standards for determining whether a SAR should be disclosed will not have an annual effect on the economy of $100 million or more. The OCC 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 (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 (adjusted for inflation) in any one year. If a budgetary impact statement is required, section 205 of the Unfunded Mandates Act also requires an agency to identify and consider a reasonable number of regulatory alternatives before promulgating a rule.

The OCC has determined that these proposed amendments, which change the standards the OCC will apply when determining whether to release a SAR, will not result in expenditures by State, local, and tribal governments, or by the private sector, of $100 million or more (adjusted for inflation) 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 4

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 4, subpart C, of title 12 of the Code of Federal Regulations is proposed to be amended as follows:

PART 4—ORGANIZATION AND FUNCTIONS, AVAILABILITY AND RELEASE OF INFORMATION, CONTRACTING OUTREACH PROGRAM, POST-EMPLOYMENT RESTRICTIONS FOR SENIOR EXAMINERS

1. Revise the authority citation for part 4 to read as follows:

Authority: 12 U.S.C. 93a. Subpart A also issued under 5 U.S.C. 552. Subpart B also issued under 5 U.S.C. 552; E.O. 12600 (3 CFR 1987 Comp., p. 235). Subpart C also issued under 5 U.S.C. 301, 552; 12 U.S.C. 161, 481, 482, 484(a), 1442, 1817(a)(2) and (3), 1818(u) and (v), 1820(d)(6), 1820(k), 1821(c), 1821(o), 1821(t), 1831m, 1831p–1, 1831o, 1867, 1951 *et seq.*, 2601 *et seq.*, 2801 *et seq.*, 2901 *et seq.*, 3101 *et seq.*, 3401 *et seq.*; 15 U.S.C. 77uu(b), 78q(c)(3); 18 U.S.C. 641, 1905, 1906; 29 U.S.C. 1204; 31 U.S.C. 5318(g)(2), 9701; 42 U.S.C. 3601; 44 U.S.C. 3506, 3510. Subpart D also issued under 12 U.S.C. 1833e.

2. Add § 4.31(b)(4) to read as follows:

§ 4.31 Purpose and scope.

* * * * *

(b) * * *

(4) For purposes of §§ 4.35(a)(1), 4.36(a) and 4.37(c), the OCC's decision to disclose records or testimony involving a Suspicious Activity Report (SAR) filed pursuant to the regulations implementing 12 U.S.C. 5318(g), or any information that would reveal the existence of a SAR, is governed solely by 12 CFR 21.11(k).

* * * * *

§ 4.32 [Amended]

3. Amend § 4.32(b) by:

a. Removing paragraph (b)(1)(vii).

b. Adding the word ''and'' at the end of paragraph (b)(1)(v); and

c. Removing, at the end of paragraph (b)(1)(vi), ''; and'' and adding a period in its place;

4. Amend § 4.35(a)(2) by:

a. Removing the word ''or'' at the end of paragraph (a)(2)(iv);

b. Removing, in paragraph (a)(2)(v), the period and by adding in lieu thereof ''; or''; and

c. Adding a new paragraph (a)(2)(vi) to read as follows:

§ 4.35 Consideration of requests.

(a) * * *

(2) * * *

(vi) When prohibited by law.

* * * * *

§ 4.37 [Amended]

5. In paragraph § 4.37(c), remove the reference to ''§ 4.37'' in the last sentence and add in lieu thereof ''§ 4.38.''

Dated: January 22, 2009.

John C. Dugan,

Comptroller of the Currency.

[FR Doc. E9–4700 Filed 3–6–09; 8:45 am]

BILLING CODE 4810–33–P

DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

12 CFR Part 563

[Docket ID OTS–2008–0015]

RIN 1550–AC26

Confidentiality of Suspicious Activity Reports

AGENCY: The Office of Thrift Supervision, Treasury (OTS).

ACTION: Notice of proposed rulemaking.

SUMMARY: The OTS is proposing to amend its regulations implementing the Bank Secrecy Act (BSA) governing the confidentiality of a Suspicious Activity Report (SAR) to: clarify the scope of the statutory prohibition on the disclosure by a financial institution of a report of a suspicious transaction, as it applies to savings associations and service corporations; address the statutory prohibition on the disclosure by the government of a report of a suspicious transaction, as that prohibition applies to the OTS's standards governing the disclosure of SARs; clarify the exclusive standard applicable to the disclosure of a SAR, or any information that would reveal the existence of a SAR, by the OTS is ''to fulfill official duties consistent with the purposes of the BSA''; and modify the safe harbor provision in its rules to include changes made by the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act. These amendments are based upon a similar proposal being contemporaneously issued by the Office of Comptroller of the Currency (OCC) and the Financial Crimes Enforcement Network (FinCEN).

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

ADDRESSES: You may submit comments, identified by OTS–2008–0015 (''docket number'') by any of the following methods:

• *Federal eRulemaking 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–2008–0015'' 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–2008–0015 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–2008–0015.
- *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–2008–0015.

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–2008–0015]'' to view public comments for this rulemaking action.
- *Viewing Comments On-Site:* You may inspect comments at the OTS's 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,* 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: Louise Batdorf, Analyst, BSA and Compliance Examinations (202–906–7087); Marvin Shaw, Senior Attorney, Regulations and Legislation (202–906–6639); Margaret McPartlin, Senior Attorney, Enforcement (202–906–6831); or Noelle Kurtin, Senior Attorney, Enforcement (202–906–6739).

SUPPLEMENTARY INFORMATION:

I. Background

The BSA requires financial institutions, including savings associations and service corporations regulated by the OTS, 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 a financial institution to file a SAR when it detects a known or suspected violation of federal law or a suspicious transaction related to a money laundering activity or a violation of the BSA, terrorist financing, or other criminal activity.[1]

SARs are used for law enforcement or regulatory purposes to combat terrorism, terrorist financing, money laundering and other financial crimes. For this reason, 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. To encourage the reporting of possible violations of law and regulation, and the filing of SARs, the BSA also contains a safe harbor provision which 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.)'' [2]

FinCEN [3] has issued rules implementing SAR confidentiality provisions for various types of financial institutions that closely mirror the statutory language.[4] In addition, the federal bank regulatory agencies implemented these provisions through similar regulations that provide that SARs are confidential and generally no information about or contained in a SAR may be disclosed.[5] The regulations issued by FinCEN and the federal bank regulatory agencies also describe the applicability of the safe harbor provision to both voluntary reports of possible and known violations of law and regulation and the required filing of SARs.

The USA PATRIOT Act of 2001 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 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] The USA PATRIOT Act also expanded the safe harbor provision shielding financial institutions from liability for voluntary reporting of possible violations of law and regulations, and the filing of SARs, to cover any civil liability which may exist ''under any contract or other legally enforceable agreement (including any arbitration agreement).'' [7]

FinCEN is proposing to modify its SAR rule to interpret or further interpret the provisions of the BSA that relate to the confidentiality of SARs and the safe harbor for such reporting. The OTS is

[1] 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). The OCC, Board of Governors of the Federal Reserve System (FRB), the Federal Deposit Insurance Corporation (FDIC), the Office of Thrift Supervision (OTS), and the National Credit Union Administration (NCUA), (collectively referred to as the Federal bank regulatory agencies) subsequently issued virtually identical implementing regulations on suspicious activity reporting. *See* 12 CFR 21.11 (OCC); 12 CFR 208.62 (FRB); 12 CFR 353.3 (FDIC); 12 CFR 563.180 (OTS) and 12 CFR 748.1 (NCUA).

[2] *See* USA PATRIOT Act, section 351(a). Pub. L. 107–56, Title III, § 351, 115 Stat. 272, 321 (2001).

[3] FinCEN is the agency designated by the Department of Treasury to administer the BSA, and with which SARS must be filed. *See* 31 U.S.C. 5318; 12 CFR 563.180(d).

[4] *See,* e.g., 31 CFR 103.18(e) (SAR confidentiality rule for banks); 31 CFR 103.19(e) (SAR confidentiality rule for brokers or dealers in securities).

[5] *See* 12 CFR 21.11(k) (OCC); 12 CFR 208.62(j) (FRB); 12 CFR 353.3(g) (FDIC); 12 CFR 563.180(d)(12) (OTS); and 12 CFR 748.1 (NCUA).

[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).

proposing to amend its rule contemporaneously, based upon the proposal being issued by FinCEN, to clarify the manner in which these provisions apply to savings associations and service corporations and the OTS's own standards governing the disclosure of a SAR and any information that would reveal the existence of a SAR (referred to in this preamble as ''SAR information'').

II. Overview of Proposal

The proposed amendments to the OTS's rule include key changes that would (1) clarify the scope of the statutory prohibition on the disclosure by a financial institution of a report of a suspicious transaction, as it applies to savings associations and service corporations; (2) address the statutory prohibition on the disclosure by the government of a report of a suspicious transaction, which was added to the BSA by section 351(b) of the USA PATRIOT Act of 2001, as that prohibition applies to the OTS's standards governing the disclosure of SAR information; and (3) clarify that the exclusive standard applicable to the disclosure of SAR information by the OTS is ''to fulfill official duties consistent with the purposes 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. In addition, the proposed amendments would modify the safe harbor provision in the OTS's SAR rules [8] to include changes made by the USA PATRIOT Act.

In addition, as described in Section III, FinCEN is issuing for notice and comment proposed guidance regarding the sharing of SARs with affiliates. FinCEN's proposed guidance interprets a provision of the proposed rulemaking, and, accordingly, should be read in conjunction with this notice.

In a separate rulemaking, the OTS also is simultaneously proposing to amend its information disclosure regulation set forth in 12 CFR 510.5, to clarify that the exclusive standard governing the release of a SAR is set forth in 12 CFR 563.180. The OTS is issuing this proposed amendment to 12 CFR part 510, at the same time, to make clear that the OTS will disclose SAR information only when necessary to satisfy the BSA purposes for which SARs are filed.

[8] 12 CFR 563.180(d)(13).

III. Section-by-Section Description of the Proposal

Section 563.180(d)(2)(iii): Definition of a SAR

The primary purpose of the OTS's SAR rule is to ensure that a savings association or service corporation files a SAR when it detects a known or suspected violation of a federal law or a suspicious transaction related to a money laundering activity or a violation of the BSA. See 12 CFR 563.180. Incidental to this purpose, the OTS's SAR rule includes a section that addresses the confidentiality of SARs.

Under the current SAR rule, the term ''SAR'' means ''a Suspicious Activity Report on the form prescribed by the OTS.'' The proposed rule simply defines a ''SAR'' generically as ''a Suspicious Activity Report.'' This change would extend the confidentiality provisions of the OTS's SAR rule to all SARs, including those filed on forms prescribed by FinCEN.[9] As a consequence, a savings association or service corporation that obtained a SAR, for example, from a non-bank affiliate pursuant to the provisions of this proposed rule, would be required to safeguard the confidentiality of the SAR, even if the SAR had not been filed on a form prescribed by the OTS.

Section 563.180(d)(3): SARs Required

To clarify that a savings association or service corporation must file a SAR on a form ''prescribed by the OTS,'' the OTS is proposing to add this phrase to the introductory language of the section of the OTS's SAR rule that describes the procedures for filing of a SAR. Accordingly, the proposed rules require a savings association or service corporation to file a SAR with the appropriate Federal law enforcement agencies and the Department of the Treasury *on the form prescribed by the OTS* in accordance with the form's instructions, by sending a completed SAR to FinCEN.

Section 563.180(d)(12): Confidentiality of SARs

The OTS is proposing to amend its rules regarding SAR confidentiality [10] by modifying the introductory sentence, and dividing the remainder of the current provision into two sections. The first section would describe the prohibition on disclosure of SAR information by savings associations and service corporations, and the rules of construction applicable to this prohibition. The second section would describe the prohibition on the OTS's disclosure of SAR information.

Currently, the OTS's rules prohibiting the disclosure of SARs begins with the statement that SARs are confidential. Over the years, the OTS has received numerous questions regarding the scope of the prohibition on the disclosure of a SAR in the OTS's current rules. Accordingly, the OTS is proposing to clarify the scope of SAR confidentiality by more clearly describing the information that is subject to the prohibition. Like FinCEN, the OTS 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.

The OTS believes that the confidentiality of a SAR cannot be maintained unless any information that would reveal the existence of a SAR (such as the draft of a SAR that has been filed) is protected from disclosure. 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, even the occasional disclosure of a SAR could chill the willingness of a savings association or service corporation to file SARs, and to provide the degree of detail and completeness in describing suspicious activity in SARs that will be of use to law enforcement. If a savings association or service corporation believes 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. Savings associations and service corporations also may be reluctant to report suspicious transactions, or may delay making such reports, for fear that the disclosure of a SAR will interfere with its relationship with its customer. Further, a SAR may provide insight into how a savings association or service corporation uncovers potential criminal conduct that can be used by others to circumvent detection. The disclosure of a SAR also could harm the personal privacy interests of individuals and reputational interests of companies that may be named. Finally, the disclosure of a SAR for uses unrelated to the law enforcement and regulatory purposes for which SARs are intended increases the risk that savings associations' or service corporations' employees or others who

[9] *See, e.g.,* 31 CFR 103.19 (FinCEN regulations requiring brokers or dealers in securities to file reports of suspicious transactions on a SAR–S–F).

[10] 12 CFR 563.180(d)(12).

are involved in the preparation or filing of a SAR could become targets for retaliation by persons whose criminal conduct has been reported.

These reasons for maintaining the confidentiality of SARs also apply to any information that would reveal the existence of a SAR. Therefore, like FinCEN, the OTS is proposing to modify the general introduction in its rules to state that confidential treatment must also be afforded to ''any information that would reveal the existence of a SAR.'' The introduction also would indicate that SAR information may not be disclosed, except as authorized in the narrow circumstances that follow.

Section 563.180(d): Prohibition on Disclosure by Savings Associations

The OTS's current rules provide that any institution or person subpoenaed or otherwise requested to disclose a SAR or the information contained in a SAR must (1) decline to produce the SAR or to provide any information that would disclose that a SAR has been prepared or filed, and (2) notify the OTS.

The proposed rules more specifically address the prohibition on the disclosure of a SAR by a savings association or service corporation. 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.'' The OTS, like FinCEN and the OCC, believes that this phrase more clearly describes the type of information that is covered by the prohibition on 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,'' in order to clarify that the prohibition on disclosure extends to those individuals in a savings association or service corporation who may have access to SAR information.

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 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.[11] Consistent with case law and current regulation, the texts of the proposed rules do not limit the prohibitions 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 absolutely prohibited by the statute.

The proposed rules continue to provide that any savings association, or any director, officer, employee or agent of a savings association, subpoenaed or otherwise requested to disclose SAR information must decline to provide the information, citing this section of the rules and 31 U.S.C. 5318(g)(2)(A)(i), and must give notice of the request to the OTS. In addition, the proposed rules require the savings association or service corporation to notify the OTS of its response to the request, and require the savings association or service corporation, to provide the same information to FinCEN. This new notification requirement was added to the proposed rules so that either or both agencies can intervene to prevent the disclosure of SAR information by a savings association or service corporation, if necessary.

Section 563.180(d)(12)(ii): Rules of Construction

The OTS, like FinCEN and the OCC, 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 on disclosure of SAR information by a savings association or service corporation. 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 states that a savings association or service corporation, or any director, officer, employee or agent of a savings association or service corporation may disclose SAR information 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. Although the permissibility of such disclosures may be readily apparent, the proposal contains this statement to clarify that a savings association or service corporation cannot use the prohibition on disclosure of SAR information to withhold this information from governmental 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 SAR information 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.[12]

This proposed rule of construction includes some illustrative examples of situations where a savings association or service corporation may disclose the underlying facts, transactions, and documents upon which a SAR is based. The first example clarifies that a savings association or service corporation may disclose this information[13] to another financial institution, or any director, officer, employee or agent of the financial institution, for the preparation of a joint SAR.[14] The second example

[11] *See 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).

[12] *See Cotton* v. *Private Bank and Trust Co.*, 235 F. Supp. 2d 809, 815 (N.D. Ill. 2002).

[13] The underlying facts, transactions, and documents upon which a SAR is based do not include previously filed SARs that were not jointly filed.

[14] 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. Although joint filing of SARs by depository institutions is not permitted at this time, this proposal would amend the agencies' regulations to enable depository institutions to make disclosures

simply 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.[15]

The third proposed rule of construction makes clear that the prohibition on the disclosure of SAR information by a savings association or service corporation does not include the sharing by a savings association or service corporation, or any director, officer, employee or agent of such a financial institution, of SAR information within the institution's corporate organizational structure, for purposes consistent with Title II of the BSA, as determined by regulation or in published guidance. This proposed rule recognizes that a savings association or service corporation may find it necessary to share SAR information to fulfill its reporting obligations under the BSA, and to facilitate more effective enterprise-wide BSA monitoring and reporting, consistent with Title II of the BSA.

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). This guidance stated that the sharing of a SAR with a head office or controlling company both facilitates compliance with the applicable requirements of the BSA and enables the head office or controlling company to discharge its oversight responsibilities with respect to enterprise-wide risk management and compliance with applicable laws and regulations.[16] Concurrent with this proposed rulemaking, FinCEN is issuing additional guidance for notice and comment that further elaborates on sharing of SAR information within a corporate organization that FinCEN considers to be ''consistent with the purposes of the BSA.'' FinCEN has indicated that the proposed guidance would generally permit sharing of SAR information by depository institutions with their affiliates[17] that are subject to a SAR.[18] Consistent with the BSA and the proposed rules of construction, the proposed guidance also states that a financial institution may not share SAR information if the institution has reason to believe that the SAR may be disclosed to any person involved in the suspicious activity that is the subject of the SAR.

Section 563.180(d)(12): Prohibition on Disclosure by the OTS

As previously noted, section 351 of the USA PATRIOT Act, 31 U.S.C. 5318(g)(2)(A)(ii), amended the BSA, and added a new provision prohibiting officers and employees of the government from disclosing a SAR except ''as necessary to fulfill the official duties of such officer or employee.'' The OTS is proposing rules to address this new section that are comparable to those being proposed by the OCC and FinCEN. The proposed rules provide that the OTS will not, and no officer, employee or agent of the OTS, shall disclose SAR information, ''except as necessary to fulfill official duties consistent with Title II of the Bank Secrecy Act.''

As stated in section 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.'' The OTS, like the OCC and FinCEN, is proposing to address sections 5318(g)(2)(A)(i) and (A)(ii) in a consistent manner, because disclosure by a governmental authority of SAR information to any outside party may make it likely that the information will be disclosed to a person involved in the transaction. Accordingly, the section of the rules that address the disclosure of SAR information by the OTS and its officers, employees and agents is broad, and does not simply prohibit disclosure to ''any person involved in the transaction.''

Section 5318(g)(2)(A)(ii) narrowly permits governmental disclosures as necessary to ''fulfill official duties,'' a phrase that is not defined in the BSA. Consistent with the rules being proposed by FinCEN and the OCC, the OTS 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.'' [19] This standard would permit, for example, 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 subcommittee; 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.[20] This proposed interpretation of section 5318(g)(2)(A)(ii) would ensure that SAR information will not be disclosed for a reason that is unrelated to the purposes of the BSA. For example, this standard would not permit disclosure of SAR information to the media.

The proposed rules also specifically provide 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 unpublished information under 12 CFR 510.3. This statement, which corresponds to a similar provision in FinCEN's proposed rules, clearly establishes that the OTS will not disclose SAR information to a private litigant for use in a private legal proceeding, or pursuant to 12 CFR 510.3, because such a request cannot be consistent with any of the purposes enumerated in Title II of the BSA. The BSA exists, in part, to protect the public's interest in an effective reporting system that benefits the nation by helping to ensure that the U.S. financial system will not be used for criminal activity or to support terrorism. The OTS, like FinCEN, believes that this purpose would be undermined by the disclosure of SAR information to a private litigant for use in a civil lawsuit for the reasons described earlier, including, that such disclosures will chill full and candid reporting by financial institutions, including savings associations.

Finally, the proposed rules would apply to the OTS, in addition to its officers, employees, and agents. Comparable to a provision being proposed by FinCEN and the OCC, the OTS is proposing to include the agency itself in the scope of coverage, because

necessary to effectuate joint SAR filings, in the event that the revised SAR form becomes effective.

[15] 31 U.S.C. 5318(b)(2)(B).

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

[17] Under the proposed guidance, an ''affiliate'' of a depository institution means any company under common control with, or controlled by, that depository institution.

[18] *See, e.g.,* 12 CFR 21.11 (SAR rule applicable to national banks).

[19] 31 U.S.C. 5311 (setting forth the purposes of the BSA).

[20] 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).

requests for SAR information are typically directed to the agency, rather than to individuals within the OTS with authority to respond to the request. In addition, agents are included in the proposed paragraph because agents of the OTS may have access to SAR information. Accordingly, this proposed interpretation would more comprehensively cover disclosures by the OTS, agents of the OTS, and protect the confidentiality of SAR information.

Section 563.180(d)(13): Safe Harbor/ 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.[21] FinCEN, the OCC, and the OTS incorporated the safe harbor provisions of the 1992 law into their SAR rules.[22] In Section 351 of the USA PATRIOT Act, Congress amended section 5318(g)(3) to clarify the scope of the safe harbor provision to include 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).'' The OTS has more closely tracked the statutory language in the proposed rule, particularly by stating that the safe harbor applies to ''disclosures'' (and not ''reports'' as in some previous rulemakings) made by institutions. The OTS, like FinCEN and the OCC, has incorporated the statutory expansion of the safe harbor by placing a cross-reference to section 5318(g)(3) in the proposed rules.

Additionally, to comport with the authorization to jointly file SARs, like FinCEN, the OTS is clarifying that the safe harbor also applies to ''a disclosure made jointly with another institution.'' This concept exists currently in those SAR rules 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 the OTS or FinCEN, fall within the scope of the safe harbor.

Conforming Amendments to 12 CFR Part 510

The OTS is proposing to amend its release of unpublished OTS information rule set forth in 12 CFR part 510. Among other things, the proposal clarifies that the OTS's disclosure of SAR information will be governed exclusively by the standards set forth in the proposed amendments to the OTS's SAR rule set forth in 12 CFR 563.180. The effect of these proposed amendments is that the OTS: (i) Will not release SAR information to private litigants; and (ii) will only release SAR information to other government agencies, in response to a request or in the exercise of its discretion, when necessary to fulfill official duties consistent with the purposes of Title II of the BSA.

IV. Request for Comments

The OTS welcomes comments on any aspect of these proposed amendments to the SAR rules.

The OTS has timed the release of this proposal to coincide with the issuance of the proposed rule to amend the information disclosure rules set forth in 12 CFR part 510, 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 invite 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 proposed regulations clearly stated? If not, how could the regulations be more clearly stated?
- Do the proposed regulations contain 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 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?

VI. OTS Regulatory Analysis

Regulatory Flexibility Act

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

The OTS has reviewed the proposed rule in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3506; 5 CFR 1320, Appendix A.1) (PRA) and has determined that it does 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 (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, section 205 of the Unfunded Mandates Act also requires

[21] See footnote 1.

[22] See 31 CFR 103.18(e) (FinCEN), 12 CFR 21.11(l) (OCC), 12 CFR 563.180(d)(13) (OTS). 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 563.180(d)(13).

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