

Fried Frank International Trade and Investment *Alert*TM

FinCEN Publishes Proposed Rule to Allow Financial Institutions to Share Suspicious Activity Reports with Foreign Affiliates

On January 25, 2022 the Financial Crimes Enforcement Network (“FinCEN”) published a [notice of proposed rulemaking](#) (“proposed rule”) that would establish a pilot program to allow US financial institutions to share suspicious activity reports (“SARs”) and related information with foreign affiliates, including branches and subsidiaries, in order to combat illicit finance risks. Comments on the proposed rule may be submitted until March 28, 2022, after which FinCEN will issue a final rule implementing the pilot program. FinCEN is creating the pilot program pursuant to the [Anti-Money Laundering Act of 2020](#).

The proposed rule would establish a pilot program, the participants of which would be allowed to share SARs and related information – such as the fact that a SAR has been filed – with foreign affiliates. The pilot program will terminate on January 1, 2024, although FinCEN has the ability to extend it for an additional two years.

Under [existing guidance](#) and regulations: (1) US branches of foreign banks may share SARs with their head office; (2) US banks, savings associations, securities broker-dealers, futures commission merchants, and introducing brokers in commodities may share SARs with parent entities, whether domestic and foreign; and (3) mutual funds may share SARs with the investment advisor that controls the fund, whether foreign or domestic. Additionally, securities broker-dealers, futures commission merchants, and introducing brokers in commodities may share SARs with an affiliate as long as such affiliate is subject to a SAR regulation issued by FinCEN or a US financial regulator. However, under the Bank Secrecy Act, foreign branches of US banks are considered to be foreign banks, and thus are not subject to a SAR regulation. Therefore, while financial institutions are already generally permitted to share SARs with parent entities and US affiliates, the pilot program would allow participating financial institutions to also share SARs with foreign affiliates.

The following US entities are eligible to participate in the pilot program:

- Banks
- Casinos and card clubs
- Money services businesses
- Brokers or dealers in securities

- Mutual funds
- Insurance companies
- Futures commission merchants and introducing brokers in commodities
- Loan or finance companies
- Housing government sponsored enterprises

In order to participate in the pilot program, an eligible financial institution must first obtain approval from FinCEN by submitting a written application that includes the following:

- The institution's point of contact for the pilot program,
- The foreign affiliates with which the financial institution intends to share SARs and related information (including jurisdictional information and whether the foreign affiliates will provide reciprocal information),
- The particular purposes for which the foreign affiliates intend to use SARs and related information,
- An estimated commencement date for the institution's participation in the pilot program, and
- A description of all internal controls in place to protect the confidentiality of and prevent unauthorized disclosures of SARs and related information and ensure the confidentiality of all personality identifiable information.

The internal controls described in an institution's pilot program application should include (i) written confidentiality agreements (or similar arrangements) requiring any personnel at foreign affiliates who are granted access to SARs and related information to safeguard the confidentiality of such information, (ii) provisions for the secure transmission and storage of SARs between US institutions and their foreign affiliates, and (iii) procedures for personnel located in the US to review any request from foreign law enforcement, foreign regulators, or other outside foreign party for copies of SARs.

Under the proposed rule, FinCEN would have sole discretion to determine whether an institution will be allowed to participate in the pilot program, and may require institutions to adopt additional controls in order to participate. FinCEN may impose such additional requirements after a financial institution has been approved to participate in the pilot program. The proposed rule would also require a participant financial institution to submit quarterly reports including the following:

- The number of SARs and related information shared,
- The name of the jurisdiction of each foreign affiliate that received SARs and related information, as well as each affiliate's relationship with the participating institution and the purpose for which the SAR was shared;
- Any legal and compliance issues related to participation in the pilot program,
- Any technical difficulties encountered with the pilot program,
- Any enhancements to the institution's AML/CFT program as a result of participation in the pilot program, and

- Lessons learned from participation in the pilot program.

Under the pilot program, participant financial institutions would be prohibited from sharing SARs or related information with a foreign affiliate located in China, Russia, or any jurisdiction that has been designated as a state sponsor of terrorism, is subject to comprehensive US sanctions (currently the Crimea region of Ukraine, Cuba, Iran, North Korea, and Syria), or which has been designated as a primary money laundering concern. The proposed rule would also prohibit participant financial institutions from sharing SARs with a foreign affiliate in any jurisdiction that the Secretary of the Treasury has determined cannot reasonably protect the security and confidentiality of SARs and related information. However, FinCEN may make exceptions to allow financial institutions to share SARs with foreign affiliates in China or Russia upon written application of a request for an exception. The proposed rule would require participant financial institutions to report any unauthorized disclosures of SARs, and FinCEN indicated that it would construe its authority to impose civil money penalties as applying to foreign affiliates that disclose SARs, without regard to whether the unauthorized disclosure occurs in the United States.

The proposed rule puts into effect a provision of the Anti-Money Laundering Act of 2020, and demonstrates FinCEN's emphasis on coordination and information sharing in order to combat money laundering and the financing of terrorism. Eligible financial institutions should consider whether participation in the pilot program would assist with enterprise-wide risk management and compliance with applicable AML laws and regulations.

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