Investigation and Prosecution of Illegal Money Laundering

A Guide to the Bank Secrecy Act

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Service

Document 6936 (2-84)

INVESTIGATION AND PROSECUTION OF ILLEGAL MONEY LAUNDERING

A Guide to the Bank Secrecy Act

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FOREWORD

The Bank Secrecy Act contained in Titles 31 and 12 of the United States Code is becoming an effective tool in the fight against illegal narcotics trafficking. Although the Act has not been well understood or used since its passage in 1970, small groups of investigators and prosecutors around the country have come to realize that currency reporting statutes can be used effectively to attack criminals and illegal enterprises by focusing on the huge profits and benefits they reap. The Bank Secrecy Act is specifically designed to aid in this attack by creating a "paper trail" to trace drug and other proceeds back to their illegal source. Long-term financial investigations aided by IRS computers and sophisticated analyses of currency transactions are resulting in the indictment of high-level drug suspects. Moreover, as the financial industry begins to fully comply with the requirements of the Bank Secrecy Act, large-scale drug dealers will have a more difficult time moving illegal funds, and, consequently, they will increase their chances of being apprehended. It is the purpose of this monograph to gather into one written form an analysis of the Bank Secrecy Act and the developing case law pertaining to it. Investigators may find the materials very new, hopefully stimulating and of assistance in the investigation of groups dealing in substantial sums of illegal money, whether the underlying criminal conduct involves narcotics, organized crime or white-collar crime.

The Bank Secrecy Act is only one tool among many available to federal law enforcement personnel in fighting crime. While attacking a criminal organization through its profits can be a successful starting point, all available legal means should be used to destroy a targeted criminal organization. We hope that this monograph will stimulate that process.

For brevity and ease of reading, references to persons mentioned in the text have been done in the masculine form; whenever "he" or "him" is used, it should be read to include "she" or "her."

This monograph is not a statement of policy of the Criminal Division of the Department of Justice. Users of this manual should refer to the United States Attorneys' Manual as well as appropriate offices in the Department of Justice and the Department of the Treasury for matters of policy regarding the Bank Secrecy Act.

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PREFACE

To all who assisted in the preparation of this monograph we wish to express our sincere thanks and gratitude.

Special thanks is accorded William J. Corcoran, Jorge Rios, Thomas J. O'Malley and Robyn Mitchell for proofing and editing this monograph. We gratefully acknowledge the important substantive contributions of the Office of Chief Counsel and the Financial Investigation Unit of the Office of Investigations of the United States Customs Service and the Asset Forfeiture Office of the Criminal Division and L. Eric Johnson of that Office. We would additionally like to thank Special Agent Thomas Clifford of the Drug Enforcement Administration for his advice and support on enforcement aspects of the monograph.

To the research staff, June Seraydar, Hope Breiding and Lori Kibler we express our thanks.

To Gary Schneider for long hours of editing and suggestions which contributed greatly to this project.

To Gloria Berry, Sarah Porter, Sharon Wise, Maria Nicholson, Annabelle Noaker, Angela Brown and Alice Ricks, our clerical staff, who spent endless hours during the preparation of the document, we extend our sincere appreciation.

A special thanks to Clara Taylor, our word processing expert, who greatly facilitated the project.

A special thanks to the personnel of Operation Greenback whose experience contributed greatly to this writing.

We expect that this monograph will be reviewed and revised. Suggestions for additions and other revisions may be sent to Charles W. Blau, Chief, Narcotic and Dangerous Drug Section, United States Department of Justice, Criminal Division, Washington, D.C. 20530.

This monograph is not intended to create or confer any rights, privileges or benefits on prospective or actual witnesses or defendants. It is also not intended to have the force of law or of a United States Department of Justice directive. See United States v. Caceres, 440 U.S. 741 (1979).

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CHAPTER 1

THE BANK SECRECY ACT: LEGISLATIVE HISTORY

Introduction

On October 26, 1970, the President signed the Bank Records and Foreign Transaction Act, Public Law No. 91-508, into law. Titles I [1/] and II of the Bank Records and Foreign Transaction Act constituted what is commonly known as the Bank Secrecy Act (hereinafter the Act). Title II, which was entitled the "Currency and Foreign Transactions Reporting Act," was originally codified in Sections 1051-1122 of Title 31 of the United States Code (hereinafter the Code). [2/] In 1982, Congress reenacted all of Title 31 of the Code into positive law. The currency and foreign transaction reporting sections of the Bank Secrecy Act are now codified in Sections 5311-5322 of Title 31 of the Code.

1/ Title I, which is codified in Sections 1829b and 1951-1959 of Title 12 of the United States Code, requires banks and other financial institutions to retain certain financial records for periods of up to five years. By requiring the maintenance of these records, Congress believed that criminal, tax and regulatory investigations and proceedings would be facilitated. This was based upon Congress' finding that "an effective fight on crime depends in large measure on the maintenance of adequate and appropriate records by financial institutions." House Committee on Banking and Currency, H.R. Rep. No. 975, 91st Cong., 2d Sess. 10 (1970), (hereinafter cited as House Report).

2/ Prior to 1982, Title II of the Bank Secrecy Act was codified at 31 U.S.C. §§1051-1122. See infra notes 46-53 and accompanying text (discussing the 1982 reenactment of Title 31 of the United States Code).

These sections require private individuals, banks and other financial institutions to report certain of their foreign and domestic financial transactions to the federal government. Failure to comply with the reporting requirements of the Act may lead to civil penalties, civil forfeitures or criminal misdemeanor and felony sanctions. 3/

The primary purpose of the reporting requirements of the Bank Secrecy Act is to identify the sources, volumes and movements of United States currency being transported into or out of the country or being deposited in financial institutions in order to aid law enforcement officials in the detection and investigation of criminal, tax and regulatory violations. 4/

This chapter reviews the legislative history of the foreign and domestic currency transaction reporting sections of the Bank Secrecy Act. The chapter is divided into four parts. Part I explains the special problems which led to the enactment of Title II of the Bank Secrecy Act. Part II reviews the Congressional introduction of and 1970 debates over Title II of the Bank Secrecy Act. Part III discusses the 1982 recodification of the foreign and domestic financial transaction reporting sections of the Bank Secrecy Act, and Part IV outlines the proposed

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3/ See 31 U.S.C. §§5317(b), 5321 and 5322.

4/ See House Report, supra note 1, at 11-13; Senate Committee on Banking and Currency, S. Rep. No. 1139, 91st Cong., 2d Sess. 1-4 (1970), (hereinafter cited as Senate Report).

amendments to the foreign and domestic financial transaction reporting requirements.

I. The Need for Legislation Requiring Financial Transaction Reports

The financial transaction reporting requirements of Title II of the Bank Secrecy Act were intended to solve the law enforcement problems created by the bank secrecy laws in effect in many foreign countries. Certain foreign governments, most notably the Swiss, impose a statutory duty of secrecy on their banks. 5/ In general, banks located in these so-called "secrecy jurisdictions" cannot disclose any information found in their customers' bank accounts. Because unauthorized disclosures of information in their customers' accounts may subject these banks to criminal liability abroad, foreign banks usually have not assisted United States law enforcement agencies in their investigations of criminals and tax and regulatory violators who use secret foreign accounts to facilitate illegal activity or hide ill-gotten profits.

5/ Switzerland, the Bahamas, the Cayman Islands, Liechtenstein and Indonesia are among those countries which impose criminal penalties for violations of the bank secrecy laws. Professional secrecy in general is applied to banks and bankers in Canada, New Zealand, Panama, France, Belgium and other nations. In these latter countries, certain breaches of the professional secrecy requirements can constitute a criminal offense. Panama, for instance, specifically prohibits the production of business records to foreign authorities. See "Foreign Bank Secrecy and
(FOOTNOTE CONTINUED)

During the late 1960s, the United States government became increasingly concerned about the use of secret bank accounts by Americans engaged in illegal activity. Reports [6/] revealed that these bank accounts were frequently used to:

(1) evade capital gains tax on securities transactions;

(2) manipulate United States securities markets;

(3) violate rules on insider trading;

(4) trade in gold;

(5) act as a depository for money obtained from illegal activity; [7/] and

(6) bring money from illegal sources back into the United States as "clean" money loans.

The foreign bank secrecy laws soon were recognized as a major impediment to the prevention and detection of these illegal activities. This fact became more evident as attempts by the United States government to prosecute tax and security regulation violators who utilized foreign bank accounts were increasingly

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(FOOTNOTE CONTINUED)
Bank Records": Hearings on H.R. 15073 Before the House Committee on Banking and Currency, 91st Cong., 1st and 2d Sess. 367 (1970).

6/ See, e.g., Senate Report, supra note 4, at 3-4.

7/ Criminal enterprises operating in the United States had developed an intricate courier system for transferring their ill-gotten profits to secret foreign bank accounts. These enterprises paid couriers to transport cash to foreign banks to avoid having to transfer money through a financial institution by check or similar means. By using the courier system, criminal enterprises were able to move their profits without leaving a "paper trail," which would have subjected their profits to tracing. See Senate Report, supra note 4, at 6.

hampered. The prosecution of drug traffickers and other criminals who used foreign accounts to hide or launder their ill-gotten gains also were frustrated by foreign secrecy laws.

The United States Government initially tried to solve the problems created by the foreign bank secrecy requirements through diplomatic channels. In 1969, for example, the United States began preliminary negotiations with Switzerland for a treaty which would give United States law enforcement agencies access to the records of Swiss financial insititutions. Agreement, however, appeared unlikely. 8/

8/ At these initial meetings, the Swiss adamantly maintained that there could not be any disclosure of bank records where the acts being investigated by the United States did not constitute crimes under Swiss law, e.g., violations of United States tax and securities laws. See Note, Secret Swiss Bank Accounts: Uses, Abuses, and Attempts at Control, 39 Fordham L. Rev. 500, 508 (1971). It thus appeared that it would be at least some time before an agreement could be reached. Indeed, it was not until 1976 that the United States and Switzerland signed the Treaty on Mutual Assistance in Criminal Matters. Under this mutual assistance treaty, in certain situations, United States law enforcement officials may have access to information contained in Swiss bank accounts.

The Treaty on Mutual Assistance in Criminal Matters has been of great assistance to federal law enforcement agencies. During the past seven years, the United States has used the treaty to make more than 200 requests for bank records. The bank records which actually have been obtained have proven to be instrumental in many important prosecutions. See Statement of D. Lowell Jensen, Assistant Attorney General, Criminal Division, United States Department of Justice, Before the Permanent Subcommittee on Investigations of the Senate Committee on Governmental Affairs, at 7 (March 15, 1983) (hereinafter cited as Jensen Statement).

In view of the dim prospects on the international front, [9/] Congress began to study the problem and to explore possible domestic solutions. What emerged was Title II of the Bank Secrecy Act.

II. The Enactment of Title II of the Bank Secrecy Act

On December 3, 1969, Congressman Wright Patman introduced bank secrecy legislation [10/] in the House of Representatives. [11/] On April 6, 1970, Senator William Proxmire introduced a bill [12/] in the Senate. [13/] The portions of the House and Senate bills which required the filing of foreign and domestic financial transaction reports became Title II of the Bank Secrecy Act. The

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9/ The prospects for entering into mutual assistance treaties with foreign countries have improved in recent years. In 1976, the United States and Switzerland signed a treaty. See supra note 8 and accompanying text. A Mutual Assistance Treaty in Criminal Matters is now in force between the United States and Turkey. A treaty with Colombia has been approved by the Senate and is now awaiting ratification by our treaty partner. A treaty with Italy was recently signed by Attorney General William French Smith. Negotiations with West Germany are nearing conclusion, and negotiations with Jamaica are currently in progress. See Jensen Statement, supra note 8, at 7. An extradition and mutual assistance treaty with the Netherlands has been in force since September of 1983. This treaty, with retroactive application, also applies to the Netherlands Antilles (except for tax offenses). See T.I.A.S. __ (1983).

10/ H.R. 15073, 91st Cong., 1st Sess. (1969).

11/ See 115 Cong. Rec. 36,899 (1969).

12/ S. 3678, 91st Cong., 2d Sess. (1970)

13/ See 116 Cong. Rec. 10,401 (1970).

approach taken by Congress in drafting Title II was to require those subject to the jurisdiction of the United States to file detailed financial reports so that law enforcement officials would no longer have to seek the information from foreign banks in secrecy jurisdictions. Hearings on these bills were held in 1969 and 1970. 14/ The final version of the Act was approved by the House in May of 1970 and by the Senate in September of 1970. The President signed the bill into law on October 26, 1970. 15/

A. The Foreign Financial Transaction Reporting Requirements

As proposed and enacted, Title II of the Bank Secrecy Act required two types of foreign financial transaction reports:

(1) Reports on Exporting and Importing Monetary Instruments. Chapter 3 of Title II required any person or agent or bailee of such person who transported monetary instru-

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14/ Hearings on the House bill were held before the Committee on Banking and Currency on December 4, 6, and 9 of 1969, and February 10, March 2 and 9 of 1970. The bill was ordered reported on March 17, 1970, and it passed the House of Representatives on May 25, 1970.

Hearings on the Senate bill were held before the Subcommittee on Financial Institutions on June 8, 9, 10, and 11 of 1970. The Subcommittee recommended the bill to the Committee on Banking and Currency on July 29, 1970, and the Committee ordered the bill reported on August 4, 1970. The Senate passed the House bill in lieu of its own bill on September 18, 1970.

15/ Bank Records and Foreign Transaction Act, Pub. L. No. 91-508, 84 Stat. 1114-1136 (1970).

ments in excess of $5,000 into or out of the United States or who received such instruments in the United States from abroad to report the transaction. 16/

(2) Reports on Foreign Financial Agency Transactions. Chapter 4 of Title II required United States citizens and residents as well as any person doing business in the United States to report any transactions or relations that they had with foreign financial institutions. 17/

Congress intended that these foreign transaction reporting requirements would serve three purposes. First, and foremost, they were intended to facilitate the detection and investigation of criminal, tax and regulatory violations. 18/ Congress believed that by requiring the disclosure of certain information, law enforcement officials would be able to successfully trace transactions between United States residents and foreign banks in secrecy jurisdictions, thus eliminating the need for information from secret foreign bank accounts.

16/ See 31 U.S.C. §1101, repealed and recodified as 31 U.S.C. §5316.

17/ See 31 U.S.C. §§1121 and 1122, repealed and recodified as 31 U.S.C. §5314.

18/ See House Report, supra note 1, at 11-13; Senate Report, supra note 4, at 1-4.

The second purpose was to provide the Justice Department with an alternative means of convicting criminals and tax and regulatory violators. Although Congress recognized that "a criminal who is already breaking the law could just as easily ignore the reporting requirement," 19/ the Senate Committee was quick to point out that, "[t]he mere failure to file a report would constitute a criminal violation much easier to establish compared to proving the funds transported were illegally acquired or were to be used for an illegal purpose." 20/ As Senator Proxmire noted, Title II's reporting requirements and criminal penalty provision would be "another valuable weapon in the arsenal of law enforcement agencies." 21/

The third purpose of Title II of the Bank Secrecy Act's foreign transaction reporting requirements was to deter criminal activity and tax and regulatory violations. To achieve this goal, Congress provided criminal 22/ and civil penalties 23/ as well as a provision for the forfeiture of unreported currency. 24/

19/ Senate Report, supra note 4, at 7.

20/ Id.

21/ See 116 Cong. Rec. 10,402 (1970).

22/ See 31 U.S.C. §§1054(b), 1058, 1059, repealed and recodified as 31 U.S.C. §5322.

23/ See 31 U.S.C. §§1054(b), 1056(a) and (b), 1103, 1104, 1143(a) and (b), repealed and recodified as 31 U.S.C. §5321.

24/ See 31 U.S.C. §1102, repealed and recodified as 31 U.S.C. §5317(b).

Congress predicted that the duty to file foreign financial transaction reports, on pain of such sanctions, would "deter the illegal activity of those who are less venturesome in their determination to break the law." 25/

Virtually no one opposed the goals which the foreign transaction reporting requirements were intended to serve, but there was one major objection to the reporting requirements themselves. Some Congressmen argued that the foreign transaction reporting requirements, particularly those regarding the export and import of monetary instruments, would impede or limit the mobility of international capital. To put such fears to rest, the House and Senate Committees which reviewed the legislation stressed that the purpose of the reports was not to limit or restrict the free flow of currency in international commerce. 26/ The Senate Committee on Banking and Currency explained that, "[n]o one would be prevented from taking currency out of or into the country in whatever amounts he desired as long as the reporting requirements were observed.... [T]his legislation should in no way be interpreted as the beginning of exchange controls." 27/ With the reassurance that the reporting requirements were not intended to restrict the mobility of

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25/ Senate Report, supra note 4, at 8.

26/ See House Report, supra note 1, at 3, 10; Senate Report, supra note 4, at 7.

27/ Senate Report, supra note 4, at 7-8.

international capital, the foreign transaction reporting provisions were passed.

B. The Domestic Transaction Reporting Requirements

Prior to the enactment of Title II of the Bank Secrecy Act, only information concerning unusual domestic currency transactions was required to be reported to the Secretary of the Treasury. 28/ In addition, financial institutions rather than individual customers provided the data, and, because no criminal or civil penalties applied, compliance was voluntary. As proposed and enacted, Chapter 2 of Title II of the Act authorized the Secretary of the Treasury to require domestic financial institutions and/or private parties involved in currency transactions for the payment, receipt or transfer of United States currency to report these transactions. 29/ Failure to file the required reports was a criminal offense. 30/

The domestic reporting requirements of Title II of the Bank Secrecy Act met with far more objection than did the foreign reporting requirements. Three major objections were made.

28/ See 31 C.F.R. §102 (1972), implementing 31 U.S.C. §427 (1970), repealed, 37 Fed. Reg. 6912 (1972).

29/ See 31 U.S.C. §§1081, 1082, 1083(a) and (b), repealed and recodified as 31 U.S.C. §5313.

30/ See 31 U.S.C. §§1054(b), 1058, 1059, repealed and recodified as 31 U.S.C. §5322.

First, many Congressmen argued that the reports regarding domestic transactions were not relevant to the purpose of the legislation, which was to address the problems caused by the foreign bank secrecy laws. 31/ Indeed, the domestic reporting requirements were designed to facilitate the investigation of criminal, tax and regulatory violations even in situations where no foreign accounts were involved. 32/ Several Congressmen, therefore, suggested that the portions of Title II concerning the domestic reporting requirements be severed from the Bank Secrecy

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31/ See, e.g., 116 Cong. Rec. 16,957 (1970) (remarks of Representative Widnall).

32/ As the House Committee reported: "Criminals deal in money - cash or its equivalent. The deposit and withdrawal of large amounts of currency or its equivalent (monetary instruments) under unusual circumstances may betray a criminal activity." House Report, supra note 1, at 11. Thus, Congress viewed the domestic reporting provisions of Title II of the Bank Secrecy Act as facilitating criminal investigations in general.

Today, the Treasury Department views the domestic reporting requirements as interrelated with the foreign reporting requirements. For example, if banks were not required to report large domestic currency transactions, there would be little need for criminals to smuggle money into or out of the country. Currency simply could be taken into a bank, and the funds transferred abroad to a secret account without disclosing the identities of the persons arranging the transfer or receiving the funds. Conversely, without reports on the export or import of currency, the requirement that banks report certain domestic currency transactions would be ineffective. Criminals could easily travel to a nearby foreign country and convert their currency into a more compact and more profitable form of wealth. Thus, in practice, the domestic reporting requirements are viewed as a useful tool in the investigation of criminals and tax violators who use foreign bank accounts to facilitate their illegal activities. See Staff Study of the Permanent Subcommittee on Investigations of the Senate Committee on Governmental Affairs, Crime and Secrecy: The Use of Offshore Banks and Companies, 98th Cong., 1st Sess. 114-15 (Feb. 1983) (hereinafter cited as Staff Study).

Act so that they could be considered further. 33/ However, proponents of Title II were able to overcome the demand for severance by stressing the urgent need for the legislation and the need for uniform recordkeeping. 34/

The second objection to the domestic transaction reporting requirements was that they would invade the privacy of bank customers. 35/ To allay this fear, supporters of Title II of the Act repeatedly pointed out that information from the required records could not be obtained without legal process. 36/ This assumption was erroneous, however, because it failed to recognize the distinction between records and reports: a recordkeeping requirement demands maintenance of a depository of information, while a reporting requirement demands a dissemination of information from the records. In United States v. Morton Salt Co., 37/ the United States Supreme Court had indicated that legal process was not necessary to obtain "reasonable" reports from business

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33/ See, e.g., 116 Cong. Rec. 16,957 (1970) (remarks of Representative Widnall).

34/ See, e.g., id. at 16,953 (remarks of Representative Patman).

35/ See id. at 16,962-16,963 (remarks of Representative Hanna).

36/ See id. at 16,954, 16,959, and 16,963 (remarks of Representatives Patman, Gonzalez and Annunzio).

Individuals and businesses may demand legal process from the government upon a governmental request to inspect records. See Cudahy Packing Co. v. Holland 315 U.S. 357, 363-64 (1942); United States v. Shapiro, 159 F.2d 890, 893 (2d Cir. 1947), affirmed, 335 U.S. 1 (1948).

37/ 338 U.S. 632 (1950).

entities. 38/ Presumably because of this erroneous Congressional assumption, no provisions for legal process were written into the domestic reporting provisions. Nevertheless, with assurance that legal process would be required, Title II of the Act was passed over the privacy objection.

The third major objection was that the domestic reporting requirements would unduly burden legitimate commercial transactions. Supporters of Title II of the Act overcame this objection by stressing that the bill granted the Secretary of the Treasury and the Securities and Exchange Commission broad exemptive power to remove normal business transactions from the reporting requirements when "the law enforcement benefits are not sufficient to outweigh the cost of implementation." 39/

The final major objection to the domestic reporting provisions of the Act was that too much power had been delegated to the Secretary of the Treasury. Under the Act, the Secretary was provided virtually unlimited power to require reports pertaining to domestic transactions. 40/ This objection was

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38/ See id. at 647-654.

39/ Senate Report, supra note 4, at 4. See 31 U.S.C. §1055, repealed and recodified as 31 U.S.C. §5318.

40/ As enacted in 1970, the domestic reporting provision of Title II of the Bank Secrecy Act provided that:

> Transactions involving any domestic financial institution shall be reported to the Secretary at such time, in such manner, and in such detail as the Secretary may require if they involve the payment, receipt, or transfer of United States currency, or such

(FOOTNOTE CONTINUED

overcome by the response that the discretionary power of the Secretary was limited by the wording of Title II's purpose clause [41/] and by stressing that the Secretary's discretionary power provided the administrative flexibility necessary to avoid the creation of any undue burdens on legitimate commercial transactions. [42/]

In 1970, supporters of Title II's domestic and foreign transaction reporting requirements were able to overcome these four objections, and the Bank Secrecy Act was signed into law. Although no questions as to the constitutionality of the Act were raised during the Congressional debates, shortly after its passage the foreign and domestic reporting requirements were challenged in court as violative of the First, Fourth and Fifth

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(FOOTNOTE CONTINUED)

> other monetary instruments as the Secretary may specify, in such amounts, denominations, or both, or under such circumstances, as the Secretary shall by regulation prescribe.

31 U.S.C. §1081. The provision is presently codified, with changes, at 31 U.S.C. §5313.

41/ See, e.g., 116 Cong. Rec. 35,938-35,939 (1970) (remarks of Senator Proxmire). Former 31 U.S.C. 1051 stated:

> It is the purpose of this chapter to require certain reports or records where such reports or records have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings.

This provision presently appears at 31 U.S.C. §5311.

42/ See, e.g., 116 Cong. Rec. 16,957 and 16,964 (1970) (remarks of Representatives Widnall and Hanley). See also supra note 39 and accompanying text.

Amendments to the United States Constitution. 43/ In 1974, the United States Supreme Court held that the reporting requirements did not violate the Fourth Amendment. 44/ The Court has not ruled on the constitutionality of the Act under the First or Fifth Amendments. 45/

III. 1982 Recodification of the Foreign and Domestic Financial Transaction Reporting Requirements

In 1982, Title 31 of the United States Code, including the foreign and domestic financial transaction reporting requirements of the Bank Secrecy Act, was completely recodified by the Money and Finance Act. 46/ The public law restated certain money and finance laws without substantive change and reenacted as Title 31 of the United States Code those laws which previously had been scattered throughout the Code. The codification was part of an

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43/ See Stark v. Connally, 347 F. Supp. 1242 (N.D. Cal. 1972), affirmed in part and reversed in part sub nom., California Bankers Association v. Shultz, 416 U.S. 21 (1974).

44/ California Bankers Association v. Shultz, 416 U.S. 21 (1974).

45/ But see United States v. Dichne, 612 F.2d 632 (2d Cir. 1979), cert. denied, 445 U.S. 928 (1980) (Title II of the Bank Secrecy Act does not violate the Fifth Amendment); United States v. Fitzgibbon, 576 F.2d 279 (10th Cir.), cert. denied, 439 U.S. 910 (1978) (Title II of the Bank Secrecy Act does not violate the First or Fourth Amendments).

46/ Pub. L. No. 97-258, 96 Stat. 995 (Sept. 13, 1982).

ongoing program to prepare for enactment into positive law all titles of the United States Code. 47/

Public Law No. 97-258 was designed to serve two purposes. First, it was designed to place the laws pertaining to money and finance in one comprehensive title. 48/ Second, it was designed to revise the language of the affected laws 49/ by substituting simple terms for awkward and obsolete ones and by creating uniformity in the language of the newly codified Title 31. 50/ Congress expressly stated that it did not intend to make any changes in the substantive provisions of the money and finance laws affected. 51/

47/ This program, conducted by the Office of the Law Revision Counsel of the House of Representatives, is required by Section 285b of Title 2 of the United States Code.

48/ See House Committee on the Judiciary, H.R. Rep. No. 651, 97th Cong., 2d Sess. 1 (1982).

49/ See id. at 1, 2.

50/ For example, the laws were rewritten so that they would all appear in the present tense and in the active voice. See id. at 2, 3.

51/ Pub. L. No. 97-258, supra note 46. As the House Committee which reported on the bill asserted:

> [T]his bill makes no substantive change in the law. It is sometimes feared that mere changes in terminology and style will result in changes in substance or impair the precedent value of earlier judicial decisions and other interpretations. This fear might have some weight if this were the usual kind of amendatory legislation where it can be inferred that a change of language is intended to change substance. In codification law, however, the courts uphold the contrary presumption: the law is intended to remain substantively unchanged.

(FOOTNOTE CONTINUED)

Title II of the Bank Secrecy Act was one of the various money and finance laws which Public Law 97-258 restated and recodified in Title 31 of the Code. Although Title II of the Bank Secrecy Act had already been located in Title 31 of the Code, 52/ Public Law No. 97-258 did make three types of changes to the foreign and domestic financial transaction reporting sections. First, the provisions were renumbered so that the domestic and foreign financial transaction reporting requirements currently appear at Sections 5311-5322 of Title 31 of the Code, rather than at Sections 1051-1122, as they did prior to 1982. Second, certain provisions of the domestic and foreign financial transaction reporting requirements were reorganized. 53/ And third, some language changes were made. But, as previously indicated, the reorganization and language changes were made for purposes of comprehensiveness, simplicity, style and consistency; no substantive changes in the law were intended by Congress.

(FOOTNOTE CONTINUED)

House Committee on the Judiciary, H.R. Rep. No. 651, 97th Cong., 2d Sess. 1, 3 (1982). See also 13 Cong. Rec. 5452, 5454 (Aug. 9, 1982).

52/ Prior to 1982, Title II of the Bank Secrecy Act was located at 31 U.S.C. §§1051-1122.

53/ For example, prior to 1982, Title II of the Bank Secrecy Act's provisions regarding domestic financial transaction reports were located in three separate sections of Title 31 of the Code. See 31 U.S.C. §§1081, 1082, 1083. Public Law No. 97-258 consolidated these three sections into 31 U.S.C. §5313.

IV. Proposed Amendments to the Foreign and Domestic Financial Transaction Reporting Requirements

Several law enforcement agencies have proposed that certain substantive amendments be made to the foreign and domestic financial transaction reporting sections of the Bank Secrecy Act. These amendments are designed to improve the overall enforcement and effectiveness of the Act's reporting provisions. By and large, the proposed amendments stem from the recognition that the Bank Secrecy Act has failed to achieve the objective which Congress envisioned it would: The reporting requirements of the Act have failed to hamper the use of secret foreign bank accounts to facilitate tax and regulatory violations, or to measurably slow, much less halt, the movement of illegally derived currency from the United States. For example, it is suspected that billions of unreported dollars go off-shore each year and are hidden from the IRS. 54/ Moreover, Congressional hearings have revealed that despite the export/import reporting requirements, many criminals either have traveled to foreign countries with hidden cash or have laundered their currency with minimal risk and total impunity. 55/

54/ See Staff Study, supra note 32, at 121.

55/ See id. at 115-117. See also Statement of the Honorable John M. Walker, Jr., Assistant Secretary, United States Department of the Treasury, Before the Permanent Subcommittee on Investigations of the Senate Committee on Governmental Affairs, at 10-11 (March 15, 1983) (hereinafter cited as Walker Statement).

This Part will first explore why the reporting requirements of the Bank Secrecy Act have failed to achieve these goals. It will then review the proposals which have been made to remedy these deficiencies.

A. The Reasons for the Failure of the Foreign and Domestic Financial Transaction Reporting Requirements

There are various reasons why the reporting requirements of the Bank Secrecy Act have failed to stop illicit activity. For a long time, the primary reason was that the reporting provisions of the Act were simply not enforced. During most of the 1970s, the reporting requirements were not fully implemented, and they were rarely invoked. 56/ Therefore, violations were seldom detected and much less often prosecuted.

56/ Staff Study, supra note 32, at 118. There were various reasons for the delay in implementation and enforcement. First, there was an initial delay of almost five years caused by the extensive litigation in California attacking the constitutionality of Titles I and II of the Bank Secrecy Act. Eventually, the United States Supreme Court held that the Bank Secrecy Act was constitutional. See California Bankers Association v. Shultz, 416 U.S. 21 (1974). See also supra notes 43-44 and accompanying text.

Another reason for the delay was that it took the Treasury Department several years to decide how to implement the reporting requirements of Title II of the Act, particularly those pertaining to domestic currency transactions. Once guidelines and procedures were finally agreed upon, it took several more years for them to be perfected and even longer for them to become even partially productive. See generally Staff Study, supra note 32, at 118-119.

Since the late 1970s, the government has begun to more actively enforce the reporting provisions of Title 31 of the Code. 57/ Notwithstanding these efforts, large amounts of unreported currency are exported and imported annually. Three reasons have been offered for the present ineffectiveness of the reporting requirements: (1) deficiencies in the regulations which have been promulgated to implement the Bank Secrecy Act; (2) the lack of coordination and cooperation among the various law enforcement agencies responsible for the administration of

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57/ Initially, the government's enforcement efforts focused on Title II's domestic reporting provisions, which required banks to report certain domestic financial transactions. See 31 U.S.C. §5313. See also supra notes 28-42 and accompanying text. Government investigators and prosecutors moved against Florida banks which routinely had accepted large amounts of cash without filing the required reports. The Treasury Department tightened its regulations which permitted banks to exempt some of their customers from the reporting requirements.

Later, the government took steps to enforce the foreign financial transaction reporting requirements. Throughout Florida, federal law enforcement authorities identified and prosecuted private money launderers, who exported and imported large amounts of unreported currency. This resulted in the indictment of several drug dealers, couriers and money launderers. See Staff Study, supra note 32, at 120.

For further information about the efforts of law enforcement agencies to enforce the reporting requirements of the Bank Secrecy Act, see Statement of Robert E. Powis, Deputy Assistant Secretary for Enforcement, Department of the Treasury, Before the Subcommittee on General Oversight and Renegotiation of the House Committee on Banking and Urban Affairs (July 13, 1982) (hereinafter cited as Powis Statement); Opening Statement of Roscoe L. Egger, Jr., Commissioner of Internal Revenue, Before the Permanent Subcommittee on Investigations of the Senate Governmental Affairs Committee (March 15, 1983); Statement of Karen J. Wilson, Chief National Bank Examiner, Office of the Comptroller of the Currency, Before the Subcommittee on General Oversight and Renegotiation of the House Committee on Banking, Finance and Urban Affairs (July 13, 1982).

the Bank Secrecy Act; and (3) certain deficiencies in the reporting requirements themselves. 58/

Efforts have been made to correct all of these problems. 59/ In particular, law enforcement agencies have proposed that certain substantive amendments be made to the Bank Secrecy Act.

B. The Proposed Amendments

Law enforcement agencies have proposed that the following amendments be made to the Bank Secrecy Act.

1. "Attempt" Provision

The Treasury Department and the Department of Justice have proposed that a provision be added making it a violation of the Bank Secrecy Act to attempt to export or import monetary instruments in excess of $5,000 without reporting the trans-

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58/ See Walker Statement, supra note 55, at 7, 11; Jensen Statement, supra note 8, at 11-15.

59/ For example, the Treasury Department is taking action to strengthen its regulations to make full use of the Department's authority to require reports of foreign financial transactions. See Walker Statement, supra note 55, at 11-12. Steps have also been taken to foster cooperation among the various federal agencies. For example, it has been suggested that the restrictions which currently prevent federal law enforcement agencies from sharing certain types of information be removed. See Jensen Statement, supra note 8, at 13. Moreover, Operation Greenback I in Miami and Operation Greenback II in Chicago have used a coordinated federal agency approach in their efforts to implement and enforce the Bank Secrecy Act. See Chapter 5 infra (discussing joint task force investigations).

action. 60/ Such a provision would fill the existing gap in the law created by some court decisions which have held that the Bank Secrecy Act is not violated until the person who fails to file an export report is airborne en route out of the United States. 61/ Under these decisions, no violation of the Act occurs when a money courier, who is departing the country with one million dollars in unreported currency, is stopped as he is preparing to board a plane. By adding an attempt offense, this problem would be remedied, and law enforcement officials could more effectively control the exportation of currency and monetary instruments.

2. Authorization for Warrantless Searches

It has been recommended that the Bank Secrecy Act also be

60/ See Powis Statement, supra note 57, at 13; Walker Statement, supra note 55, at 11; Jensen Statement, supra note 8, at 14; Statement of John C. Keeney, Deputy Assistant Attorney General, Criminal Division, United States Department of Justice, Before the Subcommittee on General Oversight and Renegotiation of the House Committee on Banking, Finance and Urban Affairs, at 14-15 (July 13, 1982) (hereinafter cited as Keeney Statement).

61/ See United States v. Gomez-Londono, 422 F. Supp. 519 (E.D.N.Y. 1976), reversed, 553 F.2d 805 (2d Cir. 1977). The distict court had indicated that the export/import reporting requirements of Title II of the Bank Secrecy Act could not be violated until a defendant actually boarded the plane. 422 F. Supp. at 524. In reversing this decision, the court of appeals did not comment on the district court's interpretation of Title II of the Act. See 553 F.2d at 808 n.4. But see United States v. Rojas, 671 F.2d 159 (5th Cir. 1982) (Defendant is not required to have boarded his plane for there to be a Bank Secrecy Act violation. Because reports are required to be filed at the time of departure, he need only reach the departure gate without filing the required reports).

amended to explicitly authorize warrantless searches where there is reasonable cause to believe or suspect that monetary instruments are unlawfully being brought into or taken out of the United States. 62/ At present, the Bank Secrecy Act provides that the Secretary of the Treasury may apply for a warrant to search for monetary instruments which are suspected of being transported in violation of the reporting requirements. 63/ Because the Act does not expressly require that warrants be obtained, 64/ Customs officers have been left in a quandary. Despite the favorable Fourth Amendment case law supporting the broad application of Customs' authority to search travelers at the nation's borders, 65/ most agents are reluctant to conduct warrantless searches in cases involving unreported currency. 66/

62/ See Powis Statement, supra note 57, at 14; Walker Statement, supra note 55, at 11; Keeney Statement, supra note 60, at 15-16.

63/ 31 U.S.C. §5317(a).

64/ Nor did Congress intend that it do so. As the Senate Committee stated, "nothing in the bill would limit the authority of the Secretary to conduct searches under existing law." Senate Report, supra note 4, at 7.

65/ See, e.g., United States v. Duncan, 693 F.2d 971 (9th Cir. 1982) (where defendant was stopped while he was proceeding up a ramp to board a plane bound for a foreign country, the point at which he was stopped by customs agents was the "functional equivalent of a border" and, therefore, there was no need for probable cause, a warrant or even suspicion before conducting a search of the defendant); United States v. Ajlouny, 476 F. Supp. 995 (E.D.N.Y. 1979), affirmed, 629 F.2d 830 (2d Cir. 1980), cert. denied, 449 U.S. 1111 (1981) (warrantless export searches based on less than probable cause are proper).

66/ See Staff Study, supra note 32, at 121.

The result has been that Customs officers make little or no effort to routinely search departing passengers for unreported cash. 67/ Instead, these officers have concentrated their efforts on pursuing tips they have received about certain outbound passengers or on investigating individuals who meet certain characteristics.

3. Increased Penalties

The Justice Department has proposed raising the penalties

67/ See Staff Study, supra note 32, at 120. The following incident has been described as illustrative of the Customs Service's dilemma:

> Customs agents received unverifiable information that an alleged Peruvian cocaine smuggler would be leaving Los Angeles International Airport for Lima, Peru, later that day on a Braniff flight. After deciding to interview the man, they followed him to the boarding platform area and noticed that he appeared nervous, perspired heavily, and met with an unidentified Latin man who gave him a black plastic bag.
>
> As the Peruvian was about to board the plane, the Customs agents stopped him and advised him of the currency reporting requirement. He replied that he was aware of the requirement but was not carrying more than $5,000. The agents asked if they could search his luggage. He refused. Thus because [the] probable cause [necessary for a warrant] could not be established, he was allowed to board the plane.
>
> However, at the request of DEA authorities, Peruvian customs officials arrested the traveler on his arrival in Lima and found $95,000 in cash in his luggage.

Id. at 121.

imposed for evading the reporting requirements of the Bank Secrecy Act. 68/ Under this proposal, the maximum civil penalty would be raised from $1,000 to $10,000, and the maximum criminal penalty from $1,000 and/or up to one year's imprisonment to $50,000 and/or up to five years' imprisonment. 69/

4. Increased Reporting Amount

Another proposal would raise the minimum amount of exported or imported currency required to be reported from an amount in excess of $5,000 70/ to an amount exceeding $10,000. 71/ This upward modification of the minimum reporting figure is intended to reduce the number of forms which Customs agents would have to review, thereby making it easier for them to spot suspicious transactions. 72/ This proposed change also is a product of the realization that the value of currency has declined since 1970 when the Bank Secrecy Act was first passed. 73/

68/ See Keeney Statement, supra note 60, at 14; Jensen Statement, supra note 8, at 14.

69/ See Keeney Statement, supra note 60, at 14.

70/ See 31 U.S.C. §5316(a).

71/ See Keeney Statement, supra note 60, at 15.

72/ See id.

73/ See id.

5. Reward Authority

Federal law enforcement agencies have recommended that a section be added to the Bank Secrecy Act which would authorize the payment of rewards to individuals who provide information leading to the recovery of over $50,000 in fines, civil penalties or forfeitures under the respective provisions 74/ of the Act. 75/ These federal agencies believe that a reward system would aid in the enforcement of the Bank Secrecy Act, because it is "only through reports from persons aware of the transactions...[that law enforcement agencies can]...intercept a sufficient number of shipments to achieve a significant deterrent effect." 76/ The reward system which has been proposed would provide monetary payments of up to twenty-five percent of the fines and forfeitures recovered, 77/ thus providing a powerful incentive for persons to come forward and report illicit financial transactions.

74/ See 31 U.S.C. §§5321 (civil penalties), 5322 (criminal penalties), 5317(b)(forfeiture).

75/ See Powis Statement, supra note 57, at 14; Walker Statement, supra note 55, at 11; Keeney Statement, supra note 60, at 16.

76/ Keeney Statement, supra note 60, at 16.

77/ There would be a ceiling, however, of $250,000. See id.

All of these proposed amendments are currently being considered by Congress. 78/ The Senate proposals, included in S. 902 are currently under review by the Senate Judiciary Committee. The House proposals, included in H.R. 3052, 3053, 3054, 3055 and 3056, are presently being considered by the House Committee on Banking, Finance and Urban Affairs.

78/ Congress is also considering two other proposals which pertain to the Bank Secrecy Act, although they would not amend the Act itself. One is to add currency violations to the definition of "racketeering activity" listed in Section 1961(1) of Title 18 of the United States Code, thereby making Bank Secrecy Act violations predicate offenses for RICO prosecutions. The other proposal is to amend the federal wiretapping statute to include violations of the Bank Secrecy Act in the list of offenses for which electronic surveillance may be used. See 18 U.S.C. §2516.

CHAPTER 2

THE BANK SECRECY ACT: STATUTES AND REGULATIONS

Introduction

The Bank Secrecy Act [79/] requires individuals as well as banks and other financial institutions to report certain of their foreign and domestic financial transactions to the federal government. The Act also requires that private individuals and financial institutions keep records of their transactions and relations with foreign financial institutions. [80/]

79/ The Bank Secrecy Act (hereinafter the Act) was originally enacted as Titles I and II of the Bank Records and Foreign Transaction Act, Pub. L. No. 91-508, §§101-129, 201-242,84 Stat. 1114-1136 (1970). Title I, which pertains to financial record-keeping, is codified at 12 U.S.C. §§1829b and 1951-1959. Title II, which deals with foreign and domestic currency transaction reporting, was subsequently repealed and reenacted as part of the Money and Finance Act, Pub. L. No. 97-258, 96 Stat. 995 (1982). The provisions of Title II are currently codified at 31 U.S.C. §§5311-5322. A discussion of the legislative history of the Bank Secrecy Act can be found in Chapter 1 of this monograph.

80/ Title I of the Bank Secrecy Act requires that banks keep records of other financial transactions as well. These provisions of the Act are located in Title 12 of the United States Code and Title 31 of the Code of Federal Regulations. See 12 U.S.C. §§1829b and 1951 et seq.; 31 C.F.R. §§103.31-103.37. The recordkeeping provisions of Title 12 of the Code are discussed in Chapter 4 of this monograph. For additional information concerning these provisions, see United States Department of Justice, Narcotic and Dangerous Drug Section, Narcotics Prosecution and the Bank Secrecy Act (originally prepared by Douglas Clark Hollmann; updated April 1981 by Stuart P. Seidel and James M. Laughton); Bloch, Of Records and Reports:
(FOOTNOTE CONTINUED)

The reporting and recordkeeping requirements of the Act are found in Title 31 of the United States Code 81/ (hereinafter the Code) and Title 31 of the Code of Federal Regulations 82/ (hereinafter the Regulations). As codified in Title 31 of the Code, the Act consists of seven main parts: (1) provisions regarding the basic definitions applicable to the legislation; (2) reporting provisions; (3) recordkeeping provisions; 83/ (4) criminal penalty provisions; (5) civil remedy provisions; (6) exemption provisions; and (7) provisions regarding the dissemination of financial information. Each of these parts is described and discussed below.

I. Definitions

The first major part of Title 31 of the Code contains the

(FOOTNOTE CONTINUED)
Bank Secrecy Under the Fourth Amendment, 15 Ariz. L. Rev. 39 (1973); Note, The Bank Secrecy Act - Conflict between Government Access to Bank Records and the Right of Privacy, 37 Albany L. Rev. 566 (1973); Note, Bank Recordkeeping and the Customer's Expectation of Confidentiality, 26 Cath. U.L. Rev. 89 (1976); Note, Constitutional Law: Fourth Amendment Challenges to the Bank Secrecy Act, 14 Washburn L.J. 134 (Winter 1975).

81/ 31 U.S.C. §§5311-5322. But see infra note 83.

82/ 31 C.F.R. §103.11 et seq.

83/ This manual primarily is concerned with those recordkeeping provisions of the Bank Secrecy Act that appear in Title 31 of the Code. The Bank Secrecy Act does have other recordkeeping provisions. They are located in Title 12 of the Code. See 12 U.S.C. §§1829b, 1951-1959. See also supra note 80 and Chapter 4 infra.

basic definitions which are applicable to the Act. 84/ In

84/ 31 U.S.C. §5312, "Definitions and application," provides:

(a) In this subchapter -

(1) "financial agency" means a person acting for a person (except for a country, a monetary or financial authority acting as a monetary or financial authority, or an international financial institution of which the United States Government is a member) as a financial institution, bailee, depository trustee, or agent, or acting in a similar way related to money, credit, securities, gold, or a transaction in money, credit, securities, or gold.

(2) "financial institution" means -

(A) an insured bank (as defined in section 3(h) of the Federal Deposit Insurance Act (12 U.S.C. 1813(h)));

(B) a commercial bank or trust company;

(C) a private banker;

(D) an agency or branch of a foreign bank in the United States;

(E) an insured institution (as defined in section 401(a) of the National Housing Act (12 U.S.C. 1724(a)));

(F) a thrift institution;

(G) a broker or dealer registered with the Securities and Exchange Commission under the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.);

(H) a broker or dealer in securities or commodities;

(I) an investment banker or investment

(FOOTNOTE CONTINUED)

prosecuting violations of the Bank Secrecy Act, these definitions

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(FOOTNOTE CONTINUED)

company;

(J) a currency exchange;

(K) an issuer, redeemer, or cashier of travelers' checks, checks, money orders, or similar instruments;

(L) an operator of a credit card system;

(M) an insurance company;

(N) a dealer in precious metals, stones, or jewels;

(O) a pawnbroker;

(P) a loan or finance company;

(Q) a travel agency;

(R) a licensed sender of money;

(S) a telegraph company;

(T) an agency of the United States Government or of a State or local government carrying out a duty or power of a business described in this clause (2); or

(U) another business or agency carrying out a similar, related, or substitute duty or power the Secretary of the Treasury prescribes.

(3) "monetary instruments" means -

(A) United States coins and currency; and

(B) as the Secretary may prescribe by regulation, coins and currency of a foreign country, travelers' checks, bearer negotiable instruments, bearer investment securities, bearer

(FOOTNOTE CONTINUED)

are extremely important. Exactly what constitutes a "financial agency" or a "financial institution" is critical in determining whether the Act will apply. The term "financial institution," 85/ for instance, is defined broadly so as to include any individual who takes in money over $10,000 in a financial transaction from any source, illegal or otherwise. Under the Act, that individual as a "financial institution" must file currency transaction

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(FOOTNOTE CONTINUED)

securities, stock on which title is passed on delivery, and similar material.

(4) "person", in addition to its meaning under section 1 of title 1, includes a trustee, a representative of an estate and, when the Secretary prescribes, a governmental entity.

(5) "United States" means the States of the United States, the District of Columbia, and, when the Secretary prescribes by regulation, the Commonwealth of Puerto Rico, a territory or possession of the United States, or a military or diplomatic establishment.

(b) In this subchapter -

(1) "domestic financial agency" and "domestic financial institution" apply to an action in the United States of a financial agency or institution.

(2) "foreign financial agency" and "foreign financial instituion" apply to an action outside the United States of a financial agency or institution.

See also 31 C.F.R. §103.11, "Meaning of terms."

85/ 31 U.S.C. §5312(a)(2).

reports. 86/ Because many individuals who handle or "launder" narcotics money may qualify as "financial institutions," they can be subject to the Act's reporting requirements and, thus, to its criminal penalties for failure to comply with the law. Important terms, such as "monetary instrument," "person," "domestic financial agency" and "foreign financial agency," are also defined.

II. Reporting Provisions

The second major portion of the Act contains the reporting provisions. Under these provisions, individuals and financial institutions are required to file reports with the federal government concerning certain of their domestic and foreign financial transactions.

A. Reports on Domestic Financial Transactions

Section 5313 of Title 31 of the Code 87/ requires domestic

86/ These definitions can be troublesome when drafting indictments. Calling a defendant a financial institution, for example, may give a codefendant bank a defense to a charge of failure to file a required report because Title 31 exempts transactions between financial institutions from certain reporting requirements. See infra notes 131-132 and accompanying text. Therefore, care should be exercised in labeling.

87/ 31 U.S.C. §5313 provides:

> Reports on domestic coins and currency transactions
>
> (a) When a domestic financial institution is

(FOOTNOTE CONTINUED)

financial institutions to report currency transactions which

(FOOTNOTE CONTINUED)

involved in a transaction for the payment, receipt, or transfer of United States coins or currency (or other monetary instruments the Secretary of the Treasury prescribes), in an amount, denomination, or under circumstances the Secretary prescribes by regulation, the institution and any other participant in the transaction the Secretary may prescribe shall file a report on the transaction at the time and in the way the Secretary prescribes. A participant acting for another person shall make the report as the agent or bailee of the person and identify the person for whom the transaction is being made.

(b) The Secretary may designate a domestic financial institution as an agent of the United States Government to receive a report under this section. However, the Secretary may designate a domestic financial institution that is not insured, chartered, examined, or registered as a domestic financial institution only if the institution consents. The Secretary may suspend or revoke a designation for a violation of this subchapter or a regulation under this subchapter (except a violation of section 5315 of this title or a regulation prescribed under section 5315), section 411 of the National Housing Act (12 U.S.C. 1730d), or section 21 of the Federal Deposit Insurance Act (12 U.S.C. 1829b).

(c) (1) A person (except a domestic financial institution designated under subsection (b) of this section) required to file a report under this section shall file the report -

(A) with the institution involved in the transaction if the institution was designated;

(B) in the way the Secretary prescribes when the institution was not designated; or

(FOOTNOTE CONTINUED)

involve the payment, receipt, or transfer of United States coins or currency (or other monetary instruments the Secretary of the Treasury prescribes) 88/ of a designated amount (now $10,000 or more). 89/ The report is made on IRS Form 4789 and is commonly called a Currency Transaction Report or CTR. 90/ Under the Regulations, a financial institution must file a CTR form with the Internal Revenue Service within fifteen days following the day a currency transaction occurs. 91/ Failure to file the CTR

(FOOTNOTE CONTINUED)

(C) with the Secretary.

(2) The Secretary shall prescribe -

(A) the filing procedure for a domestic financial institution designated under subsection (b) of this section; and

(B) the way the institution shall submit reports filed with it.

88/ Current regulations do not cover cashier's checks or wire transfers between banks. There has been active pressure within the Treasury Department and upon Congress to include these two items in the reporting requirements. The Banking Industry has been generally opposed to this proposal.

89/ Financial institutions cannot escape the reporting requirements by treating a transaction which is over $10,000 as a series of smaller transactions, each under $10,000. In United States v. Thompson, 603 F.2d 1200 (5th Cir. 1979), the Fifth Circuit held that multiple cash transactions in one day at one financial institution that aggregate over $10,000 for the principal in the transaction must be reported.

90/ See Appendix for a copy of the CTR Form.

91/ 31 C.F.R. §103.25(a) provides in pertinent part:

A report required to be filed by paragraph (a) of §103.22, shall be filed within 15 days following the day on which

(FOOTNOTE CONTINUED)

can constitute a criminal offense under the Bank Secrecy Act. 92/ Supplying false information on the CTR may constitute violations of various other federal criminal statutes. 93/

The CTR form requires a financial institution to provide detailed information about each currency transaction. This information can be particularly useful in identifying money laundering by illegal sources. For example, the CTR requires disclosure of the identities of both the person making the transaction and the real owner of the monetary instruments if the transfer is made by a depositor who is acting as a nominee. The form also requires the depositor to provide identifying information, such as a social security number or a passport number. It asks for the amount of money being deposited, certain bank account information and the type of instrument being received, i.e., cash. The denomination of any bills must be provided. 94/ In addition, the financial institution and

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(FOOTNOTE CONTINUED)
the transaction occurred....

It should be noted that the fifteen-day reporting requirement applies to any transaction occurring on or after June 5, 1980. Any offense occurring before that date would be subject to the prior reporting requirement of forty-five days.

92/ See 31 U.S.C. §5322. See also infra notes 113-122 and accompanying text (discussion of the criminal penalty provisions of the Bank Secrecy Act).

93/ A number of federal statutes can be used to prosecute financial institutions which supply false information on CTRs. See Chapter 5 infra.

94/ This is helpful to investigators because bill denominations are often indicators of certain types of crimes. For example,
(FOOTNOTE CONTINUED)

employee filing the report must be identified.

Financial institutions are required to send the CTRs to the Internal Revenue Service's Service Center in Ogden, Utah. Once received, the CTRs are placed on a computer tape. The computer tape is then supplied to the Treasury Financial Law Enforcement Center (TFLEC), which places the information into its intelligence information network system (TECS) in its Bank Secrecy Act system of records. 95/ Thereafter, the information is made available to the Treasury Department's law enforcement personnel and other agencies in accordance with the provisions of the Code and Regulations.

This computer service opens the door for all types of analytical studies of problem financial institutions, problem bank accounts and problem depositors. The system can search a geographic area, a specific bank or even a specific name to determine whether there have been any large cash deposits. The IRS also can provide a certified computer record for trial purposes, or it can certify, as in a tax case for failure to file, that the computer records were searched for the time period

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(FOOTNOTE CONTINUED)
volumes of small bills are generated in connection with narcotics transactions. In addition, money launderers usually exchange small bills for those of larger denominations.

95/ Originally each IRS Service Center would receive the CTRs from within its own region. To centralize access to all CTRs, the older CTRs have been forwarded to Ogden, Utah, and they have been placed on computer tapes. Theoretically, there should not be any gaps in the system. See also Chapter 3 infra for a discussion of TFLEC and TECS.

in question and that no CTRs were found. 96/

B. Reports on Foreign Financial Transactions

The Act requires two types of foreign financial transaction reports to be filed: (1) reports on the export and import of monetary instruments; and (2) reports on foreign financial agency transactions.

1. Reports on the Export and Import of Monetary Instruments

Section 5316 of Title 31 of the Code requires any person who transports or has someone else transport monetary instruments in excess of $5,000 into or out of the United States or who receives such instruments in the United States from abroad to report the transaction. 97/ To implement this reporting requirement, the

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96/ Defendants have attempted to attack the reliability of the IRS computer system by asserting that they filed a CTR, but that the IRS lost it. As of yet, this issue has not been addressed by the courts. See infra note 115 and accompanying text.

97/ 31 U.S.C. §5316 provides:

> Reports on exporting and importing monetary instruments
>
> (a) Except as provided in subsection (c) of this section, a person or an agent or bailee of the person shall file a report under subsection (b) of this section when the person, agent, or bailee knowingly -

(FOOTNOTE CONTINUED)

Treasury Department has developed a currency reporting form

(FOOTNOTE CONTINUED)

(1) transports or has transported monetary instruments of more than $5,000 at one time -

(A) from a place in the United States to or through a place outside the United States; or

(B) to a place in the United States from or through a place outside the United States; or

(2) receives monetary instruments of more than $5,000 at one time transported into the United States from or through a place outside the United States.

(b) A report under this section shall be filed at the time and place the Secretary of the Treasury prescribes. The report shall contain the following information to the extent the Secretary prescribes:

(1) the legal capacity in which the person filing the report is acting.

(2) the origin, destination, and route of the monetary instruments.

(3) when the monetary instruments are not legally and beneficially owned by the person transporting the instruments, or if the person transporting the instruments personally is not going to use them, the identity of the person that gave the instruments to the person transporting them, the identity of the person who is to receive them, or both.

(4) the amount and kind of monetary instruments transported.

(5) additional information.

(c) This section or a regulation under this section does not apply to a common carrier of passengers when a passenger possesses a

(FOOTNOTE CONTINUED)

called the Report of International Transportation of Currency or Monetary Instruments. This form is commonly known as Customs Form 4790 or CMIR. 98/ The CMIR form must be filed "at the time of entry into the United States or at the time of departure, mailing or shipping from the United States...." 99/ Failure to file a CMIR may constitute a criminal offense under the Bank Secrecy Act. 100/

(FOOTNOTE CONTINUED)

monetary instrument, or to a common carrier of goods if the shipper does not declare the instrument.

See also 31 C.F.R. §103.23, "Reports of transportation of currency or monetary instruments."

98/ See Appendix for a copy of Customs Form 4790.

99/ 31 C.F.R §103.25(b). The requirement that the CMIR form be filed "at the time of departure" has received much judicial attention because a violation of the export reporting requirement cannot occur prior to that time.

Most courts agree that the "time of departure" is sometime prior to the take-off of the airplane which carries the unreported currency. See, e.g., United States v. Rojas, 671 F.2d 159 (5th Cir. 1982); United States v. Cutaia, 511 F. Supp. 619 (E.D.N.Y. 1981). But courts vary as to how long prior to take-off the CMIR form must be filed. For example, one court has suggested that the time of departure is not reached until the exiting passenger has taken his place aboard the aircraft, or, at least, has received his boarding pass and is ready to board. See United States v. Gomez-Londono, 422 F. Supp. 519, 525 (E.D.N.Y. 1976), reversed, 553 F.2d 805 (2d Cir. 1977). See also United States v. Rojas, 671 F.2d 159 (5th Cir. 1982) (where the critical "time of departure" had been reached when the passenger stepped on the jetport preparing to board the plane). But another court has held that when a passenger checks his bags, gets a boarding pass and waits in the boarding area, the "time of departure" is reached, even though the plane will not be departing for thirty minutes. See United States v. Cutaia, supra, 511 F. Supp. at 625.

100/ See 31 U.S.C. §5322. See also infra notes 113-122 and (FOOTNOTE CONTINUED)

Various questions are asked on the CMIR form. The form asks for the names of the person carrying the money and the owner of the money. The places where the money is being transported to and from are also requested. Moreover, the amounts and the denominations of the money must be indicated. Because a CMIR is a sworn statement, the person filling out the form signs it under penalty of perjury. Supplying false information on a CMIR form may not only constitute perjury, however. It may also involve violations of various other federal laws. 101/

Enforcement of the export/import reporting requirements is strengthened by two provisions of the Bank Secrecy Act: (1) Section 5317(a) of Title 31 of the Code, which authorizes the Customs Service to search for and seize monetary instruments which are not reported, 102/ and (2) Section 5317(b) of Title 31

(FOOTNOTE CONTINUED)
accompanying text (discussion of the criminal penalty provisions of the Bank Secrecy Act).

101/ See Chapter 5 infra.

102/ 31 U.S.C §5317(a) states:

> The Secretary of the Treasury may apply to a court of competent jurisdiction for a search warrant when the Secretary reasonably believes a monetary instrument is being transported and a report on the instrument under section 5316 of this title has not been filed or contains a material omission or misstatement. The Secretary shall include a statement of information in support of the warrant. On a showing of probable cause, the court may issue a search warrant for a designated person or a designated or described place or physical object. This subsection does not affect the authority of the Secretary under another law.

The Treasury Department and the Department of Justice have
(FOOTNOTE CONTINUED)

of the Code, which permits the United States government to seek the forfeiture of monetary instruments for which a CMIR form has not been filed or for which the CMIR form contains a material omission or misstatement. 103/

(FOOTNOTE CONTINUED)
recommended that the search warrant provision of the Act be amended so as to authorize warrantless searches where there is reasonable cause to believe or suspect that monetary instruments are unlawfully being brought into or taken out of the United States. Congress is currently considering this recommendation. See Chapter 1, supra notes 62-67 and accompanying text. However, it should be noted that the search provision of the Act does not presently require that warrants be obtained. As the last line of the provision states: "This subsection does not affect the authority of the Secretary under another law." Moreover, the legislative history reveals that Congress did not intend to limit the authority of the Secretary to conduct searches under existing law. See Senate Committee on Banking and Currency, S. Rep. No. 1139, 91st Cong., 2d Sess. 7 (1970). See also United States v. Rojas, 671 F.2d 159 (5th Cir. 1982) (Search provision of the Act merely made explicit that customs searches for currency violations, absent other authority to conduct a search, were subject to the warrant requirements of the Fourth Amendment. It did not impose warrant requirements where the Fourth Amendment did not do so). Customs agents should therefore be able to conduct warrantless searches, even without the proposed amendment, because Fourth Amendment case law supports the authority of Customs to search exiting travelers at the nation's borders without obtaining a warrant. See, e.g., United States v. Duncan, 693 F.2d 971 (9th Cir. 1982); United States v. Ajlouny, 476 F. Supp. 995 (E.D.N.Y. 1979), affirmed, 629 F.2d 830 (2d Cir. 1980), cert. denied, 449 U.S. 1111 (1981).

103/ 31 U.S.C. §5317(b) states:

> A monetary instrument being transported may be seized and forfeited to the United States Government when a report on the instrument under section 5316 of this title has not been filed or contains a material omission or misstatement. A monetary instrument transported by mail or a common carrier, messenger, or bailee is being transported under this subsection from the time the instrument is delivered to the United States Postal Service, common carrier, messenger, or bailee through the time it is delivered to the addressee, intended recipient, or agent of the

(FOOTNOTE CONTINUED)

2. Reports on Foreign Financial Agency Transactions

Under Section 5314 of Title 31 of the Code and Section 103.24 of Title 31 of the Regulations, a person within the Jurisdiction of the United States who has financial interest in, or authority over, bank securities or other financial accounts in a foreign country must report certain information about his financial interest in the account. 104/

(FOOTNOTE CONTINUED)
addressee or intended recipient without being transported further in, or taken out of, the United States.

The forfeiture provision of Section 5317 of Title 31 of the Code has been used extensively by the Customs Service. It is important to note that there is no corresponding provision which would attach to either the failure to file or the making of false statements or misstatements in a Currency Transaction Report (CTR), IRS Form 4789. See supra notes 87-96 and accompanying text (discussion of domestic financial transaction reporting requirements). Thus, currency in a bank account, unless it can be connected to a shipment from outside the United States, would have to be seized under Section 881(a)(6) of Title 21 of the United States Code (drug assets) or by using an IRS jeopardy assessment for taxes owed on income produced in the United States.

For further information about the forfeiture provision of the Act, see Chapter 6 infra.

104/ 31 U.S.C. §5314 provides:

> Records and reports on foreign financial agency transactions
>
> (a) Considering the need to avoid impeding or controlling the export or import of monetary instruments and the need to avoid burdening unreasonably a person making a transaction with a foreign financial agency, the Secretary of the Treasury shall require a resident or citizen of the United States or a person in, and doing
>
> (FOOTNOTE CONTINUED)

(FOOTNOTE CONTINUED)

business in, the United States, to keep records, file reports, or keep records and file reports, when the resident, citizen, or person makes a transaction or maintains a relation for any person with a foreign financial agency. The records and reports shall contain the following information in the way and to the extent the Secretary prescribes:

(1) the identity and address of participants in a transaction or relationship.

(2) the legal capacity in which a participant is acting.

(3) the identity of real parties in interest.

(4) a description of the transaction.

(b) The Secretary may prescribe -

(1) a reasonable classification of persons subject to or exempt from a requirement under this section or a regulation under this section;

(2) a foreign country to which a requirement or a regulation under this section applies if the Secretary decides applying the requirement or regulation to all foreign countries is unnecessary or undesirable;

(3) the magnitude of transactions subject to a requirement or a regulation under this section;

(4) the kind of transaction subject to or exempt from a requirement or a regulation under this section; and

(5) other matters the Secretary considers necessary to carry out this section or a regulation under this section.

(FOOTNOTE CONTINUED)

III. The Recordkeeping Provisions

The third major part of the Bank Secrecy Act pertains to recordkeeping. Two provisions of the Act are important in this regard. The first appears in Section 5314 of Title 31 of the Code. Under this Section, United States citizens and residents and domestic financial institutions are required to keep records of their transactions and relations with foreign financial institutions. 105/ The regulations implementing this section spell out what records are required to be made and retained by financial institutions, 106/ banks 107/ and securities and exchange brokers. 108/ The regulations also provide that records regarding foreign financial accounts must be maintained for five years by the persons having a financial interest in such accounts. 109/

The second provision of the Act which pertains to record-keeping is found in Section 5318(2) of Title 31 of the Code. This section authorizes the Secretary of the Treasury to promul-

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(FOOTNOTE CONTINUED)

> (c) A person shall be required to disclose a record required to be kept under this section or under a regulation under this section only as required by law.

105/ Section 5314 also requires that persons file reports regarding their relations and transactions with foreign financial institutions. For the text of this section, see supra note 104.

106/ 31 C.F.R. §103.33.

107/ 31 C.F.R. §103.34.

108/ 31 C.F.R. §103.35.

109/ 31 C.F.R. §103.32.

gate regulations which require domestic financial institutions to maintain appropriate procedures to ensure compliance with the reporting requirements of the Act. 110/ Some of the regulations promulgated pursuant to this authority require certain records to be maintained. For example, domestic financial institutions are required to keep records of all exemptions from the domestic financial transaction reporting requirements 111/ that are granted. 112/

110/ 31 U.S.C. §5318 provides:

> Compliance and exemptions
>
> The Secretary of the Treasury may (except under section 5315 of this title and regulations prescribed under section 5315) -
>
> (1) delegate duties and powers under this subchapter to an appropriate supervising agency;
>
> (2) require a class of domestic financial institutions to maintain appropriate procedures to ensure compliance with this subchapter and regulations prescribed under this subchapter; and
>
> (3) prescribe an appropriate exemption from a requirement under this subchapter and regulations prescribed under this subchapter. The Secretary may revoke an exemption by actually or constructively notifying the parties affected. A revocation is effective during judicial review.

111/ See supra notes 87-96 (discussion of domestic financial transaction reporting requirements).

112/ See 31 C.F.R. §103.22(e).

The Act gives the Secretary of the Treasury authority to grant exemptions from the Act's reporting requirements. See infra notes 131-132 and accompanying text (discusion of exemption provisions of the Act).

IV. Criminal Penalties

The fourth major portion of the Act pertains to criminal penalties. Under the Act, a violation of the reporting or recordkeeping requirements is a criminal offense. 113/ The Act provides for both misdemeanor and felony offenses.

A. Misdemeanor Offenses

Section 5322(a) of Title 31 of the Code provides that a

113/ 31 U.S.C. §5322 provides:

Criminal penalties

(a) A person willfully violating this subchapter or a regulation prescribed under this subchapter (except section 5315 of this title or a regulation prescribed under section 5315) shall be fined not more than $1,000, imprisoned for not more than one year, or both.

(b) A person willfully violating this subchapter or a regulation prescribed under this subchapter (except section 5315 of this title or a regulation prescribed under section 5315), while violating another law of the United States or as part of a pattern of illegal activity involving transactions of more than $100,000 in a 12-month period, shall be fined not more than $500,000, imprisoned for not more than 5 years, or both.

(c) For a violation of section 5318(2) of this title or a regulation prescribed under section 5318(2), a separate violation occurs for each day the violation continues and at each office, branch, or place of business at which a violation occurs or continues.

person who willfully violates the Act or the regulations prescribed under it shall be fined not more than $1,000 and/or imprisoned up to one year. To show a willful violation, the government must prove that the defendant actually knew of the currency reporting requirements and voluntarily and intentionally failed to comply with the requirements. 114/

Demonstrating that an individual knew about the requirements of the statute is usually more troublesome than proving the actual failure to file the required report. 115/ Money couriers 116/ who fail to report the monetary instruments which they are bringing into or out of the country will often raise the defense of lack of knowledge of the export/import reporting requirements. To counter such a defense, it is essential that the government show that the traveler knew of the reporting requirements and that he had an opportunity to file the report.

114/ See United States v. Warren, 612 F.2d 887 (5th Cir.), cert. denied, 446 U.S. 956 (1980); United States v. Chen, 605 F.2d 433 (9th Cir. 1979); United States v. Dichne, 612 F.2d 632 (2d Cir. 1979), cert. denied, 445 U.S. 928 (1980); United States v. Granda, 565 F.2d 922 (5th Cir. 1978); United States v. San Juan, 545 F.2d 314 (2d Cir. 1976).

115/ Indeed, the government often does not have to prove the absence of the required report. In a case involving the export/import reporting requirements, the Fifth Circuit held that the government need not prove the absence of the required report if the evidence clearly shows that the defendant did not file the report or if the defendant denies having had over $5,000. See United States v. Rojas, 671 F.2d 159 (5th Cir. 1982).

116/ Criminal enterprises operating in the United States have developed an extensive courier system for transferring their ill-gotten profits to secret foreign bank accounts. These enterprises hire couriers to transport their cash to foreign banks. See Chapter 1 supra, note 7 and accompanying text.

This can be accomplished by demonstrating that efforts were made to alert the travelers of the reporting requirements. 117/ If the target of the investigation is a financial institution, a complete check by the Treasury Department's Title 31 Compliance Office will reveal when the institution was notified of the reporting requirements and who was notified. Such information is very important because the government can aggregate facts known by individual employees to prove knowledge on the part of the corporation. 118/

117/ See United States v. Rodriguez, 592 F.2d 553 (9th Cir. 1979); United States v. Granda, 565 F.2d 922 (5th Cir. 1978).

United States Customs Service officials often go to great lengths to notify travelers of the export/import reporting requirements. Large signs in many languages are posted in international travel areas. The CMIR form passed out to travelers explains the reporting requirements. If travelers have any questions, they may ask Customs agents, who are taught to explain the form and the reporting requirements as part of the entry and exit procedures. Often, when a currency shipment is suspected, extra care is taken to explain the reporting requirements thoroughly to each traveler, including the suspect.

It is important to remember that the violation here is not the knowing transportation of currency into or out of the country, but rather the knowing failure to file the required forms. See United States v. Rojas, 671 F.2d 159 (5th Cir. 1982). Knowledge of the reporting requirements when the form is signed is critical. See United States v. Rojas, supra; United States v. Dichne, 612 F.2d 632 (2d Cir. 1979), cert. denied, 445 U.S. 928 (1980); United States v. Chen, 605 F.2d 433 (9th Cir. 1979); United States v. Schnaiderman, 568 F.2d 1208, rehearing denied, 573 F.2d 1309 (5th Cir. 1978); United States v. San Juan, 545 F.2d 314 (2d Cir. 1976); United States v. Cutaia, 511 F. Supp 619 (E.D.N.Y. 1981).

118/ See Inland Freight Lines v. United States, 191 F.2d 313, 315 (10th Cir. 1951); United States v. Sawyer Transport, Inc., (FOOTNOTE CONTINUED)

B. Felony Offenses

The felony penalties of Section 5322(b) apply to all violations of the Act, unless specifically excluded. Under Section 5322(b), a felony violation occurs when the defendant violates the Act or the Regulations "while violating another law of the United States" or "as part of a pattern of illegal activity involving transactions of more than $100,000 in a twelve-month period." The penalty for a felony violation is a fine of up to $500,000 [119/] and/or imprisonment for up to five years.

Under the "while violating another law of the United States" [120/] portion of the felony provision, it is clear that a

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(FOOTNOTE CONTINUED)
337 F. Supp. 29, 30-31 (D. Minn. 1971), affirmed, 463 F.2d 175 (8th Cir. 1972). See also In re Pubs, Inc., 618 F.2d 432 (7th Cir. 1980) (if the president, vice-president or director of a corporation has knowledge of a fact, knowledge is also imputed to the corporation).

119/ Many prosecutors do not believe that a court would ever impose the maximum fine, but it can be argued that such a fine is appropriate where the defendant is a large banking corporation or a professional money exchange which has been laundering hundreds of millions of narcotics dollars. Indeed, the legislative history of the Bank Secrecy Act indicates that Congress intended to take away the large profits gained from such illegal activities. See Senate Committee on Banking and Currency, S. Rep. No. 1139, 91st Cong., 2d Sess. 7 (1970). Moreover, Congress wanted the felony provision to serve as a significant deterrent to organized crime. See id.

120/ Prior to 1982, the felony provision was triggered when a violation of the Bank Secrecy Act was "committed in furtherance of the commission of any other violation of federal law." See 31 U.S.C. §1059(1). In 1982, however, Title II of the Bank Secrecy Act was repealed and reenacted. Pub. L. No. 97-258 (1982). The (FOOTNOTE CONTINUED)

separate violation of federal law must be pleaded and proved in addition to a Bank Secrecy Act offense. If narcotics money laundering can be proved, the narcotic offenses set forth in Title 21 of the United States Code can be utilized. Tactically, the prosecution should be able to introduce narcotics evidence in a Title 31 case as an element of proof to make the offense a felony. Violations of other federal laws also have been used to meet the felony requirement. Often, both a "violation of another law" pleading and a "pattern of illegal activity" pleading can be used conjunctively in the same indictment.

To establish a "pattern of illegal activity," the government must prove that the defendant engaged in repeated violations of the Bank Secrecy Act. 121/ Once a pattern of illegal activity "involving transactions of more than $100,000 in a twelve-month period" is shown, each violation of the Bank Secrecy Act that is part of the pattern may be separately prosecuted as a felony. 122/ The pattern of violations need not be prosecuted as one single felony offense.

(FOOTNOTE CONTINUED)
language of the felony provision was changed from "committed in furtherance of any other violation" to "while violating." Both Public Law 97-258 and the legislative history make it clear that no substantive change in language was intended. The reason for the change in language was simply for purposes of style and simplicity. See Pub. L. No. 97-258, which codified Title 31 of the United States Code, and Chapter 1 supra, notes 46-53 and accompanying text. Thus, pre-1982 case law regarding this portion of the felony provision should still govern.

121/ United States v. Dickinson, 706 F.2d 88 (2d Cir. 1983).

122/ See United States v. Kattan-Kassin, 696 F.2d 893 (11th Cir. 1983).

V. Civil Remedies

The fifth major part of the Act contains a variety of civil enforcement remedies. These remedies include a provision for injunctive relief and a provision for civil penalties.

A. Injunctions

Section 5320 of Title 31 of the Code allows the Secretary of the Treasury to bring a civil action to enjoin a violation or to enforce compliance with the Act or Regulations. 123/ There does not appear to be any reason why injunctive relief cannot be sought in conjunction with a criminal prosecution to enforce future compliance. In fact, such relief can be particularly effective when the criminal defendant is a corporate financial institution.

123/ 31 U.S.C. §5320 provides:

> Injunctions
>
> When the Secretary of the Treasury believes a person has violated, is violating, or will violate this subchapter or a regulation prescribed or order issued under this subchapter, the Secretary may bring a civil action in the appropriate district court of the United States or appropriate United States court of a territory or possession of the United States to enjoin the violation or to enforce compliance with the subchapter, regulation, or order. An injunction or temporary restraining order shall be issued without bond.

B. Civil Penalties

The civil penalty provision is contained in Section 5321 of Title 31 of the Code. Section 5321 is divided into three subsections. 124/ Subsection 5321(a) provides that domestic

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124/ 31 U.S.C. §5321 states:

Civil penalties

(a)(1) A domestic financial institution, and a partner, director, officer, or employee of a domestic financial institution, willfully violating this subchapter or a regulation prescribed under this subchapter (except section 5315 of this title or a regulation prescribed under section 5315) is liable to the United States Government for a civil penalty of not more than $1,000. For a violation of section 5318(2) of this title or a regulation prescribed under section 5318(2), a separate violation occurs for each day the violation continues and at each office, branch, or place of business at which a violation occurs or continues.

(2) The Secretary of the Treasury may impose an additional civil penalty on a person not filing a report, or filing a report containing a material omission or misstatement, under section 5316 of this title or a regulation prescribed under section 5316. A civil penalty under this paragraph may not be more than the amount of the monetary instrument for which the report was required. A civil penalty under this paragraph is reduced by an amount forfeited under section 5317(b) of this title.

(3) A person not filing a report under a regulation prescribed under section 5315 of this title or not complying with an injunction under section 5320 of this title enjoining a violation of, or

(FOOTNOTE CONTINUED)

financial institutions and any partner, director, officer or employee of a domestic financial institution can be fined up to $1,000 for each violation of the Act. If a domestic financial institution fails to follow the compliance procedures required by the Act or the Regulations, 125/ a separate violation occurs for each day the violation occurs or continues at each office, branch or place of business. 126/ This portion of subsection 5321(a) permits the Treasury Department to penalize minor violations of the Act, and it encourages compliance.

Subsection 5321(a) also provides that the Secretary of the Treasury may impose additional civil penalties on a person who does not file an export/import report, or who files an export/import report containing a material omission or misstatement. 127/ The civil penalty can be levied up to the value of the monetary

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(FOOTNOTE CONTINUED)

enforcing compliance with, section 5315 or a regulation prescribed under section 5315, is liable to the Government for a civil penalty of not more than $10,000.

(b) The Secretary may bring a civil action to recover a civil penalty under subsection (a)(1) or (2) of this section that has not been paid.

(c) The Secretary may remit any part of a forfeiture under section 5317(b) of this title or civil penalty under subsection (a)(2) of this section.

125/ See supra notes 110-112 and accompanying text (discussion of the compliance procedures).

126/ 31 U.S.C. §5321(a)(1), supra note 124.

127/ 31 U.S.C. §5321(a)(2), supra note 124. See also supra notes 97-103 and accompanying text (discussion of the export/import reporting requirements).

instrument for which the report was required, and it can be reduced by any amount forfeited under Section 5317(b) of Title 31 of the Code. 128/ This portion of the civil penalty provision can be very helpful when a large volume of currency is involved and criminal prosecution is not available.

Subsection 5321(b) of the civil penalty provision authorizes the Secretary of the Treasury to bring civil actions to collect civil penalties. 129/ Subsection 5321(c) provides for a remission procedure to protect innocent third parties. 130/

VI. Exemptions

The sixth major section of the Bank Secrecy Act provides for certain exemptions from compliance with the legislation. 131/ Most of these exemptions involve the domestic financial transaction reporting requirements of the Act. 132/ Currently, all transactions between financial institutions are exempt from these

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128/ See supra note 103 and accompanying text (discusses forfeiture provision of the Act). See also Chapter 6, infra.

129/ 31 U.S.C. §5321(b), supra note 124.

130/ 31 U.S.C. §5321(c), supra note 124. This power to remit rests only with the Secretary of the Treasury and cannot be exercised by a court. United States v. $15,896.00 in United States Currency, 545 F. Supp. 92 (N.D.N.Y. 1982).

131/ 31 U.S.C. §5318, supra note 110; 31 C.F.R. §103.45 and 31 C.F.R. Part 103 "Appendix - Interpretations and Exemptions."

132/ See supra notes 87-96 and accompanying text (discussion of domestic financial transaction reporting requirements).

reporting requirements. This automatic exemption is frequently raised as a defense by a bank which has failed to comply with the domestic financial transaction reporting requirements.

Domestic financial institutions can also request exemptions from the domestic financial transaction reporting requirements for their large-volume customers. The Secretary of the Treasury through the Office of Compliance has the power to grant or deny such exemptions. The Treasury Department maintains a list of all bank customers who have been granted exemptions. This exemption list often becomes an issue in criminal prosecutions if the bank defends on the ground that it does not have to comply with the domestic financial transaction reporting requirements because all of its customers are exempt.

VII. Dissemination of Financial Information

The final major part of the Bank Secrecy Act pertains to the dissemination of financial information. Section 5319 of Title 31 of the Code provides that the Secretary of the Treasury may disseminate information from domestic financial transaction reports, export/import reports, and foreign financial agency transaction reports to other agencies for use in criminal, tax or regulatory investigations or proceedings. 133/ Any information

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133/ 31 U.S.C. §5319; 31 C.F.R. §103.43.

(FOOTNOTE CONTINUED)

disseminated, however, must be received in confidence and can only be disclosed to persons utilizing the information for official purposes relating to the criminal, tax or regulatory investigation or proceedings for which the information was sought. 134/

(FOOTNOTE CONTINUED)

31 U.S.C. §5319 provides:

> Availability of Reports
>
> The Secretary of the Treasury shall make information in a report filed under section 5313, 5314, or 5316 of this title available to an agency on request of the head of the agency. The report shall be available for a purpose consistent with those sections or a regulation prescribed under those sections. However, a report and records of reports are exempt from disclosure under section 552 of title 5.

31 C.F.R. §103.43 states:

> The Secretary may make any information set forth in any report received pursuant to this part available to any other department or agency of the United States upon the request of the head of such department or agency, made in writing and stating the particular information desired, the criminal, tax or regulatory investigation or proceeding in connection with which the information is sought and the official need therefor. Any information made available under this section to other departments or agencies of the United States shall be received by them in confidence, and shall not be disclosed to any person except for official purposes relating to the investigation or proceeding in connection with which the information is sought.

For a discussion of the Congressional debates regarding the dissemination of information from the reports, see Chapter 1 supra, at 11-16.

134/ 31 C.F.R. §103.43, supra note 133.

CHAPTER 3

ACCESS TO BANK SECRECY ACT INFORMATION AND OTHER INFORMATION MAINTAINED BY THE DEPARTMENT OF THE TREASURY

Introduction

The Congressional intent behind the foreign and domestic financial transaction reporting requirements of the Bank Secrecy Act is to enhance federal law enforcement efforts to prevent the concealment of criminal violations by organized crime figures and white collar criminals who use secret foreign bank accounts or fail to report domestic and international monetary transactions. The responsibility for effectuating this purpose has been assigned to the Department of the Treasury. Under the Act, the Treasury Department is required to collect, store, utilize and disseminate Bank Secrecy Act reports and information to law enforcement agencies.

This chapter will explain the procedure which must be followed to obtain access to and dissemination of Bank Secrecy Act reports and information. It will also discuss the limitations on the use and disclosure of Bank Secrecy Act information. Finally, it will describe the types of information which can be obtained from the Treasury Department for usé in financial investigations.

I. Procedures Applicable to the Acquisition, Dissemination and Disclosure of Bank Secrecy Act Information

As a general rule, the means for acquiring and disclosing Bank Secrecy Act information are set forth in the "Criteria and Procedures for Access to and Utilization of Information Required by the Financial Recordkeeping and Currency and Foreign Transaction Reporting Act of 1970." These guidelines were promulgated by the Treasury Department to ensure that requests for Bank Secrecy Act information, dissemination and disclosure are made in accordance with Section 103.43 of Title 31 of the Code of Federal Regulations (hereinafter the Regulations) and Department of Treasury policy concerning the use and dissemination of such information. These guidelines will be discussed below.

A. The Acquisition of Bank Secrecy Act Information by Federal Departments and Agencies and by Congressional Committees, the General Accounting Office and State, Local and Foreign Agencies

1. Acquisition of Bank Secrecy Act Information by Federal Departments and Agencies

Section 103.43 of Title 31 of the Regulations describes the procedure which must be followed by a department or agency in order to obtain access to Bank Secrecy Act information in the Treasury Department's possession. That section provides in pertinent part:

> Availability of Information
>
> The Secretary of the Treasury may make any

> information...received...available [135] to any other department or agency of the United States upon the written request of the head of such department or agency, made in writing and stating the particular information desired, the criminal, tax or regulatory investigation or proceeding in connection with which the information is sought and the official need therefore.

Thus, the head of each interested department or agency must submit to the Secretary of the Treasury a written request for authorization to obtain access to information acquired pursuant to the Bank Secrecy Act. If desired, the department or agency head can also nominate a supervisory official or officials who will be authorized to act on his behalf on future requests for information. [136] If the initial request is approved, the supervisory official designated may submit all future requests directly to the Treasury Financial Law Enforcement Center (TFLEC) [137] which is located at Room 5402, 1301 Constitution Avenue, N.W., Washington, D.C. 20229.

In accordance with Section 103.43, the guidelines further require that each request for Bank Secrecy Act information contain the following information:

135/ No department or agency beside the United States Customs Service and the Internal Revenue Service may have access to any of the Bank Secrecy Act data information contained in the Treasury Enforcement Communications System (TECS), discussed infra, except in hard copy.

136/ Pursuant to an agreement with the Department of Justice, United States Attorneys may communicate directly with the Treasury Financial Law Enforcement Center for dissemination of Bank Secrecy Act information.

137/ For a discussion of TFLEC, see infra.

(1) A certification that the information requested is relevant to an official investigation or proceeding;

(2) a certification as to the specific nature or purpose of the investigation or the violations of federal law (e.g., whether it is a criminal, tax or regulatory investigation or proceeding); and

(3) a statement containing sufficient identification of the individual or entity named in the request to permit a valid examination of available files (e.g., name, address, date of birth, social security number, employee or taxpayer identification number or passport number) to help ensure the legitimacy and accuracy of the information selected for dissemination.

All requests for Bank Secrecy Act information which satisfy these requirements will be processed as follows:

(1) The appropriate file searches or information analysis will be identified and developed pursuant to the requirements outlined in the dissemination request; and

(2) the identification elements contained in

the request will be the only elements utilized to make a search. A dissemination of information will be made only where the information requested is identifiable through an exact match (name and unique number) or where the information requested so closely resembles information that is available (but does not exactly match the request) that it can be reasonably assumed to be the information intended in the request.

Requests which do not meet the above criteria for processing or dissemination will be returned to the originating department or agency with an indication of the reasons why the request could not be met.

2. Acquisition of Bank Secrecy Act Information by Congressional Committees, the General Accounting Office and State, Local and Foreign Agencies

All Congressional committees, the General Accounting Office and state, local and foreign agencies seeking Bank Secrecy Act information must submit a written request to the Commissioner of Customs, signed by the head of the committee or agency, requesting access to Bank Secrecy Act information for use in an official criminal, tax or regulatory investigation or proceeding. Each request must contain all of the previously listed elements to establish just cause for release of the requested Bank Secrecy

Act information. Each request will be reviewed by the Deputy Assistant Secretary for Enforcement of the Department of the Treasury before disclosure by the United States Customs Service.

B. Restrictions on the Use of Bank Secrecy Act Information

All recipient departments or agencies must utilize information disseminated pursuant to the Bank Secrecy Act in accordance with the following Department of the Treasury guidelines:

(1) Disseminations in response to requests naming a specific individual are to be utilized only in an official investigation, inquiry or proceeding involving the identified individual or, where the information is evidentiary, of violations by other persons.

(2) When agencies are provided forms which meet certain specific criteria for use as possible investigative leads, that information is to be utilized only in conjunction with agency data and should not become the sole basis for the creation of agency files. Agencies shall not enter data from Forms 4789,

4790, and 90-22.1 [138/] into any data base or computer system, e.g., NADDIS, NCIC, without an additional basis, such as a match against an existing agency investigative or intelligence record.

(3) Each recipient department or agency shall establish its own internal procedures to assure compliance with the laws, regulations and these guidelines. These procedures should include criteria for use, dissemination and purging as well as routine audit procedures to ensure compliance.

(4) Recipient departments or agencies are prohibited by Section 103.43 of Title 31 of the Regulations from further dissemination of the Bank Secrecy Act information, except dissemination to the Department of Justice for appropriate prosecutorial review or evaluation in a pending investigation, trial or proceeding.

(5) The Secretary of the Treasury may request the recipient department or

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138/ See infra for a discussion of these forms.

agency to certify compliance with the constraints imposed by its guidelines, the Privacy Act and the regulations promulgated pursuant to the Bank Secrecy Act, as published in Part 103 of Title 31 of the Regulations. 139/

Nothing in the Treasury Department guidelines for access to and utilization of Bank Secrecy Act data should be interpreted as prohibiting the Commissioner of Customs from unilaterally developing analytical studies or making Bank Secrecy Act report information available to any other federal department or agency whenever the Commissioner has reason to believe that the information pertains to a crime which is in the investigative jurisdiction of the other department or agency.

C. Disclosure of Bank Secrecy Act Information

All disclosures of Bank Secrecy Act reports or report information are to be made in accordance with the Bank Secrecy Act sections of Title 12 and Title 31 of the United States Code, Part 103 of Title 31 of the Regulations, the Privacy Act of 1974, as amended, and other applicable laws, regulations and Department

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139/ As of October of 1983, the Department of the Treasury was considering a United States Customs Service proposal to revise the Bank Secrecy Act dissemination and disclosure guidelines. If approved, notification of the changes will be made to the law enforcement community.

of the Treasury guidelines.

Any impropriety, irregularity or violation concerning access to and utilization and disclosure of Bank Secrecy Act information is to be referred promptly to the Deputy Assistant Secretary for Enforcement of the Department of the Treasury for appropriate action.

II. Access to Treasury Department Sources of Information

A. Treasury Financial Law Enforcement Center (TFLEC)

The Treasury Financial Law Enforcement Center (TFLEC) was established by the Department of the Treasury and the Customs Service to serve as a centralized national clearinghouse and repository for criminal-financial intelligence and expertise. TFLEC is responsible for receiving, storing, analyzing and disseminating all information collected pursuant to the Bank Secrecy Act. This information is obtained from the three foreign and domestic financial transaction reporting forms required to be filed under the Act. These forms are: (1) Customs Form 4790, Report of International Transportation of Currency or Monetary Instruments, commonly known as a CMIR (31 U.S.C. §5316 and 31 C.F.R. §104.23); 140/ (2) IRS Form 4789, Currency Transaction Report, commonly known as a CTR (31 U.S.C. §5313 and 31 C.F.R.

140/ See supra notes 97-103 and accompanying text.

§103.22); [141/] and (3) Report of Foreign Bank and Financial Accounts, Treasury Form 90-22.1 (31 U.S.C. §5314 and 31 C.F.R. §103.24).

Once these reports are received, TFLEC analyzes the information contained in the reports and identifies financial characteristics of criminal markets. TFLEC also assists in developing law enforcement strategies.

Access to TFLEC-generated information or the Financial Information Network data base is not limited solely to United States government agencies. At the same time, however, extreme care must be taken to ensure that the information contained in the data base is not misused or improperly or erroneously retained. Upon the written request of a recognized domestic or foreign law enforcement agency, the Secretary of the Treasury can authorize TFLEC to provide information requested about a named subject or organization. Access to this information is predicated, however, on the requirement that the subject or subjects are bona fide targets of an ongoing criminal investigation. TFLEC information will not be provided to agencies outside the federal government for purposes of initiating investigations or providing leads in response to nonspecific requests.

To obtain financial information from TFLEC, the head or designated representative of the requesting law enforcement agency should make a written request indicating the type of

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141/ See supra notes 87-96 and accompanying text.

information desired. The request should state that the information is to be used in an ongoing criminal investigation or other proceeding. The request should be directed to: The Commissioner of Customs, Treasury Financial Law Enforcement Center, 1301 Constitution Avenue, N.W., Washington, D.C. 20229.

B. Intelligence Systems: The Treasury Enforcement Communications System (TECS)

The Treasury Enforcement Communications System (TECS) links the telecommunications terminals located in the various law enforcement facilities of the Department of the Treasury throughout the United States. In addition, terminal facilities are provided to other federal agencies participating in TECS for entering their own records or for entering records on persons or subjects of interest to both the United States Customs Service and the entering agency.

The TECS data base is a composite of information with specifically assigned levels of access. The data is provided by a variety of system participants, including the United States Customs Service, the Bureau of Alcohol, Tobacco and Firearms, the Internal Revenue Service, the Drug Enforcement Administration, the Immigration and Naturalization Service, the Department of State, the Coast Guard and the United States National Central Bureau of the International Criminal Police Organization (INTERPOL), Washington, D.C.

The following paragraphs briefly describe the data base in TECS and define the purpose, use and source of the information.

1. Border Enforcement System

The Border Enforcement System is the major component of the Treasury Enforcement Communications System. It consists of five major files which contain documented violations and suspect information on: (1) persons; (2) vehicles; (3) vessels; (4) aircraft; and (5) businesses. The data comprising these records is received from multiple sources within the Customs Service and other participating law enforcement agencies. These records are used: (1) to assist Customs and INS officers in performing their screening (examination, clearance, and control) function; (2) to alert Customs or INS officers to potentially dangerous persons or situations; (3) to alert Customs or INS officers to NCIC-wanted persons or fugitives; (4) to provide potential or substantiated investigative data to the Customs Service or other law enforcement agency officers; (5) to provide data to the Customs Service or other agency intelligence officers for law enforcement analysis; and (6) to aid in the exchange of data with other federal, state or local government law enforcement agencies.

2. Operational and Regulatory Support Systems

The Operational and Regulatory Support Systems are a group of separate and unique system applications designed to provide specific types of operational, statistical and tactical information extracted from a variety of Customs Service and other

federal law enforcement related reports.

a. Private Aircraft Inspection Report System (PAIRS)

PAIRS contains private general aviation aircraft information derived from the Private Aircraft Inspection Report, Customs Form 178. PAIRS provides aircraft arrival data, over-flight exemptions and records of intended arrivals. All inspectors utilize the PAIRS data base when processing arriving private aircraft. The records are used to track the frequency of the arrival of aircraft and crews. Although PAIRS is not a suspect or lookout system, it provides significant investigative and intelligence data for law enforcement analysis.

b. Currency and Monetary Instrument Report (CMIR) System

The CMIR System provides Customs personnel with the information contained in Customs Form 4790 on subjects who transport currency or monetary instruments in excess of $5,000 into or out of the United States. 142/ The CMIR System is the first phase of a comprehensive three-phase currency system designed to assist in enforcing the Bank Secrecy Act. Customs inspectors working in an inspection capacity principally use this system at land, air and

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142/ See supra note 140 and accompanying text.

sea ports. In addition, Customs Service special agents use the information obtained from the CMIR System to investigate and develop cases under the Bank Secrecy Act and other currency-related laws. Customs inspectors (who receive only short responses) and Customs special agents (who receive the full record displays and other off-line reports) can obtain access to CMIR System information at most secondary terminals. The Internal Revenue Service also has access to this information pursuant to an agreement regarding the exchange of information.

c. Currency Transaction Report (CTR) System

The CTR System provides investigative personnel with information on subjects that are involved in currency transactions in excess of $10,000 in United States currency or its equivalent in foreign currency. Financial institutions are required to report these transactions to the Interal Revenue Service in IRS Form 4789. 143/ This information is initially received at the Internal Revenue Service Service Centers and is forwarded by magnetic tapes to the San Diego Data Center for input. The CTR System is the second phase of the comprehensive three-phase currency system designed to enforce the foreign and domestic financial transaction reporting requirements of the Bank Secrecy Act. Information from this system is available on-line

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143/ See supra note 141 and accompanying text.

to the Financial Investigations Division of the Customs Service and to terminals in the Office of Investigations of the Department of the Treasury. The CTR System provides intelligence for law enforcement analysis.

d. Foreign Bank Account (FBA) System

The FBA System will provide investigative information on each United States person who has a financial interest in or signature or other authority over a bank account, securities or other financial accounts in a foreign country. Such persons are required to file Treasury Form 90-22.1 on an annual basis. The intelligence and information gathered from this system will be used to enforce the foreign financial transaction reporting requirements of the Bank Secrecy Act. This information system will help support the entire federal law enforcement community and will be the third phase of the three-phase comprehensive currency system.

CHAPTER 4

RECORDKEEPING REQUIREMENTS OF THE BANK SECRECY ACT

Introduction

Title I of the Bank Secrecy Act establishes a regulatory scheme which requires individuals, banks and other financial institutions to establish, maintain and make available certain records which have a high degree of usefulness in criminal, tax and regulatory investigations and proceedings. 144/ The Act gives the Secretary of the Treasury broad authority to promulgate recordkeeping regulations with respect to persons having financial interests in foreign accounts, federally insured banks, uninsured banks 145/ and persons who engage in the business of carrying on any of the following functions: (1) issuing or redeeming checks, money orders, travelers' checks or similar instruments, except as an incident to the conduct of its own nonfinancial business; (2) transferring funds or credits domestically or internationally; (3) operating a currency exchange or otherwise dealing in foreign currencies or credits; (4) operating

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144/ Pub. L. No. 91-508, §§101 and 121, 84 Stat. 1114, 1116 (1970), codified at 12 U.S.C. §§1829b and 1951 et seq.

145/ The Act excepts bank supervisory agencies (including agencies enforcing the Bank Secrecy Act) from complying with these requirements. See 12 U.S.C. §§3401(b) and 3413(b).

a credit card system; or (5) performing such similar, related or substitute functions for any of the foregoing or for banking as may be specified by the Secretary in the regulations. 146/ Responsibility for ensuring compliance with these recordkeeping requirements has been delegated by the Secretary of the Treasury to various bank supervisory agencies and to the Commissioner of Customs and the Internal Revenue Service. 147/

The recordkeeping regulations promulgated by the Treasury Department pursuant to the Act are found in Part 103 of Title 31 of the Code of Federal Regulations. This chapter will describe the various records required to be kept by persons having financial interests in foreign financial accounts and by financial institutions, banks and securities and exchange brokers. The chapter will also explain how these records can be used to trace licit and illicit transactions and acquire other useful information. 148/

To obtain access to these records, procedures already in existence must be used. This is because the Bank Secrecy Act

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146/ Pub. L. No. 91-508 §§102 and 123, 84 Stat. 1114, 1116 (1970), codified at 12 U.S.C. §§1730d and 1953.

147/ 31 C.F.R. §103.46.

148/ Many of the records required to be kept by the Regulations are of the type which financial institutions kept prior to 1970. Nevertheless, Congress specifically required these particular records to be maintained because many financial institutions were considering plans to ease identification procedures and to stop retaining records which they considered burdensome, such as cancelled checks. See H.R. Rep. No. 975, 91st Cong., 2d Sess., reprinted in [1970] U.S. Code Cong. & Ad. News 4394, at 4395-4396.

does not contain a separate administrative summons or subpoena authority. Thus, for example, the provisions of the Right to Financial Privacy Act [149/] should be followed.

I. Records Required to be Made and Retained by Persons Having Financial Interests in Foreign Financial Accounts

Each person having a financial interest in a foreign financial account is required by the provisions of Section 103.32 of Title 31 of the Code of Federal Regulations [150/] to make and retain a record of: (1) the name in which each account is maintained; (2) the number or other designation of the account; (3) the name and address of the foreign bank or other person with whom the account is maintained; (4) the type of account; and (5) the maximum value of each account during each reporting

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149/ 12 U.S.C. §3401 et seq.

150/ 31 C.F.R. §103.32 provides in pertinent part:

> Records to be made and retained by persons having financial interests in foreign financial accounts.
>
> Records of accounts required by §103.24 to be reported on a Federal income tax return shall be retained by each person having a financial interest in any such account. Such records shall contain the name in which each such account is maintained, the number or other designation of such account, the name and address of the foreign bank or other person with whom such account is maintained, the type of such account, and the maximum value of each such account during the reporting period. Such records shall be retained for a period of 5 years and shall be kept at all times available for inspection as authorized by law....

period. These records must be retained for a period of five years.

In addition, persons having financial interests in foreign financial accounts must file a Report of Foreign Bank and Financial Accounts, Treasury Form 90-22.1, once a year with the Internal Revenue Service. 151/

II. Records Required to be Made and Retained by Domestic Financial Institutions, Banks and Securities and Exchange Brokers

Domestic financial institutions are required to make and retain the originals or copies of the records described in Section 103.33 of Title 31 of the Code of Federal Regulations. 152/

151/ A copy of Treasury Form 90-22.1 is contained in the Appendix.

152/ 31 C.F.R. §103.33 provides:

> Records to be made and retained by financial institutions.
>
> Each financial institution shall retain either the original or a microfilm or other copy or reproduction of each of the following:
>
> (a) A record of each extension of credit in an amount in excess of $5,000, except an extension of credit secured by an interest in real property, which record shall contain the name and address of the person to whom the extension of credit is made, the amount thereof, the nature or purpose thereof, and the date thereof;
>
> (b) A record of each advice, request, or instruction received regarding a trans-

(FOOTNOTE CONTINUED)

In addition, banks and securities and exchange brokers are required to retain the originals or copies of the records described in Sections 103.34(b) and 103.35(b) of Title 31 of the Regulations respectively. 153/ This section will describe the

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(FOOTNOTE CONTINUED)

action which results in the 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;

(c) A record of each advice, request, or instruction given to another financial institution or other person located within or without the United States, regarding a transaction intended to result in the 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.

153/ 31 C.F.R. §103.34(b) provides:

Each bank shall, in addition, retain either the original or a microfilm or other copy or reproduction of each of the following:

(1) Each document granting signature authority over each deposit or share account;

(2) Each statement, ledger card or other record on each deposit or share account, showing each transaction in, or with respect to, that account;

(3) Each check, clean draft, or money order drawn on the bank or issued and payable by it, except those drawn for $100 or less or those drawn on accounts which can be expected to have drawn on them an average of at least 100 checks per month over the calendar year or on each occasion on which such checks are issued, and which are (i) dividend

(FOOTNOTE CONTINUED)

various types of records required to be made and retained by

(FOOTNOTE CONTINUED)

checks, (ii) payroll checks, (iii) employee benefit checks, (iv) insurance claim checks (v) medical benefit checks, (vi) checks drawn on government agency accounts, (vii) checks drawn by brokers or dealers in securities, (viii) checks drawn on fiduciary accounts, (ix) checks drawn on other financial institutions, or (x) pension or annuity checks;

(4) Each item in excess of $100 (other than bank charges or periodic charges made pursuant to agreement with the customer), comprising a debit to a customer's deposit or share account, not required to be kept, and not specifically exempted, under paragraph (b)(3) of this section;

(5) Each item, including checks, drafts, or transfers of credit, of more than $10,000 remitted or transferred to a person, account or place outside the United States;

(6) A record 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;

(7) Each check or draft in an amount in excess of $10,000 drawn on or issued by a foreign bank which the domestic bank has paid or presented to a nonbank drawee for payment;

(8) Each item, including checks, drafts or transfers of credit, of more than $10,000 received directly and not through a domestic financial institution, by letter, cable or any other means, from a bank, broker or dealer in foreign exchange outside the United States;

(9) A record of each receipt of currency, other monetary instruments, investment

(FOOTNOTE CONTINUED)

(FOOTNOTE CONTINUED)

securities or checks, and of each transfer of funds or credit, of more than $10,000 received on any one occasion directly and not through a domestic financial institution, from a bank, broker or dealer in foreign exchange outside the United States; and

(10) Records prepared or received by a bank in the ordinary course of business, which would be needed to reconstruct a demand deposit account and to trace a check in excess of $100 deposited in such account through its domestic processing system or to supply a description of a deposited check in excess of $100. This subparagraph shall be applicable only with respect to demand deposits.

(11) A record containing the name, address, and taxpayer identification number, if available, of the purchaser of each certificate of deposit, as well as a description of the instrument, a notation of the method of payment, and the date of the transaction.

(12) A record containing the name, address and taxpayer identification number, if available, of any person presenting a certificate of deposit for payment, as well as a description of the instrument and the date of the transaction.

31 C.F.R. §103.35(b) provides:

Every broker or dealer in securities shall, in addition, retain either the original or a microfilm or other copy or reproduction of each of the following:

(1) Each document granting signature or trading authority over each customer's account;

(2) Each record described in §240.17a-3(a)(1), (2), (3), (5), (6), (7), (8), and (9) of Title 17, Code of Federal Regulations;

(3) A record of each remittance or transfer of funds, or of currency, checks, other monetary instruments,

(FOOTNOTE CONTINUED)

financial institutions and banks [154/] and their significance to law enforcement agencies. With one exception, these records must be retained for a period of five years. [155/]

A. Records to be Made and Retained by Domestic Financial Institutions

Section 103.33 of Title 31 of the Regulations requires financial institutions to retain a record of: (1) each extension of credit in an amount in excess of $5,000, unless the extension of credit is secured by an interest in real property; (2) each advice, request or instruction received which results in the transfer of more than $10,000 to a person, account or place outside the United States; and (3) each advice, request or

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(FOOTNOTE CONTINUED)

> investment securities, or credit, of more than $10,000 to a person, account, or place, outside the United States;
>
> (4) A record of each receipt of currency, other monetary instruments, checks, or investment securities and of each transfer of funds or credit, of more than $10,000 received on any one occasion directly and not through a domestic financial institution, from any person, account or place outside the United States.

154/ See Appendix G for Customs' definitions. This chapter will not specifically discuss the additional records which must be retained by securities and exchange brokers. Many of these records, however, are similar to those retained by banks.

155/ See 31 C.F.R. §103.36(c). Bank records which are needed to reconstruct certain demand deposit accounts and to trace checks of more than $100 which have been deposited into demand deposit accounts only need to be retained for two years. Id.

instruction given to another financial institution or other person located within or without the United States regarding a transaction intended to result in a transfer of more than $10,000 to a person, account or place outside the United States.

1. Each Extension of Credit in Excess of $5,000 Except When Secured by an Interest in Real Property

An extension of credit is a loan by a financial institution to a customer. The financial institution extends a certain amount of credit to a customer upon the condition that the customer repay the loan, usually with interest, within a specified period of time. Increasingly, banks are offering check credit loans to their customers. Check credit loans are offered under a variety of names, such as "Redi Credit" and "Instant Credit." Under a check credit loan plan, a bank agrees to extend credit to a customer up to an established maximum amount. Usually, the customer may write a check for any amount up to the maximum credit line. If the amount is not available in the checking account, the resulting overdraft is treated as a loan. The bank then bills the customer for the loan. In other instances, the customer may write checks up to an amount determined by a preexisting loan agreement. The outstanding balance is then treated as an installment loan by the bank.

A wealth of valuable information can be obtained about a loan applicant from a financial institution. This is because financial institutions require individuals and entities that apply for loans to provide detailed information about themselves and their general economic history, including a financial statement of their assets and liabilities. Loan or credit files also contain the results of credit inquiries and other investigations conducted by the financial institution, liability ledgers and collateral registers. Liability ledgers post a customer's loans on one page to show the customer's past and present liability to the bank, the loan date, the note number, the amount of the loan, the interest rate, the due date and loan payments. Collateral registers usually contain a complete description of items pledged as securities for loans.

2. A Record of Each Advice, Request or Instruction Received Involving Transfers of More Than $10,000 to a Person or Account or Place Outside the United States

These types of transactions occur when a customer asks a financial institution to transfer more than $10,000 in funds, currency or other monetary instruments to a person, account or

place in a foreign country. 156/

3. A Record of Each Advice, Request or Instruction Given to Another Financial Institution or Other Person Involving Transfers of More Than $10,000 to a Person, Account or Place Outside the United States

These types of transactions are one step removed from the types of transfers covered in the above paragraph. In these cases, the customer asks a financial institution or person inside or outside of the United States to have another financial institution transfer more than $10,000 in funds, currency or other monetary instruments to a person, account or place in a foreign country.

B. Additional Records Required to be Made and Retained by Domestic Banks

Section 103.34 of Title 31 of the Code of Federal Regulations requires banks to retain a number of additional records: (1) documents granting signature authority over deposits or share accounts; (2) statements, letter cards or other records showing transactions on deposit or share accounts; (3) checks, bank drafts or money orders in excess of $100 which are drawn or issued and payable by a bank, with certain exceptions; (4) debits in excess of $100 to a customer's deposit or

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156/ This record is not to be confused with a CTR form.

share account; (5) checks, drafts, transfers of credit and other items, and records of funds, currency, other monetary instruments and investment securities, of more than $10,000 remitted to a person, place or account outside of the United States; (6) foreign checks or drafts in excess of $10,000 which a domestic bank has paid or presented to a nonbank for payment; (7) checks, drafts or transfers of credits and other items, and records of receipts of currency, other monetary instruments and transfers of funds or credits, of more than $10,000 received directly from a bank, broker or dealer in foreign exchange outside the United States; (8) records needed to reconstruct a demand deposit account and to trace a check in excess of $100 deposited in a demand deposit account; and (9) records containing the name, address and taxpayer identification number of purchasers and presenters of certificates of deposit and a description of the instrument, the method of payment (if applicable) and the date of transaction. Some of these types of records are discussed below.

1. Documents Granting Signature Authority Over Accounts

The signature card is a contract between a customer and a bank. When a depositor opens an account, the bank requires that a signature card be signed. 157/ By signing the card, the

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157/ If the depositor is a corporation or partnership, the signature card is required to be accompanied by copies of the (FOOTNOTE CONTINUED)

depositor becomes a party to a contract with the bank whereby he accepts the bank's rules and regulations and authorizes the bank to honor orders for the withdrawal of funds.

Although its form varies, the signature card usually contains the depositor's social security number, the date and amount of his initial deposit, the identity of the official who opened the account and information about the depositor's banking connections. In addition, the signature card should specify whether the account is a regular or special checking account. Regular and special checking accounts differ according to the type of service charges imposed by the bank. Regular checking accounts primarily are used by businesses and individuals who maintain large average monthly balances. Special checking accounts are usually used by individuals who maintain smaller account balances.

If the bank uses an automated data processing system, the signature card will also contain the customer's account number. This number must be used to trace the customer's transactions. If the number does not appear on the signature card, it can be located in the bank's cross-reference file. These assigned account numbers are encoded on other documents relating to the depositor by means of a system called Magnetic Ink Character

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(FOOTNOTE CONTINUED)
resolution of the corporate board of directors or the partnership agreement naming the person or persons authorized to draw checks on the account.

Recognition (MICR). 158/

2. Statements, Ledger Cards or Other Records Showing Transactions

Each bank has a bookkeeping department which maintains records of its customers' checking and savings accounts and transactions. The bookkeeping departments sort checks, deposits and other credits to prepare them for posting, take care of special items (such as orders to stop payment) and proof and balance general ledger totals. Because this work may be performed either manually or with an automated data processing system, banks generate different types of transaction records.

a. Checking Account Records

Ledger cards, which consist of customers' monthly checking account statements, are the basic records produced by a manual system. Ledger cards record all checks, deposits and other transactions which affect a customer's checking account. Banks keep ledger cards and second or duplicate copies of their customer's statements. Some banks place these records on microfilm with copies of cancelled checks.

In an automated system, no historical ledger cards are

158/ See infra pp. 90-91 (explanation of the MICR system).

produced. This is the fundamental difference between a manual bookkeeping system and an automated data processing system. In the automated data processing system, checking account statements are produced periodically, usually monthly. As with ledger cards, the bank retains microfilm copies or duplicates of all statements. Two basic types of statements exist in an automated data processing system: (1) detailed statements, which set forth every customer transaction much like bank ledger cards, and (2) summary or "bobtail" statements. If summary statements are used and more detailed information is required, the account transactions must be reconstructed.

b. Savings Account Statements

In a manual system, ledger cards similar to checking account cards are usually used to maintain records of savings accounts. These statements may or may not be mailed to depositors at stated intervals.

In an automated data processing system, records similar to summary or "bobtail" statements are produced. The procedure for reconstructing savings account transactions therefore are similar to that used for checking accounts. In some instances, copies of periodic statements are available to expedite the process. If they are not available, the account must be reconstructed item by item.

3. Checks, Bank Drafts or Money Orders Over $100

a. Negotiated Checks

Cancelled checks identify the payee, the payor, the amount of the check and any endorsers. In addition, each cancelled check contains bank identification symbols and an ABA transit number. These codes or symbols provide a means to trace the path of a check. The bank identification symbols are usually imprinted on the front of a check by the bank cashing the check to indicate that the check has been "cashed." To determine the bank of origin, it is necessary to refer to the ABA transit number. The ABA transit number represents an identification code for banking institutions developed by the American Bankers Association.

The Magnetic Ink Character Recognition system (MICR) can also assist in tracing a negotiated check. MICR was developed by the American Bankers Association as a machine language. Its design is mandatory. The MICR system requires numeric information to be printed in magnetic ink on the bottom of all bank checks and other documents. The Federal Reserve check routing code and the ABA transit number also appear in the upper-right-hand corner of each bank check. The magnetic ink can be scanned electronically by computers, which in turn convert the magnetic ink notations into electronic impulses.

All MICR information is printed in groupings called fields. On bank checks, the first field on the left is the Federal

Reserve check routing code. The next field is the ABA transit number. The middle group of numbers identifies the drawer's assigned account number at the bank. The right field contains a control number used for processing. The amount of the check should always equal the encoded MICR.

b. Exchange Instruments

Exchange instruments are vehicles by which a bank transfers funds. They include cashier's checks, treasurer's checks, bank drafts, traveler's checks, bank money orders and certified checks.

Information about bank exchange instruments is maintained by means of a register record. Separate registers may be maintained for each type of record, or one register may be maintained with separate columns for each kind of exchange item. Banks often use multicopy forms to issue these instruments.

(1) Cashier's and Treasurer's Checks

Cashier's checks are checks issued by a bank. Treasurer's checks are checks issued by a trust company. Both types of checks frequently provide excellent leads to bank account information and other assets including stock and real property. Because cashier's and treasurer's checks can be held indefinitely, individuals often purchase these checks to avoid having to keep large amounts of currency on hand. Sometimes previously purchased

checks are exchanged for new ones. Cashier's checks have been found to be used regularly by money launderers as these checks are as good as cash and are readily accepted by drug suppliers in payment for drugs. The endorsements on the back can provide a number of clues as to the identity of the source of a particular shipment of drugs. The type of endorsement used can cause a great deal of confusion regarding the cashier's check's status as the equivalent of cash. If the check is endorsed simply with the payee's signature, then it is a bearer instrument and, therefore, reportable in a CMIR upon leaving or entering the United States if the amount of the check is in excess of $5,000. If it is specially or restrictively endorsed, it is a nonbearer instrument.

(2) Bank Drafts

Bank drafts are checks drawn by the issuing bank on its account with another bank. These accounts are usually used when a purchaser desires to make a payment in a geographical area where the bank does not have a local or branch office.

(3) Travelers' Checks and Money Orders

Travelers' checks are issued in predetermined amounts by the American Express Company and several other large United States companies and banks, foreign banks and foreign government agencies. Local banks purchase these checks from the issuing

company or bank and then sell them to the public. Travelers' checks require the purchaser to provide two signatures on each check: one when he purchases the checks, and the other when he cashes them.

Travelers' checks can be traced by identifying the serial numbers appearing on each check. Usually, the issuing bank keeps records of both the travelers' checks it purchases and the sales orders. If serial numbers are not available for specific checks, the issuing bank may be able to supply that information by looking at the date the checks were purchased. Cancelled travelers' checks may be obtained from the issuing bank or company.

Bank money orders are similar to cashier's checks, but they are usually issued for smaller and specific amounts.

(4) Certified Checks

Certified checks are customer's checks on which a bank places its certification. The certification represents a guarantee that the bank will pay the checks when presented for payment. Certified checks are liabilities of the bank, and, when paid, they are retained by the bank. These checks are immediately charged against the purchasing customer's account by means of a debit memorandum. Copies of debit memoranda are sent to the customer with the bank statement. Some banks permit customers to obtain the original cashier's check by surrendering the debit memoranda.

4. Records Needed to Reconstruct Demand Deposit Accounts

These records include deposit tickets, credit memoranda, telegraphic transfers and time deposits.

a. Deposit Tickets

Deposit tickets are the principal source documents for crediting a customer's account. Deposits are first recorded on the deposit ticket or slip, which usually identifies the type of instruments being deposited, i.e., currency, coins or checks. If checks are being deposited, each check is listed separately. In many banks, the depositor is required to write the ABA number and the name of the maker of the check on the deposit ticket. In other banks, the bank inserts the ABA number onto the deposit ticket. Finally, in some banks no identifying data is entered. Regardless of the detail contained on a deposit ticket, bank recordkeeping systems permit items of deposit to be identified and traced to their source.

b. Telegraphic Transfers

Telegraphic transfers are the vehicles by which funds may be transferred from one bank account to another by wire or telephone at the customer's direction. Although the transfer shows up as a deposit to the customer's account by means of a credit memorandum, a detailed record of the transfer is usually kept in a special

file. Wire transfers are frequently used by individuals who maintain bank accounts in several cities.

c. Time Deposits

A savings account is a type of time deposit. Time deposits may or may not be readily available to a customer. For example, some time deposits are subject to a 30-day notice of withdrawal.

5. Name, Address and Taxpayer Identification Number of the Purchaser or Presenter of Each Certificate of Deposit

Certificates of deposit are funds deposited with the bank for a definite period of time, usually ninety days or longer. They draw a higher rate of interest than ordinary savings accounts.

III. Other Financial Records Which May be Useful in the Investigation

A. Safe-Deposit Boxes

When banks rent safe-deposit boxes they are renting private vault space to customers. Because state laws differ, the nature of the relationship between each bank and its customers will vary.

Banks do not keep records of the contents of their customers' safe deposit boxes. Nor do bank employees generally know what is

contained inside these boxes. The records of the rental contract, however, will identify the renter, the person or persons who have access to the box, the signatures of the person or persons with access to the box and the dates of the original agreements and later renewals. Some contracts will also contain the name of the initiating bank officer.

Records which show access to safe-deposit boxes vary from bank to bank. They usually contain the signatures of the persons entering the boxes and the dates and times of entry. These entry records are normally filed in box number order. The frequency and dates of entries into the boxes can be important because they may correspond to times and dates of bank deposits or withdrawals or to the purchase or sale of securities, property or contraband.

B. Credit Card Records

Banks are conducting an increasing volume of business in credit cards. Most banks offering credit card plans are affiliated with a national credit card system. Bank credit card plans permit the cardholder to charge purchases at stores, restaurants and other businesses. The bank then bills the cardholder monthly for any purchases. Under most plans, the cardholder can elect to pay the entire balance in one payment or in installments under arrangements similar to an installment loan account.

Charge plan records contain the cardholder's credit card application and the bank's copies of the cardholder's monthly

statements. Some banks also retain copies of each customer's receipt.

The monthly statements and/or individual charge documents listing the stores where the cardholder has made purchases can furnish valuable leads to the customer's spending habits and his location at different points in time.

CHAPTER 5

PROSECUTION THEORY AND PRACTICE IN BANK SECRECY ACT CASES

Introduction

This chapter is intended to provide prosecutors and investigators with some helpful tools in utilizing the provisions of Titles 18, 21, 26 and 31 of the United States Code which relate to acts of illegal money laundering and currency transportation. Included in this chapter are both a discussion of the elements of the offenses involved and the case law interpreting the statutes. Legal issues relating to various techniques of investigation, such as joint task forces and undercover operations, will also be discussed. 159/

159/ These chapters will not cover in detail issues dealing with 26 U.S.C. §7201 et seq. (tax), 18 U.S.C. §1961 et seq. (RICO), 21 U.S.C. §848 (CCE) or 21 U.S.C. §881 (civil forfeitures), as there are numerous publications available on these statutes and their operation. This chapter deals primarily with "new" approaches involving the use of Title 31 of the United States Code and related statutes. It should be remembered, however, that all of these statutes interrelate, and that a comprehensive investigation and prosecution of a large-scale criminal enterprise involves utilization of all or most of these provisions.

I. Statutory Violations Utilized in Illegal Money Laundering Investigations

A. Pertinent Statutory Provisions

The following is a list of the primary offenses utilized in Title 31 investigations and prosecutions:

(1) Title 18 offenses

a. Section 1001 (false statement and concealment of material facts);

b. Section 1005 (false bank entries);

c. Section 1007 (false statements to the FDIC);

d. Section 1014 (fraudulent loan applications);

e. Sections 1341 and 1343 (mail and wire fraud);

f. Section 1952 (ITAR);

g. Section 1961 et seq. (RICO); and

h. Section 371 (conspiracy to commit a specific violation or to defraud the United States).

(2) Title 26 offenses (related to the obtaining of income from narcotics sales or other sources and the failure to report or to falsely report this income).

(3) Title 21 offenses (related to the importation, manufacture, sale and possession of narcotics with intent to distribute; conspiracy; and continuing criminal enterprise).

(4) Title 31 offenses [160]

a. Section 5313(a) (currency transaction reports at financial institutions involving cash or equivalent over $10,000);

b. Section 5316 (currency or monetary instrument reports at the United States border involving the transportation of cash or its equivalent over $5,000);

c. Section 5321 (foreign bank account reports);

d. Section 5322 (penalties); and

e. 31 C.F.R. Part 103 (regulations concerning currency reporting except §§103.31-103.37).

(5) Title 12 offenses (related to the recordkeeping requirements pertaining to persons having interests in foreign financial accounts and to financial institutions in Sections 1829b and 1951 et seq. and regulations in 31 C.F.R. §§103.31-103.37).

The above statutes and regulations are those most frequently involved in narcotics-financial cases. Perjury, obstruction of justice, bribery, extortion and other offenses, may also be involved. [161]

160/ These Title 31 offenses will not be discussed in depth in this chapter as they have already been discussed in detail in Chapters 1 and 2 of this monograph.

161/ While this chapter does not deal directly with the financial aspects of cases that involve federal violations which are not related to narcotics violations or with any state or local

(FOOTNOTE CONTINUED)

The following subparts 1 through 5 will discuss in greater detail the statutes which are commonly utilized in connection with Bank Secrecy Act financial investigations.

1. Section 1001 of Title 18 of the United States Code

An individual may sometimes engage in a pattern of cash transactions at a financial institution in amounts under $10,000, although the aggregate sum of the transactions over a short period of time may easily exceed that amount. If this has been done in an attempt to evade the reporting requirements of the Bank Secrecy Act, 162/ then violations of both Title 31 and Title 18 of the United States Code may have occurred. This is because by concealing material facts from a federal agency, in this case the Internal Revenue Service, the individual also violates Section 1001 163/ of Title 18 of the United States

(FOOTNOTE CONTINUED)
offenses, it should be clear that the use of the Title 12, 18, 26, and 31 offenses described herein can be used in conjunction with the investigation and prosecution of activities such as illegal gambling, arson, bribery, extortion, stolen property, weapons violations and labor violations in addition to legally generated money laundering schemes devised to evade paying taxes or to distort net worth in divorce proceedings.

162/ See United States v. Thompson, 603 F.2d 1200 (5th Cir. 1979).

163/ 18 U.S.C. §1001 provides:

Statements or entries generally.

Whoever, in any matter within the juris-
(FOOTNOTE CONTINUED)

Code. 164/ Thus, Section 1001 can be used successfully in cases involving the filing of a false CTR or CMIR or in connection with an actual scheme to avoid the filing of the forms. 165/

Although challenges have been made to indictments charging violations of both Title 31 and Section 1001 of Title 18 of the United States Code, they have not succeeded. Courts have held that Congress did not intend to preempt the field by enacting Title 31 and that the use of Section 1001 of Title 18 and Title 31 is not multiplicitous as each offense requires different elements of proof. 166/

Two basic questions arise in connection with the prosecution of Bank Secrecy Act violations under Section 1001 of Title 18.

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diction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

164/ In United States v. Tobon-Builes, 706 F.2d 1092 (11th Cir. 1983), the court upheld a prosecution under 18 U.S.C. §1001 where the defendants purposely engaged in cash transactions under $10,000 to evade the Title 31 reporting requirements.

165/ An untested theory in this area presents itself when a money launderer is depositing money on behalf of an unknown narcotics dealer and utilizes false statements in the report. As the false report on behalf of the unknown narcotics dealer is arguably not a report of the money launderer as required by law, a constructive failure to file may be chargeable.

166/ See United States v. Anderez, 661 F.2d 404 (5th Cir.), rehearing denied, 666 F.2d 592 (1981), and United States v. Fitzgibbon, 576 F.2d 279 (10th Cir.), cert. denied, 439 U.S. 910 (1978).

The first is whether the Title 31 reporting forms are a matter within the jurisdiction of an agency of the United States (viz., the Internal Revenue Service as to a CTR, Form 4789, and the United States Customs Service as to a CMIR, Form 4790). Because CTRs and CMIRs are required to be filed with the IRS and the Customs Service, respectively, these reports by definition are covered by the statute.

The second question which arises is whether the failure to file or the false filing of CTRs and CMIRs is material. The issue of materiality is a matter of law. It should be pointed out to the courts that the federal agencies with delegated responsibility in this area have been mandated by Congress to collect this information based upon Congress' findings that such reports or records have a high degree of usefulness in criminal, tax or regulatory investigations or proceedings. 167/

The question of materiality should not be an issue as the court should be asked to judicially notice Congress' findings. If the court is reluctant to take judicial notice, then it should be argued that a statement is material if it has a natural tendency to influence or is capable of influencing others. 168/

167/ See 31 U.S.C. §5311.

168/ See, e.g., United States v. May, 625 F.2d 186 (8th Cir. 1980). Particularly significant in cases dealing with money laundering is the fact that the mere potential for harm can establish materiality. United States v. Jones, 464 F.2d 1118, 1123 (8th Cir. 1972), cert. denied, 409 U.S. 1111 (1973). In United States v. Goldfine, 538 F.2d 815 (9th Cir. 1976), the court found that a false statement to a DEA official was material even when the official knew of its falsity.

Thus, it is posited that the government can prosecute persons having the illegal intent to launder money even when the money being laundered belongs to the government (such as where undercover agents pose as persons wanting money laundered). The fact that no harm occurs to the government is not significant if there exists a potential for harm.

In addition, courts have held that the making of intentionally false statements to investigative agencies may cause more of a "perversion" of an authorized function than a false statement about pecuniary claims. 169/ Thus, false statements and concealment calculated to defeat the purpose of the currency reporting requirements would appear to be covered by Section 1001 under almost every circumstance where cash taken to a bank is channeled through a secondary financial institution (which by definition can include an individual), or where cash is given to undercover agents by other persons to be laundered. Section 1001 of Title 18 of the United States Code is "couched in very broad terms to encompass the variety of deceptive practices which ingenious individuals might perpetrate upon an increasingly complex government." 170/

169/ See United States v. Lambert, 501 F.2d 943, 945 (5th Cir. 1974).

170/ United States v. Massey, 550 F.2d 300, 305 (5th Cir. 1977). In Massey there was no distinction made between the oral and written statements of the defendants to place them under the proscription of 18 U.S.C. §1001. Various means used in committing a Section 1001 offense may be charged in one count without duplicity. Travis v. United States, 247 F.2d 130 (10th Cir. 1957).

The use of a fraudulent statement for purposes of concealment is no less material than the use of a fraudulent statement to influence a governmental decision in the first instance. 171/

Even though there may be no false statements, a violation of Section 1001 of Title 18 occurs whenever there is "concealment or covering up by trick or device a material fact." 172/ Where false representations and concealment of facts are essential to the success of a plan to defraud, proof of all earlier steps and participation in the transactions are proper under both Section 1001 of Title 18 and an aiding and abetting theory. 173/

Some cases have held that where a defendant has falsely replied "no" to a question of a government agent or on a government form, Section 1001 of Title 18 does not apply because of the constitutional protection against self-incrimination. This is known as the "exculpatory no" defense doctrine. 174/ The "excul-

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171/ United States v. Voorhees, 593 F.2d 346 (8th Cir.), cert. denied, 441 U.S. 936 (1979).

172/ Harrison v. United States, 279 F.2d 19, 22 (5th Cir. 1960). See also United States v. Culoso, 461 F. Supp. 128, 132 (S.D.N.Y. 1978), where the district court explained that:

> The structure of 18 U.S.C. §1001 makes it plain that participation in a scheme to conceal material facts from the government, quite apart from the affirmative misstatement of facts, is a crime. The text of §1001 specifically provides for prosecution of such schemes in a clause separate from the clause which describes the offense of affirmative false statements.

173/ United States v. Lozano, 511 F.2d 1 (7th Cir. 1974), cert. denied, 423 U.S. 850 (1975). See infra pp. 121-123.

174/ For a discussion of the "exculpatory no" defense see United
(FOOTNOTE CONTINUED)

patory no" defense does not apply when the defendant answers negatively in an attempt to mislead the government. 175/

2. Mail Fraud, Wire Fraud and RICO Violations

The mail fraud statute is found at Section 1341 of Title 18 of the United States Code. That section provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of,

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(FOOTNOTE CONTINUED)
States v. Grotke, 702 F.2d 49 (2nd Cir. 1983); United States v. Hajecate, 683 F.2d 894 (5th Cir. 1982), cert. denied, __ U.S. __, 103 S.Ct. 2086 (1983); United States v. Schnaiderman, 568 F.2d 1208 (5th Cir. 1978). See also United States v. Carrier, 654 F.2d 559 (9th Cir. 1981) (Defendant entered the United States and answered "no" to the question of whether he was carrying more than $5,000 into the United States; the court held that 18 U.S.C. §1001 applied despite Schnaiderman); United States v. Satterfield, 644 F.2d 1092 (5th Cir. 1981) (court upheld 18 U.S.C. §1001 and 31 U.S.C. §§1101 and 1058 convictions where the defendant came into the United States and stated "no" to the question on the 4790 form concerning transporting over $5,000).

175/ In United States v. Krause, 507 F.2d 113 (5th Cir. 1975), the defendant was convicted under 18 U.S.C. §1001 where he was questioned by an investigator and gave false statements in response in order to impair the functions of the NLRB. There appears to be no conflict between Krause and cases dealing with the "exculpatory no" defense because in Krause the defendant took "affirmative action." As Massey, supra, and United States v. UCO Oil Co., 546 F.2d 833 (9th Cir. 1976), cert. denied, 430 U.S. 966 (1977), point out, the proscribed conduct involved here is the impairment of a governmental function through concealment and falsification of material facts. Thus, the degree of aggressive affirmative conduct should not be the deciding factor. United States v. Schnaiderman, 568 F.2d 1208 (5th Cir. 1978), a leading "exculpatory no" case, should not be read in a way that ignores that case's advice about what would be an 18 U.S.C. §1001 violation. There should be little question that where the defendants know the appropriate law and have no intention of complying, that they intend to subvert a valid official function.

> loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

The wire fraud statute, which is located at Section 1343 of Title 18 of the Code, states:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

Although there have been several prosecutions charging mail or wire fraud where the "fraud" perpetrated is against the United States and involves currency transactions, as of yet no cases have addressed the issue of whether mail and wire fraud violations can be charged in Title 31 situations. Arguably, a mailing or wiring to further a Title 31 "fraud" would provide the requisite jurisdictional basis for such a prosecution.

Nor have any cases addressed the question of whether mail

frauds or wire frauds which are based upon Title 31-type frauds can be charged as predicate crimes to establish a pattern of racketeering under the Racketeer Influenced and Corrupt Organizations (RICO) statutes. 176/ While Title 31 currency violations are not included in the definition of racketeering activity set forth in Section 1961 of Title 18 of the United States Code, Section 1341 mail fraud and Section 1343 wire fraud offenses are specifically included. It is therefore arguable that mail or wire fraud based upon a Title 31 underlying violation can be charged as a RICO predicate, because the crime being prosecuted is not the Title 31 violation but the use of the mail or wire to further the fraud against the United States government. 177/

3. Section 371 of Title 18 of the United States Code

Section 371 of Title 18 of the United States Code makes it a criminal offense to conspire to commit an offense against or to defraud the United States. 178/ To prove a violation of Section

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176/ See 18 U.S.C. §1961 et seq.

177/ See United States v. Klein, 247 F.2d 908 (2d Cir. 1957), cert. denied, 355 U.S. 924 (1958).

178/ 18 U.S.C. §371 provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and

(FOOTNOTE CONTINUED)

371, the evidence must show that: (1) two or more persons conspired or agreed either to commit an offense against the United States or to defraud the United States, and that (2) at least one of the conspirators committed an overt act to effect the object of the conspiracy. In the context of a Title 31 investigation, a violation of Section 371 of Title 18 would occur, for example, if the target of the investigation agreed with at least one other person to effect a scheme to avoid filing CTRs or CMIRs and an affirmative act was taken to implement the scheme.

Because the crux of a conspiracy under Section 371 is the agreement to accomplish an illegal objective coupled with one or more overt acts in furtherance of the illegal purpose, 179/ the successful completion of the underlying crime, here the Title 31 violation, would be irrelevant to the existence of the conspiracy. 180/ As the court stated in United States v. Dixon, 181/

(FOOTNOTE CONTINUED)

> one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

179/ United States v. Kaiser, 660 F.2d 724 (9th Cir. 1981), cert. denied, 457 U.S. 1121 (1982).

180/ United States v. Knowles, 572 F.2d 267, 269 (10th Cir. 1978).

181/ 547 F.2d 1079, 1081 (9th Cir. 1976).

a conspiracy "does not require 'mission accomplished,' only 'mission attempted.'"

a. Undercover Operatives Involved in Conspiracy

The undercover agent's involvement in a conspiracy will not affect the genuineness of the conspiracy if a valid conspiracy otherwise exists. 182/ For a valid conspiracy to exist, at least two persons who are not government agents must enter the agreement to commit the unlawful offense. In United States v. Rose, 183/ the defendants, who were convicted of transporting stolen goods in interstate commerce in violation of Section 2314 of Title 18 of the United States Code, unwittingly engaged government agents to perform the actual theft and transportation. The court found it irrelevant that "their plan was doomed because they...chose as their instrumentalities agents of the government." 184/ In United States v. Rosner, 185/ the court rejected the defendants' argument that their criminal conduct (conspiracy, obstruction of justice and bribery) would have been impossible had not an undercover agent supplied an indispensable means, otherwise unavailable, for the commission of the crime. The court noted that the activity

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182/ United States v. Martino, 648 F.2d 367, 405 (5th Cir. 1981), cert. denied, 456 U.S. 943 (1982).

183/ 590 F.2d 232 (7th Cir.), cert. denied, 442 U.S. 929 (1978).

184/ Id. at 235.

185/ 485 F.2d 1213, 1229 (2d Cir. 1973), cert. denied, 417 U.S. 950 (1974).

of the undercover agent in Rosner - providing witness statements and grand jury minutes to the defendants - "was not different in kind from the everyday activity of the undercover agent in narcotic cases who lacks criminal intent because his intention is to expose rather than to commit crime." 186/

b. The Klein Conspiracy Theory

There may be situations where it is appropriate to charge a conspiracy to defraud the United States where the facts indicate that the defendants were trying to preclude the Internal Revenue Service or the United States Customs Service from knowing of currency movements, exchanges or deposits in order to disrupt the IRS's or the United States Customs Service's ability to collect information regarding cash transactions and to conceal material facts. 187/ Such a theory is similar to "Klein-type" conspiracy tax cases. 188/ The basis in the Bank Secrecy Act for such use is found in Section 5311 of Title 31 of the United States Code and Section 103.21 of Title 31 of the Code of Federal

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186/ Id. at 1223.

187/ In United States v. Hajecate, 683 F.2d 894 (5th Cir. 1982), cert. denied, ___U.S.___, 103 S.Ct. 2086 (1983), the court found that a conspiracy to disrupt the Customs Service's functions under Title 31 regarding foreign currency transportation was a valid charge. The Eleventh Circuit, in United States v. Tobon-Builes, supra, found that the IRS had a similar function regarding currency transactions at financial institutions.

188/ See United States v. Klein, 247 F.2d 908 (2d Cir. 1957), cert. denied, 355 U.S. 924 (1958).

Regulations pertaining to the filing of 4789 and 4790 forms. Simply stated, a conspiracy to impair either the IRS's or the Customs Service's ability to keep track of currency movements can constitute a conspiracy to defraud, 189/ regardless of whether there is proof of monetary loss. 190/ There are numerous analogous cases wherein the IRS and other government agencies (including Congress) were defrauded through similar means.

Factual situations may arise wherein defendants will conspire to fail to file 4789 or 4790 forms, or to file them falsely. Whether these crimes can be prosecuted as felonies or as misdemeanors under Section 371 depends upon the underlying Title 31 offense. If the underlying Title 31 offense is a misdemeanor, the conspiracy must be prosecuted as a misdemeanor. If the underlying Title 31 offense is a felony, then the Section 371 conspiracy can be prosecuted as a felony. 191/ Under

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189/ See United States v. Hajecate, supra, where the court found that conspiring to defraud the Customs Service was a proper charge. In United States v. Percival, No. 82-20026 (C.D. Ill. Feb. 7, 1983), the district court in an unpublished opinion held that 18 U.S.C. §371 was applicable to a "Klein type" conspiracy to evade the Title 31 requirements in a manner akin to United States v. Tobon-Builes, 706 F.2d 1092 (11th Cir. 1983).

190/ See United States v. Peltz, 433 F.2d 48 (2d Cir. 1970), cert. denied, 401 U.S. 955 (1971).

191/ A conspiracy to defraud is a felony because the underlying offenses, the frauds, are felonies and the fraudulent scheme is felonious. See United States v. Jacobs, 475 F.2d 270 (2d Cir.), cert. denied, 414 U.S. 821 (1973) and United States v. Del Toro, 513 F.2d 656 (2d Cir.), cert. denied, 423 U.S. 826 (1975), wherein the defendants were sentenced for felony convictions of 18 U.S.C. §371 even though the acts making up the fraud conspiracy were not separately proscribed under the United States
(FOOTNOTE CONTINUED)

Title 31, a felony offense can only be charged if the offense is part of "a pattern of illegal acts" involving Title 31 violations or there is a violation of another federal offense. 192/ Thus, it is only under these two circumstances that Section 371 would allow a felony conspiracy for Bank Secrecy Act violations to be charged. To avoid a valid claim that the government is simply "bootstrapping" a pattern of activity into a felony conspiracy, care should be exercised in identifying the underlying Title 31 offenses.

c. Scheme to Defraud Theory

The law is clear that a "scheme to defraud" under Section 371 of Title 18 of the United States Code covers all types of conspiracies to interfere with or obstruct a lawful governmental function by deceit, craft, trickery or at least by means that are dishonest. 193/ Moreover, a conspiracy to defraud the United States need not charge acts that are crimes themselves so long as the purpose of the conspiracy is to impair or obstruct a govern-

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(FOOTNOTE CONTINUED)
Code, and involved attempted impairment and obstruction of governmental functions. The court stated in Jacobs that the crime involved a requirement that "legitimate official action and purpose shall be defeated." 475 F.2d at 283.

192/ 31 U.S.C. §5322(b). See also p. 51 supra.

193/ Hammerschmidt v. United States, 265 U.S. 182, 188 (1924); United States v. Sweig, 316 F. Supp. 1148 (S.D.N.Y. 1970).

mental function. 194/ An indictment therefore need only list those means used to obstruct a lawful governmental function. 195/ In Title 31 cases, the function being disrupted is the collection of information from currency transactions for use in IRS and Customs Service investigations. 196/

Defendants may be charged with both a conspiracy to defraud under Section 371 and concealment of material facts under Section 1001 of Title 18 of the Code. The fact that a defendant may have committed both offenses through the commission of the same acts does not preclude the availability of either charge to the prosecution. 197/

194/ See United States v. Turkish, 458 F. Supp. 874 (S.D.N.Y. 1978), affirmed, 623 F.2d 769 (2d Cir. 1980).

195/ There are many ways in which a conspiracy to defraud can be committed. In United States v. Enstam, 622 F.2d 857 (5th Cir. 1980), cert. denied, 450 U.S. 192 (1981), the purpose of the conspiracy was to defraud the IRS by laundering money between the United States and the Cayman Islands. In United States v. Johnson, 383 U.S. 169 (1966), the defendant attempted to corruptly influence government agencies to make decisions to benefit his business associates by way of dropping criminal charges. In United States v. Wright, 588 F.2d 31 (2d Cir. 1978), cert. denied, 440 U.S. 917 (1979), the defendant conspired to defraud the United States by depriving the government of the honest distribution of federal education funds. In all these cases the fraud was in relation to a government function and not to a separate substantive offense. See also United States v. Klein, 247 F.2d 908 (2d Cir. 1957), cert. denied, 355 U.S. 924 (1958).

196/ See 31 U.S.C. §5311 and 31 C.F.R. §103.21.

197/ Dennis v. United States, 384 U.S. 855 (1966). The court in United States v. Rosenblatt, 554 F.2d 36 (2d Cir. 1977), stated: "These two clauses [that is, conspiracy to commit an offense and to defraud] overlap when the object of a conspiracy is a fraud on the United States that also violates a specific federal statute." Id. at 40.

4. Reporting and Recordkeeping Provisions of Title 31 and Title 12 of the United States Code and Title 31 of the Code of Federal Regulations

The Bank Secrecy Act is found at Section 5311 through 5322 of Title 31 of the United States Code and at Sections 1829b and 1951 through 1959 of Title 12 of the United States Code. All the regulations promulgated pursuant to the Bank Secrecy Act are located in Part 103 of Title 31 of the Code of Federal Regulations (hereinafter the Regulations). The records required to be maintained by Title 12 of the Code are set forth in Sections 103.31 through 103.37 of Title 31 of the Regulations. The reports and records required to be maintained by Title 31 of the Code are set forth in the remaining sections of Part 103 of the Regulations. It is important to note the difference between the two sets of recordkeeping requirements, as the penalties for violations of the regulations promulgated pursuant to Title 12 of the United States Code are different than those for violations of the regulations promulgated pursuant to Title 31, notwithstanding the fact that all of the regulations are contained in Part 103 of Title 31 of the Regulations.

Misdemeanor violations of the recordkeeping provisions of Sections 1829b and 1951 through 1959 of Title 12 of the Code and Sections 103.31 through 103.37 of Title 31 of the Regulations, premised on the intentional failure to keep the required records, are found at Section 1956 of Title 12 of the Code and Section 103.47(a) of Title 31 of the Regulations. These provisions carry a maximum penalty of one year's imprisonment and a $1,000 fine.

Felony violations for intentionally not keeping records in furtherance of another federal felony are contained in Section 1957 of Title 12 of the Code and Section 103.49(a) of Title 31 of the Regulations. These sections carry a maximum penalty of five years in jail and a fine of $10,000. Thus, if the proper financial records are not kept regarding account information, for instance, the above sections apply, and not Section 5322(b) of Title 31 of the Code, where the felony carries a $500,000 fine.

Certain recordkeeping-type provisions, however, are enforceable under Section 5322(a) and (b). Both subsections make it clear that "any provision" of Section 5311 through 5321 of Title 31 of the Code and of Part 103 of Title 31 of the Regulations (except for Sections 103.31 through 103.37) is covered by them. This means, for example, that if there is a criminal failure to comply with Section 103.22(b)-(f) of Title 31 of the Regulations, regarding the "exemption" procedures, there can be a prosecution under Section 5322(a) or (b) of Title 31 of the Code. Similarly, prosecution for a criminal failure to comply with Section 103.26 of Title 31 of the Regulations regarding identification required concerning reports filed under Section 5313(a) of Title 31 of the Code (viz., the 4789 form) can also be prosecuted under Section 5322 (a) or (b).

Thus, as a general rule, anything having to do with Title 31 reports (Forms 4789 and 4790), either directly or indirectly, can be prosecuted under Section 5322(a) or (b) of Title 31, or Section 1001 of Title 18 of the Code for false statements and concealment. Recordkeeping offenses would normally be charged

only in circumstances where no other chargeable offenses are available, or as an alternative fallback position to allow for flexibility in plea negotiations with corporate or other cooperating defendants.

II. Other Title 31 Related Issues

A. Prosecutions of Financial Institutions for Violations of Section 5313 of Title 31 of the United States Code

In United States v. Beusch, 198/ the court sustained the conviction of a financial institution for violations of Title 31 of the United States Code based upon the actions of its employee-agent which involved the "laundering" of money by the employee for a third party. The company had been convicted of numerous violations of Section 1081 of Title 31 of the Code [the predecessor statute to Section 5313(a) of Title 31] and argued on appeal that it should not be held responsible for acts committed by its agents which, while done within the agents' authority, were committed in a manner contrary to the corporation's actual instructions and stated policy. The appellate court found that such a charge to the jury was appropriate in light of other instructions that spoke about the agents' authority, benefit to the corporation and other matters. The court also found that it was a question for the jury as to whether a corporation was to be

198/ 596 F.2d 871 (9th Cir. 1979).

held liable for acts done contrary to its expressed policies. However, the court explained that, "Merely stating or publishing such instructions and policies without diligently enforcing them is not enough to place the acts of an employee who violates them outside the scope of his employment." 199/ In addition, a corporation may be prosecuted for violations of Section 1001 of Title 18 of the Code 200/ and the conspiracy provision of Title 18. 201/ Generally, the law is that a corporation is criminally

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199/ Id. at 878. In United States v. Cincotta, 689 F.2d 238 (1st Cir.), cert. denied, __U.S.__, 103 S.Ct 347 (1982), a case that followed Beusch, the court found that the corporation in question was properly convicted because of the acts of an agent. In Cincotta, the corporation profited from the flow of money passing through it, even though this was occasioned by the bribery scheme of its employees. Cincotta also discusses the "conscious avoidance of knowledge." See also United States v. Miller, 676 F.2d 359 (9th Cir. 1982), where the court upheld a corporation's conviction based upon the acts of its officers which were imputed to the corporation. This case followed the holding in Beusch with little comment. In addition, the Seventh Circuit has ruled that if the president, vice president or director of a corporation has knowledge of a fact, that knowledge is also imputed to the corporation. In re Pubs, Inc., 618 F.2d 432 (7th Cir. 1980).

200/ See United States v. Lange, 528 F.2d 1280 (5th Cir. 1976).

201/ United States v. Griffin, 401 F. Supp. 1222 (S.D. Ind. 1975), affirmed, 541 F.2d 284 (7th Cir. 1976) (per curiam). The court in Griffin stated that:

> There is an officer or agent of a corporation with broad express authority, generally holding a position of some responsibility, who performs a criminal act related to the corporate principal's business. Under such circumstances the courts have held that so long as the criminal act is directly related to the performance of the duties which the officer or agent has the broad authority to perform, the corporate principal is liable for the criminal act, and must be deemed to have 'authorized' the criminal act.

(FOOTNOTE CONTINUED)

liable for the acts of its employees performed within the scope of their employment and performed for the benefit of the corporation. 202/

Finally, when the government must establish the corporation's knowledge of the offense, the government can aggregate facts known by individual employees to establish the corporate state of mind. 203/

(FOOTNOTE CONTINUED)

401 F. Supp. at 1224, quoting Continental Baking Co. v. United States, 281 F.2d 137 (6th Cir. 1960). See also United States v. Gibson Products Co., Inc., 426 F. Supp. 768 (S.D. Tex. 1976), wherein the court found the corporation guilty despite the fact that its agent received a bribe. The agent's actions were in the scope of his employment, because the underlying act when considered apart from any illegality was his job. The major beneficiary of the acts involved was the corporation despite the agent's personal benefit.

202/ See, e.g., United States v. Carter, 311 F.2d 934, 942 (6th Cir.), cert. denied, 373 U.S. 915 (1963); United States v. Chicago Express, Inc., 273 F.2d 751, 753 (7th Cir. 1960). Criminal conduct by even the lowest ranking employee, acting without any authorization, will bind the corporation if the misdeeds are committed during the employee's course of employment or within the scope of the employee's apparent authority. See, e.g., Standard Oil Co. v. United States, 307 F.2d 120, 127 (5th Cir. 1962); United States v. George F. Fish, Inc., 154 F.2d 798 (2d Cir.), cert. denied, 328 U.S. 869 (1946). Actions by employees that were not only unknown to corporate officers and directors but in defiance of specific instructions will still bring liability to the corporation. See, e.g., United States v. Cadillac Overall Supply Co., 568 F.2d 1078, 1090 (5th Cir.), cert. denied, 437 U.S. 903 (1978); United States v. Hilton Hotel Corp., 467 F.2d 1000 (9th Cir. 1972), cert. denied, 409 U.S. 1125 (1973); United States v. Armour & Co., 168 F.2d 342 (3d Cir. 1948). Having a system to prevent crimes by employees is not a recognized defense to a criminal charge against the corporation. See St. Johnsbury Trucking Co. v. United States, 220 F.2d 393, 398 (1st Cir. 1955) (concurring opinion).

203/ See, e.g., United States v. Sawyer Transport, Inc., 337 F. Supp. 29, 30-31 (D. Minn. 1971), affirmed, 463 F.2d 175 (8th Cir.
(FOOTNOTE CONTINUED)

B. Aiding and Abetting Theory and Joinder and Severance Issues in a Joint Narcotics-Currency Laundering Indictment

The government may wish to charge defendants with aiding and abetting a narcotics importation or distribution scheme by the acts of "laundering" the narcotics-generated cash in violation of Sections 5311 through 5322 of Title 31 of the United States Code. The government's theory in these instances should be that the defendants can be convicted of the actual importation or distribution of narcotics if they in any way aided and abetted the importation or distribution. The government's burden is to show that the defendant's laundering scheme in fact was such an aid, and that the movement of money was interconnected and interdependent with the delivery of controlled substances. The government should establish that the currency involved resulted from the sale of narcotics in the United States and that the cash was removed to a foreign country or placed in a financial institution for the benefit of a narcotics trafficker.

The scheme - to bring narcotics into the United States, distribute them in the United States and take the proceeds of the sales out of the country - should be highlighted. The "laundering" activity thereby becomes central to the success of the entire operation.

If joinder or severance issues are raised, the government

(FOOTNOTE CONTINUED)
1972); Inland Freight Lines v. United States, 191 F.2d 313, 315 (10th Cir. 1951).

should argue, based upon the foregoing, that the indictment charges a single scheme in the various counts to import narcotics and to launder the money derived therefrom, and that the case consequently should be tried upon all counts in one trial to avoid the wastefulness of two trials. 204/

To refute the defendants' claim that they were legally exchanging currency and should have been exempt from Title 31 regulations, the government should try to show that the defendants were illegally "laundering" money by offering testimony of

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204/ The evidence of one type of crime would be admissible at the trial of the other crime because of the "similar act" doctrine. See United States v. Green, 634 F.2d 222, 223 (5th Cir. 1981).

Not only would separate trials not preclude the admission of similar act evidence under the standard of Green, supra, and United States v. Beecham, 582 F.2d 898, 911 (5th Cir. 1978), cert. denied, 440 U.S. 920 (1979), but the doctrine of "res gestae" allows for the admissibility of all evidence in one forum. Regarding this subject the Fifth Circuit stated in United States v. Hughes, 441 F.2d 12 (5th Cir.), cert. denied, 404 U.S. 849 (1971): "Evidence of another crime is admissible where the other offense is logically connected with that charged, or so closely and inextricably mixed up with the history of the guilty act itself as to form a part of the plan or system of criminal action." Id. at 20 (citations omitted).

Where two offenses are so blended or connected that proof of one incidentally involves the other or explains the circumstances of the other, extra-indictment criminal conduct is likewise admissible. United States v. Rivera, 437 F.2d 879, 880 (7th Cir.), cert. denied, 402 U.S. 947 (1971). As stated in United States v. Turner, 423 F.2d 481, 483 (7th Cir.), cert. denied, 398 U.S. 967 (1970): "To view the...sale in a vacuum would result... in only a partial picture of a continuing scheme of illicit transactions." See also United States v. Baker, 419 F.2d 83, 86 (2d Cir. 1969), cert. denied, 397 U.S. 976 (1970) (evidence which is relevant to intent is admissible despite the fact that it may show something about the defendant's character).

the underlying narcotics violations. 205/ The government should suggest that evidence of the defendant's motive is very relevant as to the issue of intent and should be presented in the case in chief.

205/ In the area of proof of intent through similar act evidence, "intent in virtually all offenses is material and is therefore a part of the case to be proved in chief; and...unless the precise defense be disclosed in advance, the prosecution may in fairness assume that intent may come into issue." 2 Wigmore, Evidence, Sec. 307, at 207 (3rd Ed. 1940). See United States v. Juarez, 561 F.2d 65 (7th Cir. 1977); United States v. Marine, 413 F.2d 214, 216 (7th Cir. 1969), cert. denied, 396 U.S. 1001 (1970).

In United States v. Weidman, 572 F.2d 1199 (7th Cir.), cert. denied, 439 U.S. 821 (1978), a mail fraud prosecution, the government was permitted to prove prior similar fraud schemes even though the defendant had not sharpened the issue by claiming accident or mistake. The court held that "evidence of prior similar acts is 'particularly appropriate where, as with mail fraud, criminal intent is an essential element of the crime charged.'" Id. at 1202. The court also noted that the similar act testimony also furnished evidence of a preexisting design or scheme, and added that "the use of prior similar acts for this purpose is appropriate whenever the accused denies the very doing of the act charged." Id. See 2 Wigmore, Evidence, Sec. 304, at 202, (3rd Ed. 1940).

In United States v. Fierson, 419 F.2d 1020 (7th Cir. 1969), the court stated that to be admissible, other criminal acts must be similar and close enough in time to be relevant. In addition, the court explained that:

> [I]ntent must be an element of the offense to justify the admission of this type of evidence. Prior criminal acts cannot be proved to show intent when intent is not an element of the offense charged. Equally obvious is the fact that when intent is a material element of the offense, it is part of the prosecuting attorney's case to be proved in chief lest he find himself out of court at the close of his evidence.

Id. at 1022-1023 (citations omitted).

III. Discussion of Money Laundering Operations

"Laundering" involves the hiding of the "paper trail" that connects income or money with a person in order for that person to evade the payment of taxes, avoid prosecution for any federal, state or local offense and obviate any forfeiture of his illegally derived income or assets. While a financial investigation may concentrate on the money involved with crime, and particularly the proceeds, the criminal basis for the underlying offense is also of primary concern. By addressing the concept of financial crime, and attacking the finances of a criminal enterprise, the predicate crime (e.g., narcotics, gambling, extortion, illegal tax shelters) can be more effectively handled. A narcotics crime is easier to prosecute if both the distribution and financing are clearly understood. The money can be traced because cash that is generated from the crime is not easily hidden, and the attempt to hide it usually blatantly violates federal statutes, such as currency, tax and conspiracy laws.

A. Foreign Bank Secrecy Acts

Many nations and areas of the world have a legal climate that is optimal for the laundering of "dirty" money. Places such as the Cayman Islands, the Bahamas, the Netherlands Antilles, Panama, Liechtenstein and Switzerland have been used to hide currency and assets because of those nations' strict bank secrecy laws. These laws generally prohibit banks from disclosing any

information about their customers' bank accounts. Because failure to comply with foreign bank secrecy laws may subject the bank and bank personnel to criminal liability abroad, United States investigators have had great difficulty in obtaining access to foreign bank accounts by subpoena or other means. 206/

To a great extent, these laws have made it difficult to learn about the actual operation of "money launderers" in these foreign financial institutions. What is known has been primarily learned by persons infiltrating the organizations that are using these havens. While it is unlikely that all operations are conducted in the same way, many utilize the same basic techniques.

As a rule, cash is moved to a foreign bank secrecy jurisdiction by several methods: physical transportation, wire transfer, cashier's check or through attorneys' or accountants' accounts. This cash is "laundered" and then either returned to the United States or sent elsewhere to purchase assets.

There are as many ways of laundering money as there are people doing it. The money problems for a large illegal narcotics network often outweigh the distribution problems. View the money launderer as the neck of a large funnel. Large volumes of money generated from street sales of drugs come down the funnel to the launderer. He must put the money into some-

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206/ See, e.g., In re Grand Jury Proceedings, United States v. Bank of Nova Scotia, 691 F.2d 1384 (11th Cir. 1982), cert. denied, __U.S.__, 103 S.Ct. 3086 (1983). See also Chapter 1 supra, notes 5-9 and accompanying text.

thing more negotiable than boxes of ten, twenty and fifty dollar bills. He must record where the money is coming from and correctly keep a good set of accounts. Finally, he must find a way to transfer the money back to the foreign narcotics sources safely. The typical launderer may want to exchange small bills for large ones, buy cashier's checks in false names or deposit cash into dummy accounts and then transfer funds by wire to foreign sources. This process is complicated by the fact that the launderer cannot reveal the true source of the money. Narcotics dealers are touchy about their names being revealed in government reports. The launderer also has a problem explaining why taxes have not been paid on domestically generated income or, alternatively, why CMIR forms have not been filed on monies allegedly imported from abroad (which would make the money immediately subject to seizure). Finally, handling bulk cash shipments can be hazardous, as people within the narcotics group or outside of it are always tempted to steal the money. Trying to ship money out of the country in bulk is generally the least desirable alternative but one that seems to be increasing as enforcement of the Title 31 reporting requirements improves.

B. Illustration of a Haven Money-Laundering Process

This section will describe some commonly used methods to launder illegally obtained cash and it will identify the corresponding statutory violations.

Illegally obtained cash may be: (1) taken from the United

States to a foreign haven in an airplane without the filing of a CMIR (a potential 31 U.S.C. §5316 violation), and then deposited in a bank in that haven; or (2) deposited into a bank account in the United States without the filing of a CTR (a potential 31 U.S.C. §5313 violation) and then transferred by wire or mailed in the form of a cashier's check to a foreign bank located in a tax haven (potential 18 U.S.C. §§1341 and 1343 violations); or (3) deposited into a fictitious person's bank account in the United States causing a false CTR to be filed (a potential 18 U.S.C. §1001 violation) and then transferred by wire or mail in the form of a cashier's check to a foreign bank (potential 18 U.S.C. §§1341 and 1343 violations); or (4) given to an attorney or an accountant as a cash transfer without a CTR being filed by the person who is acting as a financial institution (a potential 31 U.S.C. §5313 violation), then deposited into the trust account of the attorney or accountant and then transferred either by wire or mail (potential 18 U.S.C. §§1341 and 1343 violation) or taken by air- plane abroad (a potential 31 U.S.C. §5316 violation). 207/

Once the "dirty" cash is out of the United States, it may be deposited into various foreign bank accounts in fictitious corporate or individual names (the corporation may be Caymanian or from another jurisdiction having strict bank secrecy laws,

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207/ The above techniques would also violate 26 U.S.C. §7201 et seq. for tax violations and 18 U.S.C. §§371 and 1001 for a conspiracy and/or a scheme to defraud the IRS and Customs or to conceal material facts from them regarding the true facts of the transactions.

which will extensively complicate tracing the currency). Once this haven account has been established, the money may be transferred to a bank account in another foreign country, such as Panama, where the transaction will be shielded further by these foreign bank secrecy acts. Finally, the money, whether maintained in the first haven or a second haven account will either (a) be physically transported back into the United States and declared on a CMIR in the name of the false entity involved (a potential 18 U.S.C. §1001 violation), or (b) be disguised as the proceeds of a loan granted to a United States citizen or corporation (who will be the real owner of the dirty money) and wired back or sent back by cashier's check through the mail to the United States recipient (potential 18 U.S.C. §§1341 and 1343 violations), or (c) be transformed into a finder's fee made payable from a fictitious foreign corporation to a person in the United States (again, the real owner) for "services" and wired or mailed to him (potential 18 U.S.C. §§1341 and 1343 violations).

The end result of all this activity is that cash illegally generated in the United States will be effectively hidden from law enforcement agencies so that the money will not be taxed, seized or forfeited, and the launderer will not be caught and prosecuted.

Certain countries, such as Switzerland, will cooperate when the United States can identify Swiss-held bank accounts and other assets as the proceeds of illegal activity, such as narcotics

trafficking (but usually not for tax evasion). 208/ Most laundering, however, is done in countries that absolutely will not assist the United States by means of mutual assistance treaties, executive agreements or letters rogatory.

IV. Discussion of Investigative Techniques in a Narcotics-Financial Case

A. Joint Narcotics-Financial Crime Task Force Concepts and Investigative Techniques

Narcotics trafficking can be dealt a serious blow when the traffickers are deprived of their illegally obtained and often hidden assets. Criminal organizations are more effectively immobilized when the illegal profits or proceeds, the reason for most criminal conduct, are targeted during the investigation and prosecution of the organization's underlying criminal activity.

1. Joint Task Force Concepts

There are many reasons why task forces are particularly well suited for long-term drug investigations. There are also a

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208/ There is a mutual assistance treaty in effect between the United States and Switzerland which has proven to be very helpful. The Office of International Affairs, Criminal Division, United States Department of Justice, can provide assistance in utilizing the provisions of the Swiss Treaty, or any other mutual assistance treaty to which the United States is a party. See also Chapter 1 supra, notes 5-9 and accompanying text.

number of reasons why such task forces are difficult to manage and often are nonproductive. Both issues will be discussed.

a. The Task Force Concept - A Necessary Idea

There are a number of common sense realizations in drug law enforcement today. The first and most obvious is that our national drug problem is getting worse. Almost every indicator shows that illegal drug trafficking is increasing.

Second, even with the added resources of the FBI and the assistance of the Department of Defense, there still are only limited federal resources which can be used to meet this growing national problem. The federal effort only amounts to ten present of the total law enforcement effort in the drug area. Hard choices have to be made as to how to utilize these very limited investigative resources. It makes a great deal of sense in federal/state/local task forces to combine investigative techniques, skills and experience. This selective placing of resources allows for long term investigations of large-scale foreign and domestic drug traffickers. It also permits the blending of tax investigations, currency investigations and investigations of violations of Titles 18 of the United States Code with traditional drug investigations. In the ideal situation, such an investigation would result in the indictment of several defendants for violations of a number of sections of the United States Code.

Although these ideas are simple in thought, they are diffi-

cult in execution. There are, however, many productive ways of conducting an investigation of narcotics-financial crimes. Often, the "better" investigative techniques include disparate methods and combine the strongest elements of several enforcement and prosecutive disciplines. One particular enforcement agency may have more expertise in an area than another, and each component may operate more effectively if utilized primarily in tasks involving its area of expertise. The approaches that can be taken include: (1) the use of the grand jury in the underlying criminal investigation; (2) the use of administrative subpoenas or summonses; (3) the use of "buy-bust" techniques; (4) the use of informants and/or coconspirators as witnesses; (5) the use of civil and criminal forfeitures; (6) forcing compliance with banking regulations; (7) the use of computer resources; (8) the use of undercover investigations (including reverse-undercover operations); and (9) the use of "targeting."

This last approach, "targeting," is actually a concept that makes use of all of the other approaches in order to concentrate on a particular individual, group, corporation or bank that has been identified as a suspected violator. Targeting presumes that there is a valid basis for the initial criminal investigation. This approach can produce the best results and will usually lead to spin-off cases involving defendants that may be even more significant than the investigation's original targets.

b. Beginning the Task Force Investigation

There are several ways to begin investigations of narcotics-financial violations. For instance, a major trafficking organization can be identified and the organization's "financial arm" can be targeted and vigorously pursued. Alternatively, major money movers can be identified and assets traced to their narcotics sources. These people can be prosecuted for their financial crimes and for their assistance to narcotics violators. Law enforcement can begin by looking at either the traffickers or the money movers with the broader intent of indicting the entire organization.

For an investigation to be successful, it is essential that the government obtain information from witnesses who have seen illegal money laundering schemes in operation. This generally means that the government must either obtain the cooperation of a coconspirator, who will testify at trial, or use an informant to provide an entry into the organization for a government undercover agent. Such information may also supply the basis for an application for a search warrant. In addition, undercover "storefront" projects relating to illegal cash activity and its generation are helpful to successfully identifying violations and violators.

c. Reasons to Investigate Narcotics Financing

There are several good reasons to conduct investigations relating to persons who "launder" the spoils of narcotics traffickers or other criminals. First, demonstrating to jurors and the courts that a defendant has profited greatly from the charged criminal acts assists them in assessing the defendant's culpability. Jurors can be better persuaded of a defendant's criminality when the government can show that he has otherwise unexplained ties to large amounts of money or that he has obtained the money from the sale of drugs. Judges are less likely to believe a defense of "mere presence" or that the defendant was just "doing it for a friend" if the government can trace the narcotics money directly to the defendant. More convictions and stiffer sentences can result from using a financial approach at trial and sentencing.

Second, high-level narcotics traffickers are unlikely to be in close proximity to street crime. They are, however, likely to be close to the money derived from such activities. Direct evidence of currency violations from sources such as money couriers or bank employees may help to directly tie the narcotics dealer to the underlying criminal activity.

Third, bankers, lawyers and accountants who are laundering money may be more willing to cooperate with the government when they are caught. These "white collar" criminals often prefer to become government witnesses against those persons providing them with illegally generated cash rather than risk the chance of

going to prison themselves.

d. Investigative Use of the Grand Jury

A grand jury should be convened at the outset of a financial investigation. 209/ During the course of the grand jury investigation, great care should be exercised in the handling of the huge amount of records which will be obtained in connection with the financial aspect of the investigation. In addition, a thorough record should be kept of everything the grand jury has reviewed.

Special agents of the various agencies involved in the investigation should be sworn in as "agents of the grand jury." As agents of the grand jury, they can receive records from subpoenaed parties and maintain custody of them on behalf of the grand jury. Prior to the start of the investigation, authority to issue subpoenas should be obtained from the grand jury. The records subpoenaed and obtained should be presented to the grand jury as soon after receipt as possible.

In investigating Bank Secrecy Act violations, especially investigations of financial institutions, it is extremely helpful to use a bank examiner from the Federal Deposit Insurance Corporation (FDIC), the Federal Reserve or the Comptroller of the Currency both as an investigator and as an expert witness. A bank examiner can be helpful in explaining common banking prac-

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209/ See generally, Narcotic and Dangerous Drug Section monograph, Federal Grand Jury Practice, (published in two volumes, March 1983).

tice and in identifying areas within a bank where laundering may be occurring. The bank examiner should be sworn in as an agent of the grand jury working under the direction of the case agent. It should be made clear to the examiner that he is prohibited from reporting any grand jury-related work to his supervisors, that he must act in accordance with the Right to Financial Privacy Act and that he cannot use information obtained from undisclosed bank examiner audits. To ensure this, a written agreement should be drafted with the bank examiner's agency. In addition, care should be taken not to have a concurrent criminal grand jury investigation and civil audit. If both do occur at the same time, the proceedings should be carefully segregated and a record should be maintained to show that the investigations were in fact kept separate, and that no criminal case information from the grand jury was released to assist the civil case. 210/

e. Other Investigative Aids

The Department of the Treasury's TECS computer 211/ and DEA's NADDIS and EPIC computers can provide invaluable information to obtain leads on violations. It may also prove productive to obtain information about purchases or leases from various companies

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210/ See United States v. Sells Engineering, Inc., __U.S.__, 103 S.Ct. 3133 (1983); United States v. Baggot, __U.S.__, 103 S.Ct. 3164 (1983).

211/ See Chapters 3 and 4, supra, for a discussion of the TECS system.

that manufacture or sell money-counting machines.

Effective prosecutions can combine traditional investigative approaches, such as wiretaps, consensual monitoring of conversations, informants, surveillance, undercover work, immunity and grand jury records collection. Bank documents can be analyzed and the TECS computer searched to determine who is moving large amounts of cash.

2. The Task Force Concept: The Negative Side of Managing Multi-Agency Cases

The largest problem facing any agent or attorney involved in a task force is case management. While each agency brings its own expertise into a task force, it also brings its own biases. Agencies can be very parochial in their approach to investigations. "What is in this case for me?" is often asked. The best investigations usually result from those situations in which agents can concentrate on the investigation rather than on agency politics. Questions of who is running the case and how disputes are to be managed appear next on the problem list. Having a lead case agent decide all major investigation problems is usually a good way to handle situations but may not be acceptable to agency management. It may be helpful to include the attorney who will be prosecuting the case in the decision-making process. Decision by committee is the least effective management method; however, occasional interagency meetings may help facilitate the management of the investigation and resolve major issues. Aggressive law enforcement is important, but so is diplomacy. Good person-

nel and flexible management are essential to success.

B. Legal Issues Involved in the Undercover Investigation of a Scheme to Launder or Transport Currency

Two common legal issues [212/] may arise in undercover operations. These are: (1) the question of "entrapment" with respect to those persons who are asked to illegally launder or transport currency by agents; and (2) the question of "impossibility" in situations where agents are pretending to illegally launder or transport money for persons requesting it.

212/ The discussion which follows is limited to an analysis of the two defenses that are most likely to be employed in these cases. A discussion of all issues which can be anticipated is outside the scope of this monograph. Several other concerns may arise in the context of "storefront" undercover laundering operations. See infra for a discussion of storefront operations. These matters include: (1) the possibility of civil liability if the rights of innocent third parties are compromised (for example, the operatives at the storefront should not solicit business from bona fide investors or, in infiltrating a financial institution, obtain and disseminate information to the detriment of honest investors); and (2) operations involving activities abroad create a host of practical problems. For example, law enforcement operations abroad could violate either local banking laws or the "Mansfield Amendment," 22 U.S.C. §2291(c)(1). Agents frequently experience difficulty in obtaining passports using their undercover aliases. Although such matters are outside the scope of this monograph and are not discussed herein, they can be a source of concern to the personnel involved in the operation. Prudent management of a storefront operation would include the anticipation and handling of such matters.

1. The Issue of Entrapment

To avoid issues of entrapment, certain precautions can be taken. In setting up an undercover operation, the agents should not advise the suspects that the agents are willing to or desire to break the law unless there is prior evidence that the suspect wants to break the law or circumstances arise where the suspect willingly discusses the subject. The issue of entrapment should not arise when an agent posing as a person who wants currency laundered or transported brings up the topic of the currency reporting forms. Nor should the issue arise if the agent asks the suspect whether he is going to properly fill out the currency reporting forms. Each case will depend upon the openness of the suspect and his willingness to openly discuss the criminality of his acts. 213/

213/ Prosecutors involved as advisors to undercover projects should give the agents an "entrapment lecture" and memorialize it. The case of United States v. Freedson, 608 F.2d 739 (9th Cir. 1979), is a good example of a money laundering case involving a conspiracy to violate 18 U.S.C. §1001 which deals with the issue of entrapment.

For a broader discussion of the issue of entrapment, see DEA Legal Comment No. 20, "Entrapment and the Due Process Defense." See also "Entrapment, Due Process, and the U.S. Constitution," FBI Law Enforcement Bulletin (February 1982), and "Entrapment, Inducement, and the Use of Unwitting Middlemen," FBI Law Enforcement Bulletin (anticipated to be published in two parts in December 1983 and January 1984).

2. The Issue of Impossibility

The concept of impossibility is more complicated. Courts often distinguish between "legal" and "factual" impossibility to commit a crime. The former applies in situations where even if an act occurred, it would not constitute a crime. The latter arises where the occurrence of certain factual circumstances make it impossible to bring to fruition the criminal act. Usually, legal impossibility bars prosecution, while factual impossibility does not.

Problems of impossibility relate specifically to instances where agents who are posing as launderers or transporters tell the suspect that no Form 4789 or 4790 will be filed if the suspect entrusts the agents with the suspect's currency, or where agents provide currency from government funds to suspects to be laundered or transported. The following defense arguments may be raised: (1) if a defendant's currency was given to the agents and the agents did not file either a 4789 or 4790 form, then the crime was committed by the agents; (2) same as number one, but the forms are filed, thus, there is no crime; (3) if the currency was given by the agents to the defendant, no forms need be filed as the government is "exempt" under Section 103.22 of Title 31 of the Code of Federal Regulations, or because this conduct is government-endorsed and therefore cannot constitute a crime. In rebuttal to these arguments the following responses, addressed in a slightly modified order, are suggested.

The first defense argument represents a factual situation

which generally should not occur, as there is no reason for government agents not to file the 4789 or 4790 forms even if the agents are pretending to be criminals. 214/ The forms should be filed, if possible, to avoid the argument that the government could have and should have prevented this Title 31 offense. Neither is there government-induced crime if the suspect has the requisite intent needed to commit the crime. Presumably there will be sufficient facts to show that the suspect intended to violate the law by helping the undercover agent in return for some fee or other arrangement. Problems arise, however, with a substantive offense under Title 31 as opposed to a conspiratorial offense. Depending upon the charge, the government's legal argument will vary. 215/

The third defense argument is more difficult because the government can be exempted from having transactions reported. 216/ This exemption only applies, however, when the government is "acting" as the government and not when government investigators (who are not ordinarily involved in government disbursements) are "violating" the reporting laws.

The second defense argument is the most difficult to deal

214/ Situations may arise, however, where the filing of these forms would ruin the ongoing undercover operation.

215/ See United States v. Freedson, supra. We take the position here that even if government agents give government-owned cash to a money launderer who causes a CTR or CMIR not to be filed or to be filed falsely, there is still a false statement or concealment of material facts.

216/ See 31 C.F.R. §103.22(b).

with because there can be no substantive Title 31 violation if the forms are filled out properly by the government agents. Instead, the appropriate charges are conspiracy to defraud the government in violation of Section 371 of Title 18 of the United States Code and a violation of Section 1001 of Title 18 of the Code. The government's position should be that the suspect can still be in violation of these offenses because of his intent and overt act in furtherance of the scheme even though a substantive violation of Title 31 is factually impossible. The heart of a conspiracy is the illegal agreement; the heart of a Section 1001 violation is the scheme to withhold material facts. Neither requires the completion of the actual nonreporting offenses themselves.

C. Other Undercover Operations Issues - A Management Dilemma

Undercover operations come in many varieties in financial investigations. They can range from placing undercover operatives into financial institutions to providing investment or laundering services through a storefront. Certain major enforcement and prosecution problems can arise when organizing and running these operations. The following outline is illustrative of these issues:

(1) Covert operations versus overt enforcement approaches. Where should covert operations be considered? Can the operation be better managed through normal investigative means?

(2) Agency interface and the "committee" system. How well does the agency support undercover operations over the long haul? How receptive is management to a well-planned operation and how receptive are they when the plan is changed as a result of circumstances beyond anyone's control? Does the project manager or lead case agent have the authority to run the project, or must all decisions be made by management committees?

(3) Realistic Resources and Operational Plans. Have the goals of the operation been thoroughly thought through? Are the goals realistic? Are the goals flexible enough to accommodate operational changes? Are resources available to meet the goals of the operation? Are the agencies involved good about committing additional resources, if the project expands?

(4) Targeting objectives versus targets of opportunity. Are investigative resources properly placed on productive targets? Can allocated resources be effectively switched to targets that develop as the operation unfolds?

(5) Tape transcriptions and translations. Does the project have adequate resources to keep up with transcripts from video and audio tapes, and does it have access to sufficient foreign language help when needed?

(6) Accounting for funds. Have agency rules and regulations been complied with on spending money for the project? Have proper internal and external controls been established to handle all monies?

(7) Attorney General's exemptive powers. Does the investigation contemplate operations which would have to be personally approved by the Attorney General or his designee?

(8) Overlapping judicial districts. Who will handle and coordinate investigations when they cross district boundaries? Who will mediate any disputes that develop?

(9) Legal Advice. Does the project have a permanently attached attorney to review procedures and handle legal issues that arise to prevent adverse legal rulings at subsequent hearings and trials?

(10) Utilization of trafficker furnished funds. How are monies which are taken in from traffickers being utilized? Is the project merely laundering money without getting any potential crimes out of it? Are funds capable of being invested in seizable assets?

(11) Compartmentalization of enforcement functions. Have investigative functions been properly compartmentalized? Do too many (or too few) people know what is going on? Is security

constantly being monitored and agent safety being cared about?

(12) Criminal/civil interface. Has enough planning gone into how assets generated in the criminal case are going to be seized and how they will be managed pending forfeiture? Have walls been erected to segregate grand jury materials from civil investigations? Have forfeitable assets been properly identified and related legal issues been carefully researched?

(13) Types of money laundering services. What services will be offered to narcotics dealers? Does the operation have adequate resources to handle large sums of money? Is a local bank or Federal Reserve branch able to help?

(14) Layering of shell corporations. Has the investigation been carefully planned with a layer of shell corporations to shield the undercover operation from the inquiry of large narcotics groups who carefully check out laundering corporations prior to doing large-volume business?

(15) Foreign country secrecy laws. Have foreign jurisdiction secrecy laws been carefully researched? Can the project or its attached agents operate in a foreign location as an undercover operation and not violate either foreign law or United States laws?

All of the above-listed items are important considerations in managing an undercover operation. Exploring these issues will open doors to many others.

CHAPTER 6

THE BANK SECRECY ACT: FORFEITURES

Introduction

The Bank Secrecy Act requires all persons who knowingly transport monetary instruments in excess of $5,000 into or out of the United States to file a monetary instrument report. 217/ The criminal offenses for violations of this requirement are discussed at length in other portions of these materials. 218/ An equally important tool in the enforcement of the Bank Secrecy Act is found in its forfeiture provision, Section 5317(b) of Title 31 of the United States Code. That section provides in pertinent part:

> A monetary instrument being transported may be seized and forfeited to the United States Government when a report on the instrument under section 5316 of this title has not been filed or contains a material omission or misstatement....

Prior to the 1982 recodification of Title 31 of the United States Code (hereinafter the Code), the forfeiture provision of the Bank Secrecy Act was found at Section 1102 of Title 31 of the Code. Although the current forfeiture statute varies slightly

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217/ 31 U.S.C. §5316.

218/ See Chapter 2 supra, notes 113-122 and accompanying text.

from Section 1102, it is clear from the legislative history of the Money and Finance Act [219/] that these changes were added simply to omit surplus words, to clarify the plain wording of the statute and to make the statute's use of certain terms consistent with the use found in other titles of the United States Code. [220/]

The scope of this chapter on forfeitures is limited to an overview of forfeiture law and procedure as applied to Bank Secrecy Act cases. Litigation and advisory support in this or other areas of the law involving forfeitures can be obtained from the Asset Forfeiture Office of the Criminal Division. [221/]

I. Monetary Instruments

Pursuant to Section 5317(b) of Title 31 of the Code, only a "monetary instrument being transported" may be seized and forfeited in situations where reports required by Section 5316 of

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219/ See Chapter 1 supra, notes 46-53 and accompanying text.

220/ See Pub. L. No. 97-258, 96 Stat. 995 (1982); H.R. No. 97-651, 97th Cong., 2d Sess. 1, 175 (1982). See also Chapter 1 supra, notes 46-53 and accompanying text.

221/ The Asset Forfeiture Office can be reached at FTS 272-6420. For additional information on forfeitures, see United States Department of Justice, Criminal Division, Criminal Forfeitures Under the RICO and Continuing Criminal Enterprise Statutes (prepared by David B. Smith and Edward C. Weiner), and United States Department of Justice, Drug Enforcement Administration, Drug Agents' Guide to Forfeiture of Assets (prepared by Harry L. Myers and Joseph P. Brzostowski).

Title 31 of the Code [222] are not filed or contain material omissions or misstatements. Thus, unlike other forfeiture statutes, [223] vehicles and other assets incidental to the violation of law are not subject to forfeiture.

The Act gives the Secretary of the Treasury great flexibility in determining the scope of the term "monetary instruments." As defined in Section 5312(a)(3) of Title 31 of the United States Code:

> "monetary instruments" means -
>
> (A) United States coins and currency; and
>
> (B) as the Secretary may prescribe by regulation, coins and currency of a foreign country, travelers' checks, bearer negotiable instruments, bearer investment securities, bearer securities, stock on which title is passed on delivery, and similar material.

Section 103.11 of Title 31 of the Code of Federal Regulations, "Meaning of terms," which was promulgated pursuant to Section 5312(a)(3) of Title 31 of the Code, further defines "currency" and "monetary instruments" [224] as:

> Currency. The coin and currency of the United States or of any other country, which circulate in and are customarily used and accepted as money in the country in which

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222/ The reports required to be filed by Section 5316 of Title 31 of the Code are the Currency and Monetary Instrument Reports, commonly known as Form 4790 or CMIR. See Chapter 2 supra, notes 97-103 and accompanying text. A copy of the CMIR form is contained in the Appendix.

223/ See, e.g., 21 U.S.C. §881.

224/ A detailed discussion of definitions and examples of monetary instruments which must be reported pursuant to Section 5316 and the Regulations are contained in the Appendix.

issued. It includes U.S. silver certificates, U.S. notes and Federal Reserve notes, but does not include bank checks or other negotiable instruments not customarily accepted as money.

* * *

Monetary Instruments. Coin or currency of the United States or of any other country, travelers' checks, money orders, investment securities in bearer form or otherwise in such form that title thereto passes upon delivery, and negotiable instruments (except warehouse receipts or bills of lading) in bearer form or otherwise in such form that title thereto passes upon delivery. The term includes bank checks, travelers' checks and money orders which are signed but on which the name of the payee has been omitted, but does not include bank checks, travelers' checks or money orders made payable to the order of a named person which have not been endorsed or which bear restrictive endorsements.

At the present time, it is the position of the Secretary of the Treasury that gold coins having legal tender status but which do not circulate in customary use as money are not subject to the currency reporting requirements of Section 5316. 225/

The Bank Secrecy Act requires only that monetary instruments in excess of $5,000 be reported. Thus, the question repeatedly has surfaced as to whether the first $5,000 of each seizure is exempt from seizure and forfeiture. The courts addressing this issue have consistently held that the entire amount of the

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225/ Department of Treasury, U.S. Customs Service Circular: ENF-4-R:E:P (November 18, 1976). The Customs Service is reviewing this policy in light of the recent popularity of gold coins, such as Krugerrands. Gold coins are, however, subject to those Customs reporting requirements applicable to the import or export of merchandise.

illegally exported or imported instrument is forfeitable. 226/ These cases focus on the plain language of the statute and the need to deter future violations of the Act.

II. Elements of the Forfeiture

A. Who Must File the 4790 Form

Section 5316(a) of Title 31 of the Code requires "a person or an agent or bailee of the person" transporting more than $5,000 in monetary instruments into or out of the United States to file a currency reporting form. 227/ The term "person" is not limited to someone having a legal ownership or possessory interest in a monetary instrument. 228/ Thus, "[e]ach person who

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226/ United States v. $6,700 in United States Currency, 615 F.2d 1 (1st Cir. 1980); United States v. Currency Totalling $48,318.08, 609 F.2d 210 (5th Cir. 1980); United States v. One 1964 MG, Serial Number 64GHN3L34408, 584 F.2d 889 (9th Cir. 1978); Ivers v. United States, 581 F.2d 1362 (9th Cir. 1978).

227/ In United States v. $6,250 in United States Currency, 706 F.2d 1195 (11th Cir. 1983), the court found that claimant's "physical presentation of the currency" by throwing his purse at the Customs officer did not constitute sufficient compliance with the reporting requirement to avoid forfeiture. Id. at 1197. The court reasoned that the statute does not require a traveler to surrender the currency or negotiable instrument but, rather, requires him to file a 4790 form. Id. Because the claimant refused to file such a report, even though explicitly advised of the reporting requirements both before and after he physically presented the purse, the court found that he had not complied with the statute. Id.

228/ 31 U.S.C. §5312(a)(4) provides:

(FOOTNOTE CONTINUED)

physically transports, mails, or ships, or causes to be physically transported, mailed or shipped," [229] monetary instruments bears the obligation to file the currency reporting form. [230] Moreover, if no other report has been filed, [231] the recipient of

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(FOOTNOTE CONTINUED)

> "[P]erson", in addition to its meaning under section 1 of title 1, includes a trustee, a representative of an estate and, when the Secretary prescribes, a governmental entity.

Under Section 1 of Title 1 of the United States Code, "[T]he word 'person' may extend and be applied to partnerships and corporations." Thus neither definition limits the term to someone having a legally cognizable interest in monetary instruments.

229/ 31 C.F.R. §103.23(a). 31 C.F.R. §103.23(a) provides in pertinent part:

> A person is deemed to have caused such transportation, mailing or shipping when he aids, abets, counsels, commands, procures, or requests it to be done by a financial institution or any other person. A transfer of funds through normal banking procedures which does not involve the physical transportation of currency or monetary instruments is not required to be reported by this section.

But see 31 C.F.R. §103.23(c) which lists eight categories of "persons" who are not required to file reports under the section.

230/ In United States v. $6,700 in United States Currency, 615 F.2d 1, 3 (1st Cir. 1980), the court held that even the thief of monetary instruments was not exempt from the reporting requirements. The court concluded that the owner of the monetary instruments could prevent forfeiture only upon showing that it was innocent of the failure to file the report and did "all that it reasonably could to avoid having its property put to an unlawful use." Id. at 3, citing Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 690 (1973).

231/ 31 C.F.R. §103.23(d) provides that:

> This section does not require that more than one report be filed covering a particular

(FOOTNOTE CONTINUED)

monetary instruments "in an aggregate amount exceeding $5,000 on any one occasion which have been transported, mailed or shipped to such person from any place outside the United States" must file a report "stating the amount, the date of receipt, the form of monetary instruments, and the person from whom received." 232/ The reporting requirements do not apply to any common carrier of passengers with respect to currency or monetary instruments in the possession of its passengers, nor to any common carrier of goods with respect to shipments of currency or monetary instruments not declared to be such by the shipper. 233/

B. Filing Must Occur by "Time of Departure"

Section 5316, formerly Section 1101, of Title 31 of the Code does not forbid the transportation of more than $5,000 in

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(FOOTNOTE CONTINUED)
transportation, mailing or shipping of currency or other monetary instruments with respect to which a complete and truthful report has been filed by a person. However, no person required by paragraph (a) or (b) of this section to file a report shall be excused from liability for failure to do so if, in fact, a complete and truthful report has not been filed.

232/ 31 C.F.R. §103.23(b). 31 C.F.R. §103.25(c) provides in relevant part:

> Reports required to be filed by §103.23(b) shall be filed with the Commissioner of Customs within 30 days after receipt of the currency or other monetary instruments.

233/ 31 U.S.C. §5316(c).

currency into or out of the United States, but rather forbids the failure to file the required report. Section 5316, however, does not define at what point filing becomes necessary. Treasury Department regulations state only that the reports required by Section 5316 "shall be filed at the time of entry into the United States or at the time of departure...." 234/ Various reported cases have attempted to clarify the "time of departure."

In United States v. Rojas, 235/ the Court of Appeals for the Fifth Circuit held that the "time of departure" had been reached after the flight had been called for boarding and the appellant had stepped onto the jetport preparing to board the aircraft. 236/ At this point, the court reasoned that:

> [A]ppellant had unequivocally manifested an intention to leave the United States, and although stepping on the jetport is not the latest temporal point which could be interpreted as the "time of departure," fixing this critical point at a later time would create a myriad of practical problems for enforcing the law and thus run counter to Congressional intent. 237/

234/ 31 C.F.R. §103.25(b) provides in pertinent part:

> Reports required to be filed by §103.23(a) shall be filed at the time of entry into the United States or at the time of departure, mailing or shipping from the United States, unless otherwise directed or permitted by the Commissioner of Customs.

235/ 671 F.2d 159 (5th Cir. 1982).

236/ Id. at 163.

237/ Id.

Requiring Customs officers to board every international flight, the court reasoned, would place an intolerable burden upon law enforcement. 238/

In United States v. Cutaia, 239/ the district court held that the defendants had violated former Section 1101 of Title 31 of the Code when, after being informed of the need to file if they were taking more than $5,000 with them, each had denied he had more. 240/ At that time, the defendants' bags had been checked, and they had obtained boarding passes. In concluding that the defendants violated Section 1101, the court reasoned that:

> Good sense suggests that the time of "departure" does not mean the moment when the aircraft leaves the landing field. By that moment the officials would have no effective means of enforcing the statute. It is more in accord with the manifest purpose of the legislation to construe the time of "departure" as that time reasonably close to the

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238/ The court in Rojas relied on United States v. Gomez-Londono, 553 F.2d 805 (2d Cir. 1977). In Gomez-Londono, a reliable informant notified government agents that the defendant would be departing New York for Colombia carrying $100,000 for the completion of a drug deal. Id. at 806. Agents then detained Gomez-Londono at the departure area for Avianca Airlines. After being warned of the currency reporting requirements, the defendant first denied carrying more than $5,000, but then handed agents an envelope containing $15,000. Thereafter, the agents obtained a warrant to search the defendant's luggage. Id.

At a pre-trial suppression hearing, the district court held that the warrant was improperly issued because Gomez-Londono's conduct had not violated Section 1101 of Title 31 of the United States Code. The appellate court reversed, holding that the magistrate who had issued the warrant could properly have concluded that Gomez-Londono had reached a point at which filing was required. Id. at 810.

239/ 511 F. Supp. 619 (E.D.N.Y. 1981).

240/ Id. at 625.

> carrier's actual departure when the passenger has manifested a definite commitment to leave the country with knowledge of the filing requirement and an intention not to file. 241/

Because the defendants had checked their baggage and obtained boarding passes, the court concluded that they had clearly demonstrated their intent to board the aircraft. 242/

C. Knowledge

Section 5322(a) of Title 31 of the Code 243/ provides criminal sanctions for willful violations of Section 5316. Section 5316 requires that a person "knowingly" transport monetary instruments in excess of $5,000. The Fifth and Second Circuits have held that, in criminal actions brought under

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241/ Id. at 624-25.

242/ The court in Cutaia also noted that in United States v. Ajlouny, 629 F.2d 830 (2d Cir. 1980), the Second Circuit upheld a conviction under 18 U.S.C. §2314 for transportation of stolen property in interstate or foreign commerce although the goods were seized from a dock before they were loaded aboard ship. 511 F. Supp. at 624. In Cutaia, the court reasoned that if something can be transported before it is loaded on board, "it would seem that [for the purpose of Section 5316] one can reach time of departure 'before boarding the carrier.'" Id. See also supra notes 61 and 99.

243/ 31 U.S.C. §5322(a), formerly codified as 31 U.S.C. §1058(a), provides:

> A person willfully violating this subchapter or a regulation prescribed under this subchapter (except section 5315 of this title or a regulation prescribed under section 5315) shall be fined not more than $1,000, imprisoned for not more than one year, or both.

Section 5316, the terms "knowing" and "willful" require proof of the defendant's knowledge of the reporting requirement, as well as his specific intent to commit the crime. 244/

In civil forfeiture actions under Section 5317(b) of Title 31 of the Code, forfeiture of the unreported currency is authorized without any showing of unlawful purpose or intent to violate the reporting requirements of Section 5316. 245/ In United States v. $4,255,625.39, 246/ the district court explained that the term "knowingly" as used in Section 5316 "applied to the transportation of money and not to specific knowledge about the reporting requirements." 247/

III. Defenses

The scope of this topic is limited to special procedural or substantive defenses arising in forfeiture cases under the Bank Secrecy Act. Situations will, of course, arise in which the claimant will seek return of the seized instrument on the basis that it is not a "monetary instrument" within the meaning of the

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244/ United States v. Granda, 565 F.2d 922, 926 (5th Cir. 1978); United States v. San Juan, 545 F.2d 314 (2d Cir. 1976). See also Chapter 2 supra, note 114 and accompanying text.

245/ United States v. $4,255,625.39, 528 F. Supp. 969, 971-72 (S.D. Fla. 1981). Cf. Ivers v. United States, 413 F. Supp. 394, 401 (N.D. Cal. 1975), reversed in part on other grounds, 581 F.2d 1362 (9th Cir. 1978).

246/ 528 F.2d 969 (S.D. Fla. 1981).

247/ Id. at 972.

Act. This subject is treated in the preceding materials entitled "Monetary Instruments." Similarly, the defense that the instrument was not "being transported" is treated in other areas of this monograph. Finally, situations in which the claimant contends that the instrument was not "knowingly" transported are not treated in this discussion because knowledge is a factual matter arising in all areas of the law and is not an issue peculiar to forfeiture cases.

A. Standing

Before addressing the defenses to a forfeiture action brought under Section 5317 of Title 31 of the United States Code, the question must be raised as to whom the defenses are available. Obviously, the owner of the instrument will have standing to contest the forfeiture. 248/ It will rarely be the case in a forfeiture action under Section 5317 that the res will become encumbered with conflicting liens or ownership interests in the period between seizure and adjudication of forfeiture. This is because security interests in money or instruments are generally only perfected by taking possession of the res. 249/ Therefore,

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248/ See Rule C(6) of the Supplemental Rules for Certain Admiralty and Maritime Claims.

249/ U.C.C. §9-304. The primary exception to the possession rule is in cases where the cash represents proceeds of the sale of collateral. This, of course, cannot occur in Bank Secrecy Act cases after seizure because the government will have possession.

the issue of whether a bona fide purchaser who purchases money or instruments after seizure will defeat the government's interest in the instrument will not often arise. 250/ However, assignments of the instrument in the period between seizure and forfeiture have caused problems.

In United States v. Currency Totalling $48,318.08, 251/ the Fifth Circuit held that an assignment of the res to an attorney as consideration for past, present and future legal services gave the attorney an ownership interest in the funds sufficient to confer standing and the right to assert all defenses of the assignor existing at the time of assignment. In that case, the defendant had pleaded guilty to a charge of violating the currency reporting requirements of the Act prior to the attorney's perfection of the assignment (an assignment is perfected by

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250/ Under statutes making forfeiture a mandatory consequence of engaging in prohibited activity, the interest of the government vests upon illegal use. Therefore, interests in the res created subsequent to illegal use are cut off by the government's forfeiture which "relates back" to the time of illegal use. Ivers v. United States, 581 F.2d 1362, 1367 (9th Cir. 1978). However, one court has held that Section 5317 makes forfeiture permissive rather than mandatory, and thus the interest of the government does not "relate back" to the time of the illegal use. See United States v. Currency Totalling $48,318.08, 609 F.2d 210, 213 (5th Cir.), rehearing denied, 612 F.2d 579 (1980). Significantly, however, the civil forfeiture section of the Controlled Substances Act, 21 U.S.C. §881, contains the same "permissive" language as is found in Section 5317(b). Yet forefeitures under Section 881 "relate back" to the moment of illegal use. O'Reilly v. United States, 486 F.2d 208, 210 (8th Cir. 1973). Accordingly, the "relation back" doctrine should apply in Section 5317(b) cases the same as it does in forfeiture actions brought under Section 881.

251/ 609 F.2d 210 (5th Cir.), rehearing denied, 612 F.2d 579 (1980).

giving notice to the United States). Thus, while the attorney had standing to contest the forfeiture, the defendant's pre-assignment guilty plea to the currency violation left nothing to be assigned to the attorney, and summary judgment in favor of the government was affirmed. 252/

B. Calero-Toledo and the Due Process Clause

The United States Supreme Court has rejected arguments asserting that forfeiture statutes violate the due process clause because they fail to provide pre-seizure notice and an opportunity to be heard. 253/ In Calero-Toledo v. Pearson Yacht Leasing, however, the Supreme Court suggested in dictum that an owner "who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property" might prevail on the argument that forfeiture constitutes a taking of property for government use without just compensation. 254/ It appears that the courts of appeals addressing this issue have concluded that Calero-Toledo creates a valid

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252/ See also United States v. $22,640 in United States Currency, 615 F.2d 356 (5th Cir. 1980).

253/ Calero-Toledo v. Pearson Yacht Leasing, 416 U.S. 663, 676-680 (1973).

254/ Id. at 689-690.

defense against forfeiture. 255/

In United States v. $6,700 in United States Currency, 256/ a forfeiture action brought pursuant to the Bank Secrecy Act, the res consisted of funds embezzled from an estate by one of two co-administrator sons of the decedent. However, the appellate court rejected the estate's Calero-Toledo defense because the estate failed to require the signatures of both administrators before funds could be withdrawn from the estate. Although the defense was not successful, it is a good example of the types of situations in which the defense will arise in future forfeitures under the Bank Secrecy Act.

C. Prejudicial Delay

A claim of prejudicial delay is a procedural defense common to forfeiture actions, and arises in situations where the government seizes property but fails to promptly file the forfeiture action. The due process issue arises from the claimant's right to a hearing "at a meaningful time" 257/ and applies to forfeiture cases because the deprivation of property occurs without notice

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255/ See United States v. One 1951 Douglas DC-6 Aircraft, 667 F.2d 502, 503 (6th Cir. 1981); United States v. One 1977 Cherokee Jeep, 639 F.2d 212, 213 (5th Cir. 1981); United States v. One 1975 Pontiac LeMans, 621 F.2d 444, 448 (1st Cir. 1980); United States v. One 1972 Chevrolet Blazer Vehicle, 563 F.2d 1386, 1388 (9th Cir. 1977).

256/ 615 F.2d 1 (1st Cir. 1980).

257/ Fuentes v. Shevin, 407 U.S. 67, 80 (1971).

or an opportunity for the claimant to be heard. In United States v. $8,850 in United States Currency, 258/ the United States Supreme Court held that the government's 18-month delay between the seizure of the currency and the filing of the complaint for forfeiture did not violate the claimant's right to due process of law. The Court adopted the four-part balancing test set forth in Barker v. Wingo 259/ to hold that although an 18-month delay is substantial, it was justified by the government's diligent efforts in processing the petition for remission or mitigation and in pursuing related criminal proceedings.

To determine whether the due process clause was violated by any delay, the courts will now examine the four factors identified in United States v. $8,850 in United States Currency:

(1) the length of the delay;

(2) the reason for the delay;

(3) the defendant's assertion of his rights; and

(4) the prejudice to the defendant.

IV. Outline of the Civil Forfeiture Process

A. Introduction

Under the Customs laws, a forfeiture matter is processed

258/ 461 U.S. __, 103 S.Ct. 2005 (1983).

259/ 407 U.S. 514 (1972).

administratively if the value of the property is less than or equal to $10,000. 260/ If the property is worth more than $10,000 or if a claimant posts a cost bond, 261/ the seizing agency must refer the matter to the United States Attorney for prompt institution of forfeiture proceedings in the district court. 262/

All forfeitures under Title 31 of the United States Code are judicial in nature. This is because Section 5317 of Title 31 neither specifies the procedures to be followed with respect to the forfeiture of seized monetary instruments nor does it incorporate the Customs provisions, Sections 1607-1609 of Title 19 of the Code, which would provide for administrative forfeiture proceedings where the value of the seized merchandise is not more than $10,000. This is in contrast to other forfeiture statutes, such as Section 881(a) of Title 21 of the United States Code, which allow for the administrative forfeiture of seized property valued at less than $10,000 by explicitly incorporating the provisions of the Customs forfeiture laws. 263/

B. Judicial Forfeiture Under Section 5317(b)

A civil forfeiture proceeding under Section 5317(b) of Title

260/ 19 U.S.C. §1607.

261/ 19 U.S.C. §1610.

262/ 19 U.S.C. §1608.

263/ See 21 U.S.C. §881(d).

31 of the United States Code is an in rem action against the monetary instruments themselves. Civil forfeiture proceedings can be completed regardless of whether a defendant is charged or convicted under Section 5316 of Title 31 of the Code. Moreover, civil forfeiture settles the government's title to the forfeited monetary instrument against the world. 264/

The United States Attorney begins the judicial proceedings against the res by filing a complaint for forfeiture. 265/ In response, the clerk of court issues a warrant for the "arrest" of the defendant/property. 266/ The United States Marshal then serves the property and all putative claimants with these documents. 267/ To give notice to all parties having an interest in the property, the government must also "cause public notice of the action and arrest to be given in a newspaper of general circulation in the district, designated by order of the

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264/ Conversely, a criminal forfeiture is litigated in the trial that determines the defendant's guilt and is ordered only after the defendant's conviction. See, e.g., United States v. Cauble, 706 F.2d 1322, 1349 (5th Cir. 1983); United States v. Long, 654 F.2d 911, 914-15 (3d Cir. 1981). Because other parties who may have a claim to the property cannot participate in the criminal trial, the verdict settles title in favor of the government only as against the criminal defendant. Further proceedings may be necessary to address the claims of third-party claimants.

265/ The Supplemental Rules for Certain Admiralty and Maritime Claims provide the procedures for federal forfeiture actions. See Rule A of the Supplemental Rules. Supplemental Rules C(2) and E(2) discuss the contents of a complaint for forfeiture. A sample complaint for forfeiture can be found in the Appendix.

266/ Supplemental Rule C(3).

267/ Id.

court." 268/

After the government initiates the lawsuit and complies with the notice requirements, any person wishing to contest the forfeiture must file a claim stating his or her interest in the property and an answer addressing the government's charges against the property. 269/ If no claim and answer is filed, the government may move the district court for an order of default judgment. 270/

Upon receipt of a claim and answer, the parties, using the tools provided by the Federal Rules of Civil Procedure, may then proceed to conduct discovery. Through depositions, interrogatories and requests for admissions, the government can probe the defenses offered by claimants.

Barring settlement or other resolution of the issue, such as a grant of summary judgment, 271/ the civil forfeiture process

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268/ Supplemental Rule C(4).

269/ Supplemental Rule C(6).

270/ Fed. R. Civ. P. 55(b)(2).

271/ A claimant's plea of guilty to the offense of failure to report, 31 U.S.C. §5316, constitutes an admission of all the elements of the criminal charge and establishes his knowledge of the reporting requirement and his intentional violation of the duty to report. United States v. $15,896 in United States Currency, 545 F. Supp. 92, 93 (N.D.N.Y. 1982). Accordingly, the doctrine of collateral estoppel prevents a defendant convicted under Section 5316 from litigating a claim in a subsequent civil forfeiture action under Section 5317(b). United States v. $31,697.59 Cash, 665 F.2d 903, 906 (9th Cir. 1982); Ivers v. United States, 581 F.2d 1362, 1366-67 (9th Cir. 1978). Thus a conviction or guilty plea under Section 5316 provides the government with the basis for a motion under Rule 56 of the Federal Rules of Civil Procedure for a summary judgment of forfeiture.

culminates in a trial, usually without a jury. The question of what burden of proof is required to sustain an action under Section 5317(b) has not been resolved. The legislative history of the Bank Secrecy Act indicates that the government must prove its case by a preponderance of the evidence. 272/ However, one district court, without discussing the legislative history, stated that the government's burden is a showing of probable cause to believe that the violation occurred. 273/ Another court

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272/ The House Report accompanying the Bank Secrecy Act states:

> The civil penalty provisions in sections 125 and 207 of the bill, as well as the forfeiture provision in section [5317(b)] would all be governed by chapter 163 (sections 2461 through 2465) of title 28, United States Code. These provisions established a five-year statute of limitations, put the burden of proof on the Government, and require proof by a preponderance of the evidence. This burden is less strict than the "beyond a reasonable doubt" test applied in criminal actions.

H.R. Rep. No. 975, 91st Cong., 2d Sess. 1, 19 (1970), reprinted in [1970] U.S. Code Cong. & Ad. News 4394, 4404. Contrary to the House Report's assertion, however, there is no discussion of the burden of proof in either the 1970 or the current edition of Sections 2461-2465 of Title 28 of the United States Code. In view of the House Report's incorrect reliance on Sections 2461-2465, government attorneys should maintain that the government's burden under Section 5317(b) is a showing of probable cause. Cf. 19 U.S.C. §1615.

273/ In United States v. $11,580 in United States Currency, 454 F. Supp. 376 (M.D. Fla. 1978), the court noted that the burden of proof contained in 19 U.S.C. §1615 (the government must first show probable cause in forfeiture actions brought under Title 19) has been applied to widely diverse statutes. Id. at 381. The court reasoned that under Section 5317(b) a showing of probable cause to believe that the violation occurred is also the government's burden of proof. Under this analysis, once the government has established probable cause to institute the proceedings, the burden of proof is on the claimant.

concluded that the government must initially show probable cause to support its belief that the monetary instruments were not reported and then establish by a preponderance of the evidence "a set of circumstances that mandate forfeiture." 274/

Notwithstanding the burden of proof, in the event the government prevails, the court issues an order providing that upon being paid for all its custodial costs, the custodian agency shall dispose of the forfeited monetary instruments according to law. 275/

C. Remission and Mitigation of Forfeitures Under Section 5317(b)

Most federal forfeiture statutes provide procedures for remission or mitigation. These procedures allow individuals with an interest in the seized property to petition officials of the Executive Branch for the release of the property (remission) or for the property's release upon payment of a civil penalty (mitigation).

Under Section 5321 of Title 31 of the United States Code, the Secretary of the Treasury has unfettered discretion to remit or mitigate civil forfeitures under Section 5317(b). 276/ The

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274/ United States v. $4,255,625.39, 551 F. Supp. 314, 323-24 (S.D. Fla. 1982).

275/ Cf. 19 U.S.C. §1613.

276/ In United States v. $48,595, 705 F.2d 909 (7th Cir. 1983), (FOOTNOTE CONTINUED)

Secretary has delegated this authority to the Commissioner of Customs [277/] in matters involving seizures not in excess of $100,000. Because neither Section 5321 nor any regulations promulgated thereunder provide procedures governing remission or mitigation of Section 5317(b) forfeitures, Customs has applied the regulations governing its administration of other forfeiture statutes to proceedings under Section 5317(b). [278/]

Under Customs procedures, any person appearing to have an interest in monetary instruments seized under Section 5317(b)(1) and (b)(2) receives notice of the property's liability to forfeiture and is informed of the right to petition the Commissioner of Customs for remission or mitigation of the forfeiture. [279/]

Once the matter is referred to the United States Attorney for institution of legal proceedings, however, the Commissioner is no longer authorized to take any action on a petition for

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(FOOTNOTE CONTINUED)
the court held that "the Secretary of the Treasury has the power to remit any penalty of forfeiture, in whole or in part, upon whatever terms he deems reasonable and just." Id. at 914. See also Ivers v. United States, 581 F.2d 1362, 1368-69 (9th Cir. 1978); United States v. $15,896.00 in United States Currency, 545 F. Supp. 92, 93 (N.D.N.Y. 1982).

277/ 31 C.F.R. §§103.46(a)(7), 103.48; T.D. 79-136, No. 130-1, 13 Cust. B. & Dec. 319-20 (April 11, 1979).

278/ Ivers v. United States, supra, 581 F.2d at 1370.

279/ 19 C.F.R. §162.31(a). A petition must be filed within 60 days from the date the notice of forfeiture is mailed. 19 C.F.R. §171.12(b). If the petitioner is not satisfied with the decision, he may file a supplemental petition within 60 days of the decision. 19 C.F.R. §171.33(a)(1).

remission or mitigation. 280/ The petitioner, however, may waive prompt judicial forfeiture, thereby delaying referral of the case to the United States Attorney. 281/ If this is done, the Commissioner may continue to deliberate on the petition.

Once a Section 5317(b) matter is referred to the United States Attorney, the Attorney General rules on petitions for remission and mitigation. 282/ Under regulations promulgated by the Department of Justice, a petitioner must address his petition to the Attorney General and submit it to the United States Attorney. 283/

Upon receiving the petition, the United States Attorney directs the seizing agency to investigate the merits of the petition and submit a report thereon. 284/ Upon receipt of the agency's report, the United States Attorney forwards a copy together with the petition and his recommendation as to allowance or denial of the petition to the Director of the Asset Forfeiture Office in the Criminal Division of the United States Department of Justice. 285/ The Director of the Asset Forfeiture Office then

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280/ 19 C.F.R. §171.2(a).

281/ See Ivers v. United States, supra, 581 F.2d at 1371, 1372.

282/ Executive Order No. 6166 (June 10, 1933).

283/ 28 C.F.R. §9.3(a).

284/ 28 C.F.R. §9.3(b). Before reaching its recommendation, Customs investigates whether the monetary instruments were generated through illicit activities and whether they were being transported to facilitate illegal commerce.

285/ Id.

either grants or denies the petition. 286/ The courts have no power to review a decision on a petition for remission or mitigation. 287/

286/ 28 C.F.R. §9.3(c).

287/ See, e.g., United States v. $15,896 in United States Currency, supra, 545 F. Supp. at 93; Devito v. United States Department of Justice, 520 F. Supp. 127, 129 (E.D. Pa. 1981).

TABLE OF CASES

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APPENDICES

Form **4789**
(Rev. December 1981)
Department of the Treasury
Internal Revenue Service

Currency Transaction Report

File a separate report for each transaction
(Complete all applicable parts—see instructions)

OMB No. 1545-0183
Expires 12-31-82

Part I Identity of individual who conducted this transaction with the financial institution

Name (Last)	First	Middle Initial	Social Security Number
Number and Street			Business, occupation, or profession
City	State	ZIP code	Country (If not U.S.)

Method of verifying identification:
☐ Driver's permit ..... (State) ..... (Number)
☐ Passport ..... (Country) ..... (Number)
☐ Alien ID card ..... (Country) ..... (Number)
☐ Other (specify) .....

Part II Individual or organization for whom this transaction was completed (Complete only if different from Part I)

Name	Identifying number
Number and Street	Business, occupation, or profession
City / State / ZIP code / Country (If not U.S.)	

Part III Customer's account number

☐ Savings account ..... (Number)
☐ Checking account ..... (Number)
☐ Share account ..... (Number)
☐ Loan account ..... (Number)
☐ Safety deposit box ..... (Number)
☐ Other (specify) .....

Part IV Description of transaction. If more space is needed, attach a separate schedule and check this box ☐

1. Nature of transaction (check the applicable boxes)
☐ Deposit
☐ Withdrawal
☐ Check Cashed
☐ Check Purchased
} See item 6 below
☐ Currency Exchange
☐ Mail/Night Deposit
☐ Other (specify)

2. Total amount of currency transaction (in U.S. dollars)	3. Amount in denominations of $100 or higher	4. Date of transaction (Month, day, and year)

5. If other than U.S. currency is involved, please furnish the following information:

Currency name	Country	Total amount of each foreign currency (in U.S. dollars)

6. If a check was involved in this transaction, please furnish the following information (See Instructions):

Date of check	Amount of check (in U.S. dollars)	Payee
Drawer of check		Drawee bank and City

Part V Financial institution reporting the financial transaction

Name and Address	Identifying number (EIN or SSN)
	Business activity

Sign here ▶ ..... (Authorized Signature) ..... (Title) ..... (Date)

Type or print name of authorized signer ▶

For Paperwork Reduction Act Notice, see the back of this page. APPENDIX A

General Instructions

Paperwork Reduction Act Notice.—The Paperwork Reduction Act of 1980 says we must tell you why we are collecting this information, how we will use it, and whether you have to give it to us.

The requested information is useful in criminal, tax, and regulatory investigations. In addition to directing the Federal Government's attention to unusual or questionable transactions, the reporting requirement discourages the use of currency in illegal transactions. Financial institutions are required to provide the information under 31 CFR 103.22, 103.25, and 103.26.

Who Must File.—Each financial institution must file a Form 4789 for each deposit, withdrawal, exchange of currency, or other payment or transfer, by, through, or to that financial institution, which involves a transaction in currency of more than $10,000. Multiple transactions by or for any person which in any one day total more than $10,000 should be treated as a single transaction, if the financial institution is aware of them.

Exceptions.—Banks do not have to file Form 4789 for transactions with Federal Reserve Banks, Federal Home Loan Banks, or other domestic banks.

Banks do not have to file Form 4789 for the following transactions if the amounts involved are reasonable and customary in the course of the customer's business or activities:

(1) deposits or withdrawals of currency from an existing account by an established depositor who is a U.S. resident and who—
   (a) operates a retail business in the United States (except automobile, boat, or airplane dealerships), or
   (b) operates a sports arena, race track, amusement park, bar, restaurant, hotel, licensed check cashing service, vending machine company, or theater;
(2) deposits or withdrawals, exchanges of currency, or other payments and transfers by local, state, or Federal government agencies;
(3) withdrawals for payroll purposes from an existing account by an established depositor who is a U.S. resident and who operates a firm that regularly withdraws more than $10,000 to pay employees in currency.

Banks must keep a record of customers whose transactions are not reported because of exceptions (1) through (3) above. (See 31 CFR, section 103.22 for details about what to include in this record.)

Nonbank financial institutions do not have to report transactions with commercial banks.

When and Where to File.—File this form by the 15th day after the date of the transaction with the Internal Revenue Service, Ogden, UT 84201, or hand carry it to your local IRS office. Keep a copy of each Form 4789 for 5 years from the date you file it.

Identifying Number.—For individuals this is the social security number. For others it is the Federal employer identification number (9 digits).

Identification Required.—Before completing a transaction, a financial institution must verify and record (1) the name and address of the individual making the transaction and (2) the identity, account number, and taxpayer identifying number (if any) of the individual or organization for whose account the transaction is being made. Use a passport or other official document showing nationality to verify the identity of an alien or nonresident of the United States. Use a document like a driver's license, etc., normally accepted as a means of identification when cashing checks, to verify the identity of anyone else. In each case, record on this form the method of identification used.

Penalties.—Civil and criminal penalties (up to $500,000) are provided for failure to file a report or to supply information, and for filing a false or fraudulent report. See 31 CFR, sections 103.47 and 103.49.

Specific Instructions

Part I.—

(1) In the address section, enter the permanent street address of the individual conducting the transaction. If the currency was received or shipped through the U.S. Postal Service, write in "U.S. Mail." If the currency was received in a night deposit box, write in "Night Deposit." If the currency was received or shipped through an armored car service, licensed by a state or local government, provide only the service's name and address.
(2) In the social security block, enter the social security number of the individual conducting the transaction. If the individual has no number, write "None" in this block.
(3) Check the appropriate box and enter the number of the document used to verify the identity of the individual making the transaction. When the name of an individual is not required to be given, it is not necessary to describe the method of verifying identification.

Part II.—

(1) For individuals, enter last name, first name, and middle initial, if any, in the name block in that order. For all others, enter the complete organization name.
(2) In the identifying number block, enter the social security number or employer identification number.

Part III.—

Check the appropriate box and enter the appropriate customer's account number. If there is no account relationship, check Other and write in "None."

Part IV, line 1.—

If the transaction being reported was the sale or purchase of foreign currency, check Other and write in "sale of foreign currency" or "purchase of foreign currency," whichever applies.

Part IV, line 6.—

Complete this line if a check is cashed or a bank check is purchased with currency.

Part V.—

Institutions may also enter in the name and address block other identifying information.

Signature.—This report must be signed by an authorized individual. Also type or print the name of the authorized signer.

Definitions

Bank.—Each agent, agency, branch, or office in the United States of a foreign bank and each agency, branch, or office in the United States of any person doing business in one or more of the capacities listed below:

(1) a commercial bank or trust company organized under the laws of any state or of the United States;
(2) a private bank;
(3) a savings and loan association or a building and loan association organized under the laws of any state or of the United States;
(4) an insured institution as defined in section 401 of the National Housing Act;
(5) a savings bank, industrial bank, or other thrift institution;
(6) a credit union organized under the laws of any state or of the United States; and
(7) any other organization chartered under the banking laws of any state and subject to the supervision of the bank supervisory authorities of a state.

Currency.—The coin and currency of the United States or of any other country, which circulate in and are customarily used and accepted as money in the country in which issued. It includes United States silver certificates, United States notes, and Federal Reserve notes, but does not include bank checks or other negotiable instruments not customarily accepted as money.

Financial Institution.—Each agency, branch, or office in the United States of any person doing business in one or more of the capacities listed below:

(1) a bank;
(2) a broker or dealer in securities, registered or required to be registered with SEC under the Securities Exchange Act of 1934;
(3) a person who engages as a business in dealing in or exchanging currency (for example, a dealer in foreign exchange or a person engaged primarily in the cashing of checks);
(4) a person who engages as a business in issuing, selling, or redeeming traveler's checks, money orders, or similar instruments, except one who does so as a selling agent exclusively, or as an incidental part of another business;
(5) a licensed transmitter of funds, or other person engaged in the business of transmitting funds abroad for others.

Person.—An individual, corporation, partnership, trust or estate, joint stock company, association, syndicate, joint venture, or other unincorporated organization or group, and all entities treated as legal personalities.

Transaction in Currency.—A transaction involving the physical transfer of currency from one person to another. A transaction in currency does not include a transfer of funds by means of bank check, bank draft, wire transfer, or other written order that does not include the physical transfer of currency.

U.S. GOVERNMENT PRINTING OFFICE: 1982-506-668:1053

23-188-5979

Customs Use Only

Control No.

31 USC 1101; 31 CFR 103.23 and 103.25

Please Type or Print

DEPARTMENT OF THE TREASURY
UNITED STATES CUSTOMS SERVICE

REPORT OF INTERNATIONAL TRANSPORTATION OF CURRENCY OR MONETARY INSTRUMENTS

Form Approved
OMB No. 1515-0079

This form is to be filed with the United States Customs Service

Privacy Act Notification on reverse

PART I - FOR INDIVIDUAL DEPARTING FROM OR ENTERING THE UNITED STATES

1. NAME *(Last or family, first and middle)*
2. IDENTIFYING NO. *(See instructions)*
3. DATE OF BIRTH *(Mo./Day/U*
4. PERMANENT ADDRESS IN UNITED STATES OR ABROAD
5. OF WHAT COUNTRY ARE YOU A CITIZEN/SUBJECT?
6. ADDRESS WHILE IN THE UNITED STATES
7. PASSPORT NO. & COUNTRY
8. U.S. VISA DATE
9. PLACE UNITED STATES VISA WAS ISSUED
10. IMMIGRATION ALIEN NO. *(If any)*
11. CURRENCY OR MONETARY INSTRUMENT WAS: *(Complete 11A or 11B)*

A. EXPORTED		B. IMPORTED	
Departed From: *(City in U.S.)*	Arrived At: *(Foreign City/Country)*	From: *(Foreign City/Country)*	At: *(City in U.S.)*

PART II - FOR PERSON SHIPPING, MAILING OR RECEIVING CURRENCY OR MONETARY INSTRUMENTS

12. NAME *(Last or family, first and middle)*
13. IDENTIFYING NO. *(See instructions)*
14. DATE OF BIRTH *(Mo./Da/Yr.)*
15. PERMANENT ADDRESS IN UNITED STATES OR ABROAD
16. OF WHAT COUNTRY ARE YOU A CITIZEN/SUBJECT?
17. ADDRESS WHILE IN THE UNITED STATES
18. PASSPORT NO. & COUNTRY
19. U.S. VISA DATE
20. PLACE UNITED STATES VISA WAS ISSUED
21. IMMIGRATION ALIEN NO. *(If any)*

22. CURRENCY OR MONETARY INSTRUMENTS	23. CURRENCY OR MONETARY INSTRUMENTS	NAME AND ADDRESS	24. IF THE CURRENCY OR MONETARY INSTRUMENT WAS MAILED, SHIPPED, OR TRANSPORTED COMPLETE BLOCKS A AND B.
DATE SHIPPED	☐ Shipped To		A. Method of Shipment *(Auto, U.S. Mail, Public Carrier, etc.)*
DATE RECEIVED	☐ Received From		B. Name of Transporter/Carrier

PART III - CURRENCY AND MONETARY INSTRUMENT INFORMATION (SEE INSTRUCTIONS ON REVERSE) (To be completed by everyone)

25. TYPE AND AMOUNT OF CURRENCY/MONETARY INSTRUMENTS		Value in U.S. Dollars	26. IF OTHER THAN U.S. CURRENCY IS INVOLVED, PLEASE COMPLETE BLOCKS A AND B. *(SEE SPECIAL INSTRUCTIONS)*
Coins	☐ A.	▶ $	A. Currency Name
Currency	☐ B.	▶	
Other instruments *(Specify Type)*	☐ C.	▶	B. Country
(Add lines A, B and C) TOTAL AMOUNT		▶ $	

PART IV - GENERAL - TO BE COMPLETED BY ALL TRAVELERS SHIPPERS AND RECIPIENTS

27. WERE YOU ACTING AS AN AGENT, ATTORNEY OR IN CAPACITY FOR ANYONE IN THIS CURRENCY OR MONETARY INSTRUMENT ACTIVITY? *(If "Yes" complete A, B and C)* ☐ Yes ☐ No

	A. Name	B. Address	C. Business activity occupation or profession
PERSON IN WHOSE BEHALF YOU ARE ACTING ▶			

Under penalties of perjury, I declare that I have examined this report, and to the best of my knowledge and belief it is true, correct and complete.

28. NAME AND TITLE	29. SIGNATURE	30. DATE

(Replaces IRS Form 4790 which is obsolete)

Customs Form 4790 (09-29-81)

*U.S. GOVERNMENT PRINTING OFFICE 1981 732-126/1516

General Instructions

This report is required by Treasury Department regulations (31 Code of Federal Regulations 103).

Who Must File. — Each person who physically transports, mails, or ships, or causes to be physically transported, mailed, shipped or received currency or other monetary instruments in an aggregate amount exceeding $5,000 on any one occasion from the United States to any place outside the United States, or into the United States from any place outside the United States.

A TRANSFER OF FUNDS THROUGH NORMAL BANKING PROCEDURES WHICH DOES NOT INVOLVE THE PHYSICAL TRANSPORTATION OF CURRENCY OR MONETARY INSTRUMENTS IS NOT REQUIRED TO BE REPORTED.

Exceptions. — The following persons are not required to file reports: (1) a Federal reserve bank, (2) a bank, a foreign bank, or a broker or dealer in securities in respect to currency or other monetary instruments mailed or shipped through the postal service or by common carrier, (3) a commercial bank or trust company organized under the laws of any State or of the United States with respect to overland shipments of currency or monetary instruments shipped to or received from an established customer maintaining a deposit relationship with the bank, in amounts which the bank may reasonably conclude do not exceed amounts commensurate with the customary conduct of the business, industry or profession of the customer concerned, (4) a person who is not a citizen or resident of the United States in respect to currency or other monetary instruments mailed or shipped from abroad to a bank or broker or dealer in securities through the postal service or by common carrier, (5) a common carrier of passengers in respect to currency or other monetary instruments in the possession of its passengers, (6) a common carrier of goods in respect to shipments of currency or monetary instruments not declared to be such by the shipper, (7) a travelers' check issuer or its agent in respect to the transportation of travelers' checks prior to their delivery to selling agents for eventual sale to the public, nor by (8) a person engaged as a business in the transportation of currency, monetary instruments and other commercial papers with respect to the transportation of currency or other monetary instruments overland between established offices of banks or brokers or dealers in securities and foreign persons.

When and Where to File:

A. Recipients. — Each person who receives currency or other monetary instruments shall file Form 4790, within 30 days after receipt, with the Customs officer in charge at any port of entry or departure or by mail with the Commissioner of Customs, Attention: Currency Transportation Reports, Washington, D.C. 20229.

B. Shippers or Mailers. — If the currency or other monetary instrument does not accompany the person entering or departing the United States, Form 4790 may be filed by mail on or before the date of entry, departure, mailing, or shipping with the Commissioner of Customs, Attention: Currency Transportation Reports, Washington, D.C. 20229.

C. Travelers. — Travelers carrying currency or other monetary instruments with them shall file Form 4790 at the time of entry into the United States or the time of departure from the United States with the Customs officer in charge at any Customs port of entry or departure.

An additional report of a particular transporation, mailing, or shipping of currency or other monetary instruments, is not required if a complete and truthful report has already been filed. However, no person otherwise required to file a report shall be excused from liability for failure to do so if, in fact, a complete and truthful report has not been filed. Forms may be obtained from any United States Customs Service office.

PENALTIES. — Civil and criminal penalties, including under certain circumstances a fine of not more than $500,000 and imprisonment of not more than five years, are provided for failure to file a report, supply information, and for filing a false or fraudulent report. In addition, the currency or monetary instrument may be subject to seizure and forfeiture. See sections 103.47, 103.48 and 103.49 of the regulations.

Definitions

Bank. — Each agent, agency, branch or office within the United States of a foreign bank and each agency, branch or office within the United States of any person doing business in one or more of the capacities listed: (1) a commercial bank or trust company organized under the laws of any state or of the United States; (2) a private bank; (3) a savings and loan association or a building and loan association organized under the laws of any state or of the United States; (4) an insured institution as defined in section 401 of the National Housing Act; (5) a savings bank, industrial bank or other thrift institution; (6) a credit union organized under the laws of any state or of the United States; and (7) any other organization chartered under the banking laws of any state and subject to the supervision of the bank supervisory authorities of a state.

Foreign Bank. — A bank organized under foreign law, or an agency, branch or office located outside the United States of a bank. The term does not include an agent, agency, branch or office within the United States of a bank organized under foreign law.

Broker or Dealer in Securities. — A broker or dealer in securities, registered or required to be registered with the Securities and Exchange Commission under the Securities Exchange Act of 1934.

IDENTIFYING NUMBER. — Individuals should enter their social security number, if any. However, aliens who do not have a social security number should enter passport or alien registration number. All others should enter their employer identification number.

Investment Security. — An instrument which: (1) is issued in bearer or registered form; (2) is of a type commonly dealt in upon securities exchanges or markets or commonly recognized in any area in which it is issued or dealt in as a medium for investment; (3) is either one of a class or series or by its terms is divisible into a class or series of instruments; and (4) evidences a share, participation or other interest in property or in an enterprise or evidences an obligation of the issuer.

Monetary Instruments. — Coin or currency of the United States or of any other country, travelers' checks, money orders, investment securities in bearer form or otherwise in such form that title thereto passes upon delivery, and negotiable instruments (except warehouse receipts or bills of lading) in bearer form or other in such form that title thereto passes upon delivery. The term includes bank checks, travelers' checks and money orders which are signed but on which the name of the payee has been omitted, but does not include bank checks, travelers' checks or money orders made payable to the order of a named person which have not been endorsed or which bear restrictive endorsements.

Person. — An individual, a corporation, a partnership, a trust or estate, a joint stock company, an association, a syndicate, joint venture, or other unincorporated organization or group, and all entities cognizable as legal personalities.

Special Instructions

You should complete each line which applies to you. **Part II.** — Line 22, Enter the exact date you shipped or received currency or the monetary instrument(s). Line 23, Check the applicable box and give the complete name and address of the shipper or recipient. **Part III.** — Line 26, If currency or monetary instruments of more than one country is involved, attach a schedule showing each kind, country, and amount.

PRIVACY ACT NOTIFICATION

Pursuant to the requirements of Public Law 93-579, (Privacy Act of 1974), notice is hereby given that the authority to collect information on Form 4790 in accordance with 5 U.S.C. 552a(e)(3) is Public Law 91-508; 31 U.S.C. 1101; 5 U.S.C. 301; Reorganization Plan No. 1 of 1950; Treasury Department No. 165, revised, as amended; 31 CFR 103.

The principal purpose for collecting the information is to assure maintenance of reports or records where such reports or records have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings. The information collected may be provided to those officers and employees of the Customs Service and any other constituent unit of the Department of the Treasury who have a need for the records in the performance of their duties. The records may be referred to any other department or agency of the Federal Government upon the request of the head of such department or agency.

Disclosure of this information is mandatory. Failure to provide all or any part of the requested information may subject the currency or monetary instruments to seizure and forfeiture, as well as subject the individual to civil and criminal liabilities.

Disclosure of the social security number is mandatory. The authority to collect this number is 31 CFR 103.25. The social security number will be used as a means to identify the individual who files the record.

Form Approved
OMB No. 48-RO-546

Department of the Treasury
Form 90-22.1 (9-78)
SUPERSEDES ALL PREVIOUS EDITIONS

REPORT OF FOREIGN BANK AND FINANCIAL ACCOUNTS

For the calendar year 19 . . . . . .

OFFICIAL USE ONLY

This form should be used to report financial interest in or signature authority or other authority over one or more bank accounts, securities accounts, or other financial accounts in foreign countries as required by Department of the Treasury Regulations (31 CFR 103). You are not required to file a report if the aggregate value of the accounts did not exceed $1,000. Check all appropriate boxes. SEE INSTRUCTIONS ON BACK FOR DEFINITIONS.

1. Name (Last, First, Middle)	2. Social security number or employer identification number if other than individual	3. Name in item 1 refers to ☐ Individual ☐ Partnership ☐ Corporation ☐ Fiduciary
4. Address (Street, City, State, Country, ZIP)		

5. ☐ I had signature authority or other authority over one or more foreign accounts, but I had no "financial interest" in such accounts (see instruction J). Indicate for these accounts:

(a) Name and social security number or taxpayer identification number of each owner .....

(b) Address of each owner .....

(Do not complete item 9 for these accounts)

6. ☐ I had a "financial interest" in one or more foreign accounts owned by a domestic corporation, partnership or trust which is required to file Form 90-22.1. (See instruction L). Indicate for these accounts:

(a) Name and taxpayer identification number of each such corporation, partnership or trust .....

(b) Address of each such corporation, partnership or trust .....

(Do not complete item 9 for these accounts)

7. ☐ I had a "financial interest" in one or more foreign accounts, but the total maximum value of these accounts (see instruction I) did not exceed $10,000 at any time during the year. (If you checked this box, do not complete item 9).

8. ☐ I had a "financial interest" in 25 or more foreign accounts. (If you checked this box, do not complete item 9.)

9. If you had a "financial interest" in one or more but fewer than 25 foreign accounts which are required to be reported, and the total maximum value of the accounts exceeded $10,000 during the year (see instruction I), write the total number of those accounts here: ☐

Complete items (a) through (f) below for one of the accounts and attach a separate Form 90-22.1 for each of the others.

Items 1, 2, 3, 9, and 10 must be completed for each account. Check here if this is an attachment. ☐

(a) Name in which account is maintained	(b) Name of bank or other person with whom account is maintained
(c) Number and other account designation, if any	(d) Address of office or branch where account is maintained

(e) Type of account. (If not certain of English name for the type of account, give the foreign language name and describe the nature of the account. Attach additional sheets if necessary.)

☐ Bank Account ☐ Securities Account ☐ Other (specify) .....

(f) Maximum value of account (see instruction I)

☐ Under $10,000 ☐ $10,000 to $50,000 ☐ $50,000 to $100,000 ☐ Over $100,000

10. Signature	11. Title (Not necessary if reporting personal account)	12. Date

PRIVACY ACT NOTIFICATION

Pursuant to the requirements of Public Law 93-579, (Privacy Act of 1974), notice is hereby given that the authority to collect information on Form 90-22.1 in accordance with 5 U.S.C. 552(e)(3) is Public Law 91-508; 31 U.S.C. 1121; 5 U.S.C. 301, 31 CFR Part 103.

The principal purpose for collecting the information is to assure maintenance of reports or records where such reports or records have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings. The information collected may be provided to those officers and employees of any constituent unit of the Department of the Treasury who have a need for the records in the performance of their duties. The records may be referred to any other department or agency of the Federal Government upon the request of the head of such department or agency for use in a criminal, tax, or regulatory investigation or proceeding.

Disclosure of this information is mandatory. Civil and criminal penalties, including under certain circumstances a fine of not more than $500,000 and imprisonment of not more than five years, are provided for failure to file a report, supply information, and for filing a false or fraudulent report.

Disclosure of the social security number is mandatory. The authority to collect this number is 31 CFR 103. The social security number will be used as a means to identify the individual who files the report.

APPENDIX C

INSTRUCTIONS

A. Who Must File a Report—Each United States person who has a financial interest in or signature authority or other authority over bank, securities, or other financial accounts in a foreign country, which exceeded $1,000 in aggregate value at any time during the calendar year, must report that relationship each calendar year by filing Form 90-22.1 with the Department of the Treasury on or before June 30, of the succeeding year.

An officer or employee of a commercial bank which is subject to the supervision of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, or the Federal Deposit Insurance Corporation need not report that he has signature or other authority over a foreign bank, securities or other financial account maintained by the bank unless he has a personal financial interest in the account.

In addition, an officer or employee of a domestic corporation whose securities are listed upon national securities exchanges or which has assets exceeding $1 million and 500 or more shareholders of record need not file such a report concerning his signature authority over a foreign financial account of the corporation, if he has no personal financial interest in the account and has been advised in writing by the chief financial officer of the corporation that the corporation has filed a current report which includes that account.

B. United States Person—The term "United States person" means (1) a citizen or resident of the United States, (2) a domestic partnership, (3) a domestic corporation, or (4) a domestic estate or trust.

C. When and where to File—This report shall be filed on or before June 30 each calendar year with the Department of the Treasury, Post Office Box 28309, Central Station, Washington, D.C., 20005.

D. Account in a Foreign Country—A "foreign country" includes all geographical areas located outside the United States, Guam, Puerto Rico, and the Virgin Islands.

Report any account maintained with a bank (except a military banking facility as defined in instruction E) or broker or dealer in securities that is located in a foreign country, even if it is a part of a United States bank or other institution. Do not report any account maintained with a branch, agency, or other office of a foreign bank or other institution that is located in the United States, Guam, Puerto Rico, and the Virgin Islands.

E. Military Banking Facility—Do not consider as an account in a foreign country, an account in an institution known as a "United States military banking facility" (or "United States military finance facility") operated by a United States financial institution designated by the United States Government to serve U.S. Government installations abroad, even if the United States military banking facility is located in a foreign country.

F. Bank, Financial Account—The term "bank account" means a savings, demand, checking, deposit, loan or any other account maintained with a financial institution or other person engaged in the business of banking. It includes certificates of deposit.

The term "securities account" means an account maintained with a financial institution or other person who buys, sells, holds, or trades stock or other securities for the benefit of another.

The term "other financial account" means any other account maintained with a financial institution or other person who accepts deposits, exchanges or transmits funds, or acts as a broker or dealer for future transactions in any commodity on (or subject to the rules of) a commodity exchange or association.

G. Financial Interest—A financial interest in a bank, securities, or other financial account in a foreign country means an interest described in either of the following two paragraphs:

(1) A United States person has a financial interest in each account for which such person is the owner of records or has legal title, whether the account is maintained for his or her own benefit or for the benefit of others including non-United States persons. If an account is maintained in the name of two persons jointly, or if several persons each own a partial interest in an account, each of those United States persons has a financial interest in that account.

(2) A United States person has a financial interest in each bank, securities, or other financial account in a foreign country for which the owner of record or holder of legal title is: (a) a person acting as an agent, nominee, attorney, or in some other capacity on behalf of the U.S. person; (b) a corporation in which the United States person owns directly or indirectly more than 50 percent of the total value of shares of stock; (c) a partnership in which the United States person owns an interest in more than 50 percent of the profits (distributive share of income); or (d) a trust in which the United States person either has a present beneficial interest in more than 50 percent of the assets or from which such person receives more than 50 percent of the current income.

H. Signature or Other Authority Over an Account—

Signature Authority—A person has signature authority over an account if such person can control the disposition of money or other property in it by delivery of a document containing his or her signature (or his or her signature and that of one or more other persons) to the bank or other person with whom the account is maintained.

Other authority exists in a person who can exercise comparable power over an account by direct communication to the bank or other person with whom the account is maintained, either orally or by some other means.

I. Account Valuation—For items 7, 9, and Instruction A, the maximum value of an account is the largest amount of currency and non-monetary assets that appear on any quarterly or more frequent account statement issued for the applicable year. If periodic account statements are not so issued, the maximum account asset value is the largest amount of currency and non-monetary assets in the account at any time during the year. Convert foreign currency by using the official exchange rate at the end of the year. In valuing currency of a country that uses multiple exchange rates, use the rate which would apply if the currency in the account were converted into United States dollars at the close of the calendar year.

The value of stock, other securities or other non-monetary assets in an account reported on Form 90-22.1 is the fair market value at the end of the calendar year, or if withdrawn from the account, at the time of the withdrawal.

For purposes of items 7, 9, and Instruction A, if you had a financial interest in more than one account, each account is to be valued separately in accordance with the foregoing two paragraphs.

If you had a financial interest in one or more but fewer than 25 accounts, and you are unable to determine whether the maximum value of these accounts exceeded $10,000 at any time during the year, check item 9 (do not check item 7) and complete Item 9 for each of these accounts.

J. United States Persons with Authority Over but No Interest in an Account—Except as provided in Instruction A and the following paragraph, you must state the name, address, and identifying number of each owner of an account over which you had authority, but if you check item 5 for more than one account of the same owner, you need identify the owner only once.

If you check Item 5 for one or more accounts in which no United States person had a financial interest, you may state on the first line of this item, in lieu of supplying information about the owner, "No U.S. person had any financial interest in the foreign accounts." This statement must be based upon the actual belief of the person filing this form after he or she has taken reasonable measures to endure its correctness.

If you check item 5 for accounts owned by a domestic corporation and its domestic and/or foreign subsidiaries, you may treat them as one owner and write in the space provided, the name of the parent corporation, followed by "and related entities," and the identifying number and address of the parent corporation.

K. Consolidated Reporting—

A corporation which owns directly or indirectly more than 50 percent interest in one or more other entities will be permitted to file a consolidated report on Form 90-22.1, on behalf of itself and such other entities provided that a listing of them is made part of the consolidated report. Such reports should be signed by an authorized official of the parent corporation.

If the group of entities covered by a consolidated report has a financial interest in 25 or more foreign financial accounts, the reporting corporation need only note that fact on the form; it will, however, be required to provide detailed information concerning each account when so requested by the Secretary or his delegate.

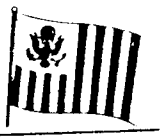
L. Avoiding Duplicate Reporting—If you had financial interest (as defined in instruction G(2)(b), (c) or (d) in one or more accounts which are owned by a domestic corporation, partnership or trust which is required to file Form 90-22.1 with respect to these accounts in lieu of completing Item 9 for each account you may check item 6 and provide the required information.

M. Providing Additional Information—Any person who does not complete item 9, shall when requested by the Department of the Treasury provide the information called for in Item 9.

N. Signature (Item 10)—***This report must be signed*** by the person named in Item 1. If the report is being filed on behalf of a partnership, corporation, or fiduciary, it must be signed by an authorized individual.

O. Penalties—For criminal penalties for failure to file a report, supply information, and for filing a false or fraudulent report see 31 U.S.C. 1058, 31 U.S.C. 1059, and 18 U.S.C. 1001.

WELCOME TO THE UNITED STATES



DEPARTMENT OF THE TREASURY
UNITED STATES CUSTOMS SERVICE

CUSTOMS DECLARATION

FORM APPROVED
OMB NO. 1515-0041

Each arriving traveler or family head must give the following information:

1. Name: _____ (Last) _____ (First) _____ (Middle Initial)
2. Date of Birth: ____ (Month) / ____ (Day) / ____ (Year) 3. Airline/Flight: _____
4. U.S. Address: _____

_____

	YES	NO
5. I am a U.S. Citizen	☐	☐
If No, Country: _____		
6. I reside permanently in the U.S.	☐	☐
If No, Expected Length of Stay: _____		

7. The purpose of my trip is or was
   ☐ BUSINESS ☐ PLEASURE

	YES	NO
8. I am/we are bringing fruits, plants, meats, food, soil, birds, snails, other live animals, farm products, or I/we have been on a farm or ranch outside the U.S.	☐	☐
9. I am/we are carrying currency or monetary instruments over $5000 U.S. or the foreign equivalent.	☐	☐

10. The total value of all goods I/we purchased or acquired abroad and am/are bringing to the U.S. is (visitors indicate value of gifts only): $ _____ (U.S. Dollars)

SIGN REVERSE OF DECLARATION AFTER YOU READ WARNING.

(Do not write below this line.)

INSPECTOR'S NAME	STAMP AREA
BADGE NO.	

Paperwork Reduction Act Notice. The Paperwork Reduction Act of 1980 says we must tell you why we are collecting this information, how we will use it and whether you have to give it to us. We ask for this information to carry out the Customs, Agriculture, and Currency laws of the United States. We need it to ensure that travelers are complying with these laws and to allow us to figure and collect the right amount of duties and taxes. Your response is mandatory.

Customs Form 6059B (051283)

APPENDIX D

WARNING

MERCHANDISE

U.S. residents must declare the total value of ALL articles acquired abroad (whether worn or used, whether dutiable or not, and whether obtained by purchase, as a gift, or otherwise) which are in their or their family's possession at the time of arrival. The value of repairs and alterations made abroad must also be included. Visitors to the U.S. must declare the total value of all gifts they are bringing with them.

CURRENCY AND MONETARY INSTRUMENTS

The transportation of currency or monetary instruments, regardless of the amount, is legal; however, if you take out of or bring into the United States more than $5000 (U.S. or foreign equivalent, or a combination of the two) in coin, currency, travelers checks or bearer instruments such as money orders, checks, stocks or bonds, you are required by law to file a report on a Form 4790 with the U.S. Customs Service. If you have someone else carry the currency or instruments for you, you must also file the report. FAILURE TO FILE THE REQUIRED REPORT OR FALSE STATEMENTS ON THE REPORT MAY LEAD TO SEIZURE OF THE CURRENCY OR INSTRUMENTS AND TO CIVIL PENALTIES AND/OR CRIMINAL PROSECUTION.

AGRICULTURAL PRODUCTS

To prevent the entry of dangerous agricultural pests the following are restricted Fruits, vegetables, plants, plant products, soil, meats, meat products, birds, snails, and other live animals or animal products. Failure to declare all such items to a Customs/Agriculture Officer can result in fines or other penalties.

IF YOU HAVE ANY QUESTIONS ABOUT WHAT MUST BE REPORTED OR DECLARED ASK A CUSTOMS OFFICER.

I have read the above statements and have made a truthful declaration.

.....
SIGNATURE

If the value of articles and repairs acquired abroad is over $1400 per person then list the items below and show the price paid or fair retail value.

DESCRIPTION OF ARTICLES	PRICE	CUSTOMS USE
TOTAL		

Customs Form 6059B (Back)

U.S. GOVERNMENT PRINTING OFFICE 1983-407-268

United States v. Barbara Mouzin, et al
Central District of California, CR 82-518

AFFIDAVIT OF CHERYL HESSLER

1. I, Cheryl Hessler (hereinafter your Affiant) am a Special Agent for the Criminal Investigation Division (CID) of the Internal Revenue Service (IRS), United States Department of the Treasury, and have been so employed for approximately five years. I have personally conducted complex financial investigations which have been successfully concluded and presently active criminal investigations involving the illegal transportation and distribution of United States currency derived from narcotics trafficking. I have determined that persons engaged in the importation and distribution of narcotics and controlled substances, as well as the negotiations which are necessary to the laundering of tremendous quantities of illicitly derived United States currency, keep in their premises, under their control, United States currency, correspondence, ledgers, personal telephone and address books, wire transfer records, bank account records, and other documents tending to establish the identity of persons trafficking in cocaine and persons conspiring to avoid the filing of Currency Transaction Reports for currency transported exceeding $10,000.00.

2. For the past 6 months, your Affiant has been personally involved, along with other Special Agents of the Criminal Investigation Division of the Internal Revenue Service (Hereinafter IRS), the United States Customs Service (hereinafter USCS), and the Drug Enforcement Administration (hereinafter DEA), in the investigation of a money laundering/ narcotics trafficking organization involving Barbara Mouzin and certain of her associates. During this investigation, your affiant has been assisted by Special Agent Henry B. Morgan of the Drug Enforcement Administration. Your Affiant has personal knowledge that S/A Morgan has

been so employed for approximatley eleven years. S/A Morgan has told your Affiant that during his service with Drug Enforcement Administration he has been involved in hundreds of narcotics investigations in Los Angeles, and has participated in the arrest of more than 200 narcotics suspects. S/A Morgan has told your Affiant that he has also negotiated for the purchase of cocaine and other controlled substances on numerous occasions while acting in an undercover capacity. S/A Morgan has also advised that he has participated in the execution of more than 100 search warrants for narcotics and narcotic related items.

3. As a result of your Affiant's personal participation in this investigation as case agent, conversations with Special Agent Henry Morgan, review of DEA and IRS reports, conversations with other DEA, IRS and Customs agents, and personal knowledge of the facts and circumstances described herein; your Affiant alleges the following facts and circumstances to show that there is probable cause to believe that on the premises as set forth under Section III. D. of this Affidavit entitled Locations To Be Searched, there is now being concealed certain property, namely United States currency, correspondence, ledgers, personal telephone and address books, wire transfer records, bank account statements, and other documents tending to establish the identity of persons involved in the trafficking of cocaine and persons involved in the laundering of millions of dollars in U.S. currency generated by illicit narcotics trafficking which are the facts, evidence and instrumentalities of the following: offenses pertaining to the unlawful possession and distribution of narcotics and conspiracy to effect same; interstate and foreign travel and transportation in aid of a racketeering enterprise and conspiracy to willfully fail to report domestic currency transactions.

racketeering enterprise and conspiracy to willfully fail to report domestic currency transactions.

4. This Affidavit is in support of a number of search warrants and seizure warrants based on facts developed during a lengthy investigation of Barbara Mouzin and certain of her associates. The investigation was a joint agency investigation and involved special agents from the IRS, USCS, and DEA, who worked under the general supervision of Assistant United States Attorney Robert J. Perry of the Central District of California.

5. The investigation was initiated in Los Angeles in early September 1981, when a banker advised that he had been approached to accept large deposits of United States currency and not file Currency Transaction Reports. The banker agreed to cooperate with the government and began accepting large currency deposits from Mouzin and others. Later, the banker introduced Mouzin to undercover agents. From November 1, 1981, through June 21, 1982, Mouzin caused approximately fifty-one (51) currency deliveries which ranged in size from $70,000 to $1,880,000 and totaled $25,770,065.

6. During the investigation, authorization was obtained to intercept telephone conversations at the Los Angeles residences of Mouzin and her associate Dorothy Hackett. On May 13, 1981, a search warrant (with sealed affidavit) was executed on a residence utilized by one of Mouzin's associates, and searching agents discovered approximately thirty-seven (37) pounds of cocaine and books and records pertaining to the distribution of narcotics and deliveries of currency. On May 27, 1982,

Mouzin distributed a kilogram of cocaine to S/A Henry B. Morgan, DEA, and another undercover DEA agent as a sample of the quality of cocaine which she and an associate had for sale.[1]

7. The following sections of this affidavit describe some of the facts developed during this investigation which lead me to conclude that probable cause exists to support the requested warrants.

II. DETAILED SUMMARY OF EVIDENCE

A. Cooperating Financial Institution #1

8. Informant #1 is the president of a small bank in Southern California (hereafter cooperating financial institution #1). In early September 1981, Informant 1 contacted IRS and advised that he had been asked by Barbara Mouzin and Michael Glasser to have his bank accept large currency deposits and not file the required reports on the deposits. (Your Affiant is aware that federal law requires that financial institutions file Currency Transaction Reports with the Treasury for transactions involving $10,000 or more in currency. See 31 USC §1081.)

9. Informant 1 agreed to cooperate with the government by having additional meetings with Mouzin and Glasser, which he agreed to secretly record. Your Affiant listened to all of the recordings.

---

[1] On June 25, 1982, during this investigation, Alphonso Carvajal gave Henry B. Morgan, DEA and another agent 20 kilograms of cocaine at the Bahia Mar Hotel, Ft. Lauderdale, Florida

10. On September 10, 1982, Informant 1 met with Mouzin and Glasser at Informant 1's bank. During the meeting, Mouzin and Glasser indicated that they could bring millions of dollars to the bank in currency. They indicated that they knew the failure to file Currency Transaction Reports was in violation of the law, and they offered to pay Informant 1 one quarter of one percent of the money they deposited for the bank's failure to file the reports.

11. With the consent of the government, Informant 1 had meetings and accepted currency deposits from Mouzin, Glasser, Dorothy Hackett, and Anthony Cantelli (one deposit). The currency transactions conducted at Informant 1's bank are set forth in the chart below. Information pertaining to Informant 1's bank set forth in the chart is based on Informant 1's statements, conversations recorded by Informant 1, bank records, and limited surveillance.

CURRENCY TRANSACTIONS AT COOPERATING FINANCIAL INSTITUTION #1

DATE	DELIVERED BY	AMOUNT *
10-19-81	Mouzin and Glasser	$ 20,000.00
10-28-81	Glasser	17,650.00
11-17-81	Mouzin and Glasser	245,000.00
11-18-81	Mouzin and Glasser	565,000.00
11-27-81	Hackett and Glasser	289,000.00
12-08-81	Mouzin	70,000.00
12-11-81	Mouzin	91,700.00
12-14-81	Mouzin and Glasser	242,000.00
12-15-81	Glasser	137,000.00
12-18-81	Mouzin and Cantelli	530,000.00
12-21-81	Mouzin and Hackett	186,200.00
12-22-81	Mouzin and Hackett	280,630.00
12-31-81	Glasser	150,000.00
01-04-82	Mouzin	150,000.00
01-06-82	Mouzin	259,770.00
01-07-82	Mouzin and Hackett	434,735.00
01-13-82	Mouzin	175,000.00
01-14-82	Mouzin and Glasser	385,120.00
01-15-82		229,480.00

DATE	DELIVERED BY	AMOUNT
01-20-82	Mouzin and Hackett	$ 486,530.00
01-21-82		111,700.00
01-25-82	Mouzin	150,700.00
01-27-82	Mouzin and Hackett	374,500.00
	TOTAL	$ 5,581,715.00

*Net of Commissions Paid to Informant #1

12. On January 28, 1982, Informant 1 introduced Mouzin to IRS undercover agents #1 and #2. Mouzin had expressed to Informant 1 her interest in depositing currency at a larger bank so that the currency deposits would be less conspicuous to federal bank examiners. The agents represented that they had an arrangement with a very large financial institution to not file Currency Transaction Reports. Mouzin requested that the agents accept currency deposits from her and agreed to pay the agents one quarter of one percent of the money deposited for influencing the bank to not file currency reports.

B. Cooperating Financial Insitution #2

13. Arrangements were made with a large financial institution (cooperating financial institution #2) to accept the large currency deposits. The deposits were delivered to undercover agents by Mouzin, and her associates Dorothy Hackett and Rusty Widdicombe. The currency was deposited to an account opened by the IRS undercover agents at cooperating financial institution #2 and the money was withdrawn at Mouzin's direction principally by wire transfer and cashier's checks. The information in the chart below is based on the observations of the IRS agents, tape recorded

conversations with Mouzin and others, bank records, and surveillance observations.

CURRENCY DELIVERIES TO UNDERCOVER AGENTS

DATE	DELIVERED BY	AMOUNT *
02-02-82	Mouzin and Hackett	$ 400,000.00
02-08-82	Mouzin	300,000.00
02-09-82	Mouzin	454,000.00
02-15-82	Hackett	361,000.00
02-22-82	Hackett	500,000.00
02-24-82	Mouzin	280,000.00
03-01-82	Mouzin and Hackett	510,000.00
03-04-82	Hackett	610,000.00
03-08-82	Hackett	280,000.00
03-11-82	Mouzin and Hackett	1,138,000.00
03-15-82	Mouzin and Hackett	918,000.00
03-22-82	Mouzin	347,000.00
04-05-82	Hackett	1,029,350.00
04-12-82	Hackett	734,000.00
04-23-82	Hackett	420,000.00
04-26-82	Hackett and Mouzin	500,000.00
04-28-82	Mouzin	623,500.00
04-20-82	Hackett	377,000.00
05-03-82	Hackett	1,346,000.00
05-07-82	Hackett and Widdecombe	1,880,000.00
05-17-82	Mouzin	184,000.00
05-18-82	Mouzin and Widdecombe	1,000,000.00
05-26-82	Mouzin	427,000.00
05-27-82	Mouzin and Hackett	824,000.00
06-02-82	Hackett and Widdecombe	1,623,000.00
06-08-82	Hackett and Mouzin	480,000.00
06-09-82	Hackett and Mouzin	500,000.00
06-15-82	Hackett and Mouzin	951,000.00
06-17-82	Hackett	247,000.00
06-21-82	Mouzin	944,500.00
	TOTAL	$ 19,288,350.00

*Net of Commissions Paid to the Agents.

C. Evidence That Mouzin And Her Associates Are Involved In Narcotics Trafficking And That The Currency Was Derived From Narcotics Trafficking

14. During many meetings with IRS undercover agents #1 and #2, Mouzin and Hackett indicated that they are involved in narcotics trafficking and that the currency deposits they deliver are derived from narcotics trafficking. (Most of the meetings with the undercover agents were tape recorded and videotaped, and your Affiant has listened to all these tape recordings. Portions in quotations are taken verbatim from the recordings.)

15. On February 22, 1982, Hackett, in a meeting with agent #1 stated,

> "What we're doing, it may be basically illegal . . . . We know that the money we're getting has ultimately come from drug money.
>
> * * * *
>
> We know that . . . this money is coming, not directly, but like second or third hand, from drug dealers. We know that for a fact. We don't deal with the drug dealers, we deal with the people who deal with the drug dealers."

Hackett also expressed an interest in supplying agent #1's "clients" with cocaine.

16. On March 1, 1982, Mouzin and Hackett met with agents #1 and #2. Mouzin expessed interest in conducting a narcotics transaction. She stated that she could get the "merchandise" and that she would do the deal herself. She stated that she personally knew a lot of people who

were narcotics traffickers including the cousin of the president of Colombia. Mouzin advised that the purchaser could pick up the cocaine in Colombia or have it delivered to Miami. She indicated that with a leased plane she could supply 20 to 30 "keys" per trip. (Your Affiant knows from experience that "keys" refers to kilograms.) She stated that the cocaine would be coming in its original packaging as she does not deal with the people who cut it and repackage it.

17. On March 8, 1982, Hackett advised agent #1 that she personally had been shipping cocaine to San Francisco and that she had been receiving cocaine in Miami. She stated, "When there are no drugs around, there is no money. Right now there is drugs around so there is money". She stated that she had gone to San Diego a few days earlier and had met directly with a narcotics trafficker. She also stated that the cocaine was packaged in Colombia and shipped directly to Miami.

18. Your Affiant was advised by S/A Morgan that on March 9, 1982, Mouzin met in Reno, Nevada, with S/A Morgan and another DEA agent (agent #3). They were acting undercover and represented themselves to be narcotic trafficker "clients" of agent #1. They engaged in a lengthy discussion about cocaine. Mouzin made the following statements, among others, related to your Affiant by S/A Morgan.

> "As far as the supply [of the cocaine], I have several different people. . . ."
>
> * * * *
>
> "The people that I know are the people who send it directly to Miami. I mean, I'm not going through three or more people. . . ."

"The people I would connect you with are the people who know me very well."

* * * *

"I would say there's three people that I would consider connecting you with. . . . Two of them are big, and the other guy is small, but from what I've heard his product is real good. He could probably supply somewhere between 20 and 50 [kilograms of cocaine] a month."

Mouzin also discussed the price, packaging, purity an physical quality ("complexion") of the cocaine. Mouzin stated that she used her business in Miami, (Mr. C of Miami), to conceal her illegal activities.

19. At the March 9th meeting, Mouzin claimed that she formerly had been a close associate of Isaac Kattan. She stated that Kattan was "fantastic" and that "it was nothing for him to launder $10 million." S/A Morgan related to your Affaint that through his review of DEA files and conversations with an agent who participated in the case, that Isaac Kattan-Kasim is believed to have received hundreds of millions of dollars in currency from Colombian narcotics traffickers in Miami. Kattan was recently convicted of narcotics possession and sentenced to thirty years imprisonment.

20. At the March 9th meeting, Mouzin said, "I'm in the same position for them that [agent #1] is for you." (Agent #1 represented to Mouzin that he laundered currency for major narcotics traffickers.)

21. On April 23, 1982, Hackett delivered $420,000 in currency to undercover agent #1 at the undercover office. The following conversation occurred. Agent #1 inquired why she had not been in earlier. Hackett responded, "Everything's relative. . . . And those 2,000 keys that got picked up in Miami, that hurt us because that hurt everybody. . . . Everything's slowed down, but the same people that lost the 2,000 doubled up to get even. And they just brought 4,000 in. So things should start picking up and moving. Everything is all interrelated. When there's no drugs, there's no money."

22. (Your Affiant was informed by S/A Morgan official DEA reports show that on March 9, 1982, Customs agents seized 3,748 pounds of cocaine at the Miami International Airport. It is clear to your Affiant that Hackett's statement regarding the 2,000 "keys" referred to this seizure.)

23. On April 26, 1982, Mouzin and Hackett delivered $500,000 in currency to undercover agents #1 and #2. Mouzin stated that the seizure of 1700 kilograms of cocaine and then a second seizure of 500 kilograms had slowed their business down. She referred to a stepped up federal enforcement effort in Miami. She stated that she paid commissions to Hackett and Tony Cantelli and also paid individuals in Miami to count the currency, and that as a result her profit was one percent of the currency she handled.

24. Mouzin instructed the agents to be careful when talking on the telephone, and to talk about "dresses". In explaining her code, Mouzin advised that "dresses" meant thousands of dollars.

25. Mouzin then asked if agent #3 was interested in doing a deal. She told agent #1 to tell agent #3 that she had merchandise which was available. She said she had eighteen "shiny" which the agents understood to mean 18 kilograms of shiny cocaine. She also said that 24 would be leaving on Wednesday and would be available shortly in Los Angeles.

26. On April 30, 1982, Hackett had a meeting with undercover agents #1 and #2. She said that "we" had "20" the other day, and that she had taken "10". The agents understood her to mean that she had accepted delivery of ten kilograms of cocaine. She mentioned a trafficker in Miami who "had really good stuff". Hackett also added that the traffickers who had lost the 2,000 kilograms of cocaine, had "doubled up to get even" and had imported 4,000 kilograms of cocaine.

27. On May 3, 1982, Hackett told agents #1 and #2 that another trafficker client had recently gone to Miami to pick up some "merchandise", which the agents understood to mean cocaine. She told the agents that all the currency was coming to the West Coast because the traffickers were transferring their narcotics businesses to the West Coast.

28. On May 6, 1982, suspect Anthony Cantelli met with Mouzin and agents #1 and #2 in Los Angeles. During a lengthy meeting, there was discussion about the fact that approximately $100,000 in Canadian currency had been delivered for laundering. There was additional discussion about the price of cocaine in Canada. Cantelli told the agents not to accept

the Canadian currency if there was a risk that bank employees might file Currency Transaction Reports.

29. On May 13, 1982, pursuant to a search warrant, agents searched the residence of Mouzin's associate Joy Adelman and found thirty-seven pounds of cocaine and books and records pertaining to the laundering and narcotics activities. The facts pertaining to this search are summarized below.

30. S/A Morgan told your Affiant that on May 19, 1982, Mouzin met with S/A Morgan and agent #3 in Reno, Nevada. S/A Morgan discussed Mouzin's possible participation in the sale of 100 kilograms of cocaine to S/A Morgan.

31. S/A Morgan told your Affiant that Mouzin introduced agent #3 and S/A Morgan to Alphonso Carvajal at her residence in Los Angeles. They discussed the possible purchase of a large quantity of cocaine from Carvajal. As Carvajal was leaving, he stated that he had thirty-three kilograms of cocaine in Los Angeles which he was willing to sell. He also advised that he had left a sample with Mouzin. Later that evening, Mouzin provided a kilogram of cocaine which she said was the sample which Carvajal had left with her.

32. S/A Morgan related to your Affiant that on June 7, 1982, agent #3 and S/A Morgan met with Mouzin in Las Vegas, Nevada. They had a lengthy meeting and discussed a number of items, including the fact that they were going to become business partners in Mouzin's laundering operation. Mouzin explained that Toni Cantelli was a partner in the

laundering operation, and that he received 50% of the profits.

33. S/A Morgan told your Affiant that in discussing Alphonso Carvajal, Mouzin stated the following. Carvajal is a major cocaine supplier for Mouzin. He has people in Los Angeles who sell cocaine for him; he also has people to pick up currency from the sale of cocaine and deliver it to Mouzin. She advised that Carvajal had already sold the thirty kilograms of cocaine he offered to the agents on May 27, and that he had more cocaine coming. She indicated that he could produce large quantities of cocaine on short notice.

34. S/A Morgan told your Affiant that Mouzin also claimed that by the end of July she would be laundering $3,000,000 per week. She stated that the money she laundered came from a number of narcotics trafficker clients. She also stated that she would receive a commission on a sale of cocaine to us. Mouzin also explained that the money is wire transferred to accounts maintained in fictitious names.

D. Wiretap Evidence

35. On April 7, 1982, the Honorable Manuel L. Real, United States District Judge for the Central District of California, authorized the interception for thirty days of a telephone at Mouzin's residence at 9833 Deep Canyon Place, Beverly Hills, California. Judge Real later authorized the renewal of the interception for an additional thirty day period.

36. On April 30, 1982, Judge Real authorized an interception for thirty days of a telephone at Dorothy Hackett's residence at 21901 Burbank Boulevard, Apartment #218, Woodland Hills, California. Judge Real

subsequently authorized a renewal of this interception also.

37. Intercepted telephone calls provided great assistance in our efforts to identify Mouzin's criminal associates and the scope of their criminal activity. Mouzin and others utilized coded language when discussing narcotics trafficking and money laundering on the telephone. A number of the intercepted calls are summarized below.

E. The Seizure Of Thirty-Seven Pounds Of Cocaine On May 13, 1982

38. The wiretaps led to the seizure of thirty-seven pounds of cocaine on May 13, 1982.

39. On May 10, 1982, Mouzin called Hackett and advised that "the new shipment of blouses is due in from the contractor in a day or two".

40. On May 12, 1982, Task Force agents on surveillance observed Carlos Pradilla in the area of his residence (see below) place a suitcase in Hackett's car. Later that day, Hackett called Joy Adelman at a residence on Tilden Avenue in Los Angeles. They had a discussion about the texture and quality of certain items in Adelman's possession.

41. The next day, Hackett called Adelman. They discussed the fact that someone had visited Joy and had taken a sample. A search warrant was obtained for the Adelman residence, and the warrant was executed the evening of May 13, 1982. Search agents found thirty-seven pounds of cocaine and books and records relating to narcotics trafficking and Mouzin's money laundering activities.

42. Based on your Affiant's experience, and that of S/A Morgan, DEA, your Affiant believes it is common for major narcotics traffickers to maintain at their residences books and records of their narcotics trafficking activities, and addresses and personal telephone books which contain the telephone numbers of their narcotics suppliers and customers. It is also common that searches of such residences yield currency derived from narcotics trafficking, narcotics, residue of narcotics, and narcotics paraphernalia including scales, packaging materials, cutting materials, etc.

43. Based on your Affiant's experience and that of S/A Morgan, DEA, it is also common for major narcotics traffickers to store large quantities of narcotics at "stash pads" maintained by others in order to minimize their possible criminal exposure. In your Affiant's experience it is common to find books and records pertaining to narcotics trafficking, currency derived from narcotics, narcotics, narcotics residue, and narcotics paraphernalia at such "stash pads".

44. Based on the facts set forth in this Affidavit and your Affiant's experience, your Affiant has reached the following conclusions. Your Affiant believes it is exceedingly clear that Mouzin and Hackett have for a number of months provided a money laundering service for major narcotics traffickers. It is also clear that Mouzin and Hackett are themselves engaged in large scale trafficking in cocaine. The vast sums of currency delivered by Mouzin and Hackett, and their desire that the currency not be reported, support the view that the currency is derived

from narcotics trafficking because that is a "cash" business.

45. Your Affiant further concludes that searches of the residences of Mouzin's criminal associates, and the residences and offices used by their criminal associates, will yield books and records relating to narcotics trafficking, the addresses and telephone numbers of narcotics traffickers, currency derived from narcotics, narcotics residue, and narcotics paraphernalia.

III. LOCATIONS TO BE SEARCHED

46. Based on the facts set forth in this Affidavit and your Affiant's experience, your Affiant believes there is probable cause to support the search of the following locations for evidence of the crimes specified in this Affidavit.

Locations in Florida

1. Mr. C of Miami, 157 N.W. 36th Street, Miami, Florida

47. On February 22, 1982, Hackett told agents #1 and #2 that she had traveled in interstate commerce with $500,000 in currency, which she delivered to the agents. She said that she used Mr. C as a cover when she traveled. Agents #1 and #2 related this information to your Affiant.

48. S/A Morgan told your Affiant that on March 9, 1982, in Reno, Nevada, Mouzin told S/A Morgan and agent #3 that she used "her business in Miami" to conceal her illegal activities. S/A Morgan understood her to mean Mr. C of Miami. She indicated to S/A Morgan who

told your Affiant that she was able to travel and represent that she was on business for Mr. "C" when she actually was conducting her money laundering activities.

49. On March 26, 1982, agents #1, #2 and #3 attended a social function in Miami Beach, Florida. Agent #1 was introduced to Tony Cantelli, the owner of Mr. "C". Cantelli told agent #1, who informed your Affiant, that he was a partner in Mouzin's money laundering operations. Later, Cantelli told agent #3, who told your Affiant, that "We have to be careful" and "Don't call me Mr. "C", call me Mr. Cash." Cantelli said that the clothing business of Mr. C was depressed, and that Mouzin's money laundering activities were carrying him through the slack period.

50. Also at the function on March 26, 1982, Hackett told agent #1, who told your Affiant, that large quantities of currency are counted at Mr. "C" of Miami.

51. On April 17, 1982, Cantelli had a telephone conversation with Mouzin and discussed how poorly the clothing business was doing. He added that it was a good thing that they had the "second" business. This was an obvious reference to the money laundering business.

52. On May 13, 1982, the search of Adelman's residence revealed a record of billing from a travel agency to Mr. "C" of Miami. The billing was for travel by Mouzin, Hackett, and Cantelli which your Affiant knows was in furtherance of the money laundering activities described in this Affidavit. One of the trips billed was the occasion when Cantelli traveled to Los Angeles and Mouzin and he delivered $530,000 in currency to cooperating financial insitution #1. Your Affiant believes this

billing record supports the fact that Mr. "C" is used as a front for money laundering activites.

53. In December of 1981, Mouzin caused checks to be payable to Mr. "C" of Miami for a total of $325,000 from currency deposited at cooperating financial institution #1.

54. Utility records for this location are subscribed to by B. Mouzin. Telephone company records show that number 576-8998 is subscribed to Mr. "C" of Miami. Mouzin and Hackett called that number on many occasions to discuss wire transfers with Alicia Koele. On June 7, 1982, S/A Morgan told your Affiant that at a meeting in Las Vegas, Mouzin told S/A Morgan and agent #3 that Alicia Koele maintained books and records for Mouzin's money laundering business at Mr. "C" of Miami.

55. S/A Morgan told your Affiant that he has called the 576-8998 number and has spoken with Alicia Koele about transfers from the currency delivered by Mouzin and Hackett. Your Affiant believes that evidence including records of wire transfers will be found in a search of this location.

2. Mr. C of Miami, 115 N.W. 36th Street, Miami, Florida

56. It is clear to your Affiant based on the evidence that this second location for Mr. "C" of Miami is also used to conduct the illegal activities described in this Affidavit. On many occasions, Mouzin and Hackett have attempted to call Alicia Koele at the 576-8998 number subscribed to by Mr. "C" of Miami at 157 N.W. 36th Street, Miami, Florida. When they have been unable to reach her at that number they have then called 573-0458. This number is subscribed to 115 N.W. 36 Street, Miami, Florida.

57. On May 10, 1982, Hackett called Mouzin at this location and talked to Mouzin and Carvajal. They discussed a delivery of currency. On May 12, 1982, Hackett called Koele at this location and discussed whether wire transfers had been received. On June 8, 1982, Mouzin called Koele at this location and discussed a deposit and moving money.

58. Telephone company records reflect that the subscriber for the 573-0458 number is Mr. "C" of Philadelphia. On April 30, 1982, Mouzin and Hackett caused a cashier's check in the amount of $100,000 payable to Mr. "C" of Philadelphia to be issued from currency given to undercover agents which was deposited in cooperating financial institution #2.

59. On June 23, 1982, agents on surveillance observed a woman arrive at Mr. "C" in a car registered to Mouzin. The woman was not Mouzin. The woman entered 157 N.W. 36 Street. A short while later she was observed to leave that location and walk down to 115 N.W. 36 Street. She was observed to be carrying a purse and a brown envelope which she did not have when she entered the first location.

60. Your Affiant concludes based on your Affiant's experience and the facts in this Affidavit that the 157 and 115 locations on Northwest 36 Street are presently being used by Mouzin and her associates to conduct the illegal activities described in this Affidavit, and that a search of those premises will reveal evidence of such activities.

3. SamBen Trading Company, 7379 N.W. 54 Street, Miami, Florida

4. 1925 Brickell Avenue, Miami, Florida

61. Location 3 above is a business office used by Sam and Susie Schuster. Location 4 is a residence used by Sam Schuster and which was

also used by Susie Schuster until very recently. Intercepted calls have recorded several occasions when Sam and Susie Schuster have contacted Mouzin or Hackett and have discussed currency to be picked up and wire transfers from currency delivered to the undercover agents.

62. On February 22, 1982, Hackett showed agents #1 and #2 a black book which she indicated contained a list of her money laundering clients. She indicated that the listing for "Maria" was really a listing for "Susie". She also stated that Rako is Susie. Your Affiant knows from the records of wire transfers in this investigation that Rako is an account in Panama which has received several million dollars from disbursements from the currency delivered by Mouzin and Hackett.

63. Your Affiant was told by S/A Morgan that on April 27, 1982, Sam Schuster flew to San Francisco and registered under his own name. Airline records reflect that he flew under the name of Gamez. Hotel records reflect that he called his home residence. Agents on surveillance observed Hackett in the same hotel. That evening Hackett called Mouzin and advised that she had received a delivery of "637 dresses". The next day Mouzin called Koele at Mr. "C" of Miami and instructed her to tell Susie that "the thing was 637". On April 28, 1982, Mouzin delivered $623,000 in currency to undercover agents. Based on these facts, your Affiant beleives that Samuel Schuster coordinated the delivery of a large sum of currency to Hackett in San Francisco on April 27, 1982.

64. Among the many intercepted calls with the Schuster's are the following. On June 3, 1982, Hackett called the business number (the SamBen Trading Company) and spoke to Sam. They discussed account

balances. Later that day, Sam called Hackett and advised that there might be a pickup that evening. On June 4, 1982, Sam called Hackett and asked about transfers. On June 7, 1982, Hackett called Sam at the business and advised there were "two big ones" and "a little half one". On June 8, 1982, Sam called and told Hackett that his bank had called Barbara (Mouzin's) bank. Also on June 8, Sam called and instructed Hackett to go to the same place at 5:00 p.m. On June 9, 1982, Sam called Hackett. There was discussion that it was about "5" but that Hackett had not counted it yet. Later that day Hackett and Mouzin delivered $500,000 to undercover agents.

66. There were also many intercepted calls with Susie Schuster. On May 3, 1982, Mouzin discussed wire transfers from cooperating financial insitution #2 with Susie. On May 4, 1982, Susie and Mouzin discussed arrangements for a pickup of currency in San Francisco. On May 5, Susie and Mouzin discussed "1800 dresses". On May 7, 1982, Hackett and Widdecombe delivered $1,880,000 in currency to undercover agents. On May 27, 1982, Susie had a conversation with Hackett and discussed wire transfers from cooperating financial institution #2. In addition, on May 3, Hackett and Mouzin had an intercepted conversation and discussed the fact that Susie was short in the amount of currency delivered to the undercover agents that day ($1,346,000).

67. Additional evidence of Susie Schuster's involvement is the fact that on December 1, 1982, Mouzin caused a cashier's check for $120,000 payable to Susie Schuster to be purchased from currency delivered to cooperating financial institution #1.

68. In listening to the intercepted conversations, and considering surveillance observations in San Francisco and the timing of currency deliveries to undercover agents, it is clear to your Affiant that the Schuster's arranged and orchestrated the deliveries of currency from persons in San Francisco. Either Sam or Susie directs Hackett or Mouzin when to go to San Francisco, and surveillance has on many occasions observed apparent deliveries of currency to Hackett and/or Widdecombe following such calls. The currency is usually driven to Los Angeles and delivered to agents.

69. Your Affiant believes it is clear that Sam and Susie Schuster are involved in Mouzin's money laundering activities. They use their business and their residence for directing pickups of currency and for discussing wire transfers after the currency is deposited. Due to the scale of their operation, your Affiant believes that they maintain records at their business and their residence pertaining to money laundering activities. Such records will include accounts for their different clients, telephone numbers for their clients, wire transfer ledgers and similar records. It should be added that on March 15, 1982, Mouzin and Hackett told agents #1 and #2 that Susie is their biggest customer.

IV. ACCOUNTS WHICH HAVE RECEIVED NARCOTICS PROCEEDS.

70. Your Affiant believes the below listed accounts have received disbursements from the currency delivered by Mouzin and Hackett, and that the currency was derived from narcotics trafficking, and that monies in the accounts are therefore subject to seizure and forfeiture pursuant to 21 USC §881(a)(6).

71. S/A Morgan caused a list of the serial numbers of approximately 45,000 bills taken from deposits Mouzin made at cooperating financial insitution #1 to be sent to DEA Headquarters in Washington, D.C. for comparison with a national list of bills used by DEA to purchase narcotics. Your Affiant was informed by S/A Morgan that he was advised by Phil DeMarco, DEA, that he compared the bills with the national list and determined that four of the bills had identical serial numbers and denominations to bills used to purchase narcotics or dangerous drugs in four unrelated investigations in New York; San Antonio; Baltimore; and Greensboro, North Carolina. (The national buy list does not include the series of the bills, and your Affiant therefore cannot state that the bills brought in by Mouzin are positively the same. Your Affiant believes, however, that the match of serial numbers and denominations is highly significant.)

72. On June 7, 1982, at a meeting in Las Vegas, Mouzin told S/A Morgan and agent #3, who informed your Affiant, that the money she laundered came from narcotics traffickers. She also said that her clients gave her the money because they knew that currency reports were not being filed by the bank where she was depositing the currency. Based on these facts and the other facts in this Affidavit, your Affiant concludes that the following accounts are seizable pursuant to 21 USC §881(a)(6).

1. Account Numbers 475-1507, 475-1493 and 475-0985 at Banco Real, 2 South Biscayne Boulevard, Miami, Florida, Banco Real, 848 Brickell, Miami, Florida

73. These three accounts appear to be owned or controlled by Alphonso Carvajal. Account 475-1507 is in the name of Alphonso Carvajal.

On November 19, 1981, Mouzin caused a wire for $500,000 to be sent to this account from currency deposited at cooperating financial insitution #1. That amount would be subject to seizure.

74. Account 475-1493, is in the name of Hernando Carvajal, who Alphonso Carvajal has identified as his brother in intercepted conversations. This account received three wire transfers totalling $362,315 on March 11, 1982, May 3 and 5, 1982. On May 3, 1982, Carvajal called Mouzin about one of the wire transfers to this account and indicated that it was fine to send money to this account. That amount would be subject to seizure.

75. Account 476-0985 is in the name of Forexint. On February 16, 1982, Hackett told agents #1 and #2 that Forexint was hers and Mouzin's major Los Angeles client. On June 25, 1982, Carvajal gave twenty kilograms of cocaine to S/A Morgan and agent #3, in Ft. Lauderdale, Florida. He instructed S/A Morgan to wire the money for the purchase of the cocaine to the Forexint account. From Februrary 8, 1982, through June 3, 1982, Mouzin caused 15 wire transfers and cables to be sent to the Forexint account from currency deliveries. Total amount sent was $1,683,191, and would be subject to seizure.

76. Carvajal's status as a major narcotics trafficker is well established. Your Affiant knows from experience that large sums of currency when handled under unusual circumstances are indicative of criminal behavior. Your Affiant is aware that narcotics is a "cash" business, and it is clear that the currency delivered by Mouzin and her associates is derived from narcotics trafficking. Your Affiant concludes

that these three accounts should be seized.

2. Account Numbers 01-12-0002 and 01-125-0002 at Banco de Ibero America, 848 Brickell, Sixth Floor, Miami, Florida

77. These accounts are in the name of Expoimpe. On March 1, 1982, Mouzin and Hackett told agents #1 and #2 that Expoimpe is their biggest customer. On March 15, 1982, they told the agents that Susie is their biggest Customer. Your Affiant believes that Expoimpe is the name for accounts maintained by Susie and Sam Schuster. Both Schuster's have frequently directed wire transfers to the accounts. In addition, records taken from the May 13 search of Adelman's residence reflect many listings for Expoimpe. A copy of two pages of records taken from the Adelman residence is attached hereto as Exhibit A. These records were found along with records showing narcotics sales. From December 15, 1981, through May 27, 1982, eighteen transfers were made from currency delivered by Mouzin and Hackett totalling $3,063,749 to Expoimpe. Account 01-12-0002 has received wire transfers totalling $1,109,749.00; account 01-125-0002 has received wire transfers totalling $1,954,000.00, from the cooperating financial institutions #1 and #2.

3. Account Number 0223000678-06 at National Bank of Florida

78. This account is in the name of Mr. "C" of Miami. As described above, Mr. "C" of Miami is a front used by Mouzin to cover her laundering activities. S/A Morgan told your Affiant that at the meeting in Las Vegas on June 7, 1982, Mouzin advised that Tony Cantelli, who owns

Mr. "C" of Miami, knew the money she laundered came from narcotics traffickers and he received 50% of the profits.

79. The records of the account opened by Mouzin at cooperating financial insitution #1 reflect the following disbursements to Mr. "C" of Miami which were deposited to the subject account.

DATE	AMOUNT
12-10-81	$ 75,000
12-15-81	75,000
12-18-81	100,000
12-18-81	75,000
TOTAL	$ 325,000

80. Since the $325,000 was derived from narcotics trafficking, your Affiant believes that amount is properly forfeitable.

81. As noted elsewhere, all references to wire transfers and disbursements from the cooperating financial institutions have been documented, and your Affiant has personally viewed copies of such disbursements, and has analyzed schedules of such disbursements prepared from copies obtained from the financial institutions.

Cheryl Hessler
Affiant

Subscribed and Sworn to before me
this _____ day of _____, 1982.

_____
UNITED STATES MAGISTRATE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA, Plaintiff, v. ONE LOT OF EIGHT THOUSAND SEVEN HUNDRED TEN DOLLARS ($8,710.00) IN UNITED STATES CURRENCY, Defendant.	Case No.

COMPLAINT FOR FORFEITURE IN REM

Plaintiff, the United States of America, by and through its undersigned United States Attorney for the Southern District of Florida in a civil cause of forfeiture, alleges upon information and belief:

1. That this Court has jurisdiction pursuant to 28 U.S.C. §§1345 and 1355.

2. That on or about December 5, 1982, officers of the United States Customs Service at Miami, Florida seized the defendant currencies.

3. That on or about December 5, 1982, the defendant currencies were transported or caused to be transported by a person known as David Smith from Toronto, Canada to Miami, Florida.

4. The defendant currencies are "monetary instruments" in excess of $5,000.00 within the meaning of 31 U.S.C. §5312(3).

5. No report of the aforementioned transportation of the defendant currencies was filed with the U.S. Customs Service as required by 31 U.S.C. §5316 and the regulations of the Secretary of the Treasury.

6. The defendant currencies are now and during the pendency of this action will be within the jurisdiction of this Court.

7. By reason of the premises, the defendant currencies have become and are forfeited to the United States of America pursuant to the provisions of 31 U.S.C. §5317(b).

WHEREFORE, Plaintiff prays that due process issue to enforce the forfeiture and to give notice to the interested parties to appear and show cause why the forfeiture should not be decreed, that the Defendant be condemned as forfeited to the United States of America; and delivered into the possession of the District Director of Customs, Miami for disposition according to law; and for such other and further relief as this Court may deem just and proper.

STANLEY MARCUS
UNITED STATES ATTORNEY

By: _____
Assistant U.S. Attorney
155 South Miami Avenue
Miami, Florida 33130

DECLARATION

I, _____, Assistant United States Attorney for the Southern District of Florida, declare under penalty of perjury as provided by 28 U.S.C. §1746, the following:

That the foregoing Complaint for Forfeiture in Rem is based on reports and information furnished to me by the United States Customs Service, United States Department of the Treasury, and that everything contained therein is true and correct to the best of my knowledge and belief.

Executed on _____.

_____
ASSISTANT U.S. ATTORNEY

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE
WASHINGTON

CIRCULAR: ENF-4-R:E:P
DATE: NOV 16 1976

Subject: Public Law 91-508, "Currency and Foreign Transactions Reporting Act"

Reference: Public Law 91-508 (31 U.S.C. 1051-1122)
31 CFR, Part 103
Circular ENF-3-CC, dated June 7, 1972
Circular ENF-3-CC, dated March 15, 1974
Circular ENF-3-O:I:F:P, dated September 10, 1974

1. PURPOSE

To provide definitions and examples of various monetary instruments which must be reported pursuant to Public Law 91-508 and the regulations thereunder.

2. BACKGROUND

Section 1101 of Title 31, United States Code, requires every person (with certain exceptions) who transports or causes to be transported into or out of the United States currency or certain monetary instruments in an amount exceeding $5,000 on any one occasion to file a report (IRS Form 4790) with Customs at the time of entry or departure, on or before the date of entry or departure if the currency or monetary instrument is mailed or shipped. Persons receiving currency or monetary instruments in the United States which have been mailed or shipped have 30 days from the date of receipt of the currency or monetary instrument to file the report. Fundamental to any case involving the seizure or potential seizure of monetary instruments is a determination that the monetary instruments are subject to the reporting requirements. The correct determination will preclude unnecessary investigation as well as the unwarranted seizure of monetary instruments not subject to the currency laws.

3. ACTION

Definitions and examples of various monetary instruments are attached.

4. EFFECTIVE DATE

The contents of this circular are effective immediately.

File: 4-02.16 S

Leonard Lehman
Assistant Commissioner
(Regulations and Rulings)

Attachment

Distribution: A , B, C, D

The terms "currency" and "monetary instruments" are defined in 31 CFR 103.11, as amended:

> CURRENCY: The coin and currency of the United States or of any other country, which circulate in and are customarily used and accepted as money in the country in which issued. It includes U. S. silver certificates, U. S. notes and Federal Reserve notes, but does not include bank checks or other negotiable instruments not customarily accepted as money.
>
> MONETARY INSTRUMENTS: Coin or currency of the United States or of any other country, travelers checks, money orders, investment securities in bearer form or otherwise in such form that title thereto passes upon delivery, and negotiable instruments (except warehouse receipts or bills of lading) in bearer form or otherwise in such form that title thereto passes upon delivery. The term includes bank checks, travelers' checks and money orders which are signed but on which the name of the payee has been omitted, but does not include bank checks, travelers' checks or money orders made payable to the order of a named person which have not been endorsed or which bear restrictive endorsements.

The Secretary of the Treasury has determined that, in addition to U. S. coin and currency, all foreign coin and currency which circulate and are customarily used and accepted as money in the issuing country must be reported when the amount being transported exceeds $5,000. Based on information currently available, gold coins do not at this time customarily circulate as money anywhere in the world; and, therefore, they currently are not required to be reported under 31 CFR 103. In an opinion dated July 21, 1975, the Director, Office of Domestic Gold and Silver Operations advised in part: "Your February 24, 1975, letter specifically inquires as to the status of coins issued by Panama, Guatemala and one of the smaller Arab countries. While such countries have issued gold coins having legal tender status, these are intended as numismatic items only and do not circulate in customary use as money."

While not subject to the currency reporting requirements, gold coins and other coins imported for non-monetary purposes must be declared and are subject to Customs entry requirements as merchandise. Commercial shipments exported from the United States should be accompanied by the filing of a Shipper's Export Declaration.

In addition to currency, the term "monetary instruments" includes travelers' checks, money orders, investment securities in bearer form and negotiable instruments in bearer form.

The term "in bearer form" has been the source of some confusion. Title to valuable papers (checks, bonds, coupons, etc.) can be transferred by delivery or by endorsement. As a general rule, if title to an instrument is transferable by delivery, it is a bearer instrument. Investment securities (in bearer form) and other negotiable instruments (in bearer form) are similar to cash; that is to say, anyone in possession of the instrument could negotiate it.

The following are definitions and examples of various monetary instruments. Included in the examples are certain instruments which are not subject to the reporting requirements of 31 U.S.C. 1101.

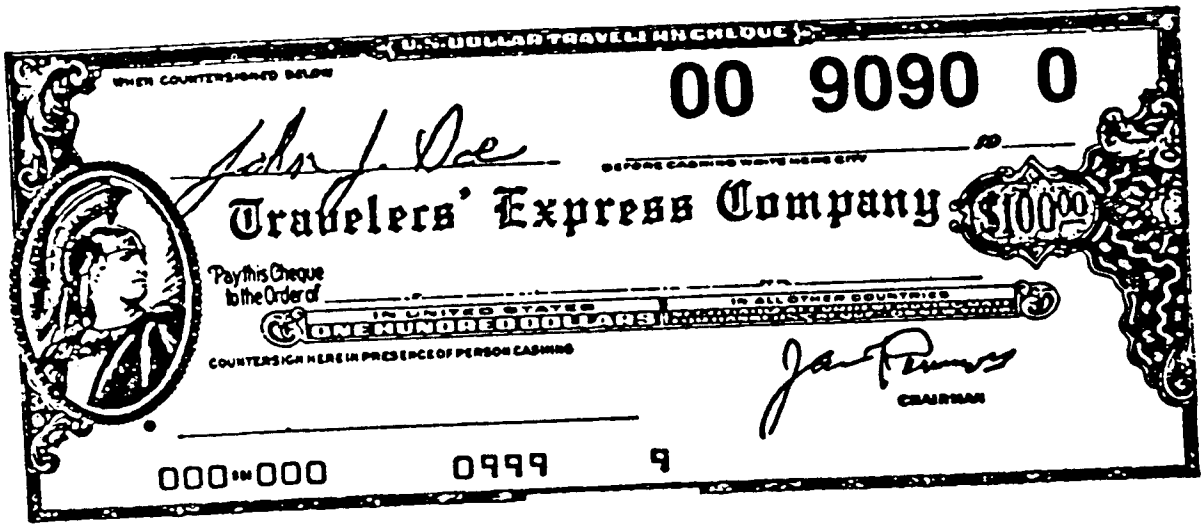
TRAVELERS' CHECKS: Travelers' checks are issued in predetermined amounts ($10, $20, $50, $100, and $500) by the American Express Company and several large United States banks. Technically a modified form of a traveler's letter of credit, travelers' checks are not drawn on any specified bank, but are payable at practically all banks throughout the world and are guaranteed by a well known institution. Travelers' checks are obtained from the issuing company's selling agent or from local banks who purchase them from issuing companies or banks and then sell them to the public. They furnish a convenient and safe currency for travelers. The signature of the payor (usually also the buyer) is written on the face of the check at the time of purchase. Space is reserved for his counter-signature in the presence of the person agreeing to cash the check. The signature written in the presence of the paying bank or other institution must correspond with the signature written at the time of the purchase, agreement of the two signatures being regarded as sufficient identification for payment of the money. The absence of this second signature does not exclude travelers checks from the reporting requirements. Travelers' checks are encountered in various forms:

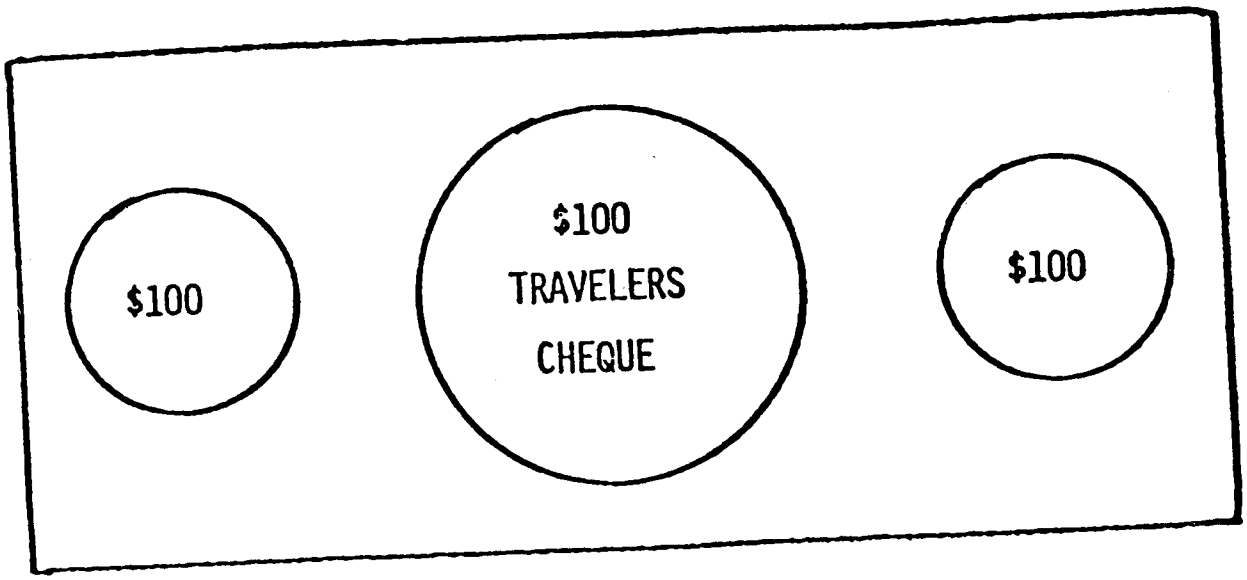
1. Bulk Lots: Bulk lots of travelers' checks prior to their delivery to and issuance by a bank or selling agent are not monetary instruments within the meaning of 31 CFR 103.11.

2. Issued: Travelers' checks which have been issued (sold to an individual) by the issuing agency, its selling agent, or a bank, whether or not countersigned, are included within the definition of monetary instruments which must be reported if in excess of $5,000 or if in combination with other monetary instruments exceeds $5,000. If countersigned, and not made payable to a named person or firm, the check is considered to be in bearer form.

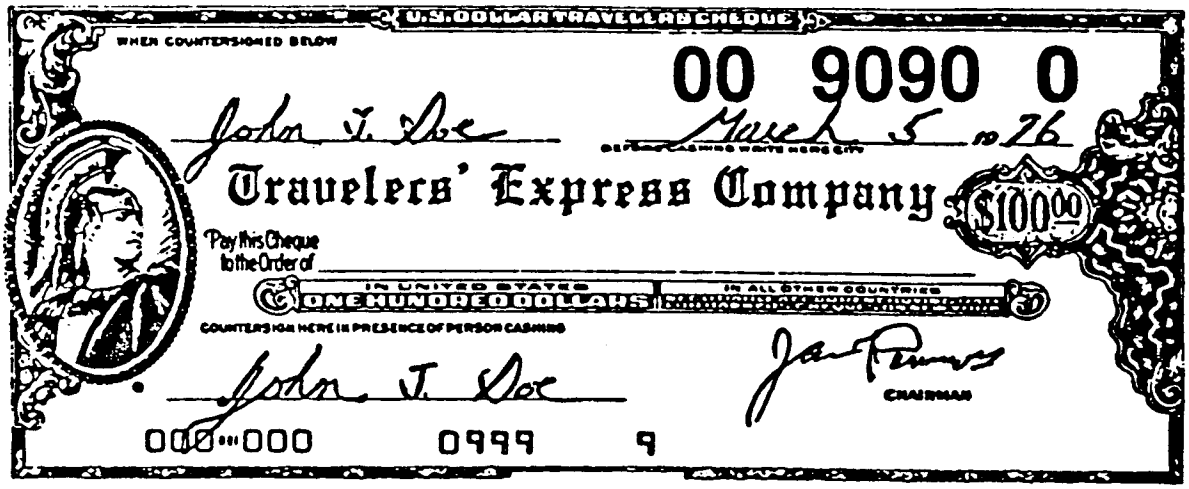
EXAMPLE 1: Issued but not countersigned

Face of check signed on top when purchased. Unsigned on bottom

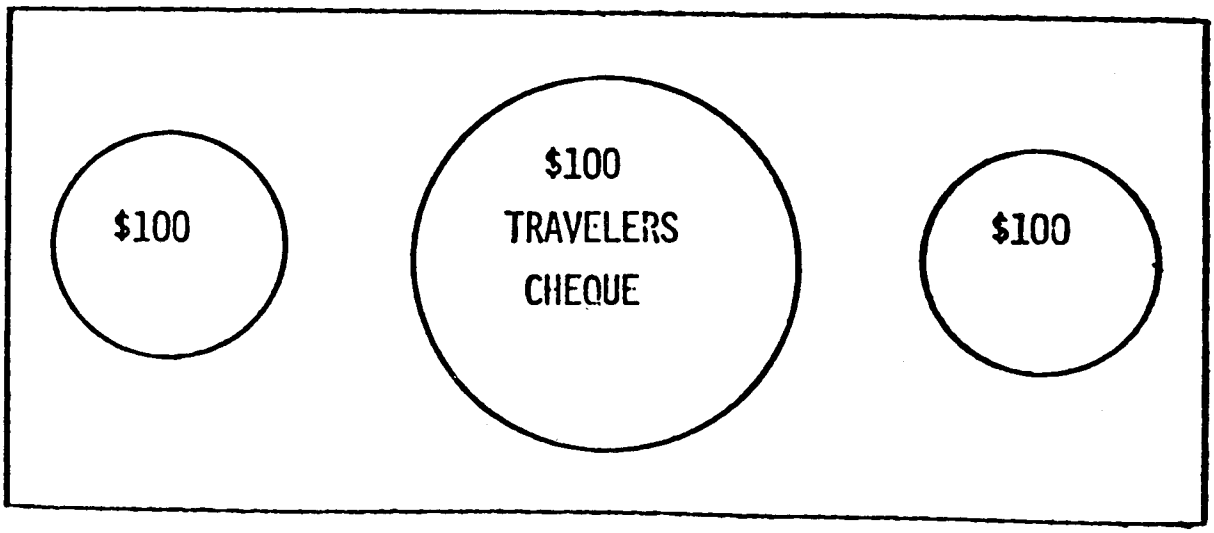




EXAMPLE 2: Issued and countersigned



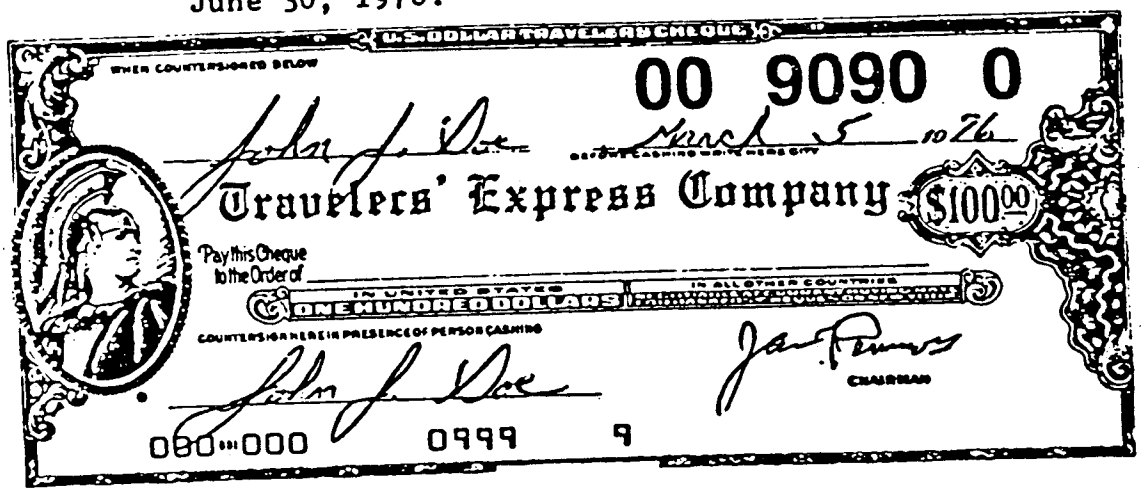
(Back of check bears no restrictions)



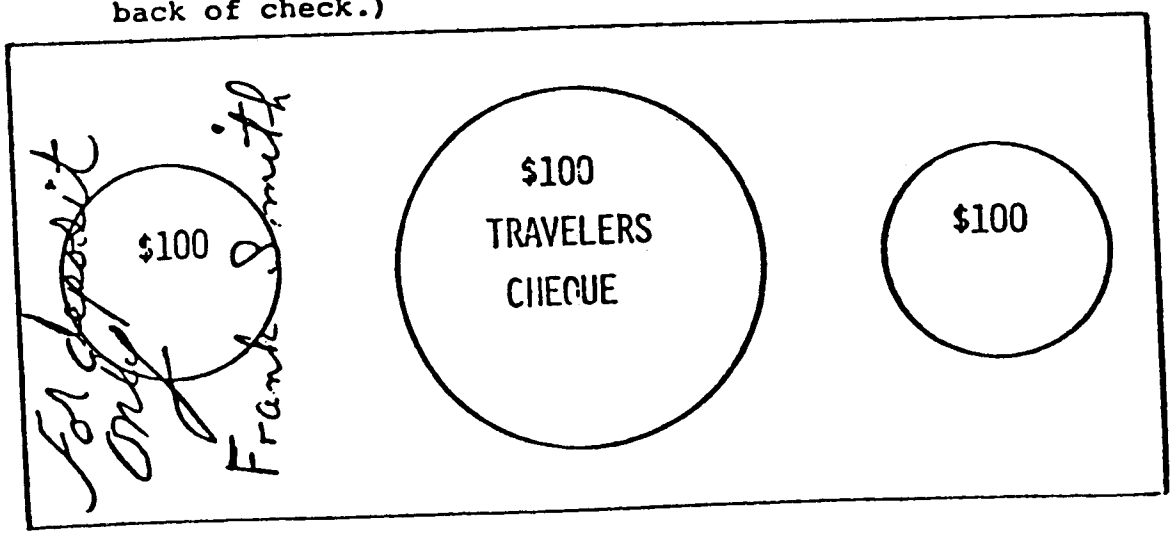
3. Restrictively endorsed Travelers' checks which bear restrictive endorsements such as "For Deposit Only", followed by the name of the endorser or bank account number, or "For the Account of (a named company or person)" are exempted from the reporting requirements. The restrictive endorsement limits the negotiability of the travelers check so that it is not a bearer instrument. The endorsement "For Deposit Only" without further restriction is subject to the reporting requirements. Anyone could add his name and deposit such a check into his account. Travelers' checks made payable to a named person or firm are not in bearer form and consequently not subject to the reporting requirements.

EXAMPLE 3: Restrictively endorsed:

Exempt from the reporting requirements as per amendment of 31 CFR 103.11, dated June 30, 1976.

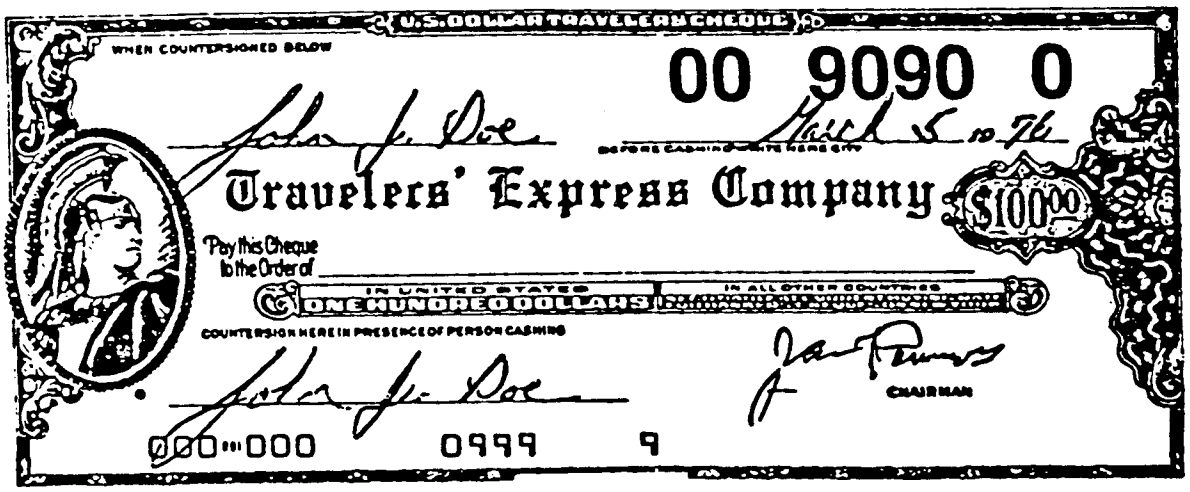


(Restrictive endorsement "For Deposit Only" on back of check.)

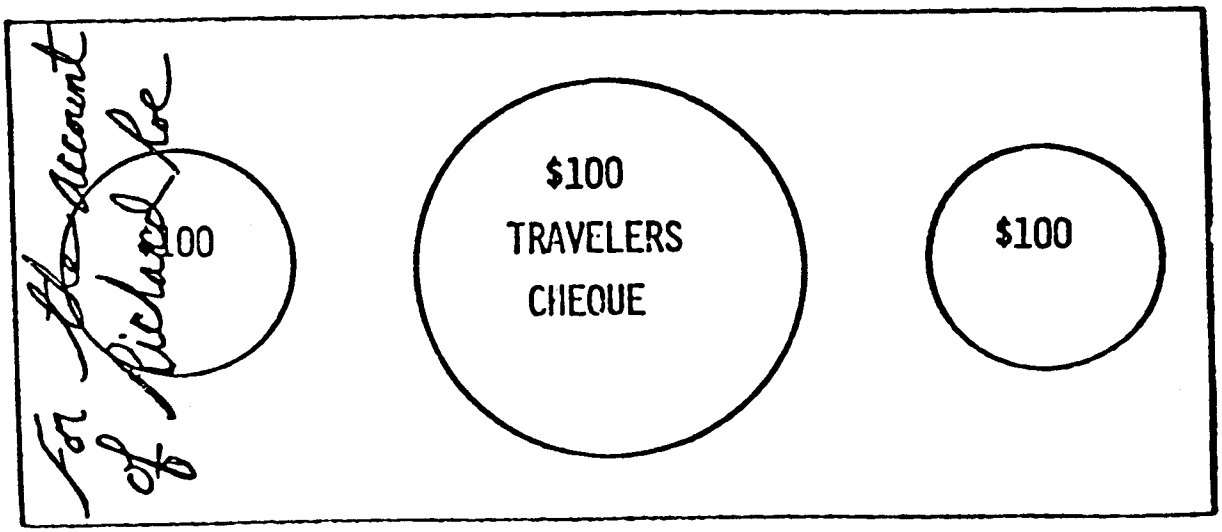


EXAMPLE 4. Restrictively endorsed:

Exempt from the reporting requirements per Treasury instructions of June 11, 1975 and February 13, 1976.

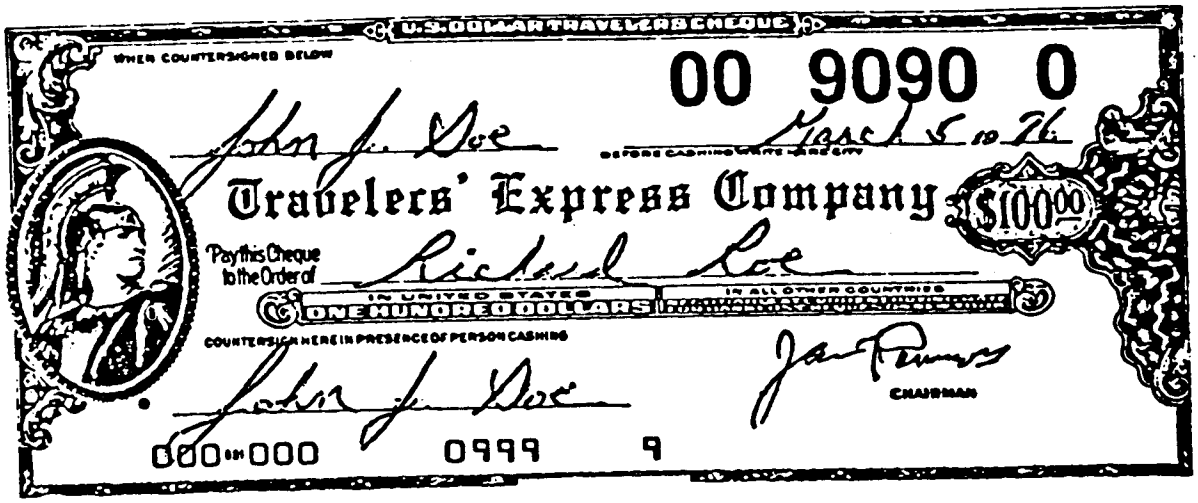


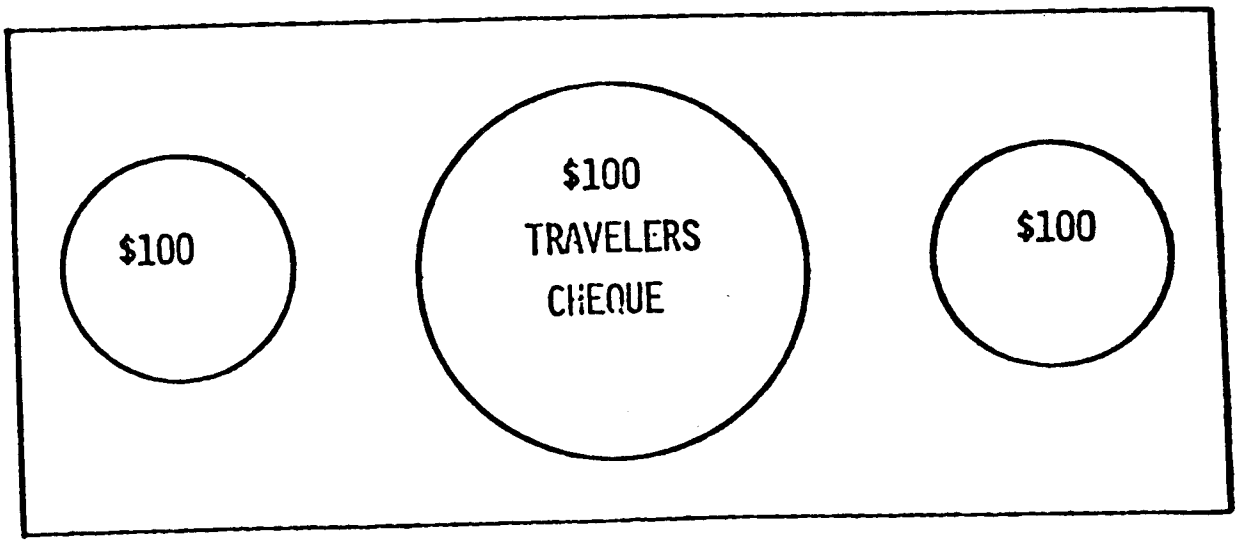
(Restrictive endorsement "For the account of a named person" on back of check.)



EXAMPLE 5. Made payable to a named person.

Exempt from the reporting requirements since not in bearer form.





MONEY ORDER: A money order is a form of credit instrument calling for the payment of money to the named payee. There are three parties to a money order; the remitter (payer), the payee, and the drawee. Money orders are issued by the Post Office Department, American Express Company, and various other private organizations; and their franchised retail stores; and by some commercial and saving banks, and savings and loan associations. Money orders are similar to travelers' checks but are usually for small amounts. Unless restrictively endorsed or payable to a person, money orders are to be reported in accordance with the requirements of 31 CFR 103.

INVESTMENT SECURITIES: The term investment securities has come to be indiscriminately applied to all classes of bonds and stocks, regardless of quality. Investment securities in bearer form or otherwise in such form that title thereto passes upon delivery are subject to the currency reporting requirements. Examples of investment securities are:

Bearer Bonds: A bearer bond is an instrument under which a person or corporation guarantees to pay a stated sum of money on or before a specified day; or a certificate of ownership of a specified portion of a debt due by government or corporation to individual holders usually bearing a fixed rate of interest. A bearer bond is presumed to be owned by the person who holds it; the owner's name is not on record with the issuer. Such bonds usually carry detachable interest coupons. Interest is collected by presentation of a coupon to the issuer's agent or the bondholder's bank. The detachable certificate of interest due is also a "negotiable instrument".

Registered Bond: A bond may be registered in the name of the owner as to principal or interest or both. A bond registered as to principal can be transferred only with the endorsement of the registered owner, but interest is paid by presentation of the appropriate coupon. Registered bonds are not in "bearer" form unless assigned in blank. Assignment in blank is a formal transfer of title in which the space for the insertion of the new owner is left blank, so that the name may be written in at any subsequent time. Assignment form will be found on the reverse side of registered bonds. Registered bonds assigned in blank become "bearer" instruments in that title passes by mere delivery.

Stock Certificate: A stock certificate is a certificate evidencing ownership of one or more shares of a corporation's stock. These certificates are usually registered to a principal and as such are not subject to the reporting requirements. A share of stock differs from a bond in that a bond is a contract to pay a certain sum of money with definite stipulations as to amount and maturity of interest payments, whereas a stock contains no promise to repay the purchase price or any amount whatsoever. The shareholder is an owner; a bondholder is a creditor. A stock certificate may be assigned in blank. The following is a form of assignment on the reverse side of a stock certificate.

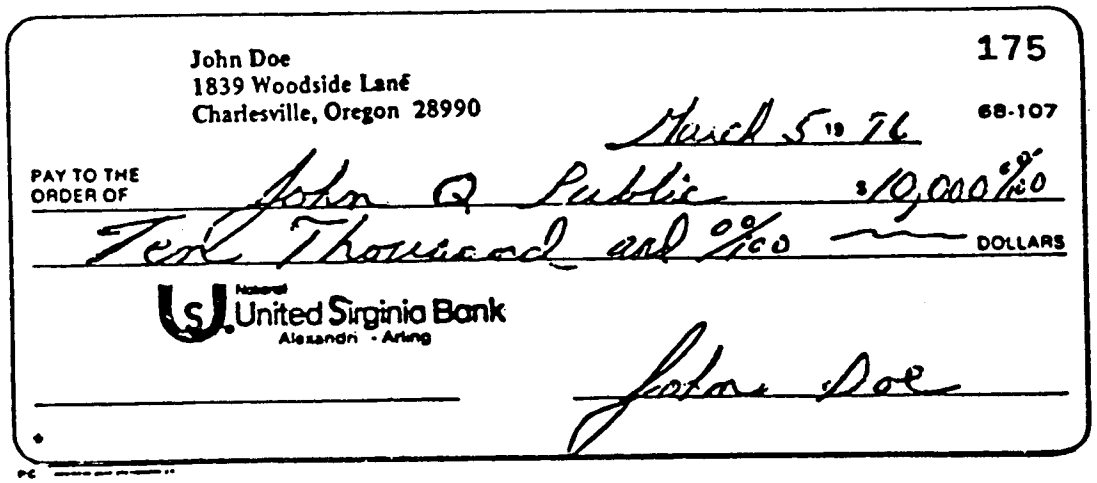
> For value received.....
> hereby sell, assign and transfer into.....
> .....
> shares of the capital stock represented by the within certificate, and do hereby irrevocably constitute and appoint.....
> attorney to transfer the said stocks on the books of the within named company with full power of substitution in the premises.
> Dated.....
> (Signature).....
> In the presence of
> .....
> .....
>
> Note: The signature of this assignment must correspond with the name as written on the face of this certificate in every particular without alteration or enlargement or any change whatever.

NEGOTIABLE INSTRUMENTS: Negotiable instruments in "bearer" form or in such form that title thereto passes upon delivery are subject to the reporting requirements of 31 CFR 103. In addition to stock certificates (in bearer form) and bearer bonds which were previously discussed, bank checks and gambling markers must be reported if in "bearer" form.

Bank Checks: As defined by the Board of Governors of the Federal Reserve System, "a check is generally defined as a draft or order upon a bank or banking house, purporting to be drawn upon a deposit of funds, for the payment at all events of a certain sum of money to the order of a certain person therein named, or to him or his order, or to bearer, and payable on demand." Checks are encountered in various forms; some are negotiable instruments (in bearer form) within the definition of 31 CFR 103.11, others are excluded from the reporting requirements.

1. Payable to a named person: The term "monetary instrument" does not include bank checks made payable to the order of a named person which have not been endorsed or which bear restrictive endorsements. Simply stated, if Frank Smith writes a check payable to the order of John Doe (a named person) and John Doe has not endorsed the check (usually by signing the back), that check is not subject to the reporting requirements of 31 CFR 103.

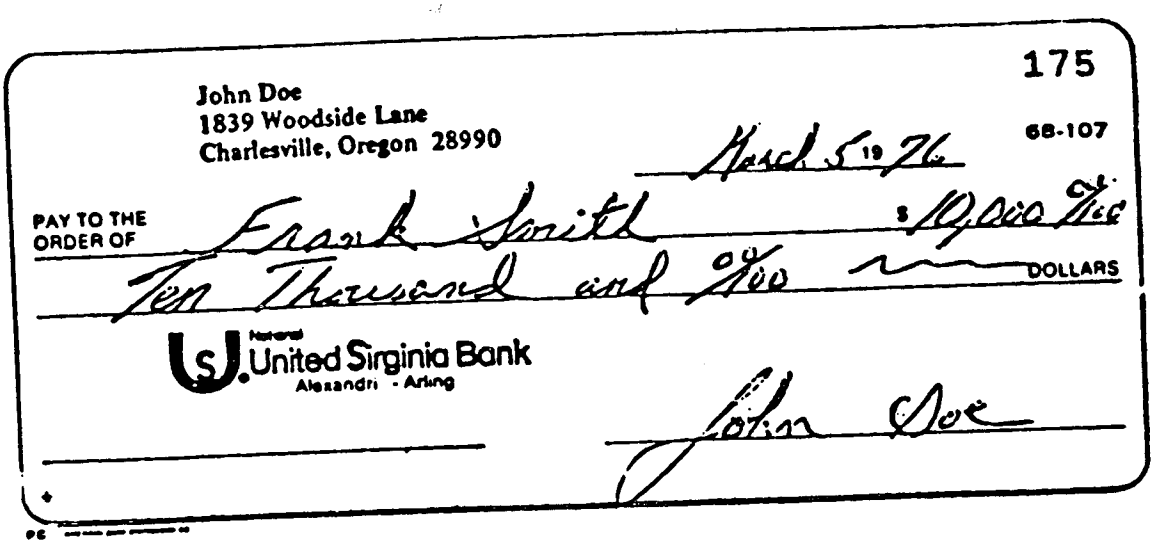
EXAMPLE 6:

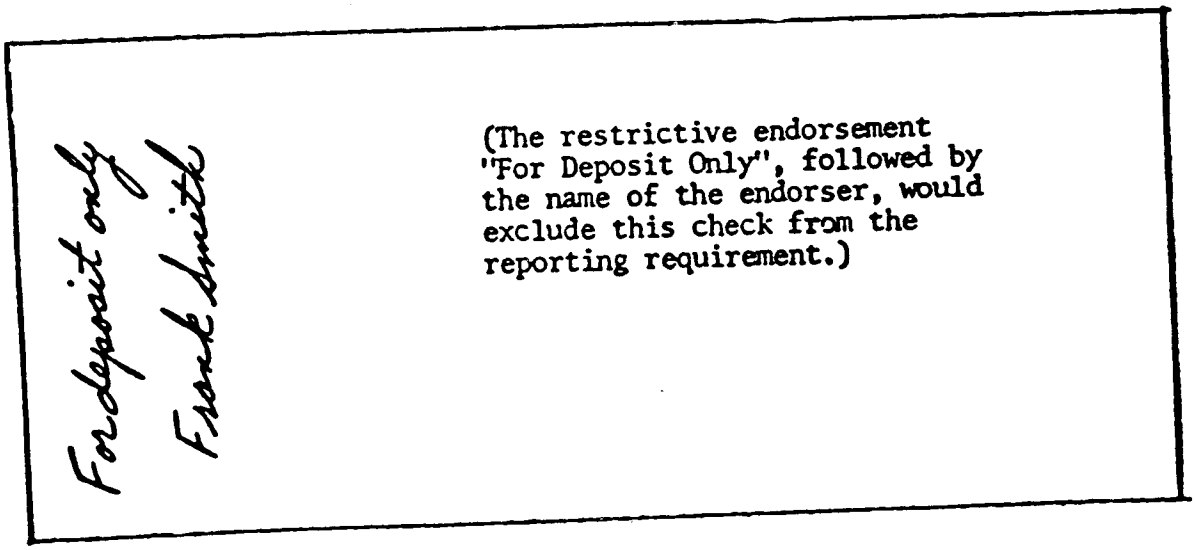


(A check of this nature, not endorsed, is not subject to the reporting requirements of the Currency and Foreign Transactions Reporting Act.)

2. Restrictively endorsed checks: Checks which bear restrictive endorsements such as "Pay any Bank or Banker, First City Bank", need not be reported. The following are additional examples of restrictive endorsements:

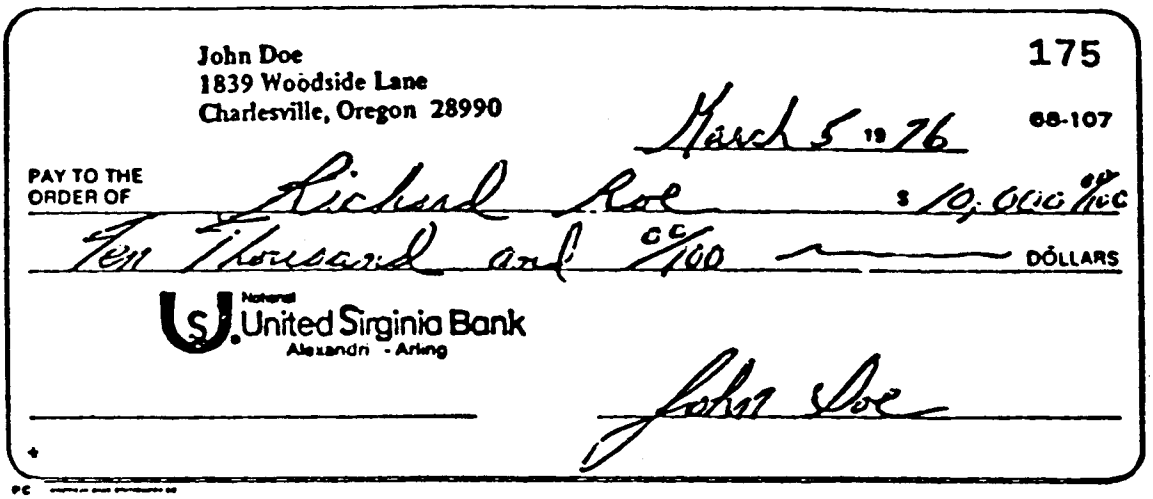
EXAMPLE 7:





(The restrictive endorsement "For Deposit Only", followed by the name of the endorser, would exclude this check from the reporting requirement.)

EXAMPLE 8:



John Doe
1839 Woodside Lane
Charlesville, Oregon 28990

175

68-107

March 5 19 76

PAY TO THE ORDER OF Richard Roe $ 10,000 00/100

Ten Thousand and 00/100 DOLLARS

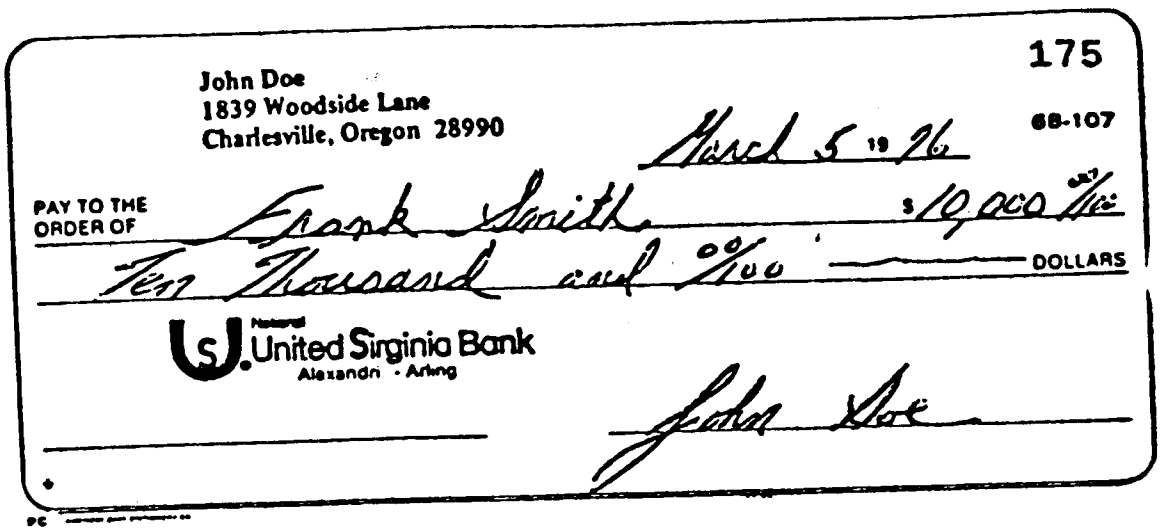
National United Virginia Bank
Alexandria - Arling

John Doe

For the account of Richard Roe

(The restrictive endorsement "For the Account of (a named person)" would exclude this check from the reporting requirement.)

EXAMPLE 9:



175

John Doe
1839 Woodside Lane
Charlesville, Oregon 28990

68-107

March 5 19 96

PAY TO THE ORDER OF Frank Smith $10,000 00/100

Ten Thousand and 00/100 DOLLARS

United Virginia Bank
Alexandri · Arlng

John Doe

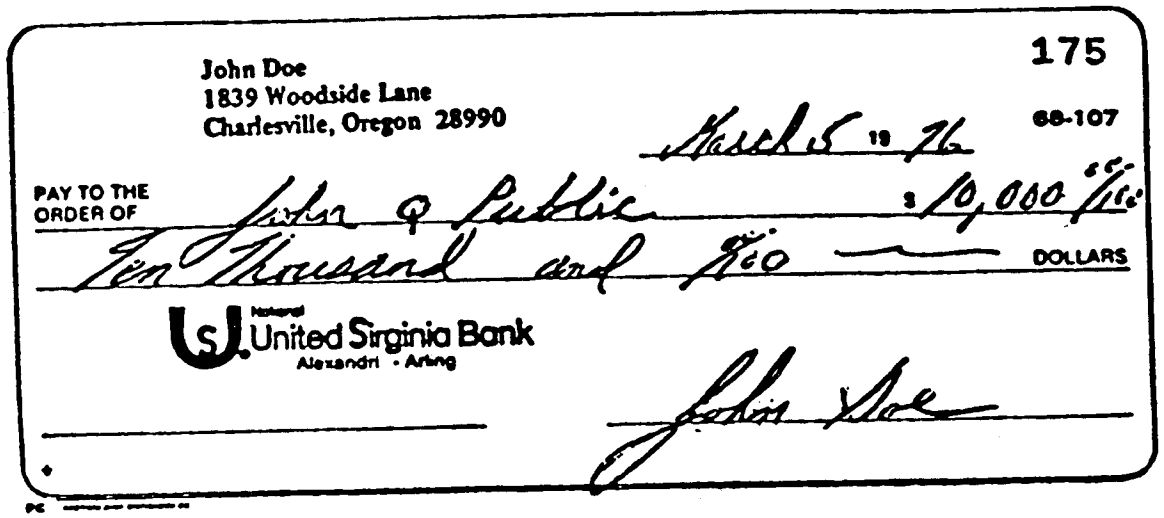
Pay to the order of Richard Roe
Frank Smith

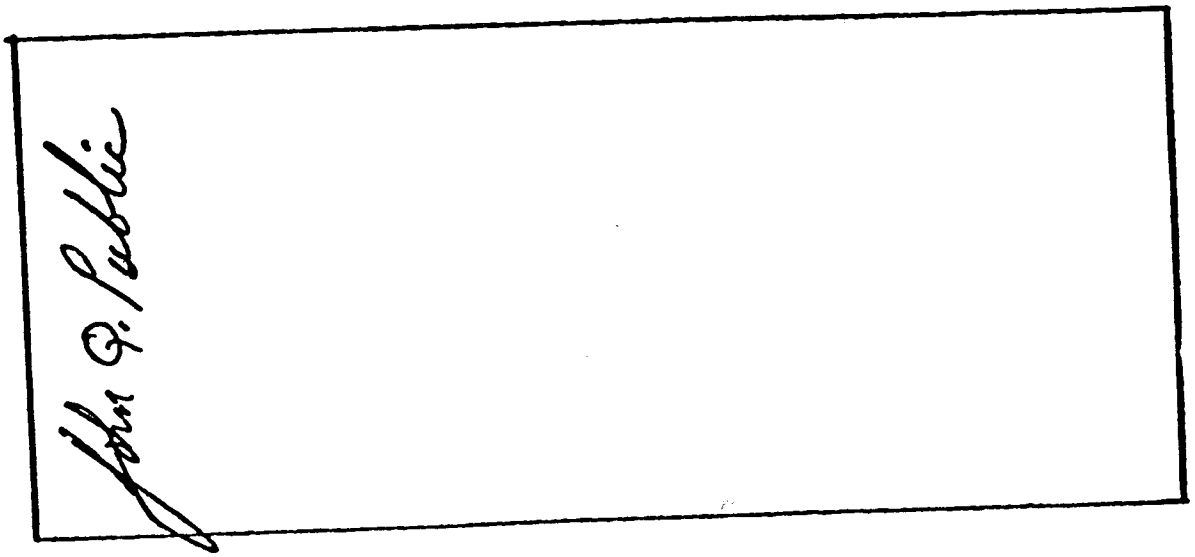
(This check is not in "bearer" form in that only Richard Roe (the named person) could negotiate it. The restrictive endorsement would exclude this check from the reporting requirement.)

It is apparent that such restrictive endorsements would greatly restrict the further negotiation of any check on which they were written.

3. Endorsed Checks: A check made payable to the order of a named person and endorsed by that person is a negotiable instrument in "bearer" form and is subject to the currency reporting requirements.

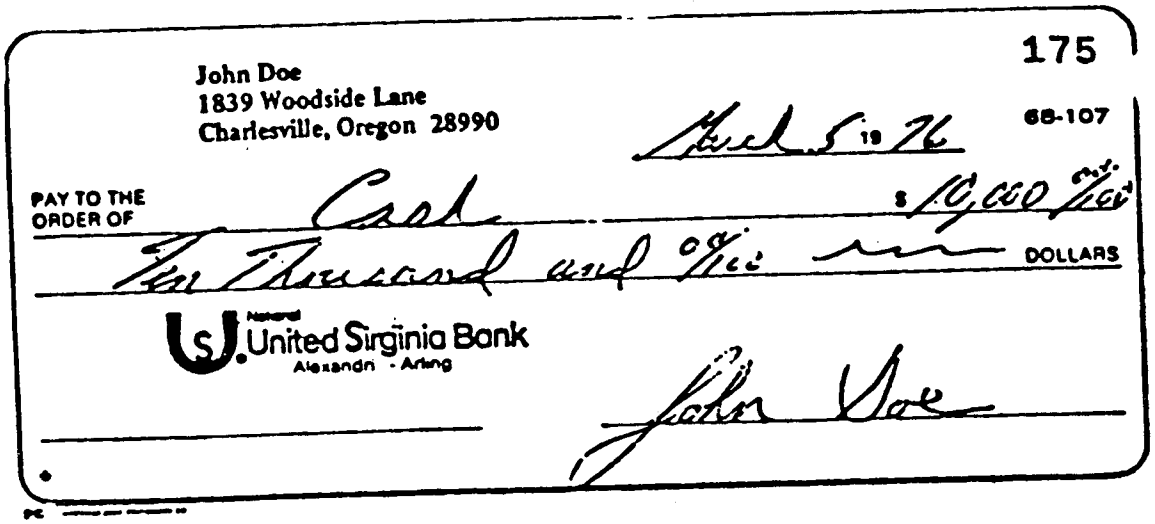
EXAMPLE 10:





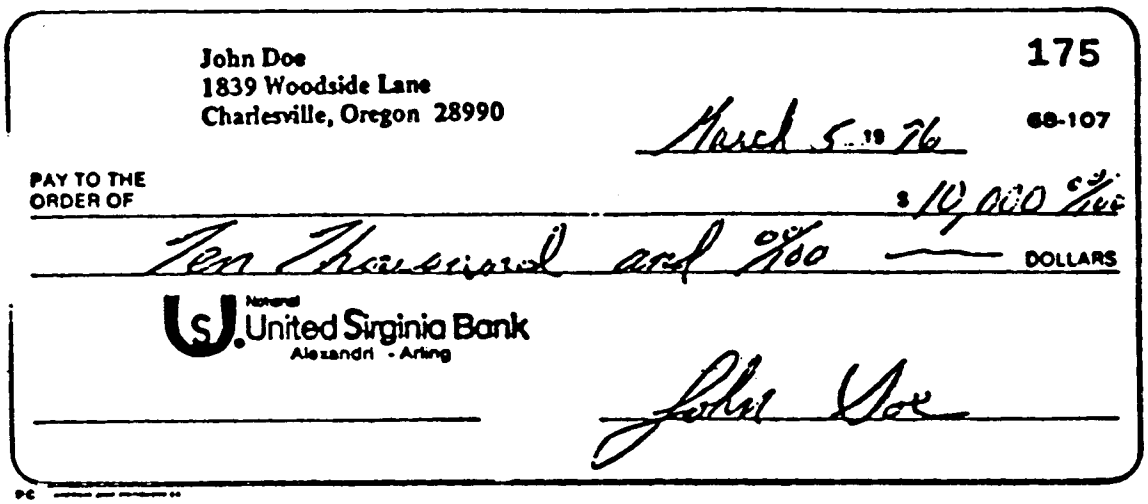
"Bearer" Checks: Checks are sometimes made payable to "Currency", "Bearer" or "Cash" which makes them payable to the bearer. Checks of this nature could be negotiated by anyone possessing them and therefore must be reported if in excess of $5,000 or if in combination with other monetary instruments and/or currency exceed $5,000. Although under the Uniform Code checks payable in blank are incomplete bearer instruments, as a practical matter checks payable in blank are readily negotiable and can usually be cashed by anyone who fills in his name as payee. Therefore, for the purposes of 31 CFR 103, these checks are to be considered bearer instruments.

EXAMPLE 11



A "bearer" check may be made payable to the order of "Cash", "Bearer", "Currency" or a similar term. The check need not be endorsed on the back to be in "bearer" form and is therefore subject to the reporting requirements.

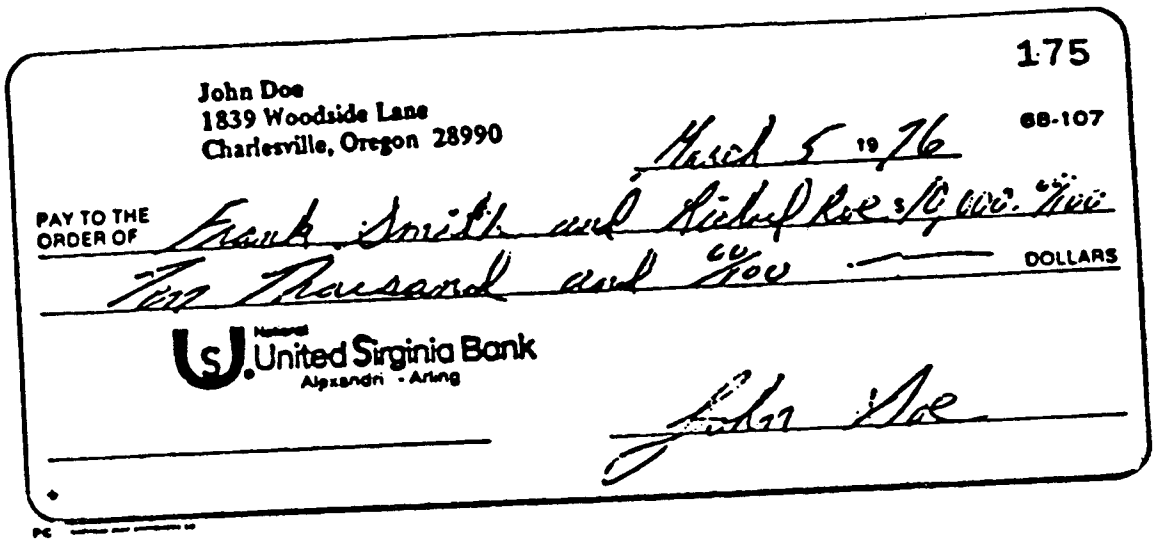
EXAMPLE 12:

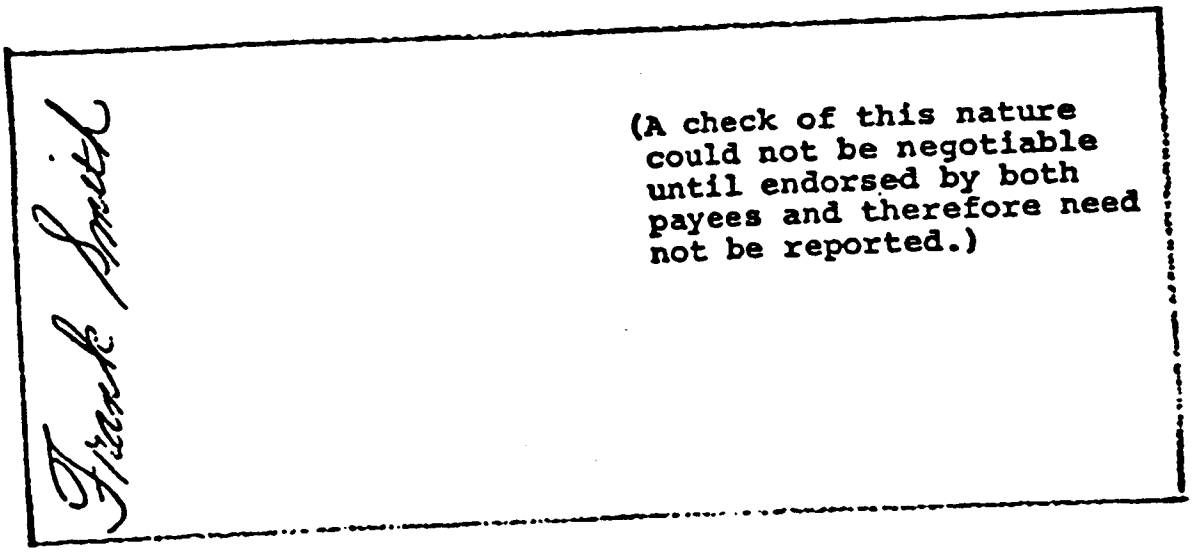


A check made payable to the order of an unnamed payee is considered to be in "bearer" form.

5. Split endorsement: A check made payable to two or more persons in the conjunctive ("to the order of A and B") which has not been endorsed by all payees is excluded from the reporting requirements. A check made payable to two or more persons in the alternative ("to the order of A or B") which has been endorsed by any payee must be reported.

EXAMPLE 13:





(A check of this nature could not be negotiable until endorsed by both payees and therefore need not be reported.)

EXAMPLE 14:

John Doe
1839 Woodside Lane
Charlesville, Oregon 28990

175
68-107

March 5 19 76

PAY TO THE ORDER OF Frank Smith or Ruby Rae $ 10,000.00

Ten Thousand and 00/100 DOLLARS

United Virginia Bank
Alexandria - Arling

John Doe

Frank Smith

(A check of this nature has become bearer paper and must be reported.)

CASE LAW PERTAINING TO REPORTING PROVISIONS OF TITLE 31

I. Constitutionality of Title 31's Reporting Requirements

A. First Amendment: Reporting Requirements of 31 U.S.C. §1101 (now §5316) do not violate the first amendment.

United States v. Fitzgibbon, 576 F.2d 279 (10th Cir.), cert. denied, 439 U.S. 910 (1978)

B. Fourth Amendment: Reporting requirements of Title 31 do not violate the fourth amendment.

California Bankers Association v. Schultz, 416 U.S. 21 (1974): Supreme Court also held that the recordkeeping requirements of the Bank Secrecy Act are constitutional.

C. Fifth Amendment: Reporting requirements of 31 U.S.C. §1101 (now §5316) do not violate a defendant's fifth amendment rights.

United States v. Dichne, 612 F.2d 632 (2d Cir. 1979), cert. denied, 445 U.S. 928 (1980)

United States v. Fitzgibbon, 619 F.2d 874 (10th Cir. 1980)

II. Violation of Domestic Transaction Reporting Requirements

A. When Reports are Required

(1) Under 31 U.S.C. §5313 and its implementing regulations, domestic financial institutions involved in currency transactions for the payment, receipt or transfer of United States coins or currency in the amount of $10,000 or more must report the transaction.

(2) Multiple Cash Transactions: Multiple cash transactions in one day at one financial institution that aggregate over $10,000 for the principal in the transaction must be reported.

United States v. Thompson, 603 F.2d 1200 (5th Cir. 1979)

B. Proof Required For Conviction: In order to convict a defendant of violating 31 U.S.C. §5313 (formerly §1081), the government must show that the defendant:

(1) had knowledge of the reporting requirements; and

(2) willfully violated the requirements.

United States v. Warren, 612 F.2d 887 (5th Cir.), cert. denied, 446 U.S. 956 (1980)

United States v. Beusch, 596 F.2d 871 (9th Cir. 1979)

United States v. Granda, 565 F.2d 922 (5th Cir. 1978)

III. Violation of Export/Import Reporting Requirements

31 U.S.C. §5316 requires any person who transports monetary instruments in excess of $5,000 into or out of the United States or who receives such instruments in the United States from abroad to report the transaction.

A. Proof Required

(1) In order to convict a defendant of violating the reporting requirements of §5316 (formerly § 1101), the government must show that the defendant had knowledge of the reporting requirements and willfully violated the law.

United States v. Warren, 612 F.2d 887 (5th Cir.), cert. denied, 446 U.S. 956 (1980)

United States v. Chen, 605 F.2d 433 (9th Cir. 1979)

United States v. Dichne, 612 F.2d 632 (2d Cir. 1979), cert. denied, 445 U.S. 928 (1980)

United States v. San Juan, 545 F.2d 314 (2d Cir. 1976)

See also United States v. $6,250 in United States Currency, 706 F.2d 1195 (11th Cir. 1983): Defendants "physical presentation of the currency" by throwing purse (containing $6,250) did not constitute sufficient compliance with reporting laws. Statutes does not require traveler to surrender currency or negotiable instruments but, rather, requires traveler who is carrying more than $5,000 to provide certain information by filing report with Customs Service. The defendant had been advised of reporting requirements both before and after he threw the purse and he had not filed a currency report.

United States v. Rodriguez, 592 F.2d 553 (9th Cir. 1979).

Fact that defendant signed a customs form which stated that travelers carrying more than $5,000 in monetary instruments are required by law to file a certain report was sufficient to prove knowledge of the reporting requirement and willful violation of the law.

United States v. Granda, 565 F.2d 922 (5th Cir. 1978): Conviction reversed because the government's failure to make known the reporting requirements made it impossible to prove beyond a reasonable doubt that a defendant claiming "ignorance of the law" acted with knowledge of such requirements; alleged false statement on customs declaration form that defendant was not carrying more than $5,000 did not establish that she was aware of the separate reporting requirement.

(2) Government need not prove absence of a U.S.C.S. form 4790 for a 31 U.S.C §1101 (now § 5316) conviction, if evidence clearly shows that defendant did not file form as required or if defendant denies having had over $5,000.

United States v. Rojas, 671 F.2d 159 (5th Cir. 1982)

B. "Time of Departure": The regulations implementing the export/import reporting requirements provide that the report is to be filed "at the time of...departure, mailing or shipping from the United States." It is important to know what constitutes the "time of departure" because there can be no violation of the export reporting requirements prior to that time.

(1) Does not mean the moment the plane is airborne: Most courts have held that "time of departure" does not mean the moment when the aircraft leaves the runway.

United States v. Rojas, 671 F.2d 159 (5th Cir. 1982)

United States v. Cutaia, 511 F. Supp. 619 (E.D.N.Y. 1981)

(2) "Time of Departure" is some time Prior to Take Off: While most courts agree that "time of departure" is some time prior to take-off, they vary as to how long prior to take off.

United States v. Rojas, 671 F.2d 159 (5th Cir. 1982): Where defendant stepped on jetport preparing to board the plane, which had been called

for boarding, the critical "time of departure" had been reached.

United States v. Cutaia, 511 F. Supp. 619, 625 (E.D.N.Y. 1981): "Time of departure" is "that time reasonably close to the moment of the carrier's actual departure when the passenger has manifested a definite commitment to leave the country." "Time of departure" was reached in this case when the defendant had checked his bags, gotten a boarding pass and sat in boarding area, even though the plane would not be departing for thirty minutes more.

United States v. Gomez-Londono, 422 F. Supp. 519, 525 (E.D.N.Y. 1976), rev'd on other grounds, 553 F.2d 805 (2d Cir. 1977), aff'd, 580 F.2d 1046 (2d Cir. 1978): Suggests that time of departure is not reached until defendant has received his boarding pass and is ready to board, or has taken his place aboard the aircraft.

IV. Prosecution of Corporate Financial Institutions for Title 31 Offenses

In order to convict a corporate financial institution of violating the foreign and/or domestic financial transaction reporting requirements of Title 31, the government must show that the institution is a "principal" and that there is an "agent" for whose actions the institution can be held liable.

The following cases deal with this area of the law known as agency.

A. General Rule: A corporation is criminally liable for the acts of its employees performed within the scope of their employment and for the benefit of the corporation.

United States v. Cincotta, 689 F.2d 238 (1st Cir.), cert. denied, ___U.S.___, 103 S.Ct. 347 (1982)

United States v. Carter, 311 F.2d 934, 942 (6th Cir.), cert. denied, 373 U.S. 915 (1963)

United States v. Chicago Express, Inc., 273 F.2d 751, 753 (7th Cir. 1960)

B. Corporate Authorization Not Required

(1) Criminal conduct by even the lowest ranking

employee, acting without any authorization, will bind the corporation if his misdeeds are committed during the course of his employment or within the scope of his apparent authority.

Standard Oil Co. v. United States, 307 F.2d 120, 127 (5th Cir. 1962) (dicta)

United States v. George F. Fish, Inc., 154 F.2d 798 (2d Cir.), cert. denied, 328 U.S. 869 (1946)

(2) Actions by employees which were not only unknown to corporate officers, but in defiance of specific instructions may still bring liability to the corporation. United States v. Cadillac Overall Supply Co., 568 F.2d 1078, 1090 (5th Cir.), cert. denied, 437 U.S. 903 (1978)

United States v. Hilton Hotel Corp., 467 F.2d 1000 (9th Cir. 1972), cert. denied, 409 U.S. 1125 (1973)

United States v. Armour & Co., 168 F.2d 342 (3d Cir. 1948)

See also United States v. Beusch, 596 F.2d 871, 878 (9th Cir. 1979)

C. Actual Benefit to the Corporation not Required: The government does not have to prove that the criminal conduct actually benefited the corporation. Rather, it only has to prove that the agent's purpose was, at least in part, to benefit the principal.

(1) The corporation can be convicted even if it was actually harmed by an illegal act that an employee believed to be in the corporation's interests.

United States v. Carter, 311 F.2d 934 (6th Cir.), cert. denied, 373 U.S. 915 (1963)

(2) See also Standard Oil Co. v. United States, 307 F.2d 120, 129 (5th Cir. 1962): No liability where employees' purpose was to advance the interests of "parties other than their corporate employer."

D. Defenses: Having a system to prevent crimes by employees is not a defense to a criminal charge against the corporation.

St. Johnsbury Trucking Co. v. United States, 220 F.2d 393, 398 (1st Cir. 1955) (concurring opinion)

E. Corporate Knowledge: To convict a financial

institution of violating Title 31's reporting provisions, the government must establish that the corporation had knowledge of the reporting requirements. The government can aggregate facts known by individual employees to establish the corporate state of mind.

In re Pubs, Inc., 618 F.2d 432 (7th Cir. 1980): If the president, vice-president or director of a corporation has knowledge of a fact, knowledge is also imputed to the corporation.

Inland Freight Lines v. United States, 191 F.2d 313, 315 (10th Cir. 1951)

United States v. Sawyer Transport, Inc., 337 F. Supp. 29, 30-31 (D. Minn. 1971), aff'd, 463 F.2d 175 (8th Cir. 1972)

F. Case Involving Title 31

United States v. Beusch, 596 F.2d 871 (9th Cir. 1979): Corporate foreign currency exchange dealer was convicted of violating the domestic and foreign transaction reporting requirements of Title 31. Court held that the evidence was sufficient to sustain district court's finding that the Vice-President of the corporation acted with the intent to benefit the corporate dealer so that the willfulness of his acts as agent could be imputed to the corporation.

G. Case Involving 18 U.S.C. §1001

United States v. Tobon-Builes, 706 F.2d 1092 (11th Cir. 1983)

United States v. Lange, 528 F.2d 1280 (5th Cir. 1976): A corporation may be prosecuted for violations of 18 U.S.C. §1001. (See discussion of the use of 18 U.S.C. §1001 in Title 31 cases).

V. Felony Provision of Title 31

Under 31 U.S.C. §5322(b), a violation of the reporting requirements of Title 31 constitutes a felony, if:

(1) a person violates Title 31 "while violating another law of the United States" as well; or

(2) the particular violation of Title 31 is part of "a pattern of illegal activity" involving transactions of more than $100,000 in a twelve-month

period.

A. "While Violating Another Law"

(1) Background: Prior to 1982, the felony provision of Title 31 was triggered when the Title 31 violation was "committed in furtherance of any other violation of federal law." See 31 U.S.C. §1059(1). In 1982, Title 31 was amended. The language of the felony provision was changed from "committed in furtherance of any other violation" to "while violating." But Congress did not intend this language change to in any way modify the substantive content of the felony provision.

(2) Pre-1982 Case Law

(a) Jury charges: Charge to jury which describes "in furtherance" as "an advancement, helping forward, or promotion" is acceptable.

(b) Proof Required: In order to establish a felony violation of 31 U.S.C. §1101 (now §5316), the government need not prove that the primary purpose of defendant's trip into or out of the United States was to violate another federal law. Only the purpose of bringing in or taking out the unreported currency or monetary instruments is important.

(3) Post-1982: No decisions since 1982 have involved the "while violating another law" provision of Title 31's felony section. Since Congress did not intend the 1982 amendments to make any substantive changes to the section, pre-1982 case law should still apply.

B. "Pattern of Illegal Activity"

1. What Constitutes a "Pattern of Illegal Activity"

(a) Pattern of Illegal Activity must involve Repeated Violations of the Reporting Provisions of Title 31 Itself: "Pattern of illegal activity" refers only to repeated violations of Title 31 itself. It does not refer to related and repeated violations of state and/or other federal law. Thus a pattern of illegal activity is not established when the government proves a single violation of the Act, at least one other illegal act, and a pattern of similar or

related suspicious behavior. Rather, the government must prove repeated violations of Title 31.

United States v. Dickinson, 706 F.2d 88 (2d Cir. 1983)

(b) See also United States v. Beusch, 596 F.2d 871 (9th Cir. 1979): Court held that a series of unreported currency transfers which, by themselves constitute only misdemeanor violations of Title 31, may in aggregate constitute a "pattern of illegal activity."

2. Each Violation may be Separately Prosecuted as a Felony: Each violation of Title 31 that is part of a "pattern of illegal activity" may be separately prosecuted as a felony. The pattern of violations need not be prosecuted as one single felony offense.

United States v. Kattan-Kassin, 696 F.2d 893 (11th Cir. 1983)

C. Indictments: Failure to incorporate counts alleging violation of federal law or pattern of illegal activity rendered defective indictment counts alleging felony violation under 31 U.S.C. §1059 (now §5322(b)).

United States v. Hajecate, 683 F.2d 894, 901-02 (5th Cir. 1982), cert. denied, __U.S.__ 103, S.Ct. 2086 (1983)

VI. Use of 18 U.S.C. §1001 in Title 31 Cases

18 U.S.C. §1001 provides:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

This statue can be used in cases where a false statement is made on a report required by Title 31 or where there is an actual scheme to avoid the filing of Title 31 reports.

A. Background: The following cases discuss the propriety of using 18 U.S.C. §1001 when another offense (such as

that provided for under Title 31) may also be appropriate.

United States v. Tobon-Builes, 706 F.2d 1092 (11th Cir. 1983): Federal statute (18 U.S.C. §1001) proscribing false statements or entries generally was intended to cover deceptive practices aimed at frustrating or impeding legitimate functions of government departments or agencies. Defendant convicted of violation of 18 U.S.C. §1001 by concealing existence, source and transfer of over $100,000 by purchasing cashier's checks in amounts less than $10,000 from different financial institutions to avoid institutions' filing of currency transaction reports (CTRs).

United States v. Grotke, 702 F.2d 49 (2nd Cir. 1983)

Dennis v. United States, 384 U.S. 855 (1966)

United States v. Fitzgibbon, 576 F.2d 279 (10th Cir.), cert. denied, 439 U.S. 910 (1978) (discusses the legislative history of Section 1001 vis-a-vis Title 31).

B. Prosecution for Violations of Both Title 31 and 18 U.S.C. §1001: A person can be convicted of both a violation of Title 31 and a violation of 18 U.S.C. §1001.

United States v. Anderez, 661 F.2d 404 (5th Cir.), reh'g denied, 666 F.2d 592 (1981)

United States v. Satterfield, 644 F.2d 1092 (5th Cir. 1981)

C. Prosecution for 18 U.S.C. §1001 Violation Only: Provisions of Title 31 were not intended to preempt prosecutions under 18 U.S.C. §1001, and hence do not preclude the government from prosecuting under the latter statute for making a false statement in connection with bringing foreign currency through U.S. Customs.

United States v. Grotke, 702 F.2d 49 (2d Cir. 1983)

United States v. Duncan, 693 F.2d 971 (9th Cir. 1982)

United States v. Fitzgibbon, 576 F.2d 279 (10th Cir.), cert. denied, 439 U.S. 910 (1978)

See also United States v. Yanes, 628 F.2d 294 (5th Cir. 1980)

D. Requirements of an 18 U.S.C. §1001 Offense -- Materiality: For there to be a Section 1001 offense, the facts which are falsely presented to or concealed from a federal agency must be "material."

(1) "Material": A statement is material if it has a natural tendency to influence or is capable of influencing agency action.

United States v. May, 625 F.2d 186 (8th Cir. 1980)

(2) Potential for Harm: The mere potential for harm can establish materiality. The fact that no harm actually occurs to the government, or even that the harm was legally or factually impossible, is not significant if there was the potential for harm.

United States v. Goldfine, 538 F.2d 815 (9th Cir. 1976) (court found that a false statement to a DEA official was material even though the official knew of its falsity)

United States v. Jones, 464 F.2d 1118, 1123 (8th Cir. 1972), cert. denied, 409 U.S. 1111 (1973)

(3) Factors Considered in Assessing the False Statement's Potential for Harm:

(a) That the federal government is involved in a particular function, such as the collection of reports required by Title 31.

(b) That the making of intentionally false statements to investigative agencies may have the potential to cause more harm than does a false statement about pecuniary claims.

United States v. Lambert, 501 F.2d 943, 945 (5th Cir. 1974)

E. Corrections: There is no violation of 18 U.S.C. §1001 where defendant's false answer on his customs declaration form to effect that he was not carrying over $5,000 was almost immediately corrected by a true oral statement; the correct statement was made prior to the time when a customs agent found the currency; and the defendant was willing and ready to amend his written declaration and to file the required reporting form.

F. Self-Incrimination Problems

(1) "Exculpatory No Doctrine": Some cases have held

that where a defendant falsely replies "no" to a question of a government agent or on a government form, Section 1001 does not apply because of the constitutional protection against self-incrimination. This is known as the "exculpatory no" doctrine.

United States v. Schnaiderman, 568 F.2d 1208 (5th Cir.), reh'g denied, 573 F.2d 1309 (1978)

(2) But see:

United States v. Carrier, 654 F.2d 559 (9th Cir. 1981): Defendant entered the U.S. and answered "no" to the question of whether he was carrying more than $5,000 into the U.S. The court held that 18 U.S.C. §1001 applied, despite Schnaiderman in the fifth circuit.

United States v. Satterfield, 644 F.2d 1092 (5th Cir. 1981): Court upheld 18 U.S.C. §1001 and 31 U.S.C. §§1101 and 1058 convictions where the defendant came into the U.S. and stated "no" to the question on the USCS Form 4790 concerning $5,000.

United States v. Fitzgibbon, 619 F.2d 874 (10th Cir. 1980)

VII. Warrants

31 U.S.C. §5317(a) provides that the Secretary of the Treasury may apply for a warrant to search for monetary instruments which are suspected of being transported in violation of Title 31's reporting requirements.

A. But Warrants not Required: 31 U.S.C. §1105 (now §5317(a)) does not mandate that customs agents obtain a warrant prior to any search for evidence of a currency reporting violation

United States v. Rojas, 671 F.2d 159 (5th Cir. 1982): §1105 (now §5317(a)) merely made explicit that customs searches for currency violations, absent other authority to conduct the search, were subject to the warrant requirements of the fourth amendment. It did not impose warrant requirements where the fourth amendment did not do so.

B. Warrantless Searches

(1) Customs Border Search Authority Applies to Exiting Travelers

United States v. Duncan, 693 F.2d 971 (9th Cir. 1982): Where defendant was stopped while he was

proceeding up ramp to board plane bound for foreign country, point at which he was stopped by customs agents was "functional equivalent of a border" and, therefore, there was no need for probable cause, warrant or even suspicion before conducting search of defendant.

United States v. Ajlouny, 476 F. Supp. 995 (E.D.N.Y. 1979), aff'd, 629 F.2d 830 (2d Cir. 1980), cert. denied, 449 U.S. 1111 (1981): Warrantless export searches based on less than probable cause are proper.

(2) Strip Search: While anyone at a border may be stopped for questioning and is subject to an inspection of luggage, handbags, pockets and wallets without any suspicion at all on the part of customs, real suspicion is required before a strip search may be conducted and the clear indication test is applicable to body cavity searches.

United States v. Rodriguez, 592 F.2d 553 (9th Cir. 1979)

VIII. Seizure

31 U.S.C. §5317(b) provides that monetary instruments transported in violation of the export/import reporting requirements of 31 U.S.C. §5316 may be seized by the government.

A. Requirement of Lawful Seizure: For a seizure to be lawful, there must be a nexus between the item seized and the particular criminal behavior involved.

B. Motion to Return the Property

(1) Continuing interest: Where the government has a continuing interest in the property seized, defendant's motion to return the property should not be granted.

(2) Evidence of Unexplained Wealth: One basis for the government's retention of cash may be to use it as evidence at trial. Thus the government can establish that it has a "continued interest" in the cash. Several cases have held that evidence of unexplained wealth is admissible to prove criminal conduct when pecuniary gain is the basic motive for the crime.

IX. Forfeiture

31 U.S.C. §5317(b) provides that monetary instruments

transported in violation of the export/import reporting requirements of 31 U.S.C. §5316 may be forfeited to the Government.

A. Timing of Forfeiture Actions: Forfeiture actions must be brought promptly, unless the delay is justified.

United States v. $8,850.00 in United States Currency, __ U.S. __, 103 S.Ct. 2005 (1983), the Supreme Court reversing the Ninth Circuit held, that an 18-month delay from time money was seized by Customs for violation of 31 U.S.C. §1101 to the beginning of administrative civil forfeiture proceedings was reasonable, and the balancing test in Barker v. Wingo, 407 U.S. 514 (1971), applicable to speedy trial claims provides a relevant framework for determining reasonableness of delay.

United States v. $48,595.00, 705 F.2d 909 (7th Cir. 1983): 49-week delay in filing motion to vacate default forfeiture judgment reasonable.

United States v. $36,125.00 in United States Currency, 510 F. Supp. 303 (E.D. La. 1980): 18-month delay reasonable.

Ivers v. United States, 581 F.2d 1362 (9th Cir. 1978): Mere filing of a petition for remission of forfeiture does not excuse government from its obligation to commence prompt judicial proceedings until petition is denied.

United States v. $47,980 in Canadian Currency, 689, F.2d 858 (9th Cir. 1982): 14-month delay in institution of forfeiture action unreasonable.

B. Proof Required

(1) Government has the initial burden of showing probable cause to support its belief that the property was used illegally; circumstantial evidence may be used to show probable cause.

United States v. $4,255,625.39, 551 F. Supp. 314 (S.D. Fla. 1982)

(2) Specific knowledge of reporting requirements for importation of currency is not an element of a civil forfeiture action under 31 U.S.C. §5317(b).

United States v. $4,255,625.39, 528 F. Supp. 969 (S.D. Fla. 1981)

See also United States v. $11,580.00, 454 F. Supp. 376 (M.D. Fla. 1978)

C. Estoppel: Where defendants entered guilty pleas to charges of violating 31 U.S.C. §5316, they were estopped from opposing civil forfeiture of property.

United States v. $31,697.57 Cash, 665 F.2d 903 (9th Cir. 1982)

D. Amount Subject to Forfeiture: Although 31 U.S.C. §5316 only requires that sums in excess of $5,000 be reported, the total amount illegally exported or imported, not merely excess over $5,000, is subject to forfeiture.

United States v. $6,700.00 in United States Currency, 615 F.2d 1 (1st Cir. 1980)

United States v. Currency Totaling $48,318.08, 609 F.2d 210 (5th Cir.), reh'g denied, 612 F.2d 579 (1980)

Ivers v. United States, 581 F.2d 1362 (9th Cir. 1978)

United States v. One 1964 MG, Serial No. 64GHN3L34408, Washington License No. DFY 260, 584 F.2d 889 (9th Cir. 1978)

United States v. $11,580.00 in United States Currency, 454 F. Supp. 376 (M.D. Fla. 1978)

E. Courts Lack Jurisdiction to Remit Forfeiture: Under Title 31, only the Secretary of Treasury is vested with discretion to remit any forfeiture in whole or in part. District Court lacks the jurisdiction to do so.

United States v. $15,896 in United States Currency, 545 F. Supp. 92 (N.D.N.Y. 1982)

X. Indictments

Use of the term "Laundering": The term "laundering" is often used in indictments alleging violations of Title 31. The use of this term in an indictment is proper.

United States v. Enstam, 622 F.2d 857 (5th Cir. 1980), cert. denied, 450 U.S. 912 (1981)

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TRANSFER TABLE

Old 31 U.S.C.	New 31 U.S.C.	Old 31 U.S.C.	New 31 U.S.C.
1051	5311	1061	5319
1052(a), (b), (g), (i)	5312(a)(1)	1062	Repealed
1052(e)	5312(a)(2)	1081	5313(a)
1052(l)	5312(a)(3)	1082	5313(a)
1052(c)	5312(a)(4)	1083(a)	5313(b)
1052(d)	5312(a)(5)	1083(b)	5313(c)
1052(f), (h)	5312(b)	1101(a)	5316(a)
1052(j)	5319	1101(b)	5316(b)
1052(k)	Repealed	1101(c)	5316(c)
1053	321	1102	5317(b)
1054(a), (b) (1st sentence)	5318	1103	5321(a)(2)
1054(b) (last sentence related to civil penalties)	5321(a)(1)	1104	5321(c)
1054(b) (last sentence related to criminal penalties)	5322(c)	1105	5317(a)
1055	5318	1121(a)	5314(a)
1056(a)	5321(a)	1121(b)	5314(c)
1056(b)	5321(b)	1122	5314(b)
1057	5320	1141	5315(a)
1058	5322(a)	1142	5315(b), (c)
1059	5322(b)	1143(a), (b) (words after last comma)	5321(a)(3)
1060	Repealed see 18 U.S.C. 6002	1143(b) (words before last comma)	5320

APPENDIX J

*U.S. GOVERNMENT PRINTING OFFICE : 1984 0-421-540/1583