

MEMO# 34026

February 4, 2022

FinCEN Proposes Pilot Program for Sharing SARs with Foreign Affiliates; ICI Member Call Scheduled for February 24 (3:00 pm ET)

[34026]

February 4, 2022

TO: AML Compliance Working Group

Transfer Agent Advisory Committee RE: FinCEN Proposes Pilot Program for Sharing SARs with Foreign Affiliates; ICI Member Call Scheduled for February 24 (3:00 pm ET)

Last week, the Financial Crimes Enforcement Network (FinCEN) issued a notice of proposed rulemaking to establish a limited-duration pilot program permitting certain financial institutions (FIs)—including mutual funds—to share their suspicious activity reports (SARs) with certain foreign affiliates.^[1] Section 6212 of the Anti-Money Laundering Act of 2020 (AML Act) requires establishment of this pilot program and sets forth certain requirements. The proposal specifies the requirements for those FIs wishing to participate in this pilot program.

Comments on the proposal are due to FinCEN by March 28.

On February 24 at 3:00 pm ET, ICI will host a member call to discuss this proposal. If you're interested in joining, please come prepared to discuss any concerns, issues, or questions you have related to the proposal. Below is the information for the call:

Join Zoom Meeting

<https://ici-org.zoom.us/j/97803662160?pwd=MStsb3V3bDdCMElVRaTVUN2NOaW1tdz09>

Meeting ID: 978 0366 2160

Passcode: 727184

One tap mobile

+13017158592,,97803662160#,,,,*727184# US (Washington DC)

+13126266799,,97803662160#,,,,*727184# US (Chicago)

Dial by your location

+1 301 715 8592 US (Washington DC)
+1 312 626 6799 US (Chicago)
+1 646 558 8656 US (New York)
+1 253 215 8782 US (Tacoma)
+1 346 248 7799 US (Houston)
+1 669 900 9128 US (San Jose)

Find your local number: <https://ici-org.zoom.us/j/adk0uWsAj1>

Background

Under the Bank Secrecy Act (BSA) and its implementing regulations, certain FIs, including mutual funds, must report suspicious transactions to FinCEN.^[2] The BSA and its implementing regulations also generally prohibit FIs from disclosing SARs or information revealing the existence of a SAR, subject to certain exceptions. FinCEN has previously issued guidance to mutual funds and other FIs on the sharing of SARs with certain of their affiliates.^[3] The AML Act requires the Secretary of the Treasury to issue rules establishing a pilot program that permits an FI with SAR reporting obligations to share SARs and related information with its foreign branches, subsidiaries, and affiliates for the purpose of combating illicit finance risk, subject to certain statutory requirements.

Description of Proposed Pilot Program

FIs wishing to participate in this information sharing pilot program would be subject to the following requirements, among others:

- Submission of a written application to FinCEN, providing specified information (e.g., the foreign branches, subsidiaries, and affiliates with which the FI intends to share SARs, and descriptions of internal controls in place to prevent unauthorized disclosures of SARs).
- Implementation of internal controls reasonably designed to ensure that the FI's foreign affiliates do not permit unauthorized disclosures of SARs and related information shared pursuant to the pilot program, with certain specified elements.
- FinCEN approval of the application (as a condition of approval, FinCEN may impose additional requirements, and FinCEN may terminate an applicant's participation in its sole discretion).
- Quarterly reporting to FinCEN thereafter (with reports including, among other things, (i) the total number of SARs and related information shared, and (ii) the name and jurisdiction of each foreign affiliate that received SARs and related information, its relationship with the participant FI, and the intended purposes and uses for which the SAR and related information were shared).

Also, under the proposed rule, a participant FI:

- Shall not deviate in any material manner from the controls proposed in its application, or from any additional requirements imposed by FinCEN, except with FinCEN's written approval.
- Shall maintain appropriate personnel located in the US to review requests or demands of a foreign affiliate for SARs and related information.
- Shall immediately notify FinCEN of all requests or demands on it or its foreign affiliates for SARs or related information from foreign law enforcement, foreign regulators, or any other outside foreign party.

- Must immediately notify FinCEN upon learning of or discovering any unauthorized disclosures of SARs or related information.
- Shall maintain records sufficient to identify the specific foreign jurisdictions in which affiliates of the FI are located and that received any specific SAR or related information.
- Shall not share SARs or related information with a foreign affiliate located in certain specified countries or jurisdictions (e.g., the People's Republic of China and the Russian Federation).
- Shall subject information related to a report received by it from a foreign affiliate with respect to a suspicious transaction to the same confidentiality requirements.
- Shall not establish or maintain any operation located outside of the US the primary purpose of which is to ensure compliance with the BSA as a result of this pilot program.

Except as otherwise authorized, no participant FI, director, officer, employee, or agent of or for a participant FI, and no foreign affiliate of a participant FI, shall disclose to any person any SAR or related information shared pursuant to the pilot program. Civil money penalties and criminal sanctions may be imposed on any foreign affiliate for violating this disclosure prohibition.

The pilot program must terminate three years after the date of the AML Act's enactment (i.e., January 1, 2024), unless the Secretary extends the pilot for not more than two years upon submitting a report to Congress. And not later than 360 days after the pilot program rules are promulgated, and annually thereafter for three years, the Secretary, or the Secretary's designee, must brief Congress on the operation of the pilot program.

Matthew Thornton
Associate General Counsel

Joanne Kane
Senior Director, Operations & Transfer Agency

Eden Nebel
Legal Intern

endnotes

[1] Pilot Program on Sharing of Suspicious Activity Reports and Related Information With Foreign Branches, Subsidiaries, and Affiliates, FinCEN, 87 Fed. Reg. 3719 (Jan. 25, 2022), available at www.govinfo.gov/content/pkg/FR-2022-01-25/pdf/2022-01331.pdf.

[2] An FI must file a SAR if it knows, suspects, or has reason to suspect that a transaction conducted or attempted by, at, or through the FI: (i) involves funds derived from illegal activity or is an attempt to disguise funds derived from illegal activity; (ii) is designed to evade regulations promulgated under the BSA; or (iii) lacks a business or apparent lawful purpose or is not the sort in which the particular customer would normally engage and the FI knows of no reasonable explanation for the transaction.

[3] See, e.g., FinCEN, FIN-2006-G013, Frequently Asked Questions Suspicious Activity

Reporting Requirements for Mutual Funds, (Oct. 4, 2006), available at www.fincen.gov/resources/statutes-regulations/guidance/frequently-asked-questions-suspicious-activity-reporting; and FinCEN, FIN-2010-G005, Sharing Suspicious Activity Reports by Securities Broker-Dealers, Mutual Funds, Futures Commission Merchants, and Introducing Brokers in Commodities with Certain U.S. Affiliates, (Nov. 23, 2010), available at www.fincen.gov/resources/statutes-regulations/guidance/sharing-suspicious-activity-reports-securities-broker.

Copyright © by the Investment Company Institute. All rights reserved. Information may be abridged and therefore incomplete. Communications from the Institute do not constitute, and should not be considered a substitute for, legal advice.