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Re: Comments on Confidentiality of Suspicious Activity Reports ("SARs");
Sharing SARS with Certain U.S. Affiliates – FinCEN Docket No. TREAS-
FinCen-2008-0022; OCC Docket No. 2009-0004; OTS No. 2008-0015

Ladies and Gentlemen:

The Institute of International Bankers welcomes the opportunity to comment on proposed changes to the regulations implementing provisions of the Bank Secrecy Act (the "BSA") requiring the confidentiality of SARs, as well as proposed guidance regarding the sharing of SARs by depository institutions, securities broker-dealers, mutual funds, futures commission merchants and introducing brokers in commodities (collectively, "covered entities") with certain U.S. affiliates.¹ The Institute's member organizations are internationally headquartered financial institutions that engage in

¹ Our comments on the proposed changes to the regulations implementing provisions of the BSA regarding confidentiality of SARs focus on those proposed by FinCEN. See 74 Fed. Reg. 10148 (March 9, 2009) (the "Confidentiality Proposal" or the "Proposal"). Our comments on the Proposal are intended to be equally applicable to the substantially similar revisions the OCC and OTS have proposed to their regulations. See 74 Fed. Reg. 10130 (March 9, 2009) (OCC); and 74 Fed. Reg. 10139 (March 9, 2009) (OTS). The proposed guidance on the sharing of SARs by covered entities with certain U.S. affiliates has been prescribed solely by FinCEN. See 74 Fed. Reg. 10158 (March 9, 2009) (depository institutions); and 74 Fed. Reg. 10161 (March 9, 2009) (non-depository covered entities). For ease of discussion, we hereinafter will refer to the latter two proposals collectively as the "Proposed Sharing Guidance" (or the "Guidance").



extensive banking, securities and other financial activities in the United States through branches/agencies, depository institution subsidiaries and securities broker-dealers and other types of nonbank subsidiaries, all of which are subject to a SAR regulation and therefore will be directly affected by the proposals.

I. Executive Summary

Among other things, the Confidentiality Proposal would revise FinCEN's existing confidentiality regulations to (i) include specific provisions addressing the scope of the BSA's prohibition against disclosure of a SAR by government authorities and clarifying the standard applicable to such disclosure as prescribed by the statute; (ii) modify the regulations' liability "safe harbor" provisions to reflect the amendments made to the corresponding provisions of the BSA by the USA PATRIOT Act; and (iii) make certain technical, drafting changes that better harmonize the regulations applicable to different industries. The Institute generally supports these proposed changes, which we believe provide important clarifications and as such will enhance the effectiveness of the regulations.

Our comments are directed principally at the remaining aspect of the Confidentiality Proposal – *i.e.*, the proposal to modify FinCEN's existing confidentiality regulations to clarify the scope of the statutory prohibition against the disclosure of a SAR by a financial institution – and focus in particular on (i) the proposed rule of construction enabling disclosure of the "underlying facts, transactions and documents upon which a SAR is based" and (ii) the extent to which a SAR and information that would reveal the existence of a SAR (collectively, "SAR information") may be shared within a corporate organizational structure for purposes consistent with Title II of the BSA as determined in the Proposed Sharing Guidance.

As to the rules of construction relating to underlying facts, transactions and documents upon which a SAR is based, we suggest they be clarified with respect to how they apply to what is described elsewhere in the confidentiality regulations as "supporting documentation" (*see, e.g.*, 31 U.S.C. § 103.18(d)). In addition, we suggest the Proposal be clarified to confirm that underlying facts, transactions and documents may be shared with U.S. and non-U.S. affiliates without regard to the Proposed Sharing Guidance. As to the Proposed Sharing Guidance itself, (i) we suggest clarification of the types of U.S. domestic affiliates with which our member institutions' U.S. operations may share SAR information, and (ii) we set forth a rationale for permitting sharing SAR information with affiliates outside the United States in ways that address concerns that such sharing may result in unwanted disclosure.

We recognize the importance of achieving an appropriate balance between, on the one hand, preserving the confidentiality of SAR information and, on the other hand, facilitating the flow of information within complex, globally active organizations in a manner that strengthens their efforts to combat money laundering, terrorist financing and



other criminal activity. Our comments are intended to assist in striking this balance in a way that preserves the integrity and confidentiality of the SAR reporting regime while promoting ongoing efforts within the financial services industry to implement effective enterprise-wide, risk-based anti-money laundering programs.

II. The Provisions of the Confidentiality Proposal Relating To the Disclosure of “Underlying Facts, Transactions, and Documents Upon Which A SAR Is Based” Should Be Clarified

A. Clarification Would Be Especially Helpful Given the Strict Approach Taken in the Proposal to the Prohibition Against Disclosure

The Confidentiality Proposal explains that the BSA and its implementing regulations have created “an unqualified discovery and evidentiary privilege for [SAR information] that cannot be waived by financial institutions.”² Accordingly, the Proposal structures the confidentiality regulations to prohibit disclosure by financial institutions of a SAR or information that would reveal the existence of a SAR unless specifically permitted by the regulation. Permitted disclosures are limited to those authorized by one of the “rules of construction.” Thus, with regard to banks, for example, there is a rule of construction permitting disclosure to “FinCEN or any Federal, state, or local law enforcement agency, or any Federal or state regulatory authority that examines the bank for compliance with the BSA,” a necessary exception whose inclusion underscores the strictness of the prohibition.³

The Confidentiality Proposal addresses the permissibility of financial institutions disclosing three types of information relating to a SAR: the SAR itself, “information that would reveal the existence of a SAR”⁴ and “underlying facts, transactions, and documents upon which a SAR is based.” Disclosure of the first two types is most strictly limited – indeed, the Confidentiality Proposal prohibits financial institutions from disclosing these to anyone other than FinCEN, law enforcement and the appropriate regulatory authorities.⁵

² See 74 Fed. Reg. at 10150.

³ See *id.* at 10156 (proposed 31 C.F.R. § 103.18(e)(1)(ii)(A)(1)).

⁴ The Confidentiality Proposal substitutes reference to “information that would reveal the existence of a SAR” in place of the existing regulations’ reference to “any information that would disclose that a SAR has been prepared or filed” on the grounds that the former phrase “more clearly describes the type of information that is covered by the prohibition against the disclosure of a SAR.” See *id.* at 10150. We note that the existing regulations also refer to requests that banks might receive for disclosure of “a SAR or the information contained in a SAR” (see 31 C.F.R. § 103.18(e)), which also would be revised to refer instead to “a SAR or information that would reveal the existence of a SAR.” We believe that this proposed change provides a helpful clarification of the scope of the prohibition.

⁵ As discussed below, the Proposal also permits limited sharing of a SAR or information that would reveal the existence of a SAR by certain types of financial institutions within their corporate organizational



The degree to which disclosure of the third type of information is intended to be limited is unclear from the Proposal. The Proposal would revise the confidentiality regulations to list only two specific examples of the types of disclosure that can be made of “the underlying facts, transactions, and documents upon which a SAR is based”: (i) disclosure to another financial institution (or its directors, officers, employees or agents) for the preparation of a joint SAR; and (ii) in connection with an employment reference or termination notice as permitted under provisions of the BSA added by the USA PATRIOT Act.⁶

Disclosure in connection with preparation of a joint SAR is a necessary exception the inclusion of which, like the exception for disclosures to FinCEN, law enforcement and regulatory authorities, highlights the strictness of the prohibition. The second exception implements provisions of the BSA that permit disclosure of “information that was included in [a SAR]” (quoting 31 U.S.C. § 5318(g)(2)(B)) in certain termination notices/employment references. The Proposal does not explain what relationship is intended between “information that was included in a SAR” and “the underlying facts, transactions, or documents upon which a SAR is based” for purposes of the rules of construction and whether disclosure of the former is permitted only in the specific context covered by the statute. It would be helpful to clarify these aspects of the Proposal in connection with finalizing the revised confidentiality regulations.

B. Clarifying the Status of “Supporting Documentation” under the Confidentiality Regulations

The Proposal also does not explain how “supporting documentation” is to be treated under the rules of construction. The Proposal does not affect provisions of the confidentiality regulations requiring financial institutions to maintain “the original or business record equivalent of any supporting documentation” relating to the filing of a SAR (such documentation “shall be deemed to have been filed with the SAR”) and directing them to provide such documentation to FinCEN, and appropriate law enforcement and regulatory authorities.⁷ In effect, these provisions function as another rule of construction creating an exception to the general prohibition against disclosure of a SAR or information that would reveal the existence of a SAR, but they do not explain how such documents should be characterized for purposes of those rules.

structure, but, notably, this provision reflects the view that “sharing” is different from “disclosure.” *See* 74 Fed. Reg. at 10151.

⁶ *See* 31 U.S.C. § 5318(g)(2)(B) , which applies only to employment references provided by a depository institution to another depository institution in accordance with 12 U.S.C. § 1828(w), as well as to termination notices or employment references provided by broker-dealers, future commission merchants or introducing brokers to other such firms in accordance with applicable SRO requirements.

⁷ *See, e.g.*, 31 C.F.R. § 103.18(d).



FinCEN’s guidance on supporting documentation states that “supporting documentation” may include, among other things, “transaction records, new account information, tape recordings, e-mail messages, and correspondence.”⁸ This characterization suggests that “supporting documentation” would not necessarily be “information that would reveal the existence of a SAR” and instead could be categorized as “underlying documents upon which a SAR is based.” If so, then, in addition to disclosing such documents to FinCEN, law enforcement or a regulatory authority pursuant to 31 C.F.R. § 103.18(d), under the Proposal a bank also should be authorized to disclose such information to others pursuant to 31 C.F.R. § 103.18(e)(1)(ii)(A)(2). Accordingly, it also would be helpful to clarify this aspect of the Proposal in connection with finalizing the revised confidentiality regulations.

C. Sharing with Affiliates the Underlying Facts, Transactions and Documents Upon Which A SAR Is Based

The rules of construction state that “underlying facts, transactions and documents” that may be disclosed “include” joint SARs and certain termination notices or employment references, and the Proposal explains that the listing of only these two types of situations is “not intended to be an exhaustive list of all possible scenarios in which the disclosure of underlying information is permissible.”⁹ The Proposal further explains that this rule of construction reflects case law, *Cotton v. Private Bank and Trust Company*, 235 F.Supp. 2d 809 (N.D. Ill. 2002),¹⁰ which draws the following distinction regarding disclosure of documents upon which a SAR is based:

There are two types of supporting documents. The first category represents the factual documents which give rise to suspicious conduct. These are to be produced in the ordinary course of discovery because they are business records made in the ordinary course of business. The second category is documents representing drafts of SARs or other work product or privileged communications that relate to the SAR itself. These are not to be produced because they would disclose whether a SAR has been prepared or filed.¹¹

In the terminology of the Confidentiality Proposal, the first category identified in *Cotton* can be characterized as “the underlying facts, transactions and documents upon which a SAR is based” and the second category can be categorized as “information that would reveal the existence of a SAR.” If, pursuant to *Cotton*, “the underlying facts,

⁸ See Suspicious Activity Report Supporting Documentation, FIN-2007-G003 (June 13, 2007).

⁹ See 74 Fed. Reg. at 10151.

¹⁰ See *id.* (text accompanying note 11).

¹¹ *Cotton* , 235 F. Supp. 2d at 815.



transactions and documents upon which a SAR is based” can be “produced in the ordinary course of discovery,” then *a fortiori* there should be no prohibition under the BSA against disclosure of such items to affiliates, regardless of where in the world they are located.

We note that the “January 2006 Guidance” (as defined in the Proposed Sharing Guidance) permits an institution subject to that Guidance to “disclose to entities within its organization information underlying the filing [of a SAR] (that is, information about the customer/suspect and transaction(s) reported).” This view is entirely consistent with *Cotton* and our reading of the Proposal. However, because of the significance of the issue regarding the scope of permissible disclosure/sharing within a financial institution’s corporate organizational structure, it would be helpful to clarify this aspect of the Proposal in connection with finalizing the confidentiality regulations. Given the careful distinctions drawn by the Proposal between “information that would reveal the existence of a SAR” and “the underlying facts, transactions or documents on which a SAR is based” we would respectfully suggest that the rules of construction incorporated into the final confidentiality regulations include a provision expressly permitting the disclosure of such facts, transactions or documents to affiliates wherever located and clarifying that such authority is exercisable independently of the authority to share with affiliates a SAR or information that would reveal the existence of a SAR.

III. Comments on the Proposed Sharing Guidance

Suspicious activity reporting is fundamental to the BSA regulatory regime, and, as recognized in the January 2006 Guidance, sharing SAR information can play an important role in promoting an “enterprise-wide risk management” approach to BSA compliance. This is an especially key consideration where AML/CFT functions and operations are “globally sourced” – *i.e.*, where persons involved in an institution’s AML/CFT program have cause to access systems and information located outside their home jurisdiction. At the same time, confidentiality is essential to maintain the integrity of the SAR reporting regime.

The tension between these two purposes, the first of which encourages broadening the availability of SAR information and the second of which counsels caution in doing so, cannot be eliminated and instead must be appropriately managed. Doing so requires a delicate balance lest one factor be given undue weight to the detriment of the other.

Our comments on the Proposed Sharing Guidance seek clarification of the scope of the type of domestic affiliates covered by the Guidance and discuss the rationale for permitting sharing with affiliates outside the United States in ways that address the valid concern that such sharing may result in unwanted disclosure. Our comments are predicated on the understanding that sharing of SAR information is properly limited to (i) persons who fulfill a role in the administration or oversight of an institution’s anti-money



laundering/counter-terrorist financing program and (ii) the establishment of appropriate internal controls to preserve the confidentiality of shared information.¹²

A. Clarifying the Scope of Domestic Affiliates Covered by the Guidance

The Proposed Sharing Guidance limits sharing of SAR information to affiliates that are “subject to a SAR regulation”. However, there is a discrepancy in the types of affiliates that are proposed to be covered by the Guidance. Specifically, the discrepancy relates to the affiliates that are considered to be subject to a SAR regulation prescribed by the Board of Governors of the Federal Reserve System (the “FRB”).

The Guidance applicable to depository institutions refers only to 12 C.F.R. § 208.62 (the “Regulation H Provision”), which applies specifically to banks that are members of the Federal Reserve system.¹³ However, other FRB regulations extend the requirements applicable to member banks to other entities regulated by the FRB – *i.e.*, uninsured state branches, agencies and representative offices of internationally headquartered banks¹⁴ and bank holding companies, their nonbank affiliates and U.S. nonbank affiliates of internationally headquartered banks.¹⁵ In each case, FRB regulations state that such entities “shall file a suspicious activity report in accordance with the provisions of [12 C.F.R. § 208.62].”

By comparison, the Guidance applicable to other types of covered entities specifically includes references to these other FRB regulations in defining the scope of what is understood to be an affiliate subject to a SAR regulation.¹⁶ It may be the case that the reference to only the Regulation H Provision in the Guidance applicable to depository institutions is intended to refer as well to the other FRB regulatory provisions discussed above, so that there is no inconsistency intended between the two. In any

¹² We note that the January 2006 Guidance calls for the establishment of “written confidentiality agreements or arrangements” to protect the confidentiality of shared SAR information, whereas the Proposed Sharing Guidance requires “written confidentiality agreements” and does not refer to other arrangements that might be implemented to address confidentiality concerns. *See* 74 Fed. Reg. at 10161. We are not aware of any concerns regarding the efficacy of the measures taken by institutions under the January 2006 Guidance to preserve the confidentiality of shared SAR information, and we did that the Guidance be conformed to the January 2006 Guidance in this respect

¹³ *See* 74 Fed. Reg. at 10161 note 7.

¹⁴ *See* 12 C.F.R. § 211.24(f). This provision of the FRB’s Regulation K specifically includes U.S. representative offices among the types of offices required to file a SAR in accordance with the requirements applicable to member banks. As such, we believe representative offices also are covered by the January 2006 Guidance, and we respectfully request confirmation that such is the case (the January 2006 Guidance expressly refers only to U.S. branches and agencies).

¹⁵ *See* 12 C.F.R. § 225.4(f).

¹⁶ *See* 74 Fed. Reg. at 10164 note 8.



event, we believe there should be no ambiguity between the two sets of Guidance with respect to such a fundamental issue as the types of affiliates with which SAR information may be shared, and we respectfully urge that the Guidance be conformed so that specific reference is made in both sets of Guidance to each of the FRB regulations cited in the non-depository institution Guidance.

B. The Rational Underlying the January 2006 Guidance Is Equally Applicable to the Proposed Sharing Guidance

The Proposed Sharing Guidance reaffirms the determinations reached in the January 2006 Guidance, an approach we strongly support.¹⁷ That earlier Guidance permits sharing SAR information with head offices, which necessarily are foreign entities, and controlling companies, whether domestic or foreign, subject to there being in place a written confidentiality agreement or arrangement specifying that the head office or controlling company “must protect the confidentiality of [SARs] through appropriate internal controls.” The January 2006 Guidance further provides that FinCEN’s concerns regarding the possibility that applicable foreign law may result in disclosure of SAR information abroad “will need to be addressed in the confidentiality agreements or arrangements” governing the sharing of the information.

We have supported this approach to sharing SAR information and continue to believe it provides appropriate safeguards against the breach of confidentiality. We respectfully submit, however, that just as the imposition of such requirements has been found to be sufficient to permit sharing SAR information with head offices and parent companies, so should imposition of the same requirements be sufficient to permit sharing with affiliates outside the United States, at least in the case of those countries where sharing with head offices or control companies is permitted. In this connection, it would be helpful to publish or otherwise make available a list of those countries where sharing takes place in accordance with the terms of the January 2006 Guidance. Under this approach, the proposed *per se* prohibition against sharing with affiliates outside the United States would be replaced by a focus on the terms of the required confidentiality agreement between the U.S. entity providing the information and its non-U.S. affiliate and the adequacy of the affiliate’s internal controls against the disclosure of the shared information abroad.

¹⁷ See 74 Fed. Reg. at 10159 and 10160 (depository institutions); and 74 Fed. Reg. at 10162 and 10164 (non-depository institution covered entities).



C. Additional Measures To Maintain the Confidentiality of SAR Information When Shared with an Affiliate Outside the United States That Is Not Itself Subject To A SAR Regulation

We strongly support the efforts underway globally to enhance and broaden implementation of the Egmont Group’s “Principles for Information Exchange”¹⁸ and believe they provide a further basis for enabling sharing SAR information outside the United States. Importantly, we believe these efforts only strengthen the mechanisms to guard against the disclosure of SAR information put in place pursuant to the January 2006 Guidance; the extent to which a country that has endorsed these principles has achieved compliance with these prescriptions should not be posited as a threshold requirement for such sharing.¹⁹

As to the potential for disclosure of SAR information shared with an affiliate abroad in connection with private litigation in the affiliate’s country, we believe this concern can be effectively addressed through a variety of means (such as the inclusion in confidentiality agreements of provisions requiring, or other arrangements calling for, the non-U.S. affiliate to notify the providing U.S. entity promptly upon its receipt of request or demand for the shared information and prohibiting disclosure of shared SAR information without the prior consent of the providing U.S. entity) coupled with, where necessary, supportive intervention by interested FIUs and/or other interested supervisory authorities in defense of maintaining the shared SAR information’s confidentiality.

¹⁸ The Egmont Group, *Principles for Information Exchange Between Financial Intelligence Units for Money Laundering and Terrorism Financing Cases* (June 13, 2001).

¹⁹ Among other things, the Egmont Principles provide: “Information exchanges between FIUs may be used only for the specific purpose for which the information was sought or provided” (Principle 11). In addition: “The requesting FIU may not transfer information shared by a disclosing FIU to a third party, nor make use of the information in an administrative, investigative, prosecutorial, or judicial purpose without the prior consent of the FIU that disclosed the information” (Principle 12). Furthermore, the “Best Practices” prescribed under the Principles require a recipient FIU to take into account the legitimate interests of the jurisdiction in which the providing FIU is located when considering whether to disseminate confidential information obtained through an information request.



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Please contact the undersigned or the Institute's General Counsel Richard Coffman (rcoffman@iib.org) if we can provide any further information or assistance. We both can be reached at 212-421-1611.

Very truly yours,

A handwritten signature in black ink that reads "Lawrence R. Uhlick". The signature is written in a cursive, flowing style.

Lawrence R. Uhlick
Chief Executive Officer