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January 23, 2003

Honorable Kenneth W. Dam
Acting Secretary
United States Treasury
1500 Pennsylvania Ave. NW
Washington, DC

Re: Patriot Act Task Force

Dear Mr. Acting Secretary:

The American Bankers Association appreciates this important opportunity to provide additional comments to the Treasury Department's Patriot Act Task Force. ABA and several of our members met with the Task Force staff in December and this letter is a follow-up to that meeting. The ABA brings together all categories of banking institutions to best represent the interests of this rapidly changing industry. Its membership – which includes community, regional and money center banks and holding companies, as well as savings associations, trust companies and savings banks – makes ABA the largest banking trade association in the country. For further information regarding the ABA, please consult the ABA on the Internet at <http://www.aba.com>.

Fifteen months after the enactment of the USA Patriot Act, the effect of these new laws and regulations on the scourge of terrorist financing are still being assessed. As you have testified, the Department's "regulatory and oversight responsibilities for the PATRIOT Act and Bank Secrecy Act will continue" after the regulations have been finalized. More importantly, you have told Congress that:

Time and experience will allow reasoned reflection on the decisions we have made, and it is incumbent upon Treasury to make adjustments to these rules when it is necessary to ensure that they continue to achieve our goals.

The ABA has also been involved in "reasoned reflection" on the plethora of obligations facing our industry since October 26, 2001. As with any omnibus piece of legislation, time and experiences produce evidence of the need for modifications to the law as well as recommendations of how to more efficiently implement

statutory mandates. Our Association offers the following as areas of improvement to USA Patriot Act oversight. ABA recommends:

- Creating an office for USA PATRIOT Act oversight;
- Immediate development of a staff commentary for Patriot Act and Bank Secrecy Act interpretation;
- Formal commitment from **all** functional regulators for uniform and consistent Patriot Act exam procedures;
- Coordination between the Treasury's Office of Foreign Assets Control (OFAC) and the financial institution regulators to provide better advice to the regulated community; and
- Improved guidance and communication on all SAR related issues.

Office of USA Patriot Act Oversight

One of the major aspects of the USA Patriot Act is the broad-based coverage of the law on the vast array of financial services providers. While members of the American Bankers Association have long experienced the challenges accompanying compliance obligations with the Bank Secrecy Act, the federal money laundering laws and now the USA Patriot Act, the non-bank entities now subjected to these obligations are experiencing the same confusion we have faced. To assist this diverse group, the Treasury Department should create a formal mechanism for responding to questions concerning interpretation of these obligations. ABA recommends an office within the Treasury to communicate guidance, interpretations and FAQs regarding all Patriot Act questions.

Representatives from all of the regulatory agencies could staff this office along with Treasury personnel. The key ingredient to success is a central location for industry questions to ensure consistency and assist in compliance. We would point out, Mr. Acting Secretary, the Financial Crimes Enforcement Network (FinCEN) created a "hotline" immediately after 9/11 for the public to use when reporting potential "terrorist financing", so we know that a process can be created.¹

Patriot Act and Bank Secrecy Act Staff Commentary

The American Bankers Association has long bemoaned the fact that the Treasury Department has never fulfilled the 1994 statutory mandate that it publish an annual staff commentary on the Bank Secrecy Act regulations (Section 5329). This indifference to congressional direction has contributed to industry confusion,

¹ According to FinCEN's website at the time, "This HOTLINE is intended to provide to law enforcement and other authorized recipients of SAR information the essence of the suspicious activity in an expedited fashion." If the government can work quickly to develop a system for when it wants information from the public, it should be able to address the need for industry assistance in the same prompt manner.

examination conflicts and inconsistent interpretation of Bank Secrecy Act obligations.

There is broad support on the need for a method of providing Patriot Act interpretations to the financial sector. As stated above, ABA believes that a centralized approach to industry questions are necessary and for BSA issues, long overdue. The recent attempts by FinCEN to publish guidance on BSA issues, while laudable, has lacked agency input and is not communicated effectively.² Given the Treasury's stated commitment to remaining engaged in Patriot Act oversight, we urge that now is the time to announce a formal annual staff commentary.

Uniform and Consistent Patriot Act/BSA/AML Examination Procedures

As we approach the release of final rules for the remainder of the Patriot Act regulations it is imperative that all affected industries be treated equitably. To accomplish this important goal, there needs to be agreement on how the financial services industry will be examined for compliance under these rules. Too often, institutions of the same approximate size, in the same geographic area and offering the same financial products are treated differently for compliance purposes. This should not continue.

ABA appreciates the fact that the OCC and the FRB have announced a joint effort to conform their new examination procedures but we strongly believe that all functional regulators need to be part of this project. We urge the Treasury Department to call for the regulatory agencies to report on their efforts in this area and ensure that this process is truly a joint endeavor.

OFAC and the Regulated Community

There has been a long-standing debate in the financial community on how to handle the myriad of transactions received every day and not violate the laws administered by the Treasury's Office of Foreign Assets Control (OFAC). While the financial industry appreciates the recent attempts by OFAC to address a variety of issues through the posting of "FAQs" (frequently asked questions) on their website, the fact remains that confusion still exists. For example, the answer to one of the most common questions "Does OFAC itself require that banks set up a certain type of compliance program?" gives the industry little solace. The answer, according to OFAC, is that OFAC is not a bank regulator and the institution should check with

² A recent example bears this out. On November 2, 2002 the Financial Crimes Enforcement Network posted an interpretation to 103.29 of the Bank Secrecy Act. The interpretation, that institutions are required to comply with certain record keeping provisions regarding monetary instrument purchases, is contrary to a September 2000 statement from the Bank Secrecy Act examination procedures of the Office of the Comptroller of the Currency that "formal records as required by 31 CFR 103.29 are not necessary" under the same circumstances. Neither the OCC nor any of the examining agencies were consulted on this change in interpretation.

their regulators “regarding the suitability of specific programs to their unique situations.”

ABA and our members need improved direction from both OFAC and the bank regulators on what is considered an acceptable OFAC compliance program as well as a reasoned analysis on the scope of these requirements. Our Association urges the Treasury to coordinate a meeting on these issues as soon as possible.

SAR Guidance

Similar to Patriot Act interpretative questions, there remains an ongoing need for the regulatory agencies, law enforcement and FinCEN to assist SAR filers with issues as they arise. This need is particularly obvious in the area of “terrorist financing.” This crime is difficult to discern as it often appears as a normal transaction. We have learned from many government experts that the financing of terrorist activities often can occur in fairly low dollar amounts and with basic financial products (e.g. retail checking accounts). Guidance in this area is extremely necessary for effective and accurate industry reporting.

An excellent example of providing guidance to SAR filers can be found with the relatively new issue of computer intrusions. The Federal Bureau of Investigation (FBI) advocated adding the crime of “computer intrusion” to the SAR and that change came with a description of the crime on the instructions to the SAR form. In addition, the instructions also described the types of activities that are not indicative of computer intrusions. (For example, “computer intrusion” does not mean, “attempted intrusions of websites.”)

Another useful example from the SAR instructions is the description of what may constitute potential money laundering or violations of the Bank Secrecy Act. Similar examples and instructions to assist SAR filers with clear direction as to what may constitute SAR reportable activity are needed for activities such as “terrorist financing.”

As our Association pointed out in a recent comment letter on the “suspicious activity report” (see attached), the interagency-authored publication, the “SAR Activity Review,” often includes a number of examples of activities that represent reported financial crime. This information is useful for training purposes. While ABA would prefer that more examples of crimes such as terrorist financing be included with the SAR instructions, we urge that, at a minimum, there be better communication about the existence of the SAR Activity Review by the Treasury Department and all of the regulatory agencies.

As we said in our comment letter, “the addition of terrorist financing, however, demands that FinCEN and the other SAR owners put examples on the SAR form itself, as was done with computer intrusion.”

Conclusion

Mr. Acting Secretary, the challenge of addressing the financial side of terrorism demands partnership of government with the private sector. ABA commends the Treasury Department as well as federal law enforcement and the regulatory agencies for their commitment to working with our industry as we continue to improve our financial crime prevention policies.

Sincerely,

John J. Byrne

Enclosure



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January 3, 2003

James F. Sloan
Director
Financial Crimes Enforcement Network
Department of the Treasury
PO Box 39
Vienna, VA 22183

Attention: 1506-0001
Revised SAR, Financial Institutions

Dear Mr. Sloan:

The American Bankers Association (ABA) appreciates this opportunity to comment on the proposed revisions to the Suspicious Activity Report (SAR) form for financial institutions. The ABA brings together all categories of banking institutions to best represent the interests of this rapidly changing industry. Its membership – which includes community, regional and money center banks and holding companies, as well as savings associations, trust companies and savings banks – makes ABA the largest banking trade association in the country. For further information regarding the ABA, please consult the ABA on the Internet at <http://www.aba.com>.

While the proposed changes to the SAR in this notice are minor, the ABA wishes to comment not only on those potential changes but several other related areas that deserve consideration. We recommend that the regulatory agencies and FinCEN:

- Provide specific examples of the characteristics of “each” of the 20 listed crimes so as to improve SAR filing information;
- Formally address the trend by states to require filers to provide SARs to state agencies so institutions will only have to provide one SAR one time; and
- Revisit the circumstances surrounding the filing of SARs for suspected structuring, a continuing problem that, in effect, clogs the SAR database.

According to the notice, the three revisions proposed are: two new boxes in block 35 (“Summary characterization of suspicious activity”) and an update to the “Safe Harbor” wording to reflect changes by the Patriot Act. The two new boxes are to indicate suspected “Terrorist Financing” and “Identity Theft.” ABA supports these changes but, as indicated below, we urge that additional guidance be given SAR filers as to what constitutes reportable examples of terrorist financing.

Need for Clarity under Summary Characteristics of Suspicious Activity

Since the official issuance of the Suspicious Activity Report in 1996, financial institutions have grappled with the challenge of trying to accurately report potential criminal activity. Financial crime is by nature extremely complicated and most SAR filers are not trained in either law enforcement or sophisticated financial crime investigative methods. Therefore, simply listing potential financial crimes on the Suspicious Activity Report, without further explanation, will result in less than accurate filings.

In fact, a recent audit report by the Department of Treasury's Office of Inspector General recommended that FinCEN, in coordination with the regulatory agencies and Internal Revenue Service, both revise "the SAR form or find other means to address the problems with narrative write-ups and identifying violations" and eliminate "duplicate SARs in the system."³

There are a number of similar characteristics to the 20 listed crimes on the SAR that have caused understandable confusion among industry filers. For example, what is the difference between "check fraud" and "check kiting?" In addition, the fact that multiple boxes are checked may indicate that there are multiple crimes from the same activity or confusion by the filers or both. The OIG Report mentioned that the 8th highest filing level of SARs came from the "other" category, a statistic that may further provide evidence of rampant confusion.

There are two possible responses to this dilemma:

- provide a central contact for SAR related questions or;
- further develop the explanations of SAR characteristics on the instructions accompanying the SAR form or in each issue of the SAR Activity Review.

ABA strongly recommends that consideration be given to both responses.

There remains an ongoing need for the regulatory agencies, law enforcement and FinCEN to assist SAR filers with issues as they arise. While some agency officials are willing to assist SAR filers, there is no designated contact within each agency or FinCEN to handle those queries. In fact, many trade groups such as ABA often receive questions on SAR filings; questions that more appropriately should go to each functional regulator. Now is the time to set a central contact for SAR filing questions.

An excellent example of providing guidance to SAR filers can be found with the issue of computer intrusions. When the Federal Bureau of Investigation (FBI) pushed for adding the crime of "computer intrusion" to the SAR, there was an agreement to describe this crime on the instructions to the SAR. In addition, the instructions also described the types of activities that are not indicative of computer intrusions. (For example, "computer intrusion" does not mean, "attempted intrusions of websites.")

³ See, "FinCEN: Reliability of Suspicious Activity Reports" OIG-03-035 (December 18, 2002)

There is also a description of what may constitute potential money laundering or violations of the Bank Secrecy Act. These are two examples of assisting SAR filers with clear direction on what may constitute a SAR reportable activity. Unfortunately, these are the only examples. With the proposed addition of “terrorist financing,” a very difficult crime to discern, further guidance is critical.

As the private sector co-chair of the SAR Activity Review, the ABA supports the efforts of FinCEN and the participating agencies in crafting a publication that provides necessary feedback to the SAR filing community. The SAR Activity Review has provided examples of the characteristics of suspicious activity such as identity theft. The 2003 issue will cover a number of examples of terrorist financing activities. The Review has also addressed a number of other examples of reportable financial crime. There should be more efficient coordination between the information needed to properly complete a SAR and the SAR Activity Review.

While ABA would prefer that examples be included with the SAR instructions, we urge that, at a minimum, the SAR instructions refer to the appropriate issue of the SAR Activity Review for further information on the summary characterization of most of the suspicious activity categories.

The addition of terrorist financing, however, demands that FinCEN and the other SAR owners put examples on the SAR form itself, as was done with computer intrusion.

State Actions that Impact SAR Filings

When the SAR Form was unveiled in 1996, it was announced with a government consensus that filers should only have to file one SAR on each reportable activity. Since 1996, however, there have been a number of states that have attempted to pass SAR reporting requirements at the state level even though states can access the SAR database for the same information. While the regulatory agencies and FinCEN have worked with the industry to attempt to dissuade states from adding an unnecessary duplicative reporting obligation, the states continue to press this issue.

ABA urges the regulatory agencies, law enforcement and FinCEN to address, once and for all, state efforts to receive SARs directly from filers by explaining how state agencies can gain access the SAR database.

In addition, states and members of Congress are considering legislation to require companies that have been victims of computer intrusions to report successful attacks to the public.⁴ Once more SAR filers will be placed in the untenable position of having to respond to a state or federal reporting mandate despite a prohibition under federal law (31 USC 5318(g)(2)) that bans the notification of any person involved in a transaction that a SAR has been filed. The financial community should be able to rely on the federal and state governments to reconcile conflicting obligations on the private sector.

⁴ See California Senate Bill 1386 that would require a business that operates in California to disclose “any breach of the security of the data” of an individual in California that has had his data access in an unauthorized manner. Senator Dianne Feinstein is considering filing a similar proposal.

SAR Filings on Suspected Structuring

As the SAR Activity Review statistics clearly show, close to half of all SAR filings (48.2% as of 10/31/02) are the result of filers suspecting that the activity in question is designed to avoid the cash transaction requirements by structuring. Financial institution officials are trained to report transactions that appear to be deliberately below the cash-reporting threshold of \$10,000. There is a major question, however, on the value of SARs for one-time transactions below \$10,000. With the obvious increase in SARs now to be filed by a broad spectrum of financial institutions, ABA urges a thorough review of SAR filings on suspected structuring. If the goal is accurate and useful SARs, there should be serious consideration given toward eliminating SARs that are not very useful for law enforcement or safety and soundness reasons.

Thank you for the opportunity to comment on this important issue. If you have additional questions, please contact me at (202) 663-5029 or jbyrne@aba.com.

Sincerely,

John J. Byrne
Senior Counsel and Compliance Manager