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NOTES

An Emerging Duty to Report Criminal Conduct: Banks, Money Laundering, and the Suspicious Activity Report

INTRODUCTION

In general, American law imposes no duty to report crimes.¹ American jurisprudence has long viewed legal sanctions for failure to report crime as repugnant. While a misprision of felony² statute has appeared in the United States criminal code since 1790,³ the courts have interpreted that law to punish active concealment rather than passive non-reporting.⁴ Instead of imposing a legal responsibility to report, the

¹ The commentary to the Model Penal Code notes that the vast majority of jurisdictions attach “no penalty to simple failure to inform authorities of criminal conduct.” MODEL PENAL CODE § 242.5 commentary at 251 (1962).

² “The offense of concealing a felony committed by another.” BLACK’S LAW DICTIONARY 1000 (6th ed. 1990). Misprision of felony does not apply to accomplices to the felony itself. *Id.*

³ 18 U.S.C. § 4 (1994) provides:

Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined under this title or imprisoned not more than three years, or both.

⁴ For cases interpreting 18 U.S.C. § 4, see Gerald E. Lynch, *The Lawyer as Informer*, 1986 DUKE L.J. 491, 519 n.118. To date, only one court has convicted a defendant of misprision. *See State v. Hann*, 40 N.J.L. 228 (N.J. Super. Ct. 1878). In the modern era, prosecutors occasionally employ the statute

American legal system has consigned the question of whether to report crime to individual and collective morality. As Justice Marshall wrote for the Supreme Court in 1822: "It may be the duty of a citizen to accuse every offender, and to proclaim every offense which comes to his knowledge; but the law which would punish him in every case, for not performing this duty is too harsh for man."⁵

While this general distaste for required reporting of crimes continues, several signs point toward a growing acceptance of specific reporting requirements. In Part I, this Note examines several manifestations of an emerging duty imposed on citizens and businesses to report criminal wrongdoing to law enforcement authorities.⁶ As a case study of the growing duty to report, this Note focuses, in Part II, on the reports required of banks and non-bank financial institutions under federal money-laundering statutes.⁷ Part III explores challenges to the reporting duties.⁸ As a specific example of the expansive and unusual duty to report criminal conduct imposed on the banking industry, Part IV examines the provisions of the new Suspicious Activity Report ("SAR")⁹ that took effect in December, 1995.¹⁰ In Part V, this Note details the politics and policy behind the SAR.¹¹ Part VI examines the liability of banks for reporting and for failure to report.¹² This Note then, in Part VII, briefly explores similar reporting duties under the money laundering laws of other countries.¹³ Finally, Part VIII suggests possible areas in

in plea negotiations and for cases in which they lack adequate proof of the defendant's involvement in the crime itself. Daniel B. Yeager, *A Radical Community of Aid: A Rejoinder to Opponents of Affirmative Duty to Help Strangers*, 71 WASH. U. L.Q. 1, 32-34 (1993).

⁵ *Marbury v. Brooks*, 20 U.S. (7 Wheat.) 556, 575-76 (1822). For a general discussion of misprision and for details on the history behind the quote (Marshall did not want to force William Marbury to report his son-in-law), see Yeager, *supra* note 4, at 30-38.

⁶ See *infra* notes 16-42 and accompanying text.

⁷ See *infra* notes 43-59 and accompanying text.

⁸ See *infra* notes 60-69 and accompanying text.

⁹ See *infra* notes 70-114 and accompanying text.

¹⁰ *Major New Suspicious Activity Reporting Duties Announced*, MONEY LAUNDERING ALERT (Alert Int'l, Inc.), Sept. 1995, at 1 [hereinafter *Major New Suspicious Activity*].

¹¹ See *infra* notes 115-55 and accompanying text.

¹² See *infra* notes 156-214 and accompanying text.

¹³ See *infra* notes 215-44 and accompanying text.

which the money laundering reporting requirements may expand.¹⁴ This Note concludes by examining the implications of the reporting requirements. The reporting duty, in effect, transforms banks into agents of the government and undermines the bank-customer relationship. However, the alternatives seem equally unattractive.¹⁵

I. INDICATIONS OF AN EMERGING DUTY TO REPORT CRIME

A number of exceptions to the general rule that citizens have no duty to report crime¹⁶ suggest an emerging acceptance of legally-mandated reporting in specific instances despite the prevailing reluctance to recognize a broader duty. This emerging acceptance of legal reporting duties echoes in the dicta of Supreme Court opinions. In contrast to the strong rhetoric of Justice Marshall in 1822,¹⁷ the Supreme Court recently stated that the "[c]oncealment of crime has been condemned throughout our history [G]ross indifference to the duty to report known criminal behavior remains a badge of irresponsible citizenship."¹⁸

The growth of specific reporting requirements includes sweeping statutes in some jurisdictions and more obscure enactments in others.¹⁹ Perhaps the broadest examples of the growing legal duty to report crime appear in the statutes of Massachusetts, Ohio, and Washington which mandate the reporting of felonies.²⁰ More narrow reporting duties include widespread statutes requiring physicians to report gunshot and knife wounds;²¹ virtually universal laws mandating that physicians,

¹⁴ See *infra* notes 245-57 and accompanying text.

¹⁵ See *infra* notes 258-60 and accompanying text.

¹⁶ See *supra* note 1.

¹⁷ See *supra* note 5 and accompanying text.

¹⁸ *Roberts v. United States*, 445 U.S. 552, 557-58 (1980).

¹⁹ In addition to statutes that compel reporting, state and federal governments have also passed whistle-blower laws to protect public and private employees who voluntarily report violations of the law. *E.g.*, KY. REV. STAT. ANN. §§ 61.102-.103 (Michie/Bobbs-Merrill 1995). For an analysis of the factors involved in considering when an employee should report, see generally Albert D. Clark, *Ethical Implications of Whistle Blowing*, 42 LA. B.J. 363 (1994).

²⁰ MASS. ANN. LAWS ch. 268, § 40 (Law. Co-op. 1992); OHIO REV. CODE ANN. § 2921.22 (Anderson 1993); WASH. REV. CODE ANN. § 9.69.100 (West 1992). See Jack Wenik, Note, *Forcing the Bystander to Get Involved: A Case for a Statute Requiring Witnesses to Report Crime*, 94 YALE L.J. 1787, 1801-04 (1985).

²¹ *E.g.*, ARK. CODE ANN. §§ 12-12-601 to -603 (Michie 1995); OHIO REV.

mental health workers, and school personnel report child abuse;²² statutes requiring that undertakers and hospitals report suspicious deaths;²³ laws compelling parking garage owners to report bullet holes in cars;²⁴ a growing number of codes and rules of professional conduct requiring that attorneys report misconduct by other lawyers;²⁵ and court decisions compelling psychiatrists to report dangerous patients.²⁶ Generally, these statutes compel the reporting of grave misconduct or severe danger.²⁷ Most reporting requirements focus on a discrete class with unique expertise and knowledge narrowly related to the information required.²⁸ Frequently, the states have imposed the reporting requirements on groups that have benefitted from licensing and bear significant professional duties of care.²⁹ In these cases the reporting duties seem commensurate with the benefits conferred and the burdens already imposed.³⁰

The world of business associations has its own set of specific, and growing, duties and incentives to report criminal conduct. These corporate duties differ dramatically from those imposed on the citizenry as individuals: most conspicuously, these reporting obligations often require the corporation to inform upon itself.³¹ The requirement of self-reporting

CODE ANN. § 2921.22(B) (Anderson 1993).

²² *E.g.*, CAL. PENAL CODE § 11166 (West Supp. 1996).

²³ *E.g.*, N.Y. PUB. HEALTH LAW §§ 4140-4143 (McKinney 1985).

²⁴ *E.g.*, R.I. GEN. LAWS § 31-26-12 (1982).

²⁵ *E.g.*, MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-103(A) (1981); MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.3(a) (1992); *see* Lynch, *supra* note 4, at 501-17. For a general discussion of the merits of requiring lawyers to report criminal conduct, *see* Paul R. Tremblay, *Ratting*, 17 AM. J. TRIAL. ADVOC. 49 (1993).

²⁶ *E.g.*, *Tarasoff v. Regents of the Univ. of Cal.*, 551 P.2d 334, 343-44 (Cal. 1976).

²⁷ *See* Lynch, *supra* note 4, at 519-20.

²⁸ *Id.*

²⁹ The argument that the benefits of licensing and the burdens of professional regulations justify commensurate reporting duties clearly applies to the banking industry. If physicians must report suspicious wounds and teachers must report suspicions of abuse, then it seems fair to require bankers to report suspicious financial transactions. *See* Pamela H. Bucy, *Epilogue: The Fight Against Money Laundering: A New Jurisprudential Direction*, 44 ALA. L. REV. 839, 847-50 (1993) (arguing that the imposition of reporting requirements under the money laundering laws is necessary and appropriate).

³⁰ *See id.*

³¹ *See infra* notes 33-35 and accompanying text.

by corporations exists because corporations, unlike citizens, enjoy none of the protections of the Fifth Amendment right against compelled self-incrimination.³²

Certainly, the most prominent duties of corporate reporting arise under the securities laws.³³ The most rapidly growing duty to report originates under the environmental laws.³⁴ In addition to the actual duties imposed on corporations, the United States Sentencing Guidelines and Justice Department prosecutorial guidelines provide significant incentives for self-reporting.³⁵

³² *E.g.*, *Doe v. United States*, 487 U.S. 201, 206 (1988) ("There also is no question that the foreign bank cannot invoke the Fifth Amendment in declining to produce the documents; the privilege does not extend to such artificial entities."); *Bellis v. United States*, 417 U.S. 85, 89-90 (1974) ("[N]o artificial organization may utilize the personal privilege against compulsory self-incrimination . . .").

³³ Securities Exchange Act of 1933 § 5, 15 U.S.C. § 77 (1994) (requiring full disclosure of material information in the registration of publicly offered securities); Securities Exchange Act of 1934 § 10(b), 15 U.S.C. § 78 (1994) (prohibiting material misrepresentations relating to the trading of securities), § 13 (prohibiting material misrepresentations in mandatory annual, quarterly, and special reports to the SEC), § 14 (prohibiting material misrepresentations in proxy solicitation of registered securities and prohibiting material misrepresentations during tender offers). These statutes, and the accompanying SEC rules, could be read to require a corporation to report its involvement in criminal conduct because a reasonable shareholder would find such involvement significant in his or her deliberations regarding the sale or purchase of the corporation's stock. For a general description of disclosure requirements under the securities laws, see HERBERT S. WANDER & RUSSELL N. PALLESEN, *DEVELOPMENTS IN SECURITIES LAW DISCLOSURE* (1995), available in WESTLAW, 907 PLI/Corp 327.

³⁴ *E.g.*, 42 U.S.C. § 9603 (1988) (requiring, under CERCLA, the reporting of certain releases of hazardous substances). For a general description of reporting requirements imposed under federal statutes and state common law, see ROBERT L. GRAHAM, *DISCLOSURE AND DUE DILIGENCE OBLIGATIONS ARISING FROM BUSINESS STATUTES AND REGULATIONS HAVING ENVIRONMENTAL IMPACTS* (1990), available in WESTLAW, 716 PLI/Corp 153. For an analysis of the overlap of the environmental and securities reporting requirements, see Robert H. Feller, *Environmental Disclosure and the Securities Laws*, 22 B.C. ENVTL. AFF. L. REV. 225 (1995).

³⁵ See MARK L. MANEWITZ & WILLIAM M.A. PORTER, *VOLUNTARY DISCLOSURE IN ENVIRONMENTAL MATTERS, AND THE EFFECT OF SENTENCING AND PROSECUTORIAL-DISCRETION GUIDELINES* (1993), available in WESTLAW, 457 PLI/Lit 111; Pamela H. Bucy, *Organizational Sentencing Guidelines: The*

The Sentencing Guidelines provide for decreased corporate fines based on self-reporting, recognition and acceptance of responsibility, and cooperation by the corporation.³⁶ The amount of the reduction in sentence depends on the stage at which the corporation comes forward.³⁷ The corporation reaps the greatest benefit if it reports prior to the commencement of a government investigation and reasonably promptly after it discovers the wrongdoing.³⁸ The Guidelines also provide incentives for effective corporate compliance programs.³⁹

Similarly, the Department of Justice Antitrust Division ("DOJ") guidelines for corporate leniency provide incentives for self-reporting.⁴⁰ Rather than promising a reduced sentence, the DOJ guidelines hold out the prospect that a corporation may avoid liability entirely by self-reporting. In effect, the DOJ guidelines spell out the elements of prosecutorial discretion involved in deciding whether to indict a corporation despite self-reporting.⁴¹ The leniency policy directs the inquiry into the following factors: (1) whether the corporation came forward on its own; (2) whether DOJ had developed enough evidence for

Cart before the Horse, 71 WASH. U. L.Q. 329, 332-33 (1993); Richard S. Gruner, *Reducing Corporate Criminal Liability Through Post-Offense Responses*, in ORGANIZING FOR CORPORATE COMPLIANCE: AVOID CORPORATE LAWBREAKING THROUGH PREVENTIVE LAWYERING: AN ALI-ABA COURSE OF STUDY (1992), available in WESTLAW, C800 ALI-ABA 159; Michael P. Kenney & William R. Mitchelson, Jr., *Corporate Benefits of Properly Conducted Internal Investigations*, 11 GA. ST. U. L. REV. 657, 660-62 (1995); Jennifer Moore, *Corporate Culpability under the Federal Sentencing Guidelines*, 34 ARIZ. L. REV. 743, 790-92 (1992); Charles J. Walsh & Alissa Pyrich, *Corporate Compliance Programs as a Defense to Criminal Liability: Can a Corporation Save Its Soul?*, 47 RUTGERS L. REV. 605, 671-76 (1995).

For an analysis of whether providing immunity for self-reporting promotes contempt for the laws, see Keri A. Gould, *Turning Rat and Doing Time for Uncharged, Dismissed, or Acquitted Crimes: Do the Federal Sentencing Guidelines Promote Respect for the Law?*, 10 N.Y.L. SCH. J. HUM. RTS. 835 (critiquing the use of downward departure authority under the United States Sentencing Guidelines to obtain the assistance of defendants in the investigation and prosecution of other crimes).

³⁶ UNITED STATES SENTENCING COMM'N, GUIDELINES MANUAL § 8C4.1 (Nov. 1995) [hereinafter USSG].

³⁷ *Id.*

³⁸ *Id.* § 8C2.5(g)(1).

³⁹ *Id.* § 8C2.5(f).

⁴⁰ Antitrust Div., United States Dep't of Justice, Corporate Leniency Policy (Aug. 10, 1993), available in 4 Trade Reg. Rep. (CCH) ¶ 13,113 (1993).

⁴¹ *Id.*

a prosecution before the corporation reported; (3) whether the corporation promptly terminated the conduct; (4) whether the corporation reported and cooperated fully; (5) whether the report reflects a corporate decision rather than merely a judgment by individuals within the organization; (6) whether the corporation has made restitution for any injury; and (7) whether leniency would result in inequity.⁴²

These various corporate duties and incentives all pose the question of whether a corporation must report criminal conduct for which it might face prosecution. In contrast, the duties imposed on individuals involve reports of criminal, or possibly criminal, conduct by others. This divergence suggests the following question: Does the law impose a duty on businesses, analogous to the duty sometimes imposed on individuals, to report criminal conduct by others?

II. REPORTING OBLIGATIONS UNDER THE MONEY LAUNDERING LAWS

Federal money laundering laws impose a distinct set of reporting duties on business and financial institutions. Unlike the corporate reporting requirements mentioned above,⁴³ these reporting duties more closely resemble those imposed on individual citizens. Like private individuals, businesses and financial institutions must comply with the money laundering laws and report conduct of others as opposed to their own conduct.⁴⁴

The details of the money laundering reporting requirements make sense only in the context of the federal money laundering scheme as a whole. Two distinct sets of statutes address money laundering: the first defines and criminalizes substantive conduct,⁴⁵ while the second imposes various reporting requirements.⁴⁶ The substantive statutes make it illegal to knowingly enter into a transaction to conceal or disguise illegal proceeds,⁴⁷ to enter into a transaction to augment unlawful activity,⁴⁸

⁴² *Id.*

⁴³ See *supra* notes 33-35 and accompanying text.

⁴⁴ See *infra* notes 52-56 and accompanying text.

⁴⁵ 18 U.S.C. §§ 1956-57 (1994); 31 U.S.C. § 5324 (1994).

⁴⁶ Money Laundering Provisions may be found at 26 U.S.C. § 6050I (1994); 31 U.S.C. §§ 5311-5322 (1994); 31 C.F.R. § 103.23 (1995); 31 C.F.R. § 103.24 (1995). Regulatory Provisions may be found at 12 U.S.C. § 1818(5) (1994); 12 C.F.R. § 21.21 (1995).

⁴⁷ 18 U.S.C. § 1956(a)(1)(B)(i) (1994).

⁴⁸ *Id.* § 1956(a)(1)(A).

to use a financial institution in a transaction that involves criminally derived property,⁴⁹ and to structure a transaction to avoid a reporting requirement.⁵⁰ The reporting requirements⁵¹ mandate reporting by financial institutions of cash transactions over \$10,000,⁵² reporting by citizens transporting over \$10,000 out of the country,⁵³ reporting of accounts in foreign financial institutions,⁵⁴ and, reporting by trades or businesses involved in cash transactions of over \$10,000.⁵⁵ In addition, financial institutions must file suspicious activity reports.⁵⁶

Obviously, most of the conduct (large cash transactions, transportation of large amounts of currency into or out of the country, and holding foreign bank accounts) reported under the money laundering laws would not qualify as criminal. These reports of predominantly innocent activity,

⁴⁹ *Id.* § 1957(a), 1957(f).

⁵⁰ *Id.* § 1956(a)(1)(B)(ii); 31 U.S.C. § 5324 (1994).

⁵¹ For a detailed description of each reporting requirement, see Frank C. Razzano, *American Money Laundering Statutes: The Case for a Worldwide System of Banking Compliance Programs*, 3 J. INT'L L. & PRAC. 277, 279-88 (1994).

⁵² The Currency Transaction Report ("CTR"), IRS Form 4789. See 31 U.S.C. § 5313 (1994); 31 C.F.R. § 103.22 (1995).

⁵³ The Report of International Transportation of Currency or Monetary Instruments ("CMIR"), Customs Form 4790. See 31 U.S.C. § 5316 (1994); 31 C.F.R. § 103.23 (1995).

⁵⁴ The Report of Foreign Bank and Financial Accounts ("FBAR"), Treasury Form 90-22. See 31 U.S.C. § 5314(a) (1994); 31 C.F.R. § 103.24 (1995). Officials suspect that non-compliance with this reporting requirement runs rampant. In a typical year, the public files only 100,000 FBARs despite the prevalence of accounts in foreign banks. *FinCEN Imposes First Penalty for Failure to File "F-BAR"*, MONEY LAUNDERING ALERT (Alert Int'l, Inc.), May 1, 1995, at 6.

⁵⁵ The Report of Cash Payments over \$10,000 Received in a Trade or Business, IRS Form 8300. See I.R.C. § 6050I (1994); Treas. Reg. § 6050I (1993).

⁵⁶ The Suspicious Activity Report, Federal Reserve Board Form 2230; FDIC Form 6710/06A; Office of the Comptroller of the Currency Form 8010-9, 8010-1; Office of Thrift Supervision Form 366; National Credit Union Administration Form 2362; Treasury Form [number pending]. See 31 U.S.C. § 5318(g) (1994); 31 C.F.R. § 103.21 (proposed, effective date Apr. 1, 1996); 12 C.F.R. §§ 208, 211, 225 (proposed, effective date Apr. 1, 1996); 12 C.F.R. § 353 (proposed, effective date Apr. 1, 1996).

however, provide the grist for the mill of federal investigation into suspicious financial conduct by allowing law enforcement officials, using computers, to piece together a mosaic of money laundering.⁵⁷ These reports contrast dramatically with the suspicious activity reports. While currency reporting requires financial institutions to report readily identifiable conduct whether or not it is criminal (on the assumption that such activity correlates with illegality),⁵⁸ suspicious activity reports force financial institutions to employ far more diligent oversight and to use discretion in deciding what to report.⁵⁹

III. CHALLENGES TO THE REPORTING REQUIREMENTS

The reporting requirements have survived numerous challenges to their authority with courts uniformly upholding the validity and constitutionality of the statutory scheme.⁶⁰ The statutory authority for the reporting duties generally stems from the Bank Secrecy Act ("BSA"),⁶¹ the legislation that created the framework of money laundering offenses. The specific authority for the suspicious activity reports arises from the Annunzio-Wylie Act.⁶² The BSA provides that the Treasury Department may "require certain reports or records where they have a high degree of usefulness in criminal, tax, or regulatory investigations or pro-

⁵⁷ *There Will Be Gold for Federal Agents in New SAR System*, MONEY LAUNDERING ALERT (Alert Int'l, Inc.), July 1, 1995, at 3.

⁵⁸ See Jeremy H. Temkin, "*Hollow Ritual[s]*": *The Fifth Amendment and Self-Reporting Schemes*, 34 UCLA L. REV. 467, 471 (1986) (analyzing the relationship between reporting requirements and the privilege against self-incrimination).

⁵⁹ See *infra* notes 101-03 and accompanying text.

⁶⁰ *E.g.*, *California Bankers Ass'n v. Shultz*, 416 U.S. 21, 57-78 (1974) (rejecting a variety of challenges to the Bank Secrecy Act reporting requirements).

⁶¹ Bank Secrecy Act of 1970, Pub. L. 91-508, 84 Stat. 1114-1124 (codified as amended at 12 U.S.C. §§ 1730(d), 1829(b), 1951-59; 18 U.S.C. § 6002, 31 U.S.C. §§ 321, 5311-5314, 5316-5322).

⁶² Annunzio-Wylie Anti-Money Laundering Act of 1992, Pub. L. 102-550, 106 Stat. 4044-4074 (codified in scattered sections of 12 U.S.C., 18 U.S.C., and 22 U.S.C.); Annunzio-Wylie Anti-Money Laundering Act of 1994, Pub. L. 103-325, 108 Stat. 2254 (codified at 31 U.S.C. § 5318).

ceedings.”⁶³ The courts have supported the Department’s findings that various reporting and record-keeping requirements aid the government in criminal, tax, and regulatory investigations and proceedings.⁶⁴ More generally, the courts have ruled that Congress has the power to require reports from businesses if those reports bear a relation to matters which are made the subject of inquiry by legitimate enabling legislation.⁶⁵

Reporting requirements have withstood two types of challenge based on alleged violations of privacy rights under the Federal Right to Financial Privacy Act (“RFPA”)⁶⁶ and under the United States Constitution. The RFPA prevents banks from divulging customer information, however, the Act specifically states that its provisions shall not “preclude any financial institution . . . from notifying a Government authority that such institution . . . has information which may be relevant to a possible violation of any statute or regulation.”⁶⁷ The courts have ruled that this provision allows the full range of required reporting under the BSA and Annunzio-Wylie.⁶⁸ Claims that the money laundering reporting requirements violate Fourth Amendment privacy rights and other constitutional protections have similarly failed.⁶⁹

⁶³ 31 U.S.C. § 5311 (1994).

⁶⁴ *E.g.*, *United States v. Tobon-Builes*, 706 F.2d 1092, 1097 (11th Cir. 1983).

⁶⁵ *E.g.*, *Stark v. Connally*, 347 F. Supp. 1242, 1250 (D. Cal. 1972), *aff’d in part, rev’d in part on other grounds* by *California Bankers Ass’n v. Shultz*, 416 U.S. 21 (1974).

⁶⁶ Right to Financial Privacy Act of 1978 (“RFPA”), Pub. L. 95-630, 92 Stat. 3697 (codified as amended in scattered sections of 12 U.S.C.).

⁶⁷ 12 U.S.C.A. § 3403(c) (West 1995).

⁶⁸ *E.g.*, *Velasquez-Campuzano v. Marfa Nat’l Bank*, 896 F. Supp. 1415, 1420-22 (W.D. Tex. 1995) (holding that bank did not violate RFPA by filing suspicious activity report).

⁶⁹ *E.g.*, *California Bankers Ass’n v. Shultz*, 416 U.S. 21, 67 (1974) (“To the extent that the regulations in connection with such transactions require the bank to obtain information from a customer simply because the Government wants it, the information is sufficiently described and limited in nature, and sufficiently related to a tenable congressional determination as to improper use of transactions of that type in interstate commerce, so as to withstand the Fourth Amendment challenge made by the bank plaintiffs.”); *United States v. Richter*, 610 F. Supp. 480, 491-93 (D. Ill. 1985), *cert. denied*, 497 U.S. 855 (1986) (holding that reporting requirements do not violate Fourth or Fifth Amendment

IV. THE SUSPICIOUS ACTIVITY REPORT

Beginning in December, 1995, the Treasury Department⁷⁰ required financial institutions⁷¹ to file a single Suspicious Activity Report ("SAR")⁷² detailing criminal and suspected criminal conduct. The SAR collects various previously fragmented reports⁷³ into one form and significantly expands the detail with which financial institutions must report suspicious activity. The SAR and its predecessors represent a dramatic break from other reporting duties imposed on American business: rather than requiring a business to report its own wrongdoing, the SAR mandates that a business report criminal conduct by citizens and other businesses. In effect, the banking community must observe a narrow version of the duty to report crimes that society generally rejects.

The Secretary of the Treasury issued regulations detailing the SAR under the broad authority granted by the BSA⁷⁴ to require record-keeping, reporting, anti-money laundering programs, know-your-customer, and compliance programs.⁷⁵ Specifically, the Annunzio-Wylie Act provided the authority to require the reporting of suspicious and criminal activity.⁷⁶ The Money Laundering Suppression Act expanded

protections).

⁷⁰ The Treasury Department acted in coordination with the various supervisory agencies that regulate financial institutions: the Federal Reserve System, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, and the National Credit Union Administration. *See supra* note 56.

⁷¹ Including commercial banks, thrifts, credit unions, and other depository institutions. *See* 31 C.F.R. § 103.11(c) (1995) (defining "bank").

⁷² For a copy of the Suspicious Activity Report and Instructions, see *infra* app. at pp. 680-84.

⁷³ Previous law required banks to complete the Criminal Referral Form, Office of the Comptroller of the Currency Form CC-8010-08 or CC-9010-09. *See* 12 U.S.C. § 21.11(a) (1994). Previous regulations required banks making a cash transaction report to check a suspicious transaction box if appropriate. Line 1(c) of IRS Form 4798. For a more detailed description of previous suspicious activity reporting, see Razzano, *supra* note 51, at 285-86.

⁷⁴ Bank Secrecy Act of 1970, Pub. L. 91-508, 84 Stat. 1114-1124, (codified as amended at 12 U.S.C. §§ 1730(d), 1829(b), 1951-59; 18 U.S.C. § 6002, 31 U.S.C. §§ 321, 5311-5314, 5316-5322).

⁷⁵ *See* 60 Fed. Reg. 46,556, 46,557 (1995) (providing general background on statutory authority for reporting and compliance programs).

⁷⁶ Annunzio-Wylie Anti-Money Laundering Act of 1992, Pub. L. 102-550, 106 Stat. 4044-4074 (codified in scattered sections of 12 U.S.C., 18 U.S.C., and

that authority and required a single report to a single governmental recipient, rather than the scattered reports previously mandated.⁷⁷ Pursuant to this legislation, the Treasury Department transferred authority for administering the reporting requirements, including the newly-authorized single SAR, to the Financial Crimes Enforcement Network ("FinCEN"), a division of the Department of the Treasury.⁷⁸

The statutory authority for the SAR lies in 31 U.S.C. § 5318. That section generally provides that the Secretary of the Treasury may require "appropriate procedures to ensure compliance" with reporting requirements⁷⁹ and specifically authorizes suspicious activity reporting as directed by the Secretary: "The Secretary may require any financial institution . . . to report any suspicious transaction relevant to a possible violation of law or regulation."⁸⁰ The statute prohibits the disclosure of any report to any of the participants in the suspicious transaction in question:⁸¹ "A financial institution . . . [that] 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."⁸²

In order to protect the reporting financial institution from liability, the statute includes a safe harbor provision designed to provide immunity from defamation claims and other lawsuits:

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.⁸³

22 U.S.C.); Annunzio-Wylie Anti-Money Laundering Act of 1994, Pub. L. 103-325, 108 Stat. 2254 (codified at 31 U.S.C. § 5318).

⁷⁷ The Money Laundering Suppression Act of 1994, Pub. L. 103-325, 108 Stat. 2160 (1994).

⁷⁸ 31 C.F.R. § 103 (1995).

⁷⁹ 31 U.S.C.A. § 5318(a)(2) (West Supp. 1995).

⁸⁰ *Id.* § 5318(g)(1).

⁸¹ *Id.* § 5318(g)(2).

⁸² *Id.*

⁸³ *Id.* § 5318(g)(3).

In addition to providing authority for the SAR, the Annunzio-Wylie Act grants the Secretary broad power to mandate programs, policies, and procedures designed to deter money laundering and improve reporting compliance.⁸⁴

The regulations promulgated by the Treasury Department appear to interpret the statutory authority liberally and suggest the possibility of a much wider array of reporting requirements. In addition, the regulations suggest that the Treasury believes it has the authority under the statute to expand the reporting requirement beyond financial institutions:

If the Secretary of the Treasury finds, upon the Secretary's own initiative or at the request of an appropriate Federal or State law enforcement official, that reasonable grounds exist for concluding that *additional recordkeeping and/or reporting requirements are necessary* to carry out the purposes of this part and to prevent persons from evading the reporting/recordkeeping requirements of this part, the Secretary may issue an order requiring any domestic financial institution or group of domestic financial institutions in a geographic area and *any other person participating* in the type of transaction to file a report in the manner and to the extent specified in such order. The order shall contain such information as the Secretary may describe concerning any transaction in which such financial institution is involved for the payment, receipt, or transfer of United States coins or currency (or such other monetary instruments as the Secretary may describe in such order) the total amounts or denominations of which are equal to or greater than an amount which the Secretary may prescribe.⁸⁵

The new SAR replaced the Criminal Referral Form,⁸⁶ long the subject of complaints from financial institutions because of its length, complexity, and the requirement that the financial institution file the form with the regulator, the local United States Attorney, the FBI, the Secret

⁸⁴ 31 U.S.C. § 5318(h) (1994) (authorizing anti-money laundering programs and reporting compliance programs including guidance on required policies, compliance officers, training programs, and independent audit procedures).

⁸⁵ 31 C.F.R. § 103.26(a) (1995) (emphasis added).

⁸⁶ 60 Fed. Reg. 46,556 (1995) (to be codified at 31 C.F.R. § 103) (proposing new 31 C.F.R. § 103.21, moving old § 103.21 to § 103.20, and providing instructions on SAR); 60 Fed. Reg. 47,719 (1995) (to be codified at 12 C.F.R. § 353) (providing FDIC regulations relating to SAR); PRESS RELEASE, FEDERAL RESERVE, June 28, 1995 (announcing proposed rule changes to 12 C.F.R. §§ 208, 211, 225) (providing FED regulations relating to SAR).

Service, and the IRS.⁸⁷ The SAR purportedly will take less time to complete,⁸⁸ and financial institutions need file it only with FinCEN.⁸⁹

Banks, savings and loans, credit unions, bank holding companies, and branches of foreign banks in the United States must file the SAR.⁹⁰ Normally, after detecting criminal or suspicious activity, the institution has thirty days to file the SAR, but the bank must immediately make a telephone report to appropriate law enforcement officials in cases of an on-going suspected violation.⁹¹ The financial institution must report suspicious transactions involving \$5,000 or more if the institution can identify the suspect⁹² and \$25,000 or more if the institution has "no basis for identifying a possible suspect."⁹³ The bank must report any transaction involving the bank which it "knows, suspects, or has reason to suspect"⁹⁴ involves illegal proceeds or an attempt to hide or disguise illegal proceeds,⁹⁵ an attempt to evade any money laundering statute including the reporting requirements,⁹⁶ or a transaction with no legitimate business purpose or "reasonable explanation."⁹⁷

The SAR must contain information about the reporting financial institution,⁹⁸ the subject of the SAR,⁹⁹ the suspicious activity it-

⁸⁷ John J. Byrne, *Preparing for the Upcoming Suspicious Activity Report*, MONEY LAUNDERING L. REP., Oct. 1995, at 1, 5 (analyzing the merits of the new SAR).

⁸⁸ *Suspicious Activity Report*, 6 BANKERS' HOTLINE 1 (1995) (estimating that the new SAR will take only 40 minutes to complete) [hereinafter *Suspicious Activity*].

⁸⁹ *Id.*

⁹⁰ See *infra* app. at SAR Instruction 1.

⁹¹ *Suspicious Activity*, *supra* note 88. See *infra* app. at Instructions.

⁹² *Suspicious Activity*, *supra* note 88. See *infra* app. at Instruction 1.b.

⁹³ *Suspicious Activity*, *supra* note 88. See *infra* app. at Instruction 1.c.

⁹⁴ *Suspicious Activity*, *supra* note 88. See *infra* app. at Instruction 1.d.

⁹⁵ *Suspicious Activity*, *supra* note 88. See *infra* app. at Instruction 1.d.i.

⁹⁶ *Suspicious Activity*, *supra* note 88. See *infra* app. at Instruction 1.d.ii.

⁹⁷ *Suspicious Activity*, *supra* note 88. See *infra* app. at Instruction 1.d.iii.

⁹⁸ *Suspicious Activity*, *supra* note 88. See *infra* app. at Part 1, p.680. The requirements include the institution's name, address, asset size, federal regulator, the accounts involved, and whether the institution has closed the accounts in question. See *infra* app. at Part 1, p.680.

⁹⁹ *Suspicious Activity*, *supra* note 88. See *infra* app. at Part II, p.680. These requirements include the suspect's name, address, social security number, phone numbers, occupation, form of ID, relationship to bank, status of relationship to bank, and whether the suspect made an admission or confession to the bank. See *infra* app. at Part II, p.680.

self,¹⁰⁰ any witnesses to the conduct, the preparer of the SAR, the contact at the bank,¹⁰¹ and finally, a detailed explanation of the suspicious activity.¹⁰² Notably, this final requirement not only imposes a considerable investigatory duty on the bank, it also requires the reporting bank to exercise significant discretion in recommending further investigation.¹⁰³

While the SAR stops short of delegating law enforcement authority to the bank, it does seem to grant a form of prosecutorial or investigatory discretion. FinCEN tactfully describes certain situations as requiring “more involved judgment . . . extend[ing] to whether the facts and circumstances and the institution’s knowledge of its customer provide a reasonable explanation for the transaction that removes it from the suspicious category.”¹⁰⁴ Furthermore, the form not only requires the bank to report all conduct of a certain type,¹⁰⁵ rather the SAR directs the bank to actively encourage or discourage further investigation by federal law enforcement.¹⁰⁶

In response to a concern by financial institutions that they lack sufficient guidance to complete the SAR, FinCEN specifically identifies

¹⁰⁰ *Suspicious Activity*, *supra* note 88. *See infra* app. at Part III, p.681. These requirements include the date of the transaction/conduct, the amount involved, the bank’s characterization of the suspicious conduct (choices include reporting, structuring, money laundering, check fraud, loan fraud, counterfeiting, credit card fraud, embezzlement, false statement, wire transfer fraud, and self-dealing), the amount of recovery or loss, whether the conduct had a material effect on the financial soundness of the bank, and whether and how the bank advised law enforcement. *See infra* app. at Part III, p.681.

¹⁰¹ *Suspicious Activity*, *supra* note 88. *See infra* app. at Parts IV-VI, p.681.

¹⁰² *Suspicious Activity*, *supra* note 88. *See infra* app. at Part VII, p.682. The requirements include “a chronological and *complete* account of the possible violation of law, including what is unusual, irregular or suspicious about the transaction.” The directions note: “This section of the referral 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.” *See infra* app. at Part VII, p.682.

¹⁰³ *Suspicious Activity*, *supra* note 88. *See infra* app. at Part VII, i, p.682 (directing the bank to “[r]ecommend any further investigation that might assist law enforcement authorities”).

¹⁰⁴ 61 Fed. Reg. 4326, 4329 (1996) (to be codified at 31 C.F.R. part 103).

¹⁰⁵ *Suspicious Activity*, *supra* note 88, 1 app. at Part VII, p.3. *See infra* app. at Part VII, p.682.

¹⁰⁶ *Suspicious Activity*, *supra* note 88, 1 app. at Part VII, p.3. *See infra* app. at Part VII, p.682.

three examples in which a bank may need to use “more involved judgment” to decide if a transaction qualifies as suspicious: fund transfers not commensurate with the “stated business or activity” of the customer; fund transfers without normal identifying information or transfers made so as to “disguise the country of origin or destination or identity” of the recipient; and the frequent use of an account as a “temporary resting place for funds from multiple sources without a clear business purpose.”¹⁰⁷ In addition to the guidance from the government, a number of private analysts, including Michael Zeldin, the former chief of the Department of Justice Money Laundering Office, have prepared lists of suspicious activities.¹⁰⁸

¹⁰⁷ *Major New Suspicious Activity*, *supra* note 10, at 4.

¹⁰⁸ *E.g.*, Michael Zeldin, *Money Laundering Compliance: Money Laundering Red Flags*, DECISION STRATEGIES INT’L J., Sept. 1995, at 2 (discussing the “generic signals to which all financial institutions, trades and businesses should be attuned to defeat money laundering”). The list includes (1) loans to offshore companies with no apparent connection to the customer’s business, (2) unusually frequent and/or large cash transactions given the nature of the customer’s business, (3) large cash transactions by the customer with other banks without the use of an armored carrier, (4) frequent and/or large wire transfers by the customer to banks offshore, (5) loans to the customer secured by obligations to offshore banks, (6) a customer with an established relationship to bank secrecy haven countries, (7) frequent and/or large wire transfers for persons with no normal customer relationship with bank, (8) brokered deposits in which the broker’s fee is paid from a related loan, (9) loan production or sales used as basis for bonuses to officers, (10) solicitations by people who claim to have large amounts of money from a confidential source available for deposit or loan, especially if the solicitor quotes a rate below the normal market rate, (11) a customer whose financial statements lack verification by an audit that supports the stated value of the customer’s company, (12) loan proceeds used for purposes other than that recorded, (13) attempts by customers to use cash to complete a transaction normally handled by check, (14) attempts by customers to use third-party instruments to complete the transaction, (15) a customer who appears more concerned with cancellation privileges than with performance or interest rate of investment, (16) reluctance by a customer to provide adequate identification, (17) purchases apparently beyond the customer’s means, (18) customers with residence or place of business distant from the bank, if the bank has a branch closer to the customer’s residence or place of business, (19) a customer whose financial statement appears inconsistent with similar customers and whose financial statement is not prepared by an accountant, and (20) customers with backgrounds inconsistent with their purported business or purchase.

The Treasury Department has also urged that banks adopt “know your customer programs.”¹⁰⁹ These programs serve two functions: the program may allow banks to apply for exemptions from certain reporting requirements,¹¹⁰ and know your customer programs may aid in the identification of suspicious and criminal activity.¹¹¹ In general, know your customer programs are designed to detect unusual, and therefore possibly illegal, transactions. One training program provided a list of suspicious body language and behavior (fidgeting, discomfort, hesitation, repetition, covering mouth, bouncing, nervousness, hurried, overly friendly, asking wrong questions) for which account executives should watch when opening new accounts.¹¹² On the basis of this behavior, the article recommended that the account executive should “[a]lert your tellers, AND someone in bookkeeping to keep an eye on the account and to alert you to any unusual activity. Put the account on referral for a few weeks, so that you can keep your eye on it.”¹¹³ Know your customer programs, however, cannot substitute for specific inquiry after the detection of an unusual transaction. The bottom line is that “[b]anks should *never* make criminal referrals without conducting a sufficient investigation to determine that there is in fact a reasonable basis to believe criminal activity is indicated.”¹¹⁴

V. POLITICS AND POLICY BEHIND THE SAR

The SAR delegates almost prosecutorial discretion to the reporting bank to interpret the law, analyze conduct, describe the elements of conduct constituting a possible offense, and to suggest future investigation.¹¹⁵ Roger Weiner, chief of the enforcement section at FinCEN, explained that the breadth and vagueness of the SAR reflected

¹⁰⁹ See *New Accounts: Know Your Customer*, 6 BANKERS' HOTLINE 1, 4 (1995) (providing guidelines for banks in verifying customer information).

¹¹⁰ See 31 U.S.C. § 5313 (1994) (defining the mandatory and discretionary exemptions from domestic coin and currency transaction reporting requirements available to financial institutions).

¹¹¹ *New Accounts: Know Your Customer*, *supra* note 109, at 4.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ Whitney Adams, *Effective Strategies for Banks in Avoiding Criminal, Civil, and Forfeiture Liability in Money Laundering Cases*, 44 ALA. L. REV. 669, 700 (1993).

¹¹⁵ See *Suspicious Activity*, *supra* note 88, at 1 app. at Part VII, p.3.

a "wait-and-see approach" on FinCEN's part.¹¹⁶ Weiner stated that FinCEN expected to receive approximately 100,000 SARs per year¹¹⁷ and that such a large number of referrals would provide the agency with information to expand the SAR instructions and to provide greater guidance for the reporting banks.¹¹⁸ Once FinCEN reaches a level of confidence with the SAR, it will expand the reporting requirements from banks to non-bank financial institutions (e.g., brokers) who will most likely face the same SAR reporting requirements as banks.¹¹⁹

Banks have complained since the beginning of the criminal referral regime about the paperwork and reporting burden created by the forms.¹²⁰ Estimates place the cost per report at approximately \$8.00 for each of the referrals filed in 1994.¹²¹ Banks expressed satisfaction that FinCEN alone would receive the SAR, rather than the several agencies that received the earlier referral.¹²² This change reflects legislative concern for the burden imposed on the financial system.¹²³ In order to address this burden, Congress provided that to the "extent practicable and appropriate" the suspicious activity report shall be sent to a single designee.¹²⁴

That single designee, FinCEN, has been at the center of intense debate since its creation. Privacy advocates raise grave concerns over the

¹¹⁶ Telephone Interview with Roger Weiner, Head of Enforcement, FinCEN (Oct. 1, 1995).

¹¹⁷ *Id.* A comparison of this estimate to the number of currency transaction reports marked suspicious under the old reporting system may prove illuminating. During the first six months of 1995, banks made a record 5.7 million currency transaction reports. *CTR's Peak As FinCEN Ponders "Exemptions"*, MONEY LAUNDERING ALERT (Alert Int'l, Inc.), Sept. 1, 1995, at 3. Historically, banks marked approximately 0.5% of all such reports as suspicious. *Profile of Suspicious Transaction Reporting in the U.S. in 1993*, MONEY LAUNDERING ALERT (Alert Int'l, Inc.), May 1, 1995, at 8. Assuming banks file an SAR for each form they previously marked as a suspicious cash transaction, Weiner's estimate seems impossibly low. His estimate seems commensurate, however, with the number of criminal referral forms (the predecessor of the SAR) that banks have historically filed. In 1993, banks filed just over 80,000 criminal referral forms, of which some 13,000 involved a suspicion of money laundering. *Id.*

¹¹⁸ Telephone Interview with Roger Weiner, *supra* note 116.

¹¹⁹ *Major New Suspicious Activity*, *supra* note 10, at 1.

¹²⁰ Byrne, *supra* note 87, at 5.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.* at 1.

¹²⁴ 31 U.S.C. § 5318(g)(4) (1994).

centralization of financial information at FinCEN which is connected to most of the federal government's databases in order to create a single, coordinated database for financial crime enforcement.¹²⁵ FinCEN has information-sharing agreements with most federal agencies charged with financial law enforcement responsibilities.¹²⁶ Critics worry that FinCEN has ushered in the age of "Big Brotherism" and government computer surveillance of personal finances.¹²⁷ Feeding the fears of the critics are proposals such as the one introduced by the Clinton Administration following the 1995 Oklahoma City bombing. The Administration included a proposal in the Antiterrorism Act to allow FinCEN to obtain additional financial information, including credit card data.¹²⁸

The critics of FinCEN find ammunition in proposals like the plan announced by the Office of Technology Assessment in 1994 to develop a FinCEN computer program capable of generating automated subpoenas for bank records.¹²⁹ The proposal envisioned a computer program that would examine currency transaction reports and SARs, detect probable crimes, issue an electronic subpoena, and then automatically access bank records to investigate.¹³⁰ After a feasibility study, OTA scrapped the plan because of technical obstacles.¹³¹

On the other side of the debate, the supporters of FinCEN foresee the organization playing a significant role in thwarting high-profile financial crime and in detecting incipient terrorist activity by tracking the flow of terror-dollars.¹³² For instance, the agency played a key role in the investigation leading to the 1994 arrest of high-ranking CIA employee

¹²⁵ *Major New Suspicious Activity*, *supra* note 10, at 4.

¹²⁶ *Institutions Given Conflicting Advice on New Compliance Duties*, MONEY LAUNDERING ALERT (Alert Int'l, Inc.), Sept. 1995, at 5.

¹²⁷ See Stephen A. Bercu, *Toward Universal Surveillance in an Information Age Economy: Can We Handle Treasury's New Police Technology?*, 34 JURIMETRICS J. 383, 428-33 (1994); Matthew N. Kleiman, Comment, *The Right to Financial Privacy Versus Computerized Law Enforcement: A New Fight in an Old Battle*, 86 NW. U. L. REV. 1169, 1172-74 (1992).

¹²⁸ Peter N. Spotts, *Why the Feds Want Access to Credit Records*, CHRISTIAN SCI. MONITOR, May 5, 1995, at 1.

¹²⁹ Gary H. Atkins, *AI System All Washed Up*, COMPUTERWORLD, Sept. 18, 1995, at 12.

¹³⁰ *Id.*

¹³¹ *Computer Anti-Money Laundering Plan Shelved*, MONEY LAUNDERING L. REP., Oct. 1995, at 3.

¹³² See *infra* notes 135-36 and accompanying text.

and Soviet/Russian double agent Aldrich Ames.¹³³ In 1993, FinCEN's analysis of a single suspicious transaction report from Citibank resulted in the prosecution of twenty-three members of an international money laundering conspiracy and the identification of between \$70 and \$100 million in illegal drug proceeds deposited at a single Swiss bank.¹³⁴ Also in 1993, FinCEN identified accounts and conduits of terrorist funding by following leads unearthed during the investigation into the World Trade Center bombing.¹³⁵ During the 1991 Gulf War, the agency helped identify Iraqi assets in the United States. Using records seized during the 1989 invasion of Panama, the agency located numerous accounts belonging to drug cartels.¹³⁶

In addition to debate about the proper role of FinCEN, the very idea of a duty to report crime incites debate. Advocates of reporting argue that it helps develop morality and builds a communitarian response to crime.¹³⁷ Critics of imposing reporting duties cite a range of concerns including general distaste for informants, the prospect for retaliation, the inconvenience of becoming a witness in a lawsuit, doubts about the efficacy of reporting, and lack of moral compulsion to report.¹³⁸ Other analysts note a hostility toward tipping the scales in an adversarial system and a concern that a duty to report would undermine public respect for the justice system.¹³⁹

A more focused criticism of the duties imposed by the BSA notes that banks merely follow the lead of federal bank regulators.¹⁴⁰ This

¹³³ FinCEN began the investigation of Ames after at least one bank reported Ames for a suspicious cash deposit — apparently a portion of his payments from the Soviets. *Spy Case Highlights BSA Compliance*, THRIFT REGULATOR, Apr. 11, 1994, at 4 [hereinafter *Spy Case*]. FinCEN subsequently began to investigate inexplicable “surges” in accounts of other high-ranking officials of the FBI and CIA. *Id.* For a description of troubling implications regarding bank compliance arising out of the Ames investigation, see *infra* note 139 and accompanying text.

¹³⁴ *Bank STR Exposes Worldwide Money Laundering Operation*, MONEY LAUNDERING ALERT (Alert Int'l, Inc.), Dec. 1, 1994, at 6.

¹³⁵ *Information Tech. and Financial Data Nab Criminals for High-Tech Agency*, TACTICAL TECH., Mar. 16, 1994, at 1.

¹³⁶ *Id.*

¹³⁷ Bucy, *supra* note 29, at 847-50.

¹³⁸ Lynch, *supra* note 4, at 528-35.

¹³⁹ Sarah N. Welling, *Corporate Officers' Duty to Report Criminal Wrongdoing by the Corporation: A Study of American Law*, Seminar at the Eighth International Conference of the Society for the Reform of Criminal Law: The Corporation and the Criminal Law, Victim and Violator, Dec. 4-8, 1994.

¹⁴⁰ This argument is advanced in John K. Villa, *A Critical View of Bank*

line of argument contends that the penalties and prosecutions in the late 1980s¹⁴¹ correlated with an abrupt shift from little emphasis on the reporting of potentially criminal conduct to a sudden commitment to full reporting. According to this school of thought, banks complied with the BSA only marginally during the mid 1980s.¹⁴² Their compliance improved dramatically during the late 1980s, but this change came about not because of the lawsuits and penalties but rather because of increased emphasis on reporting by bank regulators.¹⁴³ The core of the argument is that banks would voluntarily report criminal conduct if bank regulators emphasized the importance of such reports.¹⁴⁴ In other words, banks would report as necessary without a general statutory duty.

By imposing a duty to report criminal conduct, the government hopes to improve the social order and achieve greater peace and safety.¹⁴⁵ Ultimately, in order to evaluate the suspicious activity report, society must weigh the potential benefit of crime reduction against the certain decrease in financial privacy. In a more narrow sense, however, the SAR succeeds if it reduces financial crime and helps to purge the banking system of that crime.¹⁴⁶

Measuring the success of the SAR may prove difficult because of doubts about the extent of compliance. Even if the filing of SARs leads to the prosecution of criminals, questions remain about whether banks will competently report suspicious activity. Skepticism about the efficacy of suspicious transaction reporting requirements is dramatically portrayed by FinCEN's investigation of CIA employee and Soviet/Russian double agent Aldrich Ames. While the banks at which Ames had accounts did report large cash deposits as required, those banks often did not tag the reports as suspicious.¹⁴⁷ This incident engenders grave concerns about how many other suspicious transactions go unreported.¹⁴⁸

Secrecy Act Enforcement and the Money Laundering Statutes, 37 CATH. U. L. REV. 489, 500 (1988).

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ Yeager, *supra* note 4, at 38.

¹⁴⁶ For a general analysis of the limited success of reporting requirements, see John J. Byrne, *The Bank Secrecy Act: Do Reporting Requirements Really Assist the Government*, 44 ALA. L. REV. 801 (1993).

¹⁴⁷ *Spy Case*, *supra* note 133, at 4.

¹⁴⁸ *Id.* The Ames case also illustrates the crucial importance of know your customer programs that, theoretically, should allow banks to detect unusual

Perhaps more importantly, however, a recent Government Accounting Office report suggests that law enforcement agencies themselves may not respond to the suspicious transactions that banks do report.¹⁴⁹ The GAO scathingly criticized the IRS and other agencies for allowing reports to accumulate without investigation and for failing to provide adequate supervision over the disposition of suspicious transaction reports.¹⁵⁰ In response to these criticisms, the IRS Criminal Investigation Division issued new guidelines for handling reports of suspicious transactions, but these rules mandate an investigation only if the same individual is the subject of five or more reports in a twelve month period.¹⁵¹

FinCEN itself faces similar criticism and a complementary loss of financial support from within the government.¹⁵² This frustration stems from delays in obtaining analysis of suspicious activity from FinCEN staff.¹⁵³ In response, other agencies have returned to in-house analysis:

Agents have complained that their work is often "time sensitive" and cannot afford to wait the time it normally takes FinCEN to submit its [research] findings. Some complain that FinCEN analyses provide little new information that they did not already know. The result of the disenchantment has been a decline in the number of requests for assistance that federal agencies submit.¹⁵⁴

Simultaneously, FinCEN has lost its allocation of monies from the Justice Department's forfeiture fund.¹⁵⁵

VI. BANK LIABILITY

While critics of FinCEN and opponents of reporting focus their energy on public policy issues and debate the effectiveness of the

account activity such as Ames' illegitimate cash deposits.

¹⁴⁹ *GAO Sheds First Light on Suspicious Transaction Reporting*, MONEY LAUNDERING ALERT (Alert Int'l, Inc.), May 1, 1995, at 1; *Profile of Suspicious Transaction Reporting in the U.S. in 1993*, MONEY LAUNDERING ALERT (Alert Int'l, Inc.), May 1, 1995, at 8.

¹⁵⁰ *Id.*

¹⁵¹ *IRS CID Implements New Field Suspicious Activity Guidelines*, MONEY LAUNDERING ALERT (Alert Int'l, Inc.), Oct. 1 1995, at 3.

¹⁵² *Justice, Treasury Forfeiture Funds Cut Off FinCEN Support*, MONEY LAUNDERING ALERT (Alert Int'l, Inc.), Oct. 1, 1995, at 1.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

reporting regime, the banks continue to express concern regarding the extent of their liability under the SAR. Generally, this liability includes liability to customers for filing the SAR, liability to customers for terminating accounts after filing an SAR, liability to the government for failure to file the SAR, and liability to the government based on the bank's participation in the conduct described in the SAR.¹⁵⁶

The safe harbor provision of 31 U.S.C. § 5318(g)(3) clearly shields the bank from liability to the bank customer for statements made in the SAR, but this provision does not address potential liability for terminating an account based on unfounded suspicions. The safe harbor provision also neglects to address liability for a report that fails to comply with the standards established by the reporting requirements.

Banks must weigh carefully the danger of terminating accounts without cause after *Ricci v. Key Bancshares, Inc.*,¹⁵⁷ in which the court penalized a bank for wrongfully terminating an account after filing an inaccurate criminal referral under the old reporting system.¹⁵⁸ The dilemma comes into sharper focus with the understanding that if a bank knowingly continues its relationship with a criminal customer, the bank itself may face liability under the money laundering laws for involving a financial institution in a transaction that involves criminal proceeds.¹⁵⁹ Often Federal officials request that a bank not terminate an account so that they can monitor the suspect's activities, but to make the dilemma even more difficult, federal officials often have failed to respond to suspicious transaction reports and criminal referrals, leaving the bank without a clear path to follow.¹⁶⁰

¹⁵⁶ For an analysis of the potential liability of banks and proposed solutions, see generally Adams, *supra* note 114.

¹⁵⁷ 662 F. Supp. 1132, 1137-38 (D. Me. 1987). See also *Maine Bank Penalized for Heeding Rumors of Organized Crime Link*, AM. BANKER, Apr. 30 1987, at 7 (describing *Ricci v. Key Bancshares, Inc.*, in which two businessmen were awarded \$15 million after a bank cut off their credit based on erroneous information linking one of them to organized crime).

¹⁵⁸ *Ricci*, 662 F. Supp. at 1137-38.

¹⁵⁹ See 18 U.S.C. § 1957 (1994). In addition, a bank may face forfeiture of property involved in a money laundering offense under 18 U.S.C. § 981 (civil forfeiture) or under 18 U.S.C. § 982 (criminal forfeiture).

¹⁶⁰ Attorneys advising banks making reports must give delicate advice on when to terminate an account and how to report the bank's involvement in the suspicious transaction. This advice must take into account the benefits of self-reporting under the DOJ leniency policy and under the Sentencing Guidelines as described *supra* notes 36-42 and accompanying text. One commentator goes so

Despite the ambiguous language of the safe harbor provisions, Congress intended that the section should eliminate the problem caused by *Ricci*. As the legislative history reveals:

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.¹⁶¹

In *Young v. Chemical Bank*,¹⁶² a customer brought suit on the grounds that the bank violated customer privacy by failing to follow proper procedures for reporting suspicious activity.¹⁶³ The plaintiff argued that the improper reporting precluded the bank from availing itself of any safe harbor provision.¹⁶⁴ The suit claimed that, in 1986, officials at Chemical Bank notified police in Bermuda who then involved the Justice Department in order to subpoena records from Chemical Bank.¹⁶⁵ In 1989, the Second Circuit affirmed the dismissal of a related portion of the suit brought under the Right to Financial Privacy Act ("RFPA"),¹⁶⁶ but the court abstained from ruling on questions of state

far as to describe banks as "sitting ducks" for prosecution if they continue their relationship with a customer after an SAR. This same analyst has suggested that banks contact the government before termination, and obtain confirmation in writing if the government requests that the bank maintain the account in order to gather more information and to avoid alerting the customer. Adams, *supra* note 114, at 700-01.

¹⁶¹ 137 CONG. REC. S16,640-01, S16,647 (daily ed. Nov. 13, 1991) (statement of Sen. D'Amato (R-N.Y.) regarding amendments to BSA).

¹⁶² The suit began in federal court as a suit against the Department of Justice and Chemical Bank under the Right to Financial Privacy Act. *See Young v. United States*, 882 F.2d 633 (2d Cir. 1989) (holding that government authorities had not violated depositor's rights under the Act). Eventually, the suit appeared in New York state court as a suit against Chemical Bank alone under New York common law governing bank-depositor relations. *See Young v. Chemical Bank*, N.Y. L.J., Aug. 7, 1992, at 21, 21-22.

¹⁶³ *Young v. Chemical Bank*, *supra* note 162, at 22.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ Right to Financial Privacy Act of 1978 ("RFPA"), Pub. L. 95-630, 92

law governing bank-depositor relations.¹⁶⁷ A New York lower court ruled, in 1992, that the bank faced liability for violating its duties of confidentiality to its customer.¹⁶⁸ While *Young* does not seem to pose any challenge for the SAR,¹⁶⁹ the case does dramatically highlight the crucial importance of proper oversight and compliance programs, as well as the limits of the safe harbor provisions. The case also illustrates the unpredictability of interactions between federal statutes and state common law.

Young also suggests the possibility that banks may face liability if they follow the reporting guidelines in all regards except that they voluntarily report suspicious activity below the threshold established by the SAR. The SAR requires reporting of suspected offenses above the \$5000/\$25,000 threshold;¹⁷⁰ therefore, the safe harbor protection applies to those reports. The question is whether the safe harbor provision would protect voluntary reports of suspicious conduct that falls below the threshold level. The American Banking Association believes that the safe harbor would apply to both mandatory and voluntary reports.¹⁷¹

In contrast to *Young*, a bank recently won a decisive victory in a suit in federal court in Texas based on alleged violations of the RFPA. *Velasquez-Campuzano v. Marfa National Bank*¹⁷² arose before the passage of the Annunzio-Wylie safe harbor provision, but in a summary

Stat. 3697 (codified as amended in scattered sections of 12 U.S.C.).

¹⁶⁷ *Young v. United States*, 882 F.2d 633, 644-45 (2d Cir. 1989).

¹⁶⁸ See, e.g., *N.Y. Court Case Raises Some Surprise Questions on Issue of Reporting Suspicious Transactions*, REG. COMPLIANCE WATCH, Jan. 11, 1993, at 3 (analyzing the effect of Justice Harold Baer's ruling in *Young v. Chemical Bank*). Following Justice Baer's decision, Chemical moved to reargue and subsequently obtained a dismissal of the complaint. *Young v. Chemical Bank*, N.Y. L.J., Apr. 21, 1993, at 21, 21-22. In the second action, the court held that public policy considerations and the need to deter money laundering overrode considerations of customer confidentiality. After the second *Young* case it seems doubtful that a bank would face liability in New York under common law confidentiality requirements. For an analysis of *Young* and of other states' approaches to the confidentiality issue, see Richard A. Spehr, *Duty of Customer Confidentiality Unclear*, NAT'L L.J., Nov. 29, 1993, at 17.

¹⁶⁹ The firm of Jones, Day, Reavis & Pogue has cautioned its clients, however, that the ruling does seem to place banks between the Scylla of federal reporting requirements and the Charybdis of New York's common law which requires confidentiality. *Id.*

¹⁷⁰ See *supra* notes 92-93 and accompanying text.

¹⁷¹ Byrne, *supra* note 87, at 1.

¹⁷² 896 F. Supp. 1415 (W.D. Tex. 1995).

judgement, the court ruled that, even without that specific protection, the RFPA provided no cause of action based on the proper filing of a currency transaction report.¹⁷³ The court also rejected a claim that the bank had violated the plaintiff's constitutional rights to privacy, noting that, even if the plaintiffs had such a claim, the courts would have to balance privacy interests against compelling law enforcement concerns.¹⁷⁴ Most importantly, in contrast to the *Young* case, the court explicitly rejected any claim arising under state common law.¹⁷⁵

A bank probably cannot avoid civil lawsuits, whether frivolous or valid, by disgruntled customers who allege violations of their rights to confidentiality and privacy. Action by the government for failure to report, on the other hand, would damage a bank far more.¹⁷⁶ When the government pursues a lawsuit for failure to file required reports, it may opt for either a civil¹⁷⁷ or criminal¹⁷⁸ suit. Since FinCEN took over enforcement duties, the government has tended toward civil settlements rather than lawsuits.¹⁷⁹ Roger Weiner anticipated that the general preference for civil settlements over lawsuits would continue, although he expected to handle a small number of court cases each year.¹⁸⁰ In addition to liability for the banks, the government may also proceed against bank officials personally for causing a bank to fail to file required reports.¹⁸¹

During the late 1980s, the government underscored the seriousness of reporting requirements by penalizing over forty banks for violations.¹⁸² For instance, the Bank of America paid a \$4.75 million civil penalty; Crocker National paid a \$2.25 million civil penalty; and the Bank of Boston faced a \$500,000 penalty.¹⁸³ All of these penalties arose from

¹⁷³ *Id.* at 1424.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 1425-27.

¹⁷⁶ Adams, *supra* note 114, at 669; Villa, *supra* note 140, at 508.

¹⁷⁷ 31 U.S.C. § 5321 (1994).

¹⁷⁸ *Id.* § 5322.

¹⁷⁹ *E.g.*, *FinCEN Settles Two BSA Citations*, THRIFT REGULATOR, May 29, 1995, at 5 (detailing settlement agreements with Sacramento First National Bank of California (\$20,000 civil money penalty) and Metropolitan Bank and Trust Co. of Guam (\$6,000 civil money penalty)).

¹⁸⁰ Telephone Interview with Roger Weiner, Chief of Enforcement, FinCEN (Oct. 1, 1995).

¹⁸¹ *E.g.*, *United States v. Heyman*, 794 F.2d 788, 791 (2d Cir.), *cert. denied*, 479 U.S. 989, 989 (1986).

¹⁸² Adams, *supra* note 114, at 675.

¹⁸³ *Id.* Dan Cordtz, *Dirty Dollars*, FIN. WORLD, Feb. 1, 1994, at 20

large numbers of currency transaction report violations (e.g., 17,000 violations by the Bank of America).¹⁸⁴ In 1992, the Treasury penalized the First National Bank of Maryland \$950,000 based on the failure to file 111 reports.¹⁸⁵ The government has also penalized casinos. For instance, in 1992 the government aggressively pursued Atlantic City gaming houses levying penalties totaling \$2.5 million.¹⁸⁶

The government rarely prosecutes banks for failure to report. Before FinCEN took charge, only one reported case suggested that banks might face prosecution for failure to file a suspicious transaction report.¹⁸⁷ Perhaps the most notable criminal prosecution under the reporting requirements is *United States v. Bank of New England*, a case that revolved around a bank's failure to file currency transaction reports.¹⁸⁸ Two crucial legal doctrines that facilitate the prosecution of banks for failure to report arose out of *Bank of New England*: (1) willful blindness satisfies the mens rea requirement for a violation of reporting duties, and (2) the collective knowledge of employees provides sufficient knowledge for a willful violation.¹⁸⁹ The bank had argued that its violation did not rise to the level of willfulness as required by the statute.¹⁹⁰ The First Circuit ruled that the bank had the requisite mental state if the bank deliberately avoided learning about the reporting requirements.¹⁹¹ The court further stated that the government could prove knowledge of the reporting requirements either by establishing actual knowledge by an employee or by aggregating the partial knowledge of several employees under a theory of collective knowledge.¹⁹² In either case, the

(explaining the government crackdown on banks that fail to file the required reports).

¹⁸⁴ Adams, *supra* note 114, at 675.

¹⁸⁵ *Id.* (discussing the rise in the dollar value of the civil penalty per violation).

¹⁸⁶ *Caesar's Casino Pays \$57,000 BSA Penalty*, MONEY LAUNDERING ALERT (Alert Int'l, Inc.), Jan. 1, 1995, at 5.

¹⁸⁷ See *United States v. L.B.S. Bank*, 757 F. Supp. 496, 500 (E.D. Pa. 1990) (describing indictment of bank for, among other offenses, failure to report currency offenses).

¹⁸⁸ 821 F.2d 844, 857 (1st Cir.), *cert. denied*, 484 U.S. 943 (1987).

¹⁸⁹ *Id.* at 854-57.

¹⁹⁰ 31 U.S.C. § 5322 (1994). See *United States v. Hernando Ospina*, 798 F.2d 1570, 1580 (11th Cir. 1986) (requiring "proof of the defendant's knowledge of the reporting requirement and his specific intent to commit the crime").

¹⁹¹ *Bank of New England*, 821 F.2d at 855.

¹⁹² *Id.* at 855-56.

government also needed to prove willfulness, or specific intent.¹⁹³ By eliminating any mens rea defense, *Bank of New England* virtually imposes strict liability on banks for compliance with currency transaction reporting requirements.¹⁹⁴

The effects of government action to enforce the currency transaction report do not have clear implications for the SAR. However, *Bank of New England* certainly suggests that the government could employ the willful blindness and collective knowledge theories in a prosecution for failure to file an SAR.¹⁹⁵ Under the willful blindness doctrine, a bank would face liability if it turned a blind eye to suspicious conduct, or if it negligently failed to establish an adequate know your customer program or compliance program.¹⁹⁶ Similarly, the collective knowledge doctrine would allow prosecutors to impute knowledge of suspicious conduct to the bank even by piecing together, or aggregating, the fragmentary knowledge of several employees.¹⁹⁷ In other words, if employee A knew that based on the pattern of activity in the customer's account a large cash deposit would be suspicious and employee B knew of a large cash deposit, then the collective knowledge theory would require the bank to file an SAR.

Banking analysts and commentators universally advocate know your customer programs and compliance programs as the solutions to problems of liability.¹⁹⁸ While the Treasury Department and the bank regulators require and seek to audit compliance with reporting requirements,¹⁹⁹ the government does not now provide specific guidance or requirements regarding compliance or know your customer programs. The Treasury Department, however, has scheduled for late 1996 the release of directives on these programs designed to ensure compliance with the SAR.²⁰⁰ The purpose of a know your customer program is to accurately

¹⁹³ *Id.*

¹⁹⁴ Villa, *supra* note 140, at 499-500 (comparing the standard established in *Bank of New England* with the traditional jurisprudence for public safety regulations).

¹⁹⁵ *Bank of New England*, 821 F.2d at 854-57.

¹⁹⁶ *Id.* at 854-55.

¹⁹⁷ *Id.* at 855.

¹⁹⁸ *E.g.*, Adams, *supra* note 114, at 693-99; Razzano, *supra* note 51, at 297-98.

¹⁹⁹ *E.g.*, 31 C.F.R. § 103.21(f) (proposed) (compliance with the SAR requirement shall be audited by the Treasury).

²⁰⁰ 60 Fed. Reg. 23,758 (1995) (to be codified at 31 C.F.R. § 103) (Notice of Proposed Rule Making on BSA compliance programs (including "procedures

identify suspicious activity, while a compliance program ensures that all suspicious activity is reported.²⁰¹ Banks should also establish regular communication with law enforcement authorities and should work to ensure cooperation with the government.²⁰² Because government advice and guidance on criminal activity often lags significantly behind cutting-edge schemes, banks should also educate themselves on emerging patterns of financial crime and the techniques by which they are implemented.²⁰³

Furthermore, the regulations specifically note that a successful compliance program has no effect on the liability of a bank for facilitating a money laundering transaction. "Whether or not a bank satisfies the requirements of this reporting rule has no direct bearing on the obligations or possible liabilities of such bank or its directors, officers, employees, or agents, under provisions of Title 18 of the United States Code."²⁰⁴ Thus, despite a successful compliance program and SAR filing, a bank may still face liability under the money laundering laws for knowing involvement in an illegal financial transaction.

Filing an SAR does not shield a bank from criminal liability for participation in money laundering. "Banks and their officers can be criminally investigated, even when they initiated the inquiry with a voluntary disclosure, and it is folly to rely on the assumption that the government will reward them for being good corporate citizens after they discover and report wrongdoing."²⁰⁵ In fact, an SAR arguably might document the bank's knowledge of its role in an illegal transaction and preclude a mens rea defense in a criminal prosecution.²⁰⁶ In several instances, United States Attorneys have sought prosecution despite the filing of proper reports.²⁰⁷ For instance, a federal grand jury indicted

for BSA reporting and recordkeeping . . . the designation of BSA compliance officers and the establishment of training programs") and know your customer programs (including specific guidance on the "identification and verification of identity of account holders and beneficial owners, and customers conducting significant business transactions and/or using safe deposit facilities, including different identification and verification requirements for different categories of customers").

²⁰¹ *Id.*

²⁰² Adams, *supra* note 114, at 699-701.

²⁰³ *Id.* at 693.

²⁰⁴ 60 Fed. Reg. 46,556, 46,562 (1995) (to be codified at 31 C.F.R. 103.21(f)).

²⁰⁵ Adams, *supra* note 114, at 700.

²⁰⁶ Villa, *supra* note 140, at 507.

²⁰⁷ See *Norwest Probe Signals Tough New Theory*, DOJ ALERT, Sept. 1992,

two Texas bankers for money laundering despite complying with the reporting requirements.²⁰⁸ While the trial court did dismiss the charges, the bank admitted the responsibility of the officers and thus ended their careers.²⁰⁹ In Montana, the United States Attorney prosecuted a banker under the false statements statute²¹⁰ based on an incomplete criminal referral form filed on a suspicious transaction.²¹¹ The prosecutor argued that the form falsified information because the banker failed to complete the entire document.²¹² The SAR now features a prominent warning: "Always complete entire report."²¹³ In response to these prosecutions, the DOJ has adopted prosecutorial guidelines requiring that United States Attorneys receive approval from the Criminal Division in Washington, D.C., before proceeding with prosecution of a bank under the money laundering statutes.²¹⁴

VII. AN INTERNATIONAL PERSPECTIVE ON MONEY LAUNDERING REPORTING OBLIGATIONS

Money launderers often move in international waters in order to exploit discrepancies among the banking laws of different countries.²¹⁵ Their efforts to disguise the criminal origins of these funds rely on poor communication and, particularly, on scant information-sharing across national boundaries.²¹⁶ The European experience illustrates the combination of factors that make international money laundering so successful. Europe has historically been home to strong bank secrecy and privacy laws making investigation by law enforcement difficult.²¹⁷ The

at 4 [hereinafter *Norwest Probe*] (discussing the Norwest criminal indictment following a criminal referral form completed by Norwest attorneys after a Norwest branch suspected money laundering by one of its customers).

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 5.

²¹⁰ 18 U.S.C. § 1001 (1992).

²¹¹ *Norwest Probe*, *supra* note 207, at 4.

²¹² *Id.*

²¹³ *See infra* app. at p.680.

²¹⁴ *Money Laundering Guidelines to Protect Banks*, DOJ ALERT, Nov. 1992, at 2, 4.

²¹⁵ *See* Jeffrey L. Quillen, *The International Attack on Money Laundering: European Initiatives*, 1991 DUKE J. COMP. & INT'L L. 213, 214.

²¹⁶ *See* Bruce Zagaris & Sheila M. Castilla, *Constructing an International Financial Enforcement Subregime: The Implementation of Anti-Money-Laundering Policy*, 19 BROOK. J. INT'L L. 871, 949 (1993).

²¹⁷ Quillen, *supra* note 215, at 215.

European Community has recently encouraged more liberal regulation of banking and capital markets as part of the move toward European economic union and in an effort to improve international competitiveness.²¹⁸ Moreover, growing organized crime in Eastern Europe has filtered into Western Europe following efforts to integrate the East into the western economy.²¹⁹

To meet the challenge of international money laundering, several international organizations and working groups have urged their member countries to adopt laws requiring banks to report large currency transactions and suspicious transactions. Several of the countries attempting to impose a duty to report financial crime have, like the United States, a history of ambivalent treatment of duties to report. For instance, although English common law has historically subscribed to misprision of felony,²²⁰ that offense appears extinct in modern England.²²¹ Japan has a comparable history of requiring citizens to report crime, but it also no longer legally imposes such a duty.²²²

The international community has reached a remarkable consensus about the importance of developing money laundering laws that include suspicious transaction reporting duties generally similar to those in the United States. The following international organizations have proposed such statutory schemes: the United Nations; the Financial Action Task Force ("FATF"), a twenty-six member group organized by the Group of Seven industrial nations; the Basle Committee on Banking Regulation and Supervisory Practices; the European Community; and the Organization of American States.²²³

²¹⁸ *Id.*

²¹⁹ Leyla Boulton, *Russians "Money Laundering"*, FIN. TIMES, July 14, 1994, at 3 (describing the prevalence of money laundering by Russian criminals through banks in the United Kingdom).

²²⁰ See, e.g., *Sykes v. Director of Pub. Prosecutions*, 1962 App. Cas. 528, 555 (H.L. 1961) ("Ever since the days of hue and cry, it has been the duty of a man, who knows that a felony has been committed, to report it to the proper authority so that steps can be taken to apprehend the felon and bring him to justice.").

²²¹ Lynch, *supra* note 4, at 518, 518 n.111.

²²² "During the Tokugawa era (1600-1868), members of the public bore broad duty to assist investigative officials in reporting crimes." Daniel H. Foote, *The Benevolent Paternalism of Japanese Criminal Justice*, 80 CAL. L. REV. 317, 328 (1992). The government rewarded citizens who reported and arrested serious offenders, while it punished those who failed in their duty. *Id.* at 328 n.67.

²²³ For a description of international efforts to establish money laundering

The FATF, for example, recommended that its members adopt laws providing: "If financial institutions suspect that funds stem from a criminal activity, they should be permitted or required to report promptly their suspicions to the competent authorities."²²⁴ Interestingly, the FATF has urged that its members not only require suspicious transaction reports of banks, but also of dealers in high value items such as jewelry, art, antiques, and real estate.²²⁵ FATF has also advised that its members establish, within their law enforcement organizations, a financial intelligence unit, like FinCEN, with a centralized, computerized database of information.²²⁶ Worldwide, seventeen countries have created such agencies.²²⁷

The European Community proposed that its members "ensure that credit and financial institutions and their directors and employees cooperate fully with the authorities responsible for combating money laundering . . . by informing those authorities, on their own initiative, of any fact which might be an indication of money laundering."²²⁸ Individual European countries have greeted this directive with general opposition.²²⁹ Sentiment often included fear of the expense and burden of imposing a reporting duty and skepticism that such reports would provide only minimal assistance to money laundering enforcement efforts.²³⁰ The debate in Europe has revolved around many of the same

laws and for a description of the money laundering laws of individual countries, see Duncan E. Alford, *Anti-Money Laundering Regulations: A Burden on Financial Institutions*, 19 N.C. J. INT'L L. & COM. REG. 437 (1994); Lisa A. Barbot, *Money Laundering: An International Challenge*, 3 TUL. J. INT'L & COMP. L. 161, 172-77 (1995); Zagaris & Castilla, *supra* note 216, at 882-906.

²²⁴ FINANCIAL ACTION TASK FORCE REPORT § III(B)(3) (Recommendation 16) (Apr. 19, 1990), cited in Byrne, *supra* note 146, at 834-35.

²²⁵ *FATF Warns of Laundering through Securities*, MONEY LAUNDERING ALERT (Alert Int'l, Inc.), Aug. 1, 1995, at 1 (evaluating the provisions of the FATF annual report for 1994-1995).

²²⁶ "Financial Intelligence Units" Proliferate Around World, MONEY LAUNDERING ALERT (Alert Int'l, Inc.), Feb. 1, 1995, at 7 ("One of the FATF's recommendations urges countries to institute 'a national central agency . . . for use in money laundering cases.'").

²²⁷ *Id.*

²²⁸ Council of the European Community Directive of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering, 91/308/EEC, art. 6, available in WESTLAW, CELEX Database, 391L0308.

²²⁹ Quillen, *supra* note 215, at 226.

²³⁰ *Id.*

issues causing consternation in this country. These issues include how to draft a safe harbor provision as part of the suspicious transaction report regulations, whether a bank should face liability for terminating an account after reporting a suspicious transaction, whether the government should prosecute a bank for involvement in money laundering even if it diligently reports its involvement at the earliest opportunity, and whether conviction for a reporting violation requires scienter.²³¹

Australia possesses the most developed system of suspicious transaction reporting and has required reports very similar to the SAR since the passage of the Financial Transactions Reports Act of 1988.

The Act requires SUSTRs [suspicious transaction reports] to be filed when there is a reasonable suspicion that information about a transaction "may be relevant to investigation of, or prosecution of a person for, an offense against a law of the Commonwealth or of a Territory."

Those required to file the forms, which are banks, insurance companies, securities dealers, casinos, bookmakers, bullion dealers, cash carriers and sellers of traveler's checks and money orders, are given a "safe harbor" from legal action [related to their reports].²³²

Australia also has the most advanced financial intelligence unit in the world, the Australian Transaction Reports and Analysis Center ("AUSTRAC"). AUSTRAC has exactly the sort of access to financial data dreaded by privacy advocates in the United States. The AUSTRAC system does not rely exclusively on written reports; its computer programs analyze huge numbers of innocent transactions in order to discern suspicious patterns.²³³ The suspicious activity reports merely contribute to the investigatory efforts, rather than fueling them as in the United States.²³⁴

In England, the law mandates suspicious transaction reports only if the bank suspects a connection to terrorism; otherwise the law merely permits suspicious transaction reporting without liability to the customer.²³⁵ These reporting provisions went into effect in 1993, and

²³¹ *Id.* at 227-28.

²³² *Australia's AUSTRAC Pioneers Tracking of Suspicious Activity*, MONEY LAUNDERING ALERT (Alert Int'l, Inc.), May 1, 1995, at 7 (citation omitted).

²³³ *Id.*

²³⁴ *Id.*

²³⁵ Quillen, *supra* note 215, at 227, 227 n.87. For a detailed description of

the National Criminal Intelligence Service, Britain's financial intelligence unit, expected to receive only five hundred reports annually.²³⁶ Instead, it has received over 15,000 reports and faces criticism (similar to that levelled at FinCEN and the IRS²³⁷) over its failure to respond to all the information.²³⁸

In Switzerland, efforts to impose a reporting duty on Swiss banks, most famous for their bank secrecy, have met with stiff resistance from industry groups.²³⁹ Swiss law currently only addresses knowing participation in money laundering.²⁴⁰

In Hong Kong, a country with a reputation for money laundering, the government has mandated suspicious transaction reporting since 1989.²⁴¹ An appellate court ruling that those reports violated constitutional confidentiality protections briefly interrupted the requirements until Hong Kong's highest court reinstated the laws.²⁴²

The success of international money laundering efforts depends not only on the adoption of laws, but also on international data-sharing from reports of suspicious transactions and large currency transactions.²⁴³ These efforts may face significant hurdles because many countries fear

the English statutes, see Scott E. Mortman, Note, *Putting Starch in European Efforts to Combat Money Laundering*, 60 FORDHAM L. REV. S429, S447-52 (1992).

²³⁶ *Top UK Crime Fighter Urges Creation of Laundering Task Force*, MONEY LAUNDERING ALERT (Alert Int'l, Inc.), June 1, 1995, at 7.

²³⁷ See *supra* notes 141-46 and accompanying text.

²³⁸ Jimmy Burns, *MPs Urge Money Laundering Crackdown*, FIN. TIMES, July 26, 1995, at 8; *Top UK Crime Fighter*, *supra* note 236, at 7.

²³⁹ *Swiss Secrecy Laws Hinder Suspicious Activity Reporting*, MONEY LAUNDERING ALERT (Alert Int'l, Inc.), Feb. 1, 1995, at 7 (describing the redrafting of an amendment to the Swiss money laundering law which would have incorporated more stringent reporting requirements).

²⁴⁰ For a description of the voluntary and legal standards applicable to the Swiss banking industry, see Rebecca G. Peters, *Money Laundering and Its Current Status in Switzerland: New Disincentives for Financial Tourism*, 11 NW. J. INT'L L. & BUS. 104, 125-30 (1990).

²⁴¹ Richard L. Holman, *Money Laundering in Hong Kong*, WALL ST. J., Oct. 25, 1995, at A9.

²⁴² *Hong Kong Regains Laundering Enforcement Authority*, MONEY LAUNDERING ALERT (Alert Int'l, Inc.), June 1, 1993, at 7.

²⁴³ See Zagaris & Castilla, *supra* note 216, at 953-62 (detailing the need for international efforts to research money laundering schemes, train law enforcement officials, provide financial and technical assistance to less developed countries, and establish international agreements for extradition).

that requiring suspicious transaction reports will jeopardize the international competitiveness of their banks.²⁴⁴

International efforts with respect to suspicious transaction reporting have several implications for the United States. First, they provide a wider source of information on the successes and social consequences of imposing a duty to report. Second, they may offer innovative solutions to unanticipated or intractable problems. Third, the international experience may offer clues to the directions in which reporting requirements may grow in the future.

VIII. POTENTIAL GROWTH IN REPORTING DUTIES

An analysis of the likely growth areas for the duty to report suspected money laundering may illustrate the direction of the emerging duty to report criminal conduct. The most immediate prospect for growth is also the most mundane. SARs or similar reports will soon be required²⁴⁵ of non-bank financial institutions (e.g., brokers)²⁴⁶ and gambling establishments.²⁴⁷ This area of growth will most likely have ramifications for the development of gambling on the Ohio River and could have future implications for the horse track and off-track betting industry in Kentucky. Another industry ripe for regulation is the booming business of check-cashing. Estimates place the number of such enterprises at 4500 nationally.²⁴⁸ The fate of all such new regulation hinges dramatically on the control and direction of Congress. Several Republican members of Congress have pushed for a moratorium on new regulation which, if passed, would halt the imposition of any new reporting requirements.²⁴⁹

²⁴⁴ *Id.* at 911.

²⁴⁵ 60 Fed. Reg. 46,556, 46,559 (1995) (to be codified at 31 C.F.R. part 103) (explaining that current authority permits the Treasury Department to require suspicious transaction reports from all financial institutions, not just banks, and noting that "FinCEN intends to extend the obligation to report suspicious transactions to such other institutions in the near future. However, [the new SAR regulation] applies only to reporting of suspicious transactions by banks and other depository institutions.").

²⁴⁶ While much discussion has surrounded these impending regulations, the actual formulation of concrete rules has lagged behind the rhetoric. *No New BSA Rules in Sight for Stock Brokers*, MONEY LAUNDERING ALERT (Alert Int'l, Inc.), Oct. 1, 1995, at 8.

²⁴⁷ *Treasury Says More Casino Rules on the Way*, MONEY LAUNDERING ALERT (Alert Int'l, Inc.), Dec. 1, 1994, at 4.

²⁴⁸ Cordtz, *supra* note 183, at 20.

²⁴⁹ *Looming BSA Rules Affected by GOP Bill Seeking "Time Outs"*, MONEY

In the long run, speculation about new money laundering laws and concomitant reporting duties focuses on the information superhighway and the danger of "cyberlaundering."²⁵⁰ The danger of cyberlaundering stems from the fact that no current regulations cover the operation of cyberbanking.²⁵¹ Cyberbanking appears most likely to grow on the Internet and through smart cards (information age credit cards).²⁵² While the industry lacks structure, it has several attributes making it particularly attractive to money launderers. Money launderers could potentially use this industry to place, or deposit, illegally-obtained funds into legitimate accounts.²⁵³ Electronic banking facilitates the process of integrating illicit funds into the economy because the medium allows parties to easily conceal their identities, to move funds instantaneously, and to ignore national borders.²⁵⁴ Stanley Morris, the Director of FinCEN has referred to the danger as one of "anonymous international cash flows."²⁵⁵ Money launderers could use multiple electronic transactions and encryption to layer and mask transactions, thus thwarting any effort to ascertain the source or owner of funds.²⁵⁶ The nature of the electronic medium facilitates the money laundering process by allowing cyberbanks to move their electronic locations (e.g., an Internet site) easily and employ phantom addresses.²⁵⁷

The need for regulation of cyberbanking once again evokes the most trenchant criticism of the current reporting scheme: the danger of Big Brotherism and a massive government computer system that catalogs all

LAUNDERING ALERT (Alert Int'l, Inc.), Feb. 1, 1995, at 5.

²⁵⁰ See *Citicorp Suffers First "Cyberheist" as Regulators Show Alarm*, MONEY LAUNDERING ALERT (Alert, Int'l, Inc.), Oct. 1, 1995, at 9 ("A federal criminal complaint in Manhattan alleges that from his computer terminal in St. Petersburg, Russia, the 28-year old [Vladimir] Levin broke into Citicorp's sophisticated electronic wire transfer system, disguised himself as various banks and illegally transferred \$12 million from customer accounts to accounts he controlled."); Ezra C. Levine, *New Laundering Concerns: Safety in Cyberspace*, MONEY LAUNDERING L. REP., Oct. 1995, at 1, 1-3; *U.S. Says Cyber Banking Vulnerable*, L.A. DAILY NEWS, Sept. 28, 1995, at B1.

²⁵¹ "Cyberlaundering" Poses Threat to Controls, MONEY LAUNDERING ALERT (Alert Int'l, Inc.), Apr. 1, 1995, at 1.

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ Sarah J. Hughes, "Phantom" Cyberbanks Pose Laundering, Tax Evasion Threat, MONEY LAUNDERING ALERT (Alert Int'l, Inc.), July 1, 1995, at 4.

²⁵⁶ "Cyberlaundering", *supra* note 251, at 1.

²⁵⁷ Hughes, *supra* note 255, at 4.

financial transactions in order to weed out patterns of illegality. Unlike in other areas in which the government and privacy conflict, in the area of financial transactions in cyberspace, no legal roadblocks currently prevent the free exercise of government regulation.

CONCLUSION

Perhaps the SAR makes banks uneasy because of concern for the bottom line. There is a fear that the duty to report will hurt business because the reporting requirements have transformed banks from dignified institutions of caution and discretion that uphold the trust of their customers into institutions that play an activist role in fighting crime and that owe greater loyalty to the government than to their depositors.²⁵⁸ In other words, the SAR deputizes the bank, grants it prosecutorial discretion, and cloaks its reports with immunity.²⁵⁹ Consumers of financial services may not want to do business with banks that must act as surrogates for law enforcement. A solution might be to give the FinCEN increased access to financial records and then let the government perform its own analysis. This solution, however, is fraught with the perils of "Big Brotherism." It appears that the war on money laundering presents society with a dilemma: expand the reporting of innocent conduct and allow the government to extract evidence of illegality,²⁶⁰ or delegate responsibility for detecting suspicious conduct to business. The former sacrifices privacy and expands the power of the government information bureaucracy, while the latter fundamentally alters the relationship between bank and customer.

Viewed from one perspective, the mechanical reporting of innocent conduct seems preferable. The SAR changes the role of business by forcing banks to participate in the accusatorial process, while the currency transaction reports engender far less anxiety despite the fact that they overwhelmingly report the names of the innocent. On the other hand, reporting innocent conduct occasions far greater concerns for privacy and for the intrusion of government power. If fighting money laundering is an imperative, society appears to have a choice: impose a duty upon business to report illegality, or provide law enforcement with the information necessary to perform the task of detecting money laundering.

Matthew R. Hall

²⁵⁸ See Adams, *supra* note 114, at 700; Alford, *supra* note 223, at 466-68.

²⁵⁹ Adams, *supra* note 114, at 700; Alford, *supra* note 223, at 466-68.

²⁶⁰ Australia takes this approach. See *supra* notes 232-34 and accompanying text.

APPENDIX

Suspicious Activity Report		FRB: FR 2230 FDIC: 6710/06 OCC: 8010-9,8010-1 OTS: 1801 NCUA: 2362 TREASURY: TD F 90-22.47	OMB No. 7100-0212 OMB No. 3084-0077 OMB No. 1557-0180 OMB No. 1550-0003 OMB No. 3153-0094 OMB No. 1506-0001
ALWAYS COMPLETE ENTIRE REPORT		Expires September 30, 1998	
1 Check appropriate box: a <input type="checkbox"/> Initial Report b <input type="checkbox"/> Corrected Report c <input type="checkbox"/> Supplemental Report			
Part I Reporting Financial Institution Information			
2 Name of Financial Institution		3 Primary Federal Regulator a <input type="checkbox"/> Federal Reserve d <input type="checkbox"/> OCC b <input type="checkbox"/> FDIC e <input type="checkbox"/> OTS c <input type="checkbox"/> NCUA	
4 Address of Financial Institution		8 EIN or TIN	
5 City	6 State	7 Zip Code	10 Asset size of financial institution \$.00
9 Address of Branch Office(s) where activity occurred		14 If institution closed, date closed (MMDDYY) ___/___/___	
11 City	12 State	13 Zip Code	16 Have any of the institution's accounts related to this matter been closed? a <input type="checkbox"/> Yes b <input type="checkbox"/> No If yes, identify _____
15 Account number(s) affected, if any a _____ b _____			
Part II Suspect Information			
17 Last Name or Name of Entity		18 First Name	19 Middle Initial
20 Address		21 SSN, EIN or TIN (as applicable)	
22 City	23 State	24 Zip Code	25 Country
26 Date of Birth (MMDDYY) ___/___/___			
27 Phone Number - Residence (include area code) ()		28 Phone Number - Work (include area code) ()	
29 Occupation			
30 Forms of Identification for Suspect: a <input type="checkbox"/> Driver's License b <input type="checkbox"/> Passport c <input type="checkbox"/> Alien Registration d <input type="checkbox"/> Other _____ e Number _____ f Issuing Authority _____			
31 Relationship to Financial Institution: a <input type="checkbox"/> Accountant d <input type="checkbox"/> Attorney g <input type="checkbox"/> Customer j <input type="checkbox"/> Officer b <input type="checkbox"/> Agent e <input type="checkbox"/> Borrower h <input type="checkbox"/> Director k <input type="checkbox"/> Shareholder c <input type="checkbox"/> Appraiser f <input type="checkbox"/> Broker i <input type="checkbox"/> Employee l <input type="checkbox"/> Other _____			
32 Is insider suspect still affiliated with the financial institution? a <input type="checkbox"/> Yes If no, specify { b <input type="checkbox"/> No c <input type="checkbox"/> Suspended e <input type="checkbox"/> Resigned d <input type="checkbox"/> Terminated		33 Date of Suspension, Termination, Resignation (MMDDYY) ___/___/___	34 Admission/Confession a <input type="checkbox"/> Yes b <input type="checkbox"/> No

Part III Suspicious Activity Information			
35 Date of suspicious activity (MMDDYY) ___/___/___	36 Dollar amount involved in known or suspicious activity \$.00		
37 Summary characterization of suspicious activity:			
a <input type="checkbox"/> Bank Secrecy Act/Structuring/ Money Laundering	g <input type="checkbox"/> Counterfeit Check	m <input type="checkbox"/> False Statement	
b <input type="checkbox"/> Bribery/Gratuity	h <input type="checkbox"/> Counterfeit Credit/Debit Card	n <input type="checkbox"/> Misuse of Position or Self-Dealing	
c <input type="checkbox"/> Check Fraud	i <input type="checkbox"/> Counterfeit Instrument (other)	o <input type="checkbox"/> Mortgage Loan Fraud	
d <input type="checkbox"/> Check Kiting	j <input type="checkbox"/> Credit Card Fraud	p <input type="checkbox"/> Mysterious Disappearance	
e <input type="checkbox"/> Commercial Loan Fraud	k <input type="checkbox"/> Debit Card Fraud	q <input type="checkbox"/> Wire Transfer Fraud	
f <input type="checkbox"/> Consumer Loan Fraud	l <input type="checkbox"/> Defalcation/Embezzlement		
r <input type="checkbox"/> Other _____			
38 Amount of loss prior to recovery (if applicable) \$.00	39 Dollar amount of recovery (if applicable) \$.00	40 Has the suspicious activity had a material impact on or otherwise affected the financial soundness of the institution? a <input type="checkbox"/> Yes b <input type="checkbox"/> No	
41 Has the institution's bonding company been notified? a <input type="checkbox"/> Yes b <input type="checkbox"/> No			
42 Has any law enforcement agency already been advised by telephone, written communication, or otherwise? If so, list the agency and local address. Agency _____			
43 Address		[REDACTED]	
44 City	45 State		
Part IV Witness Information			
47 Last Name	48 First Name	49 Middle Initial	
50 Address		51 SSN	
52 City	53 State	54 Zip Code	55 Date of Birth (MMDDYY) ___/___/___
56 Title	57 Phone Number (include area code) ()	58 Interviewed a <input type="checkbox"/> Yes b <input type="checkbox"/> No	
Part V Preparer Information			
59 Last Name	60 First Name	61 Middle Initial	
62 Title	63 Phone Number (include area code) ()	64 Date (MMDDYY) ___/___/___	
Part VI Contact for Assistance (If different than Preparer Information in Part V)			
65 Last Name	66 First Name	67 Middle Initial	
68 Title	69 Phone Number (include area code) ()		
70 Agency (if applicable)			

Part VII Suspicious Activity Information Explanation/Description		3
<p>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.</p> <p>a Describe supporting documentation and retain for 5 years.</p> <p>b Explain who benefited, financially or otherwise, from the transaction, how much, and how.</p> <p>c Retain any confession, admission, or explanation of the transaction provided by the suspect and indicate to whom and when it was given.</p> <p>d Retain any confession, admission, or explanation of the transaction provided by any other person and indicate to whom and when it was given.</p>	<p>e Retain any evidence of cover-up or evidence of an attempt to deceive federal or state examiners or others.</p> <p>f Indicate where the possible violation took place (e.g., main office, branch, other).</p> <p>g Indicate whether the possible violation is an isolated incident or relates to other transactions.</p> <p>h Indicate whether there is any related litigation; if so, specify.</p> <p>i Recommend any further investigation that might assist law enforcement authorities.</p> <p>j Indicate whether any information has been excluded from this report; if so, why?</p> <p>For Bank Secrecy Act/Structuring/Money Laundering reports, include the following additional information:</p> <p>k Indicate whether currency and/or monetary instruments were involved. If so, provide the amount and/or description.</p> <p>l Indicate any account number that may be involved or affected.</p>	

Paperwork Reduction Act Notice: The purpose of this form is to provide an effective and consistent means for financial institutions to notify appropriate law enforcement agencies of known or suspected criminal conduct or suspicious activities that take place at or were perpetrated against financial institutions. This report is required by law, pursuant to authority contained in the following statutes. Board of Governors of the Federal Reserve System: 12 U.S.C. 324, 334, 611a, 1844(b) and (c), 3105(c) (2) and 3106(a). Federal Deposit Insurance Corporation: 12 U.S.C. 93a, 1818, 1831-84, 3401-22. Office of the Comptroller of the Currency: 12 U.S.C. 93a, 1818, 1831-84, 3401-22. Office of Thrift Supervision: 12 U.S.C. 1463 and 1464. National Credit Union Administration: 12 U.S.C. 1766(a), 1768(a). Financial Crimes Enforcement Network: 31 U.S.C. 5318(g). Information collected on this report is confidential (5 U.S.C. 552(b)(7) and 552a(h)(2), and 31 U.S.C. 5318(g)). The Federal financial institutions regulatory agencies and the U.S. Departments of Justice and Treasury may use and share the information. Public reporting and recordkeeping burden for this information collection is estimated to average 36 minutes per response, and includes time to gather and maintain data in the required report, review the instructions, and complete the information collection. Send comments regarding this burden estimate, including suggestions for reducing the burden, to the Office of Management and Budget, Paperwork Reduction Project, Washington, DC 20503 and, depending on your primary Federal regulatory agency, to Secretary, Board of Governors of the Federal Reserve System, Washington, DC 20511; or Assistant Executive Secretary, Federal Deposit Insurance Corporation, Washington, DC 20429; or Legislative and Regulatory Analysis Division, Office of the Comptroller of the Currency, Washington, DC 20219; or Office of Thrift Supervision, Enforcement Office, Washington, DC 20552; or National Credit Union Administration, 1775 Duke Street, Alexandria, VA 22314; or Office of the Director, Financial Crimes Enforcement Network, Department of the Treasury, 2070 Chain Bridge Road, Vienna, VA 22182.

**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 suspected or known criminal violations and suspicious activities 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 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."

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 Part 103). 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. 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.
3. 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:
 FinCEN, Detroit Computing Center, P.O. Box 33980, Detroit, MI 48232
 2. For items that do not apply or for which information is not available, leave blank.
 3. Complete each suspicious activity report in its entirety, even when the suspicious activity report is a corrected or supplemental report.
 4. Do not include 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 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 complete an item (for example, to report an additional suspect or witness), a copy of the page containing the item should be used to provide the information.
 6. Financial institutions are encouraged to provide copies of suspicious activity reports to state and local authorities, where appropriate.
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