sharing of a SAR or, more broadly, any information that would reveal the existence of a SAR, with a head office or controlling company (including overseas) promotes compliance with the applicable requirements of the BSA by enabling the head office or controlling company to discharge its oversight responsibilities with respect to enterprise-wide risk management, including oversight of a depository institution's compliance with applicable laws and regulations.

The January 2006 Guidance deferred taking a position on whether a depository institution is permitted to share a SAR with affiliates and directed institutions not to share with such affiliates. FinCEN has now concluded that a depository institution that has filed a SAR may share the SAR, or any information that would reveal the existence of the SAR, with an affiliate, as defined herein, provided the affiliate is subject to a SAR regulation.[7] The sharing of SARs with such affiliates facilitates the identification of suspicious transactions taking place through the depository institution's affiliates that are subject to a SAR rule. Therefore, such sharing within the depository institution's corporate organizational structure is consistent with the purposes of Title II of the BSA.[8]

It is not consistent with the purposes of Title II of the BSA for an affiliate that has received a SAR from a depository institution that has filed the SAR to further share that SAR, or any information that would reveal the existence of that SAR with an affiliate of its own, even if that affiliate is subject to a SAR rule.

As is the case with sharing SARs with head offices and controlling companies, there may be circumstances under which a depository institution, its affiliate, or both entities would be liable for direct or indirect disclosure by the affiliate of a SAR or any information that would reveal the existence of a SAR. Therefore, the depository institution, as part of its internal controls, should have written confidentiality agreements in place ensuring that its affiliates protect the confidentiality of the SAR through appropriate internal controls.

[7] *See* 31 CFR 103.15 to 103.21. *See also,* 12 CFR 208.62 (FRB); 12 CFR 353.3 (FDIC); 12 CFR 748.1 (NCUA); 12 CFR 21.11 (OCC); and 12 CFR 563.180 (OTS).

[8] Because foreign branches of U.S. banks are regarded as foreign banks for purposes of the BSA, under this guidance, they are ''affiliates'' that are not subject to a SAR regulation. Accordingly, a U.S. bank that has filed a SAR may not share the SAR, or any information that would reveal the existence of the SAR, with its foreign branches.

Consistent with the BSA and the implementing regulations issued by FinCEN and the Federal Banking Agencies, a SAR, or any information that would reveal the existence of a SAR, must not be disclosed, even under this guidance, if the depository institution has reason to believe it may be disclosed to any person involved in the suspicious activity that is the subject of the SAR.

Dated: February 27, 2009.

James H. Freis, Jr.,

Director, Financial Crimes Enforcement Network.

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DEPARTMENT OF THE TREASURY

31 CFR Part 103

[Docket Number: TREAS–FinCen–2008–0022]

Interpretive Guidance—Sharing Suspicious Activity Reports by Securities Broker-Dealers, Mutual Funds, Futures Commission Merchants, and Introducing Brokers in Commodities With Certain U.S. Affiliates

AGENCY: Financial Crimes Enforcement Network, Department of the Treasury.

ACTION: Proposed guidance.

SUMMARY: The Financial Crimes Enforcement Network (''FinCEN'') of the Department of the Treasury, after consulting with staffs of the U.S. Securities and Exchange Commission (''SEC'') and the Commodity Futures Trading Commission (''CFTC''), is issuing for comment this proposed interpretive guidance. Published elsewhere in this part of the **Federal Register** are proposed rules clarifying the scope of the statutory prohibition on the disclosure by a financial institution of a report of a suspicious transaction set forth in the Bank Secrecy Act (''BSA''). The proposed rules include a provision which states that the prohibition does not apply when a securities broker-dealer, mutual fund, futures commission merchant, or introducing broker in commodities shares a suspicious activity report (''SAR''), or any information that would reveal the existence of a SAR, within its corporate organizational structure for purposes consistent with Title II of the BSA, as determined by regulation or guidance. The proposed guidance interprets this provision to permit a securities broker-dealer, mutual fund, futures commission merchant, or introducing broker in commodities to share a SAR with its affiliates that are also subject to SAR rules.

DATES: Written comments on the proposed guidance may be submitted on or before June 8, 2009.

ADDRESSES: You may submit comments, identified by docket number TREAS–FinCen–2008–0022,[1] by any of the following methods:

- *Federal e-rulemaking portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *E-mail: regcomments@fincen.treas.gov.* Include docket number TREAS–FinCen–2008–0022 in the subject line of the message.
- *Mail:* FinCEN, P.O. Box 39, Vienna, VA 22183. Include docket number TREAS–FinCen–2008–0022 in the body of the text.

FOR FURTHER INFORMATION CONTACT: Regulatory Policy and Programs Division, FinCEN, (800) 949–2732.

SUPPLEMENTARY INFORMATION:

I. Background

FinCEN, through its authority under the BSA as delegated by the Secretary of the Treasury, may require financial institutions to keep records and file reports that FinCEN determines have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings, or for intelligence or counterintelligence activities to protect against international terrorism. Within this framework, FinCEN may require financial institutions to file SARs and has issued rules implementing that specific authority with respect to certain types of financial institutions.[2]

Sharing Within the Corporate Organizational Structure

In January 2006, FinCEN, after consulting with the staffs of the Securities Exchange Commission (''SEC'') and the Commodity Futures Trading Commission (''CFTC''), determined that, subject to certain exceptions or qualifications, a securities broker-dealer, futures commission merchant, or introducing broker in commodities may share a SAR with its parent entities, both domestic and foreign.[3] Moreover, guidance issued by

[1] This single docket number is shared by three related documents (a notice of proposed rulemaking, and this and another piece of proposed guidance related to that notice of proposed rulemaking) published simultaneously by FinCEN in today's **Federal Register**. Accordingly, commenters may submit comments related to any of the proposals, or any combination of proposals, in a single comment letter.

[2] *See* 31 CFR 103.15 to 103.21.

[3] ''Guidance on Sharing of Suspicious Activity Reports by Securities Broker-Dealers, Futures

Continued

FinCEN in consultation with the SEC in October 2006 stated that a U.S. mutual fund may share a SAR with the investment adviser that controls the fund, whether domestic or foreign, so that the investment adviser could implement enterprise-wide risk management and compliance functions over all of the mutual funds that it controls[4] and improve its identification and reporting of suspicious activity.[5] FinCEN also issued joint guidance with the Board of Governors of the Federal Reserve System (''FRB''), the Federal Deposit Insurance Corporation (''FDIC''), the Office of the Comptroller of the Currency (''OCC''), and the Office of Thrift Supervision (''OTS''), concluding that, subject to certain exceptions or qualifications, a U.S. branch or agency of a foreign bank may share a SAR with its head office outside the United States, and a U.S. bank or savings association may disclose a SAR to its controlling company, no matter where the entity or party is located.[6] Nothing in the proposed guidance for sharing with affiliates supersedes any of the guidance mentioned in the preceding paragraph, or the adopting release for the mutual fund SAR rule.[7]

These guidance documents reflected a recognition by FinCEN, the FDIC, the FRB, the OCC, the OTS, the SEC, and the CFTC (referred to collectively in the proposed guidance as the ''Federal regulators'') that a head office, controlling entity or party, or parent entity of a depository institution, broker-dealer, mutual fund, futures commission merchant, and introducing broker in commodities, has oversight responsibilities with respect to enterprise-wide risk management. These responsibilities include a valid need to review compliance by U.S.-based depository institutions, broker-dealers, mutual funds, futures commission merchants, and introducing brokers with legal requirements to identify and report suspicious activity.

The guidance documents regarding the sharing of SARs with head offices, controlling companies or parties, and parent entities (referred to here as the ''2006 Guidance'') expressly noted that the sharing of a SAR with a non-U.S. entity raises concerns about the ability of the foreign entity to protect the SAR in light of possible requests for disclosure abroad that may be subject to foreign law. The 2006 Guidance also provides that the recipient may not disclose further any SAR, or the fact that such a report has been filed; however, the recipient may disclose without permission underlying information. The 2006 Guidance also stated that FinCEN and the other Federal regulators were considering whether a financial institution may share a SAR with other entities within the financial institution's corporate organization located inside the United States and those located abroad, and instructed financial institutions not to share SARs with such entities until further guidance was issued.

Proposed Regulatory Changes

In proposed regulations issued today, FinCEN is proposing to revise the regulations implementing the BSA regarding the confidentiality of a SAR to clarify, among other things, the scope of the statutory prohibition against the disclosure by a financial institution of a SAR. These rules include a provision clarifying that the statutory prohibition does not apply to sharing by a securities broker-dealer, mutual fund, futures commission merchant, or introducing broker in commodities, or any director, officer, employee, or agent thereof, of a SAR, or any information that would reveal the existence of a SAR, within the corporate organizational structure of a securities broker-dealer, mutual fund, futures commission merchant, or introducing broker in commodities for purposes consistent with Title II of the BSA, as determined by regulation or in guidance, provided that no person involved in any reported suspicious transaction is notified that the transaction has been reported.

II. Proposed Guidance

This proposed guidance interprets the general statement in the proposed SAR confidentiality rules[8] that a securities broker-dealer, mutual fund, futures commission merchant, or introducing broker in commodities, or any director, officer, employee, or agent thereof, may share a SAR, or information that reveals the existence of a SAR, within its corporate organizational structure for purposes consistent with Title II of the BSA. First, the proposed guidance acknowledges that the 2006 Guidance regarding securities broker-dealers, mutual funds, futures commission merchants, and introducing brokers in commodities continues to be applicable. It explains that sharing of a SAR or information that reveals the existence of a SAR by a securities broker-dealer, mutual fund, futures commission merchant, or introducing broker in commodities with its head office or its controlling company, whether domestic or foreign, promotes compliance with the BSA by enabling the head office or controlling company to discharge its oversight responsibilities with respect to enterprise-wide risk management, including oversight of the securities broker-dealer's, mutual fund's, futures commission merchant's, and introducing broker in commodities' compliance with applicable laws and regulations.

Next, the guidance explains that FinCEN also has concluded that the proposed regulations may be interpreted to permit a securities broker-dealer, mutual fund, futures commission merchant, and introducing broker in commodities that has filed a SAR to share the SAR, or any information that would reveal the existence of the SAR, with an affiliate[9] that is subject to a SAR regulation.[10]

FinCEN has concluded that such sharing within a corporate organization is consistent with two important purposes of the BSA: promoting efforts to detect and report money laundering and terrorist financing by financial institutions that are subject to the BSA,

Commission Merchants, and Introducing Brokers in Commodities'' (January 20, 2006).

[4] ''Control'' for the purposes of the October 2006 Guidance is defined in section 2(a)(9) of the Investment Company Act of 1940 (15 U.S.C. 80a–2(a)(9)) to mean ''the power to exercise a controlling influence over the management or policies of a company, unless such power is solely the result of an official position with such company.'' A mutual fund typically is organized and operated by an investment adviser that controls the fund. By contrast, an investment adviser that performs limited functions in managing a mutual fund's securities portfolio (also known as a ''subadviser'') would not typically control the fund and therefore would be outside the scope of the guidance.

[5] FIN–2006–G013, ''Frequently Asked Questions: Suspicious Activity Reporting Requirements for Mutual Funds'' (October 4, 2006).

[6] ''Interagency Guidance on Sharing Suspicious Activity Reports with Head Offices and Controlling Companies'' (January 20, 2006).

[7] Specifically, we note that in both the mutual fund SAR rule adopting release (71 FR 26213) and the October 2006 guidance, FinCEN acknowledged the role of transfer agents and other service providers in the suspicious activity monitoring, detection, and reporting obligations of mutual funds. These service providers may be unaffiliated or affiliated with the mutual funds. The October 2006 guidance and adopting release clarified that a mutual fund may contractually delegate its SAR functions to such an agent, although the mutual fund remains responsible for assuring compliance with the rule, and therefore must monitor actively the performance of its reporting obligations.

[8] The proposed guidance interprets a provision in the proposed SAR regulations. The final guidance issued will be modified to correspond to any changes made in the final SAR regulations.

[9] For the purposes of this proposed guidance, an ''affiliate'' is effectively defined as a company under common control with, or a subsidiary of, the securities broker-dealer, mutual fund, futures commission merchant, or introducing broker in commodities. ''Affiliate'' does not include holding companies because sharing with these entities is already addressed in the 2006 Guidance.

[10] *See* 31 CFR 103.15 to 103.21. *See also,* 12 CFR 208.62 (FRB); 12 CFR 353.3 (FDIC); 12 CFR 748.1 (NCUA); 12 CFR 21.11 (OCC); and 12 CFR 563.180 (OTS).

and ensuring the confidentiality of a SAR or any information that would reveal the existence of a SAR. The sharing by a securities broker-dealer, mutual fund, futures commission merchant, or introducing broker in commodities of a SAR, or any information that would reveal the existence of a SAR, can facilitate the identification of suspicious transactions taking place through the securities broker-dealer's, mutual fund's, futures commission merchant's, or introducing broker in commodities' affiliates that are also subject to SAR reporting requirements. Although the sharing of information underlying the filing of a SAR has never been prohibited under the BSA, it is understood that the sharing of a SAR itself pursuant to this proposed guidance may entail greater efficiencies.[11]

Moreover, the proposed SAR confidentiality rules provide that a ''SAR, and any information that would reveal the existence of a SAR, are confidential.'' [12] Accordingly, affiliates subject to a SAR rule are prohibited from disclosing any SAR or information that a SAR was filed, including both SARs they have filed, and any SARs they have received that have been filed by others. In addition, because the guidance applies only to the sharing of a SAR by the securities broker-dealer, mutual fund, futures commission merchant, and introducing broker in commodities ''that has filed'' the SAR, the guidance includes a statement clarifying that it is not permissible for an affiliate that has received such a SAR to share that SAR, or any information that would reveal the existence of that SAR with another affiliate, even if that affiliate is an affiliate subject to a SAR rule. The guidance also states that a broker-dealer in securities, mutual fund, futures commission merchant, and introducing broker in commodities, as part of its internal controls, should have written confidentiality agreements in place ensuring that its affiliates protect the confidentiality of the SAR through appropriate internal controls. Given the above restrictions, FinCEN is satisfied that the sharing permitted by this guidance is consistent with the BSA objective to ensure that suspicious activity reporting remains confidential.

FinCEN has declined to permit sharing with affiliates that are not subject to a SAR rule, whether domestic or foreign.[13] At this time, it is not apparent that such sharing would be consistent with the purposes of the BSA, to promote efforts to detect and report money laundering and terrorist financing by financial institutions that are subject to rules implementing the BSA, and to ensure the confidentiality of a SAR or any information that would reveal the existence of a SAR.

Finally, this proposed guidance is intended only to remove unnecessary obstacles to detecting and reporting suspicious activity. It should not be read to impose new BSA requirements or to suggest that sharing with affiliates is compulsory.

III. Request for Comment

FinCEN invites comments on all aspects of the proposed guidance. FinCEN solicits comment on whether this proposed guidance would achieve the intended effect of promoting compliance with the BSA. We also request comment on whether the proposed guidance will be beneficial, whether it raises any ambiguities, and whether it will result in any negative consequences. In addition, we specifically invite comment on the following:

- Whether the definition of ''affiliate'' is appropriate?
- Whether the scope of the guidance should be expanded to permit sharing with other affiliates *within the United States.* Commenters suggesting that the scope of the guidance be expanded should address how additional sharing would be consistent with the purposes of Title II of the BSA;
- Whether the scope of the guidance clearly limits sharing with affiliates to only those affiliates within the United States based on the application of FinCEN's SAR rules or whether further clarification is needed to ensure that SARs are shared only in a domestic context;
- Whether the scope of the guidance should be expanded to permit sharing with other affiliates *outside of the United States.* Commenters suggesting that the scope of the guidance be expanded should address how additional sharing outside the U.S. would be consistent with the purposes of Title II of the BSA. In particular, commenters should explain how a foreign affiliate might protect a SAR in light of a possible request for disclosure abroad that may be subject to foreign law;
- Whether similar provisions to allow sharing with certain affiliates should be permitted among all financial institutions subject to a SAR rule; and
- Whether financial institutions, other than depository institutions, securities broker-dealers, mutual funds, futures commission merchants, or introducing broker in commodities, subject to a SAR rule should be permitted to share a SAR, or any information that would reveal the existence of a SAR, with parent entities and/or affiliates; and

Whether and how a securities broker-dealer, mutual fund, futures commission merchant, and introducing broker in commodities can store and provide access to SARs in an electronic system in a way that prevents the SARs from being subject to disclosure laws or obligations of foreign jurisdictions.

Proposed Interpretive Guidance [14]

Sharing Suspicious Activity Reports by Securities Broker-Dealers, Mutual Funds, Futures Commission Merchants, and Introducing Brokers in Commodities With Certain U.S. Affiliates [1]

The Financial Crimes Enforcement Network (''FinCEN''), after consulting with staff of the U.S. Securities and Exchange Commission (''SEC'') and the Commodity Futures Trading Commission (''CFTC''), is issuing this guidance to confirm that under the Bank Secrecy Act (''BSA'') and its implementing regulations, securities broker-dealers, mutual funds, futures commission merchants, and introducing brokers in commodities that have filed a Suspicious Activity Report (''SAR'') may share the SAR, or any information that would reveal the existence of the SAR, with certain affiliates. This guidance does not address the applicability of any other Federal or state laws.

[11] For example, the sharing of a SAR eliminates the need to create a separate summary document which, if shared, might inadvertently reveal the existence of a SAR itself.

[12] *See* the Notice of Proposed Rulemaking published elsewhere in today's **Federal Register**.

[13] FinCEN does not intend this guidance to permit the sharing of SARs with affiliates where such sharing would subject the SARs to the laws of a foreign jurisdiction, and elsewhere in this notice seeks specific comment on whether as drafted, the guidance meets that purpose based on present industry practices.

[14] For purposes of the guidance text below, all citations to Title 31 SAR regulations are references to the amended regulations we anticipate promulgating as discussed in the above section, *Proposed Regulatory Changes.*

[1] For purposes of this guidance, ''affiliate'' of a person means any company under common control with, or controlled by, such person. ''Control'' of a company means the power to exercise a controlling influence over the management or policies of a company whether through ownership of securities, by contract, or otherwise. Any person who owns beneficially, either directly or through one or more controlled companies, more than 25 percent of the voting securities of any company is presumed to control the company. Any person who does not own more than 25 percent of the voting securities of any company will be presumed not to control the company.

The BSA prohibits the filer of a SAR from notifying any person involved in a suspicious transaction that the activity has been reported.[2] Regulations issued by FinCEN[3] construe this confidentiality provision as generally prohibiting a securities broker-dealer, mutual fund, futures commission merchant, or introducing broker in commodities from disclosing a SAR, or any information that would reveal the existence of a SAR.

However, the regulations make clear that, provided no person involved in the transaction is notified that the transaction has been reported, the prohibition does not include disclosures to (1) FinCEN; (2) any Federal, State, or local law enforcement agency; (3) any Federal or state regulatory agency that examines the securities broker-dealer, mutual fund, futures commission merchant, or introducing broker in commodities for compliance with the BSA; or (4) a self-regulatory organization for the purpose of examining the filing financial institution for compliance with its SAR reporting requirements. The regulations also provide that the prohibition does not apply to: (i) The disclosure of the underlying facts, transactions, 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 (ii) the sharing of a SAR, or any information that would reveal the existence of a SAR, within the corporate organizational structure of a securities broker-dealer, mutual fund, futures commission merchant, or introducing broker in commodities for purposes consistent with Title II of the BSA, as determined by regulation or in guidance.[4]

In previously issued guidance (''January 2006 Guidance''), FinCEN, in consultation with the staffs of the SEC and the CFTC, determined that a securities broker-dealer, futures commission merchant, or introducing broker in commodities may share a SAR with its parent entity (whether domestic or foreign).[5] In October 2006, FinCEN additionally published guidance stating that a mutual fund may share SARs with an investment adviser that controls the fund, whether domestic or foreign.[6] These guidance documents continue to be applicable and comport with the SAR regulations referenced above.[7] The sharing of a SAR or, more broadly, any information that would reveal the existence of a SAR, with a parent entity or investment adviser that controls a mutual fund (including a foreign parent entity or foreign investment adviser) promotes compliance with the applicable requirements of the BSA by enabling the parent entity or investment adviser that controls a mutual fund to discharge its oversight responsibilities with respect to enterprise-wide risk management and compliance with applicable laws and regulations.

The January 2006 Guidance deferred taking a position on whether a securities broker-dealer, futures commission merchant, or introducing broker in commodities is permitted to share a SAR with affiliates and directed institutions not to share with such affiliates. FinCEN, in consultation with SEC and CFTC staff, has now concluded that a securities broker-dealer, mutual fund, futures commission merchant, or introducing broker in commodities that has filed a SAR may share the SAR, or any information that would reveal the existence of the SAR, with an affiliate, provided the affiliate is subject to a SAR regulation[8] issued by FinCEN, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the National Credit Union Administration, the Office of the Comptroller of the Currency, or the Office of Thrift Supervision. The sharing of SARs with such affiliates facilitates their compliance with the identification of suspicious transactions taking place through the securities broker-dealer's, mutual fund's, futures commission merchant's, or introducing broker in commodities' affiliates that are subject to a SAR rule. Therefore, such sharing within the corporate organizational structure of a securities broker-dealer, mutual fund, futures commission merchant, or introducing broker in commodities is consistent with the purposes of Title II of the BSA.

It is not consistent with the purposes of Title II of the BSA for an affiliate that has received a SAR from a securities broker-dealer, mutual fund, futures commission merchant, or introducing broker in commodities to share that SAR, or any information that would reveal the existence of that SAR with an affiliate of its own, even if that affiliate is subject to a SAR rule.

As is the case with sharing SARs with parent entities, there may be circumstances under which a securities broker-dealer, mutual fund, futures commission merchant, or introducing broker in commodities, its affiliate, or both entities would be liable for direct or indirect disclosure by the affiliate of a SAR or any information that would reveal the existence of a SAR. Therefore, the securities broker-dealer, mutual fund, futures commission merchant, or introducing broker in commodities, as part of its internal controls, should have written confidentiality agreements in place ensuring that its affiliates protect the confidentiality of the SAR through appropriate internal controls.

Consistent with the BSA and the implementing regulations issued by FinCEN, a SAR, or any information that would reveal the existence of a SAR, must not be disclosed, even under this guidance, if the securities broker-dealer, mutual fund, futures commission merchant, or introducing broker in commodities has reason to believe it may be disclosed to any person involved in the suspicious activity that is the subject of the SAR.

Dated: February 27, 2009.

James H. Freis, Jr.,

Director, Financial Crimes Enforcement Network.

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[2] *See* 31 U.S.C. 5318(g)(2).

[3] *See* 31 CFR 103.15(d), 103.17(e), and 103.19(e).

[4] *See* the Notice of Proposed Rulemaking published elsewhere in today's **Federal Register**.

[5] ''Guidance on Sharing of Suspicious Activity Reports by Securities Broker-Dealers, Futures Commission Merchants, and Introducing Brokers in Commodities'' (January 20, 2006).

[6] ''Frequently Asked Questions: Suspicious Activity Reporting Requirements for Mutual Funds'' (October 4, 2006).

[7] *See* supra note 4.

[8] *See* 31 CFR 103.15 to 103.21. *See also,* 12 CFR 21.11 (Office of the Comptroller of the Currency); 12 CFR 208.62, 211.5(k), 211.24(f), 225.4(f) (Board of Governors of the Federal Reserve System); 12 CFR 353.3 (Federal Deposit Insurance Corporation); 12 CFR 563.180 (Office of Thrift Supervision); 12 CFR 748.1(c) (National Credit Union Administration).