

December 14, 2010

Regulatory Policy and Programs Division
Financial Crimes Enforcement Network
Department of the Treasury
P. O. Box 39
Vienna, VA 22183

Attention: PRA Comments – BSA-SAR Database

Dear Sir or Madam:

The American Bankers Association (ABA)¹ appreciates the opportunity to comment on the proposal by the Financial Crimes Enforcement Network (FinCEN) to update the database used for Suspicious Activity Reports (SAR).² The proposed changes are not intended to change the regulatory requirements but to create a modern environment for the filing and analysis of SAR information. As FinCEN begins the design of the new Bank Secrecy Act (BSA) database, it has requested comment on the technical aspects of the program. The goal is to develop an e-filed dynamic and interactive report that can be used by all BSA filing institutions.

Overview of ABA Comments

ABA appreciates FinCEN's motivation to make SAR information more useful to law enforcement and to create a database that is easily searched. However, ABA is concerned that certain steps in the proposal will move in the opposite direction and actually diminish the usefulness of information provided to law enforcement. ABA is also concerned that some of the steps may cause problems for filers and the addition of numerous fields will not mesh well with existing bank software or normal business information collection practices leading to reporting errors. This initiative should not increase the burden on banks to supply data not collected in the normal course of business. It is not the obligation of bank filers to supply either demographic or taxonomic information not germane to the limited investigative role that reporting suspicious activity entails.

Fundamentally, while ABA believes that SAR quality improvement is a worthwhile effort, we are concerned about the process pursued to accomplish this goal. To begin with, there was no real engagement with the financial institutions that file the data during the initial phases of the project.³ As a result, the overall project has the very real potential to repeat the problems with BSA Direct.⁴ In the process of moving to address GAO criticisms and meet law enforcement needs, failure to

¹ The American Bankers Association represents banks of all sizes and charters and is the voice for the nation's \$13 trillion banking industry and its 2 million employees. The majority of ABA's members are banks with less than \$165 million in assets. Learn more at www.aba.com.

² 75 *Federal Register*, pp. 63545 to 63550, October 15, 2010.

³ Although there were meetings, it would be unfair to characterize them as a true dialogue with the private sector.

⁴ See, e.g., GAO report, July 14, 2006, <http://www.gao.gov/new.items/d06947r.pdf> and FinCEN press release http://www.fincen.gov/news_room/nr/html/20060713.html.

engage fully the private sector reporters that actually submit information in the initial designs for the database put the cart before the horse. The appearance is that information technology (IT) is dictating results and technology solutions instead of having regulators, law enforcement and the industry have the software meet their needs.

Excessive Specification

ABA stresses that while the revisions ostensibly are not designed to be a regulatory change, the specificity and new reporting elements actually do change the substance of SAR investigation and reporting. ABA details the extensive scope of the changes or the consequences of the proposed changes in the attached appendix. For example, the simple suggestion that a filer must provide the zip + 4 is something that may exceed information filers maintain in the routine course of business.⁵

Categorization of Suspicious Activity. One of the issues that often confronts bankers and which should be raised in the context of the proposal is the categorization of a particular activity. Admittedly, that helps law enforcement and also helps identify particular concerns. However, it is not always possible for a filer to determine whether a particular activity is, for example, mortgage fraud or a pyramid scheme. Fundamentally, the goal is to have an institution identify a transaction or series of transactions that do not make sense given the institution's underlying knowledge of its customer. As the form is developed and the database progresses, ABA encourages clarification that the key is reporting a suspicious transaction and not categorizing which criminal activity may be involved, since that is a role more properly left to law enforcement.⁶

Pre-populated information. One of the advantages to the system that FinCEN is proposing is that it will pre-populate certain information once a filer has registered with the system. ABA supports such a step, since it can be very efficient, provided filers can override pre-populated data. While it can be helpful to pre-populate information from an efficiency perspective, there may be times when the automated system inserts information that would make the report inaccurate in a particular situation and this must be taken into account. ABA also recommends that FinCEN clarify whether discrete filers who use the Adobe format will also be able to take advantage of pre-populated data fields as well as having the ability to provide multiple entries when and where appropriate in the same way as other filers.

Unknown Data. In many instances, there is likely to be information that is unknown or unavailable. Bankers have suggested that the likelihood that FinCEN will get a substantial amount of "unknown" data is a serious possibility. For instance, as more detailed in the attached appendix on the individual fields in the proposal, gender may not be known (especially if the account was established on-line). Similarly, a bank may not have the plus four in a zip code. In finalizing the program, ABA recommends that FinCEN ensure that it obtain as much data as possible without taking steps that

⁵ In some cases, it may be because the account information pre-dates the existence of the plus four or it may be that the bank has never found the need to obtain the information. We do not believe there is any material law enforcement value in the plus four component of the zip code. ABA opposes plus four being included as a filing mandate or compliance requirement.

⁶ Once the database revisions are complete, ABA recommends that FinCEN turn to updating the guidelines for completing SARs to ensure that guidance is consistent with these changes.

encourage the unintended consequence that, instead of partial data, it gets no data at all in a particular field.⁷

Other elements, including information on geocoding and how suspect activities are reported, exceed current requirements and go beyond the expectations for filers to undertake in reporting suspicious activities. As a result, one of the serious drawbacks to the proposed changes are they are likely to delay reporting substantially as all these data are collected. This again points out the need for consultation with filers to develop a workable program.

Fundamentally, before the proposal is finalized, a clear and careful decision about which data fields must be completed and how unknown or unavailable information is to be handled will be important. Although this will be a painstaking process, it is critical to the integrity of the database and the reporting process.

Filing Format

One of the changes that FinCEN proposes is to convert the current database to an XML-based format. ABA supports the use of the XML-based format, especially if it does improve the processing speed and access to reported information. However, FinCEN must allow sufficient time for the industry to transition to the new format for several practical reasons. First, not all financial institutions are in a position to convert easily to this format.⁸ While federal agencies have been taking steps to move in this direction, it is not yet universal, and forcing filers to choose between paper and XML might cause some institutions to rely solely on paper format. For larger institutions that use batch filing and automated systems, FinCEN must first provide technical specifications to the industry. That will allow software vendors and larger financial institutions that operate legacy systems to process and file SAR data to ensure that the format that FinCEN has proposed will mesh properly with existing software. Incompatibility could easily skew data, and correcting filings can be a time-consuming process. Better communication between FinCEN and the private sector on the technical specifications would facilitate the transition and minimize data errors in the transition.

Second, it is important that FinCEN acknowledge that financial institutions are under many other regulatory demands, and the pace for these demands on resources – especially IT resources – is only going to continue in the coming months. Therefore, ABA recommends a compliance deadline that is no earlier than the beginning of the first calendar quarter that follows 18 months after the government's system to receive the new electronic reporting format is final and demonstrably operational.

ABA also believes that the effort to move to the Adobe system for discrete filers is a positive step, and we commend FinCEN for this effort.

⁷ ABA believes that this demonstrates the usefulness that dialogue with filers would have helped address upfront. For example, under the Equal Credit Opportunity Act and Federal Reserve Regulation B, lenders generally are prohibited from collecting and maintaining gender information on non-mortgage loan applicants and borrowers.

⁸ It is also important to recognize that forcing some smaller filers in this direction might cause those who currently file electronically to revert to paper forms, moving in the wrong direction.

We also believe that drawing the parallel to tax filing systems with which many are familiar is helpful to allow filers to understand the new protocols. To help smaller institutions, ABA strongly recommends that FinCEN conduct a series of webinars on the operation and use of the Adobe programs for discrete filers. The attendance at the November 4 webinar FinCEN conducted on e-filing⁹ is testament to the interest in such training, and ABA believes that additional sessions will both help smaller filers convert to e-filing and make proper use of the programs.

Since FinCEN is proposing to move toward an electronic system, ABA suggests that the new program encourage and allow filings during non-business hours. For example, allowing larger companies to file the data on Saturdays and Sundays would streamline the process.

Finally, ABA strongly recommends that FinCEN establish and make available a dedicated telephone line and Internet area for quick response to questions from filers. This type of “customer service” will be especially important in the initial months that the new systems are up and running to let filers avoid possible errors. ABA is concerned that frustration during the transition, especially for smaller filers or filers that do not process substantial volumes, could undermine FinCEN’s goals of moving closer to 100% e-filing. If problems are encountered, the simple fall-back would be submitting a paper file.¹⁰

Attachments

Special attention is needed to a step that was considered that would allow filers to attach documents to the SAR filing, and ABA commends FinCEN for listening to concerns raised during the discussions about the conversion. In the past, this option has been discussed, but ABA believes that it is important to document some of the issues that can be associated with attachments to SAR filings that make them problematic. First, there is the problem of defensive attachments where a filer may attach any number of documents to ensure completeness and to avoid examiner criticism of not including an attachment. This problem raises a second issue, which is the sheer volume of attachments that can easily consume database capacity. Second, there is the problem of allowing users of the database to research information readily in attached files which may or may not be possible in an automated way. And finally, when the program permits or encourages attachments, it should be made clear from a legal perspective whether documents which are neither attached nor referenced in the narrative are properly part of the SAR or whether access to the information not attached requires compliance with the provisions of the Right to Financial Privacy Act.

The proposal would allow a filer to attach an MS Excel-compatible file that is up to 1MB in size. ABA believes that allowing an attachment that provides details in tabular form of transactions subject to the suspicious activity discussed is likely to be helpful for law enforcement. However, before this is finalized, ABA suggests that FinCEN reconsider the size restriction, since there may be instances when the list exceeds 1MB, or expressly provide a mechanism that permits filers to compress or include zip files. It would also be useful for FinCEN to develop guidelines for these attachments to help filers produce information that is useful and easily used – but not so prescriptive

⁹ <http://www.fincen.gov/whatsnew/html/20101008.html>

¹⁰ Reverting to a paper file would be especially likely if a filer encounters a problem which cannot be resolved as the deadline to submit a report approaches.

that it produces compliance nit-picking that acts as a disincentive to filers. Fundamentally, the entire process should be designed to encourage information to be filed quickly and efficiently to assist law enforcement.

Joint Filing

ABA understands that in the past, systems challenges have prevented a smooth transition to allow joint filing of SARs by two financial institutions for a single suspicious transaction or series of related suspicious transactions. As our members have reviewed the fields for the proposed database, it seems likely that some of the proposed steps are similarly going to handicap the potential for seamless and simple joint filing. We have highlighted those issues in the attached appendix, but urge FinCEN in the next phase of review to ensure that each and every step will permit joint filing.

Additional Concerns

Glossary of terms. ABA recommends that FinCEN take a number of other steps to facilitate the transition and to ensure that the final database achieves the goals that FinCEN has set. The database fields reference a number of different terms or acronyms that should be defined, if not in the instructions in some easily accessible source. For example, not everyone knows what BMPE means. Having a glossary of terms would be extremely useful, especially to avoid errors and miscommunication. Moreover, a standard glossary would ensure consistency for all parties, including law enforcement. On a related point, it is also important that there be a readily accessible set of defined parameters for what constitutes a particular activity or item. While such a set of definitions need not be comprehensive and complete, possibly creating such an area on the FinCEN website that could be readily and easily updated would be extremely useful. As an aside, the same area or webpage could be used as a source for responses to frequently-asked-questions.

Feedback. ABA urges FinCEN to ensure that the steps that it takes for the SAR database process ensures that any new fields are subsequently evaluated for their actual utility to law enforcement and are also utilized to expand feedback to the industry. To the extent that certain data elements are less important than others, this prioritization should be shared with all filers as a factor in considering future burden reduction and in giving filers a risk-based foundation for measuring their reporting success.

Security. Whenever there is discussion of a database, it is equally critical to remember that data security is extremely important. Only recently, FinCEN issued a new rule on SAR confidentiality that helps reinforce the importance of maintaining the integrity and sanctity of SAR information.¹¹ Therefore, ABA strongly urges FinCEN to ensure that as it makes changes to the SAR database that the first and foremost priority must be maintaining and ensuring the integrity, safety and security of the system. The media has been rife with reports about data security leaks in recent weeks,¹² a further reminder that data security must be paramount.

¹¹ http://www.fincen.gov/news_room/nr/html/20101122.html

¹² See, e.g., <http://www.guardian.co.uk/world/2010/dec/01/wikileaks-cables-pakistan-nuclear-threat>

Regulatory Burden

ABA believes that the estimated burden in the proposal seriously underestimates the actual amount of time associated with identifying a possible suspicious transaction, investigating and documenting the activity, and filing the report. The estimate of 60 minutes per report and 60 minutes recordkeeping per filing, while admittedly an average, is far less than what most banks need. It appears to fail to take into account all the time and resources needed to ensure that systems are in place to monitor and detect suspicious activities, that systems are properly calibrated to capture transactions which merit further investigation. For example, the office in a large institution responsible for investigating and filing a SAR may actually have to review 50 referrals which leads to 25 active investigations in order to build the information needed finally to file 10 SARs. Clearly, part of the process – and a very significant part of the process – is the time needed to create monitoring programs that lead to the initial referrals, including quality assurance, testing, auditing and training staff.

Many institutions rely on third-party vendors to provide the necessary programs. ABA understands that some have refused to begin to estimate the costs for updating existing systems to comply with the proposed changes, while others have estimated substantial costs based on the proposal. In any case, it is fair to state that the software costs alone will be significant.

While FinCEN is focusing on the incoming data and SARs, ABA also believes it is important for FinCEN to recognize that filers, especially larger financial institutions, often have internal case management systems to process the potential activities and to weed out those that merit reporting from those that do not. As this database process moves forward, institutions will need to adjust their internal case management systems to ensure that the two programs work in tandem, and these changes have the potential to be both burdensome and costly.

ABA also believes that it is important that FinCEN bear in mind that any changes that this rule will engender will not occur in isolation. Under the Dodd–Frank Wall Street Reform & Consumer Protection Act, financial institutions of all sizes are being confronted with massive changes to processes, systems and procedures. Therefore, ABA must again emphasize that in order to ensure as smooth a transition as possible and to ensure that any unforeseen challenges can be addressed in an appropriate and timely way, FinCEN should factor this burden into the equation.

Finally, ABA urges FinCEN to balance carefully the benefits to law enforcement against the costs to the industry to ensure that the overall changes produce the most optimal result. Too often, steps are taken without full cognizance of the potential costs. With some of the changes proposed in the revisions to the SAR database, ABA is concerned that failure to attend fully to all the details could result in errors in transmission and data compilation that might not be readily apparent but that could prevent law enforcement from receiving the most useful and timely information.

Summary

Overall, ABA commends FinCEN for making efforts to streamline and improve the efficiency and effectiveness of the SAR filing process. Moreover, taking steps that make the information more useful for regulators and law enforcement – and presumably in providing feedback to the industry – are also welcome steps. However, we are concerned that lack of input from the financial industry on the structure of the database could create problems with filing and loading data, possibly creating errors which may not be readily apparent. Better upfront communication with the private sector as the database was being designed would have been helpful, but it is imperative to ensure that the next steps do not lead to an unworkable program format.

As always, the ABA remains ready to work with FinCEN to streamline the process and hopes that some of our comments can help make the next steps towards an effective and efficient SAR database both workable and useful for all parties.

Thank you for the opportunity to comment. If you have any questions or need additional information, please contact the undersigned at ABA by e-mail at rrowe@aba.com or by telephone at 202-663-5029.

Sincerely,

A handwritten signature in black ink, reading "Robert G. Rowe, III". The signature is written in a cursive style with a horizontal line extending from the end.

Robert G. Rowe, III
Vice President & Senior Counsel

APPENDIX – Specific Comments on Data Fields

- Field 1 – Type of Filing: Further explanation is needed on the application of option d and joint reporting.
- Field 1(f) references an “internal control/file number” and further explanation will be needed as to what this means and whether it an internal number assigned by the bank or something furnished from FinCEN and how it comes into play

Part I: Subject Information

- Field 2b – Check if all critical * subject information is unavailable – needs additional guidance on how this comes into play and when the box should be checked, i.e., whether it should be checked if only some “critical” information is not available or if unknown is chosen for particular critical fields
- Field 3 – when entering the names of legal entities, will this field be limited (the current 35-characters may not be sufficient) – and if it is limited, will FinCEN provide a standardized set of abbreviations to ensure consistency?
- Field 5 – If the bank is an electronic filer but only has an individual’s middle initial, does the bank then leave this data field blank?
- Field 5a – Gender: This data element is not a data element collected at the time of account opening and, therefore, not part of the customer’s record. In this case, the ‘Unknown’ option may very often be checked, which calls into question the practical utility. Equally significant, since many accounts are opened in non-face-to-face environments (e.g. credit cards), the gender is unknown (note that under the Equal Credit Opportunity Act and Federal Reserve Regulation B, financial institutions are prohibited from collecting this information for non-mortgage customers).
- Field 7 – NAICS is not always electronically captured in source systems. Further guidance is needed on how this should be completed (drop-down boxes would be helpful). Second, does FinCEN intend for the occupation to be separate from the NAICS code? And does FinCEN intend to mandate a conversion to NAICS for institutions that use the SIC system?
- Field 11 – Zip/Postal Code: Confirmation is needed on whether the +4 is required. If the bank has the zip code but not the +4, should it default to “unknown?” It has been suggested that FinCEN would be more appropriately positioned to complete this information.
- NOTE: on the address information, it has been recommended that FinCEN take steps that would complete city/state information/verification based on the data provided, including furnishing the zip +4, possibly through coordination with the USPS and their databases.
- FinCEN references information on HIFCA and HIDTA being incorporated following Field 11 – ABA suggests that FinCEN should manage this information since these data elements can change after a SAR has been entered.

- Following Field 11 is a series of optional “New Data Element” codes. Will those elements be derived by FinCEN as part of the file processing, or is FinCEN requesting those to be provided on the e-file?
- Field 14 – since foreign TINs can change and have different numbers of characters, additional specificity is needed
- Field 16 – Additional guidance is needed to complete the Date of Birth field. For an individual, if that information is unknown (which may be frequent, especially if the suspect is not a bank customer), what should be entered? What if the filer has partial information (i.e., year or month and year but not date)? If the subject of the report is an entity, how should this field be completed?
- Field 17 – the bank may have a telephone number but may not have information on whether it is a home number, a work number or a mobile number. Should the filer take a best guess? Does it matter what type of number it is?
- Field 20 is a check-box on the “corroborative” statement to filer – what this means needs to be explained – is it meant to replace the existing box that asks if there was a confession?
- Field 21 identifies the relationship to the filer but in a loan transaction, there are multiple parties. It would be helpful to have a drop-down box for this field that includes “transaction participants” such as Real Estate Broker, Settlement Agent/Closing Attorney, Appraiser, Mortgage Loan Broker, Third Party Loan Officer, Notary, Seller/Developer, Title Insurer, Other. It would be helpful to add an option to indicate the customer relationship (closed, transferred, and so forth).
- Field 21(a) is not clear, since an entity’s EIN is not a relationship. This appears to more appropriately belong in fields 52 and 53.
- Field 21(k) is for “Owner/Shareholder” but a filer would not likely know if subject is a shareholder of a publicly traded company, nor would it be relevant
- Field 24 – appears to be limited to four accounts and this should be confirmed – and if such a limit is intended, instructions for how to reference other accounts, such as through the narrative, will be needed (especially since the narrative section is being curtailed)
- Field 25 – there are far more potential roles for a subject than the two that are listed and this appears to be an unnecessary and possibly misleading restriction. It also seems to be of minimal use in other categories of filing, e.g., in the broker-dealer context. More clarity is needed to explain how this field is to be used.

Part II: Suspicious Activity Information

- Field 26 - this item (amount involved) appears more appropriate with Field 60 (loss to institution) and should logically be relocated there.
- Field 27 – for reports of continuing activity, this data field needs clarification as to whether it is only for the date range for the current report or the entirety of the suspicious transactions over time

- Field 28 – to report the Cumulative Amount for continuing activity filings, clarification is needed on whether the amount includes all prior reports plus Field 26 (Amount Involved in this report)
- Field 29(l) for hedge fund should be expanded to include equity funds and pooled investments
- Field 29(s) for personal/business check needs more precision
- Field 29 is missing key items, e.g., commercial loan note, consumer loan note, mortgage note
- Field 29 – definitions are needed for various items, e.g., commercial Paper, gaming instruments
- Field 29 – funds transfers should be broken out to include wire transfers and phone transfers, online transfers, ACH, etc.
- Field 29 – should the SAR narrative contain specific references to the instruments/product types checked in field 29 – and if it does not, will that be deemed a defective filing
- Field 31 is unclear on what information is sought or how this data field should be completed
- Field 33 – the IP address is more appropriately included with subject information (Part I) instead of the Suspicious Activity information
- Field 36 – needs additional clarity on which types of recordkeeping requirements could be subject to structuring
- Field 38 – should financial institutions be compelled to always check one of these categories or should this better be left to law enforcement? And if a financial institution makes a best-guess, could that then mislead law enforcement?
- Field 39 – regarding identification – clarification is needed on what is sought through this data field
- Fields 36 through 44 – if an item is not checked or mis-defined due to lack of clarity, would that be a flaw in the filing?
- Fields 36 through 44 should incorporate the many items that FinCEN has requested be added to SAR narratives, e.g., foreclosure rescue scam, SIGTARP
- Other items missing from the listings:
 - Counterfeit cards
 - False statements
- Field 41 – Securities/Futures/Options – unauthorized pooling (option d) needs to be defined
- Identity theft is listed under Filed 44 as a suspicious activity when it would be more properly categorized as fraud
- Field 43 – Money Laundering – Items (a) and (c) seem to be synonymous
- Field 43(f) – “suspicious receipt of government payments/benefits” needs to be defined
- Field 43(g) – multiple accounts needs to be defined – if it implies multiple persons, then would that automatically implicate a check for 43(k) as well?
- Field 43(h) – “noncash monetary instrument” needs to be defined

- Field 43(j) – TBML/BMPE – these two should be segregated into separate items and fully defined (not everyone will recognize the acronyms)
- Field 43(l) – “transaction out of pattern for customer” is too vague and misleading – if the transaction is out of pattern and not explainable, that would mandate the filing in the first place and therefore this item seems unnecessary
- Field 44(e) – identity theft – needs to be distinguished from the identification items in field 39
- Field 44(j) - “suspicious use of multiple locations” – an example of this scenario would be helpful
- Field 44(z) – “other” – instructions are needed for where to enter data on the location of collateral/security – it is also significant that the proposed format lacks any fields that indicate “where” a fraud occurred – for example, the location of the suspect and the location of the bank is not always the location of the fraud, e.g., bank branch is located in NJ, borrower is located in California, while subject property for a possible mortgage fraud is located in Florida

Part III: Information Concerning Financial Institution Where Activity Occurred

- Fields 45 and 46 – where there is a joint filing, the ability to check more than one option will be needed for these fields (otherwise, it defeats the purpose of the joint filing)
- Field 47 – since there can be more than one filing institution identification number, the ability to enter more than one number will be needed or instructions on which option to choose will be needed
- Field 49(c) – it is not clear why the option “holding company” is included
- Fields 49(f) (“registered investment adviser”) and (g) (“investment company”) both need to be defined
- Field 51 – when an alternate name is entered, will the final format distinguish between a/k/a and d/b/a?
- Field 52 – will this be available to current users of the SAR-SF? And where a location is an international branch, will there be a way to avoid reject errors for this field?
- Field 53 – SSN-ITIN should not be an option
- Fields 54 and 55 – since these apply to the filer, the unknown option is not logical
- Field 58 appears to be a new data field that will pre-populate to a certain extent (based on zip code), but it would be helpful to allow data entry/override in all cases
- Field 60 – loss to financial institution – specificity is needed on the amount to enter – is it the amount initially suspected? The total amount possible? The net amount after any recovery? And is it only at the time of filing or, if the amount later changes, does this mandate a new filing?
- Field 61 – Financial Institution’s Role in Transaction” needs clarification – there are far more roles an institution can be than just a paying or selling institution

- Field 68 – “Branch’s Role in Transaction” also requires clarification – particularly how this differs from Field 61

Part IV: Filing Institution Contact Information

- Fields 77 through 79 (Filer Information) – additional clarification is needed – for example, is the name of the filer the name of the individual completing the report (and if yes, this contradicts prior efforts to protect the individual, especially following recently well-publicized leaks of actual SAR forms to the media)? Wasn’t the goal to provide an appropriate contact at the institution who could answer questions?
- Field 80 – only allows one type of filing institution to be checked, but what happens where there is a joint filing?
- Field 89 – “Internal Control/File Number” needs to be defined
- Field 94 – “Designated Contact” – can multiple contacts be input?
- Field 96 – “Designated office e-mail address” – although it is indicated that this field is required, some LE agencies do not provide it