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FinCEN Expands Access to Section 314(a) Information Requests

MAUREEN YOUNG AND PAUL M. TYRRELL

This article explains FinCEN's final rule expanding the Section 314(a) information sharing program adopted pursuant to the Bank Secrecy Act.

On February 10, 2010, FinCEN's final rule ("Final Rule") expanding the Section 314(a) information sharing program adopted pursuant to the Bank Secrecy Act ("BSA") was published in the *Federal Register* and became immediately effective. The Final Rule allows access by certain foreign law enforcement agencies, as well as state and local law enforcement agencies, along with FinCEN, on behalf of itself and on behalf of other components of the U.S. Department of Treasury ("Treasury"). The expanded access was characterized as part of Treasury's continuing effort to increase the efficiency and effectiveness of its anti-money laundering ("AML") and counter terrorist financing policies.

BACKGROUND REGARDING THE EXPANDED 314(A) PROGRAM

On October 26, 2002, FinCEN published a final rule implementing the authority contained in Section 314(a) of the USA PATRIOT Act (the "Act"). The 314(a) rule allows FinCEN to require financial institutions to search their records to determine whether they have maintained an account or conducted a transaction with a person that a federal law enforcement

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agency has certified is suspected based on credible evidence of engaging in terrorist activity or money laundering.

Under the Section 314(a) program, FinCEN provides banks, broker-dealers, futures commission merchants, trust companies, and life insurance companies ("Covered Institutions") a list (usually biweekly) of individuals and entities that are subjects of significant money laundering or terrorist financing investigations. The Covered Institutions are required to review their records to determine whether the institution maintains or has maintained an account for a named subject during the proceeding 12 months, or have conducted any transactions involving any named subjects during the previous six months. The financial institutions are required to report positive matches to FinCEN.

The issuance of the Final Rule followed an accelerated comment period on the proposed rule. Significant concerns about the impact of the proposed rule were raised by the financial services industry, including opposition from the American Bankers Association and the Florida International Bankers Association. Many of the concerns were directed at the increased compliance burden "without a compelling reason" which the expanded access will arguably produce. Other opponents of the expanded access included some former law enforcement officials who were concerned that the proposed rule failed to identify how the requests would be handled and failed to address how abuse by foreign entities would be curtailed or what penalties FinCEN would impose if the requested information is used inappropriately by those entities.

Prior to the issuance of the Final Rule, only federal law enforcement agencies participated in the Section 314(a) program. According to FinCEN, the Section 314(a) program yields "significant investigative benefits" to federal law enforcement users in terrorist financing and major money laundering cases. In view of this purported success and despite significant opposition by the financial services industry, FinCEN determined to broaden access to the program to include certain foreign law enforcement agencies, state and local law enforcement, and FinCEN (as well as other Treasury components), to add subjects to the list. As discussed more fully below, this expansion will most likely result in additional requests for information to Covered Institutions, triggering additional need for AML

compliance resources, and particularly impacting small financial institutions using manual 314(a) searches.

REQUIREMENTS FOR FOREIGN, STATE, AND LOCAL LAW ENFORCEMENT SECTION 314(a) REQUESTS

In issuing the Final Rule, FinCEN tried to reassure Covered Institutions that the expanded access to the Section 314(a) program will be used only in the most compelling situations in an attempt to minimize reporting by those financial institutions. To that end, FinCEN stated that it will specify requirements for foreign, state, and local law enforcement entities to access the Section 314(a) program, consistent with the requirements imposed today on federal law enforcement agencies. Specifically, the foreign and state and local law enforcement agencies will be required to certify that each individual, entity, or organization about which the law enforcement agency is seeking information is engaged in, or is reasonably suspected based on credible evidence of engaging in, terrorist financing, or money laundering. They will also have to certify, in the case of money laundering, the matter is significant, and the requesting agency has been unable to locate the information sought through traditional methods of investigation before attempting to make a Section 314(a) request. In addition, the law enforcement agencies will be required to include in their certifications certain descriptions such as: the relevant statutory provisions; a description of the suspected criminal conduct; and for money laundering cases, a description of why the case is significant, and a list of methods of investigation and analysis which have been conducted prior to making the request. All such requests will be reviewed and approved by FinCEN.

In addition, to ensure that the requests made by foreign law enforcement are from a legitimate entity, the requests must be submitted to a federal law enforcement attaché, who will review the request for legitimacy. The attaché then will forward the request to FinCEN for review and approval; thereafter, the request will be made to Covered Institutions via the 314(a) Secure Information Sharing System.

In order to alleviate Covered Institutions having to call foreign law enforcement agencies, requests made by a foreign law enforcement agency

will only include the contact number for FinCEN's 314 Program Office. As is the case with federal law enforcement agency requests made available by FinCEN, state and local law enforcement agency requests will include the name and contact number of the state or local agency representative making the request.

When presented by the requesting agency with the request to search records for matches against names of subject persons and entities under investigation, the Covered Institutions need only confirm that a matching account or transaction exists. Other sensitive customer information does not have to be provided to the requesting agency. Thus, despite the introduction of foreign law enforcement agencies to the Section 314(a) program, FinCEN stated that it does not believe that Section 314(a) responses need to be afforded the same safe harbor protections and assurances of confidentiality that currently apply to Suspicious Activity Report ("SAR") information. The requesting agency can only obtain that additional customer information from the Covered Institution through the appropriate legal process.

REQUIREMENTS FOR FINCEN SELF-INITIATED SECTION 314(a) REQUESTS

In addition to expanding access to foreign and state and local law enforcement agencies, the final rule also clarifies that FinCEN, on its own behalf, and on behalf of other components of Treasury, may submit 314(a) requests. FinCEN maintains its requests will be made to increase the value of analytical support to law enforcement. FinCEN believes that its use of the Section 314(a) program will enable it to deliver critical information about criminal activity on a more timely basis. FinCEN stated that "[a] single 314(a) request issued by FinCEN can more efficiently coordinate and simultaneously support several investigations, thereby eliminating the need for separate requests from each analytical agency or jurisdiction."

FinCEN or appropriate Treasury components seeking a request will be subject to similar procedures and certification requirements as are required of the law enforcement agencies. Moreover, if FinCEN uses the Section 314(a) process in support of proactive target development, it will first brief

law enforcement to ensure that the analysis is of interest to law enforcement and that it does not conflict with any ongoing investigation. FinCEN initiated Section 314(a) requests also will be independently reviewed and approved by multiple offices within FinCEN.

In addition, FinCEN intends to certify that it has been unable to locate the information sought through traditional methods of analysis, and will list the types of analysis conducted. FinCEN anticipates that the typical scenarios under which it would make a Section 314(a) request will be when it serves as a conduit in issuing a consolidated Section 314(a) request on behalf of a multiagency task force investigation or when it develops significant, multistate proactive targets/leads.

IMPACT ON FINANCIAL INSTITUTIONS

FinCEN believes that the Section 314(a) program has yielded significant benefits for federal law enforcement agency investigations and that expanded access to the program will significantly advance the efforts of a larger population of law enforcement agencies. In the Final Rule, FinCEN acknowledges that the expanded access will most likely result in additional requests for information from financial institutions, but FinCEN stated that it does not believe that the increase in volume of inquiries is likely to reach unmanageable levels. It estimated, based on analysis of the volume and type of information requests FinCEN received from these law enforcement agencies in the past, that only 60 foreign law enforcement requests, 50 state and local law enforcement requests, and 10 FinCEN requests would occur annually. FinCEN further contends that its internal procedures will ensure that the Section 314(a) program is only used in compelling situations. FinCEN acknowledged that smaller financial institutions using manual search processes will be disproportionately impacted by the expanded access. However, FinCEN does not believe that the expanded access will have a dramatic impact on the time necessary to complete those searches.

Banks and other financial institutions have disagreed with this viewpoint. Importantly, FinCEN did not factor in the increased AML compliance burden upon financial institutions after finding a 314(a) match. Al-

though Section 314(a) does not require a financial institution to respond with more information than the existence of a match, financial institutions are subject to larger obligations under the BSA to conduct research with respect to a subject person or entity and the matching account or transaction to determine if the institution's records and monitoring activities indicate suspicious activity warranting the filing of a SAR. Further, FinCEN did not factor into its analysis that additional matches under the 314(a) program will inevitably lead to additional legal process from law enforcement agencies seeking additional information on the subject of the investigation, to which financial institutions will have to respond.

FinCEN intends to address any overlapping interests of the law enforcement agencies pursuing the same subject. With respect to foreign requests, FinCEN will determine if there are other Section 314(a) requests for the same subject(s) so that they can be brought to the attention of FinCEN's 314 Team Leader. FinCEN will automatically notify the FBI of all international terrorism related requests and notify federal and nonfederal law enforcement agencies, as appropriate, of all international money laundering requests. State and local law enforcement agencies will be required to identify in their certifications the federal law enforcement agency with whom they have consulted.

With the expanded access, financial institutions must ensure that they have adequate procedures and resources to handle the increased Section 314(a) requests, or else face potential regulatory consequences. For example, recently, the Financial Industry Regulatory Authority ("FINRA") issued a disciplinary action against one of its broker-dealer members when it failed to have adequate procedures relating to Section 314(a) requests.¹ In *Terra Nova*, FINRA found that the broker-dealer failed to evidence that it had conducted an expeditious search of its records to determine if it had any accounts for any individual or entity in FinCEN requests and that the firm's written procedures and systems failed to address responses to Section 314(a) requests from FinCEN. FINRA's recent disciplinary action puts its member firms on notice that it intends to ensure that they have procedures that comply with Section 314(a) requests and responses. Financial institutions which have written procedures that currently only address federal law enforcement access to the Section 314(a) program should make

appropriate changes to their written procedures in light of the expanded access.

CONCLUSION

The expanded access by foreign and other enforcement agencies will increase the number of Section 314(a) requests made to financial institutions and require those institutions to provide additional resources to process the requests, conduct the subsequent internal investigations for SAR purposes, and respond to follow up subpoenas and other legal process from the investigating agencies.

NOTE

¹ See *In re: Terra Nova Financial, LLC*, Letter of Acceptance, Waiver and Consent (“AWC”), FINRA No. 2007007328101 (April 22, 2009).