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MONEY LAUNDERING - PART ONE
The Bank Secrecy Act *

By Joel M. Androphy

Money Laundering is a runaway global industry that serves customers ranging from cocaine cartels to tax-dodging corporations - Time, December 18, 1989

Joe Smurf uses $18,000 in currency to buy two $9,000 cashier's checks at First Confidential Bank on two different days. His counsel assures him that his actions are legal. First Confidential says nothing to Smurf and does not file Currency Transaction Reports for the transactions. Then Joe Smurf and First Confidential receive grand jury subpoenas requesting records of Smurf's business with the bank for that period.

Question: Does Joe Smurf or First Confidential have any criminal liability?

In 1970 Congress enacted the Bank Records and Foreign Transaction Act[1], commonly known as the Bank Secrecy Act ("the Secrecy Act").[2] Congress enacted the Secrecy Act in response to mounting concern over the use of foreign bank accounts to launder proceeds from illegal operations and finance illegal activity.[3] The Secrecy Act initially was unsuccessful in stopping this practice because it was merely a vague reporting statute that the government unilaterally expanded to attack what it considered illicit activity. Hence, legal interpretations were inconsistent and honest businessmen were being charged with a variety of reporting crimes fashioned by the U.S. Attorney's office around the country.

The Secrecy Act has undergone a series of modifications in an attempt to clearly define criminal activity for reporting violations, and keep up with defense strategies and loopholes. The Money Laundering Control Act of 1986 ("the Laundering Act") was enacted to strengthen and expand criminal liability beyond the mere reporting requirements of the Secrecy Act.

This article will discuss the background of government regulations in two parts. Part One will deal with the Secrecy Act. Part Two will discuss the Laundering Acting and the overall effects on financial privacy.

I. BANK SECRECY ACT: THE FIRST ATTACK

A. General Background

> A financial institution[4] must file a currency transaction report ("CTR") on "each deposit, withdrawal, exchange of currency...or transaction in currency of more than $10,000."[5] A transaction in currency[6]) is defined: physical transfer of currency from one person to another. A transaction which is a transfer of funds by means of bank check, bank draft, wire transfer, or other written order, and which does not include the physical transfer of currency is not a transaction in currency...[7]

In practice, the regulations require that a CTR be filed for every deposit of cash or currency exceeding $10,000. If the deposit involves, for example, a bank draft or certified check, the financial institution that receives such a deposit is not required to file a CTR. Only the financial institution that issued the bank draft or certified check would have a legal duty to file a CTR at the time of conversion from cash into a paper document.[8]

The reporting law alerted the government to suspected laundering activities a the earliest stage, the initial cash transactions. The CTR filing leaves the government a "paper trail" to follow the unusual movement of large amounts of money.[9] The initial cash transactions are a vulnerable point because large amounts of cash are prominent and difficult to cloak as representative of legitimate transactions, As the laundering process continues, the transactions become more obscure and difficult to trace.

B. Problems with the Statute and Regulations.

The original regulations imposed a duty only on financial institutions to report cash transactions more than $10,000. It was unclear whether customers owed any duty to disclose to the financial institution the true nature and extent of their transactions. Some individuals attempted to structure or disguise a transaction to evade the duty

bank's duty to disclose, it was reasoned that the bank's failure to file imposed no criminal liability on anyone. Without a duty to disclose, it was reasoned that the bank's failure to file imposed no criminal liability on anyone. This thought process was the subject of a divergence of opinion in the courts.[10] Some courts found responsibility based on an accomplice theory of liability. Other courts refused to hold customers liable because the law was too vague to provide fair notice.

There were also many opportunities to manipulate a transaction with a financial institution to avoid the $10,000 reporting requirement. Congress never contemplated that so-called "smurfs" would go to different banks, different branch offices of a particular bank, different teller stations at one bank branch office, purchase numerous instruments, set up numerous accounts at a particular bank, conduct dealings over several days or weeks.[11]

These schemes exploited the lack of any aggregation requirement in the statutes or regulations Although the instructions on the back of the reporting form provided for aggregation, some courts found the instruction to be non-binding.[12]

C. Judicial Response

The judicial response was mixed. In some limited circumstances, courts were willing to collapse the transactions and aggregate the amounts to reach in excess of $10,000. Generally, courts refused to aggregate transactions. These courts reasoned that no language in the statute or regulations imposed a duty or warning to aggregate transactions. The courts shifted the responsibility to Congress to regulate.[13]

II. AMENDED REGULATIONS (SECOND ATTACK)

The Secretary of the Treasury amended the regulations to address judicial response. A new regulation clarified the status of branch banks.[14] The secretary also adopted a regulation that codified the aggregation instructions on the back of the reporting form.[15]

> The Money Laundering Act of 1986 was enacted to strengthen and expand criminal liability beyond mere reporting requirements of the Secrecy Act.

This regulation requires that three conditions exist before multiple transactions are treated as one. transactions are treated as one. The transactions must be "by or on behalf of any person," the transactions must amount to more than $10,000 cash in or cash out in a single day, and the bank must have knowledge of both these conditions. If any one of these conditions fails, then multiple transactions are not treated as a single transaction.

Although the regulations do not explicitly address whether cash in and cash out must be aggregated, the comments indicate that only cash in or cash out must be aggregated.[16] Although the regulations do not address whether deposits one person makes to the multiple accounts, or deposits multiple people make to a single account, must be combined into a single account, the comments indicate that the presence of a single person or single account means that transactions involving that person or account must be combined and treated as a single transaction.[17]

III. ANTI-SMURFING STATUTE (THIRD ATTACK)

A. General Background

The amended regulations left some options open to the ambitious launderer. For example, a smurfer could limit his cash transaction to $10,000 or less each day. He also could use multiple banks during a single day because the regulations did not require aggregation of transactions conducted at different banks. The regulations were an incomplete solution. Thus, Congress enacted a new statute,[18] which provides that no person shall, for the purpose of evading the reporting requirements: (1) cause a financial institution to fail to file a required report; (2) cause a financial institution to file a required report with an commission or misstatement; or (3) structure any transaction with one or more financial institutions. Sanctions for violating this statute include forfeiture, civil penalties, and criminal sanctions of up to $250,000 in fines, five years in prison, or both.[19]

1. Clause (1)

Clause (13) was enacted to extend liability to any person who causes a bank's failure to file a report.[20] Its application is doubtful. Assume a smurfer goes into a bank numerous time in one day, and each time buys a cashier's check with cash for an amount less than $10,000, but in total greater than $10,000. To find liability, the bank must have a duty to file a report, and must fail to do so. Under the revised regulations, however, the bank has a duty to file only if it knows that multiple transactions for one person total cash in or cash out more than $10,000 in one day. If the bank satisfies the criteria, how could the smurfer "cause" its failure to file?[21]

Clause (1) can be effectively utilized in circumstances in which an individual is charged as a financial institution[22] and his co-conspirator customers are paying him a percentage so that reports are not filed. Clause (1) also contains an attempt provisions. The attempt language of Clause (1) is useful under the regulations because it encompasses situations where a customer attempts to mislead a bank, but the bank discovers the attempt and files a report.

2. Clause (2)

Clause (2) makes it a crime to cause or attempt to cause a bank to file a report containing material commission or misstatement.[24] It is essentially a false statement provision that authorizes the prosecution of an individual for causing or attempting to cause a financial institution to file a false CTR.[25]

3. Clause (3)

Clause (3) makes it illegal for anyone to structure, assist or attempt to assist in structuring any transactions with one or more financial institutions for the purpose of evading the reporting requirements of Title 31, United States Code, § 5313(a).[26] It finally makes illegal what the government has envisioned and argued for years.[27]

It expressly subjects to potential liability a person who causes to attempts to 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 facts. In addition, it would create the offense of structuring a transaction to evade the reporting requirements, without regard to whether an individual transaction is, itself, a reportable under the Bank Secrecy Act.

The crime of structuring is no longer limited to transactions accomplished in a particular period or conditioned on the bank's knowledge. Hence, making daily trips to the bank in amounts less than $10,000 and/or using multiple banks, agents and/or multiple accounts to secrete structuring, will no longer sidetrack criminal exposure. This clause is independent of the aggregation regulation, thus prohibiting all structuring regardless of whether the bank has a duty to file a report.[28]

Joe Smurf's daily runs could subject him to criminal exposure. The following defenses could be considered.

B. Defenses

1. Specific Intent

Only willful failures to file CTRs are subject to criminal penalties under the Act.[29] The government must prove the defendant's knowledge of the reporting requirement and his specific intent[30] to commit the crime. Whether actual knowledge of the anti-structuring statute is a component of a Section 5324(3) violation or whether knowledge of the federal reporting requirements and intent to avoid them suffices is presently unsettled.[31]

Factors typically giving rise to a finding of intent to evade are:

> use of false payee or remitter names on checks or money orders; false information on account opening documents; artificially structuring single deposits; numerous artificial withdrawals or exchanges of currency in order to create a false appearance that multiple unrelated transactions were made; employment of runners to surreptitiously make deposits, withdrawals, or exchanges; payment or receipt of a percentage for conducting deposits, withdrawals, or exchanges for which a bank would have charged no fee; and, maintenance of multiple accounts for moving money among several banks or within one bank.[32]

One interesting defense may exist if the depositor argues that he is merely structuring his transactions with his cohorts, and not "with one or more financial institutions."[33] Although the mere avoidance of accumulating reportable sums may be prosecuted as a conspiracy, there may be problems with a lack of fair warning in charging individual liability. In that regard, when was the last time you saw any anti-structuring notice at your bank?

Structuring may appear may appear to be innocent based in an individual's experience with the tax laws. Structuring finances to avoid taxes is acceptable conduct. The applicability of the defense will vary on a case-by-case basis depending on the degree of sophistication of your client.

Another argument is related to the opportunity for notice. Regulation of cash transaction if not as pervasive as the tax laws. No state laws regulate cash transactions. Moreover, the Treasury Department is still considering specific measures to provide notice of the law to bank customers. To date, there is no bank in this city that advises a customer of the statute or regulations.

2. Participants

According to the regulations promulgated by the Secretary of the Treasury ("Secretary"), and the instructions appearing on the back of the CTR form, completion and filing of form 4789 is the responsibility of the financial institution conducting the transaction. The Secretary's regulations require only financial institutions to file CTRs, not participants in the transaction.[34] Although the Secrecy Act would permit the Secretary to impose a duty on "any other participant in the transaction," including customers,[35] Fifth Amendment concerns have caused the Secretary to hesitate in expanding the role of participants.[36]

3. Individuals

Prosecutors may be inclined to charge individuals as financial institutions when the evidence is insufficient to prove their liability for structuring a transaction with a traditional financial institution.[37] The circuits are divided.[38] Defense lawyers may argue that it is not the role of the judiciary to "strengthen" the basis for requiring CTRs beyond that expressly provided by the statute and regulation.[39] If the government wishes to impose a duty on depositions, or other participants in a transaction to file CTRs, one can argue that the duty should be explicit and did not indiscriminate.[40] Any attempt to impose such a duty by implication, expecting that the courts will stretch statutory construction to accommodate governmental interpretation, would deprive the individual depositor of his due process right to fair notice of the criminal implications of his failure to file.[41] Even the cases supporting a finding of criminal liability fail to address any quantitive analysis for determining when an individual crosses the institutional line.

4. Due Process/Lenity

If there is fair doubt whether an individual's conduct is embraced in a prohibition, the policy of lenity requires that the doubt or ambiguity be resolved in favor of the accused.[42] Ordinary people must understand what is prohibited.[43]

5. Double Jeopardy

In those jurisdictions in which customers are liable as accomplices under the reporting laws,[44] the legislative history seems to preclude multiple punishment under the anti-smurfing statute.[45] Also, imposing a civil fine after a criminal prosecution would violate the double jeopardy clause.[46]

6. Constitutionality

a. Fourth Amendment – Legitimate Expectation of Privacy

In *California Bankers Association v. Shultz,*[47] banks and depositors challenged the constitutionality of the bank reporting law under the fourth amendment. The Supreme Court held that the statute did not violate the bank's fourth amendment rights because, among other reasons, it was reasonably related to proper governmental purpose.[48] The court did not decide the issue relating to depositors because it concluded that the depositors lacked standing to challenge the statute.[49] In a

concurring opinion, Justice Powell agreed that the reporting law was constitutional, but expressed doubt that the requirements would be constitutional if extended to impose reporting requirements on individuals: "[a] significant extension of the regulations' reporting requirements... would pose substantial and difficult constitutional questions... and implicate legitimate expectations of privacy."[50]

More recently, In *United States v. Miller,*[51] the Supreme Court held that no legitimate expectation of privacy was breached when a customer's bank records were turned over to the government. When the customer voluntarily conveys the information to the bank, he assumes the risk that the bank will in turn convey the information to the government. Considering the conservative trend in constitutional interpretation, a depositor would be wise not to anticipate any favorable rulings in this area.

Many people will not do business with an institution that behaves like the I.R.S. ... an honest customer may suffer from an institution's fear, greed and reluctance.

b. Fifth Amendment

The reporting requirements and anti-smurfing statute do not violate the privilege against self-incrimination because the courts have concluded that reports filed under bank reporting law are not incriminating. Courts have found no incrimination because the report requirement is not targeted at an inherently suspect group, and because no direct nexus exists between the disclosure and potential criminal activity.[52] Defense counsel may take issue with this rationale and argue that people who deal in cash are criminals.[52] Filing a report obviously exposes one to close scrutiny and risk of prosecution. For fifth amendment reasons, the Secretary has hesitated to require participants ti directly file reports. However, the anti-structuring or indirect approach leads to the same result: criminal exposure.

7. Lack of notice and comment

Attempts by the Secretary to impose reporting requirements beyond the language of the statute or regulations, for example by merely adding instructions on form 4789, have been held to violate the notice and comment requirements of the Administrative Procedure Act.[54]

8. Reliance on counsel/banking authorities

Good faith reliance on counsel [55] or banking authorities is a valuable weapon to combat specific intent.

Joe Smurf's best defenses are lack of specific intent, lack of notice and institutional inquiry as discussed below, and reliance on counsel. He should also argue constitutional violations of due process and self-incrimination.

C. Continual Problems

1. *Institutional Inquiries*

Prosecutors have also argued that the financial institution has a duty to disclose in Part II of CTR from 4789 the "true source and ownership" of currency received from a suspected intermediary party. Although recent authority[56] has caused the regulations and general instructions on the CTR from 4789 to require financial institutions to be more inquisitive,[57] and consider adopting computer systems to aggregate[58] the new obligations have caused institutions to be more apprehensive about the forms. The fear that an in-depth explanation may invite structuring and thus a charge of conspiracy,[59] and the discretion of prosecutors in determining whether the actions of the financial institution were willful, have caused many institutions to become cautious.

There is a parallel relationship between inquiry and deposits. Despite a First Circuit opinion finding a financial institution criminally liable based upon flagrant indifference to the obligations imposed under the Secrecy Act,[60] and the principal of willful blindness, or one who deliberately avoids positive knowledge,[61] the potential of attracting vast illegal proceeds and generating large profits may outweigh the threat of criminal exposure.[62]

Furthermore, many people will not do business with an institution that behaves like the I.R.S. The net effect is that an honest customer may suffer from an institution's fear, greed, and reluctance.

When banks have inquire whether they should refuse a deposit if the customer does not provide the necessary information, the response was expected:

> The Bank Secrecy Act neither requires nor prohibits a financial institution to refuse a currency transaction when...it cannot obtain the information necessary to complete the CTR. However,...failure to obtain complete information could result in criminal and/or civil liability...[63]

Some comfort.

In the example at the beginning of this article, First Confidential could be subject to criminal liability if its actions were the result of flagrant organizational indifference. As discussed, profits breed this activity.

2. Depositor Assistance

Despite recent amendments, prosecutors have used inventive means to expand the scope of liability under the Secrecy Act. They have argued that a participant has a legal obligation to advise a depositing bank of the true source and ownership of the currency to be deposited. Despite fifth amendment concerns and the lack of specific authority under the Secrecy Act and regulations imposing a duty by the depositor to reveal this information, this potential obligation is arguably self-defending and ineffective. The CTRs are supposed to leave a paper trail leading eventually to the source of the currency. Requiring each depositor to "guess" the initial source of the currency, instead of providing his direct source, may lead to more confusion in the forms, and the ultimate failure of the reports to trace the currency to the suspected drug source. Of course, the depositir, like a currency exchange, may be prudent to disclose to the bank the original source to avoid potential

prosecution in the future, and refuse to accept funds if the source appears dubious.

IV. THE RELATIONSHIP OF THE ANTI-SMURFING STATUTE TO OTHER FEDERAL CRIMES

The federal crime statutes are consistently being amended to expand liability. The result is a panoply of laws that provide the prosecution with may ways to charge the same or similar criminal conduct.

A. Deception – 18 U.S.C. § 1001

A person can be prosecuted under 18 U.S.C.A. §1001 for structuring a transaction, thus causing a financial institution not to file a CTR.[64]

B. Conspiracy – 18 U.S.C. § 371

A customer's collusion with a financial institution[65] or his own team of cohorts[66] to avoid filing CTRs, constitutes an unlawful conspiracy in violation of 18 U.S.C.A. § 371.[67]

C. RICO – 18 U.S.C. §1961 et seq

A Secrecy Act violation is a predicate under RICO, the racketeering act, and is primarily used against money laundering schemes in narcotics prosecutions.[68]

D. Other Statutes

1. Attorneys

There is an indentical reporting for individuals, including attorneys, who receive greater that $10,000 in cash.[69] This is not a predicate offense under RICO, unless the individual can be construed as a financial institution.[70]

2. Import/Export

There is also a reporting requirement for any person who imports or exports by physical transfer of mail more than $10,000 in currency on any one occasion.[71]

3. $3,000 Requirement

No financial institution may issue or sell, for example, a cashier's check or money order in amounts in excess of $3,000 in connection with a transaction or group of transactions, unless the customer has an account with the institution with identification that the Secretary may require in the regulations.[72]

V. CONCLUSION

Large cash transactions are not necessarily illegal, but they must be reported. If you want to hide your cash, keep it in your mattress. If you want to deposit cash, make sure your bank understands the legal requirements. If concerned about the bank's policy, keep your own records of the transation, the name of the teller, etc.

ENDNOTES

1. Pub. L. No. 91-508, 84 Stat. 1114 (1970), codified as amended at 31 U.S.C. § 5311 *et seq.* (1983 & Supp. 1989).
2. The domestic reporting requirements are governed by 31 U.S.C. § 5313 (a), which provides, in pertinent part, as follows: When a domestic financial institution is involved in a transaction for the payment, receipt, or transfer of United States coins or currency (or other monetary instruments, the Secretary of the Treasury prescribes), in an amount, denomination, or amount and denomination, or under circumstances the Secretary prescribes by regulation, the institution and any other participant in the transaction the Secretary may prescribe shall file a report on the transaction at the time and in the way the Secretary prescribes.
3. *See* Villa, Banking Crimes, Chapter 6 (1988).
4. The term "financial institution" is defined in both the statute and the regulations:
(A) Section 5312(a)(2) of 31 U.S.C. provides 21 definitions of "financial institution," including "an insured bank," § 5312(a)(2)(A); "a private or trust company," § 5312(a)(2)(B); "a private banker," § 5312(a)(2)(C); "a currency exchange," § 2312(a)(2)(J); "an issuer, redeemer, or cashier of travelers' checks, checks, money orders, or similar instrumants," § 5312(a)(2)(K); and "another business or agency carrying out a similar, related, or substitute duty or power the Secretary of the Treasury describes." § 5312(a)(2)(U).
(B) The Secretary's regulations, 31 C.F.R. § 103.11, define "financial institution" as follows: Each agency, branch, or office within the United States of any person doing business in one or more of the capacities listed below:
(1) A bank (except bank credit card systems);
(2) A broker or dealer in securities;
(3) A person who engages as a business in dealing in or exchanging currency as, for example, a dealer in foreign exchange or a person engaged primarily in the cashing of checks;
(4) A person who engages as a business in the issuing, selling, or similar instruments, except one who does so as a selling agent exclusively or as an incidental part of another business;
(5) A licensed transmitter of funds, ot other person engaged in the business of transmitting funds abroad for others;
(6) A telegraph company;
(7) A casino ($1 million reversal); and
(8) persons subject to supervision.
5. The regulation setting forth the reporting requirements envisioned by the Act, 31 C.F.R. § 103.22(a) states, in oertinent part, as follows: Each financial institution shall file a report of each deposit, withdrawal, exchange or currency ot other payment of transfer, by, through, or to such financial institutions which involves a transaction is currency of more than $10,000. See 31 U.S.C. § 5313(a).
6. Although authorized by statute, the Secretary has confined the reporting requirements to transactions in currency and has not required reporting all transactions in monetary instruments. 31 C.F.R. § 103.22(a); 31 C.F.R. § 103.11(d).
7. 31 C.F.R. § 103.11(1).
8. *United States v. Herron*, 816 F.2d 1036, 1037 n.1 (5th Cir. 1987).
9. *See Califonia Bankers Ass'n v. Shultz,* 416 U.S. 21, 25-41 (1974).
10. Under prior law, the actual money launders were charged with violations of 18 U.S.C. 2 (aiding and abetting or causing another to commit offense) and material fact by trick, scheme, or device). For example, in *United States v. Tobon-Builes,* 706 F.2d 1092 (11th Cir. 1983), the Eleventh Circuit Court of Appeals upheld a conviction under 18 U.S.C. 1001 which they had structured a series of currency transactions, each one less than $10,000 but totaling more than $10,000, to evade the reporting requirements. In contrast, the First Circuit Court of Appeals, in *United States v. Anzalone,* 766 F.2d 676 (1st Cir. 1985), the Eleventh Circuit Court in *United States v. Denmark,* 779 F.2d 1559 (11th Cir. 1986), and the Ninth Circuit Court of Appeals in *United States v. Varbel,* 780 F.2d 758 (9th Cir. 1986) have held that structuring currency transactions to avoid the reporting requirements did not violate 18 U.S.C. Section 1001. Justice Department Handbook at p.84. That holding, however, rested on the fact that the bank was not required to file CTRs for the structured transactions involved in that case.
11. See Welling , *Smurfs, Money Laundering, and the Federal Criminal Law: The Crime of Structuring Transactions,* 41 Fla. L. Rev. 287, 297 (1989).
12. *United States v. Reinis*, 794 F.2d 506, 508 (9th Cir. 1986)(form does not operate as regulation); *United States v. Palzer*, 745 F.2d 1350, 1357 (11th Cir. 1984)(instruction may be binding).
13. A Comptroller General's report had indentified this aggregation loophole. The courts relied on the Secretary's subsequent inaction to conclude that the Secretary knew of the problem but apparently had chosen not to cure it. *Anzalone*, 766 F.2d at 681-82; *Cogswell*, 637 F.Supp. 295, 297-98 (N.D. Cal. 1985).
14. The old regulations did not specifically address this issue. The definitions of "bank" and "financial institution" suggested that each branch was a separate entity. Despite this language, the courts favored aggregation of branch transaction. The new regulation was merely an enactmentt of court consensus. 31 C.F.R. § 103.22(a)(4)(1987).
15. The reporting form included aggregation instructions, but the force of these instructions was unclear and the courts were reluctant to rely on them as the basis of a criminal prosecution. This uncertainty has been cured now that the instructions are embodied in a regulation. The new regulation provides: "Multiple 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 during any one business day." 31 C.F.R. § 103.22(a)(1)(1987).
16. 52 Fed. Reg 11,438 (1987).
17. *Id.*
18. 31 U.S.C. § 5324.
19. A person willfully violating this subchapter or a regulation prescribed inder this subchapter (except section 5315 of this title or a regulation prescribed under section 5315) shall be fined not more than $250,000, or imprisonment not more than five years, or both. A person willfully violating this subchapter or a regulation prescribed under this subchapter (except section 5315 of this title or a regulation prescribed under section 5315), while violating another law of the United States or as part of a pattern of any illegal activity involving more than $100,000 in a 12-month period, shall be fined not more than $500,000, imprisoned for not more than 10 years, or both. For a violation of section

5318(a)(2) of this title or a regulation prescribed under section 5318(a)(2), a separate violation occurs for each day the violation continues and at each office, branch, or place of business at which a violation occurs or continues.
20. The section was intended to cover multiple transactions at the same or different branches of a financial institution as well a multiple multiple transaction with different teller at the same time or at least on the same day, with less than $100,000 being taken by any one book on the Anti-Drug Abuse Act of 1986, Subtitle H (March 1987).
21. In this regard, the analysis is based on the revised regulations and statute not the line of cases supporting an accomplice theory of liability set forth in n. 10. See Welling, 41 Fla. L. Rev. at 305.
22. See nn. 37-39.
23. Justice Department Handbook on the Anti-Drug Abuse Act of 1986, Subtitle H (Amrch 1987). *See United States v. Cure,* 804 F.2d 625 (11th Cir. 1986). Furthermore, the act of giving the individual money launderer (charged as a financial institution) currency for the purpose of depositing or exchanging it at secondary financial institutions (e.g. banks) in such a way as to cause the bank not to file or to falsly file under 11th Circuit analysis. *Id. See* n.10 for divergence of opinion.
24. Causing the bank to file a false report may also be criminal under 18 U.S.C. § 1001.
25. Jsutice Department Handbook on the Asnti-Drug Abuse Act of 1986 (March 1987). For an analysis of materiality of falsity see 18 U.S.C. § 1001; *United States v. Toben-Builes*, 706 F.2d 1092 (11th Cir. 1983); *United States v. London*, 550 F.2d 206 (5th Cir. 1977); and *United States v. Fiztgibbon*, 619 F.2d 874 (10th Cir. 1980).
26. 31 U.S.C. § 5324(3) provides that no person shall for the purpose of evading the reporting requirements of § 5313(a) with respect to such transaction: (3) structure or assist in structuring, or attempt to structure or more domestic financial institution. 5324(3) has codified *Toban-Builes* and like cases and negates the effect of *Azalnoe, Varbel, and Denemark*.
27. The legislative history of the statute reveals that section 5324(3) was enacted to broaden the scope of the Bank Secrecy Act by criminalizing all currency transaction structuring schemes designed to evade the act's reporting requirements regardless of whether the $10,000 threshold at a single financial institution on a single day had been met. *See* S. Rep. No. 433, 99th Cong., 2d Sess. 22 (1986).
28. See Welling, 41 Fla. L. Rev. at 307.
29. Criminal violations of section 5324(3) are prosecuted under 31 U.S.C. § 5322, which imposes criminal sanctions for "willful" violations of the statute. The Fifth Circuit explained that an act is done "willfully" if done voluntarily and intentionally, and with the specific intent to do something the law forbids; i.e. with the bad purpose to disobey or disregard the law. *U.S. v. Camarena*, 863 F.2d 880 (5th Cir. 1988) (unreported decision), *cert. denied*, 109 S. Ct. 3158 (1989). The "willful" requirement is satisfied if the defendant acts with the bad purpose of circumventing the reporting requirements. *United States v. Hernando Ospina*, 798 F.2d 1570 (11th Cir. 1986).
30. The only intent noted in the Senate Report is the specific intent to cause a bank not to file CTR forms.
31. U.S. v. 316 Units of Mun. Securities, 725 F. Supp. 172 (S.D.N.Y. 1989). The decision of a federal district court in Texas (see reference in Mu. Securities at 175 to unreported district court opinion) that a criminal conviction under 5324(3) requires the defendant's knowledge that structuring is prohibited appears to conflict with a subsequent unreported decision by the Fifth Circuit Court of Appeals in Camarena (mere knowledge of the reporting requirements and intent to circumvent them satisfies the specific intent requirements, Mun. Securities at 178, and a recent decision by the Second Circuit. U.S. v. Scanio, 47 Cr. L. 1014 (2d Cir. March 16, 1990). Although the language and the legislative history of the anti-smurfing statute are silent on actual knowledge of illegality, to restrict prosecutions to those cases in which the government could only prove actual knowledge of the anti-structuring statute may contravene the legislative intent to broaden the scope of the currency reporting statute. *Id.* On the other hand, the lack of adequate notice of the structuring laws to bank customers breeds arbitrary and selective enforcement. See *United States v. Liparota*, 471 U.S. 419 (1985) (applying the rule of lenity, the court held that ignorance of the law is a defense).
32. Justice Department Handbook on the Anti-Drug Abuse Act of 1986, section 5324 of Title 31 (March 1987).
33. Villa, Banking Crimes, § 6.05(1)(c)(ii) at 6-59-60 and nn. 25.3, 26.
34. *United States v. Dela Espriella*, 781 F.2d 1432, 1435 (9thCir. 1986).
35. 31 U.S.C. § 5313(a).
36. *See n*.52. Although the anti-structuring statute indirectly places reporting requirements on individuals, a direct reporting requirement would obviously raise greater fifth amendment concerns.
37. *United States v. Cure*, 804 F.2d 625, 628-29 (11th Cir. 1986).
38. *United States v. Bucey*, 876 F.2d 1297 (7th Cir. 1989; *United States v. Nersesian*, 824 F.2d 1294, 1311-12 (2d Cir.) (bank customer involved in money laundering scheme had no legal duty to file a CTR himself) (dicta), *cert. denied*, ______U.S.______, 108 S.Ct.
357 (1987); *United States v. Rigdon*, 874 F.2d 774 (11th Cir. 1989); *United States v. Mouzin*, 785 F.2d 682 (9th Cir.), *cert. denied*, 479 U.S. 985 (1986); *United States v. Hawley*, 855 F.2d 595, 602 (8th Cir. 1988); *United States v. Rily*, 669 F.Supp. 196, 199-200 (N.D. I11. 1987).
39. *United States v. Bucey*, 876 F.2d at 1306.
40. *United States v. Anzalone*, 766 F.2d at 682.
41. *Kolender v. Lawson*, 461 U.S. 352 (1983).
42. *United States v. Porter*, 591 F.2d 1048, 1053 (5th Cir. 1979).
43. *Kolender v. Lawson*, 461 U.S. 352, 3257 (1983).
44. *See* n.10.
45. See Hearing Before Senate Comm. On Banking, Housing and Urban Affairs, 99th Cong., 2d Sess. 22, 30 (1986).
46. United States v. Halper, 109 S. Ct. 1892 (1989).
47. 416 U.S. 21 (1974).
48. 416 U.S. at 66-67.
49. The court also refused to decide whether a depositor was continually entitled to notice that the financial institution was reporting his banking activities. *Id.* at 69-70.
50. *Id.* at 78-79.
51. 425 U.S. 435 91976).
52. *United States v. Dichne*, 612 F.2d 632, 639-40 (2d Cir. 1979); *United States v. Sanchez Vazquez*, 585 F.Supp. 990, 995-96 (N.D. Ga. 1984). This issue was raised in *California Bankers Association v. Shultz*, 416 U.S. at 71-75.
53. H.R. Rep. No. 975, 91st Cong., 2d Sess., reprinted in 1971 U.S. Code Cong. & Admin. News 4396 ("Criminals deal in money – cash or its equivalent"); 99th Cong., 1st Sess. 51-52 (1985) ("What legitimate business in the united States of America today transfers money in cash?") (comments by Congressman McKinney).
54. 5 U.S.C. § 553; *United States v. Risk*, 843 F.2d 626, 632 (5th Cir.), *cert. denied*, 414 U.S. 1064 (1973).
55. *United States v. Carr*, 740 F.2d 339, 346, 347 (5th Cir. 1984); *United States v. Thaggard*, 477 F.2d 626, 632 (5th Cir.), cert. denied, 414 U.S. 1064 (1973).
56. *United States v. Murphy*, 809 F.2d 1427 (9th Cir. 1987); *United States v. Gimbel*, 632 F, Supp. 713 (E.D. Wis. 1984).
57. 54 Fed. Reg. 3023, No. 13 (Jan. 1989); Fed. Reg. 23289, No. 119 (June 1988).
58. Treasury also urged financial institutions to consider adopting systems with the ability to aggregate. 52 Fed. Reg. 11, 437 (1987).
59. 54 Fed. Reg. 3,023, 3,026 (1989).
60. In *United States v. Bank of New England*, 821 F.2d 844 (1st Cir.), *cert. denied*, 108 S. Ct. 328 (1987), the court affirmed the conviction of a bank on the failure of bank personnel to constitute flagrant indifference to obligations imposed by the Secrecy Act for the purpose of supporting a finding of willfulness.
61. *United States v. Jewell*, 532 F.2d (9th Cir.), *cert. denied*, 426 U.S. 951 (1976).
62. *See* Villa, Banking Crimes, § 6.05(3).
63. 54 Fed. Reg. 3,025 (1989).
64. *United States v. Puerto*, 730 F.2d 627, 632-34 (11th Cir.), *cert. denied*, *sub. nom. Everett v. United States*, 469 U.S. 847 (1984); *United States v. Tobon-Builes*, 706 F.2d 1092, 1099 (11th Cir. 1983); *United States v. Cure*, 804 F.2d at 628.
65. *United States v. Cure*, 804 F.2d at 628.
66. *United States v. Richter*, 610 F. Supp. 480 (N.D. I11. 1985), aff'd without opinion sub. nom. *United States v. Mangovski*, 785 F.2d 312 (7th Cir. 1986).
67. The conspiracy statute, 18 U.S.C.A. § 371, subjects to criminal liability two types of conspiracies to commit an offense against the United States.
68. 18 U.S.C. § 1961(1)(E).
69. 26 C.F.R. § 1.60501-1.
70. See 31 U.S.C. § 5312 and 31 C.F.R. § 103.22.
71. 31 U.S.C. § 5316.
72. 31 U.S.C. § 5325.

* Views expressed by the authors do not necessarily reflect the opinions and policies of the Department of Justice.