the laws regarding access to records were not changed by the Bank Secrecy Act to be an important factor in upholding the constitutionality of the Bank Secrecy Act rationale. *California Banker's Assoc. v. Shultz*, 416 U.S. 21 (1974). In his dissent, Justice Brennan noted that access to the bank records by the FBI without process occurs with some degree of frequency. *Id.* at 91-93 (Brennan, J., dissenting). The Bank Secrecy Act allowed the Secretary to make reported information available to any department or agency on request of the agency. 31 U.S.C. § 5319 (1989); 31 C.F.R. § 103.43 (1989).

124. 12 U.S.C. § 3412 (1989). The customer is notified of the transfer after the records are taken. 12 U.S.C. § 3411 (1989).

125. L.R. FISCHER, *supra* note 9, at 2-50.

Secrecy Act and other regulations are not inhibited by the probable cause or reasonableness requirements of the fourth amendment.¹²⁶ Such regulatory investigations are less hostile, and there is a greater degree of candor between the government and the inspected business.¹²⁷ The general sharing of information gathered in the audit for the purpose of criminal investigation may be a violation of the fourth amendment.¹²⁸ Under such circumstances there is no neutral official weighing the interests of privacy and the government's need to obtain the information.¹²⁹ Therefore, information would be exchanged by unreviewed executive discretion.¹³⁰

This amendment does not change the fact that the examination by the department or agency must have been done in the capacity of financial institution supervisor or regulator. The records which have been maintained may be transferred if found to be of help in a criminal proceeding.¹³¹ If the Justice Department wants financial institution records that have not been obtained by a regulatory examination, then the Justice Department must obtain the records by some other means. The Justice Department cannot cause a regulatory examination.¹³²

*E. Anti-Drug Abuse Act of 1988-Subtitle E-Money Laundering*¹³³

The Bank Secrecy Act and Right to Financial Privacy Act were amended to include areas that the Secretary found to be conducive to money laundering activities.¹³⁴ The following amendments became particularly important for financial institutions: forfeiture provisions were amended to provide that the corpus of the laundered funds or its substitute is now subject to forfeiture;¹³⁵ and money laundering criminal statutes were amended to provide for sting operations.¹³⁶ The Secretary of the Treasury is also following other current developments which affect financial institutions.¹³⁷

126. *U.S. v. Deak-Perera & Co.*, 566 F. Supp. 1398, 1402 (D.D.C. 1983).

127. *Id.* at 1402.

128. *Id.* at 1402-03.

129. *Schultz*, 416 U.S. 21, 79.

130. *Id.*

131. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4357, 4358, § 6186 (1988).

132. *Deak-Perera*, 566 F. Supp. 1398, 1402.

133. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181, 4354-59 (1988).

134. Pub. L. No. 101-73, 103 Stat. 183-506 (1989).

135. Pub. L. No. 100-690, § 6463, 102 Stat. 4374 (codified at 18 U.S.C. 981, 982 (1989)).

136. Pub. L. No. 100-690, § 6465, 102 Stat. 4375 (codified at 18 U.S.C. § 1956 (1989)).

137. The Secretary of the Treasury is investigating the possibility of requiring records and reports of electronic transfers of funds. Street, *Comparison of State Money Laundering*, in EXECUTIVE ENTERPRISES, INC., WIRE TRANSFERS AND CURRENCY REPORTING: HOW TO PROTECT YOUR BANK AGAINST MONEY LAUNDERING (Feb. 14-15 1990) (seminar materials, available by calling (212) 645-7880).

V. FEDERAL AND STATE LAW COMPARED

State law is instructive in understanding the federal provisions governing the relationship between bank, customer and government. Of particular relevance are state laws in which the public enjoys a right to privacy in their financial records. For this reason, the laws of the State of Florida will be compared to the federal law.¹³⁸

The structure of Florida's government is different from the structure of the federal government. In Florida, financial institutions are regulated by the Comptroller.¹³⁹ Florida's counterpart to the Internal Revenue Service is the Department of Revenue, a department of the executive branch of government which is separate from both the Comptroller and the Treasurer of the State of Florida. Under the federal structure, however, the Secretary of the Treasury¹⁴⁰ supervises and regulates both financial institutions and the Internal Revenue Service. These different governmental structures affect who enforces the reporting and record keeping requirements.¹⁴¹

A. Filing of Records and Reports

Trades or businesses that are not included in the definition of "financial institution" must file currency transaction reports.¹⁴² These reports are filed with the Internal Revenue Service on the federal level and with the Department of Revenue on the state level.¹⁴³

To add to the complexity, the definition of "financial institution" is different on the federal and state level. The federal definition of "financial

138. There are eight states with some kind of transaction or transportation reporting and record keeping, or money laundering law. These states are: Florida, California, Connecticut, Georgia, Illinois, New York, Utah, and Virginia. *Id.*

139. The Comptroller is the chief fiscal officer of the state who settles and approves accounts against the state. *See* FLA. CONST. art. IV, § 4. The Comptroller serves as the head of the State of Florida Department of Banking and Finance. *Id.* § 6; FLA. STAT. ANN. § 20.12 (West 1988). The Treasurer disburses state funds upon the order of the Comptroller. *See* FLA. CONST. art. IV, § 4.

140. The Secretary of the Treasury is appointed by the President with the advice and consent of the Senate. U.S. CONST. art. II, § 2.

141. In Florida, transaction reports are filed with the Comptroller. Federal government reports are filed with the Internal Revenue Service. In Florida, the examination of financial institutions for compliance with reporting and record keeping requirements is the responsibility of the Comptroller of the State of Florida. Under the federal structure, examination and enforcement are the responsibility of various government entities such as the Comptroller of the Currency, Federal Deposit Insurance Corporation, and Federal Home Loan Bank Board. *See* 31 C.F.R. § 103.46 (1989).

142. These reports are mandated pursuant to FLA. STAT. ANN. § 896.102 (West 1989). In Florida, brokers/dealers of securities must file CTRs for and maintain records of transactions over \$10,000 with the Department of Banking and Finance, the Department of Revenue, and the Internal Revenue Service. FLA. STAT. ANN. §§ 517.12(14), 896.102 (West 1989); 31 C.F.R. § 103.22 (1989).

143. 31 C.F.R. § 103.22; FLA. STAT. ANN. § 896.102 (West 1989).

institution" includes many businesses other than banks.¹⁴⁴ Florida's definition of "financial institution" refers only to banks.¹⁴⁵ All banks in Florida must file transaction reporting forms with both the Internal Revenue Service and the Department of Banking and Finance. Businesses which are considered "financial institutions" under the federal definition must file transaction reports with the Internal Revenue Service. In Florida, however, businesses other than banks file with the Department of Revenue. The simple difference in definition makes a difference in filing requirements and responsibility for enforcement.

In Florida, transaction reports are required for single transactions of over \$10,000 in currency¹⁴⁶ and for any transaction "known" by the financial institution to involve the proceeds of criminal activity.¹⁴⁷ Florida encourages financial institutions to report activity suspected to involve criminal actions and exempts financial institutions and their employees from civil liability for making such reports.¹⁴⁸ Unlike the Federal government, Florida does not require reports of transportations of currency. The Federal law requires reports of single and multiple transactions of over \$10,000, and strongly encourages reports of suspected criminal activity.¹⁴⁹ Florida does not require the same records to be kept as are required under federal Law,¹⁵⁰ but Florida honors federal exemptions to transactions reporting requirements.¹⁵¹

Despite the differences in filing requirements, Florida essentially requires a duplicate of the federal transaction report to be filed with the state.¹⁵² There are two reasons for this requirement. The first reason is for Florida to remain current with information filed with the Internal Revenue Service so that Florida can actively prevent money laundering in state institutions. The

144. 31 U.S.C. §§ 103.11, 5312 (1988).

145. FLA. STAT. ANN. § 655.50 (West 1988).

146. "Coins" is included in the definition of currency. Hence, a large deposit or other transaction of collectors coins must be reported in Florida. These collectors coins are not considered currency under federal law because they are not circulated. 31 C.F.R. § 103.11 (1989).

147. The reporting requirements for suspicious transactions are not limited by the type of transaction or the amount of funds involved. This requirement is broad enough to include multiple transactions amounting to over \$10,000 as structuring is a suspicious activity.

148. FLA. STAT. ANN. § 655.50 (West 1988).

149. If suspected criminal activity is not reported, the financial institution may be charged with promoting the criminal enterprise. 18 U.S.C. § 1956 (1988). There is an exemption from liability if a report is filed in good faith.

150. FLA. STAT. ANN. § 655.50(4)(a) (West 1988). Florida does require a record of transactions exceeding \$10,000 and transactions known to involve suspicious activity. Although there are no similar record keeping requirements under federal law, any prudent financial institution would not only record such transactions under federal law, but report it as well and have an exemption from civil liability. If this is not done, the financial institution may also be prosecuted for money laundering. 18 U.S.C. § 1956 (1988).

151. FLA. STAT. ANN. § 655.50 (West 1988).

152. *Id.*

second reason is that this information will help the state regulators understand why a state institution may be the subject of federal investigations.¹⁵³

Florida adopted the federal criminal statute making money laundering a crime.¹⁵⁴ While the transaction offenses are identical, there is a difference in transportation offenses. In Florida, it is a crime to transport or attempt to transport monetary instruments¹⁵⁵ with either the intent to promote a crime or the knowledge that the monetary instrument or funds¹⁵⁶ are the proceeds of a crime. If the monetary instrument or funds are the proceeds of a crime, then the transportation must either conceal or disguise the nature, location, source, ownership or control of the proceeds, or avoid a transaction reporting requirement.¹⁵⁷ A similar provision of federal law makes the same kind of transportation an offense only when the transportation crosses the United States borders.¹⁵⁸

The State of Florida monitors the information filed with the federal government, which allows the Comptroller to assess the activities of financial institutions located within the state.

153. In 1980, the first enforcement action under the Bank Secrecy Act took place in Miami, Florida. "Operation Greenback" was a joint operation between the Internal Revenue Service, the U.S. Attorney's Office, and the U.S. Customs service. In 2.5 years, 147 indictments were filed against 38 narcotics organizations. There were approximately 100 arrests where thirty million dollars were seized and forfeited and over one million dollars worth of property was seized. The penalties amounted to thirty-three million with one hundred and twelve million in jeopardy tax assessments. *Money Laundering: Hearing Before the United States House of Representatives Committee on Banking, Finance, and Urban Affairs* (Dec. 7, 1989) (statement of Charles Saphos, Chief - Narcotic and Dangerous Drug Section, Criminal Division, Department of Justice). The most important aspect of "Operation Greenback" was not the number of fines, indictments, or forfeitures. It was the fact that a state chartered bank, Great American Bank of Dade County, was closed immediately by the federal government without notice to state regulators. It was also the first case in which a financial institution's president, loan officer, and a chief teller were all indicted. The indictments took place between December 1982 and August 1984, charging that the bank had laundered over \$94 million and had wilfully failed to file 406 transaction reports. Three narcotics organizations were depositors of the bank. *Id.*

154. 18 U.S.C. § 1956 (1988); FLA. STAT. ANN. § 896.101 (West 1989).

155. "Monetary instruments" means coin or currency of the United States or of any other country, traveler's checks, personal checks, bank checks, money orders, investment securities in bearer form or otherwise in such form that title thereto passes upon delivery, and negotiable instruments in bearer form or otherwise in such form that title thereto passes upon delivery.

156. "Funds" means electronic transfers of debits and credits. HANDBOOK ON THE ANTI-DRUG ABUSE ACT OF 1986, *supra* note 28, at 63.

157. Transportation of funds means sending the debit or credit by wire. *Id.* at 73.

158. The CMIR must be completed for any international transportation of monetary instruments. The difference between the crime and the reporting requirement is that the crime extends to international transportation of monetary instruments of any amount and wire transfers of funds which are proceeds of a crime and the transportation is to further the purposes of the crime or avoid a reporting requirement. The CMIR report only requires reports of any not exempted international transportation of monetary instruments of over \$10,000, no matter what the purpose of the transportation or origin of the money.

B. Constitutional Right to Privacy in Financial Records

The Constitution of the State of Florida, unlike the United States Constitution, expressly provides for a right of privacy.¹⁵⁹ On the federal level, the concept of privacy was developed by the U.S. Supreme Court.¹⁶⁰ The Florida Supreme Court has interpreted Florida's constitutional privacy provision as giving the citizens of Florida more protection in their privacy interests than is provided by the federal Constitution.¹⁶¹

The common law principles outlined in the beginning of this article have been accepted in Florida as applying to contracts between a bank and its customer.¹⁶² The Florida Supreme Court has held that the common law applies only to disclosures to private persons and, by its own terms, does not apply to disclosures required by the government or under compulsion of law.¹⁶³ The distinction may become blurred if the records obtained by the government ultimately become public records.¹⁶⁴

According to the Florida Supreme Court, Florida's constitutional privacy provision recognizes a legitimate expectation of privacy in a person's financial records.¹⁶⁵ This includes records maintained by a financial institu-

159. Article I, section 23 of the Florida Constitution was approved by the voters of Florida on November 4, 1980. See FLA. CONST. art. I, § 23. *Winfield v. Div. of Pari-Mutual Wagering*, 477 So. 2d 544 (Fla. 1985).

160. See Brandeis & Warren, *supra* note 9 (one of the first articles publishing the concept of the "right to be let alone"). This idea was more fully developed in Brandeis' dissent in *Olmstead v. United States*, where he wrote:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect . . . They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone the most comprehensive of rights and the right most valued by civilized men.

277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

It is interesting to note that the words "right to be let alone" were incorporated into the language of the Constitution of the State of Florida: "Right to Privacy — Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law." FLA. CONST. art. I, § 23.

161. *Winfield*, 477 So. 2d at 544.

162. *Milholnich v. First National Bank of Miami Springs*, 224 So. 2d 759 (Fla. Dist Ct. App. 1969); see also FLA. STAT. ANN. § 655.059 (West 1988).

163. *Winfield*, 477 So. 2d at 544, 546-547.

164. This was the concern expressed by the Circuit court in *Winfield*. *Id.* at 546. Pursuant to Chapter 119 of the Florida Statutes, governmental records are, with some exceptions, public records. There are restrictions to public access to financial records maintained by the Department of Banking and Finance. FLA. STAT. ANN. § 655.057 (West 1988). However, a court can order that the records or the information contained in them to be maintained under seal.

165. *Winfield*, 477 So. 2d at 548.

tion.¹⁶⁶ The Florida Supreme Court specifically rejected the holding and reasoning of the decision in *United States v. Miller* for two reasons. First, the Florida constitution contains an express right to privacy.¹⁶⁷ Second, in *Winfield v. Division of Pari-Mutual Wagering*, the Florida Supreme Court reasoned that privacy interests were left to the states to protect.¹⁶⁸ The Court held that the state constitutional protection did not bar the state from obtaining financial records, but it did require the state to show that it had a compelling interest in obtaining the records and that the least intrusive means were used to obtain them.¹⁶⁹

The Florida Supreme Court confirmed this holding in *Shaktman v. State*.¹⁷⁰ The Court held that the state can obtain access to financial records if it demonstrates a compelling interest and shows that procedural safeguards were followed to insure that the least intrusive means were utilized.¹⁷¹ The court reasoned that, at a minimum, this required judicial approval prior to the state's intrusion into a person's privacy.¹⁷²

Winfield and *Shaktman* do not restrict the state examiner from conducting examinations of financial institutions.¹⁷³ Florida law expressly allows financial institutions to be examined by the state or federal regulator.¹⁷⁴ The records of these examinations are confidential.¹⁷⁵ If the state regulator discovers a crime, the regulatory agency may report the suspected criminal

166. *Id.* at 547, 548. The problem with the *Miller* decision is that while it recognized that people expected their financial records to be kept confidential by a bank (because of the common law concerning the implied provision of privacy in the contract between banker and customer), it was the very exposure to a third person regardless of the relationship that took away any constitutionally protected expectation of privacy. *See id.* at 443. Justice Ehrlich of the Florida Supreme Court reasoned that because of that expectation of privacy people have in their bank records, these records are within the zone of privacy recognized and protected by the Florida Constitution. *Shaktman v. State*, 553 So. 2d 148 (Fla. 1989).

167. *See supra* note 160. The Florida Supreme Court also looked to the legislative history behind the amendment. *Winfield*, 477 So. 2d at 548.

168. *Id.* at 544. The Florida Supreme Court stated: "[T]he protection of a person's general right to privacy—his right to be let alone by other people—is, like the protection of his property and of his very life, left largely to the law of the individual States." *Id.* at 547 (quoting *Katz v. United States*, 389 U.S. 347, 350-51 (1967)). As Justice Brennan noted in his dissent in the *Miller* decision, there is an "emerging trend among high state courts of relying upon state constitutional protection of individual liberties—protection pervading counterpart provisions of the United States Constitution, but increasingly being ignored by decisions of this Court." (footnote omitted) 425 U.S. 435, 455 (Brennan, J., dissenting).

169. *Winfield*, 477 So. 2d at 547. The Florida Supreme Court additionally held that the Constitution did not require that the customer be notified of the subpoena of his records. *Id.* The Right to Financial Privacy Act requires that the customer be notified only if the records are sought by the federal government.

170. *See Shaktman*, 553 So. 2d 148.

171. *Id.* at 151.

172. *Id.* at 152.

173. FLA. STAT. ANN. § 655.021 (West 1988).

174. *See* FLA. STAT. ANN. §§ 655.045, 655.049 (West 1988).

175. *See* FLA. STAT. ANN. §§ 655.057, 655.550 (West 1988).

activity to appropriate law enforcement.¹⁷⁶ But, as on the federal level, the state regulator cannot conduct an examination on behalf of law enforcement. If this is done, it is a violation of the subject's constitutional right to privacy.

It is an open question as to whether the department may obtain the reports of transactions from the financial institution. The compelling interests here are the state regulator's need to have the information filed with federal regulators, and to have information which may 'reasonably lead to the investigation or prosecution of a crime. The narrow state purpose is for the State of Florida to keep apprised of federal reports filed by local banks.

Another open question is whether the Department of Banking and Finance can freely share reports or information with the Department of Law Enforcement.¹⁷⁷ In comparison, the Secretary of the Treasury can share any reports with any state or federal agency if the request meets certain standards, such as being in writing and stating the purpose of the information sought.¹⁷⁸ There are no such restrictions in Florida's law. Such free access for criminal investigators¹⁷⁹ would violate a citizen's state constitutional protections if the citizen has a legitimate expectation of privacy in reports of unusual transactions filed with the Department.¹⁸⁰

The standards are different for access to records of the financial institution by law enforcement via the regulatory agency. In Florida, the Department of Banking and Finance can refer such records to law enforcement only if there is suspected criminal activity.¹⁸¹ Under federal law, the supervisory agency must certify that the records were obtained in its regulatory capacity and that the information will be relevant to a violation of federal criminal law.¹⁸² There is no violation of the state constitutional protections of privacy because the Department is only acting as any citizen would in reporting a crime if such were encountered in the exercise of the Department's regulatory function.

Winfield and *Shaktman* could, conceivably, apply to reports filed with the Department of Banking and Finance, if the Florida Supreme Court decides that a person's financial transactions are within the zone of privacy. Reports of these transactions are confidential, but they are available to criminal prosecutors or investigators if obtained by court order or subpoena.¹⁸³

176. The common law in fact provides for the reporting of information if for the public good. It is the duty of every citizen to report crime.

177. FLA. STAT. ANN. § 655.55 (West 1988).

178. 31 C.F.R. § 103.43 (1989).

179. They are not required to show a compelling interest or narrowly tailored means. *Winfield*, 447 So. 2d at 548.

180. The Florida Supreme Court did not find the fact that records are kept by a third person to be destructive of that person's expectations of privacy. *Shaktman*, 553 So. 2d 148, 153.

181. FLA. STAT. ANN. § 655.057(1)(c) (West 1988).

182. 12 U.S.C. § 3412 (1988). The Federal Bureau of Investigations may simply write the financial institution for information. 12 U.S.C. § 3414 (1988). Pub. L. No. 99-569, 1000 Stat. 3197, § 404 (1988).

183. FLA. STAT. ANN. § 655.50(4)(b) (West 1988).

Therefore, if there is a compelling state interest and appropriate procedures are followed, the reports may constitutionally be obtained from the department.

The reporting of suspicious criminal activity poses certain problems. As to filings with the federal government, state constitutional rights are preempted by the express terms of federal law so that the reporting person or entity is exempt from liability. Similarly, the state law expressly exempts financial institutions from prosecution for such reports of suspicion.¹⁸⁴ A state statute, however, cannot waive a state constitutional protection, and a banker cannot waive the constitutional right of his customer.¹⁸⁵

One way to ease the tension between Florida's right of financial privacy and the federal scheme, which does not recognize any such privacy, is to apply the common law exception to the duty of confidentiality of a bank's duty to protect the public from the wrongdoing of a depositor. Reaffirmation of that common law exception, pursuant to state statute, can be applied to interpret the state constitution as allowing disclosure by the banker, even if criminal activity is only suspected.

VI. CONCLUSION

The common law in Great Britain and the United States is that there is an implied duty on the financial institution not to disclose the records of its customers to third persons. The exceptions to that common law duty explain many of the disclosure requirements of the Bank Secrecy Act. First, the law requires the maintenance of records and filing of reports. Second, the government now interprets the reporting of suspicious activity as being the financial institution's duty to the public to disclose. Finally, these reports of suspicious activity may protect the financial institution from being prosecuted for promoting the laundering scheme.

It is easy to do away with the common law principle of confidentiality by severing large portions of it into categories of exceptions. The fact that information concerning a customer is given to the government, thus fitting into three categories of exceptions, does not mean that the information will not be publicized. A better analysis for protecting confidentiality would be to weigh the rights of the customer with the government's interest in obtaining the particular information. Under this analysis, it would not be possible to obtain wide categories of information on every person in America. The United States Supreme Court has paved the road for such ease of bureaucratic access to the most personal information. The solace in understanding such

184. FLA. STAT. ANN. § 655.50 (West 1988).

185. *Shaktman*, 553 So. 2d at 153. "[T]he individual certainly expected that the information would not be released without authorization." *Id.*

disregard of legitimate expectations of privacy, as is recognized by the common law, is found in the writings of Samuel Warren and Louis Brandeis: "Political, social, and economic changes entail a recognition of new rights, and the common law, in its youth grows to meet the demands of society."¹⁸⁶ With the automation of a global banking system and the ease of transferring funds, the focus has changed from the privacy of individuals to a recognition of the public welfare. However, the broadscale means to achieve that end is difficult to justify.



186. Brandeis & Warren, *supra* note 9, at 194.