

MEMO# 14497

March 5, 2002

FINCEN PROPOSES PATRIOT ACT RULES ON INFORMATION SHARING

ACTION REQUESTED [14497] March 5, 2002 TO: MONEY LAUNDERING RULES WORKING GROUP No. 11-02 RE: FINCEN PROPOSES PATRIOT ACT RULES ON INFORMATION SHARING

The Treasury Department's Financial Crimes Enforcement Network (FinCEN) proposed rules yesterday that provide for the sharing of information both between the government and financial institutions and among financial institutions for the purpose of combating terrorism and money laundering.¹ These rules would implement section 314 of the USA PATRIOT Act ("Act"). A copy of the Proposing Release is attached and summarized below.² Comments on the proposed rules must be filed with FinCEN by April 3rd. If there are issues you would like us to consider addressing in our comment letter, please contact me at (202) 371-5430 or by email to rcg@ici.org or Frances Stadler at (202) 326-5822 or by email at frances@ici.org by Wednesday, March 20th.

A. Information Sharing with Federal Law Enforcement Agencies

Section 314(a) of the Act requires Treasury to adopt regulations encouraging cooperation between financial institutions and the federal government through the exchange of information regarding individuals, entities, and organizations engaged in or reasonably suspected of engaging in terrorist acts or money laundering activities. Section 314(a) of the Act does not define "financial institution." The proposed rule would define "financial institution" for purposes of section 314(a) by reference to the definition in the Bank Secrecy Act ("BSA"), which includes broker-dealers (including fund underwriters) and investment companies. This definition would not include investment advisers or transfer agents that are neither banks nor broker-dealers.

1 Financial Crimes Enforcement Network: Special Information Sharing Procedures to Deter Money Laundering and Terrorist Activity, 67 Fed. Reg. 9879 (March 4, 2002) (the "Proposing Release").

2 Treasury simultaneously issued an interim rule implementing section 314(b) of the Act. See Financial Crimes Enforcement Network: Special Information Sharing Procedures to Deter Money Laundering and Terrorist Activity, 67 Fed. Reg. 9873 (March 4, 2002). The interim rule is identical to the proposed rule with respect to section 314(b), and therefore is not attached.

3 The proposed rule provides that FinCEN, acting on behalf of a federal law enforcement agency investigating money laundering or terrorist activity, may request any financial institution to search its records to determine whether the financial institution maintains or has maintained accounts for, or has engaged in transactions with, specified individuals, entities, or organizations. If, after receiving such a request and searching its records, the financial institution identifies a matching account or transaction, it would have to file a report with FinCEN that contains the relevant information about the account or transaction. Unlike other customer screening requirements (such as those imposed by OFAC), this proposed rule would prohibit the financial institution from taking any action that could alert the individual, entity or organization that it has been identified by federal law enforcement agencies. Thus, this rule would prohibit financial institutions from rejecting a transaction,

freezing assets in an account, or refusing to open a new account based on the FinCEN request for information. The proposed rule also would require financial institutions, upon a request from FinCEN, to designate one person who will receive FinCEN's requests for information. B. Voluntary Information Sharing Among Financial Institutions Section 314(b) of the Act permits financial institutions, upon providing notice to Treasury, to share information with one another in order to better identify and report to the federal government concerning activities that may involve money laundering or terrorism. The proposed rule would implement this section of the Act. As with section 314(a), the term "financial institution" is not defined in section 314(b) of the Act. Unlike the proposed rule implementing section 314(a), the proposed rule implementing section 314(b) does not adopt the BSA's definition of financial institution. Instead, the proposed rule would define "financial institution" for purposes of section 314(b) to include: (1) A financial institution that is subject to SAR reporting that is not a money services business; (2) A registered broker or dealer; (3) An issuer of traveler's checks or money orders; (4) A registered money transmitter; and (5) An operator of a credit card system that is not a money services business. Investment companies, investment advisers, and transfer agents that are not banks or broker-dealers would not be financial institutions under this definition. 3 Although FinCEN could make such a request of any financial institution, the Proposing Release notes that FinCEN expects to focus initially on those financial institutions that are required (or soon will be required) to file suspicious activity reports, such as banks and broker-dealers. 3 The Proposing Release specifically requests comment on whether the five listed categories of entities should be included within the definition of financial institution for purposes of section 314(b) of the Act and the implementing rule, and whether the definition should be expanded to include other categories of BSA financial institutions. If the Institute comments on this proposal, it is likely to recommend that this definition be expanded to include investment companies. Prior to engaging in information sharing under the proposed rule, financial institutions would be required to file a certification form with Treasury. The form would include relevant information about the financial institution and representations that the financial institution (1) will maintain adequate procedures to protect the security and confidentiality of the information and (2) will not use any shared information for any purpose other than as authorized under the rule. The financial institution also would be required to designate a contact person for matters pertaining to information sharing. This certification would have to be renewed annually. The proposed rule provides a safe harbor such that financial institutions that share information in compliance with the rule are not liable for such sharing or for any failure to provide notice of such sharing. The proposed rule also provides for the voluntary reporting of information concerning suspicious transactions that may relate to money laundering or terrorist activities that come to the financial institution's attention as a result of information sharing with other financial institutions. Any such voluntary reporting would not relieve a financial institution from any obligation to file an SAR pursuant to a regulatory requirement to do so. Robert C. Grohowski Associate Counsel Attachment Attachment (in .pdf format)