

Follow the Money: Obtaining and Using Financial Information in Military Criminal Investigations and Prosecutions

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Make no mistake about it. The goal of the U.S. Government is to interdict and obstruct the ability of criminals to utilize their ill-gotten gains, whether for the purpose of continuing their criminal enterprises or to enhance their lifestyles.¹

I. Introduction

Trial counsel must be able to properly secure, and use, financial records, without exposing the government to costly civil litigation.

Military offenders are just as likely as white-collar corporate thieves to abscond with large sums of money. For example, in 2008, the Army reported \$24.2 million in losses from potentially fraudulent temporary duty claims submitted by servicemembers.² More recently, former Army Major (MAJ) Eddie Pressley was convicted of soliciting and receiving nearly \$3 million in bribes for favorable disposition of overseas contracts.³

For the criminals who obtain money for their crimes, the disposition of the illicit funds is limited only by their imaginations. While some might spend the ill-gotten gains immediately, others hide the money in the bank accounts of relatives and friends, businesses, or in capital investments like real property.⁴ For example, MAJ Pressley, both a spender and a saver, bought expensive cars and property, but also stashed bribe money in bank accounts located in Dubai and the Cayman Islands.⁵

This kind of financial activity usually produces evidence in the form of financial documents. Traditional records include bank account statements, negotiable instruments such as checks, and real or personal property loan documents.⁶ More complicated and non-traditional

records include securities and trust instruments, safe deposit records, tax information, and credit reports.⁷ These documents can provide trial counsel with important evidence of the motives of the accused, or the means of their criminal activity.⁸

However, when counsel fail to comply with the laws regarding financial documents the consequences can be significant. While improperly obtained records are not often suppressed at trial,⁹ aggrieved parties may receive substantial damages in civil court.¹⁰ With significant damage awards and disciplinary action as potential penalties, counsel would do well to proceed cautiously when seeking to secure these important financial records.

The goal of this article is to enhance trial counsel's ability to properly secure, and use, financial records, without exposing the Government to costly civil litigation. Part II provides a brief history of the legislation that enables the government to obtain financial records. Part III outlines the means of obtaining financial records and the hazards of improperly obtaining such records, which include exposure to civil litigation and fines for violations. Section III also discusses three areas where courts have traditionally held the introduction of financial records to be relevant and proper proof, either direct or circumstantial, of a criminal offense.¹¹

II. Background

Described as “an iron fist in a velvet glove,”¹² the rules regarding disclosure of financial information represent the legislative and judicial desire to balance the legitimate

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¹ ROBERT S. MUELLER, II, *Foreword to MONEY LAUNDERING*, FEDERAL PROSECUTION MANUAL (1993) (Assistant Attorney General, Criminal Division) [hereinafter FEDERAL PROSECUTION MANUAL].

² ASSISTANT SEC'Y OF THE ARMY (FIN. MGMT. & COMPTROLLER), REP. NO. 09-001, REVIEW OF TEMPORARY CHANGE OF STATION PROGRAM (Oct. 1, 2008).

³ Press Release, U.S. Dep't of Justice, Army Major, Wife Convicted in Bribery Scheme Related to Defense Contracts to Support Iraq War (Mar. 2, 2011) [hereinafter DoJ Press Release].

⁴ See Michael Levi & Peter Reuter, *Money Laundering*, 34 CRIME & JUST. 289, 290 (2006).

⁵ DoJ Press Release, *supra* note 3.

⁶ See DEP'T OF THE TREASURY FIN. CRIMES ENFORCEMENT NETWORK, FREQUENTLY ASKED QUESTIONS (FAQS) CONCERNING THE 314(A) PROCESS (Feb. 5, 2007) [hereinafter FINCEN FAQ].

⁷ *Id.*; 26 U.S.C. § 6103(i) (2006) (tax records); 15 U.S.C. § 1681b(a)(1) (2006) (credit reports).

⁸ See *infra* Part III.C.

⁹ See *infra* Part III.B.

¹⁰ *Id.*

¹¹ This article does not discuss the wide array of federal and military financial crimes themselves. For practice pointers on prosecuting money laundering, fraud, conspiracy, aiding and abetting drug offenses, RICO, and other related offenses, see FEDERAL PROSECUTION MANUAL, *supra* note 1.

¹² LAURA K. DONOHUE, THE COST OF COUNTERTERRORISM: POWER, POLITICS, AND LIBERTY 152 (2008).

interests of law enforcement against the privacy rights of individuals. With this goal in mind, the legislation and case law, discussed below, create effective money laundering controls, and mandate strict customer notification and challenge procedures. These laws also impose criminal and civil penalties for violations of their provisions.¹³

To accomplish these objectives, a large body of federal law regulates the tracking, reporting, and movement of currency inside and outside the United States. However, the Bank Secrecy Act (BSA) of 1970¹⁴ and the Right to Financial Privacy Act (RFPA) of 1978¹⁵ are the primary authorities. A basic understanding of how these acts operate will provide a foundation for the effective use of financial records in criminal litigation.

A. Bank Secrecy Act (BSA) of 1970

Prior to 1970, secret foreign bank accounts posed a problem for law enforcement professionals trying to connect illicit funds to criminal activity.¹⁶ When efforts to solve the problem through diplomatic channels proved largely unsuccessful, Congress enacted the BSA.¹⁷ The primary purpose of the BSA was to combat secret financial transactions and make financial records, which have a “high degree of usefulness in criminal, tax, and regulatory investigations,” available to law enforcement.¹⁸

To minimize secret financial transactions, and to better track the movement of currency both inside and outside the United States, the BSA amended the Federal Deposit Insurance Act. It requires financial institutions to verify “the identity of each person having an account . . . with the bank,” maintain copies of “each check, draft or similar instrument drawn on [the financial institution],” and file currency transaction reports with the Department of the

¹³ *Id.*

¹⁴ Bank Secrecy Act of 1970, Pub. L. No. 91-508, 84 Stat. 1114 (1970) [hereinafter BSA].

¹⁵ Right to Financial Privacy Act of 1978, Pub. L. No. 95-630, 92 Stat. 3641, §§ 1100–22 (1978) [hereinafter RFPA].

¹⁶ See DEPARTMENT OF JUSTICE, INVESTIGATION AND PROSECUTION OF ILLEGAL MONEY LAUNDERING: A GUIDE TO THE BANK SECRECY ACT 3 (1983) [hereinafter DOJ GUIDE]. Switzerland, the Bahamas, the Cayman Islands, Liechtenstein, Indonesia, Canada, New Zealand, Panama, France, and Belgium all had laws requiring some form of bank secrecy. *Id.* at 3–4 (citing *Foreign Bank Secrecy and Bank Records: Hearings on H.R. 15073 Before the H. Comm. on Banking and Currency*, 91st Cong. 367 (1970)). For example, “[a]lthough a tax treaty with Switzerland had been in existence since 1951, difficulties existed over the exchange of information in tax fraud investigations and proceedings.” Richard Albrecht, *An Analysis of the Bank Secrecy Act*, in PRACTISING LAW INSTITUTE, BANK SECRECY ACT 10 (1976).

¹⁷ DOJ GUIDE, *supra* note 16, at 5.

¹⁸ BSA, *supra* note 14, at § 101.

Treasury for certain transactions.¹⁹ The implementing rules impose similar reporting requirements on non-banking businesses involved in the transfer of funds, exchange of currency, or the operation of credit card systems.²⁰ The Secretary of the Treasury may make the reports available to “any other department or agency of the United States,” or to a state or foreign government.²¹ Finally, the Act imposes criminal and civil penalties for failure to comply with the reporting provisions.²² It was not long, however, before the Supreme Court would have to measure the BSA against the Fourth Amendment.

B. *United States v. Miller*²³

By 1973, the Bank Secrecy Act (BSA) had been in effect for three years. In that year, pursuant to the authority of the BSA, federal agents obtained grand jury subpoenas for the bank records of Mr. Mitch Miller. The agents believed that Miller was operating an unregistered still and manufacturing whiskey without paying tax on the product. Among Miller’s bank records were checks Miller wrote to rent a van, secure radio equipment, and purchase still-making materials.²⁴

Miller sought to suppress the bank records under the Fourth Amendment, but the district court denied the motion. The Fifth Circuit disagreed, stating the bank records fell “within a protected zone of privacy.”²⁵ In overturning the Fifth Circuit’s decision, the Supreme Court first noted the records were not Miller’s “private papers” within the meaning of the Fourth Amendment but rather “business

¹⁹ *Id.* Currently, financial institutions must file a Suspicious Activity Report (SAR) for transactions of “at least \$5,000” that are known, or suspected, to involve “funds derived from illegal activities or . . . intended . . . to hide” such funds or “avoid any transaction reporting requirement.” 31 C.F.R. § 1020.320 (2011). Furthermore, any transaction (deposit, withdrawal, or exchange) involving \$10,000 or more must also be reported. 31 U.S.C. § 5316(a) (2006); 31 C.F.R. § 1010.311 (2011).

²⁰ See 31 C.F.R. §§ 1022.300 (money services businesses), 1023.300 (securities brokers), 1024.300 (mutual funds), 1025.300 (insurance companies), 1026.300 (futures merchants and commodities brokers), 1028.300 (credit card system operators). The Anti-Drug Abuse Act of 1988 expanded the definition of “financial institution” under the BSA to include “business[es] engaged in vehicle sales . . . [and] persons involved in real estate closings and settlements.” Pub. L. No. 100-690 § 6185, 102 Stat. 4181 (1988) (amending 31 U.S.C. § 5312(a)(2) (2006)).

²¹ 31 C.F.R. § 1010.950(b). This information is provided in confidence, and is made available only upon written request. *Id.* § 1010.950(b)-(e) (2011).

²² See, e.g., 31 U.S.C. §§ 5317(c) (forfeiture of assets), 5324(d) (fine or imprisonment). See also 31 C.F.R. §§ 1010.820 (civil penalties), 1010.830 (forfeitures), 1010.840 (criminal penalties).

²³ 425 U.S. 435 (1976).

²⁴ *Id.* at 436–38.

²⁵ *Id.* at 438–39.

records of the banks.”²⁶ To be certain, “[t]he depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the Government.”²⁷ Because Miller exposed the checks to the bank’s employees, Miller had no Fourth Amendment privacy interest in the subsequently created records.²⁸

Additionally, according to the Court, Congress assumed “[t]he lack of any legitimate expectation of privacy concerning the information kept in bank records” when it enacted the BSA.²⁹ Thus, a bank customer had no statutory privacy right in his financial records.³⁰ This decision motivated Congress to undertake remedial measures and enact the Right to Financial Privacy Act.

C. Right to Financial Privacy Act (RFPA) of 1978

Congress’s concern with the decision in *Miller* was that the Court read the BSA to give government agencies potentially “unfettered access” to financial records.³¹ To strike a better balance between the bank customer’s privacy interest and the interest of law enforcement professionals in thwarting crime, Congress created five categories of financial records access requests under the RFPA. In doing so, Congress effectively “restrict[ed] the free flow of such information.”³²

The five categories are customer authorization, disclosure pursuant to administrative subpoena, search warrant, judicial subpoena, and formal written request.³³ This primer outlines each of these avenues in detail in Part III.A and discusses the penalties for violations of the RFPA in Part III.B.

III. Analysis

Operating within this legislative framework, trial

²⁶ *Id.* at 440. The Court further dismissed Miller’s assertion that the records were copies of “private documents,” noting “[t]he checks are not confidential communications but negotiable instruments to be used in commercial transactions.” *Id.* at 442.

²⁷ *Id.* at 443 (citing *United States v. White*, 401 U.S. 745, 751–52 (1971)).

²⁸ *Id.*

²⁹ *Id.* at 443–44 (citing 12 U.S.C. § 1829b(a)(1)).

³⁰ *Id.* at 445.

³¹ Richard Cordero, Annotation, *Construction and Application of Right to Financial Privacy Act of 1978*, 112 A.L.R. FED. 295, § 2[a] (1993). *See also Lopez v. First Union Nat’l Bank of Fla.*, 129 F.3d 1186, 1190 (11th Cir. 1997) (stating the Court’s decision in *Miller* “prompted Congress to enact the Right to Financial Privacy Act”).

³² Cordero, *supra* note 31, at § 2[a].

³³ RFPA, *supra* note 15, § 1102(1)–(5).

counsel can obtain a wide variety of financial information about an accused and, potentially, close friends and relatives. So long as counsel comply with the RFPA when obtaining the records, they may avoid exposure to subsequent, and potentially costly, civil litigation. Once the records are obtained, counsel may use them to prove motive, intent, or the offense itself.

A. Avenues for Obtaining Financial Records in the Military

Before the government can offer financial records to develop its case, trial counsel must first secure the records. The Criminal Investigative Division (CID) Liaison at the Financial Crimes Enforcement Network (FinCEN) can point trial counsel in the right direction. Armed with information from FinCEN, trial counsel can then use one of the five methods set out in the RFPA to request and secure copies of relevant records.

1. The Financial Crimes Enforcement Network

FinCEN is the Treasury Department’s lead agency for implementing the requirements of the BSA. FinCEN gathers reports required under the BSA and “provides intelligence and analysis for case support.”³⁴ With FinCEN’s access to these required reports, and a large number of related databases, FinCEN is “one of the largest repositories of information available to law enforcement in the country.”³⁵ As a result, FinCEN agents provide invaluable strategic analysis and support to complex investigations where financial information is relevant.

For the Army, a CID special agent serves as liaison at FinCEN pursuant to an agreement between FinCEN and CID’s Chief of Major Procurement Fraud.³⁶ The FinCEN liaison can gather a wide variety of personal information for trial counsel and investigators. A subject’s current address, real and personal property owned, liens, bankruptcies, businesses owned, and U.S. Customs information can all be collected by the liaison. More importantly, the liaison, accessing the Treasury Department’s database, can provide Currency Transaction Reports (CTRs), Suspicious Activity Reports (SARs), and Currency and Monetary Instrument Reports (CMIR).³⁷

³⁴ U.S. DEP’T OF JUSTICE, U.S. ATTORNEYS’ MANUAL, CRIMINAL RESOURCE MANUAL § 2040 (1997).

³⁵ FINANCIAL CRIMES ENFORCEMENT NETWORK, U.S. DEP’T OF THE TREASURY, http://www.fincen.gov/law_enforcement/ (last visited May 21, 2011).

³⁶ Telephone Interview with Special Agent Rebecca Christensen, FinCEN Liaison (Oct. 13, 2010). None of the sister services has a liaison at FinCEN. *Id.*

³⁷ *Id.*

When the evidence suggests money laundering, the FinCEN liaison may also provide limited financial information pursuant to a request under Section 314(a) of the USA PATRIOT Act.³⁸ Upon receiving such a request, FinCEN sends the information to all financial institutions.³⁹ Each institution must then search its deposit, funds transfer, trust, securities, and safe deposit box records for matching information.⁴⁰ If the financial institution discovers a match, it notifies FinCEN, but, at that point, does not provide any records.⁴¹ Subsequent disclosure of the matching records requires one of the processes discussed below.

Finally, as part of FinCEN's partnership with the Egmont Group, the liaison may access financial information from participating international organizations.⁴² The Egmont Group is a conglomerate of over one hundred national security organizations that collects and analyzes suspicious and unusual financial activity.⁴³ An Egmont request may prove useful when an accused hides funds in offshore and international accounts.⁴⁴

2. Consent, Subpoenas, Search Warrants, and Written Requests

Once counsel know where to look for financial records, several avenues are available to obtain them. Counsel may request consent, make a formal request to the financial institution, issue a judicial subpoena, or request a warrant.⁴⁵ Administrative subpoenas, though permitted under the RFP, are prohibited by regulation in the Army.⁴⁶

a. Consent

For the Army, the preferred method is customer consent.⁴⁷ At any point in the court-martial and investigation process, counsel may request the consent of the accused to obtain financial records.⁴⁸ A request for consent must be "in writing . . . [i]dentify the particular financial records . . . [s]tate the customer may revoke the consent at any time before disclosure . . . [and] [s]pecify the purpose of disclosure."⁴⁹ The request must also outline the customer's RFP rights.⁵⁰

³⁸ Pub. L. No. 107-56, § 314(a), 115 Stat. 272 (2001) (requiring the Secretary of the Treasury to adopt regulations for such information sharing). A 314(a) request must be "based on credible evidence of terrorist activity or money laundering" and should detail the "size or impact of the case, the seriousness of the underlying criminal activity, the importance of the case to a major agency program, and any other facts demonstrating its significance." DEP'T OF THE TREASURY FIN. CRIMES ENFORCEMENT NETWORK, FINCEN'S 314(a) FACT SHEET (Oct. 5, 2010) [hereinafter 314(a) FACT SHEET]. See also 31 C.F.R. § 1010.520(b) (2011).

³⁹ FINCEN FAQ, *supra* note 6. Generally, requests are sent out every fourteen days. *Id.* "This power . . . quickly became known in some circles as a 'Google search.'" DONOHUE, *supra* note 12, at 162 (citation omitted). This is because FinCEN can "reach out to more than 44,000 points of contact at more than 22,000 financial institutions to locate accounts and transactions of persons that may be involved in terrorism or money laundering." 314(a) FACT SHEET, *supra* note 38.

⁴⁰ FINCEN FAQ, *supra* note 6. The institution is required to search records up to six to twelve months old.

⁴¹ *Id.* See also, 314(a) FACT SHEET, *supra* note 38 ("Section 314(a) provides lead information only and is not a substitute for a subpoena or other legal process.").

⁴² FINCEN FAQ, *supra* note 6.

⁴³ *Id.* "[B]y November 2005, the Egmont Group contained 101 National Financial Intelligence Units (FIUs) that meet internally developed criteria for receiving, analyzing, and processing reports (including Suspicious Activity Reports [SARs])." Levi & Reuter, *supra* note 4, at 291. At the writing of this primer, Egmont's website listed 121 members. *List of Members*, THE EGMONT GRP. OF FIN. INTELLIGENCE UNITS, <http://www.egmontgroup.org/about/list-of-members> (last visited Dec. 29, 2010).

⁴⁴ For example, Major Pressley set up accounts in Dubai and the Cayman Islands to hide bribe money he and his wife received. DoJ Press Release, *supra* note 3.

⁴⁵ 12 U.S.C. § 3402 (2006). See also Captain Nick Tancredi, *Using Tax Information in the Investigation of Nontax Crimes*, ARMY LAW., Mar. 1986, at 30-35 (reviewing the means of obtaining, and methods of using, tax information).

⁴⁶ U.S. DEP'T OF ARMY, REG. 190-6, OBTAINING INFORMATION FROM FINANCIAL INSTITUTIONS para. 2-3 (9 Feb. 2006) [hereinafter AR 190-6] ("The Army has no authority to issue an administrative summons or subpoena for access to financial records").

⁴⁷ *Id.* para. 1-5a(1). "It is DA policy to seek customer consent to obtain a customer's financial records from a financial institution unless doing so would compromise or harmfully delay a legitimate law enforcement inquiry." *Id.*

⁴⁸ *Id.* As a practical matter, counsel should remain cognizant of the prohibition on direct communication with a represented party when requesting consent. U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYER, r. 4.2 (1 May 1992).

⁴⁹ AR 190-6, *supra* note 46, para. 2-2a. See also 12 U.S.C. § 3404 (2006).

⁵⁰ AR 190-6, *supra* note 46, para. 2-2a. See also 12 U.S.C. § 3404 (2006).

b. Formal Written Request

If trial counsel cannot get customer consent, or if requesting “consent from the customer would compromise or harmfully delay a legitimate law enforcement inquiry,” counsel may instead submit a formal written request to the financial institution.⁵¹ The government must first serve a copy of the request on the customer.⁵² The customer then has ten to fourteen days to challenge the request or attempt to obtain an injunction against the government.⁵³ However, counsel may only use the formal written request process if they cannot secure a judicial subpoena.⁵⁴ Thus, the formal written request is only available to counsel at the pre-referral stage of the court-martial process.

c. Judicial Subpoena

Once charges have been referred, trial counsel may issue a judicial subpoena pursuant to Article 46 of the Uniform Code of Military Justice.⁵⁵ A post-referral subpoena *duces tecum*, issued by trial counsel under Rule for Courts-Martial 703, is a judicial subpoena under the RFPA.⁵⁶ Trial counsel must ensure they serve notice of the subpoena on the customer before or at the same time as the financial institution.⁵⁷ The customer then has ten or fourteen days to file a motion with the military judge to quash the subpoena.⁵⁸ However, an assertion of rights under the RFPA tolls the statute of limitations.⁵⁹

⁵¹ AR 190-6, *supra* note 46, para. 2-6a. Such a request must be signed by the “head of a law enforcement office of field grade rank or higher.” *Id.* para. 2-6b(5) (referencing para. 1-5b). *See also* 12 U.S.C. § 3408 (2006).

⁵² 12 U.S.C. § 3408(2), (4)(A).

⁵³ *Id.* § 3408(4)(B). Any delay resulting from an assertion of rights under the RFPA tolls the statute of limitations. *See infra* note 59 and accompanying text.

⁵⁴ 12 U.S.C. § 3408(1). The statute provides that counsel may only use the written request if an administrative summons or judicial subpoena is not available. *Id.* However, as discussed above, the use of an administrative subpoena is prohibited by Army Regulation 190-6.

⁵⁵ *See* AR 190-6, *supra* note 46, para. 2-5. *See also* 12 U.S.C. § 3407 (2006).

⁵⁶ *United States v. Curtin*, 44 M.J. 439, 440 (C.A.A.F. 1996) (“[S]ubpoenas issued by a trial counsel are ‘judicial’ within the meaning of the Right to Financial Privacy Act.”). *See also*, AR 190-6, *supra* note 46, para. 2-5b (“[Judicial subpoena] [i]nclude subpoenas issued under Rule for Courts-Martial 703(e)(2) of the Manual for Courts-Martial and Article 46 of the Uniform Code of Military Justice.”).

⁵⁷ 12 U.S.C. § 3407(2).

⁵⁸ *Id.* § 3407(3) (The time limits are ten days from service or fourteen days from mailing of the subpoena.).

⁵⁹ *Id.* § 3419 (2006). *See also United States v. Dowty*, 46 M.J. 845, 848–49 (N-M. Ct. Crim. App. 1997) (“Under the Right to Financial Privacy Act, the applicable statute of limitations, in this case Article 43 of the UCMJ, 10 U.S.C. § 843, is tolled during the pendency of challenges to government subpoena . . .”).

d. Search Warrants

The RFPA also permits the use of search warrants to obtain financial information.⁶⁰ Search warrants are the least preferred method of obtaining financial records during the pre-referral stage of the court-martial process.⁶¹ Like judicial subpoenas, search warrants require customer notification.⁶² However, only a civilian authority, such as a federal magistrate or state court judge, may issue a search warrant.⁶³ Thus, search warrants must be coordinated with the U.S. Attorney’s Office and must comply with the Federal Rules of Criminal Procedure and the Fourth Amendment, and therefore must be supported by probable cause.⁶⁴ Because of these hurdles, it is unlikely that trial counsel will often seek a warrant to obtain financial records.

e. Emergency Access Requests

Finally, both the RFPA and Army Regulation 190-6 include provisions for emergency access to financial records. The emergency access provisions permit investigators to deviate from normal procedures to prevent imminent “physical injury to a person, serious property damage, or flight to avoid prosecution.”⁶⁵ Within five days of gaining such access, counsel must file an affidavit “setting forth the

⁶⁰ 12 U.S.C. § 3406 (2006). Trial counsel should not confuse a search warrant with a search authorization. A search authorization may be issued by a military judge or by a commander “who has control over the place where the property or person to be searched is situated.” MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 315(d) (2008) [hereinafter MCM]. Unlike a search warrant, a search authorization cannot be used to secure financial records “in any State or territory of the United States.” AR 190-6, *supra* note 46, para. 2-4c. If the financial institution is located on a DoD installation “outside the United States” a search authorization may then be used. *Id.* para. 2-4d(1).

⁶¹ 28 C.F.R. § 59.4(a)(1). “A search warrant should not be used to obtain documentary materials believed to be in the private possession of a disinterested third party unless it appears that the use of a subpoena, summons, request, or other less intrusive alternative means of obtaining the materials would substantially jeopardize the availability or usefulness of the materials sought . . .” *Id.*

⁶² 12 U.S.C. § 3406(a), (b). *See also* AR 190-6, *supra* note 46, para. 2-4a. However, a court may order an initial delay in notification of up to 180 days, with additional ninety day extensions. 12 U.S.C. § 3406(c). *See also infra* Part III.A.3.

⁶³ MCM, *supra* note 60, MIL. R. EVID. 315(b)(2); FED. R. CRIM. P. 41(b).

⁶⁴ 12 U.S.C. § 3406(a), (b); 28 C.F.R. § 60.1 (2010) (“[I]n all instances, military agents of the Department of Defense must obtain the concurrence of the appropriate U.S. Attorney’s Office before seeking a search warrant.”); FED. R. CRIM. P. 41(d)(1). *See also* AR 190-6, *supra* note 46, para. 2-4a (permitting law enforcement officers to seek subpoenas under Rule 41 of the Federal Rules of Criminal Procedure). For general guidelines on requirements for the issuance of federal search warrants see HOMELAND SEC., FED. LAW ENFORCEMENT TRAINING CTR., LEGAL DIVISION HANDBOOK 354–63 (2010), available at <http://www.fletc.gov/training/programs/legal-division/legal-division-handbook.pdf>.

⁶⁵ AR 190-6, *supra* note 46, para. 2-7.

grounds for the emergency access” with the appropriate court.⁶⁶

3. Delay of Customer Notification

As discussed above, generally, the government must notify a customer when financial records have been requested.⁶⁷ This notification details the customer’s rights under the RFPA and in some cases includes a draft motion to quash, which the customer may file in court.⁶⁸ However, investigators may delay notification when doing so risks the “life or physical safety of any person, [f]light from prosecution, [d]estruction of or tampering with evidence, [i]ntimidation of potential witnesses, [or] [o]therwise seriously jeopardizing an investigation.”⁶⁹ The periods of available delay vary depending on the method used to acquire the records.⁷⁰

B. Hazards of Improperly Obtaining Records

A failure to comply with the RFPA may not result in suppression of the evidence, but violations are not without consequence. Courts are reluctant to exclude evidence at trial based solely on an RFPA violation. However, courts may instead assess fines, which can prove costly to the government.

1. Admissibility of Improperly Obtained Records at Trial

Though the RFPA applies at courts-martial, the remedy for evidence obtained in violation of the Act is not suppression. In *United States v. Wooten*, a fraudulent check case, the government subpoenaed the accused’s bank records. The court-martial was convened in Germany, but the financial records were maintained in the United States.⁷¹ Because trial counsel lacked the authority to subpoena stateside records from Germany, defense counsel alleged that the subpoenas were improperly issued, in violation of Article 46, UCMJ.⁷² The court, however, held that even if

⁶⁶ 12 U.S.C. § 3414(b)(3).

⁶⁷ See, e.g., *id.* §§ 3405(2), 3406(b), 3407(2), 3408(4)(a).

⁶⁸ See *id.* § 3408(4)(A) (draft motion to quash included with customer rights).

⁶⁹ AR 190-6, *supra* note 46, para. 2-9b.

⁷⁰ *Id.* para. 2-9a. Initial delays vary from 90 days for formal written requests to 180 days for search warrant requests. Each requested delay may then be extended for 90-day periods. *Id.* These delays require coordination with the “supporting staff judge advocate.” *Id.* para. 2-9c. See also 12 U.S.C. § 3409 (2006) (delayed notice).

⁷¹ *United States v. Wooten*, 34 M.J. 141, 144 (C.M.A. 1992).

the records were obtained in violation of the RFPA with an improper subpoena, the remedy was not suppression of the evidence, but rather, a civil suit.⁷³

The Air Force Court of Military Review reached the same conclusion in *United States v. Moreno*.⁷⁴ In *Moreno*, the installation commander improperly authorized a search of the base credit union, which resulted in the production of Moreno’s bank records. Because the installation commander was not “authorized to issue search warrants under the Federal Rules of Criminal Procedure,” and search authorizations may not be used for stateside financial institutions, the search violated the RFPA.⁷⁵

As in *Wooten*, though the government violated the RFPA, suppression was not the answer. The court noted that Congress, in drafting the RFPA, authorized injunctive relief and penalties but did not provide for the exclusion of evidence. Because Congress omitted any provision for exclusion, the court would only exclude improperly obtained financial records if some other basis for exclusion arose.⁷⁶

2. Proper Forum for Challenges

The proper forum to file a motion to quash a judicial subpoena is the court from which the subpoena issued. An administrative subpoena or formal written request may only be challenged in a U.S. district court.⁷⁷ The Court of Appeals for the Armed Forces has held that subpoenas *duces tecum*

⁷² *Id.* at 143. See also generally *United States v. Bennett*, 12 M.J. 463, 471 (C.M.A. 1982) (discussing in depth the jurisdictional limits of the government’s subpoena power outside the United States and holding that a court-martial’s ability to enforce its subpoenas did not include forcing persons to travel to foreign countries, with or without documents).

⁷³ *Wooten*, 34 M.J. at 146–47 (“As the military judge properly recognized, Congress intended these civil remedies to be the only remedies for a breach of this Federal statute.”), 148–49 (“In these circumstances, a court-ordered remedy of a more drastic nature would be inappropriate . . . and the remedy of exclusion of the challenged evidence as supervisory punishment would not be warranted”).

⁷⁴ 23 M.J. 622 (A.F.C.M.R. 1986).

⁷⁵ *Id.* at 623–24. See also *supra* note 60 (discussing search authorizations).

⁷⁶ *Id.* at 624 (“Since [Congress] chose not to [provide for exclusion], exclusion is only required if the information requires exclusion for some reason other than violation of [the RFPA]”). Improperly obtained tax records have generally received the same treatment. See Tancredi, *supra* note 45, at 35–36.

⁷⁷ 12 U.S.C. § 3410(a) (2006).

A motion to quash a judicial [subpoena] shall be filed in the court which issued the [subpoena]. A motion to quash an administrative summons or an application to enjoin a Government authority from obtaining records pursuant to a formal written request shall be filed in the appropriate United States district court.

Id.

issued by trial counsel “are ‘judicial’ within the meaning of the Right to Financial Privacy Act,” and therefore may be challenged before a Military Judge.⁷⁸

3. Civil Penalties

Unlike a motion to quash a judicial subpoena, a civil suit alleging a violation of the RFPA may only be brought in federal district court.⁷⁹ The RFPA provides for civil penalties against the government when the government improperly obtains financial records.

A 1998 *Army Lawyer* article discussed the issue of agency liability for violations of the RFPA.⁸⁰ At that time, the most common violations of the RFPA for the Army were failure to provide notice under 12 U.S.C. § 3406(b) and failure to coordinate with the U.S. Attorney’s Office.⁸¹ USALSA’s concern was that a lack of awareness “or disregard for the RFPA’s requirements unnecessarily expose[d] the government to litigation and costly civil penalties.”⁸²

In a lawsuit for violation of the RFPA, private citizens⁸³ may obtain actual damages, punitive damages, and actual costs, including attorney’s fees.⁸⁴ One award for the government’s violation of the RFPA was just under \$100,000 per plaintiff.⁸⁵ Furthermore, in addition to damages, federal employees may face “[d]isciplinary action

for willful or intentional violation[s].”⁸⁶

While an RFPA violation will not alone cause evidence in financial records to be excluded, that evidence must still be introduced for a proper purpose to be relevant and admissible.

C. Proper Purpose and Relevance of Financial Records at Trial

Once the government has properly secured the financial records of the accused, counsel may use them to develop the case.⁸⁷ The government may offer financial records to prove an accused’s lifestyle does not match the income earned. Similarly, the records may be used to show that the accused enjoyed an unexplained or sudden accretion of wealth connected to the underlying offense. Alternatively, counsel may use the records to demonstrate an extraordinary financial burden provided motive commit an offense.

1. Living Beyond One’s Means

When monetary gain results from an offense, financial records may show that an accused was living a lifestyle unsupported by legitimate income.⁸⁸ Such evidence is useful in proving motive to commit the underlying offense⁸⁹ and mens rea.⁹⁰ It may also serve to prove elements of the charged offense.⁹¹

For example, when law enforcement personnel suspected that Rudolph Keszthelyi was distributing cocaine, investigators examined his financial records. The investigation revealed that over a period of five years Keszthelyi deposited just over \$240,000 into multiple bank accounts. Keszthelyi also “made a number of very expensive purchases despite having no appreciable legitimate

⁷⁸ United States v. Curtin, 44 M.J. 439, 439–40 (C.A.A.F. 1996).

⁷⁹ Russell v. Dep’t of the Air Force, 915 F. Supp. 1108, 1114 (D. Colo. 1996) (citing United States v. Wooten, 34 M.J. 141 (C.M.A. 1992); 12 U.S.C. § 3416) (“Alleged violations of the RFPA are ‘peculiarly’ within the jurisdiction of Article III courts and not the military justice system.”).

⁸⁰ Major Key, Litigation Division Note, *Right to Financial Privacy Act*, ARMY LAW., Sept. 1998, at 53–54 (citing 12 U.S.C. § 3417(a)); see also Litigation Division Note, *Trial Counsel’s Pre-Referral Subpoena Puts Bank at Risk*, ARMY LAW., Mar. 2003, at 35, 38 (“The RFPA provides account holders a private right of action against the government when it violates their rights under the statute . . .”).

⁸¹ Key, *supra* note 80, at 54.

⁸² *Id.* at 55.

⁸³ The *Feres* doctrine, however, bars claims for violations of the RFPA by military members. *Feres v. United States*, 340 U.S. 135 (1950); *Flowers v. United States Army*, 179 F. App’x 986, 987–88 (9th Cir. 2006) (unpublished), *cert. denied*, 550 U.S. 933 (2007). The *Flowers* case involved an improperly issued pre-referral subpoena without the required certification of compliance with the RFPA. *Flowers v. First Hawaiian Bank*, 295 F.3d 966, 968–69 (9th Cir. 2002), *discussed in* Litigation Division Note, *Trial Counsel’s Pre-Referral Subpoena Puts Bank at Risk*, ARMY LAW., Mar. 2003, at 35–37.

⁸⁴ 12 U.S.C. § 3417(a) (2006). See also Tancredi, *supra* note 45, at 37 (arguing the availability of punitive damages “create[s] a strong financial incentive to vigorously prosecute a civil claim”).

⁸⁵ Key, *supra* note 80, at 53 (citing Neece v. I.R.S., 41 F.3d 1396 (10th Cir. 1994)).

⁸⁶ 12 U.S.C. § 3417(b).

⁸⁷ For foundations for financial records see EDWARD J. MWINKELRIED ET AL., *MILITARY EVIDENTIARY FOUNDATIONS* § 4.3 (4th ed. 2010).

⁸⁸ *United States v. Fakhoury*, 819 F.2d 1415, 1421 (7th Cir. 1987) (quoting *United States v. Feldman*, 788 F.2d 544, 557 (9th Cir. 1986), *cert. denied*, 479 U.S. 1067 (1987)) (“Evidence that tends to show that a defendant is living beyond his means is of probative value in a case involving a crime resulting in financial gain.”).

⁸⁹ See *id.* at 1418 (evidence of financial circumstance used to prove motive to commit arson).

⁹⁰ DOJ GUIDE, *supra* note 16, at 133 (“Jurors can be better persuaded of a defendant’s criminality when the government can show that he has otherwise unexplained ties to large amounts of money or that he has obtained the money from the sale of drugs.”).

⁹¹ *United States v. Keszthelyi*, 308 F.3d 557, 577 (6th Cir. 2002) (“[T]he government’s evidence was sufficient to support a finding that the total amount of unexplained cash deposits made into defendant’s accounts over the relevant time period was attributable to drug sales.”).

income.”⁹²

At trial, the financial records, in conjunction with the testimony of Keszthelyi’s customers, served two purposes. First, by showing that Keszthelyi’s lifestyle exceeded his income, the government was able to prove that Keszthelyi had “a constant source of revenue from drug sales that explained [the] deposits.”⁹³ Once the prosecution established the illegitimacy of the source of the funds, the government was able to establish the quantity of drugs Keszthelyi distributed.⁹⁴ Thus, evidence that the accused was living beyond his means properly served to establish the underlying offense itself.

In a similar case, Disbursing Clerk Third Class Joseph Tebsherany was tried for larceny of more than \$50,000.⁹⁵ As evidence of Tebsherany’s “unexplained affluence,” the government introduced a vehicle contract made by Tebsherany at the time of the theft. The contract showed that Tebsherany made a substantial cash down payment. The Navy-Marine Court of Military Review found that though it was not unusual for junior enlisted “to purchase moderately priced automobiles . . . [t]he cash down payment is unusual” and “strong probative circumstantial evidence that he stole this money.”⁹⁶

Likewise, the government’s introduction of records of Tebsherany’s gambling activity was also proper. At the time of the larceny, Tebsherany was living the “extravagant lifestyle” of a gambler at an Atlantic City casino. As the records showed, Tebsherany gambled large sums of money and received complimentary services casinos normally only afforded to “high rollers.”⁹⁷ On review, the Court of Military Appeals held that the amounts wagered were “well beyond the pay and emoluments of a junior petty officer” and “the documents were relevant to show that it was more likely than not that appellant was a thief.”⁹⁸ Thus, as in *Keszthelyi*, evidence of Tebsherany’s extravagant lifestyle served to establish the offense.

2. Unexplained or Sudden Accretion of Wealth

Financial records may also be relevant when an unexplained or sudden accretion of wealth serves to corroborate facts underlying the criminal offense.⁹⁹ For example, in *United States v. Cecil*,¹⁰⁰ an officer formerly employed by the Metropolitan Nashville Police Department was charged with distributing cocaine.¹⁰¹ At trial, his accomplice testified that following the robbery of a drug dealer, the accomplice paid Cecil \$10,000.¹⁰²

To corroborate the statement, the prosecution introduced the bank records of Cecil and his wife. The records showed that, over three years, Cecil and his wife had never deposited more than \$3,800 per year into their accounts. However, within a week of the alleged offense, Cecil and his wife had deposited \$6,000 into their accounts.¹⁰³

The records were relevant and properly admitted at trial because the deposit amounts “were linked to the particular offense” and chronologically proximate to the robbery.¹⁰⁴ In reaching this conclusion, the court reiterated, “‘after the commission of an offense . . . it is permissible for the prosecution to show unusual wealth in the hands of a previously impecunious defendant.’”¹⁰⁵ Thus, it was proper for the government to show sudden unexplained wealth to corroborate the offense charged.

3. Imminent or Extraordinary Financial Burden

In some cases, rather than prove a sudden increase in wealth, the government may need to demonstrate an absence of wealth. This is the case when the financial records of an accused show that dire financial circumstances provided a motive to commit the offense.¹⁰⁶ However, courts often consider mere “poverty evidence,” without more,

⁹² *Id.* at 562–63.

⁹³ *Id.* at 577.

⁹⁴ *Id.* (“In order to prove drug quantity by [conversion], the government must prove by a preponderance of the evidence both the amount of money attributable to drug activity and the conversion ratio—*i.e.*, the price per unit of drugs.”) (citation omitted).

⁹⁵ *United States v. Tebsherany*, 30 M.J. 608, 609 (N.M.C.M.R. 1990).

⁹⁶ *Id.* at 613.

⁹⁷ *Id.* at 613–14.

⁹⁸ *United States v. Tebsherany*, 32 M.J. 351, 355 (C.M.A. 1991).

⁹⁹ *United States v. Weller*, 238 F.3d 1215, 1221 (10th Cir. 2001) (“[T]he Government introduced evidence that [the defendant] possessed a large amount of cash after the robbery, where before the robbery she had an empty bank account, ‘maxed out’ credit cards, and no other obvious source from which to obtain cash. It appears this evidence of her sudden change in circumstances was offered as circumstantial evidence of guilt and went well beyond the improper use of ‘poverty as motive.’”).

¹⁰⁰ 615 F.3d 678 (6th Cir. 2010).

¹⁰¹ *Id.* at 683–84.

¹⁰² *Id.* at 688.

¹⁰³ *Id.* at 688–89.

¹⁰⁴ *Id.* at 689.

¹⁰⁵ *Id.* (quoting *United States v. Ingrao*, 844 F.2d 314, 316 (6th Cir. 1988); *United States v. O’Neal*, 496 F.2d 368, 370–71 (6th Cir. 1974)).

¹⁰⁶ *United States v. Fakhoury*, 819 F.2d 1415, 1418 (7th Cir. 1987).

improper.¹⁰⁷

United States v. Fakhoury illustrates the use of evidence of dire financial circumstances to prove motive.¹⁰⁸ When Salim Fakhoury's store burned down, Fakhoury provided multiple affidavits denying any responsibility in the incident. However, Fakhoury's financial records told a different story.¹⁰⁹ As a result, the government introduced records of Fakhoury's debts, bounced checks, and sharp decline in account balances to prove his need for the money before the fire.¹¹⁰ On review, the Seventh Circuit held that, under these circumstances, the evidence of Fakhoury's "deteriorating financial condition" was a proper demonstration of his "motive to commit arson."¹¹¹

By contrast, in *United States v. Johnson*, the Government had no such proper purpose. Staff Sergeant Donald Johnson was tried for drug distribution. In Johnson's case, the evidence demonstrated that Johnson had trouble paying his bills and managing his finances, but little more.¹¹² According to the Court of Appeals for the Armed Forces, "[t]hese conditions might describe a broad swath of military members, without converting such circumstances into motive to transport and distribute drugs."¹¹³ The court held that this kind of "poverty evidence," without more, "has little tendency to prove that a person committed a crime" and is therefore improper.¹¹⁴

These examples demonstrate that trial counsel must exercise caution when introducing evidence of an accused's imminent or extraordinary financial burden to prove motive.

Evidence of generally poor financial circumstances, without more, is improper. However, if trial counsel connect that evidence to the underlying offense, it may be used effectively to demonstrate motive.

IV. Conclusion

Financial records can provide a critical link between an offense and an accused. Such records may prove motive, intent, or facts underlying the charged offense. As long as counsel comply with the Right to Financial Privacy Act when they obtain financial records, and offer the records for a proper purpose at trial, the fact finder may be "better persuaded of a defendant's criminality."¹¹⁵ However, counsel must work closely with the FinCEN liaison to locate the records, and then follow the correct procedures, to ensure that these valuable evidentiary resources are properly obtained without unnecessarily exposing the government to subsequent civil litigation. Though the process is not overly complicated, and financial records can prove quite valuable, unnecessary missteps may prove costly.

¹⁰⁷ See, e.g., *United States v. Johnson*, 62 M.J. 31, 34 (C.A.A.F. 2005); *United States v. Mitchell*, 172 F.3d 1104, 1110 (9th Cir. 1999) ("That a person is feckless and poor, or greedy and rich, without more, has little tendency to establish that the person committed a crime to get more money, and its probative value is substantially outweighed by the danger of unfair prejudice.").

¹⁰⁸ 819 F.2d 1415 (7th Cir. 1987).

¹⁰⁹ See *id.* at 1419–20.

¹¹⁰ *Id.* at 1418 ("[T]he appellant's individual bank account declined from an initial balance of \$18,972.29 in January 1984 to a negative balance of \$410.66 in September 1984."). "The government also submitted evidence showing that on September 4, 1984, a \$40,000 loss of earnings clause was added to the store's \$150,000 insurance policy." *Id.*

¹¹¹ *Id.* at 1421 ("The admission of this evidence did not constitute an abuse of discretion and certainly did not constitute plain error.").

¹¹² *United States v. Johnson*, 62 M.J. 31, 34–35 (C.A.A.F. 2005). Trial counsel argued that Johnson's "divorce, outstanding child support, loans, and overdue bills" put him in a "difficult financial position" and that drug trafficking "simply provided him the opportunity to make a great deal of money." *Id.* at 34 (quoting *United States v. Johnson*, 59 M.J. 666, 673 (A. Ct. Crim. App. 2003)).

¹¹³ *Id.* at 35.

¹¹⁴ *Id.* at 34 (citing *United States v. Mitchell*, 172 F.3d 1104, 1108–09 (9th Cir. 1999)).

¹¹⁵ DOJ GUIDE, *supra* note 16, at 133.

Appendix A

Securing Financial Records Checklist

Pre-Referral

1. Contact FinCEN CID liaison (703-905-3541) and secure investigative leads. Coordinate contact through the local CID office if possible.
 - a. FinCEN Form 50 (Request for Search). Counsel will need to obtain a FinCEN Form 50 to make the request. This form is not available online and can only be provided by the FinCEN liaison.
 - b. Egmont Group Request. A separate Egmont Group request form must also be completed if appropriate for the investigation.
 - c. Section 314(a) Request. If information is requested under Section 314(a) of the USA PATRIOT Act because money laundering is suspected, a law enforcement agency certification, provided by the FinCEN liaison, must also be completed.
2. Request customer consent. This is the preferred method for requesting financial records. AR 190-6, para. 2-2.
 - a. Sample. AR 190-6, Figure 2-1, provides a sample consent request.
 - b. Requirements (12 U.S.C. § 3404(a); AR 190-6, para. 2-2). The request must:
 - i. Be in writing, signed, and dated.
 - ii. Identify the records sought.
 - iii. Notify the customer of the ability to revoke consent at any time before disclosure.
 - iv. Specify the purpose of the disclosure and the agency to which the records may be disclosed.
 - v. Not exceed three months.
 - vi. Include a statement of rights under the RFPA (provided in AR 190-6, Figure 2-2).
 - c. Certification. Counsel must complete a certificate of compliance with 12 U.S.C. § 3401 *et seq.* AR 190-6, Figure 2-3, provides a sample certification.
 - d. Mail. Send the certificate of compliance and customer consent to the financial institution.
3. Formal written request to the financial institution. A formal written request is appropriate if the customer has refused consent, or seeking consent would compromise or harmfully delay an investigation. AR 190-6, para. 2-6a.
 - a. Sample. AR 190-6, Figure 2-4, provides a sample formal written request for access.
 - b. Requirements (12 U.S.C. § 3408; AR 190-6, para. 2-6). The request must:
 - i. Invoke the RFPA as a basis for the request.
 - ii. Describe records sought.
 - iii. State that records are sought in connection with a legitimate law enforcement inquiry.
 - iv. Describe the nature of the inquiry.
 - v. Be signed by a field grade officer (or civilian equivalent) who heads the law enforcement office.
 - c. Notice. The customer must receive notice of the request before the date of access to the records.
 - i. 10 days before if personal service, or 14 days before if mailed.
 - ii. AR 190-6, Figure 2-5, provides a sample notice.
 - d. Motion to Quash. Counsel must provide a draft motion to quash, suitable for filing at the local district court, with the notice to the customer. This requires coordination with the local U.S. Attorney's office. 12 U.S.C. § 3408(4)(A); AR 190-6, para. 2-6g.

- e. Certification. If a customer fails to challenge the request (within 10 days if personal service, 14 days if service by mail), or the customer loses the challenge, the head of the law enforcement office must provide written certification of compliance with 12 U.S.C. 3401 *et seq.* to the financial institution in order to receive the requested documents.
4. Request Search Warrant.
 - a. Authority (12 U.S.C. § 3406; RCM 315). Warrants may only be issued by a competent civilian authority, i.e., magistrate or state court judge, and must comply with Federal Rule of Criminal Procedure 41.
 - b. Coordination. Warrants must be coordinated through the local U.S. Attorney's Office. 28 C.F.R. § 60.1.
 - c. Notice. Within 90 days of service of the warrant, the customer must receive notification unless a delay is approved. AR 190-6, para. 2-4b includes a sample notice.
 5. Search Authorization. A search authorization is not normally a proper method of obtaining financial records. A search authorization may only be used in the limited circumstance where customer consent cannot be obtained, or seeking consent would be inappropriate, and the financial records are located on a DoD installation outside the United States, Puerto Rico, The District of Columbia, Guam, American Samoa, or the Virgin Islands. AR 190-6, para. 2-4d.

Post-Referral Judicial Subpoena

1. Application. After referral, trial counsel may issue a subpoena *duces tecum* in accordance with UCMJ art. 46, and RCM 703.
2. Notice. Personally serve or mail a copy of the subpoena to the customer on or before the date the subpoena is served on the financial institution. 12 U.S.C. § 3407(2).
3. Motion to Quash. Counsel must provide a draft motion to quash suitable for filing at the local district court with the notice to the customer. This requires coordination with the local U.S. Attorney's office. 12 U.S.C. § 3407(2).
4. Certification. If a customer fails to challenge the request (within 10 days if personal service, 14 days if service by mail), or the customer loses the challenge, the head of the law enforcement office should provide written certification of compliance with 12 U.S.C. 3401 *et seq.* to the financial institution to receive the requested documents. (*See* 12 U.S.C. § 3407(3)).

Emergency Access Request

1. Application. When the processes outlined above would create "an imminent danger of physical injury to a person, serious property damage, or flight to avoid prosecution" counsel may obtain financial records under the emergency access provisions. 12 U.S.C. § 3414(b); AR 190-6, para. 2-7a.
2. Requirements. AR 190-6, para. 2-7b.
 - a. Certification. Provide written certification of compliance with 12 U.S.C. § 3401 *et seq.* to the financial institution.
 - b. Affidavit. Within five days, file a signed sworn affidavit setting forth the circumstances requiring the emergency access with the court.
3. Notice. Unless a delay in notice has been granted, personally serve or mail notice to the customer "as soon as practicable." AR 190-6, para. 2-7c(1) provides a sample notice.

Delay of Notification

1. Application. Delay of notice is appropriate if needed to prevent flight from prosecution, destruction or tampering with evidence, intimidation of a witness, endangering life or safety of another, or seriously jeopardizing an

investigation. 12 U.S.C. § 3409; AR 190-6, para. 2-9a.

2. Requirement. Request an order from the appropriate court (for a formal written request, the appropriate court is the U.S. District Court; for a judicial subpoena, the appropriate court is the military court). *See* 12 U.S.C. § 3410(a).
3. Length of Delay. 12 U.S.C. §§ 3406(c), 3409(b); AR 190-6, para. 2-9(a).
 - a. Formal Written Request, Emergency Access: 90 days initially, then successive 90-day extensions.
 - b. Search Warrant: 180 days initially, then successive 90 day extensions.
4. Notice. Upon expiration of delay, notice must be provided as required above based on the method used to obtain the records. AR 190-6, para. 2-9d.

Appendix B

Securing Financial Records Flowchart

