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## Montana's Foreign Capital Depository Act

David Aronofsky

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# Montana's Foreign Capital Depository Act: A Financial Pie in the Rocky Mountain Sky or a Sensible New Assets Attraction Approach?

David Aronofsky\*

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## I. INTRODUCTION

In 1997, Montana attracted national and world financial attention when Montana Governor Mark Racicot signed into law Senate Bill 83, the Foreign Capital Depository Act (Act), creating the first U.S. state-chartered financial entity designed solely for attracting non-U.S. capital.<sup>1</sup> Depicted by skeptics as an unworkable "Panama without the Canal," "Switzerland of the Rockies" and "Rocky Mountain High," Montana is nonetheless pursuing a creative approach to increased state revenues that capitalizes on the state's unique privacy laws as well as innovative statutory drafting. The Act warrants attention from offshore assets owners and managers who seek U.S. stability in a state committed to full financial privacy protections.<sup>2</sup>

This Article first describes the Act's history, key provisions and implementing regulations. It then briefly assesses several legal issues affecting the Act's likely future. These include: (1) Montana's constitutional privacy rights applicable to foreign capital depositories and their customers; (2) the Act's relationship to federal money laundering laws; (3) the Act's express statutory bar against recognizing and enforcing most non-U.S. court judgments adverse to depositories and their customers; and (4) the implications of newly emerging federalism jurisprudence that suggests that sovereign state activities, including those related to international financial services, may fall outside the scope of international treaty and federal regulatory statutes traditionally deemed applicable to such activity. Finally, the Article draws some preliminary conclusions about the Act's future.

## II. ACT SUMMARY AND OVERVIEW

The Act enables the creation of new foreign capital depository institutions (depositories) available solely for non-resident alien customer liquid assets and precious metals accounts.<sup>3</sup> It amends more than one hundred Montana statutes, and creates two new statutory chapter parts. These changes exempt depositories and their customers from Montana taxes, treat depositories as other

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1. 1997 MONT. LAWS 382 (codified in scattered sections of Montana Code Annotated).

2. See Robin Bulman, *Here's a Riddle: What's Like Panama Without the Canal? Try Montana*, J. COM., Dec. 27, 1996, at 1A; Brigid McMenamin, *Rocky Mountain High*, FORBES, Nov. 3, 1997, at 48.

3. See 1997 MONT. LAWS 382, §§ 2, 22, 23.

state-chartered financial entities for most regulatory purposes,<sup>4</sup> and create a detailed new legal scheme to govern depository charter and customer accounts activities, including accounts comprised of precious metals.<sup>5</sup>

Depositories receive non-bank charters from the Montana Banking Board (Board), and depository activities are regulated by the Montana Commerce Department Division of Banking and Financial Institutions (Division).<sup>6</sup> The Division Commissioner (Commissioner) is the principal state official who oversees depository activity.<sup>7</sup> The Board and the Division have adopted regulations to carry out these functions.<sup>8</sup>

The Act imposes severe civil and criminal penalties for breaching depository customer confidentiality, subjecting state officials who breach confidentiality to removal from office.<sup>9</sup> It bars depository disclosure of customer records to state or local officials except for suspected or actual legal violations.<sup>10</sup> It also bars disclosure except pursuant to subpoenas based on probable cause of wrongdoing, giving both depositories and customers rights to quash them.<sup>11</sup> The Act strictly limits foreign civil judgment enforcement by: (1) declaring most such judgments repugnant to Montana public policy; (2) requiring those seeking enforcement to prove their validity and compatibility with U.S. law; and (3) allowing for damage awards in the event of enforcement activity adverse to customer privacy rights.<sup>12</sup>

### III. A BRIEF ACT HISTORY<sup>13</sup>

In 1995 the Montana Legislature adopted Senate Joint Resolution 19, and began to study the depository as a financial institution that could produce new state revenue through a state-owned or a state-chartered foreign investment non-bank depository for non-U.S. capital.<sup>14</sup> Because the Legislature meets

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4. See *id.* § 6.

5. See *id.* §§ 25-28.

6. See *id.* §§ 3, 13.

7. See *id.* §§ 3, 11.

8. See MONT. ADMIN. R. 8.80.8 (1998) (Mont. Dep't of Commerce Banking and Fin. Inst. Div.); MONT. ADMIN. R. 8.87.8 (1998) (Mont. State Banking Bd.).

9. See 1997 MONT. LAWS 382, §§ 43, 44.

10. See *id.*

11. See *id.* §§ 37, 38.

12. See *id.* § 48.

13. See *An Outside Chance: Prospecting for Foreign Capital*, A Report to the Governor and the 55th Legislature of the Subcomm. on the Foreign Inv. Depository (Jan. 1997) (hereinafter 1997 Report).

14. See *id.* at 1-3.

biennially, legislators vote at each session's end on issues to be studied between sessions by bipartisan committees. SJR 19 created a Foreign Investment Depository Subcommittee of eight legislators—two Senate and two House Republicans, plus two Senate and two House Democrats—chaired by Billings Republican Senator Mike Sprague.<sup>15</sup> Senator Sprague had received suggestions for revising Montana banking laws to attract overseas capital from Montana native and California developer Robert Svoboda, as well as Swiss visitors to Montana during the 1995 legislative session.<sup>16</sup>

After thirteen months of meetings, the Subcommittee voted in late 1996 to introduce Senate Bill 83, which subsequently became the Act.<sup>17</sup> In Subcommittee hearings around the state, the legislators took testimony and comments from federal and state regulators, law enforcement agencies, banks and other financial institutions, law firms, academic experts from inside and outside Montana, and financial consultants.<sup>18</sup> Although these hearings began with uncertainty and skepticism from Subcommittee Members and witnesses alike, the Subcommittee concluded its work shortly before the 1997 legislative session by unanimously introducing Senate Bill 83 with enthusiastic optimism.<sup>19</sup>

The Subcommittee received input from U.S. federal regulators, including U.S. Treasury Department Financial Crimes Enforcement Network staff, who queried whether Montana planned to “secede” from the United States as a means of shielding depository assets from federal oversight.<sup>20</sup> This input focused Subcommittee attention on the extent to which U.S. states can legally ensure confidentiality of U.S.-based financial transactions from federal and state law enforcement agencies. U.S. Treasury officials cautioned that federal agencies would not treat Montana “like the Cayman Islands” for deposit secrecy purposes, and they noted how Montana depository secrecy laws could clash with U.S. treaty obligations to cooperate with other countries in disclosing asset owner identities.<sup>21</sup> The Subcommittee incorporated these federal concerns into Senate Bill 83.<sup>22</sup>

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15. *See id.* at 1.

16. *See id.* at 1, 7.

17. *See id.* at 7.

18. *See id.* at 2-7.

19. *See id.* at 1.

20. *See id.* at 7.

21. *See id.*

22. *See id.* at 128-29.

The Subcommittee premised Senate Bill 83 on five key goals: (1) maximum customer privacy allowed by law; (2) depository profitability; (3) enhancing state revenues at no cost to Montana taxpayers; (4) stimulating state economic development; and (5) making depositories "Snow White clean" in all legal respects and not money laundries.<sup>23</sup> The Bill also reflected some core assumptions about what would help depositories succeed, including:

1. limiting depository customer and services competition with Montana banks, and allowing the latter to own depositories;
2. protecting depository assets against liens, seizure and the political instability outside the United States, while ensuring reasonable confidentiality;
3. a viable non-U.S. customer base for depositories;
4. U.S. bank, non-U.S. bank subsidiary and private company interest in acquiring depository charters;
5. depository non-competition with other off-shore banking havens, whose users would diversify capital deposit sites; and
6. maintaining customer confidentiality while still providing mechanisms to allow depositories to screen out unsavory customers and money sources, in addition to the state's regulatory ability to oversee.<sup>24</sup>

How the Act addresses its goals and assumptions is discussed below.

#### IV. THE ACT'S PROVISIONS

##### A. *The Express Act Purpose*

The Act reflects a concern rare in Montana's lawmaking process—a concern about non-U.S. world problems. It cites "political instability, economic insecurity, and financial risk" outside the United States as "incentives for the transfer and investment of foreign capital derived from legitimate estates and business activities to relatively safe places such as Montana."<sup>25</sup> The Act also cites "political conditions in some countries . . . contrary to the fundamental freedoms and individual liberties codified in international human rights law and contained in the Montana constitution" as another incentive for creating the state-

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23. See *id.* at 14-15.

24. *Id.* at 16-24.

25. 1997 MONT. LAWS 382, § 1.

chartered financial entity.<sup>26</sup> It states an intent to attract "legally derived foreign capital for investment, revenue enhancement, and other economic development purposes as well as to facilitate tax abatement" for Montana residents and businesses.<sup>27</sup> The Act also asserts authority to "treat foreign persons differently than it does, Montana citizens" as a way to improve state economic conditions,<sup>28</sup> and it cites Montana's "compelled and rationally motivated" reasons to offer "specialized private financial services exclusively to foreign customers" seeking stable U.S. economic and political conditions.<sup>29</sup> Because Montana courts must construe all statutes to achieve the social purpose for which they are enacted and to effect their objectives, this Act language will guide all Act statutory construction.<sup>30</sup>

### B. Act Definitions

The Act has sixteen definitions. The key definitions are list below:

1. "Controlling person," defined as "a person who holds 5% or more of the equity in a depository" or who otherwise controls operations and management decisions.<sup>31</sup>
2. "Customer," defined as "a *person* who is using or has used the services of a foreign capital depository or for whom a foreign capital depository has acted as a fiduciary."<sup>32</sup>
3. "Foreign capital depository" or "depository," defined as a "financial institution *incorporated in Montana* and chartered by the Board to conduct business as a foreign capital depository."<sup>33</sup>
4. "Money laundering," defined as the process through which the "existence, illegal source, true ownership, or unlawful application of illicitly derived funds is concealed or disguised to make the funds appear legitimate, thereby helping to evade detection, prosecution, seizure or taxation."<sup>34</sup>
5. "Nonresident alien" is defined as "a person who is not a citizen or a resident of the United States."<sup>35</sup>

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26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. See MONT. CODE ANN. §§ 1-2-102 to 103 (1997); *Maney v. State*, 842 P.2d 704, 706 (Mont. 1992); *Montana Talc Co. v. Cyprus Mines Corp.*, 748 P.2d 444, 448 (Mont. 1987).

31. MONT. CODE ANN. § 32-8-103(7) (1997).

32. *Id.* at §32-8-103(8) (emphasis added).

33. *Id.* § 32-8-103(11) (emphasis added).

34. *Id.* § 32-8-103(8).

35. *Id.* § 32-8-103(12).

6. "Person" is defined as "an individual, partnership, corporation, limited liability company, association, trust, or other legal entity."<sup>36</sup>
7. "Supervisory agency" is defined to include (a) the Montana Attorney General and Justice Department criminal law enforcement personnel; (b) the Division, for depository examination and supervision purposes; (c) the Commissioner, who enforces and administers state charter and supervision laws; (d) the Board, for charter issuance; (e) the Federal Reserve System, when U.S. subsidiary of a non-U.S. bank has a depository charter; (f) the Montana Legislative Auditor, for audit and monitoring of public fund collection and disbursements; (g) the Montana Revenue Department, for taxes and fees; and (h) the Montana Insurance Department, for regulating depository account insurers.<sup>37</sup>
8. "Tangible personal property" is defined as "platinum, palladium, gold, or silver bullion or coins, precious stones, jewelry, works of art, furnishings, and other objects of value that are not legal tender."<sup>38</sup>

Certain definitions warrant brief analysis and observations here.

A depository "customer" is any "person," who in turn can be any individual or legal entity.<sup>39</sup> The Act expressly bars deposits from individuals who are U.S. citizens and residents, as well as from "a corporation, trust, or partnership if any shareholder, settlor, member, beneficiary, or partner" is a U.S. citizen or resident.<sup>40</sup> The Act is ambiguous, however, about offshore corporations owned *indirectly* by U.S. shareholders or corporate entities. A U.S. citizen or resident alien may thus be able to create a non-U.S. corporation or other legal entity, which in turn could create and own an interest in a separate non-U.S. corporate or other legal entity.

The Act broadly defines a depository "controlling person" for charter eligibility purposes; and the Board has adopted an even broader definition including "any person who directly or indirectly acting through or in concert with one or more persons holds 5% or more of the equity in a foreign capital depository."<sup>41</sup> However, the Act has no similar definition for customer identity or eligibility purposes, and its language appears to permit a non-U.S. entity controlled by another non-U.S. entity or person (if the former has no U.S. citizen or resident alien shareholder or principal) to be a depository customer even though the Act's intent may not have

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36. *Id.* § 32-8-103(13).

37. *Id.* § 32-8-103(15).

38. *Id.* § 32-8-103(16).

39. *See id.* § 32-8-103(5), (14).

40. *Id.* § 32-8-315.

41. MONT. ADMIN. R. 8.87.801(2)(g) (1998).

been to do so. A future legislature may wish to clarify this by noting analogous U.S. Internal Revenue Code definitions.<sup>42</sup>

### C. Depository Charter Application Process and Fees

The Act requires depositories to have state charters and bars unchartered entities from transacting business under a name or title containing the terms "foreign," "capital," and "depository."<sup>43</sup> A depository charter applicant must incorporate in Montana and file its incorporation articles with the Division.<sup>44</sup> It must also file a separate application with the Board.<sup>45</sup> The application must identify and verify a background check on each proposed depository director, executive officer, and "controlling person."<sup>46</sup> It must also contain a customer identity and assets verification plan; depository personnel training and screening methods; security and federal transactions record keeping and reporting plans; a certified financial statement attesting that applicant assets exceed liabilities in an amount set by Board rule; and a viable business plan.<sup>47</sup> A Board rule requires a minimum \$2 million capitalization per depository, with at least fifty percent in U.S. currency and no more than fifty percent in tangible personal property.<sup>48</sup> Foreign bank subsidiaries regulated by the Federal Reserve System may also obtain charters.<sup>49</sup>

Charter applicants must pay a \$25,000 non-refundable application fee set by Board rule, based on applicant background check costs.<sup>50</sup> Successful applicants must pay an initial \$50,000 charter fee, less the application fee amount.<sup>51</sup> Annual charter renewal fees are not to exceed \$10,000.<sup>52</sup>

42. See, e.g., 26 U.S.C. §§ 957, 958 (defining controlled foreign corporations and prescribing criteria for determining U.S. or foreign corporate citizenship based on actual direct and indirect shareholder identity); 26 U.S.C. § 6038(2)(c) (defining U.S. and foreign corporations by direct and indirect shareholder identity).

43. See MONT. CODE ANN. § 32-8(1), (2) (1997); MONT. ADMIN. R. 8.87.802, 8.87.805 (1998); MONT. ADMIN. R. 8.80.802, 8.80.804 (1998).

44. See MONT. CODE ANN. § 32-8-103(11), -201(b).

45. See MONT. ADMIN. R. 8.87.802.

46. See *id.*

47. See *id.* at 8.80.804.

48. See *id.* at 8.87.805.

49. See MONT. CODE ANN. § 32-8-201(2) (1997); MONT. ADMIN. R. 8.87.805 (1998); see also 12 U.S.C. 3101 *et seq.* (referenced in the Montana Act as the latter's legal frame of reference for granting depository charters to such subsidiaries).

50. See MONT. ADMIN. R. 8.87.802.

51. See MONT. CODE ANN. § 32-8-205(2).

52. See *id.* § 32-8-205(3).

The Act requires stringent depository know-your-customer policies as a condition for receiving and keeping a charter.<sup>53</sup> Although the Act does not define "know-your-customer" directly, the Division has done so in a rule that contains the detailed know-your-customer criteria required to comply with applicable Federal Reserve System customer requirements.<sup>54</sup> Absent compliance with the federal criteria, a depository must: (1) know customer identities, funding sources, backgrounds and identity of the private investigative service used for prospective customer background checks; (2) maintain anticipated customer transaction profiles and "suitability" determinations; (3) monitor customer depository activity compatibility with initial profiles; (4) comply with federal money laundering, and financial crimes law; and (5) establish and maintain internal audit procedures to ensure such compliance.<sup>55</sup>

These criteria in turn resemble both the American Bankers Association Money Laundering Task Force suggested criteria adopted following the 1992 Annunzio-Wiley Money Laundering Act, and the Federal Reserve System know-your-customer requirements.<sup>56</sup> A separate Division rule imposes federal suspicious activity reporting requirements on depositories as an additional know-your-customer requirement under the act.<sup>57</sup>

The Board may deny charters if an applicant or person planning to own, operate, or manage the depository is determined not to be "of good character" or "financially sound" based on statutory criteria.<sup>58</sup> These criteria include whether such person (or applicant's controlling person, director, or executive officer) has (1) been convicted of or pleaded guilty or *nolo contendere* to any theft, fraud, conspiracy, money laundering, or racketeering crime; (2) had a professional license revoked or suspended for conduct "involving an act of fraud or dishonesty;" (3) wilfully made or caused to be made false or misleading statements in a depository application; (4) wilfully violated, or helped anyone else to violate, any Act charter application requirement; or (5)

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53. See MONT. ADMIN. R. at 8.80.804.

54. See *id.* at 8.80.804.

55. See *id.*

56. See 1997 Report, *supra* note 13, at 79-82; MONT. ADMIN. R. 8.80.804 (1998). For a detailed review of current Federal Reserve System and other federal agency know-your-customer actual and proposed new regulations, see Federal Reserve Board Notice of Proposed Rulemaking, 63 Fed. Reg. 67516 (1998) (to be codified at 12 C.F.R. pts. 208, 211, 225) (proposed Dec. 7, 1998); Office of Thrift Supervision Notice of Proposed Rulemaking, 63 Fed. Reg. 67536 (1998) (to be codified at 12 C.F.R. pt. 563) (proposed Dec. 7, 1998); and similar proposals by the Comptroller of the Currency and the FDIC.

57. See MONT. ADMIN. R. 8.80.807 (1998).

58. See *id.* at 82.803.

committed any other act or omission objectionable to the Board.<sup>59</sup>

The Act authorizes background checks by the Commissioner on any proposed depository director, executive officer, or controlling person, and it also authorizes Board to establish financial soundness rules.<sup>60</sup> The Board may suspend or revoke charters for (1) an Act violation; (2) failure to follow a Commissioner order; (3) any unsound or unsafe condition; (4) insolvency, i.e., a depository's inability to pay its bills when due, or liabilities exceeding assets; (5) bankruptcy; (6) false statements or reports to the Department; (7) failure to pay any required state fee, penalty or interest; or (8) if the depository is a foreign bank holding company or other foreign financial institution subsidiary, the suspension or revocation of the foreign entity's licensure in its domicile nation.<sup>61</sup>

Charter revocation or suspension requires a Board hearing pursuant to the Montana Administrative Procedure Act,<sup>62</sup> and the Board may reinstate a suspended or revoked charter once the depository has corrected its problems.<sup>63</sup> The Act also empowers the Commissioner to issue cease and desist or other administrative orders deemed necessary by the Commissioner (although grounds for such orders are not specified),<sup>64</sup> and it also allows the Commissioner to order civil penalties up to \$10,000 per Act violation per day.<sup>65</sup> The Commissioner's orders must also comply with Montana's Administrative Procedure Act.<sup>66</sup>

#### D. *Depository Regulation, Supervision, and Taxability*

The Act authorizes the Department to promulgate rules to (1) ensure depository compliance with all Act provisions; (2) establish Department examination procedures, including those related to Act know-your-customer requirements; (3) set "suspicious activity" reporting requirements; (4) compel submission—at Department request—of all customer records of depository transfers or withdrawals of \$10,000 or more; and (5) require annual Department reports detailing depository security measures, federal money laundering compliance procedures, and employee training programs related to customer privacy and

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59. See 1997 MONT. LAWS 382, § 9.

60. See *id.*

61. See *id.* § 10.

62. See *id.*

63. See *id.* § 11.

64. See *id.*

65. See 1997 MONT. LAWS 382, § 43.

66. See *id.* § 10.

other Act disclosure requirements.<sup>67</sup> Depositories must comply with all applicable federal money laundering laws and reporting requirements described below.<sup>68</sup>

The Department must conduct annual depository financial examinations and report results to the examined depositories.<sup>69</sup> The Act compels depository cooperation with such examinations, subject to customer confidentiality considerations described below.<sup>70</sup> The Act permits, but does not require, Department examinations of foreign bank-chartered depositories in cooperation with the Federal Reserve System,<sup>71</sup> and it allows for Department acceptance of Federal Reserve examination results or findings.<sup>72</sup> Depositories must keep all records in English words and figures,<sup>73</sup> and in a form satisfactory to the Department.<sup>74</sup> The Act authorizes special Department examinations when "the condition of a depository or the actions of a customer necessitate" them, at depository cost not to exceed four hundred dollars per day per examiner plus other actual Department costs.<sup>75</sup>

The Act prohibits any charter sale, transfer, or assignment,<sup>76</sup> and it subjects charter transferors or recipients to criminal and civil liability for knowing violations.<sup>77</sup> It permits the Board to dissolve depositories based upon the above-cited grounds, and for negligence or misconduct.<sup>78</sup> It also allows Board removal of directors, executive officers, or employees prior to dissolution.<sup>79</sup> The Department may close depositories and seize all books, records, and assets under state statutes applicable to the closing of all state-chartered financial institutions.<sup>80</sup> A depository may not close its primary office or cease operations absent Department written consent.<sup>81</sup> Voluntary dissolution must meet statutory requirements applicable to all state-chartered financial institutions.<sup>82</sup>

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67. See MONT. CODE ANN. § 32-8-301 (1997) (Regulatory Supervision Statutes).

68. See *id.* § 32-8-314(e).

69. See *id.* § 32-8-303.

70. See *id.* § 32-8-303(2).

71. See *id.* § 32-8-303(4)(a), (b).

72. See *id.* § 32-8-313(5).

73. See *id.* § 32-8-303(c).

74. See 1997 MONT. LAWS. 382, § 18 (discussing reports but not English requirement); MONT CODE ANN. §§ 32-8-308, -309 (1997).

75. *Id.* § 32-8-304.

76. See *id.* § 32-8-311(1).

77. See *id.* § 32-8-311(2).

78. See *id.* § 32-8-312.

79. See *id.*

80. See *id.*

81. See *id.*

82. See *id.*

The Act imposes various civil and criminal penalties for non-compliance. It permits the Department to enjoin violations of and enforce compliance with all Act statutes and rules.<sup>83</sup> It also authorizes the Department to seek civil penalties of up to \$10,000 per day for most Act statutory and rules violations.<sup>84</sup> Finally, the Act imposes criminal liability for most knowing statutory and rules violations with fines up to \$10,000 per violation, imprisonment up to six months for initial offenses, or both (although the knowing violation of Act customer records disclosure statutes imposes harsher penalties, as described below).<sup>85</sup>

Customers pay no Montana taxes,<sup>86</sup> while depositories pay no corporate income taxes and are exempt from state corporate license taxes until 2012.<sup>87</sup> Depositories do pay semi-annual fees of 0.75% of deposited assets, calculated on the assessment date, and based on either a dollar value or the market price of precious metals or other tangible property held on account or in safe deposit boxes.<sup>88</sup>

#### E. *Depository Services and Activities Prohibitions*

The Act authorizes, requires, restricts, and bars specific depository activity. Depositories may (1) accept deposits in any currency or form convertible to U.S. currency; (2) offer safe deposit and other storage services to protect customer "tangible personal property"; (3) convert cash deposits to purchase orders for platinum, palladium, gold, or silver bullion on customer behalf or direction; (4) purchase, sell, and pay interest to customers for tax exempt federal, state, or local government bonds; (5) exchange foreign currency; (6) offer trust and fiduciary services *if* the depository receives a Department trust company or trust company subsidiary certificate required for all state-chartered financial entities; (7) issue customer debit and ATM cards; (8) charge customer debit and ATM card interest; (9) establish different types of customer accounts; (10) offer deposit or safe deposit insurance from insurers approved by the Montana Insurance Commissioner; (11) charge fees for customer tangible personal property storage, trust and account opening, management, and insurance; (12) set underwriting standards for each type of customer account; and (13) set minimum deposit

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83. See 1997 MONT. LAWS 382, § 43.

84. See *id.*

85. See *id.* § 44.

86. See MONT. CODE ANN. § 15-31-102 (1997).

87. See *id.* at §§ 15-31-101, -102, -802 (Taxation).

88. See *id.* §§ 15-31-803.

amounts not less than \$200,000.<sup>89</sup> The Act also permits depositories to refuse, at their discretion, customer applications for accounts of any type.<sup>90</sup>

The Act mandates that a depository: (1) exercise "extraordinary diligence" in determining genuine depository customer identity; (2) ensure customer privacy protection pursuant to the Act provisions described below; (3) provide legal defense of a customer at customer (or customer legal representative) request against Montana recognition of a civil judgment obtained against the customer outside the United States; (4) comply with applicable Montana state securities fraud statutes involving customer precious metals accounts; and (5) comply with federal financial institutions secrecy and money laundering statutes and regulations.<sup>91</sup>

The Act prohibits acceptance of deposits from U.S. citizens and residents, and from corporations, trusts, or partnerships if any shareholder, settlor, member, beneficiary, or partner is a U.S. citizen or resident.<sup>92</sup> It also bars deposits in an amount less than \$200,000.<sup>93</sup> Furthermore, it bars depository services to any nonresident alien customer; depository lending or commercial banking services (except for certain Department-approved trust lending or precious metals account activity); transferring \$10,000 or more of customer cash on deposit to any other U.S. or non-U.S. financial institution without giving the Commissioner and the Montana Attorney General the customer's name, last known address, and passport number; and accepting a deposit from any customer who has been convicted of a state or federal felony, including any corporation with a controlling person who has been convicted of any felony.<sup>94</sup> The Act further bars depository sale or trade of any account except to customer heirs, spouses, or designated kin.<sup>95</sup>

#### F. *Precious Metals Accounts*

The Act authorizes depository customer precious metals accounts "in which the depository, upon instructions of a customer, exchanges cash for a commensurately valued amount of platinum, palladium, gold, or silver bullion procured by the depository for the primary purpose of safekeeping over an

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89. See *id.* § 32-8-314.

90. See *id.*

91. See *id.*

92. See *id.* § 32-8-315.

93. *Id.*

94. See *id.*

95. See *id.* § 32-8-316.

extended period of time.”<sup>96</sup> The Legislature linked this provision to Montana’s own status as a major U.S. precious metals producer in the hope of drawing “many nonresident aliens and foreign corporations” as customers who “place great value in the security inherent in precious metals as a hedge against currency depreciation, currency devaluation and general inflation.”<sup>97</sup> The Legislature apparently anticipates depository interest in Montana’s own precious metals.

Sensitive to money laundering abuse potential, the Act limits the “liquidity of a precious metals account” to “reduce significantly any incentive there may be for a person to use a precious metals account for illicit purposes.”<sup>98</sup> It also requires precious metals account maturity terms of at least thirty-six months, with a mandatory early withdrawal penalty greater than twenty percent based on an account’s total precious metals amount valued at the *Wall Street Journal* spot market price on the withdrawal date.<sup>99</sup>

The Act also requires delivery of all precious metals bought by a customer to the depository “within 7 days of verified payment of any part of the purchase price.”<sup>100</sup> Notwithstanding the thirty-six month account maturity date, however, the Act permits debit or ATM card withdrawal of up to twenty percent of an account without penalty before maturity, subject to customer interest and fee charges.<sup>101</sup> Finally, the Act requires conversion of account precious metals at the above spot market rate upon termination of the account either at or before maturity, allowing the depository to delay settlement up to five business days after closure.<sup>102</sup>

#### G. Act Confidentiality Provisions<sup>103</sup>

The Legislature expressly linked Act viability to “the confidential nature of customer accounts and safe deposits in the depository and in the confidential nature of transactions between a customer and a depository.”<sup>104</sup> A key Act purpose protects “the confidential relationship” between depositories and customers, while balancing “a customer’s right of privacy with the

96. *Id.* § 32-8-402.

97. *Id.* § 32-8-401.

98. *Id.*

99. *See id.* § 32-8-403.

100. *Id.*

101. *See id.*

102. *See id.* § 32-8-404.

103. *Id.* § 32-8-5.

104. *Id.* § 32-8-501(1).

governmental interest in obtaining information for specific purposes and by specified procedures" authorized in the Act.<sup>105</sup> As indicated above, the Act generally bars depositories from including customer financial records or identity in most Department reports, and it also bars customer records disclosure during dissolution or closure.<sup>106</sup>

The Act contains other confidentiality provisions. It defines "financial records" protected from disclosure as paper, electronic, or other originals or copies of depository records which contain customer names.<sup>107</sup> It generally precludes disclosure of such records, absent customer consent, except pursuant to administrative or judicial subpoena or criminal search,<sup>108</sup> and it requires state or local agency legal authority to seek use these formal legal avenues.<sup>109</sup> The Act does allow limited voluntary disclosure by depositories if the depositories reasonably believe themselves or their customers to be crime victims, or if they believe that their customers have violated an applicable law.<sup>110</sup> Customer criminal convictions or guilty pleas conclusively shield depositories from liability for such voluntary disclosures.<sup>111</sup> The Act also allows voluntary disclosure without customer consent if the disclosed records do not contain customer names, or if required by federal statute, regulation, or treaty, or other international agreement involving the U.S. Government.<sup>112</sup> The Act prohibits disclosure to private individuals in almost all circumstances except pursuant to court order.<sup>113</sup>

Customers may consent to disclosure of their depository records, but the Act requires depository disclosure forms that are signed and dated by the customer.<sup>114</sup> The forms must specify the time for which disclosure is authorized, identify each person or entity to whom disclosure may be made, and list the records to be disclosed.<sup>115</sup> The Act bars depositories from obligating customers to authorize records disclosure as a condition for doing business,<sup>116</sup> and allows customers to withdraw their disclosure consent in writing any time.<sup>117</sup> Absent a court order based on

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105. *Id.*

106. *See id.*

107. *See id.* § 32-8-502(2)(a).

108. *See id.* § 32-8-503(1)(b), (c), (d).

109. *See id.* § 32-8-503(1).

110. *See id.* §§ 32-8-503(5), -504(2).

111. *See id.* § 32-8-504(2).

112. *See id.*

113. *See id.* § 32-8-505.

114. *See id.* § 32-8-506(1)(a).

115. *See id.* § 32-8-506(1)(b), (c), (d).

116. *See id.* § 32-8-506(2).

117. *See id.* § 32-8-506(3).

good cause, an agency which receives customer financial records must generally notify the customer in writing of any record received within thirty days of receipt.<sup>118</sup> Even if a court permits an agency not to disclose customer record possession, the non-disclosure period may not exceed 180 days and must be renewed each thirty to sixty days by the same judge.<sup>119</sup>

The Act carefully prescribes depository obligations and customer rights regarding records disclosure pursuant to subpoenas and search warrants.<sup>120</sup> Most subpoenas must be served on a customer, who has ten days to object before depositories may disclose customer records, unless a court orders otherwise.<sup>121</sup> A depository must also immediately notify its customer of the warrant unless a court orders otherwise.<sup>122</sup> In no instance may an administrative agency withhold service of a subpoena on a customer absent a court order.<sup>123</sup>

The Act specifies various grounds for quashing subpoenas, including: relevancy; incompetence or immateriality to the purpose for which records are sought; unreasonable customer or depository burden or hardship; harassment; lack of legal basis for the subpoena; or failure to seek the records from other sources.<sup>124</sup> It permits both customer and depository motions to quash,<sup>125</sup> and it requires the latter when it is uncertain whether a customer has been served with sufficient time to object (although the Act allows a customer to waive this obligation by written agreement).<sup>126</sup>

Even when agencies and persons validly obtain customer records, however, the Act limits their use and disclosure to other agencies or persons by requiring all use and retention to comply with "the statutory purpose for which the record was originally obtained."<sup>127</sup> The Act further *requires* liberal use of agency and judicial *in camera* review at customer or depository request "to determine whether the record contains material . . . not expected to be the subject of the investigation, inquiry, or proceeding."<sup>128</sup> The Act also requires a liberal grant of protective orders or "other

118. *See id.* § 32-8-506(4)(a).

119. *See id.* § 32-8-506(4)(a), (b).

120. *See id.* §§ 32-8-507, -509.

121. *See id.*

122. *See id.* § 32-8-508.

123. *See id.* § 32-8-507.

124. *See id.* § 32-8-510.

125. *See id.*

126. *See id.* § 32-8-510(2).

127. *Id.* § 32-8-515(1).

128. *Id.* § 32-8-515(3).

appropriate processes” to protect confidential depository financial records.<sup>129</sup>

The Act imposes civil and criminal penalties for unauthorized disclosure and receipt of depository customer records.<sup>130</sup> Supervisory agency officials who wrongfully disclose customer identity during an examination, audit or investigation face removal from office and felony liability with a \$10,000 fine and up to ten years in prison.<sup>131</sup> A depository employee, officer, director, or controlling person who wrongfully discloses records has misdemeanor liability with up to a \$5,000 fine and up to a year in prison;<sup>132</sup> a knowing wrongful disclosure is a felony.<sup>133</sup> Wrongful request or receipt of customer records by state and local agencies or any other person, as well as wrongful depository disclosure of customer records, permits the imposition of (1) a minimum \$10,000 in damages; (2) all other actual damages; (3) all legal costs and attorney fees; and (4) any other civil remedy authorized by law, including injunctive relief.<sup>134</sup> Depositories may seek all authorized civil remedies on behalf of their customers, with any damages recovered to be placed in the customer's account and the depository entitled to costs and attorney fees.<sup>135</sup> The Act bars customer confidentiality waivers except where it otherwise expressly permits them.<sup>136</sup> It has a three year limitations statute for confidentiality enforcement rights.<sup>137</sup>

The Act contains other provisions less protective of customer records confidentiality rights. To address money laundering concerns:

a state offering secure and confidential depository services to its customers must be mindful that significant amounts of capital are derived from or moved for illegal purposes and that the United States and other jurisdictions have passed laws and worked diligently to prevent money laundering and other offenses from being conducted as part of otherwise lawful transactions.<sup>138</sup>

The Act cites “Montana's needs to enforce its own criminal laws vigorously” in licensing and supervising depositories by cooperating with federal “law enforcement and other authorities to effectively deter and, when deterrence fails, detect, investigate, and prosecute

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129. *See id.*

130. *See id.* §§ 32-8-521, 522.

131. *See id.* §§ 32-8-521(4)(a), -522(2).

132. *See id.* § 32-8-522(1).

133. *See id.* § 32-8-522(2).

134. *See id.* § 32-8-521(4), (6), (7).

135. *See id.* § 32-8-521(5).

136. *See id.* § 32-8-523.

137. *See id.* § 32-8-524.

138. *Id.* § 32-8-501(2).

perpetrators of financial crimes."<sup>139</sup> These money laundering concerns are addressed in more detail further below.

The Montana Legislature expressly states in the Act that its purpose is "not to avoid the application of the Bank Secrecy Act, the Right to Financial Privacy Act of 1978, the Money Laundering Control Act of 1986, and the Annunzio-Wylie Anti-Money Laundering Act" as federal laws which "prevent or deter money laundering and other financial crimes while maintaining a degree of secrecy of customer bank accounts from federal agencies. . . ."<sup>140</sup> Instead, the Act applies "state law in those areas unregulated by these and other relevant federal laws."<sup>141</sup> The Act states "that if there is a clear and direct conflict" between customer confidentiality rights "and applicable federal statutes, treaties or regulations that cannot be resolved by other means, *then the state law would be preempted in order to maintain the efficacy and integrity of United States laws intended to combat financial crimes.*"<sup>142</sup>

In other words, Montana courts must generally decide conflicts between federal and state laws applicable to depositories in favor of the former. This raises doubts about whether the Act can shield depository customer records from federal agencies, and it also raises questions about the Act's attractiveness to prospective foreign depositors. On the other hand, the Legislature has opted to sacrifice some attractiveness in favor of enforcing financial crimes laws. This decision may ultimately enhance the appeal of depositories for asset owners and managers unaffected by criminal laws because their assets derive from untainted sources, as those Act confidentiality protections that are not in conflict with federal money laundering laws seem to provide customers with ample protection from unwarranted legal intrusions. This seems especially true given Montana's state constitutional privacy rights discussed below.

## V. MONTANA STATE PRIVACY LAW CONSIDERATIONS

Montana's Constitution makes individual privacy a right "essential to the well-being of a free society" which "shall not be infringed without the showing of a compelling state interest."<sup>143</sup> This exceeds any privacy right recognized by federal law. Montana's Supreme Court has held that a constitutional privacy

139. *Id.* § 32-8-501(3).

140. *Id.* § 32-8-501(4).

141. *Id.*

142. *Id.* (emphasis added).

143. MONT. CONST. art. II, § 10.

right exists when one seeking to exercise it has an actual or subjective privacy expectation and "society is willing to recognize that expectation as reasonable."<sup>144</sup> The court has recognized this right for both individual behavioral and "confidential informational privacy."<sup>145</sup> Where personal records discovery is concerned even for law enforcement purposes, "Montana adheres to one of the most stringent protections of its citizens' rights to privacy in the country" and requires a narrow tailoring limited to the minimum intrusion needed for protecting a compelling state interest.<sup>146</sup>

The court has recently applied these principles to favor privacy over government intrusion by invalidating Montana's same-sex sodomy laws and criminal remote sensory image surveillance.<sup>147</sup> The latter merits special mention because the court cited the Montana Constitution's overt hostility to all electronic and technological prying except in response to U.S. national security concerns or "heinous federal crimes" (which are unlikely to include most financial transactions covered by the Act).<sup>148</sup> The court has also recently raised doubts about whether even court-ordered writs of attachment authorizing entry into private property for non-criminal property seizures meet these constitutional privacy standards.<sup>149</sup>

The court has had only a few occasions to apply Montana privacy laws to financial or comparable records, and it did rule a number of years ago that private citizen telephone records do not enjoy constitutional privacy protection.<sup>150</sup> Several witnesses cited this older case for concluding that individual bank records may not have such privacy, and legislative staff who drafted the Act appeared to agree.<sup>151</sup> This view seems overly cautious, however, because it relies on legal precedent that predates the court's most recent privacy decisions, and fails to consider two other relevant Montana Supreme Court cases.

For example, the court has given financial trade secrets in state agency possession constitutional privacy protection from both public and other state agency scrutiny.<sup>152</sup> It has also

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144. *State v. Burns*, 830 P.2d 1318, 1321 (Mont. 1992).

145. *State v. Nelson*, 941 P.2d 441, 448 (Mont. 1997).

146. *Id.* at 447 (quoting *Burns*, 830 P.2d at 1320); see also *Dorwart v. Caraway*, 966 P.2d 1121, 1137-38 (Mont. 1998).

147. See *Gryczan v. State*, 942 P.2d 112 (Mont. 1997); *State v. Siegal*, 934 P.2d 176 (1997).

148. See *State v. Siegel*, 934 P.2d at 180.

149. See *Dorwart*, 966 P.2d 1121.

150. See *Hastetter v. Behan*, 639 P.2d 510 (Mont. 1982).

151. See 1997 Report, *supra* note 13, at 42.

152. See *Mountain States Tel. & Tel. v. Department of Pub. Serv. Regulation*, 634 P.2d 181 (Mont. 1981).

barred state law enforcement access to private personnel records and other state agency access to public employee personnel records except by subpoena subject to stringent criminal search warrant standards.<sup>153</sup> Although the court has recently refused to apply constitutional privacy principles to the State of Montana itself in public procurement bidding and negotiations, the court nonetheless noted that even in this context the private sector companies submitting their business proprietary information have a state constitutional right that protects it from public disclosure in many circumstances.<sup>154</sup> The test used by today's court to decide when depository customer records might enjoy constitutional privacy protection appears to favor such privacy.

The Act itself contains various provisions described above which connote unequivocal legislative intent to make depository records confidential, creating both an actual and an individual customer subjective privacy expectation. There also appears to be no basis for concluding that society would find such a right or expectation unreasonable in Montana, given the state's strong legal privacy rights tradition regarding personal information. Subject to the limited depository records access and disclosure provisions allowed in the Act, and given the court's strong recent privacy protection trend, depository customers appear to have substantial privacy protection from state and local government or private third-party intrusion into their activities and records.

## VI. FEDERAL MONEY LAUNDERING ISSUES AFFECTING THE ACT

A detailed analysis of federal money laundering statutes<sup>155</sup> and regulations affecting and affected by the Act exceeds this Article's scope. It nonetheless seems useful to summarize them

153. See *id.*; *State v. Burns*, 830 P.2d 1320 (Mont. 1992); *Montana Human Rights Div. v. Billings*, 649 P.2d 1283 (Mont. 1982).

154. See *Great Falls Tribune Co. v. State*, 959 P.2d 508 (Mont. 1998).

155. Federal money laundering laws applicable here include the Bank Secrecy Act, codified at 31 U.S.C. § 5311 *et seq.*; the 1986 Money Laundering Control Act, 18 U.S.C. § 1957; the 1992 Annunzio-Wylie Anti-Money Laundering Act, Pub. L. No. 102-550, 106 Stat. 3672 (1992) (codified in scattered sections of 12, 18, and 31 U.S.C.); and the 1994 Money Laundering Suppression Act, Pub. L. No. 103-325, 108 Stat. 2243 (1994) (codified in scattered sections of 18 U.S.C.). In addition, even though the Montana Act fails to cite the more recently enacted Money Laundering and Financial Crimes Strategy Act of 1998, Pub. L. No. 105-310 (1998) (codified at U.S.C. tit. 31, ch. 53), one may reasonably assume the latter's incorporation into the former for compliance and preemption purposes. For legal assessments of federal money laundering laws and issues, see Andrew J. Camello & Benjamin Pergament, *Money Laundering*, 35 AMER. CRIM. L. REV. 965 (1998); Fletcher N. Baldwin, *Money Laundering and Wire Transfers: When the New Regulations Take Effect Will They Help?*, 14 DICK. J. INT'L L. 413 (1996).

here to assess the potential impact on depository activities because the Act requires compliance with them.

The federal Bank Secrecy Act will require depositories to keep customer financial transactions records and report any currency transaction exceeding \$10,000 on any business day, or any movement of currency or monetary instrument in excess of \$10,000 into or from the United States.<sup>156</sup> It will also require depositories to keep records on all funds transfers exceeding \$3,000.<sup>157</sup> The 1986 Money Laundering Control Act<sup>158</sup> bars structuring depository financial transactions to avoid Secrecy Act report and records requirements.<sup>159</sup> The 1988 Money Laundering Prosecution Improvements Act<sup>160</sup> limits depository transactions with non-customers and possibly requires reporting of transactions under the \$10,000 threshold in "suspicious" cases.<sup>161</sup> The 1992 Annunzio-Wylie Anti-Money Laundering Act<sup>162</sup> requires depositories to identify customers and report information about them, and it also requires depository employees to report suspected illegal customer activity without notifying the customer.<sup>163</sup> The 1994 Money Laundering Suppression Act<sup>164</sup> will permit electronic reports and record keeping to reduce the burden of federal compliance.<sup>165</sup>

All the above reports go to the U.S. Treasury Department, which has agreements with several dozen non-U.S. law enforcement agencies to police money laundering activity. The Treasury Department also has agreements with states, including Montana, to cooperate in money laundering law enforcement activity.<sup>166</sup> Failure to meet these federal reporting and record-keeping requirements can result in major criminal and civil penalties for depositories and their employees, officers, directors, and customers, and, as already noted, may also expose state depository regulatory officials and agencies to the same

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156. See 31 U.S.C. § 5311.

157. See *id.*

158. See 18 U.S.C. § 1957.

159. See *id.*

160. See Pub. L. No. 100-690, 102 Stat. 4354 (1988) (codified at 18 U.S.C. § 981).

161. See 31 U.S.C. § 5326.

162. Pub. L. No. 102-550, 106 Stat. 3672 (1992) (codified in scattered sections of 12, 18, and 31 U.S.C.).

163. Pub. L. No. 102-550, 106 Stat. 3672 (1994).

164. Pub. L. No. 103-325, 108 Stat. 2243 (1994) (codified in scattered sections of 18 U.S.C.).

165. See *id.*

166. See 1997 Report, *supra* note 13, at 75-58. See also Scott Sultzer, *Money Laundering: The Scope of the Problem and Attempts to Combat It*, 63 TENN. L. REV. 143, 182-83 & n.238 (1995) (discussing Project Gateway cooperation with states).

liabilities.<sup>167</sup> The new 1998 Money Laundering and Financial Crimes Strategy Act<sup>168</sup> may prove particularly relevant here because it requires the U.S. Treasury Secretary and U.S. Attorney General to develop a comprehensive strategy to combat money laundering and identify high risk areas.<sup>169</sup> It also provides federal grants to state and local law enforcement agencies for the purpose of assisting federal enforcement actions.<sup>170</sup>

The Montana Act requires depositories, their customers, and the state itself to comply with all federal money laundering legal requirements.<sup>171</sup> Given these requirements, there is no reason to assume that the Act will attract or bolster illicit financial transactions or funds to any greater or lesser extent than current U.S. and state laws already do so. The Act's attraction to prospective depository owners and their customers must therefore lie in other areas, such as Montana's ability to protect customer information from non-federal governments both here and abroad based on the state privacy law considerations described above, the Act's favorable tax treatment of depository customers, and the Act's strict barriers to shield depository customer assets from third-party judgment creditors as described below.

#### VII. ACT FOREIGN JUDGMENT ENFORCEMENT AND RECOGNITION BARRIERS

Although Montana has enacted Uniform Enforcement of Foreign Judgments and Uniform Foreign Money-Judgments Recognition laws,<sup>172</sup> the Act favors depository customer asset protection over these Uniform Acts in private party litigation.<sup>173</sup> The 1997 Act amended Montana's Foreign Money-Judgments Recognition statutes by expressly excluding judgments against

167. See generally Camelio & Pergament, *Money Laundering*, *supra* note 155. Federal money laundering law defines "financial institution" for reporting purposes as "an agency of . . . a State or local government carrying out a duty or power of a business. . . ." 31 U.S.C. § 5312(w).

168. See Pub. L. No. 105-310, 112 Stat. 2950 (1998).

169. See *id.* sec. 2 (to be codified at 31 U.S.C. § 5341).

170. See *id.* sec. 2 (to be codified at 31 U.S.C. §§ 5352-5355).

171. See MONT. CODE ANN. § 32-8-501(4).

172. MONT. CODE ANN. § 25-9-5, -6 (1997) set forth Montana's Uniform Enforcement of Foreign Judgments and Uniform Foreign Money-Judgments Recognition Acts, while MONT. CODE ANN. § 25-9-8 (1997) contains the 1997 Act Foreign Capital Depository—Asset Protection provisions. The 1997 Act does not directly address the Montana Uniform Foreign-Money Claims Act, MONT. CODE ANN. tit. 25, ch. 9, pt. 7 (1997), although the former states its intent in pertinent parts to override other conflicting Montana statutory provisions.

173. See MONT. CODE ANN. § 25-9-5, 7, 8.

depository customers from its scope.<sup>174</sup> The 1997 Act also created a new Montana Code Foreign Capital Depository—Asset Protection Part to shield depository customers from judgments otherwise subject to these Uniform Judgment statutes.<sup>175</sup>

The Act contains other depository customer protections against foreign judgments, which include: (1) declaring depository customer asset protection “a vital component” of depositories “designed to serve the interests of high net worth individuals who are not U.S. citizens and do not reside in the United States;”<sup>176</sup> (2) denying comity towards non-U.S. judgments against depository customers;<sup>177</sup> (3) requiring depositories to defend customers from efforts to recognize and enforce judgments in Montana courts;<sup>178</sup> (4) imposing a \$2,500 filing fee on anyone seeking foreign judgment recognition against depository customers;<sup>179</sup> and (5) sealing customer records in most judgment recognition litigation.<sup>180</sup> The Act also declares foreign judgment recognition and execution against depository customers “repugnant” to Montana public policy if such actions: violate individual privacy rights under international or Montana law;<sup>181</sup> stimulate “lawsuits motivated by greed or pecuniary speculation and lacking a good faith argument or other legally sound purpose;”<sup>182</sup> facilitate “civil prosecution arising from class or ethnic hatred and nurtured by a corrupt legal system;”<sup>183</sup> or threaten depository or the state’s stability “by discouraging foreign depositors and investors from becoming customers or by encouraging customers to withdraw their capital.”<sup>184</sup>

The Act does permit a foreign judgment creditor to enforce a judgment by proving that it “was rendered under a system that provides impartial tribunals or procedures . . . compatible with . . . due process of law” by a foreign tribunal that had both subject matter and personal jurisdiction in the case.<sup>185</sup> It also requires depositories or their customers to prove lack of adequate notice, fraud, foreign state public policy violation, conflict with another judgment, settlement agreement breach, or forum non

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174. See *id.* § 25-9-603.

175. See MONT. CODE ANN. tit. 25, ch. 9, pt. 8 (1997).

176. MONT. CODE ANN. § 25-9-801(1).

177. See *id.* § 25-9-801(3).

178. See *id.* § 25-9-803.

179. See *id.* § 25-9-506(2), -804.

180. See *id.* § 25-9-809(3).

181. See *id.* § 25-9-805.

182. *Id.* § 25-9-805(3).

183. *Id.* § 25-9-805(4).

184. *Id.* § 25-9-805(5).

185. *Id.* § 25-9-806(a), (b).

conveniens as nonrecognition grounds if any are raised.<sup>186</sup> It also imposes costs and attorney fees against anyone who unsuccessfully seeks judgment recognition against depository customers.<sup>187</sup> Additionally, the Act allows for monetary damages not to exceed \$1 million for customer loss of privacy—based on judgment creditor ability to pay.<sup>188</sup> Finally, the Act bars contingency fee cases on behalf of foreign judgment creditors against depository customers.<sup>189</sup>

The Act would appear to have little effect on U.S. court judgments, largely because of reasons grounded in the Full Faith and Credit Clause of the U.S. Constitution.<sup>190</sup> It nonetheless substantially modifies the recent U.S. judicial trend towards recognizing and enforcing non-U.S. court judgments.<sup>191</sup> In addition, at least two federal court decisions—including the Ninth Circuit U.S. Court of Appeals, which has jurisdiction over Montana—have acknowledged that non-U.S. judgments obtained in legal systems or under legal circumstances contrary to the U.S. forum policies like those reflected in Montana statutes will lawfully defeat recognition and enforcement of such judgments.<sup>192</sup>

The Montana statutory provisions will likely make foreign judgment recognition and enforcement against depository customers very difficult to obtain. The Legislature intended this result when it preempted Montana's otherwise conflicting uniform foreign judgment statutes. Although judgments obtained in courts with modern laws and legal systems protective of individual rights may well be enforceable against depository customers in certain cases, such judgments will almost certainly

186. See *id.* §§ 25-9-806(2), -605(2).

187. See *id.* § 25-9-806(4).

188. See *id.* § 25-9-807(1), (2).

189. See *id.* § 25-9-808.

190. See *Baker v. General Motors Corp.*, 118 S. Ct. 657, 663-64 (1998) (citing the "exacting" requirement that states recognize other U.S. state and federal judgments with little if any discretion); *Carr v. Bett*, 970 P.2d 1017 (Mont. 1998) (discussing and applying Full Faith and Credit principles).

191. See, e.g., *Van Den Biggelaar v. Wagner*, 978 F. Supp. 848 (N.D. Ind. 1997) (the court recognized and enforced Dutch judgment because the U.S. court voluntarily consented to jurisdiction and had a full and fair hearing); *Tonga Air Services, Ltd. v. Fowler*, 826 P.2d 204 (Wash. 1992) (recognizing and enforcing foreign money judgment rendered by Tongan trial court); *Reading & Bates Constr. Co. v. Baker Energy Resources Corp.*, 976 S.W.2d 702 (Tex. App. 1998) (recognizing and enforcing Canadian judgment awarding damages for patent infringement).

192. See *Bank Melli Iran v. Pahlavi*, 58 F.3d 1406 (9th Cir. 1995) (refusing to enforce Iranian court judgment because Iran's judicial system did not afford adequate due process when the judgment was issued); *Matusevitch v. Telnikoff*, 877 F. Supp. 1 (D.D.C. 1995), *aff'd* 159 F.3d 636 (D.C. Cir. 1998) (refusing to enforce British libel judgment as contrary to U.S. free speech laws).

be the minority. This aspect of the Act may prove attractive to depository customers who wish to shield assets from adverse overseas litigation.

#### VIII. RECENT FEDERALISM DEVELOPMENTS THAT ARE POTENTIALLY APPLICABLE

Given the nature and purpose of Montana's Foreign Capital Depository Act, no analysis of the Act could be complete without briefly addressing recent U.S. federalism legal issues potentially applicable to depository activities. The first involves the extent to which any otherwise applicable U.S. treaty or international agreement can now be enforced against any state government agency or activity absent the state's consent. The U.S. Supreme Court has recently suggested that treaties entered into by the U.S. Government may not be enforceable against states because of federal Eleventh Amendment immunity considerations.<sup>193</sup> Legal scholars now conclude that the federal government may lack the power to enter into any international agreements binding on the states, at least to the extent such agreements obligate state governments themselves to act or refrain from acting;<sup>194</sup> one such scholar has observed that the U.S. Constitution's framers expressly rejected efforts to preclude Eleventh Amendment immunity from applying to states in international treaty cases.<sup>195</sup> These new developments raise substantial doubt about whether any federal money laundering treaties or international agreements can be lawfully enforced (at least in federal court) against a state's will for activities like those applicable to Montana government agency and official regulatory involvement with depositories. However, federal agencies would apparently

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193. See *Breard v. Greene*, 118 S. Ct. 1352, 1356 (1998) (citing the Eleventh Amendment as a likely basis for barring suit by a foreign country, under the Vienna Convention, against the State of Virginia); see also *Republic of Paraguay v. Allen*, 134 F.3d 622 (4th Cir. 1998) (stating that the Eleventh Amendment does not permit the federal courts to provide a remedy against state officials since the treaty violation was not ongoing when the action was filed, nor was the relief provided prospective); *United Mexican States v. Woods*, 126 F.3d 1220 (9th Cir. 1997) (stating that the Eleventh Amendment provides immunity to a state and state officials from suit by a foreign government in federal court); *Consulate General of Mexico v. Phillips*, 17 F. Supp.2d 1318, 1323 (S.D. Fla. 1998) (stating that the Eleventh Amendment provides immunity to a state and state officials from suit by a foreign government in federal court).

194. See generally Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390 (1998).

195. See James E. Pfander, *History and State Suability: An "Explanatory" Account of the Eleventh Amendment*, 83 CORNELL L. REV. 1269, 1362 (1998).

still have jurisdiction over the depositories and their customers pursuant to any treaty.<sup>196</sup>

Of course, the Montana Foreign Capital Depository Act itself may reduce any actual conflict to a large extent with its express preemption of any Act provision to the extent "there is a *clear and direct* conflict" with "applicable federal statutes, treaties or regulations that cannot be resolved by other means . . ." <sup>197</sup> On the other hand, one needs little imagination to envision situations in which there is no "clear and direct conflict" between federal and state laws or their interpretations (such as an internal federal agency memorandum of understanding with a non-U.S. government agency counterpart to assist the latter's financial crimes law enforcement effort despite the lack of any formal treaty or federal statute specifically requiring, or even directly authorizing, such assistance). In such cases, there could well be reasonable doubt about the Montana preemption applicability; as already noted above, the Act imposes harsh legal penalties on Montana public officials who disclose depository or customer information except where the Act expressly authorizes such disclosure. As one legal commentator recently noted, current federalism legal principles suggest that even federal prosecution and civil enforcement of financial criminal laws involving states now face unprecedented Eleventh Amendment and related challenges.<sup>198</sup>

One other issue related to the above federalism concerns also warrants attention here. The Montana Act relies heavily on federal know-your-customer regulations and the Montana Legislature clearly intended to incorporate these regulatory principles in 1997. Since that time, however, virtually all federal agencies responsible for regulating financial institution monetary transactions and reporting have jointly proposed revised federal know-your-customer regulations substantially more detailed than those in place in 1997.<sup>199</sup> These proposed regulations have unleashed a virtual firestorm among national interest groups and U.S. media committed to financial information privacy protections.<sup>200</sup> Given Montana's own unequivocal commitment to

196. See *El Al Airlines, Ltd. v. Tseng*, 67 U.S.L.W. 4036 (U.S. Jan. 12, 1999) (precluding air passenger from maintaining private right of action in conflict with international aviation treaty).

197. MONT. CODE ANN. § 32-8-501(4) (1997) (emphasis added).

198. See generally George D. Brown, *Should Federalism Shield Corruption? Mail Fraud, State Law and Post-Lopez Analysis*, 82 CORNELL L. REV. 225 (1997).

199. See Proposed Rulemaking Notices, *supra* note 56.

200. See, e.g., James Bovard, *Snooping Eyes on Savings*, WASH. TIMES, Jan. 28, 1999, at A18; Scott Barancik, *FDIC Chief, ABA Lining Up Against 'Know-Your-Customer'*, AM. BANKER, Jan. 27, 1999, at 1; Donald Csaposs, *Maintaining Profiles of Clients Threat to Liberties*, ALBANY TIMES UNION, Jan. 26, 1999, at A6.

privacy rights noted above, it is perhaps only a matter of time before Montana's political and legal leadership joins the national protest against these proposed regulations if their implementation becomes likely. If and when this occurs, one can reasonably assume that Montana's willingness to embrace federal know-your-customer principles, with regard to depositories and otherwise, will change and the Montana Act could face revision.

## IX. CONCLUSION

The Act presents a novel legal effort by Montana to create a new type of financial institution for non-U.S. customers and their assets. Only Montana has adopted such a law to date, although two other states are presently considering similar ones.<sup>201</sup> Although no depository has yet been licensed, Montana has received hundreds of inquiries from prospective applicants and their customers during the past year since the adoption of final Act implementing regulations. The author's own recent experiences in fielding inquiries about the Act's legal aspects confirm a more-than-casual interest in its provisions.<sup>202</sup>

The author understands the basis for national media and U.S. federal official skepticism about the depositories. However, such skepticism disregards many key aspects of the Act: Montana's unique privacy law rights; the Act's stringent customer records confidentiality provisions; depository customer protections from most foreign judgment creditors; and the beneficial tax treatment of depositories. Once skeptics discover these factors and learn that Montana incorporates federal money laundering laws as its own with the objective of attracting only clean foreign asset deposits, the skepticism necessarily ceases while serious interest heightens.

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201. See S.B. 83, 62D LEG., 1ST REG. SESS. (COLO. 1997); S.B. 9, 20TH LEG. (HAW. 1999). Hawaii considered foreign capital depository legislation somewhat similar to Montana's during the 1997-98 legislative session, but money laundering concerns prevented the sponsors from finding enough support to enact it. See H.B. 2499, 19th LEG. (HAW. 1998); H.B. 3398, 19th LEG. (HAW. 1998); H.B. 3387, 19th LEG. (HAW. 1998); S.B. 2354, 19th LEG. (HAW. 1998); S.B. 2603, 19th LEG. (HAW. 1998); S.B. 2821, 19th LEG. (HAW. 1998); S.B. 2961, 19th LEG. (HAW. 1998); S.R. 81, 19th LEG. (HAW. 1998); Olaf Domis, *Hawaii Legislators Weigh New Depositories Structure*, AM. BANKER, Mar. 12, 1998, at 7; *Money Laundering Hot Line*, 8 MONEY LAUNDERING 2 (1998). Of the Hawaii legislation listed herein, Senate Bill 2821, which creates a state task force to study foreign capital depositories, was enacted in July 1998. See 1998 Haw. Sess. Laws 154 § 2 (citing Montana's law).

202. David Aronofsky & Senator Mike Sprague, Remarks at the Offshore Wealth Summit (Dec. 11, 1998). See also Charles Johnson, *Montana Still Awaits Bank Boom*, MISSOULIAN, Jan. 31, 1999, at D1.

Although the Act cannot likely protect money launderers whose assets result from criminal activity, there appear to be enough potential benefits for prospective depository customers to consider placing at least some of their assets in Montana's new depositories. On at least a modest scale, Montana may well become a "Switzerland of the Rockies" in a manner not necessarily foreseen by its critics. Time will soon tell.