

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 0:17-cv-60907-MORENO/STRAUSS

FEDERAL TRADE COMMISSION, *et al.*,

Plaintiffs,

v.

JEREMY LEE MARCUS, *et al.*,

Defendants.

**PNC BANK, N.A.’S CORRECTED¹ SUPPLEMENTAL BRIEFING
REGARDING CONTINUING ACTIVITY REPORTS**

PNC Bank, N.A. (“PNC”) submits this supplemental briefing at the direction of the Court’s Order Granting Amended Receiver’s Motion for *In Camera* Review of Documents Withheld Based on the SAR Privilege (DE 468), which directed the parties to file supplemental briefing on the question of whether PNC’s Continuing Activity Reports, or CARs, are subject to the legal prohibition against disclosure of the existence of Suspicious Activity Reports, or SARs.

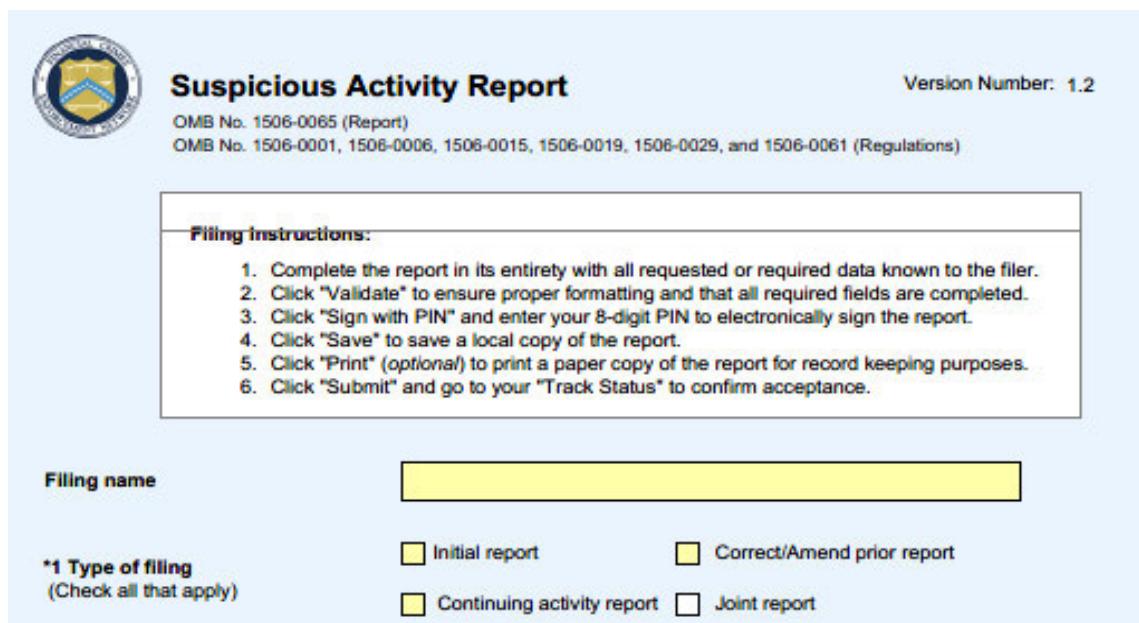
1. The Court held a hearing on March 5, 2020 regarding the Receiver’s Amended Motion for *In Camera* Review of Documents Withheld Based on the SAR Privilege (DE 447). During the hearing, the Court accepted certain documents from PNC for the purposes of an *in camera* review. At the end of the hearing, counsel for PNC noted for the Court and parties that any possible reference to a “CAR” in the documents received by the Court refers to a “Continuing Activity Report,” which is how PNC identifies reports on continuing suspicious activity that are filed after an initial related “Suspicious Activity Report,” or SAR, already has been filed. Counsel

¹ This brief is corrected to include the full attachment.

for PNC further noted that such a form represents standard practice in the industry and in fact is required by bank regulators.

2. Counsel for the Receiver immediately objected, stating that counsel had never heard of a CAR, and questioned whether such a document was contemplated by the Bank Secrecy Act (“BSA”) or covered by the BSA’s settled prohibition against disclosing the filing or non-filing of SARs.

3. The Receiver’s objection is meritless. Continuing Activity Reports are an established and vital component of the SAR-reporting regime under the BSA for all covered financial institutions. The very first page of the SAR form, which is filed electronically (via the link on the left-hand column entitled “E-Filing System Login,” available at <https://bsaefiling.fincen.treas.gov/main.html>), has a set of four boxes to check to designate the type of SAR being filed. Consistent with PNC’s nomenclature, one of the four boxes is for a “Continuing activity report.” Attached hereto is a blank sample SAR form from the website of the Financial Crimes Enforcement Network, or FinCEN, where SARs are filed. The relevant portion of the SAR face sheet is set forth here:



The screenshot shows the "Suspicious Activity Report" form. At the top left is the FinCEN seal. To its right is the title "Suspicious Activity Report" and "Version Number: 1.2". Below the title are two OMB numbers: "OMB No. 1506-0065 (Report)" and "OMB No. 1506-0001, 1506-0006, 1506-0015, 1506-0019, 1506-0029, and 1506-0061 (Regulations)". A large rectangular box contains "Filing Instructions" with the following steps:

1. Complete the report in its entirety with all requested or required data known to the filer.
2. Click "Validate" to ensure proper formatting and that all required fields are completed.
3. Click "Sign with PIN" and enter your 8-digit PIN to electronically sign the report.
4. Click "Save" to save a local copy of the report.
5. Click "Print" (optional) to print a paper copy of the report for record keeping purposes.
6. Click "Submit" and go to your "Track Status" to confirm acceptance.

Below this box, the "Filing name" field is filled with a yellow bar. Underneath it, the "Type of filing" section asks "Check all that apply" and lists four options with checkboxes:

<input checked="" type="checkbox"/> Initial report	<input type="checkbox"/> Correct/Amend prior report
<input checked="" type="checkbox"/> Continuing activity report	<input type="checkbox"/> Joint report

Thus, SARs and CARs are filed with FinCEN on the exact same electronic form.

4. FinCEN provides instructions on the e-filing of SARs (via the link on the right-hand column entitled “FinCEN Suspicious Activity Report (SAR) XML Filing Requirements,” available at <https://bsaefiling.fincen.treas.gov/main.html>). On page 142 of these instructions, FinCEN observes the following regarding the duty of a financial institution to file a continuing activity report, when appropriate, after the filing of the initial SAR. The instructions reflect that the additional report will have to be filled out entirely, and that the filing financial institution will have to provide cumulative dollar figures for the funds at issue and a new narrative section:

4. Continuing Reports: A continuing report should be filed on suspicious activity that continues after an initial FinCEN SAR is filed. Financial institutions with SAR requirements 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. Financial institutions may also file SARs on continuing activity earlier than the 120 day deadline if the institution believes the activity warrants earlier review by law enforcement. Continuing reports must be completed in their entirety, including the information about all subjects involved in the suspicious activity and all financial institutions where the activity occurred. The continuing report Part V narrative 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. Do not reproduce the narratives from prior reports in the continuing report. Provide both the dollar amount involved in the suspicious activity for the 90-day period in Item 26 and the cumulative dollar amount for the current and all prior related reports in Item 28. If continuing losses are involved for any financial institution recorded in Part III, record the 90-day loss in Item 63 and the cumulative loss in Part V.

5. Likewise, the Bank Secrecy Act/Anti-Money Laundering Examination Manual of the Federal Financial Institutions Examination Council (available at <https://bsaaml.ffiec.gov/manual>), which is the governing handbook for federal regulators conducting BSA/AML exams of banks and other financial institutions, also describes the duty to file SARs on continuing activity. *Id.* at 67-68. See also Frequently Asked Questions Regarding the FinCEN Suspicious Activity Report (available at <https://www.fincen.gov/frequently-asked->

questions-regarding-fincen-suspicious-activity-report-sar), at Question #16 (FinCEN observes that “[f]inancial institutions with SAR requirements 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. Financial institutions may also file SARs on continuing activity earlier than the 120-day deadline if the institution believes the activity warrants earlier review by law enforcement.”).

6. Accordingly, the same prohibition against disclosure of a SAR, and the reasons driving that prohibition,² apply equally to a “CAR.” They are functionally the same document, even though the acronyms used to refer to the documents have a one-letter difference, depending upon the point in time in the investigation and reporting process.

7. Moreover, and as a matter of logic, the very existence of a CAR necessarily reflects that a SAR previously was filed: that is, there never can be a CAR unless there already was a SAR. For this reason alone, any reference to the filing or non-filing of a CAR cannot be disclosed. The prohibition against disclosure under federal law does not just apply to a SAR itself, but also to “any information that would reveal the existence of a SAR.” 31 C.F.R. § 1020.320(e).

8. Accordingly, any references to CARs or related information in the materials currently at issue cannot be disclosed, because such disclosure would violate federal law. 31 U.S.C. § 5318(g)(2)(A); 12 C.F.R. § 21.11(k); 31 C.F.R. § 1020.320(e).

² Courts have noted several important concerns that support strong protections against disclosure of SAR filing information, including: (1) the disclosure of a SAR could compromise an ongoing law enforcement investigation, provide information to a criminal wishing to evade detection, or reveal the methods by which banks are able to detect suspicious activity; *see, e.g., Cotton v. PrivateBank & Trust Co.*, 235 F.Supp.2d 809, 815 (N.D.Ill. 2002); *Youngblood v. Comm'r*, 2000 WL 852449, *11–12 (C.D. Cal. 2000); (2) banks may be reluctant to prepare a SAR if it believed that its cooperation may cause customers to retaliate; *see, e.g., Cotton*, 235 F. Supp. 2d at 815; and (3) the disclosure of a SAR could harm the privacy interests of innocent people whose names may be mentioned. *Weil v. Long Island Sav. Bank*, 195 F. Supp. 2d 383, 388 (E.D.N.Y. 2001).

Dated: March 11, 2020

Respectfully submitted,

s/Peter D. Hardy

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Dated: March 11, 2020

Respectfully submitted,

s/Peter W. Homer

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CERTIFICATION OF SERVICE

I hereby certify that, on March 11, 2020, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will also send notice of this electronic filing to all counsel of record.

Respectfully submitted,

s/Peter W. Homer

Peter W. Homer, Esq.

WARNING: PRINTED VERSIONS OF THE BSA E-FILING FORMS ARE NOT FOR SUBMISSION AND WILL NOT BE PROCESSED by FinCEN.



Suspicious Activity Report

Version Number: 1.2

OMB No. 1506-0065 (Report)

OMB No. 1506-0001, 1506-0006, 1506-0015, 1506-0019, 1506-0029, and 1506-0061 (Regulations)

Filing Instructions:

1. Complete the report in its entirety with all requested or required data known to the filer.
2. Click "Validate" to ensure proper formatting and that all required fields are completed.
3. Click "Sign with PIN" and enter your 8-digit PIN to electronically sign the report.
4. Click "Save" to save a local copy of the report.
5. Click "Print" (optional) to print a paper copy of the report for record keeping purposes.
6. Click "Submit" and go to your "Track Status" to confirm acceptance.

Filing name

***1 Type of filing**
(Check all that apply)

- Initial report Correct/Amend prior report
 Continuing activity report Joint report

Prior report BSA Identification Number (BSA ID)

2 Filing Institution Note to FinCEN

Attachment

By providing my PIN, I acknowledge that I am electronically signing the BSA report submitted.

Sign with PIN

This PDF is intended for testing purpose only. Please do not use it in a production environment.

WARNING: PRINTED VERSIONS OF THE BSA E-FILING FORMS ARE NOT FOR SUBMISSION AND WILL NOT BE PROCESSED by FinCEN.

Part IV Filing Institution Contact Information

*79 Type of financial institution

*75 Primary federal regulator

*76 Filer name (Holding company, lead financial institution, or agency, if applicable)

*77 TIN

*78 TIN type

- 80 Type of Securities and Futures institution or individual filing this report - check box(es) for functions that apply to this report
- Clearing broker-securities
 - Introducing broker-securities
 - SRO Securities
 - CPO/CTA
 - Investment Adviser
 - Subsidiary of financial/bank holding company
 - Execution-only broker securities
 - Investment company
 - Other
 - Futures Commission Merchant
 - Retail foreign exchange dealer
 - Holding company
 - Self-clearing broker securities
 - Introducing broker-commodities
 - SRO Futures

81 Financial institution identification

Type <input type="text"/>
Number <input type="text"/>

*82 Address

*83 City

*84 State *85 ZIP/Postal Code *86 Country

87 Alternate name, e.g., AKA - individual or trade name,
DBA - entity

88 Internal control/file number

89 LE contact agency

90 LE contact name

91 LE contact phone number (Include Area Code) Ext.

92 LE contact date

*93 Filing institution contact office

*94 Filing institution contact phone number (Include Area Code) Ext.

95 Date filed

(Date filed will be auto-populated when the form is signed.)

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Part III Information about Financial Institution Where Activity Occurred 1 of 1

*51 Type of financial institution [REDACTED] [REDACTED]

*52 Primary federal regulator [REDACTED]

53 Type of gaming institution

State licensed casino Tribal authorized casino Card club Other (specify) [REDACTED]

54 Type of Securities and Futures institution or individual where activity occurred - check box(es) that apply to this report

Clearing broker-securities Introducing broker-securities Subsidiary of financial/bank holding company
 Execution-only broker securities Investment Adviser Other [REDACTED]
 Futures Commission Merchant Investment company
 Holding company Retail foreign exchange dealer
 Introducing broker-commodities Self-clearing broker securities

55 Financial institution identification Type [REDACTED]

Number [REDACTED]

56 Financial institution's role in transaction Selling location Paying location Both

*57 Legal name of financial institution Unknown [REDACTED]

58 Alternate Name, e.g., AKA - individual or trade name, DBA - entity

[REDACTED]

*59 TIN Unknown [REDACTED] 60 TIN type [REDACTED]

*61 Address Unknown [REDACTED]

*62 City Unknown [REDACTED]

63 State [REDACTED]

*64 ZIP/Postal Code Unknown [REDACTED]

*65 Country Unknown [REDACTED]

66 Internal control/file number [REDACTED]

67 Loss to financial institution \$ _____ .00

Branch where activity occurred information

If no branch activity involved, check this box

Branch Information

68 Branch's role in transaction Selling location Paying location Both

69 Address of branch or office where activity occurred [REDACTED]

71 City [REDACTED] 70 RSSD Number [REDACTED]

72 State [REDACTED] 73 ZIP/Postal Code [REDACTED] *74 Country [REDACTED]

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Part I Subject Information 1 of 1

3 Check: if entity, if all critical* subject information is unavailable (Does not include item 24)

*4 Individual's last name or entity's legal name Unknown [REDACTED]

*5 First name Unknown [REDACTED]

6 Middle name/initial [REDACTED]

7 Suffix [REDACTED] 8 Gender [REDACTED]

*19 Date of birth Unknown [REDACTED]

9 Alternate name, e.g., AKA - individual or trade name, DBA - entity [REDACTED]

10 Occupation or type of business [REDACTED]

10a NAICS Code [REDACTED]

*16 TIN Unknown [REDACTED] 17 TIN type [REDACTED]

21 Phone number [REDACTED] Ext. [REDACTED] 20 Type [REDACTED]

22 E-mail address [REDACTED]

22a Website (URL) address [REDACTED]

23 Corroborative statement to filer? [REDACTED] 28 Subject's role in suspicious activity [REDACTED]

Subject Address Information

*11 Address Unknown [REDACTED]

*12 City Unknown [REDACTED]

*13 State Unknown [REDACTED] *14 ZIP/Postal Code Unknown [REDACTED]

*15 Country Unknown [REDACTED]

*18 Form of identification for subject Unknown

Type [REDACTED]

Number [REDACTED] Country [REDACTED] Issuing State [REDACTED]

24 Relationship of the subject to an institution listed in Part III or IV (check all that apply)

a Institution TIN [REDACTED]

b Accountant

e Attorney

h Director

k Officer

c Agent

f Borrower

i Employee

l Owner or Controlling Shareholder

d Appraiser

g Customer

j No relationship to institution

z Other [REDACTED]

25 Status of relationship [REDACTED]

26 Action date [REDACTED]

*27 Financial institution TIN and account number(s) affected that are related to subject No known accounts involved

Institution TIN [REDACTED] Non-US Financial Institution

account number [REDACTED] Closed? Yes

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Part II Suspicious Activity Information

*29 Amount involved in this report Amount Unknown No amount involved \$ _____ .00

*30 Date or date range of suspicious activity for this report From _____ To _____

31 Cumulative amount (only applicable when "Continuing activity report" is checked in Item 1) \$ _____ .00

When completing item 32 through 42, check all that apply

32 Structuring

- | | |
|---|---|
| a <input type="checkbox"/> Alters or cancels transaction to avoid BSA recordkeeping requirement | d <input type="checkbox"/> Transaction(s) below BSA recordkeeping threshold |
| b <input type="checkbox"/> Alters or cancels transaction to avoid CTR requirement | e <input type="checkbox"/> Transaction(s) below CTR threshold |
| c <input type="checkbox"/> Suspicious inquiry by customer regarding BSA reporting or recordkeeping requirements | z <input type="checkbox"/> Other _____ |

33 Terrorist Financing

- | | |
|--|--|
| a <input type="checkbox"/> Known or suspected terrorist/terrorist organization | z <input type="checkbox"/> Other _____ |
|--|--|

34 Fraud

- | | | | |
|--|--|---|--|
| a <input type="checkbox"/> ACH | e <input type="checkbox"/> Consumer loan | i <input type="checkbox"/> Mass-marketing | m <input type="checkbox"/> Wire |
| b <input type="checkbox"/> Advance fee | f <input type="checkbox"/> Credit/Debit card | j <input type="checkbox"/> Ponzi scheme | z <input type="checkbox"/> Other _____ |
| c <input type="checkbox"/> Business loan | g <input type="checkbox"/> Healthcare/Public or private health insurance | k <input type="checkbox"/> Pyramid scheme | |
| d <input type="checkbox"/> Check | h <input type="checkbox"/> Mail | l <input type="checkbox"/> Securities fraud | |

35 Gaming activities

- | | |
|--|--|
| a <input type="checkbox"/> Chip walking | d <input type="checkbox"/> Unknown source of chips |
| b <input type="checkbox"/> Minimal gaming with large transactions | z <input type="checkbox"/> Other _____ |
| c <input type="checkbox"/> Suspicious use of counter checks or markers | |

36 Money Laundering

- | | |
|---|--|
| a <input type="checkbox"/> Exchange small bills for large bills or vice versa | h <input type="checkbox"/> Suspicious receipt of government payments/benefits |
| b <input type="checkbox"/> Funnel account | i <input type="checkbox"/> Suspicious use of multiple accounts |
| c <input type="checkbox"/> Suspicion concerning the physical condition of funds | j <input type="checkbox"/> Suspicious use of noncash monetary instruments |
| d <input type="checkbox"/> Suspicion concerning the source of funds | k <input type="checkbox"/> Suspicious use of third-party transactors (straw-man) |
| e <input type="checkbox"/> Suspicious designation of beneficiaries, assignees or joint owners | l <input type="checkbox"/> Trade Based Money Laundering/Black Market Peso Exchange |
| f <input type="checkbox"/> Suspicious EFT/wire transfers | m <input type="checkbox"/> Transaction out of pattern for customer(s) |
| g <input type="checkbox"/> Suspicious exchange of currencies | z <input type="checkbox"/> Other _____ |

37 Identification/Documentation

- | | |
|---|---|
| a <input type="checkbox"/> Changes spelling or arrangement of name | e <input type="checkbox"/> Refused or avoided request for documentation |
| b <input type="checkbox"/> Multiple individuals with same or similar identities | f <input type="checkbox"/> Single individual with multiple identities |
| c <input type="checkbox"/> Provided questionable or false documentation | z <input type="checkbox"/> Other _____ |
| d <input type="checkbox"/> Provided questionable or false identification | |

38 Other Suspicious Activities

- | | | |
|--|--|---|
| a <input type="checkbox"/> Account takeover | h <input type="checkbox"/> Human trafficking | o <input type="checkbox"/> Suspicious use of multiple transaction locations |
| b <input type="checkbox"/> Bribery or gratuity | i <input type="checkbox"/> Identity theft | p <input type="checkbox"/> Transaction with no apparent economic, business, or lawful purpose |
| c <input type="checkbox"/> Counterfeit instruments | j <input type="checkbox"/> Little or no concern for product performance penalties, fees, or tax consequences | q <input type="checkbox"/> Transaction(s) involving foreign high risk jurisdiction |
| d <input type="checkbox"/> Elder financial exploitation | k <input type="checkbox"/> Misuse of position or self-dealing | r <input type="checkbox"/> Two or more individuals working together |
| e <input type="checkbox"/> Embezzlement/theft/disappearance of funds | l <input type="checkbox"/> Suspected public/private corruption (domestic) | s <input type="checkbox"/> Unlicensed or unregistered MSB |
| f <input type="checkbox"/> Forgeries | m <input type="checkbox"/> Suspected public/private corruption (foreign) | z <input type="checkbox"/> Other _____ |
| g <input type="checkbox"/> Human smuggling | n <input type="checkbox"/> Suspicious use of informal value transfer system | |

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39 Insurance

- | | |
|---|---|
| a <input type="checkbox"/> Excessive insurance | e <input type="checkbox"/> Suspicious termination of policy or contract |
| b <input type="checkbox"/> Excessive or unusual cash borrowing against policy/annuity | f <input type="checkbox"/> Unclear or no insurable interest |
| c <input type="checkbox"/> Proceeds sent to or received from unrelated third party | z <input type="checkbox"/> Other <input type="text"/> |
| d <input type="checkbox"/> Suspicious life settlement sales insurance (e.g.,STOLI's, Viaticals) | |
-

40 Securities / Futures / Options

- | | |
|--|---|
| a <input type="checkbox"/> Insider trading | d <input type="checkbox"/> Unauthorized pooling |
| b <input type="checkbox"/> Market manipulation | e <input type="checkbox"/> Wash trading |
| c <input type="checkbox"/> Misappropriation | z <input type="checkbox"/> Other <input type="text"/> |
-

41 Mortgage Fraud

- | | |
|---|---|
| a <input type="checkbox"/> Application fraud | d <input type="checkbox"/> Loan Modification fraud |
| b <input type="checkbox"/> Appraisal fraud | e <input type="checkbox"/> Origination fraud |
| c <input type="checkbox"/> Foreclosure/Short sale fraud | z <input type="checkbox"/> Other <input type="text"/> |
-

42 Cyber event

- | | |
|--|---|
| a <input type="checkbox"/> Against Financial Institution(s) | z <input type="checkbox"/> Other <input type="text"/> |
| b <input type="checkbox"/> Against Financial Institution Customer(s) | |
-

45 Were any of the following product type(s) involved in the suspicious activity? (Check all that apply)

- | | | | |
|--|---|--|--|
| a <input type="checkbox"/> Bonds/Notes | g <input type="checkbox"/> Forex transactions | m <input type="checkbox"/> Microcap securities | s <input type="checkbox"/> Stocks |
| b <input type="checkbox"/> Commercial mortgage | h <input type="checkbox"/> Futures/Options on futures | n <input type="checkbox"/> Mutual fund | t <input type="checkbox"/> Swap, hybrid, or other derivatives |
| c <input type="checkbox"/> Commercial paper | i <input type="checkbox"/> Hedge fund | o <input type="checkbox"/> Options on securities | z <input type="checkbox"/> Other (List below) <input type="text"/> |
| d <input type="checkbox"/> Credit card | j <input type="checkbox"/> Home equity line of credit | p <input type="checkbox"/> Prepaid access | |
| e <input type="checkbox"/> Debit card | k <input type="checkbox"/> Home equity loan | q <input type="checkbox"/> Residential mortgage | |
| f <input type="checkbox"/> Deposit account | l <input type="checkbox"/> Insurance/Annuity products | r <input type="checkbox"/> Security futures products | |
-

46 Were any of the following instrument type(s)/payment mechanism(s) involved in the suspicious activity? (Check all that apply)

- | | | | |
|---|---|--|--|
| a <input type="checkbox"/> Bank/Cashier's check | d <input type="checkbox"/> Gaming instruments | g <input type="checkbox"/> Personal/Business check | z <input type="checkbox"/> Other (List below) <input type="text"/> |
| b <input type="checkbox"/> Foreign currency | e <input type="checkbox"/> Government payment | h <input type="checkbox"/> Travelers checks | |
| c <input type="checkbox"/> Funds transfer | f <input type="checkbox"/> Money orders | i <input type="checkbox"/> U.S. Currency | |
-

43 IP Address (enter the IP address/date/timestamp of the subject's electronic internet based contact with the financial institution, if known)

<input type="text"/>	Date <input type="text"/>	Timestamp (UTC) <input type="text"/>
----------------------	---------------------------	--------------------------------------

44 Cyber Event Indicators (select the appropriate indicator(s) from the drop-down list and provide the associated supporting information)

Event type <input type="text"/>	<input type="text"/>	
Event value <input type="text"/>	Date <input type="text"/>	Timestamp (UTC) <input type="text"/>

47 Commodity type (if applicable)

<input type="text"/>

48 Product/Instrument description (if needed)

<input type="text"/>

49 Market where traded (i)

<input type="text"/>

50 CUSIP® number

<input type="text"/>

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Part V Suspicious Activity Information - Narrative*