

an agency to identify and consider a reasonable number of regulatory alternatives before promulgating a rule.

The OTS has determined that this proposed rule 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 12 CFR Part 563

Crime, Currency, Savings associations, Reporting and recordkeeping requirements, Security measures.

#### Authority and Issuance

For the reasons set forth in the preamble, part 563 of title 12 of the Code of Federal Regulations is proposed to be amended as follows:

#### PART 563—SAVINGS ASSOCIATIONS—OPERATIONS

1. The authority citation for part 563 continues to read as follows:

**Authority:** 12 U.S.C. 375b, 1462a, 1463, 1464, 1467a, 1468, 1817, 1828, 3806; 31 U.S.C. 5318;

2. Section 563.180 is amended by revising paragraphs (d)(2)(iii), (d)(3) introductory text, (d)(12), and (d)(13) to read as follows:

#### § 563.180 Suspicious Activity Reports and Other Reports and Statements.

\* \* \* \* \*

(d) \* \* \*

(2) \* \* \*

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

(3) *SARs required.* A savings association or service corporation shall file a SAR with the appropriate Federal law enforcement agencies and the Department of the Treasury on the form prescribed by the OTS and in accordance with the form's instructions, by sending a completed SAR to FinCEN in the following circumstances:

\* \* \* \* \*

(12) *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)(12).

(i) *Prohibition on disclosure by savings associations—(A) General rule.* No savings association or Service Corporation, and no director, officer, employee, or agent of a savings association or service corporation, shall disclose a SAR or any information that would reveal the existence of a SAR. Any savings association or service corporation, and any director, officer,

employee, or agent of any savings association or service corporation that is subpoenaed or otherwise requested to disclose a SAR, or any information that would reveal the existence of a SAR, shall decline to produce the SAR or such information, citing this section and 31 U.S.C. 5318(g)(2)(A)(i), and shall notify the following of any such request and the response thereto:

(1) Deputy Chief Counsel, Litigation Division, Office of Thrift Supervision; and

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

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

(A) The disclosure by a savings association or service corporation, or any director, officer, employee or agent of a savings association or service corporation 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 savings association 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 savings association, or any director, officer, employee, or agent of a savings association, of a SAR, or any information that would reveal the existence of a SAR, within the savings association's corporate organizational structure, for purposes consistent with Title II of the Bank Secrecy Act as determined by regulation or in published guidance.

(iii) *Prohibition on disclosure by OTS.* Neither OTS (nor any officer, employee or agent of OTS) shall disclose a SAR, or any information that would reveal the existence of a SAR, except as necessary to fulfill official duties consistent with Title II of the Bank Secrecy Act. For purposes of this section, official duties shall not include the disclosure of a SAR, or any information that would reveal the existence of a SAR, in response to a request for use in a private legal proceeding or in response to a

request for disclosure of non-public information under 12 CFR 510.5.

(13) *Limitation on liability.* A savings association or service corporation and any director, officer, employee or agent of a savings association or service corporation 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).

\* \* \* \* \*

Dated: November 18, 2008.

By the Office of Thrift Supervision.

**John M. Reich,**  
Director.

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

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#### DEPARTMENT OF THE TREASURY

#### Office of Thrift Supervision

#### 12 CFR Part 510

[Docket ID OTS-2008-0018]

RIN 1550-AC28

#### Standards Governing the Release of a Suspicious Activity Report

**AGENCY:** Office of Thrift Supervision, Treasury.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Office of Thrift Supervision (OTS) is proposing to revise its regulations governing the release of unpublished OTS information. The primary change being proposed would clarify that the OTS's decision to release a Suspicious Activity Report (SAR) will be governed by the standards set forth in proposed amendments to the OTS's SAR regulation that are part of a separate, but simultaneous, rulemaking. **DATES:** Comments must be received by June 8, 2009.

**ADDRESSES:** You may submit comments, identified by OTS-2008-0018 by any of the following methods:

- *Federal Rulemaking Portal:*—“Regulations.gov”: Go to <http://www.regulations.gov>, under the “More Search Options” tab click next to the “Advanced Docket Search” option where indicated, select “Office of Thrift

Supervision” from the agency drop-down menu, then click “Submit.” In the “Docket ID” column, select “OTS–2008–0018” to submit or view public comments and to view supporting and related materials for this notice of proposed rulemaking. The “How to Use This Site” link on the Regulations.gov home page provides information on using Regulations.gov, including instructions for submitting or viewing public comments, viewing other supporting and related materials, and viewing the docket after the close of the comment period.

- *E-mail address:*

*regs.comments@ots.treas.gov.* Please include OTS–2008–0018 in the subject line of the message and include your name and telephone number in the message.

- *Fax:* (202) 906–6518.

- *Mail:* Regulation Comments, Chief Counsel’s Office, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552, Attention: OTS–2008–0018.

- *Hand Delivery/Courier:* Guard’s Desk, East Lobby Entrance, 1700 G Street, NW., from 9 a.m. to 4 p.m. on business days, Attention: Regulation Comments, Chief Counsel’s Office, OTS–2008–0010.

*Instructions:* All submissions received must include the agency name and docket number or Regulatory Information Number (RIN) for this rulemaking. All comments received will be posted without change to the OTS Internet Site at <http://www.ots.treas.gov/Supervision&Legal.Laws&Regulations>, including any personal information provided. Comments received, including attachments and other supporting materials, are part of the public record and subject to public disclosure. Do not enclose any information in your comment or supporting materials that could be considered confidential or inappropriate for public disclosure.

- *Viewing Comments Electronically:*

Go to <http://www.regulations.gov>, under the “More Search Options” tab click next to the “Advanced Document Search” option where indicated, select “Office of Thrift Supervision” from the agency drop-down menu and click “Submit.” In the “Docket ID” column, select “OTS–2008–0018” to view public comments for this rulemaking action.

- *Viewing Comments On-Site:* You may inspect comments at the Public Reading Room, 1700 G Street, NW by appointment. To make an appointment call (202) 906–5922, send an e-mail to [public.info@ots.treas.gov](mailto:public.info@ots.treas.gov), or send a facsimile transmission to (202) 906–6518. (Prior notice identifying the

materials you will be requesting will assist us in serving you.) We schedule appointments on business days between 10 a.m. and 4 p.m. In most cases, appointments will be available the next business day following the date we receive a request.

**FOR FURTHER INFORMATION CONTACT:**

Marvin Shaw, Senior Attorney, Regulations and Legislation (202–906–6639); Dirk Roberts, Deputy General Counsel, Litigation (202–906–7631), Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

**SUPPLEMENTARY INFORMATION:**

**I. Introduction**

The Office of Thrift Supervision (OTS) is proposing to amend its regulations set forth in 12 CFR part 510, governing the release of unpublished OTS information. First, the proposed amendments would conform section 510.5 to amendments to the OTS’s SAR confidentiality rule, 12 CFR 563.180, that are being proposed as part of a separate, but simultaneous, rulemaking that the OTS is conducting. Under the standards that the OTS is proposing to incorporate into section 510.5, the OTS would only release a SAR, or any information that would reveal the existence of a SAR (referred to in this preamble as “SAR information”), when “necessary to fulfill official duties consistent with Title II of the Bank Secrecy Act (BSA).”

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

In addition to the clarification of the standards governing the release of SAR information, the proposed amendments to section 510.5 clarify that the OTS would deny a request for non-public information made under 12 CFR section 510.5(d), if the release is prohibited by law.

**II. Background**

This proposal would amend part 510 to make it consistent with the proposed amendments to OTS’s SAR regulation that implements section 351 of the USA PATRIOT Act, thus ensuring that the appropriate standard is applied to OTS’s disclosure of SAR information. Section 510.5 sets forth OTS’s standards and

procedures for the release of “unpublished OTS information,” and sets forth the restrictions on the dissemination of such information. Generally, “unpublished OTS information” is confidential and privileged information that is the property of the OTS, and that the OTS is not required to release under the Freedom of Information Act (5 U.S.C. 552 et seq.) or that the OTS has not yet published or made available pursuant to 12 U.S.C. 1818(u), the statute requiring publication of certain enforcement orders.

Section 510.5 describes procedures for requesting unpublished OTS information from the OTS, such as, where to submit a request, the form of the request, information that must be included in any request involving an adversarial matter, and various bases for the OTS’s denial of such a request.<sup>1</sup> Section 510.5 authorizes the OTS to make unpublished OTS information available to a supervised entity and to other persons, at the sole discretion of the Director or his or her delegate.<sup>2</sup> Section 510.5(d)(5) also indicates that the OTS may condition release of information that it discloses under this section.

Although a SAR may be considered “unpublished OTS information,” it is the OTS’s position that the release of a SAR must be governed by standards set forth in the BSA. The BSA and its implementing regulations require a financial institution to file a SAR when it detects a known or suspected violation of Federal law or a suspicious activity related to money laundering, terrorist financing, or other criminal activity.<sup>3</sup> The BSA also provides that a financial institution, and its officers, directors, employees, and agents are prohibited from notifying any person involved in a suspicious transaction that the transaction was reported.<sup>4</sup> Most importantly, in 2001, section 351 of the USA PATRIOT Act added a new provision to the BSA prohibiting officers or employees of the Federal government or any State, local, tribal, or territorial government within the United States from disclosing to any person<sup>5</sup> involved in a suspicious transaction that

<sup>1</sup> See 12 CFR 510.5.

<sup>2</sup> See 12 CFR 510.5(d).

<sup>3</sup> 31 U.S.C. 5318(g)(1).

<sup>4</sup> 31 U.S.C. 5318(g)(2)(A)(i).

<sup>5</sup> The phrase “any person involved in the transaction” has been construed to apply to “any person” because the disclosure of SAR information to any outside party may make it likely that SAR information would be disclosed to a person involved in the transaction, which is absolutely prohibited by the BSA. See *Cotton v. Private Bank and Trust Co.*, 235 F. Supp. 2d 809, 815 (N.D. Ill. 2002).

the transaction was reported, other than as necessary to fulfill the official duties of such officer or employee.<sup>6</sup>

Accordingly, it is this provision that now governs the ability of the OTS to disclose SAR information to any person.

The OTS is revisiting the treatment of SAR information in section 510.5 in light of the 2001 amendments to the BSA, added by section 351 of the USA PATRIOT Act that specifically addresses governmental disclosures of SARs. Under the proposed amendments to section 510.5, the OTS will decide whether to release SAR information based upon the standard in the OTS's proposed amendments to its SAR rules, 12 CFR 563.180, implementing section 351, rather than upon the factors set out in section 510.5(d). The standard in the proposed amendments to the OTS's SAR rule provides that "Neither OTS (nor any officer, employee or agent of OTS) shall disclose a SAR, or any information that would reveal the existence of a SAR except as necessary to fulfill official duties consistent with Title II of the BSA." In addition, the standard provides that "official duties" shall not include the disclosure of SAR information in response to a request for use in a private legal proceeding or in response to a request for disclosure of non-public information under 12 CFR 510.5.<sup>7</sup> The proposed SAR rules interpret "official duties" to mean "official duties consistent with the purposes of Title II of the BSA," namely, for "criminal, tax, regulatory investigations or proceedings, or in the conduct of intelligence or counterintelligence activities, including analysis, to protect against international terrorism."<sup>8</sup> This standard would permit disclosures responsive to a grand jury subpoena; a request from an appropriate Federal or State law enforcement or regulatory agency; and prosecutorial disclosures mandated by statute or the Constitution, in connection with the statement of a government witness to be called at trial, the impeachment of a government

witness, or as material exculpatory of a criminal defendant.<sup>9</sup>

### III. Section-by-Section Description of the Proposal

#### *Section 510.5(a) and (b) Scope and Purpose*

Section 510(b) currently includes several standards for the release of unpublished OTS information. A person seeking such information, generally must submit a request in writing to the OTS that addresses the factors set forth in section 510.5(b). Section 510.5(d) describes how the OTS will make its determination to release the information. That provision also provides that OTS will deny a request if it deems the information to be (A) not highly relevant, (B) privileged, (C) available from other sources, or (D) information that should not be disclosed for reasons that warrant restriction under the Federal Rules of Civil Procedure.<sup>10</sup>

This proposal adds a new paragraph (iv) to the scope section of 12 CFR 510.5, which states that this section does not apply to OTS's decision to disclose records or testimony involving a SAR filed pursuant to regulations implementing 12 U.S.C. 5318(g) or any information that would reveal the existence of a SAR. Accordingly, the OTS's decision to disclose records or testimony involving SAR information would be governed solely by the standard in 12 CFR 563.180. Paragraph (iv) makes clear that the standard in 12 CFR 563.180 would apply in place of the standards for denial set forth in 12 CFR 510.5(d)(4). Accordingly, the OTS would not release SAR information in response to any request received pursuant to section 510.5, including from a federal, state, or foreign government, and the Director would not disclose SAR information to any person, except to fulfill the OTS's official duties in light of the purposes of the BSA. Consistent with the OTS's longstanding commitment to protect the confidentiality of SARs, the proposed SAR rule also states that "official duties" does not include the disclosure of SAR information in response to a request for use in a private legal proceeding or in response to a request for disclosure of non-public information under 12 CFR 510.5.

<sup>9</sup> 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).

<sup>10</sup> See 12 CFR 510.5(d)(4).

#### *Section 510.5(d) Consideration of Requests*

Section 510.5 generally describes how the OTS makes its determination to release or to withhold unpublished OTS information in response to requests received under section 510.5(b) and (d).<sup>11</sup> Section 510.5(d)(4) specifically lists four examples of reasons for which the OTS will deny the release of unpublished OTS information.

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

### IV. Request for Comments

The OTS welcomes comments on any aspect of these proposed amendments to the SAR rule. The OTS has timed the release of this proposal to coincide with the issuance of the proposed rule to amend its SAR confidentiality rule set forth in 12 CFR part 563.180, so that commenters can consider each proposal in commenting on the other.

### V. OTS Solicitation of Comments on Use of Plain Language

Section 722 of the Gramm-Leach-Bliley Act, Public Law 106–102, sec. 722, 113 Stat. 1338, 1471 (Nov. 12, 1999), requires the OTS to use plain language in all proposed and final rules published after January 1, 2000. Therefore, the OTS specifically invites your comments on how to make this proposal easier to understand. For example:

- Have we organized the material to suit your needs? If not, how could this material be better organized?
- Are the requirements in the proposal clearly stated? If not, how could the requirements be more clearly stated?
- Does the proposal contain language or jargon that is not clear? If so, which language requires clarification?
- Would a different format make the regulations easier to understand? If so, what changes to the format would make them easier to understand?
- What else could we do to make the regulations easier to understand?

#### *Regulatory Flexibility Act*

Under section 605(b) of the Regulatory Flexibility Act (RFA), 5 U.S.C. 605(b), the regulatory flexibility

<sup>11</sup> As described earlier, § 510.5 does not apply to SAR information.

<sup>6</sup> See USA PATRIOT Act, section 351(b). Public Law 107–56, Title III, § 351, 115 Stat. 272, 321 (2001).

<sup>7</sup> For purposes of this provision "official duties" means official disclosures necessary to accomplish a governmental purpose consistent with Title II of the BSA entrusted to the agency, the officer or employee. For example, prosecutorial disclosures mandated by statute or the Constitution, such as a statement of a government witness to be called at trial, impeachment of a government witness, or material exculpatory of a criminal defendant. See, e.g., *Giglio v. United States*, 405 U.S. 150, 153–54 (1972); *Brady v. State of Maryland*, 373 U.S. 83, 86–87 (1963); *Jencks v. United States*, 353 U.S. 657, 668 (1957).

<sup>8</sup> 31 U.S.C. 5311 (setting forth the purposes of the BSA).

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]

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## **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.<sup>1</sup>

**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,<sup>2</sup> by any of the following methods:

<sup>1</sup> 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.

<sup>2</sup> 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.