

BILLING CODE: 6720-01-P

DEPARTMENT OF THE TREASURY
Office of Thrift Supervision

12 CFR Part 563

{No. 95-145}

RIN 1550-AA62

Operations - Suspicious Activity Reports and
Other Reports and Statements

AGENCY: Office of Thrift Supervision, Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Office of Thrift Supervision (OTS) is proposing to revise 12 CFR 563.180 to implement a new interagency suspicious activity referral process and to update and clarify the underlying reporting regulation. The proposal reduces substantially the burden on savings associations and service corporations in reporting suspicious activities while enhancing access to such information by the Federal law enforcement agencies, the Federal financial institutions supervisory agencies, and the Department of the Treasury.

DATES: Comments must be received by [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Comments should be sent to: Chief, Dissemination Branch, Records Management and Information Policy, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552, Attention Docket No. 95-145. These submissions may be hand-delivered to 1700 G Street, NW., from 9:00 A.M. to 5:00 P.M. on business days; they may be sent by facsimile transmission to FAX Number (202) 906-7755. Comments will be available for inspection at 1700 G Street, NW., from 1:00 P.M. until 4:00 P.M. on business days.

FOR FURTHER INFORMATION CONTACT: Richard Stearns, Deputy Chief Counsel, Enforcement Division, (202) 906-7966, or Karen Osterloh Counsel (Banking and Finance), Regulations and Legislation Division, (202) 906-6639, Chief Counsel's Office, Office of Thrift Supervision, 1700 G Street, NW., Washington DC 20552.

SUPPLEMENTARY INFORMATION

Background

The Federal financial institutions supervisory agencies (Agencies)¹ and the Department of the Treasury (Treasury)² are

¹ The Federal financial institutions supervisory agencies are the OTS, the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, and the National Credit Union Administration.

² Through its Financial Crimes Enforcement Network (FinCEN).

responsible for ensuring that financial institutions apprise Federal law enforcement authorities of any known or suspected violation of a Federal criminal statute and of any suspicious financial transaction. Suspicious financial transactions (which will be the subject of regulations and other guidance to be issued by Treasury) can include transactions that a savings association or service corporation suspects involved funds derived from illicit activities, were conducted for the purpose of hiding or disguising funds from illicit activity, otherwise violated the money laundering statutes,³ were potentially designed to evade the reporting or recordkeeping requirements of the Bank Secrecy Act (the BSA),⁴ and transactions that the savings association or service corporation believes were suspicious for any other reason.

Fraud, abusive insider transactions, check kiting schemes, money laundering, and other crimes can pose serious threats to a financial institution's continued viability and, if unchecked, can undermine the public confidence in the nation's financial industry. The Agencies and Federal law enforcement agencies need to receive timely and detailed information regarding suspected criminal activity to determine whether investigations, administrative actions, or criminal prosecutions are warranted.

³ 18 U.S.C. 1956 and 1957.

⁴ 31 U.S.C. 5311 through 5330.

An interagency Bank Fraud Working Group (BFWG), consisting of representatives from many Federal agencies, including the Agencies and law enforcement agencies, was formed in 1984. The BFWG addresses substantive issues, promotes cooperation among the Agencies and Federal and State law enforcement agencies, and improves the Federal government's response to white collar crime in financial institutions. Today's revisions to this regulation and the reporting requirements are being made under the auspices of the BFWG.

Suspicious Activity Report

The Agencies have been working on a project to improve the criminal referral process, to reduce unnecessary reporting burdens on financial institutions, and to eliminate confusion associated with the current duplicative reporting of suspicious financial transactions in criminal referral forms and currency transaction reports (CTRs). Contemporaneously, Treasury analyzed the need to implement the procedures for reporting suspicious financial transactions by financial organizations following the enactment of the Annuzio-Wylie Anti-Money Laundering Act of 1992. As a result of these reviews, the Agencies and Treasury approved the development of a new referral process that includes suspicious financial transaction reporting.

To implement the reporting process, and to reduce unnecessary burdens associated with these various reporting requirements, the Agencies and FinCEN developed a new report form for reporting known or suspected Federal criminal law violations and suspicious financial transactions. The new form is designated the Suspicious Activity Report (SAR).⁵ The SAR is a simplified and shortened version of its predecessors.

The new referral process and the SAR reduce the burden on savings associations and service corporations for reporting known or suspected violations and suspicious financial transactions. The agencies anticipate that the new process will be instituted by October, 1995.

Proposal

The OTS proposes to revise 12 CFR 563.180 by updating and clarifying the current rule governing the filing of criminal referral reports, implementing the new SAR, and eliminating current confusing and overly burdensome reporting requirements. This action should improve reporting of known or suspected violations and suspicious financial transactions relating to

⁵ The reporting requirements contained in the SAR will be submitted to the Office of Management and Budget for review in accordance with the Paperwork Reduction Act of 1980 (44 U.S.C. 3504(h)) and the OTS will seek comments on the SAR in a separate notice.

Federally insured financial institutions while providing uniform data for entry into the new interagency computer database. The OTS expects that each of the other Agencies will be making substantially similar changes contemporaneously.

The proposed changes to the current OTS rules are discussed below. The principal changes include: (1) raising the mandatory reporting thresholds for criminal offenses, thereby reducing unnecessary reporting burdens; (2) requiring the filing of only one form with a single repository, rather than multiple filings to several Federal law enforcement agencies and the Agencies, thereby further reducing reporting burdens; and (3) clarifying the criminal referral and suspicious financial transaction reporting requirements of the Agencies and Treasury, thereby eliminating duplicative referrals.

§ 563.180(d)(1) Purpose and scope.

The proposal clarifies the scope of the current rule. Under the proposal, the SAR will replace the various criminal referral forms that the Agencies currently require institutions to file. The purpose of the proposed rule is to ensure that savings associations or service corporations file a SAR when they detect known or suspected violations of Federal criminal law or

suspicious financial transactions.⁶

The proposed rule continues to require reporting by savings associations and by service corporations. It does not, however, impose a separate reporting obligation on operating subsidiaries established by savings associations. OTS regulations provide that all Federal laws and regulations governing the operation of savings associations apply to operating subsidiaries, unless otherwise provided by statute, regulations or policies of the OTS. The OTS general policy is to consolidate regulatory requirements for the operating subsidiary with the parent. Accordingly, the reporting obligation of parent savings associations under § 563.180 will be deemed to include the duty to report events or conduct occurring at the operating subsidiary level, as well as the parent level.

Under the current regulation, savings association holding companies are not required to file reports. Holding companies are encouraged to do so when actions have a substantial impact on

⁶ As noted above, there has been some confusion regarding filing of criminal referrals and CTRs for suspicious cash transactions. The BSA requires all financial institutions to file CTRs in accordance with Treasury's implementing regulations (31 CFR part 103). Part 103 requires financial institutions to file a CTR whenever a currency transaction exceeds \$10,000. If a currency transaction exceeds \$10,000 and is suspicious, the institution, under these new requirements, will file both a CTR (reporting the currency transaction) and a SAR (reporting the suspicious criminal aspect of the transaction). If a currency transaction equals or is below \$10,000 but is suspicious, the institution will only file a SAR.

the depository institutions that they own. The OTS solicits comment on whether to amend the rule so that it expressly requires savings association holding companies to file SARs regarding known or suspected criminal violations or suspicious financial transactions that affect their depository institution subsidiaries.

§ 563.180(d)(2) Definitions.

Proposed § 563.180(d)(2) defines the following terms: "FinCEN," "institution-affiliated party," "instructions," "known or suspected violation," and "SAR." The definitions should make the rule easier to interpret and apply.

In particular, the definition of "known or suspected violation" refers to any matter for which a savings association or service corporation has a basis to believe that a violation of any Federal criminal statute (including a pattern of criminal violations) has occurred or has been attempted, is occurring, or may occur, coupled with a basis to believe that a savings association or service corporation was an actual or potential ~~victim of the criminal violation or was involved in or was used~~ to facilitate the criminal violation. This definition supplants the definition of suspected crimes, the illustrative listing of crimes requiring reporting, and other descriptions of known or suspected crimes in the existing rule at 12 CFR 563.180(d)(1) and

(2)(1995).

§ 563.180(d)(3) Reports required.

The proposal clarifies the categories of violations that are subject to the reporting obligation. In addition, the proposal reduces the regulatory burden on savings associations and service corporations by increasing applicable dollar thresholds for two categories of violations, and by eliminating the requirement for duplicative filings with multiple Federal agencies.

Proposed § 563.180(d)(3)(i) requires a savings association or service corporation to file a SAR, regardless of the dollar amount involved, whenever it has a substantial basis for believing that a director, officer, employee, agent or other institution-affiliated party (as defined in the regulation, which cross references section 3(u) of the FDIA) committed or aided in the commission of a Federal crime. This provision is substantially identical to the existing rule at 12 CFR 563.180(d)(1)(i)(1995), with one exception. The existing rule applies to violations involving "affiliated parties," as defined in 12 CFR 561.5(1995). Unfortunately, the cited definition is both too narrow and too broad. For example, "affiliated persons" under 12 CFR 561.5 does not include all shareholders who may participate in the conduct of the affairs of the institution, but does include members of a director's or officer's immediate

family who have no connection to the institution. The OTS believes that the proposed rule describes relevant insiders with greater precision.

OTS's current rules further require savings associations and service corporations to report known or suspected criminal acts that involve actual or anticipated losses of: (1) \$1,000 or more where there is a basis for identifying a non-insider suspect; or (2) \$5,000 or more regardless of whether a suspect has been identified.⁷ The proposed rule at §§ 563.180(d)(3)(ii) and (iii) would reduce this reporting burden by increasing the \$1,000 and \$5,000 thresholds to \$5,000 and \$25,000, respectively. Moreover, the proposed rule clarifies that threshold amounts are based on actual or potential losses to the savings association or service corporation, without regard to possible reimbursement or recovery.

Proposed § 563.180(d)(3)(iv) requires a savings association or service corporation to report any financial transaction, regardless of the dollar amount if: (1) the institution suspects the transaction involved funds derived from illicit activity, was conducted for the purpose of hiding or disguising funds from illicit activity, or in any way violated the money laundering

⁷ 12 CFR 563.180(d)(1)(ii) and (iii) (1995).

statutes;⁸ (2) the institution suspects the transaction was potentially designed to evade the reporting or recordkeeping requirements of the BSA;⁹ or (3) the institution believes the transaction to be suspicious for any reason. This revision makes minor clarifying changes to the existing requirements at 12 CFR 563.180(d)(1)(iv)(1995).

The current rules require savings associations and service corporations to file a criminal referral report with appropriate Federal law enforcement authorities. Because this process results in multiple filings with several agencies, the Agencies propose to reduce the filing burden by permitting institutions to file a single SAR at one location. Accordingly, under proposed § 563.180(d)(3), a savings association or service corporation will file a SAR with all appropriate Federal law enforcement agencies by sending a single copy of the SAR to the FinCEN, whose address will be printed on the SAR.

FinCEN will input the information contained on the SARs into a newly created database that FinCEN will maintain. This process will fulfill the regulatory requirement that a savings association or service corporation refer any known or suspected criminal violation to appropriate Federal law enforcement

⁸ 18 U.S.C. 1956 and 1957.

⁹ 31 U.S.C. 5311 through 5330.

agencies. The database will enhance Federal law enforcement and supervisory agencies' ability to track, investigate and prosecute individuals suspected of violating Federal criminal law. This change will ensure that all SARs are placed in the database at FinCEN and that the information is made available on computer to the appropriate law enforcement and supervisory agencies as quickly as possible.

To further reduce the reporting burden, the Agencies are modifying the manner in which financial institutions file a SAR. In following the Instructions on a SAR, a savings association or service corporation may file the referral form in several ways, including submitting an original form or a photocopy, and filing a SAR by magnetic means, such as by a computer disk.¹⁰ In the future, the OTS and the other Agencies anticipate that a financial institution will be able to file a SAR electronically.

The Agencies, working with FinCEN, are developing computer software to assist financial institutions in preparing and filing SARs. The software will allow an institution to complete a SAR, to save the SAR on its computers, and to print a hard copy of the SAR for its own records. The computer software will also enable an institution to file a SAR using various forms of magnetic media, such as computer disk or magnetic tape. The OTS will make

¹⁰ FinCEN, however, will not be able to receive SARs by facsimile machine.

the software available to all savings associations and service corporations. A savings association or service corporation, of course, may complete and file a SAR using printed forms without using this software, if it so desires. The Instructions to the SAR will address new permissible filing methods as the methods are developed.

§ 563.180(d)(4) Service corporations.

When a service corporation must file a report under the current rule, the required filing may be made either by the service corporation or by a saving association that wholly or partially owns the service corporation. This provision is retained in the proposed rule at 12 CFR 563.180(d)(4).

§ 563.180(d)(5) Time for reporting.

Proposed § 563.180(d)(5) requires a savings association or service corporation to file the SAR within 30 calendar days after the date of detection of the act triggering the reporting requirement. If no suspect is identified on that date, the savings association or service corporation may delay the filing of a SAR for an additional 30 calendar days after the identification of a suspect. Filings, however, may not be delayed for more than 60 calendar days after detection. The proposal substantially modifies the current regulation at

§ 563.180(d)(2) which requires the savings association or service corporation to file within 14 business days after discovery of the activity.

§ 563.180(d)(6) Reports to State and local authorities.

The proposed rule includes a new provision encouraging savings associations and service corporations to file SARs with State and local law enforcement agencies where appropriate.

§ 563.180(d)(7) Retention of records.

Existing OTS rules require savings associations and service corporations to retain a copy of the criminal referral report and related records for a period of ten years.¹¹ This requirement is retained in the proposed rules at § 563.180(d)(7).

The current instructions to the criminal referral form require savings associations and service corporations to submit copies of all related documentation when a criminal referral is filed. The new SAR reduces the regulatory burdens on the industry by eliminating this requirement altogether. Instead, the proposal requires that the documentation be identified and

¹¹ 12 CFR 563.180(d)(5)(1995). This time frame corresponds with the statute of limitations for most Federal criminal statutes involving financial institutions.

treated as filed with the SAR and that the savings association or service corporation maintain the documentation, along with a copy of the SAR, for ten years from the submission date. This approach ensures that Federal law enforcement agencies and the Agencies, upon request, have access to any documentation necessary to prosecute a violation or pursue administrative action by requiring the preservation of the underlying documentation for ten years.

§ 563.180(d)(8) Exemptions.

The proposed rule would exempt robberies and burglaries and attempted robberies and burglaries that are reported to the appropriate local law enforcement authorities. This exemption is substantially similar to the existing exemption at 12 CFR 563.180(d)(2)(1995).

§ 563.180(d)(9) Notification of the board of directors.

Proposed § 563.180(d)(9) requires the management of a savings association to promptly notify the board of directors (or a committee of directors or executive officers designated by the board to receive notice) whenever the savings association or a service corporation in which the savings association has an ownership interest has filed a SAR. Where an executive officer

or director is a suspect, the proposal requires management to notify the entire board of directors, except the suspect.

This proposed rule generally incorporates the requirements of the existing rules at § 563.180(d)(4)(1995), but includes several modifications designed to provide savings associations with greater flexibility. These modifications: (1) permit notification to a designated committee in lieu of the entire board; (2) require "prompt" notification, rather than notification at the first regularly scheduled board meeting after the filing of the SAR; and (3) assign notification responsibility to management of the savings association rather than the chief executive officer. The OTS expects each savings association to maintain appropriate mechanisms to ensure that the board of directors will be informed promptly of SAR filings.

§ 563.180(d)(10) Compliance.

The proposed rule includes a new provision stating that the failure to file a SAR in accordance with the regulation and the Instructions may result in supervisory actions, including enforcement actions.

§ 563.180(d)(11) Obtaining the SAR.

Proposed § 563.180(d)(11) states that savings associations and service corporations may obtain the SAR form from the appropriate OTS Regional Office at the address listed in 12 CFR 516.1(b)(1995). The current rule does not contain a comparable instruction.

§ 563.180(d)(12) Confidentiality of SARs.

The proposed rule contains a new provision preserving the confidentiality of SARs and the information contained in SARs.

Comments

The OTS invites public comment on all aspects of this proposal.

Regulatory Flexibility Act

Pursuant to section 605(b) of the Regulatory Flexibility Act, the OTS hereby certifies that this proposed rule will not have a significant economic impact on a substantial number of small entities. This proposal primarily reorganizes the process for reporting crimes and suspicious activities and has no material impact on savings associations and service corporations,

regardless of size. Accordingly, a regulatory flexibility analysis is not required.

Executive Order 12866

The OTS has determined that this document is not a significant regulatory action under Executive Order 12866.

Unfunded Mandates Reform Act of 1995

Section 202 of the Unfunded Mandates Reform Act of 1995, Pub. L. No. 104-4 (signed into law on March 22, 1995) requires that an agency prepare a budgetary impact statement before promulgating a rule that includes a Federal mandate that may result in expenditure by State, local, and tribal governments, in the aggregate, or by the private sector of \$100 million or more in one year. If the budgetary impact statement is required, section 205 of the Act also requires an agency to identify and consider a reasonable number of regulatory alternatives before promulgating a rule. This proposal reorganizes the process for reporting crimes and suspicious activities by savings associations and service corporations to Federal agencies. The OTS has determined that the final rule will not result in expenditure by State, local, or tribal governments or by the private sector of more than \$100 million. Accordingly, the Unfunded Mandates Reform Act does not apply.

List of Subjects in 12 CFR Part 563

Accounting, Advertising, Crime, Currency, Flood insurance, Investments, Reporting and recordkeeping requirements, Savings associations, Securities, Surety bonds.

Authority and Issuance

For the reasons set out in the preamble, part 563 of chapter V of title 12 of the Code of Federal Regulations is proposed to be amended as set forth below:

SUBCHAPTER D -- REGULATIONS APPLICABLE TO ALL SAVINGS ASSOCIATIONS

PART 563 -- OPERATIONS

1. The authority citation for part 563 continues to read as follows:

Authority: 12 U.S.C. 375b, 1462, 1462a, 1463, 1464, 1467a, 1468, 1817, 1828, 3806; 42 U.S.C. 4012a, 4104a, 4104b, 4106, 4128.

2. Section 563.180 is amended by revising paragraph (d) to read as follows:

§ 563.180 Suspicious Activity Reports and Other Reports and Statements.

* * * * *

(d) Suspicious Activity Reports. (1) Purpose and scope.

This paragraph (d) ensures that savings associations and service corporations file a Suspicious Activity Report when they detect a known or suspected violation or a suspicious transaction.

(2) Definitions. For the purposes of this paragraph (d):

(i) FinCEN means the Financial Crimes Enforcement Network of the Department of the Treasury.

(ii) Institution-affiliated party means any institution-affiliated party as that term is defined in section 3(u) and 8(b)(8) of the Federal Deposit Insurance Act (12 U.S.C. 1813(u) and 1818(b)(8)).

(iii) Instructions means the instructions on the SAR.

(iv) Known or suspected violation means any matter for which there is a basis to believe that a violation of a Federal criminal statute (including a pattern of criminal violations) has occurred or has been attempted, is occurring, or may occur, and there is a basis to believe that a savings association or service corporation was an actual or potential victim of the criminal violation or was involved in or was used to facilitate the criminal violation.

(v) SAR means a Suspicious Activity Report.

(3) SARs required. A savings association or service corporation shall file a SAR with the appropriate Federal law enforcement agencies and the Department of the Treasury, in accordance with the Instructions, by sending a completed SAR to FinCEN, in the following circumstances:

(i) Whenever the savings association or service corporation detects a known or suspected violation of Federal criminal law and has a substantial basis to believe that one of its directors, officers, employees, agents, or other institution-affiliated parties committed or aided in the commission of the violation;

(ii) Whenever the savings association or service corporation detects a known or suspected violation of Federal criminal law, there is an actual or potential loss to the savings association or service corporation (before reimbursement or recovery) aggregating \$5,000 or more, and the savings association or service corporation has a substantial basis for identifying a possible suspect or group of suspects, where none of the suspects are included in paragraph (d)(3)(i) of this section;

(iii) Whenever the savings association or service corporation detects a known or suspected violation of Federal criminal law, there is an actual or potential loss to the savings association or service corporation (before reimbursement or recovery) aggregating \$25,000 or more, and the savings association or service corporation has no substantial basis for

identifying a possible suspect or group of suspects; or

(iv) Whenever a financial transaction is conducted, or attempted, at the savings association or service corporation and:

(A) The savings association or service corporation suspects that the transaction involved funds derived from illicit activity, was conducted for the purpose of hiding or disguising funds from illicit activity, or in any way violated the money laundering statutes (18 U.S.C. 1956 and 1957);

(B) The savings association or service corporation suspects that the transaction was potentially designed to evade the reporting or recordkeeping requirements of the Bank Secrecy Act (31 U.S.C. 5311 through 5330) or regulations issued thereunder; or

(C) The savings association or service corporation believes that the transaction was suspicious for any reason.

(4) Service corporations. When a service corporation is required to file a SAR under paragraph (d)(3) of this section, either the service corporation or a savings association that wholly or partially owns the service corporation, may file the SAR.

(5) Time for reporting. (i) Generally. A savings association or service corporation shall file the SAR required by paragraph (d)(3) of this section within 30 calendar days after the date of initial detection of an act described in paragraph

(d)(3). In situations involving violations that require immediate attention, such as when a reportable violation is ongoing, the savings association or service corporation shall immediately notify, by telephone, the appropriate law enforcement authority in addition to filing a timely SAR.

(ii) No suspect identified. If no suspect was identified on the date of detection of an act described in paragraph (d)(3) of this section, the savings association or service corporation may delay filing the SAR for an additional 30 calendar days after the identification of a suspect, but in no case may savings association or service corporation delay filing a SAR for more than 60 calendar days after the date of detection of an act described in paragraph (d)(3).

(6) Reports to State and local authorities. A savings association or service corporation is encouraged to file a copy of the SAR with State and local law enforcement agencies where appropriate.

(7) Retention of records. A savings association or service corporation shall maintain a copy of any SAR filed and the original of any related documentation for a period of ten years from the date of filing the SAR, unless the OTS informs the savings association or service corporation in writing that it may discard the materials sooner. A savings association or service corporation must make all supporting documentation available to

appropriate law enforcement agencies upon request. Supporting documentation shall be identified and treated as filed with the SAR.

(8) Exemptions. A savings association or service corporation need not file a SAR for a robbery or burglary committed or attempted that is reported to appropriate law enforcement authorities.

(9) Notification to board of directors. (i) Generally. Whenever a savings association (or a service corporation in which the savings association has an ownership interest) files a SAR pursuant to this paragraph (d), the management of the savings association shall promptly notify its board of directors or a committee of directors or executive officers designated by the board of directors to receive such notice.

(ii) Suspect is a director or officer. If the savings association or service corporation files a SAR pursuant to § 563.180(d)(3) and the suspect is a director or executive officer of the savings association, the savings association must not notify the suspect in accordance with 31 U.S.C. 5318, but must notify all directors who are not suspects.

(10) Compliance. Failure to file a SAR in accordance with this paragraph (d) and the Instructions may subject the savings association or service corporation, its directors, officers,

employees, agents, or other institution-affiliated parties to supervisory actions including enforcement actions.

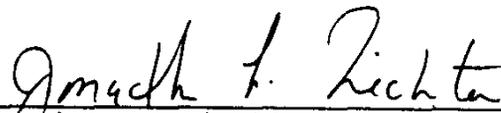
(11) Obtaining SARs. A savings association or service corporation may obtain SARs and the Instructions from the appropriate OTS Regional Office listed in 12 CFR 516.1(b).

(12) Confidentiality of SARs. SARs are confidential. Any person subpoenaed or otherwise requested to disclose a SAR or the information contained in a SAR shall decline to produce the information citing these regulations, applicable law (e.g., 31 U.S.C. 5318(g)), or both.

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DATED: July 12, 1995

By the Office of Thrift Supervision.



Jonathan L. Fiechter
Acting Director