BOARD OF GOVERNORS
OF THE
FEDERAL RESERVE SYSTEM

WASHINGTON, D. C. 20551

DIVISION OF
BANKING
SUPERVISION AND
REGULATION

SR 04-8
May 24, 2004

TO THE OFFICER IN CHARGE OF SUPERVISION AND APPROPRIATE SUPERVISORY AND EXAMINATION STAFF AT EACH FEDERAL RESERVE BANK AND TO EACH DOMESTIC AND FOREIGN BANKING ORGANIZATION SUPERVISED BY THE FEDERAL RESERVE

SUBJECT: Interagency Advisory Concerning the Legal Protections Associated with the Filing of Suspicious Activity Reports

Federal law provides protection from civil liability to financial institutions and their employees who report suspicious or potentially criminal activity to the appropriate law enforcement and bank supervisory authorities in Suspicious Activity Reports (SARs). A recent federal court case reaffirmed the scope of this statutory protection, which is generally referred to as a "safe harbor." The enforcement staffs of the Federal Reserve Board and the other federal financial institutions supervisory agencies, along with the U.S. Department of the Treasury's Financial Crimes Enforcement Network, prepared an Interagency Advisory discussing the facts, holding, and implications of the court decision. A copy of the Interagency Advisory is attached.

In addition to a discussion of the case and the background of the "safe harbor" provisions, the Interagency Advisory also provides useful information regarding steps that banking organizations should take to better ensure that they are fully protected under the law. Most importantly, the Advisory states that, in the opinion of the staffs of the banking agencies, financial institutions and their employees who follow their respective agencies' SAR regulations and the filing instructions should be fully protected by the "safe harbor" provisions of federal law.

Reserve Banks are asked to distribute this SR letter and the attached Interagency Advisory to the state member banks, bank holding companies, and foreign banking organizations supervised by the Federal Reserve in their districts, as well as to their supervisory and examination staff. Questions pertaining to this letter should be directed to Herbert A. Biern, Senior Associate Director, at (202) 452-2620, Nina Nichols, Special Counsel, at (202) 452-2961, or to John McCormick, Special Counsel, at (202) 728-5829, in the Division of Banking Supervision and Regulation.

Richard Spillenkothen
Director

Attachment (119 KB PDF)

Board of Governors of the Federal Reserve System
Federal Deposit Insurance Corporation
Financial Crimes Enforcement Network
National Credit Union Administration
Office of the Comptroller of the Currency
Office of Thrift Supervision

May 24, 2004

Interagency Advisory

FEDERAL COURT REAFFIRMS PROTECTIONS FOR FINANCIAL INSTITUTIONS FILING SUSPICIOUS ACTIVITY REPORTS

Banks, thrift institutions, bank holding companies and non-bank subsidiaries, credit unions, the U.S. branches and agencies of foreign banks, and certain other financial institutions are required to file Suspicious Activity Reports (SARs) pursuant to regulations issued by the five federal financial institutions supervisory agencies and the U.S. Department of the Treasury's Financial Crimes Enforcement Network (FinCEN). The agencies' SAR rules are authorized by various federal laws, including the Bank Secrecy Act, and generally require these financial institutions to file SARs with law enforcement and bank supervisory authorities whenever they know or suspect suspicious or potential criminal activity. The Bank Secrecy Act and the agencies' SAR regulations also provide protection to financial institutions and their employees from civil liability for filing a SAR or for making disclosures in a SAR. The purpose of this advisory is to tell financial institutions about a recent federal court case, *Whitney Nat'l Bank* v. *Karam*, 306 F. Supp.2d 678 (S.D. Tex. 2004), that reaffirms the scope of that statutory protection, generally referred to as a "safe harbor."

In 1992, Congress passed the Annunzio-Wylie Anti-Money Laundering Act and provided a safe harbor for financial institutions and their employees from civil liability for reporting known or suspected criminal offenses or suspicious activity by filing a SAR. This law is codified at 31 U.S.C. § 5318(g)(3). Each of the federal financial institutions supervisory agencies and FinCEN incorporated the safe harbor provisions of the 1992 law into its suspicious activity reporting regulations.

In recent years, several courts have disagreed about the scope of the protection afforded by this safe harbor provision. Some courts have limited the safe harbor protection to disclosures based on a good faith belief that a violation has occurred, or have declined to extend the protection to financial institutions that may have misrepresented material facts to law enforcement.[1] However, the majority of courts have ruled that the safe harbor provision provides

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[1] *See, e.g.,Lopez v. First Union Nat'l Bank* and *Coronado v. BankAtlantic Bancorp., Inc.*, both at 129 F.3d 1186, 1195 (11th Cir. 1997); *Bank of Eureka Springs v. Evans*, 353 Ark. 438, 109 S.W.3d 672 (Ark. 2003).

unqualified protection to financial institutions and their employees from civil liability for filing a SAR.[2]

The federal district court in *Whitney* sided with the majority of courts that have interpreted the safe harbor provision to afford unqualified protection to financial institutions and their employees from civil suit. In the *Whitney* case, individuals filed a defamation suit against a bank, claiming that the bank wrongfully accused them of illegal lending activity when it filed a SAR. In the suit, the individuals sought discovery of any oral or written communications the bank may have had with law enforcement concerning their suspected illegal conduct. The individuals did not seek a copy of the SAR because a clear provision of the Bank Secrecy Act prohibits such disclosure to the people who are reported in the SAR, so instead they sought information from the bank about any disclosures it may have made to law enforcement surrounding the possible filing of a SAR. Several of the federal financial institutions supervisory agencies jointly filed a brief with the court arguing that a financial institution that reports suspected crimes should not be subject to discovery of its communications with law enforcement.

The *Whitney* court ruled that a bank may not produce documents in discovery evidencing:

- the existence or contents of a SAR;
- communications pertaining to the filing of a SAR or its contents;
- communications with government authorities that led to the filing of a SAR or in preparation for the filing of a SAR;
- communications that follow the filing of a SAR intending to explain or clarify the SAR; or
- the existence or content of oral communications to authorities regarding suspected or possible violations of laws or regulations that did not lead to the filing of a SAR.

The court noted, however, that the safe harbor protections do not apply to documents upon which a SAR was based that a bank may have generated or received in its ordinary course of business, unless producing these documents would confirm the existence of a SAR.

While the *Whitney* court ruled in a case involving a national bank and the rules and regulations of the Office of the Comptroller of the Currency, the five federal financial institutions supervisory agencies and FinCEN believe that the court's rulings apply to all financial institutions that file SARs in accordance with suspicious activity reporting rules.

In light of the *Whitney* decision, the agencies remain confident that financial institutions and their employees that follow the prescribed agency regulations and SAR filing instructions should be fully protected by the safe harbor provisions of the law. The staffs of the agencies want to emphasize that all financial institutions covered by the agencies' SAR reporting rules should have internal processes to handle the filing of SARs as well as requests for sensitive

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[2] *See, e.g., Lee v. Bankers Trust Co.*, 166 F.3d 540, 544-45 (2d Cir. 1999); *Gregory v. Bank One Corp.*, 200 F.Supp.2d 1000, 1003 (S.D. Ind. 2002); *Stoutt v. Banco Popular de Puerto Rico*, 158 F.Supp.2d 167, 175 (D.P.R. 2001).

information from law enforcement authorities and from litigants in private lawsuits regarding suspicious activities and reporting to law enforcement. Communicating with law enforcement authorities through these processes, or in response to a subpoena from federal, state, or local law enforcement agencies or other forms of compulsory process, such as a request from FinCEN pursuant to section 314(a) of the USA PATRIOT Act or the reporting of a blocked transaction to the U.S. Department of the Treasury's Office of Foreign Assets Control, will provide maximum legal protection for financial institutions.