



Department of the Treasury Financial Crimes Enforcement Network

Guidance

FIN-2010-G005

Issued: November 23, 2010

Effective: January 3, 2011

Subject: **Sharing Suspicious Activity Reports by Securities Broker-Dealers, Mutual Funds, Futures Commission Merchants, and Introducing Brokers in Commodities with Certain U.S. Affiliates¹**

The Financial Crimes Enforcement Network (“FinCEN”), after consulting with staff of the U.S. Securities and Exchange Commission (“SEC”) and the Commodity Futures Trading Commission (“CFTC”), is issuing this guidance to confirm that under the Bank Secrecy Act (“BSA”) and its implementing regulations, securities broker-dealers, mutual funds, futures commission merchants, and introducing brokers in commodities that have filed a Suspicious Activity Report (“SAR”) may share the SAR, or any information that would reveal the existence of the SAR, with certain affiliates. This guidance does not address the applicability of any other Federal or state laws.

The BSA prohibits the filer of a SAR from notifying any person involved in a suspicious transaction that the activity has been reported.² Regulations issued by FinCEN construe this confidentiality provision as generally prohibiting a securities broker-dealer, mutual fund, futures commission merchant, or introducing broker in commodities from disclosing a SAR, or any information that would reveal the existence of a SAR.³

However, the regulations make clear that, provided no person involved in the transaction is notified that the transaction has been reported, the prohibition does not include disclosures to (1) FinCEN; (2) any Federal, state, or local law enforcement agency; (3) any Federal regulatory authority that examines the securities broker-dealer, mutual fund, futures commission merchant, or introducing broker in commodities for compliance with the BSA; or (4) any SRO that examines the filing financial institution

¹ For purposes of this guidance, “affiliate” of a person means any company under common control with, or controlled by, such person. “Control” of a company means the power to exercise a controlling influence over the management or policies of a company whether through ownership of securities, by contract, or otherwise. Any person who owns beneficially, either directly or through one or more controlled companies, more than 25 percent of the voting securities of any company is presumed to control the company. Any person who does not own more than 25 percent of the voting securities of any company will be presumed not to control the company.

² See 31 U.S.C. 5318(g)(2).

³ See 31 C.F.R. §§ 103.15(d), 103.17(e), and 103.19(e).

for compliance with its SAR reporting requirements, upon the request of the Federal agency responsible for its oversight. The regulations also provide that the prohibition does not apply to: (i) the disclosure of the underlying facts, transactions, and documents upon which a SAR is based, including, but not limited to, disclosures related to filing a joint SAR and in connection with certain employment references or termination notices; and (ii) the sharing of a SAR, or any information that would reveal the existence of a SAR, within the corporate organizational structure of a securities broker-dealer, mutual fund, futures commission merchant, or introducing broker in commodities for purposes consistent with Title II of the BSA, as determined by regulation or in guidance.⁴

In previously issued guidance (“January 2006 Guidance”), FinCEN, in consultation with the staffs of the SEC and the CFTC, determined that a securities broker-dealer, futures commission merchant, or introducing broker in commodities may share a SAR with its parent entity (whether domestic or foreign).⁵ In October 2006, FinCEN additionally published guidance stating that a mutual fund may share SARs with an investment adviser that controls the fund, whether domestic or foreign.⁶ These guidance documents continue to be applicable⁷ and comport with the SAR regulations referenced above.⁸ The sharing of a SAR or, more broadly, any information that would reveal the existence of a SAR, with a parent entity or investment adviser that controls a mutual fund (including a foreign parent entity or foreign investment adviser) promotes compliance with the applicable requirements of the BSA by enabling the parent entity or investment adviser that controls a mutual fund to discharge its oversight responsibilities with respect to enterprise-wide risk management and compliance with applicable laws and regulations.

The January 2006 Guidance deferred taking a position on whether a securities broker-dealer, futures commission merchant, or introducing broker in commodities is permitted to share a SAR with affiliates and directed institutions not to share with such affiliates. FinCEN, in consultation with SEC and CFTC staff, has now concluded that a securities broker-dealer, mutual fund, futures commission merchant, or introducing broker in commodities 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 a SAR regulation⁹ issued by FinCEN, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the National Credit Union Administration, the Office of the Comptroller of the Currency, or the Office of Thrift

⁴ See the Final Rule published in this same separate part of today’s Federal Register.

⁵ “Guidance on Sharing of Suspicious Activity Reports by Securities Broker-Dealers, Futures Commission Merchants, and Introducing Brokers in Commodities” (January 20, 2006).

⁶ “Frequently Asked Questions: Suspicious Activity Reporting Requirements for Mutual Funds” (October 4, 2006) at http://www.fincen.gov/statutes_regs/guidance/pdf/guidance_faqs_sar_10042006.pdf. This same guidance also acknowledged the role of transfer agents and other third party service providers and their access to SAR information in the context of the suspicious activity monitoring, detection, and reporting obligations of mutual funds.

⁷ FinCEN reiterates that nothing in the final rule or this guidance supersedes any of FinCEN’s previous written guidance or the adopting release for the mutual fund SAR rule. .

⁸ See supra note 4.

⁹ See 31 C.F.R. §§ 103.15 to 103.21. See also, 12 C.F.R. § 21.11 (Office of the Comptroller of the Currency); 12 C.F.R. §§ 208.62, 211.5(k), 211.24(f), 225.4(f) (Board of Governors of the Federal Reserve System); 12 C.F.R. § 353.3 (Federal Deposit Insurance Corporation); 12 C.F.R. § 563.180 (Office of Thrift Supervision); 12 C.F.R. § 748.1(c) (National Credit Union Administration).

Supervision. The sharing of SARs with such affiliates facilitates their compliance with the identification of suspicious transactions taking place through the securities broker-dealer's, mutual fund's, futures commission merchant's, or introducing broker in commodities' affiliates that are subject to a SAR rule. Therefore, such sharing within the corporate organizational structure of a securities broker-dealer, mutual fund, futures commission merchant, or introducing broker in commodities is consistent with the purposes of Title II of the BSA.

It is not consistent with the purposes of Title II of the BSA for an affiliate that has received a SAR from a securities broker-dealer, mutual fund, futures commission merchant, or introducing broker in commodities to share that SAR, or any information that would reveal the existence of that SAR with an affiliate of its own, even if that affiliate is subject to a SAR rule.

As is the case with sharing SARs with parent entities, there may be circumstances under which a securities broker-dealer, mutual fund, futures commission merchant, or introducing broker in commodities, its affiliate, or both entities would be liable for direct or indirect disclosure by the affiliate of a SAR or any information that would reveal the existence of a SAR. Therefore, the securities broker-dealer, mutual fund, futures commission merchant, or introducing broker in commodities, as part of its internal controls, should have policies and procedures in place to ensure that its affiliates protect the confidentiality of the SAR.

Consistent with the BSA and the implementing regulations issued by FinCEN, a SAR, or any information that would reveal the existence of a SAR, must not be disclosed, even under this guidance, if the securities broker-dealer, mutual fund, futures commission merchant, or introducing broker in commodities has reason to believe it may be disclosed to any person involved in the suspicious activity that is the subject of the SAR.

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Questions or comments regarding the contents of this Guidance should be addressed to the FinCEN Regulatory Helpline at 800-949-2732.