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FinCEN Publishes a Final Rule and Interpretive Guidance Clarifying the Scope of SARs Confidentiality Provisions

As part of the ongoing effort to increase efficiency and effectiveness of its anti-money laundering (AML) policies, on December 3, 2010, the Treasury Department's Financial Crimes Enforcement Network (FinCEN) published a Final Rule clarifying prohibitions against the disclosure of suspicious activity reports (SARs) and an Interpretive Guidance (Guidance) clarifying sharing of SARs by certain financial institutions with their affiliates. The Final Rule and Guidance, both to be effective on January 3, 2011, clarify and solidify amendments to the SARs disclosure provisions proposed by FinCEN in a number of publications on March 9, 2009.

FINAL RULE

The Final Rule amends the regulations that implement the Bank Secrecy Act (BSA) to (1) clarify the scope of the statutory prohibition against the disclosure by a financial institution of a SAR; (2) address the statutory prohibition against the disclosure by the government of a SAR; (3) clarify that the exclusive standard applicable to the disclosure of a SAR by the government is to fulfill official duties consistent with the purposes of the BSA; (4) modify the limits on liability/safe harbor provisions; and (5) make minor technical revisions for consistency and harmonization among the different SAR rules.

SARs Confidentiality Requirements for Financial Institutions

The Final Rule clarifies that confidential treatment must be afforded not only to SARs but also to "information that would reveal the existence of SAR." With respect to information that would reveal the existence of a SAR, the Final Rule explains that any document or other information that indicates that a SAR has been filed (or that a SAR has not been filed) constitutes information that would reveal the existence of a SAR and must be kept confidential.

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Rules of Construction

The Final Rule includes three rules of construction that clarify the scope of the SAR disclosure prohibitions, implement statutory modifications to the BSA made by the USA PATRIOT Act, and describe situations that are not covered by the prohibitions. The rules of construction apply provided that no person involved in any reported suspicious transaction is notified that the transaction has been reported. For most industries, the three rules of construction are:

1. A financial institution, or any director, officer, employee, or agent of a financial institution may disclose a SAR, or information that would reveal the existence of a SAR, to FinCEN or any Federal, State, or local law enforcement agency or any Federal or State regulatory authority that examines the financial institution for compliance with the BSA, including disclosures to self-regulatory organizations, tribal regulatory authorities, and civil enforcement authorities.
2. A financial institution, or any director, officer, employee, or agent of a financial institution may disclose the underlying facts, transactions, and documents upon which a SAR is based, including but not limited to, disclosures to another financial institution, or any director, officer, employee, or agent of a financial institution, for the preparation of a joint SAR.
3. The sharing by a financial institution, or any director, officer, employee, or agent of the financial institution, of a SAR, or any information that would reveal the existence of a SAR, is permitted within the financial institution's corporate organizational structure for purposes consistent with Title II of the Bank Secrecy Act, as determined by regulation or in guidance.

SAR Disclosures by the Government

The Final Rule permits disclosures of SARs and SAR-related information by financial institutions to FinCEN, law enforcement, and to the financial institution's supervisory or examining authority. The Final Rule, however, limits the ability of the federal, state, local, territorial or tribal government authorities to disclose SARs to third parties except as necessary to fulfill "official duties" consistent with Title II of the Bank Secrecy Act. "Official duties" cover disclosures that are (1) responsive to a grand jury subpoena; (2) responsive to a request from an appropriate Federal or State law enforcement or regulatory agency; (3) responsive to a request from an appropriate Congressional committee or subcommittees; and (4) prosecutorial disclosures mandated by statute or the Constitution, in connection with the statement of a government witness to be called at trial, the impeachment of a government witness, or as material exculpatory of a criminal defendant.

Limits on Liability/Safe Harbor Provision

The Final Rule clarifies that a financial institution, and any director, officer, employee, or agent of a financial institution, that makes (1) a voluntary disclosure of any possible violation of law or regulation to a government agency; (2) a disclosure of a SAR; or (3) another type of a voluntary or required disclosure,



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including a disclosure made jointly with another institution, shall be protected from liability to any person for any such disclosure, or for failure to provide notice of such disclosure to any person identified in the disclosure, or both.

Compliance

In the Final Rule FinCEN streamlined the compliance provision by providing that (1) FinCEN or its delegates may examine a financial institution's compliance with SAR requirements; (2) a failure to satisfy the requirements of the SAR rule may constitute a violation of the BSA or its implementing regulations; and (3) for depository institutions with parallel Title 12 SAR requirements, the failure to comply with FinCEN's SAR requirement may also constitute a violation of the parallel Title 12 rules.

GUIDANCE

The Guidance explains that banks, depository institutions, securities broker-dealers, mutual funds, futures commission merchants, and introducing brokers in commodities are permitted under the Final Rule to share SAR information or any information that would reveal the existence of a SAR with certain affiliates. The term "affiliate" is generally defined as "any company that controls, is controlled by, or is under common control with another company."

Specifically, affiliates with whom aforementioned financial institutions are permitted to share SARs and SAR-related information must themselves be subject to SAR filing requirements. The Guidance further indicates that as part of its internal controls, a financial institution should have policies and procedures to ensure that its affiliates protect the confidentiality of a SAR and of any information that would reveal the existence of a SAR. An affiliate of a financial institution that receives a SAR or SAR-related information may not, however, further share that information with its affiliates. This prohibition also applies to foreign affiliates of financial institutions.

The Final Rule in its entirety may be found at:

http://www.fincen.gov/statutes_regs/guidance/pdf/SAR%20Confidentiality%20final%20rule_11-22-2010.pdf.

The Guidance in its entirety may be found at:

http://www.fincen.gov/statutes_regs/frn/pdf/noticeofavailabilityofguidance.pdf

If you have any questions about the Final Rule or the Guidance, please contact Jeffrey M. Telep at +1 202 626 2390 or Jane Cohen at +1 202 661 7842.

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