FinCEN Guidance on SAR Sharing "Falls Short," Says ABA

June 08, 2009 By Brian Monroe

A proposal by the U.S. Treasury Department that would prevent banks from sharing their suspicious activity reports with foreign affiliates is "needlessly" restrictive, a top banking association said Friday.

The Washington D.C.-based American Bankers Association (ABA) said that proposed guidance on sharing the reports "falls short" because it would stop financial institutions from sending intelligence on suspected crimes to foreign-based affiliates. The department's Financial Crimes Enforcement Network (FinCEN) disclosed details of the plan on March 3.

If finalized, the guidance would create an "unwarranted demarcation" between affiliated operations in the United States and other countries that "needlessly" restricts internal data sharing and impairs suspicious activity reporting, the ABA said in a 17-page comment letter posted on its Web site Friday.

Under the proposed guidance, banks, broker dealers and futures commission merchants would be allowed to share suspicious activity report (SAR) data across their broader corporate structure rather than only with an operation's controlling company. The planned expansion of SAR sharing would only apply to domestic operations, however.

Allowing a bank to send SAR data to foreign affiliates would make anti-money laundering efforts "more effective because it allows more connecting of the dots," according to Kenneth Bryant, managing director of Bryant & Associates, a Hayesville, North Carolina-based anti-money laundering (AML) consultancy.

Broader SAR distribution would allow the bank to double check that a customer who had been rejected at a private banking arm in one country hasn't opened a retail account in another country, he said.

In January 2006 interagency guidance on SAR sharing, FinCEN said that distributing SARs "raises concerns" about the ability of foreign entities to protect sensitive data "in light of possible requests for disclosure abroad."

The bureau is likely concerned about breaching U.S. and foreign privacy laws and potentially losing control of any sensitive banking data, said Bryant, adding that FinCEN might try to obviate the problem by working out data protection agreements with foreign jurisdictions.

Banks and other financial institutions believed, however, that the 2006 guidance already "allowed SARs to be shared without geographical limits and there has been no indication that this has been either unsafe or unsound," the ABA said, adding that, under the current plan,

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criminals would migrate to a bank with the "weakest controls."

Should banks and other influential financial associations decry the plan, FinCEN may ultimately back away from the plan, said Bryant, who believes the current restrictions add cost to anti-money laundering investigations.

But if the agency "believes the sharing will break safe harbor provisions, they might not be able to address the industry's concerns," said a chief compliance officer at a large New Jersey-based bank. "They are trying to extend SAR sharing, but at the same time water it down so the move doesn't overstep legal boundaries."

The ABA's comments were briefly the subject of one of the panels at a regulatory conference in Orlando, Fla. Monday.

William Langford, director of global anti-money laundering at JPMorgan Chase, said at the conference that, while regulation should hold banks accountable for how they disseminate SARs, it shouldn't "hold them back from sharing one with an affiliate because they aren't subject to U.S. SAR rules."

The proposed guidance, based on the 2006 guidance by the Office of the Comptroller of the Currency as well as FinCEN, was defended by Dan Stipano, chief counsel at the OCC.

There is no reason to share information with affiliates in countries that don't share information with the United States, said Stipano, during the conference. Speaking after the panel, Stipano added that SARs often contained sensitive information, including mention of politically exposed persons, which could be misused in some countries.

In October, FinCEN Director James Freis also touched on the issue in a speech before attendees at an AML conference in Acapulco, Mexico, saying that the agency realizes that banks will need to share SAR data with foreign affiliates in some cases, but that U.S. SAR confidentiality and safe harbor underpinnings are "not recognized in foreign jurisdictions."

FinCEN spokesman Steve Hudak said the agency could not comment on a pending rulemaking.

Kieran Beer contributed to this story.

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