[NOT YET SCHEDULED FOR ORAL ARGUMENT]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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| FBME BANK LTD., et al.,<br><br>Plaintiffs-Appellants,<br><br>v.<br><br>STEVEN MNUCHIN, in his official capacity as Secretary of the Treasury, et al.,<br><br>Defendants-Appellees. | No. 17-5076 |

**OPPOSITION TO THE EMERGENCY MOTION OF PLAINTIFFS-APPELLANTS FOR STAY PENDING APPEAL**

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The Department of the Treasury found that FBME Bank Ltd. (FBME), a bank headquartered in Tanzania and doing business primarily in Cyprus, facilitated "money laundering, terrorist financing, transnational organized crime, fraud schemes, sanctions evasion, weapons proliferation, corruption by politically exposed persons, and other financial crimes." 81 Fed. Reg. 18,480, 18,489 (Mar. 31, 2016). Among FBME's clients, for example, were the head of an international narcotics-trafficking and money laundering network, a front company for a Syrian entity that is subject to U.S. sanctions and has been designated as a proliferator of weapons of mass destruction, and people affiliated with Hezbollah. *See* 79 Fed. Reg. 42,639, 42,639-40 (July 22, 2014); *see also* 81 Fed. Reg. at 18,482. Between 2006 and 2014, FBME transmitted many hundreds of millions of dollars through the United States in suspicious wire transfers. 81 Fed. Reg. at 18,489.

Based on this and other evidence, the Department found pursuant to Section 311 of the USA PATRIOT Act that there were reasonable grounds to conclude that FBME was "of primary money laundering concern." 31 U.S.C. § 5318A(a)(1). The Department then issued a final rule, after notice and comment, prohibiting U.S. banks from opening or maintaining correspondent accounts on FBME's behalf. *See* 80 Fed. Reg. 45,057 (July 29, 2015); *see also* 31 U.S.C. § 5318A(b)(5). The Department concluded that restricting FBME's access to the U.S. financial system through correspondent accounts would help guard against FBME's threat. 80 Fed. Reg. at 45,060.

Before the rule went into effect, FBME and its Cayman Islands holding company filed this lawsuit, claiming that the rule violates the Administrative Procedure Act (APA) and the Due Process Clause. The district court ultimately rejected all of plaintiffs' claims after a careful and rigorous review of the rule. Plaintiffs now ask this Court to block the rule while they pursue an appeal, but they are not entitled to that extraordinary relief. Plaintiffs will suffer no irreparable harm as a result of the rule going into effect: the rule prohibits U.S. banks from opening or maintaining correspondent accounts for FBME, but U.S. banks independently and voluntarily closed all of FBME's correspondent accounts long ago, before plaintiffs even filed this lawsuit. The strong public interest in formalizing FBME's exclusion from the U.S. financial system outweighs any indirect and speculative third-party harms that plaintiffs allege. The district court also correctly upheld the rule on the merits; plaintiffs' objections to the rule are premised on basic misunderstandings of administrative law and of the statutory scheme. The Court should deny plaintiffs' motion for a stay pending appeal.

## STATEMENT

### 1. Statutory and Regulatory Background

In 2001, Congress "increase[d] the strength of United States measures to prevent, detect, and prosecute international money laundering and the financing of terrorism," giving the Secretary of the Treasury "broad discretion" to "take measures

tailored to the particular money laundering problems presented by specific . . . financial institutions operating outside of the United States." 31 U.S.C. § 5311 note.

Under Section 311 of the USA PATRIOT Act, if the Secretary of the Treasury finds "reasonable grounds . . . for concluding" that a foreign financial institution or jurisdiction is "of primary money laundering concern," he can require that U.S. banks take "special measures" to prevent harm to the U.S. financial system. 31 U.S.C. § 5318A(a)(1).[1] In making a finding of primary money laundering concern, the Secretary is to "consider . . . such information as the Secretary determines to be relevant." *Id.* § 5318A(c)(2).

After finding that a foreign bank is of primary money laundering concern, the Secretary can require that U.S. banks take any of five "special measures" to address the threat, "in such sequence or combination as the Secretary shall determine." 31 U.S.C. § 5318A(a)(2)(A). Four of the special measures require U.S. banks to collect and report information about their transactions with the foreign bank. *See id.* § 5318A(b)(1)-(4). Under the fifth special measure, the Secretary can "prohibit, or impose conditions upon, the opening or maintaining in the United States of a correspondent account or payable-through account by any domestic financial institution or domestic financial agency for or on behalf of" the foreign institution.

[1] The Secretary has delegated his Section 311 authority to the Financial Crimes Enforcement Network (FinCEN), a bureau of the Department of the Treasury. *See* Treas. Order 180-01 (July 1, 2014), https://www.treasury.gov/about/role-of-treasury/orders-directives/Pages/to180-01.aspx.

*Id.* § 5318A(b)(5). Because correspondent and payable-through accounts help foreign banks access the U.S. financial system, *see id.* § 5318A(e)(1)(B)-(C) (defining those terms), the fifth special measure restricts a foreign bank's ability to launder money through the United States.

Section 311 permits imposition of the fifth special measure "only by regulation," 31 U.S.C. § 5318A(a)(2)(C), and expressly contemplates that the Secretary may rely on classified information, which a reviewing court will examine "ex parte and in camera," *id.* § 5318A(f).

**2. Prior Proceedings**

**A.** In July 2014, FinCEN published in the Federal Register its finding that there were reasonable grounds to conclude that FBME was of primary money laundering concern. *See* 79 Fed. Reg. 42,639 (July 22, 2014). The same day, FinCEN published a notice of proposed rulemaking proposing to apply Section 311's fifth special measure and prohibit U.S. banks from opening or maintaining correspondent accounts for FBME. *See* 79 Fed. Reg. 42,486 (July 22, 2014). FinCEN found that "FBME facilitated a substantial volume of money laundering . . . for many years" and was "used by its customers to facilitate money laundering, terrorist financing, transnational organized crime, fraud, sanctions evasion, and other illicit activity internationally and through the U.S. financial system." 79 Fed. Reg. at 42,639. FBME advertised itself as willing to help customers evade anti–money laundering regulations, and its weak anti–money laundering controls allowed substantial amounts of

suspicious activity. *Id.* at 42,640. FBME customers were involved in at least $875 million worth of suspicious wire transfers through U.S. correspondent accounts between November 2006 and March 2013. *Id.* Between April 2013 and April 2014 alone, FBME's suspicious wire transfers through the U.S. financial system totaled at least $387 million. *Id.*

After considering all of the available information, including comments and other materials that FBME submitted in response to the notice of proposed rulemaking, and after performing the intra-government consultations that Section 311 requires, FinCEN decided to apply the fifth special measure. In July 2015, FinCEN issued a final rule that would prohibit U.S. banks from opening or maintaining correspondent accounts on FBME's behalf. *See* 80 Fed. Reg. 45,057 (July 29, 2015).

**B.** Before the final rule took effect, FBME and its holding company filed this lawsuit and obtained a preliminary injunction against implementation of the rule. The district court found that plaintiffs were not likely to succeed in challenging FinCEN's "ultimate finding" that FBME was of primary money laundering concern. *FBME Bank Ltd. v. Lew*, 125 F. Supp. 3d 109, 114 (D.D.C. 2015) (*FBME I*). The court found that plaintiffs were, however, likely to succeed on two of their procedural objections under the APA. *Id.* The government sought a voluntary remand so that FinCEN could remedy the deficiencies that the district court had perceived. The district court granted that motion, *see FBME Bank Ltd. v. Lew*, 142 F. Supp. 3d 70 (D.D.C. 2015)

(*FBME II*), and FinCEN reopened its final rule to solicit additional comments on the relevant issues, *see* 80 Fed. Reg. 74,064 (Nov. 27, 2015).

**C.** After carefully considering the information it received during the reopened comment period, FinCEN determined that FBME continued to be an institution of primary money laundering concern. 81 Fed. Reg. at 18,490. FinCEN further concluded that eliminating FBME's access to U.S. correspondent accounts was the only viable way to protect the U.S. financial system from FBME's threat. *Id.* at 18,489-90. Accordingly, after again performing the requisite intra-government consultations, FinCEN issued a new final rule in March 2016 reimposing the prohibition of U.S. correspondent accounts under the fifth special measure. *Id.*

On summary judgment, the district court rejected most of FBME's challenges to the second final rule,[2] holding that FinCEN had properly proceeded by notice-and-comment rulemaking and had undertaken the intra-government consultations that Section 311 requires; that the Due Process Clause likely did not apply to FBME but that FBME had received sufficient process in any event; and that the rule's reasoning was in most respects adequately articulated. *See FBME Bank Ltd. v. Lew*, 209 F. Supp. 3d 299, 313-14, 322-31, 335-40 (D.D.C. 2016) (*FBME III*). The court also held that, taking into account the APA's harmless-error provision, FBME had received

[2] The district court stayed the rule from going into effect while the parties' cross-motions for summary judgment were pending. *See* ADD00059. (Citations beginning with "ADD" are to the addendum that plaintiffs attached to their motion.)

sufficient notice of the basis for FinCEN's rule. *Id.* at 316-22. The court did conclude, however, that FinCEN should have responded more specifically to certain comments that FBME had made regarding "Suspicious Activity Reports . . . submitted by other financial institutions concerning transactions with the Bank." *Id.* at 313; *see also id.* at 331-34. The court remanded the matter so that FinCEN could further address those particular comments. *Id.* at 341-43. The court continued its stay of the rule but did not vacate the rule, finding a "substantial probability that FinCEN could respond adequately to FBME's comments." *Id.* at 342-43.

**D.** On remand, FinCEN again considered FBME's comments regarding Suspicious Activity Reports. FinCEN then published a supplement to the March 2016 final rule, which responded to those comments in more detail. *See* 81 Fed. Reg. 86,577 (Dec. 1, 2016).

On April 14, 2017, the district court granted summary judgment in favor of the government, holding that FinCEN had adequately addressed FBME's comments regarding Suspicious Activity Reports. *See FBME Bank Ltd. v. Mnuchin*, No. 15-cv-1270, 2017 WL 1379311 (D.D.C. Apr. 14, 2017) (*FBME IV*). The court also "lift[ed] the stay . . . blocking the Second Final Rule's implementation." *Id.* at *10. The court applied the familiar four-factor standard in evaluating whether to grant FBME's request for a stay pending appeal. *Id.* The court held that FBME had "not demonstrated how implementation of the Rule would cause it irreparable harm under present circumstances." *Id.* The court also noted that it had rejected all of plaintiffs'

challenges to the rule. *Id.* The court recognized that "FinCEN's interest in having the Rule take effect[] and the public's interest in protecting the U.S. financial system from illicit activity such as money laundering" further counsel against a stay. *Id.*

## ARGUMENT

A stay pending appeal is an "extraordinary remedy." *Brotherhood of Ry. & S.S. Clerks, Freight Handlers, Exp. & Station Emp. v. National Mediation Bd.*, 374 F.2d 269, 275 (D.C. Cir. 1966). To obtain that relief, plaintiffs must show that they are likely to succeed on the merits of their claims and that a stay will prevent irreparable harm that is not outweighed by harm to third parties and the public interest. *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977). Although plaintiffs suggest that this Court assesses those factors on a "sliding scale," Mot. 14, members of this Court have interpreted *Winter v. NRDC, Inc.*, 555 U.S. 7 (2008), "to create a more demanding burden than the sliding-scale analysis requires," *Sherley v. Sebelius*, 644 F.3d 388, 392 (D.C. Cir. 2011) (quotation marks omitted); *see also Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1295-96 (D.C. Cir. 2009) (Kavanaugh, J., concurring).[3]

Plaintiffs are not entitled to a stay. First, a stay is not needed to prevent irreparable harm: plaintiffs hold no correspondent accounts with U.S. banks, and they

[3] Although *Winter* addressed the requirements for a preliminary injunction, rather than a stay pending appeal, the standards are the same. *See Holiday Tours*, 559 F.2d at 842 n.1.

have not identified any harm that would directly and certainly result from implementation of a rule that prohibits U.S. banks from offering such accounts. The government and the public, by contrast, have a strong interest in FinCEN's rule becoming effective. Congress gave the Secretary of the Treasury broad discretion to respond decisively to the money laundering risks that specific foreign banks present, and FinCEN promulgated its rule because of grave concerns regarding FBME's conduct. Plaintiffs' claims are also unlikely to succeed on the merits. The district court correctly upheld the rule after a rigorous review. Indeed, the rule is now particularly insulated against legal challenge because of the additional proceedings FinCEN conducted to resolve the district court's limited concerns regarding prior versions of the rule.

## I. Plaintiffs Have Not Alleged Irreparable Harm, And Important Interests Of The Government And The Public Counsel Against A Stay

**A.** To obtain a stay pending appeal, plaintiffs must identify an irreparable harm that is "both certain and great." *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985); *see also Winter*, 555 U.S. at 22 (rejecting the notion that a preliminary injunction can be "based only on a possibility of irreparable harm"). The alleged harm must "*directly* result from the action" that plaintiffs seek to enjoin. *Wisconsin Gas*, 758 F.2d at 674 (emphasis added). "[T]he basis of injunctive relief in the federal courts has always been irreparable harm," and a plaintiff's failure to make the required

showing is thus grounds for denying relief. *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006) (quoting *Sampson v. Murray*, 415 U.S. 61, 88 (1974)).

Plaintiffs have identified no certain, great, and direct irreparable harm from the rule. FinCEN's rule prohibits U.S. banks from opening or maintaining correspondent accounts for, or on behalf of, FBME. 81 Fed. Reg. at 18,493. Even before FinCEN issued the rule, however, FBME had no U.S. correspondent accounts. *See FBME I*, 125 F. Supp. 3d at 126. U.S. banks terminated those accounts before the rule was issued and before this lawsuit was filed. *Id.* The only conduct that the rule prohibits is conduct in which U.S. banks have already chosen not to engage. To be sure, until the rule goes into effect, there is no *legal* bar to U.S. banks maintaining correspondent accounts for FBME, and that makes the public interest weigh more heavily against a stay. *See infra* Section I.B. But while FBME's motion refers generically to a potential effect on correspondent accounts, Mot. 25, FBME does not claim that those accounts are with U.S. banks, the only entities to which FinCEN's rule applies. *See* ADD00296-97 (Reimer Decl. ¶¶ 2, 5-7) (discussing FBME's correspondent accounts at German and Austrian banks).

Instead of addressing the rule's actual coverage, which is limited to U.S. banks, FBME focuses its irreparable-harm discussion on actions that it believes foreign banks and foreign regulators might take if the rule goes into effect. *See* Mot. 25-26. But those speculations about third-party conduct are not a basis for staying the rule at issue here: nothing in the rule requires a foreign bank or foreign regulator to do

anything, and a stay of the rule would simply delay a restriction on U.S. banks. Although one of FBME's declarations might be read to imply that foreign banks will somehow be "bound" by FinCEN's rule when it takes effect, *see* ADD00297 (Reimer Decl. ¶ 6), any such suggestion is unsupported and mistaken: the rule applies only to domestic institutions, *see* 81 Fed. Reg. at 18,481; 31 U.S.C. § 5318A(a)(1).

The U.S. government does not control how foreign entities respond to its actions under Section 311, and there is no reason to conclude that the disposition of plaintiffs' stay motion will significantly affect the decisions of foreign governments and foreign commercial actors, which are likely to be motivated by their own assessment of the threat posed by FBME's activities and the risk of money laundering. Plaintiffs' own declarations state that regulators in Cyprus have already revoked FBME's banking license and begun liquidating it, subject to the supervision of a Cypriot court, ADD00198 (Saab Decl. ¶ 17), and the Tanzanian government took control of FBME in 2014, ADD00199 (Saab Decl. ¶ 21). There is no reason to think those foreign regulators will change their courses of action if this Court grants or denies a stay. *See* ADD00200 (Saab Decl. ¶ 28) (merely speculating that Cyprus will "redouble its efforts" in ongoing liquidation proceedings if the rule becomes effective); ADD00200-01 (Saab Decl. ¶¶ 29, 32) (vaguely asserting that the Bank of Tanzania "reserved its right to take action" if the final rule became effective). Indeed, regulators have already found that FBME "is not in a position to carry on

operations," ADD00248 (Ex. 7, ¶ 82(e)(iii)), and it thus appears highly unlikely that any additional irreparable harm would flow from this Court's denial of a stay.

This Court has regularly declined to grant relief whose "effectiveness . . . depends on the unforeseeable actions of a foreign nation." *Dellums v. U.S. Nuclear Regulatory Comm'n*, 863 F.2d 968, 976 (D.C. Cir. 1988). Plaintiffs' speculation that a stay pending appeal might help them persuade foreign regulators, foreign courts, and foreign banks to treat them more favorably does not justify the extraordinary relief they seek. FinCEN's rule simply prohibits U.S. banks from holding correspondent accounts for FBME. The distinct third-party injuries that plaintiffs allege do not come close to establishing the "certain and great" harm, "directly result[ing] from" the rule, that would be needed to justify a stay. *Wisconsin Gas*, 758 F.2d at 674.[4]

**B.** The balance of equities and the public interest, which "merge" in cases where relief is sought against the United States, *Nken v. Holder*, 556 U.S. 418, 435 (2009), strongly counsel against a stay pending appeal. The United States has a substantial interest in protecting the integrity of its financial system from foreign threats, and Congress enacted Section 311 for precisely that purpose. *See* 31 U.S.C. § 5311 note (finding that money laundering "can threaten the safety of United States citizens and undermine the integrity of United States financial institutions and of the

[4] Plaintiffs suggest that "the threatened loss of a constitutional right" is irreparable harm, Mot. 26, but plaintiffs lack any constitutional presence in the United States, *see infra* p. 15, and they have identified no ongoing deprivation of a constitutionally guaranteed freedom.

global financial and trading systems upon which prosperity and growth depend"). Congress gave the Department of the Treasury "broad discretion" to address the money laundering threats that particular foreign banks pose, *id.*, and courts routinely defer to the government's balancing of interests when dealing with issues that touch on foreign policy and national security, *see Adams v. Vance*, 570 F.2d 950, 954 (D.C. Cir. 1978) (noting that, in a case concerning foreign policy, "a court is quite wrong in routinely applying . . . the traditional standards governing more orthodox stays" (citation and quotation marks omitted)); *see also Regan v. Wald*, 468 U.S. 222, 242 (1984) (citing "classical deference to the political branches in matters of foreign policy").

FinCEN issued its final rule to address the serious risks that FBME's operations posed to the U.S. financial system and to the public more broadly. As explained in the rulemaking, FBME transmitted many hundreds of millions of dollars in suspicious funds through the United States. *See* 81 Fed. Reg. at 18,489. The "lack of transparency" in FBME's U.S. wire activity "ma[d]e it extremely difficult for U.S. and other financial institutions involved in these transactions to verify the *bona fides* of all of the parties to the[] transfers." 79 Fed. Reg. at 42,640. FBME advertised its willingness to help customers evade anti–money laundering regulations and failed to comply with regulators' instructions to remedy deficiencies in its compliance scheme. 81 Fed. Reg. at 18,489. As the district court recognized, eliminating the financing of terrorist activity and transnational crime, "and extricating it from the U.S. financial

system, are of paramount importance to the Government and the public." *FBME I*, 125 F. Supp. 3d at 128.

Plaintiffs suggest that supervision by Cypriot and Tanzanian regulators "ensures against any conceivable money-laundering risk," Mot. 27, but the Court should give those assurances very little weight. After Cyprus and Tanzania began their supervision, FBME employees took "various measures to obscure information" in what "may have been part of an effort to reduce" regulatory scrutiny. 81 Fed. Reg. at 18,489. FBME has an "extensive history of . . . ignoring its own . . . regulator's directives" and actively seeking to evade anti–money laundering regulations. *Id.*

FinCEN investigated FBME thoroughly and carefully, and FBME has had more than ample opportunity to make its case before both the agency and the district court. The government and the public share a strong interest in preventing future abuses by formalizing FBME's exclusion from the U.S. financial system, and the Court should not further delay the rule's implementation.

## II. Plaintiffs Are Not Likely To Prevail On The Merits

Although plaintiffs suggest that they need only raise "serious" merits questions to obtain a stay, Mot. 14, that standard applies (if at all, after *Winter*) only where "each of the other three factors clearly favors granting" a stay, *Davis*, 571 F.3d at 1292 (quotation marks omitted). As explained above, none of the other factors favor a stay, and plaintiffs are not entitled to relief under any standard. The district court entered summary judgment against plaintiffs on each of their claims after a careful

review, and after FinCEN addressed the court's concerns regarding prior versions of the rule. Plaintiffs' challenges to the rule are likely to fail on appeal (and are not made any stronger by their multiplicity).

**A.** The district court correctly rejected plaintiffs' arguments that FinCEN's rulemaking proceeding provided inadequate procedural protections. FinCEN gave FBME "notice[] [of its] findings against the Bank and summarized the supporting evidence, including, to the extent possible, the classified evidence that the agency relied upon"; engaged in an "extensive dialogue" with FBME, including an in-person meeting; considered FBME's many written submissions, including those it submitted outside the comment period; and, for purposes of ex parte review, gave the district court the classified information it had withheld from FBME. *FBME III*, 209 F. Supp. 3d at 329-30. FinCEN amply satisfied the procedural requirements of the APA, as well as any due process rights that plaintiffs might possess. *Id.*; *see also id.* at 326-28 (concluding that the Due Process Clause likely does not apply to plaintiffs, who lack presence in and substantial connections with the United States).

Plaintiffs contend that they received insufficient notice of two facts that appeared in FinCEN's fifteen-page rule. Mot. 15-17. But the APA requires only that an agency give interested persons "[g]eneral notice" of a proposed rule and "an opportunity to participate in the rule making." 5 U.S.C. § 553(b), (c). A notice of proposed rulemaking need not catalog all information on which the agency intends to rely. *See Air Transport Ass'n of Am. v. FAA*, 169 F.3d 1, 6 (D.C. Cir. 1999). The facts

that FBME employees concealed misconduct in 2014 and that a Hezbollah affiliate held an account at FBME in 2015 were well within the "subjects and issues" that FinCEN had advised plaintiffs it was considering. *Id.* And in any event, the district court correctly rejected these claims on the alternative ground that any error was harmless. *See FBME III*, 209 F. Supp. 3d at 319 (citing *Owner-Operator Indep. Drivers Ass'n, Inc. v. Federal Motor Carrier Safety Admin.*, 494 F.3d 188, 202 (D.C. Cir. 2007)).

Plaintiffs do not offer any credible response to the two facts on which they focus. Instead, they misread a footnote in *People's Mojahedin Organization of Iran v. U.S. Department of State*, 613 F.3d 220, 229 n.6 (D.C. Cir. 2010), to suggest that no error can be harmless in a case involving classified evidence. Mot. 17. That case adopted no such rule, however. Here, the district court correctly determined that FinCEN "ha[d] strong enough support for its factual assertion[s] . . . that any comment from FBME would not make a difference." *FBME III*, 209 F. Supp. 3d at 319; *see also id.* at 321-22.

Plaintiffs also suggest that FinCEN should have given them copies of Suspicious Activity Reports that other banks had submitted regarding FBME, which are made confidential by statute. Mot. 17-20. The district court explained that FinCEN's rule relied on *aggregate* information drawn from the reports, which was summarized in the notice of finding—not on individual reports. *FBME III*, 209 F. Supp. 3d at 316-17. Moreover, FinCEN's observations regarding the reports reflected "the agency's more general concern regarding deficiencies in the Bank's [anti–money laundering] controls," of which FBME had ample notice. *Id.* at 317.

*Abourezk v. Reagan*, 785 F.2d 1043, 1061 (D.C. Cir. 1986), does not compel a different result. Dicta in that case cautioned against "heavy reliance" on ex parte submissions except, for example, where "specified by statute." *Id.* By statute, the purpose of Suspicious Activity Reports is to aid criminal, tax, and regulatory investigations and proceedings, as well as intelligence and counterintelligence activities. *See* 31 U.S.C. § 5311. And Section 311 is codified within the Bank Secrecy Act, the same statute that makes Suspicious Activity Reports confidential. *See id.* § 5318A(f).

Plaintiffs invoke a constitutional right to a "neutral decisionmaker." Mot. 20-21. But FBME, a foreign bank with no substantial connection to the United States, is not entitled to due process, *see supra* p. 15, and this is a rulemaking, not an adjudication. In any event, it is black-letter administrative law that, absent "special facts and circumstances," "the combination of investigative and adjudicative functions" in a single agency "does not . . . constitute a due process violation." *Withrow v. Larkin*, 421 U.S. 35, 58 (1975). The district court correctly held that FinCEN's reliance on classified information, as expressly authorized by Congress in Section 311, and other statutorily protected information does not make FinCEN a biased or unfair decisionmaker. *See FBME III*, 209 F. Supp. 3d at 330-31. Indeed, the government regularly relies on such information in imposing targeted measures against terrorists and other threats to national security, *see, e.g.*, *Islamic Am. Relief Agency*

*v. Gonzales*, 477 F.3d 728 (D.C. Cir. 2007), and plaintiffs cite no case holding that the practice triggers the need for a third-party adjudicator.

**B.** Plaintiffs also seek to "encroach[] on the province of the agency," *FBME IV*, 2017 WL 1379311, at *7, by second-guessing FinCEN's methodology for assessing the money laundering risks that FBME poses. *See* Mot. 23-24. But "[t]he scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *see also Islamic Am. Relief Agency*, 477 F.3d at 734 (describing the Court's review "in an area at the intersection of national security, foreign policy, and administrative law" as "extremely deferential"). FinCEN "reviews relevant information and determines whether all of that information, taken together, justifies action under Section 311." 81 Fed. Reg. at 86,579. The district court correctly accepted FinCEN's methodological choices as reasonable and adequately explained. *FBME IV*, 2017 WL 1379311, at *7-8.

FBME claims that FinCEN was required to set a "benchmark" identifying an acceptable number of Suspicious Activity Reports for a bank to have. Mot. 23-24. FinCEN explained that statistical benchmarks are not the best way to measure a bank's risk and noted that benchmarks could instead set a counterproductive "target for banks or customers wishing to evade money laundering controls." 81 Fed. Reg. at 86,579. Moreover, the number of Suspicious Activity Reports regarding FBME is likely "under-inclusive" because of FBME's extensive efforts to conceal wrongdoing;

comparing FBME's statistics to those of other banks thus "would not necessarily portray the relevant risk posed by FBME." *Id.* at 86,578-79.

**C.** Plaintiffs' statutory arguments, *see* Mot. 21-22, 24-25, are also mistaken. Section 311 does not prohibit FinCEN from consulting with representatives of the Chairman of the Board of Governors of the Federal Reserve System, the Secretary of State, and the Attorney General, rather than those officials themselves. *See FBME III*, 209 F. Supp. 3d at 322 n.3. Unlike in the cases plaintiffs cite, *see* Mot. 21-22, where statutes expressly authorized only limited subdelegations, there is no sign that Congress intended for Cabinet officials and the Federal Reserve Chairman to attend personally to Section 311 proceedings.

Plaintiffs also incorrectly assert that FinCEN failed to assess the extent to which FBME is "used for legitimate business purposes" in Cyprus and Tanzania. Mot. 24-25 (citing 31 U.S.C. § 5318A(c)(2)(B)(ii)). FinCEN explained, however, that FBME "functions largely as an offshore bank catering to a significant number of shell entities that are nominally located in Cyprus and other high-risk jurisdictions." 79 Fed. Reg. at 42,640. A memorandum in the administrative record adds more detail, stating that up to 27 percent of FBME's clients were "high-risk," that many of FBME's clients were difficult to identify, and that many customers were shell companies and "politically exposed persons." *FBME III*, 209 F. Supp. 3d at 337. As the district court held, that assessment is "grounded in the record" and satisfies FinCEN's statutory obligations. *Id.*

**D.** Finally, plaintiffs renew their inaccurate claims that FinCEN "secretly received" and relied on unsolicited materials from former FBME investigators and a report from the Central Bank of Cyprus. Mot. 22-23. The district court correctly rejected any suggestion of impropriety, concluding that there was no "basis for finding that the agency relied on [the investigators' materials] or that their receipt or review tainted the rulemaking proceedings in any meaningful way," *FBME III*, 209 F. Supp. 3d at 341, and that all documents on which FinCEN relied were properly included in either the classified or the unclassified record, *FBME IV*, 2017 WL 1379311, at *8-10.

## CONCLUSION

For the foregoing reasons, the Court should deny plaintiffs' motion for an emergency stay pending appeal. The government respectfully requests that, if the Court grants plaintiffs' motion for a stay pending appeal, the Court set a briefing schedule promptly and schedule argument for the first available date.

Respectfully submitted,

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APRIL 2017

## CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing response complies with the requirements of Federal Rule of Appellate Procedure 27(d) because it has been prepared in 14-point Garamond, a proportionally spaced font. I further certify that this response complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2) because it contains 4985 words according to the count of Microsoft Word.

s/ *Sarah Carroll*
SARAH CARROLL

**CERTIFICATE OF SERVICE**

I hereby certify that on April 21, 2017, I electronically filed the foregoing with the Clerk of the Court by using the appellate CM/ECF system. Service will be accomplished by the appellate CM/ECF system.

s/ *Sarah Carroll*
SARAH CARROLL