

MEMO# 24743

November 30, 2010

FinCEN Issues Final Rule on SAR Confidentiality and Guidance Permitting Sharing SARs with Certain Affiliates

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TO: AML COMPLIANCE WORKING GROUP No. 18-10 RE: FINCEN ISSUES FINAL RULE ON SAR CONFIDENTIALITY AND GUIDANCE PERMITTING SHARING SARs WITH CERTAIN AFFILIATES

On November 23rd, the Financial Crimes Enforcement Network (“FinCEN”) released a final rule on the Confidentiality of Suspicious Activity Reports (“Final Rule”), along with a Notice of Availability of Final Interpretive Guidance (“Notice”), two guidance documents, and an advisory. [\[1\]](#) Together, these documents clarify and strengthen the scope of Suspicious Activity Report (“SAR”) confidentiality and expand the ability of certain financial institutions, including mutual funds, to share a SAR, or any information that would reveal the existence of a SAR (collectively, “SAR information”), with certain affiliates. The changes are effective 30 days after the Final Rule is published in the Federal Register.;

Final Rule

The Final Rule: (1) clarifies the scope of the statutory prohibition against the disclosure by a financial institution of a SAR; (2) addresses the statutory prohibition against the disclosure by the government of a SAR; (3) clarifies that the exclusive standard applicable to the disclosure of SAR information by the government is to fulfill official duties consistent with Title II of the Bank Secrecy Act (“BSA”), in order to ensure that SAR information is protected from inappropriate disclosures unrelated to the BSA purposes for which SARs are filed; (4) modifies the safe harbor provision to include changes made by the USA PATRIOT Act; and (5) where possible, harmonizes minor technical differences that exist among the confidentiality, safe harbor, and compliance provisions of the rulemaking for different industries.

The Final Rule contains rules of construction that describe situations that are not covered by the prohibition against the disclosure of SAR information. Under the Final Rule, provided no person involved in the transaction is notified that the transaction has been reported, the prohibition on disclosing SAR information does not include disclosures to: (1) FinCEN; (2) any Federal, state, or local law enforcement agency; (3) any Federal regulatory authority that examines the mutual fund for compliance with the BSA; or (4) any SRO that examines the filing financial institution for compliance with its SAR reporting requirements, upon the request of the Federal agency responsible for its oversight. In addition, the prohibition does not apply to: (1) the disclosure of the underlying facts, transaction, and documents upon which a SAR is based, including, but not limited to, disclosures related to filing a joint SAR and in connection with certain employment references or termination notices, and (2) the sharing of SAR information within the corporate organizational structure of a mutual fund for purposes consistent with Title II of the BSA, as determined by regulation or in guidance.

In its comment letter, the Institute recommended that, to eliminate any ambiguity, the rules of construction specify that a fund is permitted to share SAR information with a service provider to whom it has contractually delegated all or a portion of its SAR responsibility consistent with existing rules and guidance. FinCEN declined to make this change in the Final Rule, but reiterates that nothing in the Final Rule or accompanying guidance supersedes any of FinCEN's previous written guidance or the adopting release for the mutual fund SAR rule. FinCEN further states that it is considering additional guidance on the appropriate use of SARs by agents of financial institutions and that, until such guidance is issued, FinCEN reminds institutions of their ultimate responsibility to protect, through reasonable controls or agreements with agents, the confidentiality of SAR information as prescribed in the Final Rule.

Guidance on Sharing SARs with Affiliates

In addition to the Final Rule, FinCEN issued two guidance documents, one for the securities and futures industries and one for the banking industry ("Guidance Documents"), as well as the Notice, which announces the issuance of the Guidance Documents. In the Guidance Document applicable to the securities and futures industries, FinCEN states that it has concluded that a mutual fund, securities broker-dealer, futures commission merchant, or introducing broker in commodities that has filed a SAR may share the SAR information with an affiliate, provided the affiliate is subject to SAR regulation issued by FinCEN or one of the listed banking regulators. FinCEN also notes that the guidance documents it issued in January and October 2006 continue to be applicable and comport with the SAR regulations.

In the Guidance Documents and the Notice, FinCEN states that it is not consistent with the purposes of Title II of the BSA for an affiliate that has received a SAR from a mutual fund (or other financial institution) to share that SAR information with an affiliate of its own, even if that affiliate is subject to a SAR rule. FinCEN also states that authorizing sharing with affiliates within an institution's corporate organizational structure that are not subject to a SAR requirement would be inconsistent with the purposes of the BSA.

In the Notice FinCEN states that, since the final Guidance Documents allow sharing only with affiliates subject to a SAR rule, it will no longer require that a written confidentiality agreement be in place between sharing affiliates. Instead, the Guidance Documents have been amended to state that an institution, "as part of its internal controls, should have policies and procedures to ensure that its affiliates protect the confidentiality of a SAR."

Advisory Regarding Maintaining Confidentiality

FinCEN also issued an advisory on maintaining the confidentiality of SARs to reinforce and reiterate the requirement to preserve the confidentiality of SAR information. In the advisory, FinCEN stresses that the unauthorized disclosure of SARs could undermine ongoing and future investigations by tipping off suspects, deter financial institutions from filing SARs, and threaten the safety and security of institutions and individuals who file such reports. FinCEN encourages organizations and authorities, both governmental and non-governmental, to be vigilant in ensuring SAR confidentiality is maintained. To that effect, FinCEN states that financial institutions may want to consider including information about an employee's SAR obligations in their ongoing training of employees and consider implementing additional risk-based measures to ensure SAR confidentiality.

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endnotes

[1] The Final Rule is available at http://www.fincen.gov/statutes_regs/guidance/pdf/SAR%20Confidentiality%20final%20rule_11-22-2010.pdf, the Notice of Availability of Final Interpretive Guidance is available at http://www.fincen.gov/statutes_regs/frn/pdf/noticeofavailabilityofguidance.pdf, the guidance documents are available at http://www.fincen.gov/statutes_regs/guidance/html/fin-2010-g005.html and http://www.fincen.gov/statutes_regs/guidance/html/fin-2010-g006.html, and the advisory is available at http://www.fincen.gov/statutes_regs/guidance/html/FIN-2010-A014.html. The Institute submitted a comment letter on the proposed rule, available at <http://www.ici.org/pdf/23516.pdf>.

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