



OFFICE OF
INSPECTOR GENERAL

DEPARTMENT OF THE TREASURY
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MEMORANDUM FOR ERIC M. THORSON
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FROM:  Rich Delmar
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SUBJECT: Inquiry into Treatment of Certain Suspicious Activity Reports in
FinCEN Databases

Treasury OIG is conducting various inquiries regarding FinCEN's adherence to the Bank Secrecy Act (BSA) and particular allegations of breaches of the BSA's confidentiality rules. Questions have been raised about the possibility of internal leakage or the improper dissemination of information by external users.

A sub-issue raises the question if SARs were improperly deleted from FinCEN record systems. This question was raised in a recent article in The New Yorker and elsewhere, with respect to three particular SARs related to particular businesses and transactions. The ranking members of two Senate committees have asked you to look into this matter, and you have directed the Office of Counsel to make this inquiry. I have done so, and provide the following background, findings, and conclusions.

Treasury OIG officials have determined after discussions with FinCEN leadership and other inquiries that in certain circumstances, the FinCEN BSA database can be adjusted to mask the existence of particular SARs or other BSA reports. This process is governed by FinCEN's Policy and Procedures for BSA Record Suppression (Suppression Policy). This document sets out the circumstances when such masking can be self-initiated by FinCEN, or done at the request of external entities, such as law enforcement agencies or prosecutors.

I reviewed the document and its procedures. I requested and received from FinCEN's Chief Counsel the body of emails and other records that bear on the three SAR "suppressions" at issue here. The standards, the evidence, and my analysis are set out below.

FinCEN's Suppression Policy, updated as of August 2017, provides for two categories of suppression and access limitation. The first, Restricted Suppression, actually results in such reports not being counted in statistical analysis and activity reporting, and is deemed to be appropriate in cases of apparently false or misleading data being reported, and in certain instances where reports contain classified or other sensitive information.

The broader category, which appears to have been applied in this case, is Limited Suppression, where the underlying reports are counted in analysis and reporting, and

are actually acknowledged in the data base as existing, but inaccessible. The FinCEN policy defines this universe to include:

Grand Jury: Although financial institutions can file a SAR based on an independent finding of suspicious activity, perhaps triggered by a grand jury subpoena, financial institutions are not to disclose the existence of the grand jury subpoena.

National Security: A BSA report that contains information that, while not classified, is nevertheless sensitive national security information.

Law Enforcement Exposure: Certain BSA reports, including currency transaction reports (CTRs) and SARs, may reveal operationally highly sensitive law enforcement information, such as details about undercover operations. Any BSA report that potentially describes, identifies, or compromises a sensitive or on-going law enforcement investigation will be assessed on a case-by-case basis and disseminated with specific instruction regarding the limited access.

Highly Unusual Circumstances: In rare instances, a request to limit access may involve highly unusual circumstances, including a highly sensitive law enforcement investigation, such that, based on the totality of circumstances, the risk of improper use and/or unauthorized disclosure of the BSA report outweighs the potential legitimate law enforcement interest in maintaining broad BSA data user access to the report and merits limiting access to the report. This category was employed in the three instances under review.

The FinCEN Suppression Policy sets out a three-phase process for the intake, evaluation, and decision-making on suppression requests. Excerpts from the publication, set out below, describe the process:

Suppression Requests - Requirements

The submission of BSA user's suppression request must contain the following information:

1. Type of report(s) and DCN/BSA ID of the report(s) or other identifying information contained in the specific report.
2. A justification supporting the suppressing of the report.

Processing of Suppression Requests

The process for handling a suppression request consists of the following three phases:

Phase 1: Documenting the Suppression Request

Phase 2: Determining the Disposition of the Suppression Request

Phase 3: Notification of FinCEN's Disposition of the Suppression Request

Phase 1: Documenting the Suppression Request

If the suppression request contains the required information as outlined above, the FinCEN Resource Center Office Director will proceed with documenting the suppression request within the Financial Intelligence Repository (FIR), and the FIR work item will be left open until a determination is made whether to approve the request.

All received/issued correspondence/e-mails, interactions, internal communications and/or supporting documentation regarding the suppression request will be documented within the respective FIR work item.

Note: Any e-mail or other written communication within FinCEN regarding the suppression request or supporting documentation should be marked with the following in the header: "Law Enforcement Sensitive//For Official Use Only//Pre-Decisional Deliberation-FOIA Exempt" to the extent such headings apply to the substance of the communication.

Phase 2: Suppression Request Determinations

Process and Responsibilities

Determination to Limit Access to BSA Reports: Requests to limit access to BSA reports may originate two ways:

- (1) as a result of FinCEN staff reviews of the BSA data; or
- (2) by requests from those with access to BSA reports. Once a request for limitation of access to a BSA report has been received, the Reports Assessment Working Group (RAWG) comprised of representatives of the Enforcement, Liaison, Intelligence, Technology and Policy Divisions and the Office of Chief Counsel will review the merits of the request to determine whether it meets established criteria justifying the limitation of access.

Determination of Need for Consultations: Depending on the facts and totality of the circumstances involving any request for potential limitation of access considered by the Reports Assessment Working Group, additional consultation with appropriate regulatory, law enforcement, or intelligence community agencies may be necessary before FinCEN reaches a determination. For example, the RAWG, or a member, may determine that additional consultation with the primary federal regulator of a filing institution or a law enforcement agency with primary or potential equities in the information contained in the report.

If a RAWG member determines that additional consultation is appropriate, the member will expeditiously undertake such consultation and communicate to the working group any insights gained from the consultation. FinCEN, as appropriate, will include appropriate headquarters officials from the requesting agency in this consultation process.

RAWG Dispute Resolution: If RAWG members are unable to reach agreement on the whether to approve a request to limit access pending before it, the RAWG

will elevate the matter to the Associate Directors of the Enforcement, Liaison, Intelligence, Technology and Policy Divisions for a determination. If the Associate Directors are unable to reach agreement on disposition of the suppression request, the Associate Directors will elevate the matter to the FinCEN Director, or the Deputy Director, for disposition of the request. Once the Director, or his Deputy, has made a determination, that decision will be referred back to the RAWG and FRC Office Director for implementation.

Determination to Limit Access to BSA Reports Involving Highly Unusual Circumstances: In rare instances, a request to limit access may involve highly unusual circumstances, including a highly sensitive law enforcement investigation, such that, based on the totality of circumstances, the risk of improper use and/or unauthorized disclosure of the BSA report may outweigh the potential legitimate law enforcement interest in maintaining broad BSA data user access to the report. In these instances, the FRC Office Director, using his or her discretion, will refer such requests directly to the Associate Directors of the Liaison and Technology Divisions, or their designees. The Associate Directors, or their designees, will make a recommendation (with or without consensus, and upon consultation with the Office of Chief Counsel or other FinCEN divisions to the extent deemed necessary by the Associate Directors) regarding suppression to FinCEN's Director, or the Deputy Director. The Director, or Deputy Director, will consult with FinCEN's Office of Chief Counsel as may be necessary. Once the Director or Deputy Director has made a determination, that decision will be referred to the FRC Office Director for implementation.

Phase 3: Notification of the Disposition of the Request

Approved Requests

1) If the limited access request is approved, the FRC Office Director will (1) notify the requester in writing; and (2) request the suppression of the BSA record(s) via email to the Technology Division's (TD) FinCEN Application Help Desk. The request to TD must contain the type of suppression being requested (e.g., Restricted or Limited) and determination criteria (e.g., "Law Enforcement Exposure"). Suppression Requests should be submitted in a standardized format which contains the requestor and all critical data elements that are needed to perform the suppression request. TD will enter these requests and related documentation as a Help Desk ticket.

2) TD will implement the limitation in the System of Record. TD has also written downstream applications to ensure proper handling of those records that are identified as suppressed records.

3) TD will send a change notification within FinCEN and to MOU holder agencies who receive bulk BSA data, instructing them to cancel, override, or nullify the suppressed report in their copy of the database.

4) To the extent appropriate, a RAWG member from Liaison will coordinate with the Liaison Division to notify regulators, user agencies, filing institutions, and parties internal to FinCEN.

Note: Any e-mail communication within FinCEN regarding the communication request or documentation should be marked with the following in the header: "Law Enforcement Sensitive//For Official Use Only//Pre-Decisional Deliberation-FOIA Exempt."

Communication with primary federal regulators and examiners, and state regulatory agencies, as appropriate, may include:

1) Information regarding a decision to limit access to a BSA report based on a reference to an NSL or based on law enforcement sensitivities, and for encouraging them to take appropriate steps with respect to the treatment of any such reports that they may have previously accessed or might otherwise access in an examination of the filing institution

2) A request that the institution file a second report that does not include a reference to an NSL or other identified sensitive information

3) Instruction, if appropriate, may be issued to the filing institution with respect to its treatment of documents related to the limited-access BSA report. If the document relates to a sensitive law enforcement operation, undercover activity, or highly unusual circumstance, under no circumstances should the filing institution be notified until representatives from the designated FinCEN division(s) and the appropriate requesting agency have engaged in consultation. If there is any disagreement among RAWG members on whether the filing institution should be notified, then the notification decision should be raised to the Associate Director level.

Observations on the process. The FinCEN records show that the intake processing set out in Phase 1 was done fully and properly. In all three cases, the justification provided for suppressing the SAR was the same, conclusory statement:

This SAR pertains to a highly sensitive ongoing law enforcement investigation that could be jeopardized by the availability of the SAR to users of the BSA Portal or other SAR requesters.

But the Suppression Policy does not require any particular wording, amount of specificity, or quantum of proof to support the suppression request. And I was advised that this conclusory language "is normal language for making a recommendation of this nature."

What the policy does require, per the "Highly Unusual Circumstances" segment within Phase 2, is that the two FinCEN reviewers (Associate Directors for the Liaison Division and the Technology Division) and one ultimate decision-maker (Deputy Director) all conclude, for each particular suppression request, that allowing access to the information in the SAR

would create a risk of improper use and/or unauthorized disclosure of the BSA report which outweighs the potential legitimate law enforcement interest in

maintaining broad BSA data user access to the report and merits limiting access to the report.

It does not define the necessary weight or specificity of the evidence underlying such conclusions. It establishes a procedure; compliance with which satisfies the process and justifies the restriction of access to the SAR.

In two of the three SAR suppressions, both of the required officials indicated their agreement with the request, and advised the decision-making official that the requested suppression was appropriate, either in their own names or, in one instance, by a senior official acting for the Liaison Division Associate Director. In the remaining case, the documents provided show that one, but not the other, of the two required officials was recorded as so agreeing and so advising. In response to my query, I was advised that the other official (the Liaison Division Associate Director) had agreed, but had not felt, in that instance, that she had anything to add to the recommendation.

I conclude that the amount of process required was in fact provided, and that the records indicate a compliance with the standards established in the Suppression Policy, warranting the imposition of restricted access to the SARs.

I further conclude that the SARs in question were not destroyed; rather the normal level of access to them was restricted in an authorized way consistent with the Phase 2 determination and Phase 3 notification procedures. I have viewed the data base and confirm that the entries for the three SARs at issue do contain the following notice:

The document(s) is/are not available to be viewed at this time.
If you need the document(s) please contact the FinCEN Resource Center at FRC@fincen.gov. Please provide the BSA ID number(s) and the reason for the request.

In sum, it is allowable for FinCEN to restrict access to particular SARs, when adequate justification and review are provided. In the three instances of such restriction reviewed here, sufficient justification and review was accomplished to meet the standard set by the FinCEN Suppression Policy.