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 proposed rules do 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 proposal will not have a significant economic impact on a substantial number of small entities. Accordingly, a regulatory flexibility analysis is not needed.

Executive Order 12866

The OTS has determined that this proposal is not a significant regulatory action under Executive Order 12866. We have concluded that the changes that would be made by the proposed amendments will not have an annual effect on the economy of $100 million or more. The OTS further concludes that this proposal 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 proposed 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 proposed 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 proposed to be amended as follows:

PART 510—MISCELLANEOUS ORGANIZATIONAL REGULATIONS

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

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. Adding paragraph (a)(3)(iv);

b. Removing, at the end of paragraph (d)(4)(i)(C), the word ''or'';

c. Removing the period at the end of paragraph (d)(4)(i)(D) and adding in its place ''; or'' and

d. Adding paragraph (d)(4)(i)(E) as follows:

§ 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: November 18, 2009.

By the Office of Thrift Supervision.

John M. Reich,

Director.

Editorial Note: This document was received at the Office of the Federal Register on February 27, 2009.

[FR Doc. E9–4699 Filed 3–6–09; 8:45 am]

BILLING CODE 6720–01–P

DEPARTMENT OF THE TREASURY

31 CFR Part 103

RIN 1506–AA99

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

Financial Crimes Enforcement Network; Confidentiality of Suspicious Activity Reports

AGENCY: The Financial Crimes Enforcement Network (FinCEN), Department of the Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Financial Crimes Enforcement Network (''FinCEN''), a bureau of the Department of the Treasury (''Treasury''), is proposing to revise the regulations implementing the Bank Secrecy Act (''BSA'') regarding the confidentiality of a report of suspicious activity (''SAR'') to: Clarify the scope of the statutory prohibition against the disclosure by a financial institution of a SAR; address the statutory prohibition against the disclosure by the government of a SAR; 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; modify the safe harbor provision to include changes made by the Uniting and Strengthening America by Providing the Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (''USA PATRIOT Act''); and make minor technical revisions for consistency and harmonization among the different rules. These amendments are consistent with similar proposals to be issued by some of the Federal bank regulatory agencies.[1]

DATES: Comments must be received by June 8, 2009.

ADDRESSES: You may submit comments, identified by RIN 1506–AA99 or docket number TREAS-FinCen-2008–0022,[2] by any of the following methods:

[1] The Federal bank regulatory agencies have parallel SAR requirements for their supervised entities: *See* 12 CFR 208.62 (the Board of Governors of the Federal Reserve System (''Fed'')); 12 CFR 353.3 (the Federal Deposit Insurance Corporation (''FDIC'')); 12 CFR 748.1 (the National Credit Union Administration (''NCUA'')); 12 CFR 21.11 (the Office of the Comptroller of Currency (''OCC'')) and 12 CFR 563.180 (the Office of Thrift Supervision (''OTS'')). Of these agencies the OCC and OTS are proposing corollary regulation changes contemporaneously.

[2] This single docket number is shared by three related documents (this notice of proposed rulemaking, and two related pieces of proposed guidance) 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.

• *Federal e-rulemaking portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

• *Mail:* FinCEN, P.O. Box 39, Vienna, VA 22183. Include RIN 1506–AA99 or docket number TREAS-FinCen-2008–0022 in the body of the text.

Inspection of comments: Comments may be inspected, between 10 a.m. and 4 p.m., in the FinCEN reading room in Vienna, VA. Persons wishing to inspect the comments submitted must request an appointment with the Disclosure Officer by telephoning (703) 905–5034 (Not a toll free call).

FOR FURTHER INFORMATION CONTACT: Regulatory Policy and Programs Division, FinCEN (800) 949–2732 and select option 1.

SUPPLEMENTARY INFORMATION:

I. Background

The BSA requires financial institutions 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 financial institutions to file a SAR when they detect a known or suspected violation of Federal law or regulation, or a suspicious activity related to money laundering, terrorist financing, or other criminal activity.[3]

SARs generally are unproven reports of possible violations of law or regulation, or of suspicious activities, that are used for law enforcement or regulatory purposes. 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.[4] FinCEN implemented this provision in its SAR regulations for each industry through an explicit prohibition that closely mirrored the statutory language. Specifically, we clarified that disclosure could not be made to the person involved in the transaction, but that the SAR could be provided to FinCEN, law enforcement, and the institution's supervisor or examining authority. In certain SAR rules, we have expressly provided for the possibility of institutions jointly filing a SAR regarding suspicious activity that occurred at multiple institutions.[5]

The USA PATRIOT Act 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.[6]

To encourage the reporting of possible violations of law or regulation, and the filing of SARs, the BSA contains a safe harbor provision that shields financial institutions making such reports from civil liability. In 2001, the USA PATRIOT Act clarified that the safe harbor covers voluntary disclosure 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 which may exist ''under any contract or other legally enforceable agreement (including any arbitration agreement).'' [7]

II. Overview of Proposal

The proposed amendments to FinCEN's SAR rules include key changes that would (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, or any information that would reveal the existence of a SAR by the government is ''to fulfill official duties consistent with Title II of the BSA,'' in order to ensure that SAR information is protected from inappropriate disclosures unrelated to the BSA purposes for which SARs are filed; (4) modify the safe harbor provision to include changes made by the USA PATRIOT Act; and (5) where possible, harmonize minor technical differences that exist between the confidentiality, safe harbor, and compliance provisions of our rulemakings for different industries.

In separate but contemporaneous rulemakings, some of the Federal bank regulatory agencies are proposing to amend their SAR rules to incorporate comparable provisions, and to amend their information disclosure regulations [8] to clarify that the exclusive standard governing the release of a SAR, or any information that would reveal the existence of a SAR is set forth in the confidentiality provisions of their respective SAR rules.

Additionally, elsewhere in this part, FinCEN is simultaneously issuing for notice and comment proposed guidance regarding the sharing of SARs with affiliates. This proposed guidance interprets one of the provisions of this notice of proposed rulemaking and, accordingly, should be read in conjunction with this notice.

III. Section-by-Section Analysis

A. Confidentiality of SARs

Out of recognition that ''reports with a high degree of usefulness'' were unlikely to be filed unless afforded strict confidentiality, Congress established what is often referred to as the ''non-disclosure provision'' [9] in the BSA. This provision prohibits financial institutions and officers or employees of the government with knowledge that a SAR was filed from notifying the person involved in the transaction that the transaction has been reported. Accordingly, under the section heading ''confidentiality of reports,'' FinCEN's rules currently prohibit financial institutions from disclosing that a SAR was filed to any person involved in the transaction. The SAR rules also provide that no institution may disclose a SAR in response to a subpoena or other request, except when that request comes from FinCEN or an appropriate supervisory or law enforcement agency. Over the years, FinCEN has received numerous questions regarding the scope of the prohibition against the disclosure of a SAR in its current rules. Accordingly, in this rulemaking, we are

[3] 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* Public Law 102–550, Title XV, § 1517(b), 106 Stat. 4055, 4058–9 (1992); 31 U.S.C. 5318(g)(1).

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

[5] Bank Secrecy Act regulations expressly permitting the filing of a joint SAR when multiple financial transactions are involved in a common transaction or series of transactions involving suspicious activity can be found at 31 CFR 103.15(a)(3) (for mutual funds); 31 CFR 103.16(b)(3)(ii) (for insurance companies); 31 CFR 103.17(a)(3) (for futures commission merchants and introducing brokers in commodities); 31 CFR 103.19(a)(3) (for broker-dealers in securities); and 31 CFR 103.20(a)(4) (for money services businesses).

[6] *See* USA PATRIOT Act, section 351(b). Public Law 107–56, Title III, § 351, 115 Stat. 272, 321 (2001); 31 U.S.C. 5318(g)(2).

[7] *See* USA PATRIOT Act, section 351(a). Public Law 107–56, Title III, § 351, 115 Stat. 272, 321 (2001); 31 U.S.C. 5318(g)(3).

[8] Generally, these regulations are known as ''Touhy regulations,'' after the Supreme Court's decision in *United States ex rel. Touhy* v. *Ragen,* 340 U.S. 462 (1951). In that case, the Supreme Court held that an agency employee could not be held in contempt for refusing to disclose agency records or information when following the instructions of his or her supervisor regarding the disclosure. As such, an agency's Touhy regulations are the instructions agency employees must follow when those employees receive requests or demands to testify or otherwise disclose agency records or information.

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

proposing to clarify the scope of SAR confidentiality.

FinCEN believes it is important to clarify that the statutory prohibition on notifying the person involved in the transaction that the transaction has been reported must be interpreted more broadly to prohibit disclosures to any person. SAR rules issued by the Federal bank regulatory agencies already provide that ''SARs are confidential.'' As described further in the Section-by-Section Analysis below, this view of SAR confidentiality also has been repeatedly upheld in relevant case law.

FinCEN also recognizes that in order to protect the confidentiality of a SAR, any information that would reveal the existence of a SAR must be afforded the same protection as the SAR itself. The confidentiality of SARs must be maintained for a number of compelling reasons. For example, the disclosure of a SAR could result in notification to persons involved in the transaction that is being reported and compromise any investigations being conducted in connection with the SAR. In addition, FinCEN recognizes that any disclosure of a SAR could reduce the willingness of all financial institutions to file SARs. If institutions believe that a SAR can be used for purposes unrelated to the law enforcement and regulatory purposes of the BSA, the disclosure of such information could adversely affect the timely, appropriate, and candid reporting of suspicious transactions. Institutions also may be reluctant to report suspicious transactions for fear that the disclosure of a SAR will interfere with the institution's relationship with its customer. Further, a SAR may provide insight into how an institution uncovers potential criminal conduct that can be used by others to circumvent detection. The disclosure of a SAR also could compromise personally identifiable information or commercially sensitive information, or damage the reputational interests of companies that may be named. Finally, the disclosure of a SAR increases the risk that an institution's employees or others involved in the preparation and filing of SARs could become targets for retaliation by persons whose criminal conduct has been reported.

FinCEN believes that all of the reasons for maintaining the confidentiality of SARs are equally applicable to any information that would reveal the existence of a SAR. Therefore, FinCEN is proposing to modify the general introduction in our rules to state that ''[a] SAR, and any information that would reveal the existence of a SAR, are confidential.'' The introduction also indicates that neither a SAR, nor any information that would reveal the existence of a SAR, may be disclosed, except as authorized in the limited circumstances that follow.

FinCEN is also proposing to modify this introductory section by clarifying that ''for purposes of [the confidentiality provision] only, a SAR shall include any suspicious activity report filed with FinCEN pursuant to any regulation in this part.'' By using the term ''SAR'' in each of the proposed confidentiality provisions, FinCEN is purposefully using a term broader than the existing references in those provisions to specific types of SARs. We note that our rules require institutions to comply with our filing requirements through the use of particular versions of the SAR form, *e.g.*, a SAR–SF for those in the securities and futures sector, or a SAR–MSB for money services businesses. Nevertheless, it is critical that the confidentiality provisions of our SAR rules apply with respect to any type of SAR in the filing institution's possession, which since it may result from the joint filing or sharing of a SAR with another type of financial institution in accordance with the provisions of these proposed rules, could include a type of SAR form not used by the institution.

B. Disclosure by Financial Institutions

FinCEN's current rules provide that any institution subpoenaed or otherwise requested to disclose a SAR or the information contained in a SAR must decline to produce the SAR or to provide any information that would disclose that a SAR has been prepared or filed, and must notify FinCEN of the request and its response to the request.

The proposed rules more specifically address the prohibition on the disclosure of a SAR by a financial institution. The rules provide that the prohibition includes ''any information that would reveal the existence of a SAR'' instead of using the phrase ''any information that would disclose that a SAR has been prepared or filed.'' FinCEN believes that this phrase more clearly describes the type of information that is covered by the prohibition against the disclosure of a SAR. In addition, the proposed rules incorporate the specific reference in 31 U.S.C. 5318(g)(2)(A)(i) to ''directors, officers, employees and agents,'' and clarify that the prohibition against disclosure extends to those individuals in a financial institution who may have access to a SAR or information that would reveal the existence of a SAR.

Although 31 U.S.C. 5318(g)(2)(A)(i) states that a person involved in the transaction may not be notified that the transaction has been reported, the proposed rules continue to reflect case law that has consistently concluded, in accordance with applicable regulations, that financial institutions are broadly prohibited from disclosing a SAR, or information that would reveal the existence of a SAR, to any person. Accordingly, these cases have held that, in the context of discovery in connection with civil lawsuits, financial institutions are prohibited from disclosing a SAR or information that would reveal the existence of a SAR because section 5318(g) and its implementing regulations have created an unqualified discovery and evidentiary privilege for such information that cannot be waived by financial institutions.[10] Consistent with case law and current regulation, the texts of the proposed rules do not limit the prohibition on disclosure only to the person involved in the transaction. Permitting disclosure to *any* outside party may make it likely that SAR information would be disclosed to a person involved in the transaction, which is prohibited by the statute.

The proposed rules continue to provide that any financial institution, or any director, officer, employee, or agent of a financial institution, that is subpoenaed or otherwise requested to disclose a SAR or information that would reveal the existence of a SAR must decline to provide the information, citing this section of the rules and 31 U.S.C. 5318(g)(2)(A)(i), and must provide notification of the request and its response thereto to FinCEN and its primary Federal regulator if that regulator has a parallel SAR requirement.

C. Rules of Construction

FinCEN is proposing rules of construction to address issues that have arisen over the years about the scope of the SAR disclosure prohibition and to implement statutory modifications to the BSA made by the USA PATRIOT Act. The proposed rules of construction primarily describe situations that are not covered by the prohibition against the disclosure of SAR information. The introduction to these rules makes clear that the rules of construction are each qualified by the statutory mandate that no person involved in any reported suspicious transaction can be notified that the transaction has been reported.

The first proposed rule of construction builds upon the existing

[10] *See, e.g., Whitney Nat'l Bank* v. *Karam,* 306 F. Supp. 2d 678, 682 (S.D. Tex. 2004); *Cotton* v. *Private Bank and Trust Co.,* 235 F. Supp. 2d 809, 815 (N.D. Ill. 2002).

provision to clarify that 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 agency that examines the financial institution for compliance with the BSA. For the rules governing broker-dealers, futures commission merchants, and introducing brokers in commodities, such disclosure is also permissible at the request of an appropriate self-regulatory organization that is examining the institution for compliance with the SAR reporting requirement. Although the permissibility of such disclosures may be readily apparent, the proposal contains this statement to clarify that the prohibition against disclosure cannot be used to withhold this information from governmental authorities or other examining authorities that are otherwise entitled by law to receive SARs and to examine for and investigate suspicious activity.

The second proposed rule of construction provides that the phrase ''a SAR or information that would reveal the existence of a SAR'' does not include the underlying facts, transactions, and documents upon which a SAR is based. This statement reflects case law which has recognized that, while a financial institution is prohibited from producing documents in discovery that evidence the existence of a SAR, factual documents created in the ordinary course of business (for example, business records and account information upon which a SAR is based), may be discoverable in civil litigation under the Federal Rules of Civil Procedure.[11]

This proposed rule of construction includes illustrative examples of situations where the underlying facts, transactions, and documents upon which a SAR is based may be disclosed. The first example clarifies that this information [12] may be disclosed to another financial institution, or any director, officer, employee, or agent of the financial institution, for the preparation of a joint SAR. Although FinCEN had not previously prohibited any institution from jointly filing with any other institution that was subject to the suspicious activity reporting requirement, this rule of construction clarifies the authority for all institutions with a SAR requirement to jointly file SARs with any other institution with a SAR requirement.[13]

The second example, applicable only to depository institutions, broker-dealers, futures commission merchants, and introducing brokers in commodities, codifies a rule of construction added to the BSA by section 351 of the USA PATRIOT Act which provides that such underlying information may be disclosed in certain written employment references and termination notices.[14] These two examples are not intended to be an exhaustive list of all possible scenarios in which the disclosure of underlying information is permissible.

The third proposed rule of construction, applicable at this time only to depository institutions, broker-dealers, mutual funds, futures commission merchants, and introducing brokers in commodities, makes clear that the prohibition against the disclosure of a SAR or information that would reveal the existence of a SAR does not include the sharing by any of these financial institutions, or any director, officer, employee, or agent of these institutions, of a SAR or information that would reveal the existence of the SAR within the institution's corporate organizational structure, for purposes that are consistent with Title II of the BSA, as determined by regulation or in guidance. This proposed rule of construction recognizes that these financial institutions may find it necessary to share a SAR or information that would reveal the existence of a SAR to fulfill reporting obligations under the BSA, and to facilitate more effective enterprise-wide BSA monitoring, reporting, and general risk-management. The term ''share'' used in this rule of construction is an acknowledgement that sharing within a corporate organization for purposes consistent with Title II of the BSA is distinguishable from a prohibited disclosure.

FinCEN and the Federal bank regulatory agencies have already issued joint guidance making clear that the U.S. branch or agency of a foreign bank may share a SAR with its head office, and that a U.S. bank or savings association may share a SAR with its controlling company (whether domestic or foreign). In consultation with the staffs of the SEC and CFTC, FinCEN also issued comparable guidance for broker-dealers, futures commission merchants, and introducing brokers in commodities permitting them to share SARs with parent entities (whether domestic or foreign). These guidance documents recognized that the sharing of a SAR with a head office, controlling company, or parent entity facilitates both the compliance with the applicable requirements of the BSA and the discharge of oversight responsibilities with respect to enterprise-wide risk management and compliance with applicable laws and regulations.[15]

In this same part of the **Federal Register**, FinCEN and certain Federal bank regulatory agencies today are issuing for notice and comment proposed guidance that further clarifies when a SAR can be shared with an institution's affiliates for purposes consistent with the BSA. FinCEN, in consultation with the SEC and CFTC, is also proposing for notice and comment similar guidance for the broker-dealer, mutual fund, futures commission merchant, and introducing broker in commodities industries.

D. Disclosures by Government Authorities

As previously noted, section 351 of the USA PATRIOT Act, 31 U.S.C. 5318(g)(2)(A)(ii), amended the BSA, adding a new provision prohibiting officers and employees of the government from disclosing a SAR except ''as necessary to fulfill [their] official duties.'' FinCEN is proposing a new section in the regulations that

[11] *See Cotton,* 235 F. Supp. 2d at 815.

[12] Although the underlying facts, transactions, and documents upon which a SAR is based may include previously filed SARs or other information that would reveal the existence of a SAR, these materials would not be disclosable as underlying documents.

[13] On December 21, 2006, FinCEN and the Federal bank regulatory agencies announced that the format for the SAR form for depository institutions had been revised to support a new joint filing initiative to reduce the number of duplicate SARs filed for a single suspicious transaction. *''Suspicious Activity Report (SAR) Revised to Support Joint Filings and Reduce Duplicate SARs,''* Joint Release issued by FinCEN, the FRB, the OCC, the OTS, the FDIC, and NCUA (Dec. 21, 2006). On February 17, 2006, FinCEN and the Federal bank regulatory agencies published a joint **Federal Register** notice seeking comment on proposed revisions to the SAR form. *See* 71 FR 8640. On April 26, 2007, FinCEN announced a delay in implementation of the revised SAR form until further notice. *See* 72 FR 23891. Until such time as a new SAR form is available that facilitates joint filing, institutions authorized to jointly file should follow FinCEN's guidance to use the words ''joint filing'' in the narrative of the SAR and ensure that both institutions maintain a copy of the SAR and any supporting documentation *(See, e.g., http://www.fincen.gov/statutes_regs/guidance/html/guidance_faqs_sar_10042006.html*).

[14] 31 U.S.C. 5318(g)(2)(B).

[15] *See* ''Interagency Guidance on Sharing Suspicious Activity Reports with Head Offices and Controlling Companies'' (January 20, 2006). *http://www.fincen.gov/statutes_regs/guidance/pdf/sarsharingguidance01122006.pdf*; and ''Guidance on Sharing of Suspicious Activity Reports by Securities Broker-Dealers, Futures Commission Merchants, and Introducing Brokers in Commodities'' (January 20, 2006). *http://www.fincen.gov/statutes_regs/guidance/pdf/sarsharingguidance01202006.pdf.*

extends this prohibition against disclosure to all federal, state, local, territorial, or tribal government authorities, and any director, officer, employee, or agent of those authorities. The proposed rules track the statutory language closely by clarifying that any officer or employee of the government may not disclose a SAR or information that would reveal the existence of the SAR, ''except as necessary to fulfill official duties consistent with Title II of the Bank Secrecy Act.''

As stated in 5318(g)(2)(A)(i), which prohibits a financial institution's disclosure of a SAR, section 5318(g)(2)(A)(ii) also prohibits the government from disclosing a SAR to ''any person involved in the transaction.'' FinCEN is proposing to address sections 5318(g)(2)(A)(i) and (A)(ii) in a consistent manner, because disclosure to any outside party may make it likely that a SAR or any information that would reveal the existence of a SAR, will be disclosed to a person involved in the transaction. Accordingly, the section of the rules that address the disclosure of a SAR or of such information by the government and its officers, employees, and agents is broad and does not prohibit disclosure only to ''any person involved in the transaction.''

Section 5318(g)(2)(A)(ii) narrowly permits governmental disclosures ''as necessary to fulfill the official duties,'' a phrase that is not defined in the BSA. FinCEN is proposing to construe this phrase in the context of the BSA, in light of the purpose for which SARs are filed. Accordingly, the proposed rules interpret ''official duties'' to mean ''official duties consistent with the purposes of Title II of the BSA,'' namely, for ''criminal, tax, or regulatory investigations or proceedings, or in the conduct of intelligence or counterintelligence activities, including analysis, to protect against international terrorism.'' [16] This standard would permit, for example, official disclosures responsive to a grand jury subpoena; a request from an appropriate Federal or State law enforcement or regulatory agency; a request from an appropriate Congressional committee or subcommittees; 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.[17] This proposed interpretation of section 5318(g)(2)(A)(ii) would ensure that a SAR or information that would reveal the existence of a SAR will not be disclosed for a reason that is unrelated to the purposes of the BSA. For example, this standard would not permit the disclosure of a SAR or information that would reveal the existence of a SAR to the media.

The proposed rules also specifically provide that ''official duties consistent with Title II of the BSA'' shall not include the disclosure of a SAR or information that would reveal the existence of a SAR in response to a request for disclosure of non-public information or in response to a request for use in a private legal proceeding, including a request under 31 CFR 1.11. The BSA exists, in part, to protect the public's interest in an effective reporting system that benefits the nation by helping to assure that the U.S. financial system will not be used for criminal activity or to support terrorism. FinCEN believes that this purpose would be undermined by the disclosure of a SAR or information that would reveal the existence of a SAR to a private litigant for use in a civil lawsuit for the reasons described earlier, including the reason that such disclosures could negatively impact full and candid reporting by financial institutions.

Finally, the proposed regulations would apply to any government authority, in addition to its officers, employees, and agents. FinCEN is proposing to include each government authority itself in the scope of coverage because requests for SARs are typically directed to the government authority, rather than to individuals within the government with authority to respond to the request. In addition, agents are included in the proposed paragraph because agents of a government authority may have access to a SAR or information that would reveal the existence of a SAR.

E. Disclosures by Self-Regulatory Organizations

Although not part of any federal, state, local, territorial, or tribal government authority, self-regulatory organizations registered with or designated by the SEC or CFTC are permitted to access SARs through FinCEN's delegation of examination authority to the SEC or CFTC, for the purpose of examining broker-dealers, futures commission merchants, and introducing brokers in commodities for compliance with their SAR requirements. Although the BSA does not explicitly address the issue of disclosures of SARs by self-regulatory organizations, FinCEN believes it was Congress's clear intent that self-regulatory organizations with access to SARs should be subject to the same confidentiality provisions as all other users of SAR data. Accordingly, in the rules governing entities which may be examined for compliance with their SAR requirements by a self-regulatory organization, FinCEN is proposing a provision regarding disclosures by self-regulatory organizations that closely follows the provision regarding government disclosures. The language differs, however, to reflect the fact that self-regulatory organizations are not governmental entities. As with the provision for financial institutions and government authorities, the provision for self-regulatory organizations would apply equally to any director, officer, employee, or agent of the self-regulatory organization.

F. Limitation on Liability

In 1992, the Annunzio-Wylie Act amended the BSA by providing a safe harbor for financial institutions and their employees from civil liability for the reporting of known or suspected criminal offenses or suspicious activity through the filing of a SAR.[18] FinCEN incorporated the safe harbor provisions of the 1992 law into its SAR rules.[19] In Section 351 of the USA PATRIOT Act, Congress amended section 5318(g)(3) to clarify that the scope of the safe harbor provision includes the voluntary disclosure of possible violations of law and regulations to a government agency, and to expand the scope of the limit on liability to include any liability which may exist ''under any contract or other legally enforceable agreement (including any arbitration agreement).'' FinCEN has more closely tracked the statutory language in the proposed rules, particularly by stating that the safe harbor applies to ''disclosures'' (and not ''reports'' as in some previous rulemakings) made by institutions.

Additionally, to comport with the authorization to jointly file SARs in the second rule of construction, FinCEN is clarifying that the safe harbor also applies to ''a disclosure made jointly with another institution.'' This concept exists currently in those SAR rules

[16] 31 U.S.C. 5311.

[17] *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).

[18] *See supra* footnote 2.

[19] *See, e.g.,* 31 CFR 103.18(e). The safe harbor regulations are also applicable to oral reports of violations. (In situations requiring immediate attention, a financial institution must immediately notify its regulator and appropriate law enforcement by telephone, in addition to filing a SAR.) *See e.g.,* 12 CFR 21.11(d).

where joint filing had been explicitly referenced, but has been revised to track more closely the statutory language. It has also been inserted for the sake of consistency into those SAR rules where it had been absent previously, clarifying that all parties to a joint filing, and not simply the party that provides the form to FinCEN, fall within the scope of the safe harbor.

For consistency, FinCEN also separated the provision for confidentiality of reports and limitation of liability into two separate provisions in those rules for industries which previously contained both provisions under the single heading ''confidentiality of reports; limitation of liability.''

G. Compliance

Each of FinCEN's existing SAR rules contains a provision that clarifies that Treasury, through FinCEN or its delegatee,[20] may audit a financial institution for compliance with the requirement. Some of the SAR rules list the appropriate delegatee(s) for the type of financial institution, and for certain financial institutions clarify that SARs must be provided to those delegatees within the context of an examination of compliance with the SAR requirement. The newly proposed rule of construction that authorizes the disclosure of a SAR to, among other official entities, a federal regulatory authority examining the institution for compliance with the BSA or any self-regulatory organization that examines the institution for compliance with the SAR requirement eliminates the need for what would be a duplicate provision in the compliance section. Accordingly, we have streamlined the section to provide only that (1) FinCEN or its delegatees may examine the institution for compliance with the SAR requirement; (2) that a failure to satisfy the requirements of the SAR rule may constitute a violation of the BSA or BSA regulations; and (3) for depository institutions with parallel Title 12 SAR requirements, that failure to comply with FinCEN's SAR requirement may also constitute a violation of the parallel Title 12 rules. Also, although some of FinCEN's current rules use the heading ''Examination and Enforcement'' while others use ''Compliance'' for the same provision, for consistency we have used only the heading ''Compliance'' for the same parallel provision in each of the proposed rules.

[20] *See* 31 CFR 103.56.

H. Technical Corrections and Harmonization

In addition to the changes described above in the Section-by-Section analysis, FinCEN is proposing technical corrections to harmonize each of the seven SAR rules with rules being issued by some of the Federal bank regulatory agencies. FinCEN believes that such efforts will simplify compliance with SAR reporting requirements.

IV. Proposed Location in 31 CFR Chapter X

As per the **Federal Register** Notice of November 7, 2008,[21] FinCEN is separately proposing to remove Part 103 of Chapter I of Title 31, Code of Federal Regulations, and add Parts 1000 to 1099 under a new 31 CFR Chapter X. As such and if finalized, the proposed changes herein would be reorganized according to the changes proposed in the Notice for Proposed Rulemaking for Chapter X. The planned reorganization will have no substantive effect on the proposed regulatory changes herein. The proposed regulatory changes of this specific NPRM would be renumbered according to the proposed Chapter X as follows:

(a) 31 CFR 103.15, Reports by mutual funds of suspicious transactions, would be moved to 31 CFR 1024.320.

(b) 31 CFR 103.16, Reports by insurance companies of suspicious transactions, would be moved to 31 CFR 1025.320.

(c) 31 CFR 103.17, Reports by futures commission merchants and introducing brokers in commodities of suspicious transactions, would be moved to 31 CFR 1026.320.

(d) 31 CFR 103.18, Reports by banks of suspicious transactions, would be moved to 31 CFR 1020.320.

(e) 31 CFR 103.19, Reports by brokers or dealers in securities, would be moved to 31 CFR 1023.320.

(f) 31 CFR 103.20, Reports by money services businesses in securities, would be moved to 31 CFR 1022.320.

(g) 31 CFR 103.21, Reports by casinos of suspicious transactions, would be moved to 31 CFR 1021.320.

V. Request for Comments

FinCEN welcomes comments on any aspect of these proposed amendments to the SAR rules. FinCEN has timed the release of the notice of proposed rulemaking to coincide with the following related items: (1) A notice of, and request for comment on, proposed guidance regarding the sharing of SARs with affiliates; (2) parallel amendments proposed by certain Federal bank regulatory agencies to their own respective SAR confidentiality regulations; and (3) proposed rules by certain Federal bank regulatory agencies to amend the information disclosure rules. Commenters are encouraged to consider each proposal when commenting on the others.

While FinCEN welcomes comment on any part of the proposed rules, we specifically solicit comment on the following areas:

- Should any of the proposed provisions which would apply only to a limited segment of SAR filers be applicable to additional types of financial institutions? For example, should sharing within an institution's corporate organizational structure for purposes consistent with Title II of the BSA be limited only to banks, broker-dealers, futures commission merchants, and introducing brokers in commodities?
- Are any of the terms or provisions that were used for consistency across financial institutions inappropriate for any one type of financial institution based on its specific characteristics?
- Have any important provisions from the existing regulations been unintentionally or inappropriately eliminated or confused by the proposed new regulations?
- Are any of the provisions or terms used in the rules or this preamble unclear in their meaning, application, or scope?
- If finalized, how would these proposed rules impact compliance costs and practices?
- What additional or alternative methods could be used to strengthen the confidentiality of SARs?
- Should additional parts of the SAR rules be harmonized? If so, please describe the benefit of such revisions.

VI. Regulatory Matters

A. Regulatory Flexibility Act

Pursuant to the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), FinCEN certifies that these proposed regulation revisions will not have a significant economic impact on a substantial number of small entities. The proposals in this notice of proposed rulemaking would affect only the disclosure provisions of the current rules relating to the reporting of suspicious activity by financial institutions, and would not change any requirement to file or maintain a report. In the context of disclosure, the proposals clarify, rather than add to,

[21] ''Transfer and Reorganization of Bank Secrecy Act Regulations,'' 73 FR 66414. *See, http//www.fincen.gov/statutes_regs/frn/pdf/frnChapt_X_NPRM-Final.pdf.*

existing regulatory provisions regarding the confidentiality of suspicious activity reports. FinCEN therefore expects little or no economic impact to result from these proposals. Accordingly, a regulatory flexibility analysis is not required.

B. Paperwork Reduction Act Notices

We have reviewed the proposed rules 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.

C. Executive Order 12866

It has been determined that this proposed rule is not a significant regulatory action for purposes of Executive Order 12866. Accordingly, a regulatory impact analysis is not required.

D. 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. The current inflation-adjusted expenditure threshold is $133 million. If a budgetary impact statement is required, § 205 of the Unfunded Mandates Act also requires an agency to identify and consider a reasonable number of regulatory alternatives before promulgating a rule.

FinCEN has determined that the proposed rules will not result in expenditures by State, local, and tribal governments, or by the private sector, of $133 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 31 CFR Part 103

Administrative practice and procedure, Authority delegations (government agencies), Crime, Currency, Investigations, Law enforcement, Reporting and recordkeeping requirements, Security measures.

Authority and Issuance

For the reasons set forth in the preamble, 31 CFR Part 103 is proposed to be amended as follows:

PART 103—FINANCIAL RECORDKEEPING AND REPORTING OF CURRENCY AND FOREIGN TRANSACTIONS

1. The authority citation for part 103 continues to read as follows:

Authority: 12 U.S.C. 1829b and 1951–1959; 31 U.S.C. 5311–5314 and 5316–5332; title III, sec. 314 Public Law 107–56, 115 Stat. 307.

2. Section 103.15 is amended by:

a. Revising paragraphs (d) and (e);

b. Redesignating paragraphs (f) and (g) as paragraphs (g) and (h); and

c. Adding new paragraph (f).

§ 103.15 Reports by mutual funds of suspicious transactions.

* * * * *

(d) *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 (d). For purposes of this paragraph (d) only, a SAR shall include any suspicious activity report filed with FinCEN pursuant to any regulation in this part.

(1) *Prohibition on disclosures by mutual funds*—(i) *General rule.* No mutual fund, and no director, officer, employee, or agent of any mutual fund, shall disclose a SAR or any information that would reveal the existence of a SAR. Any mutual fund, and any director, officer, employee, or agent of any mutual fund 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 FinCEN of any such request and the response thereto.

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

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

(*1*) A SAR, or any information that would reveal the existence of a SAR, to FinCEN or any Federal, state, or local law enforcement agency, or any Federal regulatory authority that examines the mutual fund for compliance with its SAR reporting requirements; or

(*2*) The underlying facts, transactions, and documents upon which a SAR is based, including disclosures to another financial institution, or any director, officer, employee, or agent of a financial institution, for the preparation of a joint SAR; or

(B) The sharing by a mutual fund, or any director, officer, employee, or agent of the mutual fund, of a SAR, or any information that would reveal the existence of a SAR, within the mutual fund'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 disclosures by government authorities.* A Federal, state, local, territorial, or tribal government authority, or any director, officer, employee, or agent of any of the foregoing, shall not 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 disclosure of non-public information or in response to a request for use in a private legal proceeding, including a request under 31 CFR 1.11.

(e) *Limitation on liability.* A mutual fund, and any director, officer, employee, or agent of any mutual fund, 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 institution, shall be protected from liability 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).

(f) *Compliance.* Mutual funds shall be examined by FinCEN or its delegatees for compliance with this section. Failure to satisfy the requirements of this section may be a violation of the Bank Secrecy Act and of this part.

* * * * *

3. Section 103.16 is amended by:

a. Revising paragraph (f);

b. Redesignating paragraphs (g) through (i) as paragraphs (h) through (j);

c. Adding new paragraph (g); and

d. Revising newly designated paragraph (h).

§ 103.16 Reports by insurance companies of suspicious transactions.

* * * * *

(f) *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 (f). For purposes of this paragraph (f) only, a SAR shall include any suspicious

activity report filed with FinCEN pursuant to any regulation in this part.

(1) *Prohibition on disclosures by insurance companies*—(i) *General rule.* No insurance company, and no director, officer, employee, or agent of any insurance company, shall disclose a SAR or any information that would reveal the existence of a SAR. Any insurance company, and any director, officer, employee, or agent of any insurance company 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 FinCEN of any such request and the response thereto.

(ii) *Rules of Construction.* Provided that no person involved in any reported suspicious transaction is notified that the transaction has been reported, this paragraph (f)(1) shall not be construed as prohibiting the disclosure by an insurance company, or any director, officer, employee, or agent of an insurance company of:

(A) A SAR, or any 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 insurance company for compliance with the Bank Secrecy Act; or

(B) The underlying facts, transactions, and documents upon which a SAR is based, including disclosures to another financial institution, or any director, officer, employee, or agent of a financial institution, for the preparation of a joint SAR.

(2) *Prohibition on disclosures by government authorities.* A Federal, State, local, territorial, or tribal government authority, or any director, officer, employee, or agent of any of the foregoing, shall not 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 disclosure of non-public information or in response to a request for use in a private legal proceeding, including a request under 31 CFR 1.11.

(g) *Limitation on liability.* An insurance company, and any director, officer, employee, or agent of any insurance company, 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 institution, shall be protected from liability 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).

(h) *Compliance.* Insurance companies shall be examined by FinCEN or its delegatees for compliance with this section. Failure to satisfy the requirements of this section may be a violation of the Bank Secrecy Act and of this part.

* * * * *

4. Section 103.17 is amended by revising paragraphs (e), (f), and (g) to read as follows:

§ 103.17 Reports by futures commission merchants and introducing brokers in commodities of suspicious transactions.

* * * * *

(e) *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 (e). For purposes of this paragraph (e) only, a SAR shall include any suspicious activity report filed with FinCEN pursuant to any regulation in this part.

(1) *Prohibition on disclosures by futures commission merchants and introducing brokers in commodities*—(i) *General rule.* No futures commission merchant (''FCM'') or introducing broker in commodities (''IB–C''), and no director, officer, employee, or agent of any FCM or IB–C, shall disclose a SAR or any information that would reveal the existence of a SAR. Any FCM or IB–C, and any director, officer, employee, or agent of any FCM or IB–C 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 FinCEN of any such request and the response thereto.

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

(A) The disclosure by an FCM or IB–C, or any director, officer, employee, or agent of an FCM or IB–C of:

(*1*) A SAR, or any information that would reveal the existence of a SAR, to FinCEN or any Federal, state, or local law enforcement agency, any Federal regulatory authority that examines the FCM or IB–C for compliance with the BSA, or any self-regulatory organization examining the FCM or IB–C for compliance with the requirements of this section; or

(*2*) The underlying facts, transactions, and documents upon which a SAR is based, including, 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 an FCM or IB–C, or any director, officer, employee, or agent of the FCM or IB–C, of a SAR, or any information that would reveal the existence of a SAR, within the FCM's or IB–C'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 disclosures by government authorities.* A Federal, state, local, territorial, or tribal government authority, or any director, officer, employee, or agent of any of the foregoing, shall not 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 disclosure of non-public information or in response to a request for use in a private legal proceeding, including a request under 31 CFR 1.11.

(3) *Prohibition on disclosures by Self-Regulatory Organizations.* Any self-regulatory organization registered with or designated by the Commodity Futures Trading Commission, or any director, officer, employee, or agent of any of the foregoing, shall not 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 disclosure of non-public information or in response to a request for use in a private legal proceeding.

(f) *Limitation on liability.* An FCM or IB–C, and any director, officer, employee, or agent of any FCM or IB–C, 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 institution, shall be protected from liability 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).

(g) *Compliance.* FCMs or IB–Cs shall be examined by FinCEN or its delegatees for compliance with this section. Failure to satisfy the requirements of this section may be a violation of the Bank Secrecy Act and of this part.

* * * * *

5. Section 103.18 is amended by revising paragraphs (e) and (f), and adding paragraph (g), to read as follows:

§ 103.18 Reports by banks of suspicious transactions.

* * * * *

(e) *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 (e). For purposes of this paragraph (e) only, a SAR shall include any suspicious activity report filed with FinCEN pursuant to any regulation in this part.

(1) *Prohibition on disclosures by banks*—(i) *General rule.* No bank, and no director, officer, employee, or agent of any bank, shall disclose a SAR or any information that would reveal the existence of a SAR. Any bank, and any director, officer, employee, or agent of any 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 FinCEN and its primary Federal regulator of any such request and the response thereto.

(ii) *Rules of Construction.*

Provided that no person involved in any reported suspicious transaction is notified that the transaction has been reported, this paragraph (e)(1) shall not be construed as prohibiting:

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

(*1*) A SAR, or any 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 bank for compliance with the Bank Secrecy Act; or

(*2*) The underlying facts, transactions, and documents upon which a SAR is based, including, 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 bank, or any director, officer, employee, or agent of the 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 disclosures by government authorities.* A Federal, state, local, territorial, or tribal government authority, or any director, officer, employee, or agent of any of the foregoing, shall not 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 disclosure of non-public information or in response to a request for use in a private legal proceeding, including a request under 31 CFR 1.11.

(f) *Limitation on liability.* A bank, and any director, officer, employee, or agent of any 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 institution, shall be protected from liability 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).

(g) *Compliance.* Banks shall be examined by FinCEN or its delegatees for compliance with this section. Failure to satisfy the requirements of this section may be a violation of the Bank Secrecy Act and of this part. Such failure may also violate provisions of Title 12 of the Code of Federal Regulations.

6. Section 103.19 is amended by revising paragraphs (e), (f), and (g) to read as follows:

§ 103.19 Reports by brokers or dealers in securities of suspicious transactions.

* * * * *

(e) *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 (e). For purposes of this paragraph (e) only, a SAR shall include any suspicious activity report filed with FinCEN pursuant to any regulation in this part.

(1) *Prohibition on disclosures by brokers or dealers in securities*—(i) *General rule.* No broker-dealer, and no director, officer, employee, or agent of any broker-dealer, shall disclose a SAR or any information that would reveal the existence of a SAR. Any broker-dealer, and any director, officer, employee, or agent of any broker-dealer 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 FinCEN of any such request and the response thereto.

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

(A) The disclosure by a broker-dealer, or any director, officer, employee, or agent of a broker-dealer of:

(*1*) A SAR, or any information that would reveal the existence of a SAR, to FinCEN or any Federal, state, or local law enforcement agency, any Federal regulatory authority that examines the broker-dealer for compliance with the BSA, or any self-regulatory organization examining the broker-dealer for compliance with the requirements of this section; or

(*2*) The underlying facts, transactions, and documents upon which a SAR is based, including, 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 broker-dealer, or any director, officer, employee, or agent of the broker-dealer, of a SAR, or any information that would reveal the existence of a SAR, within the broker-dealer'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 disclosures by government authorities.* A Federal, State, local, territorial, or tribal

government authority, or any director, officer, employee, or agent of any of the foregoing, shall not 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 disclosure of non-public information or in response to a request for use in a private legal proceeding, including a request under 31 CFR 1.11.

(3) *Prohibition on disclosures by Self-Regulatory Organizations.* Any self-regulatory organization registered with the Securities and Exchange Commission, or any director, officer, employee, or agent of any of the foregoing, shall not 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 disclosure of non-public information or in response to a request for use in a private legal proceeding.

(f) *Limitation on liability.* A broker-dealer, and any director, officer, employee, or agent of any broker-dealer, 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 institution, shall be protected from liability 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).

(g) *Compliance.* Broker-dealers shall be examined by FinCEN or its delegatees for compliance with this section. Failure to satisfy the requirements of this section may be a violation of the Bank Secrecy Act and of this part.

* * * * *

7. Section 103.20 is amended by:

a. Revising paragraph (d);

b. Redesignating paragraphs (e) and (f) as paragraphs (f) and (g);

c. Adding new paragraph (e); and

d. Revising newly designated paragraph (f).

§ 103.20 Reports by money services businesses of suspicious transactions.

* * * * *

(d) *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 (d). For purposes of this paragraph (d) only, a SAR shall include any suspicious activity report filed with FinCEN pursuant to any regulation in this part.

(1) *Prohibition on disclosures by money services businesses*—(i) *General rule.* No money services business, and no director, officer, employee, or agent of any money services business, shall disclose a SAR or any information that would reveal the existence of a SAR. Any money services business, and any director, officer, employee, or agent of any money services business 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 FinCEN of any such request and the response thereto.

(ii) *Rules of Construction.* Provided that no person involved in any reported suspicious transaction is notified that the transaction has been reported, this paragraph (d)(1) shall not be construed as prohibiting the disclosure by a money services business, or any director, officer, employee, or agent of a money services business of:

(A) A SAR, or any 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 money services business for compliance with the BSA; or

(B) The underlying facts, transactions, and documents upon which a SAR is based, including disclosures to another financial institution, or any director, officer, employee, or agent of a financial institution, for the preparation of a joint SAR.

(2) *Prohibition on disclosures by government authorities.* A Federal, State, local, territorial, or tribal government authority, or any director, officer, employee, or agent of any of the foregoing, shall not 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 disclosure of non-public information or in response to a request for use in a private legal proceeding, including a request under 31 CFR 1.11.

(e) *Limitation on liability.* A money services business, and any director, officer, employee, or agent of any money services business, 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 institution, shall be protected from liability 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).

(f) *Compliance.* Money services businesses shall be examined by FinCEN or its delegatees for compliance with this section. Failure to satisfy the requirements of this section may be a violation of the Bank Secrecy Act and of this part.

* * * * *

8. Section 103.21 is amended by:

a. Revising paragraph (e);

b. Redesignating paragraphs (f) and (g) as paragraphs (g) and (h);

c. Adding new paragraph (f); and

d. Revising newly designated paragraph (g).

§ 103.21 Reports by casinos of suspicious transactions.

* * * * *

(e) *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 (e). For purposes of this paragraph (e) only, a SAR shall include any suspicious activity report filed with FinCEN pursuant to any regulation in this part.

(1) *Prohibition on disclosures by casinos*—(i) *General rule.* No casino, and no director, officer, employee, or agent of any casino, shall disclose a SAR or any information that would reveal the existence of a SAR. Any casino, and any director, officer, employee, or agent of any casino 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 FinCEN of any such request and the response thereto.

(ii) *Rules of Construction.* Provided that no person involved in any reported suspicious transaction is notified that the transaction has been reported, this paragraph (e)(1) shall not be construed as prohibiting the disclosure by a casino, or any director, officer, employee, or agent of a casino of:

(A) A SAR, or any 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 casino for compliance with the BSA; or

(B) The underlying facts, transactions, and documents upon which a SAR is based, including disclosures to another financial institution, or any director, officer, employee, or agent of a financial institution, for the preparation of a joint SAR.

(2) *Prohibition on disclosures by government authorities.* A Federal, State, local, territorial, or tribal government authority, or any director, officer, employee, or agent of any of the foregoing, shall not 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 (BSA). 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 disclosure of non-public information or in response to a request for use in a private legal proceeding, including a request under 31 CFR 1.11.

(f) *Limitation on liability.* A casino, and any director, officer, employee, or agent of any casino, 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 institution, shall be protected from liability 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).

(g) *Compliance.* Casinos shall be examined by FinCEN or its delegatees for compliance with this section. Failure to satisfy the requirements of this section may be a violation of the Bank Secrecy Act and of this part.

* * * * *

Dated: February 27, 2009.

James H. Freis, Jr.,

Director, Financial Crimes Enforcement Network.

[FR Doc. E9–4697 Filed 3–6–09; 8:45 am]

BILLING CODE 4810–02–P

DEPARTMENT OF THE TREASURY

31 CFR Part 103

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

Interpretive Guidance—Sharing Suspicious Activity Reports by Depository Institutions 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 the staffs of the Board of Governors of the Federal Reserve System (''FRB''), the Federal Deposit Insurance Corporation (''FDIC''), the National Credit Union Administration (''NCUA''), the Office of the Comptroller of the Currency (''OCC''), and the Office of Thrift Supervision (''OTS'') (hereinafter, the ''Federal Banking Agencies''), 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 bank 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 bank to share a SAR with its affiliates that also are 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] The Federal Banking Agencies have issued comparable rules for financial institutions subject to their jurisdiction.[3] The SAR rules issued by FinCEN and those issued by the Federal Banking Agencies currently include a section implementing the statutory prohibition on the disclosure by a financial institution of a SAR that is set forth in the BSA.[4]

Sharing Within the Corporate Organizational Structure

In January 2006, FinCEN and all the Federal Banking Agencies other than the NCUA issued joint guidance 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.[5] FinCEN also issued guidance in consultation with the staffs of the Securities and Exchange Commission (''SEC'') and the Commodity Futures Trading Commission (''CFTC'') determining 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,

[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] *See* 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).

[4] 31 U.S.C. 5318(g)(2)(A)(i).

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