Catholic University Law Review

Volume 37
Issue 2 *Winter 1988*

Article 6

1988

Hue and Cry in the Counting-House: Some Observations on the Bank Secrecy Act

Jonathan J. Rusch

HUE AND CRY IN THE COUNTING-HOUSE: SOME OBSERVATIONS ON THE BANK SECRECY ACT

*Jonathan J. Rusch**

One of the stranger vicissitudes in our society is the extent to which cash has become more important as a medium of exchange in illegal transactions than in legal transactions. While "cash is a highly suitable means of payment for many transactions,"[1] it is not the preferred method of payment by Americans for legitimate transactions.[2] In contrast, cash is virtually indispensable for a wide range of illegal activities, including drug trafficking, illegal gambling, prostitution, loansharking, bribery, extortion, tax evasion, and other financial offenses.[3] Unlike other financial instruments, cash freely circulates throughout the population, is customarily used and accepted as a medium of exchange, and does not routinely return to the issuing institution. Law enforcement authorities, therefore, encounter substantial difficulties in reconstructing audit trails when cash is used in illegal activities.

Those difficulties are compounded by the sheer volume of cash that is traceable to some form of illegal activity. According to a 1986 survey commissioned by the Board of Governors of the Federal Reserve System:

---

* United States Department of the Treasury, Washington, D.C. The views expressed herein are solely those of the author, and do not necessarily reflect those of the Department of the Treasury or any other federal department or agency.

1. *Changes in the Use of Transaction Accounts and Cash from 1984 to 1986,* 73 Fed. Res. Bull. 179, 186 (1987) [hereinafter *Federal Reserve Study*]. The *Federal Reserve Study* reports the results of a survey, commissioned in 1986 by the Board of Governors of the Federal Reserve System, to determine how various changes, such as the greater availability of automated teller machines, have affected the payment practices of American families. *Id.* at 179.

2. According to the *Federal Reserve Study*, main checking accounts constituted the most prevalent methods of payment for aggregate household expenditures (39%). *Id.* at 180 (Table 1). Cash constituted 34% of such expenditures, while credit cards and savings or money market accounts each constituted only 8% of such expenditures. *Id.* Moreover, the survey found that the usage rate (i.e., turnover) of cash declined between 1984 and 1986, perhaps in response to the lowering of interest rates during that period. *Id.* at 189-90.

3. *See, e.g., White Collar Crime (Money Laundering): Hearings Before the Senate Comm. on the Judiciary,* 99th Cong., 2d Sess. 129 (1986) (statement of William F. Weld, U.S. Attorney for the District of Massachusetts); THE PRESIDENT'S COMMISSION ON ORGANIZED CRIME, INTERIM REPORT TO THE PRESIDENT AND THE ATTORNEY GENERAL, THE CASH CONNECTION: ORGANIZED CRIME, FINANCIAL INSTITUTIONS, AND MONEY LAUNDERING 7-13, 29-49 (1984) [hereinafter PCOC REPORT].

> [A]dult U.S. residents in the aggregate held about $20 billion in cash, which they used for transactions. This total amounted to about 11 percent of the stock of currency or coin in circulation outside banks, which was $177.4 billion at the time of the survey. Thus, in 1986 as in 1984, a large percentage of the U.S. currency stock was apparently held in unreported hoards, "underground" for illegitimate purposes, or offshore.[4]

Criminals who supervise large-scale illegal activities encounter an array of problems in handling large quantities of cash. Purveyors of illegal goods and services, such as drug trafficking, illegal gambling, and prostitution, accumulate large quantities of small-denomination bills from retail sales. Some suppliers of vital raw materials for illegal drug production may be unwilling to accept payment in these small-denomination bills.[5] Other criminals may be willing to accept cash, but want it converted into a more portable and concealable form. Even if the criminal is holding the currency for his own use, the sheer bulk of that currency may impel him to convert it into some other form that can be concealed more readily from detection by law enforcement authorities and disguised to appear legitimate.[6] To effect that concealment and disguise, the criminal has only two principal alternatives: to introduce the cash into a financial institution[7] for deposit, transfer, or exchange; or to

---

4. *Federal Reserve Study*, *supra* note 1, at 191.

5. *See* PRESIDENT'S COMMISSION ON ORGANIZED CRIME, ORGANIZED CRIME AND HEROIN TRAFFICKING 206 (1985) (testimony of Leroy Barnes, convicted heroin trafficker). Different types of illegal activities may involve different denominations of bills received from purchasers. One money launderer who had been active in the Miami area testified in 1986 that he and his associates referred to $5 and $10 bills as "marijuana money" and $20, $50, and $100 bills as "cocaine money." *Tax Evasion, Drug Trafficking and Money Laundering as They Involve Financial Institutions: Hearings on H.R. 1367, H.R. 1474, H.R. 1945, H.R. 2785, H.R. 3892, H.R. 4280, and H.R. 4573 Before the Subcomm. on Financial Institutions Supervision, Regulation and Insurance of the House Comm. on Banking, Finance and Urban Affairs*, 99th Cong., 2d Sess. 79, 85 (1986) [hereinafter *Tax Evasion Hearings*] (testimony of Herb Friedberg, former money launderer).

6. A commonly accepted definition of money laundering is "the process by which one conceals the existence, illegal source, or illegal application of income, and then disguises that income to make it appear legitimate." PCOC REPORT, *supra* note 3, at 7 (footnote omitted). One example of the need to reduce the bulk of currency from illegal activities concerned a money laundering operation that made use of several Atlantic City casinos. At one casino, money launderers deposited throughout the day a total of $1,187,450 in small-denomination bills. PRESIDENT'S COMMISSION ON ORGANIZED CRIME, ORGANIZED CRIME AND GAMBLING: RECORD OF HEARING VII 591 (1985) (testimony of Martin Molod, Revenue Agent, Internal Revenue Service). According to calculations based on data from the Bureau of Engraving and Printing, that deposit weighed approximately 280 pounds and measured 5.81 cubic feet. *Id.* at 593. After gambling with these funds for a time, the launderers withdrew $800,000 in $100 bills. *Id.* at 594. This withdrawal is estimated to have weighed 16 pounds and to have measured one-third of a cubic foot. *Id.* at 594-95.

7. The term "financial institution" includes not only financial institutions that engage in

transport the cash out of the country for similar purposes at a foreign financial institution.

I. Bank Secrecy Act Reporting Requirements

To deal with concealment and disguise of currency, Congress passed legislation in 1970 that has become commonly known as the Bank Secrecy Act (BSA).[8] The BSA vests substantial authority in the Department of the Treasury (Treasury) to require the filing of reports and the maintenance of records that have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings.[9] The BSA and the implementing regulations that the Treasury promulgated thereunder require the routine filing of four types of reports:

1. *The Currency Transaction Report (CTR).* A financial institution other than a casino must file a CTR (also known as Internal Revenue Service (IRS) Form 4789) for "each deposit, withdrawal, exchange of currency or other payment or transfer, by, through, or to such financial institution which involves a transaction in currency of more than $10,000."[10] Banks[11] may unilaterally exempt limited types of currency transactions by certain specified categories of customers (such as deposits or withdrawals by retail sellers of certain goods and services) from the CTR reporting requirements, and may apply to the IRS for additional authority to exempt other types of businesses and transactions.[12]

---

banking services, but also other financial institutions, such as casinos and currency exchanges, that carry out functions similar or related to those offered by the banking community. *See* Bank Secrecy Act, 31 U.S.C. § 5312(a)(2) (1982), *amended by* 31 U.S.C.A. § 5312(a)(2)(T) (West Supp. 1987) [hereinafter BSA]; 31 C.F.R. § 103.11(g) (1987).

8. Pub. L. No. 91-508, 84 Stat. 1114 (1970) (codified as amended at 12 U.S.C. §§ 1730d, 1829b, 1951-1959 (1982 & Supp. IV 1986) and 31 U.S.C. §§ 321, 5311-5324 (1982 & Supp. III 1985), *amended by* 31 U.S.C.A. §§ 5312(a)(2)(T), (u)(5), 5316(a)(1)-(2), 5316(d), 5317(b)-(c), 5318(a)-(f), 5321(a)(1), (4)-(6), 5321 (b)-(d), 5322(a)-(c), 5323(a)-(d), 5324 (West Supp. 1987)).

9. *See* 12 U.S.C. §§ 1829b, 1951 (1982); 31 U.S.C. § 5311 (1982).

10. 31 C.F.R. § 103.22(a)(1) (1987); *see also* 31 U.S.C. § 5313(a) (1982). The regulations define a "transaction in currency" as "[a] transaction involving the physical transfer of currency from one person to another." 31 C.F.R. § 103.11(o) (1987). A transaction that involves a transfer of funds by means of some written order, but that does not include the physical transfer of currency, is not a "transaction in currency" under the BSA. 31 C.F.R. § 103.11(o) (1987).

11. The regulations define the term "bank" to include commercial banks or trust companies, private banks, savings and loan or building and loan associations, thrifts, credit unions, banks organized under foreign law, Edge Act corporations, and other organizations chartered under state banking laws and subject to supervision by state bank supervisory agencies. 31 C.F.R. § 103.11(a) (1987). Under the regulations, a "bank" is one type of financial institution that must comply with the CTR reporting requirements. *See id.* § 103.11(g)(1).

12. *See id.* § 103.22(b)(2), 103.22(d)-(e).

2. *The Currency Transaction Report by Casinos (CTRC).* A casino must file a CTRC (also known as IRS Form 8362) for transactions similar to those for which other financial institutions must file CTR's.[13]

3. *The Report of International Transportation of Currency or Monetary Instruments (CMIR).* A person must file a CMIR (also known as Customs Form 4790) if he (1) "physically transports, mails, or ships, or causes to be physically transported, mailed, or shipped, . . . currency or other monetary instruments in an aggregate amount exceeding $10,000 on any one occasion," whether that transportation is into or out of the United States;[14] or (2) if he receives, in the U.S., currency or other monetary instruments in an aggregate amount exceeding $10,000 that have come from outside the United States and on which no CMIR was filed.[15]

4. *The Report of Foreign Bank and Financial Accounts (FBAR).* A person subject to the jurisdiction of the United States, including a U.S. citizen residing abroad,[16] must file an FBAR (also known as Treasury Form TDF 90-22.1) if that person had, at any time during the year, "a financial interest in, or signature or other authority over," one or more bank accounts, securities accounts, or other financial accounts in foreign countries, and the aggregate value of those accounts exceeded $10,000.[17]

In addition, the Treasury can impose special reporting requirements on domestic financial institutions, when it deems it appropriate, to obtain information on certain transactions between those institutions and foreign financial agencies.[18] Finally, the BSA and the regulations require financial institutions to maintain a variety of records, such as copies of signature cards, bank statements, and checks drawn for more than $100,[19] for a five-year period.[20] Records required to be kept under the BSA, unlike the BSA reports, generally may be inspected or reviewed by law enforcement authorities only for the purpose of assuring compliance with the BSA's requirements; in other cases, the authorities must obtain legal process or comply with other legal provisions.[21]

---

13. *Id.* § 103.22(a)(2) (1987); *see also* 31 U.S.C. § 5313(a) (1982).

14. 31 C.F.R. § 103.23(a) (1987); *see also* 31 U.S.C. § 5316(a)(1) (1982 & Supp. III 1985).

15. *See* 31 U.S.C.A. § 5316(a)(2) (West Supp. 1987).

16. *See* 31 C.F.R. § 103.24 (1987).

17. *See id.*; Department of the Treasury, Form TDF 90-22.1, Report of Foreign Bank and Financial Accounts (Sept. 1986 ed.).

18. 31 C.F.R. § 103.25(a) (1987). Pursuant to this authority, the Department of the Treasury (Treasury) may obtain information on checks, drafts, wire transfers, loans, commercial paper, stocks, and bonds involved in transactions with foreign financial agencies. *Id.* § 103.25(b).

19. *Id.* § 103.34(b)(1)-(3).

20. *Id.* § 103.38(d).

21. *See id.* § 103.51; H.R. REP. NO. 975, 91st Cong., 2d Sess. 10 (1970), *reprinted in* 1970

II. THE BANK SECRECY ACT'S UTILITY IN FEDERAL LAW ENFORCEMENT

The BSA reports have proved highly useful for civil and criminal law enforcement purposes. Particularly in recent years, these reports have provided law enforcement authorities with investigative leads, information that corroborates other sources of information about criminal activities, and even probative evidence in federal criminal cases. Perhaps the most prominent example of the reports' utility is *United States v. Badalamenti,*[22] which involved smuggling of substantial quantities of heroin into the United States by members of Italian and American organized criminal groups. In the course of their investigation of the heroin trafficking, federal authorities discovered a number of BSA reports that reflected large cash transactions by a Swiss national, Franco Della Torre, with stockbrokers in New York.[23] These reports eventually led to the discovery of an extensive money laundering operation that involved the transfer of tens of millions of dollars through investment houses and banks in New York City to financial institutions in Switzerland and Italy.[24] A recent study by the Treasury described the outcome of *Badalamenti:*

> Twenty defendants, who were prosecuted in Federal court in New York for their involvement in the heroin network and money laundering, were convicted of various charges, including heroin conspiracy, racketeering and Bank Secrecy Act violations. All received prison sentences, and fifteen of the defendants received sentences ranging from fifteen to forty-five years. In addition, Della Torre was convicted and imprisoned by Swiss authorities for violations of Swiss law relating to his money laundering activities.[25]

The government has also made substantial use of the BSA to prosecute a

---

U.S. CODE CONG. & ADMIN. NEWS 4394, 4395. In some instances, the Treasury requires financial institutions to maintain certain types of information, such as the names, addresses, and account numbers of those account holders from whom the financial institution has been unable to obtain a taxpayer identification number, and make that information available to it upon request. *See* 31 C.F.R. §§ 103.22(g) (list of customers exempted from reporting requirements), 103.34(a)(1), 103.35(a)(1), 103.36(a) (1987).

22. SS 84 Cr. 236 (PNL) (S.D.N.Y.), *appeal docketed,* No. 87-1303 (2d Cir. June 29, 1987). This case has become known informally as the "Pizza Connection" case. *See, e.g.,* PCOC REPORT, *supra* note 3, at 31-32.

23. United States v. Badalamenti, SS 84 Cr. 236 (PNL) (S.D.N.Y.), *appeal docketed,* No. 87-1303 (2d Cir. June 29, 1987).

24. *Id.*

25. SECRETARY OF THE TREASURY, MONEY LAUNDERING AND THE BANK SECRECY ACT: THE QUESTION OF FOREIGN BRANCHES OF DOMESTIC FINANCIAL INSTITUTIONS 21 (1987).

number of leading money launderers in the United States and abroad. In recent years, for example, the government has successfully prosecuted: Isaac Kattan-Kassin, whose money laundering organization handled gross proceeds estimated at $200 million to $250 million per year;[26] Ramon Milian-Rodriguez, who transported approximately $146 million in cash from the United States to Panama over a nine-month period;[27] Eduardo Orozco-Prada, whose money laundering organization laundered more than $150 million over a four-year period;[28] and Barbara Mouzin, who masterminded and operated a large West Coast money laundering business for cocaine traffickers.[29]

In some instances, even a single CTR can provide significant leads for criminal investigators. In one case, the IRS analyzed a CTR and determined that the individual listed on the CTR had not filed a tax return.[30] Subsequent investigation disclosed the existence of a massive heroin distribution and money laundering organization, operating primarily throughout southern California, which provided false information to the financial institutions that filed CTR's on their transactions.[31] Eventually, the IRS arrested at least a dozen persons associated with the organization, seized at least $12 million in currency at various domestic banks, and charged the organization with income tax evasion involving $27 million in income over a three-year period.[32]

---

26. *Tax Evasion Hearings, supra* note 5, at 797 (testimony of Alwin C. Coward, Acting Deputy Assistant Administrator for Intelligence, Drug Enforcement Administration, Department of Justice); *see also* PCOC REPORT, *supra* note 3, at 40-43. Kattan–Kassin was eventually prosecuted for numerous BSA violations, and cooperated with the federal government. *See* United States v. Kattan-Kassin, No. 81-5474, slip op. (11th Cir. June 3, 1983); United States v. Kattan-Kassin, 696 F.2d 893 (11th Cir. 1983).

27. *See* United States v. Milian-Rodriguez, 828 F.2d 679, 680 (11th Cir. 1987). When he was apprehended on May 4, 1983, Milian-Rodriguez was about to fly nearly $5.5 million in U.S. currency to Panama in his Lear Jet. *Id.* Milian-Rodriguez was subsequently convicted on 61 counts of racketeering, drug offenses, and BSA violations. *Id.* at 681.

28. *See* United States v. Orozco-Prada, 732 F.2d 1076, 1078 (2d Cir.), *cert. denied,* 469 U.S. 845 (1984); PCOC REPORT, *supra* note 3, at 35-36. Orozco-Prada was convicted on six counts of drug offenses, conspiracy, false statements, and BSA violations, and was sentenced to eight years' imprisonment and a fine of $1,035,000. *Orozco-Prada,* 732 F.2d at 1079.

29. *See* United States v. Mouzin, 785 F.2d 682, 685 (9th Cir.), *cert. denied,* 107 S. Ct. 574 (1986). Mouzin was convicted of 19 separate offenses, including BSA violations, conspiracy, drug offenses, and racketeering, and was sentenced to 25 years of imprisonment with a lifetime special parole term. *Id.* The co-leader of her organization was convicted on eight counts of the same indictment, and was sentenced to 29 years of imprisonment with a lifetime special parole. *Id.*

30. *See Tax Evasion Hearings, supra* note 5, at 122-24 (testimony of Richard C. Wassenaar, Assistant Commissioner for Criminal Investigation, IRS).

31. *Id.*

32. *Id.*

Although many of the examples cited above involve large-scale money laundering for drug traffickers, BSA reports also are highly useful in identifying or proving other types of financial crimes. In one recent case, for example, analysis of reports filed by a federally insured financial institution provided a number of leads to the disposition of tens of millions of dollars that had been embezzled from the financial institution through such devices as illegal loans. In another recent case, federal investigators discovered that a husband and wife had failed to file a CMIR form for $125,000 in cash that they took out of the United States. Further investigation determined that the wife had embezzled millions of dollars from a savings and loan association in Texas where she had been employed.

These examples amply demonstrate the substantial utility of BSA reports. Unlike various forms of compulsory process, such as grand jury subpoenas or judicial orders, which are used only after the initiation of a criminal investigation, the reports provide a constant stream of data on large domestic and international movements of cash and furnish the basis for either initiating or expanding an investigation. Moreover, the process for filing these reports ensures that law enforcement agents obtain valuable information on suspicious movements of cash in a more timely and less cumbersome fashion than compulsory process.[33]

33. The legislative history of the BSA makes clear that Congress created the statute's reporting requirements in part to aid law enforcement authorities in their efforts to obtain information about financial transactions and bank accounts in foreign jurisdictions, particularly those jurisdictions with stringent provisions to assure the secrecy of banking transactions. H.R. REP. NO. 975, 91st Cong., 2d Sess. 12 (1970), *reprinted in* 1970 U.S. CODE CONG. & ADMIN. NEWS 4394, 4397. At that time, the legal process in those jurisdictions for obtaining information on such transactions or accounts was "time consuming and ofttimes fruitless." *Id.* Since then, the development of formal and informal international arrangements with various foreign countries, as well as the expansion of statutory authority to obtain evidence from abroad, has alleviated some of the problems for federal law enforcement authorities. *See generally Money Laundering Control Act of 1986 and the Regulations Implementing the Bank Secrecy Act: Hearings Before the Subcomm. on Financial Institutions Supervision, Regulation and Insurance of the House Comm. on Banking, Finance and Urban Affairs,* 100th Cong., 1st Sess. (1987) (statement of William F. Weld, Assistant Attorney General, Criminal Division, Department of Justice) [hereinafter *Money Laundering Hearings*]; SECRETARY OF THE TREASURY, *supra* note 25, at 57-71. The process for obtaining admissible evidence from abroad for use in federal criminal proceedings is still generally elaborate and time consuming. In contrast, BSA reports (other than the FBAR form) generally must be filed no later than 15 days after a reportable transaction or transportation has occurred, and the reports are converted to computer-queriable data within a reasonable span of time thereafter. *See* 31 C.F.R. § 103.26 (1987).

The most obvious limitation on the utility of BSA reports, of course, is the fact that they record only those data specified in the regulations and on the reports. Other highly useful information, such as the identities of persons associated with a foreign bank account or transaction, may not be available in those reports. Prosecutors must therefore continue to seek information directly from foreign jurisdictions, as full-fledged money laundering operations

Recognition of the BSA's utility has helped to spur the federal government to enforce the BSA's requirements with increasing vigor. In the past five years, for example, the IRS Criminal Investigation Division has steadily increased the number of investigations initiated[34] and prosecutions recommended for criminal violations of the BSA. During that same period, the numbers of indictments and convictions for those violations also have increased.[35] In the past three years, the United States Customs Service, which exercises the Treasury's authority under the BSA to seize currency and mon-

almost always involve the use of foreign banks. *See Tax Evasion Hearings, supra* note 5, at 126 (testimony of Richard C. Wassenaar, Assistant Commissioner for Criminal Investigation, IRS).

In their efforts to obtain information from foreign jurisdictions more swiftly, federal prosecutors have made use of two techniques that have proved more controversial than the BSA. The first technique involves the issuance of a subpoena to a domestic subsidiary of a foreign corporation to obtain records in the custody of the foreign corporation. Foreign corporations whose records have been subpoenaed in this manner frequently resist production of the records on the ground that production would violate the secrecy laws of their country. *See, e.g., In re* Grand Jury Proceedings, Bank of Nova Scotia, 691 F.2d 1384, 1386-89 (11th Cir. 1982), *cert. denied,* 462 U.S. 1119 (1983); *see also* Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197, 200 (1958) (efforts by Swiss holding company to resist U.S. pretrial production order of bank records). While courts have frequently supported the government's efforts, that support is not without limits. *See, e.g., In re* Sealed Case, 825 F.2d 494, 498-99 (D.C. Cir. 1987) (per curiam); *In re* Arawak Trust Co. (Cayman), 489 F. Supp. 162, 165 (E.D.N.Y. 1980).

The second technique involves the issuance of grand jury subpoenas directing a person to sign a form consenting to the disclosure of bank records in a foreign country. Several circuits have upheld the use of these "consent directives." *See In re* Grand Jury Subpoena, 826 F.2d 1166, 1170-71 (2d Cir. 1987); *In re* United States Grand Jury Proceedings (Cid), 767 F.2d 1131, 1132-33 (5th Cir. 1985); United States v. Davis, 767 F.2d 1025, 1033-36 (2d Cir. 1985); United States v. Ghidoni, 732 F.2d 814, 818-19 (11th Cir.), *cert. denied,* 469 U.S. 932 (1984). *But see In re* Grand Jury Proceedings (Ranauro), 814 F.2d 791, 793 (1st Cir. 1987) (holding fifth amendment applicable to consent directive); *In re* N.D.N.Y. Grand Jury Subpoena 86-0351-S, 811 F.2d 114, 117-18 (2d Cir. 1987) (relying on court's supervisory power to preclude use of consent directive that failed to indicate the district court had compelled consent). The Supreme Court may soon decide whether consent directives violate the privilege against self-incrimination. *See In re* Grand Jury 84-2, No. 86-2663, slip op. (5th Cir. Feb. 13, 1987), *petition for cert. filed,* 56 U.S.L.W. 3055 (U.S. May 1, 1987) (No. 86-1753). In any event, neither of these techniques is likely to produce useful information as quickly as BSA reports do on a routine basis.

34. The BSA regulations delegate to the IRS the authority to investigate all criminal violations of the BSA (except for CMIR violations in 31 C.F.R. § 103.23 (1987)), and to the United States Customs Service the authority to investigate criminal CMIR violations. 31 C.F.R. § 103.46(c) (1987).

35. The following table sets forth statistics prepared by the IRS Criminal Investigation Division on their criminal investigations of BSA violations from Fiscal Year (FY) 1982 through FY 1987 (ending September 30, 1987):

etary instruments transported without being reported on CMIR forms,[36] has consistently increased its seizures of currency and monetary instruments under all applicable federal statutes, including the BSA.[37] In addition, since June of 1985, the Treasury has imposed thirty-six civil money penalties, totaling nearly $16 million, against financial institutions for civil violations of the BSA.[38]

III. COMBATTING EVASION TECHNIQUES

The increased enforcement of the BSA, coupled with substantial increases in the maximum criminal and civil sanctions for violations of the BSA,[39] has

	FY 1982	FY 1983	FY 1984	FY 1985	FY 1986	FY 1987
Investigations Initiated	126	171	238	338	354	400
Prosecution Recommendations	55	119	143	174	275	256
Indictments	29	103	102	144	204	236
Convictions	25	61	73	91	108	153

From FY82 to FY85, the percentage of these investigations that involved narcotics ranged from 36.3% to 51.7%. *See Tax Evasion Hearings, supra* note 5, at 115-16 (testimony of Richard C. Wassenaar, Assistant Commissioner for Criminal Investigation, IRS). In addition, since the enactment of the Anti-Drug Abuse Act of 1986, Pub. L. 99-570, § 1354, 100 Stat. 3207, 3207-22 (codified as amended in scattered sections of 21 U.S.C.A. (West Supp. 1987)), which created a new offense under the BSA for structuring currency transactions to evade the CTR reporting requirement, 31 U.S.C.A. § 5324 (West Supp. 1987), there have been six indictments and two convictions for structuring violations as of the date of this writing. *See infra* notes 50-60 and accompanying text (discussing 31 U.S.C.A. § 5324).

36. *See* 31 U.S.C. § 5317 (1982), *as amended by* 31 U.S.C.A. § 5317(b)-(c) (West Supp. 1987); 31 C.F.R. § 103.50 (1987).

37. From 1984 to 1986, the Customs Service increased the total of all currency and monetary instrument seizures from $67.7 million to $96.1 million. *Federal Accounting of Seized Cash in Federal Agencies: Hearing Before the Subcomm. on Federal Spending, Budget, and Accounting of the Senate Comm. on Governmental Affairs,* 100th Cong., 1st Sess. 19 (1987) (testimony of William von Raab, Commissioner of Customs). Seizures pertaining directly to BSA violations constitute a significant portion of these totals. For example, in one special operation to detect unreported outbound currency in south Florida, "Operation Buckstop," the Customs Service seized more than $7 million in one three-week period. *Id.*

38. Department of the Treasury statistics (compiled by the author).

39. Section 1357(g) of the Money Laundering Control Act of 1986 (MLCA), Pub. L. No. 99-570, § 1357(g), 100 Stat. 3207-18, 3207-26, amended the BSA, Pub. L. No. 91-508, 84 Stat. 1114 (1970) (codified as amended at 12 U.S.C. §§ 1730d, 1829b, 1951-59 (1982 & Supp. IV 1986) and 31 U.S.C. §§ 321, 5311-24 (1982 & Supp. III 1985), *as amended by* 31 U.S.C.A. §§ 5312(a)(2)(T), (u)(5), 5316(a)(1)-(2), 5316(d), 5317(b)-(c), 5318(a)-(f), 5321(a)(1), (4)-(6), 5321(b)-(d), 5322(a)-(c), 5323(a)-(d), 5324 (West Supp. 1987)), to elevate the maximum penalty for criminal violation of the BSA to 10 years' imprisonment for violations committed while violating another federal law or as part of a pattern of any illegal activity involving more than $100,000 in a 12-month period. 31 U.S.C.A. § 5322(b) (West Supp. 1987) (amending 31 U.S.C. § 5322(b) (1982)). Section 1357(b) of the MLCA, Pub. L. No. 99-570, § 1357(b), 100

helped to elicit two reactions from those who must comply with the statute's provisions. Legitimate financial institutions, which have every interest in full compliance with the BSA, have dramatically increased the number of BSA reports that they are filing each year. CTR filings alone have increased steadily from 707,000 in 1984 to 3.7 million in 1986, and in 1987, are projected to exceed 5 million.[40] Professional money launderers[41] have no interest in disclosing their association with large cash transactions, and, therefore, have developed various means to evade the BSA's reporting requirements.

One of the more commonly used evasion techniques, known as the "structuring" of transactions involves the conduct of multiple cash transactions (such as deposits or purchases of cashier's checks or money orders) in amounts that total more than $10,000, but individually do not exceed the $10,000 threshold for CTR reports, for the express purpose of evading the CTR requirement.[42] The conduct of structured transactions, at multiple branches of the same financial institution or at multiple institutions, may prevent the filing of BSA reports on transactions that otherwise would be

---

Stat. 3207-18, 3207-25, also amended the BSA to increase the maximum civil penalty for basic violations of the BSA from $10,000 to "the greater of the amount (not to exceed $100,000) involved in the transaction or $25,000." 31 U.S.C. § 5321(a)(1) (amending 31 U.S.C. § 5321(a)(1) (Supp. III 1985)). Similarly, § 1357(c) of the MLCA, Pub. L. No. 99-570, § 1357(c), 100 Stat. 3207-18, 3207-25, established a comparable maximum civil penalty for violations involving foreign financial agency transactions. 31 U.S.C. § 5321(a)(5)(B)(i). In addition, § 1357(a) of the MLCA, Pub. L. No. 99-570, § 1357(a), 100 Stat. 3207-18, 3207-25, established a maximum civil penalty for violations of 31 U.S.C. § 5324, of the amount of currency or monetary instruments involved in the transaction. *Id.* § 5321(a)(4).

Each of the foregoing civil penalties pertains only to those who "willfully violat[e]" the BSA. *See id.* § 5321(a)(1). Section 1357(d) of the MLCA, Pub. L. No. 99-570, § 1357(d), 100 Stat. 3207-18, 3207-26, also authorizes the imposition of a civil money penalty for a negligent violation of the BSA's reporting provisions or the regulations thereunder. *Id.* § 5321(a)(6). Finally, § 1366(a) of the MLCA, Pub. L. No. 99-570, § 1366(a), 100 Stat. 3207-18, 3207-35 to -39 (codified at 18 U.S.C. §§ 981-82 (Supp. IV 1986)), added a new section to the federal criminal code that permits civil forfeiture of coin, currency, or monetary instruments or any interest in other property, including a deposit in a financial institution, that is traceable to coin or currency involved in a transaction or attempted transaction that would violate the CTR or structuring provisions of the BSA. *See* 18 U.S.C. § 981(a)(1)(c) (Supp. IV 1986).

40. Department of the Treasury statistics (compiled by the author).

41. The BSA regulations define the term "financial institution" to include not only institutions chartered by federal or state banking regulatory agencies, but also any person engaged in currency dealing, 31 C.F.R. § 103.11(g)(3) (1987), or "the business of transmitting funds." *Id.* § 103.11(g)(5) (1987). Federal prosecutors sometimes have relied on the latter definitions to hold individual money launderers, or their organizations, liable as financial institutions for failing to comply with the BSA. *See, e.g.*, United States v. Goldberg, 756 F.2d 949, 954 (2d Cir.), *cert. denied*, 472 U.S. 1009 (1985).

42. *See, e.g., Tax Evasion Hearings, supra* note 5, *passim.*

reportable transactions, and, therefore, may substantially reduce the likelihood of detection by law enforcement authorities.

Federal authorities have prosecuted financial institutions and individuals for structuring transactions to evade the BSA reporting requirements. In some instances, these efforts have been successful. For example, in *United States v. Heyman,*[43] the United States Court of Appeals for the Second Circuit held that an account executive at a brokerage was criminally liable for conducting structured transactions that caused the brokerage to fail to file CTR's. In other instances, however, courts, beginning with the United States Court of Appeals for the First Circuit in *United States v. Anzalone,*[44] reversed convictions on various grounds, holding that the structuring of transactions was not a federal crime.[45]

In the Anti-Drug Abuse Act of 1986,[46] Congress created three new categories of federal offenses that carry substantial penalties for activities related to money laundering. Section 1956 of title 18 of the United States Code prohibits money laundering that involves the proceeds of certain specified unlawful activities.[47] Section 1957 of title 18 prohibits engaging in monetary transactions involving property derived from certain specified unlawful activities.[48] Although neither of these sections is part of the BSA, several of the operative terms in these sections refer to, or are defined with reference to,

43. 794 F.2d 788, 791-93 (2d Cir.) (affirming conviction under 18 U.S.C. §§ 2(b), 371 (1982) and 31 U.S.C. §§ 5313(a), 5322 (1982)), *cert. denied,* 107 S. Ct. 585 (1986); *see also* United States v. Massa, 740 F.2d 629, 645-47 (8th Cir. 1984) (affirming conviction under 18 U.S.C. § 1001 (1982)), *cert. denied,* 471 U.S. 1115 (1985); United States v. Tobon-Builes, 706 F.2d 1092, 1096-1101 (11th Cir. 1983) (affirming conviction under 18 U.S.C. § 1001 (1982)).

44. 766 F.2d 676, 680-83 (1st Cir. 1985).

45. *See* United States v. Gimbel, No. 86-1808, slip op. at 12 (7th Cir. Aug. 6, 1987) (LEXIS, Genfed library, USAPP file) (reversing conviction under 18 U.S.C. §§ 2(b), 1001, 1341, 1343 (1982)); United States v. Larson, 796 F.2d 244, 247 (8th Cir. 1986) (reversing conviction under 18 U.S.C. §§ 2, 1001 (1982)); United States v. Varbel, 780 F.2d 758, 760 (9th Cir. 1986) (reversing conviction under 18 U.S.C. §§ 2, 371, 1001, 1343 (1982)); United States v. Denemark, 779 F.2d 1559, 1561-63 (11th Cir. 1986) (reversing conviction under 18 U.S.C. § 1001 (1982)); *Anzalone,* 766 F.2d at 680-83 (reversing conviction under 18 U.S.C. §§ 2, 1001 (1982) and 31 U.S.C. §§ 5313, 5322 (1982)).

46. Pub. L. No. 99-570, 100 Stat. 3207-22 (codified as amended at 31 U.S.C.A. § 5324 (West Supp. 1987)).

47. 18 U.S.C. § 1956 (Supp. IV 1986). A violation of this section constitutes a criminal offense punishable by a fine of not more than $500,000 or twice the value of the property, funds, or monetary instruments involved in the transaction (whichever is greater), or imprisonment for not more than 20 years, or both. *Id.* § 1956(a)(1)-(2). In addition, the government can seek "a civil penalty of not more than the greater of (1) the value of property, funds, or monetary instruments involved in the transaction; or (2) $10,000." *Id.* § 1956(b).

48. *Id.* § 1957. A violation of this section constitutes a criminal offense punishable by "a fine under title 18, . . . or imprisonment for not more than ten years, or both." *Id.* § 1957(a). An alternative fine may be imposed of not more than twice the amount of the criminally derived property involved in the transaction. *Id.* § 1957(b)(2).

the BSA.[49]

In addition, Congress enacted section 5324 of title 31 of the United States Code to close the loophole created by *Anzalone* and its progeny.[50] Section 5324 amends the BSA to prohibit the structuring of transactions.[51] It makes it both a civil and a criminal violation of the BSA to commit any of the following acts for the purpose of evading the CTR reporting requirement:

1. Cause or attempt to cause a domestic financial institution to fail to file a required CTR;[52]

2. Cause or attempt to cause a domestic financial institution to file a required CTR that contains a material omission or misstatement of fact;[53] or

3. Structure or assist in structuring, or attempt to structure or assist in structuring, any transaction with one or more domestic financial institutions.[54]

The legislative history of section 5324 makes clear that Congress unambiguously intended to negate judicial decisions such as *Anzalone* and to codify judicial decisions such as *United States v. Tobon-Builes,*[55] which held individuals liable for structuring transactions to evade the CTR reporting requirement. As stated in the legislative history, section 5324 would "expressly" subject "to potential liability a person who causes or attempts to

49. Section 1956 makes it an offense for a person to conduct a financial transaction involving the proceeds of specified unlawful activity, if he knows "that the transaction is designed in whole or in part . . . to avoid a transaction reporting requirement under State or Federal law." *Id.* § 1956(a)(1)(B)(ii). Section 1956 also makes it an offense for a person to transport a monetary instrument or funds into or out of the United States, if he knows "that the monetary instrument or funds involved in the transportation represent the proceeds of some form of unlawful activity and know[s] that such transportation is designed in whole or in part . . . to avoid a transaction reporting requirement under State or Federal law." *Id.* § 1956(a)(2)(B)(ii). Finally, both §§ 1956 and 1957 define the terms "monetary instruments" and "financial institution," either implicitly or explicitly with reference to the BSA and the regulations thereunder. *See id.* §§ 1956(c)(5)-(6), 1957(f)(1).

50. Pub. L. No. 99-570, 100 Stat. 3207-22 (codified as amended at 31 U.S.C.A. § 5324 (West Supp. 1987)).

51. 31 U.S.C.A. § 5324 (West Supp. 1987).

52. *Id.* § 5324(1).

53. *Id.* § 5324(2).

54. *Id.* § 5324(3). A willful violation of any of the three provisions of § 5324 constitutes a criminal offense punishable by imprisonment for not more than five years or a fine of not more than $250,000, or both. *Id.* § 5322(a). If the violation is committed while violating another federal law or "as part of a pattern of any illegal activity involving more than $100,000 in a 12-month period," the maximum punishment may be increased to imprisonment for not more than 10 years, or a $500,000 fine, or both. *Id.* § 5322(b). A willful violation of any of the three provisions of § 5324 may also constitute a civil violation for which the Treasury may impose a civil money penalty that may not exceed the amount of the coins, currency, or other monetary instruments involved in the transaction. *Id.* § 5321(a)(4).

55. 706 F.2d 1092, 1094-95 (11th Cir. 1983).

cause a financial institution to fail to file a required report or who causes a financial institution to file a required report that contains material omissions or misstatements of fact."[56] Additionally, it "would create the offense of structuring a transaction to evade the reporting requirements, without regard for whether an individual transaction is, itself, reportable under the Bank Secrecy Act."[57] As an example, the Senate Judiciary Committee report noted:

> [A] person who converts $18,000 in currency to cashier's checks by purchasing two $9,000 cashier's checks at two different banks or on two different days with the specific intent that the participating bank or banks not be required to file Currency Transaction Reports for those transactions, would be subject to potential civil and criminal liability.[58]

These reports, and the subsequent floor debates on the legislation,[59] leave no doubt that Congress intended "to cover the splitting up of more than $10,000 in cash into multiple transactions, each totalling less than $10,000, at the same or different banks or branches of the same bank and on the same or different days, with the intent of avoiding the filing of CTR's."[60]

The term "assist in structuring" has apparently created some concern on the part of financial institutions. Some institutions evidently fear that they may be liable for assisting in structuring if they handle multiple transactions for a particular customer, without knowing that the transactions, once aggregated, have exceeded $10,000, and the customer later proves to have been structuring his transactions. Section 5324, however, does not proscribe inadvertent conduct that falls short of willfulness or negligence.[61] In addition, a financial institution that handles multiple currency transactions of $10,000 or less is not "assisting in structuring," for purposes of section 5324, if the conduct of those transactions is for some purpose other than evasion of the CTR reporting requirement.[62]

IV. Suspicious Transactions: Recognition and Reporting By Financial Institutions

Many financial institutions remain uncertain about the steps they should

56. H.R. Rep. No. 746, 99th Cong., 2d Sess. 19 (1986).
57. *Id.*
58. S. Rep. No. 433, 99th Cong., 2d Sess. 22 (1986).
59. *See* 132 Cong. Rec. H6558 (daily ed. Sept. 10, 1986) (statement of Rep. St Germain); *id.* at H6560 (statement of Rep. Wylie); *id.* at H6599 (statement of Rep. Pickle).
60. U.S. Dep't of Justice, Criminal Div., Handbook on the Anti-Drug Abuse Act of 1986, at 86 (1987) [hereinafter Handbook].
61. *See* 31 U.S.C.A. §§ 5321(a)(4)(A), 5322(a) (West Supp. 1987).
62. *See* S. Rep. No. 433, 99th Cong., 2d Sess. 22 (1986).

take if they handle currency transactions of $10,000 or less and are suspicious that the transactions may be part of a structuring effort or money laundering scheme. For some, the uncertainty may stem from lack of knowledge about professional money laundering; for others, it may be colored by their concern for customer relations.

In determining what constitutes a "suspicious transaction" (i.e., a transaction that may involve an illegal activity, such as a BSA or money laundering violation), one cannot use a single criterion that will definitively indicate a connection between a financial transaction and an illegal activity. Law enforcement authorities and bank compliance experts have observed, however, that the following acts are characteristic of persons conducting large cash transactions who are seeking either to structure transactions to avoid the CTR reporting requirement or to engage in money laundering:

1. The person seeks to exchange large amounts of small-denomination bills (i.e., $1, $5, $10, and $20 bills) for large-denomination bills (i.e., $50 and $100 bills).

2. The person presents a transaction that involves large numbers of $50 and $100 bills.

3. The person presents the transaction without having counted the cash.

4. The person expresses concern about the financial institution's intention to file a CTR on the transaction.

5. The person, after being informed that the institution intends to file a CTR on the transaction, seeks to take back part of the cash in order to reduce the amount of the transaction to $10,000 or less.

6. The person, after being informed that the institution intends to file a CTR on the transaction, asks the officer or employee handling the transaction whether he should deposit less than $10,000.

7. The person initiates a transaction involving more than $10,000 in cash, but appears reluctant to provide identification for the CTR even though he has no account relationship with that institution.

8. The person conducts multiple transactions, each involving less than $10,000, but totaling more than $10,000, over the course of several consecutive or near-consecutive days (e.g., Monday, Wednesday, and Friday), whether at the same financial institution, different branches of the same institution, or different institutions.

9. The person deposits multiple cashier's checks or money orders (each for $10,000 or less) into an account from which funds are subsequently wire-transferred to a foreign bank account or are otherwise withdrawn.

10. Two or more persons enter a financial institution together and separately make cash purchases of monetary instruments (such as cashier's

checks) that individually do not exceed $10,000, but that total more than $10,000, from different tellers in the same institution.[63]

In recent months, financial institutions throughout the country have provided information to law enforcement authorities that included numerous situations involving one or more of the factors listed above. The following situations, drawn from this information, appear to involve violations of the CTR reporting requirement or the structuring offense, and also may involve other federal offenses:

1. Over a three-month period, numerous cash deposits totaling more than $500,000 were made into the account of an import company. These deposits were made through several branches and tellers of the bank, but no individual deposit ever exceeded $10,000.

2. After depositing a check for $75,000 in a bank account, a customer returned to the bank the following day and cashed one check for $9,500, then attempted to cash a second check for $9,000. The next day, the person cashed a check for $9,000 at the bank and attempted to cash a second check for $9,500 at the same bank, then succeeded in cashing a $9,500 check at another branch of the bank. The next day thereafter, the person cashed a $9,875 check and attempted to cash another check for $8,000. At each bank branch the person visited, the person gave a different explanation of the use to which the cash would be put.

3. A customer opening a savings account told the new account clerk at the institution that he did not want to have "one of those forms filled out," and that he had a lot of cash to deposit. The clerk then informed the customer that the institution was required to complete a CTR if a deposit involved more than $10,000. On six consecutive days thereafter, the customer deposited a total of more than $36,000, all in $100 bills; all but two of the six deposits were for exactly $9,000.

4. A person, who reported his occupation as "retired," made deposits of $9,500 on multiple days. The deposits were separated into amounts of $8,500 and $1,000, and divided between checking and savings accounts. These deposits usually involved $50 and $100 bills.

5. A customer sought to deposit $14,000 in cash and a $6,000 check. When the teller handling the transaction requested information to complete a CTR, the customer asked whether she (the customer) could deposit $9,000 today and $5,000 tomorrow. When the teller said that she could not tell the customer how to conduct her transaction, the customer deposited only the check and left without depositing any of the cash. Later that day, the cus-

63. *See* United States v. Tobon-Builes, 706 F.2d 1092, 1094-95 (11th Cir. 1983).

tomer deposited $7,000 in cash at a second branch of the bank and an additional $7,000 at a third branch of that bank.

6. During two consecutive days, three branches of a bank in a southern state handled the purchases of thirteen cashier's checks totaling more than $130,000 by a nondepositor who resided several hundred miles away. When bank employees asked the purchaser for identification to complete CTR's on the transactions, the person refused and left the branches. The checks were subsequently deposited at another bank in the same state.

7. A person purchased with cash a number of $9,000 cashier's checks. A subsequent purchase of a $6,000 cashier's check was made with $100 bills.

On the basis of this information, four actions should immediately be taken whenever an officer, employee, director, or partner of a financial institution encounters evidence of a suspicious cash transaction. First, that person should immediately bring such information to the attention of the institution's compliance coordinator or other supervisor responsible for assuring the institution's compliance with the BSA.[64] Second, that supervisor should follow the institution's internal procedures to determine whether the person or persons who conducted the suspicious transaction also conducted other currency transactions at that institution (including its branches) during the same business day or over the course of several consecutive or near-consecutive days. Third, if the institution finds that the person or persons conducted more than $10,000 in currency transactions during the same business day, it must complete a CTR and should submit that CTR to the IRS as soon as possible. Fourth, whether or not the institution must file a CTR, it should immediately contact the local IRS office to report the matter to a Special Agent of the IRS Criminal Investigation Division.

These actions are wholly consistent with the CTR provisions of the regulations. The regulations state that for purposes of CTR reporting, "[m]ultiple currency transactions shall be treated as a single transaction if the financial institution has knowledge that they are by or on behalf of any person and result in either cash in or cash out totalling more than $10,000

64. Under regulations issued by five federal financial institutions supervisory agencies (i.e., the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Federal Home Loan Bank Board, and the National Credit Union Administration), all financial institutions regulated by those supervisory agencies must develop and provide for the continued administration of a program reasonably designed to assure compliance with the BSA's recordkeeping and reporting requirements. Procedures for Monitoring Bank Secrecy Act Compliance, 52 Fed. Reg. 2858 (1987) (to be codified at 12 C.F.R. §§ 21.21, 208.14, 326.8, 563.17-7, 748.2). Each of these compliance programs must include the designation of an individual responsible for coordinating and monitoring day-to-day compliance with the BSA's requirements. *Id.*

during any one business day."[65] The term "knowledge" in this statement means more than a single individual's knowledge of multiple transactions. The Treasury has stated that "knowledge" means "knowledge on the part of a partner, director, officer or employee of a financial institution, or on the part of any existing system at the institution that permits it to aggregate transactions."[66] This statement clearly indicates that the Treasury will impute to the financial institution any "knowledge" of multiple transactions that are captured in a manual or automated system that the financial institution maintains to aid in tracing cash-in and cash-out transactions.

Equally important, the Treasury will apply the concept of "willful blindness," a concept long recognized and accepted in criminal law for analysis of criminal intent,[67] in determining whether a financial institution had sufficient knowledge of multiple transactions to recognize its obligation to file a CTR:

> "Knowledge," as used in the final rule, clearly includes the concept of "willful blindness" as well. This concept applies to a person who has deliberately avoided positive knowledge; that is, "if a person has his suspicions aroused but then deliberately omits to make further inquiries, because he wishes to remain in ignorance, he is deemed to have knowledge." If a financial institution suspects someone may be structuring transactions in order to avoid the filling out of a record or report, but deliberately refuses to ask questions because it wishes to remain ignorant and therefore, "innocent," the financial institution will be deemed to have knowledge for purposes of assessing liability under the Bank Secrecy Act.[68]

This view is consistent with the recent decision by the United States Court of Appeals for the First Circuit in *United States v. Bank of New England, N.A.*[69] That decision affirmed the conviction of the Bank of New England on thirty-one felony counts of failure to file CTR's on reportable currency

65. 31 C.F.R. § 103.22(a)(1) (1987). With respect to banks, the regulations further define the term "business day," as "that day, as normally communicated to its depository customers . . . on which a bank routinely posts a particular transaction to its customer's account." *Id.* § 103.11(q). A comparable requirement for CTRC reporting applies to multiple currency transactions that "result in either cash in or cash out totalling more than $10,000 during any twenty-four hour period." *Id.* § 103.22(a)(2).

66. Amendments to Implementing Regulations Under the Bank Secrecy Act, 52 Fed. Reg. 11,436-37 (1987).

67. *See, e.g.*, United States v. Jewell, 532 F.2d 697, 700-04 (9th Cir.), *cert. denied*, 426 U.S. 951 (1976).

68. Amendments to Implementing Regulations Under the Bank Secrecy Act, *supra* note 66, at 11,437 (quoting *Jewell*, 532 F.2d at 700) (citations omitted)).

69. 821 F.2d 844 (1st Cir.), *cert. denied*, 108 S. Ct. 328 (1987).

transactions.[70] Applying the principle that a finding of willfulness for a BSA conviction must be supported by proof of the defendant's knowledge of the reporting requirements and his specific intent to commit the crime, the court of appeals upheld the district court's use of jury instructions that permitted the jury to ascribe to the bank the total knowledge of the bank's employees acting within the scope of their employment.[71] Under this "collective knowledge" theory, the fact that an officer or employee of a financial institution, acting within the scope of his employment, showed awareness of the CTR reporting requirements in considering whether to make further inquiry about the suspicious transaction could clearly be imputed to the institution itself.

Although the BSA does not compel a financial institution to report suspicious transactions that do not exceed $10,000 when aggregated, a recent amendment to the Right to Financial Privacy Act[72] now provides clear authority for a financial institution[73] to report certain information about such transactions without fear of civil liability under the Right to Financial Privacy Act for disclosure of a customer's financial records without notice to the customer. Section 1103(c) of that Act, as amended, now states that nothing in the Act:

> shall preclude any financial institution, or any officer, employee, or agent of a financial institution, from notifying a Government authority that such institution, or officer, employee, or agent has information which may be relevant to a possible violation of any statute or regulation. Such information may include only the name or other identifying information concerning any individual or account involved in and the nature of any suspected illegal activity.[74]

The legislative history of the 1986 amendment clarifies the scope of this language. The Senate Judiciary Committee report that dealt with the amendment stated:

> The name or names that may be disclosed under this section includes the name of any corporate entity, partnership, or other organization in which an account is listed, as well as the names, if known, of any individuals involved in a suspected transaction. Other identifying information that may be disclosed about individ-

70. *Id.* at 856-57.

71. *Id.* at 856.

72. 12 U.S.C. §§ 3401-3422 (1982 & Supp. IV 1986).

73. The Right to Financial Privacy Act defines the term "financial institution" more narrowly than does the BSA and the regulations thereunder. *Compare* 12 U.S.C. § 3401(1) (1982) *with* 31 U.S.C. § 5312(a)(2) (1982), *amended by* 31 U.S.C.A. § 5312(a)(2)(T) (West Supp. 1987) *and* 31 C.F.R. § 103.11(g) (1987).

74. 12 U.S.C. § 3403(c) (1982 & Supp. IV 1986).

> uals includes the individual's home or business addresses or social security number, if known.
>
> Other identifying information that may be disclosed about accounts includes, in addition to account number, the type of account (checking, savings, securities) or the interest rate paid on the account. It also includes the location of the branch or office at which the account is maintained.
>
> The nature of suspected illegal activity that may be disclosed includes a specification of the offense that the financial institution believes is being violated, if known, or a description of the activities giving rise to the bank's suspicions. Thus, for instance, if a customer of a bank comes into the bank with regularity, every Monday, Wednesday, and Friday, to obtain a cashier's check with $5,000 in small denomination bills, the bank could describe this pattern in the information it submits to law enforcement officials, even if the bank does not know precisely what law might be violated.[75]

So long as a financial institution limits its voluntary disclosure to the categories of information listed above, section 1103(c) permits that disclosure, notwithstanding any contrary provision in the laws of any state or local government. In addition, it unambiguously exempts that institution from liability to the customer under federal, state, or local law for either the disclosure or the failure to notify the customer of that disclosure.[76]

V. Voluntary Disclosure by Financial Institutions

Neither section 1103(c) nor the other provisions of the Right to Financial Privacy Act require a financial institution to disclose information about a suspicious transaction or transactions.[77] However, financial institutions should recognize that there are a number of substantial reasons for making such disclosures voluntarily. One is the need for prompt disclosure to aid in detecting and apprehending money launderers. As law enforcement officials throughout the country are aware, the hirelings of professional money launderers are likely to visit numerous financial institutions in the same geographic area for a brief duration, and then move on to other areas before they are recognized and apprehended by law enforcement authorities. If a financial institution does not promptly pass on its suspicions about such customers to the authorities, it will be far more difficult to apprehend them and disrupt the money laundering operation.

---

75. S. Rep. No. 433, 99th Cong., 2d Sess. 15 (1986).

76. 12 U.S.C. § 3403(c) (Supp. IV 1986).

77. *See* Handbook, *supra* note 60, at 88; L. Fischer, The Law of Financial Privacy § 2.05(2)(c), at 2-57 (1983).

For this reason, Francis A. Keating, II, the Assistant Secretary for Enforcement at the Treasury, has frequently urged financial institutions to be "good citizens" and report all BSA violations promptly to the appropriate federal agencies.[78] Similarly, in its report on the Anti-Drug Abuse Act of 1986, the Senate Judiciary Committee stated that it "strongly encourages financial institutions to assist law enforcement efforts by providing such voluntary disclosure wherever they legitimately suspect illegal activity, consistent with the privacy rights of their customers."[79] The Committee also expressed the hope that all financial institutions would "establish a formal policy that encourages their officers and employees to report illegal activities promptly."[80]

Moreover, if a possible structured transaction arouses the suspicions of an officer or employee of a financial institution, but that officer or employee fails to make further inquiry regarding the transaction or to bring it to the attention of law enforcement authorities, those facts may later constitute evidence of the institution's intent to violate the BSA. In *Bank of New England* the First Circuit upheld not only the so-called "collective knowledge" instruction, but also another portion of the jury instructions that permitted an inference of specific intent from evidence of the bank's flagrant indifference to its obligations under the BSA.[81] It cited with approval the United States Supreme Court's definition of willfulness, "in both civil and criminal contexts, as 'a disregard for the governing statute and an indifference to its requirements.' "[82]

Under that holding, evidence that the officer or employee had considered the amount and nature of the suspicious transaction, but made no further inquiry about the possibility that it was part of a series of transactions that had to be aggregated and reported, could be considered probative of the institution's flagrant indifference to its CTR reporting obligations. As the court noted in *Bank of New England:*

> Given the suspicions aroused by [the customer's] banking practices and the abundance of information indicating that his transactions were [structured and, therefore,] reportable, the jury could have concluded that the failure by Bank personnel to, at least, inquire about the reportability of [the customer's] transactions constituted

78. *See Money Laundering Hearings, supra* note 33, at 25 (statement of Francis A. Keating, II, Assistant Secretary for Enforcement, Department of the Treasury).

79. S. REP. NO. 433, 99th Cong., 2d Sess. 15 (1986).

80. *Id.* at 15-16.

81. 821 F.2d 844, 856-57 (1st Cir.), *cert. denied,* 108 S. Ct. 328 (1987).

82. *Id.* at 856 (quoting Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 127 & n.20 (1985)).

flagrant indifference to the obligations imposed by the Act.[83]

Particularly if a court found that the institution in question had trained the officer or employee on BSA requirements, and was responsible for administering a program for compliance with the BSA, that court might conclude that the officer or employee had disregarded the BSA "without making any reasonable effort to determine whether the plan he [was] following would constitute a violation of the law."[84] In contrast, it would appear that efforts by the institution to bring the suspicious transaction promptly to the authorities' attention, after determining whether a CTR had to be filed on that and other transactions, would tend to indicate that the institution lacked specific intent to violate the BSA.

In *Bank of New England,* the court of appeals also upheld a third portion of the jury instructions that deemed evidence of the bank's conduct after its final CTR violation to be probative of the bank's mental state.[85] The court noted that the conduct "could be found to show scant effort by the [b]ank to comply with its legal obligations, even after it had learned that [the customer] had come under suspicion."[86] Relying upon Federal Rule of Evidence 404(b),[87] the court permitted the introduction of that evidence as manifesting the bank's disregard of its reporting duty.[88] Under this holding, evidence that a financial institution failed to take any action to bring the suspicious transaction to the authorities' attention could constitute evidence of the requisite mental state in a BSA prosecution. Prompt reporting of the institution's suspicions, however, could aid the institution in demonstrating its lack of intent to violate the BSA, so long as the institution also promptly determined whether it needed to file a CTR pertaining to that transaction.

Although the foregoing comments pertain to the possible use of evidence in BSA prosecutions, such evidence could also be relevant in prosecutions for other federal criminal offenses, such as aiding, abetting, or causing the commission of a federal offense,[89] serving as an accessory after the

83. *Id.* at 857.

84. Nabob Oil Co. v. United States, 190 F.2d 478, 479 (10th Cir.), *cert. denied,* 342 U.S. 876 (1951). The Supreme Court indicated in Trans World Airlines, Inc. v. Thurston, 469 U.S. 111 (1985), that this definition of "willful" was consistent with the Court's interpretations of that term in other criminal and civil statutes. *Id.* at 126.

85. 821 F.2d at 859.

86. *Id.* at 858.

87. FED. R. EVID. 404(b). The rule states that "[e]vidence of other crimes, wrongs, or acts" may be admissible "as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *Id.*

88. *Bank of New England,* 821 F.2d at 858-59.

89. 18 U.S.C. § 2 (1982). The aiding and abetting offense, 18 U.S.C. § 2(a), generally would require proof that the "defendant had associated himself with a criminal venture, participated in it as something he wished to bring about, and sought by his actions to make it

fact,[90] misprision of a federal felony,[91] conspiracy to defraud the United States,[92] concealment of material facts from a federal agency,[93] or money laundering.[94] In addition, such evidence would clearly be relevant in the Treasury's decision whether to impose a civil penalty against a financial institution for civil violations of the BSA, such as willful failures to file CTR's or assistance in structuring transactions.

A further consideration, for some financial institutions, in making voluntary disclosures of suspicious transactions to law enforcement agencies is the

---

succeed." United States v. Bryant, 671 F.2d 450, 454 (11th Cir. 1982); *see also, e.g.*, Nye & Nissen v. United States, 336 U.S. 613, 619 (1949) (citing United States v. Peoni, 100 F.2d 401, 402 (2d Cir. 1938) (L. Hand, J.)). The "causing" offense, 18 U.S.C. § 2(b), has frequently been used against officers or employees of financial institutions for causing their institutions to fail to file CTRs. *See* United States v. Heyman, 794 F.2d 788, 790-93 (2d Cir. 1986); United States v. Thompson, 603 F.2d 1200, 1204 (5th Cir. 1979).

90. 18 U.S.C § 3 (1982). Courts define an accessory after the fact as "one who, knowing that a crime has been committed, obstructs justice by giving comfort or assistance to the offender in order to hinder or prevent his apprehension or punishment." Government of the Virgin Islands v. Aquino, 378 F.2d 540, 553 (3d Cir. 1967); *see also* United States v. Barlow, 470 F.2d 1245, 1252-53 (D.C. Cir. 1972). A bank officer or employee, like other persons, could be convicted as an accessory after the fact to a BSA violation even though he was present before, during, and after the crime. *See* Smith v. United States, 306 F.2d 286, 286-87 (D.C. Cir. 1962) (per curiam).

91. 18 U.S.C. § 4 (1982). This offense generally would require proof that the principal had committed and completed the felony alleged, and that the defendant had full knowledge of that fact but failed to notify the authorities and took an affirmative step to conceal the principal's crime. *See, e.g.*, United States v. Ciambrone, 750 F.2d 1416, 1417 (9th Cir. 1984); United States v. Baez, 732 F.2d 780, 782 (10th Cir. 1984). Mere silence, without some affirmative step, would not suffice as evidence of the offense. *See, e.g.*, United States v. Hodges, 566 F.2d 674, 675 (9th Cir. 1977) (per curiam); United States v. Farrar, 38 F.2d 515, 517 (D. Mass.), *aff'd*, 281 U.S. 624 (1930).

92. 18 U.S.C. § 371 (1982). Under this statute, courts have convicted persons for conducting currency transactions that thwart the government's ability to obtain information concerning currency transactions of more than $10,000. *See, e.g.*, United States v. Konstantinov, 793 F.2d 1296, 1296 (7th Cir.), *cert. denied*, 107 S. Ct. 191 (1986); United States v. Giancola, 783 F.2d 1549, 1553 (11th Cir.), *cert. denied*, 107 S. Ct. 669 (1986); United States v. Shearson Lehman Bros., 650 F. Supp. 490, 493-94, 497-500 (E.D. Pa. 1986); United States v. Richter, 610 F. Supp. 480, 487 (N.D. Ill. 1985), *aff'd sub nom.* United States v. Mangovski, 785 F.2d 312, 312 (7th Cir. 1986); *see also* United States v. Hajecate, 683 F.2d 894, 896-97 (5th Cir. 1982), *cert. denied*, 461 U.S. 927 (1983). In contrast to the mail fraud statute, 18 U.S.C. § 1341 (1982), which the Supreme Court recently construed to extend only to the protection of money or property rights, McNally v. United States, 107 S. Ct. 2875, 2880-81 (1987), the term "defraud" in § 371 reaches any conspiracy to impair, obstruct, or defeat the lawful function of any department of government. *See* Tanner v. United States, 107 S. Ct. 2739, 2751-52 (1987); United States v. Herron, 825 F.2d 50, 58 (5th Cir. 1987).

93. 18 U.S.C. § 1001 (1982). Some courts have upheld convictions under 18 U.S.C. § 371 (1982) for conspiracy to violate § 1001 by causing a bank to conceal material facts from the government concerning currency transactions. *See* United States v. Nersesian, 824 F.2d 1294, 1309-15 (2d Cir. 1987); *Richter*, 610 F. Supp. at 486-87.

94. *See* 18 U.S.C. §§ 1956, 1957 (Supp. IV 1986).

possibility that its federal supervisory agency may require it to report possible BSA violations. Five of the federal financial institutions supervisory agencies—the Office of the Comptroller of the Currency (OCC), the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation (FDIC), the Federal Home Loan Bank Board, and the National Credit Union Administration—have endorsed and implemented the concept of a standard form for reporting possible criminal violations to United States Attorneys, federal investigative agencies, and the supervisory agencies. These forms, known as Criminal Referral Forms, specifically include the BSA among the federal criminal statutes appropriate for reporting on the forms.[95] Both the OCC and the FDIC have specifically revised their regulations to require the institutions under their supervision to use these forms in reporting federal criminal violations.[96]

VI. CONCLUSION

Financial institutions, like other United States citizens, have "a deeply rooted social obligation"[97] to report felonies to the authorities—in common-law parlance, to raise the "hue and cry."[98] That obligation is particularly compelling in cases of money laundering and BSA violations, where the government's success in detecting and apprehending criminals is often depen-

95. *See, e.g.*, Criminal Referral Form (Short Form), OCC Form CC-8010-08, at 5 (1986 ed.); Criminal Referral Form, Federal Reserve Form FR 2230, at 6 (1986 ed.); Report of Apparent Crime (Short Form), FDIC Form 6710/06, at 4 (1986 ed.), *reprinted in* Reports of Apparent Crimes Affecting Insured Nonmember Banks, 51 Fed. Reg. 16,485, 16,491 (1986).

96. *See* 12 C.F.R. § 21.11 (1987); *id.* § 353.0–.1. Other agencies have not issued such regulations to date. For explanations of the standards that financial institutions are expected to apply in deciding whether to use the forms, see Interpretive Rulings and Minimum Security Devices and Procedures and Reports of Crimes and Suspected Crimes, 51 Fed. Reg. 25,866 (1986) (OCC regulations); Reports of Apparent Crimes Affecting Insured Nonmember Banks, 51 Fed. Reg. 16,485 (1986).

97. Roberts v. United States, 445 U.S. 552, 558 (1980).

98. English common law required every man who discovered a felony to raise the "hue and cry," and thereby summon his neighbors to assist in overtaking the felon. 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 578-79 (2d ed. 1923); *see also, e.g.*, *Roberts*, 445 U.S. at 557. Sir William Holdsworth traced the antecedents of this requirement to the Assize of Arms in 1181, and (in ruder form) even to Anglo-Saxon law. 1 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 294 (7th ed. rev. 1956); 2 *id.* at 80, 101-02, 111 (3d ed. rev. 1923); 3 *id.* at 309, 599, 600, 603; 4 *id.* 521 (1924); *see also* C. LOWELL, ENGLISH CONSTITUTIONAL AND LEGAL HISTORY 40-41 (1962).

The hue and cry requirement arose from the practical necessity of ensuring that felons could be brought to justice in areas where law enforcement authorities were not immediately available. Under the common-law approach, failure to raise the "hue" after discovering the crime could itself constitute an offense. 2 F. POLLOCK & F. MAITLAND, *supra*, at 578. Long after government assumed the primary responsibility to detect and prosecute felons, the duty to raise the hue and cry and report felonies to the authorities has remained a "deeply rooted social obligation" in this country. *Roberts*, 445 U.S. at 558; United States v. Ross, 713 F.2d

dent on the speed with which financial institutions bring suspicious transactions to its attention.[99] To deal with such cases, financial institutions can raise the "hue and cry" most effectively through full compliance with the BSA's reporting requirements and by frequent use of the legal authority for voluntary disclosures to law enforcement agencies.

Cooperation between the financial community and the law enforcement community on such matters, however, must be mutual and enduring. The Treasury's commitment to improving that cooperation has been demonstrated by its initiation of a process for promulgating formal administrative rulings on BSA issues,[100] and by its exploration of methods to make the filing of BSA reports less onerous for financial institutions.[101] Continued cooperation between financial institutions and law enforcement agencies will help to ensure that the BSA will have lasting value for detecting financial crimes.

389, 392 (8th Cir. 1983); *see also* Branzburg v. Hayes, 408 U.S. 665, 696 (1972); Roviaro v. United States, 353 U.S. 53, 59 (1957).

That obligation, of course, is not legally enforceable for every type of felony in American law. As Chief Justice Marshall once stated, "the law which would punish [the citizen] in every case, for not performing this duty is too harsh for man." Marbury v. Brooks, 20 U.S. (7 Wheat.) 251, 260 (1822).

99. *See supra* notes 77-78 and accompanying text.

100. *See* Amendment to the Bank Secrecy Act Instituting an Administrative Ruling System, 52 Fed. Reg. 35,545 (1987) (to be codified at 31 C.F.R. §§ 103.70-.77). This system will allow the Treasury to issue formal interpretations of the regulations, either on its own initiative or in response to specific inquiries from the public. *See id.* Through this system, the Treasury seeks "to ensure uniformity of advice and the effective and efficient dissemination of Treasury interpretations throughout the affected financial community." *Id.* at 35,546.

101. In March 1987, the Treasury initiated a pilot program to enable financial institutions to file CTR data on magnetic tape rather than paper forms. *See* Bank Secrecy Act; Electronic Filing of Currency Transaction Reports, 52 Fed. Reg. 10,183 (1987). For institutions that have automated systems to record data on their financial transactions, this program may appreciably reduce the time and expense associated with preparing and filing large numbers of CTR's. More recently, the Treasury amended its regulation on disclosure of BSA reports, which, inter alia, clarifies its authority to disclose CTR data periodically to states that have enacted laws similar to the BSA. *See* Amendment to the Bank Secrecy Act Regarding Disclosure of Bank Secrecy Act Data, 52 Fed. Reg. 35,544 (1987) (to be codified at 31 C.F.R. § 103.43). Periodic sharing of these data can spare not only a state form processing these reports independently, but also the financial institutions in that state from submitting duplicate or comparable forms to the state. *Id.*