

require different types of judgments. In some cases, the facts of the transaction may indicate the need to report. For example, the fact that a customer refuses to provide information necessary for the mutual fund to make reports or keep records required by this part or other regulations, provides information that the mutual fund determines to be false, or seeks to change or cancel a transaction after such person is informed of information verification or recordkeeping requirements relevant to the transactions, would indicate that a Suspicious Activity Report ("SAR-SF")<sup>27</sup> should be filed.<sup>28</sup> In other situations, determining whether a transaction is suspicious within the meaning of the rule may require a more involved judgment. Transactions that raise the need for such judgment may include, for example, (i) transmission or receipt of funds transfers without normal identifying information, or in a manner that indicates an attempt to disguise or hide the country of origin or destination, or the identity of the customer sending the funds, or the beneficiary to which the funds are sent; or (ii) repeated use of a mutual fund as a temporary resting place for funds from multiple sources without a clear business purpose. The judgments involved will also extend to whether the facts and circumstances and the institution's knowledge of its customer provide a reasonable explanation for the transaction that removes it from the suspicious category.

The means of commerce and the techniques of money launderers are continually evolving, and there is no way to provide an exhaustive list of suspicious transactions. FinCEN intends to continue its dialogue with mutual funds about the manner in which a combination of government guidance, training programs, and government-industry information exchange can smooth the way for operation of the new suspicious activity reporting system in as flexible and cost-efficient a way as possible.

Individual mutual funds are frequently part of a complex of related

funds, and it is possible that more than one mutual fund would be obligated to report the same transaction. Section 103.15(a)(3) of the proposed rule would permit all of the mutual funds involved in a particular transaction to file a single report as long as the report contains all relevant facts. Moreover, a person such as a broker-dealer that is a service provider to the fund may have a separate suspicious activity reporting obligation with regard to the same transaction. The proposed rule would permit the mutual fund's report to satisfy that person's reporting obligation as well. Thus, a service provider to which multiple mutual funds have contractually delegated their reporting obligation may file a single report on behalf of itself and all of the funds involved in the same transaction or series of transactions.

#### *B. 103.15(b)—Filing Procedures*

Section 103.15(b) sets forth the filing procedures to be followed by mutual funds making reports of suspicious transactions. Within 30 days after a mutual fund becomes aware of a suspicious transaction, the fund must report the transaction by completing a SAR-SF, collecting and maintaining supporting documentation, and filing the SAR-SF in a central location, to be determined by FinCEN. The SAR-SF will resemble the SAR used by banks to report suspicious transactions, and a draft form will be made available for comment by publication in the **Federal Register**.

If the mutual fund does not identify a suspect on the date of the initial detection, the mutual fund may delay filing a SAR-SF for an additional 30 days, but may not delay filing more than 60 days after the date of such initial detection. In situations involving violations that require immediate attention, such as terrorist financing or ongoing money laundering schemes, the mutual fund should telephone the appropriate law enforcement authority and the SEC in addition to filing a SAR-SF.

#### *C. 103.15(c)—Retention of Records*

Section 103.15(c) provides that filing mutual funds must maintain copies of SAR-SFs and the original related documentation for a period of five years from the date of filing. As indicated above, supporting documentation is to be made available to FinCEN, the SEC, and other appropriate law enforcement and regulatory authorities on request.

#### *D. 103.15(d)—Confidentiality of Reports*

Section 103.15(d) reflects the statutory bar against the disclosure of

information filed in, or the fact of filing, a suspicious activity report (whether the report is required by the proposed rule or is filed voluntarily). See 31 U.S.C. 5318(g)(2). Thus, the paragraph specifically prohibits persons filing SAR-SFs from making any disclosure, except to law enforcement and regulatory agencies, about either the reports themselves or supporting documentation.

This paragraph does not prohibit mutual funds from discussing with each other (or with service providers that are involved in the transaction, such as their investment advisers, transfer agents, principal underwriters, and broker-dealers) for purposes of section 103.15(a)(3), suspicious activity involving a transaction with which the mutual funds have been involved, or the determination of which mutual fund will file a SAR-SF in such a case.

#### *E. 103.15(e)—Limitation of Liability*

Section 5318(g) of title 31, as amended by the USA Patriot Act, provides protection from liability for making reports of suspicious transactions, and for failures to disclose the fact of such reporting to persons involved in such transactions. The safe harbor provision of 31 U.S.C. 5318(g) clearly protects any financial institution from civil liability for reporting suspicious activity.<sup>29</sup> Section 351 of the USA Patriot Act clarifies that the safe harbor applies also to the voluntary reporting of suspicious transactions, and section 103.15(e) of the proposed rule reflects this clarification.

It must be noted that, while the proposed rule reiterates and clarifies the broad protection from liability for making reports and for failures to disclose the fact of such reporting that is contained in the statutory safe harbor provision, the regulatory provisions do not extend the scope of either the statutory prohibition or the statutory protection. Inclusion of safe harbor language in the proposal is in no way intended to suggest that the safe harbor can override the non-disclosure provisions of the law and regulations. The prohibition on disclosure (other than as required by the proposed rule) applies regardless of any protection from liability.

however, usually maintained by a person, such as a broker-dealer, that has a reporting obligation. The omnibus account holder (*i.e.*, the financial intermediary) is itself a customer of the mutual fund for purposes of the proposed rule.

<sup>27</sup> The term "SF" is an abbreviation for "Securities and Futures Industry," the form that will be used for reporting by members of the securities and futures industry. See 67 FR 50751 (August 5, 2002).

<sup>28</sup> As section 103.15(d) of the proposed rule makes clear, the mutual fund must not notify the customer that it intends to file or has filed a suspicious transaction report with respect to the customer's activity.

<sup>29</sup> See *Lee v. Bankers Trust Co.*, 166 F.3d 540, 544 (2nd Cir. 1999) (stating that in enacting 31 U.S.C. 5318(g), Congress "broadly and unambiguously provide[d] \* \* \* immunity from any law (except the federal Constitution) for any statement made in a SAR by anyone connected to a financial institution").