

**DEPARTMENT OF THE TREASURY****Office of the Comptroller of the Currency****12 CFR Part 4**

[Docket ID OCC–2010–0018]

RIN 1557–AD16

**Standards Governing the Release of a Suspicious Activity Report****AGENCY:** Office of the Comptroller of the Currency, Treasury.**ACTION:** Final rule.

**SUMMARY:** The Office of the Comptroller of the Currency (OCC) is revising its regulations governing the release of non-public OCC information. The primary change clarifies that the OCC's decision to release a suspicious activity report (SAR) will be governed by the standards set forth in amendments to the OCC's SAR regulation that is part of a separate final rule published today in the **Federal Register**.

**DATES:** This rule is effective on January 3, 2011.

**FOR FURTHER INFORMATION CONTACT:** James Vivencio, Senior Counsel for BSA/AML, (202) 874–5200; Ellen Warwick, Assistant Director, Litigation, (202) 874–5280; or Patrick Tierney, Counsel, 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 amending its regulations set forth in 12 CFR part 4, subpart C, governing the release of non-public OCC information. First, the amendments conform subpart C to amendments to the OCC's SAR confidentiality rule, 12 CFR 21.11(k), that are being issued 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 incorporating into part 4, the OCC will release a SAR, or any information that would reveal the existence of a SAR (referred to in this **SUPPLEMENTARY INFORMATION** as "SAR information") only when necessary to fulfill official duties consistent with Title II of the Bank Secrecy Act (BSA). The standards also state that "official duties" do 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 OCC

information under § 4.33. Thus, one effect of these 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 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 IV of this **SUPPLEMENTARY INFORMATION**.

**II. Background**

As described in greater detail below, this final rule amends part 4 to make subpart C consistent with the 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.<sup>1</sup> 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 actions. 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."<sup>2</sup>

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.<sup>3</sup> 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,<sup>4</sup> and sets forth the

OCC's policy regarding the release of non-public OCC information to other government agencies in response to a request.<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup> 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 person<sup>8</sup> involved in a suspicious transaction that the transaction was reported, other than as necessary to fulfill the official duties of such officer or employee.<sup>9</sup> Accordingly, it is this provision that now governs the ability of the OCC to disclose SAR information to any person.

To implement this provision, this final rule amends subpart C to provide 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. The final rule further provides that the OCC will decide whether to release SAR information based upon the standard in its SAR rules, 12 CFR 21.11(k), implementing section 351, rather than

<sup>5</sup> See 12 CFR 4.37(c).

<sup>6</sup> See 31 U.S.C. 5318(g)(1).

<sup>7</sup> 31 U.S.C. 5318(g)(2)(A)(i).

<sup>8</sup> 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).

<sup>9</sup> See USA PATRIOT Act, section 351(b); Pub. L. 107–56, Title III, section 351; 115 Stat. 272, 321 (2001); 31 U.S.C. 5318(g)(2).

<sup>1</sup> USA PATRIOT Act, section 351(b); Pub. L. 107–56, Title III, section 351; 115 Stat. 272, 320–21 (2001); 31 U.S.C. 5318(g)(2).

<sup>2</sup> See 12 CFR 4.32(b)(1)(vii).

<sup>3</sup> See 12 CFR 4.33–4.35.

<sup>4</sup> See 12 CFR 4.36.

upon any of the factors set out in subpart C.<sup>10</sup>

In addition, the final part 21 rule 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 OCC information under § 4.33. The final part 21 SAR rule interprets “official duties” as “official duties consistent with Title II of the Bank Secrecy Act,” meaning official disclosures necessary to accomplish a governmental purpose entrusted to the agency, the officer, or employee, consistent with Title II of the BSA.<sup>11</sup> This standard permits, for example, disclosures responsive to a grand jury subpoena; a request from an appropriate Federal or State law enforcement 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.<sup>12</sup>

### III. Notice of Proposed Rulemaking

On March 9, 2009, the OCC published a notice of proposed rulemaking to amend its regulations set forth in 12 CFR part 4, subpart C, governing the release of non-public OCC information.<sup>13</sup> The OCC received no public comment on the part 4 proposal.<sup>14</sup> The proposed rule is adopted as final without change and is described in detail in the Section-by-Section Analysis section.

### IV. Section-by-Section Analysis of the Final Rule

#### *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.<sup>15</sup> 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.<sup>16</sup> 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 final rule 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 by the standard in 12 CFR 21.11(k). Accordingly, the Comptroller’s 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 to another government agency under § 4.37, will be subject to the standard in the 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.”<sup>17</sup> In accordance with the OCC’s longstanding commitment to protect the confidentiality of SARs, section 21.11(k) 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 § 4.33.<sup>18</sup>

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

This final rule 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 is still covered by the definition of “non-public

OCC information.” However, the OCC is removing 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 will be treated as a unique subset of non-public OCC information subject to release 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 continues to be otherwise subject to the provisions of subpart C that are not superseded by the standards in revised 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, continues 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 final rule adds “when prohibited by law” as a sixth example of a reason for denial of requests made under § 4.35. This addition clarifies that the OCC may deny a request under § 4.33 when prohibited by law, including, for example, § 21.11(k).

#### *Section 4.37(c) Disclosures to Government Agencies*

The final rule 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 final rule replaces the reference to “§ 4.37” with a reference to “§ 4.38.”

<sup>10</sup> See, e.g., 12 CFR 4.35.

<sup>11</sup> 31 U.S.C. 5311 (setting forth the purposes of the BSA).

<sup>12</sup> See, e.g., *Giglio v. United States*, 405 U.S. 150, 153–54 (1972); *Brady v. Maryland*, 373 U.S. 83, 86–87 (1963); *Jencks v. United States*, 353 U.S. 657, 668 (1957).

<sup>13</sup> 74 FR 10136 (Mar. 9, 2009).

<sup>14</sup> However, the OCC received comments on proposed changes to the part 21 SAR rules, which are discussed in the **SUPPLEMENTARY INFORMATION** section of the OCC’s part 21 final SAR rule published today in the **Federal Register**.

<sup>15</sup> See 12 CFR 4.35(a)(2).

<sup>16</sup> See 12 CFR 4.31(b)(3).

<sup>17</sup> See 12 CFR 21.11(k)(2).

<sup>18</sup> *Id.*

## V. OCC Regulatory Analysis

### Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency that is issuing a final rule to prepare and make available a final regulatory flexibility analysis that describes the impact of the final rule on small entities, 5 U.S.C. 604. However, the RFA provides that an agency is not required to prepare and make available a final regulatory flexibility analysis if the agency certifies that the final 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 final rule, 5 U.S.C. 605(b). For purposes of the RFA and OCC-regulated entities, a "small entity" is a national bank with assets of \$175 million or less (small national bank).

The OCC has determined that this final rule will not have a significant economic impact on a substantial number of small entities. The final rule's changes to the OCC's internal standards, which were prompted by a statutory change, apply to the OCC, and its internal deliberations regarding the agency's ability to disclose a SAR, and not to any other entities. Therefore, pursuant to section 605(b) of the RFA, the OCC certifies that this final rule will not have a significant economic impact on a substantial number of small entities. Accordingly, the requirement to prepare and publish a final regulatory flexibility analysis does not apply to this final rule.

### Paperwork Reduction Act

We have reviewed the final rule 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 the final rule does 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 this final rule, which amends 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 final rule 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 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) of this part, 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 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 § 4.37(c), remove the reference to "§ 4.37" in the last sentence and add in lieu thereof "§ 4.38."

[This Signature Page Relates to the Final Rule on Standards Governing the Release of a Suspicious Activity Report—Part 4.]

Dated: August 16, 2010.

John Walsh,

Acting Comptroller of the Currency.

[FR Doc. 2010-29883 Filed 12-2-10; 8:45 am]

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## DEPARTMENT OF THE TREASURY

### Office of the Comptroller of the Currency

#### 12 CFR Part 21

[Docket ID OCC-2010-0019]

RIN 1557-AD17

#### Confidentiality of Suspicious Activity Reports

**AGENCY:** The Office of the Comptroller of the Currency (OCC), Treasury.

**ACTION:** Final rule.

**SUMMARY:** The OCC is issuing this final rule 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 SAR, as it applies to national banks; address the statutory prohibition on the disclosure by the government of a SAR, as that prohibition applies to the OCC's standards governing the disclosure of SARs; clarify that the exclusive standard applicable to the disclosure of a SAR, or any information that would reveal the