The Asset Management Industry
SERVING INDIVIDUAL INVESTORS
INVESTMENT COMPANY INSTITUTE

COMMENT LETTER

April 3, 2002

Comment Letter on Efforts to Combat Money Laundering and Terrorist Activity, April 2002

April 3, 2002

Judith R. Starr, Chief Counsel
Office of the Chief Counsel
Financial Crimes Enforcement Network
Department of the Treasury
P.O. Box 1618
Vienna, Virginia 22183-1618

Re:: Proposed Rule—Special Information Sharing—Section 314 Comments

Dear Ms. Starr:

The Investment Company Institute[1] appreciates the opportunity to comment on the rule recently proposed by the Financial Crimes Enforcement Network (FinCEN) that would implement Section 314 of the USA PATRIOT Act[2] regarding the sharing of information relating to money laundering and terrorist activity.[3]

The proposed rule has two distinct sections. Section 103.100 would implement Section 314(a) of the Act, which 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 103.110 would implement Section 314(b) of the Act, which 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 terrorist activities. Our comments with respect to each of these sections are set forth below.

A. Information Sharing Between Federal Government Law Enforcement Agencies and Financial

Institutions—Section 314(a) of the Act and Section 103.100 of the Proposed Rule

The Institute strongly supports measures that would assist law enforcement agencies in combating money laundering and terrorist activities. We have some concern, however, that the proposed rule lacks appropriate constraints on the government's authority to request information, and that compliance with information requests pursuant to the proposed rule could become unduly costly and burdensome in the absence of such constraints.

Clearly, law enforcement agencies have the authority to subpoena information from financial institutions in connection with criminal investigations, and those institutions obviously would comply with those requests.[4] Nothing in Section 314(a) suggests that Congress intended to alter the government's ability to subpoena information with respect to investigations relating to money laundering or terrorist activity. Instead, it appears that Congress intended the information sharing rules under Section 314(a) to provide a mechanism, short of a subpoena, to assist law enforcement and financial institutions in preventing these crimes. We therefore believe that it would be appropriate for Section 103.100 to include reasonable parameters on the information requests by federal law enforcement agencies. Law enforcement agencies could continue to make more extensive information requests by obtaining a subpoena.

We have two specific comments on proposed Section 103.100 in this regard. First, the proposed rule states that the information search "shall cover the time period specified in FinCEN's request,"[5] and the Proposing Release explains that "FinCEN and the federal law enforcement agency seeking the information will determine the appropriate time period for the records search, depending on the circumstances of the underlying investigation."[6] However, neither the proposed rule nor the Proposing Release indicates that there are any limits on this time period, other than that it should be "appropriate."

In apparent recognition that searches of archived information can be difficult and costly, particularly if they have to be done manually, the Proposing Release specifically requests comments on the length of time financial institutions maintain records concerning closed accounts and past transactions.[7] In general, investment companies are required to maintain records in an easily accessible place for two years.[8] With respect to investment companies and their principal underwriters, we therefore recommend that the rule expressly limit information requests to records less than two years old. We believe that limiting requests to a financial institution's current (i.e., non-archived) records would be consistent with the purposes of the rule (e.g., assisting law enforcement in current investigations and preventing future crimes), and would help to mitigate the costs of complying with information requests. We reiterate that law enforcement agencies still would be able to use a subpoena to request records older than the time specified in the rule.

Second, we are concerned with the statement in the Proposing Release that "Treasury and FinCEN expect that financial institutions will use the information provided by FinCEN to report to FinCEN concerning any named individual, entity, or organization that subsequently establishes an account or engages in a transaction."[9] This statement suggests that firms would have to establish procedures to notify FinCEN if individuals, entities or organizations that were the subject of an information request ever sought to establish an account at any time in the future. Since nothing in Section 314(a) of the Act nor anything in the proposed rule itself mentions this type of prospective monitoring, we

recommend that the adopting release (1) clarify FinCEN's intent in this regard and (2) place appropriate limits on the time period for any such prospective monitoring.

B. Information Sharing Among Financial Institutions—Section 314(b) of the Act and Section 103.110 of the Proposed Rule

In order to share information pursuant to the rule, all entities involved in the sharing must be financial institutions.[10] As proposed, the definition of financial institution for purposes of Section 103.110(b) is limited to five types of financial institutions under the Bank Secrecy Act.[11] The Proposing Release specifically requests comment on "whether the definition should be expanded to include other categories of BSA financial institutions."[12]

We strongly recommend that that definition be broadened at least to include investment companies and their agents. Investment companies are financial institutions under the Bank Secrecy Act and are covered by other important sections of the USA PATRIOT Act, such as the requirement to have anti-money laundering compliance programs under Section 352. The sharing of information pursuant to the Section 103.110 safe harbor may enhance their anti-money laundering compliance efforts. It would appear, therefore, that important public policy would be served by allowing investment companies and their agents to avail themselves of the Section 103.110 safe harbor.[13]

If the definition of financial institution in the proposed rule were not broadened as we suggest, the only entity within a mutual fund complex that would qualify for the safe harbor would be the fund's principal underwriter, since it is a broker-dealer. Neither the investment companies themselves[14] nor the funds' transfer agent(s)[15] would qualify. As we have noted in other comment letters to FinCEN, an investment company's principal underwriter may or may not have access to or control over the investment company's transaction and account information.[16] As a result, including principal underwriters in the definition of financial institution for purposes of the safe harbor does not, in and of itself, allow mutual fund complexes to share fund information with the benefit of the rule's safe harbor.

Finally, we recommend that the certification process required by proposed Section 103.110(b)(2) be modified slightly to allow for affiliated financial institutions to become certified through a single filing. Although the certification form itself is not burdensome, it would be far more efficient, for example, to list all of the investment companies in a complex on a single form rather than filing substantially identical forms on behalf of each fund.[17]

* * *

The Institute appreciates the opportunity to express its views on this important issue. If you have any questions about these matters, please contact me at (202) 326-5815, Frances Stadler at (202) 326-5822 or Bob Grohowski at (202) 371-5430.

Very truly yours,

Craig S. Tyle
General Counsel

cc: William Langford, Senior Counsel for Financial Crimes

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ENDNOTES

1 The Investment Company Institute is the national association of the American investment company industry. Its membership includes9,039 open-end investment companies ("mutual funds"), 486 closed-end investment companies and 6 sponsors of unit investment trusts. Its mutual fund members have assets of about $6.951trillion, accounting for approximately 95 percent of total industry assets, and over 88.6 million individual shareholders.

2 Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. Law No. 107-56 (October 26, 2001).

3 See 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”).

4 See Fed.R.Crim.P. 17.

5 Section 103.100(d)(1) of the proposed rule.

6 Proposing Release at 9880.

7 Id.

8 See Section 31 of the Investment Company Act of 1940 and Rules 31a-1 and 31a-2 thereunder.

9 Proposing Release at 9881.

10 Section 103.110(b)(1) of the proposed rule.

11 Section 103.110(b)(2) defines the term financial institution to mean “any financial institution described in 31 U.S.C. 5312(a)(2) that:

Is subject to a suspicious activity reporting requirement of subpart B of this part and is not a money services business, as defined in Sec. 103.11(uu);

Is a broker or dealer in securities, as defined in Sec. 103.11(f);

Is an issuer of traveler's checks or money orders, as defined in Sec. 103.11(uu)(3);

Is a money transmitter, as defined in Sec. 103.11(uu)(5), and is required to register as such pursuant to Sec. 103.41; or

Is an operator of a credit card system and is not a money services business, as defined in Sec. 103.11(uu)."

12 Proposing Release at 9882.

13 For the same reasons, FinCEN may wish to consider allowing all financial institutions subject to Section 352 to take advantage of the safe harbor.

14 The definition of financial institution in the proposed rule would include any financial institution that is subject to a suspicious activity reporting requirement. This currently would not include investment companies, although fund underwriters may be required to comply with suspicious activity reporting requirements that have been proposed for broker-dealers. The Treasury Department reportedly is considering proposing a suspicious activity reporting rule for investment companies, and we have expressed our support for such an approach. See Letter from Craig S. Tyle, General Counsel, Investment Company Institute, to Judith R. Starr, Chief Counsel, Office of the Chief Counsel, Financial Crimes Enforcement Network, Department of the Treasury, dated March 1, 2002 (Broker-Dealer SAR Comment Letter), at 3. In any event, we see no reason to limit the definition of financial institution in this rule to the applicability of an SAR rule.

15 Most transfer agents are not financial institutions under the Bank Secrecy Act. However, given the transfer agent's role as the recordkeeper for the investment companies, the inclusion of an investment company's agents is critical for fund complexes to gain access to the rule's safe harbor.

16 See, e.g.,Broker-Dealer SAR Comment Letter at 2-4 and 7-8.

17 Assuming FinCEN agrees with our recommendation that investment companies and their agents be included in the definition of financial institution in this Section, each investment company would be a separate financial institution requiring certification in order to share information under the safe harbor.
