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REPORT BY THE

Comptroller General

OF THE UNITED STATES

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Federal Agencies' Initial Problems With The Right To Financial Privacy Act Of 1978

The Right to Financial Privacy Act sets procedures Federal agencies must follow in order to obtain access to customers' records maintained by financial institutions. GAO's review of the first 6 months under the new law showed that agencies are taking the proper steps to carry out its requirements. Some agencies, however, have had difficulties with several of the act's provisions. The agencies involved are currently working to resolve the administrative and interpretative problems connected with the act.

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UNITED STATES GENERAL ACCOUNTING OFFICE

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COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

B-118535

The Honorable John J. Cavanaugh
House of Representatives

Dear Mr. Cavanaugh:

As you requested in your March 7, 1979, letter, this report discusses Federal agencies' efforts to implement the Right to Financial Privacy Act of 1978. It also identifies the major difficulties experienced by the agencies in the first 6 months of operation under the act.

As arranged with your office, unless you publicly announce its contents earlier, we plan no further distribution of this report until 30 days after the report date. At that time, we will send copies to the Attorney General; the Secretary of the Treasury; the Chairmen of the Federal Reserve Board, the Federal Deposit Insurance Corporation, and the Federal Home Loan Bank Board; the Comptroller of the Currency; the Administrator of the National Credit Union Administration; the Director, Office of Management and Budget; and other interested parties and also make copies available upon request.

Sincerely yours,

Elmer B. Staats

Comptroller General
of the United States

COMPTROLLER GENERAL'S
REPORT TO THE HONORABLE
JOHN J. CAVANAUGH
HOUSE OF REPRESENTATIVES

FEDERAL AGENCIES' INITIAL PROBLEMS WITH THE RIGHT TO FINANCIAL PRIVACY ACT OF 1978

DIGEST

Agencies have made some progress in implementing the 1978 Right to Financial Privacy Act, although some report difficulties in complying with its requirements. The purpose of the act is to protect financial institutions' customers from unwarranted governmental intrusion, while at the same time permitting legitimate law enforcement activity. GAO believes that, before determining whatever changes to the law are needed, agencies need more time to work out administrative problems.

Effective in March 1979, the act established procedures Federal agencies must follow to obtain access to customer records. Essentially every Federal agency which uses customer financial information, especially such law enforcement agencies as the Departments of Justice and Treasury, is affected by the act.

Approximately 15,000 banks, about 4,600 savings and loan associations, and numerous credit unions, credit card issuers, and other financial institutions are affected, because they are responsible for releasing customer financial records only after the appropriate procedures have been followed. In addition, the act gives customers the right to challenge, in court, any access to their records by Federal agencies.

AGENCY EFFORTS TO COMPLY WITH THE ACT HAVE GENERALLY BEEN SUCCESSFUL

Agencies have issued regulations, revised manuals and procedures, instructed employees in the provisions of the act, developed forms, and taken steps to compile required evaluation data. In addition, some agencies have provided instructions to financial institutions. (See pp. 5 to 15.)

It is too soon for GAO to assess whether or not these efforts will assure future compliance with the Right to Financial Privacy Act. However, most agencies appear to be making reasonable progress in meeting its requirements. (See pp. 14 and 15.)

SIGNIFICANCE OF INITIAL PROBLEMS CANNOT BE DETERMINED

Shortly after passage of the act several problems occurred. They affect mainly law enforcement agencies, such as the Department of Justice, but they also affect bank supervisory agencies. Many of these problems undoubtedly are attributable to the newness of the act and may be resolved as agencies gain more experience with it.

Major difficulties with the act centered around:

--Controversy between some supervisory agencies and Federal law enforcement agencies over the interpretation of criminal referral procedures. (See pp. 17 to 24.)

--Refusal by financial institutions to provide sufficient data on suspected criminal violations to law enforcement agencies. (See pp. 24 to 26.)

--Refusal by financial institutions to honor the formal written requests for information by Federal law enforcement agencies. (See pp. 26 to 28.)

--Uncertainty over whether banking supervisory agencies have the authority to exchange information derived from customer records. (See pp. 28 to 30.)

AGENCY COMMENTS

The Department of Justice, the Comptroller of the Currency, the Federal Reserve Board, and the Federal Deposit Insurance Corporation generally agreed with the problem areas GAO identified and with GAO's assessment of their activities to carry out the law. (See apps. II through V.)

The Federal Reserve Board agreed with GAO's position that when supervisory agencies make criminal referrals containing customer financial information, the customer must be notified within 14 days of the referral, unless a delay order is approved by a court. The Department of Justice, the Federal Deposit Insurance Corporation, and the Comptroller of the Currency disagreed. They maintain, as pointed out in the Department of Justice's legal opinion on this issue, that supervisory agencies have implied authority to report certain suspected criminal offenses to law enforcement authorities without notifying the customer.

Contrary to the Justice opinion, GAO believes the act requires prompt customer notification when protected financial information is disclosed. The legislative history shows that authority for supervisory agencies to make criminal referrals without customer notification was rejected in an attempt to balance both privacy and law enforcement considerations.

Both the Department of Justice and the Federal Deposit Insurance Corporation agreed with GAO's conclusion that limited agency experience with the act prevents a meaningful assessment of these difficulties. They agreed that more operating data and more time is needed to formulate agency positions.

The Office of the Comptroller of the Currency and the Federal Reserve Board stated that agency experience is sufficient to justify amending the act. The Comptroller stated that the problems relating to the interagency transfer and criminal referral processes are real. He noted that unless appropriately amended, the act can reasonably be expected to frustrate coordination of investigations among the financial supervisory agencies and to interfere with referrals to the Department of Justice.

CHAPTER 2

AGENCY EFFORTS TO COMPLY WITH THE LAW

HAVE GENERALLY BEEN SUCCESSFUL

Since March 1979, most Federal agencies have made reasonable progress in implementing the actions necessary to comply with the act. Some, generally those most affected by the act, have undertaken extensive implementation steps. Others, generally those which only occasionally use customer financial records, have placed less emphasis on the implementation process. Specific actions that have been taken include

--issuing regulations,

--revising procedures and training personnel,

--developing procedures to monitor the effect of the act on agency operations,

--providing instructions to financial institutions, and

--coordinating efforts with other Federal agencies.

Federal agencies affected by the act can be grouped into three categories: law enforcement, banking supervisory, and other agencies. Law enforcement agencies frequently use financial records to investigate white collar and organized crime. Banking supervisory agencies (referred to as supervisory agencies in this report), which regulate financial institutions, have continuous contact with financial institutions and review customers' records. Other agencies is a category which includes a variety of agencies usually minimally affected by the act. Those agencies generally utilize customer financial records in administering agency programs such as loan guarantees or personnel security investigations.

AGENCIES ISSUE REQUIRED REGULATIONS

Generally, those Federal agencies required to issue regulations have done so in compliance with the act. The act requires agencies using the formal written request to issue regulations governing its use. Further, the Federal Reserve Board is required to issue regulations establishing reimbursement rates to be paid by Government agencies obtaining records from financial institutions.

C o n t e n t s

ABBREVIATIONS

FBI	Federal Bureau of Investigation
FDIC	Federal Deposit Insurance Corporation
FHLBB	Federal Home Loan Bank Board
FRB	Federal Reserve Board
GAO	General Accounting Office
NCUA	National Credit Union Administration

OCC	Office of Comptroller of the Currency
OMB	Office of Management and Budget
USPS	U.S. Postal Service
USSS	U.S. Secret Service

CHAPTER 1

INTRODUCTION

In the Right to Financial Privacy Act of 1978, effective March 10, 1979, the Congress established procedures to safeguard the privacy of personal financial records maintained by financial institutions. Every Federal agency which utilizes personal financial records obtained from financial institutions, especially the law enforcement agencies such as the Departments of Justice and Treasury, is affected by the act and must follow certain procedures before obtaining access to these records.

Approximately 15,000 banks, about 4,600 savings and loan associations, and the numerous credit unions, credit card issuers, and other financial institutions are also affected. This is because they are responsible for releasing customer financial records to Federal agencies only after the appropriate procedures have been followed. In addition, the act gives customers the right to challenge, in court, any access to their records by Federal agencies.

In March 1979, Congressman John J. Cavanaugh, a member of the House Committee on Banking, Finance and Urban Affairs, requested that we review the implementation of the act during its first 6 months of operation. As the act's principal sponsor, he was interested in monitoring Federal agencies' implementation efforts.

The purpose of our review was to determine the progress Federal agencies had made in implementing the act and the problems they encountered. For our purpose, implementation consists of actions to incorporate the act into agency operating procedures, including:

--Issuing regulations.

--Providing guidance to agency personnel through operating manual revisions, internal guidelines, and training.

--Establishing procedures for monitoring the act's impact.

--Informing nongovernment organizations of the act.

--Establishing procedures for interagency coordination.

PURPOSE OF THE ACT

Financial privacy legislation was enacted because of congressional concern over the Federal Government's access, without notice to the customer, to individuals' financial records maintained by financial institutions. Generally, the courts have upheld relatively unrestricted Government access to these records. As late as 1976 the Supreme Court, in U.S. vs. Miller 425 U.S. 435 (1976), held that an individual had no constitutional right to privacy in records maintained by a financial institution.

As individuals became more aware of the Government's access to these records, concern mounted. The Privacy Protection Study Commission reported in July 1977 that inspections were made without the customer's knowledge and without a formal record of the inspection.

The sensitivity of financial records, which can provide much personal information, combined with the necessity for most people to use financial institutions, caused many of these concerns. The ability of our modern day computers to accumulate and easily retrieve such data was also a factor. The Congress has considered financial privacy legislation since the early 1970s. Recognizing the need for privacy, as well as the need for legitimate Government access to financial institutions' records, the Congress enacted the Right to Financial Privacy Act of 1978 (Title XI of the Financial Institutions Regulatory and Interest Rate Control Act of 1978, Public Law 95-630, November 10, 1978). The act will be codified at 12 U.S.C.§§ 3401-3422.

The purpose of the act is to protect customers of financial institutions from unwarranted governmental intrusion into their financial records, while at the same time permitting legitimate law enforcement activity. To accomplish this objective, the act specifies procedures Federal agencies must follow to obtain access to financial records.

Generally, a Federal agency may obtain access to customer financial records through one of five specified access methods. These are

--customer authorization,

--administrative subpoena or summons,

--search warrant,

--judicial subpoena, and

--formal written request.

The customer authorization is a voluntary agreement by the customer to allow Government access to financial records for a period not to exceed 3 months. The administrative subpoena or summons is a legally enforceable demand for records issued by a Federal agency authorized to do so. A search warrant is a legal order for the production of information issued by a Federal magistrate or by any State judge of a court of record in the district in which the records sought are located. A judicial subpoena is a court order requiring the production of records. The formal written request is a formal request for financial records by a Federal agency which does not have administrative subpoena or summons authority. When using any of the access procedures, agencies must certify to the financial institution that they have complied with the act.

Except when a delay of notice is approved by a court, Federal agencies are required to notify a customer that records are being sought and to advise how to challenge the access. The customer may object in court to the access on the grounds that it is not for a legitimate law enforcement purpose, the records are not relevant to the inquiry, or the Federal agency did not comply with the act. If the customer objects, the requesting agency must prove that the access is related to a legitimate law enforcement purpose and that it has substantially complied with the act.

The act also provides for an emergency access procedure if there is imminent danger of physical personal injury, serious property damage, or flight to avoid prosecution. As with the other access methods, the agencies must certify compliance with the act to the financial institution. In addition, within 5 days of the emergency access, the Government must file with an approporiate court a statement explaining the reasons. Unless a court approves a delay of notice, the Government must notify the customer as soon as practical that access has been obtained.

Financial records obtained pursuant to the act may not be transferred to other Federal agencies unless the transfer is to facilitate a legitimate law enforcement inquiry. If records are transferred, the customer must generally be given postnotice of this transfer.

PRIOR GAO REPORT

A prior GAO report on financial privacy was issued on March 12, 1979, and entitled "Disclosure and Summons Provisions of 1976 Tax Reform Act-Privacy Gains with Unknown Law Enforcement Effects" (GGD-78-110). The report discusses the requirement that IRS notify the affected taxpayer after issuing a summons to a third-party recordkeeper and the restrictions placed on other agencies' right of access to tax information.

CHAPTER 2

AGENCY EFFORTS TO COMPLY WITH THE LAW HAVE GENERALLY BEEN SUCCESSFUL

Since March 1979, most Federal agencies have made reasonable progress in implementing the actions necessary to comply with the act. Some, generally those most affected by the act, have undertaken extensive implementation steps. Others, generally those which only occasionally use customer financial records, have placed less emphasis on the implementation process. Specific actions that have been taken include

--issuing regulations,

--revising procedures and training personnel,

--developing procedures to monitor the effect of the act on agency operations,

--providing instructions to financial institutions, and

--coordinating efforts with other Federal agencies.

Federal agencies affected by the act can be grouped into three categories: law enforcement, banking supervisory, and other agencies. Law enforcement agencies frequently use financial records to investigate white collar and organized crime. Banking supervisory agencies (referred to as supervisory agencies in this report), which regulate financial institutions, have continuous contact with financial institutions and review customers' records. Other agencies is a category which includes a variety of agencies usually minimally affected by the act. Those agencies generally utilize customer financial records in administering agency programs such as loan guarantees or personnel security investigations.

AGENCIES ISSUE REQUIRED REGULATIONS

Generally, those Federal agencies required to issue regulations have done so in compliance with the act. The act requires agencies using the formal written request to issue regulations governing its use. Further, the Federal Reserve Board is required to issue regulations establishing reimbursement rates to be paid by Government agencies obtaining records from financial institutions.

Agencies issue regulations for obtaining customer records through the noncoercive procedure

Certain Federal agencies, as required by the act, have issued regulations specifying procedures to use when obtaining financial records through the formal written request. This is a new noncoercive procedure for gaining access to financial records and is to be used by agencies which have authority to investigate violations of law but which lack administrative summons or subpoena power. The request is not legally enforceable, but it is intended to provide a voluntary means for financial institutions to cooperate with Government agencies legitimately seeking records and to preserve the customer's notification and challenge rights. The formal written request could be used by law enforcement components of four agencies in our review--the Departments of Justice, Treasury, and Defense and the U.S. Postal Service (USPS). Justice, Treasury, and USPS issued final regulations governing the use of this procedure on March 13, March 20, and July 5, 1979, respectively.

Each of these regulations follows essentially the same format. The request consists of a letter or memorandum, to be signed by an appropriate official of the requesting Government agency, to an appropriate official of the financial institution. It is to identify the customer, describe the records, and include any other appropriate information. These regulations require that the formal written request contain the signing official's name, title, business address, and telephone number. The regulations require the request to be issued by a supervisory official designated by the head of the requesting unit.

The Department of Defense has not yet issued regulations to implement the formal written request procedure. Department officials advised us that the delay in issuing the regulations is caused by the time required to develop a single departmental regulation coordinated with all affected Defense components. These officials told us that through September 1979, Defense components had no occasion to use the formal written request.

Federal Reserve Board promulgates reimbursement regulations

The Federal Reserve Board has also taken steps to comply with the act's requirement for issuing regulations. The act requires Federal agencies to generally reimburse financial institutions for the costs associated with providing financial records. In accordance with the act, the Federal Reserve Board has issued regulations establishing rates.

On August 2, 1979, the Board published, for comment, proposed regulations, suggesting a rate of $5 per hour for personnel time and 10 cents per page for reproduction cost. After considering the 108 letters of comment, the Board issued final regulations on September 27, 1979.

These regulations, effective October 1, 1979, allow reimbursement for personnel time, reproduction, and transportation costs. A rate of $10 per hour is established for personnel time spent in locating, retrieving, reproducing, packaging, and preparing documents for shipment. The rate for reproduction costs is 15 cents per page, and reimbursement for personnel, reproduction, and transportation is limited to reasonably necessary costs directly incurred.

AGENCIES REVISE PROCEDURES AND TRAIN EMPLOYEES TO COMPLY WITH THE ACT

In addition to revising operating procedures, several affected agencies had taken other actions to instruct employees concerning the act's provisions. These actions include

--developing standard forms to be used in obtaining financial records,

--distributing instructional and procedural memos and training employees, and

--providing answers to employee questions.

Operating procedures are revised

The Departments of Justice, Treasury, and the Federal Trade Commission (FTC) have revised their operating manuals. The revisions provide a brief explanation of the act, together with instructions, guidelines, and model forms. Generally, the revisions highlight the sections of the act most applicable to the agency. Among the subjects covered are

--the access methods available to the agency,

--the required certificate of compliance provided to financial institutions,

--records covered by the act,

--customers covered by the act,

--customer notification requirements,

--procedures for obtaining a delay of customer notice,

--dissemination of information obtained pursuant to the act to other Federal agencies,

--penalties for failure to comply with the act, and

--the reporting requirements.

The Department of Justice revised the U.S. Attorneys' manual effective March 10, 1979. This timeliness was primarily attributable to the departmental task force which had been established to implement the act. The FTC on the other hand did not distribute a revised manual until July 1979. However, their delay was not as significant as it may seem because of the minimal effect the act has on this agency.

Each of the supervisory agencies had established interim or finalized procedures for transferring information about suspected criminal violations to the Department of Justice. Differences in the transfer procedures exist, with those differences centering primarily on the supervisory agencies' legal responsibility for notifying the customer of the information transferred to the enforcement agency. The source of the differences is the conflicting interpretations of the act's requirements by the Department of Justice and supervisory agencies. This is further discussed in chapter 3.

Standardized forms are used

In order to maintain uniformity and lessen the burden on employees, most agencies have standardized forms to comply with certain provisions of the act. Agencies have both adopted their forms from model forms developed by Justice and Treasury and developed forms independently. The most common model forms used by the agencies include:

--Customer consent and authorization for access to financial records.

--Certificate of compliance with the act.

--Customer notice.

--Customer's motion to challenge Government access to financial records.

--Customer's sworn statement for filing a challenge.

--Certificate of service.

--Delay of notice order.

Major Federal agencies using standardized forms are the Departments of Justice, Treasury, the USPS, the FTC, the Department of Commerce's Office of the Inspector General, and several agencies of the Department of Agriculture. The Justice forms were developed by an implementation task force prior to the effective date of the act.

Employees receive instructional and procedural memos and classroom training

Another means agencies have to inform their employees about the act is formal instructional or procedural memos. This method was used by each of the agencies in our review. These memos generally contain a brief description of the act, but they vary from simple summaries of the act and how it affects the agency to extensive analysis of its provisions. Many of these were distributed prior to or just after the effective date of the act.

Agencies have also undertaken to advise affected employees of the act through both formal and informal instruction. Generally, the law enforcement and banking supervisory agencies had provided training to their employees. However, several of the other agencies minimally affected by the act determined that at the present time training is not necessary.

An example of the type of training is that being provided by the Federal Bureau of Investigation (FBI). During April, May, and June 1979, 1-day training sessions, including subjects other than the act, was provided to field privacy control officers. The officers represented about 75 percent of the field offices. These individuals serve as field office advisors on privacy matters.

Two additional hours of training were provided to the principal legal advisors in the field offices. Training on the act has been included in the FBI's annual 1-day

Regional Privacy Seminars conducted for all the field offices and in a 1-day white-collar crime retraining session at the FBI Academy.

The Federal Law Enforcement Training Center also provides training on the act. The Center provides training to Federal Investigative personnel, including employees from various Inspector Generals' offices. The act is covered in the Center's basic criminal investigation course and the advanced criminal investigation course on white collar crime. Approximately 1,250 and 575 students attend these 2 courses each year. The act is also discussed in the sources of information class and is included in classes on the Privacy Act of 1974 and the Freedom of Information Act.

Four banking supervisory agencies, the Federal Reserve Board, the Office of the Comptroller of the Currency (OCC), the Federal Deposit Insurance Corporation (FDIC), and the National Credit Union Administration (NCUA) have provided training to their examiners. This was usually included in established courses and consisted of less than 2 hours of instruction.

Even though training has not been formalized in some agencies, informal training such as lectures and/or speeches has been provided. These are presented to headquarters as well as field office personnel. Generally, employees at these sessions are given a chance to ask questions about the act. For example, the Small Business Administration has held a series of regional meetings at which the act was discussed. Also, some agencies will provide training if they determine it is needed.

Another way of informing agency employees of the provisions of the act is through answers to employees' questions. Most questions are resolved by telephone, but some are answered formally in writing. The FBI estimates that hundreds of calls between headquarters and the field have been made to clarify the act. Department of Justice officials have answered questions for Department personnel and other officials. Commenting on our draft report, the Board stated that it has been very active in disseminating advice by telephone to governmental and private organizations.

AGENCIES MONITOR THE EFFECT OF THE ACT ON THEIR OPERATIONS

In order to determine the act's effect on agency operations and to provide required information to the Congress, most agencies have taken steps to accumulate statistical information. The act requires agencies to report to the Congress concerning activity under the act. The report is due in April of each year for the preceding calendar year and is to include

--the number of requests for records made pursuant to each of the five access methods;

--the number of times records were requested pursuant to the emergency access procedure, foreign counter-intelligence activities, and the protective functions conducted by the Secret Service; and

--the number of times customer notices were delayed.

In addition, the Administrative Office of the U.S. Courts is required to report information annually to the Congress on the number of delays of notice and the number of customer challenges. The report, due in April for the preceding calendar year, is to include

--the identity of the Government authority requesting a delay of notice,

--the number of notice delays sought and the number granted, and

--the number of customer challenges made and the number successful.

Most of the reporting requirements affect the law enforcement agencies. Some agencies have developed standardized formats to accumulate and report the information. For example, the Department of Justice developed a standardized format for reporting of statistics by its various components.

The banking supervisory agencies generally obtain financial records under an exception and are not required to report statistics. Other agencies which have neither law enforcement nor supervisory responsibility are required to report to the Congress only when they obtain financial records through one of the five access methods. However, in many instances these agencies obtain records under an exemption and are not required to report statistics.

The frequency of reporting from field offices varies by agency. Some law enforcement agencies, such as the FBI, require their field offices or components to report quarterly while other agencies require this information to be submitted annually. In at least one agency (Department of Commerce's Inspector General Office) an auditor/investigator is required to notify the Counsel to the Inspector General whenever he intends to examine financial records pursuant to the act. The Counsel to the Inspector General then maintains a continuous record of the number of times the act is used.

The FBI was the only agency which made extensive use of the act that could provide us with statistical information. The information as of December 31, 1979, shows the following:

Number of formal written requests utilized	484
Delay notices utilized	26
Number of customer authorizations utilized	1,189
Number of judicial subpoenas utilized	80
Number of search warrants issued	1
Special Procedures	
Foreign counterintelligence requests	(note a)
Number of emergency access requests utilized	1

Note a: Number of foreign counterintelligence requests not shown for security reasons.

In March 1979, the Administrative Office of the U.S. Courts provided instructions and forms to be used by the clerks of the U.S. Courts in reporting under provisions of the act. As of December 31, 1979, the administrative office reported 15 customer challenges to Government access.

AGENCIES PROVIDE ASSISTANCE TO FINANCIAL INSTITUTIONS

To help institutions comply with the act while at the same time promoting cooperation with the Government, Federal agencies have attempted in various ways to inform financial institutions about the act. Since financial institutions must comply with the act in releasing customer financial records, they need to understand its provisions.

Banking institution officials told us that they become familiar with the act through their legal staffs or consultants and by information published by banking and trade associations. For example, the Consumer Bankers Association published a compliance manual for the act. The manual gave a legislative history of the act and described the various provisions and their effect on banks. Also, the United States League of Savings Associations provided a copy of the act and an analysis of its provisions to its member savings and loan associations.

The banking supervisory agencies and the Department of Justice have provided information. In November 1978, the FDIC and the OCC sent a summary of the act's provisions to the institutions they supervise. The NCUA published a summary of the act in its publication for the Credit Union community. A Federal Home Loan Bank Board (FHLBB) official published an article on the act in a savings and loan trade journal.

The Department of Justice, with advice from the supervisory agencies, prepared an analysis of the act and its effect on the disclosure of financial information by financial institutions to Federal law enforcement authorities. The analysis explained the records covered by the act, the information financial institutions can provide to Federal law enforcement agencies, and the access methods available to these agencies for obtaining customer financial records. Justice requested the banking supervisory agencies to forward this document to their respective financial institutions. However, as of mid-October 1979, the FDIC and the Office of the Comptroller of the Currency were the only agencies to do so. The NCUA and the FHLBB had not yet decided if they agreed with the analysis.

In its April 4, 1980, response to our draft report, the Federal Reserve Board stated that it revised the Justice advisory and sent it to the Federal Reserve Banks, for transmittal to State member banks. This was sent to the Federal Reserve Banks on April 3, 1980.

COORDINATION AMONG AGENCIES LED BY DEPARTMENT OF JUSTICE

The Department of Justice has taken a lead agency role in the Federal Government's efforts to comply with the act. It has coordinated its efforts with and provided assistance to other Federal agencies. Most Federal agencies in our review were aware of the Department's activity and publications on the act. Although Justice has influenced the actions of some agencies, not all have agreed with Justice's advice. This is discussed further in chapter 3.

The Department of Justice is not only affected by the act in the investigation of criminal activities but also represents Government agencies and employees in litigation. Because of this, the Department has a special interest in ensuring that other Federal agencies comply with the act.

Prior to the effective date of the act, Justice established an implementation task force made up of representatives from its investigating agencies and litigating divisions. Much of the material drafted by the task force to advise department personnel of the act was also provided to other Federal agencies. In addition, task force members participated in meetings with other agencies on the act. Justice officials attribute its own implementation progress, as well as that of several other Federal agencies, to the efforts of this task force.

Another example of Justice's coordination efforts are those it undertook with the Department of Treasury. This resulted in these two departments adopting many of the same forms for obtaining and transferring customer financial information. Several of the forms, such as the certificate of compliance for financial institutions, customer authorization, formal written request for financial institutions, customer notice, and customer postnotice of the use of a search warrant to obtain financial records are the same within the agencies.

Justice also prepared a letter which was sent to other Federal agencies on June 25, 1979. Its purpose was to advise agencies of the act and the potential effect it would have on their operations. The letter also served to give the agencies a brief description of the act and to invite them to contact the Department for assistance in complying with its provisions. Justice also issued a legal opinion and an analysis on the transfer of records from banking supervisory agencies and financial institutions respectively to law enforcement agencies. These are further discussed in chapter 3.

CONCLUSION

The act affects many Federal agencies and most financial institutions. In order to comply with the act, Government agencies have taken a number of steps. Many agencies have revised manuals and procedures, instructed employees in the provisions of the act, developed forms, and taken steps to compile evaluation data required by the act; some agencies have provided instructions to financial institutions. Although it was too early for us to assess whether or not these efforts will assure future compliance, most of the agencies appear to be making reasonable progress, and the actions taken thus far seem to comply with the act. Many of the future efforts will be addressed to resolving problems identified during the early months of operating under the act and problems that arise as the agencies become more experienced with the act.

AGENCY COMMENTS

The Department of Justice, the Federal Deposit Insurance Corporation, and the Federal Reserve Board generally agreed with our assessment of agencies implementation activities.

CHAPTER 3

SIGNIFICANCE OF INITIAL PROBLEMS UNCERTAIN

Federal agencies, in particular the law enforcement agencies, are finding the act more difficult to work with than was originally anticipated. Asserting that the act is hindering their investigative activities, law enforcement agencies maintain that the act restricts access to customer financial records. As a result, the agencies may need to rely more extensively on the grand jury subpoena to obtain the required records.

Agencies' major difficulties result from:

--Controversy between the supervisory agencies and Federal law enforcement agencies over interpretation of criminal referral procedures.

--Refusal by financial institutions to provide sufficient data on suspected criminal violations to law enforcement agencies.

--Refusal by financial institutions to honor the non-coercive access method.

--Uncertainty over whether supervisory agencies have the authority to exchange information derived from customer records.

Another difficulty, which is primarily a concern of Justice, is the possibility that court cases on customer challenges may take longer to be decided than the 7 days allowed by the act.

The agencies involved are currently working to resolve the administrative and interpretative problems connected with the act. Several agencies believe some of the problems can only be resolved by clarifying the act's lanaguage. To accomplish this, these agencies have submitted suggested amendments to the Office of Management and Budget (OMB).

With regard to the act's administrative difficulties, we believe it is premature to propose amendments until agencies have gained additional experience and have a further opportunity to resolve these problems. Failure to resolve interpretative problems may ultimately result in a judicial resolution of the controversy. Therefore, the Congress may want to clarify its intent regarding transfer of records between supervisory and law enforcement agencies.

CONTROVERSY BETWEEN LAW ENFORCEMENT AND SUPERVISORY AGENCIES OVER INTERPRETATION OF CRIMINAL REFERRAL PROVISIONS

The law enforcement and some supervisory agencies disagree over the interpretation of the act's criminal referral procedure. The essence of the problem is the need for customer notification when information obtained by the supervisory agencies about suspected criminal violations is provided law enforcement agencies. As a result, in its early stage, the act has somewhat impeded these referrals.

The violations at issue concern offenses related to the management of the financial institution. The Department of Justice's interpretation is that these referrals can be made without customer notification, but some supervisory agencies either disagree with this or are undecided. Justice also maintains that customer notice may jeopardize investigations and that the act does not provide sufficient time to obtain a court order delaying notice. In our view, the legislative history of the act does not support the Justice interpretation. As a result, we believe that, when supervisory agencies make criminal referrals containing customer financial information, the customer must be notified within 14 days of the referral, unless a delay order is approved by a court.

Prior to the act, whenever supervisory agencies suspected that a Federal crime affecting the management of a financial institution had been committed, they would routinely notify the appropriate Federal law enforcement agency. Their notification would provide a detailed analysis of the customer records as support. The suspected crimes generally were against the financial institutions--for example, theft or embezzlement by an officer or employee. These referrals, according to law enforcement and supervisory agency officials, were an important source of information.

Supervisory agencies generally do not have data showing the frequency and significance of these referrals. However, FDIC did have information which showed that it made 744 criminal referrals to the Department of Justice in calendar year 1978. An FDIC official said that on the basis of the types of violations reported, the majority involve offenses related to the management of the financial institution, and approximately 20 percent of criminal irregularities involved customer records. Therefore, approximately 149 of FDIC's criminal referrals in 1978 would involve customer records.

The act does not give supervisory agencies express authority to refer suspected criminal violations to law enforcement agencies. The lack of this express authority has caused confusion and disagreements between the Justice Department and several supervisory agencies about what procedures to use in referring suspected criminal violations to law enforcement agencies. The initial result of this confusion was a moratorium on criminal referrals by these agencies for about a 2-month period after the effective date of the act.

According to officials of some supervisory agencies, the effect of this halt in criminal referrals was minimized because the financial institutions referred most of the suspected violations to the Justice Department. The act permits financial institutions to report suspected criminal offenses to the appropriate law enforcement agencies in a nonidentifiable form without notice to the customer. However, the records cannot be transferred without notice to the customer unless a delay is permitted by court order. Department of Justice officials expressed concern that when bank officials themselves are involved, the financial institutions are unlikely to make such independent referrals. Therefore, Justice officials maintain that the supervisory agencies need to make these referrals.

The Department of Justice maintains that the referrals should be sufficiently detailed to allow the law enforcement agency (1) to determine that reasonable grounds exist to believe there is a criminal violation and (2) to reasonably describe the records in a request for access. Justice also contends that notice to the customer for criminal referrals could in many cases be highly detrimental to the criminal investigation and prosecution. Moreover, it believes that the 14-day delay period for this notice is too short. It maintains that this is not sufficient time to determine if a delay order should be sought and to go to Court to get the order.

In addition, the FBI contends that criminal referrals using nonidentifiable customer information do not provide sufficient information to conduct an investigation. For example, in June 1979, one of OCC's Regional Offices referred three suspected criminal violations in one financial institution to the U.S. Attorney using nonidentifiable customer information. These suspected violation reports deleted all names, replacing them instead with ABC Bank, Bank President X, D Corporation, and so forth. When referred by the U.S. Attorney to the FBI for investigation, the FBI stated that no investigation was possible due to the lack of basic, necessary identifying information. In October 1979, the FBI had still not obtained additional identifying information and had not initiated any further investigation.

Neither the Justice Department nor the supervisory agencies had data on the number of criminal referrals made where the 14-day delay period was considered too short or where the nonidentifiable customer information method was used. Therefore, the extent of this problem could not be shown.

Department of Justice's attempt to resolve the controversy not accepted by all supervisory agencies

On May 22, 1979, the Justice Department issued a legal opinion to help resolve the issue of whether supervisory agencies have the authority to refer suspected criminal violations to law enforcement agencies. The opinion basically concludes that although the act does not expressly grant such authority, these agencies have "implied" authority to make such referrals without notifying the customer. However, this authority is limited to offenses directed against a financial institution. This conclusion is based on the premise that transfers of information related to crimes involving a financial institution's operations have long been considered part of a supervisory agency's responsibility, and the act was only 1 of 20 titles of legislation primarily designed to strengthen the operation of supervisory agencies. The opinion states in part that:

> "It would be anomalous to conclude that a statute which was intended on the whole to strengthen the regulation of financial institutions was also intended to deprive the regulators of one of their oldest and strongest weapons for dealing with the most serious cases of management abuse."

The opinion also concludes that the scope or content of these criminal referrals should only provide sufficient information to enable law enforcement agencies to determine if an investigation is warranted and if so, to obtain access to the necessary records. In an accompanying memorandum, Justice provided information on the types of criminal offenses which the supervisory agencies may properly refer under implied authority. The memorandum also included a list of specific information derived from customer records that may be included in these referrals. The opinion also concluded that supervisory agencies do not have implied authority to report crimes that are unrelated to their supervisory function.

The supervisory agencies' reactions to the opinion and Criminal Division memorandum were mixed. FDIC accepted the opinion. Other supervisory agencies, however, disagree with the Department of Justice's position or have not yet decided if they will accept it. The basis for the disagreement is also recognized in the Justice Department's opinion. This opinion states that based on the act's language and legislative history, the courts may find that a supervisory agency must give notice to the customer when reporting a crime related to the management of the financial institution.

As of October 1979, except for FDIC, the supervisory agencies had policies to make referrals by providing notice to the customer or by using nonidentifiable information in the referral. The OCC, the FHLBB, and the NCUA currently use both procedures, depending on the circumstances. In most instances the Federal Reserve Board will make referrals only when the member bank has failed to do so. If a Federal Reserve Board referral is necessary, the customer notice method is used.

<u>Agencies propose amendments to clarify criminal referral controversy</u>

The Department of Justice and most supervisory agencies, including FDIC, all advocate amending the act to clarify the authority of supervisory agencies to make criminal referrals without giving notice to the customer. Most proposed amendments would simply give this type of criminal referral authority to supervisory agencies.

The Department of Justice, however, has provided to OMB a more comprehensive amendment package. The Department of Justice wishes to clarify the definition of "financial record" to restrict coverage of the act to account information only (application for or debit or credit to a demand deposit, savings, share, loan or credit card account). In addition, it would change the existing language of this section: "(financial record) means an original, copy of, <u>or information known to have been derived from</u> any record held by a financial institution * * * " (emphasis added) essentially by replacing the underlined wording with "or summary of." The Department states the proposed change would permit disclosure, as in reports of crime, of financial information as long as no original, copy or detailed summary of protected financial records is disclosed without process.

The Justice Department would also amend the act to include express authority for any financial institution, supervisory agency or other Government authority, or any officer, employee, or agent thereof, to report possible violations of any statute or rule, regulation, or order issued pursuant thereto, to the Government authority with investigative jurisdiction. It would also specify the scope of such a report similar to that presented in the Criminal Division's memorandum on the Justice opinion (discussed earlier in this chapter) and the Justice Department's guidance for financial institutions as discussed later in this chapter.

Legislative history does not support implied authority

In our view the Justice opinion overlooks the act's separate history which indicates that it does have purposes distinct from the rest of the Financial Institutions Regulatory and Interest Rate Control Act of 1978. These purposes could be viewed as contradictory to the overall intention of that act to strengthen the authority of supervisory agencies to regulate financial institutions.

In its response to our draft report, Justice objected to our opinion that the purpose of the act could be viewed as contradictory to the overall intention of the Financial Institutions Regulatory and Interest Rate Control Act of 1978, of which the Right to Financial Privacy act is a part. However, as discussed, we believe the legislative history shows that the Right to Financial Privacy Act does have purposes distinct from the rest of the overall act. Although the main thrust of the overall act is to strengthen the supervisory authority of Federal agencies regulating depository institutions, the whole focus of the Right to Financial Pricacy Act and the bills which preceded it was customer privacy.

Financial privacy legislation was introduced as many separate bills in several Congresses in response to the case of U.S. vs Miller. On the basis of many of these bills, H.R. 8133, 95th Congress, was introduced. The House Committee on Banking, Finance and Urban Affairs included this bill as Title XI of the Financial Institutions Regulatory Act of 1978.

Prior bills were more restrictive than H.R. 8133. For example, H.R. 215, 95th Congress, the "Bill of Rights Procedures Act of 1977," prohibited government agents from receiving information from or access to financial records without the consent of the customer or in response to a judicial or administrative subpoena or search warrant. Although that bill permitted financial institutions to notify law enforcement agencies of suspected criminal law violations, access was limited to methods prescribed for other financial records and no such authority was granted to supervisory agencies.

In addition, H.R. 1985 95th Congress, the "Right to Privacy Records Act," excepted information disclosed to supervisory agencies from notice requirements but provided no such exception for the transfer of information. The purpose of this provision was to enable the agencies to carry on their supervisory responsibilities. H.R. 2603, 95th Congress, the "Right to Financial Privacy Act of 1977," and numerous identical bills addressed this issue. They permit financial institutions but not supervisory agencies to give law enforcement agencies notice of suspected criminal violations only against the financial institution itself. However, access is permitted only through methods authorized by the present act and only with notice to customers. All transfers of records, including those between supervisory agencies, are prohibited unless specifically authorized by statute, and Government use of records is restricted to the statutory purposes for which the records were originally collected.

The Department of Justice points out that the restrictive H.R. 8133 allowed supervisory agencies to report crimes without notifying customers. However, since this section of the bill was deleted by amendment, statutory rules of interpretation would cause us to conclude that such an omission was intentional in the absence of convincing evidence to the contrary. Justice's assertion, in its response, that this deletion was "not purposeful" is discounted by a footnote in the Department's legal opinion which concluded:

> ".....express permission to refer was included in the bill at all points until its passage by the House and was referred to in the Committee report. However, the legislative history of 1112 shows that this authority was omitted in the Goldwater-McKinney amendment rather than through clerical inadvertence. Since the Department reviewed and assented to the text of the amendment, we can hardly argue accidental omission."

The Committee Report stated that H.R. 8133 was based on two key principles: (1) that customers be given prior notice to the Government's attempt to gain access to their bank records and (2) that customers be given an opportunity to contest such access in court. The Committee Report also stated that Title XI represents a substantial compromise between the original version of the title and the views of various law enforcement agencies. Sponsors of the act expressed concern that the Committee had conceded too much to law enforcement interests. Representative Rousselot stated during debate that the Committee had "carved out every reasonable exception to accommodate" the needs of the law enforcement community and that "any further concessions would undermine all we have tried to accomplish with this bill."

Justice's conclusion that supervisory agencies have certain implied transfer powers is weakened because language permitting such transfers was specifically deleted by a later amendment. It is further weakened by the fact that express authority to refer possible criminal, civil, or regulatory violations is provided for <u>financial institutions</u> and also for <u>other</u> Government authorities with authority to examine, investigate, or inspect a financial institution or to consider or administer assistance to the customer for a Government loan guaranty or loan insurance program. However, the Congress did not give supervisory agencies express authority to transfer customer information to law enforcement agencies; express authority was deleted by amendment. Therefore, Justice's argument that supervisory agencies have implied authority to transfer records, without customer notice, to law enforcement agencies is extremely weak.

In discussing the amendment, its sponsor seemed to be referring to the power of the supervisory agencies to exchange information among themselves when he stated his version did not apply to "supervisory agencies properly conducting their responsibilities." The sponsor further stated that

> "The effect of the amendment is to force an agency to justify beforehand its request for information, leave a paper trail of the transaction, and only upon court agreement not notify an individual." 124 Cong. Rec. H 11733 (October 5, 1978).

The Justice opinion also notes that there are rational grounds for distinguishing between referrals by financial institutions, investigative agencies, and supervisory agencies. This is because, as reported in the Committee Report, a supervisory agency has more sweeping and detailed routine access to customer records than any other Government agency. It is, therefore, consistent with the act's purpose not to permit this access to be used for the collateral purpose of detecting unrelated crime.

The Criminal Division's memorandum on the Justice opinion lists criminal offenses relating to the management of financial institutions which may properly be reported by supervisory agencies to law enforcement agencies. As shown previously, the memorandum also lists the type of information which may be included in such referrals without notice to the customer, even though such information might be derived in whole or in part from protected financial records.

However, we believe this information may even be more detailed than that which financial institutions are permitted to give a law enforcement agency. The act authorizes financial institutions to notify law enforcement agencies when they have information which may be relevant to a possible criminal violation. However, if the notice contains information derived from a customer's financial records, a court could find the information contained in the referral to constitute a financial record. Transfer of financial records is prohibited unless the notice and certification provisions are followed.

In responding to our draft report, Justice asserted that the basic principal of advance notice and court challenge would be jeopordized under GAO's conclusion, but it would be protected under Justice's opinion.

We strongly disagree. We did not state that when supervisory agencies provide information about suspected criminal violations to law enforcement agencies that all information from the customers' account should be transferred. On the contrary, we see nothing wrong with the supervisory agencies providing the "basic information" needed by Justice, so long as the customer is notified within the 14-day period, unless a court order delaying notice is obtained.

REFERRALS BY FINANCIAL INSTITUTIONS MAY BE INADEQUATE

Although the act authorizes financial institutions to notify Government authorities when they have information which may be relevant to a criminal violation, it does not require the customer to be notified. However, concerned with potential civil suits from their customers for violation of the act, financial institutions have begun restricting the amount of information they voluntarily supply in their referrals. This in turn has created problems for Government authorities, particularly law enforcement agencies. Justice has tried to solve these problems in two ways--by issuing an advisory to financial institutions and by suggesting amendments to the act.

The types of problems created generally center around interpretations of the specific records or information covered by the act and/or the amount of information that can be included in reports of suspected criminal violations. Instances cited by the agencies include:

--Refusals by financial institutions to refer suspected criminal violations or to include sufficient information to enable law enforcement agencies to initiate an investigation or request access to financial records pursuant to the act. In one case, a financial institution would not report a known teller embezzlement to the FBI. When the violation was referred to the FBI through FDIC, the institution would not make pertinent records available.

--Refusals by banks to provide information about counterfeit currency (description of note, customer from which received, etc.) to the U.S. Secret Service (USSS), the agency with investigative jurisdiction. For example, since the effective date of the act, banks in the New York City area have frequently refused to provide information about counterfeit notes. As a result, the Secret Service New York Field Office reported in June 1979 that it was receiving approximately 125 counterfeit notes per week without identification of their source. The Secret Service was still experiencing this problem at the conclusion of our review.

Department of Justice issued an advisory to financial institutions to clarify their referral authority

On July 17, 1979, the Department of Justice issued an analysis of the act (advisory) to the supervisory agencies and urged them to forward it to the financial institutions. The advisory and a supplementary memorandum by the Department's Criminal Division included Justice Department interpretations of the act with supervisory agency input and was designed to alleviate problems in obtaining information from financial institutions created by their interpretations of the act.

The advisory described the types of records protected by the act and also gave examples of items which are not covered, such as forged or counterfeit financial instruments, records relating to an account established under a fictitious name, bank surveillance photographs, and contents of a safe deposit box sought pursuant to a search warrant. The advisory also included a description of the type and amount of information that might be included in referrals. This information was identical to that suggested for supervisory agency referrals in the memorandum accompanying the Department's opinion on criminal referrals, as discussed earlier in this chapter. As of October 1, 1979, FDIC and OCC forwarded it to the banks they supervise. The Federal Reserve Board revised the advisory before sending it to its member banks on April 3, 1980, (see page 13). NCUA and FHLBB were awaiting review by their legal counsel before forwarding it to their financial institutions.

Department of Justice suggested amendments to clarify information financial institutions can refer

Besides the advisory, Justice has submitted to OMB a comprehensive amendment package for the act. Several of these amendments would clarify the type and amount of information to be furnished by financial institutions.

Another amendment would broaden the good faith defense for financial institutions. This change would allow the financial institutions to make criminal referrals following guidance in the Justice Department's advisory without liability to the customer for such disclosure even if these interpretations prove to be erroneous.

NONCOERCIVE ACCESS DENIED BY SOME FINANCIAL INSTITUTIONS

The act's provisions giving law enforcement agencies noncoercive access may be less effective than contemplated because of lack of acceptance by some financial institutions. As a result, some law enforcement agencies maintain that they will be forced to make more extensive use of the grand jury subpoena, which is not covered by the act. These agencies did not have sufficient information to document the significance of these refusals and financial institutions acceptance policies were mixed. Therefore, the extent to which financial institutions will accept the noncoercive access method is uncertain. Extensive nonacceptance could impede access to financial records for those agencies without administrative summons or subpoena authority and could also result in increased use of the grand jury subpoena.

At the urging of the law enforcement community, the Congress included the formal written request procedure, a noncoercive method for obtaining access to customer financial records maintained by financial institutions. It was included to provide a voluntary means for financial institutions to cooperate with Government agencies such as the FBI, the USPS, the USSS, and investigative components of the Department of Defense, which do not have administrative summons or subpoena authority.

The Department of Justice supported the formal written request provision because it had no other alternative for obtaining customer financial records that would provide the customer the protections of the act. Justice officials advised us that although the grand jury subpoena, which is the primary alternative for most Justice components to obtain customer financial records, does not give the customer any of the act's protections, Rule 6 (e) of the Federal Rules of Criminal Procedure would prevent disclosure of records being considered by a grand jury. In addition, the formal written request provides the financial institution a good faith defense and requires reimbursement when records are released in compliance with the act. Justice officials stated that, because of these reasons, the Department's position prior to enactment was that the formal written request would be an effective method for obtaining customer financial records.

However, several agencies, particularly the Department of Justice and the Department of the Treasury, have found that the formal written request is not an effective method of obtaining financial records because some banks will not honor these requests. As a result, some agencies maintain that they will be forced to make more extensive use of the grand jury subpoena.

Although agencies using the formal written request have had instances where financial institutions would not honor the requests, these agencies did not have sufficient information to document the extent of the refusals. The FBI was the only agency which could provide statistics on the number of formal written requests used and denied. According to an FBI survey, only 13 out of 101 formal written requests issued during the first 2 months of operation under the act were denied. An FBI official stated that most of these denials were made either because the banks desired to protect customer privacy for customer relations or because they feared civil liability for unauthorized release of financial information. According to FBI field offices, bank officials indicated they would prefer a coercive method of access such as the Federal grand jury subpoena.

Department of Justice officials advised us that there are basically two reasons why conclusions cannot be drawn from these limited statistics. First, the statistics are based on 2 months of experience under the act, which is insufficient time to establish a pattern of denials. Second, the figures do not show the number of times FBI agents did not attempt to use the formal written request because financial institutions stated beforehand that they would not honor such requests. An FBI official stated that the Bureau does not generally submit formal written requests to financial institutions which have stated that they will not honor this method.

The Departments of Justice and Treasury believe that the Congress should consider granting administrative summons or subpoena power to those agencies without this authority. This would eliminate their dependence on the formal written request. Also, in an attempt to resolve the conflict between State financial privacy requirements and the act, the Department of Justice has submitted to OMB a possible amendment. This amendment would expressly state that the act is intended to supersede all State laws which would otherwise restrict access by Federal authorities.

Information provided by officials of 10 of the largest U.S. banks indicated varied policies regarding acceptance of the formal written requests. Five of these banks had policies of not accepting such requests, and the remaining five had no such policy. Three of the five banks that would not accept the formal written request indicated that the bank's responsibility to protect customers' records dictated their nonacceptance. Officials of these banks, all New York City banks, stated that their policies preceded the act. The other two, both California banks, based nonacceptance policies on conflicts between Federal and State financial privacy laws. Bank officials told us they were concerned that California State privacy requirements prevented them from honoring voluntary methods of access.

TRANSFER AUTHORITY BETWEEN SUPERVISORY AGENCIES IS NOT CLEAR

Supervisory agencies' ability to exchange information may be restricted because of the act's definition of supervisory agency. These agencies are exempt from the act's transfer procedures when they exchange, with each other, examination reports or other information containing customer information in the exercise of their supervisory, regulatory, or monetary functions with respect to a financial institution. Although information exchanges have not yet been significantly impeded, future exchanges may be limited. Some supervisory agencies believe that, under the act's definition to exchange information about an institution, the transferring and receiving supervisory agency must both have statutory authority to examine the institution.

Generally, FDIC has statutory authority to examine all the banks it insures, including national and State chartered banks, but as a matter of practice it examines only insured State banks that are not members of the Federal Reserve System. The OCC has statutory authority over the national banks it charters. The Federal Reserve Board has statutory authority to examine national and State banks that are members of the Federal Reserve System, but as a matter of practice it examines only State banks that are members of the Federal Reserve System. The authorities of these agencies overlap, because FDIC insures almost all State chartered banks and all national banks; and both types can be member banks of the Federal Reserve System. Because the FHLBB and the NCUA supervise savings and loan associations and credit unions respectively, their examination authority does not overlap with the bank supervisory agencies.

Prior to the act, the supervisory agencies freely exchanged examination reports and other information to help each other perform their functions. The act's definition of a supervisory agency caused uncertainty by some supervisory agencies concerning their authority for exchanging information.

An initial problem with the transfer of examination reports from FDIC to the Federal Reserve Board for evaluation of applications related to Federal Reserve membership and bank holding companies was essentially resolved when both supervisory agencies agreed that these transfers could be made. However, potential problems which have not yet been resolved include

--whether FDIC can transfer information on nonmember bank mergers or changes in control;

--whether the supervisory agencies can exchange examination reports on affiliated banks that are examined concurrently to insure that the banks do not transfer questionable assets to avoid their detection; and

--whether the supervisory agencies can provide other supervisory agencies with information on loans to officers of other banks, or information on loans secured by stock of another bank.

In addition, the bank supervisory agencies do not have authority to examine savings and loan associations regulated by the FHLBB. In this regard, situations where information is needed could arise concerning bank and savings and loan reciprocal lending, stock ownership, or common management or ownership.

For the reasons discussed above, some supervisory agencies believe that the act should be amended to allow a free exchange of information among the five supervisory agencies in performing their supervisory, regulatory, or monetary functions. The Federal Reserve Board, in commenting on our draft report, stated that the legislative history of the act clearly supports this free flow of information among the supervisory agencies.

DECISIONS ON CUSTOMER CHALLENGES COULD EXCEED THE 7-DAY REQUIREMENT

Another potential problem with the act is the requirement that the courts act on Government responses to customer challenges within 7 days. Although at present sufficient statistics are not available, Department of Justice officials believe that the courts may not be able to meet the 7-day requirement.

Under the act, when a Government authority serves an administrative subpoena or summons, a judicial subpoena, or a formal written request to a financial institution, it must notify the customer that financial records are being sought. The customer may challenge in court the Government's access. The Government, in turn, must file a sworn response and within 7 calendar days after the Government's response is filed, the court may decide whether access should be granted.

As of November 30, 1979, there have been four customer challenges litigated by the Department of Justice where the Department has filed a sworn response with the courts. Of these four challenge actions, none had been decided within the required 7 calendar days. However, according to a Department of Justice attorney, the judge in one case was apparently concerned with the 7-day requirement. On the seventh day after the Government filed its statement, he issued a temporary order to allow the customer to revise his challenge due to an irregularity in the customer notice provided by the agency involved. The court rendered its final decision 6 days after the Government filed its second response. The courts decided the other cases in favor of the Government in 15, 41, and 98 days. The judge in the latter case became ill, which accounted for approximately 46 days delay.

A Justice Department attorney responsible for defending the Government against customer challenges stated that such experience is not necessarily atypical, and it can be expected that decisions on these challenges will not necessarily be made within the strict 7-day requirement. The Department of Justice's Civil Division Practice Manual recommends that any invocation of the 7-day requirement provision be a matter for cautious consideration and judgment.

CONCLUSIONS

In the first 6 months, Federal agencies have experienced some difficulties with the Right to Financial Privacy Act. These major difficulties are the

--controversy between the Federal law enforcement and some supervisory agencies over the interpretation of the criminal referral procedure,

--refusal by financial institutions to provide sufficient data on suspected criminal violations to law enforcement agencies,

--refusal by financial institutions to honor the noncoercive access method, and

--uncertainty over whether supervisory agencies have the authority to exchange information derived from customer records.

Limited agency experience with the act prevents a meaningful assessment of these difficulties. The extent to which these initial problems may be resolved as agencies gain more experience with the act is uncertain.

At the completion of our work in December 1979, recommendations for revised legislation were under consideration by the Executive Branch. The revised legislation, if adopted, will address most of the initial problems.

AGENCY COMMENTS

The Department of Justice, the Federal Reserve Board, the FDIC, and the OCC generally agreed with the problem areas we identified.

The Federal Reserve Board fully agreed with GAO's conclusion that when supervisory agencies make criminal referrals containing customer financial information, the customer must be notified within 14 days of the referral, unless a delay order is approved by a court. However, the Department of Justice, the FDIC, and the OCC disagreed with our conclusion.

The Department of Justice expressed concern for the practical realities of criminal investigations, asserting that substantial harm can result from premature notice. In its response letter, Justice stated that additional experience is needed before amendments can be recommended. While we are concerned with the practical realities of criminal investigations, we also believe the law generally requires notice for criminal referrals. In our view, there is insufficient experience to indicate whether the act should be amended to revise transfer procedures between supervisory and law enforcement agencies.

The Department of Justice also asserts that the controversy over the transfer of information has adversely affected the coordination between prosecutors and Federal financial supervisory agency personnel.

The FDIC stated that, absent clarifying language in the act or a judicial construction to the contrary, it believes the authority to make criminal referrals as outlined in the Justice Department opinion is the proper way to proceed. However, the FDIC will not finalize its proposed internal regulations for handling of information until it consults with the other supervisory agencies on how best to proceed.

The OCC issued procedures adopting the Department of Justice interpretation as one of the means to refer criminal violations to law enforcement agencies. OCC stated that under the circumstances it is compelled to follow the guidance of the Department of Justice. However, OCC pointed out that so fundamental a disagreement supports the need for legislative amendment.

OCC also believes the act should be amended to correct the identified problems in the interagency and criminal referral processes. Unless amended, OCC believes the act can reasonably be expected to frustrate coordination of investigations among the financial supervisory agencies and to interfere with referrals to the Department of Justice.

The Federal Reserve Board believes the act should be amended to preserve the five supervisory agencies' free exchange of financial information and to clarify that the financial supervisory agencies are exempt from the act's Certification of Compliance requirement.

The agencies responsible are currently working to resolve administrative and interpretative problems connected with this act. With regard to the act's administrative difficulties, we believe it is premature to propose amendments until the agencies have gained additional experience and have further opportunity to resolve the act's problems. Failure to resolve interpretative problems may ultimately result in a judicial resolution of the controversy. The Congress may want to act to clarify its intent with regard to transfer of records between supervisory agencies and law enforcement agencies.

CHAPTER 4

SCOPE

We reviewed the implementation efforts of 18 selected Federal agencies during their first 6 months of operation under the act. Our examination included the review of agency regulations, policies, and procedures for implementing the act. We also reviewed the act's legislative history, the Report of the Privacy Protection Study Commission dated July 1977, and publications of banking associations. We interviewed agency officials responsible for implementing the act and officials of selected financial institutions.

The newness of the act and the lack of agency experience and operating data restricted the extent of our assessment.

We performed our work at the agencies' headquarters offices in Washington, D.C. A listing of the agencies included in our review is shown in appendix I.

AGENCIES INCLUDED IN REVIEW

LAW ENFORCEMENT AGENCIES

Department of Justice
--Federal Bureau of Investigation
--Drug Enforcement Administration
--Immigration and Naturalization Service
--Law Enforcement Assistance Administration
Department of the Treasury
--Bureau of Alcohol Tobacco and Firearms
--U.S. Customs Service
--U.S. Secret Service
--Internal Revenue Service
Department of the Interior
Department of Defense
U.S. Postal Service

BANKING SUPERVISORY AGENCIES

Federal Reserve Board
Federal Deposit Insurance Corporation
Federal Home Loan Bank Board
National Credit Union Administration
Office of Comptroller of the Currency 1/

OTHER AGENCIES

Department of Commerce
Department of Agriculture
Department of Labor
Department of Transportation
Department of Housing and Urban Development
Small Business Administration
Federal Trade Commission
Office of Personnel Management

1/The Office of the Comptroller of the Currency (OCC) is within the Department of Treasury. However, the act defines OCC as a supervisory agency.

UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D.C. 20530

Address Reply to the
Division Indicated
and Refer to Initials and Number

APR

Mr. Allen R. Voss
Director
General Government Division
United States General Accounting Office
Washington, D.C. 20548

Dear Mr. Voss:

This letter is in response to your request to the Attorney General for the comments of the Department of Justice (Department) on your draft report entitled "Federal Agencies' Initial Problems with the Right to Financial Privacy Act of 1978."

The draft report reviews the steps taken by Federal departments and agencies to implement the Right To Financial Privacy Act (RFPA) and analyzes the major difficulties that have been encountered in operating under this new law. Generally, the report is a thorough and accurate account of implementation activities and discusses the major problems which have been experienced under the RFPA.

Our primary concern with the draft report involves the legal opinion advanced by the General Accounting Office (GAO) on the issue of referrals of criminal cases by Federal financial supervisory agencies. GAO takes issue with the May 23, 1979, opinion of the Office of Legal Counsel (OLC) that supervisory agencies have implied authority to report certain criminal offenses to law enforcement authorities without post-notice to customers. We would observe that considerable weight should be given to OLC's opinion since OLC is the organization charged with the duty of providing legal advice to the executive branch. Moreover, we believe the opinion of OLC to be the correct one for several reasons.

In the section of the GAO report entitled "Legislative history does not support implied authority," GAO first states that the purposes of the RFPA "could be viewed as contradictory" to the overall intention of the Financial

Institutions Regulatory and Interest Rate Control Act of 1978, Public Law 95-630 (Omnibus Act) of which the RFPA is a part. This unsubstantiated conclusion contradicts a well-known, general principle of statutory construction: one part of an act will not be construed to conflict with or contradict another unless such a result cannot be avoided. The OLC opinion harmonizes the RFPA with the omnibus act and follows this tenet while the GAO opinion produces an unnecessary contradiction.

GAO notes further that one of the early financial privacy bills considered by the Congress was H.R. 8133, a measure which was more restrictive of law enforcement access to financial information than the RFPA. Yet GAO does not point out or take into consideration that even the restrictive H.R. 8133 bill provided for reporting of crimes by supervisory agencies without any notice. Consequently, the original sponsor of this legislation did not see this as a privacy versus law enforcement issue.

GAO next asserts that the OLC opinion is weakened because language specifically permitting supervisory agencies to report crime was deleted by later amendment. In our view, however, that deletion was not purposeful. Furthermore, had the deletion been noticed, no action would have been taken because of a belief, shared at the time by the Department, that the reporting provision at Section 1113(h)(5)--which does not require notice--would be applicable to supervisory agency reports of criminal activity. In fact, it was only because of the decision of supervisory agencies to obtain records pursuant to Section 1113(b), rather than the equally applicable Section 1113(h), that the reporting procedure of Section 1113(h)(5) is unavailable to supervisory agencies and that this issue has arisen at all.

Next, GAO states that the OLC opinion is further weakened by the fact that express authority to transfer is provided by the RFPA. GAO does not indicate where it finds this express authority. Section 1113(h)(5) is not available because supervisory agencies obtain records pursuant to Section 1113(b). Furthermore, the author and sponsor of the amendment that deleted the supervisory agency reporting language from Section 1112 expressly stated that his version of Section 1112 did not apply to "supervisory agencies properly conducting their responsibilities." As the OLC opinion notes, the proper conduct of supervisory agency responsibility has historically included reporting bank-related crime to law enforcement authorities.

GAO concludes that it is consistent with the RFPA's purpose not to permit supervisory agency access to be used for the collateral purpose of detecting unrelated crime. We agree entirely with this conclusion and would reiterate that the OLC opinion restricts use of the implied authority exception to those crimes which are <u>related</u> to the fundamental purposes of supervisory agencies, usually crimes committed by bank officials and employees themselves. Copies of the OLC opinion (Enclosure I) and the Criminal Division memorandum related thereto (Enclosure II) are attached for ready reference.

While we believe the foregoing points support the OLC opinion, we would note that the opinion also reflects the practical realities of criminal investigation. The GAO opinion does not recognize, as the OLC opinion does, the substantial harm that can result from premature notice to the subject of a bank-related criminal investigation. It is significant that the offenses which can be reported under the OLC opinion typically involve participation by officers or employees of financial institutions, i.e., persons with ready access to all records of the institution.

In the case of crimes by officers and employees of financial institutions, law enforcement concern about premature notice to the subject of the investigation is not simply that notice may result in flight from prosecution, danger to potential witnesses, or even destruction of or tampering with evidence, all of which are bases for a judicial delay of notice order. Rather, the primary concern is that, once alerted to an investigation, offenders have an opportunity to manufacture new "evidence" or develop a plausible cover story that will "legitimize" criminal activity. In an embezzlement case, for example, the missing funds may be found to have been "mistakenly" credited to another account. In a case involving a prohibited unsecured loan, a manufactured and back-dated deed of trust securing the loan may be found to have been "misfiled" among bank records. In other cases, requisite criminal intent may be called into question by development of a cover story, e.g., that the propriety of a particular act was discussed among officers of the financial institution and that only after obtaining advice of counsel was the illegal course of action pursued in a "good faith belief" that it was proper under the law.

Such opportunities to frustrate criminal investigations and prosecutions are peculiarly available in the area of white-collar crime. In the case of violent crimes such as armed robbery, for example, the offense is generally reported to law enforcement officials by victims or innocent bystanders. At that time, the corpus delicti of the offense is manifest--both the prohibited act and the guilty intent are obvious. The job of law enforcement in such cases is difficult but comparatively straightforward--identify and apprehend the perpetrator.

In the area of white-collar crime, however, there is frequently no report of crime, the victims may be unaware of the offense, and there are no innocent bystanders. Rather, the crime is often revealed only through an examination or audit conducted by experienced and skilled professionals. There are, therefore, opportunities to frustrate the criminal investigation by attempting to cast a cloud over all three elements of the offense--the prohibited act, the guilty intent, and the identity of the perpetrator. Moreover, the offenders in white-collar crimes are generally much more sophisticated than violent criminals; not only do they have more opportunities to frustrate an investigation, they are better able to take full advantage of them. This is why one of the most important techniques in white-collar cases is to subpoena the subject to testify before a grand jury so that a sworn and recorded statement of his version of events can be obtained before he has an opportunity to confer with co-conspirators to manufacture new "evidence" or to develop a perjured cover story.

Even without premature notice, investigation and prosecution of bank-related crime is difficult and requires the commitment of substantial investigative and prosecutorial resources. The Department has sometimes been criticized by supervisory agencies for the relatively small percentage of criminal referrals pursued. Of course, our ability to pursue these and other cases is determined by resources available, but we believe that we have been able in the past to prosecute a sufficient number of bank-related crimes to deter in significant measure the violation of criminal laws designed to protect depositors. Adherence to the GAO opinion with the notice it requires, however, may well drive prosecution success rates so low as to undermine the criminal laws enacted by the Congress to prevent bank-related crime. We believe GAO fails to appreciate the very serious threat that premature notice poses for effective bank supervision.

As for the possibility of obtaining judicial delay of notice orders within the 14-day automatic delay, this is simply unrealistic given the heavy workloads of Federal law enforcement agencies and the substantial number of criminal violations that occur. In fact, given bureaucratic and mail delays, 14 days will often expire on or before the appropriate official receives and has an opportunity to review referred materials. Further, the substantial effort that would be required to conduct an expedited preliminary investigation in the case of every bank-related crime referral so that an informed decision can be made as to whether to seek a court order delaying notice, and then to generate the paperwork necessary to obtain such an order, would be so great as to jeopardize investigations and prosecutions of such priority offenses as organized crime, narcotics trafficking, public corruption and fraud against the Government.

Finally, an ironic aspect of the GAO opinion on supervisory agency referrals is that it is not only inconsistent with the omnibus act which seeks to strengthen supervision of financial institutions, it is also inconsistent with the basic principles of the RFPA itself. In this regard, GAO correctly notes that the concept of advance notice and court challenge is a basic principle of the RFPA, yet it is the OLC opinion and not the GAO opinion which advances this principle. Under the GAO opinion, criminal cases would be referred with copies of relevant financial records; there is, of course, no advance notice and challenge opportunity for the subject of the records. Under the OLC opinion, however, only basic information concerning the offense--the five items identified in the Criminal Division memorandum of July 17, 1979 (Enclosure II)--is reported to law enforcement officials. Actual records necessary for investigation and prosecution must then be obtained pursuant to the procedures of the RFPA requiring advance notice and challenge.

The practical effects of the OLC and GAO opinions are more clearly illustrated through a specific hypothetical case. Assume that a bank officer is wrongly suspected of diverting bank funds to an account in his own name which he then uses for personal expenses. Under the GAO opinion, the supervisory agency would report this suspected offense enclosing copies of cancelled checks written on the account to show that they were for personal items and not for conducting bank business. Many of the cancelled checks might reveal highly sensitive matters such as organizational affiliations, expenditures for medical treatment and other personal information. While the bank officer would receive notice 14 days after the transfer, his only remedy would be a civil action for damages and injunctive relief.

Taking the OLC procedure in the same case, the supervisory agency would only report the suspected crime generally describing (by date and account number) the particular financial records evidencing the crime. The details reflected by the cancelled checks would not be disclosed to law enforcement authorities until the records were obtained pursuant to the procedures of the RFPA. This, of course, would require advance notice and challenge unless access is obtained pursuant to judicial process which has its own built-in safeguards.

We believe very strongly that the OLC opinion is a correct interpretation of the RFPA and its legislative history, that it reflects the realities of criminal investigation and prosecution, that it harmonizes the RFPA with the omnibus act of which the RFPA is a part, and that it serves the fundamental purposes of the RFPA itself. In any event, the fact that there are two widely differing legal opinions on this issue points up one of the more serious ambiguities in the RFPA.

A related point on the issue of bank-related crime is that the RFPA has had a chilling effect on coordination between prosecutors and Federal financial supervisory agency personnel. Traditionally, prosecutors have worked closely with and relied heavily upon the expertise of supervisory agency employees in prosecutions of bank-related offenses which frequently involve highly complex transactions. Understandably concerned over the possibility of violating the RFPA by inadvertently disclosing to prosecutors information derived from financial records, supervisory agency employees have been significantly inhibited in their dealings with prosecutors. We believe this adversely affects necessary coordination and further increases the difficulty of successfully prosecuting bank-related crime.

The only additional area of the report which we believe requires comment is the discussion by GAO of proposed amendments to the RFPA which have been developed by the Department. In this regard, we would note that in April 1979, the Administration made a commitment to extend the RFPA to insurance records. Based on early experience with the RFPA, which became effective March 10, 1979, it became clear that clarifying and perfecting amendments should be made before the RFPA is extended to additional systems of records. Initiatives will be forthcoming in this as well as other areas, and the various drafts of proposed amendments under study within the Department were shared with GAO. After substantial review, however, the Department concluded, as has GAO, that further experience under the RFPA is necessary before a comprehensive series of amendments can be submitted to the Congress. Accordingly, the Department agrees that further study will be required prior to formulating proposals for changes in the RFPA and that, to avoid delay in consideration of insurance record privacy legislation, we support an extension of the RFPA to insurance records provided that the effective date of such extension is postponed until July 1, 1982. This time schedule will allow us to complete needed analyses and to formulate a comprehensive package of proposed amendments for consideration by the Congress.

We appreciate the opportunity to comment on the draft report. Should you desire any additional information, please feel free to contact us.

Sincerely,

Kevin D. Rooney

Kevin D. Rooney
Assistant Attorney General
for Administration

2 Enclosures

OPTIONAL FORM NO. 10
JULY 1973 EDITION
GSA FPMR (41 CFR) 101-11.6

UNITED STATES GOVERNMENT

Memorandum

PBH:RAP:CC:cdh

TO : Benjamin R. Civiletti
Deputy Attorney General

DATE: July 17, 1979

FROM : Philip B. Heymann
Assistant Attorney General
Criminal Division

SUBJECT: Office of Legal Counsel Opinion regarding Implied Authority of Federal Bank Supervisory Agencies to make Criminal Referrals

At your request, the Criminal Division has carefully reviewed the subject Office of Legal Counsel (OLC) opinion. This memorandum sets out our opinion as to (1) the types of cases which may be referred, pursuant to implied authority, and (2) the scope of information which may be included within such a referral

By way of review, the OLC opinion concludes that, notwithstanding the Right To Financial Privacy Act of 1978, 12 U.S.C. §§3401-3422, supervisory agencies have implied authority to make criminal referrals of offenses relating to the operations of financial institutions without post-notice to customers. The types of offenses which may be referred by implied authority without customer notice are more particularly described at page 11 of the opinion as those involving "... a criminal statute governing the management of financial institutions ..." regulated by the supervisory agency making the referral.

I. OFFENSES INCLUDED

With respect to specific criminal offenses which may appropriately be referred under an agency's implied authority to report crime, the various criminal provisions found in Title 12 of the United States Code are all directly related to the duty of supervisory agencies to regulate financial institutions. The fact that such offenses are codified within Title 12 evidences their close nexus to the essential functions which supervisory agencies were established to perform. Such criminal offenses are of two general types: (1) provisions such as 12 U.S.C. §92a(h) (loans of trust funds to officers and employees prohibited, penalties) which include their own independent criminal penalties, and

(2) provisions such as 12 U.S.C. §209 (conservators subject to certain sections of Title 18) which specifically make designated sections of Title 18 of the United States Code applicable to regulated institutions or officials. Again, all offenses punishable either directly or indirectly under Title 12 may be referred to the Department of Justice under implied authority without post-notice.

Further, there are numerous offenses under Title 18 of the United States Code which may be referred to the Department under implied authority. Several sections of Title 18 relate specifically to improper acts in connection with banking operations. These special banking-related statutes include those involving malfeasance on the part of employees of supervisory agencies (e.g., 18 U.S.C. §213 [acceptance of loan or gratuity by bank examiner]); malfeasance of officers or employees of financial institutions (e.g., 18 U.S.C. §215 [receipt of commissions or gifts for procuring loans]); misapplications by officers or employees of financial institutions (e.g., 18 U.S.C. §656 [theft, embezzlement or misapplication by bank officers or employees]); and violations of recordkeeping requirements by officers or employees of financial institutions (e.g., 18 U.S.C. §1005 [Bank entries, reports and transactions]). With regard to such special banking-related provisions of Title 18, it is difficult to postulate any set of circumstances in which an offense would not be referrable under the implied authority identified in OLC's opinion.

Further, offenses under many general provisions of Title 18 are referrable pursuant to implied authority if there is a nexus between the offense and the operations of the financial institution involved. Taking 18 U.S.C. §1341 [Frauds and swindles] as an example, evidence of a mail fraud would be referrable under implied authority if it involves an effort to obtain money or property from a regulated financial institution. In addition, such a fraud would be referrable under implied authority if perpetrated by an officer or employee of a regulated financial institution; this is because the offense would raise grave questions as to the fitness of the officer or employee for the position he or she holds and would indicate that such officer or employee may abuse his or her position to victimize account holders of the institution.

Finally, offenses under criminal provisions of titles other than Titles 12 and 18 may be referred pursuant to implied authority if the offenses jeopardize the solvency of a financial institution. An example of such a statute is 2 U.S.C. §441b restricting campaign contributions by national banks.

Of course, many crimes involve financial transactions incidental to the offenses. To the extent that such offenses do not involve wrongdoing on the part of financial institutions, supervisory agencies or officers or employees thereof and do not jeopardize the solvency of regulated financial institutions, evidence of such crimes may not be referred under implied authority. For example, if an examination of a financial institution reveals evidence that a private individual with a demend deposit account at the institution is engaging in financial transactions evidencing an illegal gambling operation, such evidence may not be referred under implied authority absent some other nexus to the operations of the regulated institution.

The above, of course, is not intended to be an exhaustive listing of all provisions of federal criminal violations which may be referred under an agency's implied authority. It is hoped, however, that it will afford a sufficient basis for compilation of such a list by supervisory agencies if such a list is deemed necessary.

II. SCOPE OF NOTIFICATION

Proceeding to the scope of information which may be included in an implied authority referral, it is important to note that a referral serves two purposes: it enables the Department (1) to determine whether to investigate or prosecute a suspected offense, and (2) to obtain necessary financial records directly from the appropriate financial institution. In determining whether to investigate further or prosecute, the Department is necessarily interested in the degree of certainty which exists that a federal criminal offense has been, is being or will be committed as well as the significance of such offense (e.g., the amount of the loss or bribe, if any). To obtain necessary financial records under the Act, the Department must be able (1) to reasonably describe the records sought, (2) to determine that there is reason to believe such records are relevant to a legitimate law enforcement inquiry, and (3) to seek customer authorization of disclosure if appropriate.

Recognizing the purposes to be served by a referral, supervisory agencies may include the following information in referrals even though such information might be derived in whole or in part from protected financial records:

(a) the name(s) and addresses(es) of the person(s) suspected and his (their) relationship with the financial institution or supervisory agency, if any;

(b) the identity of the financial institution(s) or office(s) thereof involved;

(c) the specific offense(s) suspected;

(d) the name(s) and address(es) of the account holder(s) and the account number(s) and type(s) of account(s) in which evidence of the suspected offense(s) is located; and

(e) a general description (dates and any suspicious circumstances) of the transaction(s) involved in the suspected offense(s).

Of course, other information not protected by the Act which will assist the law enforcement agency may be freely disclosed.

To illustrate the extent of information which may be disclosed in connection with a supervisory agency's referral of a suspected criminal offense, the following example is provided:

The supervisory agency, in examining a financial institution, First Financial, suspects one of its tellers, Steve Jones, of taking advantage of his position at First Financial's State Street branch office to embezzle funds from the accounts of six customers, one of which is a corporation, and of depositing the proceeds of these embezzlements in Jones' own account at the State Street office. The supervisory agency may notify federal law enforcement authorities of the crime and, in addition, provide all pertinent information not covered by the RFPA. In this case, such non-protected information might include records of Jones' shortages and overages as a teller, complete records relating to the corporate account which has been victimized, information from First Financial's employment records pertaining to Jones including such items as his employment application and salary level, information obtained from interviews with other employees of First Financial [if such information is not derived from financial records pertaining to Jones' personal account] which indicates that Jones is living in a style not in keeping with his income as a teller or that Jones engages in suspicious activities while performing his job as teller.

Of course, financial records relating to Jones' personal account are protected as are records pertaining to the five accounts of private individuals who are being victimized by Jones' embezzlement. Even if derived from such protected records, however, the following information may be reported to federal law enforcement authorities:

(a) Steve Jones' full name and address, the fact that he is employed as a teller at the State Street office, and the fact that he is suspected of embezzlement;

(b) the fact that the suspected offenses all involve transactions occurring at First Financial's State Street office;

(c) the fact that the offenses appear to involve violations of federal criminal law, i.e. 18 U.S.C. §656;

(d) the names and addresses of the customers who are the suspected victims of the embezzlements, the fact that they are believed to be victims, the fact that they have accounts at the State Street office, the account numbers of the victims' and Jones' accounts, and the fact that Jones is suspected of depositing embezzled funds in his account;

(e) the dates of the suspicious transactions involving each victim's account and Jones' account together with a description of any circumstances leading to belief that the withdrawals and deposits in question were part of an embezzlement scheme (for example, inquiries by customer-victims as to specific unexplained debits to their accounts).

The notification may also include the supervisory agency's analysis of the information described above together with an analysis of the significance of the suspected offense. While the general description and analysis of suspicious transactions may not be so detailed as to eliminate any need for law enforcement access to actual records, it should be sufficient to enable federal authorities (1) to reasonably describe records needed in the investigation, and (2) to determine that there is reason to believe such records are relevant to a legitimate law enforcement inquiry. Once provided with sufficient information to comply with these two requirements of the RFPA, federal authorities can proceed to obtain access to records pursuant to the procedures set out by the Act.

Again, the above information may be reported even if derived from protected records. And as mentioned above, it may, of course, be supplemented with financial information including actual financial records not protected by the Act. In this regard, the Right To Financial Privacy Act protects only a narrow class of financial records.

To begin with, the Act covers only financial records, or information known to be derived therefrom, relating to accounts of individuals and partnerships of five or fewer partners. The RFPA does not protect records relating to accounts of corporations, partnerships of six or more partners, trusts, associations, or other legal entities.

Further, even as to financial information relating to accounts of individuals and partnerships of five or fewer partners, not all records are protected by the RFPA. More specifically, to be a protected record, an item must meet all of the tests set out in 12 U.S.C. §3401 (2,5):

(a) it must be hald by a specific financial institution;

(b) it must pertain to an individual's (or covered partnership's) utilization of the services of that financial institution;

(c) it must relate to an account maintained by that individual (or covered partnership) at that institution; and

(d) it must relate to an account in that individual's (or partnership's) true name.

Applying the above four tests, therefore, the following items are not covered by the RFPA: forged or counterfeit financial instruments; records relating to an account established under a fictitious name; financial records in the possession of an institution other than the institution at which the person maintains an account (for example, a check or money order cashed for a non-customer); bank surveillance photographs; or records pertaining to functions that do not involve an account relationship (services not covered by the Act include sales of stock, performance of computer services, and other activities that do not constitute routine banking services).

One final point on the issue of records not covered by the Act. The fact that an officer or employee of a financial institution maintains an account at that financial institution does not make every financial item possessed by the financial institution regarding that employee a protected "financial record." For example, the fact that a bank teller has a checking account at the institution does not restrict law enforcement access to records reflecting shortages or overages experienced by that teller as such records relate to the teller's work product and not his or her checking account.

The basis for the above interpretations of records protected by the Act and the scope of information which may be referred to law enforcement authorities is set out in Section I and Section II respectively of the Criminal Division's memorandum of July 17, 1979 prepared in support of the Department of Justice Financial Privacy Act Advisory to financial institutions.

APPENDIX II

DEPUTY ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL COUNSEL

Department of Justice
Washington, D.C. 20530

MEMORANDUM TO BENJAMIN R. CIVILETTI
Deputy Attorney General

Re: Right to Financial Privacy Act of 1978

This is in response to your memorandum of April 30, 1979, which raised the following three questions about the Right to Financial Privacy Act (hereafter "RFPA" or "the Act"): 1/

1. To what extent does the Right to Financial Privacy Act of 1978 affect the ability of a bank supervisory agency to report to the Department of Justice violations of the law that it uncovers?

2. What kinds of information may be included as part of the notification that is explicitly permitted banks under § 1113(h)(5) or that may be impliedly permitted bank supervisory agencies?

3. What is the interplay of § 1112 of the Act and the ability of bank supervisory agencies to notify the Department of possible crimes without giving notice to customers?

These questions arise from the restrictions which the RFPA has placed on federal agencies' access to and dissemination of the financial records of bank customers. 2/

1/ The Right to Financial Privacy Act, 12 U.S.C. § 3401 (Supp. 1979), was enacted as Title XI of the Financial Institutions Regulatory Act of 1978, Pub. L. 95-630, 92 Stat. 3627.

2/ Under § 1101(4)-(5) of the Act, a "customer" is an individual or a partnership of five or fewer individuals, that used or is using any service of a financial institution. The financial records of corporations, larger partnerships, or other legal entities are not covered by the Act, and access to them is not affected by it.

Our conclusions on these points may be summarized as follows. First, a report that a customer's financial records may relate to a criminal violation, when based on a summary or analysis of those records, is itself a "financial record" within the meaning of § 1101(2) of the Act. Second, with the exception of § 1113(h), the procedures in § 1112 are the only ones expressly provided under the Act by which a supervisory agency may make such a report to a law enforcement agency. Third, notwithstanding § 1112, implied authority for a bank supervisory agency to make such a report exists in a narrow class of cases: possible violations of criminal statutes which are part of the regulatory system enforced by the supervisory agency. Fourth, the report of possible criminal violations expressly permitted by § 1103(c) and 1113(h)(5) and impliedly permitted for "regulatory" crimes may be specific enough to permit the law enforcement agency to request the primary records under the Act but may not be so detailed as to amount to a transfer of the substance of the original records.

We are informed by Mr. Lowell of your staff that the background to your request is as follows. Before the enactment of the Right to Financial Privacy Act, the supervisory agencies 3/ routinely inspected customer records in the course of examining the financial institutions under their charge. When examination of customer

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3/ Section 1101(6) of the Act defines "supervisory agency" as:

> with respect to any particular financial institution any of the following which has statutory authority to examine the financial condition or business operations of that institution--
>
> (A) the Federal Deposit Insurance Corporation;
> (B) the Federal Savings and Loan Insurance Corporation;
> (C) the Federal Home Loan Bank Board;
> (D) the National Credit Union Administration;
> (E) the Board of Governors of the Federal Reserve System;
> (F) the Comptroller of the Currency;
> (G) the Securities and Exchange Commission;

(Cont. on following page.)

records led them to believe that a federal crime might have been committed by the customer or others, they would notify the proper federal enforcement agency. The report would begin with a summary of the reasons for believing that an offense had been committed, and it would proceed to a detailed analysis of the customer records in support of this conclusion. The offenses reported tended to fall into two groups. The first involved misuse of authority by an officer or employee of the financial institution, whether or not in concert with a customer. 4/ The second involved offenses not related to the management of the institution. We are informed by Mr. Lowell that referrals by supervisory agencies of crimes not related to the financial institution were rare. Accordingly, this opinion will focus on the authority of the supervisory agencies to notify law enforcement agencies of crimes affecting the financial institution and the authority of the law enforcement agencies to receive such referrals.

The extent to which the Right to Financial Privacy Act affects the ability of a bank supervisory agency to report violations of law to the Department of Justice depends on four factors: the ability of the supervisory agency to report before the Act was passed, the Act's definition of financial record information, the Act's restriction on the supervisory agencies' access to records, and the Act's restriction on their power to disseminate.

The supervisory agencies are authorized by statute to examine the affairs of financial institutions under their jurisdiction. 5/ Their examining function has

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3/ (Cont. from preceding page.)

(H) the Secretary of the Treasury, with respect to the Bank Secrecy Act and the Currency and Foreign Transactions Reporting Act (Public Law 91-508, title I and II); or

(I) any State banking or securities department or agency.

4/ See, e.g., 18 U.S.C. §§ 656-57, 1005-06.

5/ See, e.g., 12 U.S.C. § 481 (Comptroller of the Currency); 12 U.S.C. § 1440 (FHLBB); 12 U.S.C. § 1756 (NCUA); 12 U.S.C. § 1730(m)(1) (FSLIC); 12 U.S.C. § 1820(b) (FDIC).

included reporting to the Department of Justice irregularities that may amount to violation of the criminal statutes governing financial institutions. 6/ These statutes were originally enacted as part of the regulatory system for financial institutions, and their purpose is to protect the solvency and integrity of these institutions against willful misuse of their funds. 7/ It was considered an integral part of the supervisory agencies' duty of protecting financial institutions and their depositors to inform the proper law enforcement authorities of those instances of mismanagement that appeared to be criminal. As stated in Cooper v. O'Conner, 99 F.2d 135, 140 (D.C. Cir. 1938):

> By reason of their performance of duties clearly assigned, the facts and evidence which suggest criminal conduct upon the part of bank officials are revealed to such [federal] officers. It is the duty of all citizens to reveal such evidence, of which they may have knowledge, at the risk of being guilty of misprision of felony for failing to do so. In the case of an official, his failure to act under such circumstances would, in addition, constitute serious malfeasance in office. In the present case, appellees were charged with responsibility for the collection and conservation of the assets of a bank. It would be absurd to contend that the duties of such an officer--so charged and so peculiarly aware of facts suggesting that certain persons were engaged in the spoliation of those very assets--should stop abruptly at the point where the initiation of criminal proceedings became necessary to protect such assets.

6/ See 18 U.S.C. §§ 213, 215, 656-57, 1005-06.

7/ See, e.g., United States v. Darby, 289 U.S. 224 (1933); United States v. Corbett, 215 U.S. 233 (1909); United States v. Manderson, 511 F.2d 179 (5th Cir. 1975); United States v. Wilson, 500 F.2d 715 (5th Cir. 1974); Weir v. United States, 92 F.2d 634 (7th Cir. 1937). See also Deitrick v. Greaney, 309 U.S. 190, 194 (1941).

There was no statutory restriction on their power to report offenses. See Bank of America National Trust & Savings Assn. v. Douglas, 105 F.2d 100, 103-04 (D.C. Cir. 1939); 29 Op. Atty. Gen. 555 (1909).

We must consider, then, the extent to which Congress has changed the previous power and duty of the supervisory agencies to report violations of law to this Department. The RFPA affects this power in three ways. First, §§ 1102 and 1113 restrict the conditions under which the supervisory agencies may obtain access to the actual records in the hands of the financial institution. Second §§ 1112 and 1113(h) of the Act place express restrictions on disseminating information once access has been obtained. Third, § 1101(2) of the Act defines "financial record" broadly enough to include information derived from the primary records showing that a crime has been committed.

Initial access by a government agency to records in the hands of a financial institution is governed by § 1102 of the Act. It lays down a general rule that access must be obtained through one of the formal methods set out in §§ 1104-08 of the Act, subject to notice to the customer and judicial supervision under §§ 1109-10. It provides that notwithstanding its general requirement, initial access may be obtained through exceptions in §§ 1103(d)-(d), 1113, and 1114. Of these, § 1113(b) and (h) are relevant to the functions of the supervisory agencies.

Section 1113(b) provides:

> Nothing in this title prohibits examination by or disclosure to any supervisory agency of financial records or information in the exercise of its supervisory, regulatory, or monetary functions with respect to a financial institution.

It was intended to give the supervisory agencies access to customer records in order to conduct examinations.

In addition, § 1113(h)(1)(A) permits any agency to have access to customer records in connection with an authorized examination, inspection or investigation of the institution or of a legal entity not a customer. 8/ The investigating agency must certify that the investigation is lawful, and transfer of the primary records is restricted. RFPA § 1113(h)(2), (h)(4). However, under § 1113(h)(5) the agency in possession may notify another agency with proper jurisdiction "that financial records obtained pursuant to this subsection may relate to a potential civil, criminal, or regulatory violation by a customer," and the notified agency may then seek access under the procedures provided by the Act. By its terms, § 1113(h)(1)(A) could be used as authority to examine a financial institution, thereby expressly permitting a supervisory agency to notify a law enforcement agency under § 1113(h)(5). We are informed by Mr. Lowell, however, that the supervisory agencies prefer to obtain access under § 1113(b) in order to avoid the certification required by §§ 1103(b), 1113(h)(2) of the Act.

Unless one of the exceptions in § 1113-14 applies, § 1112 of the Act provides the mechanism for disseminating financial records from the acquiring agency to other agencies. Under subsection (a), the transferor agency must certify that the records are relevant to a legitimate law enforcement inquiry in the jurisdiction of the recipient agency. Under subsections (b)-(c), the transferor must notify the customer within 14 days unless a court authorizes delayed notice. 9/ Subsection (d) expressly excludes

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8/ This means, in effect, a partnership of more than five individuals or a legal person not an individual. See note 2, supra.

9/ The reasons justifying delayed notice, given in § 1109(a)(3) of the Act are:

> (3) there is reason to believe that such notice will result in
> (A) endangering life or physical safety of any person;
> (B) flight from prosecution;
> (C) destruction of or tampering with evidence;
> (D) intimidation of potential witnesses; or
> (E) otherwise seriously jeopardizing an investigation or official proceeding or unduly delaying a trial or ongoing official proceeding to the same extent as the circumstances in the preceding subparagraphs.

from the Act's restrictions the exchange of information among supervisory agencies.

As reported to the House, § 1112 of the Act provided:

> Nothing in this title prohibits any supervisory agency from exchanging examination reports or other information with another supervisory agency, or from supplying information to a prosecution or enforcement agency concerning a possible violation of a statute administered by the supervisory agency. [Emphasis added.] 10/

This language would have expressly authorized the existing referral practices of the supervisory agencies for crimes relating to the financial institution. It was deleted when the present § 1112 was introduced in an amendment by Representatives Goldwater and McKinney. 11/ The effect of the amendment, Representative Goldwater explained, "is to force an agency to justify beforehand its request for information, to leave a paper trail of the transaction, and only upon court agreement not notify an individual." 12/ Represenative McKinney introduced a letter from Assistant Attorney General Wald supporting the amendment, which did not distinguish referrals by supervisory agencies from other inter-agency transfers. 13/

"Financial records" are defined by § 1101(2) of the Act to include "an original, a copy of, or information known to have been derived from" any record held by a financial institution concerning its relationship with a customer. [Emphasis added.] The underlined language was added on the House floor in an amendment by Representative Pattison, and it is not discussed in the legislative history. 14/ On its face, it is broad enough

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10/ 124 Cong. Rec. H 11728 (Oct. 5, 1978).

11/ 124 Cong. Rec. H 11733, 11734, (Oct. 5, 1978).

12/ 124 Cong. Rec. H 11733, (Oct. 5, 1978).

13/ 124 Cong. Rec. H 11734, (Oct. 5, 1978).

14/ 124 Cong. Rec. H 11735, (Oct. 5, 1978).

APPENDIX II

to include both summaries of customer records and analyses of the records showing that the customer may have engaged in any particular activity, including commission of a crime.

There are several reasons for a broad reading of this language. First, one principal purpose of the Act was to restrict the ability of the government to reconstruct an individual's affairs from his financial records. 15/ Derived information and its use are at the center of what Congress considered to be the threat to privacy under prior law. Second, §§ 1103(c) and 1113(h)(5) of the Act specifically permit a financial institution or an agency to inform a law enforcement agency that financial records show a crime may have been committed, without notifying the customer, in limited circumstances. This express grant of authority would not be necessary if such reports were not disclosure of a "record" otherwise prohibited by the Act. Third, the Pattison amendment as a whole had the purpose of encouraging customers to seek judicial review and requiring agencies to justify access to records with greater particularity. 16/ While the meaning of the phrase "information known to be derived from . . ." is not discussed, the phrase was enacted as part of an effort to make it more difficult for the government to obtain or use financial information without notice to the customer.

The argument to the contrary is that the operation of § 1112 requires that a summary or analysis, if sufficiently general, not be considered a "record." Representative Goldwater explained that § 1112's purpose was to require the agency receiving financial information to justify its need. 17/ The transferring agency is required to certify that the transfer is for a legitimate law enforcement purpose. To do so, the receiving agency must be able to explain to the transferring agency what it wants and why.

15/ See H.R. Rept. 95-1383, 95th Cong., 2nd Sess., at 33-35; 124 Cong. Rec. H 11731-32 (Reps. Pattison, Rousselot), 1173 (Rep. Cavanaugh), 11739 (Reps. Rousselot & Pattison), (Oct. 5, 1978).

16/ 124 Cong. Rec. H 11735 (Rep. Pattison), (Oct. 5, 1978).

17/ 124 Cong. Rec. H 11733 (Oct. 5, 1978).

This, in turn, requires that the transferring agency first have informed the receiving agency that it has available financial information that may be relevant to a legitimate law enforcement inquiry.

This argument, in our view, does not overcome the action of the House in expressly permitting reports that a crime may have been committed under § 1103(c) and § 1113(h)(5) and deleting similar express authority in § 1112(d). These actions would have been superfluous if such a report, based on examination and analysis of financial records, was not itself a record. It is consistent, moreover, with the Act's general purpose of limiting government access to financial data to construe the statute to prevent one agency from informing another that an individual's financial records should make him an object of the later agency's suspicions without informing the individual. We therefore conclude that the definition of "financial record" in § 1102(2) of the Act includes a report that analysis of the primary records shows a customer to be possibly committing a crime.

Thus, the statement that a customer's records may relate to a federal crime, when based on examination of those records, is itself a financial record under the Act. The Act expressly permits an agency which has obtained access to the primary financial records under § 1113(h) to notify a proper law enforcement agency of this conclusion, and it expressly permits transfer of any information among supervisory agencies. Otherwise, the procedures of § 1112(a)-(c) are the Act's only explicit mechanism for disseminating customer record information, including derivative information, from one agency to another. The question thus becomes whether Congress intended a further, implicit method of transfer from the supervisory agencies.

As a general matter, the legislative history of § 1112 is clear that implicit exceptions to it were not intended. The House was aware that the "routine use" exception to the Privacy Act, 5 U.S.C. § 552a(a)(7), (b)(3), has been used to justify exchanges of information among federal agencies based on implicit authority. In an exchange between Representatives Rousselot, Pattison, and Cavanaugh on this point, it was clearly stated that § 1112, as amended, contained no "routine use" exception, and that interagency dissemination could only be made with certification by the transferring agency and notice to the customer. 18/ Without equally clear support in the purpose and legislative history of the Act, we could not say that Congress intended to preserve as implied exceptions to § 1112 any pre-enactment practices of transferring information.

We believe, however, that support for implied authority to transfer information can be found in the narrow circumstances in which the crime reported by a supervisory agency relates to the financial institution's operations. Representative Goldwater stated that his version of § 1112 did not apply "to supervisory agencies properly conducting their responsibilities." 19/ The proper conduct of those responsibilities has long been considered to include reporting criminal violations of the banking laws to the law enforcement agencies. 20/ Moreover, the Right to Financial Privacy Act was but one title of twenty in an omnibus statute that was primarily concerned with strengthening the powers of the supervisory agencies and tightening the restrictions on bank officers, directors, and shareholders. 21/ The House Banking, Finance, and Urban Affairs Committee relied in at least one case on referrals from a supervisory agency to U.S. Attorneys as indications that a regulatory problem existed. 22/ It would be anomalous to conclude that a statute which was intended on the whole to strengthen the regulation of financial institutions was also intended to deprive the regulators of one of their oldest and strongest weapons for dealing with the most serious cases of management abuse.

18/ 124 Cong. Rec. H 11739.

19/ 124 Cong. Rec. H 11733.

20/ See p. 4, *supra*.

21/ See generally Pub. L. 95-630, Financial Institutions Regulatory and Interest Rate Control Act of 1978, Titles I-III, VI-IX, IV, 92 Stat. 3461; H.R. Rept. 95-1383, 95th Cong., 2nd Sess., at 4-22.

22/ H.R. Rept. 95-1383, 95th Cong., 2nd Sess., at 13.

When the Financial Institutions Regulatory Act is considered as a whole, then, we conclude that Congress did not intend to prohibit a supervisory agency from reporting to the proper law enforcement agency that it has discovered in a customer's records evidence that a criminal statute that is part of their regulatory system has been violated. Such reports are an integral part of the process of regulating financial institutions, and they further the agencies' primary mission of protecting the soundness of these institutions. Notwithstanding § 1112, then, the supervisory agencies have implicit authority to inform the proper law enforcement agency that their inspection of customer records shows that an individual may have violated a criminal statute governing the management of financial institutions which they regulate.

We must point out, though, that the contrary argument is strongly grounded on the language and legislative history of the Act. We cannot say with certainty that the courts would not conclude that a supervisory agency that has obtained access under § 1113(b) must give notice under § 1112 even when reporting evidence of a crime relating to the management of the institution. Furthermore, we are not aware of anything in the language or legislative history of the Act that would lead to the conclusion that supervisory agencies have implied authority to report that crimes unrelated to their supervisory function may have been committed on the basis of an analysis of a customer's financial records. 23/

23/ In his memorandum of April 27, 1979, to the Deputy Attorney General, Mr. Lowell raises three other arguments that would permit referral without transferring the primary records or notifying the customer. After careful consideration, we conclude they are not supportable.

The first is that express permission to refer was included in the bill at all points until its passage by the House and was referred to in the Committee report. However, the legislative history of § 1112 shows that this authority was omitted in the Goldwater-McKinney amendment rather than through clerical inadvertence. Since the Department reviewed and assented to the text of the amendment, we can hardly argue accidental omission.

(Cont. on following page.)

APPENDIX II

The next question is the scope of the information that may be included in a report to a law enforcement agency under § 1103(c) or § 1113(h)(5) or a report under the supervisory agencies' implied authority. These provisions permit notice to be given so that the law enforcement agency may then seek access to the records under the formal provisions of the Act, which require customer notice.

The permissible scope of referral therefore lies somewhere between two poles. On the one hand, a report cannot be so detailed as to effectively substitute for access to the records themselves, for this would permit

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23/ (Cont. from preceding page.)

In any event, Field v. Clark, 143 U.S. 644 (1892), forecloses this argument. The post-enactment remarks of Rep. Cavanaugh, the bill's sponsor, that authority to refer was intended would be given scant weight by the courts. See United States v. Philadelphia National Bank, 374 U.S. 321, 348-49 (1963); United States v. United Mine Workers, 330 U.S. 258, 282 (1947); Epstein v. Resor, 296 F.Supp. 214, 216 (N.D. Cal. 1969). See generally 2A Sutherland, Statutory Construction § 48.16

The second argument is that it is anomalous to permit financial institutions to make these referrals under § 1103(c) and to permit all investigative agencies to do so under § 1113(h)(5) without implying the same power for supervisory agencies under § 1113(b). Rational grounds for the distinction exist, however. The primary purpose of the Act is to restrict government requests for financial records. See, e.g., H.R. Rept. 95-1383, 95th Cong., 2nd Sess., at 33-34. Section 1103(c) is an exception for purely voluntary statements by the institution, unprompted by the government. Id. at 50. Section 1113(h) restricts agency access by requiring a certificate of proper purpose, a limit not found on supervisory agency access under § 1113(b). A supervisory agency has more sweeping and detailed routine access to customer records than any other government agency, and it is consistent with the Act's purposes not to permit this access to be used for the collateral purpose of detecting unrelated crime.

The third is that prior cases approve referral. This begs the question, which is the extent to which Congress intended to limit these pre-existing powers.

the formal access procedures to be bypassed. 24/ On the other hand, the report has to be sufficiently detailed to inform the law enforcement agency that reasonable grounds exist to believe that an individual has violated the law. Since the referral provisions contemplate access under the Act, it would be reasonable to identify the records and provide an explanation in sufficient detail to permit the law enforcement agency to support a formal proceeding for access. This requires a written statement giving a "demonstrable reason" to believe that the records are relevant to a legitimate law enforcement inquiry. 25/ While the legislative history is silent on the amount of detail which must be provided, the language of § 1110(c) clearly contemplates a factual showing beyond mere conclusions. We suggest that this middle ground would be occupied by a description of the pattern of transactions shown in the customer records that does not discuss particular, identifiable transactions, coupled with the supervisory agency's analysis of why this may relate to a potential violation.

Mary C. Lawton
Mary C. Lawton
Deputy Assistant Attorney General
Office of Legal Counsel

24/ Indeed, § 1113(h)(4) explicitly forbids transfer except to facilitate investigation of the institution or a legal entity not a customer.

25/ Right to Financial Privacy Act, § 1110(b)-(c).

Comptroller of the Currency
Administrator of National Banks

Washington, D.C. 20219

April 4, 1980

Mr. Allan R. Voss, Director
General Government Division
U. S. General Accounting Office
Washington, D. C. 20548

Dear Mr. Voss:

We have reviewed your March 17, 1980, draft of a proposed GAO report entitled "Federal Agencies' Initial Problems with the Right to Financial Privacy Act of 1978."

The GAO points out that several of the agencies have suggested that some of the problems experienced by the agencies can only be resolved by proposed amendments. The GAO concludes, nevertheless, that since the agencies had only six months operating experience under the Act at the time GAO commenced its study, there was not sufficient data to illustrate the significance of these problems. The GAO suggests that the agencies need more operating data and more time to formulate the agency positions.

The OCC disagrees with this observation at least insofar as it relates to the identified problems in the interagency transfer and criminal referral processes. The problems identified by the agencies are real. Absent appropriate amendment, the Act can reasonably be expected to frustrate coordination of investigations among the financial supervisory agencies and to interfere with referrals to the Department of Justice. In the latter regard, we note that subsequent to an opinion issued by the Department of Justice which concluded that the bank supervisory agencies have an "implied" authority to make criminal referrals in certain circumstances, the OCC issued procedures adopting this interpretation as one of the means to refer criminal violations to law enforcement agencies. GAO states in the report that the Department of Justice's opinion on "implied" authority is not supported by the legislative history of the Act. Under the circumstances we are, of course, compelled to follow the guidance of the Department of Justice. However, that so fundamental a disagreement should arise under the current language of the Act -- and within the four corners of the GAO report itself -- is eloquent testimony in support of immediate legislative correction.

Very truly yours,

John G. Heimann
Comptroller of the Currency

APPENDIX IV

BOARD OF GOVERNORS
OF THE
FEDERAL RESERVE SYSTEM
WASHINGTON, D. C. 20551

OFFICE OF THE GENERAL COUNSEL

April 4, 1980

Mr. Allen R. Voss
Director
General Government Division
United States General Accounting Office
Washington, D. C. 20548

Dear Mr. Voss:

Chairman Volcker has asked me to respond on his behalf to your request for review and comments about the draft report prepared by the General Accounting Office entitled "Federal Agencies' Initial Problems with the Right to Financial Privacy Act of 1978."

First, I would like to express our appreciation for the report as a whole. It treats the subject area comprehensively and fairly, I believe. Most of the comments that follow are technical in nature; since my staff and I agree with the substance of the report. Specific suggestions for these technical changes follow.

On page 9, in regard to the standardized compliance forms prepared by the Department of Justice, the Board's staff prepared the form for Customer Authorization for Access to Financial Records, and published this form as a proposal. Later, when Congress repealed the requirement for the Board to prepare the authorization form, Justice adopted, without change, the Board's proposed form. 1/

On page 10, a statement appears that the Board provides a training course consisting of less than 2 hours of instruction about the Act. I believe the statement would more accurately reflect our training course if it were amended to note that this course is repeated 8-12 times during the year.

Also, on page 10, your report notes that the Department of Justice and the FBI have answered numerous telephone inquiries about the Act. The Board's staff has also been very active in disseminating advice by telephone, and hundreds of telephone calls were received during the past year from banks, other financial institutions and creditors, newspapers, attorneys who represent banks, and other Federal

Mr. Allen R. Voss -2-

agencies--for example the Social Security Administration and the Internal Revenue Service.

On page 13 and on page 22, references are made to the Department of Justice's advisory opinion regarding the Act. I would appreciate a change, in the last sentence of this section of the report, to reflect that the Board's staff substantially revised Justice's advisory opinion and sent this revised opinion to the 12 Federal Reserve Banks, for transmittal by them to State banks that are members of the Federal Reserve System. A copy of this revised opinion was also sent to Ms. Michelle Tuman of your staff.

On page 14 of the report, in the first sentence, the statement appears that "[J]ustice established an implementation task (for the Act)." This statement is not entirely accurate. Actually, the five federal financial supervisory agencies convened the Task Force, and Justice representatives began to meet with this task force after it had been operating for 2 or 3 months. 2/

On page 15 of the report, in the first and second sentences, statements are made that law enforcement agencies believe that the Act hinders their investigative activities. Congress heard these same claims when passage of the Act was pending, and did not appear to accept the statements at face value. In the absence of objective evidence to support this point, I would urge a toning down of the statement. From my observation, no hindrance to law enforcement activities attributable to the Act has occurred.

I heartily agree with the opinion on pages 16-19 and elsewhere in the report regarding the Department of Justice's opinion regarding the "implied authority" of financial supervisory agencies to make criminal referrals without giving notice to the customer(s) whose records are involved. My staff and I found Justice's opinion legally insufficient.

On page 24 a statement appears that agencies will make "[M]ore extensive use of the grand jury subpoena, which is not covered by the act." I believe what is intended to be conveyed by this statement is that the Act does not contemplate excessive use of the grand jury subpoena. Minor editing changes in the sentence could, I believe, more accurately convey this intention.

On page 27, regarding the supervisory agencies' exchange of information, I would appreciate an additional statement that the legislative history of the Act, particularly earlier Congress' consideration of financial privacy legislation, makes clear that the intention was to preserve this free flow of information among the agencies.

Mr. Allen R. Voss -3-

As a final comment, I note that the report does not contain any recommendations for amendatory legislation for the Act. I believe it would be helpful to the financial supervisory agencies if the GAO would propose such changes. The amendment most needed is one that would clearly preserve the five agencies' free exchange of financial information, but that would at the same time not extend this information exchange authority to the Securities and Exchange Commission. Another proposal that would be helpful would be an amendment clarifying that the financial supervisory agencies are exempt from the Certificate of Compliance requirement of the Act.

I appreciate the opportunity to submit comments about this draft report; and I appreciate also your granting an extra 3 days for this response.

Sincerely,

Neal L. Petersen

Neal L. Petersen
General Counsel

Note 1/On January 1, 1979, the Federal Reserve Board published, in the Federal Register, a "Proposed Statement of Customer Rights Under the Financial Privacy Act." The Department of Justice later published a "Customer Consent and Authorization For Access to Financial Records" form and attached to it a Statement of Customer Rights which was essentially the same as that proposed by the Federal Reserve Board.

Note 2/The task force referred to in our report is an internal Department of Justice task force.

APPENDIX V

FEDERAL DEPOSIT INSURANCE CORPORATION, Washington, D.C 20429

April 1, 1980

Mr. Allen R. Voss
Director
General Accounting Office
Washington, D. C. 20548

Dear Mr. Voss:

We are in receipt of the draft report prepared by the General Accounting Office ("GAO") regarding the initial problems encountered by various Federal agencies in the administration of the Right to Financial Privacy Act of 1978 and appreciate the opportunity to comment on that report prior to its issuance in final form.

We find the report to be generally accurate in its discussion of the problem areas encountered thus far in the administration of the Act and agree with the statement found in the concluding pages of the report that limited agency experience with the Act prevents a meaningful assessment of those difficulties at this time. We have and will continue to work to achieve a resolution of the administrative difficulties presented by the Act especially in the area of interagency exchange of information among the financial supervisory agencies. The problem areas listed on the top of page 27 still exist to one extent or another. We are not able at this time to determine what effect these restrictions on transfer will have.

As to those portions of the report specifically referring to steps taken by the FDIC to comply with the Act, we find them to be substantially accurate and have no additional comment except to say that the FDIC is in the process of amending its internal regulation (12 C.F.R. Part 309) regarding the handling of information so that it will conform to the restrictions of the Act.

Regarding the extensive treatment of the issue of criminal referrals and the Justice Department legal opinion indicating that customer notice is not required in certain circumstances, we wish to voice our opinion that in view of the differing interpretations to which the literal language of the Act and its legislative history are subject, the Justice Department opinion appears to be an acceptable compromise between the needs of law enforcement agencies and the privacy concerns which spawned the Right to Financial Privacy Act. The FDIC had halted <u>all</u> criminal referrals for several months in 1979 during which time our legal staff sought to identify FDIC's responsibilities under the Act. Ongoing criminal investigations and ultimately the safety or

Mr. Allen R. Voss - 2 - April 1, 1980

soundness of the banks the FDIC supervises could have been adversely affected had the moratorium continued. The FDIC felt and continues to feel that the authority to make criminal referrals as outlined in the Justice Department opinion is the proper way to proceed absent clarifying language in the Act or a judicial construction to the contrary. We wish to emphasize that FDIC's proposed regulation provides that should any actual customer record be transferred to a U.S. Attorney or a notification be referred which contains more information than that outlined in the Justice Department Advisory, then the customer will be notified of the transfer.

According to recent communications from staffs of the Office of the Comptroller of the Currency and the Federal Home Loan Bank Board, those agencies are now operating under the same procedure as the FDIC. As the FDIC is interested in obtaining the views of all the financial institution supervisory agencies regarding the best procedure to adopt, it is our intention to present the matter to the Interagency Coordinating Committee for discussion. We will not take any final action with respect to our proposed amendment to Part 309 until such time as we are able to consult with the other supervisory agencies on how best to proceed.

Again, we appreciate the opportunity to review the GAO report before it is issued in final form. Should you have any further need for comment or information, we will try to cooperate as fully and quickly as possible.

Sincerely,

Irvine H. Sprague
Chairman

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