

Supporting Statement

1. Circumstances Necessitating Collection of Information.

On October 26, 2001, the President signed into law the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (“USA PATRIOT ACT”) Act of 2001, Public Law 107-56 (“the Act”). Title III of the Act amends the anti-money laundering provisions of the Bank Secrecy Act, codified at 12 U.S.C. 1829b and 1951–1959 and 31 U.S.C. 5311–5314 and 5316–5332, to promote the prevention, detection, and prosecution of international money laundering and the financing of terrorism. Regulations implementing the BSA appear at 31 CFR Part 103. The authority of the Secretary of the Treasury (“the Secretary”) to administer the BSA has been delegated to the Director of FinCEN.

Of the Act’s many goals, the facilitation of information sharing among governmental entities and financial institutions for the purpose of combating terrorism and money laundering is of paramount importance. Section 314 of the Act furthers this goal by providing for the sharing of information between the government and financial institutions, and among financial institutions themselves. As with many other provisions of the Act, Congress has charged the U.S. Department of the Treasury with developing regulations to implement these information-sharing provisions.

Subsection 314(a) of the Act states in part that:

[t]he Secretary shall . . . adopt regulations to encourage further cooperation among financial institutions, their regulatory authorities, and law enforcement authorities, with the specific purpose of encouraging regulatory authorities and law enforcement authorities to share with financial institutions information regarding individuals, entities, and organizations engaged in or reasonably suspected based on credible evidence of engaging in terrorist acts or money laundering activities.

2. Method of Collection and use of data.

The information contained in the 314(a) request is used, primarily, by criminal investigators during the course of investigations that involve terrorism and/or money laundering.

3. Use of Improved Information Technology to Reduce Burden.

Currently, 100 % of this collection is filed using automated technology through the FinCEN Analysis and Liaison Division.

4. Efforts to Identify Duplication

There is no similar information available; thus, there is no duplication.

5. Methods to Minimize Burden on Small Businesses or other Small Entities

This collection of information does not significantly impact small entities.

6. Consequences to the Federal Government of not collecting the Information.

This collection of information, in part, implements the process through which the Federal Government will comply with a self-executing Mutual Legal Assistance Agreement with the European Union. This treaty was ratified by the President on September 23, 2008 with the advice and consent of the United States Senate. Without this collection of information, the Federal Government will be in violation of the Mutual Legal Assistance Agreement.

7. Special Circumstances Requiring Data Collection Inconsistent with Guidelines.

There are no special circumstances.

8. Consultation with Individuals Outside of the Agency on Availability of Data. Frequency of Collection, Clarity of Instructions and Forms, and Data Elements.

An NPRM 30-day notice was published on November 16, 2009 (74 FR 58926). In order to satisfy the United States' treaty obligation with certain foreign governments, FinCEN is proposing to extend the use of the 314(a) program to include foreign law enforcement agencies. On June 25, 2003, the Agreement on Mutual Legal Assistance between the United States and the European Union was signed. The notice also proposed allowing state and local law enforcement agencies, as well as FinCEN, on its own behalf and on behalf of appropriate components of the Department of the Treasury, to initiate 314(a) queries. FinCEN received 13 comments to this notice and responds as follows. 7 comments were submitted by trade groups or associations, 4 were submitted by individuals, 2 were submitted by Federal law enforcement agencies, and 1 was submitted by an individual financial institution. Comments on the Notice focused on the following matters: (1) Requirements for foreign, State, and local law enforcement 314(a) requests; (2) Confidentiality and privacy concerns regarding information provided to foreign, State, and local law enforcement; (3) Requirements for FinCEN self-initiated 314(a) requests; (4) FinCEN's authority to expand the 314(a) rule; (5) The 314(a) statutory goal of sharing information with financial institutions; and (6) Estimate of burden.

Some commenters requested that FinCEN clarify what the requirements are for foreign, State, and local law enforcement to submit 314(a) requests. In addition, those commenters asked FinCEN to clarify how the requests will be monitored to ensure that regulatory and procedural requirements are met. For example, some commenters requested clarification as to how FinCEN will determine whether a money laundering investigation is "significant" and that more traditional means of investigation have been exhausted. FinCEN will require these law enforcement agencies 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. As discussed above, FinCEN will require these law enforcement agencies to certify that, 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 314(a) request. In addition, foreign, State, and local law enforcement agencies making 314(a) requests are required to include the following information in their certification request: a citation of the relevant statutory provisions; a description of the suspected criminal conduct; for money laundering cases, a description as to why the case is significant, and a list of the traditional methods of investigation and analysis which have been conducted prior to making the request. Factors that contribute towards evaluating the significance of a money laundering case include, for example: the seriousness and magnitude of suspected criminal conduct; the dollar amount involved; whether the analysis is being conducted as part of a multi-agency task force; the importance

of analysis to agency program goals; criminal organization involvement; and multi-regional and/or cross border implications.

All requests made by foreign, State, and local law enforcement agencies will be submitted to FinCEN for review and approval. With regard to a request made by a foreign law enforcement agency, the request will be submitted to a Federal law enforcement attaché. The attaché will review the request to ensure that the request is from a legitimate entity. The attaché will then forward the request to FinCEN for review. Following FinCEN's approval, the request will be made available to financial institutions via the 314(a) Secure Information Sharing System. The financial institutions may contact FinCEN's 314 Program Office with any questions regarding a foreign law enforcement request. With regard to a State or local law enforcement request, the financial institution may contact FinCEN, or the State or local law enforcement agency with any questions regarding its request. FinCEN's determination to subject foreign, State, and local law enforcement requests to the same procedural review and vetting process imposed upon Federal law enforcement requests goes directly to the recommendations offered by many commenters.

One commenter asked whether foreign, State, or local law enforcement will be identified as the requester on 314(a) requests sent by FinCEN to financial institutions. Currently, in a request made by a Federal law enforcement agency, the request made available by FinCEN to financial institutions only includes the name and contact number of the agency representative making the request. The Federal law enforcement agency making the request is not identified on 314(a) requests sent by FinCEN to financial institutions. For a request made by a State or local law enforcement agency, the request made available by FinCEN to financial institutions also will include the name and contact number of the agency representative making the request. For a request made by a foreign law enforcement agency, the request made available by FinCEN to financial institutions will include the contact number for FinCEN's 314 Program Office. This decision was made to alleviate the need for financial institutions to call overseas.

One commenter asked for clarification as to whether foreign, State, and local law enforcement requests could be made independent of a Federal investigation. There is no obligation that requests from these agencies be linked to a Federal investigation. However, with regard to State and local law enforcement requests, the law enforcement agency must include in the certification the identity of any Federal law enforcement agency with whom they have consulted. In addition, for terrorism cases FinCEN will review the request with the FBI liaison to FinCEN prior to further processing the request.

A few commenters suggested that FinCEN should limit access to those countries that cooperate with the United States via a treaty or other bilateral agreement. As we discuss above, only foreign law enforcement agencies with criminal investigative authority that are from a jurisdiction that is a party to a treaty that provides for, or in the determination of FinCEN is from a jurisdiction that otherwise allows, law enforcement agencies in the United States reciprocal access to information comparable to that obtainable under section 103.100 will be allowed to access the 314(a) program. Some commenters suggested that FinCEN should clarify which State and local law enforcement agencies will be allowed to access the 314(a) program. All State and local law enforcement agencies with criminal investigative authority will be allowed to access the 314(a) program.

One association suggested that before any expansion in the proposal is considered, the current internal controls over the 314(a) program should be incorporated into the rule. 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.

A few commenters asked for clarification as to what steps foreign, State, and local law enforcement will be required to take to obtain information from a financial institution if a match to their request is identified. The steps required to be taken by one of these law enforcement agencies to obtain information from a financial institution once a match has been confirmed is not addressed

within the 314(a) rule. These law enforcement agencies will have to follow the standard procedures that they currently follow in order to obtain financial information from financial institutions, for example through issuance of a subpoena, a letter rogatory, or national security letter.

Two commenters noted that Federal law enforcement is required to track their use of the 314(a) data to provide feedback, demonstrate program value, and maintain accountability. FinCEN routinely provides feedback and data to the regulated public as to the effectiveness of the 314(a) program (e.g., SAR Activity Review articles¹) and will continue to do so in the future. The commenters suggested that the data reporting requirements be made explicit in the implementing regulations and the same data reporting requirements should apply to foreign, State, and local law enforcement. As noted above, FinCEN is not inclined to incorporate its internal operating procedures into the regulation. However, the same data reporting requirements will apply to foreign, State, and local law enforcement.

One commenter asked how FinCEN would address overlapping interests of different law enforcement agencies pursuing the same subject. With regard to foreign requests, while processing the request, any existing cases the 314(a) subject(s) hits against will be brought to the immediate attention of FinCEN's 314 Team Leader to determine what further action will take place. FinCEN will automatically network (i.e., notify) all international terrorism-related requests with the FBI only, and will automatically network all international money laundering requests with both Federal and non-Federal law enforcement agencies, as applicable. With regard to State and local law enforcement requests, the law enforcement agency must include in the certification the identity of any Federal law enforcement agency with whom they have consulted. For State and local law enforcement requests related to terrorism cases, FinCEN will review the request with the FBI liaison to FinCEN prior to further processing the request. In addition, it is FinCEN's policy to network different requesters that have submitted requests for information to FinCEN on the same subject. Networking gives requesters the opportunity to coordinate their efforts with U.S. law enforcement and other international entities on matters of mutual interest. Networking will apply to requests made by foreign, State, and local law enforcement.

A few commenters suggested that FinCEN provide training to foreign, State, and local law enforcement regarding the proper procedures for utilizing the 314(a) program. While a formal process has not been instituted at this point, FinCEN's intention is to provide outreach to the new law enforcement users.

Another commenter suggested that instead of allowing all State and local law enforcement agencies to access the 314(a) program, a 2-year pilot program allowing access to two or three large State and local law enforcement agencies be implemented instead. The commenter noted that FinCEN could monitor the results of the pilot program and report the results to Congress and the public. While FinCEN will monitor the effectiveness of the program's expansion, arbitrarily limiting access to certain large local jurisdictions would deny potential access to smaller communities confronting serious criminal threats.

One commenter suggested that local law enforcement agencies be required to enter into a memorandum of understanding with FinCEN in order to access the 314(a) program. FinCEN has an active cooperative relationship with law enforcement at every level in the country, and expanding the 314(a) program to allow local law enforcement access is part of the ongoing support FinCEN provides to law enforcement. This support includes, for example, providing access to BSA data, fostering information exchange with international counterparts, and offering financial subject matter knowledge in key realms.

A few commenters expressed concern about the confidentiality of information that financial institutions would provide to FinCEN as a result of the rule, particularly when such information is shared by FinCEN with requesting foreign, State and local law enforcement agencies. At least one commenter drew an analogy between section 314(a) “hit” information and information in suspicious activity reports (“SARs”) to argue that section 314(a) information should be accorded the same protections and assurances of confidentiality when such information is shared with foreign law enforcement agencies.

FinCEN believes these concerns are unfounded. Section 314(a) information is extremely limited. Unlike SAR information, section 314(a) information will continue to consist of only a confirmation that a matching account or transaction exists. Also unlike the documentation supporting the filing of a SAR, the underlying account and transaction information relating to a 314(a) hit that contains sensitive customer financial information is not deemed to be part of the 314(a) response, and can only be obtained by the requesting agency through appropriate legal process, such as a subpoena. FinCEN is not part of that legal process to obtain the underlying information; its involvement ends at informing requesting agencies that a match exists. In addition, unlike with SARs, the personally-identifiable information (e.g., subject names, aliases, dates of birth, and social security numbers) that a financial institution uses to conduct a section 314(a) search is provided not by the institution, but by the requesting agency.

Another commenter questioned whether sharing section 314(a) information with foreign law enforcement agencies may run afoul of the Right to Financial Privacy Act (“RFPA”), 12 U.S.C. 3401 et seq., or any other Federal or state privacy law. Because any hit information provided to FinCEN would be reported pursuant to a Federal rule, the reporting of such information to FinCEN would fall within an exception to the RFPA.² FinCEN is not aware of any other Federal or state law that would prohibit a financial institution from reporting section 314(a) information to FinCEN in response to a foreign law enforcement agency’s request or that would prevent FinCEN from sharing such information with the foreign requester.

Some commenters requested that FinCEN clarify the reason FinCEN needs access to expand the 314(a) program to allow it to make self-initiated requests, how FinCEN will use the information, the procedures that will apply to initiating the requests, the parties who will screen such requests, and any limitations that will apply to FinCEN’s self initiated requests. FinCEN self-initiated requests will be for the purpose of conducting analysis to deter and detect terrorist financing activity or money laundering. These requests will be made in order to increase the value of analytical support to law enforcement. FinCEN or the appropriate Treasury component making the request shall certify in writing in the same manner as a requesting law enforcement agency that each individual, entity or organization about which FinCEN or the appropriate Treasury component is seeking information is engaged in, or is reasonably suspected based on credible evidence of engaging in, terrorist activity or money laundering. FinCEN or the other appropriate Treasury component making the request shall also certify that, 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 analysis before attempting to make a 314(a) request. In addition, FinCEN or the appropriate Treasury component making the 314(a) request is required to include information such as the following in their certification request: for money laundering cases, a description as to why the case is significant, and a list of the traditional methods of analysis which have been conducted prior to making the request. If FinCEN uses the 314(a) process in support of proactive target development, FinCEN will first brief law enforcement to ensure that the analysis is of interest to law enforcement and to ensure de-

confliction with any ongoing investigation. In addition, FinCEN self-initiated 314(a) requests will be independently reviewed and approved by multiple offices within FinCEN.

In addition, some commenters requested that FinCEN clarify the components of Treasury that will have access to the 314(a) program and under what circumstances. The components of Treasury that will have access to the 314(a) program will be those components that provide analytical support, such as those providing support to Treasury's counter-terrorist financing and anti-money laundering efforts. The components of Treasury which submit 314(a) requests will be required to comply with the same procedures and certification requirements as FinCEN self-initiated requests.

Two commenters noted that permitting FinCEN and other components of Treasury to self-initiate 314(a) requests may be detrimental to law enforcement and may cause many unnecessary searches by banks. The same commenters noted that it appears that FinCEN is lowering the threshold as to when FinCEN can initiate 314(a) requests. The commenters explained that law enforcement must exhaust all traditional methods of investigations before they can initiate a 314(a) request. Because FinCEN is not a law enforcement agency, FinCEN cannot exhaust all traditional methods of investigation, and therefore FinCEN will be held to a much lower threshold than law enforcement. In addition, the commenters are concerned that law enforcement may be precluded from making a 314(a) request on a subject, at a crucial point of an investigation, if FinCEN has previously conducted a self-initiated request on the same subject, because this would create a duplicative search, something that has been discouraged by FinCEN. The commenters also are concerned that a FinCEN or Treasury 314(a) request may be submitted on a subject who is already under investigation by law enforcement, because the broad audience that receives these requests could cause operational concerns for the investigation. In addition, the commenters noted that it is not clear what FinCEN will do with the information once it learns of a previously unknown bank account through the 314(a) process if FinCEN does not have subpoena or summons authority to pursue the lead any further. Finally these commenters noted that FinCEN's requests will be competing with law enforcement for access to the limited number of 314(a) requests that can be made, due to the need not to overburden financial institutions.

FinCEN will be implementing review procedures to ensure that any request it intends to make will not conflict with ongoing law enforcement efforts. As noted above, in the certification FinCEN or other components of Treasury will submit for a 314(a) request, they must certify that to ensure de-confliction with any possible on-going investigation within the Federal law enforcement community, they have consulted with FinCEN's Federal law enforcement liaisons. In addition, FinCEN must also certify that they have been unable to locate the information sought through traditional methods of analysis, and they must list the type of analysis they have conducted. It is anticipated that any direct use by FinCEN of the 314(a) program will not cause any significant increase in the amount of case requests going to the industry. The primary scenarios in which we would envision FinCEN making a 314(a) request are as follows: (1) A request could be made for FinCEN to serve as a conduit in issuing a consolidated 314(a) request on behalf of a multi-agency task force investigation. In this instance, it might actually reduce/preclude an otherwise larger number of separate requests emanating from individual agencies. FinCEN would request that these agencies conduct the subpoena/investigative follow up on any positive hits received from the industry. (2) FinCEN may occasionally develop significant, multi-state proactive targets/leads which might be appropriate for a 314(a) request. These are typically long-term selective efforts and therefore not likely to constitute any significant increase in the number of 314(a) requests. In addition, FinCEN would first brief the law enforcement community on the target package before deciding to issue a 314(a) request to ensure it is of substantial interest to law enforcement agencies and also to ensure an opportunity for de-confliction. If positive hits occur, FinCEN would collaborate with law enforcement on any subpoena/investigative follow-up. Furthermore, for any FinCEN self-initiated 314(a) requests, the same parameters will exist for

justifying the significance of the ‘case request’ which, in turn, will also likely limit the number of such requests.

A few commenters questioned FinCEN’s authority to expand the section 314(a) program to include requesters other than Federal law enforcement agencies. Section 314(a) authorizes Treasury to adopt regulations to encourage further cooperation among “financial institutions, their regulatory authorities, and law enforcement authorities.” Nowhere in section 314(a) is the term “law enforcement” limited to just Federal law enforcement agencies. That FinCEN initially included only Federal law enforcement agencies when it first established the section 314(a) program in 2002 was never meant to suggest a limitation on FinCEN’s authority. On the contrary, the section 314(a) program began with Federal law enforcement because of uncertainty about how the program would work in practice and uncertainty about the resulting burden to financial institutions. FinCEN has had almost eight years of experience in administering the section 314(a) program, and for the reasons outlined elsewhere in this rulemaking, believes that its expansion to include other requesters will reap benefits that far outweigh the additional obligations on financial institutions. This is particularly true in the case of foreign requesters because law enforcement agencies in the United States, as a result of FinCEN accommodating foreign requesters, now will have the opportunity to obtain information about matching accounts and transactions in those EU jurisdictions that have signed the U.S.-EU MLAT. FinCEN therefore believes that its expansion of the section 314(a) program is entirely consistent with the stated goals of section 314(a) of encouraging cooperation between financial institutions and law enforcement agencies.

FinCEN received another comment questioning its “expansion” of the term “money laundering,” as that term is used in the rule. Currently, that term is defined to mean activity criminalized by 18 U.S.C. 1956 or 1957. The one change to the definition of the term “money laundering” would be to clarify that the term includes activity that would be criminalized by 18 U.S.C. 1956 or 1957 if such activity occurred in the United States. The change is necessary because of the addition of foreign law enforcement agencies as an authorized requester. Aside from making the provisions of the rule relevant to foreign requesters, the change is not intended and should not be viewed as expanding the scope of activity for which the section 314(a) program may be used.

One commenter also expressed concern about the pace at which FinCEN is seeking to amend the section 314(a) process, given its belief that section 314(a) information may be obtained through existing processes. As was explained in the Notice and elsewhere in this rulemaking, FinCEN is seeking to finalize a rule as quickly as possible so that the U.S. Government can comply with its obligations under the U.S.-E.U. MLAT and related bilateral instruments. Those treaties enter into force on February 1, 2010. Contrary to that commenter’s belief, there is no current mechanism available to State, local and foreign law enforcement agencies that would allow those agencies to ascertain quickly whether financial institutions throughout the United States have established an account or conducted a transaction for a particular person or entity.

A few commenters noted that 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. One of these commenters noted that FinCEN should develop mechanisms, in addition to its bi-annual SAR Activity Review publication, that will help share information with financial institutions. The overarching policy directive of the Act generally, and section 314 in particular, is that more information sharing will better enable the Federal Government and financial institutions to guard against money laundering and terrorist financing. This rule supports the policy directive of the Act. FinCEN recognizes the importance of providing financial institutions information to assist them in identifying and reporting suspected terrorist activity and money laundering. For this reason, FinCEN regularly provides sample case feedback studies to the industry which illustrate how the use of 314(a) has often made a ‘break through’ difference in terrorist financing and significant

money laundering cases. The studies also convey insight on related trends and patterns. FinCEN also has posted several Federal law enforcement informational alerts on the 314(a) Secure Information Sharing System, which has provided for enhanced sharing of information between the financial industry and law enforcement in a secure environment. In addition, the final rule does not preclude law enforcement, when submitting a list of suspects to FinCEN, from providing additional information relating to suspicious trends and patterns, and FinCEN specifically will encourage law enforcement to share such information with the financial community.

9. Payments and Gifts

No payments or gifts were made to respondents.

10. Assurance of Confidentiality of Responses.

Information collected in a 314a request is made available, in accordance with strict safeguards, to appropriate criminal law enforcement and regulatory personnel solely in the official performance of their duties.

11. Justification of Sensitive Questions.

No sensitive questions are asked.

12. Estimated Annual Hourly Burden.

Frequency: Bi-weekly.

Estimated Number of Respondents: 20,134.

Estimated Number of Annual Responses: 1,080.

Estimate of Burden: Reporting average of 4 minutes per response. Reporting average of 72 hours annually per Recordkeeper. Estimate of Total Annual Burden on Respondents: 1,449,648 hours.

13. Estimated Annual Cost to Respondents for Hour Burdens.

Not applicable.

14. Estimated Annual Cost to the Federal Government.

Not applicable.

15. Reason for Change in Burden.

This is a new requirement.

16. Plans for Tabulation, Statistical Analysis, and Publication.

This collection of information will not be published.

17. Request not to Display Expiration Date of OMB Control Number.

Not Applicable.

18. Exceptions.

There are no exceptions to the certification statement on OMB Form 83-1.