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March 13, 2015

Via Courier and Electronic Mail

Director Jennifer Shasky Calvery
Financial Crimes Enforcement Network
P.O. Box 39
Vienna, VA 22183

Re: Improving the Ability of Banking Organizations to Use Suspicious Activity Report Information for Enterprise-wide AML Compliance Purposes

Dear Director Shasky Calvery:

The Clearing House Association, L.L.C. ("The Clearing House")[1] is writing to raise with you serious and continuing concerns with existing limitations and restrictions on banks' ability to share Suspicious Activity Reports ("SARs") within their internal organizations for anti-money laundering and counter-terrorist financing (collectively, "AML") compliance purposes and to request that the Financial Crimes Enforcement Network ("FinCEN") act promptly to issue guidance that removes these impediments so as to increase the efficiency and effectiveness of U.S. banks' enterprise-wide AML efforts.

Executive Summary

As you know, FinCEN regulations and guidance currently prohibit U.S. depository institutions (meaning both U.S. headquartered depository institutions and U.S. branches of foreign headquartered depository institutions) from sharing SARs, as well as any information that would reveal the existence of SARs, with any foreign branch or affiliate. While we understand that these restrictions on the sharing of

[1] Established in 1853, The Clearing House is the oldest banking association and payments company in the United States. It is owned by the world's largest commercial banks, which collectively hold more than half of all U.S. deposits and which employ over one million people in the United States and more than two million people worldwide. The Clearing House Association L.L.C. is a nonpartisan advocacy organization that represents the interests of its owner banks by developing and promoting policies to support a safe, sound and competitive banking system that serves customers and communities. Its affiliate, The Clearing House Payments Company L.L.C., which is regulated as a systemically important financial market utility, owns and operates payments technology infrastructure that provides safe and efficient payment, clearing and settlement services to financial institutions, and leads innovation and thought leadership activities for the next generation of payments. It clears almost $2 trillion each day, representing nearly half of all automated clearing house, funds transfer and check-image payments made in the United States. *See* The Clearing House's web page at www.theclearinghouse.org.

SARs and information that would reveal the existence of SARs were originally designed to ensure the confidentiality of SARs – an important public policy goal – in practice, these restrictions impede the ability of globally-active U.S. depository institutions to conduct effective and efficient enterprise-wide AML risk management, risk assessment and activity monitoring. As regulators and policymakers have widely acknowledged, enterprise-wide risk management is an important and beneficial tool in the area of AML compliance and controls, as "[a]ggregating BSA/AML risks on a consolidated basis for larger or more complex organizations may enable an organization to better identify risks and risk exposures within and across specific lines of business or product categories," and "[c]onsolidating information also assists senior management and the board of directors in understanding and appropriately mitigating risks across the organization."[2]

In the context of SARs in particular, we continue to be strong proponents of the ability of banks to share information across their organizational structures. As FinCEN identified in 2009 when it proposed revisions to its SAR rules to allow additional SAR sharing, the benefits of sharing SARs across a financial institution's organizational structure are clear and include:

> *"help[ing] financial institutions better facilitate compliance with the applicable requirements of the BSA and more effectively implement enterprise-wide risk management";*
>
> *"help[ing] financial institutions assess risks based on information regarding suspicious transactions taking place through other affiliates or lines of business within their corporate organizational structures"; and*
>
> *"eliminat[ing] the present need for a financial institution that wants to provide information to . . . an affiliate to create a separate summary document, which has to be crafted carefully to avoid revealing the existence of [a] SAR itself."*[3]

Unfortunately, and notwithstanding these clear benefits, limitations on sharing SARs with *foreign* branches and affiliates persist.

As discussed in further detail below, to aid the efforts of U.S. depository institutions in their work to combat money laundering and terrorist financing, we respectfully request that FinCEN act promptly to address these counterproductive restrictions and limitations by:

- Issuing written guidance that allows U.S. depository institutions to share SARs with a foreign branch or affiliate, so long as that branch or affiliate is located in a country that is a member of the Financial Action Task Force ("FATF");
- Issuing written guidance that allows U.S. depository institutions to share SARs with a foreign branch or affiliate that is located in non-FATF member countries, so long as the U.S. depository institution enters into written confidentiality agreements or

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2 FFIEC, Bank Secrecy Act/Anti-Money Laundering Examination Manual (2014), p. 24.

3 FinCEN Press Release, FinCEN to Expand Financial Institutions' Ability to Share Information Internally on Suspicious Activity: Proposed rules and guidance would promote greater enterprise-wide risk management (March 3, 2009).

arrangements with the branches and affiliates consistent with those required by the 2006 interagency guidance for SAR sharing with controlling companies and head offices;[4] and

- Reaffirming the authority of U.S. depository institutions to share the underlying facts, transactions, and documents upon which a SAR is based and, in particular, clarify that the fact that information from underlying facts, transactions, or documents has been included in a SAR does not cause that information to fall under the general prohibition against disclosing a SAR or information that would reveal the existence of a SAR.

Discussion

A. Regulatory Framework

The regulations of FinCEN applicable to depository institutions provide that a SAR, and any information that would reveal the existence of a SAR, are confidential. No depository institution, and no director, officer, employee, or agent of any depository institution, may disclose such information, except to certain federal, state and local authorities.[5]

1. Permitted Sharing Within the Corporate Organizational Structure

Despite this general prohibition on disclosure, the FinCEN regulations do not prohibit the sharing by a depository institution, or any director, officer, employee, or agent of the depository institution, of a SAR, or any information that would reveal the existence of a SAR, within the depository institution's corporate organizational structure "*for purposes consistent with Title II of the Bank Secrecy Act as determined by regulation or in guidance*."[6] In 2006, FinCEN and the federal banking agencies issued interagency guidance that provides that: (1) a depository institution may share a SAR, and information that would reveal the existence of a SAR, with its controlling company (whether domestic or foreign); and (2) a U.S. branch or agency of a foreign bank may share a SAR, and information that would reveal the existence of a SAR, with its foreign head office.[7] When it does so, a depository institution, "as part of its anti-money laundering program, must have written confidentiality agreements or arrangements in place specifying that the head office or controlling company must protect the confidentiality of the Suspicious Activity Reports through appropriate internal controls."[8] However, the 2006 guidance prohibits a recipient controlling company or head office from further sharing a SAR or information that would reveal the existence of a SAR.

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4 Interagency Guidance, Sharing Suspicious Activity Reports with Head Offices and Controlling Companies (January 20, 2006).

5 31 C.F.R. § 1020.320(e)(1)(i) and (ii)(A)(1).

6 *Id.* at § 1020.320(e)(1)(ii)(B)(emphasis added).

7 Interagency Guidance, Sharing Suspicious Activity Reports with Head Offices and Controlling Companies (January 20, 2006).

8 *Id*.

FinCEN affirmed the 2006 guidance in 2010 when it issued new guidance acknowledging that "[t]he sharing of a SAR or, more broadly, any information that would reveal the existence of a SAR, with a head office or controlling company (including overseas) promotes compliance with the applicable requirements of the BSA by enabling the head office or controlling company to discharge its oversight responsibilities with respect to enterprise-wide risk management, including oversight of a depository institution's compliance with applicable laws and regulations."[9] *The 2010 guidance also concluded that a depository institution that has filed a SAR may share the SAR, or any information that would reveal the existence of the SAR, with an affiliate provided the affiliate is subject to SAR regulations of the United States. In effect, this permits a U.S. depository institution to share this information only with U.S.-based affiliates.* FinCEN explained that "[t]he sharing of SARs with such affiliates facilitates the identification of suspicious transactions taking place through the depository institution's affiliates that are subject to a SAR rule. Therefore, such sharing within the depository institution's corporate organizational structure is consistent with the purposes of Title II of the BSA."

However, in the 2010 guidance, FinCEN **did not** authorize U.S. depository institution to share SARs with foreign branches. FinCEN does not regard foreign branches as part of a U.S. depository institution. Rather, foreign branches of a U.S. depository institution are regarded as foreign banks for purposes of the BSA.[10] Because no U.S. SAR regulation applies to foreign banks, foreign branches of a U.S. depository institution are, for purposes of the guidance, affiliates that are not subject to a SAR regulation. Accordingly, a U.S. depository institution that has filed a SAR may not share the SAR, or any information that would reveal the existence of the SAR, with its foreign branches. (Nor may it share such information with foreign affiliates for the same reason.) Moreover, the 2010 guidance **prohibits** an affiliate that has received a SAR from a depository institution from further sharing that SAR, or any information that would reveal the existence of that SAR, with an affiliate of its own (even if such second affiliate is subject to a U.S. SAR regulation). *An important net effect of FinCEN's position in this regard is that the U.S. depository institutions of globally active banking enterprises may not share SAR information with foreign branches or foreign affiliates, nor may such information be disseminated within global banking enterprise by their parent companies.*

2. Sharing of Underlying Information

The FinCEN regulations explicitly provide that depository institutions are not prohibited from disclosing the underlying facts, transactions, and documents upon which a SAR is based.[11] Thus, on its face, the regulations would appear to permit depository institutions to share the underlying facts, transactions, and documents on which a SAR is based with foreign branches and foreign affiliates. However, in light of commentary by FinCEN on this topic, the scope of this exception for disclosing underlying information is not entirely clear. For example, in the Supplementary Information section of the December 2010 Final Rule amending the SAR confidentiality provisions, FinCEN indicated that "[d]ocuments that may identify suspicious activity but that do not reveal whether a SAR exists (e.g., a document memorializing a customer transaction, such as an account statement indicating a cash deposit or a record of a funds transfer), should be treated as falling within the underlying facts, transactions, and

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9 FIN-2010-G006, Sharing Suspicious Activity Reports by Depository Institutions and Certain U.S. Affiliates (November 23, 2010).

10 31 C.F.R. § 1010.100(u).

11 31 C.F.R. § 1020.320(e)(1)(ii)(A)(2).

documents upon which a SAR may be based, and should not be afforded confidentiality."[12] Yet, other language in the Supplementary Information might be read as limiting the exception to information produced in the ordinary course of business.[13] For example, FinCEN explains that it "leans heavily in favor of applying SAR confidentiality not only to a SAR itself, but also in appropriate circumstances to material prepared by the financial institution as part of its process to detect and report suspicious activity . . . ."[14] This statement raises questions regarding whether the exception covers facts, descriptions of transactions, and documents that both (A) underlie a SAR and (B) are recited or referenced in, or attached to, a SAR, including with respect to sharing such underlying facts, transactions, and documents with foreign branches and foreign affiliates.[15]

B. Benefits of Cross-Border SAR Sharing

There are regulatory expectations that globally active depository institutions assess and monitor risks on an enterprise-wide basis, including AML risks. As early as 2008, the Board of Governors of the Federal Reserve System (the "Board") advised banking organizations of "the need for effective firmwide compliance risk management and oversight at large, complex banking organizations."[16] The Board explained that "[t]he need for a firmwide approach to compliance risk management at larger, more complex banking organizations is well demonstrated in areas such as anti-money laundering, privacy, affiliate transactions, conflicts of interest, and fair lending, where legal and regulatory requirements may apply to multiple business lines or legal entities within the banking organization."[17] More recently, FinCEN touched on this same theme in its *Advisory to U.S. Financial Institutions on Promoting a Culture of Compliance*. In the advisory, FinCEN emphasized the value of sharing information across an enterprise, explaining that "in a larger organization there may be multiple affiliated institutions that could benefit from sharing of relevant information across the organization."[18]

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12 75 Fed. Reg. 75593, 75595 (Dec. 3, 2010).

13 *Id.* at n. 13 ("As one commenter correctly suggested, information produced in the ordinary course of business may contain sufficient information that a reasonable and prudent person familiar with SAR filing requirements could use to conclude that an institution likely filed a SAR (e.g., a copy of a fraudulent check, or a cash transaction log showing a clear pattern of structured deposits). Such information, alone, does not constitute information that would reveal the existence of a SAR.")

14 *Id.*

15 For avoidance of doubt, please note that The Clearing House is not requesting guidance with respect to the confidentiality of SARs themselves, or even draft SARs, or documents produced in the course of a depository institution's transaction surveillance procedures or investigation of whether to file a SAR – all of which are confidential under 31 C.F.R. § 1020.320(e)(1)(i).

16 SR 08-8, Compliance Risk Management Programs and Oversight at Large Banking Organizations with Complex Compliance Programs (October 16, 2008).

17 *Id.*

18 FIN-2014-A007, Advisory to U.S. Financial Institutions on Promoting a Culture of Compliance (August 11, 2014).

Restrictions on cross-border SAR sharing impede the ability of globally active depository institutions to conduct enterprise-wide risk assessments and activity monitoring in the most effective and efficient manner. This is because these restrictions limit the ability of global banking organizations to provide information to monitoring programs and AML compliance functions at the depository institution level, where AML activity organically occurs. Ambiguity regarding the scope of the confidentiality exception for underlying information has a similar deleterious effect on the ability of globally active depository institutions to monitor and assess AML risk on an enterprise-wide basis.

While depository institutions have worked aggressively to tackle AML issues – working within the parameters of these restrictions and in a manner that is mindful of this ambiguity – the result of the restrictions and ambiguity is an artificial constraint on the ability of a banking enterprise to gauge accurately AML risk through a holistic view of customer activity and allocate AML resources in the most organizationally rational ways. This manifests itself in ways that may include inconsistent risk ratings of accounts for the same customer with accounts in different countries and also has the potential to adversely affect the quality of SARs filed by a depository institution.

A less restricted, flow of AML information within a banking enterprise would result in: (1) better transaction monitoring; (2) higher quality SARs; (3) better information for law enforcement investigations; (4) better knowledge of international money laundering and terrorist financing trends; (5) easier implementation of a risk-based, enterprise-wide approach to AML; and (6) efficiencies in the process of preparing SARs, greater uniformity in SARs filed by a banking enterprise, and minimization of duplicative SAR filings.[19]

FinCEN already permits foreign banks to engage in the type of cross-border SAR sharing by allowing U.S. branches of foreign banks to share information collected inside the U.S. with their home office outside the U.S. However, foreign branches and affiliates of U.S. depository institutions are not permitted to receive cross-border SARs from their home offices. This puts globally active U.S. depository institutions at a distinct disadvantage to such foreign banks in terms of AML risk–management tools since U.S. institutions cannot share SARS as widely as foreign institutions can. This disadvantage can be compounded in the examination process by the expectation of bank examiners that globally active U.S. depository institutions should have the same degree of enterprise-wide AML risk management as foreign banks with U.S. branches, notwithstanding the differences in SAR sharing authority. Allowing U.S. depository institutions to share SARs created inside the U.S. with branches and affiliates outside the U.S. would enable equal AML information sharing for foreign banks and U.S. banks to the benefit of the U.S. AML interests.

C. Request For Interpretive Guidance

In light of the foregoing, The Clearing House respectfully requests that FinCEN issue written guidance, pursuant to 31 C.F.R. § 1020.320(e)(1)(ii)(B), that allows U.S. depository institutions to share

[19] As the Egmont Group has observed: "The possibility of transmitting relevant data on suspicious transactions within a single financial group would allow the exchange of information on subjects, transactions, trends, and patterns of money laundering and terrorist financing (ML/TF) throughout the group. This would allow the financial group to analyze the information as a whole, leading to the creation of enhanced compliance programs to protect its customers, products, and services from criminal activities." Egmont Group of Financial Intelligence Units, Enterprise-wide STR Sharing: Issues and Approaches (February 2011).

SARs, and information that would reveal the existence of SARs, with foreign branches and affiliates that operate in countries that are members of FATF. These countries have endorsed and support, at a ministerial level, the 2012 FATF Recommendations and the 2013 FATF AML/CFT Methodology, including as relates to SAR confidentiality, and have undergone a mutual evaluation during the membership process for the purposes of assessing compliance with FATF membership criteria as well as agreeing to submit subsequent follow-up reports. These countries have demonstrated a strong record of AML laws and practices and an ongoing commitment to the FATF Recommendations. We believe that disclosure to foreign branches and affiliates in these countries strikes an appropriate balance between the benefits of such sharing in the fight against money laundering and terrorist financing and the importance of maintaining the confidentiality of SAR information.

For foreign branches and affiliates that are located in countries that are not FATF members, The Clearing House respectfully requests that FinCEN issue written guidance, pursuant to 31 C.F.R. § 1020.320(e)(1)(ii)(B), that allows U.S. depository institutions to share SARs, and information that would reveal the existence of SARs, with such branches and affiliates if the U.S. depository institution enters into written confidentiality agreements or arrangements with the branches and affiliates in line with those required by the 2006 guidance for SAR sharing with controlling companies and head offices.

In addition, to ensure that U.S. depository institutions may disclose within their corporate organizational structure valuable AML information that may underlie a SAR, The Clearing House respectfully requests that FinCEN issue written guidance clarifying the scope of the ability to disclose "underlying facts, transactions, and documents" in 31 C.F.R. § 1020.320(e)(1)(ii)(A)(2) within the framework described above. In particular we ask that FinCEN clarify that the fact that information from underlying transactions, facts, or documents has been included in a SAR does not cause that information to fall under the general prohibition against disclosing a SAR or information that would reveal the existence of a SAR.

* * * *

We appreciate the need for a careful balancing of interests in connection with the confidentiality of SARs, and we would be grateful for the opportunity to meet in-person with representatives of FinCEN to discuss this matter in general and our specific requests. You may reach me at (212) 613-0138, Jeremy Newell, Executive Managing Director, General Counsel and Head of Regulatory Affairs at (212) 649-4622, or Alaina Gimbert, Senior Vice President and Associate General Counsel at (336) 769-5302. Thank you for your attention to this important matter.

Sincerely,

Paul Saltzman
President, The Clearing House Association
Executive Vice President and General Counsel,
The Clearing House Payments Company

cc:

U.S. Department of the Treasury

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