
FinCEN Guidance on Suspicious Activity Reports

A Client Update

by

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Client Update: FinCEN Changes Suspicious Activity Reporting Requirements

In December 2004, the Department of the Treasury's Financial Crimes Enforcement Network (FinCEN) published interpretative guidance on suspicious activity reporting requirements.¹ The new guidance potentially eliminates the need for financial institutions² to file duplicative reports.

The Office of Foreign Assets Control (OFAC) requires financial institutions to file blocking reports involving Specially Designated National and Blocked Persons (SDN). In addition, FinCEN had instructed financial institutions to file a separate suspicious activity report (SAR) on transactions involving an SDN. Thus, two separate filings to the Department of the Treasury were required on the same transaction.

FinCEN has now eliminated the requirement to file a SAR based solely on the involvement of an SDN, assuming an OFAC blocking report has been filed. However, a SAR is still required if the transactions are suspicious for reasons independent of the SDN. In particular, a SAR still must be filed:

1. If the financial institution would be required to file a SAR on the transaction in the absence of a SDN; or
2. To the extent that the financial institution is in possession of information not included in the blocking report.

Background

OFAC Reporting. OFAC administers economic and trade sanctions against target foreign countries and individuals based on the foreign policy and national security goals of the United States. Financial institutions are required to block³ and file reports on transactions involving countries, individuals, and organizations designated by OFAC.⁴ Individuals or entities are so designated because they are owned, controlled by or acting on behalf of governments of target countries, or are associated with terrorism, international narcotics trafficking or the proliferation of weapons of mass destruction.⁵ These individuals and entities are listed on the Treasury Department's Specially Designated Nationals and Blocked Persons (SDN) list, so that persons subject to the jurisdiction of the United States know they are prohibited from dealing with them and must block all property within their possession or control in which these individuals and entities have an interest.⁶ Blocking reports must be filed within 10 business days following the date that the blocking occurred.⁷

FinCEN Reporting. Under the Bank Secrecy Act,⁸ the Secretary of the Treasury is authorized to require financial institutions to report any suspicious transactions relevant to a possible violation of law or regulation.⁹ Pursuant to this authority, FinCEN has issued regulations requiring financial institutions to file Suspicious Activity Reports (SARs) on such transactions which meet a minimum dollar threshold.¹⁰ The financial institution must file a SAR within 30 days of

detection of the activity giving rise to the report.¹¹ SARs are filed on industry specific forms developed by FinCEN.¹²

By nature of the individuals involved, OFAC's blocking reports potentially contain information of criminal activity. FinCEN thus instructed financial institutions to file a SAR report where a threshold transaction involved an individual or entity which was a verified SDN.¹³ Although this dual reporting requirement ensured that law enforcement had all available information, it resulted in financial institutions being burdened with two separate filings to the Treasury Department.

The New Guidance

As of December 15, 2004, FinCEN revised its previous guidance to reduce this duplicative effort in cases where an individual involved is a verified match with an individual designated by OFAC.¹⁴ Thus, FinCEN will consider its SAR requirements satisfied when an OFAC blocking report is submitted and OFAC will ensure the information is made available to law enforcement.¹⁵

The exception does not affect the financial institution's obligation to report suspicious activity beyond a match to an OFAC listing. Therefore, if the financial institution knows, suspects or has reason to suspect that the transaction involves a possible violation of law or regulation independent of the mere existence of a SDN, a SAR must still be filed.¹⁶ In short, if a financial institution would report the transaction absent a SDN, it must do so. Similarly, to the extent that the financial institution has information regarding the suspicious nature of a

transaction that is not reflected in the OFAC filing, a report should be filed with FinCEN containing that information.¹⁷

Nonetheless, whenever there is any doubt as to whether or not to file a SAR, the financial institution should err on the side of caution. Failure to file a SAR can result in civil or criminal penalties.¹⁸ Voluntary filings, however, are protected from civil liability concerning the contents of the report.¹⁹

About the Author



Viet D. Dinh is Professor of Law at the Georgetown University Law Center and founder and principal of Bancroft Associates PLLC. A Director and Chair of the Corporate Governance Committee of the News Corporation, Dinh previously served as U.S. Assistant Attorney General for Legal Policy from 2001 to 2003. In that capacity, Dinh conducted a comprehensive review and revision of Department of Justice priorities, policies and practices to ensure that all available resources are dedicated to protecting America against terrorist acts. He played a key role in developing the USA PATRIOT Act and revising the Attorney General's Guidelines, which govern federal law enforcement activities and national security investigations.

Dinh graduated magna cum laude from Harvard College and Harvard Law School, where he was a Class Marshal, Olin Research Fellow in Law and Economics, and *Bluebook* editor of *Harvard Law Review*. He clerked for Judge Laurence H. Silberman of the U.S. Court of Appeals for the D.C. Circuit and U.S. Supreme Court Justice Sandra Day O'Connor. Dinh served as Associate Special Counsel to the U.S. Senate Whitewater Committee, Special Counsel to Senator Pete V. Domenici for the Impeachment Trial of the President, and counsel to the Special Master in *In re Austrian and German Bank Holocaust Litigation*. He is a member of the District of Columbia and U.S. Supreme Court bars.

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References

¹ U.S. Dep't of the Treasury, *FinCEN Interpretive Guidance: Interpretation of Suspicious Activity Reporting Requirements to Permit the Unitary Filing of Suspicious Activity and Blocking Reports*, (Dec. 2004)(hereinafter "Interpretive Guidance").

² Financial institutions under the BSA are defined by cross reference to 31 U.S.C. §5312(a)(2)(A) through (G), to include insured banks under 12 U.S.C. §1813(h); commercial banks or trust companies; private bankers; branches and agencies of foreign banks in the United States; credit unions; casinos; futures commission merchants and registered brokers and dealers. *See also* 31 C.F.R. §103.17-21.

³ "Blocking" or "freezing" is a form of controlling assets under U.S. jurisdiction. While title to blocked property remains with the designated country or national, the exercise of the powers and privileges normally associated with ownership is prohibited without authorization from OFAC. Blocking immediately imposes an across-the-board prohibition against transfers or transactions of any kind with regard to the property. U.S. Dep't of the Treasury, *Foreign Assets Control Regulations for the Financial Community*, Nov. 24, 2004, at 4 available at <http://www.treas.gov/offices/enforcement/ofac/regulations/t11facbk.pdf> (last viewed Dec. 17, 2004),

⁴ 31 C.F.R. §501.603.

⁵ OFAC's specific designations subject to blocking requirements are: specially designated terrorist; foreign terrorist organization; specially designated global terrorist; specially designated narcotics trafficker; specially designated narcotics trafficker kingpin. *See* 31 C.F.R. Parts 595, 597, 598 and the Foreign Narcotics Kingpin Act, 21 U.S.C. §1901-08; 8 U.S.C. §1182.

⁶ A current list of these "Specially Designated Nationals and Blocked Persons" is maintained on OFAC's website at <http://www.treas.gov/offices/enforcement/ofac/sdn/> (last viewed Dec. 16, 2004).

⁷ 31 C.F.R. §501.603(b)(1). Blocking reports must identify the owner, the property, the property's location, any existing or new account number or similar reference to identify the property, actual or estimated value, the date it was blocked, a photocopy of the payment or transfer instructions (if the blocking involves a payment or transfer of funds), a confirmation that the payment has been deposited into a new or existing blocked account which is clearly labeled as such and is established in the name of, or contains a means of clearly identifying the interest of, the individual or entity subject to blocking, the name and address of the holder, and the name and telephone number of a contact person from whom compliance information can be obtained. *Id.* OFAC also requires the filing of a comprehensive annual report on blocked property due to OFAC by September 30 of each year. 31 C.F.R. §501.603(b)(2). The report must be filed using Form TDF 90-22.50, which is available on the OFAC website <http://www.treas.gov/ofac>.

⁸ Congress enacted Title II of the Currency and Foreign Transactions Reporting Act of 1970 (commonly referred to as the Bank Secrecy Act), P.L. 91-508, Title II, 84 Stat. 1118 (Oct. 26, 1970), *repealed and reenacted as* 31 USCS §§ 5311 *et seq.*, P.L. 97-258, § 4(b), 96 Stat. 1067 (Sept. 13, 1982), "in response to increasing use of banks and other institutions as financial intermediaries by persons engaged in criminal activity." *Ratzlaf v. United States*, 510 U.S. 135, 138 (1994).

⁹ Suspicious Activity Reports must be filed on any transaction meeting a threshold amount in which the financial institution "knows, suspects, or has reason to suspect" is conducted to disguise funds from illegal activities, is designed to evade currency transaction reporting, or has no business or apparent lawful purpose, and the bank no of no reasonable explanation for the transaction. 31 U.S.C. §5318(g); 31 C.F.R. §103.18.

¹⁰ The threshold for most financial institutions is \$5,000, but transactions conducted at points of sale for money services businesses have a reporting threshold of \$2,000. *See* 31 C.F.R. §103.20.

¹¹ 31 C.F.R. § 103.18(b)(3).

¹² *See* TD F 90-22.47 (depository institutions); TD F 22.56 (money services businesses); FinCEN Form 101 (securities and futures industries); FinCEN Form 102 (casinos and card clubs).

¹³ U.S. Dep't of the Treasury, *SAR Activity Review*, Issue 6 (Nov. 2003).

¹⁴ Interpretive Guidance at 3.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 4.

¹⁸ 31 U.S.C. §§5321-5322.

¹⁹ 31 U.S.C. §5318(g)(3) provides:

Any financial institution that makes a voluntary disclosure of any possible violation of law or regulation to a government agency or makes a disclosure pursuant to this subsection or any other authority, and any director, officer, employee, or agent of such institution who makes, or requires another to make any such disclosure, shall not be liable to any person under any law or regulation of the United States, any constitution, law, or regulation of any State or political subdivision of any State, or under any contract or other legally enforceable agreement (including any arbitration agreement), for such disclosure or for any failure to provide notice of such disclosure to the person who is the subject of such disclosure or any other person identified in the disclosure.