B. Foreign Bank Account Records Required to Be Kept Pursuant to Treasury Regulations Do Not Constitute "Required Records" Under *Shapiro v. United States*.

The privilege against self-incrimination must be preserves as "a bulwark against iniquitous methods of prosecution." *See United States v. White*, 322 U.S. 694, 699 (1944)). Accordingly, the required records exception is a "narrow exception." *In re Grand Jury Subpoena Serves Upon Underhill*, 781 F.2d 64, 67 (6th Cir. 1986). To qualify as "required records" under *Shapiro*, the records required to be maintained: (1) must have public aspects rendering them the equivalent of public documents; (2) must be maintained pursuant to a civil regulatory scheme, not a criminal scheme; and (3) must be of the type the regulated party would ordinarily keep. *See Shapiro v. United States*, 335 U.S. 1, 32-35 (1948); *see also, Grosso v. United States*, 390 U.S. 62, 67-68 (1968). Notwithstanding the superficial analysis set forth in the government's Motion, foreign bank account records fail to satisfy the *Shapiro* requirements.

1. Foreign Bank Account Records Have No Public Aspects.

Shapiro, as well as other cases applying the "required records" exception, involved substantive restrictions applicable to individuals and entities engaged in transactions with the public. The government imposed the substantive restrictions to protect the public from a specific harm. The government also imposed record keeping and inspection requirements in order to aid enforcement of the substantive

restrictions. Thus, the record keeping and inspection requirements did not exist in a vacuum as an end unto themselves. Rather, they serve merely as a means to and end – the enforcement of the substantive restrictions. As the Supreme Court stated in *Shapiro*, the "required records" doctrine is based on the principle that the privilege against self-incrimination cannot be maintained in relation to records required to be kept for the "enforcement of restrictions validly established." *See Shapiro v. United States*, 335 U.S. 1, 32-33 (1948) (quoting *Davis v. United States*, 328 U.S. 589 (1948)); *see also, In Re Grand Jury Proceedings (McCoy & Sussman)*, 601 F.2d 162, 168 (5th Cir. 1979). Thus, record keeping requirements do not imbue personal records with public aspects. Rather, underlying substantive restrictions – designed to protect the public – impart public aspects to otherwise personal records.

Numerous reported decisions, including cases cited by the government in its Motion, confirm the proposition that substantive regulatory restrictions designed to protect the public from harm – not mere record keeping requirements – imbue otherwise private records with public aspects. *See Shapiro v. United States*, 335 U.S. 1, 3-4 (1948) (record keeping requirements the Emergency Price Control Act were enacted to protect the public from price gouging during wartime); *In re Grand Jury Subpoena (Spano)*, 21 F.3d 226, 230 (1994) (odometer record keeping and inspection requirements imposed on licensed automobile dealers were a means

of enforcing federal laws enacted to protect the public from odometer tampering); *In re Grand Jury Proceedings (Doe M.D.)*, 801 F.2d 1164, 1166-67 (9th Cir. 1986) (requirement that licensed physician keep records of all prescriptions filled was a means of enforcing state and federal laws enacted to protect the public from the dispensation of dangerous drugs); *United States v. Lehman*, 887 F.2d 1328, 1330-32 (7th Cir. 1989) (record keeping requirements imposed upon a registered and licensed cattle dealer were a means of enforcing the Packers and Stockyards Act which was enacted in part to prevent manipulation of livestock prices harmful to the public); *In Re Grand Jury Proceedings (McCoy & Sussman)*, 601 F.2d 162, 168 (5th Cir. 1979) (licensed customs house brokers must comply with substantive customs laws and regulations on behalf of their importer and exporter clients, and record keeping requirements are designed to ensure their compliance with those laws on behalf of their clients).

In contrast to the substantive restrictions and licensing requirements at issue in *Shapiro* and its progeny, the Bank Secrecy Act ("BSA") imposes no substantive restrictions on individuals who hold foreign bank accounts. *See* 31 U.S.C. § 5311, *et. seq*. The BSA imposes no restrictions on the amount of funds an individual can maintain in a foreign account and imposes no restrictions on the number of deposits or withdrawals. An individual who holds a foreign bank account can utilize the foreign account in precisely the same manner as a domestic bank

account. Thus, other than the relatively modest record keeping requirements imposed by regulation, foreign account holders face no restrictions.

Because the BSA imposes no substantive restrictions on foreign account holders designed to protect the public, records of foreign bank accounts have no "public aspects," and therefore are not "required records" devoid of Fifth Amendment protections.

2. Congress Imposed Recordkeeping Requirements on Foreign Bank Account Holders to Assist Law Enforcement in Fighting Crime.

The lack of substantive restrictions imposed on foreign account holders raises the obvious question – if no restrictions are imposed, for what purpose does the government impose the recordkeeping requirements? The text of the statute and its legislative history prove beyond any doubt that the BSA imposed record keeping requirements on foreign account holders in order to provide American law enforcement authorities with tools to fight crime.

The text of the BSA lists several purposes for its various recordkeeping and reporting requirements. Tellingly, the first listed purpose of the BSA – and therefore the primary purpose – is to gather information which has a "high degree of usefulness in criminal . . . investigations." *See* 31 U.S.C. § 5311. The legislative history of the BSA confirms that the foreign bank account reporting requirements are intended to assist law enforcement officials in combating crime.

Title II, Chapter 4 of the BSA contains the foreign account record keeping requirements. According to the House Report that accompanied the legislation:

> THE PRINCIPAL PURPOSE OF TITLE II OF THE BILL IS TO FURNISH AMERICAN LAW ENFORCEMENT AUTHORITIES WITH THE TOOLS NECESSARY TO COPE WITH THE PROBLEMS CREATED BY SO CALLED SECRECY JURISDICTIONS. SOME OF THESE JURISDICTIONS SIMPLY DO NOT RECOGNIZE CHEATING ON TAXES, VIOLATIONS OF SECURITIES LAWS, AND MANY OTHER ACTS AS CRIMINAL. NEITHER THEIR LAW ENFORCEMENT AUTHORITIES NOR THEIR BANKING INSTITUTIONS WILL AFFORD THE SLIGHTEST COOPERATION TO AMERICAN AUTHORITIES.
>
> TITLE II IS DIVIDED INTO FOUR CHAPTERS. THE MOST IMPORTANT OF THESE IS CHAPTER 4, WHICH AUTHORIZES RECORDKEEPING AND REPORTING REQUIREMENTS WITH RESPECT TO RELATIONSHIPS AND TRANSACTIONS WITH FOREIGN FINANCIAL AGENCIES.

H.R. Rep. 91-975 (1970), U.S.C.C.A.N. 4394, 4404 (1970 WL 5667, **10)

Congress certainly has the authority to enact laws, such as the BSA, in order to assist law enforcement officials in their efforts to prevent crime. In the context of the BSA, however, the Supreme Court has noted that "[i]n so doing [Congress] . . . is of course subject to the strictures of the Bill of Rights, and may not transgress those strictures." *See California Bankers Association v. Schultz*, 416 U.S. 21, 77 (1974).

In *California Bankers*, the Supreme Court also noted that in enacting the BSA, Congress never intended that the records required to be maintained by the Secretary of the Treasury would be automatically available to law enforcement.

See id. at 27. Specifically, the House report that accompanied the legislation noted:

> IT SHOULD BE BORNE IN MIND THAT RECORDS TO BE MAINTAINED PURSUANT TO THE REGULATIONS OF THE SECRETARY OF THE TREASURY WILL NOT BE MADE AUTOMATICALLY AVAILABLE FOR LAW ENFORCEMENT PURPOSES. THEY CAN ONLY BE OBTAINED THROUGH EXISTING LEGAL PROCESS.

H.R. Rep. 91-975 (1970), U.S.C.C.A.N. 4394, 4395 (1970 WL 5667, **1-2)

Pursuant to the statute which imposes the record keeping requirements, foreign account holders are not obligated to make such records available for inspection. Rather, they are required to disclose the records, "only as required by law." *See* 31 U.S.C. § 3114(c).

Lastly, the very regulations issued by the Secretary of the Treasury recognize that the records required to be maintained by foreign account holders will be available for only the limited purpose of ensuring compliance with the recordkeeping and reporting requirements:

> Except as provided in §§ 1020.410(b)(1), 1021.410(a), and 1023.410(a)(1), and except for the purpose of assuring compliance with the recordkeeping and reporting requirements of this chapter, this chapter does not authorize the Secretary or any other person to inspect or review the records required to be maintained by this chapter. Other inspection, review or access to such records is governed by other applicable law.

31 C.F.R. § 1010.920

Both the statute and the implementing regulations limit the government's access to foreign account records. In contrast, the regulations requiring taxpayers to maintain records of their income must be "kept at all times available for inspection by authorized internal revenue officers or employees, and shall be maintained so long as the contents thereof may become material in the administration of any internal revenue law." 26 C.F.R. § 1.6001-1(b). No court, however, has ever held that an individual under investigation for tax crimes must turn over all records of his or her income simply because such records are required to be maintained pursuant to IRS regulations.

Although other sections of the BSA may serve other functions, the primary purpose of the BSA's foreign account recordkeeping requirements is to prevent crime.[5] As the Supreme Court has recognized, in enacting laws designed to combat crime, Congress cannot ignore the Constitution. Congress recognized the constitutional restrictions on the recordkeeping and reporting requirements of the BSA by specifically stating that law enforcement officials would not have automatic access to foreign account records and reports. Finally, the Secretary of

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[5] The government's reliance on *United States v. Sturman*, 951 F.2d 1466 (6th Cir. 1991), and *United States v. Des Jardins*, 747 F.2d 499 (9th Cir, 1984) is entirely misplaced. Neither *Sturman* nor *Des Jardins* involved the target of an investigation who asserted the Fifth Amendment in response to a Grand Jury subpoena for testimony and documents. Rather, both *Sturman* and *Des Jardins* involved claims that the BSA's reporting requirements violated the Fifth Amendment based on the notion that filing a report required individuals to necessarily incriminate themselves. Those cases are wholly inapposite.

the Treasury also recognized constitutional restrictions by limiting access to required records in his own regulations. Contrary arguments set forth in the Government's Motion are wholly without merit. [6]

CONCLUSION

NAME REDACTED, who is the target of the Grand Jury's investigation, cannot be compelled to testify or produce documents as the Fifth Amendment to the United States Constitution guarantees that he shall not be compelled in a criminal case to be a witness against himself. The "required records" doctrine cannot trump NAME REDACTED's Fifth Amendment rights as the BSA's foreign account record keeping requirements were imposed specifically to support criminal law enforcement. Furthermore, the Supreme Court, the Congress, and the Secretary of the Treasury all recognize that the BSA does not automatically entitle law enforcement to access to the required foreign bank account records. Rather,

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[6] Because the government cannot meet the first two prongs of the *Shapiro* test, whether the third prong is satisfied is irrelevant. Nonetheless, the government's court filings in other matters demonstrate that UBS actively sought to limit disclosure of foreign account information to its clients, and actively sought to limit the information in maintained regarding such accounts. According to the government's filings, UBS and its executives limited its communications with U.S. clients regarding their accounts, instructed UBS bankers not to report information related to foreign accounts in UBS's internal computer system, and removed identifying information from account documents and records. *See United States v. UBS AG*, Case No. 09-60033-JIC (S.D. Fl.) (Docket No. 4) (Criminal Information, Feb. 18. 2009). The government cannot have it both ways. The government cannot plausibly assert that the foreign account records it seeks are the type of records routinely maintained by foreign account holders while simultaneously asserting in other proceedings that UBS intentionally to disclose account information to its U.S. clients and intentionally failed to maintain records of such accounts in its own internal records.

law enforcement can gain access to required records only pursuant to applicable law. In the context of a Grand Jury subpoena issued to the target of a criminal investigation, applicable law necessarily includes the Fifth Amendment privilege against self-incrimination. The Court must presume that in enacting the BSA and in promulgating its regulations, Congress and the Treasury Department intended to adhere to the Constitution. *See United States v. Johnson*, 577 F.2d 1304, 1310-1311 (5th Cir. 1978). The government's suggested construction of BSA – that its law enforcement record keeping requirements trump the Fifth Amendment – raises serious doubts as to its constitutionality. The BSA should be construed so as to avoid such doubt. *See, e.g., Crowell v. Benson*, 285 U.S. 22, 62 (1932) ("When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided."). The Government's Motion to Compel, therefore, must be denied.

Respectfully submitted, this 9th day of May, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been service to all counsel of record on this 9th day of May 2011, via e-mail and certified mail return receipt requested:

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