

"INFORMATION SHARING"
UNDER SECTIONS 314(a) AND (b)
OF THE USA PATRIOT ACT

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INTRODUCTION

One of the immediate Congressional responses to the 9-11 terrorist attack on the World Trade Center was the passage of the USA Patriot Act (the "Act").¹ The Act contained a number of provisions expressly designed to strengthen the hand of law enforcement in the investigation of terrorist activity, but the predominant feature of the Act was the Congressional effort to deter and detect terrorist financing and money laundering activity. Fully one-third of the Act consists of the anti-money laundering and anti-terrorist financing provisions contained in Title III.² Among the fifty-three sections of Title III is section 314, which was designed to forge stronger links between business and federal law enforcement in their on-going partnership to combat these twin evils. In section 314, suggestively titled "Cooperative Efforts to Deter Money Laundering," Congress authorized and directed the Secretary of the Treasury (the "Secretary") to take affirmative steps to develop cooperative efforts between and among "financial institutions,"

¹ "USA Patriot Act" is actually an acronym for the formal title of the Act, which is "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001," Pub. L. No. 107-56, 115 Stat. 272 through 402 (2001).

² Title III of the Act is separately entitled "International Money Laundering and Anti-Terrorist Financing Act of 2001," Pub. L. No. 107-56, 115 Stat. 296 through 342 (2001). Title III contains virtually all of the Patriot Act's anti-money laundering and anti-terrorist financing provisions.

regulatory authorities and federal law enforcement agencies for the purpose of deterring money laundering and terrorist financing.³

Section 314(a) of the Act directed the Secretary to adopt, within 120 days of the law's enactment, regulations designed to encourage regulatory authorities and law enforcement to share with financial institutions "information regarding individuals, entities, and organizations engaged in or reasonably suspected based on credible evidence of engaging in terrorist acts or money laundering activities." Regulations implementing section 314(a) were issued in March, 2002, and became effective as final rules in September, 2002.⁴

Section 314(a) should not be confused with its companion provision, section 314(b). Section 314(a) deals specifically with information sharing with federal law enforcement. Section 314(b), on the other hand, authorizes two or more financial institutions and any association of financial institutions, upon notice to the Secretary, to share information with one another "regarding individuals, entities, organizations, and countries suspected of possible terrorist or money laundering activities."

On September 26, 2002, regulations implementing both parts of section 314 of the Patriot Act went into effect. The regulations relating to Section 314(a) of the Act are found at Title 31, Code of Federal Regulations, Part 103.100. These regulations establish the procedures for what is

³ Pub. L. No. 107-56, § 314, 115 Stat. 272, 307 (2001). Section 314 of the Patriot Act was not included by Congress as a formal part of the Bank Secrecy Act, 31 U.S.C. 5311 *et seq.*, although it clearly constitutes an integral part of an effective Bank Secrecy Act anti-money laundering. See, e.g., Federal Financial Institutions Examination Council Bank Secrecy Act/Anti-Money Laundering Examination Manual (2006), p. 89, available on the net at http://www.ffiec.gov/pdf/bsa_aml_examination_manual2006.pdf. The full text of section 314 can also be viewed as part of the *Historical and Statutory Notes* following section 5311 of Title 31, United States Code Annotated (31 U.S.C.A. 5311).

⁴ The proposed rule was published in 67 F.R. 9879, March 4, 2002. Comments were solicited through April 3, 2002. The summary of comments was published in 67 F.R. 60579 – 60585, September 26, 2002. The Final Rule was published at 67 F.R. 60585 – 60587.

generally referred to as "information sharing" with federal law enforcement agencies, while the companion regulations issued for section 314(b) "information sharing" relate specifically to the exchange of information by and among financial institutions.⁵

It is the purpose of this article to provide an overview of both portions of section 314 and the respective regulatory schemes established for information, as well as to review the procedures and requirements relating to each.

SECTION 314(a): INFORMATION SHARING BETWEEN LAW ENFORCEMENT AND FINANCIAL INSTITUTIONS (31 CFR 103.100)

Generally, section 314(a) information sharing, as implemented by the Secretary, consists of federal law enforcement agencies asking financial institutions, through the Treasury Department's Financial Crimes Enforcement Network ("FinCEN"), to state whether particular individuals, entities or organizations: (i) maintain a current account with the institution; (ii) have maintained an account with the institution during the preceding twelve months; or (iii) have been involved in any transaction or transmittal of funds by or through the institution during the preceding six months. If a financial institution's check of its records indicates an affirmative response to any of these three questions, the institution must promptly reply to FinCEN with the name of the person, entity or organization identified, together with other information such as the account number, social security number, date of birth or other similar identifying information as appropriate.

⁵ Unlike section 314(a), Congress did not include a mandate for the issuance of regulations implementing section 314(b) information sharing among financial institutions. Nevertheless, the Secretary determined that section 314(b) rules were necessary and appropriate, and issued proposed and final rules for that section along with the section 314(a) rules. As will be made clear below, the regulatory schemes for the two sections are substantially different. The section 314(b) rules are located at 31 C.F.R. 103.110. See 67 F.R. 60584 – 60585, September 26, 2002.

One might justifiably conclude that this regulatory scheme creates something akin to a "one-way street" in terms of the flow of the information being "shared." Indeed, the scheme appears to fall rather short of the stated congressional intent for section 314(a), which is quite specific and is included as part of the of section 314(a) itself: to encourage regulatory and law enforcement authorities "to share with financial institutions information regarding individuals, entities and organizations engaged in or reasonably suspected ... of engaging in terrorist acts or money laundering activities."⁶ The regulations issued for the purpose of implementing section 314(a), however, are geared more towards financial institutions providing information to law enforcement, instead of the other way around, or instead of a mutual exchange of information.

The Secretary has acknowledged that the section 314(a) regulatory scheme has been criticized as creating a "one-way" flow of information in the sense that the information "shared" is provided by financial institution to law enforcement. Acknowledgement does not amount to agreement, however, and both the Secretary and federal law enforcement agencies dispute the criticism. Their response in opposition is that the regulations provide a means by which federal law enforcement agencies can and do provide financial institutions with the names of specific persons and groups who, by the very nature of the section 314(a) request itself, are suspects of money laundering or terrorist activity based on "credible evidence." In fact, absent a representation to this effect by a law enforcement agency to FinCEN, a section 314(a) request will not be made to financial institutions in the first place. The very fact that a person or entity is named in a section 314(a) request, then, provides (or "shares") a certain degree of information with financial institutions that would otherwise not normally occur or be made available at all until arrest and indictment.

⁶ Section 314(a)(1).

As will be discussed below, while there are limits to the uses for which a financial institution may use the fact that a particular person, entity or organization has been identified in a section 314(a) "information sharing" request (and is, therefore, a suspect of money laundering or terrorist activity), financial institutions are permitted to use that fact in determining whether to open, close or maintain any particular account or engage in a particular transaction. To this extent, at least, information is, in fact, being "shared" with financial institutions by federal law enforcement. On the other hand, FinCEN itself recognizes that the fact that a person or entity has been named in a section 314(a) request should not, in itself, be *dispositive* for a financial institution, because the named suspects are, after all, merely *suspects*, and they may be cleared, the investigation may be closed, or they may be acquitted of any subsequent criminal charges.

Regardless of whether the regulatory scheme contained in 31 C.F.R. 103.100 fully meets the expressed intent of Congress will continue to be a matter of debate. What is "beyond dispute," however, is FinCEN's opinion that the section 314(a) regulations are a "critical tool" in the fight against money laundering and terrorism, that the scheme is considered a great success, and that it is here to stay.⁷

Application of Section 314(a) Information Sharing: The regulations issued in 31 CFR 103.100 apply to all "financial institutions" as defined by the Bank Secrecy Act.⁸ Thus, FinCEN

⁷ See 67 F.R. 60579, at 60580, September 26, 2002; see also FinCEN's 314(a) Fact Sheet, February 13, 2007 concerning "Feedback from Law Enforcement."

⁸ 18 U.S.C. 5312(a)(2). "Financial Institutions" in that section include: (a) an insured bank (as defined in section 3(h) of the Federal Deposit Insurance Act (12 U.S.C. 1813(h))); (b) a commercial bank or trust company; (c) a private banker; (d) an agency or branch of a foreign bank in the United States; (e) any credit union; (f) a thrift institution; (g) a broker or dealer registered with the SEC under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*) (h) a broker or dealer in securities or commodities; (i) an investment banker or investment company; (j) a currency exchange; (k) an issuer, redeemer, or cashier of traveler's checks, checks, money orders, or similar instruments; (l) an operator of a credit card system; (m) an insurance company; (n) a dealer in precious metals, stones, or jewels; (o) a pawnbroker; (p) a loan or finance company; (q) a travel agency; (r) a money transmitter; (s) a telegraph company; (t) a business

has the authority to request information from an extraordinarily wide array of businesses, even though many "financial institutions" as defined by the Bank Secrecy Act have not been the subject of any Bank Secrecy Act regulations.

Although FinCEN *may*, in theory, contact such a broad range of businesses, in practice the actual implementation of section 314(a) requests involves only those financial institutions that FinCEN has contact information for. Generally, these are businesses that are already subject to Bank Secrecy Act reporting requirements, such as suspicious activity reporting.⁹ Moreover, regardless of the sweeping scope of the term "financial institution," the regulations are, as a practical matter, further limited by the applicable definition of the terms "account" and "transaction." An "account" is defined as a formal banking or business relationship established to provide regular services, dealings or financial transactions, such as a demand deposit, savings deposit or other asset account, or a credit account or other extension of credit.¹⁰ Similarly, a "transaction" refers to activity most commonly associated with banks, credit unions, and securities and commodity broker dealers.¹¹ Since an information sharing request from law enforcement requires a financial institution to search its records to determine whether it

engaged in the sale of automobiles, airplanes, and boats; (u) persons involved in real estate closings and settlements; (v) the U.S. Postal Service; (w) an agency of the U.S. government or of a state or local government carrying out a power or duty of a business described in section 5312; (x) a casino, a gambling casino, or gaming establishment with an annual gaming revenue of more than \$1 million annually; (y) any business engaging in an activity the Secretary determines by regulation to be similar to, related to, or a substitute for any business described in section 5312; and (z) any other business designated by the Secretary whose cash transactions have a high degree of usefulness in criminal, tax, or regulatory matters.

⁹ 67 F.R. 60579, 60582-83, September 26, 2002.

¹⁰ The definitions of "account" and "transaction" are contained in 31 C.F.R. 103.90, and apply to section 314(a) information sharing through the provisions of 31 C.F.R. 103.100(a)(1).

¹¹ A "transaction" includes such activity as an exchange of currency, a loan, the purchase of a security, options or sales on commodities, the purchase or redemption of money orders, funds transfers, purchase of casino chips or tokens, or any payment by, through or to a financial institution. See 31 C.F.R. 103.90, adopting the definition of "transaction" found in 31 C.F.R. 103.11(ii), and made applicable to section 314(a) information sharing through 31 C.F.R. 103.100(a)(1).

maintains or has maintained any "account" for, or engaged in any "transactions" with, an individual, entity or organization named in a law enforcement request for information, section 314(a) requests are essentially directed to those businesses providing the services contained in these definitions, most notably banks, credit unions, and securities and commodities broker dealers, money services businesses and casinos.¹²

Requests by Law Enforcement: Section 314(a) information sharing is limited to *federal* law enforcement agencies.¹³ Further, the request itself may be made to financial institutions only by FinCEN. Neither section 314(a) of the Act nor the implementing regulations in 31 C.F.R. 103.100 authorize a federal law enforcement agency to directly request information concerning a person, entity or organization from a financial institution. A section 314(a) request is designed to provide investigative lead information only. It is *not* a substitute for a subpoena or other legal process. If a federal law enforcement agency wants to obtain documents from a financial institution, it must follow the procedures applicable to the legal process it selects for obtaining documents.

A federal law enforcement agency conducting a money laundering or terrorist investigation may ask FinCEN to request, on behalf of the law enforcement agency, certain information from a financial institution or a group of financial institutions. These requests, then, are initiated by federal law enforcement, but an actual section 314(a) request to a financial institution is generated by FinCEN. Information reported by financial institutions is then reported by FinCEN to the requesting law enforcement agency. In effect, FinCEN acts as a clearing house for

¹² FinCEN has reported, however, that section 314 has enabled federal law enforcement agencies, through FinCEN, to reach out to over 45,000 points of contact at more than 27,000 financial institutions. See FinCEN's 314(a) Fact Sheet, February 13, 2007.

¹³ 31 C.F.R. 103.100(b)(1)

information: all section 314(a) information sharing consists of a request for information *from* FinCEN to institutions, and a response *by* the financial institutions directly to FinCEN.

The information that a law enforcement agency may seek, and that will be requested by FinCEN on its behalf, is limited in scope to investigations of terrorist activity or money laundering.¹⁴ The requesting federal law enforcement agency must provide FinCEN with a written certification stating that there is credible evidence, or a reasonable suspicion based on credible evidence, that each individual, entity or organization about which information is sought is engaged in terrorist activity or money laundering. "Terrorist activity" is defined as "an act of domestic terrorism or international terrorism as those terms are defined in 18 U.S.C. 2331."¹⁵ "Money laundering" is defined as "activity criminalized by the Money Laundering Control Act, 18 U.S.C. 1956 or 1057."¹⁶ Anyone familiar with the Money Laundering Control Act will recognize that it includes virtually every type of financial crime. Because "money laundering" can encompass such a wide range of underlying criminal activity, FinCEN has imposed additional requirements upon federal law enforcement agencies seeking to make a section 314(a) request.¹⁷ In order to ensure that a section 314(a) request is being used only for appropriate cases, the law enforcement agency must first determine that its investigation is significant before submitting its request to FinCEN. To ensure that this standard is met, FinCEN requires the agency to submit documentation demonstrating the size or impact of the case, the seriousness of the underlying criminal activity, the importance of the case to a major agency program, and any other facts that demonstrate the importance of the case. In addition, for cases involving money laundering, the

¹⁴ 31 C.F.R. 103.100(b)(1)

¹⁵ 31 C.F.R. 103.90(b).

¹⁶ 31 C.F.R. 103.90(a).

¹⁷ FinCEN's 314(a) Fact Sheet, February 13, 2007.

law enforcement agency must certify to FinCEN that all traditional means of investigation have been exhausted or are unavailable. Support for this claim must be provided in the request form provided to FinCEN.

In any event, however, a financial institution need not and should not be concerned with the basis for a law enforcement request to FinCEN. FinCEN determines whether the necessary showing has been made, and if appropriate, FinCEN will approve the request and then forward it to financial institutions.

In addition to the certification to FinCEN, the federal law enforcement agency must provide specific identifiers (such as a date of birth, address and social security number) which would permit a financial institution to differentiate among common or similar names. The requesting agency must also identify one person at the agency who can be contacted with any questions related to the request. Upon receiving a completed written application from a federal law enforcement agency, FinCEN may require a financial institution to search its records to determine whether it maintains or has maintained accounts for, or has engaged in transactions with, any specified individual, entity, or organization.¹⁸

Since March 2005, FinCEN has issued section 314(a) requests by posting them through the Section 314(a) Secure Information Sharing System. Every two weeks, or more frequently if an emergency request is transmitted, the financial institution's designated point(s) of contact will receive notification from FinCEN that there are new postings to FinCEN's secure web site. The point of contact will be able to access the current section 314(a) subject list and download the

¹⁸ The request may include more than one suspect individual, entity or organization. Requests containing multiple names are referred to as a "314(a) list."

files in various formats for searching. Financial institutions may also choose to receive the section 314(a) requests by facsimile.

Duties Upon Receipt of 314(a) Information Requests: In contrast to section 314(b) information sharing among financial institutions, section 314(a) information sharing is mandatory.¹⁹ The requirements imposed on a financial institution that receives a 314(a) information sharing request from FinCEN are contained in 31 C.F.R. 103.100(b)(2). In addition, FinCEN has issued General Instructions and Frequently Asked Questions (FAQs) for financial institutions relating to section 314(a) requests that provide substantial assistance and clarification.²⁰

Financial institutions that receive a request from FinCEN are required to immediately check their records and to promptly respond if the result of the records check is affirmative.²¹ The financial institution must designate at least one person to be the "point of contact" at the institution regarding all section 314(a) requests. When requested by FinCEN, the point-of-contact's name, title, mailing address, e mail address, telephone number and fax number must be provided. Any

¹⁹ Enforcement authority for section 314(a) (and the Bank Secrecy Act, or "BSA") is delegated to FinCEN. See Treasury Department Order No. 108-01, September 26, 2002, and 31 C.F.R. 103.56. Federal regulators as well as Self-Regulatory Organizations also have independent authority to enforce the Bank Secrecy Act, and they may refer violations to FinCEN. In addition, federal regulators have agreed to promptly notify FinCEN of BSA violations. Examples of some section 314(a) enforcement actions can be seen the GAO's May 2005 Report to Congress entitled *USA Patriot Act – Additional Guidance Could Improve Implementation of Regulations Related to Customer Identification and Information Sharing Procedures*, GAO-05-412 at 52-56.

²⁰ Neither the General Instructions nor the FAQs are available on the internet, but both are available to financial institutions on the 314(a) Secure Information Sharing System, or by contacting FinCEN at 800-949-2732.

²¹ The regulations provide that a financial institution must respond "in the manner and in the time frame specified in FinCEN's request." 31 C.F.R. 103.100(b)(2)(ii). The FinCEN FAQs, however, state that "financial institutions must complete their search on all subjects listed in the 314(a) request and respond with any matches no later than fourteen (14) calendar days after receiving a 314(a) request."

changes to the point-of-contact information must be promptly reported to FinCEN.²² A financial institution may have more than one point-of-contact, and additional contact persons may be added by contacting the financial institution's primary regulator.

Financial institutions are expected to begin searching their records immediately upon receiving a section 314(a) request. If the request is received during non-business hours, the search is expected to be initiated on the next business day. Unless the request provides differently, each receiving financial institution must search its records to determine whether it maintains any *current* account for each named suspect, or any account maintained for a named suspect *during the twelve months preceding the request*. As noted above, an "account" is defined in 31 C.F.R. 103.90(c) and means a formal banking or business relationship established to provide regular services, dealings or financial transactions, such as a demand deposit, savings deposit or other asset account, or a credit account or other extension of credit.

In addition, each receiving financial institution must also search its records for any transaction conducted *by or on behalf of* a named suspect, and any transmittal of funds in which a named suspect was either the transmitter or the recipient, *within the six months preceding the request*. A "transaction" is defined in 31 C.F.R. 103.11(ii), and includes a broad array of activity. For purposes of a section 314(a) request, however, it essentially includes any non-account related activity, such as a wire transfer, a loan or extension of credit, the purchase or sale of any stock, bond or certificate of deposit, commodities or futures transactions, the purchase or redemption of

²² 31 C.F.R. 103.100(b)(2)(iii).

a money order or cashier's check, "or any other payment, transfer or delivery by, through, or to a financial institution, by whatever means effected."²³

As can be seen, the parameters for searching for an "account" or a "transaction" can, under the regulations, be extremely broad. Recognizing this, and in an effort to minimize the burden associated with responding to a section 314(a) request, FinCEN has intentionally narrowed the records that must be searched. Thus, unless otherwise instructed by an information request, financial institutions must search the records specified in the FinCEN FAQs. The records required to be searched are:

- (1) deposit account records to determine whether a named subject is or was (within the preceding twelve months) an account holder;
- (2) funds transfer records maintained pursuant to 31 C.F.R. 103.33 to determine whether a suspect was an originator/transmitter or beneficiary/recipient of a funds transfer;
- (3) records of the sale of monetary instruments (*e.g.*, cashier's checks, money orders, or traveler's checks) kept pursuant to 31 C.F.R. 103.29 to determine if a named suspect purchased a monetary instrument;
- (4) loan records to determine whether a named suspect was a borrower;
- (5) trust department account records to determine whether a named suspect matches the name in which an account is titled;
- (6) records of accounts to purchase, sell, lease, hold, or maintain custody of securities to determine whether a named suspect is or was an account holder;
- (7) commodity futures, options, or other derivatives account records to determine whether a named suspect is or was an account holder; and
- (8) safe deposit box records to determine whether a named suspect maintains or has maintained, or has had authorized access to, a safe deposit box (but only if such safe deposit box records are searchable electronically).

²³ The definition of the term "transaction" has been specifically limited to *not* include any transaction conducted through an account. Thus, a financial institution receiving a section 314(a) request is not required to search for and report on transactions through an account. See 31 C.F.R. 103.90(c)(2); see also 67 F.R. 60582, September 26, 2002.

Financial institutions are required to search *all* of these records, regardless of whether they are maintained electronically.²⁴ However, it may not be necessary to search all records in every case. If a financial institution finds a match with a named suspect, the FinCEN FAQs state that the institution should *stop* its search on that suspect and report the positive match. Thus, the search should continue through the institution's records up to the point that a match is found.

If a matched record falls *outside* the timeframe, or relates to an account or transaction in an area of the institution that was not required to be searched, or relates to a record that was not required to be kept under federal law or regulation, it should still be reported to FinCEN.²⁵ However, unless the section 314(a) request provides otherwise, the request does *not* require a financial institution to report on *future* account opening activity or transactions. In the event that a financial institution may be required to report on future activity, the terms of the section 314(a) request will clearly say so.²⁶

Finally, unlike the OFAC List, section 314(a) lists are not permanent "watch lists." Section 314(a) information sharing is completely separate from the OFAC regulations. Financial institutions are not required to close or block any account, or reject any transaction, because a customer name appears in a section 314(a) request. On the other hand, any report or action taken in response to a section 314(a) request does not relieve a financial institution of its OFAC obligations. If a suspect name does appear on the OFAC List, the financial institution must

²⁴ The FinCEN FAQs state, however, that any record described above that is *not* kept in electronic form need only be searched if that record is required to be kept under federal law or regulation. In addition, a financial institution need *not* search (1) checks processed through an account to determine if a named suspect was a payee of a check; (2) monetary instruments issued by the financial institution to determine if a named suspect was a payee of such an instrument; (3) signature cards to determine if a named suspect is a signatory to an account (unless this is the only way to determine if a named suspect is or was an account holder); and (4) reports filed with FinCEN, such as CTRs and SARs.

²⁵ See FinCEN FAQs.

²⁶ 31 C.F.R. 103.100 (b)(2)(v); *see also* 67 F.R. 60581, September 26, 2002..

comply with all OFAC responsibilities. Actions taken pursuant to information provided in a section 314(a) request from FinCEN do not affect a financial institution's obligations to comply with all of the rules and regulations of OFAC, nor do they affect a financial institution's obligations to respond to any legal process.

Response To 314(a) Information Requests: Financial institutions must search their records and report any positive matches to FinCEN within the prescribed time.²⁷ Financial institutions should report all positive matches via the Secure Information Sharing System. For those financial institutions receiving the request by fax, positive matches should be indicated on the Subject Information Form and faxed to FinCEN.²⁸

After completing the search on all suspects named in the 314(a) request, the financial institution must report any positive match to FinCEN. If, however, the search does *not* uncover any matching account or transaction, then the financial institution should *not* reply to the request. If information relating to an account or transaction matches only one portion of a suspect name, such as last name only, and none of the additional information about the suspect corresponds to the account or transaction, then the institution need not report this as a positive match.

As noted above, if a financial institution finds a match with a named suspect, the FinCEN FAQs state that the institution should stop its search on that suspect and report the positive match. However, before reporting to FinCEN, financial institutions using the Secure Information Sharing System should complete the search for *all* suspects named in the request, because the system will not allow the institution to go back and make changes or additions to its report.

²⁷ See fn. 21, above.

²⁸ Positive matches can be faxed to FinCEN at 703-905-3660. The financial institution should include each point-of-contact's name, mailing address and telephone number, and the FinCEN tracking number (found on the upper right hand corner of the Subject Information Form).

A positive report must include: (i) the name of the individual, entity or organization matched; (ii) the number of each account or, in the case of a transaction, the date and type of the transaction; and (iii) any social security or taxpayer identification number, passport number, date of birth, address or other similar identifying information provided by the named suspect. The financial institution should also provide specific information concerning who in the financial institution should be contacted for any follow-up action on the part of the agency. Financial institutions reporting a match should *not* provide any other details to FinCEN other than the fact that the financial institution has a match, together with the required information.²⁹ Similarly, a reporting financial institution should *not* send any record of an account or a transaction when reporting a match with a named suspect.

After Submitting a Positive Report: It is important to note again that a section 314(a) request is designed to provide investigative lead information only. Its purpose is to provide law enforcement with a means to quickly locate transactions and accounts involving suspected money launderers or terrorists. But a section 314(a) request is not a substitute for a subpoena or other legal process. Thus a financial institution is only required to search its records, not to produce them. This does not mean, however, that a financial institution may not communicate directly with the federal law enforcement agency making the request through FinCEN. As noted, the agency is required to provide a contact point, which is included in the section 314(a) request. Financial institutions that have questions relating to the scope or the terms of the request or the identity of the persons or entities in the request may and should contact the law enforcement

²⁹ 31 C.F.R. 103.100(b0(2))(ii).

agency directly, through the agency's contact point included in the request.³⁰ However, any matches must be reported back to FinCEN, and *not* directly to the agency, so that FinCEN can provide the agency with a comprehensive search result.

A financial institution submitting a positive match report to FinCEN can expect to receive a grand jury subpoena for documents relating to the suspect named in the 314(a) request or, in some cases, an Administrative Summons or a National Security letter, which is a request from an authorized government agency that may be issued on matters relating to international terrorist activity.³¹ If an Administrative Summons is issued, then the subject customer must be afforded notice and the opportunity to challenge the Summons, and the institution must obtain a certification of compliance with the Right to Financial Privacy Act from the issuing law enforcement agency before disclosing the customer's records.³²

Confidentiality of Section 314(a) Requests and Responses: Except to the extent necessary to comply with a section 314(a) request, a financial institution *may not disclose to any person* (other than to FinCEN, the institution's primary banking regulator, or the federal law enforcement agency on whose behalf FinCEN is requesting information) the fact that FinCEN has requested or obtained information. This means the institution should have appropriate

³⁰ If an institution does contact the law enforcement agency directly, care must be taken to avoid violating the Right to Financial Privacy Act, 12 U.S.C. 3401 *et seq.* While questions may be asked to clarify the request, customer information may not be disclosed by the institution.

³¹ In regard to an Administrative Summons, see 12 U.S.C. 3405. In regard to a National Security Letter, see section 505 of the USA Patriot Act, Pub. L. No. 107-56, § 505, 115 Stat. 272, 365, codified at 12 U.S.C. § 3414(a)(5)(A).

³² 12 U.S.C. 3401 *et seq.*

policies and procedures in place to ensure the confidentiality of section 314(a) requests both internally as well as externally.³³

Section 314(a) requests may (but are not required to) be shared with a *domestic* parent holding company. Similarly, a financial institution may provide section 314(a) requests to domestic subsidiaries and affiliates, and are encouraged to do so if those entities offer accounts or services that are within the section 314(a) search parameters. However, a request should *not* be shared with affiliates, or subsidiaries of bank holding companies if the affiliates or subsidiaries are not financial institutions as described in 31 U.S.C. 5312(a)(2).³⁴ If searches are forwarded and result in a positive match by the domestic subsidiary or affiliates, however, the report to FinCEN should be made by the institution that originally received the request. In every case in which a section 314(a) request is shared with a domestic affiliate, the domestic affiliate must maintain the confidentiality of the section 314(a) request.

Section 314(a) requests may not be shared with or sent to any *foreign* office, branch, or affiliate unless the request specifically requests a review of foreign branches. Similarly, a foreign branch office should not send a section 314(a) request to its foreign home office unless the 314(a) request specifically requests otherwise. Where a request authorizes a financial institution to forward the request to foreign branches or a foreign home office, it is expected by FinCEN that the foreign branch or home office will maintain the confidentiality of the request.

³³ The FFIEC "Bank Secrecy Act / Money Laundering Examination Manual" (2006), pp.86—88 (see fn. 3 above), includes the subjects which bank and credit union examiners should review. These include procedures to ensure the prompt and accurate response to section 314(a) requests, as well as the confidentiality requirements and the limitations on the use of section 314(a) requests.

³⁴ 31 C.F.R. 103.100(b)(2)(iv)((B)(1). However, a financial institution may share information concerning an individual, entity or organization named in a request with other financial institutions under the section 314(b) information sharing. See 31 C.F.R. 103.100(b)(2)(iv)((B)(2). Even so, the financial institution still may *not* disclose to other financial institutions that FinCEN issued a section 314(a) request concerning an individual, entity or organization.

A financial institution *may* provide a section 314(a) request to a third-party service provider or vendor to perform or assist the financial institution in complying with the request, as long as the institution takes the necessary steps, through the use of an agreement or procedures, to ensure that the third party safeguards the information and maintains its confidentiality.

Each financial institution must maintain adequate procedures to protect the security and confidentiality of section 314(a) requests. The procedures to ensure confidentiality will be considered adequate if the financial institution applies procedures similar to those it has established to comply with section 501 of the Gramm-Leach-Bliley Act (15 U.S.C. 6801) for the protection of its customers' nonpublic personal information. Financial institutions may keep a log of all section 314(a) requests received and of any positive matches identified and reported to FinCEN, but these, if kept, should be subject to strict confidentiality procedures..

Restrictions on the Use of Section 314(a) Requests: A financial institution's use of the information provided in a section 314(a) request is restricted by the regulations. A financial institution may only use the information for three purposes: (i) to report the required information to FinCEN; (ii) to determine whether to establish or maintain an account or engage in a transaction; or (iii) to assist in Bank Secrecy Act statutory and regulatory compliance.³⁵

While the section 314(a) list may be *used* to determine whether to establish or maintain an account, however, FinCEN discourages financial institutions from using it as the *sole* factor in reaching a decision to do so unless the request specifically states otherwise.³⁶ The suspects

³⁵ 31 C.F.R. 103.110(b)(2)(iv)(A).

³⁶ See, e.g., FFIEC "Bank Secrecy Act / Anti-Money Laundering Examination Manual" (2006), p. 87. A decision to close an account, or a refusal to open an account, or a refusal to conduct a transaction with an individual, entity or organization named in a section 314(a) that request is not considered to be a disclosure under the regulations. If such decisions are made, of course, the fact of the request may not be disclosed to the customer.

included in a request are not necessarily convicted or indicted persons. Instead, the fact that they have been named in a request means that, at the time, they are only "reasonably suspected" based on credible evidence of engaging in terrorist acts or money laundering. Moreover, section 314(a) lists generally are one-time inquiries and do not require financial institutions to report on future account opening activity or transactions. The lists are not updated or corrected to reflect whether an investigation has been dropped, a prosecution has been declined, or a suspect has been exonerated.³⁷

The fact that persons or entities listed in a 314(a) request are, by definition, "reasonably suspected" by a law enforcement agency of being engaged in terrorist acts or money laundering raises the obvious question of whether a request should trigger the filing of a Suspicious Activity Report (SAR) by institutions making affirmative responses to FinCEN. In regard to reporting "suspicious activity," FinCEN advises that mere inclusion on a section 314(a) list should *not* be the *sole* factor used to determine whether to file a Suspicious Activity Report (SAR).³⁸ The filing of SARs should be in accordance with the SAR rules issued by FinCEN and the primary federal regulators, and financial institutions should follow their existing procedures for determining when and if a SAR should be filed according to those criteria.

It is thus up to each financial institution to decide what action to take if the institution does maintain an account for a subject of a section 314(a) request, or is asked to engage in a transaction by such a subject.³⁹ If a financial institution does have a section 314(a) account, or is

³⁷ *Id.*

³⁸ FinCEN FAQs; see, e.g., FFIEC "Bank Secrecy Act / Anti-Money Laundering Examination Manual" (2006), p. 87.

³⁹ 31 C.F.R. 103.100(b)(2)(v) provides that the regulations shall not be interpreted to require a financial institution to take or decline to take any action with respect to an account or transaction connected with the subject of a 314(a) request.

asked to engage in a transaction with the subject of a 314(a) request, the institution would be well advised to conduct a close review that account and its activity, or that transaction, based on the request, and then to make a decision *in light of* but not solely *because of* the section 314(a) request about whether to keep or close the account, engage in the proposed transaction, or file a SAR.

Record Keeping: The FFIEC "Bank Secrecy Act / Money Laundering Examination Manual" (2006) (*see* fn. 3, above) provides that, as part of a Bank Secrecy Act regulatory examination and audit, financial institutions are expected to demonstrate compliance with section 314(a). The Manual states that documentation that all required searches were performed is "essential," and recommends that:

"[t]his may be accomplished by maintaining copies of the cover page of the request with a financial institution sign-off that the records were checked, the date of the search, and search results (e.g., positive or negative). For positive matches, copies of the form returned to FinCEN and the supporting documentation should be retained. For those institutions utilizing the web-based 314(a) Secure Information Sharing System, a Subject Response List can be printed for documentation purposes. The Subject Response List displays the total number of positive responses submitted to FinCEN for that transmission, the transmission date, the submitted date, and the tracking number and subject name that had the positive hit. If the financial institution elects to maintain copies of the section 314(a) requests, it should not be criticized for doing so, as long as it appropriately secures them and protects their confidentiality. Audits should include an evaluation of compliance with these guidelines within their scope."

In addition, FinCEN itself recommends that, in order to verify compliance, financial institutions maintain: (i) a record of the date of each request, the request tracking numbers, and the date the request was searched; and (ii) for positive matches, the date that the report was made to FinCEN.⁴⁰

⁴⁰ FinCEN FAQs.

Accordingly, while not expressly required by the statute or regulations, maintaining records of a section 314(a) request is not required, it is clearly expected, regardless of whether a financial institution is subject to examination by regulators following the FFIEC Manual. Thus, each financial institution should maintain records relating to its compliance with section 314(a) requests regardless of the lack of any express mandate to do so. Many financial institutions maintain copies of section 314(a) requests by downloading them from the secure website as proof that they were received and that the required search was conducted. Whatever means is used to keep records of section 314(a) compliance, it is important to recognize that in every case the regulations do require that each financial institution take the appropriate steps to ensure the confidentiality of all section 314(a) information. This clearly includes records kept to demonstrate compliance.

Neither the FFIEC Manual nor the regulations specify how long section 314(a) records should be maintained. FinCEN, however, recommends that section 314(a) records should be maintained for five years, as with most other Bank Secrecy Act records.⁴¹

SECTION 314(b): VOLUNTARY INFORMATION SHARING BETWEEN FINANCIAL INSTITUTIONS (31 CFR 103.110)

Section 314(a) information sharing with federal law enforcement is mandatory for financial institutions that maintain "accounts" or engage in transactions as defined by the regulations. In contrast to section 314(a), section 314(b) information sharing is entirely voluntary. Nevertheless, it is strongly encouraged by FinCEN. Indeed, the very purpose of section 314(b) is to encourage the sharing of information among financial institutions in order to identify and report suspected money laundering or terrorist activity, as is demonstrated by the fact that

⁴¹ *Id.*

Congress provided in section 314(b) a "safe harbor" for participating institutions to remove the risk of potential civil liability to customers for privacy violations or for sharing false information.

Section 314(b) provides that, upon notice to the Secretary of the Treasury, two or more financial institutions and any association of financial institutions may share information with one another regarding individuals, entities, organizations, or countries for the purposes of identifying and reporting activities that a financial institution suspects may involve possible terrorist activity or money laundering.⁴² Since section 314(b) specifically involves the transmission, receipt and exchange of information among financial institutions, it is, in fact, the actual "sharing" of information and is not the type of "one way street" exchange for which section 314(a) has been criticized.

It is important to note that the type of information shared among financial institutions under section 314(b) is limited. The information shared may relate *only* to possible money laundering or terrorist activity, and nothing else. Thus, section 314(b) may not be used by financial institutions to exchange information about other suspected criminal activity, or for general business purposes such as credit or lending decisions, locating defaulting borrowers or their assets, and so on. The only information that may be exchanged is information relating to identifying and reporting money laundering or terrorist activity.

Application: Unlike section 314(a) information sharing, the regulations issued in 31 CFR 103.110 which implement section 314(b) of the Act do *not* apply to all "financial institutions" listed in the Bank Secrecy Act, 31 U.S.C. 5312(12)(a)(2). Instead, the implementing regulations

⁴² An "association of financial institutions" is defined as a group or organization whose membership is comprised entirely of "financial institutions" as "financial institutions" are defined in 31 C.F.R. 103.110(a)(2). See "Application," *infra*.

limit voluntary information sharing to those Bank Secrecy Act "financial institutions" that are required under the Bank Secrecy Act regulations to establish and maintain an anti-money laundering program. This includes all banks regulated by a federal regulatory agency, businesses regulated by the SEC, credit unions regulated by the National Credit Union Administration, mutual funds, money services businesses, operators of credit card systems, dealers in precious metals, precious stones or jewels, and certain life insurance companies.⁴³

Procedure For Participating in Information Sharing: The "safe harbor" provision only applies to financial institutions that properly comply with the regulatory scheme established in 31 C.F.R. 103.110. The regulatory requirements for participation are simple, but because the "safe harbor" protection (which will be discussed below) is at stake it is extremely important to scrupulously adhere to them. Improper information sharing can deprive a sharing financial institution of the "safe harbor" provision of the statute and expose it to possible civil lawsuits brought by persons, entities or organizations for privacy violations or for disseminating false information. Thus, if a financial institution chooses to voluntarily participate in section 314(b), appropriate policies, procedures, and processes must be implemented and enforced in order to preserve the safe harbor protection. Otherwise, a financial institution shares information under section 314(b) at its peril.

Initially, a financial institution must first determine that it is eligible to participate in the voluntary information sharing process according to the regulatory criteria described above. The

⁴³ See variously: 31 C.F.R. 103.120; 103.125; 103.130; 103.135; 103.137; 103.140. Only insurance companies that are engaged within the United States as a business in the issuing of a permanent life insurance policy (other than group policies), annuity contracts (other than group contracts) and "any other insurance product with features of cash value or investment" are required to implement anti-money laundering programs. See 31 C.F.R. 103.137. Money services businesses include currency dealers and exchangers; check cashers; issuers, sellers or redeemers of traveler's checks, money orders or stored value; and money transmitters. See 31 C.F.R. 103.11(uu).

next step is for the financial institution to provide FinCEN with formal notice of its intent to participate in information sharing with other eligible financial institutions. Prior written notice to FinCEN is required. FinCEN requires the submission of a written, one-page notice in a form approved by FinCEN (which can be found at 31 C.F.R. 103.110, Appendix A, or can be accessed on line at http://www.fincen.gov/fi_infoappb.html). In the Notice, the financial institution or association must provide the name, address, and federal employer identification number of the institution or, if an association, each member. In addition, the financial institution or association must certify to FinCEN that it is a "financial institution" or association as defined in 31 C.F.R. 103.110(a)(2) and (a)(3), respectively, and it has established and will maintain adequate procedures to maintain the confidentiality of information shared, and that the information received will not be used or disclosed for any purpose other than the purposes permitted in 31 C.F.R. 103.110(b)(4). Finally, a point-of-contact must be designated within the institution or association in connection with inquiries related to section 314(b) information sharing.

The notice is effective immediately, and authorizes participation in information sharing for one year from the date of the notice. The initial notice is not self-renewing. If an institution wishes to continue beyond the one year period, it must submit a new notice to FinCEN.

Verification Requirement: Financial institutions may only share information with other financial institutions that have themselves already filed the formal notice with FinCEN. Thus, before sharing information, a financial institution must take "reasonable steps" to determine that the institution or association with which information is shared has submitted the required notice to FinCEN. A list of participating institutions that have filed the required notice, including their related contact information, is periodically posted by FinCEN, and checking that list is deemed

by the regulations to satisfy the verification requirement.⁴⁴ Since section 314(b) information sharing is subject to regulatory examination, it is also advisable to retain a copy of the other institution's section 314(b) notice, or at least a written statement that the other institution has complied with the requirement.⁴⁵

Confidentiality of Shared Information: Each financial institution participating in section 314(b) information must maintain the security and confidentiality of the information shared. Thus, participating institutions must establish appropriate procedures to protect shared information, both internally and externally. The procedures for maintaining the secrecy of information will be considered adequate if the financial institution applies procedures similar to the ones it has established to comply with section 501 of the Gramm-Leach-Bliley Act (15 U.S.C. 6801) for the protection of its customers' non-public personal information.

Limitation on the Use of Shared Information: If a financial institution receives information from another participating financial institution, the receiving institution must limit the use to which the information is put. Information received through the section 314(b) process may be used only for three purposes: to identify and, where appropriate, report on money laundering and terrorist activities; to determine whether to establish or maintain an account or engage in a transaction; or to assist the institution in complying with the Bank Secrecy Act and the regulations issued under that Act.⁴⁶ The most readily apparent compliance issue involved here

⁴⁴ 31 C.F.R. 103.110(b)(3).

⁴⁵ See, e.g., Federal Financial Institutions Examination Council Bank Secrecy Act/Anti-Money Laundering Examination Manual (2006), p. 89.

⁴⁶ 31 CFR 103.110(b)(4).

will be the requirement to file a Suspicious Activity Report, or SAR.⁴⁷ In regard to SARS, information received about a customer or transaction at the institution may clearly be used for purposes of reporting the activity as suspicious. However, every institution must keep in mind that disclosure of SAR filing, or even the intention to file a SAR, is strictly confidential and may not be disclosed. Section 314(b) does *not* authorize a financial institution to share the fact that a SAR has been filed or is intended to be filed, nor does it permit the financial institution to disclose the existence or nonexistence of a SAR to other participating institutions. Thus, if a financial institution shares information under section 314(b) about a person, entity or organization that is the subject of a filed or intended SAR, the information shared should be limited to the underlying transaction and customer information, and should *not* include any reference to a SAR filing. In short, a financial institution may use information obtained under section 314(b) to determine whether to file a SAR, but the intention to prepare or file a SAR may not be shared with another financial institution.

Safe Harbor Provision: Section 314(b) of the Act provides financial institutions with specific protection from civil liability for sharing information regarding individuals, entities, organizations, or countries suspected of possible terrorist activity or money laundering. Specifically, section 314(b) provides that a financial institution that "transmits, receives, or shares ... information ... 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 thereof, or under any contract or other legally enforceable agreement (including any arbitration agreement)"

⁴⁷ Any action taken pursuant to information obtained through the voluntary information sharing process will not relieve a financial institution of its obligation to file a SAR in accordance with applicable regulations.

for disclosing information regarding possible terrorist activity or money laundering, or for failing to provide notice of the disclosure to the person who is identified in it.

There are two important limitations to this "safe harbor." First, the information shared must relate to individuals, entities, organizations or countries suspected of *possible terrorist activity or money laundering*. An institution sharing other information, even information concerning other types of suspected criminal activity, and certainly information shared for general business purposes, is not protected under the safe harbor. Second, the financial institution must act in full compliance with the section 314(b) implementing regulations in 31 C.F.R. 103.110. This means that, in order to secure safe harbor protection, each sharing financial institution or association of financial institutions must, *prior to* sharing information: first, properly notify FinCEN of its intent to engage in information sharing; second, verify to FinCEN that it has taken "reasonable steps" to ensure that the other financial institutions it intends to share information with have also properly notified FinCEN of their intention to participate in section 314(b) information sharing; third, verify with FinCEN and ensure that information received in the information sharing process will only be used for authorized purposes; and fourth, verify to FinCEN and ensure that adequate procedures for maintaining the confidentiality of information are in place.

There is a final, more subtle limitation on the safe harbor provision. Voluntary information sharing under section 314(b) is restricted to "financial institutions" eligible to participate under the regulations in 31 C.F.R. 103.110(a)(2). This does not include *foreign* financial institutions. As noted above, the implementing regulations limit voluntary information sharing to those Bank Secrecy Act "financial institutions" that are required under the Bank Secrecy Act regulations to establish and maintain an anti-money laundering program. *Foreign* financial institutions are not subject to the provisions of the Bank Secrecy Act or the regulations,

and therefore fall outside the definition of financial institutions eligible to share information. Thus, overseas information sharing is neither authorized under the regulations nor protected by the safe harbor.

A more difficult question is raised for an agency or branch of a foreign bank in the United States. These local agencies and branches are covered by the Bank Secrecy Act and they are required to maintain anti-money laundering programs. Accordingly, they may voluntarily participate in section 314(b) information sharing with other participating financial institutions. But whether an agency or branch of a foreign bank may share information that it has received from other participating institutions with its *foreign parent* or other *foreign branches or agencies* of the same bank is another question. Neither the foreign parent nor non-U. S. agencies or branches are eligible for voluntary information sharing because they are not required to maintain anti-money laundering programs. Moreover, the safe harbor provision only protects financial institutions that adhere to the regulatory requirements for information sharing, and the regulations permit information sharing only with other institutions that have filed their formal section 314(b) notice with FinCEN. By definition, financial institutions not located in the United States are not eligible to do this. Consequently, the safe harbor provision probably does not apply to sharing information received by its U.S. agency or branch of a foreign bank under section 314(b) with its foreign parent or foreign siblings.

CONCLUSION

In enacting section 314 of the USA Patriot Act, it was the clear intent of Congress to encourage information sharing on money laundering and terrorist activity among financial institutions, and

between financial institutions and law enforcement. Whether that goal has been achieved is still, however, an open question.

There is little doubt that section 314(a) information sharing with law enforcement has been received with enthusiasm by federal law enforcement, and that section 314(a) requests have become a popular and effective investigative lead for federal agencies. What follow-up action may result from section 314(a) information provided by financial institutions is, of course, up to the law enforcement agency involved, and is determined by them on a case-by-case basis. But it seems clear that the information "shared" by financial institutions under section 314(a) has been actively and effectively used by federal law enforcement. In February 2007 FinCEN reported that between November 1, 2002, and February 13, 2007, the 314(a) information sharing system processed 613 requests submitted by eighteen federal agencies.⁴⁸ Terrorist activity cases accounted for 214 requests, and money laundering activity accounted for 399 requests. FinCEN further reported that the investigations identified 5,210 "subjects of interest." Of these, financial institutions responded with 33,529 positive suspect matches. The requests have resulted in the issuance of 1,418 grand jury subpoenas, 436 Administrative Subpoenas or Summonses and 21 search warrants. The investigations using section 314(a) requests have ultimately resulted in 99 arrests, 112 indictments, 9 convictions and the "location" of over \$22,300,000 dollars.

Not surprisingly, FinCEN reports that "feedback from the law enforcement requesters has been overwhelmingly positive."⁴⁹ Whether the reaction of financial institutions bearing the burden of responding to section 314(a) requests in a timely and accurate manner is equally positive is less certain. One point is clear, however. Section 314(a) information sharing is considered a

⁴⁸ FinCEN's 314(a) Fact Sheet, February 13, 2007.

⁴⁹ *Id.*

valuable investigative tool by both FinCEN and federal enforcement agencies, and the process here to stay.

Whether section 314(b) information sharing has been met with the same enthusiasm and achieved the same degree of satisfaction is a much more difficult question. Although a number of financial institutions have gone through the FinCEN notice procedures, many have been reluctant to implement the process. Before section 314(b) was enacted, financial institutions were reluctant to share information because of the potential for violating privacy laws. Although the safe harbor provision substantially reduces that risk, it may still act as a deterrent, especially in light of the requirements and limitations placed on voluntary information sharing. In addition, safe harbor protection requires that adequate policies and procedures be put into place to ensure correct implementation. The added burden and cost of implementation and enforcement on participating financial institutions, together with the fact that participation is yet another area for regulatory examiners to look into, may be more of a deterrent than the availability of the information shared is an attraction, even with the promise of the safe harbor.

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