No. _____

In The Supreme Court of the United States

M.H.,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI AND APPENDIX VOL. I

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QUESTIONS PRESENTED

In dozens, if not hundreds, of cases across the country, the United States is using grand jury proceedings to compel individuals to produce foreign bank account records under the Bank Secrecy Act ("BSA"), 31 U.S.C. §5311. Although the contents of the disclosures unquestionably would be incriminating, the Government is relying on an exception to the Fifth Amendment privilege against self-incrimination known as the Required Records exception. A split in the lower courts has developed in these cases as to whether a person can be compelled to produce these records when their content, or even the act of production, will be incriminating. This case presents the questions:

1. Whether the Required Records exception to the Fifth Amendment privilege against self-incrimination applies when an individual, without immunity, is compelled to respond to a subpoena where either the act of production or the admitted absence of required records has incriminating testimonial aspects.

2. Whether the Required Records exception to the Fifth Amendment privilege against self-incrimination applies to bank records under the BSA, even though the Act is primarily a criminal statute, and requires the production of documents which are not customarily kept and have no public aspect.

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PETITION FOR WRIT OF CERTIORARI

M.H. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The decision of the United States District Court for the Southern District of California is found at Appendix (App.) p. 27.

The Ninth Circuit's decision affirming the District Court is at App. p. 1. The Ninth Circuit's denial of rehearing and rehearing *en banc* is found at App. 50.

JURISDICTION

The judgment of the court of appeals was issued on August 19, 2011. (App. at 1.) The court denied a timely petition for rehearing and suggestion for rehearing *en banc* on October 3, 2011. (App. at 50.) The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

RELEVANT CONSTITUTIONAL PROVISION

The Fifth Amendment provides in relevant part: "No person shall be . . . compelled in any criminal case to be a witness against himself."

STATEMENT OF THE CASE

In February 2009, Swiss bank, UBS AG ("UBS") entered into a deferred prosecution agreement with the Department of Justice. Under the agreement, UBS paid a $780,000,000 fine and admitted to conspiring to defraud the United States by advising United States taxpayers how to commit tax evasion. UBS also agreed to provide the named accounts of some of its United States clients. Initially, in 2009, approximately 255 named accounts were chosen by UBS using secret criteria. In 2010, UBS forwarded approximately 4,450 additional names to the Government. David Voreacos, et al., *UBS Tax Ruling May Prompt New U.S. Legal Battle (Update1)*, Bloomberg Businessweek, Jan. 25, 2010, http://www.businessweek.com/news/2010-01-25/ubs-tax-ruling-by-swiss-court-may-prompt-new-u-s-legal-battle.html. The UBS file concerning M.H. purportedly came from the original 2009 UBS production. The file indicated that the account was closed in 2002 and the assets transferred to another Swiss bank. Therefore, the Government had no foreign bank records for years falling within the statute of limitations.

The Government is investigating whether M.H. properly reported all foreign bank accounts in which he had a financial interest on Treasury forms TD F 0-22.1, "Report of Foreign Bank and Financial Accounts" or "FBARs." M.H. may be subject to felony charges and penalties for failing to report accounts. 31 U.S.C. §§5314, 5322. Alternatively, M.H. may be subject to felony charges for failing to maintain records of these accounts. *Id.*; 31 C.F.R. §1010.420.

On June 29, 2010, the Government served M.H. with a subpoena duces tecum demanding that he produce documents required to be kept under the BSA, 31 U.S.C. §§5311 *et seq.*, and pursuant to 31 C.F.R. §103.32 (now 31 C.F.R. §1010.420). Specifically, the subpoena demanded:

> Any and all records required to be maintained pursuant to 31 C.F.R. §103.32 relating to foreign accounts that you had/have a financial interest in, or signature authority over, including records reflecting the name in which each such account is maintained, the number or other designation of such accounts, the name and address of the foreign bank or other person with whom such account is maintained, the type of such account, and the maximum value of each such account during each specified year.[1]

[1] The subpoena mirrors the language of 31 C.F.R. §1010.420, which requires anyone obligated to report a foreign bank account pursuant to 31 C.F.R. §1010.350 to maintain records of all

(Continued on following page)

M.H. asserted his Fifth Amendment privilege against self-incrimination and the Government moved to compel. On February 17, 2011, the U.S. District Court for the Southern District of California granted the Government's motion to compel M.H. to produce records of his foreign bank accounts. The district court, however, expressly found that any production or non-production by M.H. in response to the subpoena had incriminating testimonial aspects:

> Upon review, the Court concludes [M.H.] has satisfied his initial burden of demonstrating that the act of producing the subpoenaed records could result in a 'substantial hazard' of incrimination. The government's subpoena seeks '[a]ny and all records required to be maintained pursuant to 31 C.F.R. §103.32 relating to foreign financial accounts.' Pursuant to 31 C.F.R. §103.32, all U.S. holders of foreign bank accounts are required to create and retain certain records regarding those accounts for a period of five years. Those who

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such accounts for a period of five years and to keep these records available "for inspection as authorized by law." The records required to be kept by §1010.420 must have the following information:

1. The name in which each account is maintained.
2. The number or other designation of the account.
3. The name and address of the foreign bank or other person with whom such account is maintained.
4. The type of such account.
5. The maximum value of each such account during the reporting period.

> willfully fail to retain such records may be criminally prosecuted under 31 U.S.C. §5322(a). Therefore, if [M.H.] responds to the subpoena by stating he does not have the requested records, it is possible he could provide 'a significant link in a chain of evidence tending to establish guilt' of a [sic] offense under §5322. On the other hand, if [M.H.] does possess documents identifying Swiss bank accounts and money he did not previously disclose under the regulations, it is possible he could incriminate himself by 'identify[ing] heretofore unknown accounts for the Government and demonstrat[ing] that these accounts are in his possession and control, and thus, leading to a presumption of knowledge.'

(App. at 31-32 (citations omitted).)

In spite of this finding, the district court applied the rarely invoked Required Records exception to the Fifth Amendment, and granted the Government's motion to compel.

After the district court granted the Government's motion to compel, M.H. moved for a grant of immunity. On March 14, 2011, the district court denied immunity.

Because there is no interlocutory right to appeal a motion to compel, M.H. had to respectfully decline to produce documents and await a contempt citation, which is appealable. On April 22, 2011, the district court, recognizing that the issues in the case are

"substantial and worthy of appellate review," granted the Government's contempt motion, but stayed enforcement of the contempt order. The district court set a bond which M.H. posted on April 28, 2011.

M.H. appealed to the Ninth Circuit Court of Appeals. After briefing and oral argument, the Ninth Circuit panel affirmed the district court. (App. at 1.)

M.H. filed a timely petition for rehearing and suggestion for rehearing *en banc*. On October 3, 2011, the panel denied the motion for rehearing. The suggestion for rehearing *en banc* also was denied. (App. at 50.)

On October 5, 2011, M.H. filed a motion to stay the issuance of the mandate pending the filing and disposition of a petition for writ of certiorari in the United States Supreme Court. On October 7, 2011, the Ninth Circuit granted M.H.'s motion. (App. at 46.)

On October 14, 2011, the Government filed a motion for reconsideration of the Court's order staying the mandate. On October 17, 2011, less than one full business day later and without allowing M.H. an opportunity to respond, the Ninth Circuit, in a complete reversal of course, granted the Government's motion for reconsideration, vacated its previous order and issued the mandate forthwith. (App. at 47.) M.H. asked the Ninth Circuit to reconsider and to recall the mandate. The Ninth Circuit declined (App. at 48), and M.H. filed an application to stay the mandate with the U.S. Supreme Court pending the certiorari,

which the Government opposed. This Court denied the application to stay on October 25, 2011.

The District Court has since compelled M.H. not just to turn over the foreign bank records which he maintained, but to affirmatively *seek* and *obtain* from foreign jurisdictions full account statements generated by foreign banks, not just the information specified in the regulation. These full statements extend well beyond the five categories of information specified in the subpoena, §1010.420 and on the FBAR form. (*See* Dec. 6, 2011 District Court Order). Furthermore, relying on the Ninth Circuit's decision, the Government has compelled numerous other targets of FBAR investigations pending throughout the United States to seek, obtain and produce foreign bank records.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

THIS COURT SHOULD GRANT REVIEW TO RESOLVE AN ISSUE OF NATIONAL IMPORTANCE THAT IS ARISING IN A LARGE NUMBER OF CASES, AND ABOUT WHICH THE LOWER FEDERAL COURTS DISAGREE, CONCERNING THE APPLICATION OF THE REQUIRED RECORDS EXCEPTION TO THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION TO INFORMATION ABOUT FOREIGN BANK ACCOUNTS UNDER THE BANK SECRECY ACT.

The United States has initiated grand jury proceedings in a large number of cases as a result of the UBS disclosures. The Government has opened at least 150 criminal tax investigations based on the initial 255 UBS accounts and another 4,400 are being opened. Voreacos, et al., *UBS Tax Ruling May Prompt New U.S. Legal Battle (Update1)*. At least 35 individuals have been criminally charged so far. David Voreacos, *Ex-UBS Client Must Give Tax Records to U.S. Grand Jurors*, Bloomberg Businessweek, Aug. 23, 2011, http://www.businessweek.com/news/2011-08-23/ex-ubs-client-must-give-tax-records-to-u-s-grand-jurors.html. This is just the beginning. Eleven additional Swiss banks, including Credit Swisse, Julius Baer, HSBC Switzerland and Basler Kantonalbank are poised to enter agreements similar to UBS resulting in the turn-over of tens of thousands of U.S. names

and accounts. Some of these banks have already begun to turn over client data to U.S. authorities.[2]

This Court should take on this issue now and not wait until after indictment, trial and appeal because if this Court ultimately eliminates or revises the Required Records exception, hundreds of cases, completed or in progress, will have to be reexamined to determine precisely what compelled records should have been excluded from evidence and what additional evidence was fruit of that poisonous tree. Because of the volume of cases in the pipeline, this would result in massive confusion and a serious waste of judicial resources.

Recently, two federal district courts, the U.S. District Court of the Southern District of Texas and the U.S. District Court for the Northern District of Illinois, in cases identical to this one, have rejected the Ninth Circuit's decision in this case for different reasons.[3] The Southern District of Texas concluded that a target grand jury witness could not be compelled to produce personal foreign bank account records under

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[2] Randall Jackson, *U.S. Offers 11 Swiss Banks Deal to End Tax Evasion Investigation*, December 21, 2011, Worldwide Tax Daily News; Stephanie Soong Johnston, *Swiss Banks to Give Tax Evader Information to U.S. Authorities*, October 11, 2011, Worldwide Tax Daily News.

[3] These two decisions are being filed with this Court as a Supplemental Appendix (cited as "S. App.") under seal because it appears that both of these decisions were filed under seal, although the Northern District of Illinois ruling was initially published on Westlaw and then withdrawn from there.

the Required Records exception because the test for this exception was not met. *In re Grand Jury Subpoena*, Misc. Action H-11-174 (S.D. Tex. Sept. 21, 2011) (S. App. at 1). The Northern District of Illinois concluded that the Required Records exception, which is narrow, must be applied within the context of the current scope of the Fifth Amendment privilege and does not apply when the compelled production has incriminating testimonial aspects. *In re Special February 2011-1 Grand Jury Subpoena Dated September 12, 2011*, No. 11 GJ 792, 2011 WL 5903795 (N.D. Ill. Nov. 22, 2011) (S. App. at 8).

The stark contrast of these opinions with the Ninth Circuit's ruling demonstrates the need for guidance from this Court whether the Required Records exception applies in these circumstances, and if so, the requirements of this test. This case presents an ideal vehicle for consideration because the issue has been clearly presented and ruled on by the lower courts. It offers this Court a rare opportunity for review because typically the issue never advances this far. If the production is compelled and contempt issued, a witness almost always will produce the records rather than be incarcerated. Only in cases like this one, where the individual is found in contempt and the district court stays its contempt proceedings pending appeal, will the matter be presented in a posture likely to reach this Court. Because grand jury proceedings are secret, and opinions rarely published, it is impossible to know how many grand jury subpoenas already have been enforced. Given the

massive number of criminal investigations underway, this issue is arising, and will arise, in hundreds or even thousands of cases.

A. The Required Records Exception to the Fifth Amendment

This Court often has emphasized that the privilege against self-incrimination "must be accorded liberal construction in favor of the right it was intended to secure." *Hoffman v. United States*, 341 U.S. 479, 486 (1951) (citation omitted). The Required Records exception to the privilege against self-incrimination was first established in *United States v. Shapiro*, 335 U.S. 1 (1948). *Shapiro* was decided under the framework of *Boyd v. United States*, 116 U.S. 616, 630 (1886), a now discredited nineteenth century case which prohibited the compelled production of any private records. At the time, there was a need to create an exception to *Boyd* to provide the Government investigative tools necessary to enforce legitimate regulatory programs. *In re Special February 2011-1 Grand Jury Subpoena*, 2011 WL 5903795 at *2 (S. App. at 9).

Shapiro concerned the Emergency Price Control Act ("EPCA"), enacted by Congress to regulate commodity prices during wartime. The Act required licensed businesses to maintain and produce records "customarily kept" by individuals engaging in commodities sales, such as "invoices, sales tickets, cash receipts, or other written evidences of sale or delivery

which relate to the prices charged pursuant to [the EPCA.]" *Shapiro*, 335 U.S. at 5 n.3.[4] The majority concluded that the defendant business records custodian could be compelled to produce these records since they were in effect, "public documents, which the defendant was required to keep, not for his private uses, but for the benefit of the public, and for public inspection." *Id*. at 17-18 (citations omitted). The majority found, "the privilege which exists as to private papers cannot be maintained in relation to records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation and the enforcement of restrictions validly established." *Id*. at 33 (citations omitted).

Dissenting in *Shapiro*, four justices expressly warned of the disastrous constitutional implications if the Government was allowed unfettered discretion to determine what records individuals were required to maintain, and turn over to government authorities, without application of the Fifth Amendment's privilege against self-incrimination:

> If records merely because required to be kept by law *ipso facto* become public records, we are indeed living in glass houses. . . . If Congress by the easy device of requiring a man to keep the private papers that he has customarily kept can render such papers

[4] Notably, failure to maintain pricing records was *not* a crime. *Shapiro*, 335 U.S. at 5 n.3.

> "public" and non-privileged, there is little left to either the right of privacy or the constitutional privilege.

Id. at 51, 70 (Frankfurter, J., dissenting).

Similarly, Justice Jackson wrote:

> The protection against compulsory self-incrimination, guaranteed by the Fifth Amendment, is nullified to whatever extent this Court holds that Congress may require a citizen to keep an account of his deeds and misdeeds and turn over or exhibit the record on demand of government inspectors, who then can use it to convict him.

Id. at 70 (Jackson, J., dissenting).

Twenty years after *Shapiro*, this Court decided *Marchetti v. United States*, 390 U.S. 39 (1968), and *Grosso v. United States*, 390 U.S. 62 (1968), which concerned federal tax statutes requiring gamblers to pay an excise tax, register with the IRS, preserve daily records of wagers, and permit inspection of books and accounts. *Marchetti*, 390 U.S. at 42-43. The cases thus concerned both reporting requirements and record keeping provisions. At the time of the decision, wagering was largely illegal in most states. This Court found individuals could not be compelled to comply with the reporting requirements without essentially admitting to an unlawful activity.

This Court then considered the Required Records exception, created in *Shapiro*, and narrowed the exception to the current three prong test:

> ***first***, the purposes of the United States' inquiry must be essentially ***regulatory***; second, information is to be obtained by requiring the preservation of records of a kind which the regulated party has ***customarily kept***; and ***third***, the records themselves must have assumed "***public aspects***" which render them at least analogous to public documents.

Grosso, 390 U.S. at 67-68 (emphasis added); *Marchetti*, 390 U.S. at 57.

Using this test, this Court concluded the Required Records exception was inapplicable. Although the primary motivation for the tax laws is obviously the collection of revenue, this Court decided that the requirements were not essentially regulatory because they were directed at a "selective group inherently suspect of criminal activities." *Marchetti*, 390 U.S. at 57. This Court further concluded that the records of wagering activities required to be maintained were not the type of records "customarily kept" by individuals, but rather were akin to a demand that a defendant provide oral testimony about his illegal activity. *Id*.

Finally, in contrast to the records sought in *Shapiro*, this Court concluded there was nothing "public" about gambling records required to be maintained, and disclosed, under tax laws. This Court

expressly warned, in words directly applicable to this case, that the Government cannot automatically gain access to records by merely requiring that they be kept by law, for such a rule would abrogate the Fifth Amendment privilege:

> The Government's anxiety to obtain information known to a private individual does not without more render that information public; if it did, no room would remain for the application of the constitutional privilege. *Nor does it stamp information with a public character that the Government has formalized its demands in the attire of a statute; if this alone were sufficient, the constitutional privilege could be entirely abrogated by any Act of Congress*.

Marchetti, 390 U.S. at 57 (emphasis added); *see also Grosso*, 390 U.S. at 68 ("[T]he information demanded here lacks every characteristic of a public document. No doubt it is desired by the United States . . . this alone does not render information 'public,' and thus does not deprive it of constitutional protection.")

Nearly a decade after this Court established the three-prong Required Records test, it redefined the scope of the Fifth Amendment privilege in the context of business records and abandoned *Boyd v. United States*. Instead of focusing on an individual's right to privacy from Government inquiry, this Court recognized that the Fifth Amendment protects "a person only against being incriminated by his own compelled testimonial communications." *United States v. Fisher*,

425 U.S. 391, 409 (1976). This Court concluded: "We adhere to the view that the Fifth Amendment protects against 'compelled self-incrimination, not (the disclosure of) private information." *Id*. at 401; *see also In re Special February 2011-1 Grand Jury Subpoena*, 2011 WL 5903795 at *3 (S. App. at 10); Samuel A. Alito, Jr., *Documents and the Privilege Against Self Incrimination*, 48 U. Pitt. L. Rev. 27, 39-40 (1986) ("*Boyd*'s property-based interpretation of the fourth amendment could not accommodate the needs of modern law enforcement or modern concerns of privacy.")

This Court revisited this issue again in *United States v. Doe*, 465 U.S. 605 (1984), holding that when the act of producing records has incriminating testimonial aspects, production cannot be compelled unless the witness is granted corresponding immunity. *Id*. at 617. In *Doe*, the Government issued several subpoenas requiring the witness to produce all records pertaining to four bank accounts, including an account in the Grand Cayman Islands. *Id*. at 606-07. The Government did not offer the witness use immunity. *Id*. at 615-16. The trial court, like the district court in this case, expressly acknowledged that the testimonial act of producing any records would be incriminating. This Court affirmed the trial court and concluded that the act of production could not be compelled without a corresponding grant of use immunity. *Id*. at 617. Notably, the records at issue in *Doe* were the same records at issue here: foreign bank account records.

In *United States v. Hubbell*, 530 U.S. 27 (2000), this Court again affirmed Fifth Amendment protection against the compelled production of documents without immunity, if the production has incriminating testimonial aspects. *Id*. at 38 ("Compelled testimony that communicates information that may 'lead to incriminating evidence' is privileged even if the information itself is not inculpatory."). Importantly, concurring in *Hubbell*, Justices Thomas and Scalia inquired whether the assertion of the Fifth Amendment privilege ought to be just limited to the testimonial aspects of the production, or indeed extended to the contents of records as well. Specifically, they questioned whether any limitation of the self-incrimination clause was consistent with the Fifth Amendment's original intent:

> A substantial body of evidence suggests that the Fifth Amendment privilege protects against the compelled production not just of incriminating testimony, but of any incriminating evidence. In a future case, I would be willing to reconsider the scope and meaning of the Self-Incrimination Clause.

Hubbell, 530 U.S. at 49.

Although *Hubbell* did not involve the Required Records exception, it emphatically reaffirmed that "the constitutional privilege against self-incrimination protects the target of a grand jury investigation from being compelled to answer questions designed to elicit information about the existence of sources of potentially incriminating evidence." *Id*. at 43.

B. This Court Should Grant Certiorari to Resolve the Tension Between the Ninth Circuit's Decision and this Court's Rulings, and to Resolve a Split Among the Lower Courts, as to Whether the Required Records Exception Applies When the Disclosure of the Documents, or Even Their Existence or Non-Existence, Is Inherently Likely to Be Incriminating.

Lower courts have struggled to apply the Required Records exception since the original justification for the exception – a distinction between public and private documents – is no longer controlling. *See In re Special February 2011-1 Grand Jury Subpoena*, 2011 WL 5903795 at *3 (S. App. at 10). Justice Alito has opined that this doctrine must be re-examined in light of *Fisher* and *Doe*: "[t]he required records rule . . . also seems likely to be reexamined in light of *Fisher* and *Doe*, because this rule . . . was developed without any consideration of the act of production." Alito, *supra* at 71-72.

While nearly all courts agree the Required Records exception survived *Fisher* and *Doe* in some capacity, disagreement exists over how the doctrine fits within the current constitutional framework. For example, Justice Alito has written that the compulsory creation and organization[5] of documents, required by

[5] Notably the FBAR regulation may require foreign account holders to *create* records so as to include five specific pieces of information. 31 U.S.C. §5322; 31 C.F.R. §1010.420.

recordkeeping provisions, are clearly testimonial and incriminating acts:

> The compulsory creation of a document is testimonial because it is indistinguishable for fifth amendment purposes from compulsory oral testimony. . . . It therefore follows that an individual who properly claims the fifth amendment privilege cannot be compelled to organize, file, or create documents *without receiving immunity against the use of any information derived from those compelled acts*.

Alito, *supra* at 75, n.212 (emphasis added).

A similar conclusion was reached by Judge Posner of the Seventh Circuit, in *Smith v. Richert*, 35 F.3d 300 (7th Cir. 1994), which held that if a compelled production has incriminating testimonial aspects, the exception does not apply:

> It is enough to point out that in a case in which the production of personal (not business) tax records of the character of W-2's and 1099's would have testimonial force and incriminate the taxpayer, *the principles of Fisher and Doe establish that the required-records doctrine is inapplicable and that production is excused by the self-incrimination clause*.

Id. at 304 (emphasis added).

The U.S. District Court for the Northern District of Illinois, ruling on a motion to quash a grand jury

subpoena identical to the one in this case, recently held that in light of *Fisher*, *Doe* and *Smith*, two additional prongs must be considered when determining whether the Required Records exception applies: (1) whether the compelled production has incriminating testimonial aspects beyond the mere existence and applicability of the regulatory program at issue and (2) whether the individual has voluntarily entered a regulatory field such that he or she has waived Fifth Amendment protection. *In re Special February 2011-1 Grand Jury Subpoena*, 2011 WL 5903795 at *4 (S. App. at 11).

The Northern District of Illinois noted that in most cases, the production of required records will not have incriminating testimonial aspects since "[t]he individual's participation in the regulated activity is obvious because in the typical case, the individual engages in the regulated activity in public." *Id*. at *5 (S. App. at 12). In most Required Records applications, such as *Shapiro* cases, the purpose of the regulated activity is to protect consumers from the individuals engaged in the regulated public activity. The activity is thus already known to the Government.

The Northern District of Illinois contrasted those cases with the purpose of the BSA – which is not to regulate a public market or protect consumers, but to advance the Government's "criminal, tax, or regulatory investigations or proceedings":

> The people subject to BSA regulation have not necessarily engaged in activities with the public or in the public sphere. An individual's voluntary decision to obtain a foreign bank account is private, unlike the voluntary decision to conduct business with the public in a regulated area. Without some disclosure by the individual such as the FBAR – which in this case T.W. has declined to fill out – the Government has no direct way to discover T.W.'s participation in the regulated activity. Forcing T.W. to produce foreign bank account records would compel him to admit that he has a foreign bank account, a compelled admission that the Fifth Amendment protects him from having to make.

Id. at *5 (S. App. at 12).

The Northern District of Illinois, like the Seventh Circuit in *Smith*, thus limited the application of the Required Records exception when the compelled production has incriminating testimonial aspects: "[t]he required records doctrine only applies, however, in the limited case in which the individual's decision to participate in regulated activity has already revealed information that he seeks to protect under the Fifth Amendment." *Id*. at *5 (S. App. at 12) (emphasis added).

Obviously, this case would have been decided differently had it arisen in the Seventh Circuit instead of the Ninth Circuit. Like the Northern District of Illinois, the Southern District of California in this case specifically found that compelling M.H. to produce

records in response to the subpoena has incriminating testimonial aspects. (App. at 31.) However, the Ninth Circuit ignored this finding and simply applied the Required Records exception outside the framework of *Fisher* and *Doe*. (App. at 26) (Fifth Amendment privilege does not extend to an individual who voluntarily participates in a regulated activity.)

However, logically, the Required Records exception must be analyzed within the framework of *Fisher* and *Doe*. If the act of producing documents is incriminating, it is not less incriminating because the records were required to be kept. The effect is the same, whether required or not. In fact, greater scrutiny should be applied when individuals are required by law to create or maintain records. Producing foreign bank records is tantamount to admitting that these accounts and documents exist and are in the target's possession and control.

In prior cases where the Government sought production of foreign bank account records, the target was only required to sign a blank consent form authorizing release of records. The forms, however, did not contain any identifying information of the account or the institution. Rather, the burden was on the Government to identify the subject bank and present the form. This form of disclosure is constitutional because it is not "testimonial":

> It is carefully drafted not to make reference to a specific account, but only to speak in the hypothetical. Thus, the form does not

> acknowledge that an account in a foreign institution is in existence or that it is controlled by petitioner. Nor does the form indicate whether documents or any other information relating to petitioner are present at the foreign bank. . . . The form does not even identify the relevant bank. Although the executed form allows the Government access to a potential source of evidence, the directive itself does not point the Government toward hidden accounts or otherwise provide information that will assist the prosecution in uncovering evidence. *The Government must locate that evidence* "'*by the independent labor of its officers.*'"

Doe v. United States, 487 U.S. 201, 215 (1988) (emphasis added). In *Doe v. United States* this Court was very careful to prevent the self-disclosure of bank accounts unknown to the Government. *See also Fisher*, 425 U.S. at 411 ("The existence and location of the papers are a foregone conclusion and the taxpayer adds little or nothing to the sum total of the Government's information by conceding that he in fact has the papers.")

However, under the Ninth Circuit's approach, the Government need not make *any showing* of its prior knowledge of the incriminating evidence under the Required Records exception. Rather, it can simply rely on the target of the criminal investigation to identify and produce evidence of his or her purported

misdeeds. In effect, the target is compelled to do the Government's work for it.[6]

The Ninth Circuit stands in stark contrast to the recent decision of the Northern District of Illinois, in which Chief Judge Holderman wrote:

> A bedrock principle of Fifth Amendment jurisprudence is that the Government cannot obtain access to information merely by expressing its "anxiety to obtain information known to a private individual," or even by "formalizing its demands in the attire of a statute." . . . The required records doctrine only applies, however, in the limited case in which the individual's decision to participate in a regulated activity has already revealed the information that he seeks to protect under the Fifth Amendment.

In re Special February 2011-1 Grand Jury Subpoena, 2011 WL 5903795 at *5 (S. App. at 12).

[6] Indeed, as discussed above, this is precisely what has happened in this case. The district court has ordered M.H. to affirmatively seek and produce records of all foreign accounts, judging all the records to be within his possession and/or control, and making no distinction between accounts already known by the Government and those unknown.

C. This Court Should Grant Review to Resolve Tension Between the Ninth Circuit's Ruling and This Court's Decisions, the Split Among the Lower Courts, and To Clarify the Test to Be Used to Determine Whether the Required Records Exception Applies and How it is to Be Applied.

If this Court were to conclude that the Required Records exception applies in this case, review by this Court is also appropriate because the Circuits are split as to the test to be applied for the Required Records exception.

1. The confusion as to the test to be applied.

This Court, in *Marchetti* and *Grosso* established that the Required Records exception is only applicable when three criteria are satisfied: (1) the purpose of the Government's inquiry is essentially regulatory, (2) the information sought to be obtained is of a kind that is "customarily kept," and (3) the records themselves have assumed "public aspects" which render them at least analogous to public documents. *See, e.g.*, *Grosso*, 390 U.S. at 67-68. Other Circuits have followed this test. *See, e.g.*, *United States v. Lehman*, 887 F.2d 1328, 1332 (7th Cir. 1989).

By contrast, the Ninth Circuit in this case, in essence, reduced the three prong test of *Marchetti* and *Grosso* to a one prong inquiry – "whether the requirement in question is essentially regulatory or

criminal in nature." The Ninth Circuit effectively folded the other two prongs into the first.

Regarding the "customarily kept" prong, the Ninth Circuit concluded that records are "customarily kept" if they "would typically be kept in connection with regulatory activity." (App. at 19.) Thus, so long as the first prong is satisfied (i.e., the scheme is regulatory), the records are deemed to be customarily kept. This holding renders the second prong meaningless and is directly contrary to this Court's holding in *Marchetti* that records are not "customarily kept" merely because the individual is required by a regulation to keep them. *Marchetti*, 390 U.S. at 57.

The Ninth Circuit applied the same tautological reasoning to the third prong, "public aspects," concluding that "if the government's purpose in imposing the regulatory scheme is essentially regulatory, then it necessarily has some 'public aspects.'" (App. at 20.) Again, this approach collapses the third and first prongs: under the Ninth Circuit's approach, so long as the scheme is regulatory, anything required to be maintained under it is deemed to have "public aspects." Notably, this rationale is directly contrary to this Court's ruling in *Marchetti*, which expressly warns that legislation requiring a record to be maintained is *not* sufficient to transform an otherwise private document to a public one. *Marchetti*, 390 U.S. at 57.

In contrast to the Ninth Circuit's reduction of the Required Records test to one prong, the Northern

District of Illinois in the Seventh Circuit has added two additional prongs: (1) whether the compelled production has any incriminating testimonial aspects; and (2) whether the individual has voluntarily entered a field of regulation so as to waive Fifth Amendment protection. *In re Special February 2011-1 Grand Jury Subpoena*, 2011 WL 5903795 at *4 (S. App. at 11).

The significance of the first additional prong is discussed above. The second additional prong propounded out of the Seventh Circuit was implicitly recognized in this Court's previous rulings and articulated by the Seventh Circuit in *United States v. Porter*, 711 F.2d 1397 (7th Cir. 1983). The Required Records exception is intended to apply to regulated industries, which offer public goods or services. *Shapiro*, 335 U.S. at 5 (licensed businesses required to produce records under the Price Control Act); *In re Grand Jury Proceedings, Doe M.D.*, 801 F.2d 1164, 1168 (9th Cir. 1986) (licensed physician required to produce records of sales of dangerous drugs required to be kept and open to inspection by law); *In re Grand Jury Subpoena Duces Tecum, Underhill*, 781 F.2d 64, 65-66 (6th Cir. 1986) (car dealership required to produce odometer statements required to be reported by federal law). In order to function, regulated industries are licensed and submit to government regulation. These regulations often require the licensed industry to maintain and file certain documents with the government to ensure safety standards are met.

See Shapiro, 335 U.S. at 4-5. Such regulations are established to protect the public interest.

In contrast, the Required Records exception does not apply to regulations to which an individual does not voluntarily submit. For example, the exception does not apply to tax records, even though 26 U.S.C. §6001 requires taxpayers to maintain and produce records:

> The taxpayer-IRS relationship is, instead, a more limited one which creates an imperative for access to records only in rare cases. *In short, the taxpayer's substantive activities are not positively "regulated" by the IRS sufficient to create a Shapiro-type interest in unconditional access to those records*.

Porter, 711 F.2d at 1405 (emphasis added); *Smith*, 35 F.3d at 303. Tax collection is the only "regulatory" purpose cited by the Government for the FBAR provisions of the BSA. This purpose has specifically been refuted by the Seventh Circuit as insufficient since taxpayers are not volunteers in a regulated public activity.

In contrast to the substantive restrictions and licensing requirements at issue in *Shapiro* and its progeny, the BSA imposes no regulatory restrictions on individuals who hold foreign bank accounts. *See* 31 U.S.C. §5311 *et seq*. Any individual can open a foreign bank account, just as any individual is a taxpayer. Unlike regulated industries, an individual who opens a foreign bank account is not required to keep records

of the account as a condition of maintaining the account. In other words, the Government cannot "close down" the account as it could close down a business not complying with health regulations. There is no requirement that an individual maintain records to receive a license to open a foreign bank account or to transact business. The BSA imposes no restriction on the amount of funds an individual can maintain in a foreign account and imposes no restrictions on the number of deposits or withdrawals.

It was for this reason that the Southern District of Texas came to exactly the opposite conclusion as the Ninth Circuit and found that the Required Records exception did not apply to an identical set of facts as this case. The court explained:

> Other than gathering data to confirm whether its citizens are evading taxes through overseas accounts, the act has no substance – not in having its own regulatory function nor in assisting other regulators. The statute does not restrict overseas investment. It does not dictate how or why Americans can move their assets elsewhere. Unlike the Price Control Act, foreign account holders are not required to have a federal license in order to invest overseas.

In re Grand Jury Subpoena, Misc. Action H-11-174, slip op. at 4 (S. App. at 4). The court held that the Required Records exception does not apply to these records and concluded: "[t]he national government regulates nearly every aspect of life. It may not

eviscerate the limits on its authority under the Constitution by turning every regulated choice into a constitutional waiver." *Id*. at 7 (S. App. at 7).

2. The confusion in applying the test.

There also is disagreement in the lower courts as to how each aspect of the test is to be applied.

a. Essentially regulatory

First, courts are to consider whether the *purpose* of the government's inquiry is essentially regulatory. *Grosso*, 390 U.S. at 67-68; *Marchetti*, 390 U.S. at 57. Thus, the focus is on the government's *intent*. The language of this prong suggests it is not enough that the scheme have some non-prosecutorial, regulatory purpose. Rather, the "essence" of the regime must serve a non-prosecutorial function. *See* Christopher M. Ferguson, *The Required Records Doctrine: The Fifth Amendment Privilege Under Attack*, J. Tax'n, Oct. 2011, at 219.

The purposes of the statutes at issue in *Grosso* and *Marchetti* were, as in this case, to collect tax revenue. *Marchetti*, 390 U.S. at 57; *Grosso*, 390 U.S. at 68. Yet in each case, this Court concluded that the scheme was not the sort of neutral civil regulatory scheme that could trump the Fifth Amendment privilege because the information sought would increase the likelihood that an illegal offense would be discovered and prosecuted.

Unlike the tax laws at issue in *Grosso* and *Marchetti*, the BSA itself, its legislative history, and judicial precedent all make clear that its primary purpose is to detect criminal conduct, specifically money laundering, terrorism and tax evasion.

The BSA provides:

> It is the purpose of [the BSA] to require certain reports or records where they have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings, or in the conduct of intelligence or counterintelligence activities, including analysis, to protect against international terrorism.

31 U.S.C. §5311.

Similarly, IRS's website describes the BSA as follows:

> Congress passed the Bank Secrecy Act in 1970 as the first laws to fight money laundering in the United States . . . The documents filed by businesses under the BSA requirements are heavily used by law enforcement agencies, both domestic and international to identify, detect and deter money laundering whether it is in furtherance of a criminal enterprise, terrorism, tax evasion or other unlawful activity.

Bank Secrecy Act, http://www.irs.gov/businesses/small/article/0,,id=152532,00.html (last visited Dec. 27, 2011).

The text of 31 C.F.R. §1010.410 also demonstrates that the record keeping provisions are primarily used to detect crimes. Section 1010.410 requires records to be maintained for 5 years, which coincides with the statute of limitations period for willfully failing to file an FBAR. *See* 18 U.S.C. §3282. Unlike cases allowing the exception, here there is a *criminal* penalty for failing to maintain records. 31 U.S.C. §5322.

The BSA was specifically designed to gather financial information to which criminal investigators from various agencies could have access. The BSA was codified, not under the tax code, but under Title 31 – the "Anti Money Laundering" statute. This allows non-IRS agents such as DEA, FBA, ATF, access to the FBAR forms to further various criminal investigations. Moreover, the Sentencing Guidelines are far more drastic for Title 31 offenses than for Title 21 offenses because they presume that the source of the funds in the accounts are illegal. Title 31 offense levels are based on the total amount in the account, whereas Title 26 tax offense levels are based only on "tax loss." *Compare* U.S. Sentencing Guidelines Manual §§2S1.3, 2B1.1, *with* §§2T1.1, 2T4.1. If the BSA is a regulatory statute, why is a violation of it punished more severely than a tax offense?

The legislative history of the Act reveals that the BSA was developed in response to increased criminal activity. H.R. Rep. No. 91-975, at 1, 10 (1970); S. Rep. No. 91-1139 at 1 (1970). The most recent reports issued by the Treasury Inspector General for Tax Administration acknowledge the criminal purpose of

the BSA: "The legislative history of the FBAR stresses that its broad, primary purpose is intended to be a resource to combat white-collar crime and not just the narrower objectives of the Internal Revenue Code." Treasury Inspector General For Tax Administration, "New Legislation Could Affect Filers of the Report of Foreign Bank and Financial Accounts, but Potential Issues are Being Addressed," 2010-30-125, at pp. 2-3 (Sept. 29, 2010).

The purpose of the FBAR has always been to detect crime. The collection and analysis of the FBAR data was assigned to the Financial Crimes Enforcement Unit ("FinCEN"). The official FinCEN website explains its purpose by quoting the congressional testimony of Assistant Secretary of Treasury Eugene Rossides:

> "Our overall aim is to build a system to combat organized crime and white-collar crime and to deter and prevent the use of secret foreign bank accounts for tax fraud and their use to screen from view a wide variety of criminally related financial activities, and to conceal and cleanse criminal wealth."

History of the Financial Crimes Enforcement Network, http://www.fincen.gov/pdf.

Tellingly, in none of the briefs filed in the District Court or with the Ninth Circuit, did the Government ever point to any specific "regulatory" act that FinCEN, or any other government agency, performed

or utilized from the FBAR data. This utter lack of any regulatory activity bespeaks the criminal nature of the enforcement scheme.

In *Shapiro*, this Court expressly examined the legislative history of the EPCA to determine its purpose. *Shapiro*, 335 U.S. at 8-16. However, in this case, the Ninth Circuit ignored the extensive legislative history of the BSA. It further failed to articulate precisely what regulatory purpose the BSA primarily serves.

Other circuits and courts, relying on the legislative history of the BSA, have come to the opposite conclusion of the Ninth Circuit in this case and have held that the primary purpose of the BSA is criminal. *See United States v. Hajecate*, 683 F.2d 894, 901 (5th Cir. 1982) (characterization of the BSA as investigative "is amply supported by the legislative history of the Act, where we find a presumption by Congress that secret foreign bank accounts and secret foreign financial institutions are inevitably linked to criminal activity in the United States.") *United States v. Gimbel*, 632 F.Supp. 713, 726 (E.D. Wis. 1984) (the BSA is "an enforcement tool which is meant to be used in the investigation of other crimes"); *United States v. San Juan*, 405 F.Supp. 686, 693 (D. Vt. 1975).

The Southern District of Texas, in a case identical to this one, concluded that the primary purpose of the BSA was criminal. *In re Grand Jury Subpoena*, Misc. Action H-11-174, slip op. at 3-7 (S. App. at 3-7).

It explained that "*[t]he government's regulatory justifications [for the BSA] have no rigor, no substance. They are but smoke and mirrors for its real concern: crime.*" *Id*. at 4 (S. App. at 4) (emphasis in original).

Instead of following this precedent and applying this first prong as described by this Court in *Marchetti* and *Grosso*, the Ninth Circuit relied on *California Bankers Ass'n v. Shultz*, 416 U.S. 21 (1974), and cases which considered the constitutionality of *reporting requirements*, not the application of the Required Records exception.

Reporting requirement cases and the application of the Required Records exception are distinctly different. A reporting requirement can be deemed constitutional, yet the Fifth Amendment may still be asserted as to questions which incriminate. *Cf. United States v. Sullivan*, 274 U.S. 259, 263-64 (1927) (while statutory requirements to file tax forms are not unconstitutional, the taxpayer may assert the Fifth Amendment on the return on a question by question basis.)

In contrast, the Required Records exception (if applied outside the scope of *Fisher* and its progeny) requires an individual to produce records, *despite* any Fifth Amendment assertions. This is why the first prong of the exception focuses on whether the *purpose* of the Government's inquiry is essentially regulatory, not whether the conduct is illegal *per se*.

The distinction between the constitutionality of the BSA's reporting requirements and the application

of the Required Records exception to the BSA is described in *United States v. San Juan*. The district court concluded that the reporting requirements of the BSA – disclosure of transfers more than $10,000 across international borders – were constitutional because they did not require disclosure of conduct that is *per se* illegal and they concerned international border transactions, where the Government's power is exceptional. *San Juan*, 405 F.Supp. at 692, 694. However, the district court acknowledged the respondent's Fifth Amendment rights and concluded the Required Records exception did not apply because "the underlying purposes of Congress in promulgating the foreign reporting requirements of the [BSA] . . . were fundamentally prosecutorial." *Id*. at 693. If the Ninth Circuit decision stands, it means individuals could assert Fifth Amendment rights on the FBAR form, but will need to obtain and produce incriminating records, thereby eviscerating their assertion.

b. Customarily kept

The second prong is that "the information is to be obtained by requiring the preservation of records of a kind which the regulated party has customarily kept." *Grosso*, 390 U.S. at 68; *Marchetti*, 390 U.S. at 57. This Court in *Grosso* and *Marchetti*, limited the second prong to records the regulated party would have otherwise retained, absent government regulation. Obviously, the exception ought to be more narrow when an individual creates and/or maintains

records under Government compulsion rather than through his own customary practices.

The Ninth Circuit however, held that foreign bank records are "customarily kept" because they are required to be kept by the regulation. This is circular reasoning and directly contrary to this Court's holding in *Grosso* and *Marchetti*.

The Ninth Circuit further concluded that the information is "customarily kept" because the individual has access to the information and can obtain it in response to requests from the Government: "[a] bank account's beneficiary necessarily has access to such essential information as the bank's name, the maximum amount held in the account each year, and the account number." (App. at 20.) But having *access* to information, by definition, differs from being "customarily kept." This new Ninth Circuit standard has not been applied by any other court.

The Ninth Circuit's summary conclusion that foreign bank account records are "customarily kept" ignored evidence submitted to the contrary and the fact that many foreign banks, particularly in Switzerland, do not provide customers with account statements unless specifically requested to do so.

The Ninth Circuit's new definition of this prong is ripe for abuse. Relying on the Ninth Circuit's finding that "customarily kept" means any record to which the individual has access, the Government opened the door wide and compelled M.H. to *seek* and produce account records generated by third party

banks.[7] If a United States customer who does not keep any foreign bank records can be deemed to nevertheless have perpetual "custody and control" over them in foreign banks, then no one could ever be convicted for failing to maintain records since the banks would always have them. This interpretation renders the statute meaningless.

c. Public aspects

The third part of the test for the Required Records exception examines whether the documents sought have "public aspects." *Grosso*, 390 U.S. at 68; *Marchetti*, 390 U.S. at 57.

The Ninth Circuit's application of this prong is tautological by deeming them "public documents" because the law requires that the records be kept: "[h]ere, the subpoena explicitly requires the production of banking records required to be kept and maintained for inspection pursuant to regulations implemented through the BSA." (App. at 24-25.)

This is directly contrary to this Court's decisions. *Marchetti* and *Grosso* expressly hold that the mere fact that the Government has required certain information to be maintained and/or disclosed, does *not*

[7] Notably, during oral argument, the Government and the two judges from the panel agreed that the records required to be kept were limited to the information filed on the FBARs. However, the Government has now abandoned this position and is seeking information beyond that disclosed on the FBARs.

establish that the information is public. Such a rule would allow the Government unfettered access to any information it deemed regulatory and swallow the privilege against self-incrimination. *Marchetti*, 390 U.S. at 57; *Grosso*, 390 U.S. at 68.

The Ninth Circuit's approach is also directly opposite of that taken by the Seventh Circuit which has repeatedly found that records required to be maintained and produced under the federal tax code do *not* constitute public records for purposes of the Required Records exception. *See Porter*, 711 F.2d at 1405; *see also Smith*, 35 F.3d at 303. Despite detailed regulations, the court held that they are not "public" records:

> More importantly, the very nature of the limited taxpayer-government relationship is, we think, insufficient to imbue the taxpayer's cancelled checks and deposit slips with 'public aspects' as required under *Shapiro*. . . . As the Supreme Court noted in *Marchetti* in finding that the record-keeping provisions of a federal occupational tax scheme did not imbue those records with 'public aspects' in the *Shapiro* sense. . . . Similarly, we decline to carve such a radical exception to the right against self-incrimination in circumstances so little analogous to those in which the Supreme Court has applied it.

Porter, 711 F.2d at 1405; *see also Smith*, 35 F.3d at 303 ("[a] statute that merely requires a taxpayer to maintain records necessary to determine his liability

for personal income tax is not within the scope of the required-records doctrine."); *United States v. Campos-Serrano*, 430 F.2d 173, 176 (7th Cir. 1970); *Hill v. Phillpott*, 445 F.2d 144, 146 n.2 (7th Cir. 1971); *In re Special February 2011-1 Grand Jury Subpoena*, 2011 WL 5903795 at *5 n.6 (S. App. at 12) ("The fact that an individual maintains a foreign bank account and the records thereof are not 'usually known to the public in general.' ").

Personal foreign bank account records are not filed with the government or made public by disclosure. They are accessible only by the individual and his or her financial institution. Indeed, one of the few remaining areas afforded privacy protection is personal banking, which federal, state and international law aggressively safeguard. *See* Right to Financial Privacy Act, 12 U.S.C. §§3401 *et seq.*; Schweizerisches Strafgesetzbuch [Federal Act on Banks and Savings Banks] 952.0, art. 47 (Switz.), available at http://www.admin.ch/ch/d/sr/952_0/a47.html; Schweizerisches Strafgesetzbuch [Criminal Code] Dec. 21, 1937, as amended SR 311.0, art. 271 (Switz.), available at http://www.admin.ch/ch/d/sr/3/311.0.de.pdf; *Sharma v. Skaarup Ship Mgmt. Corp.*, 699 F.Supp. 440 (S.D.N.Y. 1988) (noting that New York recognizes a duty of confidentiality between a bank and its customers).

Under the Seventh Circuit's approach, personal foreign bank account documents are clearly not public. No doubt this case would have a different result if it were litigated in the Seventh or Fifth Circuits rather than the Ninth Circuit. This Court should

grant review to resolve this conflict between the Circuits and the tension between this Court's decisions and the Ninth Circuit's approach.

CONCLUSION

Across the country, the Government is using grand jury subpoenas to require individuals to either produce incriminating foreign bank records or admit to the felony of not maintaining the records. Inevitably, the targets of these subpoenas, like M.H. in this case, are invoking the privilege against self-incrimination. The district court in this case found that the Required Records exception to the Fifth Amendment applies and M.H. was required to produce these documents. In recent months, two other district courts, the Southern District of Texas and the Northern District of Illinois, in identical cases involving the subpoena of bank records have come to exactly the opposite conclusion and held that the Required Records exception does not apply and the privilege against self-incrimination protected against the disclosures. The secrecy of grand jury proceedings makes it impossible for anyone other than the Government to know if other courts have confronted this issue.

This Court last addressed the Required Records exception forty-three years ago in *Marchetti* and *Grosso*. Since then, a great deal of confusion has developed in the lower courts as to when the Required Records

exception applies, the test to be used, and how that test is to be applied. This Court should grant certiorari in this case to clarify the law in this area, to resolve the tension between the Ninth Circuit's approach and the decisions of this Court, and to resolve a split among the lower courts.

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: GRAND JURY INVESTIGATION M.H., M.H., *Witness-Appellant,* v. UNITED STATES OF AMERICA, *Appellee.*	No. 11-55712 D.C. No. 10-GJ-0200 OPINION

Appeal from the United States District Court
for the Southern District of California
Irma E. Gonzalez, Chief District Judge, Presiding

Argued and Submitted
June 24, 2011 – Pasadena, California

Filed August 19, 2011

Before: William C. Canby, Jr., Ronald M. Gould, and Richard C. Tallman, Circuit Judges.

Opinion by Judge Tallman

COUNSEL

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Frank P. Cihlar, Gregory Victor Davis, Alexander P. Robbins, Tax Division, Department of Justice, Washington, D.C., for appellee United States of America.

OPINION

TALLMAN, Circuit Judge.

Appellant M.H. is the target of a grand jury investigation seeking to determine whether he used secret Swiss bank accounts to evade paying federal taxes. The district court granted a motion to compel M.H.'s compliance with a grand jury subpoena duces tecum demanding that he produce certain records related to his foreign bank accounts. The court declined to condition its order compelling production upon a grant of limited immunity and, pursuant to the recalcitrant witness statute, 28 U.S.C. § 1826, held M.H. in contempt for refusing to comply. M.H. appealed.

The foreign bank account information the Government seeks is information M.H. is required to keep and maintain for inspection under the Bank Secrecy Act of 1970 (BSA), 31 U.S.C. § 5311, and its related regulations. M.H. argues that if he provides the sought-after information, he risks incriminating himself in violation of his Fifth Amendment privilege. He asserts that the information he is being asked to produce might conflict with other information M.H. has previously reported to the Internal Revenue Service (IRS). Production might reveal, for instance, that he has accounts he has not reported or that the

information he *has* previously reported is inaccurate. On the other hand, if M.H. denies having the records, he risks incriminating himself because failing to keep the information when required to do so is a felony.

The district court concluded that under the Required Records Doctrine, the Fifth Amendment did not apply. That doctrine recognizes that when certain conditions are met, records required to be maintained by law fall outside the scope of the privilege. We agree that, under the Required Records Doctrine, the Fifth Amendment does not apply. We therefore affirm the district court's order of contempt for failing to produce the information the grand jury sought.

I

In 2009, as part of a deferred-prosecution agreement with the United States Department of Justice, the Swiss bank UBS AG (UBS) provided the federal government with bank account records identifying approximately 250 U.S. taxpayers UBS might have aided in committing tax evasion. The UBS records showed that in 2002, M.H. transferred securities from his UBS account to a different Swiss bank, UEB Geneva. IRS agents began investigating him.

In June 2010, a San Diego federal grand jury issued a subpoena duces tecum to M.H. for records he was required to keep pursuant to Treasury Department regulations governing offshore banking. The subpoena demanded production of:

> [a]ny and all records required to be maintained pursuant to 31 C.F.R. § 103.32 [subsequently relocated to 31 C.F.R. § 1010.420] relating to foreign financial accounts that you had/have a financial interest in, or signature authority over, including *records reflecting the name in which each such account is maintained, the number or other designation of such account, the name and address of the foreign bank or other person with whom such account is maintained, the type of such account, and the maximum value of each such account during each specified year.*

(Emphasis added).[1] M.H. declined to provide the requested information and also declined to deny having it, reasoning that either response posed a risk of self-incrimination under the Fifth Amendment to the United States Constitution. The district court ordered him to comply anyway. When he again refused to produce the requested documents, the court conducted a show-cause hearing for failing to comply with its order and found him in contempt. However, because the district court considered M.H.'s arguments "substantial and worthy of appellate review," the court stayed the contempt order pending appeal, contingent on M.H.'s posting of a $250,000 cash bond. M.H. is not currently incarcerated and may travel without restriction.

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[1] The regulation cited in the subpoena, 31 C.F.R. § 103.32, has since been relocated to 31 C.F.R. § 1010.420. For ease of reference, this opinion will refer to the current citation.

The information identified in the subpoena mirrors the banking information that 31 C.F.R. § 1010.420[2] requires taxpayers using offshore bank accounts to keep and maintain for government inspection. The information the subpoena seeks is also identical to information that anyone subject to § 1010.420 already reports to the IRS annually through Form TD F 90-22.1, known as a "Report of Foreign Bank and Financial Accounts," or "FBAR." Therefore, the information at issue in this contempt proceeding is information that M.H. – if he has a foreign bank account and meets other qualifications specified in the BSA – must keep, report to the Treasury Department, and maintain for IRS inspection.

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[2] The regulation reads, in relevant part:

> Records of accounts required by [31 C.F.R. § 103.24 (relocated to 31 C.F.R. § 1010.350)] to be reported to the Commissioner of Internal Revenue shall be retained by each person having a financial interest in or signature or other authority over any such account. Such records shall contain the name in which each such account is maintained, the number or other designation of such account, the name and address of the foreign bank or other person with whom such account is maintained, the type of such account, and the maximum value of each such account during the reporting period. Such records shall be retained for a period of 5 years and shall be kept at all times available for inspection as authorized by law.

II

We review de novo mixed questions of law and fact contained within the analysis of a civil contempt proceeding. *Shoen v. Shoen,* 48 F.3d 412, 414 (9th Cir. 1995). We review for clear error any factual findings underlying the contumacious behavior. *United States v. Bright,* 596 F.3d 683, 694 (9th Cir. 2010). Where incarceration has been stayed pending appeal and no party is harmed by the delay, we may exceed the thirty-day time limit for deciding appeals that § 1826 would otherwise impose. *In re Grand Jury Witness,* 695 F.2d 359, 361 n.4 (9th Cir. 1982).

III

A

As a preliminary matter, M.H. argues that – for a number of reasons – § 1010.420 does not apply to him, so he is not required to comply with the grand jury's subpoena and we need not reach the Fifth Amendment question. But at this point in its investigation, the Government need not prove the regulation or the BSA apply. It need only show a "reasonable possibility" that the subpoena will serve the grand jury's legitimate investigative purpose. *United States v. R. Enters., Inc.,* 498 U.S. 292, 300-01 (1991).

The Government is not required to justify the issuance of a grand jury subpoena by presenting evidence sufficient to establish probable cause because the very purpose of its inquiry is to establish whether probable cause exists to accuse the taxpayer

of violating our tax laws. *See id.* at 297 ("The grand jury occupies a unique role in our criminal justice system. It is an investigatory body charged with the responsibility of determining whether or not a crime has been committed. Unlike this Court, whose jurisdiction is predicated on a specific case or controversy, the grand jury 'can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not.' " (citation omitted)).

There are, of course, limits to the grand jury's authority. *See, e.g, id.* at 299 (stating that a grand jury may not "engage in arbitrary fishing expeditions" or base its investigation on "malice or an intent to harass"). But there is no evidence of excess here. We have examined the evidence in the sealed record along with the evidence the district court reviewed in camera. That evidence confirms that the grand jury's inquiry is a legitimate exercise of its investigatory authority. If it is later established that, for whatever legal reason, the regulation at issue does not apply to M.H., then the Government will be unable to successfully prosecute him and there is no risk of a Fifth Amendment violation. Until then, however, M.H.'s obligation to comply with the grand jury subpoena is not contingent upon whether the Government has proven the BSA and its regulations apply to him as a U.S. taxpayer who has previously filed FBARs with the Department of the Treasury.

B

M.H. argues that the Required Records Doctrine – which, if it applies, renders the Fifth Amendment privilege inapplicable – does not apply to this case and that the district court erred in finding otherwise. The Fifth Amendment to the United States Constitution states that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." The Supreme Court has held that where documents are *voluntarily* created and kept, compelling their disclosure does not implicate the privilege against self-incrimination. *See United States v. Doe,* 465 U.S. 605, 611-12 (1984) (citing *Fisher v. United States,* 425 U.S. 391, 409-10 (1976)). Where documents are *required* to be kept and then produced, they are arguably compelled. However, the Supreme Court has recognized that in such circumstances, the privilege does not extend to records required to be kept as a result of an individual's voluntary participation in a regulated activity. *See Shapiro v. United States,* 335 U.S. 1, 17 (1948) (noting that the nature of documents and the capacity in which they are held may indicate that "the custodian has voluntarily assumed a duty which overrides his claim of privilege" (quoting *Wilson v. United States,* 221 U.S. 361, 380 (1911))). Our task is to determine whether the records sought in this case fall into the former or latter category. If they fall into the latter, the Required Records Doctrine applies and the privilege is unavailable to M.H., who has voluntarily participated in a regulated activity.

In *Shapiro* – credited for establishing the principles of what has come to be known as the Required Records Doctrine – the Supreme Court required a wholesaler of fruit and produce to turn over certain records he was obliged to keep and maintain for examination pursuant to the Emergency Price Control Act, which applied in part to records "customarily kept." *See Marchetti v. United States,* 390 U.S. 39, 55 (1968). The Court reasoned that the Required Records "principle applies not only to public documents in public offices, but also to records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation, and the enforcement of restrictions validly established." *Shapiro,* 335 U.S. at 17.

Twenty years after *Shapiro,* the Court considered two cases that examined whether being required to pay an excise tax on one's gambling wagers violated the Fifth Amendment. Those two cases were *Marchetti* and *Grosso v. United States,* 390 U.S. 62 (1968). In its analysis in those cases, the Court identified three principles from *Shapiro* that distinguished it from *Grosso* and *Marchetti* where, the Court concluded, the Required Records Doctrine did not apply. *See Marchetti,* 390 U.S. at 56-57 ("We think that neither *Shapiro* nor the cases upon which it relied are applicable here. . . . Each of the three principal elements of the [Required Records Doctrine], as it is described in *Shapiro,* is absent from this situation."); *Grosso,* 390 U.S. at 67-68 ("The premises of the

[Required Records Doctrine], as it is described in *Shapiro,* are evidently three: first, the purposes of the United States' inquiry must be *essentially regulatory*; second, information is to be obtained by requiring the preservation of records of a kind which the regulated party has *customarily kept*; and third, the records themselves must have assumed '*public aspects*' which render them at least analogous to public documents. . . . [B]oth the first and third factors are plainly absent from this case." (emphasis added)).

Since *Grosso* and *Marchetti,* the Supreme Court has applied *Shapiro* and the principles underlying the Required Records Doctrine broadly to "items that are the legitimate object of the government's noncriminal regulatory powers," *Baltimore City Dept. of Soc. Servs. v. Bouknight,* 493 U.S. 549, 557 (1990), regardless of whether they are required to be kept and regardless of whether they are records. *See, e.g., California v. Byers,* 402 U.S. 424, 427-31 (1971) (applying Required Records Doctrine principles and concluding that a state statute requiring drivers involved in vehicle accidents to stop at the scene of the accident and leave their names and addresses for police did not infringe the Fifth Amendment); *Bouknight,* 493 U.S. at 558 (applying the Required Records Doctrine to determine that a parent lacked a Fifth Amendment privilege in producing her child in response to a court's order).

We have recognized that the three principles announced in *Grosso* define the Required Records Doctrine, but have also adopted the Supreme Court's

flexibility in applying those principles. *See In re Grand Jury Proceedings* (*Doe M.D.*), 801 F.2d 1164, 1168 (9th Cir. 1986) ("Under [the Required Records Doctrine], the Fifth Amendment privilege does not apply if: (1) the purpose of the government's inquiry is regulatory, not criminal; (2) the information requested is contained in documents of a kind the regulated party customarily keeps; and (3) the records have public aspects."); *see also U.S. SEC v. Fehn,* 97 F.3d 1276, 1291-92 (9th Cir. 1996) (observing that we have applied the Required Records Doctrine "principles in a variety of contexts, and have accorded them varying emphasis").

Even though M.H. is being asked to turn over reports he is required to keep pursuant to the BSA and its regulations, the Government, citing *Byers, Bouknight,* and *Fehn,* suggests that all three requirements need not be met. While it is true that when the Required Records Doctrine is applied to items other than records a rigid application of all three factors may not be necessary, *see, e.g., Bouknight,* 493 U.S. at 558-60 (applying the "principles" of the Required Records Doctrine and concluding that a mother compelled to produce her child through a court order could not invoke a Fifth Amendment privilege against self-incrimination to resist the order); *United States v. Des Jardins,* 747 F.2d 499, 507-09 (9th Cir. 1984) (concluding that the Fifth Amendment privilege does not apply to a requirement under the BSA that travelers transferring more than $5,000 out of the country file a written

report, but considering only whether the regulation at issue was essentially regulatory or criminal in nature), *rev'd on other grounds,* 772 F.2d 578 (9th Cir. 1985), we need not resolve that issue here. Even if we assume, for purposes of decision, that all three prongs of the test set forth in *Grosso* apply, we conclude that all three requirements are met in this case.

1. "Essentially regulatory"

We begin by recognizing that when compelled disclosure has incriminating potential, "the judicial scrutiny is invariably a close one." *Byers,* 402 U.S. at 427. In evaluating the danger of incrimination, we consider whether the requirement in question is essentially regulatory or criminal in nature. *Doe M.D.,* 801 F.2d at 1168. In doing so, "[i]t is irrelevant that records kept for regulatory purposes may be useful to a criminal grand jury investigation." *Id.* Instead, we consider whether the statutory or regulatory requirement involves an area "permeated with criminal statutes," whether it is "aimed at a highly selective group inherently suspect of criminal activities," *Des Jardins,* 747 F.2d at 508 (internal citations and quotation marks omitted), and whether complying with the requirement would "generally . . . prove a significant 'link in a chain' of evidence tending to establish guilt." *Id.* at 509 (internal quotation marks omitted). M.H. argues that, for several reasons, the BSA's record-keeping provision is criminal in nature, not regulatory. Our precedent indicates otherwise.

M.H. first argues that § 1010.420 is criminal in nature because the BSA's "primary purpose is to detect criminal conduct, specifically money laundering, terrorism and tax evasion." To support this position, M.H. points to language in the BSA describing the purpose of the statute as requiring "certain reports or records, where they have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings, or in the conduct of intelligence or counterintelligence activities, including analysis, to protect against international terrorism." *See* 31 U.S.C. § 5311. M.H. also cites language from the IRS Web site describing the BSA as the first law to fight money laundering in the United States, along with legislative history indicating congressional interest in combating criminal activity.

The Supreme Court has already considered and rejected these arguments as they relate to the BSA generally. In *California Bankers Ass'n v. Shultz,* 416 U.S. 21, 76-77 (1974), the Court observed that the goal of assisting in the enforcement of criminal laws "was undoubtedly prominent in the minds of the legislators," as they considered the BSA. However, it noted that "Congress seems to have been equally concerned with civil liability which might go undetected by reason of transactions of the type required to be recorded or reported." *Id.* at 76. The Court concluded that "the fact that a legislative enactment manifests a concern for the enforcement of the criminal law does not cast any generalized pall of constitutional suspicion over it." *Id.* at 77. Therefore, that

Congress aimed to use the BSA as a tool to combat certain criminal activity is insufficient to render the BSA essentially criminal as opposed to essentially regulatory.

Turning to the specific regulation in question, our analysis in *Des Jardins* is informative. There, we considered whether a particular BSA record-reporting provision, which required travelers to report transporting more than $5,000 in monetary instruments across the United States border, was essentially criminal in nature and determined it was not. In that case, a U.S. Customs Agent working at the Los Angeles International Airport – as part of a project to detect narcotics-related criminal activity – noticed that Des Jardins's travel route paralleled those drug couriers frequently took. *Des Jardins,* 747 F.2d at 501. The agent inspected Des Jardins's luggage and found $5,000. Upon searching Des Jardins's person, the agent discovered several thousand more dollars. *Id.* at 502. Des Jardins was ultimately convicted for violating the reporting requirement.

We considered whether the reporting requirement violated Des Jardins's Fifth Amendment privilege, and we analyzed whether the fact that the regulation was not "*exclusively* regulatory" made it essentially criminal. *Id.* at 508-09 (emphasis added). We determined it did not. *Id.* at 509. We reasoned in part that "[s]ince the transportation of monetary instruments in such amounts is not itself illegal and since there is no reason to suppose that the transportation of monetary instruments in such amounts is

generally connected with criminal activity, the vast majority of people subject to the requirement are not suspect of illegality." *Id.*

The same can be said here. There is nothing inherently illegal about having or being a beneficiary of an offshore foreign banking account. According to the Government, § 1010.420 applies to "hundreds of thousands of foreign bank accounts – over half a million in 2009." Nothing about having a foreign bank account on its own suggests a person is engaged in illegal activity. That fact distinguishes this case from *Marchetti* and *Grosso,* where the activity being regulated – gambling – was almost universally illegal, so that paying a tax on gambling wagers necessarily implicated a person in criminal activity. Admitting to having a foreign bank account carries no such risk. That the information contained in the required record may ultimately lead to criminal charges does not convert an essentially regulatory regulation into a criminal one. *See Des Jardins,* 747 F.2d at 508; *see also Marchetti,* 390 U.S. at 57.

Considering whether the sought-after information would likely serve as a significant chain in a link of evidence establishing guilt, we found relevant in *Des Jardins* the nature of the specific information travelers were required to report (the legal capacity in which the person filing the report was acting; the origin, destination, and route being traveled; and the amount and kind of monetary instruments transported). We concluded that because such evidence lacked an inherently criminal quality, it would not

likely serve as a significant link in a chain of evidence. *Des Jardins,* 747 F.2d at 508-09.

M.H. was required to maintain, and through the subpoena is being asked to produce, the following information:

> (1) The name in which each account is maintained;
>
> (2) The number or other designation of such account;
>
> (3) The name and address of the foreign bank or other person with whom such account is maintained;
>
> (4) The type of such account;
>
> (5) The maximum value of each such account during the reporting period.

This information is not inherently criminal. As in *Des Jardins,* it is the act of *not* reporting (or in this case the act of *not* maintaining for inspection) the information that suggests criminality, not the information itself. Because the information being requested of M.H. is not inherently criminal, being required to provide that information would generally not establish a significant link in a chain of evidence tending to prove guilt. *See Des Jardins,* 747 F.2d at 509 ("Since the requirement concerns such relatively innocuous matters . . . any information obtained would be at best tangentially related to criminal activity."); *see also Wilson,* 221 U.S. at 380 ("But the physical custody of incriminating documents does not of itself

protect the custodian against their compulsory production. The question still remains with respect to the nature of the documents and the capacity in which they are held.").

M.H. suggests that *Des Jardins* should not apply because in that case we considered a reporting requirement instead of a record-keeping requirement. But *Des Jardins*'s analysis of whether the regulation in question was essentially regulatory did not hinge on the "reporting" aspect of the regulation. *Des Jardins* relied on cases interpreting the Required Records Doctrine and is clearly applicable to the "essentially regulatory" aspect of that doctrine, which does not turn on whether a reporting requirement exists, but – as we have already explained – on whether the information sought is inherently criminal in nature. While *Des Jardins* does not answer the precise question at issue in this case, we apply the rules recognized there to inform our Fifth Amendment inquiry. Those rules suggest that because § 1010.420 does not target inherently illegal activity or a highly selective group of people inherently suspect of criminal activity, it is essentially regulatory, not criminal.

We have held that whether a requirement to maintain records involves a reporting requirement is not determinative for purposes of deciding whether it is essentially regulatory. *See United States v. Rosenburg,* 515 F.2d 190, 199-200 (9th Cir. 1975) (holding that the Required Records Doctrine applied even though the statute in question only required

records to be kept for two years and did "not expressly provide that records shall be open to inspection by state officials"). Thus, the lack of an "automatic" reporting requirement does not mean § 1010.420 is not essentially regulatory. This conclusion makes sense because, as we have already explained, the heart of the "essentially regulatory" inquiry is whether the regulation in question targets inherently illegal activity. As we observed in *Rosenburg,* where the purpose of the record-keeping requirement "is to aid in the enforcement of" the statutory scheme, the Required Records Doctrine may apply, regardless of whether the regulation itself includes a reporting requirement, automatic or otherwise. *Id.* at 200.

Moreover, § 1010.420 *has* a reporting requirement. The regulation mandates that the required records "shall be kept at all times available for inspection as authorized by law." The Supreme Court has indicated that no meaningful difference exists "between an obligation to maintain records for inspection, and such an obligation supplemented by a requirement that those records be filed periodically with officers of the United States." *Marchetti,* 390 U.S. at 56 n.14.

Because § 1010.420 is essentially regulatory in nature, we conclude that the first prong of the Required Records Doctrine is satisfied.

2. Customarily Kept

We have not assigned a specific definition to the term "customarily kept," but records appear to be customarily kept if they would typically be kept in connection with the regulated activity. As the case law dealing with this requirement suggests, the Fifth Amendment does not apply when the Government compels individuals to create records that they would customarily keep.

In *Shapiro,* the records a fruit wholesaler "customarily kept" in compliance with the Emergency Price Control Act of 1942 were not privileged. By contrast, in *Marchetti,* records regarding a person's gambling expenses were deemed *not* customarily kept and were privileged. Some courts have recognized records as "customarily kept" where they are required to be retained as part of the general regulatory scheme, as they were in *Shapiro. See, e.g., In re Doe,* 711 F.2d 1187, 1191 (2d Cir. 1983) ("That the W-2s are records of a kind customarily kept by taxpayers is not open to dispute."). Most, however, seem to simply make a cursory statement that the records are, or are not, customarily kept. *See, e.g., Doe M.D.,* 801 F.2d at 1168 (concluding without analysis that "it is evident that Doe customarily maintained the documents in his possession").

The information that § 1010.420 requires to be kept is basic account information that bank customers would customarily keep, in part because they must report it to the IRS every year as part of the

IRS's regulation of offshore banking, and in part because they need the information to access their foreign bank accounts. That M.H.'s bank keeps the records on his behalf does not mean he lacks access to them or that they are records offshore banking customers would not customarily keep. A bank account's beneficiary necessarily has access to such essential information as the bank's name, the maximum amount held in the account each year, and the account number. Both common sense and the records reviewed in camera support this assessment. We conclude that the records sought are customarily kept.

3. "Public aspects"

The Supreme Court has recognized that if the government's purpose in imposing the regulatory scheme is essentially regulatory, then it necessarily has some "public aspects." *Shapiro,* 335 U.S. at 33 (noting that "the privilege which exists as to private papers cannot be maintained in relation to records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation, and the enforcement of restrictions validly established" (citation and internal quotation marks omitted)); *id.* at 34 (observing that because the Price Control Act required the records in question to be kept, they had "public aspects").

The mere fact that the government has "formalized its demands in the attire of a statute" does not automatically ascribe "public aspects" to otherwise private documents. *See Marchetti,* 390 U.S. at 57. However, that the information sought is traditionally private and personal as opposed to business-related does not automatically implicate the Fifth Amendment. Where personal information is compelled in furtherance of a valid regulatory scheme, as is the case here, that information assumes a public aspect. *See Byers,* 402 U.S. at 431-32 (holding that a California statutory requirement that drivers involved in automobile accidents provide their names and addresses to police did not infringe on the Fifth Amendment privilege because "[d]isclosure of name and address is an essentially neutral act. Whatever the collateral consequences of disclosing name and address, the statutory purpose is to implement the state police power to regulate use of motor vehicles"). Similarly, disclosure of basic account information is an "essentially neutral" act necessary for effective regulation of offshore banking.

M.H. argues that the records in question, even if they are essentially regulatory, lack public aspects because "nothing in the record keeping provision of the BSA requires [M.H.] to produce bank records to the Government." However, we have held that a regulation need not have an express reporting requirement in order to have public aspects. *See Rosenberg,* 515 F.2d at 199-200 (finding no Fifth Amendment violation even though the statute required records to

be kept but not produced (citing *Shapiro,* 335 U.S. 1, and *Grosso,* 390 U.S. at 68)).

Furthermore, as we have already noted, § 1010.420 *does* require M.H. to produce to the Government the information being sought upon request, as long as that request is authorized by law. The regulation states that records "shall be retained for a period of 5 years and shall be kept at all times available for inspection as authorized by law." § 1010.420. Additionally, the information required to be kept under § 1010.420 is the same information disclosed in FBAR forms. For purposes of the Required Records Doctrine, it does not matter whether the production of that information is requested through a subpoena (as in this case and *Shapiro*), a court order (as in *Bouknight*), or the regulation itself (as in *Byers*). *See Marchetti,* 390 U.S. at 56 n.14 (rejecting the argument that "the crucial issue respecting the applicability of *Shapiro* is the method by which information reaches the Government"). Even if § 1010.420 lacked any reporting requirement whatsoever, it would still have public aspects because, as was the case in *Rosenberg,* the documents in question are required to be kept to aid in the enforcement of a valid regulatory scheme.

M.H. next suggests that because the BSA provides that a person need only disclose records "as required by law" and the House report accompanying the legislation specified that the records "will not be made automatically available for law enforcement purposes," the records are not public because they are

not "easily accessed" by the Government. But court orders and subpoenas *are* legal processes that prevent law enforcement from automatically retrieving information, and whether a document is easily accessible has nothing to do with whether a document has public aspects. *See Marchetti,* 390 U.S. at 56 n.14; *see also Rosenberg,* 515 F.2d at 199-200. The language "as required by law" does not prevent the sought-after records from assuming public aspects for purposes of the Required Records Doctrine.

M.H.'s argument that, because the law recognizes special privacy interests in bank records and tax documents, those documents cannot have "public aspects" is also flawed. The fact that documents have privacy protections elsewhere does not transform those documents into private documents for the purpose of grand jury proceedings. *See Doe M.D.,* 801 F.2d at 1168 (finding that confidential patient records have "public aspects" for purposes of the Required Records Doctrine and that "expectations of privacy do not negate a finding that there is a public aspect to the files under the . . . regulatory schemes"); *see also Fisher,* 425 U.S. at 401 ("We adhere to the view that the Fifth Amendment protects against 'compelled self-incrimination, not the disclosure of private information.'" (citation and internal markings omitted)).

M.H. emphasizes decisions from other circuits that have found certain personal income tax documents beyond the scope of the Required Records Doctrine. Those cases are not binding in this Circuit,

but even if they were, they fail to support M.H.'s position. For example, M.H. relies heavily on *Smith v. Richert,* 35 F.3d 300, 303 (7th Cir. 1994). There, the court held that where the "production of personal tax records of the character of W-2's and 1099's would have testimonial force and incriminate the taxpayer . . . the required-records doctrine is inapplicable and that production is excused by the self-incrimination clause." *Smith,* 35 F.3d at 304.

But the rationale behind that ruling was that "[t]he decision to become a taxpayer cannot be thought voluntary . . . [because] [a]lmost anyone who works is a taxpayer, along with many who do not." *Id.* at 303. The court reasoned that the obligatory nature of paying taxes was distinguishable from "the case of the individual who enters upon a regulated activity knowing that the maintenance of extensive records available for inspection by the regulatory agency is one of the conditions of engaging in the activity." *Id.* In the latter scenario – which is precisely the situation here because no one is required to participate in the activity of offshore banking – the required records doctrine *would* apply.

Furthermore, in *Smith* the subpoena did not indicate that the records being sought related to a regulated activity, whereas in this case the subpoena so indicates. *See id.* (determining that the Required Records Doctrine did not apply in part because "[n]othing in the subpoena identifies the records sought as records required by the state's agricultural statutes to be kept"). Here, the subpoena explicitly

requires the production of banking records required to be kept and maintained for inspection pursuant to regulations implemented through the BSA.

Finally, M.H. argues that allowing the regulatory nature of a requirement to render it as having "public aspects" allows the exception to swallow the rule that "[t]he Government's anxiety to obtain information known to a private individual does not without more render that information public." *Marchetti,* 390 U.S. at 57. But, as stated above, a statute or regulation "directed at a selective group inherently suspect of criminal activities" fails to render the privilege against self-incrimination inapplicable. *Id.* Determining whether a regulation is essentially regulatory or criminal requires analysis that goes beyond the label Congress or an agency provides, thus safeguarding against the exception swallowing the rule. Furthermore, in this instance, M.H. has not made a compelling argument that the information he is being asked to provide lacks "public aspects" despite its essentially regulatory nature. We therefore conclude that the records in question have public aspects.

IV

Because the records sought through the subpoena fall under the Required Records Doctrine, the Fifth Amendment privilege against self-incrimination is inapplicable, and M.H. may not invoke it to resist compliance with the subpoena's command. *See Doe M.D.,* 801 F.2d at 1167 ("Records that are required

to be maintained by law are outside the scope of the privilege [against self-incrimination].”). Because M.H.’s Fifth Amendment privilege is not implicated, we need not address his request for immunity. *Bouknight,* 493 U.S. at 562 (declining to “define the precise limitations that may exist upon the State’s ability to use the testimonial aspects of Bouknight’s act of production in subsequent criminal proceedings”).

The district court’s order is AFFIRMED.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

IN RE GRAND JURY INVESTIGATION, (John Doe)	CASE NO. 10gj200 Redacted Order Granting Government's Motion to Compel Compliance with Grand Jury Subpoena **ORDERED UNSEALED** (Filed Feb. 17, 2011)

Presently before the Court is the government's motion to compel John Doe to comply with a grand jury subpoena requesting foreign bank account records required to be maintained under the Bank Secrecy Act ("BSA"), 32 U.S.C. §§ 5311 *et seq.* and its related regulations. Doe has refused to comply with the subpoena, asserting his Fifth Amendment privilege against self-incrimination. After full briefing from the parties, the Court heard oral argument on February 9, 2011. For the reasons explained herein, the Court GRANTS the government's motion.

Background

John Doe is the target of a grand jury investigation being conducted by the Internal Revenue Service and Department of Justice, Tax Division. The grand jury's investigation involves secret Swiss bank accounts that Doe never disclosed to the IRS.

In February of 2009, Swiss bank UBS, AG ("UBS") entered into a deferred prosecution agreement with the DOJ. UBS admitted to conspiring to defraud the U.S. government by helping U.S. taxpayers commit income tax evasion in violation of U.S. criminal laws. UBS also agreed to provide account records of approximately 250 U.S. taxpayers with whom it conspired to defraud the IRS. UBS turned over Doe's records to the DOJ as one of those taxpayers.

According to the UBS records obtained by the government, Doe maintained an account with UBS for many years. In March 2001, Doe opened a new account with UBS in the name of XYZ Corporation ("XYZ"), [country of incorporation deleted]. UBS internal records show Doe was the beneficial owner of the account. On July 8, 2002, Doe requested that securities in the XYZ UBS account be transferred to another Swiss bank, UEB Geneva, to an account also maintained in the name of "XYZ." Doe never disclosed the UBS or UEB accounts to his tax return preparer. Doe never reported his ownership or signatory control over the accounts maintained at UBS or UEB on his tax returns or by filing a Report of Foreign Bank and Financial Account ("FBAR"). Doe did not report any income derived from the accounts on his federal income tax returns.

On June 29, 2010, the grand jury issued a subpoena to Doe, calling for his attendance before the

grand jury on July 15, 2010. The subpoena sought production of the following documents:

> Any and all records required to be maintained pursuant to 31 C.F.R. § 103.32 relating to foreign financial accounts that you had/have a financial interest in, or signature authority over, including records reflecting the name in which each such account is maintained, the number or other designation of such account, the name and address of the foreign bank or other person with whom such account is maintained, the type of such account, and the maximum value of each such account during each specified year.

[Exhibit 2 to Government's Motion.] On July 20, 2010, Doe's counsel responded by letter to the subpoena, asserting the Fifth Amendment privilege against self-incrimination. [Exhibit 1 to Government's Motion.] The government now seeks an order compelling Doe to produce the documents required by the grand jury subpoena.

Discussion

The government argues Doe cannot avoid compliance with the grand jury subpoena by asserting his Fifth Amendment privilege against self-incrimination. The government argues (1) Doe's pre-existing business records are not protected by the Fifth Amendment, (2) any Fifth Amendment privilege which exists is waived under the "required records" doctrine, and (3) the act of production of the UEB records is not

protected by the Fifth Amendment because the existence and possession of those records is a foregone conclusion. As explained below, the Court finds that although Doe's act of producing the subpoenaed records would otherwise be protected by the Fifth Amendment, the "required records" exception acts as a waiver of Doe's right. Because the "required records" exception applies, the Court declines to address the government's argument that the UEB records fall within the foregone conclusion exception.[1]

1. Application of Fifth Amendment to pre-existing business records

The Fifth Amendment privilege ordinarily does not protect the contents of business records because they are created voluntarily and without compulsion. *United States v. Doe*, 465 U.S. 605, 608-09 (1984). However, the act of producing such documents may have testimonial aspects and an incriminating effect. *Id*. at 612. In particular, the Fifth Amendment is implicated where production of documents in response to a subpoena "tacitly concedes the existence of the papers demanded and their possession or control" and

[1] The government filed certain documents for the Court's *in camera* review relevant to its assertion of the foregone conclusion exception. These records were produced as part of the grand jury's inquiry such that the Court overruled Doe's objections to the *ex parte* submission. Upon cursory review, the documents do not appear to link Doe with any UEB account records over the past five years, so as to permit application of the foregone conclusion doctrine.

indicates the producing party's "belief that the papers are those described in the subpoena." *Fisher v. United States*, 425 U.S. 391, 411 (1976); *see also In re Grand Jury Subpoena*, 383 F.3d 905, 909 (9th Cir. 2004) ("by producing documents in compliance with a subpoena, the witness admits that the documents exist, are in his possession or control, and are authentic."). Determining whether the act of producing documents has a testimonial aspect sufficient to implicate the Fifth Amendment is a fact-intensive inquiry. *In re Grand Jury Subpoena*, 383 F.3d at 909.

Upon review, the Court concludes Doe has satisfied his initial burden of demonstrating that the act of producing the subpoenaed records could result in a "substantial hazard" of incrimination. *California v. Byers*, 402 U.S. 424, 429 (1971) (party invoking the privilege must demonstrate the compelled disclosure will present "substantial hazards of self-incrimination"); *United States v. Bright*, 596 F.3d 683, 690-91 (9th Cir. 2010) (party asserting privilege bears initial burden of showing applicability of privilege). The government's subpoena seeks "[a]ny and all records required to be maintained pursuant to 31 C.F.R. § 103.32 relating to foreign financial accounts." Pursuant to 31 C.F.R. § 103.32, all U.S. holders of foreign bank accounts are required to create and retain certain records regarding those accounts for a period of five years. Those who willfully fail to retain such records may be criminally prosecuted under 31 U.S.C. § 5322(a). Therefore, if Doe responds to the subpoena by stating he does not have the requested

records, it is possible he could provide "a significant link in a chain of evidence tending to establish guilt" of a offense under § 5322. *United States v. Des Jardins*, 747 F.2d 499, 509 (9th Cir. 1948) *rev'd on other grounds*, 772 F.2d 578 (9th Cir. 1985) (examining but ultimately rejecting claim that separate reporting requirement of the BSA would result in a substantial hazard of self-incrimination). On the other hand, if Doe does possess documents identifying Swiss bank accounts and money he did not previously disclose under the regulations, it is possible he could incriminate himself by "identify[ing] heretofore unknown accounts for the Government and demonstrat[ing] that these accounts are in his possession and control, and thus leading to a presumption of knowledge." [Opposition Brief, p. 3.] Thus, Doe is entitled to assert his Fifth Amendment privilege unless the government demonstrates the subpoenaed records fall within a recognized exception to that privilege.

2. Required records

"Records that are required to be maintained by law are outside the scope of the privilege [against self-incrimination], provided certain conditions are met." *In re Grand Jury Proceedings ("Doe, M.D.")*, 801 F.2d 1164, 1167 (9th Cir. 1986) (citing *Grosso v. United States*, 390 U.S. 62, 67-68 (1968)). The purpose of the required records doctrine is that "if a person conducts an activity in which record-keeping is required[,] . . . he may be deemed to have waived

his privilege with respect to the act of production – at least in cases in which there is a nexus between the government's production request and the purpose of the record-keeping requirement." *Rajah v. Mukasey*, 544 F.3d 427, 442 (2d Cir. 2008) (quoting *In re Two Grand Jury Subpoenae Duces Tecum Dated Aug. 21, 1985*, 793 F.2d 69, 73 (2d Cir. 1986)).

Under the required records doctrine, the Fifth Amendment privilege does not apply where:

> (1) the purpose of the government's inquiry is regulatory, not criminal; (2) the information requested is contained in documents of a kind the regulated party customarily keeps; and (3) the records have public aspects.

801 F.2d at 1168 (quoting *Grosso*, 390 U.S. at 67-68). The required records doctrine may be applied even where the act of producing such records would otherwise constitute privileged testimonial communication. *Id*. at 1169 (noting that the Supreme Court's decision in *United States v. Doe ("Doe I")*, 465 U.S. 605, 608-09 (1984), did not involve "required records" such that nothing in its "act of production" analysis weakens the required records doctrine); *United States v. Lehman*, 887 F.2d 1328, 1332-33 (7th Cir. 1989) (noting that although the act of producing potentially incriminating documents under government compulsion may have impermissible testimonial aspects, the Supreme Court's decisions in *Fisher v. United States*, 425 U.S. 391 (1976), *Doe I*, 465 U.S. 605, and *Braswell v. United States*, 487 U.S. 99 (1988) did not explicitly

or implicitly eliminate the required records doctrine); *Smith v. Reichert*, 35 F.3d 300, 302 (7th Cir. 1994) (discussing history of required records exception and noting that after *Fisher*, and *Doe I*, an individual could not assert the Fifth Amendment to resist a subpoena seeking required records "for the only acknowledgment conveyed by compliance would be the existence and applicability of the regulatory program that required him to maintain the records.").

A. Regulatory or criminal purpose

The Court must first determine whether the reporting requirement of 31 U.S.C. § 5314 and 31 C.F.R. §§ 103.24 and 103.32 is regulatory or criminal in nature.

> It may be assumed at the outset that there are limits which the government cannot constitutionally exceed in requiring the keeping of records which may be inspected by an administrative agency and may be used in prosecuting statutory violations committed by the record-keeper himself. But no serious misgiving that those bounds have been overstepped would appear to be evoked when there is a sufficient relation between the activity sought to be regulated and the public concern so that the government can constitutionally regulate or forbid the basic activity concerned, and can constitutionally require the keeping of particular records, subject to inspection by the Administrator. . . . [T]he privilege which exists as to private papers

> cannot be maintained in relation to records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation, and the enforcement of restrictions validly established.

Shapiro v. United States, 335 U.S. 1, 32-33 (1948). Relevant to the Court's determination is the legislative history of the reporting requirement as well as decisions of other courts which have examined the purpose of the BSA's reporting requirements. *In re Grand Jury Subpoena*, 368 F. Supp. 2d 846, 861 (W.D. Tenn. 2005). A statutory reporting requirement is more likely to be considered criminal, not regulatory, where it is "directed almost exclusively to individuals inherently suspect of criminal activities," *Grosso*, 390 U.S. at 68, or where it concerns an area permeated with criminal statutes." *Marchetti*, 390 U.S. at 47. So long as a statutory reporting requirement has a valid regulatory purpose, it is irrelevant that those records may also "be useful to a criminal grand jury investigation." *Doe M.D.*, 801 F.2d at 1168.

According to 31 U.S.C. § 5311, the purpose of the Bank Secrecy Act ("BSA") is "to require certain reports or records where they have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings, or in the conduct of intelligence or counterintelligence activities, including analysis, to protect against international terrorism." Section 5314 itself states that the reporting requirements were enacted "[c]onsidering the need to avoid impeding

or controlling the export or import of monetary instruments and the need to avoid burdening unreasonably a person making a transaction with a foreign agency. . . .” The reporting requirement is useful to law enforcement and was enacted to address the “huge gap in law enforcement” that exists when “wrongdoers cloak their activities in the shield of foreign financial secrecy.” H.R. Rep. 91-975, 1970 U.S.C.C.A.N. 4394, 4397. In particular, Congress was concerned that “one of the most damaging effects of an American’s use of secret foreign financial facilities is its undermining of the fairness of our tax laws.” *Id*.

Every court that has analyzed the purpose of the BSA has held that it is primarily a regulatory scheme notwithstanding the availability of criminal penalties. In *Des Jardins,* the Ninth Circuit rejected a challenge to the constitutionality of the BSA’s requirement that individuals report their transportation of more than $5,000 in monetary instruments across the United States border.[2] 747 F.2d at 509. The Ninth Circuit noted that “[i]t is true that the transport of large sums of money is sometimes connected with illegal activity, and Congress did enact the reporting requirement in part because it believed it would yield information useful in criminal investigations.” *Id*. Nonetheless, the reporting requirement

[2] The section at issue in *Des Jardins*, 31 U.S.C. § 1058, is now codified at § 5322. In re-codifying title 31, Congress did not intend to make any substantive changes to the provisions. *Des Jardins*, 747 F.2d at 501.

was not directed at a "highly selective group inherently suspect of criminal activities." Instead, the requirement required reports by all persons traveling across the border with more than $5,000 in monetary instruments, an act which is not itself illegal or generally connected with criminal activity. *Id*. Finally, the court noted the reporting requirement was "supported by significant non-investigative governmental interests." *Id*.

The Second and Sixth Circuits have similarly held that similar reporting requirements under the BSA are of a regulatory nature, and not criminal. In *United States v. Dichne*, 612 F.2d 632 (2d Cir. 1980), the court rejected defendant's argument that the reporting requirement related to the import or export of monetary instruments exceeding $5,000 violated his rights under the Fifth Amendment. The court noted the government has a legitimate interest in the flow of currency across international borders. 612 F.2d at 638. In addition, the transportation of currency "is by no means an illegal act" and the majority of those affected by the reporting requirements would be completely uninvolved in any related criminal action. *Id*. at 639. "While Congress clearly intended the Act's disclosure requirements to be of some use in criminal proceedings," the Government's legitimate concern with the flow of currency across the nation's borders was "substantial." *Id*. at 640.

Similarly, in *United States v. Sturman*, 951 F.2d 1466 (6th Cir. 1991), the Sixth Circuit found that the defendant's conviction for willfully failing to maintain

records and file reports of foreign bank accounts as required under § 5314 did not violate the Fifth Amendment. Relying on *Marchetti* and *Grosso*, defendant argued the reporting requirement implicated his right against self-incrimination The court rejected Sturman's challenge, finding the BSA reporting requirement did not implicate the Fifth Amendment.

> The Bank Secrecy Act applies to all persons making foreign deposits, most of whom do so with legally obtained funds. The requirement is imposed in the banking regulatory field which is not infused with criminal statutes. In addition, the disclosures do not subject the defendant to a real danger of self-incrimination since the source of the funds is not disclosed. It is not evident from the information provided whether the money in the account came from a legitimate adult entertainment business or from a scheme to skim money from a business. Thus, the defendant has failed to show that the Bank Secrecy Act violated any individual right *Marchetti* and *Grosso* seek to protect.

Id. at 1487.

In his opposition, Doe relies heavily on the case of *In re Grand Jury Subpoena (John Doe 1)*, 368 F. Supp. 2d 846 (W.D. Tenn. 2005). In that case, the court analyzed whether the required records exception applied to information maintained under 18 U.S.C. § 2257, a statute which mandated that producers of sexually explicit materials keep records of the identity and birth date of all performers. The

purpose of the statute is to combat child pornography by making it easier for law enforcement to determine whether an individual depicted in sexually explicit materials is a minor. *Id*. at 853. The statute provides for criminal liability for failure to comply with the reporting requirement (without regard for whether such violation was willful), and contained no mechanism for civil enforcement. *Id*. In concluding the statutory reporting requirement is not regulatory in nature, the court first noted that "[t]he *stated purpose* of the original Child Protection and Obscenity Enforcement Act of 1988 . . . was to alleviate the difficulty for *law enforcement officers* in ascertaining whether an individual in a film or other visual depiction is a minor *for the purpose of combating child pornography*." *Id*. at 851 (quoting *Connection Distributing Co. v. Reno*, 154 F.3d 281, 290 (6th Cir. 1998) (emphasis in original).

The court went on to compare the statutory framework of §2257 to other record keeping and reporting statutes. The court noted that ordinarily, regulatory schemes have a separate civil mechanism for enforcement, in addition to potential criminal penalties. *Id*. at 852 (citing *In re Grand Jury Subpoena (Underhill)*, 781 F.2d 64, 67 (6th Cir. 1986)). In addition, regulatory schemes ordinarily involve matters which are not inherently criminal. *Id*. at 853 (citing *Underhill*, 781 F.2d at 68). Finally, the court noted that that regulatory schemes typically do not require individuals to record and/or report *per se* illegal information. *Id*. The court found the statute at

issue, 18 U.S.C. § 2257, contained only criminal penalties and involved an inherently criminal matter (the prevention of child pornography). Furthermore, § 2257 mandates the keeping of records of *per se* illegal activity:

> Simply put, if producers who utilize minors do not keep the records required by § 2257, they may be prosecuted for the failure to keep those records, whereas if they do keep such records, they will have admitted criminal activity and may be prosecuted based upon that admission.

Id. at 855. Based thereon, the court concluded the records required to be kept under § 2257 were for a criminal purpose, and not merely regulatory.

The foreign account record keeping requirement of 31 U.S.C. § 5314 at issue in the present motion is distinguishable from the reporting requirement of 18 U.S.C. § 2257. The foreign account record keeping requirement of § 5314 has a civil compliance mechanism – § 5320 provides for injunctive action against anyone who violates the BSA's reporting provisions, and § 5321 provides for civil penalties. In addition, there is nothing inherently criminal about holding money in a foreign bank account, and most people who hold such accounts are not engaged in criminal activity. *See Sturman*, 951 F.2d at 1487 (noting most persons who make foreign deposits "do so with legally obtained funds"). Finally, the records an individual is required to keep under 31 C.F.R. §§ 103.24 and 103.32 do not reveal *per se* incriminating information.

Neither the statute nor the regulations requires an individual to indicate the source of the money held in the foreign bank account or any other directly incriminatory information. Therefore, the Court concludes the record keeping requirement of 31 U.S.C. § 5314 and 31 C.F.R. §§ 103.24 and 103.32 is regulatory in nature.

B. Customarily kept records

Foreign bank account holders must maintain a record of the following information: "the name in which each such account is maintained, the number or other designation of such account, the name and address of the foreign bank or other person with whom such account is maintained, the type of such account, and the maximum value of each such account during the reporting period." 31 C.F.R. § 103.32. Doe has provided a declaration indicating that Swiss banks do not ordinarily send account statements to their foreign account holders, such that it would be unusual for a foreign customer to "personally possess" their account records. [Speier Decl., ¶ 2.] As a result, Doe argues the government has failed to show the subpoenaed information is "customarily kept" and therefore within the scope of the required records exception.

The requirement that the government demonstrate the records are ones "customarily kept" stems from the Supreme Court's concern in *Marchetti* and *Grosso* that the record-keeping statutes and

regulations at issue compelled individuals to create new records, not merely to keep and preserve records "of the same kind as he has customarily kept." 390 U.S. at 58; 390 U.S. at 69. Similarly, in the *In re Grand Jury Subpoena* case, the detailed records required to be kept under 18 U.S.C. § 2257 regarding the identity and ages of performers appearing in sexually explicit materials would not be "customarily kept" absent the statutory requirement.

By contrast, as other courts have recognized, bank account records are customarily kept by bank customers. *United States v. Norwood*, 420 F.3d 888, 895-96 (8th Cir. 2006). The declaration Doe offers by former IRS Special Agent Speier carefully states that it would "be unusual for a foreign customer to *personally possess* account statements from a Swiss bank." Doe does not, however, claim that he actually lacks possession or access to his own bank records.[3] Therefore, the Court finds the subpoenaed records are "customarily kept."

C. Public Aspects

The required records doctrine "applies not only to public documents in public offices, but also to records required by law to be kept in order that there may be

[3] At the hearing, the government clarified that it is not asking Doe to produce any records aside from those required to be maintained under 31 C.F.R. §§ 103.32, for the five year time period required by the regulation.

suitable information of transactions which are the appropriate subjects of governmental regulation, and the enforcement of restrictions validly established. There the privilege which exists as to private papers cannot be maintained." *Shapiro v. United States*, 335 U.S. 1, 17 (1948). Examples of documents courts have found to be "public" for purposes of the required records doctrine include sales records required to be kept under the Price Control Act (*Shapiro*, 335 U.S. at 34), confidential patient records related to the purchase and sale of prescription drugs (*Doe, M.D.*, 801 F.2d at 1168), patient records and x-rays (*In re Kenny*, 715 F.2d 51, 53 (2d Cir. 1983), escrow records (*In re Grand Jury Subpoena*, 497 F.2d 218, 221 (6th Cir. 1974), and odometer statements (*In re Grand Jury Subpoena (Spano)*, 21 F.3d 226 (8th Cir. 1994) and *Underhill*, 781 F.2d at 69).

Here, the grand jury subpoena is narrowly tailored to seek only those records Doe is required to keep under 31 U.S.C. § 5314 and 31 C.F.R. §§ 103.24 and 103.32. In support of his argument that the financial records sought by the subpoena are purely private, Doe cites *United States v. Porter*, 711 F.2d 1397, 1401 (7th Cir. 1983). The private financial documents at issue in *Porter*, however, were not ones the law required an individual to maintain. Information an individual is required by law to maintain, even if otherwise private, takes on a public aspect by virtue of the fact it is a "required record." *Shapiro*,

335 U.S. at 17; *Doe M.D.*, 801 F.2d at 1168.[4] When Doe chose to maintain a foreign bank account, a regulated area where the government requires certain record-keeping, the records he thereafter maintained took on a public aspect. Therefore, the government has shown the subpoenaed records are of a "public aspect" such that they are properly within the scope fo the required records exception.

Conclusion

The government has demonstrated that the grand jury subpoena seeks only customarily held records, with public aspects, which Doe is required to keep pursuant to a valid regulatory scheme. Therefore, the subpoenaed records fall within the "required records" exception to the Fifth Amendment. The Court GRANTS the government's motion to compel, and orders Doe to comply with the grand jury subpoena within thirty (30) days of the filing of this order.

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[4] The mere fact the government has "formalized its demands [for a particular type of information] in the attire of a statute" does not automatically render otherwise private documents of a "public aspect." *Marchetti*, 390 U.S. at 57. However, where the record required to be kept is closely related to the valid regulatory scheme, the records take on a "public aspect." *Lehman*, 887 F.2d at 1333.

IT IS SO ORDERED.

Dated 2/16/11 /s/ Irma E. Gonzalez
IRMA E. GONZALEZ,
Chief Judge
United States District Court

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: GRAND JURY INVESTIGATION, M.H., Witness-Appellant, v. UNITED STATES OF AMERICA, Appellee.	No. 11-55712 D.C. No. 10-GJ-0200 Southern District of California, San Diego ORDER (Filed Oct. 7, 2011)

Before: CANBY, GOULD, and TALLMAN, Circuit Judges.

The Appellant's motion to stay the issuance of the mandate for ninety days pending the filing and disposition of a petition for writ of certiorari in the United States Supreme Court is GRANTED. Fed. R. App. P. 41(d)(2).

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: GRAND JURY INVESTIGATION, M.H., Witness-Appellant, v. UNITED STATES OF AMERICA, Appellee.	No. 11-55712 D.C. No. 10-GJ-0200 Southern District of California, San Diego ORDER (Filed Oct. 17, 2011)

Before: CANBY, GOULD, and TALLMAN, Circuit Judges.

The Government's motion for reconsideration of the Court's order staying the mandate is GRANTED. The order filed on October 7, 2011, granting the motion to stay the mandate is vacated and the motion is hereby DENIED. The Clerk shall issue the mandate forthwith.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: GRAND JURY INVESTIGATION, M.H., Witness-Appellant, v. UNITED STATES OF AMERICA, Appellee.	No. 11-55712 D.C. No. 10-GJ-0200 Southern District of California, San Diego ORDER (Filed Oct. 19, 2011)

Before: CANBY, GOULD, and TALLMAN, Circuit Judges.

M.H.'s motion to recall the mandate and motion for reconsideration of the Court's order denying a stay are denied. This case does not present the kind of exceptional circumstances that would warrant recalling the mandate. *See Carrington v. United States*, 503 F.3d 888, 891 (9th Cir. 2007) ("We have the inherent power to recall our mandate in order to protect the integrity of our processes, but should only do so in exceptional circumstances." (citation omitted)).

In rendering our final order denying M.H.'s motion for a stay pending a petition for certiorari and directing that the mandate issue forthwith, we had before us and considered each party's arguments set forth in M.H.'s motion for a stay and the Government's motion for reconsideration of our initial order

granting it. We weighed the arguments made by both parties and determined that a stay would not be appropriate and the mandate should issue forthwith given the Government's overriding concerns about the ability of the grand jury to complete its inquiries before it expires. That would necessitate a new round of litigation based on the need to empanel a new grand jury and reissue the subpoena duces tecum. M.H.'s offer to stipulate to the period covered by the initial request would toll the running of the five-year statute of limitation. 18 U.S.C. § 3282(a). But it would not resolve the delay and duplication of judicial resources triggered by a new round of identical contempt proceedings.

Accordingly, we decline to recall the mandate and further delay the investigation.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: GRAND JURY INVESTIGATION, M.H., Witness-Appellant, v. UNITED STATES OF AMERICA, Appellee.	No. 11-55712 D.C. No. 10-GJ-0200 Southern District of California, San Diego ORDER (Filed Oct. 3, 2011)

Before: CANBY, GOULD, and TALLMAN, Circuit Judges.

The panel has voted to deny the petition for panel rehearing; Judges Gould and Tallman have voted to deny the petition for rehearing en banc and Judge Canby so recommends.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are DENIED.