Financial Crimes Enforcement Network
Special Information Sharing
Section 314 Comments
2070 Chain Bridge Road
Vienna, VA 22182

Ladies and Gentlemen:

The American Bankers Association appreciates this opportunity to comment on the notice of proposed rulemaking and the interim rule regarding Section 314 (a) and (b) of the U.S.A. Patriot Act (PL 107-56). As is pointed out in the notice, one of the many goals of this Act is the "facilitation of information sharing among governmental entities and financial institutions for the combating of money laundering and terrorism."

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.

Section 314 (Cooperative Efforts to Deter Money Laundering) requires the Treasury Department to issue regulations to "encourage further cooperation" among financial institutions, their regulatory and law enforcement authorities through the sharing of information on terrorist and money laundering activities. Our Association has long advocated a clear direction as to how institutions can share information to deter criminal activity. As currently drafted, the ABA does not believe that the goal of facilitating the sharing of information will be accomplished. In fact, the rule may force financial institutions to turn away from sharing information.

Congressional Intent for Section 314

According to the Senate Report addressing the relevant part of the U.S.A. Patriot Act:

Section 314 requires the Secretary of the Treasury to issue regulations, within 120 days of the date of enactment, to encourage cooperation among financial institutions, financial regulators and law enforcement officials, and to permit the sharing of information by law enforcement and regulatory authorities with such institutions regarding persons reasonably suspected, based on credible evidence, of engaging in terrorist acts or money laundering activities. Section 314 also allows (with notice to the Secretary of the Treasury) the sharing of information among banks involving possible terrorist or money laundering activity, and requires the Secretary of the Treasury to publish, at least semiannually, a report containing a detailed analysis of patterns of suspicious activity and other appropriate investigative insights derived from suspicious activity reports and law enforcement investigations.[1]

Ranking Minority Member of the Senate Banking Committee. Phil Gramm (R-TX) pointed out, on October 16, that Section 314:

"Add[s] a requirement that the government help banks focus on up-to-date money-laundering threats by sharing with banks specific money-laundering concerns, enabling institutions to know what to be on the lookout for. This is expected to result in better enforcement and cooperation, while reducing the burden of unnecessary paper chases. The amendment would also permit financial institutions to share with each other relevant information about suspected money-laundering activities."

Congress has obviously directed the Treasury to craft a rule that will facilitate information sharing for the purpose of combating terrorism and money laundering. The proposal, for the reasons expressed below, does not meet that directive.

According to the preamble, 314 (a) of the proposal "seeks to create a communication network linking federal law enforcement with the financial industry so that vital information relating to suspected terrorist and money launderers can be exchanged quickly and without compromising pending investigations." Instead of a network, the 314 proposal is, unfortunately, a "one-way street."

As FinCEN points out, this part of the rule is an attempt to formalize the current "control list" procedures. ABA believes that this part of the proposal goes far beyond those procedures and is not consistent with congressional intent that information be "shared" with the financial institutions. In addition, the proposed rule does not "encourage" information sharing with the government; it is, instead, a new regulatory obligation.

Proposed Section 314(a)

Specifically, the rule proposes a new Subpart H to part 103 of the Bank Secrecy Act regulations. Under proposed 103.100, FinCEN may require any financial institution to search its records to determine whether the institution "maintains or has maintained accounts" or "engaged in transactions" with any "specified individual, entity, or organization." FinCEN can determine the time for the records search for each request. In addition, FinCEN and the Treasury (according to the preamble) "expect" that financial institutions will search their records from the time of the request; there is no limit. ABA believes that the existing process for responding to control list requests, the establishment of FinCEN's "Financial Institution Hotline," and the long-followed requirement that financial institutions file SARS, is working in a fairly efficient manner. The proposed changes under 314, therefore, are cumbersome, unclear and unnecessary. We respectfully urge that the changes contemplated under 314 (a) be reconsidered.

Proposed Section 314 (b)

Proposed section 103.110 attempts to address a major ongoing industry concern, the need to share information between financial institutions on money laundering and terrorist activity. This need, to clarify under what circumstances information can be shared without liability, continues to be a financial institution priority. Prior to the passage of the U.S.A. Patriot Act, the federal regulatory agencies have indicated that while the fact of a SAR being filed cannot be shared, the underlying facts of a specified crime causing the filing can be communicated between financial institutions.[2] There should be no roadblock to that important communication. The industry strongly supports the ability to share information on potential criminal activities as an excellent way of preventing and detecting financial crime. Unfortunately, the regulations proposed under section 314(b) may result in both the financial industry rejecting this new process and becoming hesitant about existing sharing of financial crime related information.

As stated above, Congress directed the Treasury to issue regulations "encouraging" the sharing of information related to terrorism and money laundering. This sharing becomes permissible, only after "notice" to the Treasury Department of the institution's desire to share information. The statute, however, does not specify that a "certification form" be filed with the Treasury; only notice. ABA believes that the certification form is an inappropriate response to clear congressional intent.[3] The Association is also opposed to the "one-year" duration of the form as severely limiting to the encouragement of information sharing.

ABA believes that the "314 notice" to the Treasury should be in several forms. For example, the filing of a "Suspicious Activity Report " or SAR should be considered sufficient notice to the Treasury

Department that an institutions plans to share information. This method of providing notice (via a SAR) will become particularly useful and efficient when Section 362 (Establishment of a Highly Secure Network) of the Act is complete and SARs can be filed electronically.

In addition, financial institutions should be able to notify FinCEN through other alternative methods that are appropriate for each institution. Treasury should not limit how notice can be provided. ABA urges the Treasury to use the next meeting of the Bank Secrecy Advisory Group to discuss further other notice mechanisms. Finally, ABA urges that "notice" under 314 be considered current until withdrawn by the institution or, at least, for a three-year period. In a section designed to encourage information sharing, it is important that regulatory examiners do not penalize institutions for missing the extremely short one-year certification period that is proposed in the rule.

The proposal also requires financial institutions to certify that the institution "has established and will maintain adequate procedures to safeguard the security and confidentiality of such information." ABA is opposed to any "new" requirement that financial institutions put in place these procedures. Section 501 (b) of the Gramm-Leach-Bliley Act of 1999 requires that all covered institutions have a "comprehensive written information security program that includes administrative, technical, and physical safeguards appropriate to the size and complexity of the institution and nature and scope of its activities." Therefore, any information received under 314 (b) must already be protected.[4] Any final rule addressing the 314 reference to the protection of shared information should contain this clarification.

Finally, as mentioned above, financial institutions may already share information such as the facts used to file a SAR. It is critical that information sharing under 314 not limit current information exchanges on check fraud and other types of financial crime. Therefore, we urge the Treasury to state that 314 will not impact other types of information sharing unrelated to terrorism and money laundering.[5]

Conclusion

The American Bankers Association supports information sharing among financial institutions and between those institutions and law enforcement. Section 314 can be the appropriate tool to facilitate that worthy and necessary goal. ABA remains willing to assist FinCEN and Treasury in their ongoing efforts to encourage and assist in effective information sharing to prevent financial crime. We believe that with substantial changes to this proposal that can still be possible.

Thank you for the opportunity to present our views. If you need additional information, please feel free to contact me at (202) 663-5029.

Sincerely,

John J. Byrne

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[1] The SAR Activity Review, prepared by a subcommittee of the BSA Advisory Group, which ABA co-chairs, will now be published quarterly, thus complying with 314 (d).

[2] See, "The SAR Activity Review: Trends, Tips & Issues" p. 28 (October 2000)

[3] Section 103.100 (c) proposes a "certification" requirement for the federal law enforcement agency that it is seeking information based on "credible evidence" of money laundering or terrorist activity. ABA

opposes the certification requirement for financial institutions in 314 (b), and would point out that the Treasury issued, in the same interim rule, a requirement that law enforcement provide notice to Treasury without describing the method or type of notice.

[4] For example, see OCC 2001-35 (Examination Procedures to Evaluate Compliance with the Guidelines to Safeguard Customer Information) and other relevant agency advisories that direct institutions on protecting information.

[5] While there are a myriad of "predicate offenses" under the federal money laundering statutes, ABA is concerned that the regulatory obstacles to sharing under Section 314 may force financial institutions to limit the exchange of financial crime information that is working well. Section 314 is voluntary; it should not unintentionally hinder existing methods of cooperation.