Comptroller of the Currency
Administrator of National Banks

Washington, DC 20219

Interpretive Letter #978
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12 C.F.R. 4.31

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Subject: Commerce Bank, N.A. v. Smith, No. 02-3226 (Bankr. W.D.N.C.)

Dear Mr. Schaaf:

This responds to your letter seeking a Suspicious Activity Report ("SAR") under 12 C.F.R. § 4.31 *et seq.* for use in the above referenced litigation.

I regret that I must deny your request. The public policy against disclosure of a SAR is very strong. Under 31 U.S.C. § 5318(g)(2), a SAR is confidential. Congress recently buttressed this policy by amending the statute to provide that no officer or employee of the federal government, or of any state, local, tribal or territorial government who knows that a SAR was filed, may disclose to any person involved in the transaction that the transaction has been reported, other than as necessary to fulfill the employee's official duties. 31 U.S.C. § 5318(g)(2)(A)(ii), as amended by the USA Patriot Act of 2001, Pub. L. No. 107-56, § 351(b), 115 Stat. 272, 320-21 (2001). Similarly, regulations issued by the OCC and FinCen underline the confidentiality of a SAR. 12 C.F.R. § 21.11(k); 31 C.F.R. § 103.18(e), respectively. The state and federal courts have been virtually unanimous in emphasizing the confidentiality of a SAR. *See* Int'l Bank of Miami, N.A. v. Shinitzky, 849 So. 2d 1188 (Fla. 2003); Matkin v. Fidelity Nat'l Bank, 2002 WL 32059740 (D.S.C. 2002); Cotton v. PrivateBank & Trust Co., 235 F. Supp. 2d 809 (N.D. Ill. 2002) (collecting cases). The courts have been equally insistent that even the act of filing of a SAR is confidential. Lee v. Bankers Trust Co., 166 F. 3d 540, 544 (2d Cir. 1999) ("[E]ven 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").

The applicable statute and agency regulations are predicated on the belief that, absent confidentiality, banks would be reluctant to file SARs, or would hesitate to describe fully the suspected misconduct. Moreover, the willingness of banks to make these filings will be diminished if SARs are made freely available to private litigants. The Congressional interest in not discouraging banks from filing SARs is reflected in the safe harbor provision that protects banks from suit, 31 U.S.C. § 5318(g)(3)(A). *See* Stoutt v. Banco Popular de Puerto Rico, 320

F.3d 26, 30-31 (1st Cir. 2003), a recent decision that refused to read into the safe harbor provision a requirement that the bank filing the SAR do so in good faith. The failure of financial institutions to liberally report all evidence of suspicious activities may diminish the SAR's importance in serving as a weapon in the fight to prevent terrorists from accessing the banking system. Finally, since a SAR contains unproven allegations, its disclosure could unfairly impugn the integrity of any individual named therein and might even subject the reporting party to retaliation. U.S. v. Holihan, 248 F. Supp.2d 179, 185 (W.D.N.Y. 2003).

Sincerely,

/s/ *Ford Barrett*

Ford Barrett
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