

Information Sharing Requirements under the USA PATRIOT Act

The Financial Crimes Enforcement Network (FinCEN) issued a final rule that requires automobile dealers and other financial institutions to respond to requests for information from FinCEN on behalf of federal law enforcement agencies that are investigating money laundering or terrorist activity. The regulation took effect September 26, 2002.

There are two components to the regulation. The first part, which implements section 314(a) of the USA PATRIOT Act, is intended to provide law enforcement with the means to quickly locate accounts and transactions associated with suspected terrorists and money launderers.

The second part, which implements section 314(b) of the USA PATRIOT Act, pertains to financial institutions that wish to voluntarily share information with other financial institutions “regarding individuals, entities, organizations, and countries for purposes of identifying and, where appropriate, reporting activities that the financial institution... suspects may involve possible terrorist activity or money laundering.” In order to facilitate information sharing for this purpose, section 314(b) creates a safe harbor from liability resulting from the sharing of such information (or from failing to provide notice of the sharing) provided the financial institution complies with several requirements. However, the second part of the regulation only applies to financial institutions that are required to establish and maintain an anti-money laundering program under FinCEN regulations (FinCEN may determine that a particular category of these financial institutions is not eligible for this protection). Because automobile dealers are not presently required to establish an anti-money laundering program under FinCEN regulations (as of April 2003), section 314(b) and its implementing regulation do not presently apply to automobile dealers. This means that dealers cannot presently avail themselves of the safe harbor protection.

The two parts of the regulation are summarized below.

Section 314(a) – Info Sharing with FinCEN

The regulation imposes the following requirements on automobile dealers:

- 1) If requested by FinCEN, a dealer must expeditiously search its records to determine whether the dealer has maintained (or currently maintains) an account for or has engaged in a transaction with any individual, entity or organization identified by FinCEN. Unless FinCEN indicates otherwise in its information request, a dealer may limit the search of its records to:
 - a) any current account maintained for the named suspect;
 - b) any account the dealer maintained for the suspect during the preceding 12 months; and
 - c) any transaction conducted by (or on behalf of) the named suspect during the preceding 6 months that the dealer is required by law or regulation to record or that the dealer has, in fact, recorded and maintained electronically.

Note: If the dealer has questions about the scope or terms of the request, the dealer should contact directly the federal law enforcement agency that forwarded the information request to FinCEN (the contact information of that agency will be included in the information request). However, if the dealer finds a match, it should send the report described below to FinCEN and not the requesting federal law enforcement agency.

- 2) If the dealer identifies such an account or transaction, the dealer must send a report to FinCEN in the manner and time frame specified in the FinCEN request. Unless otherwise indicated in the request, the search requirement is retrospective and does not require dealers to report on future account opening activity or transactions.

Note: In the short term, FinCEN anticipates that its requests and the reports it receives will be accomplished through a combination of e-mail and fax transmissions. FinCEN may later determine that it will use a secure network to send the requests and receive the reports.

- 3) The report must contain the following information:
- a) The name of the individual, entity or organization;
 - b) The number of each such account, or in the case of a transaction, the date and type of each such transaction; and
 - c) Any social security number, taxpayer identification number, passport number, date of birth, address, or other similar identifying information provided by the individual, entity or organization when each such account was opened or each such transaction was conducted.
- 4) If a dealer receives an information request, it must designate one person at the dealership to be the point of contact regarding the request and any future requests that the dealership receives from FinCEN. If requested by FinCEN, a dealer must provide FinCEN with the person's name, title, mailing address, e-mail address, telephone number and facsimile number in the manner specified by FinCEN. Dealers who have provided FinCEN with contact information must promptly notify FinCEN of any changes to that information.
- 5) Dealers are prohibited from using information provided by FinCEN for any purpose other than:
- a) Providing FinCEN with the required report;
 - b) Determining whether to establish or maintain an account or engage in a transaction; or
 - c) Assisting the dealer in complying with the anti-money laundering program requirements set forth in FinCEN regulations.

Note: As indicated above, FinCEN has not applied anti-money laundering program requirements to automobile dealers as of December 2002.

- 6) Dealers also are prohibited from disclosing to any person, other than FinCEN or the federal law enforcement agency for whom FinCEN is requesting information, the fact that FinCEN has requested or obtained such information (except as necessary to process the request).
- 7) Dealers must maintain adequate procedures to protect the security and confidentiality of requests from FinCEN for such information. This requirement is deemed satisfied if a dealer applies to this information the same procedures it has established to comply with section 501 of the Gramm Leach Bliley Act (15 U.S.C. § 6801) and the Federal Trade Commission's implementing regulation (16 CFR Part 314) pertaining to the protection of customers' nonpublic personal information.

Note: The FTC regulation referred to above is separate from the FTC's Financial Privacy regulation that dealers were required to fully comply with by July 1, 2001. The FTC regulation referred to above creates Standards for Safeguarding Customer Information that dealers must comply with by May 23, 2003 (to obtain the FTC standards, visit <http://www.ftc.gov/os/2002/05/safeguardfrn.pdf>). If a dealer has not yet created FTC-compliant safeguarding standards that it can apply to the FinCEN information requests, the dealer must nevertheless ensure it presently "maintain[s] adequate procedures to protect the security and confidentiality of requests from FinCEN."

Related Issues

- The regulation implementing section 314(a) is primarily a reporting requirement. It does not require dealers to take (or decline to take) any action on accounts or transactions that are the subject of a FinCEN request. Dealers are advised, however, that the International Emergency Economic Powers Act (IEEPA) and Executive Order 13224 prohibit "any transaction or dealing" with named individuals or entities who have been linked to terrorism. An alphabetical master list of those named individuals and entities (also known as "blocked persons") is maintained by the Office of Foreign Assets Control (OFAC) at <http://www.treas.gov/ofac/t11sdn.pdf>. Dealers are prohibited from entering into transactions with, and must freeze the existing accounts of, any "blocked person" identified on the OFAC list.
- If dealers are unsure of the appropriate way to respond to a FinCEN request or to transactions initiated by "blocked persons" or others identified by FinCEN, they may request guidance from FinCEN by calling their toll-free Financial Institutions Hotline (1-866-556-3974).
- Although the regulation specifies that FinCEN will make requests for the above-specified information on behalf of federal law enforcement agencies, the regulation does not limit

the authority of a federal agency to lawfully obtain information directly from dealers pursuant to the agency's approved procedures.

- The regulation states that the information that must be reported to FinCEN in response to an information request "shall be treated as information required to be reported under federal law, for purposes of the relevant exceptions contained in ... section 502(e)(8) of the Gramm Leach Bliley Act." That section permits the disclosure of a consumer's nonpublic personal information to comply with federal, state and local law without having to provide the consumer with an opportunity to opt out of such disclosure.

Section 314(b) – Info Sharing with Another Financial Institution

In order for a financial institution (or an association of financial institutions) to avail itself of the safe harbor protection, it must comply with the following requirements (Note: This is not presently available to automobile dealers (as of December 2002) since they are not presently required under FinCEN regulations to implement and maintain an anti-money laundering program):

- 1) The financial institution must submit to FinCEN the notice contained at Appendix A of the final rule (see attachment). The notice is effective for a period of one year. To continue the safe harbor protection beyond the one-year period, the financial institution must submit a new notice for each additional year. Completed notices may be submitted to FinCEN via its website (www.treas.gov/fincen).
- 2) Prior to sharing information covered by the rule, the financial institution must take "reasonable steps" to verify that the financial institution it intends to share information with has also submitted to FinCEN the notice described above. This requirement may be satisfied by: (i) confirming that the other financial institution appears on a list that FinCEN will periodically make available to financial institutions that have filed a notice with it (FinCEN anticipates updating the list quarterly), or (ii) confirming directly with the other financial institution that the notice has been filed. This may be confirmed by obtaining a copy of that institution's notice or by other reasonable means (including accepting the representations of the other institution that a notice was filed after the most recent list has been distributed by FinCEN).
- 3) Information that a financial institution receives under this section cannot be used for any purpose other than:
 - a) Identifying and, where appropriate, reporting anti-money laundering or terrorist activity;
 - b) Determining whether to establish or maintain an account, or engage in a transaction; or
 - c) Assisting the financial institution in establishing and maintaining its anti-money laundering program (or other requirements under FinCEN regulations).

- 4) The financial institution must maintain adequate procedures to protect the security and confidentiality of such information. This requirement is deemed satisfied if the financial institution applies to this information the same procedures it has established to comply with section 501 of the Gramm Leach Bliley Act (15 U.S.C. § 6801) and the Federal Trade Commission's implementing regulation (16 CFR Part 314) pertaining to the protection of customers' nonpublic personal information.
- 5) Dealers are not presently required to file what is known as a Suspicious Activity Report (SAR). However, when information sharing under this section causes a dealer to know, suspect or have reason to suspect that an individual, entity or organization is or may be involved in terrorist activity or money laundering, FinCEN encourages the dealer to voluntarily report such activity to FinCEN.

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The final regulation may be obtained at: www.treas.gov/press/releases/docs/314finalrule.pdf.

The foregoing summary of the new information sharing requirements under section 314 of the USA PATRIOT Act is not intended as legal advice. Dealers should consult their counsel concerning the most appropriate means of instituting and complying with these requirements at their dealership.