

Disclosure of Suspicious Activity Reports: Who Can Disclose It and Where Can It Go?

by

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The Bank Secrecy Act of 1970 (the “BSA”)² empowers the Secretary of the Treasury (the “Secretary”) to “require any financial institution, and any director, officer, employee, or agent of any financial institution, to report any suspicious transaction relevant to a possible violation of law or regulation.”³ Under this authority, the Secretary installed a new reporting system that required financial institutions, and certain individuals related to those institutions (such individuals and financial institutions collectively referred to herein as “financial institutions”), to file Suspicious Activity Reports (“SARs”) with the Financial Crimes Enforcement Network (“FinCEN”).⁴ This SAR reporting system provided the government with a valuable pipeline of information concerning dubious financial conduct.⁵ Since the inception of the reporting system, these SARs and the wealth of information they represent have been a critical tool in the government’s efforts against financial crimes.⁶

General Prohibition on Disclosure

Important to the usefulness of the reporting system is the general prohibition on disclosure imposed upon financial institutions. These entities are barred from disclosing SARs, or information related to the existence of SARs, to “any person involved in the transaction”

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² 31 U.S.C. § 5311, *et seq.* (2000).

³ 31 U.S.C. § 5318(g).

⁴ *See* FINANCIAL CRIMES ENFORCEMENT NETWORK, 1ST REVIEW OF THE SUSPICIOUS ACTIVITY REPORTING SYSTEM (SARS) (1998) (stating that the requirement to file SARs is by the Secretary’s authority under the BSA), *available at* <http://www.fincen.gov/sarptfin.html>; *see generally*, 31 C.F.R. § 103 (containing various regulations enacted by the Department of the Treasury (the “Treasury Department”) requiring the filing of SARs with FinCEN). FinCEN is a bureau of the Treasury Department. There are different implementing regulations for different types of financial institutions. For example, 31 C.F.R. § 103.18 concerns banks while 31 C.F.R. § 103.16 concerns insurance companies. While there are differences between these implementing regulations, these regulations are substantively the same for the purposes discussed in this article.

⁵ *See, e.g.*, FINANCIAL CRIMES ENFORCEMENT NETWORK, ISSUE 3, THE SAR ACTIVITY REVIEW: TRENDS, TIPS & ISSUES 37 (2001) (discussing the value of SARs to law enforcement), *available at* <http://www.fincen.gov/sarreviewissue3.pdf>.

⁶ *Id.*

reported upon in the SARs.⁷ FinCEN guidance explains that “[t]his prohibition effectively precludes the disclosure of a SAR or the fact that a SAR has been filed” to anyone, but the prohibition does not prevent the disclosure of the information underlying the SAR so long as the secrecy of the SAR’s existence is in no way implicated.⁸

The law makes an unauthorized disclosure of SARs or certain related information a criminal violation.⁹ In the context of litigation, the federal banking agencies and FinCEN advise financial institutions not to admit or deny the existence of a SAR and not to disclose a SAR in response to any discovery request or subpoena.¹⁰ In cases where a third party is persistent, the banking agencies or the U.S. Attorney may intervene to protect the interests of the United States and urge the court to deny all discovery requests for SARs.¹¹ Interesting issues arise when the disclosure of a SAR is a fundamental aspect of the case. For example, may a party in a lawsuit state that an institution has filed a SAR, if that is relevant to its case, without violating the non-disclosure provisions of the law?

There are, however, limited circumstances when financial institutions are required or permitted to disclose such information. One such exception, among others, to this general prohibition is disclosure to an appropriate law enforcement agency or an appropriate supervisory agency.¹² These government agencies may request SARs directly or in the form of certain

⁷ 31 U.S.C. § 5318(g)(2)(A).

⁸ FINANCIAL CRIMES ENFORCEMENT NETWORK, THE SAR ACTIVITY REVIEW: TRENDS, TIPS & ISSUES 28 (2000), available at <http://www.fincen.gov/sarreviewforweb.pdf>.

⁹ See 31 U.S.C. § 5322.

¹⁰ See 31 U.S.C. § 5318(g); FINANCIAL CRIMES ENFORCEMENT NETWORK, ISSUE 9, THE SAR ACTIVITY REVIEW: TRENDS, TIPS & ISSUES 45 (2005), available at <http://www.fincen.gov/sarreviewissue9.pdf>; FINANCIAL CRIMES ENFORCEMENT NETWORK, ISSUE 7, THE SAR ACTIVITY REVIEW: TRENDS, TIPS & ISSUES 51-52 (2004), available at <http://www.fincen.gov/sarreviewissue7.pdf>; 12 C.F.R. § 21.11 (national banks); 12 C.F.R. § 208.62 (state chartered banks belonging to the Federal Reserve System); 12 C.F.R. § 353 (other state chartered banks); 12 C.F.R. § 563.180(d) (federal thrifts and savings associations). “However, institutions should never disobey the order of a court to make disclosure, although they should appeal an adverse order and seek a stay when possible.” FINANCIAL CRIMES ENFORCEMENT NETWORK, ISSUE 4, THE SAR ACTIVITY REVIEW: TRENDS, TIPS & ISSUES 50 (2002), available at <http://www.fincen.gov/sarreview082002.pdf>.

¹¹ See FINANCIAL CRIMES ENFORCEMENT NETWORK, THE SAR ACTIVITY REVIEW: TRENDS, TIPS & ISSUES 28 (2000) (discussing the potential for government intervention), available at <http://www.fincen.gov/sarreviewforweb.pdf>.

¹² See, e.g., 31 C.F.R. § 103.18(e). The implementing regulations in 31 C.F.R. § 103 for the various types of financial institutions are split between their use of supervisory or regulatory in reference to appropriate agencies for disclosure. Some regulations except only law enforcement and supervisory agencies while other regulations except only law enforcement and regulatory agencies. For purposes of this article, references to supervisory agencies include both supervisory and regulatory agencies.

instruments of law enforcement like grand jury subpoenas or National Security Letters.¹³ Additionally, financial institutions may provide SARs or related information to appropriate law enforcement and supervisory agencies on their own initiative, even when no agency has requested such information.¹⁴

Requirement to Determine Appropriate Agencies

Upon receiving a request for information related to SARs from government agencies, financial institutions are posed with the task of determining whether the particular requestor is an “appropriate” law enforcement or supervisory agency, a question that can be a bit difficult at times. FinCEN guidance indicates that financial institutions that have received a request are required to disclose to appropriate law enforcement and supervisory agencies the backup that supports the SAR.¹⁵ Even in the absence of any requests for information, financial institutions are allowed and encouraged to “share a Suspicious Activity Report, or the information contained therein, with” these appropriate agencies.¹⁶ FinCEN warns financial institutions to be cautious in determining whether a request is coming from an appropriate entity.¹⁷ Hence, this interplay between the general rule of non-disclosure and the requirement for and allowance of disclosure in the case of appropriate law enforcement or supervisory agencies results in financial institutions having to make determinations of whether particular government agencies are appropriate recipients of SAR information.

Appropriate Law Enforcement Agencies

¹³ FEDERAL FINANCIAL INSTITUTIONS EXAMINATION COUNCIL, BANK SECRECY ACT ANTI-MONEY LAUNDERING EXAMINATION MANUAL, available at http://www.occ.treas.gov/bsa/pages_manual/OLM_015.htm.

¹⁴ See FINANCIAL CRIMES ENFORCEMENT NETWORK, ISSUE 9, THE SAR ACTIVITY REVIEW: TRENDS, TIPS & ISSUES 44-45 (2005), available at <http://www.fincen.gov/sarreviewissue9.pdf>. Additionally, FinCEN guidance requires that financial institutions “immediately notify, by telephone,” appropriate law enforcement and supervisory agencies when reportable SARs activity calls for immediate attention. FINANCIAL CRIMES ENFORCEMENT NETWORK, ISSUE 6, THE SAR ACTIVITY REVIEW: TRENDS, TIPS & ISSUES 57 (2003), available at <http://www.fincen.gov/sarreviewissue6.pdf>. Even when financial institutions desire to disclose information to entities other than appropriate law enforcement and supervisory agencies, they may disclose certain information despite the general prohibition on disclosure of SARs so long as the information disclosed in no way implicates the existence of the SAR itself. FINANCIAL CRIMES ENFORCEMENT NETWORK, THE SAR ACTIVITY REVIEW: TRENDS, TIPS & ISSUES 28 (2000), available at <http://www.fincen.gov/sarreviewforweb.pdf>.

¹⁵ See FINANCIAL CRIMES ENFORCEMENT NETWORK, ISSUE 9, THE SAR ACTIVITY REVIEW: TRENDS, TIPS & ISSUES 44-45 (2005), available at <http://www.fincen.gov/sarreviewissue9.pdf>.

¹⁶ *Id.* The OTS regulation on sharing with non-federal law enforcement states, for example: “A savings association or service corporation is encouraged to file a copy of the SAR with state and local law enforcement agencies where appropriate.” 12 C.F.R. § 563.180(d)(6).

¹⁷ FINANCIAL CRIMES ENFORCEMENT NETWORK, ISSUE 9, THE SAR ACTIVITY REVIEW: TRENDS, TIPS & ISSUES 43-44 (2005), available at <http://www.fincen.gov/sarreviewissue9.pdf>.

As noted above, financial institutions must/may disclose some information concerning SARs to appropriate law enforcement agencies, including appropriate state and local law enforcement agencies. But this exception to the prohibition on disclosure does not extend to non-law enforcement entities. FinCEN guidance indicates that “an appropriate law enforcement agency” is any agency that has jurisdiction under federal or state law to investigate or prosecute any person or entity involved in the transaction reported on the Suspicious Activity Report.”¹⁸ For example, financial institutions faced with requests for SARs from a state attorney general’s office and a state election commission, both with the typical powers and authority associated with those agencies, would normally consider the former a law enforcement agency, but would need to engage in a more detailed analysis to determine whether that agency is an appropriate one (*i.e.* has jurisdiction to investigate or prosecute persons or entities involved in the SAR transaction). According to FinCEN, appropriate law enforcement agencies include, among others, the FBI, ATF, state AG’s office or district attorney’s office, the IRS or state tax enforcement agencies, or a U.S. Attorney’s Office.¹⁹

Notably, FinCEN’s guidance quoted above includes within its definition of appropriate law enforcement agencies any agency that under federal or state law has the authority to “investigate or prosecute” persons involved in the transaction described in the SAR. This could include a wide swath of state and local agencies. If the definition was limited to prosecutorial authorities, than appropriate law enforcement agencies would be restricted to authorities with the power to seek criminal penalties. However, the inclusion of authorities that “investigate” violations of law allows for a much larger range of entities that might qualify as an appropriate authority for purposes of SAR disclosures. Such determinations of whether a particular government agency has the authority to investigate violations of law, thereby qualifying as an appropriate law enforcement agency, are not always clear-cut. The determination may depend upon considerations such as the language of the law that created the agency, the purpose of the agency, and the powers that the agency is able to exercise.

Appropriate Supervisory Agencies

Whether an entity can properly be considered an appropriate supervisory agency raises its own questions. FinCEN guidance indicates that “[w]hether a supervisory agency is an appropriate requestor generally depends on whether the agency has the authority under federal and state law to examine the financial institution receiving the request for Bank Secrecy Act compliance.”²⁰ In short, this guidance defines appropriate supervisory agencies in terms of examination authority. For depository institutions, for example, such agencies include, as appropriate, the Federal Reserve Board, the Office of the Comptroller of the Currency, the Office

¹⁸ *Id.* at 44.

¹⁹ *Id.*

²⁰ *Id.* at 45.

of Thrift Supervision, the Federal Deposit Insurance Corporation and the National Credit Union Administration.²¹

But other FinCEN guidance introduces a different consideration in the determination of whether a government agency is an appropriate regulatory agency.²² FinCEN guidance for casinos state that “a separate state, local or tribal suspicious activity reporting obligation, or an obligation to provide [SAR] information to state, local or tribal regulators” would also allow the disclosure of SARs or related information to those regulators.²³ This guidance allows for disclosure upon a state legal obligation to disclose, which may not necessarily coincide with authority to examine. Presumably, this allowance for disclosure due to legal obligations holds true for all financial institutions, not just casinos, and holds true for all legal obligations, not just state law obligations. Additionally, the above FinCEN guidance concerning examination authority states a general, not a bright line rule. Hence, financial institutions, in determining whether a government agency is an appropriate supervisory agency, would be prudent to investigate further. A financial institution’s reliance upon its knowledge of which agencies have examination authority over it may lead to an incorrect determination. Instead, financial institutions, in determining whether a government agency is an appropriate supervisory agency, should be willing to consider other relevant characteristics of that government agency.

Conclusion

SARs are an important component of the BSA and are an important tool in the government’s efforts to combat financial crimes. Unauthorized disclosure of SARs related information could result in a financial institution facing questions of criminal liability. Disclosures to appropriate law enforcement and supervisory agencies are one exception, among others, to the general prohibition against disclosure faced by financial institutions. The answers to these determinations are sometimes less than obvious and may require careful consideration. FinCEN guidance indicates that the agency will, however, provide assistance to financial institutions with this determination. FinCEN encourages financial institutions to call its Regulatory Helpline if they have questions concerning whether a particular agency is an appropriate requestor.²⁴

²¹ See FINANCIAL CRIMES ENFORCEMENT NETWORK, 1ST REVIEW OF THE SUSPICIOUS ACTIVITY REPORTING SYSTEM (SARS) (1998), available at <http://www.fincen.gov/sarptfin.html>.

²² See FINANCIAL CRIMES ENFORCEMENT NETWORK, Suspicious Activity Reporting Guidance for Casinos 15 (2003), available at <http://www.fincen.gov/casinosarguidancefinal1203.pdf>.

²³ *Id.*

²⁴ FINANCIAL CRIMES ENFORCEMENT NETWORK, ISSUE 9, THE SAR ACTIVITY REVIEW: TRENDS, TIPS & ISSUES 44 (2005), available at <http://www.fincen.gov/sarreviewissue9.pdf>.