SAR Confidentiality

Background

- SARs are generally “unproven reports of possible violations of law or regulation”
- The BSA prohibits a financial institution, its officers, directors, employees or agents from notifying any person involved in a suspicious transaction that the transaction was reported
- The USA PATRIOT Act strengthened SAR confidentiality by adding a prohibition that bars officers or employees of both federal or state government as well as local, tribal, or territorial governments from disclosing to any person involved in a suspicious transaction that that transaction was reported 
  other than as necessary to fulfill their official duties
- To encourage reports of possible suspicious activities, the law includes a safe harbor from liability to those who report suspicious activities in good faith

The Proposal

- The proposal would clarify that neither a SAR, nor any information that would reveal the existence of a SAR, may be disclosed, except as authorized in limited circumstances.
- The prohibition applies to any disclosure and is not limited to disclosure to the person involved in the transaction.
- EXCEPTIONS (rules of construction):
  - A SAR may be disclosed to FinCEN, any federal, state or local law enforcement agency or any federal or state regulatory agency that examines the financial institution for compliance;
  - While the SAR many not be disclosed, the underlying facts or transactions and documents that serve as the basis for the SAR may be disclosed (note that this does not include prior SAR filings);
  - Additional disclosures of a SAR may be made if and only if the disclosure is consistent with BSA reporting requirements (this provision is designed to allow sharing with headquarters and, under companion guidance being proposed, domestic affiliates).
- The regulation would incorporate the Patriot Act statutory restrictions prohibiting government employees or officials from disclosing SAR information inconsistent with the purposes of the BSA or as required by the person’s official duties.
- The proposed rule would clarify that a government official may not disclose a SAR for use in a private legal proceeding.
A new provision would clarify that self-regulatory organizations (SROs) are subject to the same confidentiality requirements as other users of SAR data.

**Proposed Guidance – Permissible Sharing by Depository Institutions with Certain U. S. Affiliates**

- The proposed confidentiality rule includes a provision that construes the rule in such a way that the prohibition does not apply when a bank shares a SAR or information that would reveal the existence of a SAR within its corporate organizational structure for purposes consistent with BSA reporting requirements.
- The proposed guidance would interpret this provision to let a bank share a SAR with an affiliate that is also subject to SAR rules.
- In January 2006, the agencies concluded banks could share SARs and SAR information with its head office or controlling company, whether that company was inside or outside the U. S.
  - Sharing was permitted based on the valid need to manage and review compliance with pertinent laws and regulations, including SAR filing.
- The proposed guidance would allow sharing with an affiliate, designed as a company under common control or a subsidiary, *if and only if* the affiliate is subject to a SAR regulation issued by FinCEN or one of the federal banking agencies (Federal Reserve, FDIC, OCC, OTS and NCUA).
- An affiliate may *not* share a SAR that it receives under this guidance.
- The financial institution should have written confidentiality agreements with its affiliates.
- SARs may *not* be shared with an affiliate, domestic or foreign, not subject to a SAR rule.
- SAR sharing with affiliates is not compulsory.

**Proposed Guidance – Permissible Sharing by Securities Broker-Dealers, Mutual Funds, Futures Commission Merchants, and Introducing Brokers in Commodities with Certain U. S. Affiliates**

- A companion proposal would establish similar guidance for these securities companies to allow them to share SARs and SAR information.