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THE RIGHT TO FINANCIAL PRIVACY ACT: NEW PROTECTION FOR FINANCIAL RECORDS

Introduction

In 1978, Congress passed the Financial Institutions Regulatory and Interest Rate Control Act,1 a sweeping bank regulatory reform measure. This Act was intended to reform and restructure those federal agencies which regulate depository institutions.2 Title XI of this comprehensive legislation established the Right to Financial Privacy Act of 19783 (FPA). The FPA establishes detailed procedures which federal agencies and departments must comply with when seeking access to records maintained by financial institutions.4 These procedures require federal agencies to notify an individual that a subpoena for the customer's financial records has been issued prior to compliance by the financial institution.5 The statute grants the customer the right to challenge the subpoena and to stay compliance until a court determination.6

This Comment will consider the concept of an individual's right to financial privacy and how recent legislation has attempted to safeguard this right. Part I will review the origins of the FPA. Part II will examine the provisions of the Act. Part III will discuss various problems encountered under the FPA and the extent of protection provided by the statute.

I. Origins of the Financial Privacy Act

A. Concern over Financial Privacy

Prior to 1970, there was little need for concern about the privacy of financial records. Bank records were considered confidential by bank officials and records were kept only for internal bank use.7 This practice was challenged upon the passage of the Bank Secrecy

4. Id. § 3402.
5. Id. §§ 3405(2), 3407(2), 3408(4).
6. Id. § 3410.
Act of 1970. This legislation was designed to aid government agencies in their investigations of criminal, tax, and regulatory matters. The Bank Secrecy Act requires, *inter alia*, depository institutions to maintain duplicate records of almost all customer transactions. In particular, it requires that checks and other charges in excess of $100 be microfilmed and retained for five years. Banks have found, however, that sorting checks over $99 is so expensive that it is easier and cheaper to microfilm all checks.

Concomitant with this development has been an increase in personal checking accounts and an expansion of commercial banking into the open-end credit market. Commercial banks, by complying with the recordkeeping requirements of the Bank Secrecy Act, now possess information about the activities and relationships of millions of people. As a result, the amount of financial and personal information available to the government has been commensurately expanded.

Improved technology has exacerbated this threat to financial privacy. For example, the use of Electronic Funds Transfer services...
(EFT) promises to increase the amount of personal information available to financial institutions. These services involve the processing and documentation of deposits, withdrawals, and transfers of money with the help of computers and telecommunications. One type of EFT services, point-of-sale services, allows an individual to use funds on deposit without having to visit the financial institution and without having to write a check. The development of point-of-sale services will have several ramifications. First, the expansion of this service will result in an increase in the amount and detail of personal information recorded by financial institutions as it is likely that accounting and administrative information will accompany periodic payment. Second, financial records will become more centralized and accessible. Third, financial records will contain information not usually considered payment data, such as information concerning the purpose of the transaction.

These developments served to increase public concern over privacy during the 1970s. In addition, the Watergate investigations focused attention on privacy interests by disclosing that government officials used information from private financial records to conduct illegitimate investigations of certain individuals.

15. PRIVACY REPORT, supra note 12, at 113.
16. Id. at 114. Point-of-sale services can vary in sophistication. Some services permit the simple withdrawal of funds, allowing a customer to receive cash at a store in order to purchase goods. A more sophisticated service allows the customer to move funds electronically from an account into the merchant's account to pay for goods or services. For a general discussion of EFT services and the many ramifications they will have on our financial system, see id. at 113-19.
17. Id. at 116. The Privacy Report noted that EFT systems could become "generalized information transfer systems." Id. For example, recurring payments could be accompanied by related benefit and tax withholding information. Id.
18. Id. at 117. Information stored on electronic records is more accessible than information contained in paper documentation or on microfilm.
19. Id.
20. The term "Watergate investigations" has come to mean the investigations of illegal activities by government officials and members of the Committee to Re-elect the President during the administration of Richard M. Nixon. R. WOODWARD & C. BERNSTEIN, ALL THE PRESIDENT'S MEN (1974).
21. Givens, The Law on Right to Financial Privacy, N.Y.L.J., Jan. 15, 1979, at 1, col. 2. As concern over privacy grew, public interest in the issue of privacy increased. A recent survey of public attitudes toward privacy showed that seventy-six percent of the people surveyed felt that the right to privacy should be added to the list of the rights of life, liberty, and the pursuit of happiness. LOUIS HARRIS & ASSOC., INC. & A. WESTIN, THE DIMENSIONS OF PRIVACY, A NATIONAL OPINION RESEARCH SURVEY OF ATTITUDES TOWARD PRIVACY 15 (1979). The
gress responded to this concern by enacting privacy legislation designed to control access to information found in tax records, credit records, and educational records. Diverse groups such as financial institutions, civil libertarians, and consumer advocates joined together to urge Congress to provide for the protection of financial records of customer-depositors. The result of this effort was the introduction of numerous privacy bills in Congress.

B. Legal Rights to Financial Privacy

1. The Banker's Dilemma

Early hornbook law viewed the relationship between depositor and bank as contractual in nature. Banks were bound not to reveal information about a customer to private parties without the

result also showed that eighty-one percent felt that the police should not be allowed to look into bank records of members of an organization never convicted of a crime. Id. at 69. Ninety-one percent of the public also felt that it was "very important" for organizations such as banks, insurance companies, private employers and credit card companies to obtain an individual's consent before information from his file is given out to other organizations for purposes other than what it was collected for. Id. at 90.

22. The increase in informational privacy legislation is reflected by the passage of: The Fair Credit Reporting Act, 15 U.S.C. §§ 1681-1681t (1976), which gives consumers the right to learn the "nature and substance" of information kept by a consumer reporting agency, id. § 1681g(a)(1); The Federal Privacy Act of 1974, 5 U.S.C. § 552a (1976), which controls the gathering and dissemination of personal information by federal agencies; The Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232g (1976), which gives a student or a student's parent the right to inspect, review and request corrections of an educational record and gives the student or parent some measure of control over the disclosure of information from an educational record.

23. The Safe Banking Act of 1977: Hearings on H.R. 9086 Before the Subcomm. on Financial Institutions Supervision, Regulation and Insurance of the House Comm. on Banking, Finance and Urban Affairs, 95th Cong., 1st Sess. (1977) [hereinafter cited as 1977 House Hearings]. Representatives of financial institutions generally supported financial privacy legislation and sought a uniform standard of rules to follow which would clarify their relationship to the customer and to the government. Support for such legislation also came from groups such as the AFL-CIO, id. at 3069, the Consumer Federation of America, id. at 3091, the American Civil Liberties Unions, id. at 1619, the National Credit Union Administration, id. at 2085, and the American Bankers Association, id. at 1585. The 1977 House Hearings also contain testimony from various credit union associations, banking associations, and savings and loan associations supporting financial privacy legislation.

24. "An indication of the tremendous interest in privacy is the fact that more than 100 privacy bills have been introduced during the 95th Congress. Many of these bills reflected the recommendations of the Privacy Protection Study Commission and many covered aspects of financial privacy." [1978] U.S. CODE CONG. & AD. NEWS 9374.

customer's express or implied consent. A bank could be held liable for breach of this implied contract with its depositor not to disclose the details of the depositor's accounts. Of course, a bank had to produce its records when faced with valid legal process. Agencies such as the Internal Revenue Service, the Securities and Exchange Commission, and the National Labor Relations Board could issue an administrative summons or subpoena without prior judicial approval. Before the enactment of the FPA a government agency faced with a court challenge had only to prove that the summons or subpoena was relevant or material to an investigation. Additional means to obtain bank records consisted of grand

27. Peterson v. Idaho First Nat'l Bank, 83 Idaho 578, 367 P.2d 284 (1961); see Milohnich v. First Nat'l Bank of Miami Springs, 224 So. 2d 759 (Fla. Dist. Ct. App. 1969), where an individual and a corporate depositor brought an action against the bank for alleged breach of a contractual duty not to disclose information concerning depositors' accounts to individual third parties. The court held that the complaint was sufficient to state a cause of action for breach by the bank of an implied contractual duty to the corporate depositor by negligently, willfully, intentionally or maliciously disclosing information concerning depositors' accounts to individual third parties. Id. at 760.
28. Harris v. United States, 413 F.2d 316 (9th Cir. 1969) (involving a subpoena duces tecum); Galbraith v. United States, 387 F.2d 617 (10th Cir. 1968) (involving a subpoena of bank records).
29. There seems to be little actual difference between a subpoena and a summons. A subpoena is defined as a process directing a witness to appear and give testimony before a court or magistrate at a specified time and place. BLACK'S LAW DICTIONARY 1595 (4th ed. 1968). A summons is a writ which directs a sheriff or other proper officer to notify a person named in the summons that an action has been commenced against him and that he must appear at a specified time to answer the complaint against him. Id. at 1604. "Under code procedure a summons is not process, but is a notice to defendant that an action against him has been commenced and that judgment will be taken against him if he fails to answer the complaint." Id.
31. See United States v. Powell, 379 U.S. 48 (1964). In this case, the Court held that the Internal Revenue Service need not meet the standard of probable cause to obtain enforcement of a summons to produce records. The Commissioner need only show that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, that the information sought is not already within the Commissioner's possession, and that administrative steps required by the Code have been followed—in particular, that the "Secretary or his delegate," after investigation, has determined the further examination to be necessary and has notified the taxpayer in writing to that effect.

Id. at 57-58. In United States v. DeGrosa, 405 F.2d 926 (3d Cir. 1969), the court said:
It has long been established that an administrative summons authorized by Congress
jury subpoenas and court subpoenas issued during litigation.  

2. Challenging Government Requests for Information

Without a statutory right to financial privacy, depositors sought to protect the confidentiality of their financial records by asserting claims under the fourth amendment. The success of this approach has varied. Those courts which have applied a traditional mechanical property test approach to the fourth amendment have generally held that the customer's financial records were not protected. Under this test, a depositor must show a possessory or proprietary interest in the financial records in order to be granted standing to assert a claim under the fourth amendment. This often proved difficult as some courts held that the financial institution owned the bank records. Hence, a depositor had no standing to sue. Assuming that standing was granted, a depositor's claim on the merits was often rejected because the courts viewed the bank as the owner or possessor of the records in which the depositor had no possessory interest. Unless the financial institution challenged a

in aid of an agency's investigative function need not be supported by ad hoc showings of probable cause. . . . The Constitution only requires that the summons not be employed in excess of the statutory purpose, that it be specific in directive so that compliance will not be unreasonably burdensome and that an ample opportunity be afforded to obtain judicial review of the demand prior to suffering penalties for a refusal to comply.

Id. at 928-29 (citation omitted).

32. FED. R. CIV. P. 45, FED. R. CRIM. P. 17(a)(c).

33. The fourth amendment states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

34. See Harris v. United States, 413 F.2d 316 (9th Cir. 1969); United States v. Bank of Commerce, 405 F.2d 931 (3d Cir. 1969); Galbraith v. United States, 387 F.2d 617 (10th Cir. 1968).


37. Harris v. United States, 413 F.2d 316 (9th Cir. 1969).

Here the microfilm records were made and paid for by the Bank for its convenience and business purposes. The Bank owned the microfilm. The cases hold that depositors have no rights in the records of their bank, and that the records may be subpoenaed over the objection of the depositor, notwithstanding the fact that the records concern the account of the depositor.

Id. at 318; accord, United States v. Bank of Commerce, 405 F.2d 931, 934 (3d Cir. 1969);
subpoena itself, a customer-depositor was without protection from government intrusion into the customer's financial records. Moreover, it became virtually impossible for a bank to sue on behalf of its customer when the Supreme Court held that a bank could not assert its customer's expectation of privacy. 38

Depositors were more successful in asserting financial privacy claims under the fourth amendment in courts which applied a test that focused on an individual's justifiable expectation of privacy. 39 For example, in Burrows v. Superior Court of San Bernardino County, 40 the plaintiff, accused of grand theft, moved to suppress certain evidence which included his bank statements. 41 The Supreme Court of California held that the plaintiff had a reasonable expectation of privacy in his bank statements and records. 42 The fact that the bank voluntarily relinquished the records did not constitute a valid consent by the plaintiff. 43 The privacy expectations of a depositor were expanded in Valley Bank of Nevada v. Superior Court of San Joaquin County, 44 wherein the California Supreme Court held that the California constitution required that a customer receive notice that his or her records were being sought. 45 Generally, those cases which acknowledged the expectation of privacy did not bar all government access, but merely granted the customer the right to notice and standing in the absence of statute. This position was accepted in a number of jurisdictions. 46

Galbraith v. United States, 387 F.2d 617, 618 (10th Cir. 1968).
40. Id. at 241, 529 P.2d 591, 118 Cal. Rptr. 167.
41. Id. at 243, 529 P.2d 593, 118 Cal. Rptr. 169.
42. Id. at 244-45, 529 P.2d 594, 118 Cal. Rptr. 170.
43. 15 Cal. 3d 652, 542 P.2d 977, 125 Cal. Rptr. 553 (1975).
44. In considering the California Constitution, the court stated:
A constitutional amendment adopted in 1974 elevated the right of privacy to an "inalienable right" expressly protected by force of constitutional mandate. Although the amendment is new and its scope as yet is neither carefully defined nor analysed by the courts, we may safely assume that the right of privacy extends to one's confidential financial affairs as well as to the details of one's personal life.
15 Cal. 3d at 656, 542 P.2d at 979, 125 Cal. Rptr. at 555.
45. Bowser v. First Nat'l Bank, 390 F. Supp. 834 (D.Md. 1975) (plaintiff sought to enjoin compliance with IRS summonses served on their banks and requiring production of documents and information pertaining to plaintiffs); Bergman v. Senate Special Comm. on Ag-
Those decisions which favored the customer's right to financial privacy appeared undermined by the Supreme Court's holding in *California Bankers Association v. Shultz*. The plaintiffs in this case included the California Bankers Association, the Security National Bank, several named individual bank customers, and the American Civil Liberties Union (ACLU). Plaintiffs challenged the constitutionality of the recordkeeping requirements and the regulations implemented pursuant to the Bank Secrecy Act. The Bankers Association also claimed that these requirements restricted the depositor's ability to challenge third party summonses of the Internal Revenue Service. The Court held that the recordkeeping provisions did not violate the fourth amendment rights of the banks, nor were they such an unreasonable economic burden as to deny the banks due process. The Court implied that the banks had no right to assert the claim of customers since the bank would suffer no injury, although, it did not decide the issue because the claim was found to be premature. The claims of the customer-depositors were also found to be premature because the records of these plaintiffs had not yet been subpoenaed. Finally, compelled recordkeeping was not found to be an illegal seizure by banks acting as government agents. Because the government could not obtain access to records except through "normal legal process", no seizure could occur until such process was issued against the bank. Therefore,

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48. Id. at 43. See notes 8-12 supra and accompanying text.
49. Id. at 51.
50. Id. at 52-54. The dissent argued that the holding presumed that every depositor is a crook:
   It is, I submit, sheer nonsense to agree with the Secretary that *all bank records of every citizen, "have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings." That is unadulterated nonsense unless we are to assume that every citizen is a crook, an assumption I cannot make.
51. Id. at 50.
52. Id. at 51.
53. Id.
54. Id. at 54.
55. Id.
the plaintiffs' final claim was found premature until process issued. Implicitly, the Court's view that the records were business records of the financial institution was antithetical to a broad view of financial privacy. 57

3. United States v. Miller

The case which sparked legislative action on financial privacy was United States v. Miller. 58 Mitchell Miller was indicted for conspiracy to defraud the United States of tax revenues by the manufacture and possession of distilled spirits. 59 The defendant was found guilty, in part, upon evidence obtained from his bank. Miller challenged those provisions of the Bank Secrecy Act which required banks to microfilm all checks, claiming that these particular provisions violated a depositor's fourth amendment right to be free from unreasonable searches and seizures. 60 Miller also asserted that the subpoenas used to obtain his bank records were defective. 61 The Court of Appeals for the Fifth Circuit held that Miller's challenge to the constitutionality of the Bank Secrecy Act had been foreclosed by the decision in California Bankers. 62 However, the court agreed with Miller's second assertion. The court of appeals held that the government's use of a faulty subpoena duces tecum to obtain Miller's bank records was an unlawful invasion of Miller's privacy. 63 Therefore, this evidence should have been suppressed. 64 The Court rested its decision on additional grounds. Citing the prohibition against "compulsory production of a man's private papers to

56. Id. at 51-52. The Court emphasized that the legislative history of the Bank Secrecy Act and the regulations promulgated thereunder provided that access to bank records be controlled by "normal legal process." Id. at 54.

57. Id. at 52-53.


59. 500 F.2d at 753.

60. Id. at 755.

61. Id. Miller urged that the subpoenas were defective because they were issued by the U.S. Attorney rather than a court, no return was made to a court, and the subpoenas were returnable on a date when the grand jury was not in session. Id.

62. Id.

63. Id.

64. Id.
establish a criminal charge against him," the court found that the government had improperly circumvented this doctrine by "first requiring a third-party bank to copy all of its depositors' personal checks and then, with an improper invocation of legal process, calling upon the bank to allow inspection and reproduction of those copies." The opinion stated that this doctrine had not been abandoned in California Bankers. In that case the majority justified its holding, in part, with the observation that customers were adequately protected from unwarranted intrusions into their financial privacy because government access to records would be controlled by existing legal processes. Relying on this language, the court of appeals found that the subpoenas issued in this case did not constitute adequate legal process, and suppressed the evidence. Rejecting the mechanical property test the court held that the fact that the bank officers cooperated voluntarily was irrelevant, because "he whose rights are threatened by the improper disclosure here was a bank depositor, not a bank official." Miller was granted "a new trial free from the taint of evidence improperly acquired." Affirmance of this decision would have established a constitutional right to financial privacy under the fourth amendment. Instead, the Supreme Court, in a seven to two decision, reversed and held that Miller had no legitimate "expectation of privacy" in the contents of his bank records. The checks were found to be negotiable instruments, voluntarily conveyed to the banks, to be used in commercial transactions, not confidential communications. The Bank Secrecy Act did not alter these considerations so as to create a protectable interest. In fact, "[t]he lack of any legitimate expectation of privacy concerning the information kept in bank records was assumed by Congress in enacting the Bank Secrecy Act ...." By revealing his or her financial affairs to a bank, the depositor

66. 500 F.2d at 757.
68. Id. at 758.
69. Id.
70. Id.
72. Id.
73. Id.
takes the risk that the information will be conveyed by the bank to the government. In addition, the failure to notify Miller of the subpoena was held to be "a neglect without legal consequences here, however unattractive it may be." The Supreme Court also found that the prohibition against "compulsory production of a man's private papers" had not been violated, as the documents subpoenaed were not Miller's "private papers" and Miller could, therefore, assert neither ownership nor possession. By classifying these documents as business records of the bank, the Court implicitly adopted the mechanical property test approach to the question of fourth amendment protection of financial records. The Court stressed that its decision was consistent with United States v. Katz. That case held that whatever is knowingly exposed to the public was not protected by the fourth amendment. Therefore, because these records were not confidential and were voluntarily conveyed to the bank, Katz did not apply.

The effect of the Miller decision was to grant the government unrestricted access to a customer-depositor's financial records through administrative subpoenas. In response, several bills were introduced in Congress to provide a statutory right to financial privacy. Support for such legislation came from diverse groups and

74. Id. at 443.
75. Id. at 443 n.5.
76. 116 U.S. at 622.
77. 425 U.S. at 440.
78. Id.
80. Id. at 351.
81. Id.
82. To reverse the cumulative effect of the Bank Secrecy Act and the Miller decision, various bills were introduced in Congress and the House Subcommittee on Financial Institutions conducted hearings in June and July of 1975 on H.R. 8024, 94th Cong., 1st Sess. (1975). Bank regulatory agencies were apparently receptive to the general intent of financial privacy bills, but the Treasury Department, responding to pressure from the IRS, was outspoken in its opposition. 1977 House Hearings supra note 23 at 1449. Subsequent to hearings on these bills, the issue was studied by the House Judiciary Committee, the Senate Banking Committee, and the Privacy Protection Study Commission. Similar bills were introduced in subsequent sessions of Congress but the Treasury Department and law enforcement agencies remained steadfast in their opposition. In 1977, H.R. 8133, 95th Cong., 1st Sess. (1977) was introduced after extensive study and hearings by the House Judiciary Committee. Nine members of the subcommittee and majority of the members of the full Committee cosponsored H.R. 8133. The provisions of H.R. 8133 were incorporated in their entirety as title XI of H.R. 9086, 95th Cong., 1st Sess. (1977), which became the Financial Institutions
was bolstered by the 1976 revision of the Internal Revenue Code and the report of the Privacy Protection Study Commission. The 1976 revision of the Internal Revenue Code was designed to change case law which had upheld the right of the Internal Revenue Service to issue third-party summonses to a bank requesting information concerning tax matters of an unidentified person. The Tax Reform Act of 1976 requires that the taxpayer be notified of an IRS summons and gives the taxpayer standing to challenge the right of the IRS to obtain the records before the bank releases them. Thus, precedence for privacy legislation was created in the tax area. In addition, the report of the Privacy Protection Study Commission called for increased protection of informational privacy. The report noted that the courts had refused to "refashion the application of constitutional theory" and abandon the traditional view that the individual lacks a "proprietary" interest in his or her financial records and, therefore, has no legal right to challenge access to these records. Protection of financial privacy, the report argued, could only come through legislation. Generally, the Commission recommended that Congress provide the customer-de-

83. See note 23, supra.
85. PRIVACY REPORT, supra note 12. The Commission which wrote the report was created by the Privacy Act of 1974, 5 U.S.C. § 552a (1976), in order to make a "study of the data banks, automatic data processing programs, and information systems of governmental, regional, and private organizations, in order to determine the standards and procedures in force for the protection of personal information," PRIVACY REPORT, supra note 12, at xv.
88. I.R.C. § 7609. Section 1205 of the Tax Reform Act of 1976 amends the 1954 Internal Revenue Code by redesignating section 7609 as section 7611 and adding, after section 7608 new sections 7609 and 7610. Pub. L. No. 94-455, § 1205, 90 Stat. 1525. By the time hearings on the FPA were held, the Ways and Means Subcommittee on Oversight had already held hearings on the 1976 Tax Reform Act's privacy provisions and decided, over the objections of the Departments of Justice and Treasury, that there was no reason to delay implementation of legislation regulating the procedures and use of IRS subpoenas. 1977 House Hearings, supra note 23, at 1451. See also notes 169-92 infra and accompanying text.
89. Compare the recommendations in chapter 9 of the Privacy Report, supra note 12, "Government Access to Personal Records and 'Private Papers' " with the provisions of the FPA.
90. PRIVACY REPORT, supra note 12, at 350-51.
91. Id.
positor with a statutory expectation of confidentiality in the customer's financial records and that there be a reasonable relationship between the records sought and the investigation. The Commission recommended also that government agencies be required to use legal process to obtain records and that an individual be notified of a government request for records.

A final impetus for Congressional action was the enactment in sixteen states of statutes concerning the disclosure of information retained by financial institutions. The state statutes are diverse. Some allow banks to share information without specifically limiting disclosure, while others specify conditions which must be met before disclosure is allowed. However, because even the most comprehensive state statutes did not regulate federal agencies, federal legislation was necessary to guarantee a right of financial privacy.

II. The Financial Privacy Act

A. Introduction

In an attempt to protect the financial privacy of individuals, the FPA prohibits any federal agency from obtaining access to a cus-

92. Id., Recommendation 1, at 362-63.
93. Id., Recommendation 2, at 365.
96. For a general discussion of state statutes see 1977 House Hearings, supra note 23, at 1517-22.
97. UTAH CODE ANN. § 7-14-1 to -5 (1953). This statute allows banks to share with one another and with credit reporting agencies information concerning the identity of depositors whose accounts have been closed as unsatisfactory.
99. The term agency in this Comment will encompass all federal agencies and departments. The FPA provisions do not apply to state and local government agencies and departments.
customer's records from financial institutions unless one of five specified procedures is followed. In addition, a blanket request for all records is not sufficient; the records must be described as specifically as possible. Financial institutions covered by the statute include banks, savings banks, credit card issuers, industrial loan companies, trust companies, savings and loans, building and loans or homestead associations, credit unions, and consumer financial institutions. Customers protected under the Act are individuals or partnerships of five or less who utilize the services of a financial institution or for whom the financial institution is acting as a fiduciary in relation to that person's account.

B. Control of Government Access to Financial Records

To obtain a customer's financial records, strict compliance with the provisions of the FPA is required. The government may obtain records by one of five procedures. The first procedure is through customer authorization. This procedure requires the customer to sign a statement which identifies the records to be released, specifies the purpose of the disclosure and describes those persons who may use the records. The authorization is valid for three months and may be revoked up to the time of actual disclosure. The second procedure involves the use of an administrative subpoena or summons. This procedure is available only if there is

104. Id. § 3403(a). A financial institution may voluntarily notify the government that it has information relevant to a possible violation of the law. Id. § 3403(c). Once the government is notified, it must still comply with the provisions of the statute if it seeks access to financial records. [1978 U.S. CODE CONG. & AD. NEWS 9322.
106. Id.
107. Id. § 3405. An administrative agency is a government agency created by statute and charged with administering particular legislation. The statute which establishes the agency may grant the agency power to issue subpoenas. The power of an administrative agency to issue a subpoena is no longer limited to investigations of a quasi-judicial nature relating to adjudication or law enforcement. The administrative power of investigation is not subject to the constraints placed on the subpoena power of a court. Subpoenas may be issued "in investigations for future guidance of the agency, to determine what rules should be adopted, . . . to determine the jurisdiction of the agency, and to determine whether a statute has
reason to believe that the records are "relevant to a legitimate law enforcement inquiry." A copy of the subpoena or summons must be served or mailed to the customer on or before the date that it is served on the financial institution. The customer has ten days from the date of service, or fourteen days from the date of mailing, to file an affidavit and motion to quash. The third procedure by which the government may obtain records is through the use of search warrants. The warrant must be obtained pursuant to the Federal Rules of Criminal Procedure, be mailed to the customer no later than ninety days after it is served, and must state the reason for searching the record. The government may obtain a ninety day delay in mailing if a court finds that the investigation of a felony would be seriously jeopardized by notice. The use of a judicial subpoena is the fourth method for obtaining access to financial records. The FPA provides that a judicial subpoena may be used only if there is reason to believe the records are relevant to a legitimate law enforcement inquiry. A copy of the subpoena, specifying the nature of the inquiry, must be served or mailed to the customer. The customer has ten days from service, or fourteen days from mailing, to file an affidavit and motion to quash. The final method of access is by a formal written request by government officials. This method can be used only if no administrative summons or subpoena authority is available to the government official, the head of the agency or department has been violated, regardless of whether there is any pre-existing probable cause." 1 AM. JUR. 2d Administrative Law § 91 (1962).

109. Id. § 3405(2).
110. Id. § 3405(3).
111. Id. § 3406.
112. Id. § 3406(a)-(b).
113. Id. § 3406(c).
114. Id. § 3407. A judicial subpoena is one issued under the subpoena power of a court.
115. Id. § 3407(1).
116. Id. § 3407(2).
117. Id. § 3407(3).
118. Id. § 3408.
119. Congress has the power to confer investigatory or inquisitorial powers on administrative agencies. 1 AM. JUR. 2d Administrative Law § 86 (1962). Examples of agencies with the power to issue subpoenas include the Securities and Exchange Commission, the Internal Revenue Service and the National Labor Relations Board. Although administrative agencies may possess implied and express investigatory powers, these powers are not unlimited but are "exclusively derived from and limited by the authorizing statutes." Id. § 91.
issued regulations authorizing the request, there is reason to believe the records are relevant to a legitimate law enforcement inquiry and the customer is served or mailed a copy of the request.\textsuperscript{120} The customer has ten days from service or fourteen days from filing to file an affidavit and motion to quash.\textsuperscript{121} The financial institution must keep a record of all instances where the customer's records were disclosed to government agencies.\textsuperscript{122} The customer may obtain a copy of this record unless the government agency or department obtains a court order pursuant to the Act to suppress disclosure.\textsuperscript{123}

C. Delay of Notice to the Customer

Each of the above procedures for obtaining records requires that notice be given to the customer. Section 3409, however, provides for a ninety day delay of notice if the presiding judge or magistrate of the appropriate court finds that the investigation is within the jurisdiction of the government authority, the records are sought for a legitimate law enforcement inquiry, and there is reason to believe that notice will cause danger to the life or safety of someone, flight from prosecution, destruction of evidence, intimidation of a witness, or otherwise seriously jeopardize an investigation or delay a trial.\textsuperscript{124} The court may grant an additional ninety day delay but only in accordance with this subsection.\textsuperscript{125} The customer must be mailed a notice specifying the reason for delay and the purpose of the investigation or official proceeding once all delay periods have expired.\textsuperscript{126}

D. Customer Challenges to Government Access

The statute sets forth detailed procedures for challenging a government attempt to obtain financial records. Within ten days of service or fourteen days of mailing, the customer may file in federal district court a motion to quash the subpoena or summons, or an application to enjoin a formal written request.\textsuperscript{127} The government

\begin{itemize}
\item 121. Id. § 3408(4)(B).
\item 122. Id. § 3404(c).
\item 123. Id. Section 3409 provides for delay of notice. See notes 124-30 infra and accompanying text.
\item 125. Id. § 3409(b)(2).
\item 126. Id. § 3409(c).
\item 127. Id. § 3410(a).
\end{itemize}
must receive service of the motion, which may be accomplished by delivering or mailing a copy of the papers to the person, office, or department specified in the papers. The motion must set forth the customer's reasons for believing that the records are not relevant to a legitimate law enforcement inquiry or that the government has failed to comply with the procedural requirements of the Act. The customer is not required to prove that there is no legitimate law enforcement purpose or make a detailed evidentiary showing. Rather, there need only be "an initial showing that access may be improper." The ultimate burden of proof that a legitimate law enforcement purpose exists rests with the government authority.

Should the court find the customer's filing to be sufficient, it must order the government agency or department to file a sworn response. A court decision on the customer challenge must be made within seven calendar days of the government response. The statute specifically states that these challenge procedures are the only judicial remedy available to the customer if the customer wishes to oppose disclosure of his or her financial records.

E. Use of Information

The information obtained from the records may not be used or retained for any purpose beyond the specific original purpose for which it was obtained and may only be transferred to another agency if that government authority certifies in writing that the records are relevant to a legitimate law enforcement inquiry within their jurisdiction. The transferring agency must notify the customer of the transfer within fourteen days. The statute does not

128. Id. The purpose of this form of service is to give the government adequate notice, but also to be as simple as possible. This form of service dispenses with the provisions of rule 4 of the Federal Rules of Civil Procedure which requires service on the United States Attorney, the Attorney General, as well as the agency. [1978] U.S. CODE CONG. & AD. NEWS 9325.
129. [1978] U.S. CODE CONG. & AD. NEWS 9325. The motion must also contain an affidavit or sworn statement that the applicant is a customer of the financial institution.
130. Id.
131. Id.
132. Id.
134. Id. § 3410(e).
135. Id. § 3412(a).
136. Id. § 3412(b).
prevent supervisory agencies from exchanging examination reports or from providing information to an enforcement agency if, upon examination of the customer records, there exists a possible violation of a regulation or statute.\textsuperscript{137}

\section*{F. Exceptions}

There are several exceptions to the provisions of the FPA. These exceptions include: disclosure of information not identified as the financial records of a particular customer; examination of records by supervisory agencies in the exercise of their supervisory, regulatory or monetary functions with respect to the financial institution; disclosures authorized under the Tax Reform Act of 1976; information required by federal statute or regulation; disclosure of records where the government and customer are parties to litigation or when they are parties to an administrative adjudicatory proceeding; when the government seeks only the name, address, account number and type of account, or when the government is exercising financial controls over a foreign account in the United States; when the financial institution itself is under investigation; and finally, grand jury subpoenas.\textsuperscript{138} The Securities and Exchange Commission is exempted from title XI for two years from the date of enactment.\textsuperscript{139} There are also special procedures when foreign intelligence, the Secret Service, or emergency situations are involved.\textsuperscript{140}

\section*{G. Costs}

The costs of retrieval and reproduction of bank records can be quite high.\textsuperscript{141} The FPA places the cost burden on the government by requiring the government authority to reimburse financial insti-

\begin{itemize}
\item \textsuperscript{137} Id. § 3412(d).
\item \textsuperscript{138} Id. § 3413.
\item \textsuperscript{139} Id. § 3422. An exception was made for the SEC, "in recognition of its rigorous internal procedures, and of the credible threat that agency's objections to the title would have posed if the exception had not been granted." [1978] U.S. CODE CONG. & AD. NEWS 9376.
\item \textsuperscript{140} Id. § 3414. Congress seems to have meant that this exception be used only for legitimate foreign intelligence investigations: "investigations proceeding only under the rubric of 'national security' do not qualify." [1978] U.S. CODE CONG. & AD. NEWS 9327.
\item \textsuperscript{141} Interview with Jon Karnofsky, European American Bank, in New York City (Oct. 19, 1979). See note 209 infra. Therefore the costs depend on the scope of the subpoena and the number of records it requests.
\end{itemize}
stitutions for collecting and supplying the requested information.\textsuperscript{142} Pursuant to this requirement, the Federal Reserve Board recently adopted Regulation S,\textsuperscript{143} which became effective October 1, 1979. The Regulation requires a government authority, subject to the FPA, requiring or requesting access to financial records, to pay a fee to financial institutions of ten dollars per hour per person for search and processing costs,\textsuperscript{144} fifteen cents per page for reproduction costs,\textsuperscript{145} and actual costs for transporation of personnel and records.\textsuperscript{146} The government is not required to reimburse the financial institution if a request involves any government authority or customer-depositor not covered by the FPA.\textsuperscript{147} In addition, Regulation S excepts certain requests from the reimbursement requirements.\textsuperscript{148} Financial institutions are required to keep an accurate record of costs by each request, including an itemized bill of various costs.\textsuperscript{149} The requesting government authority must certify in writing that it has complied with the provisions of the statute.\textsuperscript{150} After the financial institution has received a “Certificate of Compliance,” it can submit an itemized bill to the government for repayment. Should a certificate not be received because the request was withdrawn, the customer revoked authorization or the customer successfully challenged disclosure to the federal agency, the

\textsuperscript{142} 12 U.S.C. § 3415 (Supp. 1978). This section requires that the Federal Reserve Board adopt a new regulation that provides rates and conditions for reimbursement of reasonably necessary costs "directly incurred in searching for, reproducing or transporting books, papers, records, or other data required or requested to be produced."

\textsuperscript{143} 12 C.F.R. § 219 (1979).

\textsuperscript{144} Id. § 219.3(a). This is for the total amount of personnel direct time used in locating, retrieving, reproducing, packaging and preparing financial records for shipment.

\textsuperscript{145} Id. § 219.3(b). This expense is designated to cover costs incurred in making copies of documents. Photographs, films and other materials are reimbursed at actual costs.

\textsuperscript{146} Id. § 219.3(c). These costs include the financial institution's necessary costs to transport personnel to locate and retrieve information required or requested and to convey the material to the place of examination.


\textsuperscript{148} Id. § 219.4. These exceptions include information concerning security interests, bankruptcy claims, debt collection, government loan programs, nonidentifiable information, financial supervisory agencies, Internal Revenue summonses, federally required reports, government civil or criminal litigation, administrative agency subpoenas, identity of accounts in limited circumstances, investigation of a financial institution or its noncustomers, General Accounting Office requests, and Securities and Exchange Commission requests. Id. § 219.4(a)-(l).

\textsuperscript{149} Id. § 219 (supplementary information).

\textsuperscript{150} 12 U.S.C. § 3403(b) (Supp. 1978).
financial institution can submit the itemized bill for costs up to the
time the federal agency notifies the financial institution that its
request has been withdrawn or defeated.\textsuperscript{151}

H. Jurisdiction and the Statute of Limitations

Jurisdiction over actions to enforce any provision of the FPA
rests with the United States district courts. There is a three year
statute of limitations for actions brought under the Act.\textsuperscript{152}

I. Civil Penalties

The FPA imposes civil penalties for unauthorized disclosures in
the amount of $100 for each violation.\textsuperscript{153} In addition, the FPA pro-
vides for actual damages, punitive damages and attorney's fees.\textsuperscript{154}
These remedies and sanctions are the only remedies available for
violations of the FPA.\textsuperscript{155} However, injunctive relief is available to
insure compliance with provisions of the FPA.\textsuperscript{156}

J. Grand Jury Information

The Act contains special provisions concerning information ob-
tained by a federal grand jury. The information sought for grand
jury use must be actually presented to the grand jury and used
only for the purposes of indictment and prosecution.\textsuperscript{157} The information
obtained must be destroyed or returned to the financial in-
stitution if it is not used for these purposes.\textsuperscript{158} The information used
by the grand jury must be maintained only in the sealed records of
the grand jury unless it is used as evidence of the crime for which

\textsuperscript{151} 12 C.F.R. § 219 (1979). It should be noted that there are exceptions to the Certifi-
cate requirement, \textit{i.e.}, financial institutions will not receive one when financial records are
sought by a financial supervisory agency (12 U.S.C. § 3413(b) (Supp. 1978)); for federal
litigation (\textit{id.} § 3413(e)); for agency adjudicative proceedings (\textit{id.} § 3413(f)); pursuant to a
grand jury subpoena or court order (\textit{id.} § 3413(i)); and by the Secret Service or for foreign
intelligence activities (\textit{id.} § 3414(a)).

\textsuperscript{152} 12 U.S.C. § 3416 (Supp. 1978). Section 3419 provides for a toll of the statute of
limitations if a customer challenges access to financial records.

\textsuperscript{153} \textit{Id.} § 3417 (a)(1).

\textsuperscript{154} \textit{Id.} § 3417(a)(2)-(4).

\textsuperscript{155} \textit{Id.} § 3417(d).

\textsuperscript{156} \textit{Id.} § 3418. The statute does not define injunctive relief. It is clear, however, that in
order to insure effective compliance with the statute, a preliminary injunction should be is-
issued prior to the seizure of financial records. \textit{See} note 192 \textit{supra} and accompanying text.

\textsuperscript{157} \textit{Id.} § 3420(1), (2).

\textsuperscript{158} \textit{Id.} § 3420(3).
the grand jury issued the indictment.\footnote{159} 

III. Potential Problems under the FPA

Although the FPA has been in effect only since March 10, 1979, concern has already arisen over the scope of protection afforded by the Act and the potential problems customers may encounter when using the customer challenge provisions.

A. Scope of the Financial Privacy Act

The scope of the FPA is specifically limited to requests from federal agencies and departments.\footnote{160} Suggestions that state agencies be included within the scope of the Act were rejected by Congress.\footnote{161} This limitation will curtail the effectiveness of the statute to the extent that local demands proliferate. In addition, the financial burden of complying with these demands falls upon the financial institution as demands from any state agency or from any agency exempted under the Act work to deny the reimbursement provisions.\footnote{162} Short of legislation which includes within the scope of the Act state agencies, an unlikely occurrence, state legislation is necessary to ensure that interests in financial privacy are protected. Several states have recently enacted legislation that establishes requirements that must be met before financial records may be disclosed pursuant to valid legal process.\footnote{163} The California Right to Financial Privacy Act\footnote{164} is the most comprehensive state legislation enacted thus far. This statute requires that prior to the disclosure

\footnotesize{159. \textit{Id.} § 3420(3), (4).
160. \textit{Id.} § 3401(3).
161. This may have been due to the Supreme Court decision in National League of Cities v. Usery, 426 U.S. 833 (1976). In any event, the limitation was deliberate and Congressional intent clear:

This limitation reflects our belief that legislation affecting state and local government is the proper province of the respective state governments and of the Conference of Commissioners on Uniform State laws. We believe that grave constitutional and political issues would have been raised if this title had applied to other levels of Government.

Congress went on to add that state enactment of financial privacy statutes should be encouraged. [1978] \textit{U.S. CODE CONG. & AD. NEWS} 9376.
162. See note 147 \textit{supra} and accompanying text.
163. For example, Illinois, Maryland and California have enacted this type of legislation. \textit{See note} 98 \textit{supra} and accompanying text.
164. \textit{CAL. GOV'T CODE} § 7460-7493. (West Supp. 1977).}
of a customer's financial records, the government must comply with the procedural formalities of compulsory process or receive customer authorization. The customer must receive notice of any compulsory process issued by the state. The statute also grants standing under state constitutional law to quash a subpoena issued by a state agency. Notwithstanding the benefits of state legislation, the difference in state laws, which invariably result, may be burdensome to the customer, financial institutions and government alike.

B. The Financial Privacy Act and the Internal Revenue Service

Requests for financial records by the Service are exempt from the FPA because the Tax Reform Act of 1976 had already enacted new provisions controlling such requests. It is uncertain, however, whether reliance on these provisions is justified.

Prior to the 1976 Tax Reform Act, a taxpayer had no standing to intervene in third party summonses enforcement proceedings. New procedures for third party summonses are now established under section 7609 of the Internal Revenue Code. This section requires the Service to give the taxpayer notice of the third party summons within three days of service. The notice must include a

165. Id. § 7470.
166. Id. §§ 7474, 7476(a)(1), (b)(1)(i).
167. Id. §§ 7474(a)(3), 7476(a)(2), (b)(1)(i). A California court recently held that the constitutional right to privacy was violated by section 7474 of the California Right to Financial Privacy Act. This section was found to be impermissibly overbroad because it authorized state agencies to obtain financial records pursuant to an administrative subpoena without any showing of materiality or probable cause. Rietz v. California Camino Bank, 90 Cal. App. 3d 139, 154 Cal. Rptr. 3 (1979).
170. See notes 84-88 supra and accompanying text.
171. A third party summons is a summons issued to a party other than the one being investigated. For example, it would include a summons issued to a bank for the records of a customer-depositor.
copy of the summons and directions for staying compliance. The taxpayer has fourteen days to notify the financial institution not to comply. The financial institution will not release the records if it receives notice from its customer not to comply. Should the taxpayer give such notice, the Service must seek enforcement under section 7604 in federal district court. The taxpayer is automatically entitled to intervene in any enforcement proceedings under section 7604 and may assert any defenses available. In order to prevent this section from being used for purposes of delay only, the section suspends the statute of limitations, both civil and criminal, while the IRS is seeking enforcement of the summons.

The Tax Reform Act also seeks to control the use of "John Doe" summonses by Service agents. A John Doe summons is one which requests information concerning tax matters of an unidentified person pursuant to section 7602. The Supreme Court upheld the right of the IRS to issue these types of summonses, but the Internal Revenue Code now requires that the Service obtain judicial ap-

174. Id.
175. Id. § 7609(d)(1).
176. Id. § 7609(d)(2). A summons is not self-enforcing. Under section 7604, if a summoned party refuses to produce the material that has been requested, the I.R.S. must bring an enforcement action in federal district court.
178. I.R.C. § 7609(e).
179. The IRS has the power to issue summonses for the production of records, books and papers, and for the taking of testimony. Section 7602 provides:

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax ... the Secretary is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;
(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary may deem proper, to appear before the Secretary at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and
(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

Id. § 7602.
proval of the summons prior to service.\textsuperscript{181}

These new procedures provide the taxpayer with notice and standing. Notably lacking in the Tax Code's provisions is a prohibition of informal access\textsuperscript{182} to third party records. Informal access to bank records seems to have been infrequent in the past because of the frequent and easy use of the pocket summons.\textsuperscript{183} However, informal access may now increase because the statute strictly regulates the issuance of third party summonses.\textsuperscript{184} In addition, a customer is unable to stay compliance should the financial institution accede to an informal request by the Service or if the Service fails to give the customer notice as required under section 7609. The financial institution will release the records to the Service if it hears nothing from the customer within fourteen days of receipt of the summons. Moreover, because the Code does not provide for penalties where notice is not given, a citizen is without any means to enforce these newly granted rights. Thus, there exists a serious shortcoming in the Internal Revenue Code provisions and, in turn, in the FPA because of the IRS exemption it contains.

One solution available to the courts is the exclusion from evidence of financial records obtained without compliance with section 7609.\textsuperscript{185} In one case where notice was not given, the court held

\textsuperscript{181} I.R.C. § 7609(f). In order to get court approval, it must be established that the summons is relevant to an investigation, there is reasonable belief that there may be a violation of the internal revenue law and that the information is not readily available elsewhere.

\textsuperscript{182} Informal access would involve government access to records without the benefit of a search warrant, administrative summons or grand jury subpoena. An agent could simply rely on personal friendship with bank officials and ask for information about a particular customer-depositor.

\textsuperscript{183} This is a summons issued pursuant to section 7602 of the Code and can be used for the production of books, papers, records and for the taking of testimony. These summonses do not require prior judicial approval, in fact, any IRS agent may issue one. If a bank official refuses to give the agent the information he requests, the agent can pull a blank summons from his pocket and write in the name of the customer and a general description of the records he wants. See Comment, Government Access to Bank Records in the Aftermath of United States v. Miller and the Tax Reform Act of 1976, 14 Hous. L. Rev. 636, 651-52 (1977).

\textsuperscript{184} Interview with Jeremiah Gutman, Levy, Gutman, Goldberg & Kaplan, in New York City (Oct. 17, 1979). Informal access may be more likely to occur in small financial institutions rather than large ones because in the large institutions violation of procedures set forth in procedure manuals can result in the discharge of the employee. Interview with Peter Gray, Citibank, in New York City (Oct. 19, 1979). See also Comment, Government Access to Bank Records in the Aftermath of United States v. Miller and the Tax Reform Act of 1976, 14 Hous. L. Rev. 636, 656-57 (1977).

\textsuperscript{185} The exclusionary rule was first established in Weeks v. United States, 232 U.S. 383
that the taxpayer was not entitled to notice and a hearing prior to enforcement of the summons. The court reasoned that because the events took place before section 7609 became effective, Miller controlled. Thus, the taxpayer had no protectable liberty or property interest in his financial records. This decision should not now be followed because section 7609 has, in effect, given the taxpayer a protectable property interest. Tax cases involving the propriety of IRS requests for financial records support this position. To obtain financial records for an investigation, the IRS must show that "the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, that the information sought is not already within the Commissioner's possession, and that the administrative steps required by the Code have been followed. . . ." In one case a federal circuit court held that where these standards are not met and it is shown that the records are for a strictly criminal investigation, the exclusionary rule should be applied and the financial records should be suppressed. If the courts exclude evidence when the IRS has an improper purpose in obtaining it, they should also exclude it if the procedural requirements of the Financial Privacy Act are not followed. The use of the exclusionary rule will effectively insure compliance with the new provisions.

(1914).

186. United States v. Schutterle, 586 F.2d 1201 (8th Cir. 1978). This court cited the Miller decision in support of its holding that the taxpayer had no property interest, and thus none of the protections of procedural due process in the "business records of the bank." Id. at 1204-05.

187. Id.

188. Id.


191. United States v. Genser, 582 F.2d 292 (3d Cir. 1978). The court remanded the case to the district court for a factual determination whether the proper procedures had been followed.

192. This sanction is consistent with the purpose of the exclusionary rule as formulated in Weeks v. United States, 232 U.S. 383 (1914).
C. Difficulty of the Customer Challenge

The statute requires that the government show a "legitimate law enforcement inquiry" to obtain financial records. The statute defines this standard as "a lawful investigation or official proceeding inquiring into a violation, of or failure to comply with, any criminal or civil statute or any regulation, rule, or order issued pursuant thereto." This appears to give the government a fair amount of latitude in obtaining records. Apparently, Congress meant to impose a lower standard than "probable cause" believing that the combination of "reason to believe" and "legitimate law enforcement inquiry" will sufficiently prevent an unwarranted intrusion by an agency into an individual's financial records. However, the customer notification of the summons only describes generally the nature of the inquiry. The lack of information concerning the investigation provided for in the notice coupled with the short amount of time in which a challenge must be made may make it difficult to rebut the government's position. The customer need not make a detailed evidentiary showing as the ultimate burden of proof rests on the government. For example, the customer may claim that to the best of his or her belief he or she has no connection with the investigation, has committed no offense in relation to the investigation, or the request for records is merely harassment in view of prior unsuccessful government attempts to obtain financial records. The customer may also try to show that the government is actually checking on his or her lifestyle and that there is no true police investigation. In addition, if the financial records of an organization are being requested, the organization may claim that the government merely wants a membership list of the organization.

194. Id. § 3401(7) (Supp. 1978).
196. 12 U.S.C. § 3410(a) (Supp. 1978). The customer only has ten days from service or fourteen days from the mailing of a subpoena, summons or formal written request to contest. See notes 110, 117 & 122 supra.
197. See notes 129-32 supra and accompanying text.
200. Id. This would probably violate NAACP v. Alabama, 357 U.S. 449 (1958).
Some attorneys feel that the customer's burden is not very difficult to meet, that the customer has a chance to win in court and that the requirements of the challenge provisions offer the customer sufficient protection. However, it is apparent that should the customer try to attack the purpose of the inquiry directly, the agency can simply reply that the purpose of the inquiry is to determine whether that type of transaction took place. The customer may have a very difficult time negating this because the government must only meet a standard of "legitimate law enforcement inquiry." Any attempt to prove that the agency request is discriminatory would also be difficult to prove as this attack will fail if the agency can show that the investigation is broader than the alleged classification. Finally, it will probably be extremely difficult for the customer to obtain agency records to prove this point. Thus, it appears that even a customer who understands the notice received and acts in a timely fashion to oppose the request will face formidable difficulties in challenging any agency request.

D. Omissions in the Financial Privacy Act

Corporations and partnerships with more than five persons are not covered by the FPA. These entities, however, are usually provided with notice of government requests for their records by their financial institution and are usually well aware of any legal proceedings concerning them. Therefore, this exemption will rarely

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203. Id. at 3, col. 1. An agency may be discriminatory in its selection of customers it wishes to investigate, basing its selection on political, religious or ethnic grounds.
204. Id.
205. Another problem for the customer may arise if the financial institution gives special treatment to favored customers. If the financial institution receives a demand for records and hears nothing within the ten to fourteen day period, it can release the records. The records are not always released immediately, thus the potential exists for financial institutions to release records of favored customers more slowly in order to give them more time to act on the request. Interview with Jeremiah Gutman, Levy, Gutman, Goldberg & Kaplan, in New York City (Oct. 17, 1979).
207. Interview with Albert DeLeon, National Bank of North America, in New York City (Oct. 16, 1979); Interview with William Dolan, Chase Manhattan Bank, in New York City (Oct. 17, 1979); Interview with Jeremiah Gutman, Levy, Gutman, Goldberg & Kaplan, in New York City (Oct. 17, 1979); Interview with Susan Pollack, Citibank, in New York City (Oct. 19, 1979); Interview with Peter Gray, Citibank, in New York City (Oct. 19, 1979);
pose a problem for them. However, requests for corporate records are usually detailed and comprehensive and thus are costly to produce. The financial institution, therefore, may be burdened by this omission in the Act's scope.

Other exemptions to the FPA will also cause problems. One exemption, grand jury subpoenas, is a potential source of abuse. Government agents can go to an Assistant United States Attorney on their own and obtain a grand jury subpoena. In this instance, they need not comply with FPA regulations because they are not getting the subpoena through their own agency. Even if the general practice of the financial institution affords the customer notice of any subpoena, the customer will not have standing to quash the subpoena. In addition, the financial institution is not reimbursed for its costs.

The Securities and Exchange Commission (SEC) exemption (until November, 1980) poses similar problems. SEC subpoenas are often lengthy and detailed. The financial institution will not be reimbursed. Additionally, customers will receive no notice and will not have standing to quash until November, 1980. Significantly, most SEC subpoenas are for financial records of corporate accounts. Therefore, the elimination of this exclusion will be of little consequence so long as corporations remain outside the scope of the Act.

Presently, the Federal Bureau of Investigation is not covered by the FPA. However, this exemption will be eliminated by the char-

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208. Id.
209. Id.
211. See interviews cited in note 207 supra.
212. In this situation, the common law rule of Miller would control. The customer would have no right to financial privacy under the fourth amendment and therefore would have no standing to contest the subpoena.
213. See note 139 supra.
214. Interview with Albert DeLeon, National Bank of North America, in New York City (Oct. 16, 1979); Interview with William Dolan, Chase Manhattan Bank, in New York City (Oct. 17, 1979); Interview with Jon Karnofsky, European American Bank, in New York City (Oct. 19, 1979); Interview with Jay Soloway, Chemical Bank, in New York City (Oct. 23, 1979).
215. See note 214 supra.
ter proposals presently before Congress.\textsuperscript{216} These proposals would give the FBI authority to issue "investigative demands."\textsuperscript{217} These investigative demands, like administrative subpoenas, will allow the FBI to obtain from third-party recordkeepers financial records in a manner similar to that provided for under the FPA. To deter abuse, the proposals contain notice and challenge provisions in addition to other provisions similar to the FPA.\textsuperscript{218}

Finally, a problem may arise from the transfer of financial records between agencies or between levels of government. The customer is entitled to notice of a transfer of financial records from one federal agency to another and may challenge such transfer.\textsuperscript{219} However, no notice is required to be given to the customer or the financial institution if the records are passed from a federal agency to a local agency.

E. Costs

Costs for financial institutions have been an ongoing problem under the FPA. Originally, the statute required financial institutions to notify all of their customers of their rights under the FPA.\textsuperscript{220} A study done by Citibank showed that this requirement would cost all affected institutions $922 million, based on the estimate that notices would have to be mailed to 967.8 million accounts.\textsuperscript{221} However, this section was repealed before the FPA became effective.\textsuperscript{222}

Costs still pose a heavy burden on financial institutions because the reimbursement schedule under Regulation S is often insufficient to cover their search, reproduction, and transfer costs. Reproduction costs are apparently much higher than fifteen cents per

\textsuperscript{216} 33 \textit{Consumer Finance L. Bull.} 128 (Sept. 7, 1979). The charter proposals are H.R. 5030 (Rodino, D-N.J.) and S. 1612 (Kennedy, D-Mass.).

\textsuperscript{217} \textit{Id.} These charter proposals cover third-party recordkeepers such as banks, insurance companies and other creditors. The proposals include notice and challenge provisions, provisions for delay of notice and similar exceptions to those found in the FPA.

\textsuperscript{218} \textit{Id.}


\textsuperscript{220} \textit{Id.} § 3404(d).

\textsuperscript{221} Seitel, \textit{Congress Seen Favoring Change in Financial Privacy Act}, \textit{N.Y.L.J.}, Feb. 20, 1979, at 1, col. 2.

\textsuperscript{222} 12 U.S.C. § 3040(d) was repealed. Act of Mar. 7, 1979, Pub. L. No. 96-3, § 1, 93 Stat. 5.
page\textsuperscript{223} and the research requirements often exceed ten dollars per hour.\textsuperscript{224}

IV. Conclusion

There has been virtually no immediate change in banking procedures as a result of the FPA. Many banks had already operated pursuant to a general policy of giving customers notice whenever the bank received any type of legal process, unless they received a court order not to give notice.\textsuperscript{225} The financial institution has simply become a conduit and the onus of protection now falls on the government and the customer.

The statute has not yet been interpreted or applied by the courts. One recent case, \textit{United States v. Grubb},\textsuperscript{226} decided after the FPA became effective, but the facts of which occurred prior to the Act's effective date, presented virtually the same facts as did \textit{United States v. Miller}.\textsuperscript{227} In \textit{Grubb}, the court used the same traditional fourth amendment analysis applied in \textit{Miller} and held that the bank customer had no protectable fourth amendment interest in his bank records.\textsuperscript{228} Notably, the court stated that "[h]ad the subpoena for defendant Grubb's bank records been issued after March 15, 1979, the United States Attorney and the Agent could not have behaved as they did in this case."\textsuperscript{229} The court, however, refused to give the FPA retroactive effect. It is apparent that the FPA has reversed the holding of \textit{Miller}.

The court in \textit{Grubb} raised another interesting point that will

\textsuperscript{223} Although photocopying only runs four cents to eight and one-half cents per page, microfilm reproduction costs sixty cents per page and most records are on microfilm. Interview with Jon Karnofsky, European American Bank, in New York City (Oct. 19, 1979).

\textsuperscript{224} Interview with Peter Gray, Citibank, in New York City (Oct. 19, 1979). It was noted that research requires supervisory personnel to insure compliance with all provisions of the FPA and the cost of such personnel often runs higher than $10.00 per hour.

\textsuperscript{225} See interviews cited in note 207 supra. The only change which might occur will be with banks which, in the past, have placed a service charge on accounts in order to cover costs incurred when faced with legal process. This process may have to be stopped now that Regulation S is in effect. Interview with William Dolan, Chase Manhattan Bank, in New York City (Oct. 17, 1979).


\textsuperscript{227} 425 U.S. 435 (1976).

\textsuperscript{228} The conduct of the government agent, who told bank employees not to notify the customer of the subpoena, was characterized by the court as "overzealous" but was not found to be a violation of the customer's constitutional rights. 469 F. Supp. 991, 995 (E.D. Pa. 1979).

\textsuperscript{229} Id.
eventually require judicial interpretation. The defense motion to suppress the evidence consisting of Grubb's bank records was denied because the actions had taken place before the effective date of the statute. The court questioned, however, whether it could have suppressed the evidence even if the actions had occurred after the effective date. Section 3417 of the FPA provides for civil penalties for violations of the FPA and states that "[t]he remedies and sanctions described in this title shall be the only authorized judicial remedies and sanctions for violations of this title." Because section 3417 does not provide for the exclusion of evidence obtained in violation of the FPA, the court questioned whether it could have used this remedy even if the FPA had been in effect. For reasons discussed earlier in this Comment, courts should exclude evidence that is obtained in violation of the statute in addition to awarding the customer damages as provided for in the Act.

Thus far the FPA does not seem to have hindered law enforcement activities. Under both the new Internal Revenue Code provisions and the FPA there have been very few customer challenges. The courts have not been inundated with litigation as was predicted. This may be due to several reasons: the customer may feel that the challenge provisions are too difficult to meet and the burden of proof is too high; the customer may be unaware of the import of the notice received when the subpoena or summons is served; or the expense of good legal advice may simply be too high for the customer to pursue the matter. Despite these practical difficulties, the FPA affords consumers necessary protection by preventing access to financial records without prior notice and an opportunity to challenge requests for such records in court.

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232. See notes 191-92 supra and accompanying text.
234. See interviews cited in note 207 supra.