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THE RIGHT TO FINANCIAL PRIVACY ACT AND THE SEC

In 1978, Congress passed the Right to Financial Privacy Act[1] (RFPA) as Title XI of the Financial Institutions Regulatory and Interest Control Act.[2] The RFPA represents an attempt by Congress to accommodate the conflicting interests of legitimate government investigation and an individual's right to conduct business without government intrusion.[3] The RFPA establishes certain procedures that federal agencies and departments must observe in order to obtain records from financial institutions.[4] The RFPA also provides for certain exceptions to such procedures.[5] Significantly, the RFPA provides a two year exemption from the provisions of Title XI for the Securities and Exchange Commission (SEC).[6] On November 10, 1980, the RFPA became effective with respect to the SEC.[7] The first important decision concerning the proper construction of the applicability of the RFPA to the SEC is *Hunt v. United States Securities & Exchange Commission.*[8]

Courts describe communications that a customer makes to a financial institution as confidential.[9] While the law does not consider such communications privileged,[10] courts nevertheless have held banks liable for revealing a customer's financial records to private parties.[11] In situa-

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[1] 12 U.S.C. §§ 3400-3422 (Supp. III 1979).

[2] Act of Nov. 10, 1978, Pub. L. No. 95-630, 92 Stat. 3461.

[3] [1978] U.S. CODE CONG. & AD. NEWS 9273, 9375; Kirschner, *The Right to Financial Privacy Act of 1978—The Congressional Response to* United States v. Miller: *A Procedural Right to Challenge Government Access to Financial Records*, 13 U. MICH. J.L. REF. 10, 13 (1979) [hereinafter cited as Kirschner]; Smith, *The Public's Need for Disclosure v. The Individual's Right to Financial Privacy: An Introduction to the Financial Right to Privacy Act of 1978*, 32 AD. L. REV. 511, 513 (1980) [hereinafter cited as Smith].

[4] 12 U.S.C. § 3402 (Supp. III 1979). *See also* note 30 *infra.*

[5] *Id.* § 3422; text accompanying note 53 *infra.*

[6] 12 U.S.C. § 3422 (Supp. III 1979); text accompanying notes 40-44 *infra.*

[7] 12 U.S.C. § 3422 (Supp. III 1979).

[8] *See* Hunt v. SEC, 520 F. Supp. 580 (N.D. Tex. 1981); text accompanying notes 45-115 *infra.*

[9] California Bankers Ass'n v. Shultz, 416 U.S. 21, 85 (1974) (Douglas, J., dissenting); Burrows v. Superior Court, 13 Cal. 3d 238, 242-43, 529 P.2d 590, 596, 118 Cal. Rptr. 166, 172 (1974); *see Right to Financial Privacy Act, S. 1343, Hearings Before the Sub-Comm. on Financial Institutions of the Senate Comm. on Banking, Housing and Urban Affairs*, 94th Cong., 2d Sess. (1976) (statements of A. A. Milligan, Harold R. Arthur, and Lucille M. Creamer). *See generally* Note, *Bank Recordkeeping and the Customer's Expectation of Confidentiality*, 26 CATH. U. L. REV. 89, 90-91 (1976) [hereinafter cited as *Bank Recordkeeping*].

[10] *See Bank Recordkeeping, supra* note 9, at 90-91. In *United States v. Miller*, the Supreme Court expressly reserved the question of whether there exists an evidentiary privilege between the customer and his financial institution. 425 U.S. 435, 443 n.4 (1976).

[11] *See* Milohnich v. First Nat'l Bank, 224 So.2d 759, 760 (Fla. Dist. Ct. App. 1969) (im-

tions involving governmental access to financial records, however, courts have subordinated the privacy interests of an individual to the government's need for information.[12]

In 1970, the United States Congress enacted the Bank Secrecy Act (BSA), which makes records of customer transactions available to government agencies.[13] In *United States v. Miller*,[14] the Supreme Court

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plied duty on part of bank not to disclose information negligently, wilfully, maliciously, or intentionally to third parties concerning depositor's account); Peterson v. Idaho First Nat'l Bank, 83 Idaho 578, 583, 367 P.2d 284, 290 (1961) (implied contract exists between bank and customer not to disclose customer's account information unless law or customer authorizes). *See also* 10 AM. JUR. 2d BANKS § 332 (implied term of contract that banker not divulge to third parties information relating to customer that banker acquires through keeping of customer's account, unless consent of customer given or authorized by court). Banks have sought to protect themselves from the threat of liability by establishing internal restrictions on employees. Kirschner, *supra* note 3, at 14; *Bank Recordkeeping*, *supra* note 9, at 93.

[12] Harris v. United States, 413 F.2d 316, 318-319 (9th Cir. 1969) (bank records subject to production in response to valid legal process); First Nat'l Bank v. United States, 267 U.S. 576 (1925), *aff'd* 295 F. 142, 143 (S.D. Ala. 1924) (bank forced to disclose records when government agency orders disclosure). *See generally Bank Recordkeeping*, *supra* note 9, at 94.

[13] Pub. L. 91-508, 84 Stat. 114, 12 U.S.C. §§ 1730(d), 1829(b), 1951-59, 31 U.S.C. §§ 1051-62, 1081-83, 1101-05, 1121-22 (Supp. III 1979). Prior to the BSA, financial institutions frequently retained copies of customers' records to protect themselves in case of customer claims. Palmer & Palmer, *Complying with The Right to Financial Privacy Act of 1978*, 96 BANKING L.J. 196, 199 (1979) [hereinafter cited as Palmer & Palmer]. The increasing cost and delay involved in maintaining customers' records, however, led to the cessation of the practice of photocopying checks. *Id.* In the late 1960's Congress became conscious of the increase in white collar crime, federal tax evasion, and the flow of currency into secret foreign bank accounts. Kirschner, *supra* note 3, at 12 & 15. Finding that records banks maintained were insufficient to aid government agencies in prosecuting infractions of illegal customer activities, Congress enacted the BSA. *Id.* at 15; *see* California Bankers Ass'n v. Shultz, 416 U.S. 21, 25-27 (1973). Title I of the BSA directs banks to prepare and maintain certain customer records for a five year period. 12 U.S.C. § 1829(b) (Supp. III 1979). Congress stated that the purpose of Title I is to aid the government in the investigation of the illegal activities of customers. *Id.* § 1829(a)(1). Title II of the BSA imposes on the bank the duty not only to record, but also to report certain transactions to government authorities involved in law enforcement. 31 U.S.C. §§ 1081, 1101 (Supp. III 1979). The reporting requirements of Title II pertain to both American and foreign transactions. *Id.* The BSA provoked a strong public reaction and incited a demand for the imposition of restraints on government investigation. *See* Kirschner, *supra* note 3, at 16; *Bank Recordkeeping*, *supra* note 9, at 90. Customers of financial institutions initiated suits asserting that the BSA violated customers' expectations of privacy in financial records. United States v. Miller, 425 U.S. 435 (1976); California Bankers Ass'n v. Shultz, 416 U.S. 21 (1974); Burrows v. Superior Court, 13 Cal. 3d 238, 529 P.2d 590, 118 Cal. Rptr. 166 (1974). Adjudicating such claims, the Supreme Court of the United States upheld the constitutionality of the BSA. United States v. Miller, 425 U.S. at 438; California Bankers Ass'n v. Shultz, 416 U.S. at 52-54. In *California Bankers Ass'n v. Shultz*, several individual bank customers, a bank, the California Bankers Association, and the American Civil Liberties Union brought an action against the Secretary of the Treasury claiming the BSA was unconstitutional. 416 U.S. at 41. The plaintiffs alleged that the regulations enforcing the BSA violated the fourth amendment guarantee against unreasonable search and seizure. *Id.* Plaintiffs also contended that when a bank maintains records under statutory constraint, the institution acts as a governmental agency and, in effect, seizes a customer's records. *Id.* at 66. Rejecting the plaintiff's first argument, the

addressed the issue of whether the Bank Secrecy Act violated the fourth amendment to the United States Constitution.[15] The Government charged Miller with operating an unregistered still and evading federal tax laws.[16] Issuing grand jury subpoenas to two of Miller's banks, the Government requested the production of documents relating to Miller's accounts.[17] The Government did not notify the defendant of the issuance of the subpoenas.[18] At trial, Miller filed a motion to suppress the introduction of microfilm copies of his bank records.[19] The trial court denied Miller's motion, and on appeal the Fifth Circuit reversed the trial court's decision.[20]

The Supreme Court reversed the Fifth Circuit, holding that Miller did not have a legitimate expectation of privacy in the contents of his

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Supreme Court held that the mere maintenance of records is not an illegal search and seizure since a bank may reveal such records only pursuant to legal process. *Id.* at 27, 52, 54 n.24, 68-69 n.28. In addition, the Court ruled that the bank has a substantial interest in the transactions, and, therefore, the institution is not a mere agent but rather a party to such transactions. *Id.* The Court reserved the question of whether the depositor has a fourth amendment right in his records. *Id.* at 53-54 n.24. *See generally* Note, *The Right to Financial Privacy Act: New Protection for Financial Records*, 8 FORDHAM URB. L.J. 597, 603-04 (1980) [hereinafter cited as *The Right to Financial Privacy*] (Supreme Court decision in *California Bankers Ass'n* thwarted lower court decisions holding in favor of customer's right to financial privacy).

[14] 425 U.S. 435 (1975).

[15] *Id.* at 441; *see* note 14 *supra.*

[16] 425 U.S. at 436. Sheriff department officials in Kathleen, Ga. discovered a 7,500 gallon capacity distillery, 175 gallons of whiskey, and several other articles following a fire in a warehouse. *Id.* at 437.

[17] *Id.*

[18] *Id.* at 438.

[19] *Id.* The Supreme Court stated that the record was unclear whether the Government had offered the bank records to the grand jury as evidence. *Id.* The records were, however, used in the investigation and at trial to establish the overt acts comprising the conspiracy charge against Miller. *Id.*

[20] 500 F.2d 751, 766 (5th Cir. 1974). On appeal to the Fifth Circuit, Miller argued that the BSA violates depositors' fourth amendment right to be free from unreasonable searches and seizures. *Id.* Miller attacked the BSA's requirement that banks microfilm depositors' checks. *Id.* Miller stated government agencies could gain access to such records from the bank, thereby depriving customers of standing to protest. *Id.* at 756. In addition, Miller contended that the subpoenas the government issued to the banks were defective. *Id.* The Fifth Circuit held that the Supreme Court's decision in *California Bankers Ass'n v. Shultz* precluded Miller's first contention that the BSA violated the fourth amendment. *Id.* at 756. The Fifth Circuit, however, found defendant's argument concerning the defective subpoenas persuasive. *Id.* The appellate court granted the motion of exclusion, holding that under the Fifth Circuit's reading of *Shultz* the subpoenas failed to constitute legal process. *Id.* at 757-58. *See also* S. REP. NO. 91-1139, 91st Cong., 2d Sess. 5 (1970) (Senate Banking Committee Report on Bank Secrecy Act stated law enforcement officials allowed access to bank records kept under BSA only pursuant to subpoena or other lawful process); H.R. REP. NO. 91-975, 91st Cong., 2d Sess. 10 (1970) (House Report contains restrictions analogous to Senate Report admonishing government that records banks maintain under BSA only accessible by legal means).

bank records.[21] The Court considered the nature of the documents in order to determine whether Miller had a reasonable expectation of privacy.[22] Finding the checks to be commercial instruments rather than confidential communications, the Court held that the checks were not the equivalent of private papers and, thus, not entitled to the protection of the fourth amendment.[23]

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[21] 425 U.S. 435, 440 (1975).

[22] *Id.* at 442. The Supreme Court always looks to the nature of the document in determining whether an individual has a reasonable expectation of privacy. *See* Couch v. United States, 409 U.S. 322 (1973) (plaintiff has no basis for expectation of privacy once plaintiff turns records over to accountant realizing that accountant must reveal information to government for tax return purposes).

[23] 425 U.S. at 442. The Court held that because Miller had placed his checks in commercial channels, he voluntarily had made public information relating to his financial status. *Id.* Looking to the checks as originally drawn rather than the copies, the Court held plaintiff had no privacy interest in the information that the checks contained. *Id.* In *California Bankers Ass'n*, Justice Douglas argued to the contrary. 416 U.S. at 85 (Douglas, J., dissenting). In his dissent, the Justice stated that the checks a person draws define the individual himself. *Id.* (Douglas, J., dissenting). Other courts have held that a check is not commercial paper, but a biographical sketch of its drawer. *See, e.g.*, Burrows v. Superior Court, 13 Cal. 3d 244, 247, 529 P.2d 590, 596, 118 Cal. Rptr. 166, 172 (1974). Hence, the argument is that the right to receive protection under the fourth amendment derives not from a property interest in the check, but from the fact that the customer maintains a legitimate expectation of privacy in the check's confidential nature. Mancusi v. DeForte, 392 U.S. 364, 368 (1968). Relying on *Katz v. United States*, the Court in *Miller* reiterated that the fourth amendment does not protect what a person knowingly exposes to the public. 425 U.S. at 442. One writer suggests that adherence to *Katz* would require a finding that Miller reasonably expected the government would not violate his privacy. Comment, *Reasonable Expectations of Privacy in Bank Records: A Reappraisal of* United States v. Miller *and Bank Depositor Privacy Rights*, 72 J. CRIM. L. & CRIMINOLOGY 243, 255 (1981) [hereinafter cited as *Reasonable Expectations*]. In *Katz*, the Court held that the government violated defendant's legitimate expectation of privacy in the transfer of information by a public medium. *Id.* Similarly, in *Miller*, the defendant was utilizing a public intermediary to effect a transmittal of information. *Id.* Therefore, the Court should accord Miller's expectation of privacy in the communication of information through the channels of a bank the same protection as Katz's communication by means of a public phone. *Id.* In *Miller*, however, the Supreme Court ruled that a depositor assumes the risk that information transmitted to a financial institution will be conveyed to government officials. 425 U.S. at 442. The *Miller* Court stated that Congress assumed customers did not have a legitimate expectation of privacy in bank records when the legislature enacted the BSA. 425 U.S. at 443-44.

In *Burrows v. Superior Court*, the California Supreme Court revealed the fallacy of the argument that a depositor voluntarily assumes the risk of exposure. 13 Cal. 3d 244, 247, 529 P.2d 590, 596, 118 Cal. Rptr. 166, 172 (1974). The California court stressed the fact that for members of society to exist in the modern economy without taking advantage of bank accounts is nearly impossible. *Id.* Thus, the disclosure of information to one's bank is not a purely volitional act. *Id.* The *Burrows* court cited the 1890 Warren and Brandeis article, "The Right to Privacy," in which the writers prophesized the need for an expansion of constitutional rights to contend with the development of new business inventions and methods. *Id.* at 596 n.4. *See also* United States v. Maryland, 442 U.S. 735, 749-50 (1979) (dissent) (individual must have choice before court can hold person to have assumed risk voluntarily).

One commentator specifically repudiates the application of the assumption of risk theory in *Miller*. 1 W. LAFAVE, SEARCH AND SEIZURE § 2.7, at 415 (1978). LaFave argues that

In effect, the *Miller* Court found that the government is not subject to the controls of the fourth amendment in seeking access to financial records that a third party maintains.[24] In 1974, Congress established the Privacy Protection Study Commission (PPSC) to study and make recommendations concerning the standards the business community uses in the protection of personal information.[25] The *Miller* decision motivated the PPSC to call for the creation of a statutory expectation of privacy in a customer's financial records.[26] On the state level, many legislatures established procedures for disclosure of customers' financial records.[27] The need for federal legislation that would guarantee a right of financial privacy, however, still existed. Thus, in response to the *Miller* decision[28] and public sentiment, Congress enacted the Right to Financial Privacy Act in 1978.[29]

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the decision of an individual to maintain a bank account is not a relinquishment of the cutomer's privacy. *Id.* If the utilization of these economic intermediaries is purely a volitional act, then in effect, the customer must choose between foregoing the necessity of using a bank account and waiving a privacy interest. *Id.*

[24] *See The Right to Financial Privacy, supra* note 14, at 607. Dissenting in *Miller*, Justice Brennan maintained that a customer has a right to privacy in his bank records. *Id.* at 448 (Brennan, J., dissenting). Citing *Shultz*, Justice Brennan argued that the government illegally obtained the evidence the prosecutor used to convict Miller because the subpoenas were defective and thus failed to constitute legal process. 425 U.S. at 448 n.2 (Brennan, J., dissenting). Not only did Justice Brennan adopt the finding of the court of appeals that the subpoenas were defective, but the Justice also described the failure of the government to notify Miller of the issuance of the subpoenas as a fatal constitutional defect. *Id.* Justice Brennan adopted the California Supreme Court's position in *Burrows* that the fourth amendment protects the customer's expectation that records a customer transmits to his bank will remain private. *Id.* at 448.

[25] 5 U.S.C. § 552(2) (Supp. III 1979).

[26] PRIVACY PROTECTION STUDY COMMISSION, PERSONAL PRIVACY IN AN INFORMATION SOCIETY, Recommendation 1, at 362-63 (1977).

[27] *See* ALAS. STAT. 06.05.175a-b, .30.120 (1978); CAL. GOV'T CODE § 7460-7493 (West Supp. 1978); FLA. STAT. ANN. § 665.111(1) (West Supp. 1978); ILL. REV. STAT. Ch. 16½, § 48.1 (Smith-Hurd Supp. 1977); KAN. STAT. ANN. § 9-1130 (1975); KY. REV. STAT. § 289.271 (1970); MD. ANN. CODE art. 11, §§ 224-247 (West Supp. 1979); MASS. ANN. LAWS Ch. 117, § 17 (1975); MINN. STAT. ANN. § 51A.11 (West Supp. 1979); MISS. CODE ANN. §§ 81-5-55, -11-5 (1972); MO. REV. STAT. § 369.099 (West Supp. 1979); OKLA. STAT. ANN. tit. 6, § 1013 (1966); ORE. REV. STAT. § 722.118 (1975); PA. ANN. tit. 7, § 6020 (West Supp. 1979-80); UTAH CODE ANN. §§ 7-14-1 to -5 (1953); WIS. STAT. ANN. §§ 215.02, .08 (West Supp. 1979-80). *See generally The Safe Banking Act of 1977: Hearings on H.R. 9086 Before the Subcomm. on Financial Institutions Supervision, Regulation and Insurance of the House Comm. on Banking, Finance and Urban Affairs*, 95th Cong., 1st Sess. (1977); *Right to Financial Privacy, supra* note 14, at 609.

[28] *See* Hancock v. Marshall, 86 F.R.D. 208, 210 (1980) (RFPA intended to limit *Miller* decision); H.R. REP. No. 1383, 95th Cong., 2d Sess. 34 (1978) (legislative history illustrates Congress enacted RFPA to alleviate congressional uneasiness with *Miller* ruling).

[29] *See* Smith, *supra* note 3, at 529. On March 12, 1975, Senator Alan Cranston introduced Senate Bill 1343. *Id.* Congress held hearings in 1976 on Senate Bill 1343, after which the House of Representatives introduced H.R. 8133. *Id.* In 1977, Congress incorporated H.R. 8133 as Title XI of H.R. 9086 of the Safe Banking Act of 1977. *Id.* Congress revised H.R. 9086 several times, which ultimately resulted in H.R. 13471. *Id.* Congressman St. Germain

The RFPA prohibits federal agencies from obtaining access to customer records that financial institutions maintain unless the government follows one of five specified procedures.[30] The first procedure

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introduced H.R. 13471, which Congress finally enacted into law as H.R. 14279. *Id. See also* Palmer & Palmer, *supra* note 14, at 198 n.18.

[30] 12 U.S.C. §§ 3404-3408 (Supp. III 1979). Predicated on the notions of notice and opportunity to be heard, the RFPA in general requires the government to notify the customer of its request within ten to fourteen days after the government contacts the bank. *See* Smith, *supra* note 3, at 530. In addition, the customer has the right to challenge the validity of the government request. *Id.* § 3410. The RFPA establishes specific provisions for challenging an authorized government demand for financial records. *Id.* The customer may file a motion to quash the subpoena or summons in a federal district court, or he may file an application to enjoin a formal written request. *Id.* The customer must serve the government with the motion by hand or mail. *Id.* Congress designed the service provisions to provide the government with sufficient notice while keeping the procedure as simple as possible. [1978] U.S. CODE CONG. & AD. NEWS 9273, 9325. The motion must state the customer's reasons for believing no legitimate law enforcement purpose exists or indicate that the records are not relevant to a legitimate law enforcement inquiry or that the government has failed to comply substantially with the provisions of the statute. 12 U.S.C. § 3410 (Supp. III 1979). The individual must attach an affidavit or sworn statement to the motion stating that he is a customer of the financial institution being subpoenaed. *Id.* In attacking the purpose of the subpoena, the customer need not prove the absolute absence of a legitimate law enforcement objective. [1978] U.S. CONG. CODE & AD. NEWS 9273, 9325. The RFPA does not require the customer to make a detailed evidentiary showing. *Id.* He must, however, show a factual basis for his position. *Id.* The ultimate burden lies with the government to prove the legitimacy of the purpose. *Id.* If the court finds the customer's challenge adequate, the court must order the government agency to file a sworn response. 12 U.S.C. § 3410(b) (Supp. III 1979). The court will make a decision on the basis of the filings or conduct additional proceedings. *Id.* Within seven days the court must render a decision on the challenge. *Id.* The RFPA provides that the challenge procedures of the Act are the sole judicial remedies available to the customer in resisting disclosure of his records. 12 U.S.C. § 3410(e) (Supp. III 1979).

The government may use or withhold information the agency obtains from the disclosure of records only for the original purpose for which the government sought the information. [1978] U.S. CODE CONG. & AD. NEWS 9273, 9326. The Act prohibits the transfer of the information to another agency unless the agency certifies in writing that the records are relevant to a legitimate law enforcement investigation within the transfering agency's jurisdiction. 12 U.S.C. § 3412 (Supp. III 1979). The customer must receive notice of the transfer within fourteen days. *Id.*

Costs of complying with the RFPA may be high. *The Right to Financial Privacy*, *supra* note 14, at 614-15. Therefore, Congress has placed the economic burden on the government. *Id.* The government agency must compensate financial institutions for the reproduction and processing of information when the RFPA applies to the government authority or customer. 12 U.S.C. § 3415(a) (Supp. III 1979). The United States District Court retains jurisdiction over claims arising under the RFPA. *Id.* § 3416. The only remedies available for transgressions of the RFPA are actual and punitive damages, recovery for attorney's fees, and civil penalties imposing a one hundred dollar fine for each disclosure obtained in violation of the RFPA. *Id.* § 3417. In seeking financial information, the government must describe the records as specifically as possible. 12 U.S.C. § 3402 (Supp. III 1979). Congress stated that the requirement that the government reasonably describe the documents precludes the usage of a blanket request for "all records." [1978] U.S. CODE CONG. & AD. NEWS 9273, 9322. *See also* text accompanying note 32 *infra*.

available involves gaining the authorization of the customer.[31] To qualify for this section, the agency must obtain a statement signed by the customer, which reasonably identifies the records the government is seeking, delineates the purpose of the disclosure, and designates who may use the records.[32] The second procedure allows the government to use an administrative subpoena or summons to gain access to an individual's financial records.[33] Certain factors must be present before the agency may invoke this method. The government must have reason to believe that the records are relevant to a legitimate law enforcement inquiry, and the agency must serve or mail a copy of the subpoena or summons to the customer.[34] In addition, the government must give the customer ten days from the date of service, or fourteen days from the date of mailing, to file an affidavit or motion to quash.[35] The third method of obtaining access to customer records is through the use of search warrants.[36] The fourth procedure enables the government to use a judicial subpoena to gain access to customer records.[37] The final method involves the use of a formal written request directed to a financial institution by a government official.[38]

The RFPA provides for certain exceptions to the provisions of Title XI.[39] The most significant exception involved the grant of a two year

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[31] 12 U.S.C. § 3404(a) (Supp. III 1979).

[32] *Id.* The authorization is valid for three months, and the customer may revoke the authorization until the bank discloses the records. *Id.*

[33] *Id.* § 3405. An administrative subpoena is a judicially enforceable request for documents. R. ROWE, HANDLING AN SEC INVESTIGATION 1980, 303 (1980) [hereinafter cited as ROWE]. Agencies, however, have no power to enforce an administrative subpoena and must secure compliance through a court order. *Id.*

[34] 12 U.S.C. § 3405 (Supp. III 1979). The term "reason to believe" in §§ 3405, 3407, and 3408 does not encompass any reason no matter how remote or theoretical. [1978] U.S. CODE CONG. & AD. NEWS 9273, 9323. Congress intended the phrase "legitimate law enforcement purpose" to establish a less demanding standard than probable cause. *Id.* Congress believed that the combination of the two phrases would be a sufficient safeguard for a customer's financial records. *Id.*

[35] 12 U.S.C. § 3405 (Supp. III 1979).

[36] *Id.* § 3406.

[37] *Id.* § 3407. A judicial subpoena is any court order that demands the disclosure of records. ROWE, *supra* note 41, at 304. The government uses judicial subpoenas at trial or during discovery to obtain customer records in the possession of a financial institution. *Id.*

[38] 12 U.S.C. § 3408 (Supp. III 1979). This method can be used only if no administrative summons or subpoena authority is available to the government official and the head of the agency or department has issued regulations authorizing the request. *Id.*

[39] 12 U.S.C. § 3413 (Supp. III 1979). The exceptions to the RFPA include the dissemination of information that is not identifiable as records of an individual customer, the examination of records by supervisory agencies, disclosure under the Tax Reform Act of 1976, and the disclosure of information federal statutes or regulations require to be reported. *Id.* In addition, the RFPA exempts the disclosure of records relating to litigation or administrative adjudicative proceedings involving the government and the customer, grand jury subpoenas, and the investigation of the financial institution itself. *Id.* If the government is interested solely in the name, address, number, and type of account, or is concerned with

grace period to the SEC.[40] Two considerations influenced Congress in deciding to exempt the SEC temporarily from the RFPA.[41] The legislature acknowledged the stringency of the SEC's internal procedures and also recognized the threat the Commission posed to the passage of the RFPA if Congress did not exempt the SEC.[42] Congress specifically granted the exemption to provide the SEC with time to study how to achieve a fair accommodation between an individual's interest in the privacy of his bank records and the needs of the SEC.[43] As of November 10, 1980, the RFPA became applicable to the SEC.[44] In a recent district court decision, the court construed the provisions of the RFPA with respect to the SEC.[45]

In *Hunt v. United States Securities & Exchange Commission*,[46] the Hunts, both individually and as partners of Hunt International Petroleum Company (HIPCO) and of the Hunt-Stephens partnership, filed a motion for preliminary injuction against the SEC.[47] The SEC had issued a series of subpoenas on plaintiffs and their banks in conjunction with an inquiry into possible violations of federal securities law.[48] During the Commission's investigation of plaintiffs' trading activities relating to the "silver crisis" of 1979 and early 1980, the RFPA became effective with respect to the SEC.[49] In instituting the present suit, the Hunts

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foreign accounts in the United States and operating under a specific statute, the provisions of the RFPA do not apply. *Id. See also* Allison v. SEC, 14 S.L.R. 301 (N.D. Cal. 1981) (subpoenas asking only for name, address, account number, and type of account of customer exempted from notice requirements of RFPA). The RFPA also provides for special arrangements when dealing with emergencies, foreign surveillance, the Secret Service, or grand juries. 12 U.S.C. § 3413 (Supp. III 1979).

[40] 12 U.S.C. § 3422 (Supp. III 1979).

[41] [1978] U.S. CODE CONG. & AD. NEWS 9275, 9376.

[42] *Id.*

[43] [1980] U.S. CODE CONG. & AD. NEWS 3874, 3875.

[44] 12 U.S.C. § 3422 (Supp. III 1979).

[45] *See* Hunt v. SEC, 520 F. Supp. 580 (N.D. Tex. 1981).

[46] *Id.*

[47] *Id.* at 583 & 587. The two partnerships of Hunt International Petroleum Company (HIPCO) and Hunt-Stephens qualify as customers under the RFPA because they include fewer than five individuals. *Id.* HIPCO is a partnership in which W. H. Hunt, N. B. Hunt, and Lamar Hunt are the only partners. *Id.* at 587. Hunt-Stephens is a partnership in which plaintiffs W. H. Hunt and Paul Stephens are the sole partners. *Id.*

[48] *Id.*; *see* note 52 *infra*.

[49] Brief for Appellant at 4, Hunt v. SEC, 520 F. Supp. 580 (N.D. Tex. 1981) (hereinafter cited as Brief for Appellant]. In March 1980, sources notified the SEC that plaintiffs were unable to meet margin calls on positions in silver future contracts they maintained with broker-dealers registered with the SEC. *Id.* The rapid decline of the price of silver bullion threatened the Hunts' account. *Id.* As of March 28, 1980, the Hunts owed broker-dealers a sum of $439,935,900. *See* U.S. House of Representatives, Committee on Government Operations, *Silver Prices and the Adequacy of Federal Actions in the Marketplace, 1979-1980*, 96th Cong., 2d Sess., 466-81 (1980). The decline in the silver market and the Hunts' inability to meet their obligations seriously affected at least three major broker-dealers. Brief for Appellant, *supra*, at 5.

sought to enjoin the Commission from violating their rights as customers under the RPFA.[50]

On February 19, 1981, the Commission issued subpoenas duces tecum upon First International Bancshares, Inc., the parent holding company of National Bank of Dallas (First in Dallas).[51] In an attempt to describe the nature of the investigation, the customer notices merely listed six statutes.[52] The notices did not contain a complete copy of the subpoenas or attachments.[53] Rather, the SEC had deleted portions of the attachments leaving large gaps where sentences were missing.[54] The excisions related to the production of records concerning persons and entities, other than plaintiffs, who may have been entitled to notice under the RFPA.[55] The SEC defined the term "Hunts" in the original subpoena to include not only the individual plaintiffs, but also sole proprietorships, partnerships, and other ventures that plaintiffs controlled.[56] The customer notice, however, defined the term "Hunts" to encompass the Hunts merely as individuals.[57] Thus, the plaintiffs did not receive notice of the demand for documents relating to their partnerships.[58]

On February 25, 1981, the Commission served subpoenas on Republic National Bank of Dallas (Republic) and Citibank N.A. (Citibank).[59] Pursuant to plaintiffs' instructions, the SEC directed the customer notices to the Hunts' attorneys.[60] The defective notices were similar to the ones the SEC issued in conjunction with the First in Dallas subpoena.[61] The SEC, however, never received customer records under the subpoenas.[62]

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[50] 520 F. Supp. at 583.

[51] *Id.* The SEC issued the subpoena on February 19, 1981, and incorrectly addressed the subpoena to First National Bancshares, Inc. *Id.*

[52] *Id.* at 593. The notice sent to plaintiffs stated that the SEC was seeking access to the subpoenaed documents in order to adduce whether plaintiffs had violated the Securities Act of 1933, the Securities Exchange Act of 1934, the Public Utility Holding Company Act of 1935, the First Act Indenture Act of 1939, the Investment Company Act of 1940, or the Investment Advisors Act of 1940. *Id.*

[53] *Id.* at 592.

[54] *Id.* at 594. The customer notice was a photocopy of the complete attachment with gaps where the agency had covered portions of the original attachment with paper. *Id.*

[55] *Id.* at 593. The SEC did not notify any persons or entities other than plaintiffs in relation to the February 19, 1981, subpoena. *Id.* Individuals other than plaintiffs served as officers and directors of the corporations and entities mentioned in the subpoena. *Id.* These officers and directors may have been entitled to receive notive if they had qualified under the RFPA as customers. *Id.*

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] *Id.* at 594. The subpoenas the SEC served on Republic and Citibank were identical to the February 19, 1981, subpoenas the Commission served on First in Dallas. *Id.*; *see* text accompanying notes 51-58 *supra.*

[60] 520 F.Supp. at 594.

[61] *Id.*; *see* text accompanying notes 51-58 *supra.*

[62] 520 F.Supp. at 600.

Investigating the failure of public corporations to report the risks involved in extending loans to the Hunts, the SEC issued subpoenas to four banks on April 16, 1980.[63] The April subpoenas, however, did not impose a continuing duty on the banks to produce future records relating to the Hunts.[64] Subsequent to April 1980, the Hunts obtained a 1.1 billion dollar loan to refinance silver obligations through Placid Oil Company (the Placid Loan).[65] These four banks had participated with First in Dallas, Republic, and Citibank in the Placid Loan.[66] The SEC became concerned that the banks may not have disclosed all available information under the April subpoena that related to the Commission's investigation.[67] Therefore, the SEC issued update letters to the four banks in an attempt to obtain information concerning the banks' involvement in the Placid Loan.[68] Concluding that the Placid Oil Company was not a customer within the meaning of the RFPA, the Commission did not send customer notices concerning the update letters.[69] Learning of the issuance of the letters on March 10, the SEC Director of the Division of Enforcement ordered the immediate withdrawal of the letters.[70] The SEC never received any documents in response to the update letters.[71]

Pursuant to section 3410 of the RFPA, plaintiffs filed a motion to quash the subpoena issued to First in Dallas.[72] The SEC eventually retracted the subpoena voluntarily and, consequently, never obtained any financial records under the subpoena.[73] Plaintiffs withdrew their motion to quash and instituted the present action for injunctive relief on

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[63] *Id.* at 594. The SEC issued the April 1980 subpoenas to First Bank of Chicago, Royal Bank, Chemical Bank, and Bankers Trust. *Id.* at 595. The subpoenas sought documents relating to the banks' activities with the Hunts. *Id.*

[64] *Id.*

[65] *Id.*

[66] *Id.*

[67] *Id.*

[68] *Id.* All four letter were identical. *Id.* The letter in part read:

> On April 1, 1980 the Securities and Exchange Commission issued a subpoena duces tecum to the banks requesting all documentation relating to the Hunts, silver loans and loans to various broker-dealers. We understand that since that time the bank participated in a $1.1 billion loan to Placid Oil Company (the "Placid loan"). To the extent not already provided, please update the production by providing additional documentation, as described in the subpoena, relating to the bank's participation in the Placid loan. . . .

Id.

[69] *Id.* at 596-97; 12 U.S.C. § 3401 (Supp. III 1979) (RFPA customer is individual or partnership of five or fewer).

[70] 520 F. Supp. at 597.

[71] *Id.*

[72] *Id.* at 583; *see* text accompanying notes 51-58 *supra.*

[73] 520 F. Supp. at 599.

March 24, 1981.[74] The SEC filed a motion to dismiss the Hunts' suit.[75] The court granted the SEC's motion to dismiss with respect to two of the three counts plaintiffs had set forth in their complaint.[76] The court, however, retained jurisdiction over plaintiffs' third claim, which alleged that the Commission had violated plaintiffs' rights under the RFPA.[77]

The *Hunt* court listed the four traditional prerequisites that the law requires plaintiffs to establish before a court will grant an application for preliminary injunction.[78] The factors include proving a substantial likelihood that plaintiffs ultimately will prevail on the merits and showing that plaintiffs will incur irreparable harm unless the court issues the injuction. In addition, plaintiffs must prove that the potential harm to them outweighs the damage that an injunction will inflict on the opposing party and that the injunction will not be adverse to the public interest.[79] In determining whether plaintiffs carried their burden, the court looked to the construction of the RFPA and the facts of the case.

The first prerequisite requires that plaintiffs demonstrate sufficiently that they will prevail at trial on the merits.[80] Discussing the merits of plaintiffs' contention that the SEC had violated the RFPA, the court recognized that Congress had enacted the RFPA to counteract the *Miller* decision.[81] Pointing to the principles of notice and opportunity to challenge as the underpinnings of the RFPA,[82] the court stated that the issue in *Hunt* involved the SEC's use of customer authorizations, administrative subpoenas, and update letters to obtain information under the RFPA.[83] The district court, thus, focused on whether the Commission

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[74] *Id.* at 583-84. Plaintiffs' complaint contained three grounds for relief. *Id.* at 583. First, the Hunts asserted that the SEC had exceeded the scope and purpose of the Commission's investigatory order. *Id.* Second, plaintiffs alleged the SEC was encroaching on the exclusive jurisdiction of the Commodities Futures Trading Commission (CFTC). *Id.* The plaintiffs directed their third claim at the SEC's failure to comply with the RFPA in seeking to obtain financial information from plaintiffs' banks. *Id.*

[75] *Id.* at 584.

[76] *Id.* The court dismissed plaintiffs' claims that the SEC was exceeding the scope of its investigatory order and encroaching on the exclusive jurisdiction of the CFTC. *Id.* The court held the claims were not ripe for adjudication. *Id.*

[77] *Id.*

[78] *Id.* at 585.

[79] 520 F. Supp. at 585. *See also* Foley v. Alabama State Bar, 648 F.2d 355, 358 (5th Cir. 1981); Florida Medical Ass'n v. HEW, 601 F.2d 199, 202 (5th Cir. 1979); Compact Van Equipment Co., Inc. v. Legget & Platt, Inc., 566 F.2d 952, 954 (5th Cir. 1978); Hardin v. Houston Chronicle Pub. Co., 572 F.2d 1106, 1107 (5th Cir. 1978); Canal Auth. v. Callaway, 489 F.2d 567, 572-73 (5th Cir. 1974).

[80] 520 F. Supp. at 585.

[81] *Id.* at 601; *see* text accompanying notes 13-29. *See also* [1978] U.S. CODE CONG. & AD. NEWS 9273, 9306 (Title XI a Congressional reaction to *United States v. Miller*).

[82] 520 F. Supp. at 601. *See also* note 38 *supra.*

[83] 520 F. Supp. at 602.

had violated plaintiffs' right to receive notice and to challenge the issuance of the subpoenas.[84]

In dealing with the administrative subpoenas issued to First in Dallas, Republic, and Citibank, the *Hunt* court referred to section 3405 of the RFPA.[85] Section 3405 establishes the requirements that the government must meet in order to obtain access to customer records under an administrative subpoena.[86] In issuing subpoenas to First in Dallas, Republic, and Citibank, the court found the Commission had sent customer notices that contained materially different subpoenas and attachments.[87] The SEC had deleted substantial sections of the attachments relating to parties and documents.[88] The court concluded that the RFPA requires that customers receive a complete copy of the subpoena and that the SEC had violated the RFPA in this regard.[89]

The Commission also had failed to determine all the customers who were entitled to notice under the RFPA.[90] The court found that the SEC should have sent customer notices to the partnerships of HIPCO and Hunt-Stephens.[91] The *Hunt* court also found that the Commission failed to meet the requirement that the SEC describe with reasonable specificity the nature of the government inquiry.[92]

In considering the Government's defense that under section 3410 of the RFPA substantial compliance is adequate, the court recognized that minor and technical offenses would not render the subpoenas defective.[93] The court found that although plaintiffs were aware of the nature of the inquiry, the excised customer notices were not technical errors, but blatant and intentional deviations from the provisions of the RFPA.[94] The

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[84] *Id.*

[85] *Id.* at 602; text accompanying notes 51-62 *supra.*

[86] *See* text accompanying notes 33-35 *supra.*

[87] 520 F. Supp. at 603; text accompanying notes 53-58 *supra.*

[88] 520 F. Supp. at 594.

[89] *Id.* at 603. Section 3405 requires that the agency serve a copy of the subpoena on the customer. 12 U.S.C. § 3405 (Supp. III 1979). The district court interpreted the language of § 3405 to require the customers to receive a complete copy of the subpoena, regardless of whether the original subpoena requests documents relating to entities or persons not entitled to notice under the RFPA. 520 F. Supp. at 603.

[90] 520 F. Supp. at 604.

[91] *Id.* The court stated that the subpoenas clearly requested production of documents related to HIPCO and Hunt-Stephens. *Id.*

[92] *Id.* at 603. *See also* note 30; text accompanying notes 31-35 *supra.* The SEC merely had listed six statutes in a cursory fashion. 520 F. Supp. at 603; text accompanying note 52 *supra.* The district court held that the listing of the six statutes clearly was inadequate. 520 F. Supp. at 603. At trial, the SEC conceded that the mere recitation of the statutes did not constitute sufficient description. *Id.* at 593. The court stated that the SEC could have satisfied the requirement of reasonable specificity by referring in the notices to the Amended Order of Investigation, in addition to the specific statutes. *Id.*

[93] *Id.* at 603. *See also* [1978] U.S. CODE CONG. & AD. NEWS 9273, 9326.

[94] 520 F. Supp. at 604. The court emphasized the RFPA requirement of § 3405 that plaintiffs receive a complete copy of the subpoena. *Id.*

district court also rejected the SEC's contention that the failure to receive any information under the defective subpoenas precluded plaintiffs from obtaining relief pursuant to section 3418 of the RFPA.[95]

The district court then dealt with whether the use of update letters violated the RFPA unless customers received notice of the issuance of the letters.[96] Noting that the RFPA does not provide for the use of update letters, the court adhered to the general rule Congress established in section 3402 that a government agency may not gain access to the financial records of a customer unless the government observes the provisions of the RFPA.[97] The court found that the SEC's failure to send notices to customers was an egregious example of the SEC's attempt to circumvent the RFPA.[98] Thus, the *Hunt* court held that since the SEC clearly had violated the RFPA by issuing excised customer notices and update letters, plaintiffs had carried their burden of demonstrating a substantial likelihood they would prevail at trial on the merits.[99]

The district court then discussed whether the Hunts had proven that they would suffer irreparable harm if the court did not grant an injunction.[100] The court perceived the issue as involving two subissues.[101] First, the district court considered the probability that future violations would occur.[102] The SEC contended that since the issuance of the defective subpoenas and update letters, the Commission had taken remedial

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[95] *Id.* at 606. Focusing on the language of § 3418, the court maintained that to require illegal disclosure of a customer's financial records before a court could grant injunctive relief would frustrate the purpose of the RFPA. *Id.* The court pointed to the threat that the excised subpoenas and update letters posed to a customer's right to challenge such requests under the RFPA. *Id.* The court held that plaintiffs' rights under § 3410 to challenge would be worthless if plaintiffs never received notice of the request. *Id.*

[96] *Id.* at 604.

[97] *Id.*

[98] *Id.*

[99] *Id.* at 608. Plaintiffs raised two other violations under the RFPA. *Id.* at 597. The Hunts alleged that the SEC violated the RFPA in making oral requests for information. *Id.* The court dismissed the contention, finding that the agency merely was following up outstanding subpoenas. *Id.* Furthermore, the court stated that plaintiffs failed to introduce evidence that the SEC ever received any information beyond the scope of the outstanding subpoenas. *Id.* Therefore, the RFPA did not require the SEC to give notice to customers. *Id.* The second argument plaintiffs raised dealt with whether the SEC had conveyed to other agencies information relating to the Hunts' investigation without adhering to the procedures the RFPA establishes in § 3412. *Id.* at 606. Section 3412 requires that one agency may not transfer information to another agency unless the SEC certifies that the records are relevant to a legitimate inquiry within the jurisdiction of the agency receiving the information. *Id.* The transferring agency must notify the customer of such a transfer. *Id.* While plaintiffs presented evidence that the SEC exchanged information under the CFTC, the court held that the SEC did not violate the RFPA since the Commission did not transmit any specific financial information to the CFTC after the effective date of the RFPA. *Id.*

[100] *Id.* at 608.

[101] *Id.*

[102] *Id.* at 608-09.

measures to insure such violations would not occur in the future.[103] Acknowledging the SEC's good faith attempts to prevent future abuse, the Commission's reluctance to admit its failure to comply with the RFPA during trial nevertheless swayed the court.[104] The court held, therefore, that a reasonable probability existed that the SEC would violate the RFPA in the future.[105] The second subissue concerned whether future transgressions of the Act would occur if the court refused to issue an injunction and the extent to which such transgressions would harm the plaintiffs.[106] Alarmed at the possibility that the SEC could have obtained plaintiffs' records under the update letters without notifying customers, the court held that the plaintiffs would have lost their rights under the RFPA, and, therefore, the SEC would have harmed the plaintiffs irreparably.[107] The SEC's issuance of the letters would have enabled the SEC to obtain plantiffs' records without plaintiffs receiving notice or having the opportunity to challenge the release of such documents.[108]

In relation to the third factor, the *Hunt* court balanced the harm a grant of injunction would inflict upon the SEC against the injury plaintiffs would incur if the court denied the injunction.[109] The district court held that no harm could result to the SEC from the court's issuance of an

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[103] *Id.* at 608. The SEC has revised the RFPA manual four times since the issuance of the manual in November 1980. *Id.* The SEC changed the customer notice forms on February 2, 1981, by including in the notice information relating to alternative choices of venue available in a challenge to an administrative subpoena. *Id.* The second revision was on March 2, 1981. *Id.* The Commission decided to include in a notice to a subpoenaed financial institution that the institution must submit an itemized bill to receive recompense for costs the institution incurs in complying with the RFPA. *Id.* On April 4, 1981, the Commission amended the manual to require that customer notice forms specify the statutes and regulations involved in the investigative inquiry. *Id.* The fourth revision of April 21, 1981, dealt with the conflict that may arise when a subpoena to a bank requests the account records of more than one customer. *Id.* The SEC instructed the staff not to excise any portion of the subpoena or attachment in such situations. *Id.* at 601. The Commission also encouraged members of the agency to seek the advice of the Division of Enforcement's Chief Counsel when questions arise and prohibited the use of update letters. *Id.*

[104] *Id.* at 609.

[105] *Id.* The district court cited United States v. Oregon State Medical Soc'y, 343 U.S. 326, 333 (1951), for the principle that courts must be cautious of mere promises or "protestations of repentance and reform" on the part of those attempting to defeat the grant of injunctive relief. *Id.* In *Oregon State Medical Society*, the Supreme Court dealt with an action under the Sherman Act for an injunction. 343 U.S. 326, 328 (1951). Plaintiffs sought to restrain certain medical societies from monopolizing the field of prepaid medical services. *Id.* The Supreme Court emphasized that a court does not grant an injunction for punishment of past conduct, but rather to remedy future or contemporaneous behavior. *Id.* at 333. Focusing on defendants' overt and clear reversal of previous policies, the Court refused to label defendants' behavior as consisting of merely pretensions and promises. *Id.* at 334. Accordingly, the Court denied injunctive relief. *Id.*

[106] 520 F. Supp. at 609.

[107] *Id.*

[108] *Id.*

[109] *Id.*

injunction.[110] An injunction would not require the Commission to do anything more than the RFPA already exacted.[111] The court found, however, that if it denied the injunction, plaintiffs possibly would lose their rights under the RFPA.[112] Stating that no question therefore existed concerning who would suffer more harm, the court held that plaintiffs had proved sufficiently the existence of the third factor.[113]

The last factor necessary to the grant of an injunction deals with the effect an injunction would have on the public interest.[114] The *Hunt* court held congressional enactment of the RFPA illustrated a declared public policy that the actions of the government are illegal when not in accord with the RFPA and, thus, are inimical to the public.[115] In conclusion, the court granted the plaintiffs' motion for preliminary injunction, holding that plaintiffs had carried their burden of proving the existence of all four prerequisties.[116]

The *Hunt* court erroneously found that plaintiffs carried their burden in proving the four factors necessary to the issuance of an injunction. An initial inquiry with respect to the first prerequisite is whether the district court had jurisdiction to issue a preliminary injunction.[117] The *Hunt* court based its authority on section 3418 of the RFPA.[118] Section 3418 provides for the granting of injunctive relief in addition to other remedies the RFPA establishes.[119] The issue arises whether section 3418 is an independent source of relief, or whether it is only activated when the agency first violates either section 3410 or 3417. Section 3410 provides a customer with the right to challenge a subpoena.[120] Section 3417 involves the right of a customer to institute an action for damages once an agency has obtained or disclosed a customer's bank records in violation of the RFPA.[121]

In *Hunt*, the SEC had withdrawn the subpoenas and update letters before the banks had disclosed or transfered any information to the agency.[122] Therefore, neither section 3410 nor 3417 was applicable. If section 3418 is available only after a customer invokes section 3410 or 3417 and does not operate independently, the district court does not have

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[110] *Id.*

[111] *Id.*

[112] *Id.*

[113] *Id.*

[114] *Id.*

[115] *Id.* at 609-10.

[116] *Id.* at 610.

[117] *See* Flast v. Cohen, 392 U.S. 83, 95 (1968); Baker v. Carr, 369 U.S. 186, 196 (1962). *See also* Defunis v. Odegaard, 416 U.S. 312 (1974); SEC v. Medical Comm. for Human Rights, 404 U.S. 403 (1972); Sibron v. New York, 392 U.S. 40 (1968).

[118] 520 F. Supp. at 606; text accompany note 94 *supra.*

[119] 12 U.S.C. § 3418 (Supp. III 1979).

[120] *Id.* § 3410; note 30 *supra.*

[121] 12 U.S.C. § 3417 (Supp. III 1979).

[122] 520 F. Supp. at 607-08.

jurisdiction to issue an injunction. Moreover, the RFPA grants district courts jurisdiction under section 3416 only when an agency violates the RFPA.[123] If the SEC withdrew its requests, no violation under section 3410 or 3417 ever arose. Legislative history illustrates that Congress intended that upon a proper showing of abuse a customer could enjoin an agency from obtaining records without giving a customer notice.[124] The SEC did not abuse the procedure of the RFPA, but rather committed an error in judgment.[125] The agency immediately sought to rectify the mistake and revised its RFPA manual in an attempt to prevent future infractions of the RFPA.[126] The RFPA, in fact, provides governmental agencies with the opportunity to correct errors they make.[127] The requirement that the agency certify its compliance with the RFPA before a financial institution may disclose the requested records illustrates the flexibility that the RFPA accords federal agencies.[128] Furthermore, since the Supreme Court denied standing to customers challenging the disclosure of bank records in *United States v. Miller*,[129] the *Hunt* court could not rely on equity to provide relief for plaintiffs.[130]

Additionally, the court did not have jurisdiction because plaintiffs' claim for injunctive relief was moot. Article III, section 2 of the United States Constitution provides that federal courts have jurisdiction only over cases and controversies.[131] Since the SEC withdrew all defective requests and made assurances to plaintiffs that the SEC would not issue similar requests in the future, the controversy no longer existed. The

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[123] 12 U.S.C. § 3416 (Supp. III 1979).

[124] [1978] U.S. CODE CONG. & AD. NEWS 9321, 9360.

[125] 520 F. Supp. at 593 & 596. Throughout the drafting of the subpoenas and update letters, SEC staff members exercised their own judgment in arriving at decisions to delete or serve notice. *Id.* The SEC had no policy with respect to the issuance of excised subpoenas or update letters at that time. *Id.* at 600-01; text accompanying note 102 *supra.*

[126] *See* note 102 *supra.*

[127] 12 U.S.C. § 3404(b) (Supp. III 1979); text accompanying notes 145-47 *infra.*

[128] 12 U.S.C. § 3404(b) (Supp. III 1979).

[129] *See* text accompanying notes 13-26 *supra.*

[130] 520 F. Supp. at 607; Brief for Appellant, *supra* note 49, at 35. *See also* Clayton Brokerage Co., Inc. v. Clement, 87 F.R.D. 569, 571 (D. Md. 1980) (bank customer has no standing to challenge disclosure of records in civil suit since suit outside of RFPA coverage); United States v. Grubb, 469 F. Supp. 991, 995 n.8 (E.D. Pa. 1979) (§ 3417 of RFPA provides that remedies and sanctions established under RFPA only judicially authorized remedies available).

[131] U.S. CONST. art. III, § 2; Flast v. Cohen, 392 U.S. 83, 95 (1968); Baker v. Carr, 369 U.S. 186, 204 (1962). Cases that are moot do not meet the case or controversy requirement. *See* Defunis v. Odegaard, 416 U.S. 312 (1974); SEC v. Medical Commission for Human Rights, 404 U.S. 403, 407 (1972); Sibron v. New York, 392 U.S. 40, 51 (1968). To be a controversy under federal constitutional provisions, there must be a concise case admitting of an immediate and definitive determination of legal rights. Southern Ry. Co. v. Brotherhood of Locomotive Firemen and Enginemen, 223 F. Supp. 296, 303 (M.D. Ga.) *aff'd*, 324 F.2d 503. Claims based merely upon potential invasions of rights are not enough to warrant judicial intervention. *Id.*

test for mootness in a case for injunctive relief is whether the injury is continuing or likely to be repeated.[132] At least one court has stated that once a party withdraws an illegal request, the application of injunctive relief is not proper if the incident was unique and the opposing party is not likely to repeat such actions.[133] The SEC's good faith efforts to insure that future violations of the RFPA would not occur and the Commission's withdrawal and isolated use of the defective requests illustrates the inappropriateness of injunctive relief in the instant case.[134]

While the *Hunt* court found the SEC's begrudging attitude in admitting that it had violated the RFPA evidence of a possibility of future infractions of the RFPA, such support was weak.[135] The Supreme Court has stated that the moving party in a claim for injunctive relief must demonstrate that the danger of a recurrent violation is more than a mere possibility.[136] The Supreme Court listed several factors to consider in determining whether an opposing party's conduct renders an action for injunctive relief moot.[137] The considerations include the bona fides of the party's intent to comply in the future, the party's cessation of the objectionable conduct, and in some instances, the nature of the previous violations.[138] Analyzing the facts of *Hunt* in light of the Supreme Court's guidelines, the actions of the SEC render plaintiffs' claim moot. As the *Hunt* court noted, the SEC acted in good faith to insure future compliance with the RFPA by revising agency procedures as listed in the RFPA manual.[139] The SEC also prohibited the future use of excised sub-

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[132] Southwestern Bell Tel. Co. v. Communication Workers of Am., 454 F.2d 1333, 1334 (5th Cir. 1971). *See also* SEC v. Sloan, 436 U.S. 103, 109 (1978); Weinstein v. Bradford, 423 U.S. 147, 149 (1975).

[133] Familias v. Briscoe, 544 F.2d 182, 187 (5th Cir. 1976).

[134] 520 F. Supp. at 608-09. The *Hunt* court admitted that the SEC attempted in good faith to prevent future violations of the RFPA by revising the RFPA manual. *Id.*; note 102 *supra.*

[135] 520 F. Supp. at 609. The district court described the SEC's attempts to prohibit future violations of the RFPA as merely "protestations of repentance and reform." 520 F. Supp. at 609; *see* text accompanying note 104 *supra.* In *Oregon State Medical Society*, the Supreme Court looked to the behavior of the defendants in determining whether defendants' conduct consisted merely of pretensions and promises. 343 U.S. 326, 328 (1951). The Supreme Court noted that injunctions are not designed to punish past conduct but rather to affect future conduct. *Id.* The Court emphasized the fact that defendants' attitude evidenced a visible reversal of policy and appeared to be of a permanent nature. *Id.* at 334. In *Hunt*, the SEC made a clear and overt gesture of a permanent character by prohibiting the future use of excised subpoenas and update letters. *See* text accompanying note 102 *supra.* Therefore, the district court incorrectly relied on *Oregon State Medical Society* for the ruling that the SEC's remedial measures evidenced merely "protestations of repentance and reform." 520 F. Supp. at 609.

[136] United States v. W. T. Grant Co., 345 U.S. 629, 632-33 (1953).

[137] *Id.* at 633.

[138] *Id.*

[139] *See* text accompanying notes 102 & 103 *supra.*

poenas and update letters.[140] Finally, the character of the past violations reveals a judgment error on the part of the SEC rather than an agency-endorsed stratagem to obtain information illegally.

Assuming the district court did have jurisdiction under section 3418, the plaintiffs had the burden of proving they were likely to prevail on the merits.[141] Holding that plaintiffs had succeeded in carrying their burden,[142] the court mistakenly rejected the SEC's defense that the agency had complied substantially with the RFPA.[143] In the present case, the SEC presented strong support for its contention that the agency had complied substantially with Section 3410.[144] The SEC's use of the defective subpoenas and update letters was an isolated incident.[145] The fact that the SEC immediately designed remedial measures to prevent repetitions of such violations of the RFPA illustrates that the defective requests represented an unfortunate mistake as opposed to an agency policy. Furthermore, upon learning of the requests, the Commission's supervisor demanded that the agency immediately withdraw the subpoenas and letters, insuring that the banks would not disclose any records under the requests.[146]

The certification provision of the RFPA supports the SEC's argument that the court should allow the SEC the opportunity to correct mistakes before the judicial system becomes involved. Section 3403(b) requires that the Commission certify its compliance with the RFPA before a financial institution may disclose any records.[147] The SEC specifically attached cover letters to the subpoenas that the agency sent to the banks informing the banks of their duty to require certification before they released any documents.[148] Section 3404(b), therefore, illustrates Congress' intent to allow the Commission the flexibility to monitor its own activities and rectify its own mistakes.[149]

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[140] *See* text accompanying note 102 *supra*.

[141] 520 F. Supp. at 609.

[142] *Id.*

[143] *Id.*

[144] In upholding SEC subpoenas, courts generally are lenient. H. FRIEDMAN, SECURITIES AND COMMODITIES ENFORCEMENT 11 (1981). Referring to the use of administrative subpoenas in the inspection of financial records, the Supreme Court in *See v. City of Seattle* pointed to the minimal restrictions the Court has placed on the use of administrative subpoenas. 387 U.S. 541, 544-45 (1966). *See also* SEC v. Arthur Young & Co., 584 F.2d 1018, 1023-24 (D.C. Cir. 1978) (courts do not interfere with SEC's broad power to investigate and issue subpoenas unless SEC abuses power), *cert. denied*, 439 U.S. 1071; United States v. Powell, 379 U.S. 48, 58 (1964) (court's role in subpoena enforcement narrow).

[145] Brief for Appellant, *supra* note 49, at 39. The government issued the subpoenas and letters during a one week period. *Id.*

[146] 520 F. Supp. at 597 & 599.

[147] 12 U.S.C. § 3403(b) (Supp. III 1979).

[148] Brief for Appellant, *supra* note 49, at 21.

[149] *Id. See also* FTC v. Standard Oil Co., 449 U.S. 232 (1980) (invocation of judiciary system denies agency opportunity to rectify own mistakes); Weinberger v. Salfi, 422 U.S. 749, 765 (1975) (same).

Examining the facts more precisely, the technical rather than the substantive nature of the defects becomes evident. Congress stated that substantial compliance with the Act is sufficient.[150] The legislative intent was to prevent courts from denying access to the Commission due to minor and technical deviations.[151] The subpoenas allegedly were defective because of omissions in the customer notices relating to the attachments.[152] The SEC sent attachments to the customers containing large and obvious gaps where the SEC had made deletions.[153] In view of this fact, the district court was mistaken in finding that a reasonable person would not be put on notice of the alterations.[154] Since plaintiffs had directed the SEC to send any customer notices the SEC issued to the plaintiffs' attorneys, the court's finding becomes even more suspect in view of the experience of lawyers with subpoenas.[155]

Similarly, the update letters substantially complied with the RFPA. Initially, the SEC argued that the agency was seeking records solely from a corporation that the RFPA does not cover, and hence, the customers were not entitled to notice.[156] The district court, however, emphasized the poor drafting of the letters and the possibility that the bankers could interpret the letters as requesting records of the customers' individual accounts.[157] The Government then argued that since the Commission immediately withdrew the update letters, the SEC's error was not the type of abuse Congress was concerned with in providing customers with the remedy of injunctive relief.[158]

The enactment of section 78(u)(h), amending the Securities Exchange Act of 1934, further supports the contention that the deletions were minor.[159] Section 78(u)(h)(4)(c) illustrates congressional approval of the

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[150] .12 U.S.C. § 3410 (Supp. III 1979).

[151] [1978] U.S. CODE CONG. & AD. NEWS 9273, 9326.

[152] 520 F. Supp. at 590-92.

[153] *Id.* at 594.

[154] *Id.*

[155] *Id.* In *Corwin Consultants Inc. v. Interpublic Group of Cos., Inc.*, the IRS contended it had complied substantially with the notice requirement of a statute under which the agency was operating. 375 F. Supp. 186, 191 (S.D.N.Y. 1974), *rev'd*, 512 F.2d 605 (2d Cir. 1975). The court emphasized the *Mullane v. Hanover Banking and Trust Co.* standard requiring that notice be reasonably calculated under the circumstances to apprise the parties of the pendency of an action. *Id.* The court found the IRS had afforded plaintiffs reasonable notice and, therefore, allowed the IRS to prevail on its substantial compliance defense. *Id.* Considering all the circumstances in *Hunt*, the court should have found that the SEC had provided reasonable notice of the subpoenas to the plaintiffs. The gaps in the customer notices were large and readily apparent. In addition, the SEC forwarded such notices to plaintiffs' attorneys, men experienced in dealing with subpoenas and notices.

[156] *Id.* at 596-97; text accompanying note 30 *supra.*

[157] 520 F. Supp. at 587.

[158] Brief for Appellant, *supra* note 49, at 41; [1978] U.S. CODE CONG. & AD. NEWS 9321, 9360.

[159] 15 U.S.C.A. § 78(u)(h)(4)(c) (1981). Congress enacted amendment 78(u) in an attempt to balance the special need of the Commission with the privacy interests of bank customers.

procedure whereby an agency only serves a customer notice of the portion of the subpoena that specifically pertains to the disclosure of his records.[160] In enacting the amendment, Congress recognized that blanket application of the RFPA seriously could impair the SEC's investigative effectiveness.[161] Congress was concerned with the possibility that customers would use the claim of privacy the RFPA grants as a strategy to delay and obstruct the Commission's efforts.[162] Congress also was impressed with the excellent reputation the SEC had earned in its use of administrative subpoenas.[163] Hence, Congress was reluctant to subject the SEC to the full coverage of the RFPA.[164] Section 78(u)(h)(4)(c) requires that the agency notify a customer only to the extent that such subpoena is relevant to the customer's privacy interest.[165] The enactment of this amendment, therefore, reinforces the argument that the SEC's use of excised subpoenas was a minor rather than a serious transgression of the RFPA.

The court's holding that plaintiffs adequately proved that they would suffer irreparable harm absent an injunction is also questionable.[166] Not only did the Commission withdraw the subpoenas and update letters, but it also agreed to notify the plaintiffs if the agency was to make a demand for records in the future.[167] The provision preventing financial institutions from furnishing customers' records until the SEC certifies compliance with the RFPA supports the contention that no threat of irreparable harm existed.[168] Furthermore, the Hunts were experienced businessmen and had taken precautions to be notified if the

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[1980] U.S. CODE CONG. & AD. NEWS 3874, 3875. Section 78(h) provides that the Commission is subject to the RFPA except in specific cases in which the Commission needs prompt access to financial records in order to carry out its responsibilities under the federal securities laws. *Id.* The Committee on Interstate Commerce and Foreign Commerce found the SEC is unique among federal agencies in its need for prompt access to financial records. H. REP. No. 96-1321 Part I, 96th Cong. 2d Sess. (1980). Under § 78(h) the Commission may have access to copies of a customer's financial records without giving prior notice to the customer to whom the financial records relate. [1980] U.S. CODE CONG. & AD. NEWS 3874, 3875. Section 78(h)(2) specifies the manner and the circumstances under which the Commission may delay notice to the customer once the agency has received the records. *Id.* at 3879. The Commission must make an ex parte showing to a district court that the Commission has met certain factors before the court will enter an order delaying the notice to the customer. *Id.* at 3880. Customers may challenge the delay, rendering the SEC subject to civil penalties similar to those provided that § 3417 of the RFPA provides. *Id.* at 3882-83.

[160] [1980] U.S. CODE CONG. & AD. NEWS 3874, 3875.

[161] *Id.* at 3875.

[162] *Id.*

[163] *Id.* at 3877. Congress stated that it was confident that the SEC would continue to exercise its subpoena authority in a careful and responsible manner. *Id.*

[164] *Id.*

[165] 15 U.S.C.A. § 78(u)(h)(4)(c) (1981).

[166] 520 F. Supp. at 608.

[167] Brief for Appellant, *supra* note 49, at 42.

[168] 12 U.S.C. § 3404 (Supp. III 1979).

SEC subpoenaed plantiff's bank records regardless of the RFPA's guarantees.[169]

The *Hunt* court was mistaken in finding that plaintiffs had met the third prerequisite, which involves balancing the impact an injunction would have on the SEC against the harm that would occur if plaintiffs were not successful in obtaining an injunction.[170] Stating that an injunction would not injure the SEC because the law already imposed the burden of adhering to the provisions of the RFPA,[171] the district court failed to consider the practical effect of such an injunction. Not only is the impact on plaintiffs questionable, but moreover, the granting of an injunction establishes a serious and dangerous precedent. Enjoining the SEC in the present case already has and will continue to encourage the institution of suits in an effort to hinder and delay SEC enforcement inquiries.[172] The good faith attempts by the Commission to revise the RFPA manual and comply with its provisions diminish the possibility that the SEC's future conduct would harm the plaintiffs irreparably if the court denied injunctive relief. If the court issued an injunction, however, the injunction seriously would impede the agency's investigation and establish a potentially harmful precedent. The SEC contends that an injunction, in effect, would permit plaintiffs to avoid the specific provisions by transforming a customer challenge under section 3410 into a contempt hearing for any minor deviation from the RFPA.[173]

The *Hunt* court's analysis of the fourth element necessary for a grant of injunctive relief is unsound. The fourth prerequisite involves determining the effect an injunction would have upon the public interest.[174] The court's assertion that the RFPA embodies the ultimate expression of the public interest is inaccurate.[175] The existence of federal securities law demonstrates that society has a profound interest in the protection of the investing public. The enactment of the RFPA does not resolve conclusively the conflict between the government's need for information and a customer's privacy interest in favor of the individual. The RFPA's limited and specific remedies and procedures evidence the restrictive nature of an individual's right in the privacy of his financial

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[169] 520 F. Supp. at 594.

[170] *Id.* at 609.

[171] *Id.*

[172] *See, e.g.*, Daugharty v. SEC, No. 81-C-4557 (N.D. Ill., Nov. 10, 1981); Locascio v. SEC, (CCH) Fed. Sec. L. Rep. ¶ 98, 257 (D. Nev., Aug. 3, 1981); Redmer v. SEC, No. CV-LC-81-357 (D. Nev. July 14, 1981); Ratliff v. SEC, No. 81-2042 (N.D. Tenn., July 13, 1981); Penelope Surgent v. SEC, No. 81-1494 (D.N.J., May 27, 1981); John Surgent v. SEC, No. 81-1494 (D.N.J., May 27, 1981); Penelope Surgent v. SEC, No. 81-916 (D.N.J., May 20, 1981); John Surgent v. SEC, No. 81-915 (D.N.J., May 20, 1981). *See also* Vilkin, *'Hunt' Court Inhibit SEC's Enforcement Activities*, Legal Times Wash., July 20, 1981, at 2, col. 1.

[173] Brief for Appellant, *supra* note 49, at 44.

[174] 520 F. Supp. at 609.

[175] *Id.*

records.[176] The court should not subordinate the government's concern over the condition of the nation's economic market to an individual's right to privacy when, as in the present case, the public interest is of an overriding dimension.

In light of the paucity of support for the court's technical application of the RFPA, the question arises whether such a decision is an aberration. Unable to conclude that the SEC's conduct was patently egregious, the facts unambiguous, or the plaintiffs clearly victims, the district court's analysis fails to provide sound guidance for other courts in the application of the RFPA to the SEC.

PATRICIA A. CALORE

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[176] *See* note 52 *supra.*