

**Securities Industry and Financial Markets Association
Futures Industry Association**

June 8, 2009

VIA ELECTRONIC MAIL

Mr. James H. Freis, Jr.
Director
Financial Crimes Enforcement Network
Department of the Treasury
1500 Pennsylvania Ave., NW
Washington, DC 20220

Re: Request for Comments (Confidentiality of Suspicious Activity Reports and Interpretive Guidance), TREAS-FinCen-2008-0022

Dear Director Freis:

The Securities Industry and Financial Markets Association (“SIFMA”)¹ and the Futures Industry Association (“FIA”)² submit this letter to the U.S. Treasury Department's Financial Crimes Enforcement Network (“FinCEN”) in response to the request for comments to the proposed rulemaking clarifying the scope of the statutory prohibition against the disclosure of a Suspicious Activity Report (“SAR”)³ and the proposed related interpretative guidance that permits the sharing of a SAR among U.S. affiliates of broker-dealers in securities, mutual funds, futures commission merchants and introducing brokers in commodities⁴ (collectively, the “Proposed Rule”).⁵

¹ The Securities Industry and Financial Markets Association (“SIFMA”) brings together the shared interests of more than 650 securities firms, banks and asset managers. SIFMA's mission is to promote policies and practices that work to expand and perfect markets, foster the development of new products and services and create efficiencies for member firms, while preserving and enhancing the public's trust and confidence in the markets and the industry. SIFMA works to represent its members' interests locally and globally. It has offices in New York, Washington D.C., and London and its associated firm, the Asia Securities Industry and Financial Markets Association, is based in Hong Kong. SIFMA was formed in November 2006 through the merger of the Securities Industry Association and the Bond Market Association.

² FIA is a principal spokesperson for the commodity futures and options industry. FIA's regular membership is comprised of approximately 30 of the largest futures commission merchants in the United States. Among its associate members are representatives from virtually all other segments of the futures industry, both national and international. Reflecting the scope and diversity of its membership, FIA estimates that its members effect more than eighty percent of all customer transactions executed on United States contract markets.

³ 74 Fed. Reg. 10148 (Mar. 9, 2009) (to be codified at 31 C.F.R. §§ 103.15-103.21) (proposed rulemaking clarifying the scope of the statutory prohibition against the disclosure of a SAR).

⁴ 74 Fed. Reg. 10161 (Mar. 9, 2009) (proposed interpretative guidance for broker-dealers, mutual funds, futures commission merchants, and introducing brokers in commodities).

We first want to acknowledge the outstanding efforts made by the staffs of Treasury, FinCEN, the Securities and Exchange Commission (“SEC”), and the Commodity Futures Trading Commission (“CFTC”) in issuing the Proposed Rule. We have worked closely with FinCEN on this issue through the Bank Secrecy Act Advisory Group. We greatly appreciate the time spent by the staffs of FinCEN, the SEC, and the CFTC in listening to the concerns of the securities and futures industries and issuing regulatory guidance specific to our industries on this important issue. In response to FinCEN’s request for comments, we have submitted the following comments and recommendations to enhance the efficiency and effectiveness of these regulations.

A summary of our comments and recommendations are as follows:

1. All financial institutions subject to a SAR rule within the entities’ corporate organizational structure — and not just securities broker-dealers, mutual funds, futures commission merchants, introducing brokers in commodities, and depository institutions (collectively, “Designated Entities”) — should be permitted to share a SAR;
2. Third-party service providers retained by a Designated Entity should be expressly included in the definition of “agent” for purposes of accessing SAR databases;
3. All affiliates, whether foreign or domestic, within an organizational structure should be permitted to receive a SAR;
4. A recipient of a SAR should be permitted to share a SAR with all affiliates within an organizational structure;
5. Rather than require confidentiality agreements between affiliates, each organizational structure should be permitted to use its own procedures and processes to protect the confidentiality of a SAR among affiliates that are already subject to a SAR rule.
6. In addition to these recommendations, we seek clarification relating to the disclosure of a SAR to certain regulatory organizations and in the context of arbitration and reparations proceedings.

⁵ Separately, FinCEN issued proposed related interpretative guidance that permits the sharing of SARs with certain U.S. affiliates of depository institutions. *See* 74 Fed. Reg. 10158 (Mar. 9, 2009). Based upon FinCEN’s Proposed Rule, the Office of the Comptroller of the Currency and the Office of Thrift Supervision proposed two additional sets of corollary regulation: one set to address the confidentiality of SARs (74 Fed. Reg. 10130 (Mar. 9, 2009) (to be codified at 12 C.F.R. § 21.11); 74 Fed. Reg. 10139 (Mar. 9, 2009) (to be codified at 12 C.F.R. § 563.180)), and the other set to address the standards governing the release of a SAR (74 Fed. Reg. 10136 (Mar. 9, 2009) (to be codified at 12 C.F.R. §§ 4.31-4.37); 74 Fed. Reg. 10145 (Mar. 9, 2009) (to be codified at 12 C.F.R. § 510.5)).

I. THE SCOPE OF FINANCIAL INSTITUTIONS COVERED BY THE SAR SHARING PROVISION SHOULD BE EXPANDED

A. All Financial Institutions Within a Corporate Structure Subject to a SAR Rule Should be Permitted to Share a SAR

The Proposed Rule permits Designated Entities, or any director, officer, employee, or agent of these Designated Entities, to share a SAR, or any information that would reveal the existence of a SAR within these entities' corporate organizational structure for purposes consistent with Title II of the Bank Secrecy Act ("BSA").⁶ However, the Proposed Rule prohibits financial institutions, other than Designated Entities, from sharing a SAR, or any information that would reveal the existence of a SAR, even within the entities' corporate organizational structure.⁷ We believe that the scope of the Designated Entities, as that term is defined herein, should be expanded to all financial institutions subject to a SAR rule, and submit that such expansion is consistent with the purposes of the BSA. Expanding the scope of the Designated Entities that can share a SAR would facilitate enterprise-wide efforts to detect and report money laundering and terrorist financing, and would provide a more fulsome and more accurate lens from which to review suspicious activity.

Pursuant to the Proposed Rule, Designated Entities are permitted to share a SAR, while other financial entities that are also subject to a SAR rule, such as insurance companies or money services businesses, are prohibited from sharing a SAR. The consequence of such a distinction is that Designated Entities are placed at a disadvantage in their efforts to detect and report suspicious activity. For example, where a broker-dealer and an insurance company are under common control, the Proposed Rule permits the broker-dealer to share a SAR that it has filed with the insurance company, but prohibits the insurance company from sharing a SAR that it has filed with the broker-dealer. Even though the SAR filed by the insurance company may facilitate the broker-dealer's efforts to detect and report money laundering, and may relate to the same customer, such sharing is prohibited under the Proposed Rule. The reasoning for this different treatment is unclear to us and we believe the distinction between these financial entities, all of which are subject to a SAR rule, places Designated Entities at a disadvantage in their efforts to detect and report illicit activity. Moreover, the distinction between these financial entities will result in more cost for financial institutions, less effective global anti-money laundering ("AML") programs and ultimately, less information for law enforcement and intelligence authorities.

As FinCEN itself has noted in the Proposed Rule, permitting the sharing of a SAR by Designated Entities ensures the confidentiality of a SAR, or any information that would reveal the existence of a SAR.⁸ Likewise, permitting the sharing of a SAR by all financial institutions subject to a SAR rule continues to ensure the confidentiality of a SAR given that such entities are also subject to the statutory prohibition against disclosure.

⁶ See 74 Fed. Reg. at 10151; 74 Fed. Reg. at 10162.

⁷ *Id.*

⁸ 74 Fed. Reg. at 10163.

B. Third-Party Service Providers Should be Provided Access to SARs

As previously noted, the Proposed Rule permits Designated Entities, or any director, officer, employee, or *agent* of these Designated Entities, to share a SAR, or any information that would reveal the existence of a SAR within these entities' corporate organizational structure for purposes consistent with Title II of the BSA (emphasis added).⁹ We seek clarification as to whether the term "agent" in this context includes third-party service providers that are retained to perform services on behalf of the Designated Entities. Third-party service providers, or agents retained by a Designated Entity, often perform integral and essential BSA-compliance functions, including, for certain firms, the duty to report on suspicious transactions. In fact, FinCEN has previously permitted financial institutions to share sensitive information with third-party service providers and vendors in other contexts, such as to respond to a 314(a) request from FinCEN, so long as the financial institution takes the steps necessary to ensure that the third party safeguards the information.¹⁰ We thus submit that third-party service providers should be expressly included in the definition of an "agent" for purposes of the Proposed Rule.

C. All Affiliates, Regardless of Whether They are Subject to a SAR Rule, Should be Permitted to Receive a SAR From a Designated Entity

In consultation with the staffs of the SEC and the CFTC, FinCEN previously advised that a broker-dealer, futures commission merchant, or introducing broker in commodities may share a SAR with its parent entity, whether domestic or foreign.¹¹ The Proposed Rule continues to permit Designated Entities to share a SAR with a parent entity, whether domestic or foreign, but prohibits the sharing of a SAR with affiliates that are not subject to a SAR rule.¹² We recommend that the provision be expanded to permit the sharing of a SAR with all affiliates, even if they are not subject to a SAR rule, and even if the affiliate may be a foreign affiliate or foreign branch.¹³

The ability to share information regarding previously identified suspicious transactions promotes the entire organization's efforts to detect and report future suspicious activity. FinCEN, the SEC and the CFTC have expressly recognized the need for an enterprise-wide BSA compliance program, which is most effectively maintained through the free flow of information about suspicious activity, as well as information about whether a SAR was filed.¹⁴ Particularly where an organization has one enterprise-wide

⁹ See 74 Fed. Reg. at 10151; 74 Fed. Reg. at 10162.

¹⁰ See Frequently Asked Questions Concerning the 314(a) Process at 8 (Feb. 6, 2003).

¹¹ See Guidance on Sharing of Suspicious Activity Reports by Securities Broker-Dealers, Futures Commission Merchants, and Introducing Brokers in Commodities (Jan. 20, 2006) ("January 2006 Guidance").

¹² See 74 Fed. Reg. at 10163 n.13 and 10164.

¹³ The proposed guidance for depository institutions states that because foreign branches of U.S. banks are regarded as foreign banks for purposes of the BSA, foreign branches of U.S. banks are "affiliates" that are not subject to a SAR rule. 74 Fed. Reg. at 10161 n.8 and 10160 n.14. There is no similar language in the Proposed Rule insofar as it relates to foreign branches of broker-dealers, futures commission merchants, and introducing brokers in commodities.

¹⁴ The January 2006 Guidance specifically notes the need for a "parent entity to discharge its oversight responsibilities with respect to enterprise-wide risk management and compliance with applicable laws and regulations. To fulfill those responsibilities, parent entities may have a valid need to review compliance by securities broker-dealer, futures commission merchant, or introducing broker in commodities which has legal requirements to identify and report suspicious activity." January 2006 Guidance *supra* note 11 at 1-2.

AML program applicable to all subsidiaries, no matter where they are located, or where the same customer can open accounts with both U.S. and non-U.S. affiliates within the same organizational structure, often on the same platform, it is essential for all affiliates to be able to work together to detect and report suspicious activity on an enterprise-wide basis. To prohibit the sharing of a SAR that has been filed with entities within one organizational structure would have the effect of hampering enterprise-wide efforts to detect and report money laundering and terrorism. Moreover, the need to create parallel files (one containing only the underlying information and the other including the disposition of the investigation), will result in additional costs and delays, and ultimately, less timely information for law enforcement and intelligence authorities.

The application of the suggested expansion of the Proposed Rule to domestic affiliates should be equally applicable to foreign affiliates within the same organizational structure. The rationale for permitting the sharing of a SAR with a foreign parent entity is based, in part, on a recognition of the need for a foreign parent entity to discharge its oversight responsibilities with respect to enterprise-wide risk management and compliance. While a foreign affiliate does not have oversight responsibilities, it has an equally significant role in implementing the organization's overall efforts to detect and report money laundering and terrorism. To prohibit certain affiliates within one organizational structure from receiving a SAR based solely on the geographical location of that affiliate is an artificial restriction that fails to account for the need for all responsible parts of an organization to have knowledge of enterprise-wide BSA/AML risks and to detect such risks. Permitting the sharing of a SAR with all entities within one organizational structure, including those affiliates located abroad, would promote the organization's overall efforts to detect and report suspicious activity on an enterprise-wide basis.

SIFMA and the FIA recognize that there may be valid concerns that sharing a SAR with a foreign affiliate may subject the SAR to the laws of a foreign jurisdiction. The same concerns, however, are applicable to a SAR that is shared with a foreign parent entity. In the case of a foreign parent entity, the concerns are addressed by entering into a confidentiality agreement or other arrangement that ensures that a SAR would be protected by the recipient foreign parent entity. We submit that the same measures can be taken to ensure the confidentiality of a SAR that is shared with a foreign affiliate.

The concerns that sharing a SAR with a foreign affiliate may subject the SAR to potential requests for disclosures governed by foreign law can be addressed by the protocols established by the Egmont Group's Principles for Information Exchange between Financial Intelligence Units ("FIUs") for Money Laundering and Terrorism Financing Cases (the "Principles"). Recognizing that cooperation among the FIUs across national borders increases the effectiveness of individual FIUs' efforts to fight money laundering, the Egmont Group, of which FinCEN is a member, has established rules governing, among other things, the conditions for the exchange of sensitive information, the permitted uses of such information and measures to protect such information. Specifically, FinCEN and other members of the Egmont Group have agreed that information exchanged between FIUs may be used only for the specific purpose for which the information was sought or provided, and that the requesting FIU may not transfer information shared by a disclosing FIU to a third party, nor make use of the information in an administrative, investigative, prosecutorial, or judicial purpose without the prior consent of the FIU that disclosed the information.¹⁵ The same process for exchanging and protecting sensitive information among

¹⁵ The Egmont Group, *Principles for Information Exchange between Financial Intelligence Units for Money Laundering and Terrorism Financing Cases* (June 13, 2001), Principles 11 and 12.

FIUs may be used to ensure the confidentiality of a SAR. Thus, rather than impose artificial geographical limitations on access to SAR database systems within one organizational structure, we submit that FinCEN should promote this established process to protect the confidentiality of a SAR.

D. The Proposed Rule Should be Revised to Permit the Receiving Affiliate to Share a SAR with Another U.S. Affiliate

The Proposed Rule limits the ability of a recipient of a SAR to share the SAR with another affiliate, even if the affiliate is subject to a SAR rule.¹⁶ We believe this creates an artificial boundary and unnecessarily complicates enterprise-wide risk management efforts. We suggest that, at a minimum, a recipient of a SAR be permitted to share the SAR with all affiliates subject to a SAR rule within a corporate structure. For example, under the Proposed Rule, a broker-dealer that files a SAR may share that SAR with a depository institution within the same corporate organizational structure. The recipient depository institution is not permitted to share a SAR with a futures commission merchant within the same corporate structure, even though the futures commission merchant is a Designated Entity under the Proposed Rule and is subject to a SAR rule, and even though the broker-dealer itself could have shared the SAR with the affiliated futures commission merchant. Given that the filing institution is permitted to share a SAR with all U.S. affiliates subject to a SAR rule, it makes sense to permit the recipient of that SAR to share the SAR with other Designated Entities and all other affiliates subject to a SAR rule. Because these affiliates are already required to maintain the confidentiality of a SAR, permitting a recipient to share the SAR with these affiliates will ensure the confidentiality of the shared SAR. Additionally, should the final rule be expanded to permit the sharing of SARs with *all* affiliates within a corporate structure, we recommend that a recipient should similarly be permitted to share a SAR with *all* affiliates within a corporate structure.

II. CONFIDENTIALITY AGREEMENTS TO MAINTAIN THE CONFIDENTIALITY OF A SAR ARE UNNECESSARY AND UNDULY BURDENSOME

Under the Proposed Rule, FinCEN states that Designated Entities should have a written confidentiality agreement in place with its affiliates, even if they are Designated Entities subject to a SAR rule, to ensure that its affiliates protect the confidentiality of a SAR.¹⁷ We agree that it is of critical importance to maintain the confidentiality of a SAR. We recommend, however, that rather than placing the emphasis on executing multiple confidentiality agreements with affiliates, each organizational structure be permitted to use its own procedures and processes to protect the confidentiality of a SAR. Each financial institution employs unique sets of internal control measures designed to protect a wide range of confidential information, ranging from its own proprietary information to client information to SARs that it has filed. Given that, under the Proposed Rule, each financial institution that would share or receive a SAR is already subject to the statutory prohibition against disclosure, and already employs internal control measures to maintain the confidentiality of a SAR, we submit that it is not necessary, for purposes of ensuring the confidentiality of a SAR, to require the execution of confidentiality agreements among the various entities within an organizational structure that are already subject to a SAR rule. Such a process is also extremely inefficient. Requiring Designated Entities, which are already prohibited by

¹⁶ 74 Fed. Reg. at 10164.

¹⁷ 74 Fed. Reg. at 10163.

statute from disclosing a SAR, to draft, collect, update, maintain and keep records of written agreements it enters into with its U.S. affiliates, which are also already subject to the statutory prohibition against disclosure, is an inefficient and unnecessary way to ensure the confidentiality of a SAR. Rather, as noted previously, each financial institution should be permitted to use its own procedures and processes to protect the confidentiality of a SAR.

If the SAR sharing provision were expanded to include sharing with foreign affiliates or affiliates not yet subject to a SAR rule, given that those affiliates are not subject to the statutory prohibition against disclosure, we recognize that FinCEN might prefer that a confidentiality agreement with those entities be signed to protect the confidentiality of a SAR. However, even where these entities are included, if FinCEN views an agreement as absolutely necessary, we submit that each organizational structure be permitted to use a global written confidentiality agreement, as opposed to entering into multiple written confidentiality agreements with each affiliate within its own corporate structure.

III. WE REQUESTS FURTHER GUIDANCE WITH RESPECT TO THE DISCLOSURE OF SARs

A. We Request Further Guidance with Respect to Disclosures of a SAR to Certain Regulatory Organizations

(1) We Request Further Guidance with Respect to Disclosures of a SAR to Self-Regulatory Organizations (“SROs”)

The current SAR rule for broker-dealers states that “[r]eports filed under this section shall be made available to an SRO registered with the Securities and Exchange Commission *examining a broker-dealer for compliance with the requirements of this section.*” (emphasis added).¹⁸ Similarly, the current SAR rule for futures commission merchants (“FCMs”) and introducing brokers in commodities (“IB-Cs”) states that “[r]eports filed under this section...shall be made available...to the CFTC, the Securities and Exchange Commission, and any registered futures association, registered entity, or SRO, *examining an FCM, IB-C, or broker or dealer in securities for compliance with the requirements of this section.*” (emphasis added).¹⁹

The Proposed Rule, which closely tracks the statutory language, states that the prohibition against the disclosure of a SAR “shall not be construed as prohibiting...[a] SAR or any information that would reveal the existence of a SAR, to...any self-regulatory organization examining” broker-dealers, futures commission merchants, or introducing brokers in commodities for compliance with their SAR requirements.²⁰ Although the rules collectively clarify that SROs cannot disclose a SAR, there is a lack of clarity as to whether the exception to the prohibition against the disclosure of a SAR to an SRO applies solely when an SRO is acting in its examination capacity to ensure compliance with the BSA or whether it includes situations in which an SRO is acting in its role of determining whether to bring an enforcement action. We, thus, request clarification as to the scope of the exception as it pertains to disclosures of a SAR and supporting documentation to an SRO.

¹⁸ 31 C.F.R. § 103.19(g).

¹⁹ 31 C.F.R. § 103.17(g).

²⁰ 74 Fed. Reg. at 10156; 74 Fed. Reg. at 10155.

(2) We Request Further Guidance with Respect to Disclosures of a SAR to State Securities Regulators

The Proposed Rule states that the statutory prohibition against the disclosure of a SAR “shall not be construed as prohibiting...[a] SAR or any information that would reveal the existence of a SAR, to...any Federal, state, or local law enforcement agency, *any Federal regulatory authority that examines the broker-dealer for compliance with the BSA*, or any self-regulatory organization examining the broker-dealer for compliance with the requirements of this section.” (emphasis added).²¹ Despite the language referencing a Federal regulatory authority, it is the experience of broker-dealer member firms that state securities regulators have requested SARs that a firm has filed in connection with the state securities regulator’s examination of the firm for compliance. We seek clarification as to whether this provision permits the disclosure of a SAR, or any information that would reveal the existence of a SAR to any state regulatory authority when it requests SARs filed by a member firm for purposes of examining a firm.

B. We Request Further Guidance with Respect to Disclosures of a SAR in Civil Litigation

(1) We Request a Process to Permit the Voluntary Disclosure of a SAR in Certain Limited Situations

As FinCEN is aware, questions relating to the disclosure of a SAR in civil litigations have been a recurring issue. There have been, and continue to be, circumstances in which member firms must defend against civil claims that they have not detected or reported suspicious activity. Although such claims directly raise the question of whether a SAR has been filed, member firms are prohibited from disclosing whether they have filed a SAR, even where they are willing to do so, and thus are severely hampered in their ability to defend against such suits. Further, as discussed more fully below (see Section III(B)(2)), the inability to produce a SAR or even discuss that a SAR has been filed not only compromises a financial institution’s defense, but can cause irreparable harm to the institution’s credibility vis-à-vis the court, the arbitrators, or a Judgment Officer or Administrative Law Judge in a reparations proceeding. Given these difficult and recurring challenges, we request a carve-out pursuant to the Proposed Rule that would provide a member firm with the option to disclose a SAR in its own defense.

We recognize that there are compelling reasons to maintain the confidentiality of a SAR, including that the disclosure of a SAR could result in compromising or impeding an ongoing investigation, and may reduce the willingness of financial institutions to file SARs.²² While these are significant concerns which should not be set aside lightly, where an investigation has been concluded, and where a financial institution consents to the disclosure of a SAR that it has filed, we submit that these concerns are largely

²¹ 74 Fed. Reg. at 10156.

²² In the Proposed Rule, FinCEN articulated a number of other reasons why the confidentiality of SARs must be maintained, including that disclosure of a SAR: could result in notification to persons involved in the transaction that the transaction is being reported; could adversely affect the timely, appropriate and candid reporting of suspicious transactions if financial institutions believe that a SAR can be used for purposes unrelated to the law enforcement and regulatory purposes of the BSA; could interfere with the financial institutions’ relationship with its customer; may provide insight into how a financial institution uncovers potential criminal conduct that can be used by others to circumvent detection; could compromise personally identifiable information or commercially sensitive information, or damage the reputational interests of companies that may be named; and increases the risk that an institution’s employees or others involved in the preparation and filing of SARs could become targets for retaliation by persons whose criminal conduct has been reported. See 74 Fed. Reg. at 10150.

mitigated. Thus, we suggest that FinCEN develop a process by which a financial institution can request, and FinCEN can give its consent to, the disclosure of a SAR. These circumstances would involve situations where FinCEN has deemed that such a disclosure would not jeopardize an ongoing investigation or otherwise impede any law enforcement efforts (for example, where the individual referenced in the SAR has already been indicted or convicted), and where the filing financial institution has expressly given its consent to the disclosure.

(2) We Request a Process for *In Camera* Review of a SAR in an Arbitration or Reparations Proceeding

Additionally, we request that a financial institution be permitted to disclose the fact of a SAR filing, and if directed by the arbitration panel, or a Judgment Officer or Administrative Law Judge in a reparations proceeding, the SAR itself *in camera* in order to obtain a ruling as to whether a SAR is required to be produced. In a court proceeding, where necessary, parties can apply to the court for an *in camera* inspection. However, that process is not available in either an arbitration or reparation proceeding. Therefore, although both the current SAR rule and the Proposed Rule provides for a safe harbor from civil liability that is applicable in the context of arbitration or reparations proceedings, there are no procedures in place to obtain a ruling as to whether a SAR can be produced in the context of an arbitration or a reparations proceeding, even to the arbitration panel, or the Judgment Officer or Administrative Law Judge.

The current SAR rules provides a safe harbor from liability for broker-dealers in the context of arbitrations and for futures commission merchants and introducing brokers in commodities in the context of arbitrations and reparation proceedings:

A broker-dealer, and any director, officer, employee, or agent of such broker-dealer, that makes a report of any possible violation of law or regulation pursuant to this section or any other authority (or voluntarily) shall not be liable to any person under any law or regulation of the United States (or otherwise to the extent also provided in 31 U.S.C. 5318(g)(3), including in *any arbitration proceeding*) for any disclosure contained in, for any disclosure contained in, or for failure to disclose the fact of, such report. (emphasis added).²³

An FCM or IB-C, and any director, officer, employee, or agent of such FCM or IB-C that makes a report of any possible violation of law or regulation pursuant to this section or any other authority (or voluntarily) shall not be liable to any person under any law or regulation of the United States (or otherwise to the extent also provided in 31 U.S.C. 5318(g)(3), including in *any arbitration or reparations proceeding*) for any disclosure contained in, for any disclosure contained in, or for failure to disclose the fact of, such report. (emphasis added).²⁴

Although the Proposed Rule does not directly reference the phrase “any arbitration proceeding,” nor the phrase “any arbitration or reparations proceeding,” it references the statute 31 U.S.C. 5318(g)(3),

²³ 31 C.F.R. § 103.19(f).

²⁴ 31 C.F.R. § 103.17(f).

which itself makes the safe harbor applicable in the arbitration context.²⁵ Pursuant to 31 U.S.C. 5318(g)(3), “[a]ny financial institution that makes a voluntary disclosure of any possible violation of law or regulation to a government agency or makes a disclosure pursuant to this subsection or any other authority, and any director, officer, employee, or agent of such institution who makes, or requires another to make any such disclosure, shall not be liable to any person under any law or regulation of the United States, any constitution, law, or regulation of any State or political subdivision of any State, or under any contract or other legally enforceable agreement (*including any arbitration agreement*), for such disclosure or for any failure to provide notice of such disclosure to the person who is the subject of such disclosure or any other person identified in the disclosure.” (emphasis added). Although the safe harbor applies in arbitration proceedings (and by regulation, in reparations proceedings), there are no clear procedures for sharing the fact of the SAR filing or the SAR itself, with the arbitration panel or the Judgment Officer or Administrative Law Judge in a reparations proceeding. Providing a process for an *in camera* review would make it possible to obtain a ruling as to whether a SAR is required to be produced while at the same time, ensuring that the confidentiality of a SAR is maintained.

- (3) We Request that FinCEN Establish Procedures For Member Firms To Follow While Awaiting FinCEN’s Response to a Member Firm’s Notice That a SAR Has Been Requested

We seek guidance as to the procedures member firms should follow when FinCEN’s response to a member firm’s notice that a SAR has been requested is not received in a timely enough manner for the firm to meet its other obligations under the Proposed Rule. The Proposed Rule largely follows the existing SAR rules and states that for any broker-dealer, futures commission merchant, and introducing brokers in commodities, and any of their directors, officers, employees, or agents that are subpoenaed or otherwise requested to disclose a SAR or any information that would reveal the existence of a SAR, shall decline to produce the SAR or such information, citing this section and 31 U.S.C. 5318(g)(2)(A)(i), and shall notify FinCEN of any such request and the response thereto.²⁶ In some instances, a firm is under an obligation to produce documents in discovery, either under the rules, or pursuant to a court order or a directive in an arbitration or reparations proceeding, within a specific time frame. Where there is a limited time to respond, and FinCEN has been notified, it is unclear the steps a member firm should take when FinCEN has not yet responded and the member firm has to meet its discovery obligations. Without additional guidance, the firm risks sanctions from the court, an arbitration panel, or a Judgment Officer or Administrative Law Judge in a reparations proceeding. We suggest that if a response is not received from FinCEN in a timely manner, member firms should be directed to apply for an *in camera* proceeding to obtain a ruling from a court, an arbitration panel, or a Judgment Officer or Administrative Law Judge in a reparations proceeding, as to whether a SAR is required to be produced.

CONCLUSION

We hope that these comments and recommendations help Treasury and FinCEN implement the statutory mandates in a manner that promotes the purposes of the BSA and facilitates industry

²⁵ 74 Fed. Reg. at 10157 (proposed rule for broker-dealers); 74 Fed. Reg. at 10156 (proposed rule for futures commission merchants).

²⁶ 74 Fed. Reg. at 10156 (proposed rule for broker-dealers); 74 Fed. Reg. at 10155 (proposed rule for futures commission merchants).

cooperation. We stand ready to work with you to provide any necessary support. We are committed to a strong partnership between government and industry, culminating, hopefully, in the resources of each being maximized to their fullest extent to combat illicit activity.

SIFMA, the FIA, and our member firms are firmly committed to doing everything that we can to be effective in detecting and reporting suspicious activity. We look forward to continuing to work with Treasury, the SEC and the CFTC to strengthen the regulatory structure surrounding member firms and other U.S. financial institutions.

We greatly appreciate the opportunity to share our views. If you wish to receive additional information related to these comments, please feel free to contact the undersigned.

Sincerely,



Betty Santangelo,
Schulte Roth & Zabel LLP
on behalf of SIFMA and the FIA

CC: Lourdes Gonzalez
Securities and Exchange Commission

Terry Arbit
Commodity Futures Trading Commission

Rachel Romjin, SIFMA
Jeff Horowitz, SIFMA
Ryan Foster, SIFMA
Barbara Wierzynski, FIA