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April 3, 2002

Financial Crimes Enforcement Network
Special Information Sharing – Section 314 Comments
P.O. Box 1618
Vienna, VA 22183-1618

Re: Comment to Proposed Rule Under Section 314(b);
Special Information Sharing Procedures

Ladies and Gentlemen:

SUMMARY

We are pleased to submit this comment regarding the Financial Crimes Enforcement Network's ("FinCEN's") proposed rule to implement § 314(b) ("§ 314(b)") of the USA PATRIOT Act of 2001 (the "Patriot Act"), which encourages information sharing among financial institutions (the "Proposed Rule"). Section 103.110 of the Proposed Rule ("§ 103.110") would apply only to financial institutions that are subject to suspicious activity reporting requirements, brokers or dealers in securities, and certain other entities. 67 Fed. Reg. 9879 (March 4, 2002). Accordingly, § 103.110 would not apply to insurance companies. It is our view that FinCEN should modify § 103.110 and extend its coverage to insurance companies.

We believe that extending the scope of § 103.110 will benefit the government by enabling insurance companies to share information about suspected terrorists and money launderers with other financial institutions subject to the protections of

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§ 314(b). An insurance company may possess information that could assist another financial institution in its assessment of a customer or transaction that may appear suspicious. Allowing insurance companies to share information with other financial institutions subject to the protections of § 314(b) may enable other financial institutions and governmental authorities to establish more quickly the nature of a possible suspicious transaction or a suspicious customer that may involve terrorist or money laundering activities.

Extending the coverage of § 103.110 to insurance companies is also consistent with the Gramm-Leach-Bliley Act (P.L. 106-102) (“GLB Act”), which permits companies engaged in banking, securities and insurance to affiliate under the umbrella of financial holding companies. In view of the increasing number of affiliations among depository institutions, securities firms and insurers as a result of the GLB Act, permitting such companies to share information would facilitate the identification of those that may be suspected of engaging in terrorist or money laundering activities. Accordingly, we urge that § 103.110 be revised to include insurance companies within the definition of “financial institution” so that they may share information with other financial institutions subject to the protections of § 314(b) and § 103.110(d) of the Proposed Rule.

SECTION 314(b) AND THE PROPOSED RULE

Section 314(b) provides that upon notice to the Secretary of the Treasury financial institutions may share information with one another and with any association of financial institutions regarding suspected terrorists or money launderers. A financial institution that transmits, receives or shares such information for the purpose of identifying and reporting terrorist or money laundering activities will not be liable to any person under any law, regulation or contract for such disclosure or

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failure to provide notice of such disclosure to a person who is identified in the disclosure.

Section 314 does not define the term “financial institutions” for purposes of § 314(a) (sharing of information with law enforcement authorities) or § 314(b). Neither the Patriot Act nor its legislative history indicate that the meaning of the term “financial institution” used in §§ 314(a), (b), (c) and (d) should vary from subsection to subsection. Nevertheless, the Proposed Rule would define the term “financial institution” differently for purposes of § 103.100 and § 103.110. As a result, FinCEN proposes in § 103.110 to limit the types of entities that qualify as “financial institutions” for purposes of information sharing under § 314(b) in a manner that would exclude insurance companies.

We strongly urge FinCEN to include insurance companies within the class of financial institutions that may share information with other financial institutions pursuant to § 314(b) and § 103.110. Section 103.100 uses the definition of the term “financial institution” found in 31 U.S.C. § 5312(a)(2), which includes insurance companies. In view of the similar goals of §§ 314(a) and (b), it seems appropriate that the principal entities referred to in the definition of the term “financial institution” in 31 U.S.C. § 5312(a)(2) should be identical for both sections. We believe that including insurance companies within the definition of financial institution in § 103.110 will facilitate the goals of § 314(b) by enhancing the ability of insurance companies to share information with other financial institutions. This should increase the potential effectiveness of information sharing among financial institutions as it relates to the identification of possible terrorist or money laundering activities.

In the absence of a definition of the term “financial institution” in § 314, we believe it is appropriate to look to other sources that define the term. There are

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examples in other legislation where insurance companies are treated in a manner similar to that of banks and other depository institutions for purposes of law enforcement information sharing. Last November, the U.S. House of Representatives passed H.R. 1408, the Financial Services Antifraud Network Act of 2001, which establishes a database for certain regulated entities to share antifraud information among themselves and with federal regulators. H.R. 1408 includes insurance companies within the class of financial institutions that can participate in the information sharing database. See § 115(2)(A)(i) of H.R. 1408. Given the similar objectives of H.R. 1408 and the Patriot Act (see sections 2 and 121 of H.R. 1408), and the fact that both bills passed the House at approximately the same time (October 12 and November 6, 2001), it is reasonable to conclude that the term “financial institution” should be treated in a consistent manner for purposes of both acts.

Including insurance companies within the class of financial institutions that are permitted to share information under § 314(b) is also consistent with preserving the privacy of customers. Insurance companies, like banks and other financial institutions, are currently subject to Title V of the GLB Act. Under § 501 of the GLB Act, financial institutions, including insurance companies, are required to establish policies and procedures to protect the security and confidentiality of customer information. State insurance authorities are adopting additional guidelines which parallel the guidelines adopted by the federal banking agencies. See Interagency Guidelines Establishing Standards for Safeguarding Customer Information (66 Fed. Reg. 8616 (February 1, 2001)) and Standards for Safeguarding Customer Information, New York State Insurance Department Regulation No. 173 (11 NYCRR 421). In any event, insurance companies have a long history of protecting the confidentiality of customer information, and extending the provisions of § 314(b) to insurance companies should not compromise the confidentiality of customer information.

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COMMENTS ON OTHER PROVISIONS OF THE PROPOSED RULE

We are also providing the following comments on other aspects of the Proposed Rule:

A. Section 103.110(a)(3) – Definition of “Association of Financial Institutions.”

The definition of the term “association of financial institutions” is too narrow and may limit the effectiveness of the information sharing under the Proposed Rule. The definition of “association of financial institutions” should include an association that is primarily, but not entirely, comprised of financial institutions. The current definition in the Proposed Rule that an association be “comprised entirely of financial institutions” will prohibit many associations from participating in the information sharing process under § 314(b). Many associations in the financial services industry include in their membership nonfinancial entities, such as holding companies and nonfinancial institution affiliates of financial institutions. Furthermore, some financial institution trade associations permit service providers, such as data processors, to be members. It would be unfortunate if the association were precluded from acting as a conduit of information among financial institutions simply because some members are not financial institutions. Accordingly, we request that the final rule define “association of financial institutions” to include an association that is comprised “primarily” of financial institutions. If such a change were made, FinCEN may wish to consider limiting the sharing of information by such an association to those members that are defined as financial institutions.

B. Section 103.110(b)(1) – Information Sharing By Financial Institutions.

The Proposed Rule is unclear as to what the effect is if a financial institution shares information with a recipient financial institution that has not itself filed the

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certification under § 103.110(b)(2). The Proposed Rule does not provide a means by which a financial institution may determine that another institution with which it may wish to share information has filed a certification with the Treasury Department. If the institution sharing information cannot confirm that a financial institution has filed a certification with the Treasury Department, its information sharing may not be covered by the safe harbor of § 314(b). Accordingly, the final rule should expressly state one or more of the following:

- (1) there is no requirement in § 314(b) for a financial institution to confirm that another financial institution or association of financial institutions that it is sharing information with under § 103.110(b)(1) of has filed a current and effective certification with FinCEN;
- (2) a financial institution may rely upon a statement of another financial institution with whom it wishes to share information that it has filed the required certification with FinCEN and such certification is effective; or
- (3) FinCEN will confirm to a financial institution that proposes to share information with another financial institution that the other financial institution has filed a certification with FinCEN and such certification remains in effect.

C. Section 103.110(b)(2) – Notification Requirement – Certification.

Section 103.110(b)(2) requires a financial institution to file a “certification” with FinCEN that it intends to engage in the sharing of information with other financial institutions. There is nothing in § 314(b) that requires the filing of a “certification” by a financial institution. Rather, the Patriot Act states that a financial institution shall file a “notice” prior to sharing information with other financial institutions. The use of the term “certification” in the Proposed Rule, as

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well as the text of the proposed form itself, requires the financial institution to make representations that are not provided for in the Patriot Act and which, in our view, are not appropriate. Accordingly, in the interest of consistency with the Patriot Act, we request that the final rule delete the requirement for a certification, and replace it with a notice, as set forth in the Patriot Act.

D. Section 103.110(b)(2) – Notification Requirement – Intent to Share.

Section 103.110(b)(2) provides that a financial institution that “intends to share” information with another financial institution must submit a certification form to FinCEN. The proposed form contained in the Proposed Rule requires a financial institution to certify that it “intends . . . to engage in the sharing of information” with other financial institutions. We recommend that FinCEN eliminate all references in the Proposed Rule and the notice form to any “intent to share” information. There is no requirement in the Act that a financial institution have an intent to share information when it files a notification with the Treasury Department. A notice is simply a required precondition to sharing information with other financial institutions.

We are concerned that use of the concept of an “intent to share” may be interpreted as obligating a financial institution to share information in instances when it may choose not to do so. It may also be misinterpreted by financial institutions that believe that they may not file a notice with the Treasury Department unless they intend to share information with other financial institutions. This may deter a financial institution from filing a notice until it actually has information to share. Such a result may impede the ability of financial institutions to share information about terrorist and money laundering activities in a timely fashion. In order to eliminate any possibility that the provision may be misinterpreted to the detriment of financial institutions and the effectiveness of the final rule, we

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recommend that all references to “intent to share” information be eliminated from the Proposed Rule as well as from any notice form.

E. Section 103.110(b)(2) – Notification Requirement – One year duration.

Section 103.110(b)(2)(iii) provides that a financial institution’s certification is only effective for one year, and thereafter a financial institution must submit a new notice annually. Section 314(b) does not limit the effectiveness of a notice once a financial institution has informed the Treasury Department that it may share information with another financial institution. Concern about whether a financial institution’s certificate is effective may undermine the goal of the Patriot Act to encourage information sharing among financial institutions. For example, if an institution inadvertently does not file a notice one year, its failure to file may jeopardize its ability, as well as those of other financial institutions, to come within the protections of the Patriot Act.

Requiring annual notifications imposes a burden on financial institutions for little benefit. In this regard, FinCEN’s Federal Register notice states that an annual certification will help Treasury determine which financial institutions are sharing information. The filing of an annual notice does not necessarily mean that the institution is sharing information. It is only a precondition for coming within the safe harbor of § 314(b). In order to determine whether a financial institution is actually sharing information, FinCEN will still have to survey financial institutions.

In addition, FinCEN states that the requirement of an annual notice will reinforce the need for financial institutions to protect shared information. Financial institutions are already subject to the requirements of § 501 of the GLB Act, which requires financial institutions to protect the confidentiality of information they possess. The requirement of an annual notice will add little to the existing

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requirements that financial institutions are already complying with as a result of enactment of the GLB Act.

We see little public benefit in requiring financial institutions to file annual notices with the Treasury Department. We believe the additional burden imposed on financial institutions is not outweighed by the small benefit that may be present. Accordingly, we recommend that the final rule provide that the certification filed under § 103.110(b)(2) is effective until withdrawn by the financial institution or suspended by the Treasury Department.

F. Section 103.110(b)(2) – Notification Requirement – Affiliated Institutions.

The Proposed Rule does not indicate whether a group of affiliated financial institutions may file one notice with FinCEN or whether each institution must send a separate notice. We suggest that FinCEN provide flexibility in the final rule to permit affiliated financial institutions to file a single notice under § 103.110(b)(2)(i) that would be effective for all financial institutions in the same holding company or group. This could be accomplished by having the notice filed with FinCEN on behalf of affiliated financial institutions specify all the financial institutions to which the notice applies.

G. Section 103.110(c)(1) – Security and Confidentiality of Information.

The Proposed Rule requires a financial institution to maintain procedures to protect the security and confidentiality of information shared under the Proposed Rule. This provision of the Proposed Rule is unnecessary given that all the entities sharing information under the Proposed Rule are also financial institutions subject to § 501(b) of the GLB Act, which requires financial institutions to adopt procedures and policies to protect the security and confidentiality of customer

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information. Given this duplicative regulatory requirement, we recommend that § 103.110(c)(1) be deleted in the final rule.

H. Section 103.110(d)(2) – Security and Confidentiality of Information – Limitation.

Section 103.110(d)(2) provides that the protection of the safe harbor under § 103.110(d)(1) will not apply if the financial institution does not maintain the procedures to protect the security and confidentiality of information under § 103.110(c)(1). To the extent that a financial institution does not maintain appropriate procedures to protect the security and confidentiality of information, the applicable regulatory agency for the financial institution has the authority under the GLB Act and other statutes and regulations to take action against the financial institution for its failure to comply with requirements relating to information security. Furthermore, there is nothing in § 314 that conditions its safe harbor protections on whether or not the financial institution has procedures to protect the security and confidentiality of the information. In view of this, we recommend that § 103.110(d)(2) be revised in the final rule to delete this pre-condition for the availability of the safe harbor.

I. Section 103.110(e) – Information Sharing Between Financial Institutions and the Federal Government.

The language used in § 103.110(e) creates potential uncertainty as to whether the Proposed Rule requires a financial institution to report information on suspected terrorist activities to FinCEN. The Proposed Rule states that a financial institution's information "should" be reported to FinCEN by either calling the hotline number or by filing a suspicious activity report ("SAR"). The use of the term "should" is ambiguous and subject to misunderstanding. In view of the fact that § 314(b) does not require financial institutions to report suspicious activities to any governmental

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agency, and because other laws and regulations already require financial institutions to file SARs with FinCEN or with other law enforcement authorities, we believe there should be no additional reporting requirement imposed by the Proposed Rule. Accordingly, we recommend that the final rule provide that a financial institution “may,” but is not required to, report information regarding terrorism or money laundering to FinCEN.

J. Section 103.110(g) – Revocation or Suspension of Certification.

Nothing in § 314 authorizes the Treasury Department to revoke the authority of a financial institution to share information with other financial institutions after a financial institution has filed a notice with FinCEN. While the Treasury Department may view the revocation of a financial institution’s ability to share information under the safe harbor of § 314(b) as a device to ensure that a financial institution maintains the security and confidentiality of information, we believe that there is nothing in § 314(b) that gives the Treasury Department that authority. Under § 314(b), once a financial institution has provided notice to the Treasury Department, the Department may not “unring the bell.” Financial institutions already are required to establish policies and procedures to protect the confidentiality and security of information under the GLB Act and other laws and regulations. As a result, § 103.110(g) does not appear to be authorized by the Patriot Act and, in any event, is duplicative of existing requirements under the GLB Act. Accordingly, we suggest that it be deleted from the final rule.

We appreciate the opportunity to comment on the Proposed Rule.

Sincerely yours,

A handwritten signature in black ink, appearing to read 'G. T. Schwartz', with a long horizontal flourish extending to the right.

Gilbert T. Schwartz