

FinCEN Expands Section 314(b) Information Sharing Safe Harbor

December 15, 2020

Last week, the Financial Crimes Enforcement Network (“FinCEN”) released new guidance (the “Fact Sheet”) that clarifies the information sharing safe harbor of Section 314(b) of the USA PATRIOT Act.¹ Section 314(b) establishes a safe harbor from liability for financial institutions or associations of financial institutions to share information with each other, on a voluntary basis, for the purpose of identifying and reporting possible money laundering or terrorist activity.

The Fact Sheet, which FinCEN Director Kenneth Blanco highlighted in a virtual conference of the American Bankers and American Bar Associations, expands the types of information that can be shared under Section 314(b).² In particular, the Fact Sheet explains that financial institutions may, in reliance on Section 314(b), share information related to activities that may involve possible terrorist activity or money laundering even if such activities do not constitute a financial “transaction.” In addition, the Fact Sheet notes that compliance service providers and others may form and operate an association of financial institutions whose members can use Section 314(b) to share information and that unincorporated associations of financial institutions may engage in information sharing under Section 314(b).

THE INFORMATION THAT MAY BE SHARED UNDER SECTION 314(b) BACKGROUND

The Fact Sheet revises FinCEN’s prior guidance on the scope of information eligible for sharing under the Section 314(b) safe harbor. In 2009 guidance, FinCEN took the view that a financial institution could share information relating to the predicate crimes of money laundering—i.e., specified unlawful activity (“SUA”)—only if the financial institution “suspects that [a] transaction may involve the proceeds of one or more SUAs and the purpose of the permitted information sharing under the 314(b) rule is to identify and report activities that the financial institution ‘suspects may involve possible

¹ FinCEN, Section 314(b) Fact Sheet (December 10, 2020), available [here](#).

² Kenneth Blanco, Director of FinCEN, remarks to the American Bankers Association and American Bar Association on December 10, 2020. See FinCEN, “FinCEN Director Emphasizes Importance of Information Sharing Among Financial Institutions” (December 10, 2020), available [here](#).

terrorist activity or money laundering.”³ In 2012, FinCEN stated that it did not consider the sharing of information solely for the purpose of identifying an SUA “and not otherwise related to a transaction regarding the proceeds [of such SUA], to be protected under the 314(b) safe harbor.”⁴ This standard, and the requirement that there be a “transaction,” led to confusion regarding the precise contours of permitted information sharing.

Last week, FinCEN expressly rescinded both pieces of prior guidance, and the Fact Sheet takes a different and more expansive approach. It notes that, to rely on Section 314(b), a financial institution or association need not have specific information indicating that the activity as to which it proposes to share information directly relates to proceeds of an SUA or to transactions involving the proceeds of money laundering. Rather, what is required is “a reasonable basis to believe that the information shared relates to activities that may involve money laundering or terrorist activity” and that the information sharing is “for an appropriate purpose under Section 314(b) and its implementing regulations.”

Thus, there is no requirement that there be a particular financial transaction at issue. As Director Blanco explained, “financial institutions may share information about activities, even if such activities do not constitute a ‘transaction.’ This includes, for example, an attempted transaction, or an attempt to induce others to engage in a transaction.” Per Director Blanco, “This clarification is significant and addresses some uncertainty with sharing incidents involving possible fraud, cybercrime, and other predicate offenses when financial institutions suspect those offenses may involve terrorist acts or money laundering activities.”

ASSOCIATIONS OF FINANCIAL INSTITUTIONS

The Fact Sheet and Director Blanco’s accompanying remarks also offer guidance on the types of associations of financial institutions that may share information. As noted, Section 314(b) allows an association of financial institutions to share information. FinCEN has defined the term “association of financial institutions” as “a group or organization the membership of which is comprised entirely of financial institutions” that are subject to anti-money laundering program requirements under the Bank Secrecy Act and FinCEN’s regulations.⁵

³ FinCEN FIN-2009-G002, p. 2.

⁴ FinCEN FIN-2012-R006, p. 2-3.

⁵ 31 C.F.R. 1010.540(a)(2).

Additionally, the Fact Sheet notes that Section 314(b) permits unincorporated associations to engage in permitted information. The Fact Sheet explains that such unincorporated associations may exist based on contracts among their participants. The Fact Sheet notes that, “[o]f course, such unincorporated associations must conform their membership and activities to all of the requirements of Section 314(b)” and that all members of such an unincorporated association must be financial institutions eligible to participate in Section 314(b) information sharing.

The Fact Sheet clarifies that FinCEN does not require the entity that forms and operates an association of financial institutions whose members engage in Section 314(b) information sharing itself be a regulated financial institution. Thus, as Director Blanco noted in his speech, an entity forming and operating an association may be a compliance adviser or similar third party.

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Please do not hesitate to contact us with any questions.



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