

## Expect more inquiries soon; FinCEN expanded information request begins

Brace for the possibility of an immediate increase in requests from the Treasury Department's **Financial Crimes Enforcement Network** about whether criminal suspects have accounts or have conducted transactions at your firm. Despite industry opposition, FinCEN last week sent a final rule  to the *Federal Register* that will take effect upon publication and expand its 314(a) program to allow local and state law enforcement agencies, and 27 European Union jurisdictions, to make inquiries at your firm. (*BD Week*, Nov. 30, 2009).

The program – which helps law enforcement confirm whether people suspected of terrorism or significant money laundering activities have done business at U.S. firms, and which firms those are – is being expanded without the explicit procedures and safeguards the financial industry requested.

But the final rule does provide a little more explanation of how the expanded program will work.

You won't immediately know the name of the local or state agency making a request. But you will be given the name and phone number of the representative for that agency, FinCEN says. As for foreign jurisdictions, federal law enforcement officers will serve as attachés.

If you have questions about a request made by a foreign agency, you would contact FinCEN's 314

Program Office. If you have questions about a request made by a state or local law-enforcement agency, you could contact FinCEN or the contact person for the agency.

Expect money laundering inquiries to involve major allegations. Local state law enforcement agencies first have to certify that a matter is "significant" and that they can't uncover the information through traditional investigative channels. Then they may seek help from the 314(a) program.

So what's deemed significant? That will be determined by "the seriousness and magnitude of the suspected criminal conduct," the dollar amount involved, whether a multi-agency task force is working on it, whether organized crime is involved, whether there are multi-regional or cross border implications, and other factors, FinCEN says.

The only state and local law enforcement agencies that could use the program would be those that have criminal investigative authority.

Several organizations representing the financial services industries sent comment letters to FinCEN that said they hoped the program would have controls in place to keep the number of requests from getting out of hand. The organizations also asked that FinCEN make sure that any information provided by firms be kept secure.

"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," wrote **Ira Hammerman**, senior managing director and general counsel of **SIFMA** and **Tammy Botsford**, vice president and assistant general counsel of the **Futures Industry Association**.

FinCEN countered that fears about secure information are unfounded, pointing out that information provided through the 314(a) program is

*(314(a) program, continued on page 2)*

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**314 (a) program** *(cont. from pg. 1)*

“extremely limited” because it only confirms that an account or transaction linked to the suspected person exists.

Commenters also wanted FinCEN to explicitly spell out and put into regulation how it vets 314(a) requests from law enforcement, but FinCEN refused.

“FinCEN is not inclined to incorporate its internal operating procedures into the regulation, as this would not allow us sufficient latitude to revise our internal operating procedures as needed,” the agency replied in the final rule.

If there is a positive hit – that is, if you confirm that someone indeed has an account at your firm, law enforcement agencies would have to use the usual legal process, such as a subpoena or a national security letter, to obtain the information. At that point, the matter is out of FinCEN’s hands, it said.

FinCEN made estimates in its proposed rule in November of the burden the change would place on industry, but those estimates have been greeted with skepticism by industry organizations that submitted comments about the proposed rule.

Still, FinCEN says in its final rule that it is sticking to those estimates because industry hasn’t presented alternatives that it considers valid. It says the rule would result in an average of 72 hours of work a year per firm. There would be, on average, 60 international requests, 50 requests from state and local law enforcement agencies, and 10 requests from federal law enforcement. And there would be an average of nine subjects (including aliases) per

request, resulting in 1,080 subjects a year. FinCEN estimated that it would take an average of four minutes per subject.

**Steve Ganis**, an attorney at **Mintz Levin** in Boston, told *BD Week* that FinCEN’s estimate seems low “when one considers that the 314(a) floodgates are being opened to 50 states, thousands of localities and, initially, 27 EU member states. The volumes will increase as reciprocal sharing arrangements with countries in other regions are negotiated and ratified.”

Ganis, who served from 2003 to 2008 on the Treasury Bank Secrecy Act Advisory Group, a FinCEN advisory committee, also noted that:

✓ Even if the increases stay within the estimate, there will be more true matches, which means more coordination with law enforcement, more subpoenas and more suspicious activity report investigations. The financial intelligence, compliance, risk management, and legal functions at BDs need to be prepared to meet the new demands on their resources.

✓ Dealing with requests from foreign law enforcement will add a whole new dimension to your workload. There are EU member states that use different alphabets, for example, a factor that always complicates searches of account and transaction records.

✓ Even now, BDs spend a fair amount of time dealing with law enforcement officials getting clarification on possible and partial hits. Requests from foreign law enforcement will add a new layer:

*(314 (a) program, continued on page 3)*

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## **314(a) program** *(cont. from pg. 2)*

BDs will need to contact someone in FinCEN's 314 office, who will then contact foreign law enforcement.

Some industry commenters also said not enough notice was given. FinCEN said it needed to put the rule in effect because some of the measures regarding foreign jurisdictions are part of treaty provisions that were scheduled to take effect Feb. 1.

**American Bankers Association** Vice President and Senior Counsel **Robert Rowe** blasted this explanation, writing in his comment letter that “nothing in the rule-making record supports this accelerated regulatory change to grant unprecedented foreign access to U.S. financial institution account information.” ■