# Webinar: Suspicious Activity Reporting (SAR) under the Bank Secrecy Act and Anti-Money Laundering: What You Need to Know About the Safe Harbor and Limitations to Immunity

December 12, 2012 | Frank A. Mayer, III, Richard J. Zack

Pepper Hamilton LLP
Attorneys at Law

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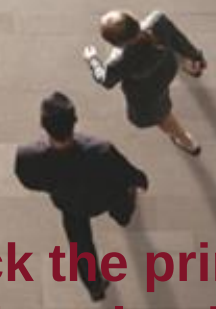

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# Freeh Association.

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We are pleased to announce that
The Hon. Louis J. Freeh
and the lawyers of Freeh Sporkin & Sullivan, LLP
have joined Pepper Hamilton LLP
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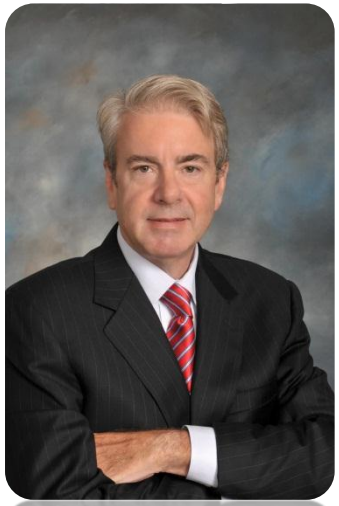
August 28, 2012

Pepper Hamilton LLP
Attorneys at Law

# Speaker: Frank A. Mayer, III



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- Partner in the Financial Services Practice Group of Pepper Hamilton LLP, resident in the Philadelphia office
- Member of the firm's Securities and Financial Services Enforcement Group
- Focuses his practice on counseling regulated business enterprises including tax-exempt organizations, with a special emphasis on financial institutions
- Former FDIC and RTC senior official and member of interagency bank fraud working group.

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- Partner in the White Collar Litigation and Investigations Group of Pepper, resident in the Philadelphia office
- Prior to joining Pepper, Mr. Zack was chief of commercial and consumer fraud and deputy chief of economic crimes for the U.S. Attorney's Office for the Eastern District of Pennsylvania. There he supervised all consumer and commercial fraud cases, including mortgage, investment, securities and corporate fraud. Before that, Mr. Zack was deputy chief of the criminal division and an Assistant U.S. Attorney
- Extensive experience in the investigation and prosecution of mortgage fraud and other financial crimes. Mr. Zack represents businesses, educational institutions, nonprofits and individuals facing investigation by federal and state law enforcement authorities, and government regulatory agencies.

# Outline of Presentation

- This presentation will provide:
  - Introduction to Suspicious Activity Reporting (SAR)
  - Summary of Annunzio-Wylie Anti-Money Laundering Act, 31 U.S.C. § 5318(g)(3)(A)
  - Split in authority regarding scope of safe harbor provision (absolute immunity vis-à-vis qualified immunity)
  - Plain language of the Anti-Money Laundering Act, its legislative history, and public policy concerns.
  - Legislative Fix

# Suspicious Activity Report

- A SAR is submitted by a financial institution to FinCEN if the bank knows, suspects, or has reason to know or suspect that a transaction involves a financial crime
- Submitted no later than thirty (30) days after the initial detection of a known or suspected violation of law
- Strict confidentiality provisions govern the filing of a SAR, and a financial institution may neither acknowledge the filing of a SAR nor disclose the content contained within the SAR unless ordered to do so by certain governmental authorities
- Used to protect the American public from financial fraud including, but not limited to: check fraud, money laundering, embezzlement, Ponzi schemes, pyramid schemes, mortgage loan fraud, identify theft and terrorist financing

# Annunzio-Wylie Anti-Money Laundering Act

- Congress passed the Annunzio-Wylie Act, 31 U.S.C. § 5318(g)(3)(A), as Title XV of the Housing and Community Development Act of 1992
- Congress added a safe harbor provision in the Act that provides immunity from any civil liability arising from the SAR
- Split in authority among the federal and state courts concerning the scope of immunity provided to financial institutions that submit SARs
  - absolute immunity vis-à-vis qualified "good faith" immunity

# Absolute v. Qualified Immunity Split In Authority

Supreme Court denied certiorari to resolve split in authority.

- Absolute Immunity
  - First Circuit
  - Second Circuit
- Qualified Immunity
  - Eleventh Circuit
  - Arkansas Supreme Court

# Congress Provided Absolute Immunity

- Plain Language of the Statute
- Legislative History
- Public Policy
- Bank Regulators

# Plain Language of the Statute

- The plain language of the Act unambiguously provides for absolute immunity from civil liability for financial institutions:
  - [a]ny financial institution that makes a voluntary disclosure of **any** possible violation of law or regulation to a government agency or makes a disclosure pursuant to this subsection or **any** other authority, and **any** director, officer, employee, or agent of such institution who makes, or requires another to make **any** such disclosure **shall not be liable** to any person under **any law** or regulation of the United States, **any** constitution, law, or regulation of **any** State or political subdivision of **any** State, or under **any** contract or other legally enforceable agreement (including any arbitration agreement), for such disclosure or for **any** failure to provide notice of such disclosure to the person who is the subject of such disclosure or **any** other person identified in the disclosure.
- "Good faith basis" or equivalent language does not appear
- Hard to imagine that Congress could have used more expansive language

# Legislative History

- Author of the Act – Representative Annunzio's statement that the safe harbor provision was intended to provide "the broadest possible exemption from civil liability for the reporting of suspicious transactions."
- Previous version of the Act contained the "good faith basis" prerequisite, but Congress chose to leave that requirement out of the final version that was passed.
- Congress could have added the "good faith" requirement in its amendment to the safe harbor provision as part of the PATRIOT Act, but chose not to.

# Patriot Act Amendment

- As part of the PATRIOT ACT passed in 2001 to clarify the terms of the safe harbor from civil liability for filing SARs, Congress **expanded** the scope of immunity, instead of limiting it with the “good faith basis” requirement.
- Congress added immunity from arbitration proceedings and voluntary submittal of SARs.
- Congress noted that the inclusion of the safe harbor language in the Act is in no way intended to suggest that the safe harbor can override the nondisclosure provisions of the law and regulations. The prohibition on disclosure applies regardless of any protection from liability.

# Public Policy

- Absolute immunity is needed to encourage banks to submit a SAR.
- The American Bankers Association remarked that "[f]or over twenty years, bank regulators and law enforcement officials have relied on financial institutions' discreet filing of confidential reports detailing suspicious activity to help deter and detect financial crime and protect the integrity of the American banking system. This system will be jeopardized if financial institutions are not afforded the full immunity protection of the safe harbor provision of the Annunzio-Wylie Anti-Money Laundering Act."
- In 2011 alone, over one and a half million SARs were filed with FinCEN. While not all of these warnings resulted in financial abuse that required federal agency action, it is without dispute that the SAR process provides a starting point for federal officials to catch fraudsters. Absolute immunity provides the necessary insurance financial institutions need to feel comfortable filing a SAR because the bank knows it will face no civil liability as a possible consequence.

# Bank Regulators

- Bank regulators and associations support absolute immunity:
  - FinCEN
  - FDIC
  - American Bankers Association
  - Independent Community Bankers Association
  - The Clearing House Association
  - Louisiana Bankers Association
  - Mississippi Bankers Association
  - New York Bankers Association

# If Good Faith Is Required . . .

- If good faith is required, the SAR is like any other litigation risk a bank must weigh.
  - When terminating an employee for embezzlement, for example, the bank must weigh whether to file a SAR as part of the settlement with the employee.
- If good faith is required, it will diminish regulators ability to impose penalties when an insufficient number of SARs have been filed.
  - This result is inconsistent with the trend of bank regulators to more carefully examine Bank Secrecy Act and Anti-Money Laundering issues.

- If good faith is required, different legal standards will apply.
  - The purpose of the SAR is to notify law enforcement officials of **suspicious** activity, not **criminal** activity. A good faith basis precondition would allow a civil lawsuit when a bank files a SAR based on **unusual** activity.

# Legislative Fix

- Congress should amend the Act to explicitly prohibit private causes of action.
  - The relevant inquiry is to determine whether Congress intended to create a private cause of action
  - Congress specifically provides private causes of actions for violations of other statutes, but not for SAR violations
  - Plain language of statute should be amended to explicitly prohibit private claims
- FinCEN should appoint a sub-agency to review allegations of “bad faith” SAR reporting. This agency would report directly to FinCEN and document any instances where a bank filed a SAR maliciously. If such a situation occurs, FinCEN would have the power to appropriately sanction the bank and take any and all corrective measures.

# General Prohibition on Disclosure

- Financial institutions are barred from disclosing SARs or the fact that a SAR has been filed
- Unauthorized disclosure is a criminal violation
- For litigation purposes, FinCEN advises against admitting or denying existence of SAR
- Do not produce a SAR in response to any discovery request or subpoena
- Prohibition on disclosure does not include the facts that are the basis of the SAR, so long as the disclosure of the facts is made in such a way that does not indicate that a SAR has been filed or reveal the information included in SAR

# Exception to Prohibition on Disclosure

- Limited situations when financial institutions must disclose SARs
  - Disclosure to an appropriate law enforcement agency
    - An agency that has jurisdiction under federal or state law to **investigate or prosecute** the suspicious transaction
  - Disclosure to an appropriate supervisory agency
    - Agency that has the **authority** under federal and state law to **examine** the financial institution (Federal Reserve Board, OCC, FDIC, NCUA, ect.)
- Not always clear whether an agency is the appropriate law enforcement or supervisory agency that allows disclosure of SAR
  - Seek legal counsel or FinCEN regulatory helpline

# Subpoena or Court Order

- FinCEN recognizes that prohibition against disclosure can raise special issues when SAR records are sought by subpoena or court order
- FinCEN recommends banks contact their primary supervisor, as well as FinCEN, to obtain guidance on how to proceed
- Legal counsel also may be appropriate
- Government agencies have intervened in the past to ensure that SAR filings remain confidential

# DOJ Money Laundering Chief Named as FinCEN Director

WASHINGTON – The U.S. Department of the Treasury announced today that Jennifer Shasky Calvery has been selected as the new Director of the Financial Crimes Enforcement Network (FinCEN). Ms. Shasky Calvery replaced the outgoing Director, Jim Freis, who served with distinction as the Director of FinCEN for the past five years.

# Conclusion

- Absolute immunity needed
- Achieves goal of protecting American citizens from financial abuse
- The minority of courts that require a “good faith basis” for the SAR misread the statute and ignore the plain language, legislative history and public policy concerns
- Legislative fix needed

# Questions & Answers

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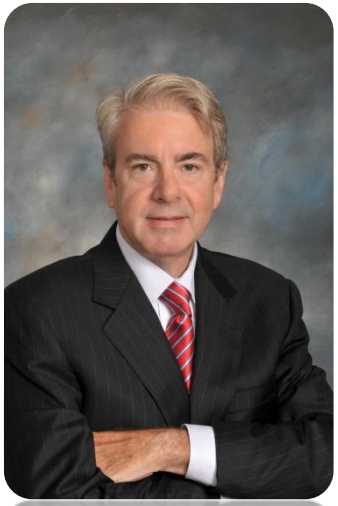
# Thank You!



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