

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

12 CFR Part 4

[Docket ID OCC–2009–0003]

RIN 1557–AD16

Standards Governing the Release of a Suspicious Activity Report

AGENCY: Office of the Comptroller of the Currency, Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Office of the Comptroller of the Currency (OCC) is proposing to revise its regulations governing the release of non-public OCC information. The primary change being proposed would clarify that the OCC's decision to release a suspicious activity report (SAR) will be governed by the standards set forth in proposed amendments to the OCC's SAR regulation that are part of a separate, but simultaneous, rulemaking.

DATES: Comments must be received by June 8, 2009.

ADDRESSES: Because paper mail in the Washington, DC area and received by the OCC is subject to delay, commenters are encouraged to submit comments by the Federal eRulemaking Portal or e-mail, if possible. Please use the title "SAR Release Standards" to facilitate the organization and distribution of the comments. You may submit comments by any of the following methods:

Federal eRulemaking Portal—*Regulations.gov*: Go to <http://www.regulations.gov>, under the "More Search Options" tab click next to the "Advanced Docket Search" option where indicated, select "Comptroller of the Currency" from the agency drop-down menu, then click "Submit." In the "Docket ID" column, select "OCC–2009–0003" to submit or view public comments and to view supporting and related materials for this notice of proposed rulemaking. The "How to Use This Site" link on the Regulations.gov home page provides information on using Regulations.gov, including instructions for submitting or viewing public comments, viewing other supporting and related materials, and viewing the docket after the close of the comment period.

• **E-mail:** regs.comments@occ.treas.gov.

• **Mail:** Office of the Comptroller of the Currency, 250 E Street, SW., Mail Stop 2–3, Washington, DC 20219.

• **Fax:** (202) 874–5724.

• **Hand Delivery/Courier:** 250 E Street, SW., Mail Stop 2–3, Washington, DC 20219.

Instructions: You must include "OCC" as the agency name and "Docket Number OCC–2009–0003" in your comment. In general, OCC will enter all comments received into the docket and publish them on the Regulations.gov Web site without change, including any business or personal information that you provide such as name and address information, e-mail addresses, or phone numbers. Comments received, including attachments and other supporting materials, are part of the public record and subject to public disclosure. Do not enclose any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure.

You may review comments and other related materials that pertain to this notice of proposed rulemaking by any of the following methods:

• **Viewing Comments Electronically:** Go to <http://www.regulations.gov>, under the "More Search Options" tab click next to the "Advanced Document Search" option where indicated, select "Comptroller of the Currency" from the agency drop-down menu, then, click "Submit." In the "Docket ID" column, select "OCC–2009–0003" to view public comments for this rulemaking action.

• **Viewing Comments Personally:** You may personally inspect and photocopy comments at the OCC, 250 E Street, SW., Washington, DC. For security reasons, the OCC requires that visitors make an appointment to inspect comments. You may do so by calling (202) 874–4700. Upon arrival, visitors will be required to present valid government-issued photo identification and submit to security screening in order to inspect and photocopy comments.

• **Docket:** You may also view or request available background documents and project summaries using the methods described above.

FOR FURTHER INFORMATION CONTACT:

James Vivenzio, Senior Counsel for BSA/AML, (202) 874–5200; Ellen Warwick, Assistant Director, Litigation, (202) 874–5280; or Patrick Tierney, Senior Attorney, Legislative and Regulatory Activities, (202) 874–5090; Office of the Comptroller of the Currency, 250 E Street, SW., Washington, DC 20219.

SUPPLEMENTARY INFORMATION:**I. Introduction**

The OCC is proposing to amend its regulations set forth in 12 CFR part 4, subpart C, governing the release of non-public OCC information. First, the proposed amendments conform subpart C to amendments to the OCC's SAR

confidentiality rule, 12 CFR 21.11(k), that are being proposed as part of a separate, but simultaneous, rulemaking that the OCC is conducting together with the Financial Crimes Enforcement Network (FinCEN) and is published elsewhere in this issue of the **Federal Register**. Under the standards that the OCC is proposing to incorporate into part 4, the OCC will only release a SAR, or any information that would reveal the existence of a SAR (referred to in this preamble as "SAR information") when "necessary to fulfill official duties consistent with Title II of the Bank Secrecy Act" (BSA). The proposed standards also state that "official duties" does not include the disclosure of SAR information for use in a private legal proceeding or a request under § 4.33. Thus, one effect of these proposed amendments is that the OCC will not release SAR information in response to a request from a private litigant arising out of a private legal proceeding.

In addition to the clarification of the standards governing the release of SAR information, the proposed amendments to subpart C also clarify that the OCC will deny a request for non-public information made under 12 CFR 4.33, if the release is prohibited by law. Finally, the amendments include a technical correction to § 4.37 that is described in section III of this **SUPPLEMENTARY INFORMATION**.

II. Background

As described in greater detail below, this proposal amends part 4 to make subpart C consistent with the proposed amendments to the OCC's SAR regulation that implement section 351 of the USA PATRIOT Act, to ensure that the appropriate standard is applied to the OCC's disclosure of SAR information. 12 CFR part 4, subpart C, contains the OCC's standards and procedures for the release of "non-public OCC information," and sets forth the restrictions on the dissemination of such information. Generally, "non-public OCC information" is confidential and privileged information that is the property of the OCC, and that the OCC is not required to release under the Freedom of Information Act (5 U.S.C. 552 *et seq.*) or that the OCC has not yet published or made available pursuant to 12 U.S.C. 1818(u), the statute requiring publication of certain enforcement orders. Examples in subpart C of "non-public OCC information" currently include "a SAR filed by the OCC, a national bank, or a Federal branch or agency of a foreign bank licensed or

chartered by the OCC under 12 CFR 21.11.”¹

Subpart C generally describes procedures for requesting non-public OCC information from the OCC, such as where to submit a request, the form of the request, information that must be included in any request involving an adversarial matter, and various bases for the OCC's denial of such a request.² Subpart C also authorizes the OCC to make non-public OCC information available to a supervised entity and to other persons, at the sole discretion of the Comptroller, without a request for records or testimony,³ and sets forth the OCC's policy regarding the release of non-public OCC information to other government agencies in response to a request.⁴ Subpart C also describes the conditions and limitations that the OCC may place on information it discloses under subpart C.

Although SARs fall within the definition of “non-public OCC information,” the release of a SAR is governed by standards set forth in the BSA. The BSA and its implementing regulations require a financial institution to file a SAR when it detects a known or suspected violation of Federal law or a suspicious activity related to money laundering, terrorist financing, or other criminal activity.⁵ SARs generally are unsubstantiated reports of possible violations of law or of suspicious activities that are used for law enforcement or regulatory purposes. The BSA provides that a financial institution, and its officers, directors, employees, and agents are prohibited from notifying any person involved in a suspicious transaction that the transaction was reported.⁶ More importantly, in 2001, section 351 of the USA PATRIOT Act added a new provision to the BSA prohibiting officers or employees of the Federal government or any State, local, tribal, or territorial government within the United States from disclosing to any person⁷ involved in a suspicious transaction that the transaction was reported, other than as necessary to fulfill the official duties

of such officer or employee.⁸ Accordingly, it is this provision that now governs the ability of the OCC to disclose SAR information to any person.

In 1999, the OCC amended the examples in its definition of “non-public OCC information” to explicitly include a SAR filed by the OCC or a supervised entity, making SARs subject to the procedures for the release of non-public OCC information set forth in part 4.⁹ The preamble to the final rule explained “while the OCC has always taken the position that SARs are non-public information, the OCC was proposing this change to enhance the ability of banks and the OCC to protect SARs from being disclosed when SARs are sought by private litigants.”¹⁰ Later, the preamble explains that SARs were being added to the list of examples of non-public OCC information “to protect the confidentiality of SARs further, particularly in litigation, not to make them more easily disclosable.”¹¹

The OCC is revisiting the treatment of SAR information in subpart C in light of the 2001 amendments to the BSA, added by section 351 of the USA PATRIOT Act, that specifically address governmental disclosures of SARs. Under the proposed amendments to subpart C, the OCC will decide whether to release SAR information based upon the standard in the OCC's proposed amendments to its SAR rules, 12 CFR 21.11(k), implementing section 351, rather than upon any of the factors set out in subpart C.¹² The standard in the proposed amendments to the OCC's SAR rules provides that the OCC will not, and an officer, employee or agent of the OCC, shall not, disclose SAR information except as necessary to fulfill official duties consistent with Title II of the BSA. In addition, the standard provides that “official duties” shall not include the disclosure of SAR information in response to a request for use in a private legal proceeding or in response to a request for disclosure of non-public information under 12 CFR 4.33.

The proposed SAR rules interpret “official duties” as “official duties consistent with the purposes of Title II of the BSA,” meaning, official disclosures necessary to accomplish a governmental purpose entrusted to the agency, the officer, or employee, consistent with the purposes of Title II of the BSA, namely, for “criminal, tax,

or regulatory investigations or proceedings, or in the conduct of intelligence or counterintelligence activities, including analysis, to protect against international terrorism.”¹³ This standard would permit, for example, disclosures responsive to a grand jury subpoena; a request from an appropriate Federal or State law enforcement or regulatory agency; a request from an appropriate Congressional committee or subcommittee; and prosecutorial disclosures mandated by statute or the Constitution in connection with the statement of a government witness to be called at trial, the impeachment of a government witness, or as material exculpatory of a criminal defendant.¹⁴

III. Section-by-Section Description of the Proposal

Section 4.31(b)(4) Purpose and Scope

Subpart C currently includes several standards for the release of non-public OCC information. A person seeking non-public OCC information generally must submit a request in writing to the OCC that addresses the factors set forth in § 4.33. Section 4.35 describes how the OCC will make its determination to release the information, and contains an illustrative list of possible bases for denial of a request.¹⁵ Section 4.36(a) provides that the OCC may release information to a supervised entity or any person, even without a request, at the discretion of the Comptroller when necessary or appropriate. In addition, the scope section of subpart C makes clear that § 4.37(c) applies to requests for non-public OCC information from Federal and foreign governments and state agencies with authority to investigate violations of criminal law, and state bank regulatory agencies.¹⁶ Section 4.37(c) states that, when not prohibited by law, the Comptroller may make non-public OCC information available to these governmental entities for their use, when necessary in the performance of their official duties.

This proposal adds a new paragraph (b)(4) to 12 CFR 4.31, the scope section of subpart C, which states that the OCC's decision to disclose records or testimony involving SAR information for purposes of 12 CFR 4.35(a)(1), 4.36(a), and 4.37(c), is governed solely by the standard in 12 CFR 21.11(k). Accordingly, the Comptroller's

¹³ 31 U.S.C. 5311 (setting forth the purposes of the BSA).

¹⁴ See, e.g., *Giglio v. United States*, 405 U.S. 150, 153–54 (1972); *Brady v. State of Maryland*, 373 U.S. 83, 86–87 (1963); *Jencks v. United States*, 353 U.S. 657, 668 (1957).

¹⁵ See 12 CFR 4.35(a)(2).

¹⁶ See 12 CFR 4.31(b)(3).

¹ See 12 CFR 4.32(b)(vii)

² See 12 CFR 4.33–4.35.

³ See 12 CFR 4.36.

⁴ See 12 CFR 4.37(c).

⁵ 31 U.S.C. 5318(g)(1).

⁶ 31 U.S.C. 5318(g)(2)(A)(i).

⁷ The phrase “any person involved in the transaction” has been construed to apply to “any person” because the disclosure of SAR information to any outside party may make it likely that SAR information would be disclosed to a person involved in the transaction, which is expressly prohibited by the BSA. See *Cotton v. Private Bank and Trust Co.*, 235 F. Supp. 2d 809, 815 (N.D. Ill. 2002).

⁸ See USA PATRIOT Act, section 351(b). Pub. L. 107–56, Title III, section 351, 115 Stat. 272, 321(2001).

⁹ 64 FR 29214 (June 1, 1999).

¹⁰ 64 FR 29215 (June 1, 1999).

¹¹ 64 FR 29216 (June 1, 1999).

¹² See, e.g., 12 CFR 4.33.

discretion to disclose SAR information to any person or entity without a request under § 4.36, and the OCC's determination to disclose SAR information in response to a request for use in private litigation under § 4.33 or to another government agency under § 4.37, will be circumscribed by the standard in the proposed amendments to 12 CFR 21.11(k) prohibiting the disclosure of SAR information "except as necessary to fulfill official duties consistent with Title II of the Bank Secrecy Act." In accordance with the OCC's longstanding commitment to protect the confidentiality of SARs, this proposed standard also provides that "official duties" does not include the disclosure of SAR information in response to a request for use in a private legal proceeding or in response to a request for disclosure of non-public information under 12 CFR 4.33.

Section 4.32(b) Definition of Non-Public OCC Information

This proposal amends the definition of "non-public OCC information" in § 4.32(b) to remove the reference to "a SAR filed by the OCC, a national bank, or a Federal branch or agency of a foreign bank licensed or chartered by the OCC under 12 CFR 21.11" from the illustrative list of examples that follow the definition of "non-public OCC information." SAR information would still be covered by the definition of "non-public OCC information." However, the OCC is proposing to remove the reference to SARs from the illustrative list because highlighting SAR information as an example of non-public OCC information would be misleading in light of the amendments to § 4.31 described in the previous section. As described earlier, under the amendments to subpart C, SAR information would become a unique subset of non-public OCC information subject to release solely in accordance with the standards set forth in 12 CFR 21.11(k).

Notwithstanding the OCC's deletion of the specific reference to SARs as an example of "non-public OCC information," SAR information would continue to be otherwise subject to the provisions of subpart C that are not superseded by the standards proposed in part 21. For example, § 4.37(d), which generally provides that the possession by a person of non-public OCC information does not constitute a waiver by the OCC of its right to control, or impose limitations on, the use and dissemination of the information, would continue to apply to SAR information.

Section 4.35(a)(2) Consideration of Requests

Section 4.35 generally describes how the OCC makes its determination to release or to withhold non-public OCC information in response to requests received under § 4.33. Section 4.35(a)(2) lists five examples of reasons for which the OCC will deny the release of non-public OCC information.

The OCC is proposing to add "when prohibited by law" as a sixth example of a reason for denial of requests made under § 4.33. This addition clarifies that the OCC may deny a request under § 4.33 when prohibited by law, for example, when the standard in § 21.11(k) is applicable to a request for SAR information.

Section 4.37(c) Disclosures to Government Agencies

The proposal also makes a technical correction to § 4.37(c). Section 4.37(c) describes the basis for disclosures of non-public OCC information to government agencies. The last sentence in § 4.37(c) also states that any information that is made available under this section is OCC property, and the OCC may condition its use on appropriate confidentiality protections, "including the mechanisms identified in § 4.37." However, the various mechanisms that provide confidentiality protections are identified in § 4.38 of subpart C, rather than in § 4.37. Therefore, the OCC is proposing to replace the reference to "§ 4.37" with a reference to "§ 4.38."

IV. Request for Comments

The OCC welcomes comments on any aspect of these proposed amendments to the SAR rules.

The OCC has timed the release of this proposal to coincide with the issuance of the proposed rules to amend its SAR confidentiality rules set forth in 12 CFR part 21.11(k), so that commenters can consider each proposal in commenting on the other.

V. OCC Solicitation of Comments on Use of Plain Language

Section 722 of the Gramm-Leach-Bliley Act, Public Law 106–102, sec. 722, 113 Stat. 1338, 1471 (Nov. 12, 1999), requires the OCC to use plain language in all proposed and final rules published after January 1, 2000. Therefore, the OCC specifically invites your comments on how to make this proposal easier to understand. For example:

- Have we organized the material to suit your needs? If not, how could this material be better organized?

- Are the requirements in the proposal clearly stated? If not, how could the requirements be more clearly stated?

- Does the proposal contain language or jargon that is not clear? If so, which language requires clarification?

- Would a different format make the regulations easier to understand? If so, what changes to the format would make them easier to understand?

- What else could we do to make the regulations easier to understand?

VI. OCC Community Bank Comment Request

The OCC invites your comments on the impact of this proposal on community banks. The OCC recognizes that community banks operate with more limited resources than larger institutions and may present a different risk profile. Thus, the OCC specifically requests comment on the impact of the proposal on community banks' current resources and available personnel with the requisite expertise, and whether the goals of the proposal could be achieved, for community banks, through an alternative approach.

VII. OCC Regulatory Analysis

Regulatory Flexibility Act

Under section 605(b) of the Regulatory Flexibility Act (RFA), 5 U.S.C. 605(b), the regulatory flexibility analysis otherwise required under section 604 of the RFA is not required if the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities and publishes its certification and a short, explanatory statement in the **Federal Register** along with its rule.

The OCC has determined that the proposed amendments will not have a significant economic impact on a substantial number of small entities. The proposed changes in internal standards, which were prompted by a statutory change, will simply affect the nature of the OCC's internal deliberations regarding the agency's ability to disclose a SAR. Therefore, pursuant to section 605(b) of the RFA, the OCC hereby certifies that this proposal will not have a significant economic impact on a substantial number of small entities. Accordingly, a regulatory flexibility analysis is not needed.

Executive Order 12866

The OCC has determined that this proposal is not a significant regulatory action under Executive Order 12866. The OCC has concluded that the proposed change in the OCC's internal

standards for determining whether a SAR should be disclosed will not have an annual effect on the economy of \$100 million or more. The OCC further concludes that this proposal does not meet any of the other standards for a significant regulatory action set forth in Executive Order 12866.

Paperwork Reduction Act

We have reviewed the proposed amendments in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3506; 5 CFR 1320, Appendix A.1) (PRA) and have determined that they do not contain any “collections of information” as defined by the PRA.

Unfunded Mandates Reform Act of 1995

Section 202 of the Unfunded Mandates Reform Act of 1995, Public Law 104-4 (2 U.S.C. 1532) (Unfunded Mandates Act), requires that an agency prepare a budgetary impact statement before promulgating any rule likely to result in a Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector of \$100 million or more (adjusted for inflation) in any one year. If a budgetary impact statement is required, section 205 of the Unfunded Mandates Act also requires an agency to identify and consider a reasonable number of regulatory alternatives before promulgating a rule.

The OCC has determined that these proposed amendments, which change the standards the OCC will apply when determining whether to release a SAR, will not result in expenditures by State, local, and tribal governments, or by the private sector, of \$100 million or more (adjusted for inflation) in any one year. Accordingly, this proposal is not subject to section 202 of the Unfunded Mandates Act.

List of Subjects in 12 CFR Part 4

Administrative practice and procedure, Freedom of information, Individuals with disabilities, Minority businesses, Organization and functions (Government agencies), Reporting and recordkeeping requirements, Women.

Authority and Issuance

For the reasons set forth in the preamble, part 4, subpart C, of title 12 of the Code of Federal Regulations is proposed to be amended as follows:

PART 4—ORGANIZATION AND FUNCTIONS, AVAILABILITY AND RELEASE OF INFORMATION, CONTRACTING OUTREACH PROGRAM, POST-EMPLOYMENT RESTRICTIONS FOR SENIOR EXAMINERS

1. Revise the authority citation for part 4 to read as follows:

Authority: 12 U.S.C. 93a. Subpart A also issued under 5 U.S.C. 552. Subpart B also issued under 5 U.S.C. 552; E.O. 12600 (3 CFR 1987 Comp., p. 235). Subpart C also issued under 5 U.S.C. 301, 552; 12 U.S.C. 161, 481, 482, 484(a), 1442, 1817(a)(2) and (3), 1818(u) and (v), 1820(d)(6), 1820(k), 1821(c), 1821(o), 1821(t), 1831m, 1831p-1, 1831o, 1867, 1951 *et seq.*, 2601 *et seq.*, 2801 *et seq.*, 2901 *et seq.*, 3101 *et seq.*, 3401 *et seq.*; 15 U.S.C. 77uu(b), 78q(c)(3); 18 U.S.C. 641, 1905, 1906; 29 U.S.C. 1204; 31 U.S.C. 5318(g)(2), 9701; 42 U.S.C. 3601; 44 U.S.C. 3506, 3510. Subpart D also issued under 12 U.S.C. 1833e.

2. Add § 4.31(b)(4) to read as follows:

§ 4.31 Purpose and scope.

* * * * *

(b) * * *

(4) For purposes of §§ 4.35(a)(1), 4.36(a) and 4.37(c), the OCC's decision to disclose records or testimony involving a Suspicious Activity Report (SAR) filed pursuant to the regulations implementing 12 U.S.C. 5318(g), or any information that would reveal the existence of a SAR, is governed solely by 12 CFR 21.11(k).

* * * * *

§ 4.32 [Amended]

3. Amend § 4.32(b) by:

- a. Removing paragraph (b)(1)(vii).
- b. Adding the word “and” at the end of paragraph (b)(1)(v); and
- c. Removing, at the end of paragraph (b)(1)(vi), “; and” and adding a period in its place;
4. Amend § 4.35(a)(2) by:
 - a. Removing the word “or” at the end of paragraph (a)(2)(iv);
 - b. Removing, in paragraph (a)(2)(v), the period and by adding in lieu thereof “; or”; and
 - c. Adding a new paragraph (a)(2)(vi) to read as follows:

§ 4.35 Consideration of requests.

(a) * * *

(2) * * *

(vi) When prohibited by law.

* * * * *

§ 4.37 [Amended]

5. In paragraph § 4.37(c), remove the reference to “§ 4.37” in the last sentence and add in lieu thereof “§ 4.38.”

Dated: January 22, 2009.

John C. Dugan,

Comptroller of the Currency.

[FR Doc. E9-4700 Filed 3-6-09; 8:45 am]

BILLING CODE 4810-33-P

DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

12 CFR Part 563

[Docket ID OTS-2008-0015]

RIN 1550-AC26

Confidentiality of Suspicious Activity Reports

AGENCY: The Office of Thrift Supervision, Treasury (OTS).

ACTION: Notice of proposed rulemaking.

SUMMARY: The OTS is proposing to amend its regulations implementing the Bank Secrecy Act (BSA) governing the confidentiality of a Suspicious Activity Report (SAR) to: clarify the scope of the statutory prohibition on the disclosure by a financial institution of a report of a suspicious transaction, as it applies to savings associations and service corporations; address the statutory prohibition on the disclosure by the government of a report of a suspicious transaction, as that prohibition applies to the OTS's standards governing the disclosure of SARs; clarify the exclusive standard applicable to the disclosure of a SAR, or any information that would reveal the existence of a SAR, by the OTS is “to fulfill official duties consistent with the purposes of the BSA”; and modify the safe harbor provision in its rules to include changes made by the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act. These amendments are based upon a similar proposal being contemporaneously issued by the Office of Comptroller of the Currency (OCC) and the Financial Crimes Enforcement Network (FinCEN).

DATES: Comments must be received by June 8, 2009.

ADDRESSES: You may submit comments, identified by OTS-2008-0015 (“docket number”) by any of the following methods:

• *Federal eRulemaking Portal:*—“Regulations.gov”: Go to <http://www.regulations.gov>, under the “More Search Options” tab click next to the “Advanced Docket Search” option where indicated, select “Office of Thrift Supervision” from the agency drop-down menu, then click “Submit.” In the