No. 17-5076

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FBME BANK LTD., *et al.*,
Plaintiffs-Appellants,

v.

STEVEN MNUCHIN,
in his official capacity as Secretary of the Treasury, *et al.*,
Defendants-Appellees.

On Appeal from the U.S. District Court
for the District of Columbia
Case No. 1:15-cv-01270-CRC

EMERGENCY MOTION OF PLAINTIFFS-APPELLANTS FOR STAY PENDING APPEAL

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Appellants FBME Bank Ltd. and FBME Ltd. (together, "**FBME**") respectfully move under 5 U.S.C. § 705 for an emergency stay pending appeal of the final rule published at 81 Fed. Reg. 18480 (Mar. 31, 2016), as issued by the Financial Crimes Enforcement Network ("**FinCEN**").

INTRODUCTION

This case involves a suspect exercise of extraordinary administrative powers under the USA PATRIOT Act. Under § 311 of that Act, FinCEN has designated FBME of "primary money laundering concern" and imposed a lethal "special measure" that cuts FBME off from U.S. dollars. This punishment results from a "sort of quasi-adjudicative rulemaking process in which the agency may rely on classified information unavailable to the target of the rule or the public." *FBME Bank Ltd. v. Lew* ("***FBME III***"), --- F. Supp. 3d ----, 2016 WL 5108018, at *1 (D.D.C. Sept. 20, 2016), ADD00060–124.[1] Because "[n]either the D.C. Circuit nor any other court has had occasion to weigh in on" the questions here posed, "the [District] Court" had to "navigat[e] without a detailed roadmap." *Id.* at *4. Guidance from this

[1] "ADD" refers to the Addendum accompanying this motion.

Court regarding § 311 is thus sorely needed but, absent a stay, any ultimate victory for FBME may be rendered hollow.

Over the past fifteen years, FinCEN has used § 311 against foreign banks on 18 other occasions without answering to judicial review on the merits precisely because the special measure imposed is so lethal: target banks typically are wiped out before any challenge can be heard. Recently, one bank had its case dismissed as moot because FinCEN's proposed measure prompted dismantling by the home regulator, at which point FinCEN rescinded its § 311 action, leaving no agency action to challenge; appeal of that mootness dismissal is under submission in this Court following argument last month. *Cierco v. Mnuchin*, No. 16-05185 (D.C. Cir.).

On April 14, the district court in this case granted summary judgment to FinCEN in its § 311 action against FBME. ADD00131–53 (ECF 101 & 102). In doing so, it lifted a stay that had effectively been in place for 20 months, since FBME first obtained a preliminary injunction in August 2015. *FBME Bank Ltd. v. Lew* ("***FBME I***"), 125 F. Supp. 3d 109 (D.D.C. 2015), ADD00008–35. After denying a full stay pending appeal, the court entered (with the Government's consent) a

14-day administrative stay so FBME could pursue its instant request with this Court. ADD00298. If the final rule now enters effect, then FinCEN will have done its worst to FBME (as it has to one foreign bank after another) before judicial review runs its course, inflicting irreparable harm and likely wiping out what remains of FBME. Accordingly, FBME respectfully seeks a stay pending appeal while committing to whatever expedited schedule this Court and the Government may desire, so that this Court can complete its vital review before the final rule takes effect.[2]

FBME will likely prevail on the merits. FinCEN's initial rule was preliminarily enjoined in *FBME I* because FinCEN failed to disclose unclassified, non-privileged material and to explain itself adequately. The current rule is marred by further notice defects that the district court acknowledged yet excused as harmless, contrary to this Court's teaching that there can be no harmless error in a case like this where unclassified information is withheld alongside classified evidence. It is further marred by FinCEN's unreasoned reliance upon Suspicious Activity Reports ("**SARs**"), third-party reports that are ***un***classified yet

[2] The Government has informed FBME that it opposes this motion for a stay pending appeal.

were withheld from FBME, relied upon by FinCEN, and submitted to the district court *ex parte*. Using secret, unclassified evidence to punish FBME is anathema to the APA and due process.

Substantively, FinCEN's use of SARs was equally flawed. After granting partial summary judgment to FBME in *FBME III* based on FinCEN's failure to explain its statistical analysis of SARs data, the district court remanded for FinCEN to try re-explaining itself. Following that peculiar, one-sided remand, the court accepted FinCEN's *supplemental* reasoning, notwithstanding FinCEN's persisting failure to account for, *e.g.*, any SARs benchmark or baseline for statistical comparison.

The problems noted above are the tip of the iceberg. Taken together, the issues on appeal stand to invalidate the final rule in multiple respects. Absent a stay, however, ultimate invalidation of the final rule may arrive too late for FBME.

BACKGROUND

A. The Statute: § 311

The statute underlying this case—§ 311 of the USA PATRIOT Act, codified at 31 U.S.C. § 5318A—empowers the Treasury Secretary to

designate foreign banks as of "primary money laundering concern" and then impose "special measures" accordingly. The Secretary has delegated § 311 responsibility to FinCEN. Treasury Order 180-01 § 3(a) (July 1, 2014), https://goo.gl/xQARSA.[3]

Designation carries dire consequences. The statute lists five "special measures" FinCEN may impose. § 5318A(b). The fifth—and most severe—special measure can prohibit a bank from utilizing any correspondent account in the United States. § 5318A(b)(5). This "has the effect of eliminating or curtailing a foreign banking institution's access to the U.S. financial system and to transactions involving the U.S. dollar." *FBME I*, 125 F. Supp. 3d at 115.

The fifth special measure is "more often than not a death sentence." *A Fearful Number*, The Economist (June 4, 2015), https://goo.gl/kZXz6a. International banks typically cannot function without U.S. dollars. Since the enactment of § 311, 18 foreign financial institutions (other than FBME) have faced the fifth special measure. *See* FinCEN, 311 Special Measures, https://goo.gl/Jvohgq (cataloguing § 311 actions). At least 12 of the 18 collapsed or were liquidated by

[3] We have shrunk links using Google's URL shortener, https://goo.gl.

foreign regulators after FinCEN proposed the fifth special measure. *See* 81 Fed. Reg. 14408, 14409 (Mar. 17, 2016) (JSC CredexBank); 81 Fed. Reg. 11496, 11497 (Mar. 4, 2016) (Banca Privada d'Andorra); 81 Fed. Reg. 9139, 9139 (Feb. 24, 2016) (Liberty Reserve S.A.); 80 Fed. Reg. 60575, 60576 (Oct. 7, 2015) (Lebanese Canadian Bank SAL); 77 Fed. Reg. 59747, 59748 (Oct. 1, 2012) (Asia Wealth Bank & Myanmar Mayflower Bank); 76 Fed. Reg. 45689, 45690 (Aug. 1, 2011) (VEF Banka); 73 Fed. Reg. 19452, 19453 (Apr. 10, 2008) (First Merchant Bank & four subsidiaries).

Before designating a foreign bank, FinCEN must (1) "consult with the Secretary of State and the Attorney General," § 5318A(c)(1), and (2) "consider" certain "factors," including (i) "the extent to which such financial institutions . . . are used to facilitate . . . money laundering," and (ii) "the extent to which such institutions . . . are used for legitimate business purposes," § 5318A(c)(2)(B). FinCEN must then undertake further consultation and consideration before imposing any special measure, *see* § 5318A(a)(4)(A), (a)(4)(B), and still more consultation before arriving at the fifth, *see* § 5318A(b)(5).

Two aspects of § 311 are uniquely problematic. First, the statute provides that the fifth special measure "may be imposed only be regulation," § 5318A(a)(2)(c), thus calling for an "unusual" rulemaking focused "acutely on a single suspected bad actor." *FBME III*, 2016 WL 5108018, at *4. Second, § 311 authorizes FinCEN to rely on "classified information" submitted "to the reviewing court ex parte and in camera." § 5318A(f). Allowing *ex parte* submission of classified information "obviously clashes with the goals of transparency and public participation that underlie the notice-and-comment process." *FBME III*, 2016 WL 5108018, at *4.

All told, imposition of the fifth special measure "involves a sort of quasi-adjudicative rulemaking process in which the agency may rely on classified information unavailable to the target of the rule or the public." *Id.* at *1. FinCEN's conduct of this case has only exacerbated serious due-process concerns posed by this anomalous statutory scheme.

B. FinCEN's Final Rules

FBME is an international commercial bank that, as of mid-2014, had some $2 billion in assets. The bank had operated primarily in Cyprus, with headquarters in Tanzania. Its founders, the Saabs, are

members of the Lebanese-Christian minority who relocated to Cyprus during the Lebanese civil war in the 1970s–80s.

In July 2014, FinCEN published two notices, one alleging FBME to be of primary money laundering concern, 79 Fed. Reg. 42639 (July 22, 2014), ADD00160–62, and the other proposing the fifth special measure, 79 Fed. Reg. 42486 (July 22, 2014), ADD00154–59. A year later, FinCEN finalized the proposed rule. 80 Fed. Reg. 45057 (July 29, 2015), ADD00163–71 ("**First Final Rule**").

On August 27, 2015, one day before the Rule took effect, the district court preliminarily enjoined it because FinCEN had "provided insufficient notice of non-classified, non-protected information during the rulemaking proceeding, in violation of the APA's notice-and-comment requirement." *FBME I*, 125 F. Supp. 3d at 118. Additionally, "the agency's failure to explain its consideration of potentially viable alternatives [to its chosen sanction] appears to have run afoul of the APA." *Id.* at 125. Beyond that, FBME proved that "it is likely to suffer irreparable harm in the absence of a preliminary injunction" through "liquidation of FBME's remaining U.S. dollar correspondent accounts." *Id.* at 127. Finally, the balance of equities and public interest

supported the injunction because "delaying the Final Rule" would not "meaningfully affect[] the important U.S. national security interests at stake in this proceeding," while achieving the "critically important" goal of "holding [FinCEN] to its full procedural obligations." *Id.* at 129.

Thereafter, FinCEN obtained—over FBME's objection—a voluntary remand to address the identified defects, even as the district court retained its jurisdiction and stayed the case pending completion of remand. *FBME Bank Ltd. v. Lew* ("***FBME II***"), 142 F. Supp. 3d 70 (D.D.C. 2015), ADD00036–44.

During remand, FinCEN reported to FBME that it was planning to publish hitherto-undisclosed submissions that it had received and reviewed, months earlier, from investigators who had originally been retained by FBME yet later commissioned (and paid) by regulators in Cyprus to report adversely to FBME. ADD00045–55 (ECF 51). Concerned that those submissions were suffused with attorney-client communications (extending to and from the undersigned counsel), FBME urgently sought relief from the district court, but the court denied the parties' joint request for a hearing on the ground that any

ruling would be "advisory." ADD00057–58 (ECF 54). FinCEN nevertheless agreed not to publish the submissions at issue.

Also on remand, FinCEN solicited new comments, 80 Fed. Reg. 74064 (Nov. 27, 2015), ADD00172–75, and then issued a new final rule at the end of March 2016 that again imposed the fifth special measure against FBME. 81 Fed. Reg. 18480 (Mar. 31, 2016), ADD00176–90 ("**Second Final Rule**").

The parties cross-moved for summary judgment. In July 2016, just before the Second Final Rule would take effect, the district court *sua sponte* stayed it, finding that a stay would enable due deliberation and that FBME would "likely be irreparably harmed should the final rule take effect." ADD00059 (ECF 82).

Two months later, the court granted summary judgment in part and denied it in part. *FBME III*, 2016 WL 5108018. The district court ruled that FinCEN yet again had withheld unclassified information and failed to provide requisite notice, but this time forgave those procedural defects as "harmless error." *Id.* at *9–11.

As to the agency's substantive rationale, the court agreed with FBME that "FinCEN did fail to respond meaningfully to FBME's

comments regarding the agency's treatment of aggregate SARs data," *id.* at *20, and that "FinCEN's decision was therefore arbitrary and capricious," *id.* at *23. In particular, it noted that FinCEN had neither provided any "comparative benchmarks" nor "attempt[ed] to explain why such benchmarks may be unnecessary, or infeasible to provide, or how else the agency may have applied its expertise and regulatory experience in the absence of specific benchmarks." *Id.* at *21. The court then remanded the matter yet again, this time solely to see whether "FinCEN could respond adequately to FBME's comments that call into question whether FinCEN could fairly rely on aggregate SARs data for the conclusions it drew about FBME." *Id.* at *30. In the meantime, it continued to keep the Second Final Rule stayed "so as to avoid potentially irreparable harm to FBME." *Id.* at *29.

On remand, FinCEN did not reopen the rulemaking, accept input from FBME, or provide any renewed notice. Instead, FinCEN took two months to publish a two-page supplement purporting to respond to FBME's previous comments about the SARs data. 81 Fed. Reg. 86577 (Dec. 1, 2016), ADD00191–93.

On April 14, 2017, the district court entered final judgment upholding the Second Final Rule, as supplemented, and lifting its stay. In tandem, the court denied FBME's request for reconsideration of prior rulings based on unsettling revelations about yet another secret submission from Cyprus that FinCEN had ostensibly considered yet withheld from FBME, even while denying any such receipt. ADD00131–53 (ECF 101 & 102).

ARGUMENT

The APA empowers courts to stay agency actions pending judicial review. 5 U.S.C. § 705; *In re GTE Service Corp.*, 762 F.2d 1024, 1026 (D.C. Cir. 1985). Four factors inform this decision: "(1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay." *Cuomo v. U.S. Nuclear Regulatory Commission*, 772 F.2d 972, 974 (D.C. Cir. 1985); *see also Nken v. Holder*, 556 U.S. 418, 434 (2009) (applying similar test to request for stay of removal).

This Court evaluates these factors on a "sliding scale"; if "the movant makes an unusually strong showing on one of the factors, then it does not necessarily have to make as strong a showing on another factor."[4] *Davis v. Pension Benefit Guaranty Corp.*, 571 F.3d 1288, 1291–92 (D.C. Cir. 2009).[5]

I. FBME Will Likely Prevail

A stay movant need not establish success: "[I]t will ordinarily be enough that the plaintiff has raised questions going to the merits, so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberative investigation." *Holiday Tours*, 559 F.2d at 844; *accord Population Institute v. McPherson*, 797 F.2d 1062, 1078 (D.C. Cir. 1986); *Akiachak Native Community v. Jewell*, 995 F. Supp. 2d 7, 13 (D.D.C. 2014). Here, FBME has not only raised "serious, substantial, difficult and doubtful" legal

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[4] Some judges have opined that the sliding-scale approach was abrogated by *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008), but this Court has not repudiated the sliding-scale approach. *See Sherley v. Sebelius*, 644 F.3d 388, 392–93 (D.C. Cir. 2011).

[5] *Davis* concerned a preliminary injunction rather than a stay pending appeal, but the test is the same for each. *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 842 n.1 (D.C. Cir. 1977).

issues with the Second Final Rule, but it is also likely to prevail on these issues.

A. Procedural Violations

The Second Final Rule reflects glaring procedural defects.

First, FinCEN violated its APA obligation to provide adequate notice and opportunity to comment. 5 U.S.C. § 553; *American Medical Ass'n v. Reno*, 57 F.3d 1129, 1132 (D.C. Cir. 1995). FinCEN likewise violated its due-process obligation to notify FBME of the unclassified evidence against it and provide meaningful opportunity for contestation. *Ralls Corp. v. Committee on Foreign Investment in the United States*, 758 F.3d 296, 318–21 (D.C. Cir. 2014).[6]

Only after it was too late for comment, in the Second Final Rule itself, did FinCEN first announce new, key accusations against FBME.

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[6] The district court found FBME "likely" is not entitled to due process but nevertheless "assum[ed]" it "has due process rights." *FBME III*, 2016 WL 5108018, at *15. In fact, the record establishes that FBME has substantial U.S. property at stake, including escrowed funds in an IOLTA account in North Carolina. *See* ADD00202 (Saab Declaration ¶ 38). Such evidence necessitates due-process analysis, especially on summary judgment, where FBME deserves all reasonable inferences. *National Council of Resistance of Iran v. U.S. Department of State*, 251 F.3d 192, 201 (D.C. Cir. 2001) (interest in "small bank account" triggers due process). At a minimum, there is a serious question about FBME's due-process rights.

Despite having months to disclose these accusations, FinCEN provided *no indication whatsoever* throughout notice and comment that it was relying on *any* development or information outside of the July 2014 notices for its proposed rule. The result was at least "two defects in the notice and opportunity for comment FinCEN afforded FBME." *FBME III*, 2016 WL 5108018, at *29.

Specifically, in the Second Final Rule, FinCEN relied heavily on the allegation—thrice repeated—that "in late 2014, FBME employees took various measures to obscure information." 81 Fed. Reg. at 18482, 18486, 18489. "FBME and the public were never made aware of this unclassified allegation against FBME and had no meaningful opportunity to contest it during the comment period." *FBME III*, 2016 WL 5108018, at *10. Similarly, FinCEN "five times in the Second Final Rule" spelled out a new allegation that "'[a]s of early 2015, an alleged Hezbollah associate and the Tanzanian company he managed owned accounts at FBME.'" *Id.* at *11. The district court recognized that "FinCEN's tendency to make available in its Second Final Rule declassified information that it [previously] disclosed only in limited form . . . carries with it the taint of unfair surprise." *Id.*

By dismissing these notice failures as harmless, *id.* at *9–11, the district court deviated from this Court's instruction: When it comes to designation cases involving reliance on *classified* evidence, withholding *un*classified material may *never* be harmless, "because a convincing response by the [entity] to the unclassified material might affect the Secretary's view not only of that evidence but of the classified material as well." *People's Mojahedin Organization of Iran v. U.S. Department of State*, 613 F.3d 220, 229 n.6 (D.C. Cir. 2010). Indeed, the district court earlier so recognized in granting the preliminary injunction. *FBME I*, 125 F. Supp. 3d at 123 (citing *People's Mojahedin* to reject argument that "any procedural deficiencies in the rulemaking process were harmless"). The district court's earlier ruling, together with this Court's opinion in *People's Mojahedin*, indicate that denial of requisite notice here is unlikely to be deemed harmless.

Second, FinCEN unlawfully relied on secret, *un*classified evidence. It is "the firmly held main rule that a court may not dispose of the merits of a case on the basis of *ex parte*, *in camera* submissions." *Abourezk v. Reagan*, 785 F.2d 1043, 1061 (D.C. Cir. 1986), *affirmed by an equally divided Court*, 484 U.S. 1 (1987). Nor does due process allow

a party to be administratively sanctioned based on secret third-party complaints. *States Marine Lines, Inc. v. Federal Maritime Commission*, 376 F.2d 230, 232–33 (D.C. Cir. 1967). Yet the Second Final Rule relies heavily on unclassified SARs (amounting to third-party reports about FBME), none of which was disclosed to FBME, none of which is classified, and all of which were submitted *ex parte* below.

The district court offered two reasons for letting FinCEN—in what appears to be unprecedented fashion—withhold unclassified SARs yet simultaneously rely upon them to sanction FBME. It first noted that the Bank Secrecy Act authorizes FinCEN to *withhold* SARs. *FBME III*, 2016 WL 5108018, at *7; *FBME I*, 125 F. Supp. 3d at 120 & n.4. But the Bank Secrecy Act does *not* authorize FinCEN to *selectively disclose* SARs via *ex parte* judicial submission, in violation of the emphatic rule of *Abourezk* and the due-process command of *States Marine Lines*. FinCEN could have eschewed reliance on the SARs and then withheld them; once it opted affirmatively to rely on them, it had to "produce the material." *Wirtz v. Baldor Electric Co.*, 337 F.2d 518, 528 (D.C. Cir. 1963).

Next, the court characterized FinCEN as relying only on "aggregate data drawn from the SARs," such that *individual* SARs need not be disclosed. *FBME III*, 2016 WL 5108018, at *19. But this Court has repeatedly held that the APA requires an agency to release underlying data, lest interested parties be denied meaningful comment on whether the agency has misread the data. *American Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 236 (D.C. Cir. 2008); *Chamber of Commerce of the United States v. SEC*, 443 F.3d 890, 899 (D.C. Cir. 2006). Due process requires the same. *State Marine Lines*, 376 F.2d at 239–40 (third-party complaints relied on must be produced in their "original form"—not via summaries—or else disregarded).

In any case, the district court's factual premise has been debunked: When defending FinCEN's "supplemental" analysis of SARs data, the Government reported that the agency analyzed "the qualitative characteristics of the SARs . . . *as well* as their overall volume," and that "FinCEN *did* examine and find that many of the SARs had the 'particular characteristics' that are associated with money laundering." ADD00129–30 (ECF 94 at 11–12; emphasis in original). Thus, FinCEN examined and relied on *individual* SARs that

it altogether withheld. Because the on-point precedents cited above foreclose that, FBME will likely prevail on this ground too.

Third, FinCEN unconstitutionally failed to provide a neutral decisionmaker. FinCEN played the part of prosecutor, judge, jury, and executioner in imposing the fifth special measure against FBME, and the district court then reviewed FinCEN's findings deferentially. FBME thus never received a *de novo* review of the evidence by a neutral arbiter who could examine FinCEN's claimed evidence (including the black box of secret evidence) while testing it against competing submissions.

Because Government officials are presumed fair, the same agency official may generally initiate enforcement and impose sanction, *provided* that an adverse party can contest *all* evidence considered. *Withrow v. Larkin*, 421 U.S. 35, 46–47 (1975). At the same time, if findings "derived from *nonadversarial processes*" effectively "foreclose[] fair and effective consideration at a subsequent adversary hearing leading to ultimate decision, *a substantial due process question would be raised*." *Id.* at 58 (emphasis added). In this case, where FBME was punished by FinCEN based on secret evidence it had no opportunity to

contest, due process requires "providing for a neutral adjudicator to conduct a *de novo* review of all factual and legal issues." *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 618 (1993).

Fourth, the administrative record betrays an absence of requisite consultations. Although Congress obligated FinCEN to undertake a series of consultations with specified cabinet officials and agencies before exercising its remarkable powers under § 311, *see* 31 U.S.C. § 5318A(c)(1), (a)(4)(A), (b)(5), the Second Final Rule refers only to consultations preceding the *original* final rule, not to any undertaken during the reopened rulemaking culminating in the Second Final Rule. *FBME III*, 2016 WL 5108018, at *14 (citing 81 Fed. Reg. at 18488). Such failure of consultation is itself fatal. *Karuk Tribe of California v. U.S. Forest Service*, 681 F.3d 1006 (9th Cir. 2012) (en banc); *Campanale & Sons, Inc. v. Evans*, 311 F.3d 109, 116–21 (1st Cir. 2002).

The district court nonetheless forgave FinCEN by crediting a *post hoc* declaration. *FBME III*, 2016 WL 5108018, at *14–15. But that self-serving, conclusory, untested declaration was unaccompanied by any claim that FinCEN had in fact consulted with the officers specified by

§ 311 (the Attorney General, the Secretary of State, and the Chairman of the Federal Reserve). Instead, the declaration states that "representatives" of these officers were consulted. *Id.* at *15. When Congress has assigned a duty to a particular federal official, however, it is unlawful for a "representative" to carry out the duty unless the official lawfully delegated it to the "representative." *United States v. Giordano*, 416 U.S. 505 (1974); *Halverson v. Slater*, 129 F.3d 180 (D.C. Cir. 1997). No such delegation exists here or has been claimed by the Government.

Fifth, additional procedural improprieties infect the Second Final Rule. Two examples are telling. FinCEN secretly received and reviewed FBME's privileged materials over a period of months before first alerting FBME. ADD00045–55 (ECF 51). Without finding otherwise, the district court essentially brushed the problem aside. *See FBME III*, 2016 WL 510818, at *28–29. This Court has taken a different approach, however, insisting that agencies whose rulemakings may have been compromised by improper *ex parte* submissions conduct evidentiary hearings and make findings to eradicate any taint. *See*

Professional Air Traffic Controllers Organization v. FLRA, 672 F.2d 109, 113 & n.7 (D.C. Cir. 1982) (collecting cases).

What is more, FinCEN also secretly received and relied on a crucial report from the Central Bank of Cyprus, apparently treating that report as classified merely because it was submitted by a foreign regulator—*even after* FBME (which is adverse to Cyprus in multiple respects, including an international arbitration seeking recovery of hundreds of millions of dollars) asked whether any such report was being withheld and was expressly assured by the Government, repeatedly, that no such report was being withheld. ADD00149–50 (ECF 101 at 19–20). The district court chalked this up to a "simple misunderstanding between counsel" and refused to treat the Government's false representations as raising any question. ADD00150 (ECF 101 at 20).

B. Substantive Violations

The Second Final Rule is similarly defective in substance.

First, FinCEN invoked raw, aggregate SARs data as a basis for sanctioning FBME, but did so in a *sui generis*, unreasoned, impenetrable fashion—without offering *any* benchmark, baseline, or

proportionate sense of what a healthy SARs rate *should* be for an international bank such as FBME relative to its total transactions. After finding arbitrariness and caprice in this very respect, the court below remanded to FinCEN for further explanation, only then to uphold the rule when FinCEN responded, in essence, that it has no benchmark or baseline to offer, and that it is indifferent to the rate of SARs incidence (as opposed to an aggregate total). ADD00139–46 (ECF 101 at 9–16). The upshot defies cases that rule it folly to view statistical data in a vacuum, without any benchmark. *See In re Complaint of Judicial Misconduct*, 687 F.3d 1188, 1189 (9th Cir. 2012); *United States v. Archer*, 671 F.3d 149, 164 (2d Cir. 2011). It also defies cases that construe the phrase "extent to which," just as it appears in § 311, as demanding proportionate analysis. *See Armenian Assembly of America, Inc. v. Cafesjian*, 758 F.3d 265, 278 (D.C. Cir. 2014); *Scriptgen Pharmaceuticals, Inc. v. 3-Dimensional Pharmaceuticals, Inc.*, 79 F. Supp. 2d 409, 421 (D. Del. 1999).

Second, FinCEN has violated its express statutory obligation to consider the "extent to which" FBME is "used for legitimate business purposes." § 5318A(c)(2)(B)(ii). The Second Final Rule simply does not

purport to account for FBME's *legitimate* activity. The district court forgave that, too, by reasoning that FinCEN's analysis of FBME's *illegitimate* activity covered the other side of the coin. *FBME III*, 2016 WL 5108018, at *25. But that neither gives this distinct statutory inquiry its due nor accounts for FinCEN's clear acknowledgement that it fixated on suspect transactions only by their *raw* numbers, taken alone, *without regard for* the remainder set of legitimate transactions.

II. FBME Faces Irreparable Injury

As the preliminary injunction reflected, FBME faces irreparable harm if the final rule takes effect, including because its persisting accounts (still totaling hundreds of millions of dollars) will be quickly dumped (likely upon local courts) by correspondent banks. *FBME I*, 125 F. Supp. 3d at 125–27. The district court continued to recognize this prospect when it *sua sponte* stayed the Second Final Rule during its review, *see* ADD00059 (ECF 82), and again when it stayed the Second Final Rule after granting partial summary judgment to FBME, *see FBME III*, 2016 WL 5108018, at *29. The same conclusion still holds today. ADD00201–02 (Saab Declaration ¶¶ 34–37); ADD00297 (Reimer

Declaration ¶¶ 5–7).[7] Moreover, the Bank of Tanzania has indicated that it may liquidate FBME if the Second Final Rule takes effect. ADD00200–01 (Saab Declaration ¶¶ 29–33). The stay that has been in effect since August 2015 is what has differentiated FBME from other banks subjected to the fifth special measure that have collapsed or been liquidated by their home regulators. *See supra* at 6–7.

A movant faces "irreparable harm" when "the very existence of the movant's business" is threatened. *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985); *accord Vaqueria Tres Monjitas, Inc. v. Irizarry*, 587 F.3d 464, 485 (1st Cir. 2009). Loss of FBME's remaining correspondent accounts, combined with its potential liquidation abroad, easily satisfies this standard. Furthermore, the threatened loss of a constitutional right by itself constitutes irreparable harm. *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013). A stay would forestall culmination of the irreparable due-process violations described above.

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[7] In denying a stay pending appeal, the district court faulted FBME for "not demonstrat[ing] how implementation of the Rule would cause it irreparable harm under present circumstances." ADD00151 (ECF 101 at 21). But the record contains precisely the same evidence previously relied on as establishing irreparable harm. The district court neither addressed that evidence nor pointed to any new contradictory evidence (of which there is none).

III. Harm to the Opposing Party and Public Interest

The third and fourth factors "merge when the Government is the opposing party." *Nken*, 556 U.S. at 435.

Staying final implementation would not impair FinCEN's interests. FinCEN first noticed its proposed rule in July 2014. During the intervening three years, the Final Rule has *never* taken effect; FinCEN took a year before arriving at a final rule in July 2015, and its rule has been stayed ever since. Extending the longstanding stay for an additional period of months while expedited appeal proceeds poses no appreciable harm to the Government or public; there is no pressing need now suddenly to upend the status quo and likely obliterate what remains of FBME. Indeed, the heavily constrained and monitored state of FBME's operations—with ongoing control and supervision by regulators in Cyprus and Tanzania, and individual transactions strictly limited and policed—ensures against any conceivable money-laundering risk now and moving forward. ADD00196–99 (Saab Declaration ¶¶ 12–24).

On the other side of the scale, there is a strong public interest in ensuring agencies comply with their legal obligations. *R.I.L-R v.*

Johnson, 80 F. Supp. 3d 164, 191 (D.D.C. 2015). A stay is especially important because this case presents the first vehicle for judicial review to run its course in a § 311 case, after other such cases have been rendered nonjusticiable. *See Cierco v. Lew*, 190 F. Supp. 3d 16, 28 (D.D.C. 2016).

In sum, the district court was quite right earlier to rule that the third and fourth factors favor enjoining the rule while judicial review is ongoing. *FBME I*, 125 F. Supp. 3d at 129. For the same reasons and more, this Court should enter a stay pending appeal and thereby ensure that FBME can carry this appeal to completion. As noted, to minimize any burden associated with a stay, FBME will embrace whatever expedited schedule the Government and this Court may desire.

CONCLUSION

For the foregoing reasons, this Court should stay the Second Final Rule pending appeal.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In accordance with Federal Rules of Appellate Procedure 27(d)(1)(E), 27(d)(2)(A), and 32(g)(1), I certify that the foregoing motion is proportionately spaced using 14-point Century Schoolbook font and contains 5187 words, excluding the parts of the brief exempted from length limits by Rules 27(d)(2) and 32(f).

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CERTIFICATE OF SERVICE

I hereby certify that, on April 17, 2017, I electronically filed the foregoing motion with the Clerk of the Court for the U.S. Court of Appeals for the District of Columbia by using the appellate CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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