American Bankers Association
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February 22, 2021

FDIC: RIN 3064–AF56,
Robert E. Feldman, Executive Secretary
Attention: Comments, Federal
Deposit Insurance Corporation, 550 17th
Street NW, Washington, DC 20429
Comments@fdic.gov

Federal Reserve: Docket No. R–1738 and RIN 7100–AG08
Ann E. Misback, Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue NW, Washington, DC 20551
regs.comments@federalreserve.gov

OCC: Docket ID OCC–2020–0037
Chief Counsel's Office
Attention: Comment Processing
Office of the Comptroller of the Currency
400 7th Street SW, Suite 3E–218
Washington, DC 20219.
www.regulations.gov

Re: Exemptions to Suspicious Activity Report Requirements

Dear Sir or Madam:

The American Bankers Association (ABA)[1] appreciates the opportunity to comment on the agencies' proposals to adopt a special exemption process from Suspicious Activity Report (SAR) requirements. The Federal Deposit Insurance Corporation (FDIC), the Federal Reserve, and the Office of the Comptroller of the Currency (OCC) (collectively, the Agencies) have each published separate proposals to allow the agencies to authorize special exemptions from SAR filing requirements while another separate proposal, not addressed in this comment letter, also was published by the NCUA.[2] The Agencies are taking this step to encourage banks to explore innovative ways to monitor and report suspicious activity as well as to coordinate with similar Financial Crime Enforcement Network (FinCEN) requirements.

The Agencies issued this proposal because, despite FinCEN's broad authority under the Bank Secrecy Act (BSA) to create exemptions from SAR filing requirements, that exemption authority

[1] The American Bankers Association is the voice of the nation's $21.2 trillion banking industry, which is composed of small, regional and large banks that together employ more than 2 million people, safeguard $17 trillion in deposits and extend more than $11 trillion in loans. Learn more at www.aba.com.
[2] See Federal Reserve Board of Governors: https://www.govinfo.gov/content/pkg/FR-2021-01-22/pdf/2021-00033.pdf, FDIC: https://www.govinfo.gov/content/pkg/FR-2021-01-22/pdf/2021-00037.pdf, NCUA: https://www.govinfo.gov/content/pkg/FR-2021-01-22/pdf/2021-00048.pdf and OCC: https://www.govinfo.gov/content/pkg/FR-2021-01-22/pdf/2021-00034.pdf

does not extend automatically to the banking agencies' SAR reporting rules. The FinCEN rule authorizes an exemption for innovative solutions to SAR monitoring and filing, but the Agencies' rules do not offer a similar exemption. As a result, if FinCEN grants a special exemption when approving an innovative solution to BSA compliance, a bank that uses that innovation could be cited by its prudential regulator for not complying with the banking agency's rule. These proposals will establish the Agencies' authority to issue exemptions for SAR filings when the bank has been approved to adopt an innovative practice. Clearly, this is an important step to encourage financial institutions to take advantage of innovative processes, and one which ABA supports.

Summary of the Comment

ABA appreciates the steps being taken by the Agencies to encourage innovation. As banks work to streamline BSA compliance and make the system more effective and efficient, innovation will be at the heart of those efforts. Agency encouragement and support for innovation is important and welcome. However, we also recommend a number of changes to make the proposed SAR special exemption process more effective. First, the proposed changes provide a good opportunity for the Agencies to streamline the process through a single interagency rulemaking that will facilitate innovation while a series of separate, similar rules may undermine that effort. Second, when a bank requests an exemption, it should only have to submit a single application to its primary prudential supervisor and not multiple agencies. Third, there should be clear procedures for how the process will work, including a template for applications and a defined timeline for the agency to respond. In addition, applications and responses should be published and made available to other banks so they, too, can take advantage of the exemption without having to apply separately.[3]

ABA Encourages the Agencies to Adopt an Interagency Rule

ABA is submitting a single comment letter to all three of the banking regulators even though each has issued a separate proposal since our comments on the proposals are essentially identical. We have two general observations about these proposals. First, despite the similarities of each agency's proposal, failing to issue an interagency proposal is disappointing because the issuance of separate, similar compliance requirements can lead to disparities in interpretation and create unnecessary burdens through those disparities. While it is understandable for the Agencies to have a rule separate from the FinCEN regulation due to the additional requirements for depository institutions for SAR filings (e.g., the requirement to report suspicious insider activity by filing a SAR), we recommend the Agencies coordinate with FinCEN to develop as uniform a rule as possible. There are other examples where the Agencies have worked together to adopt a single BSA/AML rule – for example, the Customer Identification Program rules – and we urge the Agencies to apply a similar approach here.

Second, when finalizing the proposals, the Agencies should recognize the new priorities established In January 2021 when Congress enacted the Anti-Money Laundering Act of 2020.[4] One of the primary goals set by the statute is to update and modernize the overall AML system

[3] If the application cannot be published to protect confidential or proprietary information, enough information about the request should be published to provide the necessary context for the response. Similarly, any confidential or proprietary information should be deleted from the response, provided sufficient context is provided to allow the reader to understand the exemption.
[4] Division F, Title LXI of the National Defense Authorization Act for Fiscal Year 2021, adopted January 1, 2021.

in the United States. As part of that program, FinCEN has been directed to find ways to streamline and update the SAR filing system without sacrificing important information for law enforcement. By issuing separate proposals, the Agencies have missed a key opportunity to support that goal. We urge the Agencies to work together to review the three proposals (four if the National Credit Union Administration is included), identify the similarities and differences, and with respect to the latter, determine whether that distinction merits a completely separate SAR regulation, or whether it could be combined into a single uniform requirement for all depository institutions.

Finally, even though it took from December 15, 2020, when the first proposal was shared publicly, to January 22, 2021, when the proposals were published in the *Federal Register*, the Agencies have only allowed the industry 30 days to provide feedback. One of the drawbacks to a short comment period is that it prevents industry representatives the time needed to coordinate and possibly issue joint comment letters that present a uniform set of recommendations on the proposals.

ABA Recommends Differences between the Proposals be Reconciled

Overall, ABA supports and appreciates the efforts to encourage innovations which are sorely needed in this area. While the Agencies issued Interagency Guidance in December 2018 to encourage innovation, [5] it has not had the hoped-for success. This step should support that guidance, provided that the final rules ensure that the application and approval process are simple and straightforward.
ABA offers a number of comments below that apply to all three of the proposals. Where there are differences among the FDIC, the Federal Reserve, and the OCC proposals, those are noted.

Monitoring for and reporting suspicious activity has been a requirement for depository institutions for many years. In fact, the banking regulators' requirements to report suspicious activity pre-date the existence of the current SAR regime; initially, banks were required to report possible criminal activity using a Criminal Referral Form. Then, in 1992, Congress adopted the SAR requirement, which was implemented by a FinCEN rule in 1996. When FinCEN finalized its SAR rule, the Agencies updated their regulations to be consistent with the FinCEN rule. However, the banking agencies also maintained important distinctions between the FinCEN rule and the banking agencies' rules.[6] The differences between FinCEN's requirements and the banking agency SAR rules that compel the FDIC, Federal Reserve, and OCC to take this action. The goal is to create a special exemption, available on request, it will allow banks to use innovative processes to monitor and report suspicious activity.

ABA agrees with the Agencies that creating a special exemption to encourage innovation is both appropriate and necessary. However, while taking this step, ABA believes the Agencies have missed an opportunity to combine their separate SAR rules into one, single uniform rule for all

[5] Joint Statement on Innovative Efforts to Combat Money Laundering and Terrorist Financing, December 3, 2018, https://www.fincen.gov/sites/default/files/2018-12/Joint%20Statement%20on%20Innovation%20Statement%20%28Final%2011-30-18%29_508.pdf
[6] For example, banks are required to report any suspected insider abuse regardless of amount and are required to keep the board of directors informed about SAR activity. However, banks are not required to file a SAR for bank robbery or lost, missing or counterfeit monetary instruments since these are already covered under separate reporting protocols.

depository institutions. To help streamline AML/CFT requirements, ABA encourages the Agencies to take steps to combine their separate rules into one uniform rule in the near future.

One of the inconsistencies among the three proposals is the requirement to file a separate application with FinCEN at the same time an exemption is requested from the banking agency. That creates an unnecessary burden and adds barriers to the process. The final rule should have a simple system that lets banks apply to their prudential regulator, i.e., the agency that has oversight of AML compliance, and then let the agency coordinate with FinCEN on approval, a critical step in the process. If a bank must work independently with two agencies, i.e., FinCEN and its prudential regulator, that will discourage use of the process and, in turn, dampen any enthusiasm by banks to try anything innovative. Essentially, imposing a dual-application requirement adds burden unnecessarily.

The OCC and Federal Reserve proposals both emphasize that SARs are designed to protect the financial institution and ensure public confidence in the banking system, rather than emphasizing the goal of combatting money laundering or the financing of terrorism. Although these statements are not incorrect, they imply that providing useful information to law enforcement is less important than protecting the bank. The emphasis also is inconsistent with the efforts of FinCEN's AML Effectiveness Working Group, as reflected in the FinCEN Advanced Notice of Proposed Rulemaking issued last September,[7] and the priorities set forth in the Anti-Money Laundering Act of 2020,[8] which prioritize the goal of combatting illicit finance, money laundering, and terrorist financing as the mission of the Bank Secrecy Act (BSA), including monitoring for and reporting suspicious activity. Therefore, ABA recommends the OCC and Federal Reserve change this focus to recognize that the overall goal is providing useful information for law enforcement through the risk-based approach while also protecting the financial institution and confidence in the banking system.

Separately, there is an element unique to the FDIC proposal that also should be revised. The FDIC proposal emphasizes the use of technology and technological applications for innovation when considering exemptions, even though the Agencies have stated clearly that the 2018 statement is meant to go beyond technology. ABA encourage the FDIC to clarify that the innovation process is not limited to technology and that changes in processes without changes to technology can be equally valid for innovation and, in turn, for the exemption.

Recommended Changes to the Exemption Process

Applying for exemptions and issuing exemptions are the area where the agencies diverge the most. Ironically, this is also the area where better coordination and consistency among the agencies would be most beneficial to banks.

The first step that ABA encourages the Agencies to take, in the interest of encouraging innovation, would be a brief explanation in the final rule about the benefits of the exemption and how it supports innovation. Similarly, since innovative practices will often rely on technological changes, the rule should make it clear that banks are not required to run parallel systems, running both their existing process and the innovative process simultaneously. Requiring banks to run two systems simultaneously can be costly and often serves as a serious impediment to

[7] See FinCEN Seeks Comments on Enhancing the Effectiveness of Anti-Money Laundering Programs, September 16, 2020, https://www.fincen.gov/news/news-releases/fincen-seeks-comments-enhancing-effectiveness-anti-money-laundering-programs
[8] Section 6002 of the Anti-Money Laundering Act of 2020.

innovative solutions. The final rule should also explain what protections apply once an exemption has been approved.

As noted, the exemption process is where the Agencies differ the most, and so it is worth understanding how each agency proposes to proceed.

Once a bank has applied for an exemption, the FDIC will grant exemptions only on a case-by-case basis after receiving a written request from a bank. The proposal lays out factors that the FDIC will consider, such as the safety-and-soundness of the bank and whether the request is consistent with the purpose of the BSA. When granting an exemption, the FDIC would have the authority to limit the exemption to a certain area of the bank, to certain products and services, or to a specific time frame. An exemption also could be conditional, could be extended, or could be revoked. Once a request is received, the FDIC will confer where appropriate with FinCEN and then issue a written response to the bank, although the proposal does not indicate any specific timeframe for responding.

The OCC proposes a similar mechanism for its banks. However, unlike the FDIC, the OCC does not indicate whether exemptions would be granted on a case-by-case basis or whether they can apply more broadly. To receive an exemption, a bank would submit a written request to the OCC. If a requested exemption would be covered by both OCC and FinCEN SAR rules, a bank would need to submit requests to both agencies, and there is no mention of cooperation or collaboration between the agencies for reviewing a request, which may result in conflicting responses. As with the FDIC proposal, when a response is issued, it may be conditional, and it can be revoked.

Under the Federal Reserve's proposal, a bank would submit a written request, and the Federal Reserve would consider the possible implications for safety and soundness as well as whether the request is consistent with the purpose of the BSA. The Board would confer with FinCEN where appropriate. An approval would be in writing, might be conditional or limited in scope or time, similar to the proposal under the other agencies' proposals. The proposal does not include a timeframe for the Board to respond. Once issued, the Board would also have the authority to revoke an exemption.

Although similar in nature, the distinctions between the proposals are sufficient to create unnecessary burdens. ABA strongly encourages the Agencies cooperate to establish a single set of coordinated and consistent procedures, particularly since there is no apparent justification for variations. ABA recommends a set of procedures, below, that we urge all the Agencies to adopt as a means to encourage the use of the process.

First, the application process should be simple and straightforward. The final rule should state the factors that will be considered and weighed in the process, providing examples, where possible. Simply stating that "safety-and-soundness will be considered" is too vague to provide guidance to applicants. We also recommend that the Agencies offer a model or template for applications that banks can use. Without these guideposts, banks are far less likely to be willing to take advantage of the process. That will be especially true if the first few applications are denied.

Second, there should be a set of clear procedural steps for applications. Banks should only be required to submit one application to the bank's prudential regulator, and the regulator, not the bank, should confer with FinCEN about the application. The obligation of the Agency to consult

with FinCEN, where appropriate should clearly be included in the final regulation. Requiring banks to submit two separate applications would impose an unnecessary barrier to the process.

Third, the Agencies should provide a timeline for responses. ABA recommends 30 days, with the understanding that an agency could extend that timeline for good reason, but with a clear statement of when a final decision can be anticipated by the applicant. Otherwise, banks are concerned that applications could remain pending indefinitely, which may discourage use of the process. Also, in the final rule, the Agencies should explain what happens while an application is pending: can the bank start using the new process or must it wait until a final decision has been issued?

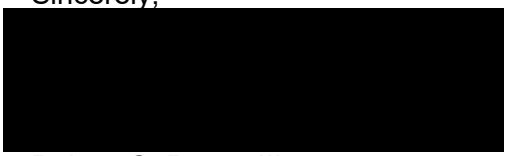
When a final determination on an exemption application is issued, it should clearly explain the factors that were considered in reaching the determination, why any conditions have been imposed, and what other limitations apply to the exemption. The procedures also should include an appeal mechanism or second review so that a denied application can be revised or amended to address any objections raised by an agency.

Finally, ABA recommends that any approved applications for a SAR exemption be published, preferably on FinCEN's website, but somewhere where all depository institutions can access the decisions and use the information to guide its own innovative practices.

Conclusion

ABA appreciates the Agencies' proposals to support and encourage innovative practices by banks when monitoring and reporting suspicious activity. However, ABA believes that the industry, regulators and especially law enforcement would be better served by a single, uniform standard. At the same time, providing a standard that is clear and includes a well-outlined process is also important to ensure that banks take advantage of the proposal.

Sincerely,



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