

December 16, 2009

**Via Electronic Mail**

Attn: Special Information Sharing Procedures  
to Deter Money Laundering and Terrorist Activity,  
RIN 1506-AB04  
Financial Crimes Enforcement Network  
Department of the Treasury  
P.O. Box 39  
Vienna, VA 22183

Mr. James H. Freis  
Director  
Financial Crimes Enforcement Network  
Department of the Treasury  
1500 Pennsylvania Ave., NW  
Washington, DC 20220

**Re: Special Information Sharing Procedures to Deter Money Laundering  
and Terrorist Activity, RIN 1506-AB04**

Dear Mr. Freis:

The Securities Industry and Financial Markets Association (“SIFMA”)<sup>1</sup> and the Futures Industry Association (“FIA”)<sup>2</sup> (collectively, “we”) are submitting this letter to the U.S. Treasury Department’s Financial Crimes Enforcement Network (“FinCEN”) in response to the request for comments to the proposed rulemaking clarifying the expansion of special information sharing procedures to deter money laundering and terrorist activity (the

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<sup>1</sup> The Securities Industry and Financial Markets Association brings together the shared interests of more than 600 securities firms, banks and asset managers. SIFMA’s mission is to promote policies and practices that work to expand and perfect markets, foster the development of new products and services and create efficiencies for member firms, while preserving and enhancing the public’s trust and confidence in the markets and the industry. SIFMA works to represent its members’ interests locally and globally. It has offices in New York, Washington D.C., and London and its associated firm, the Asia Securities Industry and Financial Markets Association, is based in Hong Kong.

<sup>2</sup> FIA is a principal spokesperson for the commodity futures and options industry. FIA’s regular membership is comprised of approximately 30 of the largest futures commission merchants in the United States. Among its associate members are representatives from virtually all other segments of the futures industry, both national and international. Reflecting the scope and diversity of its membership, FIA estimates that its members effect more than eighty percent of all customer transactions executed on United States contract markets.

“Proposed Rule”).<sup>3</sup> We appreciate the opportunity to submit comments and recommendations with respect to the Proposed Rule, which expands the rule implemented pursuant to section 314 (the “314(a) Rule”) of the USA PATRIOT Act of 2001 (“the Act”).<sup>4</sup>

We and our members have long been supporters of the Act’s goal with respect to information sharing among governmental entities and financial institutions for the purpose of combating terrorism and money laundering. Even prior to the passage of the Act in October 2001, we were working with our members to increase their anti-money laundering awareness and compliance efforts. Since the passage of the Act, we have continued to work closely with FinCEN and the Securities and Exchange Commission (“SEC”), as well as the Financial Industry Regulatory Authority (“FINRA”), to develop sound and effective rules to protect financial institutions from being used for money laundering and terrorist financing.

We are aware of the significant role that section 314 and the 314(a) Rule play in furthering the goals of the Act, particularly with respect to the prevention of terrorist financing,<sup>5</sup> and are strongly supportive of these goals. Given that the Act focuses on the use of the 314(a) Rule to address terrorist financing, we believe that the 314(a) Rule should be focused on detecting, preventing and prosecuting terrorist financing, and, to the extent that the 314(a) Rule is expanded, we believe that these measures should continue to focus on the prevention of terrorist financing, at least initially. We submit the comments and recommendations below to enhance the efficiency and effectiveness of the Proposed Rule in meeting this important goal.

## **Background**

Section 314(a) of the Act required Treasury to adopt regulations for the “specific purpose of encouraging regulatory ... and law enforcement authorities to share with financial institutions information regarding individuals, entities, and organizations engaged in ... terrorist acts or money laundering activities.”<sup>6</sup> By this provision, Congress intended to facilitate law enforcement’s sharing of information with financial institutions to help identify suspicious activity. As SIFMA noted in its comment letter, dated April 3, 2002, submitted to FinCEN when the 314(a) Rule was initially proposed, we were and remain disappointed that the 314(a) Rule focuses primarily on the reporting requirements by the industry to the

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<sup>3</sup> 74 Fed. Reg. 58926 (Nov. 16, 2009).

<sup>4</sup> USA PATRIOT Act of 2001, Pub. L. No. 107-56, § 314(a), 115 Stat. 272 (2001).

<sup>5</sup> Section 314(a)(2) of the Act provides that the regulations adopted pursuant to section 314(a)(1) may include or create procedures for cooperation and information sharing that focus on “matters specifically related to the finances of terrorist groups, the means by which terrorist groups transfer funds around the world and within the United States, ... and the extent to which financial institutions in the United States are unwittingly involved in such finances and the extent to which such institutions are at risk as a result[.]” USA PATRIOT Act § 314(a)(2)(A).

<sup>6</sup> USA PATRIOT Act § 314(a)(1).

government and does not also focus on information sharing by the government with the industry.<sup>7</sup>

Although, as written, the 314(a) Rule is not necessarily consistent with the intent of section 314(a) of the Act, we did not object when the 314(a) Rule was implemented because it appeared to formalize the “Control List,” which was created after September 11 as part of the coordinated effort against money laundering and the financing of terrorism.<sup>8</sup> Through the Control List, financial institutions were already voluntarily checking their records against the list of individual and entity names prepared and supplied by a single law enforcement agency—the FBI.<sup>9</sup> When the 314(a) Rule was first implemented, it appeared useful because it allowed multiple federal law enforcement agencies to submit their lists of names directly to FinCEN and have FinCEN facilitate the coordination and distribution of those names to the financial industry.

While we remain supportive of the goals underlying the 314(a) Rule, we are increasingly concerned that the Proposed Rule moves even further beyond the intent of the Act. Moreover, the Proposed Rule does not sufficiently address or provide adequate clarification with respect to several important points, including: 1) the standard for reviewing the 314(a) requests of State, local, and foreign law enforcement agencies; 2) the “local” agencies that will be allowed to utilize the 314(a) process; 3) the specific procedures that will be utilized to implement the Proposed Rule; 4) the purposes for which FinCEN itself will be initiating 314(a) requests, and the procedures for such requests; 5) the controls that will be in place to ensure the proper usage and storage of shared information; 6) the difficulties associated with the 314(a) searches pursuant to the Proposed Rule; and 7) FinCEN’s authority for expanding the 314(a) Rule.

## **1. Standard of Review for 314(a) Requests**

The Proposed Rule provides that, prior to initiating a 314(a) query, a State, local, or foreign law enforcement agency, will have to certify that, “in the case of a money laundering investigation, the matter is significant, and that it has been unable to locate the information sought through traditional methods of investigations and analysis before attempting to use the 314(a) program.”<sup>10</sup> In our view, FinCEN should define the matters that will be considered “significant” with respect to 314(a) requests from State, local, and foreign law enforcement agencies. Specifically, FinCEN should clarify whether all State, local, and foreign law

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<sup>7</sup> This comment letter was submitted by the Securities Industry Association (“SIA”) in response to FinCEN’s proposed and interim rules implementing section 314 of the Act. (SIFMA was formed in November 2006 through the merger of the SIA and the Bond Market Association.)

<sup>8</sup> In the SIA’s April 2002 comment letter, the SIA stated that it did not think section 314(a) was intended to create additional reporting requirements, but did not oppose the proposed rule because it appeared to replace the Control List.

<sup>9</sup> As noted in FinCEN’s 314(a) Frequently Asked Questions, when the 314(a) Rule came into effect, “the FBI ... discontinued the use of the “Control List” and ... [began to] use FinCEN’s 314(a) process to communicate with financial institutions about individuals and entities who are suspected of engaging in money laundering or terrorist financing activities.”

<sup>10</sup> 74 Fed. Reg. at 58927.

enforcement agencies' requests must involve matters that are being investigated jointly with Federal Agencies to be deemed "significant" or if the State, local, and foreign law enforcement agencies will be able to make 314(a) requests in connection with their own matters that are not related to Federal investigations.

We believe that this language should be narrowly construed to confine the 314(a) requests processed on behalf of State, local, and foreign law enforcement agencies to those "significant" investigations specifically related to terrorist financing. Among other things, this provision will assist in limiting the number of 314(a) requests that result from the Proposed Rule, thereby reducing the amount of protected information that is released, and the potential burden on financial institutions.

## **2. Local Law Enforcement Agencies Allowed to Make 314(a) Requests**

FinCEN should define "local" with respect to the "local law enforcement agencies" to clarify which types of agencies will be able to submit 314(a) requests pursuant to the Proposed Rule. We believe there are significant concerns regarding which levels of "local" law enforcement will be covered by the Proposed Rule because there may be greater risks associated with sharing information obtained from a 314(a) request with local law enforcement agencies. Our concerns arise with respect to the controls that local law enforcement agencies have in place—or the lack thereof—to ensure that the shared information is utilized for only proper purposes and remains protected.

The Proposed Rule does not specify whether a local law enforcement agency will be required to enter into a Memorandum of Understanding ("MOU") with FinCEN, as is required to access the Bank Secrecy Act ("BSA") data through FinCEN's secure database. Although we do not believe that local law enforcement should necessarily be allowed to initiate 314(a) requests, in the event that the Proposed Rule becomes effective, we submit that the local law enforcement agencies should be required to enter into MOUs with FinCEN prior to the approval of such requests. Further, as discussed below, there must be adequate controls in place to restrict the purpose for which local law enforcement agencies utilize shared information, and to ensure that the information is kept secure.

## **3. Procedures Implementing the Proposed Rule**

The Proposed Rule does not address the procedures that will be followed to implement the expanded information sharing with State, local, and foreign law enforcement agencies. It is not clear, in situations where a State, local, or foreign law enforcement agency adds a name to the 314(a) list and there is a match, whether a financial institution should follow up with FinCEN or communicate directly with the State, local, or foreign jurisdiction. If there is a match, the Proposed Rule does not set forth the steps that must be taken to ensure that the State, local, and foreign law enforcement agencies comply with the applicable laws, such as the Right to Financial Privacy Act and the Mutual Legal Assistance Treaties. Additionally, the Proposed Rule does not address whether, and, if so, how, the Interstate

Compact Act<sup>11</sup> applies with respect to the ability of State and local law enforcement agencies to make 314(a) requests for information from financial institutions in different States.

The Proposed Rule should clarify the relevant procedures, as well as the extent of FinCEN's role, in the proposed process. For example, if financial institutions communicate directly with State, local, and foreign law enforcement agencies, the Proposed Rule should address how FinCEN will be involved to coordinate and oversee the process. We believe that FinCEN's coordination of the 314(a) process under the Proposed Rule, if effected, will be essential. We are concerned about how FinCEN will control the number of requests from State, local, and foreign law enforcement agencies if the actual number of requests exceeds the estimates stated in the Proposed Rule. FinCEN should have adequate controls in place to vet the requests and ensure that the 314(a) requests submitted by State, local, and foreign law enforcement agencies meet the appropriate standard, and that the information sharing process is consistent with all applicable laws.

#### **4. FinCEN's Ability to Make 314(a) Requests**

The Proposed Rule states that FinCEN will initiate 314(a) requests on its own behalf and on behalf of the appropriate components of the Department of the Treasury.<sup>12</sup> FinCEN will utilize the 314(a) program to analyze BSA data to assist law enforcement in connection with significant money laundering and terrorist financing investigations. By utilizing the 314(a) process, FinCEN claims that it will be able to coordinate investigations, thereby eliminating the need for separate requests from each investigating agency or jurisdiction.

According to the Proposed Rule, FinCEN will also use the 314(a) program to enhance its ability to conduct analysis into the trends, patterns, and common activity associated with criminal activity, as well as provide a more complete picture of financial transactions and interrelationships among investigative subjects and financial transactions or entities. Additionally, access to the 314(a) program will assist other components of the Department of the Treasury that provide analytical support in fulfilling their missions.

The Proposed Rule does not make clear why it is necessary for FinCEN to have the authority to initiate 314(a) requests, particularly given that other Federal agencies can utilize the existing 314(a) process to submit requests. It is also not clear for what specific analytical and other purposes FinCEN will be utilizing the shared information. This latter proposal in particular goes well beyond the purposes of the 314(a) Rule itself. Additionally, the Proposed Rule does not specify what the criteria will be for FinCEN's initiating such requests, and who, if anyone, other than FinCEN, will screen or vet such requests.

The Proposed Rule should clarify the purposes for which FinCEN will utilize the 314(a) information, the procedures for initiating such requests, the parties who will screen

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<sup>11</sup> The Interstate Compact Act allows two or more States to enter into agreements or compacts for cooperative effort and mutual assistance in the prevention of crime and in the enforcement of their respective criminal laws and policies. 4 U.S.C. § 112.

<sup>12</sup> 74 Fed. Reg. at 58928.

such requests, estimates of the volume of FinCEN initiated requests, and any other limitations that will apply.

## **5. Document Protection Requirements**

FinCEN should specify detailed procedures for controlling any information that is shared with State, local, and foreign law enforcement agencies in response to a 314(a) request. We understand the importance of information sharing in the fight against money laundering and terrorist financing, particularly between the U.S. and financial intelligence units in different countries. However, we are concerned as to how the information that is provided by financial institutions might be used, and how securely it will be controlled once that information is released to non-Federal participating agencies, particularly those in foreign jurisdictions.<sup>13</sup>

For example, the Federal, State, and local law enforcement agencies that have access to BSA information through FinCEN's secure website have strict document protection requirements to which they must adhere. Presumably, although not specified in the Proposed Rule, the 314(a) information provided by financial institutions will also be similarly protected. We believe that the State, local, and foreign law enforcement agencies should be subject to these same strict document protection requirements. The Proposed Rule should set forth data reporting requirements for State, local, and foreign law enforcement agencies. FinCEN should provide training to the State, local, and foreign law enforcement agencies, and should monitor their use of the shared information obtained through the 314(a) program to ensure that the information is properly used, disseminated, and kept secure.

## **6. Difficulties Associated with 314(a) Searches under the Proposed Rule**

Based on the experience of our members, we believe that FinCEN has underestimated the averages stated in the Proposed Rule for the number of subjects per 314(a) request and the annual estimate of time spent on 314(a) requests.<sup>14</sup> However, we think that there are more important issues that could arise, separate from any burden associated with time or cost, with respect to the ability of financial institutions to meet the obligations of the Proposed Rule.

The 314(a) Rule requires that 314(a) requests be submitted with enough specific identifiers, such as date of birth, address, and social security number, to permit a financial institution to differentiate between common or similar names. To conduct a 314(a) search, most of our members upload the search target's information and perform the search electronically, not manually. In our members' experience, although required by regulation, 314(a) requests do not always have sufficient identifying information. Moreover, some of

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<sup>13</sup> It is unclear why the security concerns related to sharing suspicious activity reports are too great to allow U.S. financial institutions to share such information with certain affiliates, yet the Proposed Rule contemplates financial institutions sharing 314(a) information with foreign law enforcement agencies.

<sup>14</sup> In the Proposed Rule, FinCEN advises that there is an average of 9 subjects per 314(a) request, and that it takes about 72 hours worth of work to conduct the searches, based on an average time of four minutes spent searching for each subject. 74 Fed. Reg. at 58929.

our members have commented that identifying information is more likely to be missing from requests involving search targets that are foreign persons. This is particularly of concern with respect to searches submitted by foreign law enforcement agencies, which will, presumably, relate to foreign persons, for whom there will be no social security number and for whom, as a result thereof, it will be more difficult to search electronically and more time consuming to resolve potential false positive matches.

Therefore, if State and local, and foreign law enforcement agencies are able to submit 314(a) requests, FinCEN must require that they provide adequate identifiers for the search targets, including name, address, and other unique identifying information, such as government-issued identification numbers and date of birth, that will enable financial institutions to expedite the search process and to determine whether there is a valid match.

## **7. Authority For Expanding the 314(a) Rule**

While we are clearly supportive of efforts to prevent money laundering and terrorist financing, the Proposed Rule may expand the 314(a) Rule well beyond the original intent of, and authority granted by, the Act, thereby jeopardizing the safe harbor provided by the 314(a) Rule.<sup>15</sup>

First, the Proposed Rule sets forth additional reporting requirements for the industry, but does not address how this furthers the statutory goal of sharing information with financial institutions. Thus, we believe that allowing State, local, and foreign law enforcement agencies to initiate 314(a) requests goes well beyond the statutory intent of section 314, thereby making it increasingly subject to challenge.

Second, it is not clear that the authority granted under section 314 of the Act, with respect to “law enforcement authorities,” covers requests from State, local, and foreign jurisdictions. Indeed there is a lack of clarity regarding the basis on which FinCEN will allow State, local, and foreign law enforcement agencies to request and obtain information through 314(a) requests. Further, the Proposed Rule does not explain why the existing processes through which State, local, and foreign governments may obtain the same type of information provided by a 314(a) request are not adequate. For example, foreign governments currently can obtain information about U.S. clients through existing legal channels and processes, such as Mutual Legal Assistance Treaties or letters rogatory.

Third, the Proposed Rule broadens the definition of “money laundering” in 31 C.F.R. § 103.90(a) to include activity that would be criminalized by 18 U.S.C. 1956 or 1957 if such activity occurred within the United States, in order to allow the term to be applied to 314(a) requests by foreign law enforcement agencies.<sup>16</sup> Because the Proposed Rule does not clarify the legal basis on which FinCEN has authorization to expand this definition, this provision could also be subject to challenge.

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<sup>15</sup> The 314(a) Rule includes a safe harbor provision to protect financial institutions from being liable to any person for violations of the Right to Financial Privacy Act or the Gramm-Leach-Bliley Act for providing information pursuant to a 314(a) request. See 31 C.F.R. § 103.100(b)(3).

<sup>16</sup> 74 Fed. Reg. at 58928.

If there is a legal challenge to the 314(a) Rule, it could certainly undermine the effectiveness of the 314(a) Rule, as well as the validity of the safe harbor, upon which financial institutions rely.

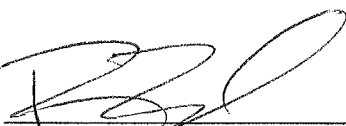
Because we view this as an important effort by FinCEN and because financial institutions must be able to rely on the safe harbor in the information sharing process, we submit that FinCEN should first consider asking Congress to expand the legislation so that there is clear authority to allow State, local, and foreign law enforcement agencies to directly avail themselves of the 314(a) information sharing process and make 314(a) requests.

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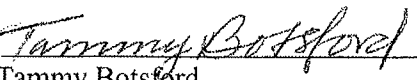
We thank you for the opportunity to submit this comment letter. As noted above, we support the underlying goals of the USA PATRIOT Act and the Proposed Rule. However, we believe that there are specific and compelling concerns that should be resolved before further steps are taken to expand the 314(a) Rule. We would be happy to discuss with you any of the comments described above or any other matters you feel would be helpful in your review of the Proposed Rule and the comments you receive. Please do not hesitate to contact the undersigned if you would like to discuss these matters further.

Respectfully submitted,

Securities Industry and  
Financial Markets Association

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