No. 12-____

IN THE
Supreme Court of the United States

GEORGE W. CUMMINGS, III, PROGRESSIVE STATE BANK AND PROGRESSIVE BANCORP, INC.,
Petitioners,
v.
JOE DOUGHTY,
Respondent.

On Petition for a Writ of Certiorari to the Fifth Judicial District Court for the Parish of Franklin, Louisiana

PETITION FOR A WRIT OF CERTIORARI

LAWRENCE B. MANDALA
JAMIL N. ALIBHAI
MUNCK WILSON MANDALA, LLP
12770 Coit Rd., Ste. 600
Dallas, TX 75251
(972) 628-3600

B. FRANKLIN MARTIN III
MCGLINCHEY STAFFORD
601 Poydras Street
New Orleans, LA 70130
(504) 596-2714

THOMAS M. HEFFERON
Counsel of Record
KEVIN P. MARTIN
SARAH K. FREDERICK
GOODWIN PROCTER LLP
901 New York Avenue, N.W.
Washington, DC 20001
(202) 346-4000
thefferon@goodwinprocter.com

Counsel for the Petitioners

September 20, 2012

Question Presented

This case involves the safe harbor established by the Annunzio-Wylie Anti-Money Laundering Act, 31 U.S.C. § 5318(g)(3)(A), that protects financial institutions from being sued when they submit suspicious activity reports ("SARs") to government regulators and law enforcement agencies. Two federal circuit courts of appeal—the First Circuit and the Second Circuit—have held, based on the plain language of the Act, that financial institutions have absolute immunity from any cause of action relating to the submission of a SAR. Another federal circuit court—the Eleventh Circuit—and the courts of two states—Arkansas and, in the decision below, Louisiana—have held that the Act provides financial institutions only qualified immunity. The case brought by Respondent Joe Doughty would have been dismissed if brought in federal courts in the First Circuit or Second Circuit but, because it was brought in State court in Louisiana, the lower courts of that State denied Petitioners' motions to invoke absolute immunity and the Louisiana Supreme Court declined to review the case. The question before this Court is the following:

Whether the safe harbor established by the Annunzio-Wylie Anti-Money Laundering Act, 31 U.S.C. § 5318(g)(3)(A), provides absolute immunity or only qualified immunity from claims that arise from the filing of a suspicious activity report.

Parties to the Proceeding

Petitioners George W. Cummings, III, Progressive Bank,[1] and Progressive Bancorp, Inc., are defendants in a lawsuit filed in the Louisiana State courts by Respondent Joe Doughty.

Corporate Disclosure Statement

Petitioner Progressive Bank is a wholly-owned subsidiary of Petitioner Progressive Bancorp, Inc. No corporation or individual has a 10% or greater ownership interest in Progressive Bancorp, Inc. Neither Progressive Bank nor Progressive Bancorp, Inc. is a publicly traded company.

[1] In the initial Petition in State court, Progressive Bank was named incorrectly as Progressive State Bank.

Table of Contents

Page

Table of Authorities

CASES:

STATUTES:

REGULATIONS AND FEDERAL REGISTER NOTICES:

LEGISLATIVE HISTORY:

OTHER AUTHORITIES:

FEDERAL AGENCY *AMICUS CURIAE* BRIEFS:

Petitioners respectfully seek a writ of *certiorari* to the Fifth Judicial District Court for the Parish of Franklin, Louisiana.

Opinion Below

The order of the Fifth Judicial District denying Petitioners' motion for summary judgment was delivered orally and is reflected in a minute order found in the Appendix at 4a-5a. The orders denying discretionary appellate review of that order are set forth in the Appendix at 1a-3a. An earlier decision by the Louisiana Court of Appeal, Second Circuit, setting forth the basis for denying Petitioners absolute immunity under the Annunzio-Wylie Anti-Money Laundering Act, 31 U.S.C. § 5318(g)(3)(A), is set forth in the Appendix at 7a-14a and was reported at *Doughty* v. *Cummings*, 28 So. 3d 580 (La. Ct. App. 2009).

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a). The order of the Fifth Judicial District Court for the Parish of Franklin, Louisiana, denying Petitioners' motion for summary judgment, was entered on December 12, 2011. App. 4a-5a. Petitioners thereafter sought discretionary review by the Louisiana Court of Appeal, which was denied on March 29, 2012, App. 2a-3a, and discretionary review by the Supreme Court of Louisiana, which was denied on June 22, 2012. App. 1a; *Doughty* v. *Cummings*, 91 So. 3d 970 (La. 2012). Petitioners have now exhausted all avenues of appeal within Louisiana from the denial of their motion for summary judgment, and this petition is being filed

within 90 days of the order of the Supreme Court of Louisiana.

The decision of the Fifth Judicial District denying Petitioners summary judgment despite the immunity granted under a federal law is a final judgment within the meaning of Section 1257(a). See *Cox Broad. Corp.* v. *Cohn*, 420 U.S. 469, 482-83 (1975); *cf. Mitchell* v. *Forsyth*, 472 U.S. 511, 525 (1985) ("[T]he denial of a substantial claim of absolute immunity is an order appealable before final judgment, for the essence of absolute immunity is its possessor's entitlement not to have to answer for his conduct in a civil damages action."). At this point "the federal issue"—immunity under the Annunzio-Wylie Anti-Money Laundering Act—"has been finally decided in the state courts with further proceedings pending," *Cox*, 420 U.S. at 482, insofar as one of the principal benefits of that immunity, protection from the burdens of trial, will be lost if this Court does not now intervene. "[R]eversal of the state court on the federal issue"—immunity—"would be preclusive of any further litigation on the relevant cause of action," so there is jurisdiction despite the interlocutory nature of the order. *Id.* at 482-83. In addition, the jurisdictional standard is met because it is possible that Petitioners could prevail in further proceedings on non-state grounds, thereby mooting the federal issue. See *id.* at 482. "[R]efusal immediately to review the state court decision might seriously erode federal policy," *id.* at 483, for the reasons given *infra* at 26-35.

Statutory Provision Involved

This case involves the safe harbor in Section 1517(b) of the Annunzio-Wylie Anti-Money

Laundering Act (the "Annunzio-Wylie Act" or "Act"), 106 Stat. 4059-60 (1992), codified as amended at 31 U.S.C. § 5318(g)(3).

Statement of the Case

Federal law enforcement officials and banking regulators do not have the resources or mandate to review every transaction in which every financial institution participates to ensure compliance with law. Yet, in today's world, the use or abuse of our financial systems is a fertile source for the funding or the furthering of threats as diverse as bank fraud, abuse of investors or depositors, attempted financial scams, drug trafficking, and terrorism. Accordingly, public protection depends to a great extent on financial institutions that report suspicious transactions to government officials, who in turn can investigate the transactions and take action when needed. Some reporting is mandated by the Annunzio-Wylie Act, which requires the submission of "Suspicious Activity Reports," or SARs, in certain instances. To encourage reporting by financial institutions under the Act, federal law immunizes them from liability when they submit a SAR to the government.

This case concerns a well-developed split in authority among the federal circuit courts and state courts concerning the extent to which federal law protects those submitting SARs from being sued for having done so. Two federal circuit courts have held that Congress has provided absolute immunity against suits arising from the submission of a SAR. Another federal circuit court and two sets of state courts, including the Louisiana courts in the decision below, have held that federal law provides only

qualified immunity. This Court should grant *certiorari* and resolve this conflict in authority by holding that federal law provides absolute immunity.

A. Statutory and Regulatory Background

Congress passed the Annunzio-Wylie Act as Title XV of the Housing and Community Development Act of 1992, to assist law enforcement and financial regulators in policing and prosecuting financial fraud, including efforts to hide illicit sources of funds and uses of funds. See Pub. L. 102-550, 106 Stat. 3672, 4044-74 (1992).

Of particular importance to this case, Section 1517(b) of the Act broadly authorizes the Secretary of the Treasury to impose an *obligation* on financial institutions and their officers and employees to report *any* suspicious behavior of which they become aware:

> The Secretary may require any financial institution, and any director, officer, employee, or agent of any financial institution, to report any suspicious transaction relevant to a possible violation of law or regulation.

106 Stat. 4060 (codified, as amended, at 31 U.S.C. § 5318(g)(1)).[2] The Secretary has used this

---

[2] Section 1517(b) of the Annunzio-Wylie Act, which added subsection (g) to previously enacted and amended 31 U.S.C. § 5318, erroneously made the amendment to 31 U.S.C. § 5314. The error was corrected in the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103-322, § 330017(b)(1), 108 Stat. 1796, 2149 (1994), and, identically, in the Riegle Community Development and Regulatory Improvement Act of 1994, Pub. L. 103-325, § 413(b)(1), 108 Stat. 2160, 2254 (1994).

authorization to require the filing of SARs in certain enumerated situations, as discussed below.

In order to provide law enforcement and banking regulators an opportunity to investigate any suspicious activity or possible crime without the possible target of the investigation becoming the wiser, the Act also *prohibits* the entity or person submitting any report of suspicious activity from even disclosing the existence of the report to the person named in it:

> NOTIFICATION PROHIBITED. A financial institution, and a director, officer, employee, or agent of any financial institution, who voluntarily reports a suspicious transaction, or that reports a suspicious transaction pursuant to this section or any other authority, may not notify any person involved in the transaction that the transaction has been reported.

106 Stat. 4060 (codified, as amended, at 31 U.S.C. § 5318(g)(2)). Going even further, the relevant regulations throw an absolute blanket over SARs:

> (g) *Confidentiality of suspicious activity reports*. Suspicious activity reports are confidential. Any bank subpoenaed or otherwise requested to disclose a suspicious activity report or the information contained in a suspicious activity report shall decline to produce the suspicious activity report or to provide any information that would disclose that a suspicious activity report has been prepared or filed * * * .

12 C.F.R. § 353.3(g) (2012).

Understandably, financial institutions and their officers and employees who cooperate with the government and submit a report of suspicious activity might be concerned that, in doing so, they are exposing themselves to suit by the persons involved in the reported transactions. Even prior to the introduction of the Annunzio-Wylie Act, the Committee on Banking, Finance and Urban Affairs had voiced its "concern[] that financial institutions have been reluctant to report suspicious transactions to law enforcement authorities because of concern for potential civil liability resulting from the filing of the report." App. 68a; H.R. Rep. No. 101-446, at 31 (1990) (advocating an amendment to the Right to Financial Privacy Act which would provide safe harbor for financial institutions filing suspicious transaction reports). This concern was later echoed by one of the principal authors of the Annunzio-Wylie Act. See App. 65a; 139 Cong. Rec. E57-02 (1993) (Rep. Annunzio) ("I was deeply concerned that financial institutions should be free to report suspicious transactions without fear of civil liability.").

To avoid concerns of civil liability acting as a deterrent to reporting suspicious transactions, Congress included in the Act a sweeping safe harbor provision providing reporters absolute immunity from any liability arising from required reporting of suspicious financial activity:

> LIABILITY FOR DISCLOSURES. Any financial institution that makes a disclosure of any possible violation of law or regulation or a disclosure pursuant to this subsection or any other authority, and any director, officer,

> employee, or agent of such institution, *shall not be liable* to any person under any law or regulation of the United States or any constitution, law, or regulation of any State or political subdivision thereof, *for such disclosure* or for any failure to notify the person involved in the transaction or any other person of such disclosure.

106 Stat. 4060 (codified, as amended, at 31 U.S.C. § 5318(g)(3)) (emphases added). Congress's goal in creating this safe harbor provision was to protect financial institutions so they would have "no excuses" when it came to deciding whether to report potential financial crimes that fell within the Act's scope. See App. 63a; 139 Cong. Rec. E57-02 (Rep. Neal).

Congress subsequently amended the suspicious activity reporting provisions after the terrorist attacks of September 11, 2001, in the Uniting and Strengthening America By Providing Appropriate Tools Required To Intercept and Obstruct Terrorism Act of 2001 ("PATRIOT Act"), Pub. L. 107-56, 115 Stat. 272 (2001). The PATRIOT Act amended the Annunzio-Wylie Act "to clarify the terms of the safe harbor from civil liability for filing suspicious activity reports." 115 Stat. 298. The PATRIOT Act clarified the breadth of the immunity provided to reporting institutions and persons in two ways. *Compare* Annunzio-Wylie Act, § 1517(b), 106 Stat. 4059-60 *with* PATRIOT Act, § 351, 115 Stat. 320-22. First, the PATRIOT Act made clear that the immunity applies to both "voluntary" and mandatory disclosures of suspicious transactions. See 115 Stat. 320-21. It also made explicit that the immunity

applies to shield a reporter from liability in an arbitration as well in any judicial proceedings. See 115 Stat. 321.

The full text of the safe harbor provision, as amended by the PATRIOT Act (and as in effect at the time of the events in the case at bar), now states that:

> Any financial institution that makes a voluntary disclosure of any possible violation of law or regulation to a government agency or makes a disclosure pursuant to this subsection or any other authority, and any director, officer, employee, or agent of such institution who makes, or requires another to make any such disclosure, *shall not be liable* to any person under any law or regulation of the United States, any constitution, law, or regulation of any State or political subdivision of any State, or under any contract or other legally enforceable agreement (including any arbitration agreement), *for such disclosure* or for any failure to provide notice of such disclosure to the person who is the subject of such disclosure or any other person identified in the disclosure.

31 U.S.C. § 5318(g)(3)(A) (emphases added).

Pursuant to his authority under 31 U.S.C. § 5318(a)(1), the Secretary of Treasury delegated to the federal agencies and departments that regulate financial institutions the duty to promulgate regulations implementing the SARs provisions; for Petitioners, the relevant agency is the Federal

Deposit Insurance Corporation ("FDIC").[3] The stated purpose of the SARs regulations is to "ensure that a [financial institution] files a [SAR] when it detects a known or suspected criminal violation of federal law or a suspicious transaction related to a money laundering activity or a violation of the Bank Secrecy Act." 12 C.F.R. § 353.1 (2012).

Treasury has charged the Financial Crimes Enforcement Network ("FinCEN") with being the central bureau for collecting and analyzing SARs. See App. 47a-51a; Treasury Order 180-01 (Mar. 24, 2003). During its drafting of safe harbor regulations parallel to those of the FDIC, FinCEN recounted that "[a]ll comments received about the safe harbor provision encouraged making the provision as strong as possible." App. 42a; Confidentiality of Suspicious Activity Reports, Final Rule, 75 Fed. Reg. 75593, 75600 (Dec. 3, 2010). Consistent with the Act and the public comments, the immunity provided for in the relevant FDIC regulations is far-reaching, covering "all reports of suspected or known criminal violations and suspicious activities * * * regardless of whether such reports are filed pursuant to this part or are filed on a voluntary basis." 12 C.F.R. § 353.3(h) (2012). The regulations also make clear

---

[3] The Secretary of the Treasury has delegated its authority under the Act to, *inter alia*, the FDIC, the Office of the Comptroller of the Currency, the Office of Thrift Supervision, the Federal Reserve System, the National Credit Union Administration, the Federal Trade Commission, and the Financial Crimes Enforcement Network. These entities have promulgated parallel regulations to implement the Act. The FDIC is the agency responsible for regulating insured nonmember state banks like Petitioner Progressive Bank. See 12 U.S.C. § 1813(q)(2)(A).

that the immunity provided by the Act applies to "a disclosure of any possible violation of law." *Id.*[4]

FinCEN, in coordination with the other agencies regulating financial institutions, has promulgated a form for use by institutions and individuals who wish to file a report of suspicious activity. App. 70a-74a. Notably, the section of the form labeled "INSTRUCTIONS" begins with a verbatim recitation of the statutory safe harbor, contained in a box, and appearing before the reporter is told the first thing about how to complete the document. App. 73a. Thus informed that it would not be sued for what is reported, the form instructs the reporter that it has a duty to report, *inter alia*, "[i]nsider abuse" involving "any known or suspected Federal criminal violation" and "where the financial institution believes that it was either an actual or potential victim of a criminal violation, or series of criminal violations, or that the financial institution was used to facilitate a criminal transaction." *Id.*

B. Doughty's Complaint

Respondent Joe Doughty is the former President of a branch of Progressive Bank. In 2008, Mr. Doughty brought the instant lawsuit against Petitioners—Progressive Bank, Progressive Bancorp, Inc., and George Cummings III, President of Progressive Bank (together, the "Bank")—in the Fifth Judicial District Court for the Parish of Franklin, Louisiana. App. 21a; Pet. ¶ 1.

---

[4] In another effort to implement the broadest possible immunity for reporters, FinCEN's parallel rules "protect[] persons from liability not only to the person involved in the transaction, but also to any other person." App. 42a; 75 Fed. Reg. at 75600.

In his complaint, Doughty alleged that in September and October 2002 he alerted the Bank that a bookkeeper for one of the Bank's major customers (Abby Lines) had been fired for theft, and that the customer was missing over $200,000. App. 22a; Pet. ¶ 5. Upon investigating, the Bank discovered irregularities in that customer's account and relationship with Progressive Bank and, on November 7, 2002, asked Doughty to resign. App. 22a-23a; Pet. ¶¶ 6-7.

According to Doughty, after firing him, Petitioners went a step further and provided notice to federal authorities and bank regulators to potential "fraud and defalcation" by Doughty. App. 23a; Pet. ¶ 9. Pursuant to the Act's confidentiality provision, no SAR has ever been produced in this litigation. In any event, Doughty claims that Petitioners filed the hypothetical SAR accusing him of fraud solely in order to facilitate their collection on a D & O liability bond covering dishonesty by Bank employees. *Id.* Doughty's complaint further alleged that Petitioners lacked any good faith basis to believe that Doughty may have potentially violated an applicable law or regulation. App. 24a; Pet. ¶ 12. Based on these allegations, Doughty's causes of action against the Bank defendants were for defamation and malicious prosecution. *Id.*

Doughty's allegations notwithstanding, a federal grand jury ultimately indicted Doughty on thirteen counts of bank fraud arising out of his role in Abby Lines' relationship with Progressive Bank. App. 23a; Pet. ¶ 9. A federal court later dismissed those charges without prejudice on the motion of the United States Attorney. App. 24a; Pet. ¶ 11.

C. The Decisions Below

1. On November 10, 2008, Petitioners moved the Fifth Judicial District Court to dismiss Respondent's complaint on the basis of the Annunzio-Wylie Act's safe harbor provision, 31 U.S.C. § 5318(g)(3). Petitioners argued that the Act barred Doughty's claims in their entirety because the lawsuit was based on allegations that the Bank "made federal authorities and bank regulators aware of their accusations of fraud and defalcation by plaintiff." App. 23a; Pet. ¶ 9. Petitioners specifically asserted that the safe harbor provision of the Act provides unqualified immunity for any such reports to federal authorities and bank regulators. See Mot. to Dismiss at 37-42 (citing 31 U.S.C. § 5318(g)(3)).

The trial court denied the motion to dismiss. App. 18a-20a. The case next went to the Louisiana Second Circuit Court of Appeal, which accepted the order for discretionary review. The Court of Appeal recognized "a split among the federal circuits as to whether the safe harbor provision has a 'good faith' requirement," with the First Circuit and Second Circuit holding that the Act's safe harbor is absolute and the Eleventh Circuit holding that the safe harbor is available only if the SAR filing was in good faith. See App. 11a; *Doughty*, 28 So. 3d at 583. The Louisiana Court of Appeal also noted a decision by the Supreme Court of Arkansas that "for all practical purposes" held that good faith is a prerequisite to the availability of the statutory immunity. See App. 12a; *Doughty*, 28 So. 3d at 583. Without explaining why, the Court of Appeal sided with the Eleventh Circuit and Supreme Court of Arkansas on the question of statutory interpretation. Turning to the

application of the good faith qualified immunity test, the Court of Appeal affirmed the denial of the Bank's motion. The court reasoned that dismissal was not required because Doughty's twin allegations that there was no evidence he "diverted any money or received any financial gain," and that the Petitioners must have submitted the imagined SAR merely to collect on the D & O bond, cast sufficient doubt on Petitioners' claim of immunity to require further litigation. See App. 12a-13a; *Doughty*, 28 So. 3d at 583.

Petitioners sought discretionary review of the Court of Appeal's decision, raising their absolute immunity defense, with the Louisiana Supreme Court. See Writ App. at 5-16 (June 4, 2009). That court declined to hear the case. See App. 6a; *Doughty* v. *Cummings*, 31 So. 3d 394 (La. 2010). Its refusal was without opinion.

2. Petitioners next moved for summary judgment in the Fifth Judicial District Court. They again argued that the Act provides absolute immunity against claims based on the submission of SARs. See Mot. for Summ. J. at 11. They also argued that, even if the Act only provides qualified immunity with respect to such claims, there were no facts in this case to suggest that Petitioners had acted in bad faith or for an improper purpose. See Mot. for Summ. J. at 12. In particular, Petitioners recounted that discovery following denial of the motion to dismiss had established, through Doughty's own admissions and other evidence, that Doughty repeatedly violated Bank policies in approving loans that were the alleged subject of the hypothetical SAR

and Doughty's subsequent indictment. See *id.* at 12-15.

The trial court denied Petitioners' motion, orally and without explanation. App. 4a-5a.

Petitioners then again brought their case to the Louisiana Second Circuit Court of Appeal, seeking discretionary review of the denial of summary judgment. While acknowledging that court's prior ruling concerning absolute immunity, Petitioners repeated their argument that the Annunzio-Wylie Act and its implementing regulations "provide that a financial institution and its officers have *complete immunity* from civil claims under federal or state law * * * ." Writ App. at 15 (Feb. 9, 2012) (emphasis added). Petitioners also argued that they were entitled to summary judgment even under a qualified immunity standard. See *id.* at 15-19.

The Louisiana Court of Appeal declined, without substantive explanation, to exercise its discretionary authority to hear the appeal. See App. 2a-3a (citing *Herlitz Constr. Co.* v. *Hotel Investors of New Iberia, Inc.*, 396 So. 2d 878, 878 (La. 1981)).

Petitioners therefore again sought discretionary review by the Louisiana Supreme Court.[5] In their writ application they repeated verbatim the argument that the Act and its implementing regulations "provide that a financial institution and its officers have complete immunity from civil claims under federal or state law." Writ App. at 7 (Apr. 27, 2012). The Louisiana Supreme Court, however,

---

[5] See LA. CONST. art. V, § 5(A); LA. SUP. CT. R. X, § 1(a) (providing means for seeking discretionary review).

again declined to hear the case on discretionary appeal. See App. 1a; *Doughty* v. *Cummings*, 91 So. 3d 970 (La. 2012).

With the denial of summary judgment in the Fifth Judicial District Court, and the refusal of both the Louisiana Court of Appeal and the Louisiana Supreme Court to conduct a review of that denial, this case—in which an alleged SAR target is suing a SAR reporter for having filed a SAR—must now proceed to trial, unless this Court intervenes.

3. Due to the denial of their federal immunity by the Louisiana courts, Petitioners have already been forced to endure the burdens of over four years of litigation. As matters currently stand, Respondent's claim based on Petitioners' alleged submission of a SAR to federal regulators will proceed to trial. If the Act does provide absolute immunity then, barring intervention by this Court, one of the principal benefits of such immunity—avoiding the burden and expense of proceeding through trial with respect to protected activity, see *infra* at 30-32—will be irretrievably lost.

Reasons for Granting the Petition

The Court should take this case to resolve a well-developed split in authority among federal and state courts concerning the scope of the immunity provided by the Annunzio-Wylie Act to those submitting SARs. If the Court does not take this case and reverse the decision below, financial institutions and their officers and employees will be discouraged from reporting suspicious transactions due to the possibility of civil liability, undercutting Congress's policy of encouraging reporting to assist regulators

and law enforcement. Allowing the decision to stand also will subject reporters to potential liability even though Congress provided an explicit safe harbor protecting those persons from suit. Given the deep, intractable and well-percolated split among lower courts on an important question of federal law affecting immunity from trial, the Court should not hesitate to grant review merely because the instant decision arises from a trial court. See, *e.g.*, *Norfolk & W. Ry. Co.* v. *Ayers*, 538 U.S. 135 (2003) (reviewing trial court decision). Indeed, it should grant review precisely because the Louisiana State courts have chosen not to exercise their authority of review and superintendence over the Fifth Judicial District Court's recent decision on an important point of federal law.

A. The Decision Below Implicates a Well-Developed Split in Authority Among Federal and State Courts

In holding that the Annunzio-Wylie Act provides only qualified immunity to financial institutions submitting SARs, the Louisiana courts placed themselves squarely in conflict with two federal courts of appeal—the First Circuit and the Second Circuit—that have held the Act provides absolute immunity from any suit arising from submission of a SAR. At the same time, the Louisiana courts are joined in their (incorrect) reading of the Act by two other jurisdictions, the Eleventh Circuit and the Arkansas Supreme Court. The split in authority with respect to the meaning of the same federal statute leaves financial institutions facing varying exposure for the same conduct, based on the mere happenstance of where plaintiff files his complaint.

The split in authority is particularly troublesome given that many financial institutions have multistate operations and suspicious activities can (and often do) span state borders. The Court should take this case to resolve the split in guidance to SAR reporters and to provide financial institutions certainty as to their immunity from legal liability with respect to submitting SARs.

1. In support of its reading the Act's safe harbor provision as granting only qualified immunity, the Louisiana Court of Appeal relied on the earlier decisions of two other courts, the Eleventh Circuit and the Arkansas Supreme Court, each of which held that the Act does not provide absolute immunity to reporters. App. 11a-12a; *Doughty*, 28 So. 3d at 583.

The Eleventh Circuit was the first to find that the Act does not provide absolute immunity. See *Lopez* v. *First Union Nat'l Bank*, 129 F.3d 1186 (11th Cir. 1997). *Lopez* concerned two sets of plaintiffs. The first plaintiff, Lopez, alleged that the defendant bank had provided law enforcement officials access to information concerning his account, invoking its duty to report suspicious activity under the Act. *Id*. at 1188. After a judicial asset freeze and settlement of related forfeiture proceedings, Lopez sued the bank for alleged violations of several federal financial privacy acts and Florida law. See *id*. at 1188-89.

Pointing to the Act's safe harbor provision, the defendant bank moved to dismiss Lopez's lawsuit. The Eleventh Circuit refused to shield the bank from having to defend its filing of a SAR, holding that, "[i]n order to be immune from liability" for "disclosure of any possible violations of law or regulation":

> [I]t is sufficient that a financial institution have a good faith suspicion that a law or regulation may have been violated, even if it turns out in hindsight that none was.

Id. at 1192-93.

Applying this good faith requirement to the case before it, the Eleventh Circuit concluded that because Lopez's complaint, standing alone, admitted to nothing suspicious about the transactions related to the account, the bank was not entitled to dismissal:

> The problem for First Union at this stage of the litigation is that it is stuck with the allegations of the complaint. Those allegations do not show that First Union had a good faith suspicion that a law or regulation may have been violated. None of the allegations indicate that the transactions associated with Lopez's account were suspicious enough to suggest a possible violation of law.

Lopez, 129 F.3d at 1193. In short, the Eleventh Circuit refused to dismiss Lopez's claim (or the claims brought by the other set of plaintiffs), and thereby overrode the statutory immunity, only because the plaintiffs had not made the mistake of pleading that the defendant banks had reported in good faith. See *id.* at 1194-96. In so concluding, the Eleventh Circuit engaged in no analysis of the Act's text or its legislative history and gave no consideration to the practical problems or policy implications of permitting such a case to go forward into litigation and trial. See *id.*

Six years after the decision in *Lopez*, the Supreme Court of Arkansas joined with the Eleventh Circuit in qualifying the immunity Congress granted in the Act. See *Bank of Eureka Springs* v. *Evans*, 109 S.W.3d 672 (Ark. 2003). The *Evans* case involved a claim that the defendant bank submitted two SARs concerning plaintiff, a loan customer of the bank, in retaliation for the customer's decision to declare bankruptcy. See *id*. at 676-77.

Rejecting the bank's argument that the lawsuit should have been dismissed on the basis of absolute immunity, the Arkansas court stated:

> Importantly, the Act requires there to be a "possible" violation of law—"possible" being the operative word—before a financial institution can claim protection of the statute. Here, viewing the evidence in the light most favorable to [plaintiff], there was no possible violation. * * * Under these facts, we hold that the Bank did not file a report of a "possible violation" of the law but rather acted maliciously and willfully in an attempt to have [plaintiff] arrested and brought to trial on charges it knew to be false.

Evans, 109 S.W.3d at 680.

2. In contrast to the substantial and serious limitations to immunity read by these courts into the Act's safe harbor provision, two federal courts of appeal—the First Circuit and the Second Circuit—have, in well-reasoned decisions, given the Act its more natural reading as providing absolute immunity to claims based on the filing of a SAR. Had Respondent filed his lawsuit in a federal district

court located in one of those two circuits, rather than in a State court in Louisiana, it would not have survived a motion to dismiss, let alone a motion for summary judgment.

The Second Circuit was the first court to confirm that the Act provides absolute immunity, explicitly rejecting the Eleventh Circuit's reasoning in *Lopez*. See *Lee* v. *Bankers Trust Co.*, 166 F.3d 540 (2d Cir. 1999); see also *id.* at 544-45 (recognizing, but disagreeing with, *Lopez*). In *Lee*, a managing director was fired by the defendant bank following an investigation by the bank into the misallocation of escheatable funds in certain unclaimed trust accounts. See *id.* at 542-43. The former director sued the bank, alleging that the bank defamed him in SARs submitted to federal law enforcement officials; the claim was based on information and belief, as the former employee never saw the alleged SARs or even had their existence confirmed. See *id.* at 543.

The district court dismissed the lawsuit at the outset on the basis of the safe harbor provision. The Second Circuit affirmed, rejecting the former bank officer's argument that "there is immunity only where the disclosures in the SAR were made in good faith." *Lee*, 166 F.3d at 544. The court reasoned that:

> The plain language of the safe harbor provision describes an unqualified privilege, never mentioning good faith or any suggestive analogue thereof. The Act broadly and unambiguously provides for immunity from *any* law (except the federal Constitution) for *any* statement made in [a] SAR by *anyone*

> connected to a financial institution. There is not even a hint that the statements must be made in good faith in order to benefit from immunity. Based on the unambiguous language of the Act, Bankers Trust enjoys immunity from liability for its filing of, or any statement made in, an SAR.

Id.[6]

In explaining its holding, the Second Circuit noted an important practical problem with permitting claims based on a SAR to proceed at all: the statutory prohibition on financial institutions even disclosing the existence or contents of SARs, which would impede the ability of a financial institution to defend itself. *Lee*, 166 F.3d at 544. The court also looked to the Act's legislative history, noting that "[a]n earlier draft of the safe harbor provision included an explicit good faith requirement," but "the requirement was dropped in later versions of the bill, and was not included in the bill that was eventually enacted by Congress." *Id.* at 544 (citing 137 Cong. Rec. S16642 (1991)).

The First Circuit agreed with the Second Circuit in *Stoutt* v. *Banco Popular de Puerto Rico*, 320 F.3d 26 (1st Cir. 2003), a case which considered cases on both sides of the split. In *Stoutt*, the defendant bank filed with the Federal Bureau of Investigation ("FBI") a "criminal referral form," a predecessor

---

[6] The Second Circuit also agreed with the position expressed by the Board of Governors of the Federal Reserve in an *amicus* brief. See Br. for the Bd. of Governors of the Fed. Reserve Sys. as Amicus Curiae, *Lee* v. *Bankers Trust Co.*, 1998 WL 34088671 (2d Cir. July 6, 1998).

document to a SAR,[7] on suspicion that a customer was engaged in a check-kiting scam. See *id.* at 27-28. The FBI conducted an investigation and a grand jury indicted Stoutt, though prosecutors dismissed the charges voluntarily for reasons that were "unclear" to the First Circuit. See *id.* at 28-29. Stoutt then sued the bank.

The circuit court affirmed the district court's grant of summary judgment to the bank under the Act's safe harbor provision. In doing so, the First Circuit rejected both the Supreme Court of Arkansas's "possible violation" analysis and the Eleventh Circuit's "good faith" rule. As to the former, the First Circuit explained:

> Conceivably, Stoutt could argue that the report was not one of a possible violation, even though so termed and colorably disclosing a possible crime, if the Bank knew that there was (in reality) no violation. But this is a non-literal reading of the statute, which speaks of "any possible violation," and we think it more straightforward to confront any requirement of good faith or due care as an implied qualification of immunity rather than an issue of initial scope. Here, whatever its internal beliefs, the Bank did by any objective test identify a "possible violation."

Stoutt, 320 F.3d at 30.

---

[7] The case was subject to the safe harbor because the report occurred after enactment of the Annunzio-Wylie Act. *Stoutt*, 320 F.3d at 28. A SARs form could not have been used because the SARs regulations had not yet been promulgated.

Turning to the question whether good faith is required for immunity to attach, the First Circuit then agreed with the Second Circuit (and an *amicus* brief submitted by the Federal Reserve's Board of Governors) that the immunity is absolute. See *id.* at 30; Br. for the Bd. of Governors of the Fed. Reserve Sys. as Amicus Curiae, *Stoutt* v. *Banco Popular de Puerto Rico*, 2002 WL 34231743 (1st Cir. May 13, 2002). The court reached this decision following an exhaustive analysis that took into account the language of the statute; the fact that Congress often explicitly includes a good faith requirement in reporting statutes, but had not done so here; the Act's legislative history; the role of regulators and law enforcement officials in weeding out unmeritorious SARs, and thereby avoiding harm to innocent subjects of such SARs; and the fines and imprisonment that may be imposed on those submitting false SARs. See *Stoutt*, 320 F.3d at 30-32.

3. Since this split of authority developed, federal and state trial courts and intermediate state appellate courts have continued to grapple with whether the Annunzio-Wylie Act provides absolute or only qualified immunity. Most courts have concluded that the Act provides absolute immunity. See, *e.g.*, *Martinez-Rodriguez* v. *Bank of Am.*, No. C 11–06572 CRB, 2012 WL 967030, at *12 (N.D. Cal. Mar. 21, 2012) ("[T]o impose a good faith requirement on top of this clear statutory text would result in a far narrower preemption provision."); *Eyo* v. *United States*, Civ. No. 06-6185, 2007 WL 4277511, at *5 (D.N.J. Nov. 29, 2007) (agreeing, in explicit contrast to *Lopez*, with "the reasoning of various other courts that have agreed that financial

institutions should be free to report suspicious transactions in compliance with the Act without fear of civil liability"); *Nieman* v. *Firstar Bank*, No. C03-4113-MWB, 2005 WL 2346998, at *6 (N.D. Iowa Sept. 26, 2005) ("The court is persuaded by the reasoning found in the *Lee* decision[.]"); *Rachuy* v. *Anchor Bank*, No. A09-299, 2009 WL 3426939, at *2 (Minn. Ct. App. Oct. 27, 2009) ("Appellant's contention that respondent lacked good faith in reporting to law enforcement is irrelevant because [the Act] does not contain a good-faith requirement."). But there is some other authority that has suggested inquiry into a reporter's motive in submitting a SAR is permissible. See *Shayesteh* v. *Cent. Bank*, No. 2:04-CV-488-CW, 2010 WL 417413, at *8 (D. Utah Jan. 29, 2010) (suggesting immunity would not adhere if a SAR was submitted as a result of "racial [or] other bias"). The result is a deep split of authority on the immunity question.

Notably, the law appears to be uncertain even within courts within a State's borders, heightening the incentive for plaintiffs to forum shop in deciding where to sue SAR reporters. Notwithstanding the Arkansas Supreme Court's qualified immunity decision in *Evans*, the federal District Court for the Eastern District of Arkansas has rejected any "good faith" condition on the absolute immunity for reporters under the Act. See *Gibson* v. *Regions Fin. Corp.*, No. 4:05CV01922, 2008 WL 110917, at *3 (E.D. Ark. Jan. 9, 2008) (observing that "Congress chose not to include good faith as an element of the exemption" and concluding that "[t]his Court has no authority to read into the statute a provision that Congress omitted"), aff'd on other grounds, 557 F.3d 842 (8th Cir. 2009). And, in a decision concerning

whether a banking regulator was required to turn over a SAR in response to a records request, the federal District Court for the Eastern District of Louisiana acknowledged that the Act creates "immunity" from suit for reporters. *Bizcapital Bus. & Indus. Dev. Corp.* v. *Comptroller of the Currency,* 406 F. Supp. 2d 688, 694-95 (E.D. La. 2005), reversed in part as to remedy only, 467 F.3d 871 (5th Cir. 2006).

4. In summary, a well-developed split exists among federal and state courts over whether the Annunzio-Wylie Act provides absolute or only qualified immunity to those making SAR filings. There is little to be gained from awaiting further percolation of the split. As set forth above, the Act's immunity provision was enacted over twenty years ago and numerous courts have addressed the Act's plain language, its legislative history, and the Congressional policies that underlay it. Those courts reading the Act to provide only qualified immunity have done so arguably under two distinct theories (an implied good faith requirement and a stringent "possible violation" requirement), both of which already have been addressed by those courts on the other side of the split.

The existence of the split is troubling for a number of related reasons. Uncertainty about immunity undermines the very reason the protection was enacted in the first place. Persons and institutions who are in doubt about the scope of protections for reporters may have less incentive to report, potentially robbing law enforcement and banking regulators of critical information that ought

to be the subject of investigation. Immunity should be something as to which the rules are clear.

As a result of the split of authority, financial institutions with operations throughout the United States are left with a different kind of uncertainty, presenting them with different exposure under the same federal statute for the same conduct, based on the happenstance of the jurisdiction in which suit is filed. The split is particularly problematic when it comes to multi-jurisdictional financial transactions, in which someone who is the subject of a report, by the mere expedient of forum shopping, might escape a rule of absolute immunity prevailing in another relevant jurisdiction. Indeed, as noted above, the split can lead to inconsistent results *even within the same state*. The split has further consequences because those seeking guidance cannot turn to precedent to understand what the law might be in the majority of jurisdictions where there is no controlling caselaw.

All told, there is considerable confusion and division among the lower courts over financial institutions' immunity with respect to SARs. Guidance from this Court is required to establish a uniform national rule governing this important question of federal immunity.

B. The Decision Below Is Plainly Incorrect, Undermines Important Federal Policies, and Concerns Matters of National Importance

Congress included the expansive safe harbor provision in the Annunzio-Wylie Act to encourage the reporting of suspicious conduct without fear of

legal action brought by the subjects of the reports. The decisions of those courts that have held the Act provides only qualified immunity greatly undercut this federal policy. Those courts' reading of the Act leaves financial institutions exposed to the potential for substantial damages awards and, at a minimum, to the significant cost of defending lawsuits based on SARs. The Court should grant the writ to confirm that the Act provides absolute immunity, thereby giving force to the protections Congress provided in the Act.

1. As an initial matter, and as recognized by the majority of the federal appellate and trial courts to have considered the issue, the Annunzio-Wylie Act on its face provides for absolute, not merely qualified, immunity. Congress could not have used more expansive language in setting forth the immunity: the Act protects "*[a]ny* financial institution that makes a voluntary disclosure of *any possible* violation of law or regulation to a government agency or makes a disclosure pursuant to this subsection or *any* other authority, and *any* director, officer, employee, or agent of such institution who makes, or requires another to make any such disclosure." 31 U.S.C. § 5318(g)(3)(A) (emphases added). It further provides that such entities and persons "*shall not be liable* to any person under *any* law or regulation of the United States, *any* constitution, law, or regulation of *any* State or political subdivision of any State, or under *any* contract or other legally enforceable agreement (including any arbitration agreement) * * * ." *Id.* (emphases added). Contrary to the interpretation adopted by the Eleventh Circuit and the Arkansas and Louisiana courts, the plain language of the Act

states that reporters "shall not be liable," without exception.

Qualifying language is not only absent from the Annunzio-Wylie Act's safe harbor provision, Congress considered adding it and elected not to do so. In particular, when the Act was initially enacted, an earlier version of the bill included a "good faith" limitation on the reporting immunity. App. 53a; 137 Cong. Rec. S16642 (1991). That provision was omitted from the Act, as passed, consistent with Rep. Annunzio's stated goal of providing "the broadest possible exemption from civil liability for the reporting of suspicious transactions." App. 66a; 139 Cong. Reg. E57-02.

Since the 1992 Act, Congress has consistently declined to condition SARs immunity on a reporter's "good faith." This is so despite Congress's amendment of the Annunzio-Wylie Act in 2001 for the purpose of "clarify[ing] the terms of the safe harbor from civil liability for filing [SARs]." 115 Stat. 298. Far from limiting that immunity with a "good faith" requirement, Congress in the PATRIOT Act *expanded* it to make clear that the immunity applies to voluntary disclosures and to arbitration as well as judicial proceedings. See *supra* at 7-8.

If Congress intended only to provide financial institutions the lesser procedural and substantive protections of a qualified immunity, it knew how to do so—but did not. In other immunity statutes, Congress has explicitly required a showing of good faith as a precondition for that protection to attach. See, *e.g.*, 6 U.S.C. § 1104(a)(1) (in the Implementing Recommendations of the 9/11 Commission Act of 2007, providing immunity to "any person who, in

good faith and based on an objectively reasonable suspicion, makes, or causes to be made, a voluntary report of covered activity to an authorized official"); 12 U.S.C. § 4642(b) (in the Housing and Economic Recovery Act of 2008, providing immunity to regulated entities that "in good faith" report fraudulent loans); 42 U.S.C. § 16929 (in the Sex Offender Registration and Notification Act, providing the federal government and its officers, employees, and agents with immunity "from liability for good faith conduct under this subchapter").

The PATRIOT Act itself, which amended the Annunzio-Wylie Act's SARs immunity, contains two qualified immunities for other types of government cooperation, using very explicit language of a type that is missing in the immunity provision at issue in this case. In that Act, Congress awarded immunity to those who produce tangible things in the course of an FBI international terrorism investigation, but the immunity applies only to those who do so in "good faith" pursuant to a court order. See 115 Stat. 288 (codified at 50 U.S.C. § 1861(e)). The Act also gives immunity to consumer reporting agencies that disclose consumer reports, but again, only for disclosures made in "good faith" and in response to a certification of need from a federal agency authorized to investigate terrorism. See 115 Stat. 328 (codified at 15 U.S.C. § 1681v(e)).

Limiting the immunity provided in the Act also would be inconsistent with the Act's related confidentiality rules. As discussed above, a financial institution that files a SAR may not tell the person who is the subject of the report—or anyone at all—that a SAR was filed (let alone what was in it). 31

U.S.C. § 5318(g)(2); 12 C.F.R. § 353.3(g). Given this cone of silence, it would be exceedingly odd to allow the subject of a SAR to premise a lawsuit upon it, as the reporter is forbidden from disclosing even the SAR's existence, much less its substance, to defend against the suit. Rather, a better reading of the Act as a whole would be that absolute immunity prevails, thereby preventing a reporter from being forced to defend a case without the ability to disclose the most relevant facts—precisely the situation Petitioners here will face at trial if review is not granted.

2. Under the construction adopted by the Eleventh Circuit, the Supreme Court of Arkansas, and now the Louisiana courts, a claim based on the submission of a SAR will almost never be dismissed at the pleadings stage. As the Eleventh Circuit applied the Act in *Lopez*, for a plaintiff to avoid dismissal he need only avoid pleading facts suggesting the financial institution defendant submitted the SAR in good faith. See *supra* at 17-18. Of course, someone who feels aggrieved by the filing of an alleged SAR will always be quite convinced that the reporter was acting in bad faith, so conditioning the immunity as these courts have done threatens to turn it into a dead letter.

This Court has previously recognized that a major purpose of absolute immunity is to relieve the protected party from the burdens of litigation, including trial. See, *e.g.*, *Davis* v. *Passman*, 442 U.S. 228, 235 & n.11 (1979) (grant of immunity in the Speech or Debate Clause "shields federal legislators * * * not only from the consequences of litigation's results but also from the burden of defending themselves" (internal quotation marks and citation

omitted)); *cf. Nixon* v. *Fitzgerald*, 457 U.S. 731, 756 (1982) (subjecting President to "trial on virtually every allegation that an action * * * was taken for a forbidden purpose * * * would deprive absolute immunity of its intended effect"). Indeed, the Court has previously observed that:

> *The procedural difference between the absolute and qualified immunities is important.* An absolute immunity defeats a suit at the outset, so long as the official's actions were within the scope of the immunity. The fate of an official with qualified immunity depends upon the circumstances and motivations of his actions, as established by the evidence at trial.

Imbler v. *Pachtman*, 424 U.S. 409, 419 & n.13 (1976) (emphasis added).

By ensuring that, for all practical purposes, every complaint based on the alleged filing of a SAR will survive at least into discovery and potentially to trial—as has happened in the case below—the "good faith" standard eliminates one of the principal protections Congress provided financial institutions in the Annunzio-Wylie Act. The risk of litigation costs and potential liability stands as a major disincentive to financial institutions taking a "better safe than sorry" approach to reporting, depriving regulators and law enforcement of potentially crucial leads in the fight against financial crime, bank fraud and mismanagement, consumer and investor scams, drug trafficking, and terrorism.

The provision of the Act that protects the financial institution and its officers who report suspicious activity is specifically designed to

encourage them to step forward. This is just as important in the buttoned-up world of finance as it is on the streets. One only need look at the form for reporting itself to see the potential power the immunity holds: the available immunity is quoted in full—and set out in a box, for emphasis—as the very first element of the form's instructions on how to report. App. 73a. Undermining the immunity, or effectively eliminating it, is consistent with neither the plain words of the Act nor its purpose.

3. If the Act's text and history left any doubt whether the immunity is absolute, it is eliminated by the consistent position of the agencies charged with overseeing both SARs reporting and the health of the nation's financial systems. The bureau charged with being the central recipient for SARs, FinCEN, has consistently opined that "[t]he safe harbor in the SAR rule provides *total immunity* for filing the SAR." App. 35a; Amendments to the Bank Secrecy Regulations, Final Rules, 68 Fed. Reg. 65392, 65396 n.39 (Nov. 20, 2003) (emphasis added). The bureau has commented on the split in authority concerning the immunity provision and stated its agreement with those courts interpreting the act to provide absolute immunity. See App. 32a; Amendment to the Bank Secrecy Act Regulations—Requirement That Mutual Funds Report Suspicious Transactions, Notice of Proposed Rulemaking, 68 Fed. Reg. 2716, 2719 & n.29 (Jan. 21, 2003) ("[I]n enacting 31 U.S.C. § 5318(g), Congress 'broadly and unambiguously provide[d] * * * immunity from any law (except the federal Constitution) for any statement made in a SAR by anyone connected to a financial institution[.]'") (quoting *Lee*, 166 F.3d at 544). According to FinCEN, the safe harbor "clearly

protects any financial institution from civil liability for reporting suspicious activity." *Id.*[8]

Other agencies charged with overseeing the nation's financial system, including the Board of Governors of the Federal Reserve System and the FDIC, have filed *amicus* briefs that pronounce these agencies' unequivocal view that the immunity for SARs reporters is unqualified. The Federal Reserve expressed this view in *Lee* and in *Stoutt*, noting that any other interpretation:

> undermines the Board's investigatory and supervisory system. Such impediments would not only weaken the ability of law enforcement authorities to investigate possible criminal activity, but would also threaten the ability of bank supervisory authorities to receive information that could be vital to their fundamental role of ensuring the safety and soundness of the country's financial system.

Br. for the Bd. of Governors of the Fed. Reserve Sys. as Amicus Curiae, *Stoutt*, 2002 WL 34231743; see

---

[8] FinCEN also noted recently that the SARs safe harbor includes no "good faith" limitation, in contrast to similar immunities provided to reporters of other kinds of financial transactions. See App. 45a-45a; Anti-Money Laundering Program and Suspicious Activity Reporting Requirements for Housing Government Sponsored Enterprises, Notice of Proposed Rulemaking, 76 Fed. Reg. 69204, 69211 (Nov. 8, 2011) (contrasting 31 U.S.C. § 5318(g)(3)(A) with 12 U.S.C. § 4642(b)). Based on its reading of the Annunzio-Wylie Act's immunity grant in 31 U.S.C. § 5318(g)(3)(A) and the subsequent case law, FinCEN concluded that "[l]egal authority weighs heavily in favor of the proposition that this safe harbor is not subject to a 'good faith' limitation." *Id.*

also Br. for the Bd. of Governors of the Fed. Reserve Sys. as Amicus Curiae, *Lee*, 1998 WL 34088671, at *12-13 (same).

The FDIC in *Evans* agreed with the Federal Reserve, noting that "[f]inancial institutions are not required to establish probable cause of a violation of law or to resolve doubts as to the legality of a given transaction before making a report" and that it is the responsibility of law enforcement to determine whether a SAR is worth pursuing. Br. for the Fed. Deposit Ins. Corp. as Amicus Curiae, *Bank of Eureka Springs* v. *Evans*, 2002 WL 32625039, at *4-5 (Ark. Sept. 5, 2002). The FDIC stressed that "broad immunity, with no qualifying limitations," is supported by the text of the Act and helps fulfill its purpose "to protect the banking system and the public from illegal activities (e.g. fraud, theft, embezzlement, money laundering, falsification of financial institution documents, breach of a bank insider's fiduciary duties) which threaten the safety and soundness of the nation's banks." *Id.* at *4 & *6. The FDIC, like the Federal Reserve, has warned that "[a]ny impediments to the willingness of financial institutions to report suspicious activity would weaken law enforcement's ability to investigate possible criminal activity and threaten the ability of bank supervisory authorities to protect the safety and soundness of the country's financial system." *Id.* at *4-5.[9]

---

[9] *Cf.* Br. for the United States as Amicus Curiae, *Bizcapital Bus. & Indus. Dev. Corp.* v. *Comptroller of the Currency*, 2006 WL 5391138 (5th Cir. May 31, 2006) ("The United States has a strong interest in this matter. Suspicious Activity Reports ('SARs'), which lie at the heart of this litigation, are essential

4. The plain language of the Act and its legislative history make clear that Congress intended to provide absolute immunity to persons submitting SARs. Failing to preserve the absolute immunity will undercut the safe harbor provision's purpose, as recognized by Congress in drafting the provision and by the federal regulators responsible for implementing it. This Court should grant the writ of *certiorari* to the Fifth Judicial District Court, to protect and enforce the absolute immunity provided by Congress.

Conclusion

For the foregoing reasons, the petition for a writ of *certiorari* should be granted.

---

weapons utilized by a wide-array of government banking and law enforcement agencies in the fight against money laundering, terrorist financing, and other illegal activities.").

Respectfully submitted,

LAWRENCE B. MANDALA
JAMIL N. ALIBHAI
MUNCK WILSON
MANDALA, LLP
12770 Coit Rd., Ste. 600
Dallas, TX 75251
(972) 628-3600

B. FRANKLIN MARTIN III
MCGLINCHEY STAFFORD
PLLC
601 Poydras Street
New Orleans, LA 70130
(504) 596-2714

THOMAS M. HEFFERON
Counsel of Record
KEVIN P. MARTIN
SARAH K. FREDERICK
GOODWIN PROCTER LLP
901 New York Avenue, N.W.
Washington, DC 20001
(202) 346-4000
thefferon@goodwinprocter.com

Counsel for Petitioners

September 20, 2012

APPENDIX

SUPREME COURT OF LOUISIANA.
Joe DOUGHTY
v.
George W. CUMMINGS, III, Progressive State Bank and Progressive Bancorp, Inc.

No. 2012–CC–0966.
June 22, 2012.

In re Cummings III, George W. et al.; Progressive Bancorp, Inc.; Progressive State Bank;—Defendant(s); Applying For Supervisory and/or Remedial Writs, Parish of Franklin, 5th Judicial District Court Div. B, No. 40,232; to the Court of Appeal, Second Circuit, No. 47,287–CW.

Denied.

La. 2012.

Doughty v. Cummings

91 So.3d 970, 2012-0966 (La. 6/22/12)

STATE OF LOUISIANA
COURT OF APPEAL, SECOND CIRCUIT
430 Fannin Street
Shreveport, LA 71101
(318) 227-3700

NO: 47,287-CW

JOE DOUGHTY

VERSUS

GEORGE W. CUMMINGS, III,
PROGRESSIVE STATE BANK AND
PROGRESSIVE BANCORP, INC.

FILED: 02/10/12
RECEIVED: FEDEX 02/09/12

On application of George W. Cummings, III, Progressive Bank, and Progressive Bancorp, Inc., for SUPERVISORY WRIT in No. 40,232 on the docket of the Fifth Judicial District, Parish of FRANKLIN, Judge James Mark Stephens.

McGLINCHEY STAFFORD, PLLC Byron Franklin Martin, III Deirdre Claire McGlinchey	Counsel for: George W. Cummings, III, Progressive Bank, and Progressive Bancorp, Inc.
	Counsel for: Joe Doughty

Donald L. Kneipp

Before BROWN. MOORE and LOLLEY, JJ.

WRIT DENIED.

Applicants, George W. Cummings, III, Progressive State Bank, and Progressive Bank Corp, Inc., seek supervisory review of the trial court's ruling that denied their motion for summary judgment. On the showing made, this Court's supervisory jurisdiction is not warranted. *Herlitz Construction Co. v. Hotel Investors of New Iberia*, 396 So. 2d 878 (La. 1981). Accordingly, the writ is denied.

Shreveport, Louisiana, this 29th day of March, 2012.

/s/ JLL

/s/ HMB

/s/ DMM

FILED: March 29, 2012

/s/ Debbie R. Ware

CLERK

JOE DOUGHTY
VS.
GEORGE W. CUMMINGS, III, PROGRESSIVE STATE BANK

SUIT: C-40232 B

DATE: 9/17/2012 JUDGE: James M. Stephens

MINUTES OF THE COURT

Monday, December 12, 2011, court met pursuant to adjournment with the Honorable James M. Stephens, Judge, Division B, Fifth Judicial District, presiding. Also present were Tim Pylant, Deputy Sheriff; Lois Cummins, Court Reporter; and DeAnna Parks, Deputy Clerk of Court.

Minutes of previous court, Division B, approved.

12/12/2011 This matter was before the Court on motion for summary judgment. A substitution of exhibit C-2 for the exhibit in the record was made by the defense without opposition. Following pre-trial conference, the motion for summary judgment was submitted on the record and was denied by the Court. Counsel will meet with the Court to schedule the trial date.

A True Copy and Correct Copy of The
Minutes Of the Fifth Judicial District Court
Judge James M. Stephens, Presiding

/s/ Alene Mayo

Deputy Clerk, Fifth Judicial District Court
Franklin Parish, LA
September 17, 2012

SUPREME COURT OF LOUISIANA.

Joe DOUGHTY

v.

George W. CUMMINGS, III, Progressive State Bank and Progressive Bancorp, Inc.

No. 2010–CC–0251.

April 9, 2010.

Prior report: La. App., 28 So. 3d 580.

In re Cummings III, George W. et al.; Progressive Bancorp Inc.; Progressive State Bank;—Defendant(s); Applying For Supervisory and/or Remedial Writs, Parish of Franklin, 5th Judicial District Court Div. B, No. 40,232–B; to the Court of Appeal, Second Circuit, No. 44,812–CW.

Denied.

CLARK, J., recused.

La. 2010.

Doughty v. Cummings

31 So. 3d 394, 2010-0251 (La. 4/9/10)

COURT OF APPEAL OF LOUISIANA,
SECOND CIRCUIT.
Joe DOUGHTY, Plaintiff–Respondent
v.
George W. CUMMINGS, III, Progressive State Bank and Progressive Bancorp, Inc., Defendants–Applicants.

No. 44,812–CW.
Dec. 30, 2009.

McGlinchey Stafford, PLLC by: Byron Franklin Martin, III, Deirdre Claire McGlinchey, for Applicants.

Donald L. Kneipp, for Respondent.

Before WILLIAMS, STEWART and DREW, JJ.

DREW, J.

George Cummings is the President, CEO, and Chairman of the Board of Progressive Bank and Progressive Bancorp. Progressive Bank is a subsidiary of Progressive Bancorp, together referred to as "the Bank." Joe Doughty was employed by the bank as President of its Franklin Parish Division.

Doughty filed a lawsuit for defamation and malicious prosecution against Cummings and the Bank on June 13, 2008. In this lawsuit, Doughty alleged the following:

• In August or September of 2002, he learned that a bookkeeper for Abby Lines, a major customer of the Bank, had been fired and was under investigation for theft. He reported this to

Cummings. When he learned in October that Abby Lines had over $200,000 in uncollected charge-back invoices, he reported this to Cummings.

• Cummings instructed the Bank to advance over $523,000 to purchase invoices from Abby Lines in order to cover overdrafts and give Abby Lines a positive balance in its checking account. When Cummings entered the invoices in the system on November 5, 2002, the Bank learned that most of the invoices were either unsupported or duplicated. Doughty was asked by Cummings to resign two days later.

• On November 27, 2002, Cummings received a preliminary analysis of the account which showed that Abby Lines had submitted duplicate and unsupported invoices in excess of $500,000 throughout the history of the relationship, in addition to the $523,000 advance that Cummings had authorized. Nothing in the analysis suggested that Doughty had diverted any money or received financial gain from the account.

• At the beginning of 2003, Cummings made a claim on the Bank's D & O Liability Bond. The local agent told Cummings that the bond would not pay for the loss unless the Bank linked the loss to dishonesty by a bank employee. Cummings then told the agent that he could substantiate that task and implicated Doughty to be in collusion in a fraud scheme with Abby Lines. Cummings and the Bank also made federal authorities and bank regulators aware of their accusations of fraud and defalcation by Doughty.

• On June 29, 2006, Doughty was indicted in federal court on charges of bank fraud. On April 1, 2008, these charges were dismissed.

Cummings and the Bank raised the exceptions of no cause of action and prescription. They contended inter alia that the claims for malicious prosecution and defamation which were premised upon statements allegedly made to federal authorities and bank regulators were barred by the safe harbor provision found in the Annunzio–Wylie Anti–Money Laundering Act ("Act"), codified at 31 U.S.C. § 5318, and related federal regulations. They also contended that the defamation claims were prescribed on the face of the petition.

The trial court denied the exceptions. Cummings and the Bank sought supervisory relief with this court concerning the applicability of the safe harbor provision to claims of malicious prosecution and defamation and prescription of the defamation claims. This court granted their writ application and placed the matter on the appellate calendar.

DISCUSSION

Exception of no cause of action

A peremptory exception of no cause of action questions whether the law extends a remedy to anyone under the factual allegations of the petition. *Birdsong v. Hirsch Memorial Coliseum*, 42,316 (La. App. 2d Cir. 8/22/07), 963 So. 2d 1095. The exception is triable on the face of the petition, and the facts pled are to be accepted as true. *Industrial Companies, Inc. v. Durbin*, 2002–0665 (La. 1/28/03), 837 So. 2d 1207. In reviewing a trial court's ruling sustaining

an exception of no cause of action, this court should subject the case to *de novo* review because the exception raises a question of law, and the lower court's decision is based only on the sufficiency of the petition. *Cleco Corp. v. Johnson*, 2001–0175 (La. 9/18/01), 795 So. 2d 302.

Cummings and the Bank contend that the safe harbor provision of the Act bars Doughty's defamation and malicious prosecution claims that are based upon the allegation that they "made federal authorities and bank regulators aware of their accusations of fraud and defalcation."

The safe harbor provision of the Act is found in 31 U.S.C. § 5318(g)(3)(A), which reads:

> (g) Reporting of suspicious transactions.—
>
> * * *
>
> (3) Liability for disclosures.—
>
> (A) In general.—Any financial institution that makes a voluntary disclosure of any possible violation of law or regulation to a government agency or makes a disclosure pursuant to this subsection or any other authority, and any director, officer, employee, or agent of such institution who makes, or requires another to make any such disclosure, shall not be liable to any person under any law or regulation of the United States, any constitution, law, or regulation of any State or political subdivision

> of any State, or under any contract or other legally enforceable agreement (including any arbitration agreement), for such disclosure or for any failure to provide notice of such disclosure to the person who is the subject of such disclosure or any other person identified in the disclosure.

Cummings and the Bank also note the corresponding federal regulation, 12 C.F.R. § 353.3(h), which states:

> The safe harbor provisions of 31 U.S.C. § 5318(g), which exempts any bank that makes a disclosure of any possible violation of law or regulation from liability under any law or regulation of the United States, or any constitution, law or regulation of any state or political subdivision, cover all reports of suspected or known criminal violations and suspicious activities to law enforcement and financial institution supervisory authorities, including supporting documentation, regardless of whether such reports are filed pursuant to this part or are filed on a voluntary basis.

We recognize that there is a split among the federal circuits as to whether the safe harbor provision has a "good faith" requirement. In *Lopez v. First Union National Bank of Florida*, 129 F.3d 1186 (11th Cir. 1997), the court took the position that the safe harbor provision protects a bank when it has a good faith suspicion that a law or regulation may have been violated. This position was rejected in *Lee v. Bankers Trust Company*, 166 F.3d 540 (2nd Cir. 1999), where

the court concluded that the protection of the safe harbor provision is not limited to disclosures based on a good faith belief that a violation had occurred.[1] See also *Stoutt v. Banco Popular de Puerto Rico*, 320 F.3d 26 (1st Cir. 2003), where the court stated that careless or malicious reporting is possible under the safe harbor provision.

Doughty argues that the safe harbor provision does not provide immunity in this instance because any disclosures were not made in good faith as there was never a "possible" violation of law to report. In support of his argument, Doughty cites an Arkansas Supreme Court case, *Bank of Eureka Springs v. Evans*, 353 Ark. 438, 109 S.W.3d 672 (2003). Although the court in *Evans* did not specifically state that the safe harbor provision required "good faith," for all practical purposes that was what it did as it held that the safe harbor provision did not protect the bank when its conduct was malicious and based on information that the bank knew was false. The Arkansas court reasoned that because the Act requires a "possible" violation of law before a financial institution can claim protection of its safe harbor provisions, the safe harbor provision did not apply when the bank knew there was no possible violation of the law but had acted maliciously and willfully to have a bank customer arrested and brought to trial on charges it knew were false.

---

[1] In *Lee*, the court noted that a review of the Act's legislative history showed that an earlier draft of the safe harbor provision included an explicit good faith requirement for statements made in a suspicious activity report, but this requirement was dropped in later versions of the bill and was not included in the bill ultimately enacted by Congress.

Doughty alleges that Cummings implicated him when he learned that the bond would not be paid unless the loss was linked to employee dishonesty. This was done despite there being nothing in the preliminary analysis that suggested that Doughty diverted any money or received financial gain. As such, Cummings and the Bank were not reporting a possible violation, but were merely seeking financial benefit. The trial court did not err in denying the exception of no cause of action.

Prescription

Applicants contend that the trial court erred in denying the exception of prescription as to the claims of defamation. Claims for defamation are delictual in nature and are subject to La. C.C. art. 3492's one-year prescriptive period, which commences to run from the day injury or damage is sustained. *Clark v. Wilcox*, 2004–2254 (La. App. 1st Cir. 12/22/05), 928 So. 2d 104, writ denied, 2006–0185 (La. 6/2/06), 929 So. 2d 1252.

The defamation claim is prescribed on the face of the petition. The statement to the insurance agent was made in 2003, and although the petition does not announce precisely when applicants made federal authorities and bank regulators aware of their accusations of fraud and defalcation by Doughty, presumably this occurred well prior to the 2006 indictment.

Doughty contends that prescription on the defamation claims was interrupted during the pendency of the federal criminal proceedings. An action for defamation arising out of allegations

made in judicial proceedings and against a party to those proceedings cannot be brought until those proceedings are terminated. *Waguespack v. Judge*, 04–137 (La. App. 5th Cir. 6/29/04), 877 So. 2d 1090; *Nolan v. Jefferson Parish Hospital Service District* No. 2, 01–175 (La. App. 5th Cir. 6/27/01), 790 So. 2d 725. However, that principle is not applicable in this matter as the statements were not made in a judicial proceeding, but prior to any proceeding.

The trial court found that the indictment had the effect of republishing the defamatory statements. Even if we accept this premise, we note that the suit was filed more than one year after the indictment was handed down. Accordingly, Doughty's defamation claims have prescribed, and the trial court erred in concluding otherwise.

CONCLUSION

We grant the writ in part and reverse the trial court's denial of the exception of prescription as to the defamation claims. In all other respects, the writ is denied.

WRIT GRANTED IN PART AND DENIED IN PART.

La. App. 2 Cir., 2009.
Doughty v. Cummings
28 So. 3d 580, 44,812 (La. App. 2 Cir. 12/30/09)

STATE OF LOUISIANA, PARISH OF FRANKLIN
FIFTH JUDICIAL DISTRICT COURT

JOE DOUGHTY FILED: May 5, 2009

VS. NO. 40,232B

GEORGE W. CUMMINGS, III ET AL By: /s/ Alene Mayo DEPUTY CLERK

REASONS FOR JUDGMENT

This matter is before the Court on Peremptory Exceptions of No Cause of Action and Prescription filed by the defendants.

Plaintiff Joe Doughty filed suit against the defendants George W. Cummings, III, Progressive Bank and Progressive Bancorp, Inc., alleging that he is entitled to damages for defamation and malicious prosecution. Doughty contends that the defendants made false statements to an insurance agent and to federal authorities in order to make him a "scapegoat" for a loan that had gone bad, after the insurance agent told the defendants that their insurance bond would not pay for the loss unless they tied the loss to dishonesty by a bank official. Although Doughty was indicted by a federal grand jury, those charges were subsequently dismissed.

The defendants have filed Peremptory Exceptions of No Cause of Action and Prescription, in which they make three claims. First, they contend the petition fails to state a cause of action because the Annunzio-Wiley Act establishes an unqualified "safe harbor" from civil liability for financial institutions reporting possible violations of law or regulation in 12 U.S.C.

Sec. 5318. Second, they contend the petition fails to state a cause of action under Louisiana law in that there are no allegations that would constitute "legal causation" by the defendants of the criminal prosecution against Doughty. Third, they contend that the defamation claim has prescribed.

In regard to the first claim, the defendants argue that the safe harbor provisions give them complete immunity from civil claims under federal or state law for "all reports" of "any possible violations of law or regulation" or suspected or known criminal violations and suspicious activities made to governmental agencies. The defendants cite several federal cases for their contention that this immunity is unqualified and even applies to "malicious" reports and to reports not made in good faith.

Doughty, on the other hand, cites the decision of the Arkansas Supreme Court in *Bank of Eureka Springs v. Evans*, 353 Ark. 438, 109 S.W. 3d 672 (2003) which held that the Act does not apply to knowingly false, financially motivated statements. In other words, a "possible" violation has to exist before the immunity comes into play. The Arkansas Supreme Court stated in pertinent part:

> "We recognize that the Act specifies that financial institutions are to report 'any possible violation of law ore regulation.' We also agree with the federal jurisdictions which have determined that the Act is to be broadly interpreted. We do not agree, however, that Congress intended the Act's safe harbor to give banks such blanket immunity that even malicious, willful criminal and civil violations of law are protected. Importantly, the Act requires there to be a 'possible' violation of

> law- 'possible' being the operative word-before a financial institution can claim protection of the statute. Here, viewing the evidence in the light most favorable to Mr. Evans, there was no possible violation Under these facts, we hold that the Bank did not file a report of a 'possible violation' of the law but rather acted maliciously and willfully in an attempt to have Mr. Evans arrested and brought to trial on charges it knew to be false. The Act's safe harbor does not apply to this situation."

Evans, 353 Ark. at 451-52, 109 SW. 3d. at 680.

The *Evans* case seems to be directly on point with the allegations of the petition in this case. For purposes of the Exception, the allegations have to be accepted as true. (Whether Doughty will be able to prove the allegations at trial is another issue.) The allegations assert that the defendants knowingly made false allegations against Doughty for the purposes of obtaining the insurance money.

This Court agrees with the reasoning of the Arkansas Supreme Court. Congress did not intend to give blanket immunity for even malicious, willful false allegations. There has to be a "possible" violation of the law before the financial institution can claim protection of the statute.

In regard to the defendants' second claim, they contend that one of the elements necessary to support a claim for malicious prosecution is "its legal causation by the present defendant against plaintiff who was defendant in the original proceeding", citing *Kennedy v. Sheriff of East Baton Rouge*, 2005-1418, (La. 7/1Q/06), 935 So. 2d 669. The defendants argue there is no factual allegation that would constitute

"legal causation" by these defendants of the criminal prosecution against Doughty. They state that Louisiana case law makes clear that simply reporting possible criminal violations is not legal causation, and that merely making authorities "aware" of accusations does not establish legal causation of a grand jury indictment three years later. The defendants contend they are not responsible for the actions of the U.S. Attorney and a federal grand jury.

Doughty responds that the prosecuting attorney's decision to prosecute is not an intervening cause which eliminates their liability. He argues that in the cases cited by the defendants, the police made independent investigations before instituting the prosecutions. However, in the present case, he argues there is a difference because law enforcement relied upon the defendant's false reports made in bad faith in bringing the indictment against him. He cites jurisprudence for the proposition that, to defeat causation, the defendants must show that the plaintiff's prosecution stems solely from a determination by the police rather than the false reports of the informer. He argues that if the informer acts with the intent to mislead, a prosecution based on such knowingly false information does not relieve the informer from liability.

This Court finds that there are sufficient allegations that the defendants knowingly and intentionally made false allegations to law enforcement, solely for the purpose of obtaining the insurance money. Among other allegations, the petition alleges that the defendants made "federal authorities and bank regulators aware of their accusations of fraud and defalcation by plaintiff. As a result of these allegations, on June 29, 2006, a grand jury indicted plaintiff on charges of bank fraud." This Court agrees that if an

informer acts with the intent to mislead, a prosecution based on such knowingly false information does not relieve the informer from liability. The decision of the grand jury to indict Doughty, based on these false allegations, does not constitute an intervening cause that would serve to insulate the defendants from liability.

In regard to the third claim, the defendants contend that the allegations are that the defamatory statements were made to the insurance agent in January, 2003; the grand jury indictment occurred on June 29, 2006; and this suit was filed on June 13, 2008. The defendants contend that a claim for defamation is prescribed in one year, and therefore Doughty's claim is prescribed on the face of the petition.

Doughty contends that an action for defamation arising out of allegations made in judicial proceedings and against a party to those proceedings cannot be brought until those proceedings are terminated, citing *Waguespack v. Judge*, 04-137 (La. App. 5 Cir. 6/29/04), 877 So. 2d 1090. Doughty contends that in that case, the plaintiff's relatives made false statements that caused the Jefferson Parish Sheriff's Office to arrest him on charges of stalking and threatening them. Even though charges were made before the actual judicial proceeding against the defamation plaintiff, the appellate court found that prescription was interrupted as to the accusations the relatives made pending the judicial proceedings win which those accusations were at issue.

Doughty therefore argues that prescription was suspended until the indictment was dismissed on April 1, 2008, and that his defamation claim is timely.

As indicated above, this Court believes that the allegations in the petition are sufficient to allege that the false statements were made both to the insurance agent and to the federal authorities and bank regulators, and that they formed the foundation for the subsequent federal grand jury indictment. In other words, they were "republished". See *Clark v. Wilcox*, 2004-2254R, (La. App. 1 Cir. 12/22/05), 928 So. 2d 104. In addition, the person who makes the allegations upon which a prosecution is based and/or who alleges that it is a "victim", would seem to be a "party to the proceedings", as alluded to in *Waguespack*, supra. Therefore, the action for defamation could not be brought until the proceedings were terminated on April 1, 2008, and the present action is timely.

For these reasons, the Peremptory Exceptions of No Cause of Action and Prescription filed by the defendants are denied at the costs of the defendants.

Counsel shall prepare a judgment in conformity with these written reasons and submit same for signature in Chambers after having been approved as to form.

THUS DONE AND SIGNED this 4th day of May, 2009, in Winnsboro, Louisiana.

/s/ James Stephens
JAMES M. STEPHENS
JUDGE, FIFTH JUDICIAL DISTRICT COURT
DIVISION "B"

STATE OF LOUISIANA PARISH OF FRANKLIN
FIFTH DISTRICT COURT

JOE DOUGHTY FILED: June 13, 2008

VERSUS NO. 40,232c

GEORGE W. CUMMINGS, III,
PROGRESSIVE STATE BANK
and PROGRESSIVE
BANCORP, INC.

/s/ Alene Mayo
DEPUTY CLERK

PETITION FOR DAMAGES

The Petition for Damages of plaintiff, JOE DOUGHTY ("plaintiff"), a person of the full age of majority and domiciled in the Parish of Franklin, State of Louisiana, respectfully represents that:

1.

Made defendants herein are:

GEORGE W. CUMMINGS, III ("Cummings"), a person of the full age of majority and a resident of the Parish of Ouachita, State of Louisiana, who is President, Chief Executive Officer and Chairman of the Board of both Progressive Bank and Progressive Bancorp, Inc.;

PROGRESSIVE BANK, a subsidiary of Progressive Bancorp, Inc., authorized to do and doing business in the State of Louisiana;

PROGRESSIVE BANCORP, INC., a parent corporation of Progressive Bank authorized to do and doing business in the State of Louisiana;

2.

This Court is a court of proper venue pursuant to Louisiana Code of Civil Procedure Article 42(2).

Jurisdiction is proper in this court pursuant to Louisiana Code of Civil Procedure Article 2.

3.

Plaintiff brings this action for defamation and malicious prosecution. Cummings is individually liable for his intentional acts for reasons described in this Petition. Progressive Bank and Progressive Bancorp, Inc. are liable for the acts of its employee pursuant to the doctrine of *respondeat superior*.

4.

From April 16, 1979 to November 7, 2002, plaintiff was an employee of Progressive Bank. On January 1, 2001, plaintiff was appointed President of the Franklin Parish Division of Progressive Bank. His office was in Franklin Parish, Winnsboro, Louisiana.

5.

In August or September of 2002, plaintiff discovered that a bookkeeper at Abby Lines, Inc., ("Abby Lines") a major customer of Progressive Bank, had been fired and was under investigation for theft, which over time was determined to be over $200,000, and reported the discovery to Cummings. In October 2002, plaintiff discovered that Abby Lines, a major customer of Progressive Bank, had over $200,000.00 in uncollected charge back invoices and reported the discovery to Cummings.

6.

On October 31, 2002, Progressive Bank, on Cummings's instruction, advanced over $523,000.00 to purchase invoices from Abby Lines in order to cover overdrafts and give Abby Lines a positive balance in its checking account. Cummings did not enter the

invoices in the system until five days later. On that day, November 5, 2002, Progressive Bank discovered that most of the invoices were either unsupported or duplicated.

7.

On November 7, 2002, Cummings asked plaintiff to resign.

8.

On November 27, 2002, Cummings received the preliminary analysis for the Abby Lines account which showed that Abby Lines submitted duplicate and unsupported invoices in excess of $500,000.00 throughout the history of the relationship and in addition to the $523,000,00 advance he authorized on October 31. The extensive review of the Abby Lines account contained nothing to suggest that plaintiff diverted any money or received financial gain from the account.

9.

In January 2003, Cummings made a claim on Progressive Bank's D & O Liability Bond. The local agent informed Cummings that the bond would not pay for the loss on the Abby Lines account unless the Progressive Bank tied the loss to dishonesty by a bank employee. Cummings told the agent that he could substantiate that task, and Cummings implicated the plaintiff to be in collusion in a fraud scheme with Abby Lines. Cummings and Progressive also made federal authorities and bank regulators aware of their accusations of fraud and defalcation by plaintiff. As a result of these allegations, on June 29, 2006, a grand jury indicted plaintiff on charges of bank fraud.

10.

After the indictment, Cummings was contacted to help plaintiff sell plaintiff's stock in Progressive Bancorp, Inc., to raise money to pay for plaintiff's defense. Cummings refused to assist, and plaintiff was forced to sell other assets at discounted prices to help pay for his defense.

11.

On April 1, 2008, a federal judge dismissed all charges against plaintiff.

12.

The above described actions constitute malicious prosecution and defamation of plaintiff in violation of the laws of the State of Louisiana. Neither Cummings nor Progressive Bank had evidence to support their accusations. The accusations were made to support Progressive Bank's claim against its D & O policy.

13.

Defendants' conduct collectively caused, contributed to, or acquiesced in the following injuries to plaintiff:

a. Plaintiff suffered severe emotional distress and mental anguish after he was indicted for no probable cause. Plaintiff was charged with fraud and forced to sell assets at a discount to help pay for his defense. He was required to appear in court as a result of the intentional actions of the defendant, suffering shame, humiliation, and fear of an adverse outcome of the legal process.

b. Plaintiff lost considerable income, vacation time, stock options.

c. Plaintiff suffered potential loss of future employment and was subjected to great public humiliation and embarrassment from this incident.

d. Plaintiff claims legal expenses incurred as a result of the false allegations.

14.

Plaintiffs injuries were directly and proximately caused by the negligence and bad faith of the defendants.

15.

Plaintiff is entitled to compensatory damages in an amount sufficient to compensate him for his injuries and damages, as well as any other damages which may be shown at trial in this matter.

16.

Plaintiff hereby requests trial by jury on all issues herein and against all defendants against whom a jury trial is allowed by law.

WHEREFORE, plaintiff, JOE DOUGHTY, prays that defendants, GEORGE W. CUMMINGS, III, PROGRESSIVE BANK, and PROGRESSIVE BANCORP, INC. be duly cited and served with a copy of this Petition, that there be trial by jury herein and, after due proceedings are had, that there be judgment herein in favor of plaintiff, for such damages as are reasonable in the premises, including legal interest thereon from date of judicial demand until paid, for all costs of these proceedings, and for all general and equitable relief.

Respectfully submitted,

/s/ Donald Kneipp

DONALD L. KNEIPP (#7742)
P.O. Drawer 2808
Monroe, LA 71207-2808
Telephone: (318) 388-4440
Attorney for Plaintiff, Joe Doughty

PLEASE SERVE A COPY OF THE PETITION FOR DAMAGES ON:

George W. Cummings, III
3269 Deborah Drive
Monroe, Louisiana 71201

Progressive Bank
301 Fair Avenue
Winnsboro, LA 71295

Progressive Bancorp, Inc.
1411 North 19th Street
Monroe, Louisiana 71201

STATE OF LOUISIANA
PARISH OF OUACHITA VERIFICATION

I, JOE DOUGHTY, verify that I have read the above and foregoing Petition for Damages and that the allegations of fact contained therein are true and correct to the best of my knowledge, information and belief.

/s/ Joe Doughty
JOE DOUGHTY

SWORN TO AND SUBSCRIBED
before me, Notary, on this 12th
day of June, 2008.

/s/ Suzanne C. Elmore
NOTARY PUBLIC

PROPOSED RULES

DEPARTMENT OF THE TREASURY

31 CFR Part 103

RIN 1506-AA37

Financial Crimes Enforcement Network; Amendment to the Bank Secrecy Act Regulations—Requirement That Mutual Funds Report Suspicious Transactions

Tuesday, January 21, 2003

AGENCY: Financial Crimes Enforcement Network ("FinCEN"), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document contains an amendment to the regulations implementing the statute generally known as the Bank Secrecy Act. The amendment would require mutual funds to report suspicious transactions to the Department of the Treasury. The amendment constitutes a further step in the creation of a comprehensive system for the reporting of suspicious transactions by the major categories of financial institutions operating in the United States, as a part of the counter-money laundering program of the Department of the Treasury.

****

I. BACKGROUND

A. Statutory Provisions

The Bank Secrecy Act[1] authorizes the Secretary of the Treasury, inter alia, to issue regulations requiring financial institutions to keep records and file reports that are determined to have a high degree of usefulness in criminal, tax, and regulatory matters, or in the conduct of intelligence or counter-intelligence activities, to protect against international terrorism, and to implement counter-money laundering programs and compliance procedures.[2] Regulations implementing title II of the Bank Secrecy Act (codified at 31 U.S.C. 5311-5330) appear at 31 CFR part 103. The authority of the Secretary to administer the Bank Secrecy Act has been delegated to the Director of FinCEN.

With the enactment of 31 U.S.C. 5318(g) in 1992,[3] Congress authorized the Secretary of the Treasury

---

[1] Public Law 91-508, as amended, codified at 12 U.S.C. 1829b, 12 U.S.C. 1951-1959, and 31 U.S.C. 5311-5331.

[2] Language expanding the scope of the Bank Secrecy Act to intelligence or counter-intelligence activities to protect against international terrorism was added by section 358 of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001 (the "USA Patriot Act"), Public Law 107-56.

[3] 31 U.S.C. 5318(g) was added to the Bank Secrecy Act by section 1517 of the Annunzio-Wylie Anti-Money Laundering Act (the "Annunzio-Wylie Anti-Money Laundering Act"), title XV of the Housing and Community Development Act of 1992, Public Law 102-550; it was expanded by section 403 of the Money Laundering Suppression Act of title IV of the Riegle Community Development and Regulatory Improvement Act of 1994, Public Law 103-325, to require designation of a single government recipient for reports of suspicious transactions.

to require financial institutions to report suspicious transactions. As amended by the USA Patriot Act, subsection (g)(1) states generally:

The Secretary may require any financial institution, and any director, officer, employee, or agent of any financial institution, to report any suspicious transaction relevant to a possible violation of law or regulation.

Subsection (g)(2)(A) provides further:

If a financial institution or any director, officer, employee, or agent of any financial institution, voluntarily or pursuant to this section or any other authority, reports a suspicious transaction to a government agency—

(i) The financial institution, director, officer, employee, or agent may not notify any person involved in the transaction that the transaction has been reported; and

(ii) No officer or employee of the Federal government or of any State, local, tribal, or territorial government within the United States, who has any knowledge that such report was made may disclose to any person involved in the transaction that the transaction has been reported, other than as necessary to fulfill the official duties of such officer or employee.

Subsection (g)(3)(A) provides that neither a financial institution, nor any director, officer, employee, or agent of any financial institution—

That makes a voluntary disclosure of any possible violation of law or regulation to a government agency or a makes a disclosure pursuant to this subsection or any other authority * * * shall * * * be liable to any person under any law or regulation of the United States or any constitution, law or regulation of any State or political subdivision of any State, or under any contract or other legally enforceable agreement (including any arbitration agreement), for such disclosure or for any failure to provide notice of such disclosure to the person who is the subject of such disclosure or any other person identified in the disclosure.

Finally, subsection (g)(4) requires the Secretary of the Treasury, "to the extent practicable and appropriate," to designate "a single officer or agency of the United States to whom such reports shall be made."[4] The designated agency is in turn responsible for referring any report of a suspicious transaction to "any appropriate law enforcement, supervisory agency, or United States intelligence agency for use in the conduct of intelligence or counterintelligence activities, including analysis, to protect against international terrorism."[5]

****

[4] This designation does not preclude the authority of supervisory agencies to require financial institutions to submit other reports to the same agency or another agency "pursuant to any applicable provision of law."31 U.S.C. 5318(g)(4)(C).

[5] 31 U.S.C. 5318(g)(4)(B).

E. 103.15(e)—Limitation of Liability

Section 5318(g) of title 31, as amended by the USA Patriot Act, provides protection from liability for making reports of suspicious transactions, and for failures to disclose the fact of such reporting to persons involved in such transactions. The safe harbor provision of 31 U.S.C. 5318(g) clearly protects any financial institution from civil liability for reporting suspicious activity.[29] Section 351 of the USA Patriot Act clarifies that the safe harbor applies also to the voluntary reporting of suspicious transactions, and section 103.15(e) of the proposed rule reflects this clarification.

It must be noted that, while the proposed rule reiterates and clarifies the broad protection from liability for making reports and for failures to disclose the fact of such reporting that is contained in the statutory safe harbor provision, the regulatory provisions do not extend the scope of either the statutory prohibition or the statutory protection. Inclusion of safe harbor language in the proposal is in no way intended to suggest that the safe harbor can override the non-disclosure provisions of the law and regulations. The prohibition on disclosure (other than as required by the proposed rule) applies regardless of any protection from liability.

****

---

[29] See *Lee v. Bankers Trust Co.*, 166 F.3d 540, 544 (2nd Cir. 1999) (stating that in enacting 31 U.S.C. 5318(g), Congress "broadly and unambiguously provide[d] * * * immunity from any law (except the federal Constitution) for any statement made in a SAR by anyone connected to a financial institution").

RULES and REGULATIONS

DEPARTMENT OF THE TREASURY

31 CFR Part 103

RIN 1506-AA44

Financial Crimes Enforcement Network; Amendments to the Bank Secrecy Act Regulations; Definition of Futures Commission Merchants and Introducing Brokers in Commodities as Financial Institutions; Requirement That Futures Commission Merchants and Introducing Brokers in Commodities Report Suspicious Transactions

Thursday, November 20, 2003

AGENCY: Financial Crimes Enforcement Network ("FinCEN"), Treasury.

ACTION: Final rules.

SUMMARY: This document contains amendments to the regulations implementing the statute generally referred to as the Bank Secrecy Act. The amendments add futures commission merchants and introducing brokers in commodities to the regulatory definition of "financial institution" and require that they report suspicious transactions to FinCEN. Bringing these major participants in the futures industry into the Bank Secrecy Act regulatory structure is intended to further the counter-money laundering program of the Department of the Treasury.

DATES: Effective Date: December 22, 2003.

Applicability Date: May 18, 2004.

****

8. Safe Harbor from Civil Liability. Paragraph (f) incorporates the BSA's statutory protection from civil liability for making or filing a report of a suspicious transaction or for failing to disclose the fact that a report has been made or filed. The specific reference to arbitration reflects the clarification provided in the USA Patriot Act that the safe harbor for suspicious transaction reporting would apply in arbitration proceedings. Because some disputes in the futures industry are resolved under a reparations procedure provided for by the CEA,[37] paragraph (f) clarifies that the safe harbor also applies in reparations proceedings. FinCEN intends to work with the CFTC, the DSROs, and industry representatives to ensure that appropriate educational materials are delivered to compliance and litigation personnel.

It must be noted that, while the rule reiterates and clarifies the broad statutory protection from liability for making reports of suspicious transactions and for failing to disclose the fact of such reporting, the regulatory provisions do not extend the scope of either the statutory prohibition or the statutory protection. The prohibition on disclosure (other than as required under the rule) applies regardless of any protection from liability. This means, for instance, that during an arbitration or reparations proceeding, an FCM or IB-C would not be permitted to provide a copy of a SAR-SF, or disclose the fact that one had been filed, to any participant in the proceeding, including as applicable, the arbitrator, judgment officer, or administrative law judge.

---

[37] See Section 14 of the CEA, 7 U.S.C. 18 and 7 CFR Part 12.

Both commenters requested that the safe harbor protection from civil liability under this rule, and under FinCEN's rule implementing Section 314(b) of the USA Patriot Act,[38] be extended to protect disclosures to foreign financial institutions to the extent that an FCM or IB-C needs to obtain information from that foreign entity.[39] However, foreign entities are not "financial institutions" and thus are not eligible for these protections that the BSA extends to financial institutions. Moreover, FinCEN and the relevant examining authority in the United States have the ability to require U.S.-regulated financial institutions to protect adequately sensitive information involved in reporting a suspicious transaction. That said, it may be appropriate in certain circumstances for an FCM or IB-C to question carefully the foreign financial institution about the customer or the transaction to understand more fully whether the FCM should report the transaction as suspicious. The FCM could not however, disclose the fact that it is contemplating the filing of a SAR. FinCEN recognizes that, particularly with respect to international transactions, the

---

[38] 31 CFR 103.110(b)(5).

[39] These provisions are different and serve different purposes. The safe harbor in the SAR rule provides total immunity for filing the SAR. Those financial institutions permitted to file a joint SAR must be able to share information, including the SAR itself, in order to prepare and file the SAR. Under Section 314(b) of the USA Patriot Act, however, information sharing relates to the underlying transactional and customer information; nothing in the rule implementing Section 314(b) authorizes the sharing of actual SARs. 31 CFR 103.10. If other financial institutions, e.g., CTAs, become subject to final rules requiring them to have an AMLP, FCMs and IB-Cs can qualify for the safe harbor under Section 314(b) when they share underlying transactional and customer information with those financial institutions.

balance between obtaining sufficient information and protecting the confidentiality of suspicious activity reporting is a difficult one for FCMs and IB-Cs to achieve, but it is one that is faced by all financial institutions subject to a SAR requirement, and one which they are generally successful in achieving.

****

RULES and REGULATIONS

DEPARTMENT OF THE TREASURY

31 CFR Part 103

RIN 1506-AA99

Financial Crimes Enforcement Network; Confidentiality of Suspicious Activity Reports

Friday, December 3, 2010

AGENCY: The Financial Crimes Enforcement Network ("FinCEN"), Treasury.

ACTION: Final rule.

SUMMARY: FinCEN is issuing this final rule to amend the Bank Secrecy Act ("BSA") regulations regarding the confidentiality of a report of suspicious activity ("SAR") to: Clarify the scope of the statutory prohibition against the disclosure by a financial institution of a SAR; address the statutory prohibition against the disclosure by the government of a SAR; clarify that the exclusive standard applicable to the disclosure of a SAR by the government is to fulfill official duties consistent with the purposes of the BSA; modify the safe harbor provision to include changes made by the Uniting and Strengthening America by Providing the Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 ("USA PATRIOT Act"); and make minor technical revisions for consistency and harmonization among the different SAR rules. These amendments are part of the Department of the Treasury's continuing effort

to increase the efficiency and effectiveness of its anti-money laundering and counter-terrorist financing policies. These amendments are consistent with similar proposals to be issued by some of the Federal bank regulatory agencies in conjunction with FinCEN. The Federal bank regulatory agencies have parallel SAR requirements for their supervised entities: See 12 CFR 208.62, 12 CFR 211.24(f), and 12 CFR 225.4(f) (the Board of Governors of the Federal Reserve System) ("Fed")); 12 CFR 353.3 (the Federal Deposit Insurance Corporation ("FDIC")); 12 CFR 748.1 (the National Credit Union Administration ("NCUA")); 12 CFR 21.11 (the Office of the Comptroller of Currency ("OCC")) and 12 CFR 563.180 (the Office of Thrift Supervision ("OTS")).

DATES: Effective Date: January 3, 2011.

****

I. BACKGROUND

The BSA requires financial institutions to keep certain records and make certain reports that have been determined to be useful in criminal, tax, or regulatory investigations or proceedings, and for intelligence or counter-intelligence activities to protect against international terrorism. In particular, the BSA and its implementing regulations require financial institutions in certain industries[2] to file a

---

[2] FinCEN has implemented regulations for suspicious activity reporting at 31 CFR 103.15 (for mutual funds); 31 CFR 103.16 (for insurance companies); 31 CFR 103.17 (for futures commission merchants and introducing brokers in commodities); 31 CFR 103.18 (for banks); 31 CFR 103.19 (for broker-dealers in securities); 31 CFR 103.20 (for money services businesses); 31 CFR 103.21 (for casinos).

SAR when they detect a known or suspected violation of Federal law or regulation, or a suspicious activity related to money laundering, terrorist financing, or other criminal activity.[3]

SARs generally are unproven reports of possible violations of law or regulation, or of suspicious activities, that are used for law enforcement or regulatory purposes. The BSA provides that a financial institution and its officers, directors, employees, and agents are prohibited from notifying any person involved in a suspicious transaction that the transaction was reported.[4] FinCEN implemented this provision in its SAR regulations for each industry through an explicit prohibition that closely mirrored the enacting statutory language. Specifically, we clarified that disclosure could not be made to the person involved in the transaction, but that the SAR could be provided to FinCEN, law enforcement, and the financial institution's supervisory or examining authority. In certain SAR rules, we have expressly provided for the possibility of institutions jointly filing a SAR regarding suspicious activity that occurred at multiple institutions.[5]

---

[3] The Annunzio-Wylie Anti-Money Laundering Act of 1992 (the Annunzio-Wylie Act), amended the BSA and authorized the Secretary of the Treasury to require financial institutions to report suspicious transactions relevant to a possible violation of law or regulation. See Public Law 102-550, Title XV, 1517(b), 106 Stat. 4055, 4058-9 (1992); 31 U.S.C. 5318(g)(1).

[4] See 31 U.S.C. 5318(g)(2).

[5] Bank Secrecy Act regulations expressly permitting the filing of a joint SAR when multiple financial transactions are involved in a common transaction or series of transactions involving suspicious activity can be found at 31 CFR 103.15(a)(3) (for

The USA PATRIOT Act strengthened the confidentiality of SARs by adding to the BSA a new provision that prohibits officers or employees of the Federal government or any State, local, Tribal, or territorial government within the United States with knowledge of a SAR from disclosing to any person involved in a suspicious transaction that the transaction was reported, other than as necessary to fulfill the official duties of such officer or employee.[6]

To encourage the reporting of possible violations of law or regulation, and the filing of SARs, the BSA contains a safe harbor provision that shields financial institutions making such reports from civil liability in connection with the report. In 2001, the USA PATRIOT Act clarified that the safe harbor also covers voluntary disclosure of possible violations of law and regulations to a government agency and expanded the scope of the limit on liability to cover any civil liability that may exist "under any contract or other legally enforceable agreement (including any arbitration agreement)."[7]

****

---

mutual funds); 31 CFR 103.16(b)(3)(ii) (for insurance companies); 31 CFR 103.17(a)(3) (for futures commission merchants and introducing brokers in commodities); 31 CFR 103.19(a)(3) (for broker-dealers in securities); and 31 CFR 103.20(a)(4) (for money services businesses).

[6] See USA PATRIOT Act, section 351(b). Public Law 107-56, Title III, § 351, 115 Stat. 272, 321(2001); 31 U.S.C. 5318(g)(2).

[7] See USA PATRIOT Act, section 351(a). Public Law 107-56, Title III, § 351, 115 Stat. 272, 321(2001); 31 U.S.C. 5318(g)(3).

F. Limitation on Liability

In Section 351 of the USA PATRIOT Act, Congress amended section 5318(g)(3) to clarify that the scope of the safe harbor provision also includes the voluntary disclosure of possible violations of law and regulations to a government agency, and to expand the scope of the limit on liability to include any liability which may exist "under any contract or other legally enforceable agreement (including any arbitration agreement)." FinCEN tracked more closely the statutory language in the proposed rules, particularly by stating that the safe harbor applies to "disclosures" (and not "reports" as in some previous rulemakings) made by institutions.

Additionally, to comport with the authorization to jointly file SARs in the second rule of construction, FinCEN clarified that the safe harbor also applies to "a disclosure made jointly with another institution." This concept exists currently in those SAR rules where joint filing had been explicitly referenced, but has been revised to track more closely the statutory language. It was also inserted for the sake of consistency into those SAR rules where it had been absent previously, clarifying that all parties to a joint filing, and not simply the party that provides the form to FinCEN, fall within the scope of the safe harbor.

For consistency, FinCEN also separated the provision for confidentiality of reports and limitation of liability into two separate provisions in those rules for industries which previously contained both provisions under the single heading "confidentiality of reports; limitation of liability."

All comments received about the safe harbor provision encouraged making the provision as strong as possible. One commenter identified the statutory phrase, "to any person," that was not included in the proposed rules, and which FinCEN believes would strengthen the safe harbor provided by the final rule. The commenter correctly pointed out that the statutory safe harbor provision protects persons from liability not only to the person involved in the transaction, but also to any other person. Accordingly the final rule is being amended to insert the phrase "shall be protected from liability to any person, for any such disclosure * * *" and is otherwise being adopted as proposed, without change.

Another commenter requested that FinCEN expressly grant safe harbor to an institution that makes a determination not to file a SAR after investigating potentially suspicious activity. The statutory safe harbor provision, however, is clearly intended to protect persons involved in the filing of a voluntary or required SAR from civil liability only for filing the SAR and for refusing to provide notice of such filing. FinCEN cannot provide additional protection from liability for other actions.

****

PROPOSED RULES

DEPARTMENT OF THE TREASURY

Financial Crimes Enforcement Network

31 CFR Parts 1010 and 1030

RIN 1506-AB14

Anti-Money Laundering Program and Suspicious Activity Reporting Requirements for Housing Government Sponsored Enterprises

Tuesday, November 8, 2011

AGENCY: Financial Crimes Enforcement Network ("FinCEN"), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: FinCEN, a bureau of the Department of the Treasury ("Treasury"), is issuing proposed rules defining certain housing government sponsored enterprises as financial institutions for the purpose of requiring them to establish anti-money laundering programs and report suspicious activities pursuant to the Bank Secrecy Act. The proposal to require these organizations to establish anti-money laundering programs and report suspicious activities is intended to help prevent fraud and other financial crimes.

****

D. Reports of Suspicious Transactions

****

Section 1030.320(d)(1) reinforces the statutory prohibition against the disclosure by a financial institution of a SAR (regardless of whether the report would be required by the proposed rule or is filed voluntarily).[47] Thus, the section requires that a SAR and information that would reveal the existence of that SAR ("SAR information") be kept confidential and not be disclosed, except as authorized within the rules of construction. The proposed rule includes rules of construction that identify actions an institution may take that are not precluded by the confidentiality provision. These actions include the disclosure of SAR information to FinCEN, or Federal, State, or local law enforcement agencies, or a Federal regulatory authority that examines the Housing GSE for compliance with the BSA. This confidentiality provision also does not prohibit the disclosure of the underlying facts, transactions, and documents upon which a SAR is based, or the sharing of SAR information within the Housing GSE's corporate organizational structure for purposes consistent with Title II of the BSA as determined by FinCEN in regulation or in guidance.[48]

---

[47] See 31 U.S.C. 5318(g)(2).

[48] On November 23, 2010, FinCEN issued updated guidance for the banking, securities, and futures industries authorizing the sharing of SAR information with parent companies, head offices, and, under certain conditions, domestic affiliates. 75 FR 75607 (Dec. 3, 2010). No such guidance has been issued for the Housing GSEs.

Section 1030.320(d)(2) incorporates the statutory prohibition against disclosure of SAR information, other than in fulfillment of their official duties consistent with the BSA, by government users of SAR data. The section also clarifies that official duties do not include the disclosure of SAR information in response to a request for non-public information[49] or for use in a private legal proceeding, including a request under 31 CFR 1.11.[50]

Section 1030.320(e) provides protection from liability for making reports of suspicious transactions, and for failures to disclose the fact of such reporting to the full extent provided by 31 U.S.C. 5318(g)(3). The protection afforded the GSEs in title 12 by FHFA explicitly requires "good faith,"[51] unlike 31 U.S.C. 5318(g)(3) which contains no such requirement. Legal authority weighs heavily in favor of the proposition

---

[49] For purposes of this rulemaking, "non-public information" refers to information that is exempt from disclosure under the Freedom of Information Act.

[50] 31 CFR 1.11 is the Department of the Treasury's information disclosure regulation. Generally, these regulations are known as "Touhy regulations," after the Supreme Court's decision in *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951). In that case, the Supreme Court held that an agency employee could not be held in contempt for refusing to disclose agency records or information when following the instructions of his or her supervisor regarding the disclosure. An agency's Touhy regulations are the instructions agency employees must follow when those employees receive requests or demands to testify or otherwise disclose agency records or information.

[51] FN51 12 CFR 1233.5.

that this safe harbor is not subject to a "good faith" limitation.[52]

Section 1030.320(f) notes that compliance with the obligation to report suspicious transactions will be examined by FinCEN or its delegates, and provides that failure to comply with the rule may constitute a violation of the BSA and the BSA regulations.

****

[52] See *Stoutt v. Banco Popular de Puerto Rico*, 320 F.3d 26, 31 (1st Cir. 2003) (no good faith requirement), *Lee v. Bankers Trust*, 166 F.3d 540, 544 (2d Cir. 1999) (same), *Henry v. Bank of America*, 2010 U.S. Dist. LEXIS 14561 *11-13 (N.D. Cal., Feb. 2, 2010) (same), *Eyo v. United States*, 2007 U.S. Dist. LEXIS 88088 *15-16 (D.N.J., Nov. 29, 2007) (same), *Nieman v. Firstar Bank*, 2005 U.S. Dist. LEXIS 38959 *18 (N.D. Iowa, Sept. 26, 2005) (same); but see *Lopez v. First Union National Bank*, 129 F.3d 1186, 1992 (11th Cir. 1997) (good faith requirement).

TREASURY ORDER 180-01

DATE: March 24, 2003

SUBJECT: Financial Crimes Enforcement Network

1. DELEGATION OF AUTHORITY. By virtue of the USA PATRIOT Act of 2001 (Pub. L. No. 107-56, Title III, Subtitle B, Section 361(a)(2), 115 Stat. 272, 329-332), and by the authority vested in me as Secretary of the Treasury, it is hereby ordered that the Financial Crimes Enforcement Network ("FinCEN" or the "Bureau") is re-established as a bureau within the Department. The head of the Bureau is the Director, Financial Crimes Enforcement Network, who shall perform duties under the general supervision of the Secretary and under the direct supervision of the Deputy Assistant Secretary (Terrorist Financing and Financial Crimes).

2. MISSION. The mission of FinCEN shall be to fulfill the duties and powers assigned to the Director, Financial Crimes Enforcement Network, in the USA PATRIOT Act of 2001, codified in relevant part at 31 U.S.C. 310(b), to support law enforcement efforts and foster interagency and global cooperation against domestic and international financial crimes, and to provide U.S. policy makers with strategic analyses of domestic and worldwide trends and patterns. FinCEN works toward those ends through information collection, analysis, and sharing, as well as technological assistance and innovative, cost-effective implementation of the Bank Secrecy Act and other Treasury authorities assigned to FinCEN.

3. DUTIES AND POWERS. In addition to the duties and powers established by the USA PATRIOT Act of 2001, codified in relevant part at 31 U.S.C. 310(b), the

Director of FinCEN is authorized to issue regulations and perform other actions for the purposes of carrying out the functions, powers, and duties delegated to the Director. The Director is hereby delegated authority to:

a. take all necessary and appropriate actions to implement and administer the provisions of Titles I and II of Public Law 91-508, as amended, (the "Bank Secrecy Act"), which is codified at 12 U.S.C. 1829b, 12 U.S.C. 1951-59, and 31 U.S.C. 5311 et seq., including, but not limited to, the promulgation and amendment of regulations and the assessment of penalties;

b. exercise authority for enforcement of and compliance with the regulations at 31 CFR Part 103 with respect to the activities of agencies exercising authority thereunder that has been redelegated to such agencies by FinCEN under paragraph 9 infra; and

c. design and implement programs of public outreach and communication to the financial community and the general public relating to the functions of the Bureau and the Department's efforts to prevent and detect money laundering and other financial crime.

4. AUTHORITIES. The Director of FinCEN shall possess full authority, powers, and duties to administer the affairs of and to perform the functions of FinCEN, including, without limitation, all management and administrative authorities similarly granted to Bureau Heads or Heads of Bureaus in Treasury Orders and Treasury Directives. The Director shall also possess authority to request one or more other government agencies to provide administrative support to the Bureau, in the name of the Bureau and under policies adopted by the Director.

5. CHIEF COUNSEL. The Office of Chief Counsel of FinCEN shall be a part of the Legal Division, under the supervision of the General Counsel.

6. REGULATIONS.

a. All regulations prescribed, all rules and instructions issued, and all forms adopted for the administration and enforcement of the Bank Secrecy Act, that were in effect or in use on the date of enactment of the USA PATRIOT Act of 2001, shall continue in effect as regulations, rules, instructions, and forms of the Bureau until superseded or revised.

b. All regulations prescribed, all rules and instructions issued, and all forms adopted for the administration of FinCEN prior to it becoming a bureau, that were in effect or in use on the date of enactment of the USA PATRIOT Act of 2001, shall continue in effect as regulations, rules, instructions, and forms of the Bureau until superseded or revised.

c. The terms "Director, Financial Crimes Enforcement Network," "Director, Office of Financial Enforcement," and "Assistant Secretary (Enforcement)" wherever used in regulations, rules, instructions, and forms issued or adopted for the administration and enforcement of the Bank Secrecy Act that were in effect or in use on the date of enactment of the USA PATRIOT Act of 2001, shall be held to mean the Director of FinCEN.

d. All regulations issued or amended by the Director of FinCEN shall be subject to approval by the Deputy Assistant Secretary (Terrorist Financing and Financial Crimes).

7. REDELEGATION.

a. The Director of FinCEN may redelegate any authority vested under this Order to an officer or employee of the Treasury Department, including its bureaus.

b. The Director of FinCEN may redelegate any authority vested in the Director to an officer or employee of an agency other than the Treasury Department, when authorized by law.

8. RATIFICATION. Any action heretofore taken that is consistent with this Order is hereby affirmed and ratified.

9. OTHER BUREAUS' AUTHORITIES.

This Order does not affect the authorities of the Commissioner of Customs and the Commissioner of Internal Revenue under Treasury Directive 15-23, "Bank Secrecy Act -- U.S. Customs Service" and Treasury Directive 15-41, "Bank Secrecy Act -- Internal Revenue Service," or under successor issuances to those Directives.

10. CANCELLATIONS.

a. Treasury Order 180-01, "Financial Crimes Enforcement Network," dated September 26, 2002, is superseded.

b. All existing Treasury Orders and Directives shall be read in a manner that is consistent with FinCEN's status as a bureau and the authorities vested in the Director of FinCEN as described in this Order.

11. AUTHORITIES.

a. Public Law 107-56, Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001, October 26, 2001, Pub. L. No. 107-56, Title III, Subtitle B, Section 361(a)(2), 115 Stat. 272, 329-332, codified in relevant part at 31 U.S.C. 310(b).

b. 31 U.S.C. 321(b).

12. OFFICE OF PRIMARY INTEREST. Director, Financial Crimes Enforcement Network.

/S/
John W. Snow
Secretary of the Treasury

Congressional Record --- Senate
Proceedings and Debates of the 102nd Congress,
First Session
Wednesday, November 13, 1991

COMPREHENSIVE DEPOSIT INSURANCE REFORM AND TAXPAYER PROTECTION ACT

D'AMATO AMENDMENT NO. 1337

(Ordered to lie on the table.)

Mr. D'AMATO submitted an amendment intended to be proposed by him to the bill, S. 543, supra, as follows:

At the appropriate place in the bill, insert the following:

****

TITLE III-BANK SECRECY AND RIGHT TO FINANCIAL PRIVACY AMENDMENTS

SEC. 301. AMENDMENTS TO THE BANK SECRECY ACT.

(a) Section 5324 of title 31, United States Code, is amended by adding the words "or section 5325 or the regulations thereunder" after the words "section 5318(a)," each time they appear.

(b) Section 5318 of title 31, United States Code is amended by adding new subsections (g) and (h), as follows:

"(g)(1) the Secretary may prescribe that financial institutions report suspicious transactions relevant to possible violation of law or regulation.

"(2) A financial institution may not notify any person involved in the transaction that the transaction has been reported.

"(3) Any financial institution, or officer, employee, or agent thereof, making a voluntary disclosure of any possible violation of law or regulation or a disclosure pursuant to this subsection or any other authority, shall not be liable to any person under any law or regulation of the United States or any constitution, law or regulation of any state or political subdivision thereof, for such disclosure or for any failure to notify the customer or any person of such disclosure or for refusal to do business with any person before or after disclosure of a possible violation of law or regulation made in good faith to a Government authority. This subsection shall not apply to financial institutions subject to the provisions of section 1103(c) of the Right to Financial Privacy Act of 1978, 12 U.S.C. 3403(c)."

"(h) In order to guard against money laundering through financial institutions, the Secretary may require financial institutions to have anti-money laundering programs, including at a minimum, the development of internal

policies, procedures and controls, designation of a compliance officer, an ongoing employee training program, and an independent audit function to test the program. The Secretary may promulgate minimum standards for such procedures.".

(c) Section 5321(a)(5)(A) of title 31, United States Code, is amended by adding "or any person willfully causing" after "willfully violates".

(d) Section 5322 of title 31, United States Code, is amended adding "or section 5318(g)(1)" after "under section 5315," each time it appears.

(e) Section 1829b(j)(1) of title 12, United States Code, is amended by adding "or any person who willfully causes such a violation" after "gross negligence violates".

(f) Section 1955 of title 12, United States Code, is amended by adding "or any person willfully causing a violation of the regulation" after "applies".

(g) Section 1957 of title 12, United States Code, is amended by adding "or willfully causes a violation" after "whoever willfully violates".

****

TITLE III

SECTION 301. AMENDMENTS TO THE BANK SECRECY ACT

Section (a). This technical amendment makes a change to the anti-structuring provision of the Bank Secrecy Act, 31 U.S.C. 5324, to specify that structuring transactions to avoid the $3,000 identification requirement of 31 U.S.C. 5325 is prohibited.

By way of background, the anti-structuring provision of the Bank Secrecy Act, 31 U.S.C. 5424, prohibits structuring of transactions to avoid the currency reporting requirements of section 5313, i.e., the $10,000 Currency Transaction Report requirement under 31 C.F.R. 103.22. In section 6185(b) of the Anti-Drug Abuse Act of 1988, Congress added section 5325 to further guard against the practice of "smurfing" drug proceeds by cash purchases of monetary instruments at amounts below the $10,000 reporting threshold. Section 5325 prohibits the cash purchase of certain monetary instruments-bank checks, cashier's checks, traveler's checks, money orders-in amounts greater than $3000 to non-account holders unless the financial institution verifies the identification of the purchaser. Treasury has issued regulations under section 5325, 31 C.F.R. 103.29, which require that financial institutions maintain a log of cash purchases of these instruments over $3000 which included a notation of the identification exacted for non-account holders.

Nevertheless, section 5324 only refers to structuring to avoid the Currency Transaction Report requirement. Therefore, the proposed amendment is needed because under the current law it could be argued that customer structuring of transactions or

smurfing to avoid the $3000 identification requirement would not be a violation of the Bank Secrecy Act.

Section (b). This section contains provisions necessary to bring the financial enforcement program in the United States in conformity with the recommendations of the Financial Action Task Force ("FATF") on money laundering.

The FATF was convened by the 1989 G-7 Summit to study the state of international cooperation on money laundering and measures to improve cooperation in international money laundering cases. The group was composed of fifteen financial center countries and the European Community. After several meetings of experts from law enforcement, Justice and Finance Ministries, and bank supervisory authorities, in April 1990, the group issued a comprehensive report with 40 action recommendations for comprehensive domestic anti-money laundering programs and improved international cooperation in money laundering investigations, prosecutions, and forfeiture actions. The recommendations of the group have become the world model for effective anti-money laundering measures.

President Bush and the other heads of state and government endorsed the report of the Financial Action Task Force at the Houston Economic Summit in summer 1990, and the financial ministries of non-G-7 participants also endorsed the report. The Houston Summit reconvened the Task Force for another year. The mandate of the reconvened Task Force is to study possible complements to the original recommendations, to assess implementation of the recommendations, and to study how to expand the number of countries that subscribe to the recommendations. The reconvened Task Force is

currently meeting. The original members have been joined by six other European countries and Hong Kong and the Gulf Cooperative Council.

By their endorsement, the Task Force members are committed to take necessary legislative and regulatory measures to implement the recommendations. Most of the countries are in the process of developing the necessary legislation. As can be expected, most of the recommendations reflect measures already in place in the United States because the United States was among the first countries to recognize the need for a comprehensive regulatory and legislative response to money laundering. Nevertheless, to fully measure up to the recommendations, our program requires some refinements which the amendments in this section address.

First, the Task Force recommendations (recommendation 9) provide that the same anti-money laundering measures recommended for banks be put in place for non-bank financial institutions, such as the requirement to report suspicious transactions possibly indicative of money laundering (recommendation 16) and to create anti-money laundering programs (recommendation 20). Our collective experience in the United States and abroad reflects that as banks become more effective in guarding against money laundering, money launderers turn to non-bank financial institutions, such as casas de cambio and telegraph companies. Many of these institutions are subject to the recordkeeping and reporting requirements of the Bank Secrecy Act, but unlike banks are not required to report suspicious transactions nor to have compliance programs to guard against money laundering. See e.g., 12 C.F.R. 12.11 (relating to reports to suspected crimes by national banks); 12

C.F.R. 21.21 (relating to procedures for monitoring Bank Secrecy Act compliance by national banks).

Proposed section 31 U.S.C. 5318(g)(1) authorizes the Secretary to require by regulation the reporting of suspicious transactions by any financial institution subject to the Bank Secrecy Act. Failure to report a suspicious transaction would subject the institution to the civil penalties of 31 U.S.C. 5321. It is anticipated that the Secretary would issue guidelines to assist financial institutions in identifying suspicious transactions.

Also in furtherance of the FATF recommendations, a financial institution, bank or non-bank, would be prohibited under s 5318(g)(2) from warning its customer if it made a suspicious transaction report (recommendation 17). Under the Right to Financial Privacy Act ("RFPA"), 12 U.S.C. 3403(c), a financial institution may report a suspicious transaction free from civil liability for not notifying its customer, but is not specifically prohibited from warning the customer. The FATF concluded that in order for suspicious transactions reporting to be effective there must be a prohibition from notifying the persons involved in the suspicious transaction.

Subsection (g)(3) provides non-bank financial institutions that file suspicious transaction reports with protection from customer liability lawsuits arising out of the filing of such a report or the institution's refusal to do business with a customer who is the subject of such a report. This protection is similar to, but somewhat broader than, the existing protection from lawsuits available to banks under s 1103(c) of the Right to Financial Privacy Act (12 U.S.C. 3404(c)).

Under the RFPA, financial institutions are able to report, in good faith, possible violations of law or regulation to federal authorities without notice to the suspected customer and free from civil liability. At the Administration's request in the Anti-Drug Abuse Acts of 1986 and 1988, Congress further clarified this provision to specify what information a financial institution could give regarding the customer and the suspicious activity, and that the protection preempted any state law requiring notice to the customer. These changes were added to ensure that financial institutions would not be inhibited from reporting suspected violations, especially money laundering and Bank Secrecy Act reporting violations.

The protection provided by s 1103(c), however, applies only to liability based on the disclosures in the suspicious transaction report and not to liability for refusal to do business with customers named in such reports. Moreover, because it appears in the RFPA, it applies only to financial institutions otherwise subject to the RFPA and not to the wide variety of other institutions that also file suspicious transaction reports.

The financial institutions that would be expected to file suspicious transaction reports under s 5318(g)(1) justifiably fear liability under the Fair Credit Reporting Act, 15 U.S.C. 1691, et seq., or for breach of contract, if they sever relations with a customer. See Ricci v. Key Bancshares of Maine, 768 F.2d 456 (1st Cir. 1985). If they continue relations with the customers, however, they fear that they may be implicated in any illegal activity.

In many cases, after a suspicion has been reported, Federal authorities will encourage financial institutions to continue dealing with a suspicious

customer so his activities may be monitored. Unfortunately, in other cases, law enforcement authorities do not always follow-up with financial institutions on the disposition of suspicious activity reports. In any event, financial institutions should be free to sever relations with the customer based on their suspicions or on information about a customer received from law enforcement.

Subsection (g)(3) addresses these concerns by extending the protection of section 1103(c) to a non-bank financial institution that severs relations with a customer or refuses to do business because of activities underlying a suspicious transaction report. Thus a non-bank financial institution that acts in good faith in reporting a suspicious transaction would be protected from civil liability to the customer under any theory of state or Federal law.

This protection would apply to the wide range of non-bank institutions subject to the Bank Secrecy Act under 31 U.S.C. 5312. Currently, the protection from civil liability set forth in the RFPA applies only to financial institutions described in section 101 of the Act (12 U.S.C. 3401) such as banks, credit unions, and savings associations. Non-bank institutions, which would be required to file suspicious transaction reports under regulations promulgated under s 5318(g)(1), are not covered by the RFPA or any of its protections for civil liability for defamation or breach of contract or under financial or consumer privacy laws.

Therefore, under this proposal, the protection from civil liability would apply to any institution enumerated in 31 U.S.C. 5312 not covered by the RFPA that files a suspicious transaction report, whether it does so voluntarily or in response to regulations promulgated under s 5318(g)(1). Thus, an

institution such as check casher, securities broker, or foreign currency exchange, which is not categorized as a "financial institution" under the RFPA, but is categorized as such under 31 U.S.C. 5312, will be free from customer liability based on the suspicious transaction report made in good faith.

Proposed section 31 U.S.C. 5318(h), which tracks the language of FATF recommendation 20, would authorize the Secretary to require financial institutions subject to the Bank Secrecy Act to have anti-money laundering programs which include, at a minimum, development of internal policies, procedures, and controls, designation of a compliance officer, an ongoing employee training program, and an independent audit function to test the program. The Secretary would be able to promulgate minimum standards for such procedures.

This recommendation was based on the regulations the U.S. bank regulators have in place pursuant to 12 U.S.C. 1818 to ensure Bank Secrecy Act compliance. See e.g., 12 C.F.R. 21.21. The Secretary already has authority under 31 U.S.C. 5318 to promulgate procedures to issue procedures to ensure compliance with requirements of the Bank Secrecy Act. This amendment would eliminate the requirement that the procedures be linked to a Bank Secrecy Act requirement, i.e., currency transaction reporting. The procedures would be geared at money laundering generally whether or not a customer dealt in cash. For instance, this authority could be used to require that anti-money laundering programs include "know your customer" procedures.

The Department of the Treasury envisions that the authority of proposed section 5318(g) and (h) could be used with respect to any institution subject to the

Bank Secrecy Act under 31 U.S.C. 5312 whether or not that institution is required to report currency transactions under the Bank Secrecy Act.

The amendments in sections (d) through (h) specify that persons who cause financial institutions to maintain false or incomplete records in contravention of the Bank Secrecy Act recordkeeper requirement would themselves be subject to civil sanctions. Currently, the Bank Secrecy Act recordkeeping civil penalties apply only to the financial institution required to maintain the record. (Criminal penalties already apply to persons causing such violations pursuant to 31 U.S.C. ss 5322 and 5324 (1) and (2), and 18 U.S.C. s 2.) The penalties do not apply to a customer who caused a financial institution to maintain a false or incomplete record. As Treasury refines its recordkeeping requirements, e.g., the proposal for enhanced funds transfer records, this may become a loophole in the statutory framework. The amendments in section 1 (d) through (h) would cure this problem for records required under the general recordkeeping authority for insured financial institutions (12 U.S.C. 1829b), non-bank financial institutions (12 U.S.C. 1951-1959), and requirements promulgated pursuant to 31 U.S.C. 5314 (foreign financial agency records).

****

Congressional Record --- Extension of Remarks
Proceedings and Debates of the 103rd Congress,
First Session

Material in Extension of Remarks was not spoken by a Member on the floor.

In the House of Representatives
Tuesday, January 5, 1993

MONEY LAUNDERING

HON. STEPHEN L. NEAL OF NORTH CAROLINA

Tuesday, January 5, 1993

Mr. NEAL of North Carolina.

Mr. Speaker, in the closing days of the 102d Congress we passed important legislation to fight money laundering by domestic and international criminals. Congress added to the Housing and Community Development Act of 1992, Public Law 102-550, the Annunzio-Wylie Anti-Money Laundering Act to place severe penalties on banks that do not cooperate in the reporting of suspicious activities.

Banks have long been encouraged to report suspicious transactions to the appropriate authorities. To ensure that banks have no excuses, the legislation contains a provision, section 1517(b), that provides a safe harbor when banks report suspicious activities. The goal of this new law is to have banks work with international efforts to stop the global movement of drug money.

Money laundering is an international problem. Money knows no borders and flows freely from one

country to another. The United States has long recognized that, and has worked hard to ensure cooperation from foreign governments and financial institutions to assure that money launderers have no place to hide. We encourage foreign entities to inform U.S. authorities of suspicious transactions, and we expect our banks to likewise provide foreign governments with the intelligence they need to combat money laundering within their borders.

As this legislation was added during a House-Senate conference there was no legislative history. After adjournment the Honorable Frank Annunzio, who was both the chairman of the Financial Institutions Subcommittee and author of the bill was asked and responded to, a question by a major U.S. bank about the applicability of the new law to help clarify the meaning of this law and at the request of the bank I ask unanimous consent that the letters between the bank and then-Chairman Annunzio be printed in the RECORD.

CHEMICAL BANK,
New York, NY, December 1, 1992
Hon. FRANK ANNUNZIO,
Chairman of the Subcommittee on Financial Institutions, Washington, DC.

DEAR MR. CHAIRMAN: It is Chemical Bank's understanding that the "safe harbor" provision of Section 1517(b) of the Annunzio-Wylie Anti-Money Laundering Act (the "Act") applies not only to disclosures made after the date of its enactment, but also to those disclosures made by a financial institution prior to enactment of the Act. We request that you advise us if our understanding is correct.

We thank you in advance for your prompt attention.
Respectfully yours,

BARBARA E. DANIELE,
Associate General Counsel &
Senior Vice President, Legal Department

SUBCOMMITTEE ON FINANCIAL INSTITUTIONS SUPERVISION, REGULATION AND INSURANCE OF THE COMMITTEE ON BANKING, FINANCE AND URBAN AFFAIRS,
Washington, DC, December 3, 1992.
BARBARA E. DANIELE, Esquire,
Chemical Bank,
New York, NY.

DEAR MS. DANIELE: This is in response to your letter dated December 1, 1992 in which you inquire about the intent of section 1517(b) of the Annunzio-Wylie Anti-Money Laundering Act contained in the Housing and Community Act of 1992 (Pub. L. 102-550, October 28, 1992). You ask whether this provision applies not only to disclosures made after the date of enactment, but also to disclosures made by a financial institution prior to enactment of the Act.

As the author of the Annunzio-Wylie Anti-Money Laundering Act and the House-passed bills upon which it was based, I was deeply concerned that financial institutions should be free to report suspicious transactions without fear of civil liability. Two earlier versions of Annunzio-Wylie Anti-Money Laundering Act which I sponsored this Congress, and which passed the House without a dissenting vote,

H.R. 26 and H.R. 6048, both contained provisions providing for an exemption from liability for banks which reported suspicious transactions.

Section 1517(b) amends section 5318 of title 31, United States Code, to provide the broadest possible exemption from civil liability for the reporting of suspicious transactions. My colleagues and I in Congress wanted to assure that financial institutions which reported suspicious transactions should not be held liable to any person under any law, Federal, state or local, for making such disclosures. I was my intent as the author of the provision that it would apply to any such disclosure, regardless of whether the disclosure was made prior or subsequent to the date of enactment of the Act.

I hope this helps answer your question concerning the scope of section 1517(b) of this Act.

With every best wish,
Sincerely,

FRANK ANNUNZIO,
Chairman.

DEPOSITORY INSTITUTION MONEY LAUNDERING AMENDMENTS OF 1990

HOUSE REPORT NO. 101–446
April 3, 1990
[To accompany H.R. 3848]

The Committee on Banking, Finance and Urban Affairs, to whom was referred the bill (H.R. 3848) to require the appropriate Federal depository institution regulatory agency to revoke the charter of any Federal depository institution which is found guilty of a crime involving money laundering or monetary transaction report offenses and to require the Federal Deposit Insurance Corporation and the National Credit Union Administration Board to terminate the deposit insurance of any State depository institution which is found guilty of any such crime, having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

The amendments are as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

****

SEC. 12. RIGHT TO FINANCIAL PRIVACY ACT AMENDMENT.

The last sentence of section 1103(c) of the Right to Financial Privacy Act (12 U.S.C. 3403(c)) is amended–

(1) by inserting "in good faith" after "disclosure of information";

(2) by striking "or" after "such disclosure" and inserting a comma; and

(3) by inserting before the period the following: ", or for a refusal to do business with that customer after having made such disclosure".

****

Section 12. Right to Financial Privacy Act Amendment

The Committee is concerned that financial institutions have been reluctant to report suspicious transactions to law enforcement authorities because of concern for potential civil liability resulting from the filing of the report. Financial institutions are also reluctant to cease doing business with customers whom they suspect are engaged in illegal activities out of concern for liability to those customers. In one case, a court held the bank civilly liable for terminating a business relationship with a customer, even though the bank had been told (erroneously) by Federal law enforcement authorities that the customer was engaged in illegal activities.

In order to encourage financial institutions to report suspicious transactions and to encourage financial institutions to terminate relationships with customers who may be engaged in illegal transactions but who have not yet been charged with any offense, the Committee amends the Right to Financial Privacy act to provide an exemption from civil liability for any institution which, in good faith, files a suspicious transaction report or who refuses to do business with a customer that the institution has in good faith reported.

The Committee emphasizes that this exemption from liability applies only when the referral has been made in good faith. It does not apply to the filing of a referral simply as an attempt to evade liability for an otherwise impermissible purpose or motive.

The Committee intends "good faith" to mean that the report has been filed with an honesty of intention, observing the reasonable standards of fair dealing in filing the report.

****

Suspicious Activity Report

March 2011
Previous editions will not be accepted after September 30, 2011

ALWAYS COMPLETE ENTIRE REPORT (see instructions)

1

FRB:	FR 2230	OMB No. 7100-0212
FDIC:	6710/06	OMB No. 3064-0077
OCC:	8010-9,8010-1	OMB No. 1557-0180
OTS:	1601	OMB No. 1550-0003
NCUA:	2362	OMB No. 3133-0094
TREASURY:	TD F 90-22.47	OMB No. 1506-0001

1 Check box below only if correcting a prior report.
☐ Corrects Prior Report (see instruction #3 under "How to Make a Report")

Part I Reporting Financial Institution Information

2 Name of Financial Institution

3 EIN

4 Address of Financial Institution

5 Primary Federal Regulator
a ☐ Federal Reserve d ☐ OCC
b ☐ FDIC e ☐ OTS
c ☐ NCUA

6 City

7 State

8 Zip Code

9 Address of Branch Office(s) where activity occurred ☐ Multiple Branches (include information in narrative, Part V)

10 City

11 State

12 Zip Code

13 If institution closed, date closed
_____/_____/_____
MM DD YYYY

14 Account number(s) affected, if any
a _____ Closed? ☐ Yes ☐ No
b _____ Closed? ☐ Yes ☐ No
c _____ Closed? ☐ Yes ☐ No
d _____ Closed? ☐ Yes ☐ No

Part II Suspect Information

☐ Suspect Information Unavailable

15 Last Name or Name of Entity

16 First Name

17 Middle

18 Address

19 SSN, EIN or TIN

20 City

21 State

22 Zip Code

23 Country (Enter 2 digit code)

24 Phone Number - Residence (include area code)
( )

25 Phone Number - Work (include area code)
( )

26 Occupation/Type of Business

27 Date of Birth
_____/_____/_____
MM DD YYYY

28 Admission/Confession?
a ☐ Yes b ☐ No

29 Forms of Identification for Suspect:
a ☐ Driver's License/State ID b ☐ Passport c ☐ Alien Registration d ☐ Other _____
Number _____ Issuing Authority _____

30 Relationship to Financial Institution:
a ☐ Accountant d ☐ Attorney g ☐ Customer j ☐ Officer
b ☐ Agent e ☐ Borrower h ☐ Director k ☐ Shareholder
c ☐ Appraiser f ☐ Broker i ☐ Employee l ☐ Other _____

31 Is the relationship an insider relationship? a ☐ Yes b ☐ No
If Yes specify: c ☐ Still employed at financial institution e ☐ Terminated
d ☐ Suspended f ☐ Resigned

32 Date of Suspension, Termination, Resignation
_____/_____/_____
MM DD YYYY

Part III Suspicious Activity Information 2

33 Date or date range of suspicious activity
From: ____/ ___/ _____ To: ____/ ___/ _____
MM DD YYYY MM DD YYYY

34 Total dollar amount involved in known or suspicious activity
$ .00

35 Summary characterization of suspicious activity:

a ☐ Bank Secrecy Act/Structuring/ Money Laundering
b ☐ Bribery/Gratuity
c ☐ Check Fraud
d ☐ Check Kiting
e ☐ Commercial Loan Fraud
f ☐ Computer Intrusion
g ☐ Consumer Loan Fraud
h ☐ Counterfeit Check
i ☐ Counterfeit Credit/Debit Card
j ☐ Counterfeit Instrument (other)
k ☐ Credit Card Fraud
l ☐ Debit Card Fraud
m ☐ Defalcation/Embezzlement
n ☐ False Statement
o ☐ Misuse of Position or Self Dealing
p ☐ Mortgage Loan Fraud
q ☐ Mysterious Disappearance
r ☐ Wire Transfer Fraud
s ☐ Other _____ (type of activity)
t ☐ Terrorist Financing
u ☐ Identity Theft

36 Amount of loss prior to recovery
$ .00

37 Dollar amount of recovery (if applicable)
$ .00

38 Has the suspicious activity had a material impact on, or otherwise affected, the financial soundness of the institution?
a ☐ Yes b ☐ No

39 Has the institution's bonding company been notified?
a ☐ Yes b ☐ No

40 Has any law enforcement agency already been advised by telephone, written communication, or otherwise?

a ☐ DEA
b ☐ FBI
c ☐ IRS
d ☐ Postal Inspection
e ☐ Secret Service
f ☐ U.S. Customs
g ☐ Other Federal
h ☐ State
i ☐ Local
j ☐ Agency Name (for g, h or i) _____

41 Name of person(s) contacted at Law Enforcement Agency

42 Phone Number (include area code)
( )

43 Name of person(s) contacted at Law Enforcement Agency

44 Phone Number (include area code)
( )

Part IV Contact for Assistance

45 Last Name

46 First Name

47 Middle

48 Title/Occupation

49 Phone Number (include area code)
( )

50 Date Prepared
____/ ____/ _____
MM DD YYYY

51 Agency (if not filed by financial institution)

Part V	*Suspicious Activity Information Explanation/Description	3

Explanation/description of known or suspected violation of law or suspicious activity.

This section of the report is **critical**. The care with which it is written may make the difference in whether or not the described conduct and its possible criminal nature are clearly understood. Provide below a chronological and **complete** account of the possible violation of law , including what is unusual, irregular or suspicious about the transaction, using the following checklist as you prepare your account. **If necessary, continue the narrative on a duplicate of this page.**

a **Describe** supporting documentation and retain for 5 years.
b **Explain** who benefited, financially or otherwise, from the transaction, how much, and how.
c **Retain** any confession, admission, or explanation of the transaction provided by the suspect and indicate to whom and when it was given.
d **Retain** any confession, admission, or explanation of the transaction provided by any other person and indicate to whom and when it was given.
e **Retain** any evidence of cover-up or evidence of an attempt to deceive federal or state examiners or others.
f **Indicate** where the possible violation took place (e.g., main office, branch, other).
g **Indicate** whether the possible violation is an isolated incident or relates to other transactions.
h **Indicate** whether there is any related litigation; if so, specify.
i **Recommend** any further investigation that might assist law enforcement authorities.
j **Indicate** whether any information has been excluded from this report; if so, why?
k If you are correcting a previously filed report, describe the changes that are being made.

For Bank Secrecy Act/Structuring/Money Laundering report s, include the following additional information:

l **Indicate** whether currency and/or monetary instruments were involved. If so, provide the amount and/or descrip tion of the instrument (for example, bank draft, letter of credit, domestic or international money order , stocks, bonds, traveler's checks, wire transfers sent or received, cash, etc.).
m **Indicate** any account number that may be involved or affected.

Tips on SAR Form prep aration and filing are available in the SAR Activity Review at www .fincen.gov/pub_reports.html

Suspicious Activity Report
Instructions

Safe Harbor Federal law (31 U.S.C. 5318(g)(3)) provides complete protection from civil liability for all reports of suspicious transactions made to appropriate authorities, including supporting documentation, regardless of whether such reports are filed pursuant to this report's instructions or are filed on a voluntary basis. Specifically, the law provides that a financial institution, and its directors, officers, employees and agents, that make a disclosure of any possible violation of law or regulation, including in connection with the preparation of suspicious activity reports, "shall not be liable to any person under any law or regulation of the United States, any constitution, law, or regulation of any State or political subdivision of any State, or under any contract or other legally enforceable agreement (including any arbitration agreement), for such disclosure or for any failure to provide notice of such disclosure to the person who is the subject of such disclosure or any other person identified in the disclosure".

Notification Prohibited Federal law (31 U.S.C. 5318(g)(2)) requires that a financial institution, and its directors, officers, employees and agents who, voluntarily or by means of a suspicious activity report, report suspected or known criminal violations or suspicious activities may not notify any person involved in the transaction that the transaction has been reported.

In situations involving violations requiring immediate attention, such as when a reportable violation is ongoing, the financial institution shall immediately notify, by telephone, appropriate law enforcement and financial institution supervisory authorities in addition to filing a timely suspicious activity report.

WHEN TO MAKE A REPORT:

1. All financial institutions operating in the United States, including insured banks, savings associations, savings association service corporations, credit unions, bank holding companies, nonbank subsidiaries of bank holding companies, Edge and Agreement corporations, and U.S. branches and agencies of foreign banks, are required to make this report following the discovery of:

   a. **Insider abuse involving any amount.** Whenever the financial institution detects any known or suspected Federal criminal violation, or pattern of criminal violations, committed or attempted against the financial institution or involving a transaction or transactions conducted through the financial institution, where the financial institution believes that it was either an actual or potential victim of a criminal violation, or series of criminal violations, or that the financial institution was used to facilitate a criminal transaction, and the financial institution has a substantial basis for identifying one of its directors, officers, employees, agents or other institution-affiliated parties as having committed or aided in the commission of a criminal act regardless of the amount involved in the violation.

   b. **Violations aggregating $5,000 or more where a suspect can be identified.** Whenever the financial institution detects any known or suspected Federal criminal violation, or pattern of criminal violations, committed or attempted against the financial institution or involving a transaction or transactions conducted through the financial institution and involving or aggregating $5,000 or more in funds or other assets, where the financial institution believes that it was either an actual or potential victim of a criminal violation, or series of criminal violations, or that the financial institution was used to facilitate a criminal transaction, and the financial institution has a substantial basis for identifying a possible suspect or group of suspects. If it is determined prior to filing this report that the identified suspect or group of suspects has used an "alias," then information regarding the true identity of the suspect or group of suspects, as well as alias identifiers, such as drivers' licenses or social security numbers, addresses and telephone numbers, must be reported.

   c. **Violations aggregating $25,000 or more regardless of a potential suspect.** Whenever the financial institution detects any known or suspected Federal criminal violation, or pattern of criminal violations, committed or attempted against the financial institution or involving a transaction or transactions conducted through the financial institution and involving or aggregating $25,000 or more in funds or other assets, where the financial institution believes that it was either an actual or potential victim of a criminal violation, or series of criminal violations, or that the financial institution was used to facilitate a criminal transaction, even though there is no substantial basis for identifying a possible suspect or group of suspects.

   d. **Transactions aggregating $5,000 or more that involve potential money laundering or violations of the Bank Secrecy Act.** Any transaction (which for purposes of this subsection means a deposit, withdrawal, transfer between accounts, exchange of currency, loan, extension of credit, purchase or sale of any stock, bond, certificate of deposit, or other monetary instrument or investment security, or any other payment, transfer, or delivery by, through, or to a financial institution, by whatever means effected) conducted or attempted by, at

or through the financial institution and involving or aggregating $5,000 or more in funds or other assets, if the financial institution knows, suspects, or has reason to suspect that:

i. The transaction involves funds derived from illegal activities or is intended or conducted in order to hide or disguise funds or assets derived from illegal activities (including, without limitation, the ownership, nature, source, location, or control of such funds or assets) as part of a plan to violate or evade any law or regulation or to avoid any transaction reporting requirement under Federal law;

ii. The transaction is designed to evade any regulations promulgated under the Bank Secrecy Act; or

iii. The transaction has no business or apparent lawful purpose or is not the sort in which the particular customer would normally be expected to engage, and the financial institution knows of no reasonable explanation for the transaction after examining the available facts, including the background and possible purpose of the transaction.

The Bank Secrecy Act requires all financial institutions to file currency transaction reports (CTRs) in accordance with the Department of the Treasury's implementing regulations (31 CFR Chapter X). These regulations require a financial institution to file a CTR whenever a currency transaction exceeds $10,000. If a currency transaction exceeds $10,000 and is suspicious, the institution must file both a CTR (reporting the currency transaction) and a suspicious activity report (reporting the suspicious or criminal aspects of the transaction). If a currency transaction equals or is below $10,000 and is suspicious, the institution should only file a suspicious activity report.

2. **Computer Intrusion.** For purposes of this report, "computer intrusion" is defined as gaining access to a computer system of a financial institution to:

a. Remove, steal, procure, or otherwise affect funds of the institution or the institution's customers;
b. Remove, steal, procure or otherwise affect critical information of the institution including customer account information; or
c. Damage, disable or otherwise affect critical systems of the institution.

For purposes of this reporting requirement, computer intrusion does not mean attempted intrusions of websites or other non-critical information systems of the institution that provide no access to institution or customer financial or other critical information.

3. A financial institution is required to file a suspicious activity report no later than 30 calendar days after the date of initial detection of facts that may constitute a basis for filing a suspicious activity report. If no suspect was identified on the date of detection of the incident requiring the filing, a financial institution may delay filing a suspicious activity report for an additional 30 calendar days to identify a suspect. In no case shall reporting be delayed more than 60 calendar days after the date of initial detection of a reportable transaction.

4. This suspicious activity report does not need to be filed for those robberies and burglaries that are reported to local authorities, or (except for savings associations and service corporations) for lost, missing, counterfeit, or stolen securities that are reported pursuant to the requirements of 17 CFR 240.17f-1.

HOW TO MAKE A REPORT:

1. Send each completed suspicious activity report to:

Detroit Computing Center, P.O. Box 33980, Detroit, MI 48232-0980

2. For items that do not apply or for which information is not available, leave blank.
3. If you are correcting a previously filed report, check the box at the top of the report (line 1). Complete the report in its entirety and include the corrected information in the applicable boxes. Then describe the changes that are being made in Part V (Description of Suspicious Activity), line k.
4. **Do not include any supporting documentation with the suspicious activity report.** Identify and retain a copy of the suspicious activity report and all original supporting documentation or business record equivalent for five (5) years from the date of the suspicious activity report. All supporting documentation must be made available to appropriate authorities upon request.
5. If more space is needed to report additional suspects, attach copies of page 1 to provide the additional information. If more space is needed to report additional branch addresses, include this information in the narrative, Part V.
6. Financial institutions are encouraged to provide copies of suspicious activity reports to state and local authorities, where appropriate.