

Proposed SAR Rulemaking



Patti D. Joyner, CRCM
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1

Shifting Strategic SAR Direction

2

- Although recent Banking Agency proposed rules and new laws may appear to be fairly mundane, process-oriented regulatory amendments, they strongly indicate that Congress and the federal banking agencies are serious about fostering the development of innovative tools to gather information about potential money laundering and illegal activity and getting that information into the hands of law enforcement in a more efficient manner.
- In December 2018, the federal banking agencies and FinCEN issued a Joint Statement on Innovative Efforts to Combat Money Laundering and Terrorist Financing (the 2018 Joint Statement). This formalized the shift in the strategic winds.
- The Banking Agencies recognize that as these technological advancements are being piloted and fine-tuned, banks may need to expand their investigations, perhaps requiring an extension of the 30-day SAR filing deadline, or requiring the sharing of information otherwise prohibited by SAR confidentiality regulations. With the recently proposed rules, the banking agencies demonstrate their willingness to amend the existing regulations necessary to foster these continued advancements.



2

Banking Agencies 2018 Statement

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- In 2018 the OCC, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, FinCEN, and the National Credit Union Administration issued a statement encouraging banks to take innovative approaches to meet their BSA/anti-money laundering (BSA/AML) compliance obligations.
- The statement encouraged banks to consider, evaluate, and, where appropriate, responsibly implement innovative approaches in this area. Today, innovative approaches and technological developments in the areas of SAR monitoring, investigation, and filings may involve, among other things:
 - i. Automated form population using natural language processing, transaction data, and customer due diligence information;
 - ii. Automated or limited investigation processes depending on the complexity and risk of a particular transaction and appropriate safeguards; and
 - iii. Enhanced monitoring processes using more and better data, optical scanning, artificial intelligence, or machine learning capabilities.



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Banking Agencies Propose SAR Exemption Rules

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- The proposed SAR rules have two primary objectives:
 - To further encourage and permit financial institutions to develop innovative technological solutions to satisfy their Bank Secrecy Act (BSA) obligations with greater efficiency and effectiveness; and
 - To cure a disparity in which the Financial Crimes Enforcement Network (FinCEN) might exempt a financial institution that is testing innovative anti-money laundering (AML) solutions from complying with certain of FinCEN's SAR regulations, where the federal banking agencies currently lack the authority to grant the financial institution a similar exemption under their corresponding SAR regulations, thus impeding the first objective.



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Banking Agencies Propose SAR Exemption Rules

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- FinCEN, as the BSA administrator, has implemented a number of financial institution regulations pertaining to, among other things, the reporting of suspected illegal transactions and maintaining the confidentiality of such reporting.
- The federal banking agencies implemented their own SAR regulations largely identical to FinCEN's rules. The federal agency regulations, however, include additional requirements, such as reporting insider abuse regardless of dollar amount.
- One other key difference—which the proposed rules seek to address—is that FinCEN has the general authority to grant exemptions from the requirements of the BSA and its own SAR regulations.
- The OCC and FDIC, on the other hand, have the authority to grant exemptions only in limited, specific circumstances pertaining to physical crimes (robberies and burglaries), and lost, missing, counterfeit, or stolen securities.



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National Defense Authorization Act (NDAA) 2021

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The Anti-Money Laundering Act of 2020 (AML Act) as included in the NDAA established many significant expansions and reforms to the BSA/AML landscape:

1. Companies doing business in US must submit beneficial ownership information to FinCEN
2. To incentivize reporting of BSA/AML violations, the Act creates a new whistleblower program with awards to whistleblowers whose tips lead to monetary penalties in excess of \$1 million
3. The Act significantly increases penalties for BSA/AML violations for both companies and individuals
4. The Treasury, the Justice Department, and other agencies must evaluate consider the usefulness of, and opportunities to streamline, BSA reporting requirements (CTRs, SARs, etc.)
5. The Act reinforces the importance of working with foreign law enforcement authorities to safeguard the financial system as part of FinCEN's mission
6. A pilot program must be created allowing banks to share SAR information with foreign branches, subsidiaries, and affiliates
7. The Act also makes a number of other changes significantly modifying the U.S. BSA/AML regime



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NDAA Anti-Money Laundering Provisions

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- The money laundering provisions command an entire title of the NDAA and substantially strengthens the US government’s anti-money laundering/combating the financing of terrorism (“AML/CFT”) enforcement through enhanced analytical capabilities, a regular process of establishing national AML priorities, and clearer authority to regulate providers of virtual currency services. Specifically, the MLCA seeks to:
 - Improve coordination and information sharing between FinCEN, the federal functional regulatory agencies, federal law enforcement agencies, national security agencies, the intelligence community, and financial institutions;²¹
 - Modernize AML/CFT laws to adapt both government and private sector abilities to respond to new and emerging threats;
 - Encourage technological innovation and the adoption of new technology by financial institutions to more effectively counter money laundering and terrorist financing;
 - Reinforce the risk-based approach to AML/CFT compliance; and,
 - Establish uniform beneficial ownership information reporting requirements, particularly with respect to shell companies.



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Enhanced Resources for US AML Regime

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- The Act established special hiring authority for FinCEN and the Office of Terrorism and Financial Intelligence and created a number of unique roles, including FinCEN domestic liaisons to oversee different regions of the U.S., as well as Treasury attachés and FinCEN foreign intelligence unit liaisons to be stationed at U.S. embassies or foreign government facilities
- The Act additionally creates a Subcommittee on Innovation and Technology to advise the Secretary of the Treasury on innovation with respect to AML and calls for BSA “Innovation Officers” and “Information Security Officers” at FinCEN and other federal financial regulators.
- The government’s increased focus and sophistication in addressing money laundering may result in additional inquiries from law enforcement, regulations, and guidance.



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Enhanced Information Sharing

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- MLCA establishes a “FinCEN Exchange,” which would promote enhanced information sharing among law enforcement, national security agencies, FinCEN, and banks.
- The FinCEN Exchange would also promote innovation and the use of enhanced technology in required reporting. Any information shared with bank Exchange participants could only be used for identifying and reporting on activities that may involve the financing of terrorism, money laundering, proliferation financing, or other financial crimes.
 - Proliferation is defined by the Financial Action Task Force (FATF) as the illegal manufacture, acquisition development, export, trans-shipment, brokering, transport, transfer, stockpiling or use of nuclear, chemical, or biological weapons and their means of delivery and related materials.
 - Proliferation financing is defined by the FATF as the provision of funds or financial services used for those activities.



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Enhanced BSA Reporting and Sharing

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- As part of improving BSA reporting, the Act instructs Treasury to permit streamlined reporting and automated reporting for noncomplex categories of reports and also to consider whether reporting thresholds should be adjusted.
- FinCEN is required to solicit feedback from law enforcement on the usefulness of information reported in SARs and, in turn, provide periodic summary reports to banks on information provided in SARs found to be most useful for law enforcement.
- The Act requires FinCEN to semi-annually report on threat patterns and trend data, focusing on typologies, including data that may be adapted into algorithms and alerts concerning emerging money laundering threat patterns and trends.
- The Act also requires the Treasury Secretary to convene a team of relevant federal agencies as well as private sector experts on banking, national security, and law enforcement to meet periodically with the goal of countering illicit finance, including proliferation finance and sanctions evasion.



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Harnessing BSA Technological Innovation

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- The Act includes several initiatives designed to spur the use of technology, including artificial intelligence in BSA compliance. The Act requires that the Bank Secrecy Act Advisory Group (“BSAAG”)—a statutorily mandated body comprised of federal regulators, law enforcement officials, and state government, trade group, and financial institution representatives that advise Treasury on BSA compliance issues—to form a Subcommittee on Technology and Innovation to encourage technology and innovation in AML and CTF undertakings.
- The subcommittee is directed to reduce obstacles to innovation in current guidance and in examination practices. The Act also provides that FinCEN and financial institutions’ regulators appoint BSA Innovation Officers, whose mission will be to provide outreach to state supervisors, financial institutions, trade associations and technology companies and vendors on innovative technologies that may further BSA compliance goals.
- The Act requires the Treasury to issue a rule specifying the standards banks are to use in testing technology and innovative processes related to BSA compliance. Such processes can include the use of artificial intelligence or machine learning and other enhanced analytics. The standards should include criteria for when and how new technologies should be risk-tested against existing approaches.



11

Regulatory Proposals by Agency

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Each of the prudential federal banking agencies proposed to amend their version of the SAR reporting rules to support new broad objectives to enhance SAR reporting and the usefulness of the information collected.

- OCC - 86 FR 6573
- FRB - 86 FR 6576
- FDIC – 86 FR 6580
- NCUA – 86 FR 6586



12

OCC SAR Proposal, 86 FR 6573

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- National banks and federal savings associations are currently required to file SARs under both OCC and FinCEN regulations that are not identical, but are substantially similar.
- Both the OCC's and FinCEN's SAR regulations require banks to file SARs relating to money laundering, transactions that are designed to evade the reporting requirements of the BSA, and transactions that have no business or apparent lawful purpose or are not the sort in which the particular customer would normally be expected to engage, and the bank knows of no reasonable explanation, including the background and possible purpose of the transactions.
- With respect to the BSA SAR confidentiality requirements, both the OCC's and FinCEN's SAR regulations require banks to maintain the confidentiality of a SAR and any information that would reveal the existence of the SAR, outside of certain limited circumstances.



13

OCC SAR Proposal, 86 FR 6573

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- The existing OCC and FinCEN SAR regulations also provide:
 - i. That SARs are not required for a robbery or burglary committed or attempted that is reported to appropriate law enforcement authorities;
 - ii. That SARs are confidential and shall not be disclosed except as authorized;
 - iii. Recordkeeping requirements for SARs and supporting documentation;
 - iv. That supporting documentation shall be deemed to have been filed with the SAR; and
 - v. That supporting documentation shall be made available to appropriate law enforcement agencies upon request.
- The regulations also provide a limitation on liability to any financial institution (FI) and any FI director, officer, employee, or agent that makes a voluntary disclosure of any possible violation of law or regulation to a government agency or files a SAR pursuant to the regulations or any other authority.
- The OCC's regulations also contain a provision requiring that national banks and federal savings associations promptly notify their board of directors when a SAR has been filed.



14

OCC SAR Proposal, 86 FR 6573

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- While neither the OCC's nor FinCEN's SAR reporting regulations contain provisions permitting exemptions, **FinCEN has general authority to grant exemptions** from the requirements of the BSA, which includes granting exemptions under its SAR reporting regulations.
- FinCEN's regulation provides that "[t]he Secretary [of Treasury], in his sole discretion, may by written order or authorization make exceptions to or grant exemptions from the requirements of [the BSA]. Such exceptions or exemptions may be conditional or unconditional, may apply to particular persons or to classes of persons, and may apply to transactions or classes of transactions."
- The Secretary delegated exemption authority to FinCEN. This disparity in exemption authority makes it more difficult for the OCC to grant relief if the situation does not squarely fit within the requirements, but would still be beneficial from an AML and safety and soundness perspective.
- As financial technology and innovation continue in monitoring and reporting financial crime and terrorist financing, the OCC will need express authority to grant exemptive relief when necessary.



15

FRB SAR Proposal, 86 FR 6576

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- The proposed rule would provide for the issuance of exemptions from the requirements, in full or in part, of the Board's SAR regulations. Upon receiving a written request from a Board-supervised institution, the Board would determine whether the exemption is consistent with safe and sound banking.
- The Board would also seek FinCEN's determination whether the exemption is consistent with the purposes of the BSA, as applicable, where an exemption request involves an exemption from the requirements to file a SAR required by FinCEN regulations implementing the BSA.
- The proposed rule would require the Board to seek FinCEN's concurrence regarding any exemptions that involve SAR provisions relating to potential money laundering or violations of the BSA or other unusual activity covered by FinCEN's SAR regulation.
- The proposed rule would allow the Board to consult with FinCEN regarding other exemption requests, as well as consult with state or other federal banking agencies.



16

FRB SAR Proposal, 86 FR 6576

17

- The changes made by the proposed rule would add a new paragraph (l) to § 208.62 of Regulation H (12 CFR 208.62), which concerns the SAR filing obligations of member banks.
- Sections 211.5(k) and 211.24(f) of Regulation K (12 CFR 211.5(k) and 211.24(f)) and § 225.4(f) of Regulation Y (12 CFR 225.4(f)) make § 208.62 of Regulation H applicable to Edge and Agreement corporations, the U.S. branches and agencies of foreign banks (except a Federal branch or Federal agency or a state branch that is insured by the Federal Deposit Insurance Corporation), a representative office of a foreign bank, and bank holding companies and their nonbank subsidiaries, respectively.
- This means that the changes applicable to member banks will also be applicable to the suspicious activity reporting responsibilities of these other domestic and foreign banking organizations supervised by the Federal Reserve, including bank holding companies, Edge corporations, and the U.S. branches and agencies of foreign banks.



17

FDIC SAR Proposal, FIL-114-2020, 86 FR 6580

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- On December 15, 2020 the FDIC issued a proposed rule (with accompanying Financial Institution Letter [FIL-114-2020](#)), which would amend the agency's Suspicious Activity Report (SAR) regulation to permit additional, case-by-case, exemptions from SAR filing requirements.
- The proposed rule would allow the FDIC, in conjunction with FinCEN, to grant supervised institutions exemptions to SAR filing requirements when developing "innovative solutions to meet BSA requirements more efficiently and effectively."
- The FDIC would seek FinCEN's concurrence with an exemption when the exemption request involves the filing of a SAR for potential money laundering, violations of the BSA, or other unusual activity covered by FinCEN's SAR regulation. The proposal allows the FDIC to grant the exemption for a specified time period and allows the FDIC to extend or revoke the exemption if circumstances change.
- The proposal is intended to reduce the regulatory burden on supervised financial institutions that are likely to leverage existing or future technologies to report suspicious activity in a different and innovative manner.



18

FDIC SAR Proposal, FIL-114-2020

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- The FDIC's current SAR regulation allows exemptions from SAR filing requirements for physical crimes (robberies and burglaries) and lost, missing, counterfeit, or stolen securities.
- The proposed rule would amend the SAR regulation to permit the FDIC to issue additional, case-by-case exemptions from SAR filing requirements to FDIC-supervised institutions.
- The proposed amendments would allow the FDIC, in conjunction with the Financial Crimes Enforcement Network, to grant exemptions to FDIC-supervised institutions that develop innovative solutions to otherwise meet Bank Secrecy Act requirements more efficiently and effectively.
- The FDIC is proposing this rule as a proactive measure to address the likelihood that FDIC-supervised institutions will leverage existing or future technologies to report, share, or disclose suspicious activity in a different manner.
- The FDIC expects the amendments to the SAR regulation will reduce regulatory burden on financial institutions and encourage technological innovation in the banking sector.



19

Comments are Requested Regarding:

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- a. Whether the collections of information are necessary for the proper performance of the agencies' functions, including whether the information has practical utility;
- b. The accuracy or the estimate of the burden of the information collections, including the validity of the methodology and assumptions used;
- c. Ways to enhance the quality, utility, and clarity of the information to be collected;
- d. Ways to minimize the burden of the information collections on respondents, including through the use of automated collection techniques or other forms of information technology; and
- e. Estimates of capital or startup costs and costs of operation, maintenance, and purchase of services to provide information.



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OCC SAR Proposal, 86 FR 6573

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- *Solicitation of Comments and Use of Plain Language:* Section 722 of the Gramm-Leach-Bliley Act requires the federal banking agencies to use plain language in all proposed and final rules published after January 1, 2000. The OCC has sought to present the proposed rule in a simple and straightforward manner, and invite comment on the use of plain language. For example:
 - Has the OCC organized the material to suit your needs? If not, how could the OCC present the proposed rule more clearly?
 - Are the requirements in the proposed rule clearly stated? If not, how could the proposed rule be more clearly stated?
 - Do the regulations contain technical language or jargon that is not clear? If so, which language requires clarification?
 - Would a different format (grouping and order of sections, use of headings, paragraphing) make the regulation easier to understand? If so, what changes would achieve that?
 - Would more, but shorter, sections be better? If so, which sections should be changed?
 - What other changes can the OCC incorporate to make the regulation easier to understand?



21

Best Steps Forward

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- The proposed rules provide a good opportunity for the Agencies to streamline through an interagency rulemaking to support innovation while a series of separate, similar rules would be contrary to that objective.
- The most effective solution for banks requesting an exemption is to be allowed to submit a single application to its primary prudential supervisor and not multiple agencies.
- There should be clear procedures for how the process will work, including a template for applications and a defined timeline for Agency response. Applications and responses should be published and made available to other banks so they, too, can take advantage of the exemption without having to apply separately.



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Proceed Cautiously

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- The Banking Agencies have repeatedly reiterated that while supportive of innovative AML solutions, banks must continue to meet their BSA and regulatory obligations. Conduct parallel testing of new technology in parallel with existing processes.
- Even after assured of the accuracy and effectiveness of any new AML solution, obtain input from regulators before launching a replacement compliance process or program.
- Don't **assume** regulatory leniency for violating SAR regulations when testing new compliance technology. Although the banking agencies have expressed a willingness to grant exemptive relief in certain situations, the proposed rules underscore that banks will have to seek and receive permission first.
- There should be no expectation of anything less than full compliance with the requirements of all applicable SAR regulations unless you have a written full exemption from FinCEN and your primary regulator.



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Patti D. Joyner, CRCM
Patti.Joyner@finsolinc.com
www.finsolinc.com



24