

## Comment on

Proposed Amendment to the Policy Regarding the Confidentiality of Suspicious Activity Reports

John Zulkey

**Docket No. ID OTS-2008-0015**

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### **I. Introduction**

The Bank Secrecy Act (“BSA”)<sup>1</sup> requires banks and a variety of financial institutions to file Suspicious Activity Reports (“SARs”)<sup>2</sup> with the Financial Crimes Enforcement Network (“FinCEN”)<sup>3</sup> as a means of reporting transactions that the institutions suspect may relate to criminal activity. These SARs act as a tip to the federal government, encouraging further investigation into what could possibly be a part of a money laundering enterprise or other illegal activity. To encourage financial institutions to participate, the government has urged the courts to prohibit the discovery of SARs, and in 2001, the USA PATRIOT Act specifically provided safe harbors from civil liability for filing such reports.<sup>4</sup> To further protect the confidentiality of both customer information and institution reporting practices, the Office of Thrift Supervision (OTS) now proposes several new rules and amendments to old rules to prevent disclosure of SARs and information confirming the existence of a SAR.

### **II. Proposed Changes**

#### **A. Definition of SAR**

The new definition of SAR<sup>5</sup> will include reports of suspicious activity that are not filed on the official SAR form.<sup>6</sup> The SAR form requirement will compel institutions to report

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<sup>1</sup> 31 U.S.C. § 5218.

<sup>2</sup> See *infra*, Appendix A for an example.

<sup>3</sup> Alex C. Lakatos and Mark G. Hanchet, *Confidentiality of Suspicious Activity Reports*, 124 Banking L.J. 794, 794 (2007).

<sup>4</sup> USA PATRIOT Act, section 351(a) Pub. L. 107-56, Title III § 351, 115 Stat. 272, 321 (2001).

<sup>5</sup> Confidentiality of Suspicious Activity Reports, 74 Fed. Reg. 10143 [hereinafter Proposed Amendment], Section 563.180(d)(2)(iii).

suspicious activity on the official form,<sup>7</sup> rendering this rule a moot point in most instances. However this broader definition will close a potential loophole that otherwise could allow parties to evade the spirit of the disclosure rules when suspicious activity is reported in a non-standard fashion.

## **B. SAR form requirement**

The new proposed form requirement<sup>8</sup> would require all financial institutions to use the official SAR form<sup>9</sup> when reporting suspicious activity. This proposal will help to streamline FinCEN's data processing by ensuring that the information is reported in a uniform, easily managed format. The form is flexible enough to allow institutions to report activity that falls outside of the archetypal circumstances, and is readily availability online<sup>10</sup> ensuring that institutions will have access to the forms whenever needed. Compliance with this new proposed rule may render the SAR definition<sup>11</sup> essentially moot, however the broad definition of SAR could be read as a contingency to deal with reports that are not in compliance with this proposed rule.

## **C. Confidentiality of SARs**

The current OTS rules state that SARs are confidential and that subpoenas requesting them or the information contained therein should be declined and reported to FinCEN.<sup>12</sup> The Courts for the most part have upheld the confidentiality of SARs and refused to require institutions<sup>13</sup> or agencies<sup>14</sup> to disclose them. However the Fifth Circuit indicated in 2006 that it

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<sup>6</sup> See Appendix A.

<sup>7</sup> See *infra*, Part II.B.

<sup>8</sup> Proposed Amendment Section 563.180(d)(3).

<sup>9</sup> See Appendix A.

<sup>10</sup> Available at [http://www.fincen.gov/forms/files/f9022-47\\_sar-di.pdf](http://www.fincen.gov/forms/files/f9022-47_sar-di.pdf) (last checked Apr. 29, 2009).

<sup>11</sup> See *supra* Part II.A.

<sup>12</sup> 12 C.F.R. 563.180(d)(12).

<sup>13</sup> See *Weil v. Long Island Sav. Bank*, 195 F. Supp. 2d 383, 390 (E.D.N.Y. 2001) (“The plain language of the regulation requires this court to deny the production of the SAR itself.”)

would apply a balancing test between the interests of the parties, rather than categorically denying any request for a SAR.<sup>15</sup> The new proposed rule on confidentiality<sup>16</sup> would discount the interests of other parties and protect institutions completely for filing unfounded SARs against their customers. The new proposed rules would also expand the confidentiality to include any information that could reveal the existence of a SAR.<sup>17</sup> The OTS wishes to keep the existence of SARs confidential to protect ongoing investigations, prevent institutions from losing customers who might resent being reported, prevent disclosure of practices by which financial institutions uncover suspicious activity, protect customer privacy, and protect institution personnel from criminal retaliation by reporters.<sup>18</sup> While these concerns are substantial, this subsection will address the competing interests in favor of some disclosure.

Financial institutions already have substantial incentives to file SARs, even upon the barest of suspicions. The government may pressure banks to show “good citizenship” by reporting any and all suspicious activity, however slight.<sup>19</sup> This reputation with the government could protect an institution if it finds itself subject to an enforcement action for violation of other agency rules.<sup>20</sup> Additionally, the USA PATRIOT Act requires banking agencies to consider an institution’s record for combating money laundering when considering approval for mergers or acquisitions.<sup>21</sup> Both facts may lead banks to attempt to build up a track record for compliance by

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<sup>14</sup> See *FDIC v. Flagship Auto Center, Inc.* No. 3:04 CV 7233 WL 1140768, at \*6 (N.D. Ohio, May 13, 2005) (refusing to compel the FDIC to provide a SAR in response to a discovery request); *Wuliger v. OCC*, 394 F. Supp. 2d 1009 (N.D. Ohio 2005) (upholding the decision by the Office of the Comptroller of the Currency under the Administrative Procedure Act to refuse an administrative request for a SAR). *But see Dupre v. FBI*, No. CIV. A. 01-3431, 2002 WL 1042073, at \*2 (E.D. La. May 22, 2002) (ordering the FBI to disclose information in a SAR pursuant to a FOIA request before the order was vacated by a consent motion and the appeal dismissed as moot).

<sup>15</sup> *BizCapital v. OCC*, 406 F.3d 871, 873 (2006).

<sup>16</sup> Proposed Amendment Section 563.180(d)(12).

<sup>17</sup> *Id.*

<sup>18</sup> Rule

<sup>19</sup> Eric J. Gouvin, *Are There Any Checks and Balances on the Government’s Power to Check Our Balances? The Fate of Financial Privacy in the War on Terrorism.* 14 Temp. Pol. & civ. Rts. L. Rev. 517, 534 (2005).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

setting a very low standard of suspicion for reporting, or even establishing a quota of SARs to file in a given time period. As a result, financial institutions already tend to err on the side of reporting rather than ignoring even marginally suspicious activity.<sup>22</sup> Furthermore, as there are no negative consequences for filing SARs on frivolous grounds, overly cautious general counsels may recommend a presumption of SAR filings on transactions over a certain amount to ensure that the institution is protected from accusations of complicity should an employee fail to spot a red flag. Such a result could flood FinCEN with false leads, thereby impeding the agency’s ability to identify and focus on genuine illegal activity.

<b>FINANCIAL INSTITUTION REPORTING INCENTIVES/CONSEQUENCES</b>		
	<b>Files SAR</b>	<b>Does not file SAR</b>
<b>Innocent Activity</b>	-No negative consequences -Potentially more positive record for reporting	-No negative consequences
<b>Criminal Activity</b>	-Positive record for reporting -Protected from potential civil/criminal culpability	-Negative record for reporting -Exposed to potential civil/criminal culpability

If the new confidentiality rule is passed, financial institutions will have every incentive to file SARs based on the flimsiest of grounds, particularly since they will risk no consequences for unfounded filings—not from the government, nor from their wrongly-accused customers. The rest of this subsection will highlight the prejudice caused to parties with a potential interest in some disclosure. Parties affected would have no access to the SARs, their contents, or even confirmation that a SAR had ever been filed, therefore gauging the degree to which the following parties would be prejudiced would be extremely difficult.

**Parties Holding an Interest in SAR disclosures:**

1. *Customers of Financial Institutions:* The customers of financial institutions have an obvious interest in knowing if the institution is filing SARs about their transactions, or if it reports its customers at a high rate. Because SARs could lead to IRS audits or criminal investigations, even completely honest customers may wish to avoid doing business with a financial institution that is more likely to file a SAR on them. Such concerns of course go to the heart of why FinCEN pushes for such confidentiality—if customers are deterred from institutions that readily file SARs, then institutions will be reluctant to file at all without confidentiality.

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<sup>22</sup> Alex C. Lakatos and Mark G. Hanchet, *Confidentiality of Suspicious Activity Reports*, 124 *Banking L.J.* 794, 794 (2007).

Conversely, these same customers have an equally obvious interest in keeping SARs out of the hands of third parties. By maintaining confidentiality, such customers would both safeguard their private information generally while at the same time preventing potential plaintiffs from obtaining what could essentially be a roadmap to damaging evidence against them.

2. *Third-Party Civil Plaintiffs*: Plaintiffs, particularly in fraud or civil RICO cases, may have a particular interest in SARs to highlight the suspiciousness of the transactions or to alert the plaintiff to the existence of further documents that could be used against the customer at trial. Particularly where the financial institution itself is a party, a SAR may prove invaluable in demonstrating that the institution knew or suspected that a transaction was fraudulent. The inability of such plaintiffs to gain access to these SARs is regrettable but must ultimately be weighed against the valid interests in confidentiality. Such a balance must also take into account the fact that documentation of the transactions that prompted the SAR would still be available through standard discovery methods,<sup>23</sup> just not the SAR itself.
3. *Third-Party Criminal and Civil Defendants*: A miscarriage of justice would occur if a criminal defendant were wrongly convicted while FinCEN held back a SAR that could have provided the necessary reasonable doubt to secure an acquittal. Fortunately, the OTS anticipated such a contingency and contends that the new standards would allow FinCEN to disclose the document, either as exculpatory evidence or to impeach a criminal defendant.<sup>24</sup>

Civil defendants will not enjoy the same access to SARs or knowledge of their existence as criminal defendants, and that lack of access may on rare occasions cost them a civil verdict. Counter to plaintiffs' interest in using SARs against an institution to prove criminal knowledge,<sup>25</sup> the defendant institution may itself wish to use the SARs to demonstrate that it was not an accomplice but a good citizen. Courts, however, have denied financial

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<sup>23</sup> See *infra* Part II.E.

<sup>24</sup> Proposed Amendment Section 563.180(d)(12) (citing *Giglio v. United States*, 405 U.S. 150 153-54 (1972); *Brady v. State of Maryland*, 373 U.S. 82, 86-87 (1963); *Jencks v. United States*, 353 U.S. 657, 668 (1957)).

<sup>25</sup> See *supra* II.C.2.

institutions such an opportunity to use SARs in their defense.<sup>26</sup> While the inability to use these documents in civil defense is unfortunate, that outcome must be measured against the significant policy concerns raised above in favor of confidentiality. Furthermore, given that the financial statements underlying the SAR would still be available,<sup>27</sup> it would likely only be in very rare circumstances where the existence of the SAR itself would prove determinative.

4. *FinCEN*: At first blush, it would seem ridiculous to suggest that FinCEN might benefit from increased disclosures, given that the agency is pushing for increased confidentiality. In evaluating FinCEN's interest, however, it is necessary to account for the biases FinCEN officials may have in pushing for more information, even when it is not necessarily in the agency's best interest.

Any analytical agency such as FinCEN has a maximum amount of information it can efficiently process given its size—any extra information coming in beyond that threshold and it becomes impossible to find the wheat amidst all of the chafe. As financial institutions forward more and more information, a greater percentage is likely to be regarding innocent activity, thus wasting time that could be spent on real leads.<sup>28</sup> However the incentives for career agency officials may prompt them to push for more information even if the agency is well beyond the threshold of what it could effectively process. Consider that an agent is unlikely to ever be reprimanded for being too diligent or effective in seeking out more financial information but instead is likely be commended. However the same agent may face negative consequences for discouraging tips, even if the agency was well over the threshold at the time.

This analysis is not a strike at the integrity of FinCEN officials, but merely an explanation of political pressures that may goad those officials to push for positions that could work against the agency's interest. Ironically, the very confidentiality policy at issue precludes

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<sup>26</sup> See *Gregory v. Bank One*, 200 F. Supp. 2d 1000, 1003-04 (S.D. Ind. 2002) (preventing Bank One from using a SAR in its own defense in civil court); see also *Lee v. Bankers Trust Co.*, 166 F.3d 540, 543 (2d Cir. 1999) (“[E]ven in a suit for damages based on disclosures allegedly made in a SAR, a financial institution cannot reveal what disclosures it made in an [sic] SAR, or even whether it filed an [sic] SAR at all.”).

<sup>27</sup> See *infra* II.E.

<sup>28</sup> Eric J. Gouvin, *Are There Any Checks and Balances on the Government's Power to Check Our Balances? The Fate of Financial Privacy in the War on Terrorism*. 14 *Temp. Pol. & civ. Rts. L. Rev.* 517, 527 (2005).

an outside observer from knowing whether FinCEN is beyond this threshold or comfortably under it. If FinCEN was over this hypothetical threshold, disclosure requirements could give banks pause before reporting borderline information, thereby leaving FinCEN with a more manageably-sized amount of data—more of which is likely to be genuinely criminal in nature.

#### **D. Prohibition on Disclosure By Savings Associations**

The proposed rules governing disclosure by savings associations<sup>29</sup> would replace the phrase prohibiting the disclosure of “any information that a SAR has been prepared or filed”<sup>30</sup> with “any information that would reveal the existence of a SAR.” This change is consistent with the changes in the above rule on confidentiality<sup>31</sup> and all the same concerns apply.

This proposed section would also specify that the prohibition applies to “directors, officers, employees and agents” of the institution. The change would merely incorporate language already found in the enabling statute, and therefore only serves to clarify the existing law.

#### **E. Rules of Construction**

The proposed changes include three rule of construction<sup>32</sup> to aid Courts and financial institutions in interpreting the intent behind the OTS rules. While these rules of construction could not override the plain meaning of the statutes, they serve as a useful guide to how the agency would interpret any ambiguities.<sup>33</sup>

1. *Disclosure to Law Enforcement*: The first rule of construction specifies that financial institutions may disclose SAR information to any federal, state, or local law enforcement agency that examines financial institutions for compliance with the

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<sup>29</sup> Proposed Amendment Section 563.180(d).

<sup>30</sup> 12 C. F. R. § 353.3(g) (2005).

<sup>31</sup> *See supra* part II.C.

<sup>32</sup> Proposed Amendment Section 563.180(d)(12)(ii).

<sup>33</sup> *See Chevron U.S.A. Inc., v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (holding that agencies are granted deference to interpret their statutes, so long as that interpretation is a reasonable construction). *But see MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 512 U.S. 218 (1994) (holding that an actual ambiguity must exist before an agency’s interpretation can be given deference).

BSA. As a result, institutions may not interpret the prohibition against disclosure to deny such agencies access to this information. This construction makes clear sense, as the BSA was not intended to impede the investigations of other law enforcement agencies.<sup>34</sup>

2. *Disclosure of Underlying Facts:* The second proposed rule of construction is that the prohibitions do not prevent the disclosure of the underlying facts, transactions, and documents on which a SAR is based. Not only is this rule consistent with case law,<sup>35</sup> but with the purpose behind the prohibition. Were an individual or group to discover that information regarding their accounts and transactions were suddenly unavailable to them, they would quickly realize that an SAR must have been issued against them—exactly the opposite of what the prohibition intended. Furthermore, this construction eases the burden on civil litigants denied access to SARs.<sup>36</sup>
3. *Disclosure to Individuals Within the Reporting Institution:* The final rule of construction clarifies that the prohibition does not prevent individuals within the financial institution from sharing SAR information within the institution’s corporate organizational structure. By increasing the number of people with access to SAR information, this construction could increase the possibility that the information could be leaked or accidentally disclosed by someone within the financial institution. Nonetheless, such a construction is necessary to ensure that the lower-level employees can seek guidance from their superiors and that officers and attorneys within the organization retain the ability to direct lower-level employees on how to handle the SARs. Moreover, it would be inefficient for the institutions attempting to fully cooperate with law enforcement if the only person within the organization with knowledge of the SAR’s information was a single low-level employee (who presumably would not be available at all times).

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<sup>34</sup> This rule could put at risk federal investigations into large criminal enterprises a fear exists that such an enterprise could corrupt local law enforcement and induce them to demand SARs from the financial institution. But such a speculative possibility does not warrant a policy that would encourage financial institutions to refuse to cooperate with their local law enforcement.

<sup>35</sup> See, e.g. *Cotton v. PrivateBank & Trust Co.*, 235 F. Supp. 2d 809 (N.D. Ill. 2002) (holding that the factual documents that give rise to a SAR are not confidential, so long as they do not reveal that a SAR has been filed); *Union Bank of Cal., N.A. v. Superior Court*, 130 Cal. App. 4th 478 (2005) (describing wire transfers, statements, and checks and deposits slips as the types of documentation disclosable, even though they give rise to a SAR).

<sup>36</sup> See *supra* Part II.C.2 and II.C.3.

## **F. Prohibition on Disclosure By the OTS**

The prohibition on disclosure by the OTS would replace language that bars financial institution from disclosing SARs except “as necessary to fulfill the official duties of such officer or employee”<sup>37</sup> with “except as necessary to fulfill official duties consistent with Title II of the Bank Secrecy Act.” This modification is intended to specifically exclude parties in private litigation from receiving access to the SARs and thus coax more financial institution into cooperating without fear of civil liability. As described above, such a construction would still allow SARs to be made available in response to grand jury subpoenas, requests other law enforcement agencies, congressional committees, and prosecutorial disclosure to impeach government witnesses or as exculpatory evidence.<sup>38</sup>

While the SARs have always been intended solely for use in BSA-related activities, exclusively limiting their use to the purpose could have unforeseen consequences. One disturbing possibility is that such a narrow usage could preclude the OTS from using the SARs to discipline institutions that file them on a discriminatory basis. For example, suppose that an institution made a habit of filing SARs on virtually all of its minority customers based on the flimsiest of rationales, but rarely ever did so for Caucasian customers. Would the OTS be permitted to use the SARs as evidence in an action against the institution, given that it would be limited to using them strictly for BSA purposes? One could argue that the agencies would be justified in punishing the offenders, given that such discrimination impedes investigation (either by providing false information on overreported minorities or by withholding valuable information on underreported Caucasians) but the outcome of such a claim is speculative.<sup>39</sup> As such, the proposed rule should clarify that SARs could be used to discipline financial institutions for such improper filings.

## **G. Safe Harbor/Limitation on Liability**

The new rule on the safe harbors<sup>40</sup> would clarify that the safe harbors that protect institutions from civil liability for reports of suspicious activity would apply to all “disclosures”

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<sup>37</sup> 12 CFR 5318(g)(2)(A)(ii).

<sup>38</sup> *See supra* note 23.

<sup>39</sup> An additional concern is whether FinCEN would ever discover such discrimination if it were occurring. The SAR does not request information on race, therefore FinCEN would never discover if a disproportionate number of reportees from an institution were minorities unless it launched further investigations into all. Private litigants would have more incentive to investigate such allegations, but they would lack access to the reports.

<sup>40</sup> Proposed Amendment Section 563.180(d)(13).

(including oral reports) and not simply information filed on an official SAR form. Like the SAR definition,<sup>41</sup> the proposed rule merely closes a loophole and protects the obvious intention behind the enabling act.

The language also clarifies that disclosures made “jointly with another institution” are likewise covered by the safe harbor provision. Again, this language merely confirms the clear intent of the enabling act, which could not have intended to expose to liability financial institutions that collaborate in their cooperation with FinCEN.

## **H. Paperwork Reduction Act**

The proposed rules declare that the new rules do not contain any “collections of information” as defined by the Paperwork Reduction Act (“PRA”).<sup>42</sup> This statement is not entirely accurate, as the PRA also applies to “modification of existing collection of information that . . . [w]ould cause the burden of the information collections conducted or sponsored by the Board to exceed by the end of the fiscal year the Information Collection Budget allowance set by the Board and OMB [Office of Management and Budget] for the fiscal year-end.”<sup>43</sup> The proposed rule changes certainly modify the existing collection of information. And given that the proposed rules are designed to produce more reports from financial institutions, there exists the distinct possibility that the new rules could be so effective as to require cost overflows in processing it all.

Whether or not the new rule changes would produce such cost-overruns is purely speculative, and even if they did, that fact in itself would not be a sufficient reason to reject the proposed changes. Nonetheless, FinCEN is an agency with limited employees governing hundreds of thousands of financial institutions.<sup>44</sup> A program designed to encourage each of those institutions to submit more reports could have a significant impact on the agency’s paperwork costs and any suggestion otherwise is somewhat dubious. For this reason, the OMB should weigh in regarding the proposed rules.

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<sup>41</sup> *See supra* Part II.A.

<sup>42</sup> 44 U.S.C. 3506

<sup>43</sup> *Id.*

<sup>44</sup> FinCEN website at [http://www.fincen.gov/about\\_fincen/wwd/](http://www.fincen.gov/about_fincen/wwd/) (last checked Apr. 29, 2009).

### III. Analysis

The proposed rules remove review over the transmission of customer information to FinCEN, although that by itself is not a legal problem. The U.S. Supreme Court found in *Webster v. Doe* that agency discretion is not always subject to review, particularly when the enabling act discounts the possibility.<sup>45</sup> In the matter at hand, the BSA specifically prohibits disclosure of SARs to the individual being reported, thereby indicating that the discretion of FinCEN and OTS over SARs was meant to be unreviewable. Nonetheless, even *Weber* contains an exception when constitutional rights are imperiled.<sup>46</sup> For this reason, litigants who suspect financial institutions of filing SARs in a discriminatory manner may still maintain a right to review.

Although several interested parties will be denied the opportunity to challenge SAR procedures, due process is not offended. Due process is only implicated when life, liberty, or property are in jeopardy, and the disclosure of the information in a SAR alone is unlikely to endanger any of the three. Although the SAR could lead to an investigation, it is only a guide for law enforcement as to where to dig, and evidence of nothing in itself. In fact, U.S. Attorneys rarely even introduce into evidence or produce in discovery the SARs that instigate their investigations.<sup>47</sup> Unless and until a SAR ripens into an investigation or a prosecution, it is unlikely that a reportee will have a valid claim that any rights have been violated, and even then that interest may be outweighed by the confidentiality interests outlined above.<sup>48</sup>

Legality aside, there remains the question of whether the proposed rules constitute good policy. Does the OTS's desire to protect financial institutions from the losing indignant customers outweigh the right of those customers to know if their bank is instigating investigations against them? Is the desire to encourage more reporting worth the prejudice that will be imposed on civil litigants by denying them access to SARs? The outcome of both determinations may ultimately turn on whether or not an increase in the number of SARs will actually aid FinCEN in light of the deluge of reports it already receives, or if the push for more information is simply a kneejerk reaction by an already overwhelmed agency. If the SARs do prove useful, that utility could justify the limited incursion into the rights of civil litigants and financial institution customers.

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<sup>45</sup> *Webster v. Doe*, 486 U.S. 592 (1988).

<sup>46</sup> *Id.*

<sup>47</sup> Conversation with Colin Bruce (via Professor Peter Beckett), First Assistant United States Attorney for the Central District of Illinois, Mar. 18, 2009.

<sup>48</sup> *See supra* Part C.

#### IV. Recommendation

The proposed changes to the OTS confidentiality requirements are legal and constitutional, but require input from OMB and either Government Accountability Office (GAO) or a similar independent body to review their effectiveness. Although the proposed rules infringe to a small degree upon the rights of several interested parties, those concerns seem to be outweighed by government and financial institution interests in confidentiality. The greatest concerns are whether the influx of new reports that the rule changes are designed to generate are in FinCEN's best interest,<sup>49</sup> and whether they violated the PRA.<sup>50</sup>

As discussed above,<sup>51</sup> agents of FinCEN and the OTS have a vested interest in always seeking more information, even if the agency is always inundated with more than it can effectively process. The number of SARs submitted to FinCEN has been increasing at an exponential rate even before these changes.<sup>52</sup> Before deluging the agency with even more information, the GAO or a similar independent body should first review FinCEN's operation to ensure that more SARs would actually aid the agency in tracking down law-breakers instead of simply overwhelming the analysts.

Following GAO's examination of the effect the anticipated rise in SARs will have on FinCEN, the OMB should use that report to evaluate whether the increase will lead FinCEN to exceed its information collection budget. The new rules may still be worthwhile even if they do lead to a budget overrun, but OMB should still play its part under the Paperwork Reduction Act.

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<sup>49</sup> *See supra* II.C.4.

<sup>50</sup> *See* 2.H.

<sup>51</sup> *See supra* Part II.C.

<sup>52</sup> "The SAR Activity Review," *By the Numbers*, Issue 8, FinCEN (June 21, 2007).

# Suspicious Activity Report

July 2003

Previous editions will not be accepted after December 31, 2003

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FRB:	FR 2230	OMB No. 7100-0212
FDIC:	6710/06	OMB No. 3064-0077
OCC:	8010-9,8010-1	OMB No. 1557-0180
OTS:	1601	OMB No. 1550-0003
NCUA:	2362	OMB No. 3133-0094
TREASURY:	TD F 90-22.47	OMB No. 1506-0001

**ALWAYS COMPLETE ENTIRE REPORT**  
(see instructions)

- 1 Check box below only if correcting a prior report.  
 Corrects Prior Report (see instruction #3 under "How to Make a Report")

## Part I Reporting Financial Institution Information

2 Name of Financial Institution			3 EIN		
4 Address of Financial Institution			5 Primary Federal Regulator		
6 City			7 State		
8 Zip Code			a <input type="checkbox"/> Federal Reserve d <input type="checkbox"/> OCC		
			b <input type="checkbox"/> FDIC e <input type="checkbox"/> OTS		
			c <input type="checkbox"/> NCUA		
9 Address of Branch Office(s) where activity occurred <input type="checkbox"/> Multiple Branches (include information in narrative, Part V)					
10 City		11 State		12 Zip Code	
				13 If institution closed, date closed	
				____/____/____ MM DD YYYY	
14 Account number(s) affected, if any					
a _____			Closed? <input type="checkbox"/> Yes <input type="checkbox"/> No		
b _____			c _____		
			Closed? <input type="checkbox"/> Yes <input type="checkbox"/> No		
			d _____		
			Closed? <input type="checkbox"/> Yes <input type="checkbox"/> No		

## Part II Suspect Information Suspect Information Unavailable

15 Last Name or Name of Entity		16 First Name		17 Middle	
18 Address				19 SSN, EIN or TIN	
20 City		21 State		22 Zip Code	
				23 Country	
24 Phone Number - Residence (include area code) ( )			25 Phone Number - Work (include area code) ( )		
26 Occupation/Type of Business		27 Date of Birth		28 Admission/Confession?	
		____/____/____ MM DD YYYY		a <input type="checkbox"/> Yes b <input type="checkbox"/> No	
29 Forms of Identification for Suspect:					
a <input type="checkbox"/> Driver's License/State ID		b <input type="checkbox"/> Passport		c <input type="checkbox"/> Alien Registration	
Number _____		Issuing Authority _____		d <input type="checkbox"/> Other _____	
30 Relationship to Financial Institution:					
a <input type="checkbox"/> Accountant		d <input type="checkbox"/> Attorney		g <input type="checkbox"/> Customer	
b <input type="checkbox"/> Agent		e <input type="checkbox"/> Borrower		h <input type="checkbox"/> Director	
c <input type="checkbox"/> Appraiser		f <input type="checkbox"/> Broker		i <input type="checkbox"/> Employee	
				j <input type="checkbox"/> Officer	
				k <input type="checkbox"/> Shareholder	
				l <input type="checkbox"/> Other _____	
31 Is the relationship an insider relationship?			a <input type="checkbox"/> Yes b <input type="checkbox"/> No		
If Yes specify:			c <input type="checkbox"/> Still employed at financial institution		
			e <input type="checkbox"/> Terminated		
			d <input type="checkbox"/> Suspended		
			f <input type="checkbox"/> Resigned		
32 Date of Suspension, Termination, Resignation					
____/____/____ MM DD YYYY					



**Explanation/description of known or suspected violation of law or suspicious activity.**

This section of the report is **critical**. The care with which it is written may make the difference in whether or not the described conduct and its possible criminal nature are clearly understood. Provide below a chronological and **complete** account of the possible violation of law, including what is unusual, irregular or suspicious about the transaction, using the following checklist as you prepare your account. **If necessary, continue the narrative on a duplicate of this page.**

- a **Describe** supporting documentation and retain for 5 years.
- b **Explain** who benefited, financially or otherwise, from the transaction, how much, and how.
- c **Retain** any confession, admission, or explanation of the transaction provided by the suspect and indicate to whom and when it was given.
- d **Retain** any confession, admission, or explanation of the transaction provided by any other person and indicate to whom and when it was given.
- e **Retain** any evidence of cover-up or evidence of an attempt to deceive federal or state examiners or others.

- f **Indicate** where the possible violation took place (e.g., main office, branch, other).
- g **Indicate** whether the possible violation is an isolated incident or relates to other transactions.
- h **Indicate** whether there is any related litigation; if so, specify.
- i **Recommend** any further investigation that might assist law enforcement authorities.
- j **Indicate** whether any information has been excluded from this report; if so, why?
- k If you are correcting a previously filed report, describe the changes that are being made.

For Bank Secrecy Act/Structuring/Money Laundering reports, include the following additional information:

- l **Indicate** whether currency and/or monetary instruments were involved. If so, provide the amount and/or description of the instrument (for example, bank draft, letter of credit, domestic or international money order, stocks, bonds, traveler's checks, wire transfers sent or received, cash, etc.).
- m **Indicate** any account number that may be involved or affected.

Tips on SAR Form preparation and filing are available in the SAR Activity Review at [www.fincen.gov/pub\\_reports.html](http://www.fincen.gov/pub_reports.html)

Paperwork Reduction Act Notice: The purpose of this form is to provide an effective and consistent means for financial institutions to notify appropriate law enforcement agencies of known or suspected criminal conduct or suspicious activities that take place at or were perpetrated against financial institutions. This report is required by law, pursuant to authority contained in the following statutes. Board of Governors of the Federal Reserve System: 12 U.S.C. 324, 334, 611a, 1844(b) and (c), 3105(c) (2) and 3106(a). Federal Deposit Insurance Corporation: 12 U.S.C. 93a, 1818, 1881-84, 3401-22. Office of the Comptroller of the Currency: 12 U.S.C. 93a, 1818, 1881-84, 3401-22. Office of Thrift Supervision: 12 U.S.C. 1463 and 1464. National Credit Union Administration: 12 U.S.C. 1766(a), 1786(q). Financial Crimes Enforcement Network: 31 U.S.C. 5318(g). Information collected on this report is confidential (5 U.S.C. 552(b)(7) and 552a(k)(2), and 31 U.S.C. 5318(g)). The Federal financial institutions' regulatory agencies and the U.S. Departments of Justice and Treasury may use and share the information. Public reporting and recordkeeping burden for this information collection is estimated to average 30 minutes per response, and includes time to gather and maintain data in the required report, review the instructions, and complete the information collection. Send comments regarding this burden estimate, including suggestions for reducing the burden, to the Office of Management and Budget, Paperwork Reduction Project, Washington, DC 20503 and, depending on your primary Federal regulatory agency, to Secretary, Board of Governors of the Federal Reserve System, Washington, DC 20551; or Assistant Executive Secretary, Federal Deposit Insurance Corporation, Washington, DC 20429; or Legislative and Regulatory Analysis Division, Office of the Comptroller of the Currency, Washington, DC 20219; or Office of Thrift Supervision, Enforcement Office, Washington, DC 20552; or National Credit Union Administration, 1775 Duke Street, Alexandria, VA 22314; or Office of the Director, Financial Crimes Enforcement Network, Department of the Treasury, P.O. Box 39, Vienna, VA 22183. The agencies may not conduct or sponsor, and an organization (or a person) is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

## Suspicious Activity Report Instructions

**Safe Harbor** Federal law (31 U.S.C. 5318(g)(3)) provides complete protection from civil liability for all reports of suspicious transactions made to appropriate authorities, including supporting documentation, regardless of whether such reports are filed pursuant to this report's instructions or are filed on a voluntary basis. Specifically, the law provides that a financial institution, and its directors, officers, employees and agents, that make a disclosure of any possible violation of law or regulation, including in connection with the preparation of suspicious activity reports, "shall not be liable to any person under any law or regulation of the United States, any constitution, law, or regulation of any State or political subdivision of any State, or under any contract or other legally enforceable agreement (including any arbitration agreement), for such disclosure or for any failure to provide notice of such disclosure to the person who is the subject of such disclosure or any other person identified in the disclosure".

**Notification Prohibited** Federal law (31 U.S.C. 5318(g)(2)) requires that a financial institution, and its directors, officers, employees and agents who, voluntarily or by means of a suspicious activity report, report suspected or known criminal violations or suspicious activities may not notify any person involved in the transaction that the transaction has been reported.

**In situations involving violations requiring immediate attention, such as when a reportable violation is ongoing, the financial institution shall immediately notify, by telephone, appropriate law enforcement and financial institution supervisory authorities in addition to filing a timely suspicious activity report.**

### WHEN TO MAKE A REPORT:

1. All financial institutions operating in the United States, including insured banks, savings associations, savings association service corporations, credit unions, bank holding companies, nonbank subsidiaries of bank holding companies, Edge and Agreement corporations, and U.S. branches and agencies of foreign banks, are required to make this report following the discovery of:
  - a. **Insider abuse involving any amount.** Whenever the financial institution detects any known or suspected Federal criminal violation, or pattern of criminal violations, committed or attempted against the financial institution or involving a transaction or transactions conducted through the financial institution, where the financial institution believes that it was either an actual or potential victim of a criminal violation, or series of criminal violations, or that the financial institution was used to facilitate a criminal transaction, and the financial institution has a substantial basis for identifying one of its directors, officers, employees, agents or other institution-affiliated parties as having committed or aided in the commission of a criminal act regardless of the amount involved in the violation.
  - b. **Violations aggregating \$5,000 or more where a suspect can be identified.** Whenever the financial institution detects any known or suspected Federal criminal violation, or pattern of criminal violations, committed or attempted against the financial institution or involving a transaction or transactions conducted through the financial institution and involving or aggregating \$5,000 or more in funds or other assets, where the financial institution believes that it was either an actual or potential victim of a criminal violation, or series of criminal violations, or that the financial institution was used to facilitate a criminal transaction, and the financial institution has a substantial basis for identifying a possible suspect or group of suspects. If it is determined prior to filing this report that the identified suspect or group of suspects has used an "alias," then information regarding the true identity of the suspect or group of suspects, as well as alias identifiers, such as drivers' licenses or social security numbers, addresses and telephone numbers, must be reported.
  - c. **Violations aggregating \$25,000 or more regardless of a potential suspect.** Whenever the financial institution detects any known or suspected Federal criminal violation, or pattern of criminal violations, committed or attempted against the financial institution or involving a transaction or transactions conducted through the financial institution and involving or aggregating \$25,000 or more in funds or other assets, where the financial institution believes that it was either an actual or potential victim of a criminal violation, or series of criminal violations, or that the financial institution was used to facilitate a criminal transaction, even though there is no substantial basis for identifying a possible suspect or group of suspects.
  - d. **Transactions aggregating \$5,000 or more that involve potential money laundering or violations of the Bank Secrecy Act.** Any transaction (which for purposes of this subsection means a deposit, withdrawal, transfer between accounts, exchange of currency, loan, extension of credit, purchase or sale of any stock, bond, certificate of deposit, or other monetary instrument or investment security, or any other payment, transfer, or delivery by, through, or to a financial institution, by whatever means effected) conducted or attempted by, at

or through the financial institution and involving or aggregating \$5,000 or more in funds or other assets, if the financial institution knows, suspects, or has reason to suspect that:

- i. The transaction involves funds derived from illegal activities or is intended or conducted in order to hide or disguise funds or assets derived from illegal activities (including, without limitation, the ownership, nature, source, location, or control of such funds or assets) as part of a plan to violate or evade any law or regulation or to avoid any transaction reporting requirement under Federal law;
- ii. The transaction is designed to evade any regulations promulgated under the Bank Secrecy Act; or
- iii. The transaction has no business or apparent lawful purpose or is not the sort in which the particular customer would normally be expected to engage, and the financial institution knows of no reasonable explanation for the transaction after examining the available facts, including the background and possible purpose of the transaction.

The Bank Secrecy Act requires all financial institutions to file currency transaction reports (CTRs) in accordance with the Department of the Treasury's implementing regulations (31 CFR Part 103). These regulations require a financial institution to file a CTR whenever a currency transaction exceeds \$10,000. If a currency transaction exceeds \$10,000 and is suspicious, the institution must file both a CTR (reporting the currency transaction) and a suspicious activity report (reporting the suspicious or criminal aspects of the transaction). If a currency transaction equals or is below \$10,000 and is suspicious, the institution should only file a suspicious activity report.

2. **Computer Intrusion.** For purposes of this report, "computer intrusion" is defined as gaining access to a computer system of a financial institution to:

- a. Remove, steal, procure, or otherwise affect funds of the institution or the institution's customers;
- b. Remove, steal, procure or otherwise affect critical information of the institution including customer account information; or
- c. Damage, disable or otherwise affect critical systems of the institution.

For purposes of this reporting requirement, computer intrusion does not mean attempted intrusions of websites or other non-critical information systems of the institution that provide no access to institution or customer financial or other critical information.

3. A financial institution is required to file a suspicious activity report no later than 30 calendar days after the date of initial detection of facts that may constitute a basis for filing a suspicious activity report. If no suspect was identified on the date of detection of the incident requiring the filing, a financial institution may delay filing a suspicious activity report for an additional 30 calendar days to identify a suspect. In no case shall reporting be delayed more than 60 calendar days after the date of initial detection of a reportable transaction.
4. This suspicious activity report does not need to be filed for those robberies and burglaries that are reported to local authorities, or (except for savings associations and service corporations) for lost, missing, counterfeit, or stolen securities that are reported pursuant to the requirements of 17 CFR 240.17f-1.

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## HOW TO MAKE A REPORT:

1. Send each completed suspicious activity report to:

**Detroit Computing Center, P.O. Box 33980, Detroit, MI 48232-0980**

2. For items that do not apply or for which information is not available, leave blank.
3. If you are correcting a previously filed report, check the box at the top of the report (line 1). Complete the report in its entirety and include the corrected information in the applicable boxes. Then describe the changes that are being made in Part V (Description of Suspicious Activity), line k.
4. **Do not include any supporting documentation with the suspicious activity report.** Identify and retain a copy of the suspicious activity report and all original supporting documentation or business record equivalent for five (5) years from the date of the suspicious activity report. All supporting documentation must be made available to appropriate authorities upon request.
5. If more space is needed to report additional suspects, attach copies of page 1 to provide the additional information. If more space is needed to report additional branch addresses, include this information in the narrative, Part V.
6. Financial institutions are encouraged to provide copies of suspicious activity reports to state and local authorities, where appropriate.