

MEMORANDUM TO: The Board of Directors

FROM: Doreen R. Eberley
Director, Division of Risk Management Supervision

SUBJECT: *Notice of Proposed Rule. Additional Exemptions to Suspicious Activity Report Requirements (12 CFR Part 353)*

RECOMMENDATION:

Staff is recommending for approval of the FDIC Board of Directors (“Board”) and authorization for publication in the *Federal Register* the attached notice of proposed rulemaking to amend the FDIC’s suspicious activity report (“SAR”) regulation. The proposed amendment would allow the FDIC to issue case-by-case exemptions from SAR filing requirements in addition to the two existing, limited exemption provisions. In contrast, the Financial Crimes Enforcement Network (“FinCEN”), the Administrator of the Bank Secrecy Act (“BSA”), has broad authority to grant exemptions to its parallel, but not identical SAR rule. The proposed amendment would add three paragraphs to 12 CFR § 353.3(d) *Exemptions* so that the FDIC could grant exemptions, in conjunction with FinCEN, to FDIC-supervised institutions that develop innovative solutions to meet BSA requirements more efficiently and effectively.

Background

The FDIC has long required its supervised institutions to report potential violations of law. In 1986, the FDIC promulgated 12 CFR Part 353 (“Part 353”) and created criminal referral forms. The modern SAR emerged after Congress passed the Annunzio-Wylie Anti-Money Laundering

Concur:

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Act of 1992, which required institutions to report certain suspicious transactions through the filing of SARs with FinCEN. In 1996, FinCEN and the federal banking agencies contemporaneously amended their criminal referral form regulations and created their new SAR regulations.

Currently, FDIC-supervised institutions must file SARs pursuant to both FDIC and FinCEN regulations for activity related to potential money laundering, violations of the BSA, or other unusual activity covered by FinCEN's SAR regulation. Although FDIC and FinCEN SAR regulation requirements are substantively similar, the FDIC imposes, like the other federal banking agencies, additional SAR filing requirements that address instances of insider abuse. These additional requirements extend beyond the scope of the BSA's purposes.

FinCEN, unlike the FDIC, has broad authority to grant case-by-case exemptions for BSA requirements, including exemptions for its SAR reporting regulation. The FDIC's current filing exemptions pertain to physical crimes (robberies and burglaries), and lost, missing, counterfeit, or stolen securities. This disparity makes it problematic for the FDIC to grant relief to supervised institutions if they request and receive an exemption from FinCEN. This is especially true in light of the federal banking agencies' 2018 interagency statement, which encouraged banks to adopt responsible and appropriate innovative approaches to comply with the BSA.¹ The FDIC expects new technologies to prompt innovative SAR approaches related to suspicious activity monitoring and SAR filing. For example, financial institutions may request an

¹ <https://www.fdic.gov/news/news/press/2018/pr18091a.pdf>

exemption for the automated filing of certain types of SARs, such as structuring² SARs, and the type of information reported in both the initial and follow-up SARs.

The Proposed Rule

The proposed rule would add three paragraphs to 12 CFR §353.3(d) of the FDIC Rules and Regulations that would expand the FDIC's ability to exempt a supervised institution from the requirements of Part 353. Under the proposed rule, the FDIC would determine whether the requested exemption is consistent with safe and sound banking and may consider other appropriate factors. If the exemption request relates to the requirement to file SARs required by FinCEN's regulations implementing the BSA and therefore overlaps with FinCEN's SAR rule, the FDIC would seek FinCEN's determination that the exemption request is consistent with the purposes of the BSA. When an exemption request overlaps with FinCEN's SAR rule, the FDIC would also seek FinCEN's concurrence in granting the exemption. For exemption requests pertaining only to the FDIC's expanded SAR requirements, the FDIC may consult with FinCEN. The exemptions may be conditional or unconditional, may apply to particular persons or to classes of persons, may apply to transactions or classes of transactions, and may be granted for a specified time period. Under the proposed rule, the FDIC could also extend or revoke previously granted exemptions.

² 31 CFR § 1010.100 (xx) A person structures a transaction if that person, acting alone, or in conjunction with, or on behalf of, other persons, conducts or attempts to conduct one or more transactions in currency, in any amount, at one or more financial institutions, on one or more days, in any manner, for the purpose of evading the reporting requirements. "In any manner" includes, but is not limited to, the breaking down of a single sum of currency exceeding \$10,000 into smaller sums, including sums at or below \$10,000, or the conduct of a transaction, or series of currency transactions at or below \$10,000. The transaction or transactions need not exceed the \$10,000 reporting threshold at any single financial institution on any single day in order to constitute structuring within the meaning of this definition.

Exemptions granted under this proposed rule would not relieve an FDIC-supervised institution from its obligation to comply with FinCEN's SAR regulation. To the extent required by FDIC and FinCEN SAR regulations, an FDIC-supervised institution would need exemptions from both agencies. The FDIC would coordinate with FinCEN when handling parallel exemptions. Where an FDIC SAR requirement alone (and not a parallel FinCEN requirement) applies, the proposed rule would allow the FDIC to exempt a supervised institution from that requirement independently.

The Board of Governors of the Federal Reserve System ("Federal Reserve"), the National Credit Union Administration ("NCUA"), and the Office of the Comptroller of the Currency ("OCC"), are also proposing similar exemptions to their SAR regulations. The FDIC is coordinating with all three agencies and FinCEN. The OCC proposal differs from the FDIC proposal in that the OCC would make the determination whether a request is consistent with the purposes of the BSA rather than the FDIC's proposal to seek a determination by FinCEN. In addition, when the exemption request overlaps with FinCEN's SAR provision, the OCC would make its own independent determination rather than seeking FinCEN's concurrence as proposed by the FDIC. The Federal Reserve and the NCUA are proposing SAR exemptions similar to the FDIC's exemption proposal.

Section 353.3 – *Reports and Records*

This section specifies the SAR filing requirements for FDIC-supervised institutions.

NPR to Add Three Paragraphs to 12 CFR § 353.3(d) *Exemptions*

After carefully reviewing 12 CFR § 353.3(d), staff concludes that three exemption paragraphs should be added to the two existing exemptions: (d)(1) robberies and burglaries reported to the appropriate law enforcement authorities; and (d)(2) lost, missing, counterfeit, or stolen securities reported pursuant to 17 CFR § 240.17f-1.

§ 353.3(d)(3)

The proposed paragraph (d)(3) would permit the FDIC to exempt any FDIC-supervised institution from the requirements of 12 CFR 353.3. The FDIC would determine whether the exemption is consistent with safe and sound banking and may consider other appropriate factors. The FDIC would also seek FinCEN's determination whether the exemption is consistent with the purposes of the BSA, as applicable, where an exemption request involves an exemption from the requirements to file a SAR required by FinCEN regulations implementing the BSA. When an exemption request overlaps with FinCEN's SAR requirements, the FDIC would seek FinCEN's concurrence in granting the exemption. For exemption requests pertaining only to the FDIC's SAR rule, the FDIC may consult with FinCEN. All exemptions may be conditional or unconditional, may apply to particular persons or to classes of persons, may apply to transactions or classes of transactions, and may be granted for a specified time period.

§ 353.3(d)(4)

The proposed paragraph (d)(4) would require that, after the FDIC has sought FinCEN's concurrence and consulted with appropriate agencies, the FDIC respond in writing to any supervised institution's exemption request. Before responding in writing, the FDIC would consider whether the exemption is consistent with safe and sound banking, consult with the appropriate agencies, and seek concurrence when appropriate.

§ 353.3(d)(5)

The proposed paragraph (d)(5) would permit the FDIC to revoke or extend the period of time for an exemption granted under paragraph (d)(3). The FDIC would have discretion to revoke exemptions due to concerns about safe and sound banking, conditions imposed on the exemption, whether the exemption is consistent with the purposes the BSA, if applicable, and other appropriate factors.

Conclusion

Staff recommends that the Board approve the attached notice of proposed rulemaking and authorize its publication in the *Federal Register* with a comment period open for 30 days after the date of publication in the *Federal Register*.

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