

statutory prohibition against the disclosure by financial institutions and by the government of SAR information and clarifies the scope of the safe harbor from liability for institutions that report suspicious activities. Therefore, pursuant to section 605(b) of the RFA, the OCC hereby certifies that this final rule will not have a significant economic impact on a substantial number of small entities. Accordingly, a regulatory flexibility analysis is not needed.

Paperwork Reduction Act

We have reviewed the final rule in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3506; 5 CFR 1320, Appendix A.1) (PRA) and have determined that it does not contain any "collections of information" as defined by the PRA.

Unfunded Mandates Reform Act of 1995

Section 202 of the Unfunded Mandates Reform Act of 1995, Public Law 104-4 (2 U.S.C. 1532) (Unfunded Mandates Act), requires that an agency prepare a budgetary impact statement before promulgating any rule likely to result in a Federal mandate that may result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector of \$100 million or more in any one year. If a budgetary impact statement is required, section 205 of the Unfunded Mandates Act also requires an agency to identify and consider a reasonable number of regulatory alternatives before promulgating a rule.

The OCC has determined that this final rule will not result in expenditures by State, local, and Tribal governments, or by the private sector, of \$100 million or more in any one year. Accordingly, this proposal is not subject to section 202 of the Unfunded Mandates Act.

List of Subjects in 12 CFR Part 21

Crime, Currency, National banks, Reporting and recordkeeping requirements, Security measures.

Authority and Issuance

■ For the reasons set forth in the preamble, part 21 of title 12 of the Code of Federal Regulations is amended as follows:

PART 21—MINIMUM SECURITY DEVICES AND PROCEDURES, REPORTS OF SUSPICIOUS ACTIVITIES, AND BANK SECRECY ACT COMPLIANCE PROGRAM

■ 1. The authority citation for part 21 continues to read as follows:

Authority: 12 U.S.C. 93a, 1818, 1881–1884, and 3401–3422; and 31 U.S.C. 5318.

■ 2. Section 21.11 is amended by revising paragraphs (b)(3), (c) introductory text, (k) and (l) to read as follows:

§ 21.11 Suspicious Activity Report.

* * * * *

(b) * * *

(3) *SAR* means a Suspicious Activity Report.

(c) *SARs required.* A national bank shall file a SAR with the appropriate Federal law enforcement agencies and the Department of the Treasury on the form prescribed by the OCC and in accordance with the form's instructions. The bank shall send the completed SAR to FinCEN in the following circumstances:

* * * * *

(k) *Confidentiality of SARs.* A SAR, and any information that would reveal the existence of a SAR, are confidential, and shall not be disclosed except as authorized in this paragraph (k).

(1) *Prohibition on disclosure by national banks.* (i) *General rule.* No national bank, and no director, officer, employee, or agent of a national bank, shall disclose a SAR or any information that would reveal the existence of a SAR. Any national bank, and any director, officer, employee, or agent of any national bank that is subpoenaed or otherwise requested to disclose a SAR, or any information that would reveal the existence of a SAR, shall decline to produce the SAR or such information, citing this section and 31 U.S.C. 5318(g)(2)(A)(i), and shall notify the following of any such request and the response thereto:

(A) Director, Litigation Division, Office of the Comptroller of the Currency; and

(B) The Financial Crimes Enforcement Network (FinCEN).

(ii) *Rules of construction.* Provided that no person involved in any reported suspicious transaction is notified that the transaction has been reported, this paragraph (k)(1) shall not be construed as prohibiting:

(A) The disclosure by a national bank, or any director, officer, employee or agent of a national bank of:

(1) A SAR, or any information that would reveal the existence of a SAR, to the OCC, FinCEN, or any Federal, State, or local law enforcement agency; or

(2) The underlying facts, transactions, and documents upon which a SAR is based, including, but not limited to, disclosures:

(i) To another financial institution, or any director, officer, employee or agent

of a financial institution, for the preparation of a joint SAR; or

(ii) In connection with certain employment references or termination notices, to the full extent authorized in 31 U.S.C. 5318(g)(2)(B); or

(B) The sharing by a national bank, or any director, officer, employee, or agent of a national bank, of a SAR, or any information that would reveal the existence of a SAR, within the bank's corporate organizational structure for purposes consistent with Title II of the Bank Secrecy Act as determined by regulation or in guidance.

(2) *Prohibition on disclosure by the OCC.* The OCC will not, and no officer, employee or agent of the OCC, shall disclose a SAR, or any information that would reveal the existence of a SAR, except as necessary to fulfill official duties consistent with Title II of the Bank Secrecy Act. For purposes of this section, official duties shall not include the disclosure of a SAR, or any information that would reveal the existence of a SAR, in response to a request for use in a private legal proceeding or in response to a request for disclosure of non-public OCC information under 12 CFR 4.33.

(l) *Limitation on liability.* A national bank and any director, officer, employee or agent of a national bank that makes a voluntary disclosure of any possible violation of law or regulation to a government agency or makes a disclosure pursuant to this section or any other authority, including a disclosure made jointly with another financial 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, to the full extent provided by 31 U.S.C. 5318(g)(3).

Dated: August 16, 2010.

John Walsh,

Acting Comptroller of the Currency.

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DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

12 CFR Part 510

[Docket ID OTS-2010-0016]

RIN 1550-AC28

Standards Governing the Release of a Suspicious Activity Report

AGENCY: Office of Thrift Supervision, Treasury.

ACTION: Final rule.

SUMMARY: The Office of Thrift Supervision (OTS) is revising its regulations governing the release of unpublished OTS information. The primary change clarifies that the OTS's decision to release a Suspicious Activity Report (SAR) is governed by the standards set forth in amendments to the OTS's SAR regulation that are part of a separate, but simultaneous, rulemaking.

DATES: The final rule is effective January 3, 2011.

FOR FURTHER INFORMATION CONTACT: Marvin Shaw, Senior Attorney, Regulations and Legislation (202-906-6639); Dirk Roberts, Deputy Chief Counsel, Litigation (202-906-7631), Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

SUPPLEMENTARY INFORMATION:

I. Introduction

On March 9, 2009, the Office of Thrift Supervision (OTS) issued a notice of proposed rulemaking to revise its regulations governing the release of unpublished OTS information.¹ The proposal was intended to clarify that OTS's decision to release a Suspicious Activity Report (SAR) would be governed by the standards set forth in proposed amendments to OTS's SARs regulation at 12 CFR 563.180, *Suspicious Activity Reports and other reports and statements*, that were part of a separate, but simultaneous rulemaking.

OTS received no comments to the proposed amendments to section 510.5, although the agency did receive comments to the proposed amendments to section 563.180. Those comments are addressed in the part 563 final rule published elsewhere in today's **Federal Register**.

II. Final Rule

A. Overview

OTS is amending its regulations set forth in 12 CFR part 510, governing the release of unpublished OTS information. First, the amendments conform section 510.5 to amendments to the OTS's SAR confidentiality rule, 12 CFR 563.180 that are being adopted as part of a separate, but simultaneous, rulemaking that the OTS is conducting. Under the standards that the OTS is incorporating into section 510.5, the OTS will only release a SAR, or any information that reveals the existence of a SAR (referred to in this preamble as

"SAR information"), when "necessary to fulfill official duties consistent with Title II of the Bank Secrecy Act (BSA)."

The effect of these amendments is that the OTS will not release SAR information in response to a request from a private litigant arising out of a civil lawsuit or administrative proceeding to which the OTS is not a party. The Director also will not disclose SAR information to any other person or entity, and the OTS will not release SAR information in response to a request by another government agency, except to fulfill official duties in light of the purposes of the BSA.

This final rule amends part 510 to make it consistent with the amendments to OTS's SAR regulation that implements section 351 of the USA PATRIOT Act, thus ensuring that the appropriate standard is applied to OTS's disclosure of SAR information. Section 510.5 sets forth OTS's standards and procedures for the release of "unpublished OTS information," and sets forth the restrictions on the dissemination of such information. Generally, "unpublished OTS information" is confidential and privileged information that is the property of the OTS, and that the OTS is not required to release under the Freedom of Information Act (5 U.S.C. 552 *et seq.*) or that the OTS has not yet published or made available pursuant to 12 U.S.C. 1818(u), the statute requiring publication of certain enforcement orders.

Section 510.5 describes procedures for requesting unpublished OTS information from the OTS, such as, where to submit a request, the form of the request, information that must be included in any request involving an adversarial matter, and various bases for the OTS's denial of such a request.² Section 510.5 authorizes the OTS to make unpublished OTS information available to a supervised entity and to other persons, at the sole discretion of the Director or his or her delegate.³ Section 510.5(d)(5) also indicates that the OTS may condition release of information that it discloses under this section.

Although a SAR may be considered "unpublished OTS information," it is the OTS's position that the release of a SAR must be governed by standards set forth in the BSA. The BSA and its implementing regulations require a financial institution to file a SAR when it detects a known or suspected violation of Federal law or a suspicious activity related to money laundering,

terrorist financing, or other criminal activity.⁴ The BSA also provides that a financial institution, and its officers, directors, employees, and agents are prohibited from notifying any person involved in a suspicious transaction that the transaction was reported.⁵ Most importantly, in 2001, section 351 of the USA PATRIOT Act added a new provision to the BSA prohibiting officers or employees of the Federal government or any State, local, tribal, or territorial government within the United States from disclosing to any person⁶ involved in a suspicious transaction that the transaction was reported, other than as necessary to fulfill the official duties of such officer or employee.⁷ Accordingly, it is this provision that now governs the ability of the OTS to disclose SAR information to any person.

The OTS is revisiting the treatment of SAR information in section 510.5 in light of the 2001 amendments to the BSA, added by section 351 of the USA PATRIOT Act that specifically addresses governmental disclosures of SARs. Under the amendments to section 510.5, the OTS will decide whether to release SAR information based upon the standard in the OTS's amendments to its SAR rules, 12 CFR 563.180, implementing section 351, thereby replacing the factors previously set out in section 510.5(d). The standard in the amendments to the OTS's SAR rule provides that "Neither OTS (nor any officer, employee or agent of OTS, shall disclose a SAR, or any information that will reveal the existence of a SAR except as necessary to fulfill official duties consistent with Title II of the BSA." In addition, the standard provides that "official duties" shall not include the disclosure of SAR information in response to a request for use in a private legal proceeding or in response to a request for disclosure of non-public information under 12 CFR 510.5.⁸ The

⁴ 31 U.S.C. 5318(g)(1).

⁵ 31 U.S.C. 5318(g)(2)(A)(i).

⁶ The phrase "any person involved in the transaction" has been construed to apply to "any person" because the disclosure of SAR information to any outside party may make it likely that SAR information would be disclosed to a person involved in the transaction, which is absolutely prohibited by the BSA. See *Cotton v. Private Bank and Trust Co.*, 235 F. Supp. 2d 809, 815 (N.D. Ill. 2002).

⁷ See USA PATRIOT Act, section 351(b). Pub. L. 107-56, Title III, § 351, 115 Stat. 272, 321(2001).

⁸ For purposes of this provision "official duties" means official disclosures necessary to accomplish a governmental purpose consistent with Title II of the BSA entrusted to the agency, the officer or employee. For example, prosecutorial disclosures mandated by statute or the Constitution, such as a statement of a government witness to be called at trial, impeachment of a government witness, or material exculpatory of a criminal defendant. See, e.g., *Giglio v. United States*, 405 U.S. 150, 153-54

¹ 74 FR 10145, 12 CFR 510.5, *Release of unpublished OTS information*.

² See 12 CFR 510.5.

³ See 12 CFR 510.5(d).

SAR rules interpret “official duties” to mean “official duties consistent with the purposes of Title II of the BSA,” namely, for “criminal, tax, regulatory investigations or proceedings, or in the conduct of intelligence or counterintelligence activities, including analysis, to protect against international terrorism.”⁹ This standard will permit disclosures responsive to a grand jury subpoena; a request from an appropriate Federal or State law enforcement or regulatory agency; and 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.¹⁰

B. Section-by-Section Description of the Rule

Section 510.5(a) and (b) Scope and Purpose.

The existing section 510(b) includes several standards for the release of unpublished OTS information. A person seeking such information, generally must submit a request in writing to the OTS that addresses the factors set forth in section 510.5(b). Section 510.5(d) describes how the OTS will make its determination to release the information. That provision also provides that OTS will deny a request if it deems the information to be (A) not highly relevant, (B) privileged, (C) available from other sources, or (D) information that should not be disclosed for reasons that warrant restriction under the Federal Rules of Civil Procedure.¹¹

This final rule adds a new paragraph (iv) to the scope section of 12 CFR 510.5, which states that this section does not apply to OTS’s decision to disclose records or testimony involving a SAR filed pursuant to regulations implementing 12 U.S.C. 5318(g) or any information that will reveal the existence of a SAR. Accordingly, the OTS’s decision to disclose records or testimony involving SAR information is governed solely by the standard in 12 CFR 563.180. Paragraph (iv) makes clear that the standard in 12 CFR 563.180 applies in place of the standards for denial set forth in 12 CFR 510.5(d)(4). Accordingly, the OTS will not release

SAR information in response to any request received pursuant to section 510.5, including from a federal, state, or foreign government, and the Director will not disclose SAR information to any person, except to fulfill the OTS’s official duties in light of the purposes of the BSA. Consistent with the OTS’s longstanding commitment to protect the confidentiality of SARs, the SAR rule also states that “official duties” does not include the disclosure of SAR information in response to a request for use in a private legal proceeding or in response to a request for disclosure of non-public information under 12 CFR 510.5.

Section 510.5(d) Consideration of requests.

Section 510.5 generally describes how the OTS makes its determination to release or to withhold unpublished OTS information in response to requests received under section 510.5(b) and (d).¹² Section 510.5(d)(4) specifically lists four examples of reasons for which the OTS will deny the release of unpublished OTS information.

The OTS is adding “when not prohibited by law” as a fifth reason for denial of requests made under section 510.5(d)(4). This addition makes the language in section 510.5(d), consistent with the standard applicable to disclosures to government entities, which includes the condition that such disclosures only be made “when not prohibited by law.”

III. Regulatory Analysis

Regulatory Flexibility Act

Under section 605(b) of the Regulatory Flexibility Act (RFA), 5 U.S.C. 605(b), the regulatory flexibility analysis otherwise required under section 604 of the RFA is not required if the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities and publishes its certification and a short, explanatory statement in the **Federal Register** along with its rule.

The OTS has determined that the rule does not impose any economic costs as they simply clarify the scope of the statutory prohibition against the disclosure by financial institutions and by the government of SAR information. Therefore, pursuant to section 605(b) of the RFA, the OTS hereby certifies that this rule will not have a significant economic impact on a substantial number of small entities. Accordingly, a regulatory flexibility analysis is not needed.

¹² As described earlier, § 510.5 does not apply to SAR information.

Executive Order 12866

The OTS has determined that this rule is not a significant regulatory action under Executive Order 12866. We have concluded that the changes that made by the amendments will not have an annual effect on the economy of \$100 million or more. The OTS further concludes that this rule does not meet any of the other standards for a significant regulatory action set forth in Executive Order 12866.

Paperwork Reduction Act

We have reviewed the amendments in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3506; 5 CFR 1320, Appendix A.1) (PRA) and have determined that they do not contain any “collections of information” as defined by the PRA.

Unfunded Mandates Reform Act of 1995

Section 202 of the Unfunded Mandates Reform Act of 1995, Public Law 104–4 (UMRA) requires that an agency prepare a budgetary impact statement before promulgating a rule that includes a Federal mandate that may result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector of \$100 million or more (adjusted annually for inflation) in any one year. If a budgetary impact statement is required, section 205 of the UMRA also requires an agency to identify and consider a reasonable number of regulatory alternatives before promulgating a rule. The OTS has determined that its rule will not result in expenditures by state, local, and tribal governments, or by the private sector, of \$133 million or more. Accordingly, OTS has not prepared a budgetary impact statement or specifically addressed the regulatory alternatives considered.

List of Subjects in 12 CFR Part 510

Administrative practice and procedure, Freedom of information, Individuals with disabilities, Minority businesses, Organization and functions (Government agencies), Reporting and recordkeeping requirements, Women.

Authority and Issuance

■ For the reasons set forth in the preamble, part 510 of title 12 of the Code of Federal Regulations is amended as follows:

PART 510—MISCELLANEOUS ORGANIZATIONAL REGULATIONS

■ 1. The authority citation for part 510 continues to read as follows:

(1972); *Brady v. State of Maryland*, 373 U.S. 83, 86–87 (1963); *Jencks v. United States*, 353 U.S. 657, 668 (1957).

⁹ 31 U.S.C. 5311 (setting forth the purposes of the BSA).

¹⁰ See, e.g., *Giglio v. United States*, 405 U.S. 150, 153–54 (1972); *Brady v. State of Maryland*, 373 U.S. 83, 86–87 (1963); *Jencks v. United States*, 353 U.S. 657, 668 (1957).

¹¹ See 12 CFR 510.5(d)(4).

Authority: 12 U.S.C. 1462a, 1463, 1464; Pub.L. 101-410, 104 Stat 890; Pub.L. 104-134, 110 Stat 1321-358.

■ 2. Amend § 510.5 by:

- a. Removing, at the end of paragraph (a)(3)(ii), the word “and”;
- b. Removing, at the end of paragraph (a)(3)(iii), the period and adding “; and” in its place;
- c. Adding paragraph (a)(3)(iv) to read as set forth below;
- d. Removing, at the end of paragraph (d)(4)(i)(C), the word “or”;
- e. Removing, at the end of paragraph (d)(4)(i)(D) the period and adding “; and” in its place; and
- f. Adding paragraph (d)(4)(i)(E) as set forth below.

§ 510.5 Release of unpublished OTS information.

(a) * * *

(3) * * *

(iv) Requests for a Suspicious Activity Report (SAR), or any information that would reveal the existence of a SAR.

* * * * *

(d) * * *

(4) * * *

(i) * * *

(E) Information that should not be disclosed, because such disclosure is prohibited by law.

* * * * *

Dated: June 1, 2010.

By the Office of Thrift Supervision.

John E. Bowman,

Acting Director.

[FR Doc. 2010-29871 Filed 12-2-10; 8:45 am]

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DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

12 CFR Part 563

[Docket ID OTS-2010-0015]

RIN 1550-AC26

Confidentiality of Suspicious Activity Reports

AGENCY: The Office of Thrift Supervision, Treasury (OTS).

ACTION: Final rule.

SUMMARY: The OTS is issuing this final rule to amend its regulations implementing the Bank Secrecy Act (BSA) governing the confidentiality of a suspicious activity report (SAR) to: Clarify the scope of the statutory prohibition on the disclosure by a financial institution of a SAR, as it applies to savings associations and service corporations; address the statutory prohibition on the disclosure

by the government of a SAR, as that prohibition applies to the OTS's standards governing the disclosure of SARs; clarify that the exclusive standard applicable to the disclosure of a SAR, or any information that would reveal the existence of a SAR, by the OTS is to fulfill official duties consistent with the purposes of the BSA; and modify the safe harbor provision in the OTS's SAR rules to include changes made by the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act. These amendments are consistent with a final rule being contemporaneously issued by the Financial Crimes Enforcement Network (FinCEN) and the Office of Comptroller of the Currency (OCC).

DATES: This rule is effective on January 3, 2011.

FOR FURTHER INFORMATION CONTACT:

Marvin Shaw, Senior Attorney, Regulations and Legislation (202-906-6639); Noelle Kurtin, Senior Attorney, Enforcement (202-906-6739); or Stacy Messett, Senior Project Manager, BSA and Compliance Examinations (202-906-6241); Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

SUPPLEMENTARY INFORMATION:

I. Background

The BSA requires financial institutions, including savings associations and service corporations regulated by the OTS, to keep certain records and make certain reports that have been determined to be useful in criminal, tax, or regulatory investigations or proceedings, and for intelligence or counter intelligence activities to protect against international terrorism. In particular, the BSA and its implementing regulations require a financial institution to file a SAR when it detects a known or suspected violation of Federal law or a suspicious activity related to money laundering, terrorist financing, or other criminal activity.¹

¹ The Annunzio-Wylie Anti-Money Laundering Act of 1992 (the Annunzio-Wylie Act) amended the BSA and authorized the Secretary of the Treasury to require financial institutions to report suspicious transactions relevant to a possible violation of law or regulation. See Pub. L. 102-550, Title XV, section 1517(b), 106 Stat. 4055, 4058-9 (1992); 31 U.S.C. 5318(g)(1). The OTS, Board of Governors of the Federal Reserve System (FRB), Federal Deposit Insurance Corporation (FDIC), Office of the Comptroller of the Currency (OCC), and National Credit Union Administration (NCUA), (collectively referred to as the Federal bank regulatory agencies) subsequently issued virtually identical implementing regulations on suspicious activity reporting. See 12 CFR 21.11 (OCC); 12 CFR 208.62 (FRB); 12 CFR 353.3 (FDIC); 12 CFR 563.180 (OTS); and 12 CFR 748.1 (NCUA).

SARs are used for law enforcement or regulatory purposes to combat terrorism, terrorist financing, money laundering and other financial crimes. For this reason, the BSA provides that a financial institution, and its officers, directors, employees, and agents are prohibited from notifying any person involved in a suspicious transaction that the transaction was reported.² To encourage the voluntary reporting of possible violations of law and regulation, and the filing of SARs, the BSA also contains a safe harbor provision, which shields financial institutions making such reports from civil liability.

FinCEN³ has issued rules implementing the SAR confidentiality provisions for various types of financial institutions that closely mirror the statutory language.⁴ In addition, the Federal bank regulatory agencies implemented these provisions through similar regulations that provide SARs are confidential and generally no information about or contained in a SAR may be disclosed.⁵ The regulations issued by FinCEN and the Federal bank regulatory agencies also describe the applicability of the safe harbor provision to both voluntary reports of possible and known violations of law and the required filing of SARs.⁶

The USA PATRIOT Act of 2001 strengthened the confidentiality of SARs by adding to the BSA a new provision that prohibits officers or employees of the Federal Government or any State, local, tribal, or territorial government within the United States with knowledge of a SAR, from disclosing to any person involved in a suspicious transaction that the transaction was reported, other than as necessary to fulfill the official duties of such officer or employee.⁷ The USA PATRIOT Act also clarified that the safe harbor shielding financial institutions from liability covers voluntary disclosures of possible violations of law and regulations to a government agency and expanded the scope of the limit on liability to cover any civil liability that

² 31 U.S.C. 5318(g)(2)(A)(i).

³ FinCEN is the agency designated by the Department of the Treasury to administer the BSA, and with which SARs must be filed. See 31 U.S.C. 5318; 12 CFR 21.11(c).

⁴ See, e.g., 31 CFR 103.18(e) (SAR confidentiality rule for banks); 31 CFR 103.19(e) (SAR confidentiality rule for brokers or dealers in securities).

⁵ See 12 CFR 21.11(k) (OCC); 12 CFR 208.62(j) (FRB); 12 CFR 353.3(g) (FDIC); 12 CFR 563.180(d)(12) (OTS); and 12 CFR 748.1 (NCUA).

⁶ 31 U.S.C. 5318(q)(3).

⁷ See USA PATRIOT Act, section 351(b), Pub. L. 107-56, Title III, section 351, 115 Stat. 272, 321 (2001); 31 U.S.C. 5318(g)(2).