APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

AUGUST TERM, 2019

ARGUED: MARCH 31, 2020
DECIDED: DECEMBER 4, 2020

No. 19-3272

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,

Plaintiff - Appellee,

v.

ALPINE SECURITIES CORPORATION,

Defendant - Appellant.

Appeal from the United States District Court for the Southern District of New York.

Before: WALKER, CABRANES, and SACK, *Circuit Judges*.

The Securities and Exchange Commission (SEC) filed a civil enforcement action against Alpine Securities Corporation (Alpine), a registered broker-dealer specializing in penny stocks and micro-cap securities. The SEC claimed that Alpine's failure to comply with the reporting requirements for filing

Suspicious Activity Reports (SARs) violated the reporting, recordkeeping, and record retention obligations under Section 17(a), of the Securities Exchange Act of 1934 (Exchange Act), and Rule 17a-8 promulgated thereunder. The district court granted in part and denied in part the SEC's motion for summary judgment and denied Alpine's motion for summary judgment.

On appeal, Alpine argues that the district court erred: (1) in concluding that the SEC has authority to bring an enforcement action under Section 17(a) and Rule 17a-8 on the basis of Alpine's failure to comply with the SAR provisions of the Bank Secrecy Act (BSA); (2) in concluding that Rule 17a-8 is valid; (3) in concluding that Rule 17a-8 does not violate the Administrative Procedure Act (APA); and (4) in finding Alpine liable for violations of Section 17(a) and Rule 17a-8 on the basis of its deficient SAR practices. Alpine further challenges the district court's imposition of a civil penalty under the Exchange Act in the amount of $12 million.

For the reasons that follow, we AFFIRM the judgment of the district court.

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JOHN M. WALKER, JR., *Circuit Judge*:

The Securities and Exchange Commission (SEC) filed a civil enforcement action against Alpine Securities Corporation (Alpine), a registered broker-dealer specializing in penny stocks and micro-cap securities. The SEC claimed that Alpine's failure to comply with the reporting requirements for filing Suspicious Activity Reports (SARs) violated the reporting, recordkeeping, and record retention obligations under Section 17(a), of the Securities Exchange Act of 1934 (Exchange Act), and Rule 17a-8 promulgated thereunder. The District Court for the Southern District of New York (Denise L. Cote, J.), granted in part and denied in part the SEC's motion for summary judgment and denied Alpine's motion for summary judgment.

On appeal, Alpine argues that the district court erred: (1) in concluding that the SEC has authority to bring an enforcement action under Section 17(a) and Rule 17a-8 on the basis of Alpine's failure to comply with the SAR provisions of the Bank Secrecy Act (BSA); (2) in concluding that Rule 17a-8 is valid; (3) in concluding that Rule 17a-8 does not violate the Administrative Procedure Act (APA); and (4) in finding Alpine liable for violations of Section 17(a) and Rule 17a-8 on the basis of its deficient SAR

practices. Alpine further challenges the district court's imposition of a civil penalty under the Exchange Act in the amount of $12 million.

For the reasons that follow, we AFFIRM the judgment of the district court.

BACKGROUND

Prior to examining the issues in this case, a brief review of the relevant statutory and regulatory authority will be helpful.

i. The Bank Secrecy Act

Congress enacted the Foreign Transactions Reporting Act of 1970, or Bank Secrecy Act (BSA), in 1970 due to concerns over (1) the adequacy of records retained by domestic financial institutions, (2) the failure of such institutions to report to the government large deposits and withdrawals of currency,[1] and (3) the use of foreign financial institutions to evade "domestic criminal, tax, and regulatory enactments."[2]

The BSA authorizes the Secretary of the Treasury to mandate certain recordkeeping and reporting

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[1] *California Bankers Ass'n v. Shultz*, 416 U.S. 21, 27-28 (1974).
[2] *Id.*; *see also Ratzlaf v. United States*, 510 U.S. 135, 138 (1994) ("Congress enacted the Currency and Foreign Transactions Reporting Act (Bank Secrecy Act) in 1970, Pub.L. 91-508, Tit. II, 84 Stat. 1118, in response to increasing use of banks and other institutions as financial intermediaries by persons engaged in criminal activity. The Act imposes a variety of reporting requirements on individuals and institutions regarding foreign and domestic financial transactions.").

requirements for United States financial institutions.[3] In enacting the BSA, Congress concluded that such records and reports "have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings."[4]

When the BSA was initially enacted, Treasury regulations only required broker-dealers to retain records and file reports relating to domestic and foreign transactions above a certain dollar amount.[5] In 2001, however, Congress amended the BSA through the USA PATRIOT Act to require the Treasury, after consultation with the SEC and Board of Governors of the Federal Reserve System, to publish regulations requiring broker-dealers to report suspicious transactions.[6] The Secretary of the Treasury delegated that responsibility to the Financial Crimes Enforcement Network (FinCEN) within the Treasury Department.[7]

In 2002, FinCEN promulgated 31 C.F.R. § 1023.320, which requires every broker-dealer to file a report of any suspicious transaction relevant to a possible violation of law or regulation. Specifically, broker-dealers must file a SAR if a transaction "is conducted or attempted by, at, or through a broker-

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[3] *California Bankers Ass'n*, 416 U.S. at 26.
[4] *Id*. (citing 12 U.S.C. §§ 1829b(a)(2), 1951; 31 U.S.C. § 1051).
[5] *See id*. at 30-38.
[6] Financial Crimes Enforcement Network; Amendment to the Bank Secrecy Act Regulations–Requirement that Brokers or Dealers in Securities Report Suspicious Transactions, 67 Fed. Reg. 44,048 (July 1, 2002) (SAR Regulation Adopting Release).
[7] Treasury Order 180-01(a)-(b); Financial Crimes Enforcement Network, 67 Fed. Reg. 64,697 (Oct. 21, 2002).

dealer, it involves or aggregates funds or other assets of at least $5,000, and the broker-dealer knows, suspects, or has reason to suspect that the transaction (or a pattern of transactions of which the transaction is a part):" (1) "[i]nvolves funds derived from illegal activity;" (2) is designed, "whether through structuring or other means, to evade" the BSA and its regulations; (3) "[h]as no business or apparent lawful purpose;" or (4) "[i]nvolves use of the broker-dealer to facilitate criminal activity."[8] Section 1023.320 also requires broker-dealers to retain a copy of any SAR filed "for a period of five years from the date of filing" and to "make all supporting documentation available to FinCEN or any Federal, State, or local law enforcement agency, or any Federal regulatory authority that examines the broker-dealer for compliance with the Bank Secrecy Act, upon request."[9]

Upon the issuance of this regulation, FinCEN announced that the "regulation of the securities industry in general and of broker-dealers in particular relies on both the Securities and Exchange Commission … and the registered securities associations and national securities exchanges."[10]

ii. The Exchange Act

The Exchange Act delegates to the SEC broad authority to regulate brokers and dealers in securities.[11] Section 17(a) of the Exchange Act

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[8] 31 C.F.R. § 1023.320(a)(2).
[9] 31 C.F.R. § 1023.320(d).
[10] SAR Regulation Adopting Release, 67 Fed. Reg. at 44,049.
[11] *See* 15 U.S.C. § 78b; *id.* § 78q-1.

authorizes the SEC to promulgate rules to carry out Section 17(a)'s requirement that brokers and dealers "make and keep for prescribed periods such records … and disseminate such reports as the Commission, by rule, prescribes as necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this chapter."[12]

In 1981, the SEC promulgated Rule 17a-8 under Section 17(a). Rule 17a-8, instead of duplicating the reporting and retention requirements of the BSA, incorporated those requirements by mandating that every registered broker or dealer "who is subject to the requirements of the Currency and Foreign Transactions Reporting Act of 1970 [Bank Secrecy Act] shall comply with the reporting, recordkeeping and record retention requirements of chapter X of title 31 of the Code of Federal Regulations."[13] Chapter X of Title 31 concerns the Treasury's rules for brokers or dealers in securities, including FinCEN's SAR requirements under Section 1023.320.

The SEC observed that by not duplicating the existing BSA Treasury requirements, Rule 17a-8 would impose "no burden on competition."[14] The SEC further specified that the Rule was not confined to any specific identifiable reports and records so as to allow for any revisions to reporting requirements that the Treasury may adopt in the future.[15] No comments

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[12] 15 U.S.C. § 78q(a)(1).
[13] 17 C.F.R. § 240.17a-8.
[14] Recordkeeping by Brokers and Dealers, 46 Fed. Reg. 61,454, 61,455 (Dec. 17, 1981) (Rule 17a-8 Adopting Release).
[15] *Id.*

were received from the public in response to the proposed rule.[16] In 2011, the SEC amended Rule 17a-8 to make clear that it still considered the Treasury's reporting obligations, which at that point included the SAR reporting requirement, as promoting the goals of the Exchange Act.[17]

iii. Current Enforcement Action

Alpine is a registered broker-dealer and Financial Industry Regulatory Authority (FINRA) member that "acts as a clearing firm."[18] Over the years, the SEC and FINRA, which is overseen by the SEC, found numerous deficiencies in Alpine's SAR reporting standards and submissions. In 2012, FINRA found that Alpine failed to file SARs over a two-month and a four-month period in 2011 and that many SARs that Alpine did file were inadequate. In 2015, the SEC found that for half of the SARs it reviewed, Alpine failed to provide a clear and complete description of the financial activity reported and that frequently Alpine was intentionally trying to obscure the suspicious nature of that activity.

On June 5, 2017, the SEC filed this civil action against Alpine to enforce reporting and recordkeeping requirements of the securities laws. The SEC alleged that, through non-compliant SAR practices, Alpine violated the reporting, recordkeeping, and record retention obligations under Section 17(a) and Rule

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[16] *Id.*

[17] Technical Amendments to Rule 17a-8: Financial Recordkeeping and Reporting of Currency and Foreign Transactions, 76 Fed. Reg. 11,327 (Mar. 2, 2011).

[18] App'x 48, 50.

17a-8. The SEC moved for partial summary judgment, submitting SARs to exemplify the categories of Section 17(a) and Rule 17a-8 violations it was alleging. Alpine cross-moved for summary judgment, principally arguing that the SEC lacked authority to bring such a suit because the Treasury had sole authorization to enforce the BSA requirements.

The district court granted the SEC's motion in part, but deferred its resolution of categories of allegedly deficient SARs pending discovery and additional briefing. The district court also denied Alpine's motion, rejecting Alpine's argument that the SEC was improperly enforcing the BSA and upholding the SEC's authority to enforce the reporting and recordkeeping provisions of the Exchange Act on the basis of non-compliance with SAR requirements.[19]

The district court determined that Rule 17a-8 was a reasonable interpretation of the Exchange Act because the SEC concluded that the SARs, which assist the Treasury Department in targeting illegal securities transactions, would also serve to protect investors by providing information relevant to determining whether there is any market manipulation.[20] The district court further found that nothing in the Exchange Act or the BSA expressly

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[19] *United States Sec. & Exch. Comm'n v. Alpine Sec. Corp.*, 308 F. Supp. 3d 775, 789 (S.D.N.Y. 2018), *reconsideration denied*, No. 17CV4179(DLC), 2018 WL 3198889 (S.D.N.Y. June 18, 2018), *and reconsideration denied*, No. 17CV4179(DLC), 2019 WL 4071783 (S.D.N.Y. Aug. 29, 2019).

[20] *Id.* at 796.

precluded FinCEN and the SEC from exercising concurrent regulatory and enforcement authority.[21]

The district court also rejected Alpine's argument that the SEC violated the APA when promulgating Rule 17a-8. Specifically, the district court noted that the "text of the regulation itself, as well as the SEC's 1981 notice of final rule, unambiguously demonstrate[d] the SEC's intent [that] the nature of the Rule 17a-8 reporting obligation [would] evolve over time through the Treasury's regulations."[22] The district court observed that Rule 17a-8's evolving nature "made government more efficient by incorporating the obligations that had been and would be imposed by the Treasury."[23]

After discovery and additional briefing, the SEC moved for summary judgment as to Alpine's liability for thousands of Rule 17a-8 violations based on deficient SARs reporting and recordkeeping practices. Evaluating the specific violations alleged, the district court granted summary judgment to the SEC as to 2,720 violations of Rule 17a-8 on the basis of Alpine's SARs reporting and recordkeeping practices in three categories: submitting SARs with deficient narratives, failing to submit SARs on deposit-and-sales patterns, and failing to retain support files for SARs. The district court denied summary judgment

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[21] *Id.*
[22] *Id.* at 797.
[23] *Id.*

as to hundreds of other alleged violations by Alpine, which the SEC then declined to prosecute further.[24]

The district court then imposed a $12 million civil penalty and enjoined Alpine from future violations of Section 17(a) and Rule 17a-8. This appeal followed.

DISCUSSION

On appeal, Alpine argues (1) this enforcement action is invalid because the SEC lacks authority to enforce the SAR provisions of the BSA; (2) Rule 17a-8, which requires compliance with BSA requirements, is invalid because it is not a reasonable interpretation of the Exchange Act; (3) Rule 17a-8 is invalid because its promulgation did not comply with the APA; and (4) the district court erred in finding that Alpine violated Section 17(a) and Rule 17a-8 on the basis of SAR compliance. Alpine further argues that the district court erred in imposing a civil penalty of $12 million on Alpine.

We review motions for summary judgment *de novo*.[25]

I. The SEC Has Authority to Enforce Section 17(a) of the Exchange Act Through This Civil Action

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[24] *See, e.g., United States Sec. & Exch. Comm'n v. Alpine Sec. Corp.*, 354 F. Supp. 3d 396, 430-31, 443 (S.D.N.Y. 2018), *reconsideration denied*, No. 17CV4179(DLC), 2019 WL 4071783 (S.D.N.Y. Aug. 29, 2019).

[25] *See United States v. Epskamp*, 832 F.3d 154, 160 (2d Cir. 2016) (quoting *Roach v. Morse*, 440 F.3d 53, 56 (2d Cir. 2006)); *Mario v. P & C Food Mkts, Inc.*, 313 F.3d 758, 763 (2d Cir. 2002).

Alpine first contends that the SEC is not authorized to bring this civil enforcement action because the Treasury Department has sole authority to enforce the BSA. We disagree.

This enforcement action was brought solely under Section 17(a) of the Exchange Act and Rule 17a-8 promulgated thereunder. This suit therefore falls within the SEC's independent authority as the primary federal regulator of broker-dealers to ensure that they comply with reporting and recordkeeping requirements of those provisions.[26] The fact that Rule 17a-8 requires broker-dealers to adhere to the dictates of the BSA in order to comply with the recordkeeping and reporting provisions of the Exchange Act does not constitute SEC enforcement of the BSA. We thus reject Alpine's argument that the SEC is enforcing the BSA, and not the Exchange Act.

II. Rule 17a-8, Which Requires Compliance with BSA Requirements, Is a Reasonable Interpretation of Section 17(a) of the Exchange Act

Alpine next challenges the validity of Rule 17a-8, which requires compliance with BSA requirements, on that basis that it is not a reasonable interpretation of the Exchange Act.

We review questions of statutory interpretation *de novo*.[27] Because this issue centers on an agency's

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[26] *See, e.g., VanCook v. SEC*, 653 F.3d 130 (2d Cir. 2011) (enforcement action for violation of Section 17(a)).

[27] *See United States v. Epskamp*, 832 F.3d 154, 160 (2d Cir. 2016) (quoting *Roach v. Morse*, 440 F.3d 53, 56 (2d Cir. 2006)).

interpretation of a statute, we turn to the analytical framework established in *Chevron, U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*[28] "[A] reviewing court must first ask whether Congress has directly spoken to the precise question at issue."[29] Only if the statute is ambiguous or silent on the question need a court proceed in the analysis. If Congress has not clearly spoken, "a reviewing court must respect the agency's construction of the statute so long as it is permissible."[30]

The Exchange Act expressly delegates to the SEC the authority to determine which reports from covered entities, including brokers and dealers, are "necessary or appropriate" to further the goals of the Exchange Act. The SEC, pursuant to that authority, may promulgate rules defining the recordkeeping and reporting obligations of broker-dealers that the SEC deems necessary to pursue those statutory aims.[31]

That is exactly what the SEC has done by promulgating Rule 17a-8. The Exchange Act aims to protect the national securities market and "safeguard[] … securities and funds related thereto."[32] The SEC determined that the SARs, which assist the Treasury Department in targeting illegal securities transactions, would also serve to further the aims of the Exchange Act by protecting investors

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[28] 467 U.S. 837 (1984).
[29] *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000) (internal quotation marks omitted) (quoting *Chevron*, 467 U.S. at 842).
[30] *Id.* (citing *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424 (1999)).
[31] 15 U.S.C. § 78q(a)(1).
[32] 15 U.S.C. § 78b; *see also* 15 U.S.C. § 78q-1.

and helping to guard against market manipulation. For example, SARs facilitate the SEC's effective enforcement with regard to market abuses associated with penny stock trading.[33] The SEC thus promulgated Rule 17a-8, which requires compliance with those BSA regulations. In promulgating Rule 17a-8, the SEC acted pursuant to an express delegation of rulemaking authority. We thus hold that the SEC's interpretation of Section 17(a), as expressed in Rule 17a-8, is reasonable.[34]

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[33] *See* Ronald S. Bloomfield, Robert Gorgia, & John Earl Martin, Sr., S.E.C. Release No. 9553 (Feb. 27, 2014), *vacated in part on other grounds*, Robert Gorgia, S.E.C. Release No. 9743 (Apr. 8, 2015) ("Penny stocks present risks of trading abuses due to the lack of publicly available information about the penny stock market in general and the price and trading volume of particular penny stocks."); *see also Testimony Before the S. Comm. on Banking, Housing and Urban Affairs*, 2002 WL 169600 (Jan. 29, 2002) (Annette L. Nazareth, Director, SEC Division of Market Regulation) (stating that the "SEC and Treasury staff readily reached consensus" on extending comparable SAR obligations to combat "money laundering risks.").

[34] Alpine's argument that the district court improperly applied *Auer* deference lacks merit. *See Auer v. Robbins*, 519 U.S. 452 (1997). As an initial matter, in *Kisor v. Wilkie*, the case on which Alpine relies, the Supreme Court held that "*Auer* deference retains an important role in construing agency regulations." 139 S. Ct. 2400, 2408 (2019). Here, the text of Rule 17a-8 unambiguously encompasses the suspicious activity recordkeeping and reporting requirements of Section 1023.320 by referring to the chapter of the Code of Federal Regulations in which those provisions appear. To the extent there is any ambiguity in Rule 17a-8, the SEC's interpretation is reasonable and not "plainly erroneous or inconsistent with the regulation." *Nat. Res. Def. Council v. EPA*, 808 F.3d 556, 569 (2d Cir. 2015) (citation omitted).

Alpine contends that in authorizing the Treasury to regulate suspicious activity in recordkeeping and reporting by broker-dealers under the BSA, Congress has precluded the SEC from regulating recordkeeping and reporting under the Exchange Act.

When "[c]onfronted with two Acts of Congress allegedly touching on the same topic, this Court is not at 'liberty to pick and choose among congressional enactments' and must instead strive 'to give effect to both.'"[35] Because Alpine's position is that the Exchange Act and the BSA cannot be "harmonized," it "bears the heavy burden" of showing, based upon "a clearly expressed congressional intention," that such a result should follow.[36] Such an intention must be "clear and manifest," and courts "come armed with the stron[g] presum[ption] that repeals by implication are disfavored and that Congress will specifically address preexisting law when it wishes to suspend its normal operations in a later statute."[37]

Here, the statutory and regulatory provisions are easily harmonized. Rule 17a-8 requires broker-dealers to comply with the duties imposed by the Treasury Department through the BSA.[38] Far from

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[35] *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1624 (2018) (some internal quotation marks omitted) (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974)).

[36] *Id*. (quoting *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 533 (1995)).

[37] *Id*. (internal citations and quotation marks omitted).

[38] Specifically, the rule requires that "[e]very registered broker or dealer who is subject to the requirements of the Currency and Foreign Transactions Reporting Act of 1970 [Bank Secrecy Act] shall comply with the reporting, recordkeeping and record

conflicting, those duties imposed on broker-dealers by the BSA are "consistent with the purposes of the Exchange Act and the [SEC]'s obligation to enforce broker-dealer recordkeeping requirements."[39] Rule 17a-8's incorporation of the BSA's reporting obligation serves the goal of regulatory enforcement by minimizing regulatory costs on broker-dealers, who need only comply with one set of reporting requirements.[40] And the Treasury and the SEC have plainly worked in tandem, issuing policy statements and reports, and initiating enforcement actions since the BSA's inception.[41] For example, FinCEN's adoption of the SAR regulation in 2002 expressly referenced Rule 17a-8 when it stated that "both the SEC and SROs [self-regulatory organizations] will address broker-dealer compliance" with the SAR reporting rule.[42]

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retention requirements of chapter X of title 31 of the Code of Federal Regulations." 17 C.F.R. § 240.17a-8.

[39] Rule 17a-8 Adopting Release, 46 Fed. Reg. at 61,455.

[40] Congress was fully aware of this enforcement design. *See Testimony Before the S. Comm. on Banking, Housing and Urban Affairs*, 2002 WL 169600 (Jan. 29, 2002) (Annette L. Nazareth, Director, SEC Division of Market Regulation) (stating that the SEC expected that, after Section 1023.320's promulgation, "bank-affiliated broker-dealers should be subject to Treasury's rule, rather than two separate SAR rules").

[41] *See, e.g.*, Pinnacle Capital Markets, LLC, FinCEN No. 2010-4 (Aug. 26, 2010); Oppenheimer & Co., Inc., SEC Release No. 74141, 2015 WL 331117 (Jan. 27, 2015); SEC & FinCen, SEC and FinCEN Sign Information Sharing Agreement (Dec. 21, 2006).

[42] SAR Regulation Adopting Release, 67 Fed. Reg. at 44,049.

The two cases upon which Alpine relies, *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*[43] and *Nutritional Health All. v. Food & Drug Admin*,[44] are unavailing. In *Brown & Williamson*, the Supreme Court rejected the claimed authority of the Food and Drug Administration (FDA) to regulate tobacco products through the Food, Drug, and Cosmetic Act (FDCA).[45] In support, the Court pointed out that such FDA authority would conflict with congressional intent because, if that were the case, the FDCA would "require the agency to ban [cigarettes]" which would "contradict Congress' clear intent as expressed in its more recent, tobacco-specific legislation."[46] The Court supported its holding by pointing out that: (1) Congress had "considered and rejected bills that would have granted the FDA such jurisdiction"; and (2) the FDA had taken the "long-held position that it lacks jurisdiction under the FDCA to regulate tobacco products."[47] Nothing approaching these circumstances is present here. Fully aware that the SEC enforces the SAR provisions, Congress has never indicated its disapproval of joint SAR reporting enforcement.

In *Nutritional Health*, we found that congressional intent conflicted with FDA jurisdiction over certain products.[48] The FDA claimed delegated authority under the FDCA to regulate the packaging of dietary supplements and drugs for the purpose of

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[43] 529 U.S. 120 (2000).
[44] 318 F.3d 92, 104 (2d Cir. 2003).
[45] 529 U.S. at 126.
[46] *Id*. at 137, 143.
[47] *Id*. at 144.
[48] 318 F.3d at 95.

poison prevention.[49] We held the FDA's interpretation of its authority to be unreasonable because Congress had later passed the Poison Prevention Packing Act (PPP Act), which "specifically targeted the problem of accidental poisoning,"[50] and the PPP Act "expressly prohibited the FDA from prescribing 'specific packaging designs, product content, package quantity, or with [one] exception … [,] labeling.'"[51] In our view, the FDA's interpretation was impermissible because the PPP Act "specifically and unambiguously" targeted and prescribed its own regulatory approach to addressing the accidental poisoning problem through packaging standards, and the Consumer Product Safety Act "unambiguously transferred authority to administer and enforce the PPP Act from the FDA to the [Consumer Product Safety Commission (CPSC)]."[52] In both *Brown & Williamson* and *Nutritional Health*, a history of expressed congressional intent compelled the conclusion that the FDA lacked authority. No such history is present here.

Alpine contends that *Nutritional Health* requires us to hold that the later-enacted SAR provision "specifically and unambiguously" demonstrates congressional intent for the Treasury to possess sole authority to "address money laundering and terrorist financing through the compilation of data derived from various financial institutions." According to Alpine, this "specific authorization" to the Treasury

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[49] *Id*. at 94.
[50] *Id*. at 102.
[51] *Id*. at 104.
[52] *Id*. (citing *Brown & Williamson*, 529 U.S. at 132-33)).

Department trumps the general authorization to the SEC. We disagree.

The SEC's *Rule 17a-8 Adopting Release*, in 1981, expressly stated that the "Treasury has delegated to the Commission the responsibility for assuring compliance with the Currency Act and Treasury regulations."[53] No comments, or objections, were received from the public in response to proposed Rule 17a-8.[54] Later, when FinCEN adopted the SAR reporting requirements through 31 C.F.R. § 1023.320, it expressly stated that the Exchange Act enables "the SROs, subject to SEC oversight, to examine for BSA compliance" and therefore "both the SEC and SROs will address broker-dealer compliance with this rule."[55] That Congress never proposed to silo SAR enforcement authority in the Treasury strongly suggests that Congress intended for the SEC to maintain its compliance authority and from the outset, it was envisioned by both agencies that the SEC would have enforcement authority over broker-dealers.

In sum, Alpine has not met its "heavy burden" to show that Congress "clearly expressed [its] intention"[56] to preclude the SEC from examining for

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[53] Rule 17a-8 Adopting Release, 46 Fed. Reg. at 61,454.

[54] *Id*. Additionally, when this rule was proposed, FinCEN recognized that the SEC played a primary role in "reporting and maintaining data about securities law violations" and that the SEC had the authority, under Rule 17a-8, to examine for BSA compliance. SAR Regulation Adopting Release, 67 Fed. Reg. at 44,051.

[55] SAR Regulation Adopting Release, 67 Fed. Reg. at 44,049.

[56] *See Epic Sys. Corp*., 138 S. Ct. at 1624.

SAR compliance in conjunction with FinCEN and pursuant to authority delegated under the Exchange Act.

III. Rule 17a-8 Does Not Violate the Administrative Procedure Act

Alpine next contends that, even if the SEC does have rulemaking authority under Section 17(a), Rule 17a-8 violates the APA. Specifically, Alpine argues that the open-ended nature of Rule 17a-8, which permits the automatic incorporation of future BSA requirements, impermissibly allows the SEC to bypass the notice-and-comment requirements of the APA. We disagree.

The APA "requires an agency conducting notice-and-comment rulemaking to publish in its notice of proposed rulemaking 'either the terms or substance of the proposed rule or a description of the subjects and issues involved.'"[57] The public had an opportunity to comment on both Rule 17a-8 and Section 1023.320(a)(2) of the BSA regulations.

As discussed earlier, Rule 17a-8 was promulgated in 1981 before FinCEN adopted its current SAR reporting requirements. At the time, the BSA regulations required broker-dealers to submit reports of currency transactions and transactions involving foreign accounts. The SEC indicated, when it proposed Rule 17a-8, that requiring broker-dealers to comply with the BSA was "consistent with the

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[57] *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174 (2007) (quoting 5 U.S.C. § 553(b)(3)).

purposes of the Exchange Act and the [SEC]'s obligation to enforce broker-dealer recordkeeping requirements."[58]

Moreover, when it was published for notice and comment, the proposed Rule 17a-8 expressly stated that it did "not specify the required reports and records so as to allow for any revisions the Treasury may adopt in the future."[59] When the SEC formally adopted the Rule, in its *Rule 17a-8 Adopting Release*, the SEC further made clear that the Rule would "allow for any revisions the Treasury may adopt in the future."[60]

Accordingly, we conclude that the public was afforded the requisite notice and opportunity to comment on Rule 17a-8 and, in particular, its potential to require additional reporting requirements should the Treasury regulations specify them.

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[58] *Recordkeeping by Brokers & Dealers*, Release No. 18073 (Aug. 31, 1981).

[59] Rule 17a-8 Adopting Release, 46 Fed. Reg. at 61,455. Alpine argues that the SEC's *Rule 17a-8 Adopting Release* also acknowledged that its role, with respect to the BSA, was limited to merely examination authority. That seems to be a mischaracterization. *Rule 17a-8 Adopting Release* stated that "most effective means of enforcing compliance" with the BSA requirements was through on-site "examinations" but there is no indication that SEC was limited to mere examination and could not enforce the BSA provisions. The same notice stated that the "Treasury has delegated to the Commission the responsibility for assuring compliance with the Currency Act and Treasury regulations." 46 Fed. Reg. at 61,454.

[60] Rule 17a-8 Adopting Release, 46 Fed. Reg. at 61,454.

The suspicious activity recordkeeping and reporting requirements of Section 1023.320(a)(2), incorporated into Rule 17a-8, were also subject to public notice-and-comment. In 2002, when it proposed Section 1023.320(a)(2), FinCEN publicly stated that both the SEC and SROs would "address broker-dealer compliance" with its requirements, including through enforcement actions, as they had done with other BSA recordkeeping and reporting requirements for decades.[61] In response to comments it received, FinCEN revised its proposed rule in "significant respects" and provided extensive guidance regarding, among other matters, the standard and scope of reporting.[62] The publication of the SAR regulations under Section 1023.320(a)(2) provided ample notice-and-comment opportunities in satisfaction of the APA's requirements.

We reject Alpine's argument that the SEC was required to seek future public comments each time FinCEN issued new BSA reporting requirements to avoid an "improper delegation [to Treasury] of rulemaking authority under the Exchange Act." Alpine Br. 42-43.

"An agency delegates its authority when it shifts to another party almost the entire determination of whether a specific statutory requirement … has been satisfied, or where the agency abdicates its final

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[61] Financial Crimes Enforcement Network; Proposed Amendment to the Bank Secrecy Act Regulations—Requirement of Brokers or Dealers in Securities to Report Suspicious Transactions, 66 Fed. Reg. 67,670 (Dec. 31, 2001).

[62] SAR Regulation Adopting Release, 67 Fed. Reg. at 44,049.

reviewing authority."[63] But Rule 17a-8 does not charge the Treasury with deciding which recordkeeping and reporting requirements would further the purposes of the Exchange Act. Instead, the SEC determined, through notice-and-comment rulemaking, that any reporting requirements that the Treasury imposed on broker-dealers pursuant to its independent authority under the BSA would be "consistent with the purposes of the Exchange Act and the [SEC's] obligation to enforce the broker-dealer recordkeeper requirements."[64]

Moreover, the SEC has not taken the position that Rule 17a-8 obliges the SEC to automatically adopt any changes the Treasury may make to the BSA's recordkeeping and reporting requirements, regardless of whether they are consistent with the purposes of the Exchange Act. Rather, the SEC has worked together with FinCEN on the SAR regulation, "update[d] the reference to the BSA implementing regulations" in 2011, and in a formal adjudication, reiterated that requiring broker-dealers to maintain records and file reports of suspicious activity is consistent with the purposes of the Exchange Act.[65] Alpine has failed to demonstrate either that the SEC has impermissibly delegated authority to the Treasury under the Exchange Act, or that it has abdicated its final reviewing authority relating to

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[63] *Fund for Animals v. Kempthorne*, 538 F.3d 124, 133 (2d Cir. 2008) (internal citations and quotation marks omitted).

[64] Rule 17a-8 Adopting Release, 46 Fed. Reg. at 61,455.

[65] Technical Amendments to Rule 17a-8, 76 Fed. Reg. at 11,328; *see also* Ronald S. Bloomfield et al., Release No. 71632, 2014 WL 768828 (Feb. 27, 2014).

broker-dealer recordkeeping and reporting requirements.

Accordingly, in this case, there are no APA concerns because the public was fully aware of the interrelated and cohesive nature of the regulations of both agencies. Holding otherwise would only serve to waste governmental resources and hinder efficient enforcement.

Because both Rule 17a-8 and the SAR regulation were open to public comment, this situation is distinguishable from *United States v. Picciotto*[66] *and City of Idaho Falls v. F.E.R.C.*[67] on which Alpine relies. Neither case is apposite.

In *United States v. Picciotto*, the D.C. Circuit held that additional conditions that were added to regulations governing the United States Park Service violated the APA, notwithstanding that the regulation contained an open-ended provision that had gone through notice and comment.[68] But, unlike this case, in which the SAR requirement had been promulgated by the Treasury in compliance with the APA, the additional regulatory conditions in *Picciotto* were never issued in compliance with the APA.[69]

In *City of Idaho Falls v. F.E.R.C*, the Federal Energy Regulatory Commission (FERC) had previously approved a methodology, used by the

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[66] 875 F.2d 345 (D.C. Cir. 1989).
[67] 629 F.3d 222 (D.C. Cir. 2011).
[68] 875 F.2d at 346-47.
[69] *Id.*

Forest Service, for setting rental fees.[70] FERC then incorporated a new Forest Service rental fee schedule without providing an opportunity for notice and comment.[71] The D.C. Circuit held that "[b]ecause FERC previously approved and used the old Forest Service methodology, its implicit acceptance of the new methodology in the 2009 Update marked a change in its own regulations" which required notice-and-comment rulemaking.[72] Our case differs from *City of Idaho Falls* because all changes to FinCEN reporting regulations are open to public comment and will be APA compliant whenever such changes occur, as happened with the issuance of Section 1023.320.

In sum, we find that because: (1) the SEC made clear in its request for public comment that Rule 17a-8 incorporated present and future Treasury SAR reporting requirements, and would be modified accordingly; (2) FinCEN itself published its SAR reporting requirements for public comment; and (3) FinCEN expressly notified the public that the SEC would continue to enforce the BSA's reporting changes, Rule 17a-8 did not violate the notice-and-comment requirements of the APA.

IV. The District Court Did Not Err in Granting Summary Judgment with Respect to the SARs

The district court granted summary judgment to the SEC as to 2,720 violations of Rule 17a-8 on the

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[70] 629 F.3d at 223.
[71] *Id*. at 227-29.
[72] *Id*. at 231.

basis of certain of Alpine's SARs reporting and recordkeeping practices—specifically, submitting SARs with deficient narratives, failing to submit SARs on deposit-and-sales patterns, and failing to retain support files for SARs. Alpine argues that the district court erred when it: (1) deferred to the SEC's interpretation of FinCEN guidance; and (2) applied a "purely mechanical" test in finding that Alpine did not adequately comply with its SAR reporting requirements. Both arguments are without merit.

First, there is no indication in this record that the district court improperly deferred to the SEC. The district court did nothing other than independently interpret the supporting FinCEN documentation, which was consistent with the SEC's interpretation.

The district court stated that it was relying on "instructions on the 2002 SAR Form, the 2012 SAR Instructions, and the SAR Narrative Guidance issued [by FinCEN] in 2003."[73] As relevant here, the 2002 SAR Form makes clear that the narrative section of the SAR "is ***critical***."[74] It further provides,

> *The care with which [the narrative section] is completed may determine whether or not the described activity and its possible criminal nature are clearly understood by investigators*. Provide a clear, complete and chronological description … of the activity, including what is unusual, irregular or

[73] *Alpine Sec. Corp.*, 354 F. Supp. 3d at 414.
[74] *Id.* at 413 (emphasis in original); 2002 SAR Form at 3 (emphasis in original).

> suspicious about the transaction(s), using the checklist below as a guide.[75]

The district court read the totality of the FinCEN guidance, in the 2002 SAR Form, 2003 Narrative Guidance, and 2012 Instructions, to indicate that certain "red flags" may evidence SAR reporting violations. The "red flags" included: (1) related litigation; (2) shell companies and derogatory stock history; (3) stock promotion; (4) unverified issuers; (5) low trading volume; (6) foreign involvement; (7) basic customer information.[76]

As one example, the district court found that Alpine failed on multiple occasions to provide SAR information regarding related litigation. Specifically, Alpine "omitted information, which was present in Alpine's support files for the SARs, [that] indicated that the SEC had sued one customer and its CEO for fraud in connection with asset valuations and improper allocations of expenses, that another customer had pleaded guilty to conspiracy related to counterfeiting, and that yet another customer had a history of being investigated by the SEC for misrepresentations."[77]

Once the district court determined that such "red flags" triggered certain SAR obligations, it then used an objective test to determine whether summary judgment was warranted. We agree with the district court's approach to summary judgment in this case

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[75] *Alpine Sec. Corp.*, 354 F. Supp. 3d at 413-14 (emphasis in original).
[76] *Id*. at 426-40.
[77] *Id*. at 426-27.

and reject Alpine's argument that its own subjective belief as to what needed to be reported sufficed.

Importantly, the text of 31 C.F.R. § 1023.320(a)(2) supports the district court's finding that the SAR regulation imposes an objective test (*i.e.*, broker-dealers shall file an SAR if it "knows, suspects, or *has reason to suspect*" that a transaction is suspicious). Alpine points to isolated parts of FinCEN guidance in support of its argument that a subjective test must be utilized.[78] But, Alpine does so while ignoring FinCEN's express statement that the SAR reporting provision requires an objective standard:

> The final rule retains the "has reason to suspect" language. FinCEN believes that compliance with the rule cannot be adequately enforced without an *objective* standard. The reason-to-suspect standard means that, on the facts existing at the time, a reasonable broker-dealer in similar circumstances would have suspected the transaction was subject to SAR reporting. This is a flexible standard that adequately takes into account the differences in operating realities among various types of broker-dealers, and is the standard contained in the existing SAR rules for depository institutions and money services businesses.[79]

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[78] Alpine Br. 49.

[79] SAR Regulation Adopting Release, 67 Fed. Reg. at 44,053 (emphasis added).

While subjective factors may be relevant where the enforcing agency shows that the broker-dealer actually "knows" or "suspects" that the transaction is subject to SAR reporting, the "reason to suspect" standard sensibly permits the use of objective "red flags" that would alert reasonable broker-dealers to the fact that that the transaction required a SAR report.[80] Accordingly, the district court did not err in its determination that an objective analysis was proper.

We also reject Alpine's claim that the district court's examination was "purely mechanical." The district court inspected the allegedly deficient SARs before making its determination. In its 100-page opinion, the district court recognized that each "SAR must, of course, be examined individually" and, without announcing a mechanical or bright-line test, reviewed all of the alleged deficiencies before concluding that, given the "sheer number of [Alpine's] lapses at issue in this case[,]" summary judgment was warranted.[81] Indeed, Alpine did not "contest in a large number of instances that it failed to include information in SAR narratives that the SAR Form itself directs a broker-dealer to include."[82]

Alpine finally argues that the district court "ignore[d]" that certain assertions created genuine disputes of fact.[83] We disagree. As noted above, in many instances, Alpine did not dispute the fact that

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[80] *See* SEC Br. 65.
[81] *Alpine Sec. Corp*., 354 F. Supp. 3d at 419, 436 (emphasis added).
[82] *Id*. at 419.
[83] Alpine Br. 69.

it failed to include required information in SAR narratives. When Alpine raised properly supported factual disputes as to specific SARs, the district court ruled in its favor.[84] But, for example, the district court did not err in rejecting as "vague and conclusory" Alpine's assertion that it filed SARs for large deposits of low-priced securities even though it concluded it was not required to do so.[85] Plainly, when Alpine's evidence did create genuine disputes of material fact as to particular SARs, the district court considered it.

In sum, the district court did not err in granting summary judgment to the SEC as to Alpine's liability on the basis of 2,720 violations of the reporting, recordkeeping, and record retention requirements of Section 17(a) and Rule 17a-8.

V. In Imposing the Civil Penalty, the District Court Did Not Abuse Its Discretion

Alpine finally challenges the district court's imposition of a $12 million civil penalty for the 2,720 SAR violations of the reporting, recordkeeping, and record retention requirements of Section 17(a) and Rule 17a-8. The SEC requested that the district court impose a tier-one civil penalty of $10,000 for each SAR violation and $1,000 for each support-file violation,

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[84] *See, e.g., Alpine Sec. Corp.*, 354 F. Supp. 3d at 431.
[85] *Id.* at 423 n.44.

totaling $22.7 million.[86] Alpine argued that the total penalty should fall between $80,000 and $720,000.[87]

Section 21(d) of the 1934 Exchange Act authorizes monetary penalties for statutory violations.[88] In assessing a penalty, a court may impose "a first-tier penalty … for any violation," regardless of mental state or other factors.[89] Within the maximum penalty authorized by the statute, the "actual amount of the penalty" is left "up to the discretion of the district court." Because the amount of the penalty is left to the sound discretion of the district court, we review an award of penalties for abuse of discretion.[90]

Here, we conclude that the district court did not abuse its discretion in imposing the $12 million civil penalty. The breadth and duration of Alpine's deficient reporting and recordkeeping activity supports the district court's imposition of the civil penalty. The district court did recognize that Alpine "took some steps to improve … compliance."[91] But as the district court noted, "[a]lthough the extraordinary scale of Alpine's violations decreased over the years, the violations did not cease."[92] The district court found that the "scale and duration" of the violations

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[86] *United States Sec. & Exch. Comm'n v. Alpine Sec. Corp.*, 413 F. Supp. 3d 235, 245 (S.D.N.Y. 2019).
[87] *Id.* at 248.
[88] *See* 15 U.S.C. § 77t(d); 15 U.S.C. § 78u(d)(3).
[89] *SEC v. Ramilovic*, 738 F.3d 14, 38 (2d Cir. 2013).
[90] *Id.*
[91] Sp. App'x 253.
[92] Sp. App'x 256.

"undermine[d] Alpine's assertion that its conduct was, at worst, merely negligent."[93]

Alpine's arguments to the contrary are without merit. Insofar as Alpine's challenge to the civil penalty is based on the premise that the district court erroneously concluded that Alpine acted with "scienter," the district court expressly noted that "a finding of scienter is *not* required to impose the tier-one penalty sought by the SEC."[94] Nor does the "sheer, unprecedented" amount of the penalty itself rise to the level of abuse of discretion.[95] The total amount was driven by the "unprecedented number of violations" of Section 17(a) and Rule 17a-8 committed by Alpine.[96] Alpine's argument that the district court disregarded evidence of the firm's financial condition is similarly unavailing. The district court expressly stated that Alpine's financial records indicated that it would have had the ability to pay the $22.7 million penalty requested by the SEC, but it still imposed a penalty that was "substantially less" due to Alpine's financial condition.[97]

All in all, the district court acted within its discretion to impose the $12 million civil penalty in light of the

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[93] Sp. App'x 253.
[94] Sp. App'x 252-53 (emphasis added).
[95] Alpine Br. 81. Notably, Alpine itself does not argue that the individual $5,000 penalty for failing to file an SAR or filing a deficient SAR, or $1,000 penalty for failing to produce a SAR support file upon request, are unreasonable.
[96] *See* SEC Br. 100. Alpine's argument that the penalty is excessive in light of the BSA's comparable penalty provisions is of no moment. As discussed, the SEC brought this enforcement action pursuant to Section 17 of the Exchange Act.
[97] Sp. App'x 265.

particular facts and circumstances of this case, namely, Alpine's "systematic and widespread evasion of the law."[98]

We have considered Alpine's remaining arguments on appeal and conclude that they are without merit.

CONCLUSION

For the reasons stated above, the judgment of the district court is AFFIRMED.

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[98] Sp. App'x 259-60.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

-v-

ALPINE SECURITIES CORPORATION,

Defendant.

17cv4179 (DLC)

AMENDED REDACTED OPINION AND ORDER

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DENISE COTE, District Judge:

Plaintiff United States Securities and Exchange Commission ("SEC") seeks an injunction and imposition of $22,736,000 in civil penalties against defendant Alpine Securities Corporation ("Alpine") for Alpine's 2,720 violations of its obligation to file suspicious activity reports ("SARs"). Alpine opposes imposition of any injunction and contends that the civil penalties should not exceed $720,000. For the following reasons, an injunction will issue against Alpine and civil penalties are assessed in the amount of $12,000,000.

Background

Much of the factual and regulatory background relevant to this motion is described in the two summary judgment Opinions issued in March and December 2018. *See SEC v. Alpine Sec. Corp.*, 308 F. Supp. 3d 775 (S.D.N.Y. 2018) ("March Opinion"); *SEC v. Alpine Sec. Corp.*, 354 F. Supp. 3d 396 (S.D.N.Y. 2018) ("December Opinion").[1] Familiarity with those Opinions is assumed and they are incorporated by reference.

[1] The March Opinion granted summary judgment on certain exemplar SARs. Applying the legal standards articulated in the March Opinion, the December Opinion addressed all of the individual SARs on which the SEC sought summary judgment and granted that motion in part.

The Low-Priced Securities Market

Alpine principally provides brokerage clearing services for penny stocks and microcap securities traded in the over-the-counter market.[2] The markets for these low-priced securities ("LPS") are rife with fraud and abuse. The Penny Stock Reform Act of 1990, for example, identified as problems with the penny stock markets "a serious lack of adequate information concerning price and volume of penny stock transactions," involvement by individuals banned from the securities markets in roles such as "promoters" or "consultants," and the use of shell corporations to facilitate market manipulation schemes. Pub. L. No. 101-29, § 502(6)-(8), 104 Stat. 931, 951; *see also* December Opinion, 354 F. Supp. 3d at 406.

Financial regulators like FINRA,[3] FinCEN,[4] and the SEC have warned investors of the risks of fraud connected to investments in LPS. FINRA has warned investors, in particular, about the risk that the issuer of a penny stock may be a shell company for

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[2] The term "over-the-counter market" is used to describe "the trading of securities other than on a formal centralized exchange" such as the New York Stock Exchange. 4 Hazen, Treatise on the Law of Securities Regulation § 14:3 (2017).

[3] FINRA, or the Financial Industry Regulatory Authority, is a self-regulatory organization ("SRO") that supervises broker-dealers. *See Fiero v. Financial Industry Regulatory Auth., Inc.*, 660 F.3d 571 & n.1 (2d Cir. 2011).

[4] FinCEN, or the Financial Crimes Enforcement Network, is a division of the U.S. Department of the Treasury ("Treasury Department") responsible for administering the Bank Secrecy Act ("BSA"), among other things. *See* March Opinion, 308 F. Supp. 3d at 791.

those seeking to launder money or conduct illicit activity.[5] The SEC has observed that "information about microcap companies can be extremely difficult to find, making them more vulnerable to investment fraud schemes and making it less likely that quoted prices in the market will be based on full and complete information about the company."[6]

Regulatory Framework

The Bank Secrecy Act ("BSA"), 31 U.S.C. § 5311, *et seq.*, first enacted in 1982, requires broker-dealers like Alpine to file SARs. Under the BSA, the Secretary of the Treasury may "require any financial institution … to report any suspicious transaction relevant to a possible violation of law or regulation." 31 U.S.C. § 5318(g)(1). The Secretary has delegated this authority to FinCEN,[7] and, in 2002, the Treasury Department and FinCEN promulgated 31 C.F.R. § 1023.320 ("Section 1023.320").[8]

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[5] *See* FINRA, Beware Dormant Shell Companies (Mar. 14, 2016), http://www.finra.org/investors/beware-dormant-shell-companies; *see also* FinCEN, The Role of Domestic Shell Companies in Financial Crime and Money Laundering: Limited Liability Companies (Nov. 2006), https://www.fincen.gov /sites/default/ files/shared/LLCAssessment_FINAL.pdf.

[6] SEC, Microcap Stock: A Guide for Investors (Sept. 18, 2013), https://www.sec.gov/reportspubs/investor-publications/investor pubsmicrocapstockhtm.html.

[7] *See* Treasury Order 180-01, 67 Fed. Reg. 64,697, 64,697 (Oct. 21, 2002).

[8] *See* FinCEN, Amendment to the Bank Secrecy Act Regulations—Requirement that Brokers or Dealers in Securities Report Suspicious Transactions, 67 Fed. Reg. 44,048 (July 1, 2002) ("FinCEN Section 1023.320 Notice"). The USA PATRIOT

As described in greater detail in the December Opinion, Section 1023.320 provides that "*[e]very broker or dealer* in securities within the United States … *shall file* with FinCEN, to the extent and in the manner required by this section, *a report of any suspicious transaction* relevant to a possible violation of a law or regulation." 31 C.F.R. § 1023.320(a)(1) (emphasis added). Under Section 1023.320, a transaction requires reporting if it is "conducted or attempted by, at, or through a broker-dealer," "involves or aggregates funds or other assets of at least $5,000," and the broker-dealer "knows, suspects, or has reason to suspect" that the transaction (or pattern of transactions) "[i]nvolves use of the broker-dealer to facilitate criminal activity." *Id.* § 1023.320(a)(2)(iv).

In addition, Section 1023.320 requires a broker-dealer to retain a copy of any SAR filed and supporting documentation "for a period of five years from the date of filing the SAR." *Id.* § 1023.320(d). It further requires a broker-dealer to "make all supporting documentation available to FinCEN or any Federal, State, or local law enforcement agency, or any Federal regulatory authority that examines a broker-dealer for compliance with the Bank Secrecy Act, upon request." *Id.* SARs are currently submitted to FinCEN via an electronic SAR Form.[9] The SAR

ACT of 2001, Pub. L. No. 107-56, 115 Stat. 272 (the "Patriot Act"), significantly expanded the scope of the BSA.

[9] As explained in the December Opinion, two versions of the SAR Form were in effect during the period at issue in this litigation: one version from 2002 to 2012 (the "2002 SAR Form") and another version after 2012 (the "2012 SAR Form"). *See* December Opinion, 354 F. Supp. 3d at 413 n.18. In connection with the

Form states that the narrative section of the SAR "is critical." 2002 SAR Form at 3 (emphasis in original).

It further provides,

> *The care with which [the narrative section] is completed may determine whether or not the described activity and its possible criminal nature are clearly understood by investigators. Provide a clear, complete and chronological description … of the activity, including what is unusual, irregular or suspicious about the transaction(s), using the checklist below as a guide.*

Id. (emphasis in original).

FinCEN has issued several guidance documents explaining the scope of the SAR reporting duty in the narrative section of the SAR Form. A summary of that guidance, including examples of relevant information identified by FinCEN, is provided in the December Opinion. *See* 354 F. Supp. 3d at 415. 1

As the Treasury Department has explained, the SEC enforces SAR regulations pursuant to

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2012 SAR Form, FinCEN published an instructional document. *See* FinCEN, FinCEN Suspicious Activity Report (FinCEN SAR) Electronic Filing Instructions (2012), https://www.fincen.gov/sites/default/files/shared/FinCEN%20SAR%20ElectronicFilingInstructions-%20Stand%20Alone%20doc.pdf ("2012 SAR Instructions"). The 2012 SAR Instructions are similar to those in the 2002 SAR Form in all respects that are material to this litigation.

Section 17(a) of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. § 78a, *et seq*., and SEC Rule 17a-8. Rule 17a-8 requires a broker-dealer to "comply with the reporting, recordkeeping and record retention requirements of chapter X of title 31 of the Code of Federal Regulations." 17 C.F.R. § 240.17a-8. The reporting, recordkeeping, and retention requirements incorporated by Rule 17a-8 include those described in Section 1023.320. *See* December Opinion, 354 F. Supp. 3d at 411-12.

Alpine's Failure to Comply with SAR Regulations

Alpine is a clearing broker that primarily provides clearance and settlement services for microcap securities traded in the over-the-counter market. It was purchased by its current owner in early 2011. That owner also owns Alpine's affiliate Scottsdale Capital Advisors ("SCA"), the introducing broker for most of the transactions at Alpine that are at issue here. SCA settled a FINRA enforcement action in November 2011 that the SEC had brought for, among other things, SCA's own failure to file SARs and its omission of material information from the SARs it did file.[10]

From March 2, 2011 through January 22, 2012, FINRA conducted a financial, operational, and sales practices examination of Alpine. On July 23, 2012,

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[10] *See* Order Accepting Offer of Settlement, *In the Matter of FINRA Department of Enforcement v. Scottsdale Capital Advisors Corp. and Justine Hurry*, Disciplinary No. 2008011593301 at 11-12, 21-22 (Nov. 14, 2011), https://www.finra.org/sites/default/files/fda_documents/2008011593301_FDA_TX93804.pdf.

FINRA shared its highly critical findings with Alpine during an exit meeting. On September 28, 2012, FINRA issued its seven-page report of that examination ("FINRA Report"), documenting Alpine's widespread failures to comply with its obligations under the regulations that govern its industry.

The FINRA Report identified ten exceptions to Alpine's practices. It disclosed that Alpine failed to timely file *any* SARs for over six months in 2011 (from March 1 through May 10, and from August 16 through December 19). FINRA concluded that the SARs Alpine later filed for transactions occurring during this period were all filed late. The FINRA Report concluded more generally that Alpine had "failed to establish and enforce procedures reasonably designed to detect and report suspicious activity."

In addition, the FINRA Report determined that the narrative sections of the 823 SARs that Alpine filed during the examination period were "substantively inadequate" and in violation of Section 1023.320. The FINRA report emphasized that the narratives for Alpine's SARs "failed to fully describe why the activity was suspicious" and therefore "fail[ed] to justify at the basic core the legitimacy of the SAR filing." It criticized Alpine for submitting SARs in the form of two basic, boilerplate templates, "neither of which were substantively adequate as they failed to fully describe why the activity was suspicious."

As the December Opinion confirmed, Alpine's SAR narratives were woefully inadequate. Over half of the SARs on which the December Opinion granted

summary judgment were deficient in several significant respects, failing to include multiple pieces of information that the SAR Form and its instructions require to be included. *See* December Opinion, 354 F. Supp. 3d at 420.

During and after the FINRA examination, Alpine's ownership hired additional legal and compliance personnel and took some measures to improve its anti-money laundering ("AML") program. Beginning in the fall of 2012, for example, Alpine arranged for an annual audit of its AML program and created standard operating procedures for compliance with AML regulations.

Roughly two-thirds of the SARs that the SEC contends Alpine filed with deficient narrative sections were filed before September 28, 2012, the date on which Alpine received the FINRA Report. Alpine's faulty practices, however, continued well beyond that date. Roughly one-third of the SARs at issue in this action were filed after October 1, 2012, including in 2013, 2014, and 2015. The December Opinion granted summary judgment on hundreds of separate violations of Section 1023.320 that occurred in both 2013 and 2014, many of which were the failure to file a SAR when Alpine had the obligation to do so. The SEC identified comparatively few violations that occurred during the year 2015.

There is a snapshot of Alpine's practices as they existed about two years after the FINRA exit interview in July 2012. In July 2014, the SEC Office of Compliance Inspections and Examinations ("OCIE") conducted a one-week on-site review of

Alpine's compliance practices. The OCIE Report reviewed 252 of the over 4,600 SARs filed by Alpine between January 2013 and July 2014. On April 9, 2015, OCIE issued a report ("OCIE Report") strongly critical of Alpine.

The OCIE Report found that 50% of the 252 SARs "failed to completely and accurately disclose key information of which [Alpine] was aware at the time of filing." It concluded that Alpine's SAR "narratives generally contained 'boilerplate' language and very little—if any—specific and material information that Alpine identified in its investigations of the matters." It criticized Alpine for omitting mention of many red flags for suspicious activity, such as a customer's civil, regulatory, or criminal history; foreign involvement with the transactions; concerns about an issuer; stock promotion activity; or that an issuer had been a shell company. According to the OCIE Report, Alpine's failure to disclose key information "rendered the SARs less valuable to investigators trying to understand the activity and any criminal or administrative implications thereof."

The OCIE report described Alpine's conduct as "***recidivist*** activity" (emphasis in original) since it persisted notwithstanding the 2012 FINRA examination. The OCIE Report concluded that Alpine's compliance practices violated Rule 17a-8 and "obscured the true nature of the suspicious activity." It further concluded that many of Alpine's SARs appeared to indicate that Alpine was "intentionally trying to obfuscate or distort the truly suspicious nature of the activity that [Alpine] is required to report to law enforcement." These conclusions are

entirely consistent with the Court's own assessment based on its review of materials submitted by the parties in connection with the summary judgment motions.

The SEC's Action Against Alpine

The SEC filed this action against Alpine on June 5, 2017. Its complaint alleged violations of Rule 17a-8 during a period of May 17, 2011 through December 31, 2015. As invited by the Court, the SEC moved for partial summary judgment based on exemplar SARs in each of four categories that it alleged revealed violations of Rule 17a-8.[11] *See* March Opinion, 308 F.

Relying on the guidance given in the March Opinion regarding the legal standards that would be applied in this action, the SEC thereafter moved for summary judgment as to Alpine's liability for several thousand individual violations of Rule 17a-8. The SEC's motion focused on four categories of deficiencies in Alpine's compliance with SAR reporting requirements: (i) filing SARs with deficient narratives ("Deficient Narrative SARs"), (ii) failing to file SARs reflecting sales that followed large deposits of LPS ("Failure to Report Violations"), (iii) filing SARs long after the transactions were completed ("Late-Filed SARs"),[12] and (iv) failing to maintain and

[11] Alpine declined to submit exemplars to assist in the development of the legal framework that would govern this action. December Opinion, 354 F. Supp. 3d at 405. Supp. 3d at 781.

[12] The December Opinion denied summary judgment as to this category because the SEC did not show that Alpine had an

produce support files for SARs ("Support Files Violations"). The December Opinion granted in part the SEC's motion for summary judgment, finding thousands of violations of Rule 17a-8 based on Alpine's Deficient Narrative SARs, Failure to Report Violations, and Support Files Violations. 354 F. Supp. 3d at 422-45.

The findings in the December Opinion are highly relevant to this decision on penalties. While those findings are incorporated by reference and will not be repeated here, the granularity of the findings and the extent to which they reveal how widespread the deficiencies were in Alpine's SAR-filing system bear emphasis.

The December Opinion is significant as well for the determination of penalties because it is a decision rendered on a summary judgment motion. It reflects an extremely conservative finding regarding the extent of Alpine's disregard of its legal obligations. In identifying those circumstances in which there could be no factual dispute regarding Alpine's failure to abide by those legal obligations, the December Opinion relied on a narrow set of measurements. A few examples suffice. Although the SEC had argued that SARs were deficient for failing to include information that there was a history of stock promotion activity in connection with deposited LPS up to eighteen months before the SAR was filed, the

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obligation to file these SARs. To show that Alpine had an obligation to file the SARs, the SEC had relied exclusively on the fact that FINRA had ordered Alpine to file the SARs. *See* December Opinion, 354 F. Supp. 3d at 443.

December Opinion granted summary judgment only for those SARs that failed to report stock promotion activity that occurred within six months of a substantial deposit of LPS. *Id.* at 433. Similarly, the SEC sought summary judgment for SARs that failed to disclose the comparatively low trading volume in deposited LPS where the deposit represented at least three times the average daily trading volume of the stock when measured over the three months preceding the deposit. The December Opinion granted summary judgment only where the ratio between the shares deposited in a single transaction was at least twenty times the average daily trading volume over the three-month period prior to the deposit. *Id.* at 437. As a final example, while Alpine may have had a duty to file as many as 3,568 SARs to report the liquidations that followed the deposit of a large number of shares of LPS, the December Opinion adopted a conservative measure and found only 1,218 violations.[13] *Id.* at 441. Using such conservative measures, summary judgment was entered for over 2,200 SAR-related violations.[14]

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[13] The SEC asserted that Alpine had a duty to file a SAR reflecting certain patterns of sales that followed a large deposit of LPS. The SEC identified 1,242 deposit-and-liquidation groups, which together include 3,568 individual sales of shares worth $5,000 or more. Although the liquidation of a deposit of a large number of shares of LPS is a hallmark of market manipulation, Alpine had filed no SARs for those sales. December Opinion, 354 F. Supp. 3d at 441.

[14] In opposition to the SEC's request for remedies, Alpine defends its actions by arguing that the law's requirements were less than clear. As explained in the March Opinion, however, the standards governing Alpine's SAR obligations are clearly established by Section 1023.320, the SAR Forms, and FinCEN

The December Opinion also revealed in other ways the risks to market integrity represented by Alpine's decision to ignore its regulatory obligations. For instance, in establishing that Alpine had a legal duty to file the SARs that the SEC asserted had been filed with a deficient narrative section, the SEC identified six red flags which triggered a broker-dealer's duty to file a SAR. These red flags were derived from the SAR Form and its instructions as well as FinCEN and other guidance interpreting Section 1023.320. The red flags "take into account the unique characteristics of the LPS markets such as the difficulty in obtaining objective information about issuers, the risk of abuse by undisclosed insiders, and the opportunity for market manipulation schemes." *Id.* at 425-26.

The six red flags are: (1) the existence of any related litigation; (2) the issuer's status as a shell company or a history of derogatory information regarding the issuer; (3) a history of stock promotion

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guidance documents. *See* March Opinion, 308 F. Supp. 3d at 789-95. Moreover, Alpine was warned of violations of its SAR obligations as early as July 23, 2012, when FINRA conducted an exit meeting concerning the deficiencies in Alpine's AML program and the SARs it had filed. To the extent Alpine relies in part on the December Opinion's refusal to grant summary judgment for all of the SARs at issue, Alpine's argument mistakes the summary judgment standard, which seeks only to identify material, disputed issues of fact, with a verdict at trial, which determines whether a violation occurred by resolving those factual disputes. Alpine has not identified any uncertainty in the law that excused its violations, as found in the December Opinion. Had there been a finding of additional violations at trial, it is highly doubtful that Alpine would have been able to do so at that time either.

in connection with the LPS being deposited; (4) the existence of an unverified issuer, *e.g.*, an issuer with an expired business license or nonfunctioning website; (5) a comparatively low average daily trading volume compared to the amount of stock being deposited in a single transaction; and (6) involvement in the transaction by a foreign entity or individual. *Id.* at 425-39. Alpine admitted, with one exception, that the red flags identified by the SEC required Alpine to investigate the transaction to determine whether a SAR had to be filed. *Id.* at 426. These red flags existed in thousands of transactions at issue in the motion. Frequently there were multiple red flags for a single transaction.

The March and December Opinions also illuminate the extent to which Alpine has continued right up until today to deny that it had a deficient SAR-filing regime. For example, it took the extreme position in this litigation that its filing of a SAR could not be taken as an admission that it had any duty to file a SAR in connection with the transaction. It argued that the SEC had to independently show that Alpine had such a duty to file a SAR for each transaction because Alpine's filings were simply "voluntary" filings as opposed to filings made pursuant to the law's mandates to alert regulators to suspicious trading activity. March Opinion, 308 F. Supp. 3d at 799 & n.20.

One more example is useful to illustrate Alpine's continued resistance to its legal obligations. In opposition to summary judgment Alpine argued that, even if it was required to file a SAR, it did not have to disclose the existence of a red flag in the SAR's

narrative section. This argument was rejected for several reasons. December Opinion, 354 F. Supp. 3d at 426. Among those reasons was the substance of the SARs themselves. Nearly all of Alpine's SARs used "template narratives that failed to include any details, positive or negative, about the transactions." *Id.* The December Opinion found that, while a fulsome SAR narrative could have presented a question of fact as to whether it also should have included a discussion of the red flags in the SAR narratives, "except in rare instances Alpine has not shown that its SAR narratives contained sufficient information to create [such] a question of fact." *Id.*

After the December Opinion was issued, a conference on April 12 and an Order of April 30, 2019 resolved all remaining disputes on that Opinion's findings. As the parties now agree, the December Opinion granted summary judgment as to 2,720 violations comprising 1,010 Deficient Narrative SARs, 1,214 Failure to Report Violations, and 496 Support Files Violations.

The SEC has decided to forgo trial on the remainder of the alleged violations of Rule 17a-8. Its motion for remedies was filed on May 3 and became fully submitted on July 11.

Discussion

"Once the district court has found federal securities law violations, it has broad equitable power to fashion appropriate remedies." *SEC v. Frohling*, 851 F.3d 132, 138 (2d Cir. 2016) (citation omitted).

These remedies may include both civil penalties and injunctive relief. *Id.*

I. Civil Penalties

Section 21(d)(3) of the Exchange Act authorizes an award of civil penalties "for both deterrent and punitive purposes." *Id.* at 139; *see also* 15 U.S.C. § 78u(d)(3)(A). Pursuant to Section 21(d)(3), three tiers of civil penalties may be imposed. *Id.*

> [A] first-tier penalty may be imposed for any violation; a second-tier penalty may be imposed if the violation involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement; a third-tier penalty may be imposed when, in addition to meeting the requirements of the second tier, the violation directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons.

SEC v. Razmilovic, 738 F.3d 14, 38 (2d Cir. 2013) (citation omitted). "[F]or each violation" within each tier, "the amount of the penalty shall not exceed *the greater of* a specified monetary amount or the defendant's gross pecuniary gain." *Id.* (citation omitted).

As modified by the Debt Collection Improvement Act of 1996 and corresponding SEC regulations, the maximum amounts specified for non-natural persons are as follows. For each violation

occurring between March 4, 2009 and March 5, 2013, the maximum amount specified is $75,000 at tier one, $375,000 at tier two, and $725,000 at tier three. 15 U.S.C. § 78u(d)(3)(B); Exchange Act Release No. 34-59449, Feb. 25, 2009 (effective Mar. 3, 2009); 17 C.F.R. § 201.1001; Table I to 17 C.F.R. § 201.1001.[15] For each violation occurring between March 6, 2013 and November 2, 2015, these amounts increase to $80,000, $400,000, and $775,000, respectively. 17 C.F.R. § 201.1001; Table I to 17 C.F.R. § 201.1001.

Beyond these restrictions, the amount of the penalty is within "the discretion of the district court," *Razmilovic*, 738 F.3d at 38 (citation omitted), and should be determined "in light of the facts and circumstances" surrounding the violations. 15 U.S.C. § 78u(d)(3). In determining the proper amount for a civil penalty, courts in this district have looked to a number of factors, including

> (1) the egregiousness of the defendant's conduct; (2) the degree of the defendant's scienter; (3) whether the defendant's conduct created substantial losses or the risk of substantial losses to other persons; (4) whether the defendant's conduct was isolated or recurrent; and (5) whether the penalty should be reduced due to the defendant's demonstrated current and future financial condition.

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[15] Table I to 17 C.F.R. § 201.1001 was previously found at 17C.F.R. § 201.1004 and Table IV to Subpart E of Part 201.

SEC v. Haligiannis, 470 F. Supp. 2d 373, 386 (S.D.N.Y. 2007); *see also SEC v. Cope*, No. 14cv7575(DLC), 2018 WL 3628899, at *6 (S.D.N.Y. July 30, 2018) (same); *SEC v. Tavella*, 77 F. Supp. 3d 353, 362-63 (S.D.N.Y. 2015) (same). The *Haligiannis* factors "are not to be taken as talismanic." *SEC v. Rajaratnam*, 918 F.3d 36, 45 (2d Cir. 2019). It is appropriate to consider as well factors such as a defendant's financial condition, *id.*, a defendant's failure to admit wrongdoing, *SEC v. Alt. Green Techs., Inc.*, No. 11cv9056(SAS), 2014 WL 7146032, at *4 (S.D.N.Y. Dec. 15, 2014), and a defendant's lack of cooperation with authorities. *SEC v. Cavanagh*, No. 98cv1818(DLC), 2004 WL 1594818, at *31 (S.D.N.Y. July 16, 2004); *see also SEC v. Lybrand*, 281 F. Supp. 2d 726, 730 (S.D.N.Y. 2003). The "brazenness, scope, and duration" of illegal conduct may warrant "a significant penalty." *Rajaratnam*, 918 F.3d at 45.

The SEC seeks civil penalties in the amount of $10,000 for each Deficient Narrative SAR and Failure to Report Violation. It seeks a penalty of $1,000 for each Support File Violation. Combined, it requests a total civil penalty of $22,736,000.

Examining the first *Haligiannis* factor, it is easy to find that Alpine's misconduct was egregious. It has not just been found liable, it has been found liable for illegal conduct on a massive scale. The breadth and regularity of Alpine's violations of Rule 17a-8 warrant a substantial civil penalty.

As described in the December Opinion, the SEC met its burden to prove on summary judgment 2,720 separate violations of Rule 17a-8 premised on

thousands of deficient narratives in the SARs it filed, its failure to report the massive sell-offs of large deposits of LPS, and Alpine's failure to produce hundreds of support files as required by Section 1023.320.[16] Although each of the 1,010 Deficient Narrative SARs has been counted as only a single violation of Rule 17a-8 for the purposes of summary judgment, over half of the SARs to which the December Opinion granted summary judgment contained multiple deficiencies—any one of which would have been sufficient to justify a civil penalty. December Opinion, 354 F. Supp. 3d at 420. Alpine's SARs omitted references to multiple red flags indicative of suspicious activity and failed to disclose transaction sequences that reflected "a hallmark of market manipulation." *Id.* at 441. In a large number of instances, Alpine failed to include information in the SAR narratives that the SAR Form itself specifically directs a broker-dealer to include.

The next factor to be considered in assessing a penalty is the degree of Alpine's scienter. Although a finding of scienter is not required to impose the tier-one penalty sought by the SEC, the evidence supports a finding that Alpine acted knowingly and with

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[16] Section 1023.320 requires both the maintenance of records for five years after a SAR is filed and the production of records at the request of a federal regulatory agency such as the SEC. *See* March Opinion, 308 F. Supp. 3d at 811-12. In connection with its motion for summary judgment, the SEC submitted evidence that Alpine failed to produce support files for 496 SARs when requested by the SEC in 2016. *See* December Opinion, 354 F. Supp. 3d at 444.

disregard for its obligations under the law.[17] As a threshold matter, the scale and duration of Alpine's violations of Rule 17a-8 undermine Alpine's assertion that its conduct was, at worst, merely negligent. Alpine's violations were systemic and enduring, occurring over a course of years and involving conduct that was plainly in violation of federal law reporting requirements. Moreover, Alpine was aware of the nature and extent of its SAR violations at least as early as July 23, 2012, when FINRA conducted an exit meeting with Alpine to discuss findings later summarized in the FINRA Report.[18] Although Alpine took some steps to improve its AML compliance practices, it continued to resist regulators' demands to fully comply with its SAR obligations. Based on Alpine's persistent failure to file substantively adequate SARs, the 2014 OCIE Report concluded that Alpine was "intentionally trying to obfuscate or distort the truly suspicious nature of the activity that [Alpine] is required to report to law enforcement."

Alpine's failure to acknowledge its wrongdoing throughout this litigation provides further evidence

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[17] Alpine disputes that it acted willfully or recklessly. Alpine recites its history of improving compliance and asserts that it acted with diligence and in good faith. It asserts that before any finding can be made that it was willful or reckless, Alpine must conduct discovery and a hearing must be held. Alpine has access to its own employees; it has not explained what additional discovery would achieve. Nor is a hearing on its scienter necessary. The Court has considered Alpine's arguments and evidence submitted in opposition to this motion. *See SEC v. Koenig*, 469 F.2d 198, 202 (2d Cir. 1972).

[18] Almost two years earlier, Alpine's affiliate SCA, which was the introducing broker for many of the transactions at issue here, was charged with similar violations of SAR regulations.

that it acted with scienter. That failure also independently counsels in favor of a substantial civil penalty. As described in the March and December Opinions, a principal defense asserted by Alpine—aside from its jurisdictional arguments—has been that Alpine had no duty to file the thousands of SARs that have been the focus of this litigation. *See* March Opinion, 308 F. Supp. 3d at 782, 799-800; December Opinion, 354 F. Supp. 3d at 422-425. It has asserted this defense even with respect to SARs that it did file, claiming that they were simply "voluntary" filings and not mandatory filings. Alpine has maintained this position notwithstanding warnings from FINRA and OCIE and despite Opinions of this Court ruling otherwise. Moreover, Alpine has failed to produce credible evidence of a good faith belief that it had no obligation to file the SARs it did file. As explained in the December Opinion,

> Alpine has not identified any means by which a regulator or a fact-finder could identify such a "voluntary" SAR. It has not pointed to any disclosure in the 1,593 SARs that they were "voluntary" filings. Nor has it pointed to any portion of the SAR's support file reflecting an analysis of the reporting obligation and a conclusion that the SAR was not required to be filed. Alpine's vague and conclusory assertion is insufficient to raise a triable question of fact as to whether any SAR was filed voluntarily as opposed to pursuant to Alpine's obligation under the law to make the filing.

December Opinion, 354 F. Supp. 3d at 423 n.44.

As for the next factor, Alpine's contempt for the SAR reporting regime increased the risk to investors that they would suffer substantial losses. Alpine's violations prevented regulators from obtaining information necessary to timely investigate and squelch fraudulent and abusive trading practices. The missing information included derogatory information about a stock's issuer or the Alpine customer, the use of shell companies, or the price, volume, and timing of suspicious transactions. As the OCIE Report concluded, Alpine's failure to adequately and accurately describe the nature of suspicious activity in its SARs "rendered the SARs less valuable to investigators" and impeded their ability to understand the suspicious activity and its criminal or administrative implications. Given the sheer scale of Alpine's violations and the risk of fraud inherent in the LPS markets, Alpine's violations of Rule 17a-8 risked substantial losses to investors in those markets.

As for the fourth factor, and as already discussed, Alpine's misconduct was not isolated; it was recurrent. Alpine's violations of Rule 17a-8 occurred over the course of years. The SEC's complaint and this litigation have focused on Alpine's practices in filing and neglecting to file SARs, and in refusing to produce SAR-related files, during the period 2011 to 2015. Alpine disregarded its legal obligations regarding SARs throughout this period. The deficiencies persisted notwithstanding an intensive examination by FINRA in 2011 and a highly critical FINRA Report issued in 2012. Although the

extraordinary scale of Alpine's violations decreased over the years, the violations did not cease.

As reflected in the 2014 OCIE Report, Alpine never adopted a satisfactory SAR compliance program during the period examined in this litigation. As the OCIE Report emphasized, Alpine's SARs remained woefully deficient even years after the FINRA Report issued. It reported that over 50% of the SARs OCIE reviewed omitted reference to suspicious activity of which Alpine knew at the time the SAR was filed. It further stated that "the amount and type of actual material information in SARs filed by Alpine is very similar to the sample SAR that FinCEN has identified in its public guidance as being insufficient or incomplete." The examination of individual SARs undertaken during the summary judgment process confirmed that finding.

The final *Haligiannis* factor is whether a penalty should be reduced due to Alpine's demonstrated current and future financial condition. In fiscal year 2018, Alpine's annual revenue was roughly REDACTED. It currently has excess net capital of REDACTED; it generally maintains an average of approximately REDACTED in excess net capital. Alpine's business is highly profitable. From 2014 to May 2019, its owner withdrew over $31 million of Alpine's equity. Over $8 million of this amount was withdrawn from capital in 2014 alone.[19]

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[19] On July 22, 2019, Alpine filed a motion to strike portions of the SEC's brief to the extent it suggested that "the financial condition of Alpine's 'ownership' must be taken into account in determining an appropriate penalty." Alpine's July 22 motion to

An additional factor that is relevant here is Alpine's failure to admit wrongdoing and its lack of cooperation with authorities. Much of the evidence relevant to this factor has been discussed as indicative of Alpine's scienter. Nonetheless, it bears emphasis that at no step of this eight-year saga has Alpine forthrightly confronted the glaring deficiencies in its SAR reporting regime. When new ownership took over Alpine in early 2011 it did so without putting in place a competent compliance system. While Alpine did upgrade its AML capability following the FINRA examination, it did not use the FINRA examination and the substantial guidance in the FINRA Report as an opportunity to admit its deficiencies and to thoroughly reform its practices to bring them into compliance with the law. Thus, the 2014 OCIE examination revealed that Alpine was still using boilerplate language in its SAR narratives, omitting critical information from its SARs, and acting to "obscure[] the true nature" of the suspicious activity it was assisting as a broker-dealer. Moreover, in response to the OCIE Report, Alpine repeated many of the same specious defenses that it had previously asserted during the course of the FINRA examination. In a letter of May 20, 2015, Alpine disputed each of OCIE's findings point by point, arguing that its SARs should be considered in the nature of an "alternative, voluntary filing process"

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strike, and its alternative request for leave to file a sur-reply, is denied. The financial condition of Alpine's ownership is not relevant to this motion and no discovery is needed regarding its ownership's "ability to pay." The figures describing withdrawals by Alpine's ownership are relevant evidence of the financial condition of *Alpine*. There is no dispute as to the figures, which are contained in Alpine's reports.

and that "the process for determining whether activity is suspicious is a subjective one."

Alpine's lack of remorse and denial of wrongdoing has persisted to this day.[20] Confronted with this lawsuit, Alpine did not admit that any of its SAR filings were deficient or that it had a duty to file more SARs than it had filed. It even argued that it had no duty to file the SARs that it did file. Without any evidentiary support, and in the face of overwhelming evidence to the contrary, it asserted that its SARs were "voluntary" filings and denied that they had been filed because of any legal duty to do so.[21]

As noted above, the SEC seeks a civil penalty of $22,736,000. Alpine opposes the imposition of a civil penalty of this magnitude on several grounds. It suggests instead that a penalty in the range of $80,000 to $720,000, combined with certain undertakings to improve its compliance practices, would be sufficient to satisfy the punitive and

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[20] In opposition to this motion for remedies, Alpine argues that it acted in good faith in not filing SARs when its customers liquidated substantial deposits of LPS because Alpine "assumed" every deposit would be sold and therefore it was sufficient to merely report the deposit. This attitude and argument reflect, at best, a poor understanding of the SAR reporting regime and the risks to the market when suspicious liquidations are not timely reported to regulators.

[21] Alpine has also disputed throughout this litigation that the SEC has enforcement authority over the SAR violations asserted here. Whatever one might think of the legal merits of that argument, Alpine does not contest generally that, as a broker-dealer, it had a duty to comply with the SAR regulations.

deterrent purposes of the civil remedies provisions of the Exchange Act. It would not.

First, Alpine asserts that the penalty the SEC seeks is a corporate death penalty. While the SEC's requested penalty is large, so is the misconduct that prompts it. Alpine's financial records indicate that the application of three years or so of its profits would suffice to pay the penalty the SEC requests. Since the SEC has established that Alpine's systematic and widespread evasion of the law lasted more than three years, this benchmark does not suggest that the SEC's request is out of sync with the magnitude of the violations shown.

Next, Alpine asserts that the penalty should not be set by the number of individual violations on which the SEC was granted summary judgment, but by some other less onerous method. It argues that the SEC is seeking to impose a staggering penalty by separately counting each time the same type of deficiency, which it describes as relatively few in number, affected a different SAR. For instance, by its calculation millions of dollars would be assessed for failing to report in its SARs the same customer's involvement in an ongoing regulatory action. It contends as well that the penalty requested by the SEC is higher in the aggregate than penalties imposed in other cases where there were recurrent, multi-year violations of the SAR reporting requirements. While Alpine admits that almost all of the cases to which it points were settled matters, it argues that it should not be subject to what it terms a

"litigation penalty."[22] Thus, it suggests that, in this tier-one penalty case where the SEC has not shown a "high degree of scienter" or fraud or significant victim losses, the proper measure of penalties should be set per course of conduct, and not per SAR.[23] According to Alpine, there were three, or at most nine, courses of conduct at issue here.[24]

If coupled with prompt internal reform and a timely admission of the deficiencies in its SAR filings, Alpine's plea for alternative measures of the penalty or for a penalty set at an even more minimal level than that selected by the SEC would have more appeal. Alpine can point to neither. For at least three years after the period examined by FINRA, Alpine continued to obfuscate suspicious activity and to

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[22] The SEC has pointed to instances in which far larger penalties were imposed as well. *See, e.g.*, *In re Wells Fargo Advisors, LLC*, SEC Release No. 82054, 2017 WL 5248280 (Nov. 13, 2017) (imposing penalty of $3,500,000 for 50 unreported or untimely SAR filings). Alpine argues that each of those cases is distinguishable.

[23] Alpine also suggests that the penalty could be pegged to disgorgement by measuring Alpine's ill-gotten gains. If this measurement had been pursued by the SEC, it is by no means clear that that measure would have reduced the requested penalty. Alpine's business model appears to have been exceedingly profitable and to have relied in large part on the business of a few customers specializing in LPS whose transactions Alpine did not properly report in SARs.

[24] The three courses of conduct Alpine identifies are (1) its Deficient Narrative SARs, (2) its Failure to Report Violations, and (3) its Support Files Violations. The nine courses of conduct Alpine identifies are (1)-(6) the six red flags discussed above, (7) its failure to describe in its SARs the "Five Essential Elements" as defined by FinCEN guidance, (8) its Failure to Report Violations, and (9) its Support Files Violations.

avoid its duties under the law. The summary judgment record confirms that Alpine's obstruction of government oversight of the LPS market was an ingrained, multi-year enterprise. Instead of undertaking the scrutiny and reporting of individual transactions required by law, Alpine chose to run a high-volume business in the LPS market and use templates for many of the SARs it filed. Even today, in its opposition to this motion for remedies, Alpine continues to minimize and excuse its offenses.

The SEC is entitled under the law to seek a penalty for each separate violation of the SAR reporting obligations. Alpine required, as it was entitled to, that the SEC separately prove with respect to each SAR that Alpine had both a duty to file the SAR, and, if it had filed one, that the SAR was legally deficient. The SEC carried that burden to the extent found in the December Opinion. For those individual SARs, and within the range of penalties permitted at tier one, the SEC has selected civil penalty amounts that fall toward to the bottom of the range.[25] Alpine has not shown that the SEC's request is inappropriate or excessive based on the record recited above.

Third, Alpine asserts that any penalty imposed for its violations of Section 17a-8 cannot exceed the penalty limits prescribed in the BSA. This argument is merely a reprise of Alpine's repeatedly rejected

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[25] Applying the maximum penalties available for a tier-one violation, Alpine's 2,720 violations would result in an aggregate penalty of more than $204,000,000. *See* 15 U.S.C. § 78u(d)(3)(B). The SEC seeks roughly 10% of that figure.

argument that the BSA, rather than Rule 17a-8 and the Exchange Act, provides the governing law for this case. *See* March Opinion, 308 F. Supp. 3d at 795; *SEC v. Alpine Sec. Corp.*, No. 17cv4179(DLC), 2018 WL 3198889, at *2 (S.D.N.Y. June 18, 2018) (denying reconsideration of the March Opinion); *see also* December Opinion, 308 F. Supp. 3d at 416-17; *SEC v. Alpine Sec. Corp.*, No. 17cv4179(DLC), 2019 WL 4071783, at *2 (S.D.N.Y. Aug. 29, 2019) (denying reconsideration of the December and March Opinions). Although the BSA limits the maximum civil penalty that the Secretary of the Treasury may impose for negligent violations of Section 1023.320, *see* 31 U.S.C. § 5321(a)(6), the SEC brought this case and it brought it under Section 17(a) of the Exchange Act and Rule 17a-8. Accordingly, it is the penalty provisions of the Exchange Act, not of the BSA, that provide the maximum civil penalty available. *Cf. Kokesh v. SEC*, 137 S. Ct. 1635, 1643 (2017) (noting that disgorgement, one of several inherently punitive sanctions the SEC may impose, "further[s] the Commission's public policy mission of protecting investors and safeguarding the integrity of the markets").

Finally, Alpine argues that the SEC's requested remedy would violate the Eighth Amendment's prohibition against excessive fines. *See* U.S. Const. amend. VIII.[26] Under the Eighth Amendment, however, a fine is unconstitutionally excessive only if it is "grossly disproportional to the

[26] "The Eighth Amendment protects against excessive civil fines, including forfeitures." *Hudson v. United States*, 522 U.S. 93, 103 (1997).

gravity of a defendant's offense." *United States v. Sabhnani*, 599 F.3d 215, 262 (2d Cir. 2010) (quoting *United States v. Bajakajian*, 524 U.S. 321, 334 (1998)); *see also United States v. Viloski*, 814 F.3d 104, 111 (2d Cir. 2016) (explaining that courts may consider fine's impact on future ability to earn a livelihood). While courts consider numerous factors to determine whether a particular fine is grossly disproportional, *see Sabhnani*, 599 F.3d at 262, the Eighth Amendment proportionality analysis is substantially similar to the analysis required by the factors described and considered above. A civil penalty of $22,736,000, while substantial, is not grossly disproportional to the gravity of Alpine's 2,720 violations of the federal securities laws.

Having considered the above factors, the circumstances surrounding Alpine's 2,720 violations of Rule 17a-8, and each of Alpine's arguments in opposition to the SEC's request for remedies, a tier-one civil penalty in the amount of $12,000,000 is assessed. This penalty is substantial; it reflects the seriousness of Alpine's violations and the need for a remedy that is adequate to punish and deter such violations. A $12,000,000 penalty, however, is also a small fraction of the maximum tier-one remedies available and substantially less than the amount the SEC has requested.[27] While the SEC's requested penalty falls within the range of penalties that could

[27] Whereas the SEC has requested remedies of $10,000 per Deficient Narrative SAR and Failure to Report Violation, an aggregate penalty of $12,000,000 is roughly equivalent to a tier-one penalty of just over $5,000 per Deficient Narrative SAR and Failure to Report Violation, in addition to a penalty of $1,000 per Support File Violation.

reasonably be imposed in this case, consideration of several factors, but principally of Alpine's financial condition, make a penalty of $12,000,000 more appropriate. A $12,000,000 penalty is reasonable in light of all the facts and circumstances described above.

II. Permanent Injunction

In addition to civil penalties, Congress has expressly authorized the use of injunctive relief to proscribe future violations of the federal securities laws. 15 U.S.C. § 17u(d)(1). Injunctive relief is only warranted where "there is a substantial likelihood of future violations of illegal securities conduct." *SEC v. Cavanagh*, 155 F.3d 129, 135 (2d Cir. 1998); *see also SEC v. Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1100 (2d Cir. 1972). When making this determination, courts consider:

> [1] the fact that the defendant has been found liable for illegal conduct; [2] the degree of scienter involved; [3] whether the infraction is an isolated occurrence; [4] whether defendant continues to maintain that his past conduct was blameless; and [5] whether, because of his professional occupation, the defendant might be in a position where future violations could be anticipated.

Cavanagh, 155 F.3d at 135 (citation omitted). The imposition of permanent injunctive relief is "within the court's discretion," and is particularly appropriate "where a violation was founded on systematic

wrongdoing, rather than an isolated occurrence" and where the defendant's "persistent refusals to admit any wrongdoing make it rather dubious that the [defendant is] likely to avoid such violations of the securities laws in the future in the absence of an injunction." *Frohling*, 851 F.3d at 139 (citation and emphasis omitted).

For many of the reasons already discussed, a permanent injunction against further violations of Section 17(a) and Rule 17a-8 is warranted in this case. The December Opinion found Alpine liable for 2,720 violations of Rule 17a-8, which occurred over a course of years and which persisted on a systemic basis notwithstanding clear warnings by FINRA and OCIE. As discussed above, Alpine continues to maintain that many of the SARs on which summary judgment was granted were not required to be filed and to argue, in the face of clear regulatory guidance to the contrary, that it engaged in no wrongdoing. Alpine's persistent refusal to admit wrongdoing and its record of noncompliance with SAR reporting obligations demonstrate a substantial likelihood that Alpine will continue to violate federal securities laws in the future. Given its function as a broker-dealer, Alpine remains in a position where future violations could be anticipated.

Conclusion

The SEC's May 3 motion for remedies is granted in part. Alpine shall pay a civil penalty in the amount of $12,000,000. An injunction will be entered against Alpine.

Dated: New York, New York
September 12, 2019

/s/ Denise Cote
Denise Cote
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

	:	17cv4179(DLC)
UNITED STATES SECURITIES AND EXCHANGE COMMISSION,	:	OPINION & ORDER
Plaintiff,	:	
-v-	:	
ALPINE SECURITIES CORPORATION,	:	
Defendant.	:	

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DENISE COTE, District Judge:

Plaintiff United States Securities and Exchange Commission ("SEC") has sued clearing broker Alpine Securities Corporation ("Alpine"), alleging that between the years 2011 and 2015 Alpine repeatedly filed deficient suspicious activity reports

("SARs") and failed altogether to file other SARs and to maintain support files for SARs when required by law to do so. The SEC asserts that this conduct violated 17 C.F.R. § 240.17a-8 ("Rule 17a-8"), which obligates a broker-dealer to comply with certain regulations promulgated under the Bank Secrecy Act ("BSA"), including 31 C.F.R. § 1023.320 ("Section 1023.320"), which dictates when a broker-dealer must file SARs.

The SEC has moved for summary judgment as to liability on thousands of violations of Rule 17a-8. For the reasons that follow, the SEC's motion is granted in part.

Procedural History

The SEC filed this action on June 5, 2017. Following an unsuccessful effort to dismiss the action for lack of personal jurisdiction and improper venue, Alpine answered the complaint on September 29, 2017. It filed an amended answer on October 27.

As invited by the Court, the parties made preliminary summary judgment motions to articulate the legal standards that govern the SEC's claims and Alpine's defenses. The SEC moved for partial summary judgment on December 6, 2017, submitting thirty-six SARs under seal as examples of four categories of purported Rule 17a–8 violations. Alpine cross-moved for summary judgment and for judgment on the pleadings on January 19, 2018. Alpine declined the opportunity to submit additional SARs for review in connection with the SEC's motion. Alpine's motions principally argued that the SEC does not have

jurisdiction to bring this action and that the SEC's complaint was deficient for failing to plead that Alpine acted with wrongful intent. An Opinion of March 30, 2018 (the "March Opinion") denied Alpine's motions and granted in part the SEC's motion. *See SEC v. Alpine Sec. Corp.*, 308 F. Supp. 3d 775 (S.D.N.Y. 2018).[1]

On June 22, 2018, Alpine and its affiliate, Scottsdale Capital Advisors ("SCA"),[2] filed an action in the United States District Court for the District of Utah (the "Utah Action"). *See Alpine Sec. Corp. v. SEC*, No. 18cv504(CW) (D. Utah filed June 22, 2018). The Utah Action sought, *inter alia*, to enjoin the SEC from pursuing this action before this Court. The SEC moved to enjoin the Utah Action on July 3. That motion was granted on July 11. *See SEC v. Alpine Sec. Corp.*, No. 17cv4179(DLC), 2018 3377152 (S.D.N.Y. July 11, 2018). Alpine's appeal of the July 11 injunction is pending before the Court of Appeals for the Second Circuit. *See SEC v. Alpine Sec. Corp.*, No. 18-2045 (2d Cir. filed July 12, 2018).

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[1] On April 20, 2018, Alpine filed motions to reconsider the rulings in the March Opinion, and for certification of certain issues for interlocutory appeal. These motions were denied on June 18. *See SEC v. Alpine Sec. Corp.*, No. 17cv4179(DLC), 2018 WL 3198889 (S.D.N.Y. June 18, 2018). On June 22, Alpine filed a petition for writ of mandamus with the United States Court of Appeals for the Second Circuit. That petition was denied on August 7. *See In re Alpine Sec. Corp.*, No. 18-1875 (2d Cir. Aug. 7, 2018).

[2] SCA and Alpine are owned by the same individual. For many of the transactions at issue here, SCA served as Alpine's introducing broker.

Following the conclusion of discovery, the SEC filed this summary judgment motion on July 13. The motion became fully submitted on September 14.

Background

Much of the relevant factual and regulatory background is recited in the March Opinion. Familiarity with the March Opinion is assumed.

I. The Low-Priced Securities Market

The SAR transactions at issue involve penny stocks and microcap stocks.[3] Penny stocks are securities that trade at less than $5 per share. Microcap stocks are defined based on the market capitalization of the issuer; these stocks tend to have a share price of less than one cent. Penny stocks and microcap stocks are primarily traded in "over-the-counter" markets. *See* March Opinion, 308 F. Supp. 3d at 781 & n.1.

The markets for these low-priced securities ("LPS") have long been the subject of congressional and regulatory scrutiny due to the unique characteristics of those markets. In 1990, Congress enacted the Penny Stock Reform Act of 1990. *See* Pub. L. No. 101-429, *sec.* 501, 104 Stat. 931, 951. That Act

[3] The parties do not suggest that the issues in this case turn on any distinction between the terms share and stock and the terms are used in this Opinion interchangeably to refer to units of securities. Similarly, for purposes of this motion, no distinction is made between deposits of securities with Alpine in the form of physical certificates or in electronic transactions. *Cf. Delaware v. New York*, 507 U.S. 490, 496 (1993) (explaining immobilization of physical certificates of securities).

includes congressional findings that "[u]nscrupulous market practices and market participants have pervaded the 'penny stock' market with an overwhelming amount of fraud and abuse." *Id.* sec. 502(4), 104 Stat. at 951. Congress concluded that one key problem with the penny stock market was "a serious lack of adequate information concerning price and volume of penny stock transactions, the nature of th[e] market, and the specific securities in which [individuals] are investing." *Id.* sec. 502(6), 104 Stat. at 951. In addition, Congress stated that "[c]urrent practices do not adequately regulate the role of 'promoters' and 'consultants' in the penny stock market," and that individuals "banned from the securities markets" "ended up in promoter and consultant roles, contributing substantially to fraudulent and abusive schemes." *Id.* sec. 502(7), 104 Stat. at 951. Congress also found that "shell corporations … are used to facilitate market manipulation schemes" in the penny stock markets. *Id.* sec. 502(8), 104 Stat. at 951.

The SEC has promulgated rules pursuant to the Penny Stock Reform Act. It revised those rules in 2005 in order to better combat "fraudulent sales practices" and "the diversion of substantial capital to unscrupulous promoters and broker- dealers" in the LPS markets. *See* SEC*, Amendments to the Penny Stock Rules*, SEC Release No. 49037, 2004 WL 51685, at *3 (Jan. 8, 2004).

Financial regulators frequently warn investors about the risks of fraud connected to investments in LPS. The SEC, for instance, has observed that "information about microcap companies can be

extremely difficult to find, making them more vulnerable to investment fraud schemes and making it less likely that quoted prices in the market will be based on full and complete information about the company." SEC, Microcap Stock.[4] Similarly, FINRA[5] has warned investors "about the dangers of penny stocks," focusing on the lack of publicly available or verifiable information about issuers and the possibility that the issuer may be a shell company.[6] *See* FINRA, Beware Dormant Shell Companies.[7]

The SEC has explained in an administrative decision that "[p]enny stocks present risks of trading abuses due to the lack of publicly available information about the penny stock market in general and the price and trading volume of particular penny stocks." *In re Bloomfield*, SEC Release No. 9553, 2014 WL 768828, at *2 (SEC Feb. 27, 2014), *aff'd*, 649 F. App'x 546 (9th Cir. 2016). In that decision, the SEC

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[4] SEC, Microcap Stock: A Guide for Investors (Sept. 18, 2013), https://www.sec.gov/reportspubs/investor-publications/investorpubsmicrocapstockhtm.html.

[5] FINRA, or the Financial Industry Regulatory Authority, is a self-regulatory organization ("SRO") that supervises broker-dealers. *See Fiero v. Financial Industry Regulatory Auth., Inc.*, 660 F.3d 569, 571 & n.1 (2d Cir. 2011). Its responsibilities include monitoring broker-dealers' anti-money laundering ("AML") programs. *See* March Opinion, 308 F. Supp. 3d at 794-95.

[6] A shell company is a company with no or nominal operations, and either no or only nominal assets, assets "consisting solely of cash and cash equivalents," or "[a]ssets consisting of any amount of cash and cash equivalents and nominal other assets." 17 C.F.R. § 240.12b-2; 17 C.F.R. § 230.405.

[7] FINRA, Beware Dormant Shell Companies (Mar. 14, 2016), http://www.finra.org/investors/beware-dormant-shell-companies.

noted that penny stocks are vulnerable to pump-and-dump schemes that manipulate a stock price in order to enrich stock promoters. *Id.* at *3. The SEC added that

> [m]oney laundering activities can also be facilitated through the trading of penny stocks. Some money laundering red flags include: a customer who has a questionable background or is the subject of news reports indicating possible criminal, civil, or regulatory violations; multiple accounts in the names of family members or corporate entities for no apparent business or other purpose; wire transfers to or from countries identified as money laundering risks or tax havens; and excessive journal entries between unrelated accounts.

Id.

As noted, a frequent tool of market manipulation is the use of shell companies. *See* FINRA, Dormant Shell Companies;[8] *SAR Activity Review*, Issue 1, at 11.[9] FinCEN[10] has warned that

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[8] FINRA, Dormant Shell Companies—How to Protect Your Portfolio from Fraud (Oct. 30, 2014), http://www.finra.org/investors/alerts/dormant-shell-companies-portfoliofraud.

[9] FinCEN, *The SAR Activity Review: Trends, Tips & Issues*, Issue 1 (Oct. 2000), https://www.fincen.gov/sites/default/files/shared/sar_tti_01.pdf.

[10] FinCEN, the Financial Crimes Enforcement Network, is a division of the United States Department of the Treasury (the

shell companies "are an attractive vehicle for those seeking to launder money or conduct illicit activity" with significant potential for "abuse" in the form of money laundering or pump-and-dump schemes. FinCEN Domestic Shell Company Report at 2, 4.[11] FinCEN has explained that shell companies are "common tools for money laundering and other financial crimes, primarily because they are easy and inexpensive to form and operate." FinCEN Shell Company Guidance at 2.[12]

Alpine does not dispute these risks of investing in the LPS markets. Alpine points out, however, that these markets provide access to capital for smaller companies.

II. Alpine's Business

Alpine is a clearing broker. Clearing brokers provide clearance and settlement services for introducing brokers. This involves handling the recording of transactions, the exchange of funds, and the delivery of securities after a transaction has been executed. Clearing firms typically maintain records of

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"Treasury Department"). It is responsible for, as relevant here, administering the BSA. *See* March Opinion, 308 F. Supp. 3d at 791.

[11] FinCEN, The Role of Domestic Shell Companies in Financial Crime and Money Laundering: Limited Liability Companies (Nov. 2006), https://www.fincen.gov/sites/default/files/shared/LLCAssessment_FINAL.pdf.

[12] FinCEN, FIN–2006–G014, Potential Money Laundering Risks Related to Shell Companies (Nov. 9, 2006), https://www.fincen.gov/sites/default/files/guidance/AdvisoryOnShells_FINAL.pdf.

all trading and issue trade confirmations and statements.

Alpine was founded in 1984. In early 2011, Alpine was acquired by its current owner.

III. 2011-2012 FINRA Examination

Alpine is regulated by FINRA and other regulators. Between March 2, 2011 and January 22, 2012, FINRA conducted a financial, operational, and sales practices examination of Alpine. FINRA conducted an exit meeting with Alpine on July 23, 2012, where it shared its highly critical findings with Alpine. FINRA issued a seven-page report of that examination on September 28, 2012 ("FINRA Report").

The FINRA Report listed ten exceptions to Alpine's practices, five of which have particular relevance to the issues raised in this lawsuit. The FINRA Report discloses that Alpine did not file any SARs for over six months in 2011—March 1 through May 10 and August 16 through December 19—and found that Alpine was not in compliance with a FINRA SAR reporting rule and two federal reporting regulations, including Section 1023.320.[13] The FINRA Report recited the explanations Alpine provided for its failure to file these SARs, including that its compliance officer had determined that these filings were discretionary and that it was unnecessary

[13] The three regulations are FINRA Rule 3310, Section 1023.320, and 31 C.F.R. § 1010.520, which requires broker-dealers to provide certain information about terrorist activity and money laundering to law enforcement agencies upon request.

to file them. Alpine's chief of operations explained that once he had learned that no SARs had been filed for the period August 16 through December 19, 2011, Alpine filed SARs to reflect certain transactions that had occurred during that period. The FINRA Report found that these filings were all late and should have been filed no later than thirty days after the initial detection of the suspicious activity reported in them. It concluded that Alpine had "failed to establish and enforce procedures reasonably designed to detect and report suspicious activity."

The FINRA Report also determined that the narrative sections of the 823 SARs that Alpine did file during the period March 7, 2011 through January 22, 2012 were "substantively inadequate" and in violation of Section 1023.320(a)(1). It explained that

> [t]he narratives for all SARs reviewed were substantively inadequate as they failed to fully describe why the activity was suspicious. For the SARs reviewed, the narrative just described isolated events of activity without any detail or support of why the firm actually considered the activity to be suspicious and therefore failing to justify at the basic core the legitimacy of the SAR filing.

The FINRA Report recited the "two basic formats or templates" that Alpine had used in these SARs, "neither of which were substantively adequate as they failed to fully describe why the activity was

suspicious." As quoted in the FINRA Report, the first boilerplate, barebones narrative read:

> On or around December 09, 2011 ABC LLC deposited a large quantity (40,000,000 shares) of XYZ Corp, a low-priced ($0.0001/share) security.

The second read:

> ABC Inc. is a client of ACAP Financial, a firm for which Alpine Securities provides securities clearing services. Due to the activity within this account, it has been placed on a Heightened Supervisory list. It is policy of Alpine to file a SARs [sic] related to each deposit of securities into accounts of this nature. On or around 12/23/2011, ABC Inc. deposited a large quantity (5,097,312) of XYZ Corp, a low-priced ($.0045 /share) security. This transaction amounted to approximately $22,938.00.

The FINRA Report notes that the first template was used in 559 SARs and the second template was used in 264 SARs.

The FINRA Report also criticized Alpine for failing to review requests from FinCEN for information, and for the inadequacies in its AML program, including the program's failure to detect and report suspicious activity. As disclosed in the Report, Alpine had failed to enforce its own AML procedures, including the requirement that it file a

SAR within thirty days of becoming aware of a suspicious transaction.

In response to the FINRA examination, Alpine filed 251 SARs between December 2011 and May 2012 for transactions that had occurred between August 17, 2011 and February 3, 2012, and for which it had previously filed no SARs. Alpine explains in opposition to this motion for summary judgment that it filed these SARs only because FINRA informed Alpine that it expected to see SARs filed on all transactions involving large deposits of LPS. The SEC contends that Alpine violated Rule 17a-8 by failing to file these SARs within the thirty-day period imposed by Section 1023.320(b)(3). These SARs will be referred to as the Late-Filed SARs.

IV. Alpine's Improvements of its AML Program and SAR Filing Program

In response to this motion for summary judgment, Alpine freely acknowledges that before the change in ownership in 2011, Alpine had had only limited compliance staff. Alpine's current owners hired more compliance personnel in 2011 and 2012. Beginning in the Fall of 2012, Alpine arranged for an annual audit of its AML program. Also in 2012, Alpine created standard operating procedures for compliance with AML regulations. Alpine has submitted three versions of its AML procedures, dated April 11, 2013, August 29, 2014, and October 1, 2015.

The SEC's motion for summary judgment is premised in part on 1,593 SARs that Alpine filed and

which the SEC contends contain deficiencies in their narratives. Of those 1,593 SARs, approximately two-thirds were filed before September 28, 2012, when Alpine received the FINRA Report.

The following is the narrative section of SAR 1763, which is one of the post-FINRA Report SARs at issue here. It was filed in September 2013, approximately one year after the FINRA Report. It reads:

> [Customer] is a client of [SCA], a firm for which Alpine Securities provides clearing services. This account is a foreign broker-dealer. This account historically makes deposits of large volumes of low-priced securities. For that reason this transaction may be suspicious in nature. On or around [date, Customer] deposited physical stock certificate(s) representing a large quantity (2,---,--- shares) of [issuer], a low-priced ($.05/share) security into brokerage account [number.] The brokerage account is maintained through Alpine Securities. This transaction amounted to approximately $1--,---.--. The return on the initial investment of $2-, on [date six months before transaction] considering the relatively short time period. [sic]

The SEC contends that this SAR narrative is deficient for failing to disclose (a) basic customer information, (b) that the deposit was significantly disproportionate

to the average daily trading volume of the LPS, and (c) that the sub-account holder is foreign.

V. 2014 OCIE Examination

The SEC Office of Compliance Inspections and Examinations ("OCIE") conducted a one-week on-site review of Alpine in July 2014. OCIE reviewed 252 of the over 4,600 SARs filed by Alpine between January 2013 and July 2014, and concluded in a report issued on April 9, 2015 ("OCIE Report") that 50% of those 252 SARs "failed to completely and accurately disclose key information of which [Alpine] was aware at the time of filing." OCIE found that the narrative sections of Alpine's SARs "generally contained 'boilerplate' language." It criticized Alpine for omitting mention of many red flags for suspicious activity, such as a customer's civil, regulatory, or criminal history; foreign involvement with the transactions; concerns about an issuer; stock promotion activity; and that an issuer had been a shell company. In bringing this lawsuit, the SEC relies on the existence of these red flags in Alpine's support files for the SARs Alpine filed.

The OCIE Report found as follows:

> All of the information noted above was of critical importance to adequately and accurately describe the nature and extent of the suspicious activity that was the subject of each SAR. And, as evidenced by Alpine's own investigative files, Alpine knew of the omitted information at the time each SAR was

> filed. By excluding the information described above, Alpine failed to "provide a clear, complete, and concise description of the activity, including what was unusual or irregular that caused suspicion:" and failed to show the degree of care required by FinCEN to complete the narrative. (In fact, we note that the amount and type of actual material information in SARs filed by Alpine is very similar to the sample SAR that FinCEN has identified in its public guidance as being insufficient or incomplete.)[14] This rendered the SARs less valuable to investigators trying to understand the activity and any criminal or administrative implications thereof. As a result, the Firm is in contravention of FinCEN's SAR Rule and Exchange Act Rule l7a-8.

(Footnotes omitted.)

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[14] The OCIE Report referred to FinCEN published guidance which gave the following example of an "insufficient or incomplete" SAR narrative:

> Account was opened in 2002. Assets were transferred in by wire. 50 checks for $250 were deposited, securities were liquidated and money was paid out in May 2003.

FinCEN, Guidance on Preparing a Complete & Sufficient Suspicious Activity Report Narrative 27 (Nov. 2003), https://www.fincen.gov/sites/default/files/shared/sarnarrcompletguidfinal_112003.pdf
("SAR Narrative Guidance").

The OCIE Report also noted that Alpine filed SARs on certain customers' deposits of LPS but "[i]nexplicably" failed to file SARs when those customers sold those LPS. The OCIE Report describes Alpine's failures as "recidivist activity" because of FINRA's 2012 findings that Alpine was filing substantively inadequate SARs. It concluded that Alpine's SAR practices "obscured the true nature of the suspicious activity," and that it appeared that Alpine was "intentionally trying to obfuscate or distort the truly suspicious nature of the activity that the Firm is required to report to law enforcement."

Discussion

The SEC seeks summary judgment as to Alpine's liability for several thousand violations of Rule 17a-8. The SEC's motion is largely addressed to four discrete alleged deficiencies in Alpine's compliance between 2011 and 2015 with SAR reporting requirements. For each alleged deficiency, it has submitted a table that identifies hundreds of deficient or missing SARs or missing support files for SARs.[15]

"Summary judgment is appropriate only where there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Jaffer v. Hirji*, 887 F.3d 111, 114 (2d Cir. 2018) (citation omitted). "A genuine issue of material fact exists if the evidence is such that a reasonable jury

[15] The SARs and tables in this case have been filed under seal. As explained in the March Opinion, the SAR reporting regime is premised on the secrecy of the SARs. *See generally* 308 F. Supp. 3d at 783 n.4.

could return a verdict for the nonmoving party." *Nick's Garage, Inc. v. Progressive Cas. Ins. Co.*, 875 F.3d 107, 113 (2d Cir. 2017) (citation omitted). "Where the movant has the burden" of proof at trial, "its own submissions in support of the motion must entitle it to judgment as a matter of law." *Albee Tomato, Inc. v. A.B. Shalom Produce Corp.*, 155 F.3d 612, 618 (2d Cir. 1998)

When the moving party has asserted facts showing that it is entitled to judgment, the opposing party must "cit[e] to particular parts of materials in the record" or "show[] that the materials cited [by the movant] do not establish the absence … of a genuine dispute" in order to show that a material fact is genuinely disputed. Fed. R. Civ. P. 56(c)(1). "A party may not rely on mere speculation or conjecture as to the true nature of the facts to overcome a motion for summary judgment," as "[m]ere conclusory allegations or denials cannot by themselves create a genuine issue of material fact where none would otherwise exist." *Hicks v. Baines*, 593 F.3d 159, 166 (2d Cir. 2010) (citation omitted). Only disputes over "facts that might affect the outcome of the suit under the governing law" will properly preclude the entry of summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Summary judgment may be granted if the evidence cited by the nonmovant is "merely colorable or is not significantly probative." *Id.* at 249 (citation omitted).

I. Regulatory Framework

This case concerns the interplay of regulations promulgated under two federal statutes: the BSA, 31

U.S.C. § 5311, *et seq.*, first enacted in 1982, and the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. § 78a, *et seq.* The BSA allows the Secretary of the Treasury to "require any financial institution … to report any suspicious transaction relevant to a possible violation of law or regulation." 31 U.S.C. § 5318(g)(1). The Secretary has delegated this authority to FinCEN.[16] Pursuant to these delegations, in 2002 the Treasury Department and FinCEN promulgated Section 1023.320.[17] There are similar suspicious activity reporting regulations that apply to other types of financial institutions, such as banks, casinos, and mutual funds. *See, e.g.*, 31 C.F.R. §§ 1020.320 (banks), 1021.320 (casinos), 1024.320 (mutual funds).

Rule 17a-8 was promulgated by the SEC in 1981 under authority delegated to it by Congress in the Exchange Act. *See* March Opinion, 308 F. Supp. 3d at 796. The Rule requires a broker-dealer to "comply with the reporting, recordkeeping and record retention requirements of Chapter X of Title 31 of the Code of Federal Regulations." 17 C.F.R. § 240.17a-8.

The reporting and record-keeping requirements found in Chapter X of Title 31 of the Code of Federal Regulations and incorporated by

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[16] *See* Treasury Order 180-01, 67 Fed. Reg. 64,697, 64,697 (Oct. 21, 2002).

[17] *See* FinCEN, Amendment to the Bank Secrecy Act Regulations—Requirement that Brokers or Dealers in Securities Report Suspicious Transactions, 67 Fed. Reg. 44,048 (July 1, 2002) ("FinCEN Section 1023.320 Notice"). The USA PATRIOT ACT of 2001, Pub. L. No. 107-56, 115 Stat. 272 (the "Patriot Act"), significantly expanded the scope of the BSA.

Rule 17a-8 include Section 1023.320, which, among other things, requires a broker-dealer to file SARs. Section 1023.320 states in pertinent part:

> (1) *Every broker or dealer* in securities within the United States (for purposes of this section, a "broker-dealer") *shall file* with FinCEN, to the extent and in the manner required by this section, *a report of any suspicious transaction* relevant to a possible violation of law or regulation. A broker-dealer may also file with FinCEN a report of any suspicious transaction that it believes is relevant to the possible violation of any law or regulation but whose reporting is not required by this section …
>
> (2) *A transaction requires reporting under the terms of this section if* it is conducted or attempted by, at, or through a broker-dealer, it involves or aggregates funds or other assets of at least $5,000, and *the broker-dealer knows, suspects, or has reason to suspect that the transaction (or a pattern of transactions of which the transaction is a part)*:
>
> (i) Involves funds derived from illegal activity or is intended or conducted in order to hide or disguise funds or assets derived from illegal activity (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 Federal law or regulation or to avoid any transaction reporting requirement under Federal law or regulation;
>
> (ii) Is designed, whether through structuring or other means, to evade any requirements of this chapter or of any other regulations promulgated under the Bank Secrecy Act;
>
> (iii) 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 broker-dealer knows of no reasonable explanation for the transaction after examining the available facts, including the background and possible purpose of the transaction; or
>
> (iv) *Involves use of the broker-dealer to facilitate criminal activity*.

31 C.F.R. § 1023.320(a) (emphasis supplied).

> The regulation also provides that a SAR must be filed
>
> *no later than 30 calendar days* after the date of the initial detection by the reporting broker-dealer of facts that may constitute a basis for filing a SAR under this section. If no suspect is identified on

> the date of such initial detection, a broker-dealer may delay filing a SAR for an additional 30 calendar days to identify a suspect, but in no case shall reporting be delayed more than 60 calendar days after the date of such initial detection.

31 C.F.R. § 1023.320(b)(3) (emphasis supplied).

In addition, a broker-dealer is required to retain support files for SARs for five years, as follows:

> Retention of records. *A broker-dealer shall maintain* a copy of any SAR filed and the original or business record equivalent of *any supporting documentation for a period of five years* from the date of filing the SAR. Supporting documentation shall be identified as such and maintained by the broker-dealer, and shall be deemed to have been filed with the SAR. *A broker-dealer shall make all supporting documentation available to* FinCEN or any Federal, State, or local law enforcement agency, or *any Federal regulatory authority* that examines the broker-dealer for compliance with the Bank Secrecy Act, upon request …

31 C.F.R. § 1023.320(d) (emphasis supplied).

SARs are currently submitted to FinCEN via an electronic SAR Form.[18] Part I of the Form is titled "Subject Information" and requires a filer to provide identifying information about the subject of the SAR. 2002 SAR Form at 1. The subject of a SAR is defined in guidance as the individuals or entities "involved in the suspicious activity." SAR Narrative Guidance at 3. "If more than one individual or business is involved in the suspicious activity," a filer must "identify all suspects and any known relationships amongst them in the Narrative Section." *Id.*; *see also* 2012 SAR Instructions at 88 (directing filers to provide subject information for "each known subject involved in the suspicious activity").

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[18] Over the period at issue in this action, two versions of the SAR Form were in effect: one from 2002 to 2012 (the "2002 SAR Form") and one after 2012 (the "2012 SAR Form"). *See* March Opinion, 308 F. Supp. 3d at 792-93. The 2002 SAR Form includes instructions for what information to include in the narrative section on the form. *See* 2002 SAR Form at 3. A copy of the 2002 SAR Form is attached as an Exhibit to this Opinion. FinCEN published notices with drafts of the 2002 and 2012 SAR Forms in the Federal Register and solicited public comment before requiring regulated parties to use those forms. *See* March Opinion, 308 F. Supp. 3d at 792 & nn.10-11. In connection with the 2012 SAR Form, FinCEN published an instructional document. *See* FinCEN, FinCEN Suspicious Activity Report (FinCEN SAR) Electronic Filing Instructions (2012), https://www.fincen.gov/sites/default/files/shared/FinCEN%20SAR%20ElectronicFiling Instructions-%20Stand%20Alone%20doc.pdf ("2012 SAR Instructions"). The 2012 SAR Instructions and the 2002 SAR Form contain essentially identical instructions for completing the SAR narrative. The parties do not contend that there are any differences in those instructions that are material to the issues in dispute here.

Part II of the SAR Form requires the filer to identify the suspicious activity being reported. A filer must provide the date or date range of suspicious activity and the dollar amount involved. In addition, there is a list of financial instruments, such as "Bonds/Notes," "Stocks," and "Other securities." 2002 SAR Form at 1.[19] A filer is directed to check all that apply to the transaction. A filer must also check boxes identifying the type of suspicious activity, which includes "Commodity futures/options fraud," "Insider trading," "Market manipulation," "Money laundering/structuring," "Prearranged or other non-competitive trading," "Securities fraud," "Wash or other fictitious trading," and "Wire fraud." *Id.* This list also includes an option to check "Other," with an instruction to "[d]escribe" the activity in the narrative portion of the SAR. *Id.* A FinCEN instructional document for this Form directs filers to "[p]rovide a brief explanation in [the SAR narrative] of why each box is checked." 2002 Form Instructions at 3.[20]

The SAR Form also contains directions for SAR filers about how to complete the narrative portion of the SAR.[21] The instructions state that the narrative

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[19] The 2012 SAR Form replaced the list of financial "instruments" with a list of "product type(s) involved in the suspicious activity." That list includes a box to check for "Penny stocks/Microcap securities." 2012 SAR Form at 7.

[20] FinCEN, Form 101a, Suspicious Activity Report (SAR-SF) Instructions (May 22, 2004), https://www.fincen.gov/sites/default/files/shared/fin101_instructions_only.pdf.

[21] The following excerpts are taken from the 2002 SAR Form. As explained in the March Opinion, materially similar directions are included in an instructional document created by FinCEN

> section of the report is ***critical***. *The care with which it is completed may determine whether or not the described activity and its possible criminal nature are clearly understood by investigators.* Provide a clear, complete and chronological description … of the activity, including what is unusual, irregular or suspicious about the transaction(s), using the checklist below as a guide.

(Emphasis in original.) The checklist has twenty-two items, each addressed to a specific type of information. The following items are particularly relevant to the SEC's motion for summary judgment:

> h. Indicate whether the suspicious activity is an isolated incident or relates to another transaction.
>
> i.Indicate whether there is any related litigation. If so, specify the name of the litigation and the court where the action is pending.
>
> …
>
> k. Indicate whether any information has been excluded from this report; if so, state reasons.

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for the post-2012 electronic filing system. *See* 308 F. Supp. 3d at 793 (citing 2002 SAR Form and 2012 SAR Instructions).

> l.Indicate whether U.S. or foreign currency and/or U.S. or foreign negotiable instrument(s) were involved. If foreign, provide the amount, name of currency, and country of origin.
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> …
>
> o. Indicate any additional account number(s), and any foreign bank(s) account number(s) which may be involved.
>
> p. Indicate for a foreign national any available information on subject's passport(s), visa(s), and/or identification card(s). Include date, country, city of issue, issuing authority, and nationality.
>
> q. Describe any suspicious activities that involve transfer of funds to or from a foreign country, or transactions in a foreign currency. Identify the country, sources and destinations of funds.

2002 SAR Form at 3.

FinCEN has issued a number of guidance documents explaining the scope of the SAR reporting duty in the narrative section of the SAR Form. FinCEN guidance interpreting Section 1023.320 is entitled to deference. *See* March Opinion, 308 F. Supp. 3d at 791. That guidance includes the instruction that a SAR narrative should include the who, what, when, why, where, and how of the

suspicious activity (the "Five Essential Elements").[22] *See* SAR Narrative Guidance at 3–6; *SAR Activity Review*, Issue 22, at 39–40;[23] 2012 SAR Instructions at 110–12. *See generally* 308 F. Supp. 3d at 791-95. To interpret the scope of Section 1023.320, this Opinion principally relies on the instructions on the 2002 SAR Form, the 2012 SAR Instructions, and the SAR Narrative Guidance issued in 2003. Both the 2002 SAR Form (and its list of instructions) and the 2012 SAR Form were promulgated after FinCEN published a notice in the Federal Register with a draft version of the form and invited public comment. *See* FinCEN 2002 SAR Form Notice, 67 Fed. Reg. at 50,751;[24] FinCEN 2012 SAR Form Notice, 75 Fed. Reg. at 63,545.[25] The 2012 SAR Instructions are similar in all respects that are material to this litigation to those instructions contained in the 2002 SAR Form.[26]

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[22] FinCEN guidance refers to the who, what, where, when, and why, as the "five essential elements" of a SAR narrative, but also adds that a sixth element, "the method of operation (or how?)[,] is also important." SAR Narrative Guidance at 3. This Opinion follows FinCEN's lead in calling these six elements the Five Essential Elements of a SAR.

[23] FinCEN, *The SAR Activity Review: Trends, Tips & Issues*, Issue 22 (Oct. 2012), https://www.fincen.gov/sites/default/files/shared/sar_tti_22.pdf.

[24] FinCEN, Proposed Collection, Comment Request, Suspicious Activity Report by the Securities and Futures Industry, 67 Fed. Reg. 50,751 (Aug. 5, 2002).

[25] FinCEN, Proposed Collection, Comment Request, Bank Secrecy Act Suspicious Activity Report Database Proposed Data Fields, 75 Fed. Reg. 63,545 (Oct. 15, 2010).

[26] Alpine does not argue that its SAR obligations changed when the filing format changed in 2012.

The SAR Narrative Guidance was issued by FinCEN in 2003 with the "purpose" of "educat[ing] SAR filers on how to organize and write narrative details that maximize[] the value of each SAR form." SAR Narrative Guidance at 1. This "guidance document" describes in detail the Five Essential Elements of a SAR narrative, describes how a SAR narrative should be structured, and provides examples of sufficient and insufficient narratives for each type of filing entity. *See id.* at 1-2.

The "who" of the Five Essential Elements encompasses the "occupation, position or title … , and the nature of the suspect's business(es);" the "what" includes "instruments or mechanisms involved" such as wire transfers, shell companies, and "bonds/notes;" and the "why" includes "why the activity or transaction is unusual for the customer; consider[ing] the types of products and services offered by the [filer's] industry, and the nature and normally expected activities of similar customers."[27] SAR Narrative Guidance at 3–4. The "how" includes the "method of operation of the subject conducting the suspicious activity," by giving "as completely as possible a full picture of the suspicious activity involved." *Id.* at 6. The obligation to identify involved parties in a transaction extends to all "subject(s) of the filing," and "filers should include as much

[27] The SAR Narrative Guidance also directs filers to find "[o]ther examples of suspicious activity … in previously published FinCEN Advisories, SAR Bulletins, and editions of The SAR Activity Review – Trends, Tips & Issues." SAR Narrative Guidance at 6 n.5. Those sources are cited in this Opinion and in the March Opinion.

information as is known to them about the subject(s)." *SAR Activity Review*, Issue 22, at 39.

Examples of relevant information listed by FinCEN include "bursts of activities within a short period of time," SAR Narrative Guidance at 5, whether foreign individuals, entities, or jurisdictions are involved, 2012 SAR Instructions at 112, or the involvement of unregistered businesses, SAR Narrative Guidance at 5. A common scenario identified by FinCEN as suspicious involves a "[s]ubstantial deposit … of very low- priced and thinly traded securities" followed by the "[s]ystematic sale of those low-priced securities shortly after being deposited." *SAR Activity Review*, Issue 15, at 24.[28]

FinCEN has explained that "[t]ransactions like these are red flags for the sale of unregistered securities, and possibly even fraud and market manipulation," and firms need to "investigate[] thoroughly" such questions as "the source of the stock certificates, the registration status of the shares, how long the customer has held the shares and how he or she happened to obtain them, and whether the shares were freely tradable." *Id.*

Broker-dealers are also required by regulation to maintain written AML policies that define how the broker-dealer detects potential money laundering and implements the duty to file SARs. This requires

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[28] FinCEN, *The SAR Activity Review: Trends, Tips & Issues*, Issue 15 (May 2009), https://www.fincen.gov/sites/default/files/shared/sar_tti_15.pdf.

broker-dealers to engage in "ongoing customer due diligence," which includes

> (i) Understanding the nature and purpose of customer relationships for the purpose of developing a customer risk profile; and
>
> (ii) Conducting ongoing monitoring to identify and report suspicious transactions and, on a risk basis, to maintain and update customer information … includ[ing] information regarding the beneficial owners of legal entity customers.

31 C.F.R. § 1023.210(b)(5).

In 2002, FinCEN delegated its BSA authority over broker- dealer AML programs to the SEC and SROs including FINRA.[29] Pursuant to its supervisory authority over SROs, the SEC reviewed and approved AML best practices submitted by the SROs.[30] FINRA Rule 3310 has governed its members' AML programs since 2009.[31] Rule 3310 requires member firms to

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[29] *See* FinCEN, Anti–Money Laundering Programs for Financial Institutions, 67 Fed. Reg. 21,110, 21,111 (Apr. 29, 2002) (interim final rule effective April 24, 2002); *see also* 31 C.F.R. § 1023.210(c) (requiring a broker-dealer AML program to "[c]ompl[y] with the rules, regulations, or requirements of its self-regulatory organization governing such programs").

[30] *See* SEC, Order Approving Proposed Rule Changes Relating to Anti–Money Laundering Compliance Programs, 67 Fed. Reg. 20,854 (Apr. 26, 2002).

[31] *See* SEC, Order Approving Proposed Rule Change to Adopt FINRA Rule 3310 (Anti–Money Laundering Compliance

have a written AML policy that receives approval from FINRA's senior management and that "[e]stablish[es] and implement[s] policies, procedures, and internal controls reasonably designed to achieve compliance with the Bank Secrecy Act and the implementing regulations thereunder." FINRA Rule 3310(b) (2015).[32] The Rule also requires that member firms "[e]stablish and implement policies and procedures that can be reasonably expected to detect and cause the reporting of transactions required under 31 U.S.C. 5318(g) and the implementing regulations thereunder." FINRA Rule 3310(a).

II. General Arguments

The SEC makes four categories of claims, each of which is separately addressed below. It asserts that Alpine filed SARs that failed to report in their narrative sections one or more of seven different types of information. It then asserts that Alpine failed to file SARs reporting suspicious sales following large deposits of LPS. The third set of claims concerns SARs that the SEC asserts were filed later than allowed by Section 1023.320. Finally, the SEC asserts that Alpine violated the law by not maintaining support files for many of the SARs it filed. Before addressing the specific violations on which the SEC seeks

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Program) in the Consolidated FINRA Rulebook, SEC Release No. 60645, 2009 WL 2915633 (Sept. 10, 2009). Prior to 2009, substantially similar rules governed broker-dealer AML programs administered by FINRA's predecessor organizations. *See id.* at *1.

[32] Found at http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=8656.

summary judgment, this Opinion addresses Alpine's general arguments about the propriety of this action.

Alpine contests whether the SEC has authority to bring this suit.[33] In large part, these arguments were addressed in the March Opinion. *See* 308 F. Supp. 3d at 795-97. Alpine argues that the SEC has not been empowered to sue for violations of the BSA. *See id.* at 795-96. According to Alpine, the Treasury Department, and in particular FinCEN, are empowered to enforce the BSA, and FinCEN has delegated to the SEC only the authority to *examine* a broker-dealer for compliance with the BSA but not the authority to *enforce* the BSA.

Alpine is correct that FinCEN has not expressly delegated BSA enforcement authority to the SEC. But, that ignores the separate statutory authority at issue here. The SEC has its own independent authority to require broker-dealers to make reports, and has enforcement authority over those broker-dealer reporting obligations. It was efficient for the Treasury Department to delegate its own duty to examine broker-dealers to the agency primarily responsible for regulating broker-dealers.

The Exchange Act requires broker-dealers to "make … such reports as the Commission …

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[33] Alpine principally presents its legal argument in the expert declaration Alpine submitted with its opposition papers. These legal arguments may not be presented through an expert. *See DiBella v. Hopkins*, 403 F.3d 102, 121 (2d Cir. 2005) ("Expert witness statements embodying legal conclusions exceed the permissible scope of opinion testimony under the Federal Rules of Evidence." (citation omitted.)).

prescribes as necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of [the Exchange Act]." 15 U.S.C. § 78q(a)(1). One of the rules the SEC has promulgated pursuant to this statute is Rule 17a-8. As explained in the March Opinion, Rule 17a-8 is a valid exercise of the broad authority Congress conferred on the SEC in 15 U.S.C. § 78q(a)(1).[34] Rule 17a-8 incorporates the reporting obligations imposed on broker-dealers in that section of the Code of Federal Regulations in which the SAR regime is contained. *See* March Opinion, 308 F. Supp. 3d at 797.

Alpine also makes a related argument that the FinCEN guidance on which the SEC relies was not meant to create rules of law, but rather provided a number of suggestions that broker- dealers could consider when filing SARs. Alpine also contends that it lacked notice about its SAR obligations because some guidance documents were issued after certain

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[34] Alpine and its expert fail to engage with the analysis provided in the March Opinion. In particular, they do not account for the SEC's interpretation of Rule 17a-8 as encompassing the duty to file a SAR and otherwise comply with Section 1023.320 in a formal adjudication. *See In re Bloomfield*, SEC Release No. 9553, 2014 WL 768828, at *15–*17 (Feb. 24, 2014). As explained in the March Opinion, it is axiomatic that agencies may announce rules by rulemaking or through a formal adjudication, and when an agency acts through adjudication, its rules are necessarily retrospective. *See* 308 F. Supp. 3d at 788 (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 201–02 (1947) and *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 221 (1988) (Scalia, J., concurring)). The March Opinion thus provided two bases for concluding that the SEC may bring this action under Rule 17a-8.

transactions occurred. Neither argument is persuasive.

First, while FinCEN guidance is informative and useful, its role in this action can be overstated. The violations that the SEC asserts occurred here arose from Alpine's failure to comply with Section 1023.320's mandates and the SAR Form's instructions, including the requirement that it provide in its SARs' narratives a "clear, complete and chronological description [of] what is unusual, irregular or suspicious about the transaction(s)." 2002 SAR Form at 3. These instructions have the force of law, having been issued as FinCEN regulations following a notice and comment period.[35]

Second, it has long been established that an agency's guidance documents receive deference when they reasonably interpret an agency's ambiguous regulation. *See Nat. Res. Def. Council v. EPA*, 808 F.3d 556, 569 (2d Cir. 2015); *see also* March Opinion, 308 F. Supp. 3d at 791 (concluding that Section 1023.320 is ambiguous and that FinCEN guidance is entitled to deference). Alpine does not argue that Section 1023.320, including its injunction that a broker-dealer report suspicious transactions, is unambiguous. Indeed, that regulation is designed to capture the breadth of ways in which a broker-dealer could be "use[d]" to "facilitate criminal activity." 31 C.F.R. § 1023.320(a)(2)(iv). Nor does Alpine argue that FinCEN guidance unreasonably interprets either Section 1023.320 or the SAR Form. The FinCEN guidance cited by the SEC explains that

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[35] *See* FinCEN 2002 SAR Form Notice, 67 Fed. Reg. 50,751.

certain fact patterns are typical of suspicious activity and should be reported by SAR filers. *See* SAR Narrative Guidance at 4-6 (listing "[e]xamples of some common patterns of suspicious activity" that should be included in a SAR narrative). These guidance documents, responding to the broad legal requirement contained in Section 1023.320, give content to a broker-dealer's obligation to file SARs.

Alpine also contends it is inappropriate to rely on some guidance documents cited by the SEC because those documents were promulgated after the SARs at issue were filed. The principal source of guidance cited here is the 2003 SAR Narrative Guidance. That document predates all of the SARs at issue. In addition, this Opinion cites several issues of the *SAR Activity Review* from 2000, 2009, and 2012. The 2012 issue is only cited, however, in conjunction with earlier guidance documents.

Alpine makes two additional arguments about its interactions with FINRA and the SEC. Alpine first argues that it did not have notice of the SEC's theory of this case until it received the OCIE Report in 2015 and that it is accordingly unfair to hold it liable for failing to include mention of red flags in its SARs' narratives that the SEC asserts it improperly omitted. This argument fails. The SEC has the burden to show that Alpine's failures violated Section 1023.320. The standards at issue here are those that have existed since the issuance of the 2002 SAR Form, which provided the mechanism by which broker-dealers comply with the requirements of Section 1023.320. Nothing OCIE did or said in 2015

can increase the scope of that duty.[36] In addition, Section 1023.320 uses an objective standard to measure compliance. *See* March Opinion, 308 F. Supp. 3d at 799. This standard obligated Alpine to file SARs when it had reason to suspect criminal activity. Its ignorance of its legal obligations or its intent in failing to comply with those obligations may be relevant to an award of damages, but they are not defenses to this motion regarding its liability.

Alpine next contends that its level of compliance with Section 1023.320 increased over time, and that it has shown that it tried in good faith to comply with its SAR obligations. It is true that approximately two-thirds of the SARs at issue in the SEC's motion predate the FINRA Report. But even if Alpine is correct that its program improved over time, this does not immunize Alpine for its past failures to include required information in any SAR narrative, or to file a SAR when it was required to do so. A broker-dealer's duty to maintain an AML program reasonably calculated to ensure compliance with the BSA is distinct from the duty to file a complete report of suspicious transactions.

Finally, Alpine asserts that holding it liable under the SEC's theory in this case would be extraordinary and wreak havoc with the SAR regime and the broker-dealer industry. Not so. This Opinion holds the SEC to the well-established summary

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[36] Similarly, this Opinion cites the FINRA and OCIE Reports solely to give context to arguments Alpine has made in opposition to this motion. These Reports are not the source of any legal obligation or of any finding that Alpine violated Section 1023.320.

judgment standard. The SEC is required to demonstrate that no question of fact exists regarding whether Alpine complied with Section 1023.320 for each SAR, missing SAR, or missing SAR support file on which it seeks summary judgment. To defeat the SEC's motion, all Alpine must do is raise a question of fact. Alpine has done so in a number of instances—both as to individual SARs and as to entire categories of SARs. This Opinion denies summary judgment to the SEC wherever its presentation is deficient, and wherever Alpine identifies a question of fact as to the specific SAR or transaction at issue.

As described below, the SEC has shown that the failures in Alpine's SAR-reporting regime were stark. Tellingly, Alpine does not contest in a large number of instances that it failed to include information in SAR narratives that the SAR Form itself directs a broker-dealer to include. Given the sheer number of lapses at issue in this case, there is no basis to conclude that a broker-dealer that reasonably attempts to follow the requirements of Section 1023.320 will be at risk. And questions about what effect this action will have on the SAR regime are ultimately about policy, not the law a court must apply. This Opinion resolves the SEC's motion by applying well- established principles of administrative law and summary judgment. Following those principles, the SEC's motion is granted in part.

III. Admissibility of Summary Tables

Before addressing the various deficiencies in Alpine's compliance with the SAR reporting regimen that are asserted by the SEC, a threshold evidentiary issue must be resolved. Relying on Rule 1006, Fed. R. Evid., the SEC has supported its motion for summary judgment with ten tables that identify the SARs or transactions as to which it is asserting each alleged deficiency.

Rule 1006 provides that

> [t]he proponent may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court. The proponent must make the originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place. And the court may order the proponent to produce them in court.

Fed. R. Evid. 1006. Such a summary must be "based on foundation testimony connecting it with the underlying evidence summarized and must be based upon and fairly represent competent [and admissible] evidence." *Fagiola v. Nat'l Gypsum Co. AC&S*, 906 F.2d 53, 57 (2d Cir. 1990) (citation omitted). Objections that a summary "d[oes] not fairly represent the [underlying] documents and [is] excessively confusing and misleading go more to [the summary's] weight than to its admissibility." *U.S. ex rel. Evergreen Pipeline Constr. Co. v. Merritt Meridian Constr. Corp.*, 95 F.3d 153, 163 (2d Cir. 1996) (citation omitted).

The SEC's ten tables include seven that correspond to the seven alleged deficiencies in the SAR narratives.[37] These seven deficiencies are the omission of (1) basic customer information, (2) "related" litigation, (3) shell company status or derogatory history of the stock, (4) stock promotion activity, (5) unverified issuers, (6) low trading volume, and (7) foreign involvement.

Each of these seven tables has six columns. The columns list the SAR item number,[38] date filed, SAR Bates stamp, volume of shares in the transaction, value stated in the SAR narrative, and a final column with a heading describing the type of violation and a Bates stamp page number where the missing information was found in Alpine's support file for that SAR.

Table 10 is itself a summary table for Tables 1 though 7. It lists all 1,594 SARs for which the SEC contends the SAR narratives were deficient. Table 10 contains columns identifying the SAR number,[39] the

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[37] The ten tables are labelled in the SEC papers as Exhibits 3 through 12. Exhibits 3 through 9 are also labelled Tables A-1 through A-7 to Exhibit 2 in the SEC's submissions. Tables A-1 through A-7 are referred to in this Opinion as Tables 1 through 7. SEC Exhibits 10 through 12 are referred to as Tables 10 through 12. Using this numbering system, this Opinion does not refer to any Table 8 or 9.

[38] The item number is a number assigned to each SAR in Tables 1 through 7. The numbering system is nonconsecutive and does not correspond to any chronological or other apparent order.

[39] The SAR number is a number assigned to each allegedly deficient SAR, consecutively from 1 to 1,594. The number is different than the item number, and the SEC has not provided a table that matches an item number to a SAR number. As a

Alpine customer identified in the SAR, and the SAR Bates stamp number. Table 10 also has seven columns corresponding to the seven types of deficient narratives for which the SEC seeks summary judgment. Many SARs have entries in multiple deficiency columns. Those columns have a Bates stamp page number that gives the location in the Alpine SAR support file where information missing from the SAR narrative is found.

The two remaining tables are Tables 11 and 12. Table 11 lists sales-and-liquidation patterns. The SEC contends that Alpine had a duty to file SARs reflecting these sales, but did not do so. Table 11 lists 1,242 groups of transactions, organized as follows. The right half of the table lists a deposit date, the volume of the deposit, the value of the deposit, the date a SAR was filed reporting the deposit, and the Bates stamp number for that SAR. The left portion of the table lists a group number, the customer name, a liquidation date, the number of shares sold, and the stock symbol. The SEC contends that Alpine should have filed a SAR for at least each of the 1,242 groups.

Table 12 lists the SARs that the SEC alleges were filed late. It lists the SAR number, the Bates stamp number, the date of the transaction reported, the date the SAR was filed, the number of days between the transaction and SAR, and the number of days the SAR was late. The number of days late is

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result, the item number and the SAR number may only be matched by comparing the Bates numbers between Table 10 and Tables 1 through 7. As was true with the item number, the SAR number does not correspond to chronological or other apparent order.

calculated by subtracting 30 from the number of days between date of the transaction and the date the SAR was filed.

These tables summarize voluminous evidence that is not subject to convenient examination in court. This evidence is organized by subject matter. Each type of violation alleged in the case has its own separate table, and one table also allows the fact-finder to determine whether a single SAR is alleged to reflect multiple violations. The SEC seeks summary judgment as to approximately 1,800 SARs, and moves for summary judgment as to approximately 3,500 other transactions that are listed in Alpine's transaction records. Accordingly, the threshold for Rule 1006—that a summary be used to prove the content of voluminous writings—is met. Alpine does not suggest that it has not had access to the underlying documentation—which came from its files—or that the SARs and the SAR support files referenced in the tables are not admissible documents.

To the extent that the tables list information such as an item number, date of SAR filing, Bates stamp number, volume of shares in the underlying transaction, and the value stated in a SAR, these are classic examples of information that is appropriately captured in a summary table. The SEC has merely taken a number or date from a voluminous quantity of admissible documents and placed the data in a convenient format for the fact finder. On this basis, there can be little debate that these components of Tables 1 through 7 and 10 through 12 are admissible.

To the extent that a column in a Table identifies a particular alleged deficiency in a SAR and lists a Bates stamp page number from the SAR's support file upon which the SEC relies to show that deficiency, those columns also summarize the contents of voluminous files and are admissible to prove the contents of those files. Alpine is free to argue that there are inaccuracies in the tables—in fact, it has raised a few such arguments as to each of the tables. Subject to specific challenges by Alpine, therefore, these tables are admissible as summaries of the contents of voluminous admissible documents—the Alpine SARs and their support files, and Alpine transaction records.

Alpine argues that a column heading identifying the particular deficiency at issue for a SAR is an expert opinion. It is not. That column heading reflects the SEC's contention and includes as well a citation to the documents supporting that contention. This citation permitted Alpine, and permits the fact finder, to assess whether that contention is proven in the case of an individual SAR. Indeed, expert testimony would be inadmissible to prove these violations. An expert's opinion may not "usurp either the role of the trial judge in instructing the jury as to the applicable law or the role of the jury in applying that law to the facts before it." *United States v. Stewart*, 433 F.3d 273, 311 (2d Cir. 2006) (citation omitted). A fact finder, advised of the governing law would have to assess whether Alpine complied with the law in filing each SAR identified in a table (or violated the law in failing to file a SAR for each group of transactions for which there was no SAR filed, again as identified in a table). For instance,

advised by the court of what constitutes "related" litigation, does the SAR support file contain a description of such litigation, and was that information omitted from the SAR narrative?

Alpine also argues that Table 11 is inadmissible because the groups listed in Table 11 reflect expert conclusions unsupported by a reliable methodology. Not so. The group numbers are used by the SEC as a contention that each of the deposits and liquidations listed in a group form a suspicious pattern that had to be reported in a SAR. This is a question of fact to be resolved under the governing law. The SEC may have relied on an expert and consulting group to assist it in assembling the groups of transactions on which the SEC would focus in this action, but that task could have been done as well by an SEC attorney or an SEC paralegal. It reflects no more than the SEC's contentions. The fact finder, applying the controlling law, will have to examine the facts summarized in Table 11 and determine for each group whether there is an actionable pattern of suspicious trading that triggered Alpine's duty to file a SAR reporting the sales listed within a group. An expert cannot tread on that duty, which rests on the shoulders of a fact finder. Of course, a qualified expert could properly provide testimony generally about illicit and manipulative market activities and practices to inform a fact finder's examination of each of the listed groups, and improve its understanding of suspicious patterns, but the table by itself does not do that.

Finally, Alpine contends that the SEC has failed to carry its burden of proof by relying

exclusively on the tables without also offering each of the SARs and support files to which the tables refer. That objection is not well founded. In connection with the partial summary judgment motion, the SEC submitted exemplar SARs and support files; Alpine chose not to do so. The legal framework for the litigation of the SEC's claims having been described in the March Opinion, the SEC appropriately relied on Rule 1006 to present in convenient and summary form the voluminous evidence on which it relies. Alpine has had a full opportunity to raise questions of fact in response and to submit SARs and support files where it takes issue with the SEC's assertions. This Opinion examines that evidence, and where appropriate, denies the SEC's summary judgment motion.

IV. Deficient Narratives

The first of the four categories of claims brought by the SEC concerns 1,593 SARs that Alpine filed.[40] The SEC claims that Alpine was required by law to include information in 1,593 SAR narratives that Alpine omitted. The omitted information is found in the Alpine support files for each of these SARs. These alleged deficiencies in the SAR narratives fall into

[40] The SEC initially sought summary judgment as to 1,594 SARs with allegedly deficient narratives. In two categories—unverified issuers and low trading volume—the SEC withdrew its motion as to six and seven SARs, respectively. Of these thirteen affected SARs, twelve are also identified as having other deficiencies. One SAR (item number 511; SAR number 299), however, does not have any other identified deficiency. Accordingly, the SEC's motion now pertains to 1,593 SARs.

seven categories. Before addressing each of the claimed deficiencies, the SEC's allegation that Alpine was required to file each of these SARs is assessed.

A. Mandatory Filing

The issue of whether Alpine was in fact required by law to file the 1,593 SARs it did file became significant during the parties' briefing of the preliminary summary judgment motion.[41] Here, the SEC asserts that Alpine was required by law to file each of these SARs. *See* 31 C.F.R. § 1023.320(a)(2) (describing when a SAR must be filed). The SEC advances a two-part test to determine whether the duty to file a SAR was triggered in this case because Alpine had reason to suspect that a transaction may involve use of a broker-dealer to facilitate criminal activity.

The SEC contends that, in the circumstances at issue here, Alpine had a duty to file a SAR where the underlying transaction involved a large deposit of LPS, and the transaction also involved either one of six red flags it has identified or the transaction was conducted by a certain customer. Each of the 1,593 SARs reported customer deposits of LPS worth at

[41] The portion of the SEC's motion for partial summary judgment addressed to the allegedly deficient SAR narratives was denied because Alpine argued that it routinely filed "voluntary" SARs and the SEC had failed to explain why Alpine was obliged to file the exemplar SARs on which its motion was based. *See* March Opinion, 308 F. Supp. 3d at 799-800.

least $5,000. Many reported far larger deposits.[42] Of those 1,593 transactions, 1,465 were cleared by Alpine for just six customers, which the parties identify as customers A through F.[43] Ranking them in order of the largest number of SARs that Alpine filed for each of these customers, it filed 702 for A, 443 for E, 149 for C, 116 for F, thirty-seven for D, and eighteen for B.

Of the 1,593 SARs, the SEC contends that one or more of its identified red flags appears in the Alpine support files for 1,302 of those transactions, but is not mentioned in the SAR narrative. For the remaining SARs, the SEC relies on an alleged pattern of suspicious trading, specifically, that Alpine filed a large number of SARs for the same customer.

As described earlier in this Opinion, it is uncontested that the market for LPS is vulnerable to securities fraud and market manipulation schemes. These schemes depend on the deposit of a large amount of securities with a broker-dealer so that those securities can enter the market. Alpine does not take issue with either of these propositions.

Moreover, it is not unreasonable to infer from Alpine's very act of filing a SAR that the reported

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[42] For instance, of the 1,014 deposits listed in Table 1, the deposits ranged in value from $5,000 to $31,619,250, the mean value was $132,025, and the median value was $23,228.

[43] This Opinion uses the term "customer" or "client" to refer to the entity whose transaction in LPS was reported in a given SAR. The parties largely use this formulation as well, although Alpine also contends that its customer was the introducing broker.

transaction had sufficient indicia of suspiciousness to mandate the creation and filing of a SAR. None of these SARs suggests that the filing was simply a voluntary act or otherwise filed outside of Alpine's attempt to comply with its duties under the law.[44] After all, Alpine did have some version of an AML program in place during the time it filed these SARs, even if Alpine improved its AML program over time. And, for reasons already explained in the March Opinion, in the absence of an explicit statement that a SAR was a voluntary filing, it would have been unreasonable for anyone filing a SAR to assume that FinCEN or the SEC would know that a filed SAR was simply a "voluntary" filing, as opposed to one filed to comply with the law's mandates to alert regulators to suspicious trading activity. March Opinion, 308 F. Supp. 3d at 799 & n.20.

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[44] Without identifying any particular SAR, Alpine asserts that it filed numerous voluntary SARs on transactions involving more than 5 million shares or $50,000 worth of microcap securities. Alpine has not identified any means by which a regulator or a fact-finder could identify such a "voluntary" SAR. It has not pointed to any disclosure in the 1,593 SARs that they were "voluntary" filings. Nor has it pointed to any portion of the SAR's support file reflecting an analysis of the reporting obligation and a conclusion that the SAR was not required to be filed. Alpine's vague and conclusory assertion is insufficient to raise a triable question of fact as to whether any SAR was filed voluntarily as opposed to pursuant to Alpine's obligation under the law to make the filing.

Moreover, more than a few of the 1,593 SARs state explicitly that Alpine thought the transaction was suspicious. For instance, the narrative portion of SAR 348 states that "Alpine is filing this SAR because of the potentially suspicious nature of depositing large volumes of shares involving a low- priced security(ies)."

In addition, with one exception,[45] Alpine does not contest that the red flags on which the SEC relies are indeed red flags and that a broker-dealer should focus on these issues when reviewing transactions.[46] Accordingly, the SEC has shown that Alpine had a duty to file each of these 1,593 SARs so long as it also shows, as discussed below, that Alpine's support files for the SARs contained information about a qualifying red flag.

Alpine makes two arguments in opposition to the SEC's assertion that it was required to file these SARs. First, Alpine argues that there is no liability under the law for a broker-dealer's failure to file a SAR, only for failing to establish an adequate AML regime. Not so. While a deficient AML program may create liability, the failure to timely file a complete SAR may also create liability. This case involves the latter type of violation. As Section 1023.320(a)(1) states, in mandatory terms, a broker-dealer "shall file" a SAR "relevant to a possible violation of law or regulation." Alpine's position was also expressly

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[45] Alpine appears to contend that foreign involvement in a transaction is only noteworthy when the foreign jurisdiction has been designated by our government as a "high-risk" jurisdiction.

[46] Alpine's own AML procedures, which it has submitted in connection with this motion, define a number of "Red Flags indicating potential Money Laundering" that mirror the red flags on which the SEC relies, such as the "customer (or a person publicly associated with the customer) ha[ving] a questionable background or [being] the subject of news reports indicating possible criminal, civil, or regulatory violations," the "practice of depositing penny stocks, liquidat[ing] them, and wir[ing] the proceeds," and the customer "for no apparent reason or in conjunction with other 'red flags,' engages in transactions involving certain types of securities, such as penny stocks."

rejected in 2002 by the Treasury Department when it promulgated Section 1023.320. The Treasury Department stated that "[a] regulator's review of the adequacy of a broker- dealer's anti-money laundering compliance program is not a substitute for, although it could be relevant to, an inquiry into the failure of a broker-dealer to report a particular suspicious transaction." FinCEN Section 1023.320 Notice, 67 Fed. Reg. at 44,053.

Alpine argues as well that the "sizeable LPS transaction-plus red flag" test proposed by the SEC for deposits of LPS fails to establish the reasonable suspicion that exists in criminal law pursuant to the Fourth Amendment.[47] According to Alpine, that standard imposes on the SEC the duty to point to "specific and articulable" facts in Alpine's possession that would have given it a basis to believe there was a reasonable possibility that an entity or individual was involved "in a *definable* criminal activity or

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[47] In support of this argument, Alpine points to 28 C.F.R. part 23. These regulations are the Department of Justice's "policy standards" that are "applicable to all criminal intelligence systems operating through support under the Omnibus Crime Control and Safe Streets Act of 1968." 28 C.F.R. § 23.3. 28 C.F.R. § 23.20 allows collection of "criminal intelligence information" about individuals "only if there is reasonable suspicion that the individual is involved in criminal conduct or activity and the information is relevant to that criminal conduct or activity." 28 C.F.R. § 23.20(a). Reasonable suspicion "is established when information exists which establishes sufficient facts to give a trained law enforcement or criminal investigative agency officer, investigator, or employee a basis to believe that there is a reasonable possibility that an individual or organization is involved in a definable criminal activity or enterprise." 28 C.F.R. § 23.20(c). Alpine's citation to 28 C.F.R. part 23 is inapposite.

enterprise." (Emphasis supplied by Alpine.) Furthermore, it asserts that it would not be permissible under the reasonable suspicion standard for Alpine to rely on knowledge that the entity or person had engaged in wrongdoing in the past, had a claim pending against it, or had settled a claim.

Alpine does not explain why a Fourth Amendment concept should apply to the SAR reporting framework. Applying the standard used to determine the legality of a temporary, warrantless investigative detention of a person—particularly as Alpine defines the standard[48]—would make little sense. Broker-dealers operate in a highly regulated industry, and both FinCEN and the SEC have broad mandates regarding broker-dealer reporting regimes for securities transactions. The SAR reporting system was designed to allow law enforcement to monitor activity before any determination of unlawfulness is made.

By design, the SAR regime does not depend on or require a broker-dealer to make any finding of wrongdoing before it files a SAR. Section 1023.320 makes this clear: filing is required whenever a broker-dealer "has reason to suspect" that the transaction involves criminal activity. When FinCEN promulgated Section 1023.320, it considered and rejected the view that it would be "overly burdensome to require a broker-dealer to report transactions that could not definitively be linked to wrongdoing."

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[48] Because it is irrelevant, this Opinion need not define the contours of the reasonable suspicion standard under the Fourth Amendment.

FinCEN Section 1023.320 Notice, 67 Fed. Reg. at 44,051. Congress, when it enacted the legislation that authorized Section 1023.320, "sought to increase the reporting of transactions that *potentially* involved money laundering." March Opinion, 308 F. Supp. 3d at 791 (emphasis supplied) (citing the Patriot Act, *sec.* 302, 115 Stat. at 296-97). Section 1023.320, accordingly, "target[s] all *possible* types of illegal activity."[49] *Id.* (emphasis supplied).

As significantly, while Part II of the SAR Form provides boxes to check to identify the "Type of suspicious activity," these are broad categories such as "Market manipulation" or simply "Securities fraud." 2002 SAR Form at 1. The Form instructions also permit a filer to check "[m]ore than one box" and to check a box entitled "Other" with an explanation in the narrative. 2002 SAR Form at 1-2. The Form cannot be read to impose on the filer the duty to select "a definable criminal activity" when filing the SAR, or relieve a broker-dealer of the duty to file unless it can define the criminal activity in which the subject may be engaged.

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[49] This standard is somewhat analogous to the standard that governs whistleblower suits under 18 U.S.C. § 1514A, a provision of the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley"). A whistleblower is entitled to protection under Sarbanes-Oxley if, *inter alia*, an employee in his or her position would have reasonably believed that the conduct complained of violated federal law. *See Nielsen v. AECOM Tech. Corp.*, 762 F.3d 214, 221 (2d Cir. 2014). A whistleblower's complaint need not relate "definitively and specifically" to any one statute covered by Sarbanes-Oxley. *See id.* at 220-21.

Similarly, Alpine's argument that a broker-dealer may not consider the litigation history of its customer or the issuer, or their affiliates, is flatly contradicted by the SAR Form, which requires disclosure of "related litigation." *See* 2002 SAR Form at 3, 2012 SAR Instructions at 112. The SEC's proposed test—which begins with the large deposit of LPS and adds other red flags—is faithful to the language and purpose of Section 1023.320.

B. Red Flags Omitted From SAR Narratives

As noted, the SEC contends that the SAR narratives in 1,593 SARs were legally deficient because they omitted information from the Alpine support files for the SARs that the law requires to be included in the narratives. The SEC also contends that, with respect to these six red flags, their existence is another reason that a broker-dealer would have had reason to suspect that the transaction involved use of the broker-dealer to facilitate criminal activity, which triggered its duty to file a SAR.

In each instance, the SEC's identified red flags have been derived from the SAR Form and its instructions, as well as FinCEN and other guidance interpreting Section 1023.320. They take into account the unique characteristics of the LPS markets such as the difficulty in obtaining objective information about issuers, the risk of abuse by undisclosed insiders, and the opportunity for market manipulation schemes.

Alpine argues that, although it was required to scrutinize these red flags, it had to do so in the context of all of the facts and circumstances surrounding the

transaction and consider as well information that Alpine refers to as "green flags." Even if Alpine was required to file a SAR, Alpine's view is that the red flag that triggered a duty to investigate and report did not necessarily need to be disclosed in the SAR's narrative.

There are several problems with this approach. First, with the very limited exceptions described below, Alpine has not pointed to any evidence that it omitted reference to a red flag in any particular SAR's narrative because its examination of other information in that SAR's support file led it to conclude that the red flag was, after all, not indicative of suspicious trading activity. Second, Alpine's omission of a red flag from the discussion in the narrative is also at odds with FinCEN's view, as expressed on the SAR Form itself, that a SAR filer should provide in the narrative a "clear, complete and chronological description … of the activity, including what is unusual, irregular or suspicious about the transaction(s)." 2002 SAR Form at 3. The SAR Form adds that a filer should "[i]ndicate whether any information has been excluded from this report; if so, state reasons." *Id.* Finally, this contention is undermined by an examination of those SARs that Alpine did file that are in the record, that is, those the SEC submitted with its partial summary judgment motion and those Alpine has submitted in opposition to this motion. Alpine repeatedly used template narratives that failed to include any details, positive or negative, about the transactions. While a fulsome SAR narrative could present a question of fact as to whether the narrative was deficient, except in rare instances Alpine has not shown that its SAR

narratives contained sufficient information to create a question of fact. Each of the six red flags is now discussed in turn.

1. Related Litigation

The SEC contends that 675 SARs omit a description of "related" litigation from the SARs' narratives. The 2002 SAR Form directs a filer to "indicate whether there is any related litigation, and if so, specify the name of the litigation and the court where the action is pending" in the narrative portion of a SAR. 2002 SAR Form at 3. Materially similar instructions are included in the 2012 SAR Instructions. *See* 2012 SAR Instructions at 112.

Webster's dictionary defines "related" as "having relationship" or "connected by reason of an established or discoverable relation." The relevant definition of relation is "an aspect or quality … that can be predicated only of two or more things taken together," or a "connection." The SEC is thus entitled to summary judgment to the extent it shows that there is no question of fact as to the (1) presence of information about the litigation in the SAR support file, and (2) a connection between the litigation and the reported transaction. That connection is established where the litigation at issue concerns either the issuer of the securities in the transaction or the customer engaged in the transaction.

In connection with the partial summary judgment motion, the SEC proved that three SARs were deficient as a matter of law because Alpine failed to include information in the SAR narrative about

related litigation. The omitted information, which was present in Alpine's support files for the SARs, indicated that the SEC had sued one customer and its CEO for fraud in connection with asset valuations and improper allocations of expenses, that another customer had pleaded guilty to conspiracy related to counterfeiting, and that yet another customer had a history of being investigated by the SEC for misrepresentations. *See id.*

In Table 2, the SEC identifies the pages from the Alpine support files that describe the related litigation which the SEC contends should have been disclosed in the SAR, but was not. Alpine does not contend that the pages listed in the table do not include descriptions of litigation or that the SARs actually did include the information. It does argue for most of the 675 SARs, however, that it had no duty to include the missing information in the SAR narratives for one or more of the following reasons.

First, Alpine appears to argue that civil litigation with a private party is never "related" litigation, and need never be disclosed. To the extent it is relying on the March Opinion for that proposition, that reliance is mistaken.[50] While civil litigation with a private party may be unrelated to the

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[50] Although the March Opinion used the phrase "criminal or regulatory history" (which described the omitted information from the three exemplar SARs) and the phrase "related litigation" somewhat interchangeably, the March Opinion did not purport to change the scope of the reporting obligation established by the SAR Form and FinCEN guidance. The duty to report is not confined to criminal or regulatory litigation.

securities transaction, where it is "related" it must be disclosed.

Alpine next contends that summary judgment cannot be granted to the SEC because Alpine was diligent about obtaining information about its customers and others. According to testimony given by the AML Officer who began to work at Alpine in 2012, Alpine only disclosed litigation in its SARs where Alpine concluded that it was "actually … relevant to the activity" reported in the SAR. In doing so, Alpine considered "the proximity" of "the infraction" to the transaction being reported.

As explained above, a broker-dealer must have a reasonably effective AML compliance program and also file SARs on all suspicious transactions. This action involves the latter duty, and Alpine's efforts in 2012 and beyond to improve its AML compliance program cannot save it from liability under Section 1023.320 and Rule 17a-8 where it did not file required SARs. And, as previously explained, when proving a violation of Rule 17a-8, the SEC has no burden to prove that a broker-dealer acted with scienter. Section 1023.320 imposes an objective test: A SAR must be filed when the broker-dealer has "reason to suspect" that the transaction requires a filing. 31 C.F.R. § 1023.320(a)(2). Finally, Alpine has provided no testimony regarding its analysis and decision-making process that led it to omit from any individual SAR the information about related litigation that appears in any particular SAR's support file. Nor has it pointed to any recorded analysis in a support file that reflects the decision that the information about the litigation need not be

included. Its conclusory assertions would not raise a question of fact even if its subjective intent were relevant.

Finally, Alpine complains that the SEC has not described separately for each of these 675 SARs why the omitted information needed to be disclosed. But, that exercise was conducted in connection with the briefing of the partial summary judgment motion so that the parties would have an early understanding of the legal standards that would be applied to the SEC claims regarding the many SARs at issue in this lawsuit. To the extent that Alpine has raised a question of fact now as to whether the omitted information identified by the SEC in Table 2 for any particular SAR was in fact "related" litigation or did not for some other reason need to be disclosed, then those assertions are addressed next. Alpine has raised specific factual disputes regarding the omissions from each of the SARs filed by three customers and from ten other individual SARs.

a. Three Customers

Alpine contends that the SEC's motion should be denied as to 499 SARs that Alpine filed for transactions conducted by Customers A, D, and E. The assertions will be addressed in order of the customers for which Alpine filed the largest number of SARs.

Customer E is a capital management firm and 372 SARs in Table 2 relate to Customer E alone. The Alpine support files indicate that on October 25, 2010 the SEC sued Customer E, its former manager, and

its CEO for (a) overvaluing Customer E's largest holdings, (b) making material misrepresentations to investors, and (c) misusing investor funds.

This is related litigation. The SEC has shown it is entitled to summary judgment with respect to its claim that Alpine was required to file SARs for every large deposit of LPS made by Customer E and that the Customer E SARs Alpine did file were deficient if they failed to disclose the ongoing SEC litigation against Customer E for securities law violations.

Alpine contends, however, that it was entitled to omit mention of the SEC lawsuit from its SARs because Alpine's office files included a request by its affiliated introducing broker, SCA, that Alpine make an exception to its float limit policy despite the ongoing litigation that the SEC had filed against Customer E.[51] SCA principally argued in its request that Customer E no longer managed money for outside investors and that the SEC did not seek to limit the activities of Customer E pending the outcome of the litigation. Alpine argues that the documents it received from SCA, and the fact that the SEC litigation was not yet resolved, create a question of fact as to whether Alpine acted reasonably in not disclosing the existence of the SEC action in the Customer E SARs. They do not. The duty to report related litigation extends not just to litigation that has been resolved, but also to ongoing litigation. The 2002 SAR Form directs a filer to indicate "*any* related

[51] While Alpine relies on the SCA request in opposing this summary judgment motion, that request was not found in the support files for these SARs.

litigation" and to name the court "where the action is *pending*." 2002 SAR Form at 3 (emphasis supplied). A materially similar instruction appears in the 2012 SAR Instructions. *See* 2012 SAR Instructions at 112.[52] Under the objective standard that applies to the SEC claims in this action, Alpine had an obligation to disclose the pending SEC action as related litigation, and no reasonable jury could conclude otherwise.

The next customer at issue is Customer A. Alpine argues that SEC litigation against an affiliate of Customer A did not need to be disclosed. While Alpine makes arguments as to each of the ninety-three SARs Alpine filed for Customer A that are listed in Table 2, its argument ultimately has significance for only eight of the SARs.[53]

Alpine failed to disclose the following in SARs it filed for Customer A. In November of 2013, the SEC and an entity affiliated with Customer A settled an

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[52] Tellingly, Alpine's expert does not opine that the pending SEC lawsuit against Customer E did not constitute "related" litigation.

[53] There are ninety-three SARs for Customer A listed in Table 2. Alpine argues that, as a general matter, it had no duty to disclose the existence of litigation brought by private parties, and for that reason had no duty to supplement the narrative sections for forty-eight of the ninety-three SARs. As discussed above, litigation with private parties may be related litigation and Alpine has not presented evidence to raise a question of fact that that litigation was not related litigation. For the remaining forty-five SARs, Alpine makes the specific objection addressed above. For thirty-seven of those forty-five SARs, however, Table 2 refers to pages in the SAR supporting files that describe at least one additional related legal action not disclosed in the SARs. Accordingly, Alpine's objection has significance for only eight of the ninety-three SARs for Customer A.

action that charged the affiliate with selling unregistered securities in improper reliance on the Rule 504 exemption.[54] The president of Customer A was also the president of the affiliate. As a matter of law, this is related litigation and Alpine had a duty to file SARs to report Customer A's large deposits of LPS and to disclose its affiliate's litigation with the SEC in those SARs.

Alpine does not contend that the SEC action against the affiliate was not "related" litigation. Instead, it relies again on a memorandum sent to it by its affiliated introducing broker, SCA, which requested an exception to Alpine's float limit policy in connection with Customer A, to excuse the nondisclosure. The memorandum argued that the issues concerning Rule 504 are "subtle" and that Customer A itself no longer invested in such transactions. This memorandum, which was not in the support files for the SARs but in Alpine's office files, is not sufficient to create a question of material fact as to whether the SEC action against Customer

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[54] Rule 504 refers to 17 C.F.R. § 230.504. This regulation exempts certain public offerings of securities of up to $5 million in a 12-month period from registration under the Securities Act of 1933, 15 U.S.C. § 77a, *et seq*. *See* 17 C.F.R. § 230.504. The SEC, however, "retain[s] authority under the antifraud provisions of the federal securities laws to pursue enforcement action against issuers and other persons involved in [Rule 504] offerings." SEC, Exemptions to Facilitate Intrastate and Regional Securities Offerings, 81 Fed. Reg. 83,494, 83,530 (Nov. 21, 2016). In one significant revision to Rule 504 in 1999, for instance, the SEC noted a rise in fraudulent schemes "involv[ing] the securities of microcap companies" issued under Rule 504. SEC, Revision of Rule 504 of Regulation D, The "Seed Capital" Exemption, 64 Fed. Reg. 11,090, 11,091 (Mar. 8, 1999).

A's affiliate, which was also controlled by Customer A's own president, was related to the transaction being reported and had to be disclosed. Summary judgment is accordingly granted as to Customer A's SARs listed in Table 2.

The third customer for which Alpine attempts to raise a question of fact is Customer D, as to whom Alpine filed thirty-four SARs included in Table 2. Alpine's SAR support files included information that Customer D's president and others had engaged in a mortgage fraud scheme in 2010. Alpine has submitted a 2011 press report which describes the scheme as follows: Customer D's president convinced unsophisticated buyers to purchase property at inflated prices, falsified loan documents, and fraudulently secured loans that all ended in default, costing the government millions of dollars. The president of Customer D owned the entity engaged in the mortgage fraud scheme, and along with his co-defendants was required to pay damages and penalties to the government.

Alpine contends that there are questions of fact as to whether it had to include information about the settlement in the SARs because Customer D's president had committed the fraud in connection with another entity that he owned, and the settlement had been reached in 2011, while the SARs were filed between three and four years later.[55] These arguments do not raise a question of material fact

[55] While Alpine indicates that the settlement was reached in 2010, the press report on which it relies indicates the settlement was reached at the end of 2011.

about the duty to include the omitted information in the SARs. The settlement was not so distant in time that the highly pertinent information about a fraudulent scheme in which Customer D's president participated had become irrelevant when these transactions occurred.

b. Ten SARs

Finally, Alpine argues that it had no duty to include certain litigation information in the narrative section of ten of the SARs listed on Table 2. These are SARs 515, 612, 701, 703, 748, 859, 904, 1222, 1970, and 1971.[56] The SEC has not responded to the specific arguments that Alpine has made regarding these ten SARs except to say that private litigation and civil litigation can be related litigation. But, both the SEC and Alpine have discussed the general principles that underlie Alpine's arguments regarding several of these SARs. For the following reasons, summary judgment is granted to the SEC as to SARs 701, 1970, and 1971, and denied as to the remaining SARs to the extent the SEC relies on the omission of related litigation listed in Table 2.

Table 2 identifies the omission from SAR 701 as the failure to include information about third-party litigation. The support files for SAR 701 reveal that a director of the issuer had been sued for securities fraud. Alpine argues that it has no duty to disclose this information because the litigation is neither a

[56] These are the item numbers assigned to the SARs in Tables 1 through 7. Except where otherwise indicated, this Opinion uses item numbers to identify SARs and not the SAR numbers provided in Table 10.

regulatory nor criminal action. As noted above, it is wrong. Nothing in the 2002 SAR Form or the 2012 SAR Instructions limits the disclosure of related litigation to regulatory actions filed by the SEC or criminal actions filed by a prosecutor's office. So long as there is a connection between the litigation and the reported transaction, there is a duty to disclose the litigation. No reasonable jury could find that a pending lawsuit for securities fraud against an issuer's director was not connected to the deposit of a large quantity of that issuer's LPS.

The support files for SARs 1970 and 1971 each state that Alpine's customer is the subject of an ongoing SEC Action, and that the CEO and CFO of the issuer have been "listed in civil suit alleging securities fraud for misrepresentation." The narrative for SAR 1970 reports the SEC action against the customer but omits mention of the civil suit against the CEO and the CFO of the issuer. The narrative for SAR 1971 reports an SEC "investigation" of the customer and again omits mention of the securities fraud action against the CEO and CFO of the issuer. The securities fraud action against two officers of the issuer was litigation related to the large deposit of the issuer's LPS, and as a matter of law Alpine had a duty to disclose it in these SARs' narratives.

Table 2 identifies the omission from SARs 515 and 703 as the failure to identify an ongoing SEC action for accounting violations against an officer of the issuer who is identified in Table 2 as a person with

the middle initial W.[57] The first and last names of the individual are not unusual. This description of the officer comes directly from material contained in the Alpine support files. At least two other entries in those same support files, however, indicate that the officer's name bears the middle initial H., not W. Since there is a question of fact as to whether Alpine's support files misidentified the issuer's officer, summary judgment is denied.[58]

SAR 748 was filed in 2015 and reports that Alpine's customer had been named in an SEC complaint and charged with fraud. It omits, however, the fact that the CEO of the issuer had been charged with a kickback scheme in 2001, which is fourteen years earlier. Given the passage of time, a question of fact exists as to whether the 2001 litigation was sufficiently related to the 2014 transaction to require Alpine to include it in the SAR.

Table 2 indicates that SAR 859 did not disclose information about a broker. According to SAR 859's support file, an "unrelated" broker was "in litigation for investing client's money" in the issuer without disclosing risks associated with LPS. Without more information about how the litigation relates to the

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[57] This same problem appears to arise with respect to SAR 612, but the version of Table 2 submitted to the Court does not include the complete notice of deficiency. Therefore, summary judgment is denied as to SAR 612.

[58] In opposition to the motion for summary judgment, Alpine has offered search results appearing in other SARs' support files which appear to indicate that the SEC action was brought against the person with the middle initial W.

transaction reported in the SAR, summary judgment is denied.

Lastly, Table 2 indicates that SARs 904 and 1222, which reported transactions that occurred in 2011 and 2012, omitted information from their support files regarding the CEO of the issuer—the same individual in both SARs. That CEO had disgorged almost $75,000 in settlement of a 1994 SEC action for violating Section 57(a)(1) of the Investment Company Act of 1940 through sales than occurred in 1988.[59] Given the passage of time between the events described in the support files and the transactions in the SARs, summary judgment is denied.

c. Summary

The SEC is entitled to summary judgment as to 668 SARs in Table A-2. As to those SARs, the SEC has shown both that Alpine was required to file those SARs, and that the filed SARs were deficient due to the omission of information contained in the Alpine support files that is identified in Table 2. Alpine has identified a question of material fact as to the following seven SARs, as to which the SEC's motion is denied: SARs 515, 612, 703, 748, 859, 904, and 1222.

2. Shell Companies or Derogatory History of Stock

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[59] Section 57(a)(1) of the Investment Company Act of 1940, 15 U.S.C. § 80a-56(a)(1), prohibits the sale of certain securities to a business development company by persons closely affiliated with the business development company.

The SEC claims that 241 SARs listed in Table 3 were deficient for failing to disclose derogatory information regarding the history of a stock, including that the issuer was a shell company or formerly a shell company. Other types of derogatory information include such things as the issuer's frequent name changes and trading suspensions.

The SAR Form requires a filer to provide "a clear, complete and chronological description" of the suspicious activity, "including what is unusual, irregular or suspicious about the transaction(s)." 2002 SAR Form at 3. FinCEN has identified the "inability to obtain … information necessary to identify originators or beneficiaries of wire transfers" as an example of suspicious activity that should be disclosed in a SAR. FinCEN Shell Company Guidance at 3-5. FinCEN guidance also explains that a company being a "suspected shell entit[y]" is one of several "common patterns of suspicious activity." SAR Narrative Guidance at 5. Although "most shell companies are formed by individuals and businesses for legitimate purposes," FinCEN counsels that "a SAR narrative should use the term 'shell' as appropriate." FinCEN Shell Company Guidance at 5. For these reasons, the March Opinion concluded that "[a]ny complete description [in a SAR narrative] of the facts responsive to the Five Essential Elements" should include "the presence of a shell company" in a transaction. 308 F. Supp. 3d at 802.

In its preliminary motion for summary judgment, the SEC identified three SARs as exemplars of this type of deficiency. One SAR omitted that the issuer of the deposited stock was a shell

company. Another omitted that the issuer had been a shell company within the last year.[60] A final omitted information that the issuer was not current in its SEC filings, that no company website was found for the issuer, and that the over-the-counter market's website for the issuer marked its stock with a stop sign. *Id.* All of the omitted information was found in the Alpine support files for those SARs. *Id.*

In opposition to this portion of the SEC's motion, Alpine has submitted its own table, which lists information in the support file for SARs which, Alpine contends, rebuts the SEC's claim that it had a duty to include the omitted derogatory information identified by the SEC in Table 3. Alpine's table and its arguments in opposition to this portion of the SEC's motion fall into three broad categories.

Alpine first contends that the March Opinion did not hold that Alpine had a duty to disclose in its SARs that the *issuer*, as opposed to the customer, was a shell. Alpine is wrong. Indeed, in each of the three instances described in the March Opinion, Alpine's SARs were deficient because Alpine failed to disclose derogatory information about the issuer. *Id.* The SEC now seeks to apply that ruling to transactions in which over $5,000 worth of LPS were deposited with Alpine. The SEC has carried its burden to show both that Alpine was required to file SARs for such transactions in which there was derogatory

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[60] The SAR's support file included a handwritten notation "within last year" in response to the question "Is the issuer, or was it ever, a shell company?" on its "Deposited Securities Checklist."

information about the customer or issuer, and that the filed SARs were deficient for failing to disclose that either is a shell company.[61] As already discussed, use of shell companies is a hallmark of certain market manipulation schemes. Alpine was required to disclose large deposits of LPS issued by shells.

Alpine next argues that the SEC has failed to carry its burden of showing that Alpine must always disclose that an issuer was once a shell corporation.[62] Alpine is correct. In support of this motion, the SEC has not offered any argument or expert testimony addressed to the significance of an issuer's former status as a shell company, or attempted to explain for how long or in what circumstances such former shell status remains relevant to the SAR reporting regime.[63] Therefore, summary judgment is granted as to the SARs in Table 3 where the issuer was a shell company when the transaction occurred or had been

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[61] Alpine appears to argue as well that it did not need to disclose that an issuer was a shell when the support file confirmed that the issuer had filed Form 10-Qs or 10-Ks. Those filings did not relieve Alpine of the duty in transactions of the nature at issue here to disclose that the issuer is a shell.

[62] Alpine calculates that the SEC has identified 103 SARs as deficient for failing to disclose that the issuer was once a shell company.

[63] While the preliminary summary judgment motion included as an exemplar a SAR in which Alpine omitted to disclose that the issuer had been a shell company within the year preceding the transaction, the SEC has given no indication that the many SARs which it lists as deficient for their failure to disclose that the issuer was a "former" shell or "possibly former" shell were similarly cabined in time.

a shell company within one year preceding the transaction.

The third and final category of omitted negative information concerning issuers that Alpine contests includes frequent name changes by an issuer, trading being suspended on an issuer's security, the issuer having a "caveat emptor" designation, the issuer having sold unregistered shares, and the issuer having been delisted. Table 3 apparently includes 113 SARs in which derogatory information of this kind was omitted. These types of derogatory information may indicate that the issuer is engaging in unlawful distributions of securities or is attempting to evade requirements of the securities laws. Neither Alpine nor its expert suggest otherwise.[64] Accordingly, Alpine had a duty to file SARs for the deposits of over $5,000 worth of LPS for such issuers, and to include the derogatory information in the 113 SARs identified by the SEC in Table 3.

Instead of disputing the significance of this derogatory information, Alpine opposes summary judgment on these 113 SARs by arguing that the support files included information showing that the

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[64] Alpine does complain that the SEC has highlighted instances of "frequent name changes" by an issuer without referring to any law, regulations, or guidance about the relevance of name changes to securities law violations. The SEC has relied on this Court's description of the relevant law in the March Opinion, and that description is sufficient to encompass this type of derogatory information, which would have given Alpine "reason to suspect" that the transaction involved use of the broker-dealer to facilitate criminal activity. 308 F. Supp. 3d at 801-02.

issuers were "current" in their SEC filings of Forms 10-K and 10-Q and had freely tradable securities under SEC Rule 144.[65] This additional information does not create a question of fact as to whether Alpine was required to file these SARs and include the derogatory information identified by the SEC in these SARs' narratives. An issuer's compliance with Rule 144 or its SEC reporting duties did not relieve Alpine of the duty to comply with its SAR reporting obligations.

3. Stock Promotion

The SEC claims that the narratives in the fifty-five SARs listed in Table 4 were deficient for failing to include information that there was a history of stock promotion in connection with the LPS being deposited with Alpine. The unreported stock promotion activity occurred between one week and eighteen months before the SAR was filed. The fifty-five SARs reported deposits ranging from 500,000 to 800 million shares of LPS. The SEC has shown that Alpine was required to file those SARs that reported a substantial deposit of LPS where the stock promotion occurred within six months of the deposit and to include information about the stock promotion activity in the SAR narrative. Summary judgment is therefore granted on forty-one of the fifty-five SARs.

The SAR Form's instructions explain that the SAR narrative must "[p]rovide a clear, complete and

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[65] Rule 144, 17 C.F.R. § 230.144, provides a safe harbor for certain sales of restricted securities. *See generally SEC v. Kern*, 425 F.3d 143, 148 (2d Cir. 2005). Rule 144 is an interpretation of Section 4(a)(1) of the Securities Act of 1933. *See id.*

chronological description … of the activity, including what is unusual, irregular or suspicious about the transaction(s)." 2002 SAR Form at 3. According to FinCEN, a common scenario of suspicious trading activity is a substantial deposit of a low-priced and thinly traded security, followed by the systematic sale of that LPS shortly after the deposit. *SAR Activity Review*, Issue 15, at 24; March Opinion, 308 F. Supp. 3d at 792. The systematic sale of shares is typically accompanied by systematic promotion of the stock. Indeed, promotion of an issuer's stock is a classic indicator that a low-priced stock's price is being manipulated as part of a pump-and-dump scheme. *See* March Opinion, 308 F. Supp. 3d at 803 (citing *Fezzani v. Bear, Stearns & Co.*, 716 F.3d 18, 21 (2d Cir. 2013)). In administrative proceedings, the SEC has found an entity's AML program inadequate where it did not file SARs for transactions where an issuer was "the subject of promotional campaigns at the time of the customer's trading." *In re Albert Fried & Co.*, SEC Release No. 77971, 2016 WL 3072175, at *5 (June 1, 2016).

In its preliminary summary judgment motion, the SEC identified three Alpine SARs that described sizable deposits of LPS, but included only a barebones narrative in the SARs. The SARs failed to disclose information regarding stock promotion contained in the Alpine SAR support files that had occurred between two weeks to two months before the reported transaction, including information found in Google search results, screenshots of websites, and news articles. March Opinion, 308 F. Supp. 3d at 803. Alpine acknowledged in connection with that motion practice that evidence of stock promotion activity is

relevant if connected to a pump-and-dump scheme. *Id.*

In opposition to this current motion, Alpine does not dispute that it had a duty to include in its SAR narratives information in its possession about stock promotion activities when it was reporting a sizeable deposit of a LPS. It argues, however, that it was only required to disclose stock promotion activities when the stock promotion was "ongoing."[66]

Neither the SEC nor Alpine has directly addressed when a history of stock promotion is stale for SAR reporting purposes. The one month cut-off which Alpine proposes in opposition to this motion is clearly too short a period. Pump-and-dump schemes can last months or even years, and promotion campaigns can occur in several cycles over that period. *See, e.g.*, *Absolute Activist Value Master Fund Ltd. v. Ficeto*, 677 F.3d 60, 63-64 (2d Cir. 2012)

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[66] Alpine also objects to the March Opinion's reliance on the SEC's 2016 decision in *In re Albert Fried & Co.*, SEC Release No. 77971, 2016 WL 3072175, at *5 (June 1, 2016), for the proposition that stock promotion can constitute suspicious activity. It argues that the *Fried* decision was issued after the events at issue here. Alpine's objection is not well founded. Stock promotion has been recognized as a hallmark of pump-and-dump schemes involving LPS since at least the 1990s. *See, e.g.*, SEC Charges 41 People in 13 Actions Involving More than $25 Million in Microcap Fraud, SEC News Release 98-92, 1998 WL 779347 (Sept. 24, 1998) (manipulation of stock price of microcap companies). The dissemination of false information to promote a stock has been a component of securities fraud for much longer, of course. *See, e.g.*, *Berko v. SEC*, 316 F.2d 137, 139 (2d Cir. 1963) (Marshall, J.) (describing distribution through mails of "deceptive and misleading" "brochures" to promote securities).

(describing "cycles of fraudulent trading of securities" over "approximately three years" with different phases including stock promotion, misrepresentations to investors, and fraudulent transactions through Cayman Island hedge funds and investment manager); *SEC v. Cavanagh*, 445 F.3d 105, 108-09 (2d Cir. 2006) (promotional campaign beginning in December 1997, with manipulated trading extending to March 1998); *United States v. Salmonese*, 352 F.3d 608, 612-13 (2d Cir. 2003) (pump-and-dump schemes involving, *inter alia*, bribing brokers to sell securities at inflated prices over seven month period). Alpine's search results indicating promotional activity within at least the six months preceding the deposit could focus law enforcement attention on ongoing schemes and allow law enforcement to connect the recent promotional activity with stock manipulation.

In light of the legal authority cited above, the SEC will be granted summary judgment for those SARs, which account for roughly forty-one of the fifty-five, in which the SAR support files had evidence of stock promotion activity occurring within six months of the large-scale deposit of the LPS with Alpine. While a fact finder must determine the outer limit, stock promotion activity that occurs within six months of these deposits constituted, as a matter of law, a red flag requiring disclosure in the SAR.

Despite arguing that it had no duty to report stock promotion activity unless it had occurred within one month of the deposit reported in its SARs, Alpine did not disclose that near contemporaneous activity in

over a dozen of its SARs.[67] It asserts that it used a second screening test to do so. It contends that it chose to omit mention of the stock promotion so long as it uncovered "no connection" between that activity and the customer who deposited the shares. As an example, Alpine's support file for SAR 9—a SAR that reported a deposit of LPS worth $9,497—indicates that a generically named LLC (the "Promoter") had been compensated for a promotion of the issuer's stock by another generically named entity, and that the Promoter's website had been registered by yet another generically named LLC. The support file also indicates that, because Alpine did not have evidence that the Promoter was "connected" to Alpine's customer, it determined that it need not refer to the stock promotion activity in the SAR.

As discussed above, a broker-dealer has a duty to file a SAR when it has reason to suspect that the transaction may involve use of the broker-dealer to violate the law, and to include in the SAR a "clear" and "complete" description of activity that is "unusual, irregular, or suspicious" about the transaction. *See* 2002 SAR Form at 3. Alpine's lack of information about the ownership and control of generically named LLCs involved in promotion of the LPS did not relieve it of the duty to report the stock promotion activity. After all, the SAR Form instructions also require filers to "[i]ndicate whether

[67] An examination of the pages in the support files cited by the parties indicates that Alpine filed about fifteen SARs without reporting that stock promotion activities had occurred within roughly a month of the sizable deposit of LPS with Alpine.

any information has been excluded from this report; if so, state reasons." *Id.*

4. Unverified Issuers

The SEC claims that thirty-six SARs listed in Table 5 were deficient for failing to disclose in their narratives the problems with the issuers described in the Alpine support files for the SARs, even though millions of shares of that issuer's LPS were deposited with Alpine.[68] The SEC contends that Alpine improperly omitted that the issuer had an expired business license, a nonfunctioning website, or no current SEC filings. Summary judgment is granted to the SEC on all thirty-six SARs.

The SAR Form requires filers to provide a "clear" and "complete" description of what is "unusual, irregular or suspicious about the transaction(s)." 2002 SAR Form at 3. FinCEN has explained that suspicious activity "common[ly]" includes transactions involving "parties and businesses that do not meet the standards of routinely initiated due diligence and anti-money laundering oversight programs (e.g., unregistered/unlicensed businesses)." SAR Narrative Guidance at 5.

The SEC's preliminary motion for summary judgment identified three SARs in which Alpine reported deposits of millions of shares of LPS. The SARs failed to disclose that Alpine was either unable

[68] Table 5 lists forty-two SARs. In its reply papers, the SEC withdrew its motion as to six of these SARs. The SEC continues to assert, however, that those six SARs are deficient for reasons other than those listed in Table 5.

to locate a company website for the issuer or that the issuer's corporate registration was in default. The March Opinion concluded that a SAR reporting a deposit of an enormous quantity of LPS without also disclosing such problems with the issuer was deficient as a matter of law. 308 F. Supp. 3d at 804.

Alpine contends that it only needed to report that the issuer's website was not functioning, that its business registration was in default, or that it had no current SEC filings if Alpine could not confirm that the issuer was an "active and functioning" entity. Alpine asserts that it was able to confirm that each of the issuers for these SARs was an "active" company based on an examination of the issuer's SEC filings, documentation that its stock was "free trading" for the purposes of SEC Rule 144, or indications that the issuer was not a shell company.

Each SAR must, of course, be examined individually. When that is done, Alpine's defense evaporates. But, there is a larger point that is relevant here. If a SAR must be filed for a transaction, then the information casting doubt on the legitimacy of the issuer must be included in the SAR. And that is so even when other information also exists that suggests the issuer may be a functioning business. The duty of the filer is not to weigh and balance the competing inferences to be drawn from the negative and the more reassuring pieces of information, but to disclose "as much information as is known to" the filer about the subjects of the filing. *SAR Activity Review*, Issue 22, at 39. The SAR Form advises filers to "[i]ndicate whether any information has been

excluded from this report; if so, state reasons." 2002 SAR Form at 3.

The SEC has carried its burden of showing that Alpine had a duty to file each of these thirty-six SARs. Each of these SARs reflects the deposit of between 110,000 and 164 million shares of LPS,[69] and Alpine's files contained information casting doubt on the legitimacy of or the regularity in the business of the issuer of the deposited LPS.

In filing the required SARs, Alpine had a duty to disclose that the issuer's business license was expired, its website was nonfunctioning, or there were irregularities in its SEC filings. Such information is part of the "Five Essential Elements" of a transaction. The fact that the issuer's shares may be tradable under a different SEC regulation does not change the scope of the SAR reporting obligation.

5. Low Trading Volume

The SEC claims that 700 SARs[70] listed on Table 6 were deficient for failing to disclose the comparatively low trading volume in the LPS that these SARs reported were being deposited with

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[69] The mean number of shares was 28,892,783, and the median was 14,200,000. The value of the transactions ranged from $5,710 to $112,200, with a mean of $18,285 and a median of $10,764.

[70] Table 6 lists 707 SARs. In its reply papers, the SEC withdrew seven of these SARs from its motion, reducing the total from 707 to 700. Because six of these seven SARs are also alleged to be deficient in other ways, the number of SARs subject to this part of the SEC's motion for summary judgment is reduced from 1,594 to 1,593.

Alpine. In the 700 SARs, the number of deposited shares was substantial, often amounting to millions of shares, and it represented at least three times the average daily trading volume of the stock, measured over the three months preceding the deposit. For the following reasons, summary judgment is granted to the SEC as to the SARs where the ratio between the shares deposited in a single transaction was at least twenty times the average daily trading volume over the three-month period prior to the deposit.[71]

The SAR Form requires a filer to "[d]escribe conduct that raised suspicion," and to do so with a "clear, complete and chronological" description of the suspicious activity. 2002 SAR Form at 3. One type of transaction that may be suspicious is a "[s]ubstantial deposit, transfer or journal of very low-priced and thinly traded securities." *SAR Activity Review*, Issue 15, at 24. The March Opinion held that when such a deposit has been made the SAR must report each of three elements: "the substantial deposit of a security, the low price of the security, and the low trading volume in the security." 308 F. Supp. 3d at 804. The March Opinion granted summary judgment to the SEC as to three SARs where the reported deposits were for share amounts that ranged from fifty to 600 times the average daily trading volume of the LPS.[72] *Id.* at 805.

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[71] Twenty times reflects roughly one month's trading volume, calculated on the basis of four weeks of five trading days per week.

[72] The March Opinion listed the figures for the deposits and average trading volume correctly in the summary of the SARs, but incorrectly referred later in that Opinion to one ratio as ten.

In response to the instant motion, Alpine first argues that low trading volume is not a red flag because it is a "hallmark of microcap stocks." That argument misses the point. Low trading volume need not be disclosed in a vacuum. But, if there is a deposit of LPS that is substantial in comparison with the average volume of trading in that LPS, then there is a duty to report both the size of the deposit and the relatively thin trading volume.

Alpine next questions why comparatively thin trading volume must be reported when the differential between the volume of shares in a transaction and the average trading volume is only 300%, as opposed to some other figure. The SEC has not provided expert testimony or any other basis to conclude that a ratio of three is the appropriate demarcation for reporting the transaction and the trading volume in LPS. The SEC relied on three exemplars in connection with the preliminary summary judgment motion, and their ratios were fifty, 100 and 600.[73] Those ratios are extraordinary and do not provide a basis to conclude that the SAR reporting requirements are only triggered by such extreme ratios. But, given the undeveloped evidentiary record, a trial will be necessary to determine the precise ratio that triggers the duty to include the average trading volume. It is safe to find, however, that a failure to report the average trading

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Compare 308 F. Supp. 3d at 786-87 (correctly stating figures) *with id.* at 805 (giving incorrect deposit and ratio for SAR M).

[73] Alpine did not argue in opposition to that motion, and does not argue now that those ratios, or even the ratio of ten reported in the March Opinion, were too low to trigger SAR reporting requirements.

volume when the substantial deposit exceeds a month's worth of the average daily trading in the LPS will always be a violation of the SAR reporting obligations. Therefore, the summary judgment motion is granted to the extent that Alpine failed to include in its SAR narratives the trading volume for a substantial deposit of LPS when the deposit was greater than twenty times the average daily trading volume, measured over the three months prior to the deposit. When such a ratio is present, Alpine had a duty to file the SAR and to report the average trading volume as well.

Finally, Alpine argues that it had no obligation to add information about trading volumes to its SARs because such information is already available to law enforcement. This argument is meritless. Other categories of information, such as related litigation, are publicly available but must be included in the SAR. The purpose of a SAR is to provide law enforcement with timely and "complete" access to information that permits them to understand what is suspicious about the reported activity. 2002 SAR Form at 3. Nothing in the SAR reporting regime provides the exception which Alpine suggests for information available to the government through other means. *See* March Opinion, 308 F. Supp. 3d at 789-94.

6. Foreign Involvement

The SEC moves for summary judgment as to 289 SARs where a foreign entity or individual was involved in the transaction reported by Alpine in its SAR, but Alpine did not disclose that foreign

involvement in the SAR narrative. For the following reasons, the SEC is granted summary judgment as to these 289 SARs.

The 2002 SAR Form directs filers to "[i]ndicate" in the SAR narrative "whether U.S. or foreign currency and/or U.S. or foreign negotiable instrument(s) were involved. If foreign, provide the amount, name of currency, and country of origin," and to include in the narrative "foreign bank(s) account number(s)," and "passport(s), visa(s), and/or identification card(s)" belonging to an involved "foreign national." 2002 SAR Form at 3. The 2012 SAR Instructions direct filers to include essentially the same information in the SAR narrative. *See* 2012 SAR Instructions at 111-12. Both sets of instructions also state that filers should "identify" in the narrative "the country, sources, and destinations of funds" if funds have been "transfer[red] to or from a foreign country." In addition, SAR guidance issued by FinCEN directs a filer to "[s]pecify" in the SAR narrative

> if the suspected activity or transaction(s) involve a foreign jurisdiction. If so, provide the name of the foreign jurisdiction, financial institution, address and any account numbers involved in, or affiliated with the suspected activity or transaction(s).

SAR Narrative Guidance at 4.

In its preliminary motion for summary judgment, the SEC submitted three SARs in which

Alpine reported enormous deposits of LPS. One SAR listed a foreign address for the customer but omitted from the SAR narrative information about foreign correspondent accounts that were involved in the underlying transaction. Another SAR provided a foreign address for the customer in the subject information boxes of the SAR, but omitted in the narrative any reference to the foreign nature of the transaction, much less that the country in question has been identified as a jurisdiction of primary concern for money laundering activity. The last SAR did not disclose any foreign involvement with the transaction, omitting that the deposited shares were purchased by the customer through a transfer of funds to a foreign bank account. The March Opinion held that, regardless of whether a SAR filer has disclosed a foreign entity in other parts of the SAR, "a broker-dealer is required by law to include information constituting the Five Essential Elements and foreign connections to the transaction in the narrative section of any SAR that the filer is required to file." 308 F. Supp. 3d at 806.

Alpine was required to file each of the 289 SARs. Each reported a substantial deposit of LPS and had a foreign connection to the transaction. As summarized above, the SAR Form instructions required Alpine to include information in the SAR narrative that described the foreign connections to the transaction.

Alpine first argues that it need only include information in the SAR narrative about foreign involvement in the transaction where the foreign jurisdiction is a "high-risk" jurisdiction. This

argument may be swiftly rejected. Neither the SAR Form instructions nor FinCEN guidance creates a distinction between high-risk and other foreign jurisdictions.[74]

Alpine next argues that its inclusion of foreign addresses in other parts of the SAR form obviated the need to disclose a foreign connection to the transaction in the SAR narrative. Not so. *See id.* The SAR Forms contain specific instructions that apply to the narrative portion of a SAR. Those instructions specifically require the disclosure in the narrative of foreign connections to the transaction being reported.

Finally, Alpine argues that in three of the 289 SARs it adequately disclosed the foreign connection to the transaction in the SAR narratives because it disclosed that its customer had acquired the shares from a resident of Belize. In none of these SARs did Alpine indicate in the narrative, however, that Alpine's customer was itself a foreign entity. The narratives are accordingly deficient, and the SEC is entitled to summary judgment as to these three SARs as well.

7. Five Essential Elements

Finally, the SEC seeks summary judgment as to approximately 295 SARs listed on Table 1 filed by

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[74] If the involvement of a high-risk jurisdiction in a transaction were the only factor triggering the filing of a SAR, then of course, the involvement of that kind of foreign jurisdiction may be of importance. Such a distinction between foreign jurisdictions is not relevant here, however, given the unusual nature of the transactions, i.e., the substantial deposit of LPS.

Alpine in connection with large deposits of LPS made by three customers.[75] It is undisputed that these SARs omitted the basic customer information in the SAR narrative which FinCEN refers to as the Five Essential Elements. Alpine contends that it had no duty to file these SARs, and therefore, the deficiencies in their filed SARs do not violate the SAR regulations.

Each of these SARs reported a large deposit of a LPS. In addition, each relates to a deposit by one of three Alpine customers: Customers A, C and E. As described above, Customers A and E had significant "related" litigation. For Customer A, there was a settled SEC action with an affiliate of Customer A, whose president was also the president of Customer A. For Customer E, there was an ongoing SEC action against Customer E, its CEO, and its former manager.

The SEC has carried its burden of showing that a reasonable broker-dealer would have had reason to suspect that substantial deposits of LPS by Customers A and E involved use of the broker- dealer to facilitate criminal activity. The SEC has shown, therefore, that Alpine had a duty to file the SARs it

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[75] The SEC asserts that 1,105 SARs listed on Table 1 were deficient because they omitted from their narratives the information known as the Five Essential Elements. Because Alpine does not dispute that assertion, all that is in dispute in this part of the motion is whether Alpine had a legal duty to file each of these SARs. For all but approximately 295 of these 1,105 SARs, the SEC relies on the identified the six red flags discussed above to support its argument that it has shown that the SARs were required filings. Accordingly, this section of this Opinion is necessary for at least the remaining 295 SARs.

filed for these transactions by Customers A and E and that it is entitled to summary judgment as to those SARs.

The SEC further contends that the twenty-two SARs filed for large LPS deposits by Customer C were required filings.[76] If the SAR narrative reported that Alpine was filing the SAR "because of the potentially suspicious nature of depositing large volumes of shares involving a low-priced security" there cannot be a credible argument that the Alpine SARs were "voluntary" SARs. If there are SARs, however, that do not include such notice, or its equivalent, then there is a question of fact as to whether Alpine was required to file these SARs.

In arguing that Alpine was required to file these SARs, the SEC does not appear to be relying on any evidence that either Customer C or the issuer of the LPS reported in the SAR was the subject of "related" litigation or derogatory information. Instead, it appears to rely on the fact that Customer C frequently conducted other transactions in which the issuers of the securities had had significant regulatory or criminal actions brought against them. The SEC has not explained why Customer C's transactions in LPS issued by questionable issuers would give a broker-dealer a reason to suspect that all of Customer C's LPS transactions involved questionable issuers. There is accordingly a question

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[76] 149 of the 1,593 SARs that are listed in Table 10 were filed by Alpine for transactions conducted by Customer C. The SEC has alleged a separate narrative deficiency as to all but twenty- two, however.

of fact as to whether Alpine was required to file SARs for Customer C where the only information missing from the narrative is the Five Essential Elements and the narrative does not include a statement that Alpine considered the transaction suspicious.

V. Deposit-and-Liquidation Patterns

In its second category of claims, the SEC seeks summary judgment as to 3,568 sales of LPS listed in Table 11. In each instance, Alpine filed a SAR reflecting a large deposit of a LPS but did not file a SAR reflecting the sales that followed those deposits. The SEC contends that, when a SAR is filed on a large deposit of LPS, a broker-dealer is obligated to file new or continuing SARs when the shares are sold within a short period of time. In Table 11, the SEC has identified 1,242 deposit-and-liquidation groups, which together include 3,568 individual sales of shares, each sale being worth $5,000 or more. For the following reasons, the SEC's motion is granted as to 1,218 groups where Alpine failed to file a SAR reporting a customer's sales after the customer had made a substantial deposit of LPS in a thinly traded market.[77]

Section 1023.320 requires reporting of a suspicious transaction "if the transaction or *a pattern of transactions* of which the transaction is a part

[77] Alpine challenges as arbitrary the inclusion of twenty-four groups (groups 639, 860, 861, 862, 885, 886, 887, 888, 890, 904, 906, 959, 962, 996, 1195, 1196, 1203, 1228, 1229, 1230, 1231, 1232, 1241, and 1242) among the 1,242 groups identified by the SEC. The SEC has not responded to that challenge. Therefore, this Opinion is addressed to the remaining 1,218 groups.

meets certain criteria." 31 C.F.R. § 1023.320(a)(2) (emphasis supplied). FinCEN guidance explains that the "[s]ubstantial deposit … of very low- priced and thinly traded securities," followed by the "[s]ystematic sale of those low-priced securities shortly after being deposited" is suspicious and subject to reporting under Section 1023.320. *SAR Activity Review*, Issue 15, at 24 (footnote omitted). Such patterns, in FinCEN's view, present "red flags for the sale of unregistered securities, and possibly even fraud and market manipulation." *Id.*

In its preliminary summary judgment motion, the SEC provided evidence that one customer deposited over twelve million shares of a LPS in February 2012, and then sold in twelve transactions ten million shares in February and March of 2012. That pattern repeated itself in April through August 2012, with the customer depositing a very large number of shares in the same LPS and within weeks selling a large proportion of those shares in a series of smaller transactions. Alpine had timely filed SARs of the deposits, but not for the sales. The SEC also provided evidence that two other customers had each deposited a large number of physical certificates of a LPS, and then sold an almost equal amount of shares in that LPS in a series of small transactions over the weeks immediately following the deposits. The March Opinion granted summary judgment to the SEC, conditioned on it establishing that its charts of the trading activity were accurate. *See* 308 F. Supp. 3d at 808-09.

Alpine first argues that not every liquidation following a deposit is suspicious, and therefore it was

not required to file SARs for liquidations just because it filed a SAR to report the deposit. If the liquidations followed the deposit of a large number of shares of LPS, then the precedent recited above forecloses this argument. This pattern of transactions is a hallmark of market manipulation.

Alpine next argues that the filing of SARs for every such liquidation would flood regulators with thousands of additional SARs and be unworkable. But, as the SEC points out, multiple transactions may be reported in a single SAR. In fact, Alpine reported multiple transactions in some of the SARs it submitted in its opposition to this motion. Both the 2002 SAR Form and 2012 SAR Instructions allow filers to describe multiple transactions; they direct filers to describe suspicious activities and transactions.[78] Moreover, SAR reports are generally only due to be filed within thirty days of the transaction. *See* 31 C.F.R. § 1023.320(b)(3). Thus, all the sales occurring within a thirty-day period could be reported together with the deposit. The SEC estimates that roughly 40% of the unreported liquidations occurred before Alpine had even filed a SAR for the deposit.[79] Many of the liquidations

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[78] *See, e.g.*, 2002 SAR Form at 3 (describing the narrative as the "[e]xplanation/description of suspicious activity(ies)" and directing filers to disclose "what is unusual, irregular or suspicious about the transaction(s)"); 2012 SAR Instructions at111-12 (directing filers to, *inter alia*, "[d]escribe the conduct or transaction(s) that caused suspicion" in the SAR narrative).

[79] Alpine does not present an alternative calculation for this phenomenon, but complains that the SEC has failed to explain, among other things, whether the 40% figure includes sales that occurred the same day as the deposit and includes as well every

reflected in Table 11 are packed tightly together, occurring several times in a single day, multiple times in a single week, and many times in a single month.

Alpine next argues that its AML review of the deposits confirmed that the shares were freely tradable, and that was all that the law required. It explains that, since its business model treated each deposit as if the deposited LPS would be sold shortly thereafter, its careful review of the need to file a SAR for the deposit fulfilled all of its obligations under the law.[80] Filing a SAR for a suspicious deposit of LPS did not relieve Alpine of the duty to file SARs for other suspicious transactions, including potentially the sale of the deposited shares. Moreover, as already explained, the duty to maintain an AML program does not excuse compliance with the separate duty to file SARs for suspicious transactions. *See* Section 1023.320 Notice, 67 Fed. Reg. at 44,053. Alpine violated Section 1023.320 if it failed to file a SAR when it was required to do so.

Alpine next contends that, if this portion of the SEC's motion is granted, that should result in a finding that Alpine violated its SAR reporting obligations at most 1,242 times, and not 3,568 times.[81]

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sale tethered to a deposit so long as at least one of those sales occurred before the SAR was filed.

[80] Alpine adds that it filed SARs as well for certain patterns of market manipulation, such as matched trading and wash trading. These SARs are not the subject of the SEC's lawsuit against Alpine.

[81] Alpine also argues that the correct number should fall to a few hundred because all deposits and sales by a customer in a single issuer's securities should be grouped together, instead of

The former figure reflects the number of deposit and sale groups the SEC has identified in Table 11; the latter represents the number of sales. For the following reasons, this Opinion assumes that the maximum number of violations is, as adjusted to remove certain groups to which Alpine has made a specific objection, 1,218.

The duty that Alpine is alleged to have violated is the duty to file a SAR. Those missing SARs would have reported patterns of suspicious trading. The text of Section 1023.320 states that "[a] transaction requires reporting" if it is conducted through a broker-dealer and the broker dealer "has reason to suspect that the transaction (or a pattern of transactions of which the transaction is a part)" involves illegal activity. 31 C.F.R. § 1023.320(a)(2). The Section 1023.320 Notice explains FinCEN's view that

> [t]he language in the rule requiring the reporting of patterns of transactions is not intended to impose an additional reporting burden on broker-dealers. Rather, it is intended to recognize the fact that a transaction may not always appear suspicious standing alone.

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creating a separate group for the liquidations that followed deposits closely in time. That argument is rejected. The pattern at issue that was suspicious and that Alpine failed to report was the liquidation in multiple transactions of a large deposit that had been reported in a SAR filed by Alpine, not all sales of a particular LPS.

Section 1023.320 Notice, 67 Fed. Reg. at 44,051. Alpine therefore had a duty to file SARs that reported each sale that was part of a suspicious pattern.[82] The SEC has carried its burden of showing that Alpine violated the law by failing to file such SARs. Because Alpine failed to file any such SARs, as opposed to filing incomplete SARs that reported some but not all of the sales in a pattern, resolution of how many SARs Alpine should have filed would require a fact intensive examination of the patterns of sales that followed deposits. At a minimum, the SEC has shown that Alpine failed to file at least 1,218 SARs to report the suspicious pattern of sales following the large deposits of LPS.

Finally, Alpine objects to eleven groups identified in Table 11 on the ground that the sales occurred too long after the deposit to require Alpine to file a SAR.[83] The SEC's motion is granted as to seven of these eleven groups; Alpine has raised a question of fact as to groups 1207, 1225, 1236, and 1237. A description of two of the seven groups is sufficient to explain why Alpine has failed to raise a material question of fact as to its duty to file a SAR to report the pattern of trading in the seven groups.

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[82] Alpine also had the option of filing continuing SARs, an option provided on the SAR forms that the parties do not discuss. *See SAR Activity Review*, Issue 1, at 27; FinCEN, *SAR Activity Review: Trends, Tips & Issues*, Issue 21 (May 2012), at 53, https://www.fincen.gov/sites/default/files/shared/sar_tti_ 21.pdf; 2012 SAR Form at 1.

[83] These are groups 4, 1207, 1220, 1221, 1224, 1225, 1226, 1227, 1233, 1236, and 1237.

Group 1221 begins with a deposit of 8- million[84] shares of a LPS, with a value of $1- million, in early February 2012. In early March 2012, Alpine filed a SAR reporting the deposit. Six weeks after the deposit and two weeks after the SAR was filed, Alpine's customer began to sell shares.[85] All told, the customer sold 7- million shares, or 87% of the initial deposit, in six transactions over fifteen days.

Group 1233 consists of one deposit of 1- million shares valued at $1- million in mid-November 2012. Alpine filed a SAR the next day. Nineteen days later, the customer began the selloff.[86] Over a three-month

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[84] "8- million" indicates an amount between 80 million and 89,999,999. These less than precise numbers are used in this Opinion, as they were in the March Opinion, to accommodate the secrecy of the SAR reporting regime.

[85] On four consecutive days, Alpine's customer made sales in amounts of 1- million shares, 7 million shares, 5 million shares, and 1- million shares. Five days later, the customer sold 1- million shares. One week later, the customer sold 1- million shares.

[86] The first sale was of 5- thousand shares. One month after the first sale, the customer sold 2— thousand shares. The next day, the customer sold 2— thousand shares and 9- thousand shares in two separate transactions. The next week, the customer made five sales in three days, of 2— thousand shares, 9- thousand shares, 3— thousand shares, 1— thousand shares, and 1— thousand shares. The following week, the customer made four sales in two days, of 5— thousand shares, 2— thousand shares, 4— thousand shares, and 2— thousand shares. Two weeks thereafter, the customer made three sales in three days, in amounts of 5— thousand, 5— thousand, and 1 million shares. The following week, the customer made two sales of 6 thousand and 1 million shares. Three weeks later, the customer made one sale of 1 million shares.

period, Alpine's customer sold 7 million shares in nineteen separate transactions, 78% of the deposit.

VI. Late-Filed SARs

The SEC moves for summary judgment as to 251 SARs identified in Table 12 that were filed long after the transactions they reported, often more than six months later. Section 1023.320 directs that "a SAR shall be filed no later than 30 calendar days after the date of the initial detection by the reporting broker-dealer of facts that may constitute a basis for filing a SAR under this section." 31 C.F.R. § 1023.320(b)(3). Summary judgment is denied due to the SEC's failure to show that Alpine had an obligation to file these SARs. *See* March Opinion, 308 F. Supp. 3d at 800.

To establish Alpine's duty to file each of these SARs, the SEC relies on the fact that Alpine filed the SARs to comply with an order from FINRA to do so. This is not sufficient to establish for purposes of this lawsuit that Alpine had an independent duty to file the SARs.[87]

VII. Failure to Maintain Support Files

[87] Thirty-four of the SARs reported transactions worth less than $5,000. Generally, there is no duty to file SARs for transactions in an amount less than $5,000. *See* 31 C.F.R. § 1023.320(a)(2) (requiring reporting if a transaction "involves or aggregates funds or other assets of at least $5,000").

The final portion of the SEC's motion is directed to Alpine's failure to maintain support files for 496 of its SARs. The motion is granted.

A broker-dealer is required to maintain support files for its SARs. Section 1023.320(d) provides as follows:

> Retention of Records. *A broker-dealer shall maintain* a copy of any SAR filed and *the original or business record equivalent of any supporting documentation for a period of five years from the date of filing the SAR*. Supporting documentation shall be identified as such and maintained by the broker-dealer, and shall be deemed to have been filed with the SAR. *A broker-dealer shall make all supporting documentation available to* FinCEN or any Federal, State, or local law enforcement agency, or *any Federal regulatory authority that examines the broker-dealer* for compliance with the Bank Secrecy Act, upon request; or to any SRO that examines the broker-dealer for compliance with the requirements of this section, upon the request of the Securities and Exchange Commission.

31 C.F.R. § 1023.320(d) (emphasis supplied). Section 1023.320

> is cast in mandatory terms and requires two acts: the maintenance of records for five years after a SAR is filed, and the production of such records at the request of a federal regulatory agency such as the SEC. A failure to either maintain or produce a SAR's supporting documents … violates Section 1023.320 and, as a result, violates Rule 17a-8 as well.

March Opinion, 308 F. Supp. 3d at 811-12 (citation omitted).

The SEC's evidence of Alpine's failure to maintain files rests on the efforts the SEC made in 2015 and 2016 to collect the Alpine support files for SARs under investigation. In 2016, Alpine produced some of the files that the SEC subpoenaed, but no support files for the 496 SARs that are the subject of this motion. The SEC provided Alpine with a list of SARs for which it could not locate any support files in the Alpine document productions. Alpine's counsel represented during a November 2016 telephone call that some support documents "simply don't exist." Despite additional requests during the discovery period for Alpine to supplement its document production and produce the missing files, Alpine has not produced the missing files.

In opposition to this motion, Alpine has not provided evidence that it ever provided the SEC with the support files for these 496 SARs. Instead, Alpine makes two meritless arguments. First, it seeks a Rule 56(d) deposition of the SEC affiant who has described the search through the Alpine document

productions in a fruitless effort to locate the missing support files. If Alpine maintained the missing files, then all it needs to do to defeat this prong of the SEC's motion is to produce them now,[88] or identify by Bates number the copies it produced to the SEC in 2016. It has done neither. A deposition of the person who conducted the SEC search is unnecessary.[89] *See Paddington Partners v. Bouchard*, 34 F.3d 1132, 1138 (2d Cir. 1994).

Second, Alpine argues that a failure to maintain files is not a violation of Rule 17a-8, which is the Rule upon which the SEC's action is predicated. Alpine argues that the SEC's recourse, if any, was to sue for a violation of 17 C.F.R. § 240.17a-4(j) ("Rule 17a-4").[90] Rule 17a-8, however, requires a broker-dealer to comply with "the reporting, recordkeeping and record retention requirements of chapter X of title 31 of the Code of Federal

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[88] If Alpine produced the missing files now, then the SEC may have a different application regarding the untimely production, but this portion of the summary judgment motion regarding the failure to maintain the files would likely have been mooted.

[89] The request for the deposition is also untimely. At the time the Court issued the March Opinion on the preliminary summary judgment motion, the Court gave Alpine an opportunity to request this very deposition after it had completed its review of the March Opinion. Following that review, Alpine made other discovery requests, but did not renew its earlier request to depose this affiant.

[90] Rule 17a-4(j) provides that broker-dealers must furnish promptly to a representative of the [SEC] legible, true, complete, and current copies of those records of the [broker-dealer] that are required to be preserved under this section, or any other records of the member, broker or dealer subject to examination under section 17(b) of the [Exchange] Act.

Regulations," the chapter containing Section 1023.320. 17 C.F.R. § 240.17a-8. Section 1023.320(d), which is quoted above, is titled "Retention of Records". 31 C.F.R. § 1023.320(d). Accordingly, the SEC has shown that Alpine violated the record-retention provision of Section 1023.320 by showing that Alpine was unable to "make [496 SAR support files] available to" the SEC in 2016. *Id.* This constitutes a violation of Rule 17a-8.

Conclusion

The SEC's July 13, 2018 motion for summary judgment is granted in part. The SEC has shown as a matter of law that Alpine violated Rule 17a-8 repeatedly by filing required SARs with deficient narratives, failing to file SARs for groups of suspicious liquidation transactions, and failing to maintain and produce SAR support files.

Dated: New York, New York
December 11, 2018

/s/ Denise Cote
DENISE COTE
United States District Judge

17 C.F.R. § 240.17a-4(j).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES & EXCHANGE COMMISSION,

Plaintiffs,

-v-

ALPINE SECURITIES CORPORATION,

Defendant.

17cv4179(DLC)

- **EXHIBIT 1**

FinCEN Form 101 Effective May 2004	Suspicious Activity Report by the Securities and Futures Industries Please type or print. Always complete entire report. Items marked with an asterisk * are considered critical. (See instructions.)	OMB No. 1506 - 0019
1 Check the box if this report corrects a prior report (See instructions)❑		
Part I Subject Information		

2 Check box	a ❑ if multiple subjects	box b ❑ subject information unavailable
*3 Individual's last name or entity's full name		
*4 First name		
5 Middle initial		
6 Also known as (AKA - individual), doing business as (DBA - entity)		
7 Occupation or type of business		
*8 Address		
*9 City	*10 State	*11 ZIP code |||||||
*12 Country code (If not U.S.) (See instructions)		
13 E-mail address (If available)		
*14 SSN/ITIN (individual), or EIN (entity) ||||||||		
*15 Account number(s) affected, if any. Indicate if closed. Acc't #_____ yes❑ Acc't #_____ yes❑ Acc't #_____ yes❑ Acc't #_____ yes❑		
16 Date of birth ____/____/_____ MM DD YYYY		

*17 Government issued identification (If available)
a ❑ Driver's license/state ID
b ❑ Passport
c ❑ Alien registration
d ❑ Corporate/Partnership Resolution
e ❑ Other _____
f ❑ ID number
|||||||||||||
g ❑ Issuing state or country (2 digit code)

18 Phone number – work
(|||)||||-||||

19 Phone number – home
(|||)||||-||||

20 Is individual/business associated/affiliated with the reporting institution? (See instructions)
a ❑ Yes b ❑ No

Part II Suspicious Activity Information

*21 Date or date range of suspicious activity
From ____/____/____/ To _____/____/____/
MM DD YYYY MM DD YYYY

*22 Total dollar amount involved in suspicious activity $|||||-||||.00

23 Instrument type (Check all that apply)
a ❑ Bonds/Notes
b ❑ Cash or equiv.
c ❑ Commercial paper
d ❑ Commodity futures contract l Warrants
e ❑ Money Market Mutual Fund
f ❑ Mutual Fund
g ❑ OTC Derivatives
h ❑ Other derivatives
i ❑ Commodity options

j ❑ Security futures products (Please identify) k ❑ Stocks n ❑ Other non-securities m ❑ Other securities o ❑ Foreign currency futures/options p ❑ Foreign currencies q ❑ Commodity type r ❑ Instrument description s ❑ Market where traded (Enter approprite three or four-letter code.) t ❑ Other (Explain in Part VI)
24 CUSIP® number ||||||||||||
25 CUSIP® number ||||||||||||
26 CUSIP® number ||||||||||||
27 CUSIP® number ||||||||||||
28 CUSIP® number ||||||||||||
29 CUSIP® number ||||||||||||
*30 Type of suspicious activity: a ❑ Bribery/gratuity b ❑ Check fraud c ❑ Computer intrusion d ❑ Credit/debit card fraud e ❑ Embezzlement/theft f ❑ Commodity futures/options fraud g ❑ Forgery n Securities fraud h ❑ Identity theft i ❑ Insider trading without economic purpose j ❑ Mail fraud

k	❑ Market manipulation
l	❑ Money laundering/Structuring
m	❑ Prearranged or other non-competitive trading
o	❑ Significant wire or other transactions
p	❑ Suspicious documents or ID presented
q	❑ Terrorist financing
r	❑ Wash or other fictitious trading
s	❑ Wire fraud
t	❑ Other (Describe in Part VI)

Part III	Law Enforcement or Regulatory Contact Information

31 If a law enforcement or regulatory authority has been contacted (excluding submission of a SAR) check the appropriate box.

a	❑ DEA
b	❑ U.S. Attorney (**32)
c	❑ IRS
d	❑ FBI
e	❑ ICE
f	❑ Secret Service
g	❑ CFTC
h	❑ SEC
i	❑ NASD
j	❑ NFA
k	❑ NYSE
l	❑ Other RFA
m	❑ Other RE-futures (CME, CBOT, NYMEX, NYBOT)
n	❑ Other state/local
o	❑ Other SRO-securites (PHLX, PCX, CBOE, AMEX, etc.)
p	❑ State securities regulator
q	❑ Foreign

r ❑ Other (Explain in Part VI)		
32 Other authority contacted (for Item 31 l through r) ** List U.S. Attorney office here.		
33 Name of individual contacted (for all of Item 31)		
34 Telephone number of individual contacted (Item 33) (| |)| | | |-| | | |		
35 Date contacted ____/___/_____/ MM DD YYYY		
Part IV Reporting Financial Institution Information		
*36 Name of financial institution or sole proprietorship		
*37 EIN / SSN / ITIN | | | | | | | | |		
*38 Address		
*39 City	*40 State |	*41 ZIP code | | | | |
42 Additional branch address locations handling account, activity or customer.		
43 Multiple locations (See instructions)		
44 City	45 State |	46 ZIP code | | | | |
47 Central Registration Depository number | | | | | | | | | | | | |		
48 SEC ID number		

| | | | | | |-| | | | | | |

50 Has this reporting individual/entity coordinated this report with another reporting individual/entity? Yes ❑(Provide details in Part VI) No❑

51 Type of institution or individual - Check box(es) for functions that apply to this report

a ❑ Agricultural trade option merchant
b ❑ Affiliate of bank holding company
c ❑ CPO
d ❑ CTA
e ❑ Direct participation program
f ❑ FCM o RE-futures
g ❑ Futures floor broker
h ❑ Futures floor trader
i ❑ IB-C
j ❑ IA
k ❑ Investment company - mutual fund
l ❑ Market maker
m ❑ Municipal securities dealer
n ❑ NFA w Specialist
p ❑ Other RFA
q ❑ Securities broker - clearing
r ❑ Securities broker - introducing
s ❑ Securities dealer
t ❑ Securities floor broker
u ❑ Securities options broker-dealer
v ❑ SRO-securities
x ❑ Subsidiary of bank
y ❑ U.S. Government broker-dealer
z ❑ U.S. Government interdealer broker
aa ❑ Other (Describe in Part VI)

Part V Contact For Assistance

*52 Last name of individual to be contacted regarding this report	
*53 First name	
*54 Middle initial	
*55 Title/Position	
*57 Date report prepared _____/____/____/ MM DD YYYY	
	Send completed reports to: Detroit Computing Center Attn: SAR-SF P.O. Box 33980 Detroit, MI 48232
Part VI	Suspicious Activity Information - Narrative *
Explanation/description of suspicious activity(ies). This section of the report is *critical. The care with which it is completed may determine whether or not the described activity and its possible criminal nature are clearly understood by investigators.* Provide a clear, complete and chronological description (not exceeding this page and the next page) of the activity, including what is unusual, irregular or suspicious about the transaction(s), using the checklist below as a guide, as you prepare your account. a. Describe conduct that raised suspicion. b. Explain whether the transaction(s) was completed or only attempted.	

c. Describe supporting documentation (e.g. transaction records, new account information, tape recordings, E-mail messages, correspondence, etc.) and retain such documentation in your file for five years.
d. Explain who benefited, financially or otherwise, from the transaction(s), how much, and how (if known).
e. Describe and retain any admission or explanation of the transaction(s) provided by the subject(s) or other persons. Indicate to whom and when it was given.
f. Describe and retain any evidence of cover-up or evidence of an attempt to deceive federal or state examiners, SRO, or others.
g. Indicate where the possible violation of law(s) took place (e.g., main office, branch, other).
h. Indicate whether the suspicious activity is an isolated incident or relates to another transaction.
i. Indicate whether there is any related litigation. If so, specify the name of the litigation and the court where the action is pending.
j. Recommend any further investigation that might assist law enforcement authorities.
k. Indicate whether any information has been excluded from this report; if so, state reasons.
l. Indicate whether U.S. or foreign currency and/or U.S. or foreign negotiable instrument(s) were involved. If foreign, provide the amount, name of currency, and country of origin.
m. Indicate "*Market where traded*" and "*Wire transfer identifier*" information when appropriate.

n. Indicate whether funds or assets were recovered and, if so, enter the dollar value of the recovery in whole dollars only.
o. Indicate any additional account number(s), and any foreign bank(s) account number(s) which may be involved.
p. Indicate for a foreign national any available information on subject's passport(s), visa(s), and/or identification card(s). Include date, country, city of issue, issuing authority, and nationality.
q. Describe any suspicious activities that involve transfer of funds to or from a foreign country, or transactions in a foreign currency. Identify the country, sources and destinations of funds.
r. Describe subject(s) position if employed by the financial institution.
s. Indicate whether securities, futures, or options were involved. If so, list the type, CUSIP° number or ISID° number, and amount.
t. Indicate the type of institution filing this report, if this is not clear from Part IV. For example, an IA that is managing partner of a limited partnership that is acting as a hedge fund that detects suspicious activity tied in part to its hedge fund activities should note that it is operating as a hedge fund.
u. Indicate, in instances when the subject or entity has a CRD or NFA number, what that number is.
v. *If correcting a prior report (box in Item 1 checked), complete the form in its entirety and note the corrected items here in Part VI*

Information already provided in earlier parts of this form need not necessarily be repeated if the meaning is clear. Supporting documentation should not be filed with this report. *Maintain the information for your files*.
Tips on SAR form preparation and filing are available in the SAR Activity Review at www.fincen.gov/pub_reports.html Enter explanation/description in the space below. Do not include legal disclaimers in this narrative.

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,

Plaintiff, 17cv4179(DLC)
OPINION & ORDER

-v-

ALPINE SECURITIES CORPORATION,

Defendant.

APPEARANCES

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DENISE COTE, District Judge:

This litigation addresses the duty of a broker-dealer to file suspicious activity reports ("SARs"). The Securities and Exchange Commission ("SEC") alleges that Alpine Securities Corporation ("Alpine") has violated 17 C.F.R. § 240.17a-8 ("Rule 17a-8"), promulgated under the Securities Exchange Act of 1934 (the "Exchange Act"), by filing fatally deficient SARs or by failing to file any SAR when it had a duty to do so. Rule 17a-8 requires compliance with Bank Secrecy Act ("BSA") regulations that, *inter alia*, govern the filing of SARs by broker-dealers.

Because the SEC alleges several thousand violations of Rule 17a-8, the Court invited the parties to move for partial summary judgment using exemplar SARs. The SEC has done so, submitting several SARs in each of four categories that it alleges reveal violations of Rule 17a-8. Alpine has submitted its own motion for summary judgment and for judgment on the pleadings, principally arguing that the SEC is without authority to enforce BSA regulations. For the reasons that follow, the SEC's motion is granted in part and Alpine's motion is denied.

Background

The following facts are taken from the parties' evidentiary submissions. In the sections of this Opinion addressing each party's summary judgment motion, inferences are drawn in favor of the nonmovant. Insofar as this Opinion addresses Alpine's motion for judgment on the pleadings, solely the operative pleadings are considered.

I. Alpine's Business

Alpine is a broker-dealer that primarily provides clearing services for microcap securities traded in the over-the-counter market.[1] As a clearing broker, Alpine's role is principally to prepare trade confirmations, receive and deliver customers' funds, maintain books and records, and maintain custody of customer funds and securities. An introducing broker, in contrast, is responsible for opening customer accounts, directly interacting with customers, and executing trades. An introducing broker transmits transaction information to a clearing broker, which then completes the transaction.

For all of the SARs submitted by the SEC in support of its motion for partial summary judgment, Alpine acted as the clearing broker. For a majority of the transactions at issue in this suit, and all but one of the transactions at issue in the SEC's motion, the introducing broker was Scottsdale Capital Advisors

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[1] The term "over-the-counter market" is used to describe "the trading of securities other than on a formal centralized exchange" such as the New York Stock Exchange. 4 Hazen, *Treatise on the Law of Securities Regulation* § 14:3 (2017).

("SCA"). SCA and Alpine are owned by the same individual.

Alpine has an anti-money laundering ("AML") program consisting of written standard procedures ("WSPs"). Alpine represents that it updates its WSPs to account for guidance provided by the Financial Crimes Enforcement Network ("FinCEN")[2] and other regulators; the parties have submitted excerpts from WSPs dated January 2012, April 2013, August 2014, and October 2015.

Alpine's WSPs relating to the filing of SARs incorporate regulatory language from 31 C.F.R. § 1023.320 ("Section 1023.320"), the principal regulation at issue in this case, which requires broker-dealers such as Alpine to file SARs in certain circumstances. The WSPs also incorporate relevant language from guidance documents published by FinCEN regarding "red flags" that a broker-dealer should investigate if they appear in a transaction subject to the SAR regulation. *See* Alpine Apr. 11, 2013 WSPs at 152. These include the following:

> The customer (or a person publicly associated with the customer) has a questionable background or is the subject of news reports indicating possible criminal, civil, or regulatory violations.
>
> …

[2] FinCEN is a division of the Department of the Treasury ("Treasury") with primary authority for enforcing the BSA

> The customer engages in suspicious activity involving the practice of depositing penny stocks, liquidates them, and wires proceeds. A request to liquidate shares may also represent engaging in an unregistered distribution of penny stocks which may also be a red flag.
>
> …
>
> The customer, for no apparent reason or in conjunction with other "red flags," engages in transactions involving certain types of securities, such as penny stocks …

Alpine Jan. 5, 2012 WSPs at 40-41.[3] This list is consistent across the WSPs. In addition, the 2014 WSPs give as an example of "transactions that may be indicative of money laundering" those involving "heavy trading in low-priced securities" and "unusually large deposits of funds or securities." Alpine Aug. 29, 2014 WSPs at 180.

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[3] Alpine contends, in response to several portions of the SEC's motion, that its customer was the introducing broker and not the individual or entity whose securities transaction is reported on Alpine's SARs. This contention is plainly meritless. Section 1023.320 uses the term "customer" to mean the party conducting the transaction that is reported. *See* 31 C.F.R. § 1023.320(a)(2)(ii). Further, Alpine's WSPs also use the term "customer" to refer to the individual or entity transacting securities through Alpine. *E.g.*, Alpine Jan. 5, 2012 WSPs at 40 (describing suspicious types of transactions in which a "customer" engages).

Alpine's AML Officer describes its AML procedures as follows. For each transaction cleared by Alpine, Alpine receives from the introducing broker a "due diligence packet" containing information about the customer and transaction. The due diligence packet is transmitted to an Alpine compliance analyst, who reviews the transaction based on "various predetermined areas of focus" set by Alpine's AML managers. In addition, Alpine created and maintained a "heightened supervision list," which Alpine claims to have created

> as an aid to Alpine employees conducting AML review, and to ensure Alpine's own enhanced scrutiny of transactions. The reasons for inclusion on the list vary and inclusion on the list, or reference to the list, did not constitute any finding by Alpine that there was anything criminally suspicious about the transaction itself. In filing SARs on this basis, and highlighting the list in the SAR narrative, Alpine was providing what it understood to be useful information to regulators, even though a SAR filing was not required.

Alpine contends that many of the SARs it filed "did not meet the requirements for when a SAR must be filed" under Section 1023.320, and were merely "voluntary SARs."

After an Alpine compliance analyst drafted a SAR, the draft SAR would be sent to Alpine's AML Officer, Chief Compliance Officer, and/or a legal

analyst for review. The review process could include "additional review of the due diligence packet … , additional research on Google of the parties involved, research of any stock promotions, and review of trading volume, including discussions with the trading desk if necessary."

The SEC's principal allegation in its complaint is that Alpine's AML program and WSPs "did not accurately represent what Alpine did in practice," and that in reality, Alpine's AML program failed to comply with Section 1023.320, and that Alpine thereby violated Rule 17a-8. The complaint divides this general allegation into four categories of failures. The SEC alleges that Alpine has (1) failed to include pertinent information in approximately 1,950 SARs, (2) failed to file additional or continuing SARs for certain suspicious patterns of transactions in approximately 1,900 instances, (3) filed at least 250 SARs after the 30-day period for filing had elapsed, and (4) failed to maintain supporting information for approximately 1,000 SARs as it is required to do for five years after filing.

II. The Exemplar SARs

The SEC moves for summary judgment on 36 SARs, on a number of different grounds. For the purposes of this motion, the SEC first contends that Alpine filed 14 SARs with deficient narratives. The SEC has labeled these SARs A through H, J through

N, and P. A brief summary of each of the 14 SARs follows.[4]

SAR A was filed April 24, 2012. The SAR A narrative states that the customer "is a client of [SCA], a firm for which Alpine Securities provides clearing services. On or around [date, this customer] deposited a large quantity (4-,—-,—- shares) of [issuer], a low-priced ($0.11/share) security. This transaction amounted to approximately $4,—-,—-.—." The SEC alleges that SAR A insufficiently conveys why the transaction was suspicious, is deficient because it fails to note the involvement of a shell company, and improperly fails to disclose that a foreign entity participated in the transaction; these last two pieces of information are contained in the SAR A support file.

SAR B was filed on April 28, 2012. The narrative portion of the SAR states that the customer

> is a client of [SCA], a firm for which Alpine Securities provides securities

[4] The SARs have been submitted under seal. Certain information in the SARs has been omitted from this Opinion to maintain confidentiality. Section 1023.320 prohibits broker-dealers and government entities from "disclos[ing] a SAR or any information that would reveal the existence of a SAR" in all but a few enumerated instances. 31 C.F.R. § 1023.320(e). Given that a major purpose of the BSA is to enable law enforcement to react quickly to evidence of money laundering, SARs are required to be kept confidential in part to prevent the subject of a SAR from learning that their transactions were regarded as suspicious. This Opinion redacts the exact numbers of shares and transaction values to balance confidentiality concerns with clarity regarding the rulings on the transactions at issue.

> clearing services. On or around [date, this customer] made a DWAC deposit representing a large quantity (5,—-,—- shares) of [issuer], a low-priced ($.0176/share) security into brokerage account [number]. The brokerage account is maintained through Alpine Securities. Alpine is also filing a SAR due to the heightened sensitivity surrounding this client. This proposed transaction is expected to amount to approximately $8-,—-.—. [This customer] acquired the shares as a partial settlement of $3,—-,—-.—owed to them by the issuer. Alpine is filing a SAR due to the heightened sensitivity surrounding the client.

No SAR B support file was submitted. The SEC alleges that the SAR B narrative is deficient because it does not disclose why Alpine thought the transaction was suspicious.

SAR C was filed July 6, 2011. The narrative portion states as follows: The customer

> is a client of [SCA], a firm for which Alpine Securities provides securities clearing services. Due to the activity within this account, it has been placed on a Heightened Supervisory list. It is policy of Alpine to file a SARs [sic] related to each deposit of securities into it's [sic] account. On or around [date, this customer] deposited a large quantity

> (5,—,—- shares) of [issuer], a low-priced ($0.019/share) security. This transaction amounted to approximately $1—,—-.—.

The SAR C support file contains information indicating that a shell company was involved with the transaction, as well as a foreign entity; the SEC alleges that the narrative was deficient because it failed to disclose that information or why Alpine found the transaction suspicious.

SAR D was filed on January 13, 2012. The narrative states in relevant part that

> [d]ue to the activity within this account, it has been placed on a Heightened Supervisory list. It is policy of Alpine to file a SARs [sic] related to each deposit of securities into accounts of this nature. On or around [date, this customer] deposited a large quantity (2,—-,—-) of [issuer], a low-priced ($.0062/share) security. This transaction amounted to approximately $1-,—-.—.

The SEC alleges that this SAR was deficient because it failed to include information contained in the SAR support file that the customer and its CEO were engaged in litigation with the SEC.

SAR E was filed on August 21, 2012. The narrative reads in relevant part that

> [o]n or about [date, this customer] deposited a large quantity (2-,—-,—-

> shares) of [issuer], a low-priced ($0.0096/share) security. This transaction amounted to approximately $2—,—-.—. Alpine Securities is filing a suspicious activity report because this deposit involves a large volume of shares of a low-priced security and also has a high estimated value.

The SAR E support file contains search results indicating that the customer had previously pleaded guilty to conspiracy relating to counterfeiting, and the SEC contends that SAR E was deficient because it failed to disclose that information.

SAR F was filed on May 5, 2014. The narrative states as follows:

> [Customer] is a client of [SCA], a firm for which Alpine Securities provides securities clearing services. On or around [date, this customer] deposited a physical stock certificate(s) representing a large quantity (1,—-,—- shares) of [issuer], a low-priced ($.0033/share) security into brokerage account [number]. The brokerage account is maintained through Alpine Securities. Alpine is filing this SAR because of the potentially suspicious nature of depositing large volumes of shares involving a low-priced security(ies). This proposed transaction is expected to amount to approximately $4-,—-.—… [This customer] purchased a convertible

> note for $1-,—.—pursuant to an [agreement] on [date]. [This customer] converted $1,—-.—dollars into 1- million shares. Alpine is also filing a SAR as, shortly thereafter, the shares are worth about 33 times their purchase price, which may be potentially suspicious.

The SAR F support file includes information indicating that the customer had a history of being investigated by the SEC for misrepresentations, and the SEC alleges that Alpine was required to include this information.

SAR G was filed on March 8, 2013. The narrative states

> [Customer] is a client of [SCA], a firm for which Alpine Securities provides securities clearing services. It is Alpine's policy to file a SAR for each security deposited into the account because of the heightened sensitivity around this particular account as this account historically makes deposits of large volumes of low-priced securities. For that reason this transaction may be suspicious in nature. On or around [date, this customer] deposited a physical stock certificate(s) representing a large quantity (6,—-,—- shares) of [issuer], a low-priced ($0.0062/share) security, into brokerage account [number]. The brokerage account is maintained through Alpine Securities. This

> transaction amounted to approximately $4-,—-.—.

The SAR G support file contains information indicating that no company website was found for the issuer, that the issuer was not current in its SEC filings, that the over-the-counter markets placed a stop signal on the issuer's stock, and that there was a history of stock promotion. The SEC alleges that this SAR is deficient because Alpine did not include this information.

SAR H was filed on August 26, 2013. The narrative states that the customer

> is a client of [SCA], a firm for which Alpine Securities provides securities clearing services. It is Alpine's policy to file a SAR for each security deposited into the account because of the heightened sensitivity around this particular account as this account historically makes deposits of large volumes of low-priced securities. For that reason this transaction may be suspicious in nature. On or around [date, the customer] deposited a physical stock certificate(s) representing a large quantity (1-,—-,—shares) of [issuer], a low-priced ($0.0006/share) security, into brokerage account [number]. The brokerage account is maintained through Alpine Securities. This transaction amounted to approximately $7,—-.—.

The SEC alleges that SAR H is deficient because it fails to disclose a history of stock promotion by the issuer and that a foreign entity was involved in the transaction, both pieces of information contained in the SAR H support file.

SAR J was filed on July 16, 2012. The SAR narrative states that the customer is a client of SCA, and that

> [d]ue to the activity within this account, it has been placed on a Heightened Supervisory list. It is policy of Alpine to file a SARs [sic] related to each deposit of securities into accounts of this nature. On or around [date, this customer] deposited a large quantity (6-,—-,—- shares) of [issuer], a low-priced ($.0002/share) security. This transaction amounted to approximately $1-,—-.—.

The SEC alleges that SAR J was deficient because the narrative does not disclose that the stock had been promoted, information contained in the SAR J support file.

SAR K was filed on May 6, 2013. The narrative states that the customer in question is a client of SCA, and that Alpine files

> a SAR for each security deposited into the account because of the heightened sensitivity around this particular account as this account historically makes deposits of large volumes of low-

> priced securities. For that reason this transaction may be suspicious in nature. On or around [date, this customer] deposited a physical stock certificate(s) representing a large quantity (1-,—-,—- shares) of [issuer], a low-priced ($0.001/share) security, into brokerage account [number]. The brokerage account is maintained through Alpine Securities. This transaction amounted to approximately $1-,—-.—.

The SEC alleges that SAR K is deficient because it does not report that the issuer's website is not currently functioning, information contained in the SAR K support file.

SAR L was filed on June 7, 2013. The narrative recites that the customer is a client of SCA, and that it is

> Alpine's policy to file a SAR for each security deposited into the account because of the heightened sensitivity around this particular account as this account historically makes deposits of large volumes of low-priced securities. For that reason this transaction may be suspicious in nature. On or around [date, the customer] deposited a physical stock certificate(s) representing a large quantity (2,—-,—- shares) of [issuer], a low-priced ($0.003/share) security, into brokerage account [number]. The brokerage account is maintained

> through Alpine Securities. This transaction amounted to approximately $8,—-.—.

The SEC alleges that SAR L is deficient because it does not report that the issuer's corporate registration was in default, information contained in the SAR L support file.

SAR M was filed on April 17, 2013. The SAR M narrative reports that the customer is client of SCA and that

> [i]t is Alpine's policy to file a SAR for each security deposited in to the account because of the heightened sensitivity around this particular account as this account historically makes deposits of large volumes of low-priced securities. For that reason this transaction may be suspicious in nature. On or around [date, this customer] deposited a physical stock certificate(s) representing a large quantity (5,—-,—- shares) of [issuer], a low-priced ($0.0159/share) security, into brokerage account [number]. The brokerage account is maintained through Alpine Securities. This transaction amounted to approximately $1-,—-.—. [This customer] acquired the shares from a promissory note dated [date] in the principal amount of $1-,—-.—issued to [the customer]. The note is specifically disclosed in 10Q filed [date] period ending [date]. [This customer]

> converted the entire note into 5,—-,—- shares pursuant to the notice of conversion dated [date].

The SEC alleges that because the SAR M narrative does not report that the average shares traded per day over the last three months for the security was 59,108, roughly one hundred times smaller than the single deposit reported in SAR M, SAR M is deficient.

SAR N was filed on June 6, 2013. The SAR narrative states that the customer is a client of SCA, and that on a given date, the customer

> deposited a physical stock certificate(s) representing a large quantity (6-,—-,—- shares) of [issuer], a low-priced ($0.0055/share) security into brokerage account [number]. The brokerage account is maintained through Alpine Securities. The entity is a foreign broker-dealer. Alpine is filing this SAR because of the potentially suspicious nature of depositing large volumes of shares involving a low-priced security(ies). This transaction amounted to approximately $3—,—-.—. [This customer] deposited the shares for the benefit of [the customer's] sub-account [name] who is a resident of Panama.

The SEC alleges that SAR N is deficient because it fails to report that the security at issue had a trading volume of around 100,000 shares per day, more than

600 times smaller than the single deposit reported in the SAR, information contained in the support file.

SAR P was filed on March 6, 2014. The SAR P narrative states that the customer is a client of SCA, and that on a given date the customer

> deposited a physical stock certificate(s) representing a large quantity (5—,—-shares) of [issuer], a low-priced ($.55/share) security into brokerage account [number]. The brokerage account is maintained through Alpine Securities. Alpine is filing this SAR because of the potentially suspicious nature of depositing large volumes of shares involving a low-priced security(ies). This proposed transaction is expected to amount to approximately $2—,—-.—. The shares stem from debt owed to [the customer] from the issuer. [This customer] converted a $2-,—-.—portion of the debt into the 5—,—-shares. Alpine is also filing a SAR as the shares represent a potential large return on the investment, which may be suspicious.

The SEC alleges that SAR P is deficient because it fails to report that the average trading volume is 10,971, roughly fifty times smaller than the deposit reported in the SAR, information found in the support file.

The SEC also moves for summary judgment on the ground that Alpine failed to file necessary SARs for three of its customers who engaged in patterns of deposit-and-liquidation transactions that are suspicious as a matter of law; the SEC refers to these customers as Customers A, B, and C. The SEC has submitted the SARs that Alpine did file as Customer A SARs 1 through 5, Customer B SARs 1 through 5, and Customer C SARs 1 and 2. Each of these SARs notes that the customer has deposited a large number of certificates of a penny stock. The SEC has also submitted charts that it alleges represent subsequent sales of shares in that same penny stock. The SEC alleges that the pattern of a large deposit of securities followed by successive sales of a large proportion of that deposit required Alpine to file SARs reporting those sales.

The SEC further moves for summary judgment on five SARs it alleges were filed late; these SARs are labeled Late SARs 1 through 5. Each of these five SARs was filed between 189 and 211 days after the underlying transaction.

Lastly, the SEC moves for summary judgment on five SARs for which it alleges Alpine has not maintained support files for five years, as it is required to do. These SARs are labeled Missing File SARs 1 through 5. The SEC has submitted the SARs and alleges that Alpine did not produce any support files for those SARs when requested to do so by the SEC in 2016.

Procedural History

The SEC filed this action on June 5, 2017. On August 3, Alpine moved to dismiss under Rules 12(b)(2) and 12(b)(3) for lack of personal jurisdiction and improper venue, or to transfer venue to the District of Utah under 28 U.S.C. § 1404(a). The August 3 motion to dismiss or to transfer was denied at a conference on September 15.

Alpine answered the complaint on September 29, 2017, and filed an amended answer on October 27. On November 13, the SEC filed a motion to strike affirmative defenses of estoppel, waiver, and unclean hands asserted in Alpine's amended answer. The November 13 motion to strike was granted January 12, 2018.

A Scheduling Order of September 15, 2017 set the discovery schedule, which is ongoing. Fact discovery was scheduled to conclude on March 30, 2018. Expert reports and disclosures of expert testimony were due to be served by April 20, and identification of rebuttal experts and disclosure of their expert testimony to be served by May 11. Any motion for summary judgment, or a joint pretrial order, is due July 13, 2018.[5]

As invited by the Court, the SEC moved for partial summary judgment on December 6, 2017. In

[5] On March 21, the parties jointly sought to extend this schedule by 21 days. The Court denied the motion on March 22 insofar as it sought to extend the July 13 date on which summary judgment motions or pretrial materials are due, but permitted the parties to extend the interim dates on consent.

connection with its motion, and pursuant to an Order of December 13, the SEC submitted 36 SARs under seal as examples of the four categories of Rule 17a-8 violations it asserts. The SEC's motion became fully submitted on February 9, 2018. Alpine moved for summary judgment and for judgment on the pleadings on January 19. Alpine's motion became fully submitted on February 26.

Discussion

The parties have cross-moved for summary judgment. "On a motion for summary judgment, the court must resolve all ambiguities and draw all permissible factual inferences in favor of the party against whom summary judgment is sought." *Dufort v. City of New York*, 874 F.3d 338, 347 (2d Cir. 2017) (citation omitted). "For the court to grant summary judgment, the movant must show that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Nick's Garage, Inc. v. Progressive Cas. Ins. Co.*, 875 F.3d 107, 113 (2d Cir. 2017) (citation omitted).

In assessing a motion for judgment on the pleadings under Rule 12(c), Fed. R. Civ. P., the court "accept[s] all factual allegations in the complaint as true and construe[s] them in the light most favorable to the non-moving party." *Latner v. Mt. Sinai Health Sys., Inc.*, 879 F.3d 52, 54 (2d Cir. 2018). This is the "same standard as that applicable to a motion under Rule 12(b)(6)." *Mantena v. Johnson*, 809 F.3d 721, 727 (2d Cir. 2015) (citation omitted).

An agency to which Congress has delegated authority to administer a statute is entitled to judicial deference to its views of the statute it administers. If an agency promulgates a regulation and complies with the notice-and-comment procedures defined in the Administrative Procedure Act ("APA"), 5 U.S.C. § 500, *et seq*., a court reviews the regulation under the two-part framework established in *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc*., 467 U.S. 837 (1984). Formal adjudications by an agency are also binding on a court if the agency view passes *Chevron* review. *See*, *e.g*., *ABF Freight Sys., Inc. v. NLRB*, 510 U.S. 317, 324 (1994). Giving an agency the power to regulate via adjudication as well as via rulemaking implies the power to govern conduct prospectively, via rules and retrospectively, in the form of adjudications. *See SEC v. Chenery Corp., 332 U.S.* 194, 201-02 (1947); *see also Bowen v. Georgetown Univ. Hosp*., 488 U.S. 204, 221 (1988) (Scalia, J., concurring) (defining adjudication as "that form of administrative action where retroactivity is not only permissible but standard").

"Step One of *Chevron* analysis requires the court to determine whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Lawrence + Memorial Hosp. v. Burwell*, 812 F.3d 257, 264 (2d Cir. 2016) (citation omitted). If the statute is ambiguous or silent on the question, however, "[t]he question for the reviewing court … is whether the agency's answer to the interpretive question is based on a permissible construction of the statute." *Catskill*

Mountains Chapter of Trout Unlimited, Inc. v. EPA, 846 F.3d 492, 520 (2d Cir. 2017) (citation omitted). "The agency's view need not be the only possible interpretation, nor even the interpretation deemed *most* reasonable by the courts," so long as the interpretation is "reasonable" and not "not arbitrary, capricious, or manifestly contrary to the statute." *Id*. (emphasis in original) (citation omitted).

Similarly, a court must defer to an agency's "interpretation of its own regulations unless that interpretation is plainly erroneous or inconsistent with the regulation." *Nat. Res. Def. Council v. EPA*, 808 F.3d 556, 569 (2d Cir. 2015) (citation omitted). This is true even if the agency's interpretation of its regulation was not promulgated through formal procedures prescribed by the APA, but, for example, is advanced in a legal brief. *See Talk Am., Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50, 59 (2011). This kind of deference is referred to as "*Auer* deference" after *Auer v. Robbins*, 519 U.S. 452 (1997), but it is "warranted only when the language of the regulation is ambiguous." *Christensen v. Harris Cty*., 529 U.S. 576, 588 (2000). If a regulation is unambiguous, the clear meaning of the regulation controls and may not be overridden by an inconsistent agency interpretation. *See id*.

An agency may announce an interpretation of a statute it administers in a variety of ways that do not receive *Chevron* deference but that nonetheless receive "a respect proportional to [their] power to persuade." *United States v. Mead Corp*., 533 U.S. 218, 235 (2001) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). This level of deference is referred to

as *Skidmore* deference. A less formal agency interpretation of this nature is often referred to as "guidance," although whether it is entitled to *Auer* deference or merely *Skidmore* deference depends both on the ambiguity of the agency regulation and on whether the guidance is interpreting the *statute*, in which case it is merely persuasive, or the *regulation*, in which case *Auer* deference may be appropriate. *See, e.g.*, *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 487-88 (2004); *Christensen*, 529 U.S. at 588. The weight given to a guidance document of this sort "in turn depends on, *inter alia*, the thoroughness evident in its consideration, the validity of its reasoning, and its consistency with earlier and later pronouncements." *Catskill Mountains*, 846 F.3d at 509 (citation omitted). This kind of agency action can take many forms, including agency opinion letters, policy statements, agency manuals, and enforcement guidelines. *See New York v. Next Millennium Realty, LLC*, 732 F.3d 117, 125 n.8 (2d Cir. 2013).

I. The SAR Regulatory Framework

The Exchange Act delegates to the SEC broad authority to regulate brokers and dealers in securities. *See* 15 U.S.C. § 78b; *id.* § 78q-1. A broker is "any person engaged in the business of effecting transactions in securities for the account of others." *Id.* § 78c(a)(4)(A). A dealer is "any person engaged in the business of buying and selling securities … for such person's own account through a broker or otherwise." *Id.* § 78c(a)(5)(A). Brokers and dealers may not engage in the business of buying and selling securities unless they register with the SEC. *See id.* § 78o.

Because of their importance to the national markets, broker-dealers are subject to a number of regulations, both state and federal, administered by a variety of organizations. *See generally* 1 Hazen, *Treatise on the Law of Securities Regulation* § 1:12 (2017). Although the SEC is the primary federal regulator of broker-dealers, SEC oversight is "supplemented by a system of self regulation" also created by the Exchange Act. 4 *id.* § 14:7. The self-regulatory organization ("SRO") that governs broker-dealers such as Alpine is the Financial Industry Regulatory Authority ("FINRA"), the successor organization to the National Association of Securities Dealers ("NASD"). *See generally Fiero v. FINRA, Inc.*, 660 F.3d 569, 571 & n.1 (2d Cir. 2011).

Section 17(a) of the Exchange Act mandates that

> [e]very … registered broker or dealer … shall make and keep for prescribed periods such records, furnish such copies thereof, and make and disseminate such reports as the Commission, by rule, prescribes as necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this chapter.

15 U.S.C. § 78q(a)(1). In 1981, the SEC promulgated with notice and comment Rule 17a-8, which provides that "[e]very registered broker or dealer … shall comply with the reporting, recordkeeping and record retention requirements of chapter X of title 31 of the

Code of Federal Regulations." 17 C.F.R. § 240.17a-8. That title contains regulations promulgated by the Treasury and FinCEN under the BSA.

FinCEN and the Treasury promulgated, with notice and comment, Section 1023.320, which defines a broker-dealer's obligation to file SARs. In pertinent part, it reads as follows:

> *A transaction requires reporting* under the terms of this section *if it is conducted* or attempted by, at, or *through a broker-dealer*, it involves or aggregates funds or other assets of at least $5,000, and the broker-dealer knows, suspects, or has reason to suspect that the transaction (or a pattern of transactions of which the transaction is a part):
>
> (i) *Involves funds derived from illegal activity* or is intended or conducted in order to hide or disguise funds or assets derived from illegal activity (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 Federal law or regulation or to avoid any transaction reporting requirement under Federal law or regulation;
>
> (ii) *Is designed*, whether through structuring or other means, *to evade* any requirements of this chapter or of any

> other *regulations promulgated under the Bank Secrecy Act*;
>
> (iii) 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 broker-dealer knows of no reasonable explanation for the transaction after examining the available facts, including the background and possible purpose of the transaction; or
>
> (iv) *Involves use of the broker-dealer to facilitate criminal activity*.

31 C.F.R. § 1023.320(a)(2) (emphasis supplied).

The regulations define "transaction" broadly. The definition states that a transaction is

> a purchase, sale, loan, pledge, gift, transfer, delivery, or other disposition, and *with respect to a financial institution includes 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, security*, contract of sale of a commodity for future delivery, option on any contract of sale of a commodity for future delivery, option on a commodity, purchase or redemption of any money order, payment or order for

> any money remittance or transfer, purchase or redemption of casino chips or tokens, or other gaming instruments *or any other payment, transfer, or delivery by, through, or to a financial institution, by whatever means effected.*

Id. § 1010.100(bbb)(1) (emphasis supplied). These regulations are found in chapter X of title 31 of the Code of Federal Regulations, so compliance is required by Rule 17a-8.

As is plain from its text, Section 023.320 requires reporting in broadly defined situations. In targeting all possible types of illegal activity, the regulation covers a large range of conduct such that it is susceptible to a number of interpretations. Due to the breadth of Section 1023.320, FinCEN's interpretation of Section 1023.320 as expressed in guidance and other documents is entitled to deference and is binding so long as it is reasonable and is consistent with earlier and later pronouncements.

The BSA's regulations do not define "pattern of transactions." In the notice of final rule published in the Federal Register with the implementation of Section 1023.320, however, FinCEN explained that

> [t]he language in the rule requiring the reporting of patterns of transactions is not intended to impose an additional reporting burden on broker-dealers. Rather, it is intended to recognize the fact that a transaction may not always appear suspicious standing alone. In

> some cases, a broker-dealer may only be able to determine that a suspicious transaction report must be filed after reviewing its records, either for the purposes of monitoring for suspicious transactions, auditing its compliance systems, or during some other review. The language relating to patterns of transactions is intended to *make explicit the requirement that FinCEN believes implicitly exists* in the suspicious transaction reporting rules for banks: *if a broker-dealer determines that a series of transactions* that would not independently trigger the suspicion of the broker-dealer, but that *taken together, form a suspicious pattern of activity, the broker-dealer must file a suspicious transaction report*.

FinCEN, Amendment to the Bank Secrecy Act Regulations—Requirement that Brokers or Dealers in Securities Report Suspicious Transactions, 67 Fed. Reg. 44,048, 44,051 (July 1, 2002) ("FinCEN Section 1023.320 Notice") (emphasis supplied).

The current form of Section 1023.320 was promulgated in 2002, after the USA PATRIOT ACT of 2001 significantly increased the scope of the Bank Secrecy Act. *See* USA PATRIOT ACT of 2001, Pub. L. No. 107-56, 115 Stat. 272 ("Patriot Act"). As relevant here, Congress specifically found that money laundering was being used to finance terrorist organizations, and sought to increase reporting of

transactions that potentially involved money laundering. *See id.*, sec. 302, 115 Stat. at 296-98.

The Treasury has delegated enforcement of the BSA to FinCEN, and FinCEN has issued a number of guidance documents interpreting Section 1023.320. *See* Treasury Order 180-01, Financial Crimes Enforcement Network, 67 Fed. Reg. 64,697 ¶ 3 (Oct. 21, 2002). In guidance documents, FinCEN indicates that SARs should include the who, what, when, why, where, and how of the suspicious activity (the "Five Essential Elements").[6] *See* SAR Narrative Guidance at 3-6; *SAR Activity Review*, Issue 22, at 39-40;[7] 2012 SAR Instructions at 110-12.[8] The who encompasses the "occupation, position or title … , and the nature of the suspect's business(es)," the what includes "instruments or mechanisms involved" such as wire transfers, shell companies, and "bonds/notes," and the why includes "why the activity or transaction is unusual for the customer; consider[ing] the types of

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[6] FinCEN guidance refers to the who, what, where, when, and why, as the "five essential elements" of a SAR narrative, but also adds that a sixth element, "the method of operation (or how?)[,] is also important." FinCEN, Guidance on Preparing a Compete & Sufficient Suspicious Activity Report Narrative 3 (2003), https: //www.fincen.gov/sites/default/files/shared/sarnarr completguidfinal_112003.pdf ("SAR Narrative Guidance"). For clarity, this Opinion follows FinCEN in calling these the Five Essential Elements of a SAR.

[7] FinCEN, *The SAR Activity Review: Trends, Tips & Issues*, Issue 22 (Oct. 2012), https://www.fincen.gov/sites/default/files/shared/sar_tti_22.pdf.

[8] FinCEN, FinCEN Suspicious Activity Report (FinCEN SAR) Electronic Filing Instructions (2012), https://www.fincen.gov/sites/default/files/shared/FinCEN%20SAR%20Electronic Filing Instructions-%20Stand%20Alone%20doc.pdf.

products and services offered by the [filer's] industry, and the nature and normally expected activities of similar customers." SAR Narrative Guidance at 3-4. The obligation to identify involved parties extends to all "subject(s) of the filing," and "filers should include as much information as is known to them about the subject(s)." *SAR Activity Review*, Issue 22, at 39.

Examples of relevant information listed by FinCEN include "bursts of activities within a short period of time," SAR Narrative Guidance at 5, whether foreign individuals, entities, or jurisdictions are involved, 2012 SAR Instructions at 112, or the involvement of unregistered businesses, SAR Narrative Guidance at 5. A common scenario identified by FinCEN as suspicious involves a "[s]ubstantial deposit … of very low-priced and thinly traded securities" followed by the "[s]ystematic sale of those low-priced securities shortly after being deposited." *SAR Activity Review*, Issue 15, at 24.[9] FinCEN has explained that "[t]ransactions like these are red flags for the sale of unregistered securities, and possibly even fraud and market manipulation," and firms need to "investigate[] thoroughly" such questions as "the source of the stock certificates, the registration status of the shares, how long the customer has held the shares and how he or she happened to obtain them, and whether the shares were freely tradable." *Id*.

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[9] FinCEN, *The SAR Activity Review: Trends, Tips & Issues*, Issue 15 (May 2009), https://www.fincen.gov/sites/default/files/shared/sar_tti_15.pdf.

To implement its suspicious activity reporting system, FinCEN issued, after notice and comment, two forms relevant to Alpine's conduct. The first, form SAR-SF, was mandatory from 2002 until 2012 ("2002 Form").[10] The second became mandatory in 2012 ("2012 Form").[11]

The 2002 Form contains instructions and a checklist that directs filers to include a number of pieces of information when filing a SAR. The instructions state that the narrative

> section of the report is ***critical***. *The care with which it is completed may determine whether or not the described activity and its possible criminal nature are clearly understood by investigators.* Provide a clear, complete and chronological description … of the activity, including what is unusual, irregular or suspicious about the transaction(s), using the checklist below as a guide.

2002 Form at 4 (emphasis in original). The checklist has 22 items, each directing filers to include a specific type of information. The following items are particularly relevant to the present motions:

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[10] *See* FinCEN, Proposed Collection, Comment Request, Suspicious Activity Report by the Securities and Futures Industry, 67 Fed. Reg. 50,751 (Aug. 5, 2002).

[11] *See* FinCEN, Proposed Collection, Comment Request, Bank Secrecy Act Suspicious Activity Report Database Proposed Data Fields, 75 Fed. Reg. 63,545 (Oct. 15, 2010).

h. Indicate whether the suspicious activity is an isolated incident or relates to another transaction.

i.Indicate whether there is any related litigation. If so, specify the name of the litigation and the court where the action is pending.

…

l.Indicate whether U.S. or foreign currency and/or U.S. or foreign negotiable instrument(s) were involved. If foreign, provide the amount, name of currency, and country of origin.

…

o. Indicate any additional account number(s), and any foreign bank(s) account number(s) which may be involved.

p. Indicate for a foreign national any available information on subject's passport(s), visa(s), and/or identification card(s). Include date, country, city of issue, issuing authority, and nationality.

q. Describe any suspicious activities that involve transfer of funds to or from a foreign country, or transactions in a foreign currency. Identify the country, sources and destinations of funds.

Id.

Beginning in 2012, FinCEN switched to an e-file system.[12] The SEC has submitted excerpts from a document entitled "FinCEN Suspicious Activity Report (FinCEN SAR) Electronic Filing Requirements." This document, dated October 2012, directs that "[f]ilers must provide a clear, complete, and concise description of the activity, including what was unusual or irregular that caused suspicion." 2012 SAR Instructions at 111. The document contains a checklist similar in all material respects to the checklist on the 2002 Form.[13] *See id*. at 111-12.

A broker-dealer is required to "maintain a copy of any SAR filed and the original or business record equivalent of any supporting documentation for a period of five years from the date of filing the SAR." 31 C.F.R. § 1023.320(d). If multiple broker-dealers are involved in a transaction, "[t]he obligation to identify and properly and timely to report a suspicious transaction rests with each broker-dealer involved … provided that no more than one report is required to be filed by the broker-dealers involved in a particular transaction (so long as the report filed contains all relevant facts)." *Id*. § 1023.320(a)(3).

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[12] SARs submitted by the SEC filed on the 2012 Form do not themselves contain instructions. The parties have not indicated in their submissions whether FinCEN's e-filing website contains such instructions on the screens where SARs are submitted.

[13] The 2012 Form does not state, however, that filers should indicate additional bank account numbers or foreign bank account numbers that may be involved.

SARs must be filed "no later than 30 calendar days after the date of the initial detection by the reporting broker-dealer of facts that may constitute a basis for filing a SAR under this section." *Id.* § 1023.320(b)(3). Where no suspect of the potentially illegal activity can be immediately identified, a broker-dealer may take an additional 30 days to attempt to identify a suspect. *Id.* § 1023.320(b)(3). In addition, "[a] broker-dealer may also file with FinCEN a report of any suspicious transaction that it believes is relevant to the possible violation of any law or regulation but whose reporting is not required by this section." *Id.* § 1023.320(a)(1).

Broker-dealers are required to file SARs for continuing activity that follows the original SAR. For instance, FinCEN guidance provides that a "continuing report should be filed on suspicious activity that continues after an initial FinCEN SAR is filed," and that "[f]inancial institutions … may file SARs for continuing activity after a 90 day review with the filing deadline being 120 days after the date of the previously related SAR filing." 2012 SAR Instructions at 84. "Continuing reports must be completed in their entirety" and the narrative section "should include all details of the suspicious activity for the 90-day period encompassed by the report, and only such data from prior reports as is necessary to understand the activity." *Id.* Moreover, "[a]n amended report must be filed on a previously-filed FinCEN SAR … whenever new data about a reported suspicious activity is discovered and circumstances will not justify filing a continuing report." *Id.* at 83.

Finally, broker-dealers are required to maintain written AML policies that define how the broker-dealer detects potential money laundering and files SARs. This requires broker-dealers to engage in "ongoing customer due diligence," which includes

> (i) Understanding the nature and purpose of customer relationships for the purpose of developing a customer risk profile; and
>
> (ii) Conducting ongoing monitoring to identify and report suspicious transactions and, on a risk basis, to maintain and update customer information … includ[ing] information regarding the beneficial owners of legal entity customers.

31 C.F.R. § 1023.210(b)(5).[14] These duties to maintain ongoing reviews of customers and transactions are in addition to a broker-dealer's obligation to verify the identities of its customers such that it is able "to form

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[14] FINRA similarly requires broker-dealers to "use reasonable diligence, in regard to the opening and maintenance of every account, to know (and retain) the essential facts concerning every customer and concerning the authority of each person acting on behalf of such customer." FINRA Rule 2090 (2012), http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=9858. FINRA Rule 2090 relates to the obligation of broker-dealers to be aware of their customers' investment objectives when recommending securities. *See generally* 5 Hazen, *Treatise on the Law of Securities Regulation* § 14:138 (2017).

a reasonable belief that it knows the true identity of each customer" based on

> the broker-dealer's assessment of the relevant risks, including those presented by the various types of accounts maintained by the broker-dealer, the various methods of opening accounts provided by the broker-dealer, the various types of identifying information available and the broker-dealer's size, location and customer base.

Id. § 1023.220(a)(2).

In 2002, FinCEN delegated its BSA authority over broker-dealer AML programs to the SEC. FinCEN, Anti-Money Laundering Programs for Financial Institutions, 67 Fed. Reg. 21,110 (Apr. 29, 2002) (interim final rule effective April 24, 2002); *see also* 31 C.F.R. § 1023.210(c) (requiring a broker-dealer AML program to "[c]ompl[y] with the rules, regulations, or requirements of its self-regulatory organization governing such programs"). The SEC then delegated this authority to SROs, and approved AML best practices submitted by the SROs. *See* SEC, Order Approving Proposed Rule Changes Relating to Anti-Money Laundering Compliance Programs, 67 Fed. Reg. 20,854 (Apr. 26, 2002). FINRA Rule 3310 currently governs its members' AML programs. *See* SEC, Order Approving Proposed Rule Change to Adopt FINRA Rule 3310 (Anti-Money Laundering Compliance Program) in the Consolidated FINRA Rulebook, SEC Release No. 60645, 2009 WL 2915633 (Sept. 10, 2009). Rule 3310 requires member firms to

have a written AML policy that receives approval from FINRA's senior management and that "[e]stablish[es] and implement[s] policies, procedures, and internal controls reasonably designed to achieve compliance with the Bank Secrecy Act and the implementing regulations thereunder." FINRA Rule 3310 (2015).[15]

II. Alpine Motion for Summary Judgment and for Judgment on the Pleadings

Alpine moves for summary judgment principally on the ground that the SEC is not authorized to enforce BSA regulations via Rule 17a-8. Alpine also moves for judgment on the pleadings on the ground that the SEC's complaint fails to plead that Alpine willfully or recklessly violated BSA regulations. For the reasons that follow, Alpine's motion for summary judgment and for judgment on the pleadings is denied.

A. Alpine Motion for Summary Judgment

Alpine makes two related arguments in support of summary judgment. First, it argues that in the instant action the SEC is suing under the BSA, a statute it is not authorized to enforce. Because the gravamen of the SEC's complaint is Alpine's alleged failure to comply with the BSA SAR regulation,

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[15] Found at http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=8656. The current version of Rule 3310 was adopted in 2015. The version of the rule that was effective between 2011 and 2015 is materially the same. *See* FINRA Rule 3310 (2011), http://finra.complinet.com/en/display/display main.html?rbid=2403&record id=11859.

Alpine argues that this suit is not actually brought under Rule 17a-8, despite what the complaint itself says. Alpine is incorrect.

The SEC promulgated Rule 17a-8. The plain text of that rule requires broker-dealers to "comply with the reporting, recordkeeping and record retention requirements of chapter X of title 31 of the Code of Federal Regulations." 17 C.F.R. § 240.17a-8. Alpine does not contest that the SEC has enforcement authority to pursue violations of the Exchange Act. Since this suit is brought pursuant to the Exchange Act, Alpine's first argument fails.

This leads to Alpine's second argument. Alpine contends that even if this suit is brought under Rule 17a-8, that rule is an impermissible interpretation of Section 17(a) of the Exchange Act, 15 U.S.C. § 78q(a). Alpine raises two principal issues with Rule 17a-8. First, Alpine argues that the rule itself is not a reasonable interpretation of the Exchange Act, and is therefore invalid.[16] Second, Alpine argues that to the extent Rule 17a-8 was ever a valid interpretation of the statute, the failure to update the regulation or to engage in notice-and-

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[16] To some extent, Alpine's papers can be read to assert that the SEC lacks jurisdiction to enforce suspicious activity reporting regulations. "[T]he distinction between jurisdictional and nonjurisdictional interpretations" of statutory ambiguity is "a mirage." *City of Arlington v. FCC*, 569 U.S. 290, 297 (2013). Accordingly, insofar as the question is whether the Exchange Act confers jurisdiction on the SEC over suspicious transaction reporting, the same framework of analysis supplies the rule of decision. *See New York v. FERC*, 783 F.3d 946, 953 (2d Cir. 2015).

comment procedures after the significant 2002 revisions to the relevant part of Title 31 precludes the SEC from enforcing Rule 17a-8 against Alpine for its allegedly deficient SARs. Each contention is addressed in turn.

The validity of an agency's regulation interpreting a statute is judged by the familiar two-part test derived from *Chevron*. The Exchange Act provides that entities, including brokers and dealers, subject to the Exchange Act

> shall *make and keep* for prescribed periods *such records*, furnish such copies thereof, and make and disseminate such reports *as the Commission, by rule, prescribes as necessary or appropriate* in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this chapter.

15 U.S.C. § 78q(a)(1) (emphasis supplied). Under *Chevron* step one, this regulation expressly commits to the SEC discretion to determine which reports are "necessary or appropriate" to further the goals of the Exchange Act, and empowers the SEC to promulgate rules defining recordkeeping and reporting obligations of broker-dealers. *Id.*

This express delegation of rulemaking authority satisfies the *Chevron* test. Even if it were necessary to proceed to *Chevron*'s step two, the SEC has easily shown that Rule 17a-8, which requires compliance with certain BSA regulations, is a reasonable interpretation of Section 17(a) of the

Exchange Act. It has shown that the duty to file a SAR is reasonably "necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of" the Exchange Act. *Id*. SARs are reports that assist law enforcement in detecting whether transactions have "no apparent or lawful purpose," or involve "funds derived from illegal activity," "structuring or other means" of evading requirements of the BSA, or the "facilitat[ion] of illegal activity." 31 C.F.R. § 1023.320(a)(2). The purposes of the Exchange Act are to protect the national securities market and "safeguard[] … securities and funds related thereto." 15 U.S.C. § 78b; *see also* 15 U.S.C. § 78q-1. It is reasonable to conclude that the same reports that help the Treasury target illegal securities transactions for its purposes also help protect investors by providing information to the SEC that may be relevant to whether a stock or a market is being manipulated in violation of the nation's securities laws.

Alpine resists this conclusion by arguing that the SEC may not incorporate the regulations of another agency. Not surprisingly, Alpine does not cite any authority to support that counter-intuitive proposition. Instead, Alpine presents a parade of horribles—such as the SEC enforcing broker-dealers' tax-filing obligations through Section 17(a)—or relies on cases where a statute expressly excluded certain remedies or actions. *See*, *e.g.*, *United States ex rel. Lissack v. Sakura Global Capital Mkts., Inc.*, 377 F.3d 145, 152 (2d Cir. 2004) (False Claims Act has express bar stating that it does not apply to claims brought under the Internal Revenue Code.).

Moreover, neither the Exchange Act nor the BSA expressly precludes joint regulatory authority by FinCEN and the SEC over the reporting of potentially suspicious transactions. And Alpine itself cites at least one case where Congress's silence regarding whether a state remedy precluded a concurrent federal remedy was held *not* to bar concurrent remedies. *See Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649-50 (1990) (declining to defer to agency conclusion that federal statute was preempted by state law and holding that both state and federal remedies were available to migrant workers).

Alpine's second contention is that, regardless of whether Rule 17a-8 could be a validly promulgated regulation, the SEC never properly solicited public comment on Rule 17a-8 as it relates to the expanded BSA regulation of broker-dealers upon the enactment of the Patriot Act. Alpine's position is unpersuasive.

First, the text of the regulation itself, as well as the SEC's 1981 notice of final rule, unambiguously demonstrate the SEC's intent for the nature of the Rule 17a-8 reporting obligation to evolve over time through the Treasury's regulations. The text of the rule simply incorporates the entirety of "chapter X of title 31 of the Code of Federal Regulations." 17 C.F.R. § 240.17a-8. Rather than imposing a separate and competing set of reporting obligations on broker-dealers, the SEC made government more efficient by incorporating the obligations that had been and would be imposed by the Treasury. As the notice of final rule states: "[t]he rule does not specify the required reports and records so as to allow for any revisions the Treasury may adopt in the future." SEC,

Recordkeeping by Brokers and Dealers, 46 Fed. Reg. 61,454, 61,455 (Dec. 17, 1981).

Moreover, FinCEN saw Rule 17a-8 the way the SEC does, namely that Rule 17a-8 was promulgated to impose the same obligations on broker-dealers under the Exchange Act as the Treasury imposed under the BSA, including any changes to those obligations over time. The notice of final rule for the original version of Section 1023.320 acknowledged that the scope of the SEC's Rule 17a-8 would include the new BSA broker-dealer regulations:

> The SEC adopted rule 17a-8 in 1981 under the Securities and Exchange Act of 1934 ("Exchange Act"), which enables the SROs, subject to SEC oversight, to examine for BSA compliance. Accordingly, both the SEC and SROs will address broker-dealer compliance with this rule.

FinCEN Section 1023.320 Notice, 67 Fed. Reg. at 44,049.

Finally, in a formal adjudication the SEC has announced its view that Rule 17a-8 encompasses the post-2002 BSA regulations. *See In re Bloomfield*, SEC Release No. 9553, 2014 WL 768828, at *15-*17 (Feb. 24, 2014), *vacated in part on other grounds*, *In re Gorgia*, SEC Release No. 9743, 2015 WL 1546302 (Apr. 8, 2015) (vacating sanctions as to one individual who died during the pendency of the administrative proceedings), *aff'd*, 649 F. App'x 546, 549 (9th Cir. 2016). It has also issued several settled orders

expressing its view that a broker-dealer's failure to file SARs violates Rule 17a-8. *See In re Biremis Corp.*, SEC Release No. 68456, 2012 WL 6587520, at *13 (Dec. 18, 2012); *see also In re Oppenheimer & Co.*, FinCEN Assessment No. 2015-01 (Jan. 26, 2016), https://www.fincen.gov/sites/default/files/enforcement_action/Oppenheimer_Assessment_20150126.pdf; *In re Oppenheimer & Co.*, SEC Release No. 3621, 2015 WL 331117, at *8 (Jan. 27, 2015). These expressions of the SEC's view have been consistent over the years and Alpine has not presented any contrary SEC position that would undermine the agency's interpretation of Rule 17a-8. Accordingly, Alpine's motion for summary judgment is denied. Rule 17a-8 is a valid interpretation of the Exchange Act, and validly encompasses the suspicious activity reporting obligation of Section 1023.320.

B. Alpine Motion for Judgment on the Pleadings

In addition to its motion for summary judgment, Alpine moves for judgment on the pleadings. Alpine asserts that the SEC failed to plead that it negligently or willfully violated the BSA, as required to prove a violation of that statute.

Given the foregoing analysis, Alpine's motion for judgment on the pleadings is easily denied. This suit is brought solely under the Exchange Act, specifically under Section 17(a) and Rule 17a-8. Although Alpine's intent is relevant to the remedy if the SEC carries its burden of proving a violation of Rule 17a-8, *see* 15 U.S.C. § 78u(d)(3), neither

Section 17(a) nor Rule 17a-8 includes a separate element of scienter.[17] *See* 15 U.S.C. § 78q; 17 C.F.R. § 240.17a-8. *Accord Stead v. SEC*, 444 F.2d 713, 716-17 (10th Cir. 1971) (holding that a defendant's knowledge that a securities transaction was not recorded was sufficient to show a violation of Section 17(a) of the Exchange Act). In those provisions of the Exchange Act in which Congress has imposed a scienter requirement for a violation to be found, it has done so expressly with language not found in Section 17(a).

III. SAR Narratives Missing Information

The remainder of this Opinion addresses the SEC's motion for summary judgment. The SEC's first category of alleged violations consists of SARs whose narrative sections the SEC alleges lack certain required information. Within this category are seven subcategories. The SEC has submitted 14 SARs in support of this branch of its motion. Each subcategory of SARs is addressed in turn.

A. Basic Customer and Suspiciousness Information

The SEC contends that Alpine omitted some of the Five Essential Elements in the narratives of SARs A, B, and C. The SEC is correct.

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[17] Alpine's suggestion that this holding would deprive it of constitutionally required notice is meritless, as it is plain from the text of Rule 17a-8 and the Exchange Act's penalty provisions that liability may be imposed without regard to scienter.

SARs A and C were completed on the 2002 Form. The 2002 Form warns that the narrative section of the report is "critical." It instructs the filer to "[p]rovide a clear, complete and chronological description … of the activity, including what is unusual, irregular or suspicious about the transaction(s), using [a] checklist" also found on the form. The 2012 SAR Instructions contains the same instruction.

Each of the three narratives at issue reports an enormous deposit of shares in a penny stock: over 40, over 5 and over 5 million shares, respectively. But, none of the narratives describe who the client is by, for instance, describing the nature of its business. The SAR A narrative also fails to describe why the transaction is unusual for the customer's business or to convey why Alpine thought the transaction was suspicious. The narratives for SARs B and C are similarly unhelpful. SAR B states that "Alpine is filing a SAR due to the heightened sensitivity surrounding the client" without explaining what led to that heightened sensitivity. SAR C states that "[i]t is the policy of Alpine to file a SAR[] related to each deposit of securities into it[]s account" without explaining why Alpine adopted the policy of filing a SAR for every deposit made by that customer. The SEC has carried its burden to show that three SARs are deficient as a matter of law for their failure to describe the "who" and "why" of the transaction, and to describe why the underlying transactions were suspicious.

Alpine does not argue that it was not required to include information on the SARs regarding the Five

Essential Elements, that the three SARs included such information, or that the SARs A, B, or C otherwise met the requirements of the law for completeness. Instead, Alpine opposes the entry of summary judgment with three other arguments.[18] First, it states that summary judgment is not warranted because the SEC has not offered evidence that Alpine knew or suspected that the transaction at issue was criminal. But, as described above, the SEC has no burden to prove scienter to show a violation of Rule 17a-8. Moreover, Section 1023.320 itself imposes an objective test: a SAR must be filed when the broker-dealer has "reason to suspect" that the transaction requires the filing. 31 C.F.R. § 1023.320(a)(2).

Second, Alpine argues that it was entitled to rely on SARs filed by the introducing broker for the transaction, and that the SEC has the burden to disprove the existence of such a SAR. While Alpine is correct that it may rely on such SARs, it carries the burden of showing that an introducing broker filed SARs and that the filed SARs were complete.

Section 1023.320 explicitly places that burden on Alpine. It provides that

> [t]he obligation to identify and properly and timely report a suspicious transaction rests with *each* broker-dealer involved in the transaction,

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[18] Alpine makes many of these arguments in opposition to each of the prongs of the SEC's summary judgment motion. To the extent they are rejected here, they are also rejected in connection with Alpine's arguments regarding the remaining SARs.

> provided that no more than one report is required to be filed by the broker-dealers involved in a particular transaction (so long as the report filed contains all relevant facts).

31 C.F.R. § 1023.320(a)(3) (emphasis supplied). Section 1023.320 also provides that introducing and clearing brokers who file joint SARs may share the SARs with each other. *See id.* § 1023.320(e)(1)(ii)(A)(2)(i). Alpine has not provided any evidence that any joint filings were made, that the introducing brokers for these transactions filed the necessary SARs, or that any filed SARs were sufficiently complete to meet the law's requirements for disclosure.

Finally, Alpine argues that the SEC has failed to show that it was required to file a SAR for these transactions. Alpine contends that it routinely filed voluntary SARs when it was not required to file any SAR and that that practice included these three SARs.[19] It is certainly true that Section 1023.320 allows for the voluntary filing of SARs, that is, the filing of a SAR even when a filing is not required by law. *See* 31 C.F.R. § 1023.320(a)(1). It is noteworthy, however, that none of the three SARs (or any of the SARs at issue on this motion) indicates that it is being filed voluntarily and not because of any legal duty to

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[19] Alpine has not offered admissible evidence that such a policy or practice was in place in 2011 and 2012 when SARs A, B and C were filed, and has not offered any evidence that these three SARs were filed pursuant to such a practice, even if it were in place. Because this Opinion is intended to provide guidance to the parties, it proceeds to the merits of this argument.

make a filing. Accordingly, it would have been unreasonable for Alpine to assume that FinCEN and the SEC would know the SAR was simply a "voluntary" filing.[20] The reporting requirements set out in the law are not casual. The SAR framework allocates scarce government resources to protect public security by placing the burden of compliance, and of distilling a wide range of possibly relevant information into a SAR narrative, on broker-dealers. As the 2002 Form explains: "the care with which [the SARI is completed may determine whether or not the described activity and its possible criminal nature are clearly understood by investigators."

The burden rests on the SEC, however, to prove that a SAR was required to be filed. It would appear that this will not be an onerous task in connection with the SARs at issue here, each of which reflected an enormous deposit of shares in a penny stock and, as reflected in Alpine's files, had other indicia of suspicious activity.[21] Nonetheless, because the SEC's

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[20] It is worth noting that the SEC has represented that the SARs presented on this motion are representative of thousands of similar SARs. To the extent it is able to show a pattern of suspicious trading activity for which SARs were filed, the inference that each of those filings was "voluntary" will be undermined.

[21] The summary judgment submissions of both the SEC and Alpine assume a fact-finder's knowledge of the penny stock market, and manipulation of that market, as well as various other market and broker-dealer practices. In any subsequent summary judgment motion and at any trial, the parties will be required to offer admissible lay and/or expert testimony on many of the subjects with which they have assumed familiarity for purposes of this preliminary summary judgment motion. The parties' decisions not to include expert declarations with this

motion assumed that Alpine had a duty to file each of the 14 SARs, this Opinion will not reach this contested issue. It will assume, for the purposes of that portion of the SEC's motion which addresses the adequacy of a SAR's narrative, that the SARs were required to be filed.

As explained above, SARs A, B, and C each lack basic information regarding the Five Essential Elements. Accordingly, the SEC has carried its burden of showing that each SAR was deficient as a matter of law.

B. Criminal or Regulatory History

The SEC contends that SARs D, E, and F are deficient as a matter of law because Alpine failed to include the relevant regulatory or criminal history of the customer in the SARs' narratives. SARs D and E are on the 2002 Form, which specifically instructs the filer to "[i]ndicate whether there is any related litigation[, and i]f so, specify the name of the litigation and the court where the action is pending." A materially similar instruction appears in the 2012 SAR Instructions. FinCEN guidance from 2009 also explains that one common failure of broker-dealers in their suspicious activity reporting is

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preliminary summary judgment motion may be explained by the fact that the initial expert disclosures are not due until at least April 20. Accordingly, even when it seems self-evident that Alpine had a legal obligation to file the SARs at issue in this section of the summary judgment motion, this Opinion will not reach the issue.

> [i]nadequate due diligence conducted once potentially suspicious activity is identified; for example, a firm may fail to use readily available public information about a customer's criminal or regulatory history when evaluating potentially suspicious activity for a SAR-SF filing.

SAR Activity Review, Issue 15, at 24.

In the case of each of these three SARs, Alpine's own files for the SARs contained information that the customer was the subject of criminal or regulatory proceedings. The SARs, however, did not include that information. The SAR D support file shows an SEC complaint against the customer and its CEO. The SAR E support file includes a news article regarding the customer's guilty plea to conspiracy related to counterfeiting. The SAR F support file notes the individual has an "SEC history for misrepresentation and misappropriation of funds."

Moreover, the narratives for each of these SARs contain minimal information other than describing an enormous deposit of shares in a penny stock. SAR D recites that the customer deposited roughly 2 million shares, and "has been placed on a Heightened Supervisory list" and that "[i]t is the policy of Alpine to file a SAR[] related to each deposit of securities into accounts of this nature." SAR E notes only that the customer deposited over 27 million shares of a penny stock. SAR F explains that the customer deposited 15 million shares of a penny stock, purchased a convertible note, and that "the shares are

worth about 33 times their purchase price, which may be potentially suspicious."

Again, assuming that the SEC has established that Alpine had a duty to file each of these SARs, it has easily carried its burden of showing that each of them was deficient as a matter of law for its omission of the criminal or regulatory history of a related party. This constituted a violation of Rule 17a-8, through its violation of Section 1023.320(a)(2). The information in Alpine's files not only provided Alpine with "reason to suspect" that the transactions were among those for which it was required to make a filing, but also constituted specific information that Alpine was required to include in the SAR narratives. This duty to describe the regulatory and criminal history of the customer is contained in the 2002 Form and the 2012 SAR Instructions, as well as the FinCEN Narrative Guidance. The information omitted from these three SARs was also responsive to the Five Essential Elements of these transactions.

Alpine has not argued that it was free to omit the information because this particular information did not constitute information responsive to any of the Five Essential Elements, or because the information did not relate to Alpine's separate duty to report criminal and regulatory history. Nor has it argued more generally that the omitted information would not be important for an understanding of the transactions. Instead, Alpine argues that the regulatory and criminal history of each of these customers was a matter of public record. This argument fails.

To the extent Alpine has a duty to file a SAR, it has a duty to file one that complies with the reporting requirements described above. The law does not recognize any exception to that duty based on a determination that the government may also know through other sources the very information that Alpine was required to report.[22] The SEC has shown that it is entitled to summary judgment on SARs D, E, and F.

C. Shell Company Involvement or Derogatory History of Stock

The SEC argues that SARs A and C are deficient because their narratives do not state that a shell company was involved in the transaction. It contends that SAR G omitted certain other issuer information.

FinCEN guidance explains that "[m]ost shell companies are formed by individuals and businesses for legitimate purposes." FinCEN Shell Company Guidance at 1.[23] This guidance advises that a SAR "narrative should use the term 'shell,' as appropriate." *Id*. at 5. The guidance lists, among several examples of suspicious activity FinCEN has observed in SARs, the "inability to obtain … information necessary to

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[22] While it would not be a defense to the charged violation of Rule 17a-8, Alpine does not provide any evidence in support of an assertion that the reason it omitted the information was because it believed the information was already known to the SEC.

[23] FinCEN, FIN-2006-G014, Potential Money Laundering Risks Related to Shell Companies (Nov. 9, 2006), https://www.fincen.gov/sites/default/files/guidance/AdvisoryOnShells_FINAL.pdf.

identify originators or beneficiaries of wire transfers." *Id.* at 3-5. It also instructs that a company being a "suspected shell entit[y]" is one of many "common patterns of suspicious activity." SAR Narrative Guidance at 5.

Assuming that the SEC proves that Alpine was required to file SARs A, C, and G, the SEC has carried its burden to show that the omission of the customer information from the SARs at issue here was a violation of law. SARs A, C, and G report transactions where a customer deposited, respectively, over 40, 5, and 6 million shares of a penny stock. The SARs' narratives do not disclose the involvement of a shell company or provide other information that would help a regulator understand either the customer or the transaction at issue. Alpine's file for SAR A indicates that the issuer of the deposited stock was a shell company, and the file for SAR C indicates that the issuer had been a shell company within the last year. Alpine's file for SAR G indicates that the issuer was not current in its SEC filings, that no company website was found for the issuer, and that the over-the-counter market's website for the issuer marked its stock with a stop sign.

The SEC has shown that Alpine's failure to disclose in the three SAR narratives the above-described information about the issuer and customer was a violation of law. In each instance, the omitted information was necessary to describe the Five Essential Elements. Given the paucity of information in the SAR narratives for SARs A and C, the identity of the customer as a shell entity engaged in a large deposit of penny stock shares was particularly

critical. Similarly, the lack of current SEC filings, a stop sign on a website listing the stock, and lack of an issuer website were obvious red flags for the penny stock transaction reported in SAR G. These facts raise serious questions about whether the issuer of the shares in the transaction reported in SAR G was a bona fide entity, and whether the transaction involved fraud.

Alpine does not contend that the omitted information in the three SARs is not responsive to the Five Essential Elements, and therefore a required element of a SAR. It makes essentially three other arguments, none of which is persuasive.

First, Alpine argues that, in light of FinCEN guidance stating that shell company involvement is not always suspicious, the involvement of a shell company in these transactions did not make them suspicious. But, if the SEC, using all the information on the SAR and in Alpine's possession, shows that Alpine was required to file a SAR for the transaction, then the SEC has shown that Alpine was required to disclose in both SARs A and C that the suspicious transactions were in fact conducted through a shell company. As is true with most if not all facts generating suspicion, the presence of a shell company may serve not only to identify the transaction as suspicious, thereby triggering the duty to file a SAR, but may also be a required fact to report in the SAR. Any complete description of the facts responsive to the Five Essential Elements would so demand. Alpine's conclusory argument to the contrary is insufficient to escape summary judgment.

With respect to SAR G, Alpine points out that the SEC has not explained in support of its motion what an OTC Market "stop" signal for trading in a stock means. Alpine is correct: the SEC has assumed the Court's familiarity with the significance of that market action. Alpine argues as well that Alpine's inability to locate a website for or confirm the existence of an issuer "is indicative of nothing." Again, assuming that the SEC establishes that Alpine had a duty to file SAR G, then the SEC has carried its burden to show the stop order and the absence of a website for the issuer were facts that Alpine had to disclose in the SAR. They are at the very least responsive to the Five Essential Elements. SAR G explains that the customer "historically makes deposits of large volumes of low-priced securities," and that this transaction was for another such deposit. Alpine has failed to offer any evidence or persuasive argument to raise a question of fact regarding its obligation to add two other important pieces of information for this very transaction: there was no website for the issuer and there was a stop in place for trading shares for that issuer.

D. Stock Promotion

The SEC contends that SARs G, H, and J are deficient for their failure to describe the evidence of stock promotion activity that appears in Alpine's files for these SARs. It contends that such evidence is relevant to whether a transaction may be a component of a pump-and-dump scheme. In a pump-and-dump scheme, conspirators manipulate the price and volume of a particular stock through the dissemination of false and misleading promotional

materials. *See Fezzani v. Bear, Stearns & Co.*, 716 F.3d 18, 21 (2d Cir. 2013) (scheme in which a security appeared to be "the subject of an active, rising market" but where in fact "the market was principally a series of artificial trades" is a "paradigmatic 'pump and dump' scheme"). In 2016, the SEC concluded that SARs were deficient, in violation of Rule 17a-8, because they omitted an "*additional* red flag[] that should have further raised suspicions concerned [a customer's] trading," namely that the entity "knew or should have known that two of the issuers were the subject of promotional campaigns at the time of [the customer's] trading." *In re Albert Fried & Co.*, SEC Release No. 77971, 2016 WL 3072175, at *5 (June 1, 2016) (emphasis supplied).[24]

The SAR narratives for SARs G, H, and J state that it is "Alpine's policy to file a SAR for each security deposited into the account." Each SAR describes a transaction involving a sizable deposit of a penny stock: over 6 million shares in SAR G; over 13 million in SAR H; and 60 million shares in SAR J. No other information is included in the narrative.

The SAR G support file includes screenshots of Google search results indicating that stock promotion was occurring. The SAR H support file includes four pages of screenshots of websites indicating that the stock at issue was being promoted by a third party.

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[24] Although the adjudication occurred in 2016, the decision is entitled to deference as an authoritative and reasoned interpretation of Rule17a-8.

The SAR J support file contains news articles that reveal that the stock was being promoted.

Alpine acknowledges that evidence of stock promotion activity is relevant if connected to a "pump and dump" scheme. Accordingly, should the SEC establish that Alpine had a duty to file these three SARs, it has carried its burden to show that Alpine was required to add to the SAR narrative the evidence of stock promotion activity that appeared in Alpine's files. The three transactions reported in SARs G, H, and J involved deposits of many millions of shares of a penny stock; evidence of stock promotion is particularly relevant to a transaction of this type because the combination is suggestive of illegal activity. As a result, the SEC is entitled to summary judgment on SARs G, H, and J.

E. Unverified Issuers

The SEC argues that SARs G, K, and L were defective for failing to include critical information about the issuers of securities that was contained in the Alpine files for these SARs. FinCEN guidance identifies unregistered and unlicensed businesses as indicative of suspicious transactions. It states that suspicious activity "common[ly]" includes transactions involving "parties and businesses that do not meet the standards of routinely initiated due diligence and anti-money laundering oversight programs (*e.g.*, unregistered/unlicensed businesses)." SAR Narrative Guidance at 5. As explained above, when a SAR is filed, it must include information about each of the Five Essential Elements of the suspicious activity, which includes "what" is involved in the

transaction. Underscoring this duty, a 2012 issue of the *SAR Activity Review* directs filers to "include as much information as is known to them about the subject(s)" of a SAR. *SAR Activity Review*, Issue 22, at 39.

SARs G, K, and L each report a large deposit of a penny stock. SAR G reports a deposit of over 6 million shares; SAR K, over 11 million shares; and SAR L, nearly 3 million shares. The three SARs reported very little additional information. Each of them explained that it was Alpine's policy to file a SAR for every deposit by this customer, but added no information about the *issuer* of the securities for that transaction. Each SAR support file for these SARs, however, indicates that an Alpine employee was unable to locate basic information about the issuer whose stock was deposited. For SARs G and K, the files indicate that Alpine could not locate a company website for the issuer. For SAR L, Alpine's file indicates that the issuer's corporate registration was in default. The SEC has shown that if Alpine was required to file any of these SARs, then it was required by law to include in its SAR the fact that it could not locate such information concerning an issuer.

Alpine argues that, as a general matter, the absence of a website for an issuer or an issuer's failure to renew its incorporation is "indicative of nothing." It does not address the omission of this information in the context of what was and was not included in each of these SARs. Considering the entirety of the narrative portion of these three SARs, the SEC has shown that the failure to include this information

about the issuers was a violation of Rule 17a-8. These were deposits of enormous quantities of penny stocks with absolutely no indication in the SAR itself that there was also a problem with the issuer. Accordingly, the SEC is entitled to summary judgment as to SARs G, K, and L with respect to the omissions regarding the issuers.

F. Low Trading Volume

The SEC contends that SARs M, N, and P are defective for their failure to disclose the low trading volume in the shares that these SARs reported were being deposited with Alpine. The 2002 Form and 2012 SAR Instructions required disclosures in the narrative of those circumstances that make the filing of a SAR a necessity. When a SAR was filed, as indicated repeatedly above, the filer had to include information responsive to the Five Essential Elements. A 2009 issue of the *SAR Activity Review* notes that one element of a transaction that is suspicious and should be reported is a "[s]ubstantial deposit, transfer or journal of very low-priced and thinly traded securities." *SAR Activity Review*, Issue 15, at 24. Accordingly, three elements for such events must be reported: the substantial deposit of a security, the low price of the security, and the low trading volume in the security.

These three SARs each reported a deposit of a very large quantity of shares of a penny stock. The SAR support files for SARs M, N, and P each included relevant information regarding the third element: the low trading volume. Yet, none of these SARs' narratives included that fact. SAR M's narrative

reports a deposit of almost million shares of a low-priced security, but omits that the average trading volume over the last three months is 59,108, smaller than the single deposit by a factor of ten. SAR N's narrative lists a deposit of over 60 million shares of a low-priced security, but does not include the fact that the trading volume was 101,100 per day, a tiny fraction of the single deposit reported in SAR N. SAR P's narrative notes a deposit of 500,000 shares of a low-priced security, but states nothing about the trading volume, reported in the support file to be 10,971 per day. Thus, the reported deposit was 45 times larger than the average trading volume.

The SEC has demonstrated its entitlement to summary judgment as to SARs M, N, and P. The sizable deposits, when combined with the low trading volume of a low-priced security, constitute red flags. Alpine had a duty to disclose in the SAR the reasons that made the filing necessary. It did not do so.

Alpine does not argue that SARs M, N, and P were properly completed. It does not contest that it had a duty to report low trading volume in the narrative sections of these three SARs if it had a duty to file these SARs. Instead, it contends that the SEC has a burden to show that manipulative trading such as "wash trades" was actually occurring in order for the SEC to prevail on its claim that Alpine had a duty to file a SAR. Alpine is incorrect.

Under Section 1023.320, Alpine had a duty to report a transaction when, as the regulated broker-dealer, it had "reason to suspect that a transaction (or a pattern of transactions) … [i]nvolves", among other

things, the use of the broker-dealer to facilitate criminal activity. The duty to report is not triggered by the existence of a government investigation, and the SEC has no burden at trial, when it has charged a violation of Rule 17a-8, to show that manipulative trading was actually occurring. Indeed, the entire regulatory scheme is set up to bring to the government's attention suspicious activity of which it might otherwise be unaware. Whether the government is aware or not of criminality, or able to confirm criminality or not, the duty to report suspicious activity exists. Thus, the SEC has shown that it is entitled to summary judgment because SARs M, N, and P were defective as a matter of law.

G. Foreign Involvement

In the seventh and final category, the SEC contends that SARs A, C, and H are defective because they failed to disclose the involvement of a foreign individual or entity in the transaction. The 2002 Form used for SARs A and C states that the filer should "[i]ndicate whether U.S. or foreign currency and/or U.S. or foreign negotiable instrument(s) were involved. If foreign, provide the amount, name of currency, and country of origin." The 2002 Form also states that "foreign bank(s) account number(s)" should be included, as should "passport(s), visa(s), and/or identification card(s)" belonging to an involved "foreign national." The 2012 SAR Instructions contain a materially identical instruction. Both instructions also state that filers should "identify the country, sources, and destinations of funds" if funds have been "transfer[red] to or from a foreign country."

FinCEN guidance from 2003 also emphasizes that the involvement of a foreign entity or individual must be included in a SAR. It states that a SAR should

> [s]pecify if the suspected activity or transaction(s) involve a foreign jurisdiction. If so, provide the name of the foreign jurisdiction, financial institution, address and any account numbers involved in, or affiliated with the suspected activity or transaction(s).

SAR Narrative Guidance at 4.

SARs A, C, and H each report a large deposit of shares of a penny stock. SAR A lists a foreign address for Alpine's customer, but omits information in the support file that identifies foreign correspondent accounts in two foreign jurisdictions that were involved in the underlying transaction. SAR C provides a foreign address for the customer in the "subject information" boxes of the SAR, but omits from the narrative section any reference to the foreign nature of the transaction, much less that the country in question has been identified as a jurisdiction of primary concern for money laundering activity. SAR H does not disclose any foreign involvement with the transaction, omitting that the deposited shares were purchased by the customer through a transfer of funds to a foreign bank account, information that appears in Alpine's files.

The SEC has carried its burden of showing that, to the extent Alpine was required to file a SAR

for these transactions, it was required to include in the narrative sections for the SARs the information about the foreign connections to the transactions that it had in its files. SARs A, C, and H each reflect enormous deposits of shares of penny stocks with a very opaque discussion in the narrative section of the SAR of the reasons for filing the SAR. The narrative does not comply with either the requirement to report on the Five Essential Elements, or the more specific duty to report the foreign connections to the transactions. As described above, these duties of disclosure apply specifically to the narrative section of the SAR.

Unlike its response in connection with each of the other deficiencies discussed above, Alpine's opposition to this portion of the SEC's motion switches gears and does discuss the three individual SARs and the identified deficiencies in the context of those individual SARs. None of its arguments, however, raises a question of fact regarding its obligation to add the omitted information about the foreign connections to the transactions.

First, with respect to SARs A and C, it asserts that the foreign entity was the "introducing broker", and that it identified its foreign location in the "subject information" boxes of the SARs. But, the SAR identifies the foreign entity at issue as the customer and not the introducing broker. And, as explained above, a broker-dealer is required by law to include information constituting the Five Essential Elements and foreign connections to the transaction in the narrative section of any SAR that the filer is required to file. Correctly reporting an address in a "subject

information" box does not excuse compliance with the law's additional obligations to identify why a transaction is suspicious in the narrative section of the SAR.

Next, Alpine argues that it had no obligation to report in the foreign connection to the transaction in the narrative section of SAR C since SAR C's narrative indicated that Alpine had placed the customer on a "Heightened Supervisory list" and as a matter of policy Alpine filed a SAR for each deposit of securities made by that customer. This opaque reference to Alpine's internal policy for that customer did not relieve Alpine of its obligation under the law to provide information in the SAR's narrative regarding each of the Five Essential Elements for, as well as the foreign connections to, the specific transaction.

Finally, with respect to SAR H, Alpine does not dispute that it failed to disclose that the customer had purchased the deposited shares by transferring funds to a foreign bank account. It argues only that the disclosure was unnecessary because the support file did not show a foreign wire transfer *after* the shares were deposited, and the prior transfer did not "involve" Alpine. These distinguishing features did not relieve Alpine of the obligation to report the foreign connection to the transaction. Nothing in the law, which is recited above, confines the reporting requirements for foreign connections to those specific transactions in which the broker-dealer participated or to occurrences after the reported transaction. As a result, the SEC is entitled to summary judgment on SARs A, C, and G on the ground that Alpine failed to

include information regarding the transaction's foreign connections in the SAR narrative.

H. Summary

In this section of the Opinion, the Court has assumed that Alpine had a duty to file the 14 SARs at issue. Assuming that obligation, the Opinion has addressed seven categories of omissions in the narratives of the SARs on which the SEC's summary judgment motion has focused. In each instance, the Opinion has concluded, following an examination of the specific SAR's narrative section, that Alpine had a duty under the law to include the omitted information that is the subject of the SEC motion, and that the SAR, as filed, violated the law's disclosure requirements for suspicious transactions.

A broker-dealer must complete a SAR narrative that contains sufficient information for a regulator to understand what is suspicious about the reported activity. Any analysis of a Rule 17a-8 claim that a particular SAR is deficient in this regard is necessarily a context-specific analysis. If a SAR had had a fulsome disclosure of the Five Essential Elements and other information pertinent to the transaction that the law requires a broker-dealer to disclose, then the omission of repetitive or cumulative information found in the broker-dealer's files might raise a question of fact regarding an alleged violation of Rule 17a-8. As the descriptions of the individual SARs has shown, however, Alpine's SARs were woefully inadequate. Alpine has not shown that there is any question of fact regarding its compliance with the law's disclosure requirements. The SEC is

therefore entitled to summary judgment regarding information omitted from SARs A, B, C, D, E, F, G, H, J, K, L, M, N, and P. IV. Deposit-and-Liquidate Patterns

The SEC contends that Alpine violated Rule 17a-8 and Section 1023.320(a)(2) when it failed to file new or continuing SARs in connection with liquidations of share positions. Alpine filed SARs for large deposits of shares by three customers, but no additional SARs when they sold off a large proportion of those deposits in transactions within a month or so of the deposit. In support of its motion, the SEC submitted three charts summarizing the transactions, along with SARs that Alpine filed for the customers' deposits.

The three customers are referred to as Customers A, B, and C. Customer A deposited over 12 million shares of a penny stock in February 2012, then sold, in a series of 12 transactions, 10 million shares of that same security in February and March 2012. The pattern then repeated itself in April through August 2012, with the customer depositing a very large number of shares in the same security and, within weeks, selling a large proportion of those shares in a series of smaller transactions. Alpine timely filed SARs on the deposits by Customer A, but not on the sales of the deposited shares. Similarly, Customer B and Customer C each deposited a large number of physical certificates of a penny stock, then sold an almost equal amount of shares in that security in a series of small transactions over the weeks immediately following the deposit.

The SEC has shown that it is entitled to summary judgment to the extent it carries its burden of showing the existence of the deposit-and-sales patterns on which it relies. The applicable regulations state that a broker-dealer must report a transaction if the transaction "or a pattern of transactions of which the transaction is a part" meets certain criteria. 31 C.F.R. § 1023.320(a)(2). As noted above, the notice of final rule published by FinCEN explains that the "pattern of transactions" phrase was included in the regulation so that if a broker-dealer determines that a series of transactions, "taken together, form a suspicious pattern of activity, the broker-dealer must file a suspicious transaction report." FinCEN Section 1023.320 Notice, 67 Fed. Reg. at 44,051. Similarly, FinCEN has identified as suspicious a "[s]ubstantial deposit … of very low-priced and thinly traded securities," followed by the "[s]ystematic sale of those low-priced securities shortly after being deposited." *SAR Activity Review*, Issue 15, at 24 (footnote omitted). This guidance explains that these transactions present "red flags for the sale of unregistered securities, and possibly even fraud and market manipulation." *Id*. And the same issue of the *SAR Activity Review* notes that "transactions involv[ing] the deposit of physical certificates … have their own red flags, such as [the risk that] the shares were not issued in the name of the customer, or were recently issued or sequentially numbered." *Id*. at 24-25.

Alpine argues that the SEC has not shown that the sell-offs by these three customers are sales of the very same physical securities that had been

deposited, and that as a result they are not suspicious as a matter of law.[25] Alpine is wrong.

Alpine's argument that the transactions are not suspicious as a matter of law because the liquidations are not necessarily related to the deposit of physical certificates misses the point of the relevant FinCEN guidance. The three customers at issue here dramatically increased their holdings in a penny stock with a deposit of physical certificates—activity which FinCEN indicates independently raises concerns—and then sold off most of those holdings over a few weeks in a number of discrete, small transactions. That pattern of transactions requires supplemental reporting as a matter of law, and the SEC is entitled to summary judgment to the extent that it proves that such a pattern occurred and that Alpine failed to file SARs reflecting that trading.

Next, Alpine asserts that the SEC has improperly supported its motion with three charts that the SEC claims to have prepared based on data provided by Alpine without disclosing what data was used. As provided by the Federal Rules, voluminous data may be summarized in a chart. Rule 1006, Fed. R. Evid., provides that "[t]he proponent may use a … chart … to prove the content of voluminous writings … that cannot be conveniently examined in court." But the proponent "must make the originals or duplicates available for examination or copying, or

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[25] Alpine argues further that the SEC must show that Alpine subjectively thought the transactions were suspicious before it can make out a violation. As described above, Rule 17a-8 contains no scienter element.

both, by other parties at a reasonable time and place." *Id.*; *see United States ex rel. Evergreen Pipeline Constr. Co. v. Merritt Meridian Constr. Corp.*, 95 F.3d 153, 163 (2d Cir. 1996). The SEC has shown it is entitled to summary judgment on these transactions, conditioned upon its ability to demonstrate to Alpine, and if necessary to this Court, that its charts are accurate.

V. Late-Filed SARs

The SEC contends Alpine violated the law by filing five SARs late, specifically between 189 and 211 days late. Alpine argues that it was entitled to file a SAR up to 30 days after conducting an appropriate review, and the SEC has not shown when Alpine conducted its review. Alpine's view, if adopted, would allow broker-dealers to delay review of transactions indefinitely and thereby delay the filing of SARs indefinitely. The regulatory scheme does not support that somewhat startling proposition. As described below, a broker-dealer must conduct an ongoing due diligence review of transactions. It must promptly initiate a review upon identification of unusual activity that warrants investigation. It generally has 30 days thereafter to file a SAR. Accordingly, the SEC has shown it is entitled to summary judgment.

The starting point for the analysis of the deadline for filing a SAR is again Section 1023.320, which requires a covered transaction to be reported when the broker-dealer "knows, suspects, or has reason to suspect" that the transaction is a covered transaction. Broker-dealers have an ongoing duty to scrutinize all transactions they conduct. BSA

regulations require broker-dealers to "maintain[] a written anti-money laundering program that," *inter alia*, "[i]ncludes … [a]ppropriate risk-based procedures for conducting *ongoing* customer due diligence," including "[c]onducting *ongoing* monitoring to identify and report suspicious transactions." 31 C.F.R. § 1023.210(b)(5)(ii) (emphasis supplied); *see also* 31 C.F.R. § 1023.220(a)(2) (requiring a broker-dealer to be able to "form a reasonable belief that it knows the true identity of each customer" based on types of accounts, the methods of account opening, and identification documents).

Through a series of regulatory delegations, SROs review and approve their member organizations' AML policies; Alpine's AML policy was approved by FINRA. *See* SEC, Order Approving Proposed Rule Changes Relating to Anti-Money Laundering Compliance Programs, 67 Fed. Reg. 20,854 (Apr. 26, 2002). FINRA requires member firms to have a written AML policy that receives approval from FINRA's senior management and that "[e]stablish[es] and implement[s] policies, procedures, and internal controls reasonably designed to achieve compliance with the Bank Secrecy Act and the implementing regulations thereunder." FINRA Rule 3310 (2015), http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=8656.

As relevant here, Section 1023.320 provides that a "SAR shall be filed no later than 30 calendar days after the date of the initial detection by the reporting broker-dealer of facts that may constitute a

basis for filing a SAR under this section." 31 C.F.R. § 1023.320(b)(3). The Federal Register notice explaining the final rule used slightly different phrasing, requiring a SAR to be filed "[w]ithin 30 days after a broker-dealer becomes aware of a suspicious transaction." FinCEN Section 1023.320 Notice, 67 Fed. Reg. at 44,054. Alpine's FINRA-approved WSPs state that Alpine will file a SAR "within 30 days of becoming aware of the suspicious transaction."

FINRA also publishes a template AML program for small firms such as Alpine. Given that FINRA is the ultimate delegee of FinCEN's authority to approve AML programs, this document is probative of whether an AML program complies with the BSA. The FINRA template states that

> The phrase "initial detection" does not mean the moment a transaction is highlighted for review. The 30-day … period begins when an appropriate review is conducted and a determination is made that the transaction under review is "suspicious" within the meaning of the SAR requirements.

FINRA, Anti-Money Laundering Template for Small Firms 37-38 (2010), http://www.finra.org/industry/anti-money-laundering-template-small-firms. With this explanation, firms are encouraged to flag transactions liberally for review without fear of triggering the 30-day reporting requirement.

FinCEN has also issued guidance related to this question in two publications of *the SAR Activity Review*. In one, FinCEN has said that

> [t]he phrase "initial detection" should not be interpreted as meaning the moment a transaction is highlighted for review. There are a variety of legitimate transactions that could raise a red flag simply because they are inconsistent with an accountholder's normal account activity. A real estate investment (purchase or sale), the receipt of an inheritance, or a gift, for example, may cause an account to have a significant credit or debit that would be inconsistent with typical account activity. The institution's automated account monitoring system or initial discovery of information, such as system-generated reports, may flag the transaction; however, this should not be considered initial detection of potential suspicious activity. *The 30-day* (or 60-day) *period does not begin until an appropriate review is conducted and a determination is made that the transaction under review is "suspicious" within the meaning of the SAR regulations*.
>
> *A review must be initiated promptly upon identification of unusual activity that warrants investigation*. The timeframe required for completing review of the identified activity,

> however, may vary given the situation. According to the FFIEC's 2005 *Bank Secrecy Act/Anti-Money Laundering Examination Manual*, "an expeditious review of the transaction or the account is recommended and can be of significant assistance to law enforcement. In any event, the review should be completed in a reasonable period of time."[26] What constitutes a "reasonable period of time" will vary according to the facts and circumstances of the particular matter being reviewed and the effectiveness of the SAR monitoring, reporting, and decision-making process of each institution. The key factor is that an institution has established adequate procedures for reviewing and assessing facts and circumstances identified as potentially suspicious, and that those procedures are documented and followed.

FinCEN, *The SAR Activity Review: Trends, Tips & Issues*, Issue 10, at 45-46 (May 2006), https://www.fincen.gov/sites/default/files/shared/sar_tti_10.pdf (other footnote omitted) (emphasis supplied). In another relevant publication, FinCEN indicated that

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[26] While the *FFIEC BSA/AML Examination Manual* is specific to the banking industry, this piece of guidance is also applicable to other industries with suspicious activity reporting requirements.

> *[t]he time to file a SAR starts when a firm*, in the course of its review or on account of other factors, is able to make the determination that it knows, or *has reason to suspect, that the activity or transactions under review meet one or more of the definitions of suspicious activity*. Specifically, the 30-day (or 60-day) period does not begin until an appropriate review is conducted and a determination is made that the transaction under review is "suspicious" within the meaning of the SAR regulations. *Of course, a review must be initiated promptly and completed in a reasonable period of time*. Firms should maintain some type of record reflecting the date the transaction was deemed suspicious.

SAR Activity Review, Issue 15, at 15-16 (footnote omitted) (emphasis supplied).

With this exposition in mind, the FinCEN guidance (on which Alpine and the SEC both rely) does not support the position Alpine takes, namely that Alpine was entitled to an indeterminate amount of time to initiate review of a transaction before the 30- or 60-day reporting period began. The FinCEN guidance specifically states that the time begins when an entity such as Alpine "is *able* to make the determination that it … has reason to suspect[] that the activity or transactions under review meet one or more of the definitions of suspicious activity." *Id.* at 15 (emphasis supplied). Further, the FinCEN

guidance emphasizes that "a review *must be initiated promptly* and completed in a reasonable period of time." *Id.* (emphasis supplied). And again, the BSA regulation on broker-dealer AML programs—the regulatory document out of the many canvassed above that defines AML obligations with the most specificity—states that a broker-dealer must engage in "ongoing monitoring to identify and report suspicious transactions." 31 C.F.R. § 1023.210(b)(5)(ii).

The information that triggered the duty to file a SAR was available to Alpine at the very time that the five transactions reported in these SARs occurred. This included that each transaction was a large deposit of a penny stock and that the account was flagged for heightened review. Three of the SARs themselves state that it is Alpine's practice to file SARs for transactions from the accounts at issue. Alpine had a duty to file these SARs, therefore, within 30 days of the transactions.

Alpine does not dispute that the SARs were filed between 189 and 211 days after the transactions reflected in the SARs. It does not identify any recently-acquired information regarding the transaction that converted it from one for which no SAR was required to one that required a SAR. While it contends, without any admissible evidentiary support, that the AML officer responsible for reviewing these transactions determined that the transactions were not suspicious and did not require a SAR, as described above, negligence provides no defense to a violation of Rule 17a-8. Alpine also represents that it filed the SAR within 30 days of a re-

examination of the transactions, following discussions with FINRA. But, for the reasons explained above, this late filing violated Section 1023.320(b)(3), which requires the filing to be within 30 days, and thereby violated Rule 17a-8. Accordingly, the SEC is entitled to summary judgment on the five late-filed SARs.

VI. Missing Supporting Documents

The SEC contends that Alpine has not produced the supporting documentation for five SARs, which the law required it to maintain and produce upon request. This portion of the SEC's motion concerns five SARs that were filed by Alpine with FinCEN between October 2013 and April 2015. The SEC made requests for the supporting documentation for these SARs beginning in 2016. Alpine asserts that it timely supplied the supporting documentation in response to the SEC's requests.

Section 1023.320 is cast in mandatory terms and requires two acts: the maintenance of records for five years after a SAR is filed, and the production of such records at the request of a federal regulatory agency such as the SEC. *See* 31 C.F.R. § 1023.320(d). A failure to either maintain or produce a SAR's supporting documentation, then, violates Section 1023.320 and, as a result, violates Rule 17a-8 as well. Alpine agrees that it was required to maintain "all documents or records that assisted" Alpine "in making the determination that certain activity required a SAR filing", citing FinCEN guidance from June 2007. FinCEN, FIN-2007-G003, Suspicious Activity Report Supporting Documentation (June 13, 2007), https://

www.fincen.gov/resources/statutes-regulations/guidance/suspicious-activity-report-supporting-documentation. This guidance explains that "[w]hat qualifies as supporting documentation depends on the facts and circumstances of each filing," and includes examples of "transaction records, new account information, tape recordings, e-mail messages, and correspondence. While items identified in the narrative of the SAR generally constitute supporting documentation, a document or record may qualify as supporting documentation even if not identified in the narrative." *Id*.

Summary judgment is denied. The SEC has not produced evidence of a search of the 2016 document production that failed to locate the supporting documents. In the event the SEC produces such evidence at trial, Alpine will have an opportunity to identify the supporting documents for those SARs that it produced to the SEC in 2016. To the extent that Alpine seeks to avoid liability on this claim by relying on a more recent production of supporting files in the course of discovery, that effort is futile. Alpine was required to produce the files when they were requested in 2016. Of course, the exchange of pretrial interrogatories between the parties may eliminate this dispute with the identification by Alpine by Bates number or otherwise of the specific documents it asserts that it provided to the SEC in 2016 that support these five SARs.

Conclusion

The SEC's December 6, 2017 motion for partial summary judgment is granted in part. Alpine's

January 19, 2018 motion for summary judgment and for judgment on the pleadings is denied.

Dated: New York, New York
March 30, 2018

/s/ Denise Cote
DENISE COTE
United States District Judge

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 19th day of February, two thousand twenty-one.

United States Securities and Exchange Commission,

Plaintiff - Appellee, ORDER

v. Docket No: 19-3272

Alpine Securities Corporation,

Defendant - Appellant.

Appellant, Alpine Securities Corporation, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES
SECURITIES AND
EXCHANGE COMMISSION,

Plaintiff, 17cv4179(DLC)

-v- *OPINION AND ORDER*

ALPINE SECURITIES
CORPORATION,

Defendant.

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DENISE COTE, District Judge:

On July 3, 2019, defendant Alpine Securities Corp. ("Alpine") filed a motion for reconsideration of two Opinions of March 30 and December 11, 2018 in light of the Supreme Court's recent decision in *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019). *Kisor* reaffirmed the doctrine of *Auer* deference for an agency's interpretation of its own regulations. The March and December Opinions are incorporated by reference and familiarity with them is assumed. *See SEC v. Alpine Sec. Corp.*, 308 F. Supp. 3d 775 (S.D.N.Y. Mar. 30, 2018) ("March Opinion"); *SEC v. Alpine Sec. Corp.*, 354 F. Supp. 3d 396 (S.D.N.Y. Dec. 11, 2018) ("December Opinion").

Alpine argues that *Kisor* demonstrates that this Court's March and December Opinions deferred inappropriately to the SEC's views and failed to apply the limitations on *Auer* deference described in *Kisor*. The motion was fully submitted on August 9. For the reasons that follow, Alpine's July 3 motion for reconsideration is denied.

Discussion

The standard for granting a motion for reconsideration is "strict." *Analytical Surveys, Inc. v. Tonga Partners*, L.P., 684 F.3d 36, 52 (2d Cir. 2012) (citation omitted). Reconsideration will generally be denied unless, as relevant here, the moving party "identifies an intervening change of controlling law."

Kolel Beth Yechiel Mechil of Tartikov, Inc. v. YLL Irrevocable Tr., 729 F.3d 99, 104 (2d Cir. 2013) (citation omitted). It is not a vehicle "for relitigating old issues, presenting the case under new theories, securing a rehearing on the merits, or otherwise taking a second bite at the apple." *Analytical Surveys*, 684 F.3d at 52 (citation omitted).

Alpine argues that *Kisor*, which addressed the continued viability of *Auer* deference, warrants reconsideration of the March and December Opinions.[1] The "only question presented" in *Kisor* was whether the Supreme Court would overrule *Auer v. Robbins*, 519 U.S. 452 (1997) and *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945) and discard the deference those cases give to agency interpretations of ambiguous regulations. 139 S. Ct. at 2408. The decision in *Kisor* "answer[ed] that question no," affirming that "*Auer* deference retains an important role in construing agency regulations." *Id.* To the extent the decision in *Kisor* "reinforc[ed] some of the limits inherent in the *Auer* doctrine," the Supreme Court's analysis did not change the law. *Id.* at 2415. Instead, the Supreme Court "t[ook] the opportunity to restate, and somewhat expand upon those principals" that have governed *Auer* deference, noting that while "[y]ou might view this [discussion] as `just background' because we have made many of its points in prior decisions … , it is background that matters."

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[1] Many of Alpine's arguments were also considered and rejected in an Opinion of June 18, 2018, which denied Alpine's April 20, 2018 motion for reconsideration of the March Opinion. *See SEC v. Alpine Sec. Corp.*, No. 17cv4179(DLC), 2018 WL 3198889 (S.D.N.Y. June 18, 2018).

Id. at 2410, 2414. Because *Kisor* affirmed the continued viability of *Auer* deference, it does not reflect a change in controlling law that would permit the filing of an otherwise untimely motion for reconsideration.[2]

Even assuming *Kisor* reflects a change of emphasis in the doctrine of *Auer* deference, Alpine's motion must be denied. Alpine's principal complaint in its motion for reconsideration is that the March and December Opinions erred by concluding that the Securities and Exchange Commission ("SEC") has the authority to bring this action pursuant to Section 17(a) of the Exchange Act. Section 17(a) is, of course, a statute. Therefore, it is the application of *Chevron* deference, and not *Auer* deference, that is potentially at issue in the construction of Section 17(a).[3] *See* March Opinion, 308 F. Supp. 3d at 797-79; December Opinion, 354 F. Supp. 3d at 416-17. *Auer* deference has no application where an agency is interpreting a federal statute rather than its own regulation. *See Halo v. Yale Health Plan, Director of Benefits & Records Yale University*, 819 F.3d 42, 53 (2d Cir. 2016).

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[2] To support its claim that *Kisor* marks a change in controlling law, Alpine principally cites to the concurring opinion of Justice Gorsuch. The majority opinion notes that "[t]he proper understanding of the scope of limits of the *Auer* doctrine is, of course, not set out in any of the opinions that concur in the judgment." *Kisor*, 139 S. Ct. at 2415 n.4.

[3] The March Opinion did not require the application of *Chevron* deference to conclude that the SEC had authority to bring this suit. *See* March Opinion, 308 F. Supp. 3d at 797-97.

Alpine also argues that *Kisor* requires reconsideration of this Court's interpretation of Rule 17a-8, specifically the holding that the rule encompasses the duty to file a suspicious activity report ("SAR") even though SAR regulations were not enacted for another two decades. 17 C.F.R. § 240.17a-8. This argument is correctly addressed to the interpretation of a regulation rather than a statute, but Alpine largely uses this motion to rehash old arguments that were considered and rejected in the March and December Opinions and not to suggest that those decisions incorrectly applied *Auer* deference. For several reasons, *Kisor* has limited relevance to the Court's application of Rule 17a-8 to this action.

First, the conclusion that Rule 17a-8 authorizes the SEC to enforce the SAR obligations described in 31 C.F.R. § 1023.320 ("Section 1023.320") did not turn on the application of *Auer* deference. It was and remains principally based on the plain text of Rule 17a-8, which "simply incorporates the entirety of 'chapter X of title 31 of the Code of Federal Regulations.'" March Opinion, 308 F. Supp. 3d at 797 (quoting 17 C.F.R. § 240.17a-8). As the March Opinion explained, "the text of the regulation itself, as well as the SEC's 1981 notice of final rule, unambiguously demonstrate the SEC's intent for the nature of the Rule 17a-8 reporting obligation to evolve over time through the Treasury's regulations." *Id.*[4]

[4] The SEC's 1981 notice of final rule states that Rule 17a-8 "does not specify the required reports and records so as to allow for any

Second, to the extent the March Opinion confirmed this reading of Rule 17a-8 by reviewing interpretations of Rule 17a-8 by the Financial Crimes Enforcement Network ("FinCEN") and the SEC,[5] Alpine fails to address the most important aspects of that review. *Cf. SEC v. Alpine Sec. Corp.*, No. 17cv4179(DLC), 2018 WL 3198889, at *2 (S.D.N.Y. June 18, 2018) (denying motion for reconsideration of the March Opinion). Alpine does not address, for example, FinCEN's acknowledgement that the SEC would be able to bring actions such as this pursuant to Rule 17a-8. *See* March Opinion, 308 F. Supp. 3d at 797.

Alpine's final contentions—which do concern this Court's application of *Auer* deference—fare no better. Alpine appears to argue that the March and December Opinions inappropriately deferred to "the positions advanced by the SEC," as opposed to "[a]uthoritative' statements of FinCEN," when determining what information must be included in the narrative portion of a SAR filed pursuant to Section 1023.320. Alpine is incorrect. As explained in the December Opinion, this Court "principally relie[d] on the instructions in the 2002 SAR Form, the 2012

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revisions the Treasury may adopt in the future." SEC, Recordkeeping by Brokers and Dealers, 46 Fed. Reg. 61,455 (Dec. 17, 1981). Moreover, in 2011, Rule 17a-8 was amended to specifically refer to regulations of the Bank Secrecy Act ("BSA"). *See* 76 Fed. Reg. 11,327-28 (Mar. 2, 2011).

[5] After finding the text of Rule 17a-8 unambiguous, the March Opinion reviewed a notice of final rule issued by FinCEN for the original version of 31 C.F.R. § 1023.320 as well as a formal adjudication and several settled orders issued by the SEC. *See* March Opinion, 308 F. Supp. 3d at 797.

SAR Instructions, and the SAR Narrative Guidance issued [by FinCEN] in 2003" to interpret the scope of Section 1023.320. December Opinion, 354 F. Supp. 3d at 414.

The December Opinion explained that the SAR Forms themselves were of principal importance in its findings. It explained that,

> while FinCEN guidance is informative and useful, its role in this action can be overstated. The violations that the SEC asserts occurred here arose from Alpine's failure to comply with Section 1023.320's mandates and the SAR Form's instructions, including the requirement that it provide in its SARs' narratives a "clear, complete and chronological description [of] what is unusual, irregular or suspicious about the transaction(s)." These instructions have the force of law, having been issued as FinCEN regulations following a notice and comment period.

Id. at 417 (quoting 2002 SAR Form at 3) (citation omitted). The FinCEN guidance documents cited by the SEC "respond[] to the broad legal requirement contained in Section 1023.320 [and] give content to a broker-dealer's obligation to file SARs." *Id.* at 418. Alpine has failed to show that *Kisor* warrants reconsideration of this Court's reliance on those documents.

Conclusion

Alpine's July 3 motion for reconsideration is denied.

Dated: New York, New York
August 29, 2019

/s/ Denise Cote
DENISE COTE
United States
District Judge

APPENDIX G

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

United States Securities and Exchange Commission,

Plaintiff,

17cv4179 (DLC)

-v-

MEMORANDUM OPINION & ORDER

Alpine Securities Corporation,

Defendant.

For the plaintiff:
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For the defendant:
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DENISE COTE, District Judge:

On March 30, 2018, the Court denied the motion for summary judgment and for judgment on the pleadings filed by defendant Alpine Securities Corporation ("Alpine"), and granted in part the motion for partial summary judgment of plaintiff United States Securities and Exchange Commission ("SEC"). *See SEC v. Alpine Sec. Corp.*, No. 17cv4179(DLC), 2018 WL 1633818 (S.D.N.Y. Mar. 30, 2018) (the "March Opinion"). On April 20, Alpine filed motions seeking reconsideration of rulings in the March Opinion.[1] These motions became fully submitted on May 25. Alpine also moves for certification of several questions for interlocutory appeal. For the reasons that follow, Alpine's April 20 motions are denied.

Discussion

"[T]he standard for granting a … motion for reconsideration is strict." *Analytical Surveys, Inc. v. Tonga Partners, L.P.*, 684 F.3d 36, 52 (2d Cir. 2012) (citation omitted). "A motion for reconsideration should be granted only when the [moving party] identifies an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." *Kolel Beth Yechiel Mechil of Tartikov, Inc. v. YLL Irrevocable Trust*, 729 F.3d 99, 104 (2d Cir. 2013) (citation omitted). It is "not a vehicle for relitigating old issues,

[1] Alpine also moved on April 20 to supplement the record for purposes of its motions for reconsideration, which was denied on April 23.

presenting the case under new theories, securing a rehearing on the merits, or otherwise taking a second bite at the apple." *Analytical Surveys*, 684 F.3d at 52 (citation omitted).

An issue may be certified for interlocutory appeal in the following circumstances:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order.

28 U.S.C. § 1292(b). "[O]nly exceptional circumstances will justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment." *Flor v. BOT Fin. Corp.*, 79 F.3d 281, 284 (2d Cir. 1996) (*per curiam*) (citation omitted).

At the invitation of the Court, the parties filed motions for summary judgment addressed to a few

exemplar suspicious activity reports ("SARs"). *See SEC v. Alpine Sec. Corp.*, No. 17cv4179(DLC), 2018 WL 1633818, at *7 (S.D.N.Y. Mar. 30, 2018). Alpine principally argued in its motion that the SEC cannot enforce Bank Secrecy Act regulations via Rule 17a-8. *See id.* at *14. The SEC contended in its motion that Alpine violated its obligations under Rule 17a-8 as to 36 SARs the SEC submitted with its motion. *See id.* at *3.

Alpine moves for reconsideration of almost every aspect of the March Opinion, arguing that the Opinion overlooked controlling authority cited by Alpine and inappropriately granted summary judgment to the SEC despite genuine disputes of material fact. Alpine argues that the March Opinion is therefore clearly erroneous and manifestly unjust. Alpine's arguments are unavailing.

A significant portion of Alpine's moving papers present arguments that were raised by Alpine in its summary judgment papers and discussed in the March Opinion. These topics include the appropriate measure of deference to FinCEN guidance documents, the validity of the SEC's theory of violation of Rule 17a-8, and Alpine's contention that imposing liability would violate its due process rights. Alpine's may not use its motions for reconsideration to relitigate issues that have already been fully considered by the Court, and its attempt to do so is denied.

Turning to Alpine's motion for reconsideration of the denial of its motion for summary judgment and for judgment on the pleadings, Alpine fails to address the most important aspects of the March Opinion. For

example, Alpine does not address FinCEN's acknowledgement that the SEC would be able to use Rule 17a-8 to bring actions such as this one, which is premised on deficient suspicious activity reporting by broker-dealers. *See Alpine*, 2018 WL 1633818, at *15. As a result, reconsideration of the March Opinion's denial of Alpine's motion for summary judgment and for judgment on the pleadings is not warranted.

Certification for interlocutory appeal of the questions proposed by Alpine is also unwarranted. Although Alpine contests the rulings in the March Opinion, it has not shown that this case is so extraordinary that the final judgment rule should not apply. Moreover, Alpine has failed to show any serious reason to doubt the March Opinion's application of settled administrative law principles to the suspicious activity reporting regime at issue here.

Finally, Alpine has not shown that reconsideration of the partial grant of the SEC's motion for partial summary judgment is warranted. Alpine's motion for reconsideration conflates the question of whether a broker-dealer has an adequate anti-money laundering ("AML") program with the question of whether a particular SAR filed by a broker-dealer is adequate. As the SEC explains, this case is not a test of the adequacy of Alpine's AML program *as a program*, but instead a test of whether the SARs identified by the SEC satisfy the requirements of 31 C.F.R. § 1023.320. Alpine has not shown that the March Opinion erred in ruling that the exemplar SARs submitted by the SEC in connection with its motion were deficient. (In many instances, the Opinion's findings were conditioned on

the SEC proving at trial that each SAR was required to be filed. *See Alpine*, 2018 WL 1633818, at *18.) As a result, Alpine's motion for reconsideration of the March Opinion insofar as it partially granted the SEC's motion for partial summary judgment is denied.

It should be noted that an interlocutory appeal would be particularly unwarranted since the parties' full summary judgment motions are due to be filed in a few weeks, on July 13. The partial summary judgment motion practice gave the parties the opportunity to learn the legal framework that will govern that motion and to address the evidence in that context.

Conclusion

Alpine's April 20 motions for reconsideration and for certification for interlocutory appeal are denied.

Dated: New York, New York
June 18, 2018

/s/ Denise Cote
Denise Cote
United States District Judge

APPENDIX H

15 U.S.C. § 78q
§ 78q. Records and reports

(a) Rules and regulations

(1) Every national securities exchange, member thereof, broker or dealer who transacts a business in securities through the medium of any such member, registered securities association, registered broker or dealer, registered municipal securities dealer municipal advisor,,[1] registered securities information processor, registered transfer agent, nationally recognized statistical rating organization, and registered clearing agency and the Municipal Securities Rulemaking Board shall make and keep for prescribed periods such records, furnish such copies thereof, and make and disseminate such reports as the Commission, by rule, prescribes as necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this chapter. Any report that a nationally recognized statistical rating organization is required by Commission rules under this paragraph to make and disseminate to the Commission shall be deemed furnished to the Commission.

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[1] So in original.

15 U.S.C. § 78u
§ 78u. Investigations and actions

...

(d) Injunction proceedings; authority of court to prohibit persons from serving as officers and directors; money penalties in civil actions

(1) Whenever it shall appear to the Commission that any person is engaged or is about to engage in acts or practices constituting a violation of any provision of this chapter, the rules or regulations thereunder, the rules of a national securities exchange or registered securities association of which such person is a member or a person associated with a member, the rules of a registered clearing agency in which such person is a participant, the rules of the Public Company Accounting Oversight Board, of which such person is a registered public accounting firm or a person associated with such a firm, or the rules of the Municipal Securities Rulemaking Board, it may in its discretion bring an action in the proper district court of the United States, the United States District Court for the District of Columbia, or the United States courts of any territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices as may constitute a violation of any provision of this chapter or the rules or regulations thereunder to the Attorney General, who may, in his discretion, institute the necessary criminal proceedings under

this chapter.

(2) Authority of court to prohibit persons from serving as officers and directors

In any proceeding under paragraph (1) of this subsection, the court may prohibit, conditionally or unconditionally, and permanently or for such period of time as it shall determine, any person who violated section 78j(b) of this title or the rules or regulations thereunder from acting as an officer or director of any issuer that has a class of securities registered pursuant to section 78*l* of this title or that is required to file reports pursuant to section 78*o*(d) of this title if the person's conduct demonstrates unfitness to serve as an officer or director of any such issuer.

(3) Civil money penalties and authority to seek disgorgement

(A) Authority of Commission

Whenever it shall appear to the Commission that any person has violated any provision of this chapter, the rules or regulations thereunder, or a cease-and-desist order entered by the Commission pursuant to section 78u-3 of this title, other than by committing a violation subject to a penalty pursuant to section 78u-1 of this title, the Commission may bring an action in a United States district court to seek, and the court shall have jurisdiction to—

(i) impose, upon a proper showing, a civil

penalty to be paid by the person who committed such violation; and

(ii) require disgorgement under paragraph (7) of any unjust enrichment by the person who received such unjust enrichment as a result of such violation.

(B) Amount of penalty

(i) First tier

The amount of a civil penalty imposed under subparagraph (A)(i) shall be determined by the court in light of the facts and circumstances. For each violation, the amount of the penalty shall not exceed the greater of (I) $5,000 for a natural person or $50,000 for any other person, or (II) the gross amount of pecuniary gain to such defendant as a result of the violation.

(ii) Second tier

Notwithstanding clause (i), the amount of a civil penalty imposed under subparagraph (A)(i) for each such violation shall not exceed the greater of (I) $50,000 for a natural person or $250,000 for any other person, or (II) the gross amount of pecuniary gain to such defendant as a result of the violation, if the violation described in subparagraph (A) involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement.

(iii) Third tier

Notwithstanding clauses (i) and (ii), the amount of a civil penalty imposed under subparagraph (A)(i) for each violation described in that subparagraph shall not exceed the greater of (I) $100,000 for a natural person or $500,000 for any other person, or (II) the gross amount of pecuniary gain to such defendant as a result of the violation, if—

(aa) the violation described in subparagraph (A) involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement; and

(bb) such violation directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons.

(C) Procedures for collection

(i) Payment of penalty to treasury

A penalty imposed under this section shall be payable into the Treasury of the United States, except as otherwise provided in section 7246 of this title and section 78u-6 of this title.

(ii) Collection of penalties

If a person upon whom such a penalty is

imposed shall fail to pay such penalty within the time prescribed in the court's order, the Commission may refer the matter to the Attorney General who shall recover such penalty by action in the appropriate United States district court.

(iii) Remedy not exclusive

The actions authorized by this paragraph may be brought in addition to any other action that the Commission or the Attorney General is entitled to bring.

(iv) Jurisdiction and venue

For purposes of section 78aa of this title, actions under this paragraph shall be actions to enforce a liability or a duty created by this chapter.

(D) Special provisions relating to a violation of a cease-and-desist order

In an action to enforce a cease-and-desist order entered by the Commission pursuant to section 78u-3 of this title, each separate violation of such order shall be a separate offense, except that in the case of a violation through a continuing failure to comply with the order, each day of the failure to comply shall be deemed a separate offense.

(4) Prohibition of attorneys' fees paid from Commission disgorgement funds

Except as otherwise ordered by the court upon motion by the Commission, or, in the case of an administrative action, as otherwise ordered by the Commission, funds disgorged under paragraph (7) as the result of an action brought by the Commission in Federal court, or as a result of any Commission administrative action, shall not be distributed as payment for attorneys' fees or expenses incurred by private parties seeking distribution of the disgorged funds.

(5) Equitable relief

In any action or proceeding brought or instituted by the Commission under any provision of the securities laws, the Commission may seek, and any Federal court may grant, any equitable relief that may be appropriate or necessary for the benefit of investors.

(6) Authority of a court to prohibit persons from participating in an offering of penny stock

(A) In general

In any proceeding under paragraph (1) against any person participating in, or, at the time of the alleged misconduct who was participating in, an offering of penny stock, the court may prohibit that person from participating in an offering of penny stock, conditionally or unconditionally, and permanently or for such period of time as the court shall determine.

(B) Definition

For purposes of this paragraph, the term "person participating in an offering of penny stock" includes any person engaging in activities with a broker, dealer, or issuer for purposes of issuing, trading, or inducing or attempting to induce the purchase or sale of, any penny stock. The Commission may, by rule or regulation, define such term to include other activities, and may, by rule, regulation, or order, exempt any person or class of persons, in whole or in part, conditionally or unconditionally, from inclusion in such term.

(7) Disgorgement

In any action or proceeding brought by the Commission under any provision of the securities laws, the Commission may seek, and any Federal court may order, disgorgement.

(8) Limitations periods

(A) Disgorgement

The Commission may bring a claim for disgorgement under paragraph (7)—

(i) not later than 5 years after the latest date of the violation that gives rise to the action or proceeding in which the Commission seeks the claim occurs; or

(ii) not later than 10 years after the latest

date of the violation that gives rise to the action or proceeding in which the Commission seeks the claim if the violation involves conduct that violates—

(I) section 10(b);

(II) section 17(a)(1) of the Securities Act of 1933 (15 U.S.C. 77q(a)(1));

(III) section 206(1) of the Investment Advisers Act of 1940 (15 U.S.C. 80b-6(1)); or

(IV) any other provision of the securities laws for which scienter must be established.

(B) Equitable remedies

The Commission may seek a claim for any equitable remedy, including for an injunction or for a bar, suspension, or cease and desist order, not later than 10 years after the latest date on which a violation that gives rise to the claim occurs.

(C) Calculation

For the purposes of calculating any limitations period under this paragraph with respect to an action or claim, any time in which the person against which the action or claim, as applicable, is brought is outside of the United States shall not count towards the accrual of that period.

(9) Rule of construction

Nothing in paragraph (7) may be construed as altering any right that any private party may have to maintain a suit for a violation of this chapter.

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31 U.S.C. § 5318
§ 5318 Compliance, exemptions, and summons authority

(a) General powers of Secretary.—The Secretary of the Treasury may (except under section 5315 of this title and regulations prescribed under section 5315)—

(1) except as provided in subsections (b)(2) and (h)(4), delegate duties and powers under this subchapter to an appropriate supervising agency and the United States Postal Service;

(2) require a class of domestic financial institutions or nonfinancial trades or businesses to maintain appropriate procedures, including the collection and reporting of certain information as the Secretary of the Treasury may prescribe by regulation, to ensure compliance with this subchapter and regulations prescribed under this subchapter or to guard against money laundering, the financing of terrorism, or other forms of illicit finance;

(3) examine any books, papers, records, or other data of domestic financial institutions or

nonfinancial trades or businesses relevant to the recordkeeping or reporting requirements of this subchapter;

(4) summon a financial institution or nonfinancial trade or business, an officer or employee of a financial institution or nonfinancial trade or business (including a former officer or employee), or any person having possession, custody, or care of the reports and records required under this subchapter, to appear before the Secretary of the Treasury or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give testimony, under oath, as may be relevant or material to an investigation described in subsection (b);

(5) exempt from the requirements of this subchapter any class of transactions within any State if the Secretary determines that—

(A) under the laws of such State, that class of transactions is subject to requirements substantially similar to those imposed under this subchapter; and

(B) there is adequate provision for the enforcement of such requirements;

(6) rely on examinations conducted by a State supervisory agency of a category of financial institution, if the Secretary determines that—

(A) the category of financial institution is

required to comply with this subchapter and regulations prescribed under this subchapter; or

(B) the State supervisory agency examines the category of financial institution for compliance with this subchapter and regulations prescribed under this subchapter; and

(7) prescribe an appropriate exemption from a requirement under this subchapter and regulations prescribed under this subchapter. The Secretary may revoke an exemption under this paragraph or paragraph (5) by actually or constructively notifying the parties affected. A revocation is effective during judicial review.

(b) Limitations on summons power.—

(1) Scope of power.—The Secretary of the Treasury may take any action described in paragraph (3) or (4) of subsection (a) only in connection with investigations for the purpose of civil enforcement of violations of this subchapter, section 21 of the Federal Deposit Insurance Act, section 411[1] of the National Housing Act, or chapter 2 of Public Law 91-508 (12 U.S.C. 1951 et seq.) or any regulation under any such provision.

(2) Authority to issue.—A summons may be issued under subsection (a)(4) only by, or with the approval of, the Secretary of the Treasury or a supervisory level delegate of the Secretary of the

[1] Repealed by Pub. L. 101-73, Title IV, § 407, Aug. 9, 1989, 103 Stat. 363.

Treasury.

(c) Administrative aspects of summons.—

(1) Production at designated site.—A summons issued pursuant to this section may require that books, papers, records, or other data stored or maintained at any place be produced at any designated location in any State or in any territory or other place subject to the jurisdiction of the United States not more than 500 miles distant from any place where the financial institution or nonfinancial trade or business operates or conducts business in the United States.

(2) Fees and travel expenses.—Persons summoned under this section shall be paid the same fees and mileage for travel in the United States that are paid witnesses in the courts of the United States.

(3) No liability for expenses.—The United States shall not be liable for any expense, other than an expense described in paragraph (2), incurred in connection with the production of books, papers, records, or other data under this section.

(d) Service of summons.—Service of a summons issued under this section may be by registered mail or in such other manner calculated to give actual notice as the Secretary may prescribe by regulation.

(e) Contumacy or refusal.—

(1) Referral to Attorney General.—In case of contumacy by a person issued a summons under paragraph (3) or (4) of subsection (a) or a refusal by such person to obey such summons, the Secretary of the Treasury shall refer the matter to the Attorney General.

(2) Jurisdiction of court.—The Attorney General may invoke the aid of any court of the United States within the jurisdiction of which—

(A) the investigation which gave rise to the summons is being or has been carried on;

(B) the person summoned is an inhabitant; or

(C) the person summoned carries on business or may be found,

to compel compliance with the summons.

(3) Court order.—The court may issue an order requiring the person summoned to appear before the Secretary or his delegate to produce books, papers, records, and other data, to give testimony as may be necessary to explain how such material was compiled and maintained, and to pay the costs of the proceeding.

(4) Failure to comply with order.—Any failure to obey the order of the court may be punished by the court as a contempt thereof.

(5) Service of process.—All process in any case under this subsection may be served in any judicial district in which such person may be

found.

(f) Written and signed statement required.—No person shall qualify for an exemption under subsection (a)(5) unless the relevant financial institution or nonfinancial trade or business prepares and maintains a statement which—

(1) describes in detail the reasons why such person is qualified for such exemption; and

(2) contains the signature of such person.

(g) Reporting of suspicious transactions.—

(1) In general.—The Secretary may require any financial institution, and any director, officer, employee, or agent of any financial institution, to report any suspicious transaction relevant to a possible violation of law or regulation.

(2) Notification prohibited.—

(A) In general.—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) neither the financial institution, director, officer, employee, or agent of such institution (whether or not any such person is still employed by the institution), nor any other current or former director, officer, or

employee of, or contractor for, the financial institution or other reporting person, may notify any person involved in the transaction that the transaction has been reported or otherwise reveal any information that would reveal that the transaction has been reported,;[2] and

(ii) no current or former officer or employee of or contractor for the Federal Government or of or for any State, local, tribal, or territorial government within the United States, who has any knowledge that such report was made may disclose to any person involved in the transaction that the transaction has been reported, or otherwise reveal any information that would reveal that the transaction has been reported, other than as necessary to fulfill the official duties of such officer or employee.

(B) Disclosures in certain employment references.—

(i) Rule of construction.—Notwithstanding the application of subparagraph (A) in any other context, subparagraph (A) shall not be construed as prohibiting any financial institution, or any director, officer, employee, or agent of such institution, from including information that was included in a report to which subparagraph (A) applies—

[2] So in original.

(I) in a written employment reference that is provided in accordance with section 18(w) of the Federal Deposit Insurance Act in response to a request from another financial institution; or

(II) in a written termination notice or employment reference that is provided in accordance with the rules of a self-regulatory organization registered with the Securities and Exchange Commission or the Commodity Futures Trading Commission,

except that such written reference or notice may not disclose that such information was also included in any such report, or that such report was made.

(ii) Information not required.—Clause (i) shall not be construed, by itself, to create any affirmative duty to include any information described in clause (i) in any employment reference or termination notice referred to in clause (i).

(3) Liability for disclosures.—

(A) In general.—Any 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.

(B) Rule of construction.—Subparagraph (A) shall not be construed as creating—

(i) any inference that the term "person", as used in such subparagraph, may be construed more broadly than its ordinary usage so as to include any government or agency of government; or

(ii) any immunity against, or otherwise affecting, any civil or criminal action brought by any government or agency of government to enforce any constitution, law, or regulation of such government or agency.

(4) Single designee for reporting suspicious transactions.—

(A) In general.—In requiring reports under paragraph (1) of suspicious transactions, the Secretary of the Treasury shall designate, to the extent practicable and appropriate, a single

officer or agency of the United States to whom such reports shall be made.

(B) Duty of designee.—The officer or agency of the United States designated by the Secretary of the Treasury pursuant to subparagraph (A) shall refer any report of a suspicious transaction to any appropriate law enforcement, supervisory agency, or United States intelligence agency for use in the conduct of intelligence or counterintelligence activities, including analysis, to protect against international terrorism.

(C) Coordination with other reporting requirements.—Subparagraph (A) shall not be construed as precluding any supervisory agency for any financial institution from requiring the financial institution to submit any information or report to the agency or another agency pursuant to any other applicable provision of law.

(5) Considerations in imposing reporting requirements.—

(A) Definitions.—In this paragraph, the terms "Bank Secrecy Act", "Federal functional regulator", "State bank supervisor", and "State credit union supervisor" have the meanings given the terms in section 6003 of the Anti-Money Laundering Act of 2020.

(B) Requirements.—In imposing any requirement to report any suspicious

transaction under this subsection, the Secretary of the Treasury, in consultation with the Attorney General, appropriate representatives of State bank supervisors, State credit union supervisors, and the Federal functional regulators, shall consider items that include—

(i) the national priorities established by the Secretary;

(ii) the purposes described in section 5311; and

(iii) the means by or form in which the Secretary shall receive such reporting, including the burdens imposed by such means or form of reporting on persons required to provide such reporting, the efficiency of the means or form, and the benefits derived by the means or form of reporting by Federal law enforcement agencies and the intelligence community in countering financial crime, including money laundering and the financing of terrorism.

(C) Compliance program.—Reports filed under this subsection shall be guided by the compliance program of a covered financial institution with respect to the Bank Secrecy Act, including the risk assessment processes of the covered institution that should include a consideration of priorities established by the Secretary of the Treasury under section 5318.

(D) Streamlined data and real-time

reporting.—

(i) Requirement to establish system.—In considering the means by or form in which the Secretary of the Treasury shall receive reporting pursuant to subparagraph (B)(iii), the Secretary of the Treasury, acting through the Director of the Financial Crimes Enforcement Network, and in consultation with appropriate representatives of the State bank supervisors, State credit union supervisors, and Federal functional regulators, shall—

(I) establish streamlined, including automated, processes to, as appropriate, permit the filing of noncomplex categories of reports that—

(aa) reduce burdens imposed on persons required to report; and

(bb) do not diminish the usefulness of the reporting to Federal law enforcement agencies, national security officials, and the intelligence community in combating financial crime, including the financing of terrorism;

(II) subject to clause (ii)—

(aa) permit streamlined, including automated, reporting for the categories described in subclause (I); and

(bb) establish the conditions under which the reporting described in item (aa) is permitted; and

(III) establish additional systems and processes as necessary to allow for the reporting described in subclause (II)(aa).

(ii) Standards.—The Secretary of the Treasury—

(I) in carrying out clause (i), shall establish standards to ensure that streamlined reports relate to suspicious transactions relevant to potential violations of law (including regulations); and

(II) in establishing the standards under subclause (I), shall consider transactions, including structured transactions, designed to evade any regulation promulgated under this subchapter, certain fund and asset transfers with little or no apparent economic or business purpose, transactions without lawful purposes, and any other transaction that the Secretary determines to be appropriate.

(iii) Rule of construction.—Nothing in this subparagraph may be construed to preclude the Secretary of the Treasury from—

(I) requiring reporting as provided for in subparagraphs (B) and (C); or

(II) notifying Federal law enforcement with respect to any transaction that the Secretary has determined implicates a national priority established by the Secretary.

(6) Sharing of threat pattern and trend information.—

(A) Definitions.—In this paragraph—

(i) the terms "Bank Secrecy Act" and "Federal functional regulator" have the meanings given the terms in section 6003 of the Anti-Money Laundering Act of 2020; and

(ii) the term "typology" means a technique to launder money or finance terrorism.

(B) Suspicious activity report activity review.—Not less frequently than semiannually, the Director of the Financial Crimes Enforcement Network shall publish threat pattern and trend information to provide meaningful information about the preparation, use, and value of reports filed under this subsection by financial institutions, as well as other reports filed by financial institutions under the Bank Secrecy Act.

(C) Inclusion of typologies.—In each publication published under subparagraph (B), the Director shall provide financial institutions and the Federal functional regulators with typologies, including data that can be adapted

in algorithms if appropriate, relating to emerging money laundering and terrorist financing threat patterns and trends.

(7) Rules of construction.—Nothing in this subsection may be construed as precluding the Secretary of the Treasury from—

(A) requiring reporting as provided under subparagraphs (A) and (B) of paragraph (6); or

(B) notifying a Federal law enforcement agency with respect to any transaction that the Secretary has determined directly implicates a national priority established by the Secretary.

(8) Pilot program on sharing with foreign branches, subsidiaries, and affiliates.—

(A) In general.—

(i) Issuance of rules.—Not later than 1 year after the date of enactment of this paragraph, the Secretary of the Treasury shall issue rules, in coordination with the Director of the Financial Crimes Enforcement Network, establishing the pilot program described in subparagraph (B).

(ii) Considerations.—In issuing the rules required under clause (i), the Secretary shall ensure that the sharing of information described in subparagraph (B)—

(I) is limited by the requirements of

Federal and State law enforcement operations;

(II) takes into account potential concerns of the intelligence community; and

(III) is subject to appropriate standards and requirements regarding data security and the confidentiality of personally identifiable information.

(B) Pilot program described.—The pilot program described in this paragraph shall—

(i) permit a financial institution with a reporting obligation under this subsection to share information related to reports under this subsection, including that such a report has been filed, with the institution's foreign branches, subsidiaries, and affiliates for the purpose of combating illicit finance risks, notwithstanding any other provision of law except subparagraph (A) or (C);

(ii) permit the Secretary to consider, implement, and enforce provisions that would hold a foreign affiliate of a United States financial institution liable for the disclosure of information related to reports under this section;

(iii) terminate on the date that is 3 years after the date of enactment of this paragraph, except that the Secretary of the Treasury may extend the pilot program for not more than 2

years upon submitting to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House of Representatives a report that includes—

(I) a certification that the extension is in the national interest of the United States, with a detailed explanation of the reasons that the extension is in the national interest of the United States;

(II) after appropriate consultation by the Secretary with participants in the pilot program, an evaluation of the usefulness of the pilot program, including a detailed analysis of any illicit activity identified or prevented as a result of the program; and

(III) a detailed legislative proposal providing for a long-term extension of activities under the pilot program, measures to ensure data security, and confidentiality of personally identifiable information, including expected budgetary resources for those activities, if the Secretary of the Treasury determines that a long-term extension is appropriate.

(C) Prohibition involving certain jurisdictions.—

(i) In general.—In issuing the rules required under subparagraph (A), the Secretary of the Treasury may not permit a financial

institution to share information on reports under this subsection with a foreign branch, subsidiary, or affiliate located in—

(I) the People's Republic of China;

(II) the Russian Federation; or

(III) a jurisdiction that—

(aa) is a state sponsor of terrorism;

(bb) is subject to sanctions imposed by the Federal Government; or

(cc) the Secretary has determined cannot reasonably protect the security and confidentiality of such information.

(ii) Exceptions.—The Secretary is authorized to make exceptions, on a case-by-case basis, for a financial institution located in a jurisdiction listed in subclause (I) or (II) of clause (i), if the Secretary notifies the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House of Representatives that such an exception is in the national security interest of the United States.

(D) Implementation updates.—Not later than 360 days after the date on which rules are issued under subparagraph (A), and annually thereafter for 3 years, the Secretary of the

Treasury, or the designee of the Secretary, shall brief the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House of Representatives on—

(i) the degree of any information sharing permitted under the pilot program and a description of criteria used by the Secretary to evaluate the appropriateness of the information sharing;

(ii) the effectiveness of the pilot program in identifying or preventing the violation of a United States law or regulation and mechanisms that may improve that effectiveness; and

(iii) any recommendations to amend the design of the pilot program.

(9) Treatment of foreign jurisdiction-originated reports.—Information related to a report received by a financial institution from a foreign affiliate with respect to a suspicious transaction relevant to a possible violation of law or regulation shall be subject to the same confidentiality requirements provided under this subsection for a report of a suspicious transaction described in paragraph (1).

(10) No offshoring compliance.—No financial institution may establish or maintain any operation located outside of the United States the primary purpose of which is to ensure compliance

with the Bank Secrecy Act as a result of the sharing granted under this subsection.

(11) Definitions.—In this subsection:

(A) Affiliate.—The term "affiliate" means an entity that controls, is controlled by, or is under common control with another entity.

(B) Bank Secrecy Act; State bank supervisor; State credit union supervisor.—The terms "Bank Secrecy Act", "State bank supervisor", and "State credit union supervisor" have the meanings given the terms in section 6003 of the Anti-Money Laundering Act of 2020.

(h) Anti-money laundering programs.—

(1) In general.—In order to guard against money laundering and the financing of terrorism through financial institutions, each financial institution shall establish anti-money laundering and countering the financing of terrorism programs, including, at a minimum—

(A) the development of internal policies, procedures, and controls;

(B) the designation of a compliance officer;

(C) an ongoing employee training program; and

(D) an independent audit function to test programs.

(2) Regulations.—

(A) In general.—The Secretary of the Treasury, after consultation with the appropriate Federal functional regulator (as defined in section 509 of the Gramm-Leach-Bliley Act), may prescribe minimum standards for programs established under paragraph (1), and may exempt from the application of those standards any financial institution that is not subject to the provisions of the rules contained in part 103 of title 31, of the Code of Federal Regulations, or any successor rule thereto, for so long as such financial institution is not subject to the provisions of such rules.

(B) Factors.—In prescribing the minimum standards under subparagraph (A), and in supervising and examining compliance with those standards, the Secretary of the Treasury, and the appropriate Federal functional regulator (as defined in section 509 of the Gramm-Leach-Bliley Act (12 U.S.C. 6809)) shall take into account the following:

(i) Financial institutions are spending private compliance funds for a public and private benefit, including protecting the United States financial system from illicit finance risks.

(ii) The extension of financial services to the underbanked and the facilitation of financial transactions, including remittances, coming from the United States and abroad in ways

that simultaneously prevent criminal persons from abusing formal or informal financial services networks are key policy goals of the United States.

(iii) Effective anti-money laundering and countering the financing of terrorism programs safeguard national security and generate significant public benefits by preventing the flow of illicit funds in the financial system and by assisting law enforcement and national security agencies with the identification and prosecution of persons attempting to launder money and undertake other illicit activity through the financial system.

(iv) Anti-money laundering and countering the financing of terrorism programs described in paragraph (1) should be—

(I) reasonably designed to assure and monitor compliance with the requirements of this subchapter and regulations promulgated under this subchapter; and

(II) risk-based, including ensuring that more attention and resources of financial institutions should be directed toward higher-risk customers and activities, consistent with the risk profile of a financial institution, rather than toward lower-risk customers and activities.

(3) Concentration accounts.—The Secretary

may prescribe regulations under this subsection that govern maintenance of concentration accounts by financial institutions, in order to ensure that such accounts are not used to prevent association of the identity of an individual customer with the movement of funds of which the customer is the direct or beneficial owner, which regulations shall, at a minimum—

(A) prohibit financial institutions from allowing clients to direct transactions that move their funds into, out of, or through the concentration accounts of the financial institution;

(B) prohibit financial institutions and their employees from informing customers of the existence of, or the means of identifying, the concentration accounts of the institution; and

(C) require each financial institution to establish written procedures governing the documentation of all transactions involving a concentration account, which procedures shall ensure that, any time a transaction involving a concentration account commingles funds belonging to 1 or more customers, the identity of, and specific amount belonging to, each customer is documented.

(4) Priorities.—

(A) In general.—Not later than 180 days after the date of enactment of this paragraph, the Secretary of the Treasury, in consultation with the Attorney General, Federal functional

regulators (as defined in section 509 of the Gramm-Leach-Bliley Act (15 U.S.C. 6809)), relevant State financial regulators, and relevant national security agencies, shall establish and make public priorities for anti-money laundering and countering the financing of terrorism policy.

(B) Updates.—Not less frequently than once every 4 years, the Secretary of the Treasury, in consultation with the Attorney General, Federal functional regulators (as defined in section 509 of the Gramm-Leach-Bliley Act (15 U.S.C. 6809)), relevant State financial regulators, and relevant national security agencies, shall update the priorities established under subparagraph (A).

(C) Relation to national strategy.—The Secretary of the Treasury shall ensure that the priorities established under subparagraph (A) are consistent with the national strategy for countering the financing of terrorism and related forms of illicit finance developed under section 261 of the Countering Russian Influence in Europe and Eurasia Act of 2017 (Public Law 115-44; 131 Stat. 934).

(D) Rulemaking.—Not later than 180 days after the date on which the Secretary of the Treasury establishes the priorities under subparagraph (A), the Secretary of the Treasury, acting through the Director of the Financial Crimes Enforcement Network and in consultation with the Federal functional

regulators (as defined in section 509 of the Gramm-Leach-Bliley Act (15 U.S.C. 6809)) and relevant State financial regulators, shall, as appropriate, promulgate regulations to carry out this paragraph.

(E) Supervision and examination.—The review by a financial institution of the priorities established under subparagraph (A) and the incorporation of those priorities, as appropriate, into the risk-based programs established by the financial institution to meet obligations under this subchapter, the USA PATRIOT Act (Public Law 107-56; 115 Stat. 272), and other anti-money laundering and countering the financing of terrorism laws and regulations shall be included as a measure on which a financial institution is supervised and examined for compliance with those obligations.

(5) Duty.—The duty to establish, maintain and enforce an anti-money laundering and countering the financing of terrorism program as required by this subsection shall remain the responsibility of, and be performed by, persons in the United States who are accessible to, and subject to oversight and supervision by, the Secretary of the Treasury and the appropriate Federal functional regulator (as defined in section 509 of the Gramm-Leach-Bliley Act (15 U.S.C. 6809)).

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31 U.S.C.A. § 5321
§ 5321. Civil penalties

(a)(1) A domestic financial institution or nonfinancial trade or business, and a partner, director, officer, or employee of a domestic financial institution or nonfinancial trade or business, willfully violating this subchapter or a regulation prescribed or order issued under this subchapter (except sections 5314, 5315, and 5336 of this title or a regulation prescribed under sections 5314, 5315, and 5336), or willfully violating a regulation prescribed under section 21 of the Federal Deposit Insurance Act or section 123 of Public Law 91-508, is liable to the United States Government for a civil penalty of not more than the greater of the amount (not to exceed $100,000) involved in the transaction (if any) or $25,000. For a violation of section 5318(a)(2) of this title or a regulation prescribed under section 5318(a)(2), a separate violation occurs for each day the violation continues and at each office, branch, or place of business at which a violation occurs or continues.

(2) The Secretary of the Treasury may impose an additional civil penalty on a person not filing a report, or filing a report containing a material omission or misstatement, under section 5316 of this title or a regulation prescribed under section 5316. A civil penalty under this paragraph may not be more than the amount of the monetary instrument for which the report was required. A civil penalty under this paragraph is reduced by an amount forfeited

under section 5317(b) of this title.

(3) A person not filing a report under a regulation prescribed under section 5315 of this title or not complying with an injunction under section 5320 of this title enjoining a violation of, or enforcing compliance with, section 5315 or a regulation prescribed under section 5315, is liable to the Government for a civil penalty of not more than $10,000.

(4) Structured transaction violation.—

(A) Penalty authorized.—The Secretary of the Treasury may impose a civil money penalty on any person who violates any provision of section 5324.

(B) Maximum amount limitation.—The amount of any civil money penalty imposed under subparagraph (A) shall not exceed the amount of the coins and currency (or such other monetary instruments as the Secretary may prescribe) involved in the transaction with respect to which such penalty is imposed.

(C) Coordination with forfeiture provision.—The amount of any civil money penalty imposed by the Secretary under subparagraph (A) shall be reduced by the amount of any forfeiture to the United States in connection with the transaction with respect to which such penalty is imposed.

(5) Foreign financial agency transaction violation.—

(A) Penalty authorized.—The Secretary of the Treasury may impose a civil money penalty on any person who violates, or causes any violation of, any provision of section 5314.

(B) Amount of penalty.—

(i) In general.—Except as provided in subparagraph (C), the amount of any civil penalty imposed under subparagraph (A) shall not exceed $10,000.

(ii) Reasonable cause exception.—No penalty shall be imposed under subparagraph (A) with respect to any violation if—

(I) such violation was due to reasonable cause, and

(II) the amount of the transaction or the balance in the account at the time of the transaction was properly reported.

(C) Willful violations.—In the case of any person willfully violating, or willfully causing any violation of, any provision of section 5314—

(i) the maximum penalty under subparagraph (B)(i) shall be increased to the greater of—

(I) $100,000, or

(II) 50 percent of the amount determined under subparagraph (D), and

(ii) subparagraph (B)(ii) shall not apply.

(D) Amount.—The amount determined under this subparagraph is—

(i) in the case of a violation involving a transaction, the amount of the transaction, or

(ii) in the case of a violation involving a failure to report the existence of an account or any identifying information required to be provided with respect to an account, the balance in the account at the time of the violation.

(6) Negligence.—

(A) In general.—The Secretary of the Treasury may impose a civil money penalty of not more than $500 on any financial institution or nonfinancial trade or business which negligently violates any provision of this subchapter (except section 5336) or any regulation prescribed under this subchapter (except section 5336).

(B) Pattern of negligent activity.—If any financial institution or nonfinancial trade or business engages in a pattern of negligent violations of any provision of this subchapter (except section 5336) or any regulation prescribed under this subchapter (except section 5336), the Secretary of the Treasury may, in addition to any penalty imposed under subparagraph (A) with respect to any such violation, impose a civil money penalty of not more than $50,000 on the financial institution or nonfinancial trade or business.

(7) Penalties for international counter money laundering violations.—The Secretary may impose a civil money penalty in an amount equal to not less than 2 times the amount of the transaction, but not more than $1,000,000, on any financial institution or agency that violates any provision of subsection (i) or (j) of section 5318 or any special measures imposed under section 5318A.

(b) Time limitations for assessments and commencement of civil actions.—

(1) Assessments.—The Secretary of the Treasury may assess a civil penalty under subsection (a) at any time before the end of the 6-year period beginning on the date of the transaction with respect to which the penalty is assessed.

(2) Civil actions.—The Secretary may commence a civil action to recover a civil penalty assessed under subsection (a) at any time before the end of the 2-year period beginning on the later of—

(A) the date the penalty was assessed; or

(B) the date any judgment becomes final in any criminal action under section 5322 in connection with the same transaction with respect to which the penalty is assessed.

(c) The Secretary may remit any part of a forfeiture under subsection (c) or (d)[1] of section 5317 of this title or civil penalty under subsection (a)(2) of this

[1] So in original. Section 5317 does not contain a subsec. (d).

section.

(d) Criminal penalty not exclusive of civil penalty.—A civil money penalty may be imposed under subsection (a) with respect to any violation of this subchapter notwithstanding the fact that a criminal penalty is imposed with respect to the same violation.

(e) Delegation of assessment authority to banking agencies.—

(1) In general.—The Secretary of the Treasury shall delegate, in accordance with section 5318(a)(1) and subject to such terms and conditions as the Secretary may impose in accordance with paragraph (3), any authority of the Secretary to assess a civil money penalty under this section on depository institutions (as defined in section 3 of the Federal Deposit Insurance Act) to the appropriate Federal banking agencies (as defined in such section 3).

(2) Authority of agencies.—Subject to any term or condition imposed by the Secretary of the Treasury under paragraph (3), the provisions of this section shall apply to an appropriate Federal banking agency to which is delegated any authority of the Secretary under this section in the same manner such provisions apply to the Secretary.

(3) Terms and conditions.—

(A) In general.—The Secretary of the Treasury

shall prescribe by regulation the terms and conditions which shall apply to any delegation under paragraph (1).

(B) Maximum dollar amount.—The terms and conditions authorized under subparagraph (A) may include, in the Secretary's sole discretion, a limitation on the amount of any civil penalty which may be assessed by an appropriate Federal banking agency pursuant to a delegation under paragraph (1).

(f) Additional damages for repeat violators.—

(1) In general.—In addition to any other fines permitted under this section and section 5322, with respect to a person who has previously violated a provision of (or rule issued under) this subchapter, section 21 of the Federal Deposit Insurance Act (12 U.S.C. 1829b), or section 123 of Public Law 91-508 (12 U.S.C. 1953), the Secretary of the Treasury, if practicable, may impose an additional civil penalty against such person for each additional such violation in an amount that is not more than the greater of—

(A) if practicable to calculate, 3 times the profit gained or loss avoided by such person as a result of the violation; or

(B) 2 times the maximum penalty with respect to the violation.

(2) Application.—For purposes of determining whether a person has committed a previous

violation under paragraph (1), the determination shall only include violations occurring after the date of enactment of the Anti-Money Laundering Act of 2020.

(g) Certain violators barred from serving on boards of United States financial institutions.—

(1) Definition.—In this subsection, the term "egregious violation" means, with respect to an individual—

(A) a criminal violation—

(i) for which the individual is convicted; and

(ii) for which the maximum term of imprisonment is more than 1 year; and

(B) a civil violation in which—

(i) the individual willfully committed the violation; and

(ii) the violation facilitated money laundering or the financing of terrorism.

(2) Bar.—An individual found to have committed an egregious violation of the Bank Secrecy Act, as defined in section 6003 of the Anti-Money Laundering Act of 2020, or any rules issued under the Bank Secrecy Act, shall be barred from serving on the board of directors of a United States financial institution during the 10-year period that begins on the date on which the conviction or judgment, as applicable, with respect to the egregious violation is entered.

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17 C.F.R. § 240.17a–8

§ 240.17a–8 Financial recordkeeping and reporting of currency and foreign transactions.

Every registered broker or dealer who is subject to the requirements of the Currency and Foreign Transactions Reporting Act of 1970 shall comply with the reporting, recordkeeping and record retention requirements of chapter X of title 31 of the Code of Federal Regulations. Where chapter X of title 31 of the Code of Federal Regulations and § 240.17a–4 of this chapter require the same records or reports to be preserved for different periods of time, such records or reports shall be preserved for the longer period of time.

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31 C.F.R. § 1010.810

§ 1010.810 Enforcement.

(a) Overall authority for enforcement and compliance, including coordination and direction of procedures and activities of all other agencies exercising delegated authority under this chapter, is delegated to the Director, FinCEN.

(b) Authority to examine institutions to determine compliance with the requirements of this chapter is delegated as follows:

(1) To the Comptroller of the Currency with respect to those financial institutions regularly examined for safety and soundness by national bank examiners;

(2) To the Board of Governors of the Federal Reserve System with respect to those financial institutions regularly examined for safety and soundness by Federal Reserve bank examiners;

(3) To the Federal Deposit Insurance Corporation with respect to those financial institutions regularly examined for safety and soundness by FDIC bank examiners;

(4) To the Federal Home Loan Bank Board with respect to those financial institutions regularly examined for safety and soundness by FHLBB bank examiners;

(5) To the Chairman of the Board of the National Credit Union Administration with respect to those financial institutions regularly examined for safety and soundness by NCUA examiners.

(6) To the Securities and Exchange Commission with respect to brokers and dealers in securities and investment companies as that term is defined in the Investment Company Act of 1940 (15 U.S.C. 80–1 et seq.);

(7) To the Commissioner of Customs and Border Protection with respect to §§ 1010.340 and 1010.830;

(8) To the Commissioner of Internal Revenue with respect to all financial institutions, except brokers or dealers in securities, mutual funds, futures commission merchants, introducing brokers in commodities, and commodity trading advisors, not currently examined by Federal bank supervisory agencies for soundness and safety; and

(9) To the Commodity Futures Trading Commission with respect to futures commission merchants, introducing brokers in commodities, and commodity trading advisors.

(10) To the Federal Housing Finance Agency with respect to the housing government sponsored enterprises, as defined in § 1010.100(mmm) of this part.

(c) Authority for investigating criminal violations of this chapter is delegated as follows:

(1) To the Commissioner of Customs and Border Protection with respect to § 1010.340;

(2) To the Commissioner of Internal Revenue except with respect to § 1010.340.

(d) Authority for the imposition of civil penalties for violations of this chapter lies with the Director of FinCEN.

(e) Periodic reports shall be made to the Director, FinCEN by each agency to which compliance authority has been delegated under paragraph (b) of this section. These reports shall be in such a form and submitted at such intervals as the Director, FinCEN may direct. Evidence of specific violations of any of the requirements of this chapter may be submitted to the Director, FinCEN at any time.

(f) The Director, FinCEN or his delegate, and any agency to which compliance has been delegated under paragraph (b) of this section, may examine any books, papers, records, or other data of domestic financial institutions relevant to the recordkeeping or reporting requirements of this chapter.

(g) The authority to enforce the provisions of 31 U.S.C. 5314 and §§ 1010.350 and 1010.420 of this chapter has been redelegated from FinCEN to the Commissioner of Internal Revenue by means of a Memorandum of Agreement between FinCEN and IRS. Such authority includes, with respect to 31 U.S.C. 5314 and 1010.350 and 1010.420 of this chapter, the authority to: assess and collect civil penalties under 31 U.S.C. 5321 and 31 CFR 1010.820; investigate possible civil violations of these provisions (in addition to the authority already provided at paragraph (c)(2)) of this section); employ the summons power of subpart I of this part 1010; issue administrative rulings under subpart G of this part 1010; and take any other action reasonably necessary for the enforcement of these and related provisions, including pursuit of injunctions.

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31 C.F.R. § 1023.320
§ 1023.320 Reports by brokers or dealers in securities of suspicious transactions.

(a) General.

(1) Every broker or dealer in securities within the United States (for purposes of this section, a "broker-dealer") shall file with FinCEN, to the extent and in the manner required by this section, a report of any suspicious transaction relevant to a possible violation of law or regulation. A broker-dealer may also file with FinCEN a report of any suspicious transaction that it believes is relevant to the possible

violation of any law or regulation but whose reporting is not required by this section. Filing a report of a suspicious transaction does not relieve a broker-dealer from the responsibility of complying with any other reporting requirements imposed by the Securities and Exchange Commission or a self-regulatory organization ("SRO") (as defined in section 3(a)(26) of the Securities Exchange Act of 1934, 15 U.S.C. 78c(a)(26)).

(2) A transaction requires reporting under the terms of this section if it is conducted or attempted by, at, or through a broker-dealer, it involves or aggregates funds or other assets of at least $5,000, and the broker-dealer knows, suspects, or has reason to suspect that the transaction (or a pattern of transactions of which the transaction is a part):

(i) Involves funds derived from illegal activity or is intended or conducted in order to hide or disguise funds or assets derived from illegal activity (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 Federal law or regulation or to avoid any transaction reporting requirement under Federal law or regulation;

(ii) Is designed, whether through structuring or other means, to evade any requirements of this chapter or of any other regulations promulgated under the Bank Secrecy Act;

(iii) 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 broker-dealer knows of no reasonable explanation for the transaction after examining the available facts, including the background and possible purpose of the transaction; or

(iv) Involves use of the broker-dealer to facilitate criminal activity.

(3) The obligation to identify and properly and timely to report a suspicious transaction rests with each broker-dealer involved in the transaction, provided that no more than one report is required to be filed by the broker-dealers involved in a particular transaction (so long as the report filed contains all relevant facts).

(b) Filing procedures—

(1) What to file. A suspicious transaction shall be reported by completing a Suspicious Activity Report ("SAR"), and collecting and maintaining supporting documentation as required by paragraph (d) of this section.

(2) Where to file. The SAR shall be filed with FinCEN in a central location, to be determined by FinCEN, as indicated in the instructions to the SAR.

(3) When to file. A SAR shall be filed no later than 30 calendar days after the date of the

initial detection by the reporting broker-dealer of facts that may constitute a basis for filing a SAR under this section. If no suspect is identified on the date of such initial detection, a broker-dealer may delay filing a SAR for an additional 30 calendar days to identify a suspect, but in no case shall reporting be delayed more than 60 calendar days after the date of such initial detection. In situations involving violations that require immediate attention, such as terrorist financing or ongoing money laundering schemes, the broker-dealer shall immediately notify by telephone an appropriate law enforcement authority in addition to filing timely a SAR. Broker-dealers wishing voluntarily to report suspicious transactions that may relate to terrorist activity may call FinCEN's Financial Institutions Hotline at 1–866–556–3974 in addition to filing timely a SAR if required by this section. The broker-dealer may also, but is not required to, contact the Securities and Exchange Commission to report in such situations.

(c) Exceptions.

(1) A broker-dealer is not required to file a SAR to report:

(i) A robbery or burglary committed or attempted of the broker-dealer that is reported to appropriate law enforcement authorities, or for lost, missing, counterfeit, or stolen securities with respect to which the broker-dealer files a report pursuant to the reporting requirements

of 17 CFR 240.17f–1;

(ii) A violation otherwise required to be reported under this section of any of the Federal securities laws or rules of an SRO by the broker-dealer or any of its officers, directors, employees, or other registered representatives, other than a violation of 17 CFR 240.17a–8 or 17 CFR 405.4, so long as such violation is appropriately reported to the SEC or an SRO.

(2) A broker-dealer may be required to demonstrate that it has relied on an exception in paragraph (c)(1) of this section, and must maintain records of its determinations to do so for the period specified in paragraph (d) of this section. To the extent that a Form RE–3, Form U–4, or Form U–5 concerning the transaction is filed consistent with the SRO rules, a copy of that form will be a sufficient record for purposes of this paragraph (c)(2).

(3) For the purposes of this paragraph (c) the term "Federal securities laws" means the "securities laws," as that term is defined in section 3(a)(47) of the Securities Exchange Act of 1934, 15 U.S.C. 78c(a)(47), and the rules and regulations promulgated by the Securities and Exchange Commission under such laws.

(d) Retention of records. A broker-dealer shall maintain a copy of any SAR filed and the original or business record equivalent of any supporting documentation for a period of five years from the date of filing the SAR. Supporting documentation

shall be identified as such and maintained by the broker-dealer, and shall be deemed to have been filed with the SAR. A broker-dealer shall make all supporting documentation available to FinCEN or any Federal, State, or local law enforcement agency, or any Federal regulatory authority that examines the broker-dealer for compliance with the Bank Secrecy Act, upon request; or to any SRO that examines the broker-dealer for compliance with the requirements of this section, upon the request of the Securities and Exchange Commission.

(e) Confidentiality of SARs. A SAR, and any information that would reveal the existence of a SAR, are confidential and shall not be disclosed except as authorized in this paragraph (e). For purposes of this paragraph (e) only, a SAR shall include any suspicious activity report filed with FinCEN pursuant to any regulation in this chapter.

(1) Prohibition on disclosures by brokers or dealers in securities.

(i) General rule. No broker-dealer, and no director, officer, employee, or agent of any broker-dealer, shall disclose a SAR or any information that would reveal the existence of a SAR. Any broker-dealer, and any director, officer, employee, or agent of any broker-dealer that is subpoenaed or otherwise requested to disclose a SAR or any information that would reveal the existence of a SAR, shall decline to produce the SAR or such information, citing this section and 31 U.S.C. 5318(g)(2)(A)(i), and shall notify FinCEN of any such request and the

response thereto.

(ii) Rules of construction. Provided that no person involved in any reported suspicious transaction is notified that the transaction has been reported, this paragraph (e)(1) shall not be construed as prohibiting:

(A) The disclosure by a broker-dealer, or any director, officer, employee, or agent of a broker-dealer, of:

(1) A SAR, or any information that would reveal the existence of a SAR, to FinCEN or any Federal, State, or local law enforcement agency, or any Federal regulatory authority that examines the broker-dealer for compliance with the Bank Secrecy Act; or to any SRO that examines the broker-dealer for compliance with the requirements of this section, upon the request of the Securities Exchange Commission; or

(2) The underlying facts, transactions, and documents upon which a SAR is based, including but not limited to, disclosures:

(i) To another financial institution, or any director, officer, employee, or agent of a financial institution, for the preparation of a joint SAR; or

(ii) In connection with certain employment references or termination notices, to the full extent authorized in 31 U.S.C. 5318(g)(2)(B); or

(B) The sharing by a broker-dealer, or any director, officer, employee, or agent of the broker-dealer, of a SAR, or any information that would reveal the existence of a SAR, within the broker-dealer's corporate organizational structure for purposes consistent with Title II of the Bank Secrecy Act as determined by regulation or in guidance.

(2) Prohibition on disclosures by government authorities. A Federal, State, local, territorial, or Tribal government authority, or any director, officer, employee, or agent of any of the foregoing, shall not disclose a SAR, or any information that would reveal the existence of a SAR, except as necessary to fulfill official duties consistent with Title II of the Bank Secrecy Act. For purposes of this section, "official duties" shall not include the disclosure of a SAR, or any information that would reveal the existence of a SAR, in response to a request for disclosure of non-public information or a request for use in a private legal proceeding, including a request pursuant to 31 CFR 1.11.

(3) Prohibition on disclosures by Self–Regulatory Organizations. Any self-regulatory organization registered with the Securities and Exchange Commission, or any director, officer,

employee, or agent of any of the foregoing, shall not disclose a SAR, or any information that would reveal the existence of a SAR except as necessary to fulfill self-regulatory duties with the consent of the Securities Exchange Commission, in a manner consistent with Title II of the Bank Secrecy Act. For purposes of this section, "self-regulatory duties" shall not include the disclosure of a SAR, or any information that would reveal the existence of a SAR, in response to a request for disclosure of non-public information or a request for use in a private legal proceeding.

(f) Limitation on liability. A broker-dealer, and any director, officer, employee, or agent of any broker-dealer, that makes a voluntary disclosure of any possible violation of law or regulation to a government agency or makes a disclosure pursuant to this section or any other authority, including a disclosure made jointly with another institution, shall be protected from liability to any person for any such disclosure, or for failure to provide notice of such disclosure to any person identified in the disclosure, or both, to the full extent provided by 31 U.S.C. 5318(g)(3).

(g) Compliance. Broker-dealers shall be examined by FinCEN or its delegatees for compliance with this section. Failure to satisfy the requirements of this section may be a violation of the Bank Secrecy Act and of this chapter.

(h) Applicability date. This section applies to transactions occurring after December 30, 2002.