

FinCEN Proposes Pilot Program on Sharing SARs with Foreign Affiliates

January 27, 2022

Pursuant to the Anti-Money Laundering Act of 2020 (the “AML Act”), the Financial Crimes Enforcement Network (“FinCEN”) published a notice of proposed rulemaking seeking public comment on a proposed pilot program that would permit financial institutions to share suspicious activity reports (“SARs”) and any information that would reveal the existence of such reports (“related information”) with their foreign branches, subsidiaries and affiliates (the “Proposal”).¹ The pilot program will terminate, as mandated by the AML Act, on January 1, 2024, unless the Secretary of the Treasury (the “Secretary”) extends the pilot for not more than two years.²

Below we summarize the key elements of the Proposal, including the process to apply for the pilot program and the various conditions and requirements to which participating financial institutions will be subject. Although many in the financial industry have advocated for SAR sharing with certain foreign affiliates, the time-limited nature of the Proposal and significant requirements that will apply are likely to limit participation in the pilot program. Nevertheless, the program should help inform FinCEN’s consideration of a broader, longer-term program for information sharing with foreign affiliates. Comments on the Proposal must be submitted by March 28, 2022.

Application Process

In order for a financial institution to participate in the pilot program and begin sharing SARs with its foreign branches, subsidiaries and affiliates³ (hereafter collectively referred to as “foreign affiliates”), the Proposal requires the financial institution to submit an application to FinCEN that:

¹ *Pilot Program on Sharing of Suspicious Activity Reports and Related Information with Foreign Branches, Subsidiaries, and Affiliates*, 87 Fed. Reg. 3719 (proposed Jan. 25, 2022), available [here](#).

² See 31 U.S.C. 5318(g)(8)(B)(iii).

³ An “affiliate” is defined for this purpose as “an entity that controls, is controlled by, or is under common control with another entity.” See 31 U.S.C. 5318(g)(11)(A).

- identifies the institution's point of contact for pilot program-related correspondence with FinCEN and appoints agents for service of process in the United States for entities located abroad;
- specifies the foreign affiliates with which the financial institution intends to share SARs and related information (including the operational jurisdictions of such entities and whether such entities will be providing reciprocal information to the applicant financial institution);
- specifies the particular purpose(s) for which the foreign affiliates intend to use SARs and related information;
- provides an estimated commencement date for the pilot program; and
- describes internal controls in place to protect the confidentiality of and prevent unauthorized disclosures of SARs and related information and to ensure data security and confidentiality of personally identifiable information.⁴

FinCEN proposes to determine the financial institution's suitability to participate in the pilot program based on an assessment of the applicant's internal controls as well as the foreign affiliates with which it intends to share information and the jurisdictions in which they are located. FinCEN also may consider the requirements of federal and state law enforcement and potential concerns of the intelligence community, among other factors. FinCEN will consult and share application information with the financial institution's federal regulator and other relevant agencies as needed. Under the Proposal, FinCEN will seek to provide responses within 90 days of receipt of an application.

Prohibited Disclosure & Required Controls

The Proposal provides that, except to the extent authorized pursuant to the pilot program or in existing regulations or guidance, a participant financial institution, its foreign affiliates and certain other associated individuals may not disclose a SAR or related information shared pursuant to the pilot program. The Proposal treats information related to suspicious transactions reported by foreign affiliates to a participant financial institution as subject to the same confidentiality requirements.⁵

The Proposal requires that a participant financial institution implement policies, procedures and internal controls that are reasonably designed to ensure that its foreign

⁴ See proposed 31 CFR 1010.240(c)(1).

⁵ See proposed 31 CFR 1010.240(e).

affiliates do not permit unauthorized disclosures of SARs or related information.⁶ These controls should include:

- confidentiality agreements or arrangements specifying that all personnel in foreign affiliates granted access to SARs and related information pursuant to the pilot program must safeguard the confidentiality of SARs and related information;
- provisions for the secure transmission and storage of SARs and related information between the financial institution and its foreign affiliates; and
- processes and procedures for personnel located in the United States to review any request from foreign law enforcement, foreign regulators or outside foreign parties for SARs and related information shared pursuant to the pilot program.

In addition, the Proposal gives FinCEN the authority to require implementation of additional internal controls or enhancements to existing controls to ensure data security and confidentiality of SARs and related information as a prerequisite to approving an application or at any time after an application is approved. A financial institution would need FinCEN's written approval to modify its internal controls specified in its FinCEN-approved application.⁷

Civil penalties and criminal sanctions may be imposed on participant financial institutions or their directors, officers, employees or agents for violations of the prohibition on the disclosure of SARs and related information. The Proposal notes that such prohibition on disclosure also applies to foreign affiliates and that FinCEN construes its authority to impose civil and criminal sanctions as applying to foreign affiliates.⁸

Prohibitions on Certain Jurisdictions & Offshoring Compliance Operations

The AML Act dictates that under the pilot program, a financial institution may not share SARs or related information with a foreign affiliate located in: (i) China; (ii) Russia; (iii) a jurisdiction that is a state sponsor of terrorism, is subject to sanctions imposed by the federal government or has been identified as a primary money

⁶ See proposed 31 CFR 1010.240(c)(2).

⁷ See proposed 31 CFR 1010.240(c)(5).

⁸ See proposed 31 CFR 1010.240(i).

laundering concern; or (iv) a jurisdiction that the Secretary has determined cannot reasonably protect the security and confidentiality of such information.⁹

The Proposal defines a “state sponsor of terrorism” as a jurisdiction so determined by the U.S. Department of State. Jurisdictions subject to sanctions imposed by the federal government are those “with governments whose property and interests in property in U.S. jurisdictions are blocked pursuant to U.S. sanctions authorities” as well as any jurisdiction “subject to broad prohibitions on transactions by U.S. persons involving that jurisdiction, such as prohibitions on importing or exporting goods, services, or technology to the jurisdiction or dealing in goods or services originating from the jurisdiction.”¹⁰

Under the AML Act, the Secretary may make exceptions for foreign affiliates in China or Russia on the basis of national security interest.¹¹

The Proposal, as required by the AML Act, also prohibits participant financial institutions from establishing or maintaining any operation located outside of the United States the primary purpose of which is to ensure compliance with the Bank Secrecy Act as a result of the information sharing granted by the pilot program.¹²

Reporting Requirements & Notices to FinCEN

The Proposal requires financial institutions to report on a *quarterly basis* certain information to FinCEN, including:

- the total number of SARs and related information shared;
- the name and jurisdiction of each entity that received SARs and related information, the relationship between the entity and the financial institution and the intended purposes and uses for which the SARs and related information were shared;
- legal and compliance issues encountered;
- technical difficulties and challenges;

⁹ See 31 U.S.C. 5318(g)(8)(C)(i); see also proposed 31 CFR 1010.240(d).

¹⁰ See proposed 31 CFR 1010.240(d)(iii).

¹¹ See 31 U.S.C. 5318(g)(8)(C)(ii); see also proposed 31 CFR 1010.240(d)(2).

¹² See proposed 31 CFR 1010.240(f).

- enhancements to the financial institution's anti-money laundering ("AML") program, including reallocation of resources to higher-priority AML risks, enabled as a result of the pilot program; and
- lessons learned, including any identified deficiencies in the financial institution's AML program.¹³

FinCEN plans to use this data to evaluate the effectiveness of the pilot program and inform best practices for information sharing and confidentiality of SARs and, if applicable, to include the data in its report and proposal to Congress to request an extension of the program.

The Proposal also requires a financial institution to immediately notify FinCEN of all requests or demands for SARs or related information from foreign law enforcement, foreign regulators or any other outside foreign party. The participant financial institutions and their foreign affiliates must direct the requesting party to contact FinCEN about obtaining the requested SARs and to seek to obtain such records through a request to the United States.¹⁴ A financial institution must also notify FinCEN upon learning of any unauthorized disclosure of SARs or related information shared pursuant to the program.¹⁵

Recordkeeping

Financial institutions are required to maintain records sufficient to identify the specific foreign jurisdictions in which affiliates of financial institutions are located and that received any specific SAR or related information.¹⁶

Termination

The Proposal allows FinCEN to terminate a financial institution's participation in the pilot program at any time.¹⁷ Grounds for termination could include, but are not limited to:

¹³ See proposed 31 CFR 1010.240(c)(8).

¹⁴ See proposed 31 CFR 1010.240(c)(10).

¹⁵ See proposed 31 CFR 1010.240(c)(11).

¹⁶ See proposed 31 CFR 1010.240(c)(12).

¹⁷ See proposed 31 CFR 1010.240(c)(6).

- actual, or unreasonable risk of, unauthorized disclosures of SARs and related information;
- significant internal control deficiencies identified during participation in the pilot program;
- failure to adhere to the specific requirements for participation; or
- any other issues that indicate that a participant financial institution is unable to adequately safeguard against unauthorized disclosures of SARs and related information or to ensure adequate data security and confidentiality of personally identifiable information.

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Please do not hesitate to contact us with any questions.

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