# CONFIDENTIALITY OF SUSPICIOUS ACTIVITY REPORTS

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*The authors discuss how to minimize the civil exposure of financial institutions after BizCapital v. OCC.*

Under the Bank Secrecy Act ("BSA") and the implementing regulations promulgated by the Treasury Department and the federal banking agencies,[1] banks (as well as certain other financial institutions) are required to file Suspicious Activity Reports ("SARs") with the Financial Crimes Enforcement Network ("FinCEN"). SARs are intended to report certain financial transactions that the financial institution making the filing knows or reasonably suspects may violate Federal criminal law or that relate to money laundering activity or a violation of the BSA. In the post 9/11 regulatory environment, the number of SARs filed has risen exponentially.[2] This increase in filings is due in large part to heightened sensitivity on the part of financial institutions coupled with the expanded filing requirements in the USA PATRIOT Act.[3]

In SARs, banks reveal information that typically includes the names of individuals or entities conducting the suspicious transactions, a description

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of the transaction, the fact that the bank suspects or has reason to suspect that the transaction violates the law or involves funds derived from illegal activities, and the basis for the bank's concerns. Thus, SARs are a potential treasure trove for plaintiffs and their attorneys who may be fishing for new evidence or looking to exploit a bank's vulnerable spots for use in civil litigation. This is particularly true now, in an environment in which banks tend to err on the side of reporting, rather than ignoring marginal activity. A SAR may provide a plaintiff with an invaluable roadmap to potential claims against a bank or its customers and numerous other insights into facts and conduct that bank management normally considers confidential. Not surprisingly, banks and their customers strongly oppose efforts by private civil litigants to obtain access to SARs.

For different but perhaps equally strong reasons, law enforcement and regulatory agencies are similarly hostile to affording private litigants access in discovery to SARs. From an enforcement perspective, SARs are an important tool for fighting money laundering and combating the financing of terrorism. Law enforcement and regulatory agencies consider it important that banks report potentially suspicious activity freely, comprehensively and without fear of reprisal. For this reason, regulatory agencies have been supportive of banks' preference that SARs not be subject to discovery by civil litigants. In fact, regulatory agencies have promulgated regulations designed to shield SARs from civil discovery and, historically, regulatory agencies themselves have denied Freedom of Information Act ("FOIA") and similar administrative requests seeking disclosure of SARs.

When challenged in the courts, banks and banking agencies have enjoyed success in maintaining the confidentiality of requested SARs, because courts have embraced their argument that SARs are privileged from disclosure under the BSA and its implementing regulations.

But a recent Fifth Circuit decision, *BizCapital v. OCC*,[4] may signal a shift in the landscape regarding disclosure of SARs. In *BizCapital*, the Fifth Circuit held that the BSA and its implementing regulations do not provide the OCC with a blanket privilege against revealing to third-party civil litigants, information about the filing of a SAR or its contents. Rather, the appellate court in *BizCapital* held that the OCC was required to apply a balancing test when reviewing a request for the release of SARs.

This article (i) explains the regime governing discovery, as well as FOIA and administrative requests seeking disclosure of SARs before *BizCapital*; (ii) describes how *BizCapital* suggests a change in the relevant jurisprudence (at least in the Fifth Circuit, if not more broadly); and (iii) makes recommendations on how banks may protect themselves against disclosures of SARs in the wake of *BizCapital*.

## REGIME BEFORE *BIZCAPITAL V. OCC*: SARS ARE CONFIDENTIAL

### The Policy Underlying the Confidentiality of SARs

There are myriad policy reasons to keep SARs confidential. First, non-disclosure advances important law enforcement interests and objectives. A policy of strict confidentiality encourages financial institutions to report fully even marginally suspicious activity without fear of civil exposure for themselves or their customers. Routine disclosure of SARs on the other hand, would likely render banks more reluctant to prepare reports — which would have serious consequences. For example, law enforcement would lose the benefit of potentially important information. Moreover, release of a SAR could compromise ongoing law enforcement investigations or it could "tip off" a criminal wishing to evade detection. More generally, liberal disclosure could reveal the methods by which banks are able to detect suspicious activity. Permitting the release of SARs through civil discovery could, thus, harm the very law enforcement interests that the SAR reporting requirement set forth in the Annunzio-Wylie Anti-Money Laundering Act, as embodied in the relevant parts of the BSA, was meant to promote.[5]

Second, the disclosure of a SAR also could harm the legitimate privacy interests of innocent persons whose names may be contained therein. A SAR contains unproven statements regarding a transaction that may have innocent explanations; it is by no means a final assessment regarding the transaction's legality or illegality.[6]

### Discovery Requests Seeking SARs from Banks

For many of the reasons discussed above, the BSA expressly prohibits a financial institution from disclosing to persons involved in the reported

transaction either the contents of a SAR or even its existence.[7] Applicable banking agency regulations implement and expand upon this requirement. They reiterate that SARs are confidential and set forth, for example, that "any national bank or person subpoenaed or otherwise requested to disclose a SAR or the information contained in a SAR shall decline to produce the SAR or to provide any information that would disclose that a SAR has been prepared or filed."[8]

State and federal courts have held that the BSA and the regulations thereunder afford banks a confidentiality privilege against the discovery of SARs in a civil lawsuit that is neither qualified nor subject to waiver by the financial institution that filed the SAR.[9] In the leading decision of *Weil*, the court unequivocally held: "The plain language of the regulation requires this court to deny the production of the SAR itself."[10]

Several litigants have challenged the BSA regulations as being broader than the BSA, because the regulations forbid all disclosures, whereas the BSA forbids only disclosures to persons involved in the suspect transaction.[11] But several courts have upheld the regulations as consistent with the BSA mandate forbidding disclosure to persons involved in the transaction,[12] because "the production of SARs by a bank in response to a subpoena would invariably increase the likelihood that the 'person involved in the transaction' would discover or be notified that the SARs had been filed."[13] Thus, in this context, courts have focused not on the potential chilling of accurate reporting, but rather the concern that the persons involved in wrongdoing in connection with the reported transaction not be tipped off.

Litigants also have argued that Rule 34 or Rule 45 of the Federal Rules of Civil Procedure should trump the regulatory prohibition against SAR disclosure. In particular, they have argued that regulatory protection of SARs is unwarranted where the party seeking the Rule 34 or Rule 45 discovery was not involved in the underlying transaction. But courts consistently have rejected this argument. *Weil* is a good example, where the court determined that the enabling legislation for the regulations guarding the confidentiality of SARs is sufficiently specific to justify the intrusion into the federal rules governing discovery.[14] Relying on this reasoning, courts have denied the production of SARs without regard to whether the party from whom discovery is sought is a party or a non-party.[15]



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The regulations' requirement for confidentiality (and the resulting privilege) applies not just to SARs themselves, but moreover to the information contained therein. The rules, however, do not create confidentiality in most supporting documentation.[16] Likewise, the agencies, in the history to their regulations, take the position that SAR supporting documentation is not confidential,[17] at least as long as the material in the supporting documentation does not indicate its relationship to a SAR.[18]

Courts have agreed.[19] In *Cotton*, the court distinguished between "two types of supporting documents. The first category represents the factual documents which give rise to suspicious conduct. These are to be produced in the ordinary course of discovery because they are business records made in the ordinary course of business."[20] Producing this first category of underlying business records would not reveal either the fact that a SAR was filed or the SAR's contents. Accordingly, these documents should not be shielded from otherwise appropriate discovery based solely on their connection to a SAR. "The second category is documents representing drafts of SARs or other work product or privileged communications that relate to the SAR itself. These are not to be produced because they would disclose whether a SAR has been prepared or filed,"[21] thereby thwarting the intent of the regulations.[22]

Supporting documentation subject to discovery usually includes transactional and account documents such as wire transfers, statements, checks and deposit slips,[23] but not draft SARs[24] or internal memoranda prepared as part of a financial institution's process for complying with its SAR-reporting duties.[25]

A bank's internal procedures may include the development and use of preliminary reports subject to various quality control checks before the bank prepares the final SAR that it will file. Revealing these preliminary reports, the equivalent of draft SARs, would disclose whether a SAR had been prepared.[26] Where internal reports or memoranda citing suspicious activity are legitimately part of the process for complying with a bank's SAR-reporting duties, they should be protected by privilege. But "[a] bank may not cloak its internal reports and memoranda with a veil of confidentiality simply by claiming they concern suspicious activity or concern a transaction that resulted in the filing of a SAR."[27] This distinction will not always be easy to make.

## Administrative Requests Seeking SARs from Agencies

Instead of seeking a SAR by way of discovery from the bank, a private civil litigant also may attempt to obtain a SAR directly from a government agency, by filing either a FOIA request or an "administrative" request pursuant to the relevant agency's own public disclosure regulations.[28]

As far as release of information under FOIA is concerned, agencies have relied on the exemption under 5 U.S.C. § 552(b)(3) that applies to shield from disclosure documents or information that is "specifically exempted from disclosure by statute."[29] Such efforts generally have been successful.

In *FDIC v. Flagship Auto Center, Inc.*, for example, the defendants had filed a motion to compel discovery from the FDIC regarding certain documents, including a SAR. The court, however, cited to the FDIC's regulation protecting the confidentiality of SARs, 12 C.F.R. § 353.3(g), and held that it could not "compel the production of the SARs and [the FDIC] is prohibited from providing any information that a SAR has been prepared or filed."[30]

In *Wuliger v. OCC* the plaintiff challenged the OCC's reliance on its regulation[31] and case law to support its denial of an administrative request for a SAR. The *Wuliger* court upheld the OCC's decision under the Administrative Procedure Act ("APA"),[32] finding the OCC's regulation "to be consistent with the authorizing legislation … and a reasonable implementation of the statutory provision regarding reporting and disclosure of SARs."[33] The court pointed out that "while disclosure of the SAR is prohibited, the court's ability to manage and direct discovery is not impinged upon as it still can direct production of those documents which might support the filing of a SAR."[34]

By contrast, in *Dupre v. FBI*, the district court ordered the FBI to disclose certain factual information contained in a SAR to the plaintiff pursuant to FOIA, because "the Government has not demonstrated that the information in Part VII of the SAR falls under any of the FOIA's exemptions." The information to be disclosed consisted of a narrative description of the plaintiff's transactions and communications with the bank regarding the bad check in dispute.[35] Ultimately, the court's order was vacated by consent motion and an appeal dismissed as moot, because the party seeking the



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information withdrew its request.[36] Subsequently, the court in *Cotton* criticized the *Dupre* decision, holding that "the better approach prohibits disclosure of the SAR while making clear that the underlying transaction such as wire transfers, checks, deposits, etc. are disclosed as part of the normal discovery process."[37]

## AFTER *BIZCAPITAL v. OCC* — NOT SO CONFIDENTIAL ANYMORE?

A recent decision of the Fifth Circuit may signal an end to further talk of absolute protection. In *BizCapital*, the plaintiff filed an administrative request[38] to the OCC under the agency's regulations regarding the release of non-public OCC information.[39] Through the administrative request, the plaintiff sought the disclosure of any SARs that a certain bank had filed concerning a particular third party. The plaintiff intended to use the SARs in connection with a civil litigation filed against the bank.[40]

Based on the BSA, OCC regulations, and case law, the agency denied the request. In response to the lawsuit challenging its decision, the OCC argued that the BSA confidentiality provision regarding SARs that prohibits any "national bank or person" from disclosing a SAR[41] should apply to the OCC itself.[42] Thus, the agency argued, it was absolutely prohibited from revealing information about the filing of a SAR to any third party, and it did not have to consider the plaintiff's request individually.[43]

But the trial court — the same court that had earlier ordered disclosure of part of a SAR in *Dupre*, discussed above — held that the BSA and OCC's regulations did not support the agency's position. The court was not persuaded by the OCC's argument that it was absolutely prohibited from revealing a SAR, "[b]ecause SARs are unambiguously incorporated in the [regulatory] provisions [that the OCC itself had promulgated] allowing requests for non-public OCC information."[44]

The trial court distinguished cases addressing discovery requests for production of a SAR from a bank, holding that such cases were not relevant to the instant situation, in which discovery was sought from the OCC, not a bank, and through an administrative proceeding, not a discovery request.[45] With regard to the leading case on administrative requests for SARs —

*Wuliger*, discussed above — the court "disagree[d] with *Wuliger's* conclusion: "[I]n sum, *Wuliger* makes an unwarranted leap from a finding that the regulations [regarding confidentiality of SARs] are reasonable and SARs are confidential to the conclusion that an administrative request should be denied without weighing the competing interests, just as a discovery request would be."[46]

Indeed, the *BizCapital* trial court concluded that the case law supports the conclusion that the OCC's regulations make SARs available through an administrative request. Although some courts had implied earlier that a SAR could be obtained from the OCC by a request under the agency's regulation governing release of non-public information, none of them had actually ordered disclosure of a SAR. In *United States v. Bortnick*, the court had refused to compel the OCC to produce SARs because "[the] [d]efendant has not made the showing required by [the OCC's regulations for the disclosure of non-public materials] that his need for the information outweighs the substantial public interest in maintaining the confidentiality of Suspicious Activity Reports. Moreover, Defendant has not shown that other evidence reasonably suited to his defense is not available from any other source."[47] In *Bank of China v. St. Paul Mercury Insurance Company*, the court declined to compel disclosure of a SAR by the bank, because "[a]s provided by [the applicable OCC regulations], SARs are considered 'non-public OCC information,' and therefore cannot be disclosed without the OCC's prior consent."[48] Other courts also found that "[t]he Code of Federal Regulations, specifically 12 C.F.R. § 4.31 *et seq.*, providing a mechanism for litigants … to request the OCC to provide them with access to SARs"[49] and that "[t]he OCC has the discretion to disclose SAR's [sic] and their contents. (12 C.F.R. §§ 4.31 — 4.40 (2005))."[50]

The *BizCapita*l trial court then held that the OCC was required to apply the balancing test set forth in its regulations for deciding whether to disclose non-public information. Pursuant to the balancing test, the OCC must weigh all "appropriate" factors, including whether the requesting party has fulfilled the requirements enumerated in the regulation,[51] and it may deny a request for reasons that include: "(i) [t]he requester was unsuccessful in showing that the information is relevant to the pending matter; (ii) [t]he requester seeks testimony and the requester did not show a compelling need

for the information; (iii) [t]he request arises from an adversarial matter and other evidence reasonably suited to the requester's need is available from another source; (iv) [a] lawsuit or administrative action has not yet been filed and the request was made in connection with potential litigation; or (v) [t]he production of the information would be contrary to public interest or unduly burdensome to the OCC."[52]

The court concluded that the OCC's summary denial of the request was arbitrary and capricious and ordered disclosure of the SAR.

The OCC limited its appeal to the issue whether the district court erred in failing to remand the case for an initial administrative determination of the plaintiff's request and conceded that "SARs are not categorically privileged under the circumstances presented in this case, but are subject to the balancing test set forth in the OCC's … regulation."[53] The appellate court held that the fact "[t]hat the OCC is likely to deny the request after properly applying its regulations does not render remand a mere formality."[54] It vacated the trial court's disclosure order and remanded the matter to the OCC to reconsider the request applying the factors set forth in its own regulations. As of today, the OCC has not yet issued its decision on remand. In conducting the balancing on remand, the OCC will have to weigh the relevance of the SAR and need of the requester against the public interest in its confidentiality.[55]

Thus far, other courts have neither followed nor distinguished the Fifth Circuit's decision in *BizCapital*. Thus, it is too soon to determine whether this case represents an aberration in the jurisprudential record or whether it signals a profound change in the way administrative agencies must address requests for information about SARs. Given the OCC's vehement defense of the confidentiality of SARs, it seems likely that the agency in the future will continue to deny requests for SARs by third parties, albeit on a case-by-case balancing basis to the extent the OCC believes that it is governed by *BizCapital* because the request originates from the Fifth Circuit. Nevertheless, banks have to be aware that the Fifth Circuit has pried open a small crack in the door through which civil litigants may be able to obtain SARs from the OCC.[56] Moreover, creative attorneys no doubt will attempt to parlay *BizCapital*'s modest erosion of the façade of an absolute privilege into broader application in generic civil litigation.

## RECOMMENDATIONS FOR MAINTAINING THE CONFIDENTIALITY OF SARS

In light of these developments, this may be an opportune time for banks to revisit steps that can be taken to enhance the likelihood that SARs and related materials can be shielded from production in civil litigation.

### Discovery Directed to a Bank

As discussed above, SARs and the information contained therein traditionally have not been discoverable directly from a bank — unlike supporting documentation and factual information (*e.g.*, wire transfers, statements, checks and deposit slips) on which the SAR is based that does not disclose the existence of a SAR and reveal its content, which are discoverable. As noted above, this distinction is not always as crisp as it could be.

Consequently, a bank should ensure that all documents it produces with a view to a possible filing of a SAR explicitly be labeled accordingly (*e.g.*, "privileged and confidential — SAR preparation"), to counter any argument that they were made in the ordinary course of the bank's business and hence should be discoverable. Moreover, a bank may wish to include in its internal policies and procedures for initiating, drafting and filing a SAR instructions regarding labeling and segregating SAR materials to demonstrate later which supporting documents should not be discoverable because they were generated for purposes of making a SAR filing. However, banks should not label materials as subject to the SAR-privilege excessively, or they may run the risk of losing credibility with the court and being ordered to produce a broader range of documents that otherwise would be deemed privileged.

### Requests Directed to the Agency

As discussed above, to the extent that the OCC or another agency concludes that its conduct is governed by *BizCapital*, it cannot categorically reject requests for SARs, but must conduct a balancing test for each individual request. Given the OCC's past vehement defense of the confidentiality of SARs, the agency most likely will continue to deny disclosure

requests, even under a balancing test. Nevertheless, *BizCapital* creates an enhanced risk of disclosure for banks.

As a general matter, banks should impress upon their regulators the importance of resisting SAR disclosures. In discussing the issue with regulators, one possible solution that might be suggested, specifically aimed at the *BizCapital* problem, would be for the OCC to amend its regulations that allow administrative requests for non-public OCC information, to carve out SARs from the types of information subject to such requests.

Banks also have an opportunity to enhance their protections in connection with specific SAR filings. In most cases, the OCC will notify a bank if a third party has made an administrative request for a SAR the bank has filed,[57] meaning that the bank is likely to have an opportunity to make its position and views known to the agency at the relevant time. Further, under the OCC's regulations, the agency may inquire into the circumstances of any case underlying a request for non-public information and may rely on sources of information other than the requester, such as the bank and other parties.[58] To help ensure that banks benefit from these provisions, banks may wish to note in any cover letters accompanying a sensitive SAR and/or in the SAR itself that (i) the bank understands that SARs are deemed confidential, but (ii) if the OCC receives any request for disclosure of the SAR, the bank would expect a notification according to 12 C.F.R. § 4.35(a)(5) and will (iii) file a comment that may be used as additional information by the agency in its balancing test.

## Industry-Wide Coordination

Banks should continue to coordinate their efforts through Banking Associations, in order to maintain a united front against the discovery of SARs, as the banking industry has done previously, *e.g.*, in submitting *amicae* materials in the *BizCapital* litigation. Depending on *BizCapital's* impact on how administrative agencies address requests for information about SARs, banks may even want to lobby Congress for stricter, more explicit legislative directives concerning SAR confidentiality.

At present, in most cases, a bank should be able to prepare a SAR with only a relatively modest concern for the risk that the SAR will be disclosed

to the bank's adversaries or others. If, contrary to expectations, the OCC grants a significant number of disclosure requests for SARs, it almost certainly will have a chilling effect on the content and perhaps even the frequency with which SARs are filed, undermining the SAR's utility as a weapon in the fight against crime and terrorism.

## NOTES

[1] 31 U.S.C. § 5318(g); 31 C.F.R. § 103.18 (Treasury Department); 12 C.F.R. § 21.11 (Office of the Comptroller of the Currency ("OCC")); 12 C.F.R. § 563.180 (Office of Thrift Supervision ("OTS")); 12 C.F.R. §§ 353.1 – 353.3 (Federal Deposit Insurance Corporation ("FDIC")); 12 C.F.R. § 208.62 (Federal Reserve Board ("FRB")).

[2] "The SAR Activity Review," *By the Numbers*, Issue 8, FinCEN (June 2007).

[3] *SRC Insights*, Vol. 9, Issue 1, Federal Reserve Bank of Philadelphia (Mar. 2004) at 6.

[4] *BizCapital Bus. & Indus. Dev. Corp. v. OCC*, 467 F.3d 871 (5th Cir. 2006).

[5] *See Cotton v. PrivateBank & Trust Co.* 235 F. Supp. 2d 809, 815 (N.D. Ill. 2002) (recognizing all of the foregoing concerns); *see also Weil v. Long Island Sav. Bank*, 195 F. Supp. 2d 383, 390 (E.D.N.Y. 2001); *Whitney Nat'l Bank v. Karam*, 306 F. Supp. 2d 678, 680-681 (S.D. Tex. 2004); *United States v. Holihan*, 248 F. Supp 2d 179, 185 (W.D.N.Y. 2003); *Union Bank of Cal., N.A. v. Superior Court*, 130 Cal. App. 4th 378, 392-393 (2005).

[6] *See Cotton*, 235 F. Supp. 2d at 815.

[7] 31 U.S.C. § 5318(g)(2)(A)(i) provides: "If a financial institution or any director, officer, employee, or agent of any financial institution, voluntarily or pursuant to this section or any other authority, reports a suspicious transaction to a government agency — (i) the financial institution, director, officer, employee, or agent may not notify any person involved in the transaction that the transaction has been reported." Toward the same end, the statute and regulations also provide a "safe harbor" to financial institutions that file SARs, limiting their liability arising from reporting a suspicious activity. 31 U.S.C. § 5318(g)(3); 31 C.F.R. § 103.18(e) (Department of Treasury/FinCEN); 12 C.F.R. § 21.11(l) (OCC); 12 C.F.R. § 563.180(d)(13) (OTS); 12 C.F.R. § 358.3(h) (FDIC); 12 C.F.R. § 208.62(k) (FRB).

[8] 12 C.F.R. § 21.11(k) (OCC). The regulations of FinCEN (31 C.F.R. § 103.18(e)) and the OTS (12 C.F.R. § 563.180(d)(12)) are substantially similar to the OCC's. However, the OCC's regulation seems to be slightly broader than the

FDIC regulation (12 C.F.R. § 353.3(g)) and FRB regulation (12 C.F.R. § 208.62(j)) that only apply to "[a]ny member bank subpoenaed" or "any bank subpoenaed" as opposed to "[a]ny … person subpoenaed."

[9] *See Cotton*, 235 F. Supp. 2d at 814; *Weil*, 195 F. Supp. at 389; *see also Whitney Nat'l Bank*, 306 F. Supp. 2d at 682 ("A court is not authorized to order the disclosure of a SAR under the Act."); *Gregory v. Bank One, Ind., N.A.*, 200 F. Supp. 2d 1000, 1002 (S.D. Ind. 2002) (mainly focusing on safe harbor provisions); *Matkin v. Fid. Nat'l Bank*, No. Civ. A. 6:01-2189-24, 2002 WL 32059740, at *1 (D.S.C. Mar. 28, 2002); *Lee v. Bankers Trust Co.*, 166 F.3d 540, 543 (2d Cir. 1999) (although *Lee* mainly focuses on the safe harbor provisions that limit liability arising from reporting a transaction in a SAR, the court acknowledged that the law broadly prohibits a financial institution from disclosing either that a SAR was filed or the information contained therein.); *Nevin v. Citibank, N.A.*, 107 F.Supp.2d 333, 342 (S.D.N.Y. 2000) (interpreting *Lee* to mean that "also sound public policy dictated that anything contained in an SAR enjoy an unqualified privilege."); *Holihan*, 248 F. Supp. 2d at 186-187 (in the context of a criminal case); *Int'l Bank of Miami, N.A. v. Shinitzky*, 849 So. 2d 1188, 1192 (Fla. Dist. Ct. App. 2003); *Union Bank*, 130 Cal. App. 4th at 390.

[10] *Weil*, 195 F. Supp. 2d at 390. Even where banks have wanted to file SARs to rely on them in their own defense courts have prevented them from doing so. *Gregory*, 200 F. Supp. 2d at 1003-1004. *See also Lee*, 166 F.3d at 544 ("even in a suit for damages based on disclosures allegedly made in an SAR, a financial institution cannot reveal what disclosures it made in an SAR, or even whether it filed an SAR at all").

[11] *Gregory*, 200 F. Supp. 2d at 1002; *Holihan*, 248 F. Supp.2d at 186.

[12] *Cotton*, 235 F. Supp. 2d at 815; *Weil*, 195 F. Supp. 2d at 389; *Gregory*, 200 F. Supp. 2d at 1002; *Holihan*, 248 F. Supp. 2d at 186.

[13] *Weil*, 195 F. Supp. 2d at 388 (internal quotation marks omitted); *see also In re Mezvinsky*, Bankr. No. 00-10745DWS, 2000 Bankr. LEXIS 1067, at *6 n.4 (E.D. Pa. Sept. 7, 2000).

[14] *Weil*, 195 F. Supp. 2d at 388-389.

[15] *Id.*; *In re Mezvinsky*, 2000 Bankr. LEXIS 1067, at *6.

[16] In the context of privilege this is common, e.g., the communication between attorney and client is privileged, but the underlying facts are not. *See Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

[17] *See* 61 Fed. Reg. 4332, 4336 (Feb. 5, 1996); 61 Fed. Reg. 6095, 6098 (Feb. 16, 1996); 61 Fed. Reg. 6100, 6104 (Feb. 16, 1996).

[18] *See* 61 Fed. Reg. 4326, 4330 (Feb. 5, 1996).

[19] *See Gregory*., 200 F. Supp. 2d at 1002 (the regulation's prohibition against disclosure of existence or contents of a SAR "applies only to the SARs themselves and

the information contained therein, but not to their supporting documentation"); *Weil*, 195 F. Supp. 2d at 389 ("The privilege is, however, limited to the SAR and the information contained therein; it does not apply to the supporting documentation."); *Holihan*, 248 F. Supp. 2d at 187 ("Despite the prohibition against a bank's disclosure of the existence or contents of a SAR, any supporting documentation remains discoverable.").

[20] 235 F. Supp. 2d at 815.

[21] *Id.*

[22] *See Weil*, 195 F. Supp. 2d at 389; *Gregory*, 200 F. Supp. 2d at 1002; *Holihan*, 248 F. Supp. 2d at 187; *see also Union Bank*, 130 Cal. App. 4th at 394; *Whitney Nat'l*, 306 F. Supp. 2d at 682.

[23] *See Cotton*, 235 F. Supp. 2d at 814; *Union Bank*, 130 Cal. App. 4th at 391.

[24] *See Cotton*, 235 F. Supp. 2d at 816 (holding that notes prepared for the purpose of investigating or drafting a possible SAR did not have to be produced).

[25] *See Union Bank*, 130 Cal. App. 4th at 391 (The court found to be protected by the SAR privilege a one-page internal bank document that was entitled "Suspicious Activity Report" (i) containing much the same information as the SAR form developed by FinCEN and (ii) used by the bank to report suspicious transactions to the Risk Management Department, which then (iii) determined whether to file a SAR, although (iv) not all reports made to Risk Management on this form ultimately led to a SAR being filed with FinCEN. The court maintained that the SAR privilege also protects the process of preparing the SAR).

[26] *See id.* at 392.

[27] *Id.*

[28] FOIA, 5 U.S.C. § 552, gives any person the right to request access to federal agency records. The requested records must be disclosed, unless they are protected from disclosure by one of the FOIA's exemptions or by one of its three special law enforcement record exclusions. In addition, the various agencies have their own regulations regarding release of information. *See* 31 C.F.R. § 1.1 *et seq.*; 31 C.F.R. § 103.53 *et seq.* (Treasury Department/FinCEN); 31 C.F.R. § 1.36 (in which the Treasury Department has expressly exempted the Suspicious Activity Reporting System from the relevant provisions of the Privacy Act of 1974, which grants individuals increased rights of access to records maintained about them.); 12 C.F.R. § 4.11 et seq. (OCC; FOIA) and 12 C.F.R. § 4.31 *et seq.* (OCC; Release of Non-Public OCC Information); 12 C.F.R. § 505.1 *et seq.* (OTS; FOIA) and 12 C.F.R. § 510.5 (OTS; release of unpublished OTS information); 12 C.F.R. § 309.1 *et seq.* (FDIC); 12 C.F.R. § 261.1 et seq. (FRB).

[29] *Freedom of Information Act Annual Report to the Attorney General for Fiscal Year 2004*, U.S. Department of the Treasury (Feb. 1, 2005); *FDIC Annual Report on the*

*Freedom of Information Act Fiscal Year 2004* (Oct. 1, 2003-Sept. 30, 2004); *Freedom of Information Act Annual Report Fiscal Year 2005*, FinCEN (Oct. 1, 2004-Sept. 30, 2005),

[30] *FDIC v. Flagship Auto Ctr., Inc.*, No. 3:04 CV 7233, 2005 WL 1140678, at *6 (N.D. Ohio, May 13, 2005). Admittedly, *Flagship* does not concern an administrative request, but rather a motion to compel discovery in a litigation in which the FDIC was the plaintiff. Nevertheless, the question in *Flagship*, of whether the confidentiality provisions set forth in the agencies' regulations apply to the agencies themselves is similar to the issue raised when a request is made to the agency pursuant to the FOIA.

[31] 12 C.F.R. § 21.11(k).

[32] *Wuliger v. OCC*, 394 F. Supp. 2d 1009 (N.D. Ohio2005). The court cites to *Weil*; *Cotton*; *Union Bank*; *Int'l Bank of Miami*; *Whitney Nat'l Bank*; *Lee*; *Gregory*.

[33] 394 F. Supp. 2d at 1018.

[34] *Id.* at 1019.

[35] *Dupre v. FBI*, No. CIV. A. 01-2431, 2002 WL 1042073, at *2 (E.D. La. May 22, 2002).

[36] *Dupre v. FBI*, Case No. 02-30714 (5th Cir., Mar. 20, 2003); *see also Wuliger*, 394 F. Supp. 2d at 1018 n.7 .

[37] *Cotton*, 235 F. Supp. 2d at 814.

[38] The OCC's regulation provides for an administrative request regarding non-public OCC information, which is not available under a FOIA request. 12 C.F.R. §§ 4.31 – 4.40.

[39] 12 C.F.R. § 4.31 *et seq.*

[40] Plaintiff argued that "[t]he State Court defendant has persistently denied under oath that it had any suspicion of illegal activity and none of the State Court defendant's records reveal any suspicion. The central claim against the State Court defendant is misrepresentation; therefore proof that the State Court defendant suspected illegal activity … is crucial. Plaintiff represents that allowing the State Court defendant to take a contradictory position in litigation to that taken with the OCC would effect a miscarriage of justice." *BizCapital Bus. & Indus. Dev. Corp. v. OCC*, 406 F. Supp. 2d 688, 697 (E.D. La. 2005).

[41] 12 C.F.R. § 21.11(k).

[42] *BizCapital*, 406 F. Supp. 2d at 693.

[43] *Id*. at 696.

[44] *Id.* at 693; *see also* 12 C.F.R. § 4.32(b)(vii).

[45] *BizCapital*, 406 F. Supp. 2d at 694-695.

[46] Moreover, it found the OCC's reasoning in its Interpretive Letter No. 978 did not apply to plaintiff's request. *BizCapital*, 406 F. Supp. 2d at 696.

[47] *United States v. Bortnick*, No. CRIM. A. 03-CR-0414, 2005 WL 300071, at *1 (E.D. Pa. Jan. 27, 2005) (footnote omitted).

[48] *Bank of China v. St. Paul Mercury Ins. Co.*, No. 03 Civ. 9797(RWS), 2004 WL 2624673, at *4 (S.D.N.Y. Nov. 18, 2004).

[49] *In re Mezvinsky*, 2000 Bankr. LEXIS 1067, at *4; *see also Union Bank*, 130 Cal. App. 4th at 385 n.2 ("The Code of Federal Regulations provides a mechanism for litigants to request nonpublic information from the OCC, including SAR's [sic]. (12 C.F.R. § 4.31 *et seq.* (2005).) The OCC has sole discretion whether to grant a request. (12 C.F.R. § 4.35(a) (2005).)".

[50] *Id.* at 398.

[51] 12 C.F.R. § 4.33.

[52] 12 C.F.R. §4.35(a)(2).

[53] *BizCapital*, 467 F.3d at 873 (internal quotation marks omitted).

[54] *Id.* at 874.

[55] *BizCapital*, 406 F. Supp. 2d at 696.

[56] The FRB regulations contain a similar balancing test, but also an additional requirement that the "disclosure is consistent with the supervisory and regulatory responsibilities and policies of the Board," which may put the FRB in a stronger position to argue for a blanket denial of disclosure of SARs than the OCC. 12 C.F.R. § 261.22(c)(1)(ii).

[57] 12 C.F.R. § 4.35(a)(5).

[58] 12 C.F.R. § 4.35(a)(3).