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James F. Sloan
Director
Financial Crimes Enforcement Network
Department of the Treasury
PO Box 39
Vienna, VA 22183

Attention: 1506-0001
Revised SAR, Financial Institutions

Dear Mr. Sloan:

The American Bankers Association (ABA) appreciates this opportunity to comment on the proposed revisions to the Suspicious Activity Report (SAR) form for financial institutions. The ABA brings together all categories of banking institutions to best represent the interests of this rapidly changing industry. Its membership – which includes community, regional and money center banks and holding companies, as well as savings associations, trust companies and savings banks – makes ABA the largest banking trade association in the country. For further information regarding the ABA, please consult the ABA on the Internet at <http://www.aba.com>.

While the proposed changes to the SAR in this notice are minor, the ABA wishes to comment not only on those potential changes but several other related areas that deserve consideration. We recommend that the regulatory agencies and FinCEN:

- Provide specific examples of the characteristics of “each” of the 20 listed crimes so as to improve SAR filing information;
- Formally address the trend by states to require filers to provide SARs to state agencies so institutions will only have to provide one SAR one time; and
- Revisit the circumstances surrounding the filing of SARs for suspected structuring, a continuing problem that, in effect, clogs the SAR database.

According to the notice, the three revisions proposed are: two new boxes in block 35 (“Summary characterization of suspicious activity”) and an update to the “Safe Harbor” wording to reflect changes by the Patriot Act. The two new boxes are to indicate suspected “Terrorist Financing” and “Identity Theft.” ABA supports these changes but, as indicated below, we urge that additional guidance be given SAR filers as to what constitutes reportable examples of terrorist financing.

Need for Clarity under Summary Characteristics of Suspicious Activity

Since the official issuance of the Suspicious Activity Report in 1996, financial institutions have grappled with the challenge of trying to accurately report potential criminal activity. Financial crime is by nature extremely complicated and most SAR filers are not trained in either law enforcement or sophisticated financial crime investigative methods. Therefore, simply listing potential financial crimes on the Suspicious Activity Report, without further explanation, will result in less than accurate filings.

In fact, a recent audit report by the Department of Treasury's Office of Inspector General recommended that FinCEN, in coordination with the regulatory agencies and Internal Revenue Service, both revise "the SAR form or find other means to address the problems with narrative write-ups and identifying violations" and eliminate "duplicate SARs in the system."¹

There are a number of similar characteristics to the 20 listed crimes on the SAR that have caused understandable confusion among industry filers. For example, what is the difference between "check fraud" and "check kiting?" In addition, the fact that multiple boxes are checked may indicate that there are multiple crimes from the same activity or confusion by the filers or both. The OIG Report mentioned that the 8th highest filing level of SARs came from the "other" category, a statistic that may further provide evidence of rampant confusion.

There are two possible responses to this dilemma:

- provide a central contact for SAR related questions or;
- further develop the explanations of SAR characteristics on the instructions accompanying the SAR form or in each issue of the SAR Activity Review.

ABA strongly recommends that consideration be given to both responses.

There remains an ongoing need for the regulatory agencies, law enforcement and FinCEN to assist SAR filers with issues as they arise. While some agency officials are willing to assist SAR filers, there is no designated contact within each agency or FinCEN to handle those queries. In fact, many trade groups such as ABA often receive questions on SAR filings; questions that more appropriately should go to each functional regulator. Now is the time to set a central contact for SAR filing questions.

An excellent example of providing guidance to SAR filers can be found with the issue of computer intrusions. When the Federal Bureau of Investigation (FBI) pushed for adding the crime of "computer intrusion" to the SAR, there was an agreement to describe this crime on the instructions to the SAR. In addition, the instructions also described the types of activities that are not indicative of computer intrusions. (For example, "computer intrusion" does not mean, "attempted intrusions of websites.")

¹ See, "FinCEN: Reliability of Suspicious Activity Reports" OIG-03-035 (December 18, 2002)

There is also a description of what may constitute potential money laundering or violations of the Bank Secrecy Act. These are two examples of assisting SAR filers with clear direction on what may constitute a SAR reportable activity. Unfortunately, these are the only examples. With the proposed addition of “terrorist financing,” a very difficult crime to discern, further guidance is critical.

As the private sector co-chair of the SAR Activity Review, the ABA supports the efforts of FinCEN and the participating agencies in crafting a publication that provides necessary feedback to the SAR filing community. The SAR Activity Review has provided examples of the characteristics of suspicious activity such as identity theft. The 2003 issue will cover a number of examples of terrorist financing activities. The Review has also addressed a number of other examples of reportable financial crime. There should be more efficient coordination between the information needed to properly complete a SAR and the SAR Activity Review.

While ABA would prefer that examples be included with the SAR instructions, we urge that, at a minimum, the SAR instructions refer to the appropriate issue of the SAR Activity Review for further information on the summary characterization of most of the suspicious activity categories.

The addition of terrorist financing, however, demands that FinCEN and the other SAR owners put examples on the SAR form itself, as was done with computer intrusion.

State Actions that Impact SAR Filings

When the SAR Form was unveiled in 1996, it was announced with a government consensus that filers should only have to file one SAR on each reportable activity. Since 1996, however, there have been a number of states that have attempted to pass SAR reporting requirements at the state level even though states can access the SAR database for the same information. While the regulatory agencies and FinCEN have worked with the industry to attempt to dissuade states from adding an unnecessary duplicative reporting obligation, the states continue to press this issue.

ABA urges the regulatory agencies, law enforcement and FinCEN to address, once and for all, state efforts to receive SARs directly from filers by explaining how state agencies can gain access the SAR database.

In addition, states and members of Congress are considering legislation to require companies that have been victims of computer intrusions to report successful attacks to the public.² Once more SAR filers will be placed in the untenable position of having to respond to a state or federal reporting mandate despite a prohibition under federal law (31 USC 5318(g)(2)) that bans the notification of any person involved in a transaction that a SAR has been filed. The financial community should be able to rely on the federal and state governments to reconcile conflicting obligations on the private sector.

² See California Senate Bill 1386 that would require a business that operates in California to disclose “any breach of the security of the data” of an individual in California that has had his data access in an unauthorized manner. Senator Dianne Feinstein is considering filing a similar proposal.

SAR Filings on Suspected Structuring

As the SAR Activity Review statistics clearly show, close to half of all SAR filings (48.2% as of 10/31/02) are the result of filers suspecting that the activity in question is designed to avoid the cash transaction requirements by structuring. Financial institution officials are trained to report transactions that appear to be deliberately below the cash-reporting threshold of \$10,000. There is a major question, however, on the value of SARs for one-time transactions below \$10,000. With the obvious increase in SARs now to be filed by a broad spectrum of financial institutions, ABA urges a thorough review of SAR filings on suspected structuring. If the goal is accurate and useful SARs, there should be serious consideration given toward eliminating SARs that are not very useful for law enforcement or safety and soundness reasons.

Thank you for the opportunity to comment on this important issue. If you have additional questions, please contact me at (202) 663-5029 or jbyrne@aba.com.

Sincerely,

John J. Byrne
Senior Counsel and Compliance Manager