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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

SCOTTSDALE CAPITAL ADVISORS, an Arizona corporation Plaintiff, v. UNITED STATES SECURITIES AND EXCHANGE COMMISSION, Defendant.	**PLAINTIFF SCOTTSDALE CAPITAL ADVISORS' FIRST AMENDED COMPLAINT** Case No. 2:18-cv-00504-CW Judge Clark Waddoups

Plaintiff Scottsdale Capital Advisors ("SCA" or "Plaintiff") files this First Amended Complaint against Defendant United States Securities and Exchange Commission ("SEC" or "Defendant") and alleges, by and through undersigned counsel, on knowledge of Plaintiff and upon information and belief as to all other matters, as follows:

INTRODUCTION

1. This is a suit under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 550, *et seq.,* to establish the invalidity of the SEC's attempt to use Exchange Act Rule 17a-8, 17 C.F.R. § 240.17a-8, to enforce, administer and interpret the suspicious activity reporting ("SAR") regulations of the Bank Secrecy Act (also known as the Currency and Financial Transactions Reporting Act of 1970), 31 U.S.C. §§ 5311-5330 (the "BSA") administered by the United States Department of Treasury ("Treasury").

2. The SEC's attempt to pursue claims for alleged violations of the SAR provisions of the BSA under its own standards and pursuant to Exchange Act Rule 17a-8 is defective on several procedural and substantive grounds.

3. First, the SEC asserts that Rule 17a-8, promulgated in 1981, automatically expanded over the course of years to encompass any subsequent provisions of the BSA, and permits the SEC to bring enforcement actions for violations of the SAR regulations, 31 C.F.R. § 1023.320, that were issued *twenty years later* by the Treasury Department's Financial Crimes Enforcement Network ("FinCEN") under the BSA. The SEC, however, failed to engage in *any* of the procedures required by the APA to actually effect such a

rule. In fact, this case is highly unusual: while most actions under the APA present the issue of whether an agency's process and analysis under the APA was deficient, here, the agency failed to engage in any process whatsoever.

4. That the SEC's present interpretation of Rule 17a-8 constitutes a violation of the APA is evident from the sequence of events relating to the rule and to the passage of the relevant provisions of the BSA as detailed immediately below.

5. Rule 17a-8 was adopted in 1981 and, in pertinent part, required "[e]very registered broker or dealer who is subject to the requirements of the Currency and Foreign Transactions Reporting Act of 1970 [to] comply with the reporting, recordkeeping and record retention requirements of Part 103 of Title 31 of the Code of Federal Regulations." At the time Rule 17a-8 was adopted, that statute required only that broker-dealers file currency transaction reports in three circumstances: (1) a transaction in currency involving $10,000 or more; (2) any export or import of $5,000 of currency or monetary instruments; and (3) a person subject to the jurisdiction of the United States with any financial interest or authority over a bank, securities or other financial account in a foreign country.[1]

6. More than ten years later, in 1992, Congress granted to the Secretary of the

[1] *See* SEC Notice of Proposed Rulemaking, 46 Fed. Reg. 44775 (Sept. 8, 1981) (summarizing existing Treasury regulations and reporting requirements); SEC Notice of Adoption of Final Rule, 46 Fed. Reg. 61454 (Dec. 19, 1981) (same). *See also* 31 C.F.R. §§ 103.22 (transactions involving $10,000 or more), 103.23 (export or import of currency, 103.24 (reports of foreign accounts).

Treasury the authority to require financial institutions to report suspicious transactions. 31 U.S.C. § 5318(g). Another decade later, in Section 356 of the USA Patriot Act, Congress directed the Secretary of the Treasury, after consultation with the SEC and the Federal Reserve, to publish regulations requiring various other financial institutions, including broker-dealers, to file SARs.

7. In 2002, FinCEN, pursuant to authority delegated by the Secretary of the Treasury, adopted final regulations amending the BSA Regulations to require broker-dealers to file suspicious activity reports with Treasury (*see* 66 Fed. Reg. 67670 (December 31, 2001) (publishing notice of proposed amendments to the BSA regulations); *see also* 67 Fed. Reg. 44048 (July 1, 2002) (publishing final rule amending the BSA regulations). FinCEN's broker-dealer SAR regulation is codified at 31 C.F.R. § 1023.320.

8. At no time – when the SAR regulations were first promulgated, when they were later extended to broker-dealers in 2002, or since then – has the SEC engaged in any of the procedures or analysis required under the APA or the Securities Exchange Act to promulgate a regulation relating to those SAR requirements.

9. The SEC ignored all of the critical requirements of the APA, including requirements to: publish notice in the Federal Register; solicit, evaluate and reconcile comments from the industry; address relevant and important jurisdictional issues; and conduct mandatory cost-benefit analyses. Despite FinCEN's numerous amendments,

revisions, and substantive additions to the BSA regulations – most notably FinCEN's creation of the SAR regime for banks and depository institutions in 1996 and its adoption of SAR requirements for broker-dealers in 2002 – the SEC for more than 25 years engaged in no rulemaking action relating to Rule 17a-8, confirming to the entire industry that Rule 17a-8 remained unchanged and unaltered since its adoption.

10. In addition to ignoring the rulemaking requirements of the APA, the SEC ignored its rulemaking obligations under the Securities Exchange Act with respect to its purported inclusion of the SAR requirements in Rule 17a-8. Section 17(a) of the Exchange Act authorizes the "Commission" to prescribe "by rule" which reports broker-dealers must make and disseminate, after finding that such reports are "necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this chapter." 15 U.S.C. § 78q(a)(1) (emphasis added). Under Section 3(f) of the Securities Exchange Act, "the Commission" must also "consider… whether the action will promote efficiency, competition, and capital formation" in connection with rulemaking. 15 U.S.C. § 78c(f). The SEC itself made none of these necessary findings in purporting to incorporate the SAR provisions of the BSA into Rule 17a-8.

11. From this sequence of events, broker-dealers and related industry participants reached the *only* reasonable conclusion: Rule 17a-8 addressed the currency transaction report requirements that existed at the time the rule was adopted in 1981. It

imposed ***no*** additional obligations, subject to SEC enforcement, with respect to the suspicious activity reporting requirements adopted by FinCEN twenty years later.

12. Having engaged in no rulemaking process of any kind in relation to the SAR provisions, but eager to pursue enforcement actions, the SEC has put forth the wholly after-the-fact claim that Rule 17a-8 somehow automatically absorbed the subsequent BSA provisions because they were "incorporated by reference." That claim is equally defective: the kind of boundless and never-ending incorporation that the SEC describes is expressly prohibited by specific and clear administrative process and rules. Under those rules, Rule 17a-8, because it was enacted decades *before* the SAR provisions came into existence and specifically addressed only the currency transaction reporting that then existed, did not and *could not* incorporate future provisions merely by referring to the BSA.

13. Second, *if* the SEC had engaged in procedures consistent with the APA, that process would have confirmed that a rule purporting to confer enforcement authority on the SEC is invalid. Congress expressly delegated the authority for rulemaking, administration and enforcement of the BSA to Treasury, which properly conferred that authority on FinCEN, a bureau of the Treasury department.

14. Neither Congress, the Treasury Department nor FinCEN conferred any authority on the SEC to administer or enforce the BSA, including the SAR provision.

15. The SEC is not permitted to confer on itself authority to pursue violations

of the BSA that is contrary to and in derogation of a clear Congressional delegation of authority to Treasury, and the clear and consistent retention of enforcement authority by FinCEN.

16. It was only in recent years, many years after FinCEN's application of SAR rules to broker-dealers, that the SEC began to claim that it possessed authority to enforce the SAR provisions of the BSA. It started by inserting those claims into settled administrative enforcement actions against broker-dealers who, the SEC alleged, failed to comply with FinCEN's SAR reporting requirements and thereby violated Rule 17a-8. Ensconced behind the veil of its own administrative process, and seizing on the penchant of industry participants to quickly acquiesce and settle alleged violations by means of consent decrees and cease-and-desist orders, the SEC has avoided any judicial scrutiny of its unlawful and defective expansion of its jurisdiction and application of Rule 17a-8.

17. Then, in June 2017, the SEC filed an enforcement action against Alpine Securities Corporation ("Alpine"), a self-clearing broker-dealer specializing in the microcap market, in the United States District Court for the Southern District of New York, *S.E.C. v. Alpine Securities Corp.,* Case No. 17-cv-4179-DLC, relying on Rule 17a-8 to claim that Alpine failed to comply with FinCEN's SAR regulations, 31 C.F.R. § 1023.320 ("Alpine Enforcement Action").

18. The Alpine Enforcement Action was the first litigated SAR enforcement action by the SEC in federal court. In that Action, the SEC asserted interpretations of the

SAR filing and narrative requirements, never endorsed by FinCEN, that deemed microcap and over-the counter ("OTC") stock transactions per se suspicious, and that transformed certain "red flags" – many of which are simply characteristics of a microcap or OTC stock transaction – into automatic SAR filing triggers that must be discussed in SAR narratives. The SEC also claimed that it could rely on the Securities Exchange Act's lower mens-rea standard of strict liability and higher penalties, rather than the scienter requirements, and lower penalty provisions, imposed by Congress in the BSA for violations of the BSA.

19. Alpine challenged, *inter alia,* the SEC's authority to enforce the SAR requirements of the BSA, as well as the SEC's interpretation of the SAR filing and narrative requirements, in the Alpine Enforcement Action. The district court in the Alpine Enforcement Action rejected Alpine's arguments, adopted the SEC's new, stringent interpretations of the SAR filing and content requirements, and entered judgment against Alpine. The district court's judgment was affirmed by the Second Circuit Court of Appeals, *S.E.C. v. Alpine Sec. Corp.,* 982 F.3d 68 (2d Cir. 2020), and the United States Supreme Court denied Alpine's petition for writ of certiorari on the issue of the SEC's authority to enforce the SAR provisions of the BSA on November 8, 2021. *See Alpine Securities Corp v. S.E.C.,* 142 S.Ct. 461 (2021) (denying certiorari).

20. The SEC's position in the Alpine Enforcement Action has created significant and onerous new regulatory costs, burdens and uncertainty, particularly for

broker-dealers specializing in the microcap/OTC markets, with respect to the SAR filing obligations under the BSA.

21. SCA, is one of those affected broker-dealers. As a result of the SEC's unfounded and unlawful enforcement of the BSA, and creation of a new species of SAR violation in the Alpine Enforcement Action, SCA has been forced to devote substantial time and resources to re-evaluate its BSA program and take additional steps to avoid regulatory inquiry, excessive penalties, or enforcement actions. Among other things, and as detailed further herein, SCA has had to re-examine and implement changes to its BSA program and SAR preparation, in order to comply with the SEC's stringent and inconsistent interpretations of FinCEN's SAR provisions, which has substantially increased compliance costs, caused additional SAR filings, and required the hiring of additional compliance personnel.

22. For these reasons, and for the reasons explained below, SCA requests that this Court declare unlawful the SEC's newly-minted and administratively defective application of Rule 17a-8, and enjoin the SEC from implementing or enforcing that provision or giving it effect in any manner, and order such other relief as the Court may deem just and appropriate.

THE PARTIES

23. Plaintiff SCA is an Arizona corporation, headquartered in Scottsdale, Arizona. SCA is a retail brokerage firm that trades securities, and has been registered

with the SEC as a broker-dealer since 2002.

24. Alpine, as a clearing firm, entered into and executed a "Fully Disclosed Clearing Agreement" on February 26, 2009, with SCA serving as the introducing firm.

25. The Fully Disclosed Clearing Agreement provides that SCA has the sole responsibility for (1) complying with all applicable laws, regulations, and self-regulatory requirements regarding transactions and accounts, including AML obligations, (2) maintaining procedures to ensure compliance, and (3) knowledge of the customer, including "all essential facts" relating to each customer and their accounts. Pursuant to this agreement, SCA has acted, and continues to act, as an introducing broker-dealer for transactions cleared through Alpine.

26. Defendant SEC is an independent agency of the United States government, subject to the Administrative Procedure Act (*see* 5 U.S.C. § 551(1); 15 U.S.C. § 78(d)(a)).

JURISDICTION AND VENUE

27. This action arises under the APA, 5 U.S.C. §§ 500 *et seq.*, the Regulatory Flexibility Act ("RFA"), 5 U.S.C. §§ 601, *et seq.,* the Declaratory Judgment Act, 28 U.S.C. § 2201, and the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a *et seq.* Therefore, this Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331.

28. The APA provides for judicial review to any party aggrieved by agency action, and waives sovereign immunity for all equitable actions for specific relief against

a federal agency. 5 U.S.C. § 702.

29. Venue is proper in this District under 28 U.S.C. § 1391(b) and (e)(1) because the Defendant resides in this District as an agency of the United States that maintains a regional office in this District.

GENERAL ALLEGATIONS

The Bank Secrecy Act

30. The BSA was enacted by Congress in 1970 to authorize and establish a currency transaction reporting and recordkeeping regime to address concerns regarding the movement of funds derived from or related to illicit activity through financial institutions. *See California Bankers Ass'n v. Shultz*, 416 U.S. 21, 26-28, 38 (1974) (describing Congress' motive in adopting the BSA as "recogniz[ing] the importance of reports of large and unusual currency transactions in ferreting out criminal activity" through financial institutions).

31. Congress expressly delegated authority to administer and implement the BSA to the Secretary of Treasury, including both rulemaking and enforcement authority. *See, e.g., California Bankers,* 416 U.S. at 26 (recognizing Secretary's broad rule-making authority under the BSA; *see also* 31 U.S.C. §§ 5320, 5321 (authorizing "the Secretary" to seek civil penalties and injunctive relief for violations of the BSA or its implementing regulations). As confirmed by a comprehensive amendment to the implementing regulations for the BSA in 1987, the Secretary of Treasury delegated "overall authority

for enforcement and compliance . . . to the Assistant Secretary (Enforcement)." 31 C.F.R. § 103.46(a) (now at 31 C.F.R. § 1010.810(a)); *see also* 52 Fed. Reg. 114,36 114,40 cmt. 19 (Apr. 8, 1987) (final rule) (stating the intent of the amendment to "[c]larify the overall Bank Secrecy Act enforcement and compliance authority of the Assistant Secretary (Enforcement)"). The Secretary of the Treasury further confirmed the Treasury "Department's exclusive authority to impose civil penalties under the Bank Secrecy Act." 52 Fed. Reg. at 114,40 cmt. 19; *see also* 31 C.F.R. § 103.46(d) ("Authority for the imposition of civil penalties for violations of this part lies with the Assistant Secretary, and in the Assistant Secretary's absence, the Deputy Assistant Secretary (Law Enforcement)").

32. Between 1970 and 1981, and pursuant to its delegated authority, Treasury adopted regulations requiring the reporting of specific currency and foreign transactions, i.e, each "deposit, withdrawal, exchange of currency or other payment or transfer" involving "currency of more than $10,000 (31 C.F.R § 103.22(a) (now at Ch. X, tit. 31 C.F.R. § 1010.311); *see also* 37 Fed. Reg. 6913 (Apr. 5, 1972) (notice of final rule)); any export or import of $5,000 or more of currency or monetary instruments (31 C.F.R. § 103.23(b) (now at Ch. X, tit. 31 C.F.R. § 1010.340); [2] *see also* 37 Fed. Reg. 6913 (Apr. 5, 1972) (notice of final rule)); and any person subject to the jurisdiction of the United

[2] The current version of this rule states a monetary threshold of $10,000 rather than the $5,000 threshold established in the 1972 rule; this was a result of an amendment to the rule adopted in 1985. *See* 50 Fed. Reg. 18479 (May 1, 1985).

States with any financial interest or authority over a bank, securities or other financial account in a foreign country if deemed necessary by the Secretary of the Treasury (31 C.F.R. § 103.24 (now at Ch. X, tit. 31 C.F.R. § 1010.350); *see also* 37 Fed. Reg. 6913 (Apr. 5, 1972) (notice of final rule)).

33. At ***no*** time between enactment of the BSA and the SEC's adoption of Rule 17a-8 in 1981 did Treasury adopt any rule or regulation requiring SARs or recordkeeping of SARs by broker-dealers (or any financial institution, for that matter).

34. Congress did not delegate any authority to the SEC to administer or enforce the BSA, or to issue regulations thereunder. *See* 31 U.S.C. §§ 5311-5332.

35. In connection with its delegation to the Secretary of Treasury of authority over implementing the BSA, Congress authorized the Secretary to delegate its duties and powers to another officer or employee *within* Treasury. *See* 31 U.S.C. § 310(b)(2)(I), (J). Exercising this authority, the Secretary delegated BSA responsibilities to the Director of FinCEN in 1990 (*see* Treasury Order No. 105-08 (Apr. 25, 1990)), and renewed this delegation in 2002, including (a) authority to "[t]ake all necessary and appropriate actions to implement and administer the provisions of" the BSA, including "the promulgation and amendment of regulations and the assessment of penalties" and (b) "[e]xercise authority for enforcement of and compliance with the regulations at 31 CFR part 103 [since renumbered to 31 CFR chapter X] . . . ." (*see* Treasury Order No. 180-01(3)(a)-(b).

36. FinCEN has consistently confirmed the scope of its overall authority as the "Administrator" of the BSA, and its retention of enforcement authority as well as the limited examination authority delegated to other agencies such as the SEC, in a series of reports and official statements. *See* 31 C.F.R. § 1010.810(a), (d); *see also, e.g.*, 52 Fed. Reg. 11,436, 11,440 *cmts. 19-20* (Apr. 8, 1987) ("specifically stat[ing]" that Treasury has "***exclusive*** authority to impose civil penalties under the [BSA]," and that "Treasury has been given the authority and responsibility to enforce the Bank Secrecy Act, and intends to do so to the fullest extent possible."); FinCEN, "Feasibility of a Cross-Border Electronic Funds Transfer Reporting system under the Bank Secrecy Act" (Oct. 2006) ("FinCEN has retained the authority to pursue civil enforcement actions against financial institutions for non-compliance with the Bank Secrecy Act and the implementing regulations"); *Bank Regulation*, Banking & Fin. Servs. Pol'y Rep., Dec. 2016 ("[a]lthough it delegates BSA compliance examination authority to other federal regulators, FinCEN retains enforcement authority, including the authority to impose [civil monetary penalties] for violations")).

37. In the National Defense Authorization Act of 2021, Congress again reaffirmed the FinCEN's primacy over the interpretation and enforcement of the BSA, directing FinCEN to clearly identify the priorities that should drive SAR reviews and review all SAR and CTR filing requirements, to reduce unnecessary regulatory burdens and ensure that information is useful "in combatting money laundering and financing of

terrorism." *See* H.R. 6395, 116th Congress (2021). Congress identified no such role for the SEC.

38. The Secretary has delegated to the SEC *only* the "authority to *examine* institutions to determine their compliance with the provisions of [Part 103]" and amended the rule accordingly. *See* 52 Fed. Reg. at 114,40 cmt. 19 (emphasis added); *see also* 31 C.F.R. § 103.46(b)(6) (now at 31 C.F.R. § 1010.810(b)(6)). Such "examination" authority is limited to: (1) the power to "examine any books, papers, records or other data of domestic financial institutions relevant to the recordkeeping or reporting requirements of this chapter," (31 C.F.R. § 103.46(f) (now at 31 C.F.R. § 1010.810(f)); and (2) the duty to make "periodic reports" and to submit "[e]vidence of specific violations of any of the requirements of this chapter" to the "Assistant Secretary," 31 C.F.R. § 103.46(e), and later to the Director of FinCEN. 31 C.F.R. § 1010.810(e).

The Promulgation of Rule 17a-8 in 1981 – Years Before a SAR Rule Existed and Decades Before It Applied to Broker Dealers

39. In 1981, the SEC proposed Rule 17a-8 to require broker-dealers to "comply with" the *currency and foreign transaction reporting* requirements contained in the Treasury regulations. *See* 46 Fed. Reg. 44776 (Sep. 8, 1981). Rule 17a-8 states:

> "Every registered broker or dealer who is subject to the requirements of the Currency and Foreign Transactions Reporting Act of 1970 shall comply with the reporting, recordkeeping and record retention requirements of Part 103 of Title 31 of the Code of Federal Regulations. Where Part 103 of Title 31 of the Code of Federal Regulations and

> § 240.17a-4 of this chapter require the same records or reports to be preserved for different periods of time, such records or reports shall be preserved for the longer period of time."

17 C.F.R. § 204.17a-8; *see also* 46 Fed. Reg. 61454 (setting forth text of Rule 17a-8).

40. In its notice of proposed rule, the SEC detailed the specific currency transaction reporting and recordkeeping requirements that were the subject of the proposed rule. The SEC identified "three different reports" that broker-dealers were required to file (those listed, *supra*, ¶¶ 5, 30) and further specifically identified the six recordkeeping requirements that had also been previously enacted. *See* 46 Fed. Reg. 44776 (Sep. 8, 1981). This exact information was repeated verbatim in the SEC's notice of final rule. *See* 46 Fed. Reg. 61454 (Dec. 17, 1981).

41. The SEC confirmed that Rule 17a-8 pertained to those "existing" currency transaction reporting provisions and revisions to them. The SEC specifically stated that the rule "codifies as part of the Commission's rules the *existing* requirements contained in the Treasury regulations with which brokers and dealers *currently* must comply." 46 Fed. Reg. 44776 (Sep. 8, 1981) (emphasis added). This exact language was repeated verbatim in the SEC's notice of final rule. *See* 46 Fed. Reg. 61454 (Dec. 17, 1981).

42. In its notice of proposed rulemaking, the SEC also conveyed its clear understanding of its limited "examination" authority, explaining that the rule was adopted for the purposes of "on-site examinations of broker-dealer firms" -- not for purposes of trying to procure some broader authority. *Id.*; *see also* 46 Fed. Reg. 61454 (Dec. 17,

1981) (notice of final rule).

Ten Years Later,
FinCEN Adopts Suspicious Activity Reporting Regulations

43. Beginning more than ten years after the SEC's promulgation of Rule 17a-8, and pursuant to the conferral by Congress of authority for the "overall administration and enforcement of the BSA" (Office of the Inspector General, Dep't of Treasury Audit Report, OIG-17-016 (Nov. 16, 2016)), FinCEN adopted a number of regulations imposing reporting and recordkeeping requirements related to "suspicious" transactions by, at or through financial institutions.

44. Specifically, between 1992 and 1994, Congress adopted a series of amendments to the BSA (*see* Pub. L. 102-550 (1992); Pub. L. 103-325 (1994)) that authorized the Secretary of the Treasury to require reporting of suspicious transactions, codified at 31 U.S.C. § 5318(g).

45. Pursuant to those amendments, FinCEN published a notice of proposed rulemaking in 1995, describing a rule requiring banks and other depository financial institutions to file SARs with Treasury. *See* 60 Fed. Reg. 46556 (Sep. 7, 1995). The rule was adopted on February 5, 1996. *See* 61 Fed. Reg. 4326 (February 5, 1996).

46. At the time FinCEN adopted the suspicious activity reporting regime with respect to banks, it did not have explicit statutory authority to impose similar requirements on broker-dealers or other financial institutions.

47. In 2001, however, Congress enacted the USA Patriot Act, Pub. L. No. 107-

56, which directed the Secretary of the Treasury to adopt suspicious activity reporting requirements for a number of other financial institutions. Section 356 *inter alia* directed the Secretary of the Treasury to consult with the SEC and publish rules requiring broker-dealers to report suspicious transactions pursuant to 31 U.S.C. § 5318(g).

48. Complying with this directive, the Secretary of the Treasury, through the Director of FinCEN, published a notice of proposed rulemaking on December 31, 2001 (*see* 66 Fed. Reg. 67670). In this notice, FinCEN confirmed the scope of the SEC's authority under Rule 17a-8 as described above: "[t]he [SEC] adopted Rule 17a-8 in 1981 . . . which enables *the [self-regulatory organizations ("SROs")]*, subject to [SEC] oversight, to *examine* for [BSA] compliance." *Id.* (emphasis added).

49. On July 1, 2002, FinCEN published a notice of final rule, thereby promulgating section 103.19 (now Ch. X, tit. 31 C.F.R. § 1023.320) and requiring broker-dealers to file SARs and maintain certain records in connection with SARs. *See* 67 Fed. Reg. 44048. Again, FinCEN noted that the role of the SEC in respect of this rule was to "examine" broker-dealers. 67 Fed. Reg. at 44055, n. 19 (noting that under section 103.19(g) (now Ch. X, tit. 31 C.F.R. § 1023.320(g)), broker dealers "will be examined by FinCEN or its delegees" and specifically identifying the SEC as a delegee having "examination authority" pursuant to 31 C.F.R. § 103.56(b)(6) (now Ch. X, tit. 31 C.F.R. § 1010.810(b)(6)).

50. As promulgated, FinCEN's broker-dealer SAR regulation (31 C.F.R. §

1023.320(a)(2)), requires broker-dealers to report to FinCEN transactions of at least $5,000 when the broker-dealer "knows, suspects, or has reason to suspect" that the transactions meet certain criteria, such as "involv[ing] funds derived from illegal activity." FinCEN has also approved a broker-dealer SAR form that has a series of data fields for information about the filer, the customer, and the transaction, and boxes to check about the type of activity (such as structuring or fraud), along with a narrative section that asks the filer to describe what made the activity suspicious.

51. These new SAR reporting requirements were not "revisions" to the earlier BSA currency transaction reporting and other requirements (detailed above) that existed at the time of the issuance of Rule 17a-8. The SAR provisions contained entirely new and materially different requirements, and FinCEN itself plainly identified these new obligations as "amendments," in both its notice of proposed rulemaking and notice of final rule. *See* 66 Fed. Reg. 67670 (Dec. 31, 2001); 67 Fed. Reg. 44048 (July 1, 2002).

52. Since 2002, FinCEN has enforced the SAR requirement and secured civil penalties that adhere to the scheme Congress set forth in the BSA. That scheme requires at least negligence before a violation becomes punishable by civil penalty. 31 U.S.C. § 5321(a). The maximum penalty is: $500 for a negligent violation, § 5321(a)(6)(A); up to $50,000 for a "pattern of negligent violations," § 5321(a)(6)(B); and up to $100,000 for a willful violation, § 5321(a)(1). Adjusting for inflation, those penalties are currently $1,180, $91,816, and up to $236,071, respectively. Inflation Adjustment of Civil

Monetary Penalties, 86 Fed. Reg. 7348 (Jan. 28, 2021).

The SEC Failed to Engage in Any Rule Making Process Relating to the SAR Provisions

53. The SEC failed properly to promulgate any rule, or even engage in any semblance of rulemaking process[3] in relation to the SAR requirements of the BSA, although it later recognized that just such processes were necessary to incorporate even mere "technical amendments" to the BSA (*see* SEC Rel. No. 34-63949 (Feb. 23, 2011)).

54. Specifically, the APA requires that an agency publish "general notice of proposed rule making" explaining the basis and authority for the proposed rule (5 U.S.C. § 553(b)), receive and respond to public comment (5 U.S.C. § 553(c), and provide notice of any final rule at least 30 days before it becomes effective (5 U.S.C. § 553(d)).

55. Additionally, the RFA requires an agency to consider the impact of any proposed rule on small entities by describing in an "initial regulatory flexibility assessment" the following: why the rule is under consideration, the objectives and legal basis of the rule, the number of small entities estimated to be affected by the rule, any reporting and recordkeeping requirements of the rule, and all relevant Federal rules which may "duplicate, overlap or conflict with" the rule. 5 U.S.C. § 603(b). When a final rule is

[3] In fact, FinCEN's notice of proposed rulemaking serves to highlight the SEC's remarkable lack of action in response to the new SAR rules. When FinCEN previously adopted its SAR regime for banks and depository institutions, other bank regulators, including the Board of Governors of the Federal Reserve, adopted new rules regarding suspicious transaction reporting. *See* 66 Fed. Reg. at 67671 ("[i]n April 1996 . . . the federal bank supervisors . . . concurrently issued suspicious transaction reporting rules")).

promulgated, the agency must provide further assessment in a "final regulatory flexibility analysis." 5 U.S.C. § 604.

56. The Exchange Act itself imposes procedural requirements that must be observed whenever the SEC promulgates a rule under the auspices of the Exchange Act. Section 17(a)(1) – the putative authority for Rule 17a-8 – states that broker-dealers must "make and disseminate *such reports* as *the Commission,* by *rule,* prescribes as *necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this chapter*." 15 U.S.C. § 78q(a)(1) (emphasis added). Pursuant to sections 3(f) and 23(a)(2) (15 U.S.C. § 78c(f) and § 78w(a)(2)), the SEC must also consider whether the action will promote efficiency, competition, and capital formation, and consider the impact any new rule would have on competition. In fact, section 23(a)(2) directs that the SEC "shall not adopt any such rule or regulation which would impose a burden on competition not necessary or appropriate" to further the purposes of the Exchange Act. 15 U.S.C. § 78w(a)(2). It is unlawful for the SEC to abdicate its rulemaking obligations or to delegate them to a different administrative agency or department, such as to the Treasury Department.

57. The SEC's claim that Rule 17a-8 incorporated, in perpetuity, all BSA provisions after 1981 also implicates, and violates, the regulations of the Office of the Federal Register ("OFR"), which are controlling authority on incorporation by reference under the APA. *See* 1 C.F.R. § 51.1(a)-(c). Among other things, these regulations require

agencies to obtain formal approval to incorporate any materials by reference, 1 C.F.R. § 51.5(b), and observance formal procedure and publication of notice to amend or update material incorporate by reference. 1 C.F.R. § 51.11(a). These regulations also specifically state that "incorporation by reference of a publication is limited to the edition of the publication that is approved. Future amendments or revisions of the publication are not included." 1 C.F.R. § 51.1(f). These regulations also expressly preclude incorporation by reference of material in the United States Code and materials published previously in the Federal Register, 1 C.F.R. § 51.7(c).

58. The SEC, however, ignored all of these mandatory requirements of the APA, the RFA, its own governing statute, and the regulations of the OFR. Instead, the SEC has asserted, years later and *ipse dixit*, that it had acquired enforcement authority over the 2002 SAR provisions by virtue of its 1981 rule.

The SEC SAR-enforcement Regime Differs from FinCEN's

59. The SEC's SAR-enforcement regime, which it pursues under the enforcement provisions of the Securities Exchange Act, differs substantially from FinCEN's. Whereas the BSA requires at least negligence before FinCEN imposes a civil penalty, *see* 31 U.S.C. § 5321(a), the Exchange Act creates strict liability, allowing the SEC to impose its first tier of penalties without any evidence of a culpable state of mind, *see* 15 U.S.C. § 78u(d)(3)(B)(i). Those strict-liability penalties – per violation for non-natural persons, the greater of $50,000 or "the gross amount of [the defendant's]

pecuniary gain," 15 U.S.C. § 78u(d)(3)(B)(i) – exceed the BSA's $500/$1,180 penalty for negligent violations by orders of magnitude, 31 U.S.C. § 5321(a)(6)(A). Adjusted for inflation, the possible per-violation strict-liability penalty under the Exchange Act is now the greater of $97,523 or the defendant's pecuniary gain. SEC, Adjustments to Civil Monetary Penalty Amounts, Release No. 5664 (Jan. 8, 2021), https://tinyurl.com/3jux2xx4.

60. Upon information and belief, the SEC maintains that it can commence an enforcement action for violation of FinCEN's SAR regulation without input or approval from FinCEN.

61. The SEC has used its SAR-enforcement regime to extract tens of millions of dollars in settlements from broker-dealers, who are unable or unwilling to challenge the SEC in an adjudication in court or before the agency in relation to its authority or its interpretation of FinCEN's SAR rules.

62. In the Alpine Enforcement Action – the first actually litigated SAR-enforcement action of which SCA is aware – the SEC relied on Rule 17a-8 commence an enforcement action and obtain a substantial judgment against Alpine, including a $12 million civil money penalty and obey-the-law injunction, under Section 21 of the Exchange Act (15 U.S.C. § 78u). Given the number of violations, the civil penalty could have been much higher: under the Exchange Act's harsher penalty regime, Alpine faced a maximum civil penalty (at the lowest tier) of over $200 million. But under the penalty

provisions of the BSA, Alpine would have faced a maximum penalty (at the lowest tier) of around $1.5 million.

63. Equally troubling, the SEC has also taken a much more rigid view than FinCEN about what FinCEN's SAR regulation requires and what constitutes an actionable SAR violation. In the Alpine Enforcement Action, for example, the SEC pressed, and the courts adopted, the position that a broker-dealer must file a SAR whenever it is alerted to a red flag in a sizeable transaction of low-priced securities and must then describe in the narrative portion of the SAR form each of those red flags.

64. That bright-line rule is flatly inconsistent with FinCEN's stated view that "[t]he presence or absence of a red flag in any given transaction is not by itself determinative of whether a transaction is suspicious," and so financial institutions "should take into account all relevant details … and should not necessarily presume suspicious activity" from "a single red flag."[4] It is contrary also to FinCEN's position that the reporting standard is a "flexible" one[5] and enforcers should "consider[] a range of factors when evaluating an appropriate disposition upon identifying actual or possible violations of the BSA,"[6] in recognition that the filing decision entails "individual

[4] FinCEN, Advisory to Financial Institutions Regarding Disaster-Related Fraud, FIN-2017-A007, at 4 (Oct. 31, 2007), https://tinyurl.com/3ya29nmz.

[5] 67 Fed. Reg. 44,048, 44,053 (July 1, 2002).

[6] FinCEN, Statement on Enforcement of the Bank Secrecy Act (Aug. 18, 2020), https://tinyurl.com/d7n2yz5s.

judgment calls" that the government should not be "second guessing."[7]

65. Because the SAR rules are broadly written, the SEC has the opportunity to, and, upon information and belief, may be expected to, deviate even further from FinCEN's SAR standards if allowed to continue to exercise an independent SAR-enforcement regime. Among other things, there are hundreds of red flags listed in guidance documents, allowing the SEC to pick and choose among different red flags to define the SAR filing and c[8]ontent obligations anew in each successive enforcement action, and obtain substantial settlements or penalties on a "gotcha" standard whenever a red flag selected for that action exists but did not result in a SAR or is not described in the SAR narrative. Compounding the issue further, the SEC's Division of Examinations has recently issued AML guidance that conflicts with the position it took in the Alpine Enforcement Action, including by stating that the "existence" of "examples of red flags would not necessarily trigger a broker-dealer's obligation to file a SAR."

66. As a result of the SEC's usurpation of enforcement over FinCEN's SAR regime, securities broker-dealers are now subject to two distinct SAR enforcement schemes – one by FinCEN that is authorized by Congress, and one by the SEC that is not – with different standards as to, *inter alia,* what constitutes a violation, the applicable

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[7] William J. Fox, Dir., FinCEN, Statement Before H. Comm. on Fin. Servs., Subcomm. on Oversight and Investigations (June 16, 2004), https://tinyurl.com/2dz2byxa.

[8] *See* SEC Division of Examination Risk Alert, *Compliance Issues Related to Suspicious Activity Monitoring and Reporting at Broker-Dealers,* at p. 4 n. 9 (March 29, 2021), https://www.sec.gov/files/aml-risk-alert.pdf.

mens-rea, and the penalty amounts and other remedies for a violation.

67. Former FinCEN officials James H. Freis, Jr. (director of FinCEN from 2007-2012) and Charles M. Steele (deputy director of FinCEN from 2009-2011), submitted an *amici curiae* brief in support of Alpine's petition for writ of certiorari to the United States Supreme Court, denouncing the SEC's efforts to confer upon itself BSA enforcement authority. In their *amici* brief, Mr. Freis and Mr. Steele: described at length the need to maintain Congress's carefully crafted AML regime, wherein Congress purposefully gave enforcement authority to the Treasury Department and its bureau, FinCEN; the need for uniformity in application and enforcement in the SAR regime, which applies to a wide-ranging variety of financial institutions across the industry, both at home and abroad; argued that supervisory agencies, such as the SEC, cannot unilaterally take BSA enforcement authority for themselves; and discussed the wide-ranging detrimental impacts such unauthorized and inconsistent enforcement by the SEC would have on the regime.[9]

Summary of Impact on Plaintiff

68. SCA is subject to regulation by both FinCEN (under the BSA) and the SEC (under the Exchange Act), and has suffered, and will continue to suffer, economic injury

[9] *See* Brief of Former FinCEN Officials James H. Fries, Jr. and Charles M. Steele as *Amici Curiae,* Supreme Court Docket 21-82, available at: https://www.supremecourt.gov/DocketPDF/21/21-82/188087/20210820135202124_Alpine%20Securities%20-%20Freis%20and%20Steele%20Amicus.pdf

due to the SEC's unlawful expansion of its authority under Rule 17a-8.

69. Given the SEC's imposition of new SAR requirements through the Alpine Enforcement Action and, upon information and belief, through examination, risks alerts and other enforcement and adjudicatory actions, SCA has been forced to devote substantial time and resources to update its BSA compliance program to avoid regulatory inquiry and enforcement action based on the SEC's articulation of SAR regulation requirements.

70. Among other things, given SCA's focus on the microcap/OTC markets, the SEC's aggressive stance on enforcement, and the New York court's adoption of the SEC's bright-line rule, SCA has had to re-evaluate and implement changes to its BSA program and SAR preparation, including to significantly increase the number of SARs it files and the time involved to prepare SARs. This has substantially increased the costs of compliance and required the hiring of additional compliance personnel, which has caused SCA economic harm through increased compliance costs and reduced profits.

71. Additionally, because the SEC's SAR filing standards differ from FinCEN's, SCA also faces actual and ongoing regulatory uncertainty of trying to comply with two inconsistent SAR filing regimes. Every day, SCA faces the actual risk that it will incur regulatory criticism or an enforcement action by FinCEN for SCA's attempts to comply with the SEC's interpretation of FinCEN's SAR regulation, or vice versa. Thus, the SEC's unlawful position has a chilling effect on SCA and all other similarly

situated broker-dealers.

72. In addition, under its Fully Disclosed Clearing Agreement with Alpine, SCA has the sole responsibility for, *inter alia,* complying with all applicable laws, regulations, and self-regulatory requirements regarding transactions and accounts, including AML obligations, as well as maintaining procedures to ensure compliance. SCA thus also faces contractual liability to Alpine from for any enforcement action against either entity – the scope of which obligations have been made uncertain inconsistent pronouncements of FinCEN and the SEC concerning SAR filing and content standards.

73. SCA is thus being presently harmed by the SEC's interpretation and enforcement of Rule 17a-8 and has a direct and substantial interest in preventing the SEC from pursuing an invalid action and seeking to impose enormous penalties in relation to the filing of SARs.

74. Judicial review and action by this Court is necessary and appropriate to stop and mitigate the harm that SCA has suffered, and will continue to suffer, as a result of the SEC's unlawful conduct.

COUNT ONE
Violation of the Administrative Procedure Act – Failure to Follow Notice and Comment Requirements, 5 U.S.C. §§ 553, 706(2)(D)

75. Plaintiff affirms and re-alleges each of the preceding allegations, and incorporates those as if set forth fully herein.

76. The APA requires that "[g]eneral notice of proposed rulemaking shall be published in the Federal Register" and "shall include . . . the time, place and nature of public rule making proceedings; . . . the legal authority under which the rule is proposed; and . . . the terms or substance of the proposed rule or a description of the subjects and issues involved," (5 U.S.C. § 553(b)).

77. After publishing the required notice, an agency "shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments," and "after consideration . . . the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose," (5 U.S.C. § 553(c)).

78. Finally, an agency must publish notice of adoption of a final rule "not less than 30 days before its effective date," (5 U.S.C. § 553(d)).

79. The SEC did none of this with respect to its purported authority to enforce the BSA SAR regulations.

80. Rule 17a-8 was adopted in 1981 and incorporated the currency transaction reporting and recordkeeping requirements under the BSA that existed at that time. It did not include any SAR reporting or recordkeeping requirements because they did not exist.

81. To the extent the SEC wished to incorporate those requirements into Rule 17a-8, it was required to follow the notice and comment requirements of the APA. It did not.

82. SCA is therefore entitled to relief pursuant to 5 U.S.C. §§ 702, 706(2)(D), including declaratory relief and the issuance of an injunction against the SEC's continued unlawful attempts to enforce the SAR regulations of the BSA through civil enforcement actions under the Exchange Act and Rule 17a-8.

COUNT TWO
Violation of the Administrative Procedure Act – Arbitrary and Capricious Agency Action in Seeking Enforcement of An Unauthorized and Defective Rule, 5 U.S.C. § 706(2)(A)

83. Plaintiff affirms and re-alleges each of the preceding allegations, and incorporates those as if set forth fully herein.

84. The SEC has attempted to incorporate into Rule 17a-8 the ability to enforce the SAR requirements of the BSA and impose a requirement that certain "red flags" must be discussed in the narrative portion of the SAR even if they are otherwise reflected in the SAR and/or were not the firm's basis for filing the SAR.

85. But the SEC has failed to comply with any administrative process required under the APA, the RFA, Sections 17(a)(1), 3(f), and 23(a)(2) of the Securities Exchange Act, and the OFR regulations – including, but not limited to, notice and comment rulemaking, a regulatory flexibility assessment, approval for incorporation by reference, an analysis of public-interest and impact on competition, or other cost-benefit analyses – with respect to its purported attempt to incorporate FinCEN's subsequently-promulgated SAR regulations into Rule 17a-8, and enforce them as a violation of Rule 17a-8. In fact, the SEC engaged in no administrative process at all when it conferred on itself authority

to interpret and enforce the BSA.

86. To take action without complying with such legal requirements was arbitrary and capricious, an abuse of discretion, and plainly "not in accordance with law." 5 U.S.C. § 706(2)(A).

87. Additionally, to the extent that the SEC maintains that Rule 17a-8 automatically and dynamically incorporates any future regulations by Treasury, such as the SAR regulations, without publication and notice and comment rulemaking by the SEC, and without any contemporaneous analysis by the SEC of whether those new regulatory reporting requirements are in the public interest, impose no burden on competition, promote efficiency and capital formation, and are in furtherance of the purposes of the Exchange Act, as required by the Sections 3(f), 17(a) and 23(a)(2) of Securities Exchange Act, the SEC has abdicated its rulemaking obligations thereunder and/or impermissibly delegated its rulemaking authority under the Exchange Act to FinCEN, without Congressional authority. In such circumstances, it would be FinCEN, rather than the SEC, who is determining what reports a broker-dealer must make, keep and disseminate under the Exchange Act. This is arbitrary and capricious, an abuse of discretion, and plainly "not in accordance with law." 5 U.S.C. § 706(2)(A)

88. SCA is therefore entitled to relief pursuant to 5 U.S.C. §§ 702, 706(2)(A), including declaratory relief and the issuance of an injunction against the SEC's continued unlawful attempts to enforce the SAR regulations of the BSA through civil enforcement

actions under the Exchange Act and Rule 17a-8.

COUNT THREE
Violation of the Administrative Procedure Act – Agency Action in Excess of Statutory Jurisdiction and Authority, 5 U.S.C. § 706(2)(C)

89. Plaintiff affirms and re-alleges each of the preceding allegations, and incorporates those as if set forth fully herein.

90. The SEC was delegated limited examination authority by the Secretary of Treasury. The Secretary expressly retained "overall administration and enforcement" authority, vesting that in FinCEN, a unit within Treasury.

91. No provision of the BSA, and no regulation promulgated by the Treasury Department pursuant to its rulemaking authority under the BSA, authorize the SEC to enforce the provisions of the BSA or the regulations promulgated thereunder.

92. No provision of the Exchange Act authorizes the SEC to enforce the provisions of the BSA or the regulations promulgated thereunder.

93. The SEC has taken action to interpret and enforce the SAR regulations promulgated by FinCEN to implement the BSA. This cannot be done.

94. The SEC has therefore acted in excess of both its statutory jurisdiction, and in excess of the limited examination authority delegated to it.

95. SCA is therefore entitled to relief pursuant to 5 U.S.C. §§ 702, 706(2)(C), including declaratory relief and the issuance of an injunction against the SEC's continued unlawful attempts to enforce the SAR regulations of the BSA through civil enforcement

actions under the Exchange Act and Rule 17a-8.

COUNT FOUR
Violation of the Administrative Procedure Act and Regulatory Flexibility Act – Failure to Provide Initial and Final Regulatory Flexibility Analyses, 5 U.S.C. §§ 603, 604, 5 U.S.C. § 706(2)(D), 5 U.S.C. § 611

96. Plaintiff affirms and re-alleges each of the preceding allegations, and incorporates those as if set forth fully herein.

97. The RFA requires an agency to undertake two specific assessments whenever the agency engages in rulemaking pursuant to section 553 of the APA.

98. First, at the time an agency publishes notice of proposed rulemaking, it must include an "initial regulatory flexibility analysis." 5 U.S.C. § 603(a). An initial regulatory flexibility analysis must contain: (1) a description of the reasons why action by the agency is being considered; (2) a statement of the objectives of, and legal basis for, the proposed rule; (3) a description of and estimate of the number of small entities to which the proposed rule will apply; (4) a description of projected reporting and recordkeeping requirements of the proposed rule – to include an estimate of the classes of small entities that will be subject to the requirement and the type of "professional skills necessary" for preparation of such reports or records; and (5) an identification of any relevant Federal rules which may "duplicate, overlap or conflict with the proposed rule." 5 U.S.C. § 603(b)(1)-(5).

99. Moreover, an initial regulatory flexibility analysis shall discuss "any significant alternatives to the proposed rule which accomplish the stated objectives of

applicable statutes and which minimize any significant economic impact of the proposed rule on small entities." 5 U.S.C. § 603(c).

100. At the time an agency publishes notice of final rule, it must include a "final regulatory flexibility analysis." 5 U.S.C. § 604(a). This must include information similar to that of an initial regulatory flexibility analysis, and also state "steps . . . taken to minimize the significant economic impact on small entities . . . including a statement of the factual, policy, and legal reasons for selecting the alternative adopted." 5 U.S.C. § 604(a)(1)-(6).

101. In purporting to expand Rule 17a-8 to require broker-dealers to comply with the SAR reporting regulations promulgated by FinCEN (see 31 C.F.R. § 1023.320), the SEC utterly failed to discharge these mandatory statutory directives.

102. Since the SEC did not publish any notice or solicit comment regarding its expansion of Rule 17a-8, it could not have and did not provide either an initial or final regulatory flexibility analysis.

103. By failing to perform these mandatory analyses, the SEC has violated the requirements imposed by the RFA, and acted "without observance of procedure required by law." 5 U.S.C. § 706(2)(D).

104. SCA is therefore entitled to judicial review and relief pursuant to 5 U.S.C. §§ 702, 706(2)(D) and 5 U.S.C. § 611, including declaratory relief and the issuance of an injunction against the SEC's continued unlawful attempts to enforce the SAR regulations

of the BSA through civil enforcement actions under the Exchange Act and Rule 17a-8.

COUNT FIVE
Violation of the Administrative Procedure Act and Securities Exchange Act of 1934 – Failure to Consider Competitive Effects, 15 U.S.C. §§ 78c(f), 78w(a)(2) and 5 U.S.C. § 706(2)(C), (D)

105. Plaintiff affirms and re-alleges each of the preceding allegations, and incorporates those as if set forth fully herein.

106. Section 17(a)(1) states that broker-dealers must "make and disseminate *such reports* as *the Commission,* by *rule,* prescribes as *necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this chapter*." 15 U.S.C. § 78q(a)(1) (emphasis added).

107. The SEC, whenever it "is engaged in rulemaking . . . and is required to consider or determine whether an action is necessary or appropriate in the public interest," it "shall also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation." 15 U.S.C. § 78c(f) (emphasis added).

108. For every rule and regulation promulgated by the SEC pursuant to the Exchange Act, the SEC "shall consider . . . the impact any such rule or regulation would have on competition . . . [and] shall not adopt any such rule or regulation which would impose a burden on competition not necessary or appropriate in furtherance of the purposes of" the Exchange Act. 15 U.S.C. § 78w(a)(2).

109. Further, the SEC "shall include in the statement of basis and purpose

incorporated in any rule or regulation adopted under this chapter, the reason for the [SEC's] determination that any burden on competition imposed by such rule or regulation is necessary or appropriate in furtherance of the purposes of" the Exchange Act. *Id.*

110. In purporting to expand Rule 17a-8 to require broker-dealers to comply with the SAR reporting regulations promulgated by FinCEN (see 31 C.F.R. § 1023.320), the SEC utterly failed to discharge these mandatory statutory directives.

111. Since the SEC did not publish any notice or solicit comment regarding its expansion of Rule 17a-8, it could not, and did not, consider "protection of investors," "efficiency, competition, and capital formation," 15 U.S.C. § 78c(f), or whether the rule "would impose a burden on competition." 15 U.S.C. § 78w(a)(2).

112. Further, the SEC did not "include in the statement of basis and purpose . . . the reason for [it's] determination", *id.*, and it could not have done so, because there was no statement of basis and purpose at all.

113. Further, the SEC did not "prescribe," "by rule" that SARs were reports that broker-dealers must "make and disseminate," or determine that SARs were "necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this chapter." 15 U.S.C. § 78q(a)(1).

114. By failing to address the statutory mandates of Sections 17(a)(1), 3(f) and 23(a)(2) of the Securities Exchange Act, the SEC violated a "statutory obligation to determine as best it can the economic implications of the rule." *See Business Roundtable*

v. SEC, 647 F.3d 1144, 1148 (D.C. Cir. 2011).

115. Further, to the extent that the SEC maintains that Rule 17a-8 automatically and dynamically incorporates any future regulations by Treasury, such as the SAR regulations, without meeting these statutory mandates, the SEC has violated the OFR regulations, including 1 C.F.R. §§ 51.1(f), 51.5(b) 51.7(c) and 51.11(a), and has abdicated its rulemaking obligations thereunder and/or impermissibly delegated its rulemaking authority under the Exchange Act to FinCEN, without Congressional authority. In such circumstances, it would be FinCEN, rather than the SEC, who is determining what reports a broker-dealer must make, keep and disseminate under the Exchange Act.

116. In light of these clear violations, the SEC has failed to adequately assess the economic effects of its new rule, and has proceeded in violation of the APA by taking agency action in excess of statutory authority and limitations and without observance of procedures required by law.

117. SCA is therefore entitled to relief pursuant to 5 U.S.C. §§ 702, 706(2)(C), (D), including declaratory relief and the issuance of an injunction against the SEC's continued unlawful attempts to enforce the SAR regulations of the BSA through civil enforcement actions under the Exchange Act and Rule 17a-8.

COUNT SIX
Declaratory Relief

118. Plaintiff affirms and re-alleges each of the preceding allegations, and

incorporates those as if set forth fully herein.

119. SCA brings this claim for relief under the Declaratory Judgment Act, 28 U.S.C. § 2201.

120. An actual controversy exists among the parties regarding the SEC's authority to enforce through civil enforcement proceedings under the Exchange Act the SAR provisions of the BSA through Rule 17a-8, for the reasons detailed herein.

121. SCA respectfully requests a judgment from this Court declaring that:

a. The SEC has violated the APA, RFA, the OFR regulations, and the Exchange Act, and acted arbitrarily and capriciously, by taking agency action in excess of statutory authority and limitations (acting *ultra vires*), and without observance of procedures required by law, through its attempts to secretly expand Rule 17a-8 to incorporate the SAR provisions of the BSA and to maintain civil enforcement actions predicated on purported violations of the SAR provisions of the BSA;

b. The SEC cannot bring civil enforcement actions for alleged violations of the SAR provisions of the BSA;

c. The SEC lacks the authority, through either formal or informal rulemaking or adjudication, to graft requirements onto FinCEN's SAR regulations; and/or

d. Rule 17a-8, to the extent it purports to the incorporate the SAR

provisions of the BSA, is void.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for an order and judgment:

1. Declaring the SEC's expansion of Rule 17a-8 to include the SAR reporting requirements adopted by FinCEN thirty years after the Rule's adoption unlawful as arbitrary and capricious agency action within the meaning of 5 U.S.C. § 706(2)(A); in excess of statutory jurisdiction, authority, and limitation within the meaning of 5 U.S.C. § 706(C); and without observance of procedure required by law within the meaning of 5 U.S.C. § 706(2)(D);

2. Setting aside the SEC's expansion of Rule 17a-8;

3. Issuing an injunction enjoining the SEC and all its officers, employees, and agents from implementing, applying, enforcing, or taking any action whatsoever under the expanded Rule 17a-8;

4. Awarding Plaintiff reasonable costs, including attorney's fees, incurred in bringing this action; and

5. Granting such other and further relief as this Court deems just and proper.

DATED this 1ST day of February 2022.

PARSONS BEHLE AND LATIMER

/s/ *Aaron D. Lebenta*
Aaron D. Lebenta

MARANDA FRITZ, P.C.

/s/ *Maranda E. Fritz*
Maranda E. Fritz

Counsel for Plaintiff Scottsdale Capital Advisors

CERTIFICATE OF SERVICE

I hereby certify that on February 1, 2022, I caused the foregoing to be served to the following parties of record via ECF:

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