



Securities Industry Association

1401 Eye Street, NW • Washington, DC 20005-2225 • (202) 296-9410, Fax (202) 296-9775

Via Electronic Mail and U.S. Mail

April 3, 2002

Special Information Sharing Section 314

Comments

PO Box 1618

Vienna, VA 22183-1618

Attention: Proposed Rule Special Information Sharing Section 314

Ladies and Gentlemen:

The Securities Industry Association (“SIA”)¹ appreciates the opportunity to comment on the proposed rule and interim rule issued by the Financial Crimes Enforcement Network (“FinCEN”) of the Department of the Treasury to encourage information sharing among financial institutions and government agencies. The proposed and interim rules implement section 314 of the USA PATRIOT Act,² which is aimed at encouraging greater cooperation among financial institutions, regulators and law enforcement in efforts against money laundering and the financing of terrorism.

¹ The SIA brings together the shared interests of nearly 700 securities firms to accomplish common goals. SIA member firms (including investment banks, brokers-dealers and mutual fund companies) are active in all U.S. and foreign markets and in all phases of corporate and public finance. The U.S. securities industry manages the accounts of nearly 80 million investors directly and indirectly through corporate, thrift and pension plans. The industry generates \$358 billion of revenue and employs approximately 760,000 individuals. (More information about the SIA is available on its home page: <http://www.sia.com>.)

² “Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001,” (“Patriot Act”) Pub. L. No. 107-56 (2001), signed into law by President Bush on October 26, 2001.

The proposed rule implements section 314(a) by requiring financial institutions to respond to requests from FinCEN for information concerning persons or entities suspected of terrorist activities or money laundering. In addition, the proposed and interim rules implement section 314(b) by authorizing certain financial institutions and associations of financial institutions to share amongst themselves information concerning persons or entities suspected of terrorist activities or money laundering.

While SIA supports the proposed and interim rules, the rules do not incorporate the additional sharing of information by the government with industry authorized by section 314(a), which we think Congress intended as a way for the government to help industry identify suspicious activity. We have outlined below suggested modifications to the proposal that will enhance the effectiveness of the information sharing, and our suggestions for additional information sharing by the government with industry.

Specifically, we recommend that Treasury should: 1) include provisions for the government to share information with financial institutions that would help identify suspicious activity; 2) clarify the scope of the search required in response to a FinCEN request; 3) provide guidance as to how firms, in handling a request from FinCEN, can reconcile the need to close an account and the prohibition on alerting an accountholder that it has been identified as a possible suspect; 4) broaden the definition of “financial institution” to allow for more widespread and effective information sharing; and 5) clarify that information sharing between financial institutions is exempt from the Fair Credit Reporting Act. Other recommendations are discussed below as well.

I. Section 314(a) – Information Sharing With Federal Agencies

- ***The Rule Should Provide For the Government’s Sharing of Information With Industry, as required by Section 314(a)***

Section 314(a) required Treasury to adopt regulations for the “specific purpose of encouraging regulatory and law enforcement authorities to share with financial institutions information regarding individuals, entities, and organizations engaged in . . . terrorist acts or money laundering.” We believe that by this provision Congress intended the government, as part of the coordinated effort against money laundering and the financing of terrorism, to share information with industry to help identify suspicious activity. SIA has been advocating in favor of

such information sharing for some time, even before the passage of the Patriot Act. For instance, we have urged the government to help industry identify “senior foreign political figures.” Both the Patriot Act and Treasury have acknowledged that accounts or transactions with such figures may pose a higher risk. See Patriot Act Section 312; Treasury’s Guidance on Enhanced Scrutiny For Transactions That May Involve the Proceeds of Foreign Official Corruption, issued in January 2001. We believe the government is more able through its worldwide intelligence network to identify senior foreign political figures, and should provide a list of names of such persons to industry. See SIA letter to Stuart E. Eizenstat, Deputy Secretary of the Treasury, dated January 10, 2001. Other information within the government’s possession would be beneficial to industry as well, such as known havens for money laundering and shell banks, the names of known shell banks, information from foreign law enforcement and regulatory officials, and any trends or transactions in money laundering or the financing of terrorism for which industry should be on the alert. We think the government’s sharing of such information would be extremely beneficial in the identification of possible suspicious activity, and would allow resources to be focused on the areas that present the most significant risk.

We are therefore disappointed that the proposed rule does not authorize, let alone address, information sharing by the government with industry, but instead focuses solely on new reporting requirements by industry to the government.³ We urge Treasury to expand the proposed rule to provide for greater information sharing by government.

- ***Treasury Should Clarify the Scope of the Searches Required***

The proposed rule requires firms to respond to requests for information from FinCEN, but does not specify how much time a firm has to conduct the search. The rule states, “[u]pon receiving a request from FinCEN, a financial institution shall search its records to determine whether it maintains or has maintained an

³ Although we do not think section 314(a) was necessarily intended to create additional reporting requirements, we do not oppose the proposed rule. Indeed, the rule appears to formalize the “Control List” process that was begun in the aftermath of September 11, through which financial institutions have been voluntarily checking their records for lists of names and entities supplied by law enforcement. The only difference is that the proposed rule allows federal law enforcement agencies to give lists to FinCEN, while the Control List has been limited to lists of names prepared by the FBI.

account for, or has engaged in any transaction with” the subject of FinCEN’s request. 66 Fed. Reg. at 9,884. The rule also states that if a financial institution identifies an account or transaction, the report to FinCEN must be made “as soon as possible.” The rule should make clear that firms will be provided a reasonable amount of time to search their records and to respond. The burden and disruption to financial institutions would be great if responses were required within an unreasonably short time frame. Moreover, firms have been responding extremely promptly in response to the Control List requests without any formal requirement to do so.

The proposed rule does not describe the scope of records that must be searched, although Treasury has requested comment concerning the length of time firms typically retain records after an account is closed or transaction completed, and the ability of firms to access archived information. Securities firms are subject to SEC rules that, in general, require certain records to be retained for three years and other records to be retained for six years. *See* Securities Exchange Act Rule 17a-4. Firm practices beyond these requirements vary widely. Therefore, FinCEN requests pursuant to the proposed rule should be consistent with regulatory requirements.

Moreover, firms should be required to make a “reasonable” search because SEC rules require only that records be retained in an “easily accessible” place for the first two years. Thus, a search of all of a firm’s records, regardless of where or in what form the records are kept, could be extremely disruptive. Furthermore, FinCEN requests should be required to be as specific as possible and delineate the kinds of records being sought. This is particularly necessary for records related to “transactions,” which without further specification could encompass so many different kinds of activities, e.g. purchases, sales, deposits, transfers, etc., and therefore could require a firm to search virtually its entire universe of records. Thus, when seeking records related to transactions, FinCEN should be required to describe the type of transaction records it is seeking, such as “wire transfer,” and provide as much additional detail that will help a financial institution research its records for the requested information.

Furthermore, a firm’s ability to search for transactions unrelated to an account or involving non-accountholders is limited by storage and retrieval system constraints. For example, information regarding transactions is typically retained and stored by reference to the account in which the transaction took place. It is not typically stored by reference to a non-accountholder who may have been involved

in the transaction – e.g., the originator or recipient of a wire transfer to or from a customer’s account. Accordingly, Treasury should recognize that there may be significant limitations to a firm’s ability to search its records for information relating to transactions involving a non-accountholder.

Moreover, the rule should provide a procedure to address issues raised by FinCEN requests that cannot be resolved by discussions between FinCEN and a financial institution. For instance, a financial institution may wish to challenge FinCEN’s requirement that it respond to an overly broad request, which could cause severe operational disruptions for the firm. Similarly, a financial institution may need some avenue of redress for a FinCEN request that could cause it to violate the laws of a foreign jurisdiction.

While Treasury states that the rule requires retrospective searches only, we are concerned that the rule may be construed as imposing an ongoing requirement to continuously search for records in response to each request from FinCEN. The preamble to the proposed rule states that “Treasury and FinCEN expect that financial institutions will use the information provided by FinCEN to report to FinCEN concerning any named individual, entity, or organization that *subsequently* establishes an account or engages in a transaction.” See 66 Fed. Reg. at 9,881 (emphasis added). This seems to suggest that firms will be subject to a continuing responsibility to monitor and report regarding the subject of any FinCEN request. Firms would as a result have to maintain lists of all requested individuals, entities and organizations, and then monitor all future account openings or transactions. This requirement seems unnecessarily burdensome in that, there is no cut-off for how far into the future firms are expected to continue to search. Furthermore, law enforcement is not likely to benefit because firms will be monitoring for names that may no longer be leads or suspects, or for transactions outside of relevant time frames.

- ***Treasury Should Provide Greater Guidance and Protection for Firms That Act in Response to a Request***

Treasury should provide greater guidance as to how firms are supposed to reconcile the rules’ prohibition on disclosing information regarding a request for information from FinCEN with the need or requirement to close an account for a named individual, entity or organization. In the preamble, Treasury states that the rule “prohibits a financial institution from taking any action that could alert an individual, entity or organization that it has been identified by a federal law

enforcement agency” as possibly being engaged in money laundering or terrorist activities. However, Treasury also states that financial institutions may wish to close an account or refuse to be involved in a transaction based on information provided by FinCEN.

Thus, as Treasury acknowledges, there may be a "tension" between a financial institution's desire to close an account and the prohibition on disclosing information regarding FinCEN's request – particularly since the rule bans, “any action that could alert” the subject of FinCEN's request that it has been identified as a criminal suspect. Treasury provides no resolution of this situation and only states that “it may be appropriate to advise FinCEN” where a financial institution believes its failure to close an account could facilitate money laundering or terrorism. In such situations, FinCEN will then refer the matter to the concerned federal law enforcement agency.

Treasury also states that “[u]ltimately, however, the decision whether to close an account or decline a transaction is solely that of the concerned financial institution.” See 66 Fed. Reg. at 9,881. Thus, the rule's prohibition on disclosure could place financial institutions, which are trying to satisfy all of their legal requirements and prevent the misuse of our financial system, in a very difficult and irreconcilable position. Moreover, Treasury's only suggested solution of advising FinCEN of the issue may not resolve the situation and may not allow for timely action.

Accordingly, we request the rule provide clearer guidance as to how firms are to resolve these situations.

In addition, we request that Treasury provide financial institutions with a safe harbor from liability for any actions or other steps they take to close an account or decline a transaction as a result of information received from a FinCEN request. Any firm that receives a FinCEN request will legitimately be concerned about doing business with the party in question and potentially facilitating illegal activities. Leaving a firm exposed to the risk of legal liability for terminating its relationship or refusing to deal with the individual could significantly impair its ability to take effective steps to prevent potential illicit activity.

- ***Clarification of Safe Harbor***

SIA also requests that the safe harbor from liability under Patriot Act section 314(b) (involving voluntary information sharing between financial institutions) be clarified in the rule to include disclosure by financial institutions in response to requests from FinCEN under section 314(a). The safe harbor under section 314(b) applies to a “financial institution . . . that transmits, receives or shares” information “for the purpose of identifying and reporting activities” related to money laundering and terrorism. Thus, we think Congress may have also intended the safe harbor to be equally applicable to information transmitted to Federal government authorities pursuant to section 314(a). The purposes of the legislation would be furthered by applying the safe harbor to disclosures made by financial institutions in response to requests from FinCEN – financial institutions should be encouraged to provide full and complete responses with respect to money laundering and terrorist suspects. Finally, as a matter of fundamental fairness, if Treasury is going to use section 314(a) to create a reporting requirement, it should provide financial institutions with appropriate protection for complying with it.

Alternatively, Treasury could clarify in the rule that the safe harbor in section 31 U.S.C. § 5318(g)(3), for the reporting of suspicious transactions applies in the context of this rule when a financial institution responds to a FinCEN request. The safe harbor under 5318(g)(3) applies when a financial institution makes a disclosure of a possible violation of law or regulation to a government agency pursuant to any authority.

II. Section 314(b) - Voluntary Sharing Among Financial Institutions

We strongly support the sharing of information in section 314(b) incorporated in the proposed and interim rules, and in fact, advocated that such provisions be included in the Patriot Act. In testimony before the House Financial Services Committee on October 3, 2001, SIA advocated that the legislation should help to facilitate communication between financial institutions when they are investigating suspicious activity. See Testimony of Marc E. Lackritz, President of SIA, dated October 3, 2001 before the House Financial Services Committee. We believed, then and now, that the fact gathering and analysis leading to the identification of suspicious transactions would be facilitated if firms could communicate. Thus, section 314(b)’s removal of the restrictions on sharing information has the potential to be a key tool in industry’s efforts against money laundering and terrorist financing.

We have some recommendations to assure that the rule encourages, rather than discourages, the sharing of information. Most importantly, the rule should make clear, as Congress intended, that the sharing of information under section 314(b) is voluntary, and that financial institutions are not required to make use of the sharing of information procedures. The Patriot Act, which states that institutions “may share information with one another,” is clear on this point.

- ***Definition of “Financial Institution” Should Be Broadened***

The proposed rule’s information sharing provisions implementing section 314(b), and the interim rule, define the term “financial institution” narrowly to include only certain financial institutions, such as banks and broker-dealers. Other financial institutions, such as insurance companies, investment companies and futures commission merchants, are excluded from the definition, and thus excluded from the information sharing provisions. Treasury has requested comment on whether the definition should be expanded. The narrow scope of the definition means that covered institutions such as broker-dealers will not be able to share information, including information related to a FinCEN request, with insurance companies and other financial institutions not covered by the rule. In addition, other financial entities such as investment advisors are not covered by the rule. This limits the utility of the rule by eliminating a large segment of useful information that could be supplied by the excluded financial institutions and entities. For example, an investment advisor may have information regarding a suspicious customer that would be beneficial to a broker-dealer dealing with the same customer. The same could be true for an insurance company. Moreover, excluding these entities means that broker-dealers cannot alert these institutions to suspicious customers or transactions. Lastly, the term “association of financial institutions” is defined to include only organizations, which are comprised only of covered financial institutions. While some trade associations may satisfy this standard, others may not because some of their member entities, such as insurance companies and investment advisors, are not considered covered financial institutions. Accordingly, we recommend that the definition of financial institution be made consistent with 31 U.S.C. § 5312(a)(2), which is the definition used under the 314(a) rules.

Further clarification is also needed on how affiliates are treated under the definition of “financial institution.” Specifically, it is unclear whether covered financial institutions can share information with their own affiliates that are not covered financial institutions – such as investment advisors and insurance

companies. Because the Gramm-Leach-Bliley privacy rules allow sharing with affiliates in accordance with the disclosure requirements of the Fair Credit Reporting Act (“FCRA”), and given the importance of sharing information in identifying suspicious activity, we recommend that Treasury clarify that the rule does not limit sharing among affiliates.

- ***Certification Requirements Should Be Made More Effective***

The interim and proposed rules’ requirement that a financial institution wanting to share information file a certification should be modified. First, we recommend that the yearly “certification” be changed to a yearly “notice.” Section 314(b) specifically states that financial institutions may share information “[u]pon notice provided to the Secretary” and does not appear to either contemplate or authorize a certification requirement. Second, we recommend that Treasury develop a process whereby financial institutions can check with Treasury to determine whether another financial institution has submitted a notice that it intends to share information. If such a process is not created, then the rule must make clear that financial institutions have no requirement to determine whether another institution has filed a notice with FinCEN. The rule should also make clear that a financial institution is not required to verify that another institution maintains adequate procedures to protect the confidentiality of any shared information.

Third, we recommend that to eliminate unnecessary duplication, holding companies should be able to file notices on behalf of all of their affiliates, rather than affiliates filing separately. The rule should also clarify that introducing brokers and clearing brokers or prime brokers are not required to file a certification to share information regarding parties suspected of possible money laundering or terrorist activities. This is necessary because the present regulatory scheme allows such firms to contractually allocate account responsibilities between themselves. See NYSE Rule 382(b). For this reason, we have also requested that the proposed BD-SAR rule allow introducing brokers to share information regarding SAR filings to ensure that each are satisfying their reporting obligations.

Finally, the rule provides that a federal regulator may revoke or suspend a certification if the regulator finds that the institution failed to comply with the rule’s security and confidentiality provisions. We recommend that in order to address possible improper agency action the rule provide some procedure to allow financial institutions to challenge such revocations or suspensions.

- ***Treasury Should Clarify The Rule's Reference to Confidentiality Procedures and the Scope of The Information That May Be Shared***

Treasury should clarify that the reference in the rule requiring financial institutions to “maintain adequate procedures to protect the security and confidentiality” of shared information does not impose any new obligations beyond those currently in force. This clarification is needed because the statute does not authorize any additional procedures. Moreover, financial institutions are already required by current rules, including those issued under Gramm-Leach-Bliley, to safeguard customer information.

The rule should also clarify the scope of information that financial institutions are permitted to share. The rule restricts the sharing of information for purposes other than “[d]etecting, identifying and reporting any activities that may involve terrorist or money laundering activities.” The rule limits the scope of money laundering by the definitions in 18 U.S.C. §§ 1956 and 1957. We think the purposes of the Patriot Act would be best served if financial institutions were permitted to share the same information that they are required to report on a SAR. By limiting the information that can be shared to the definition of money laundering as defined in 18 U.S.C. § 1956 and 1957, the rule is prohibiting the discussion of other potential violations, such as securities fraud and bank fraud, which could be tied to a money laundering violation.

- ***Clarification of Safe Harbor***

We are concerned that the rule may negate the safe harbor against liability provided by Congress for the sharing of information. The rule states in section 103.110(d)(2) that the safe harbor should not apply when an institution fails to comply with the proposed rule. Thus, a technical, inadvertent, or immaterial violation could cause a financial institution to lose the protection of the safe harbor. Financial institutions may not take advantage of the information sharing if they are at risk of losing the safe harbor protection as a result of technical violations. Given that FinCEN can revoke or suspend a financial institution that fails to comply with the rule, we see no need for the paragraph that limits the extent of the safe harbor.

We request that Treasury confirm that Section 314(b) of the Patriot Act and the proposed and interim rules exempt financial institutions who share information

with federal government law enforcement agencies, or amongst themselves or from industry-sponsored or private databases aimed at compliance with the Patriot Act requirements, from all provisions of the FCRA. Section 314(c) provides that disclosure or sharing of information regarding parties engaged in or suspected of engaging in terrorist acts or money laundering activities by financial institutions and any association of financial institutions shall not constitute a violation of the provisions of title V of the Gramm-Leach-Bliley Act. While the FCRA and GLB are interrelated laws, we are unclear whether the GLB exemption in Section 314(c) was meant to also include the FCRA.

Without an exemption, the FCRA may impose certain obligations on financial institutions that inhibit the ability to effectively share information. For example, if an institution makes a credit or employment decision based upon the receipt of shared information that could be considered to be a “consumer report” from a “consumer reporting agency” under the FCRA – that may require an “adverse action letter” to be sent to the subject customer. As a result, the sending of such an adverse action letter could possibly cause the financial institution to have violated the rule’s non-disclosure provisions. Accordingly, we expect that the sharing of information pursuant to section 314(a) or (b) of the Patriot Act would be exempt from the provisions of the FCRA. We therefore request that the Treasury clarify the sharing and disclosure of information under the proposed and interim rules are exempt from the FCRA.

We also note that other sections of the Patriot Act, namely sections 312 and 326, also may implicate the FCRA since those sections may require a financial institution to share information about a person with a third party. We request that any regulations issued by the Treasury Department in the future clearly exempt financial institutions from liability and operation of GLB and the FCRA.

*

*

*

We appreciate the opportunity to comment on the proposed and interim rules. If you wish to receive additional information related to our comments, please feel free to contact us.

Sincerely,

Alan E. Sorcher
Vice President and
Associate General Counsel
Securities Industry Association
(202) 296-9410

cc: (Via Electronic Mail)

Catherine McGuire
U.S. Securities and Exchange Commission

Robert Love
U.S. Securities and Exchange Commission

Judith Starr
Financial Crimes Enforcement Network

William Langford
U.S. Department of the Treasury

April 3, 2002

page 13

Gary Sutton

U.S. Department of the Treasury