

Legal Sidebar

Anti-Terrorist/Anti-Money Laundering Information-Sharing by Financial Institutions under FINCEN's Regulations

12/10/2014

Information-sharing programs developed by Treasury's Financial Crimes Enforcement Network (FINCEN) to implement [section 314 of the USA PATRIOT Act](#) have been designed to aid law enforcement investigation and prosecution of money laundering and terrorist financing. Because funds from criminal activity and funds headed to terrorist organizations must pass through the financial system, the FINCEN information-sharing programs have been the means of quickly identifying financial transactions tied to crimes or terrorist organizations under investigation. The section 314 programs supplement more general [Bank Secrecy Act](#) requirements, such as the [Currency Transaction Reports \(CTRs\)](#) on cash transactions of \$10,000 or more, and the [Suspicious Activity Reports \(SARs\)](#) on [transactions suspected to involve criminal activity](#).

The FINCEN information-sharing programs tailored to money laundering and terrorist financing consist of one mandatory and one voluntary program for [financial institutions](#), a term that is broadly defined to include an array of businesses. The mandatory program requires financial institutions to search for transactions related to queries from law enforcement agencies forwarded through a [FINCEN communication network](#). The voluntary program permits financial institutions registered with FINCEN to share information with one another on suspected money laundering or terrorist financing transactions without liability for disclosing customer information. Although not available to all financial institutions covered by the Bank Secrecy Act, the voluntary program is available to financial institutions, including banks, casinos, and broker-dealers, required to establish [anti-money laundering \(and terrorist financing\) compliance programs](#).

Under FINCEN's mandatory information-sharing program, every other week, FINCEN cumulates a list of persons and entities that federal, state, and some foreign law enforcement agencies have submitted based on suspicions of involvement in money laundering or terrorist activity. Once the list is posted, financial institutions are required to search their records for accounts or transactions relating to persons or entities on the list and to provide certain information on any matches to FINCEN for relaying to the requesting law enforcement offices. [FINCEN reports](#) that, since 2002, this program has successfully supplied information used in connection with 455 terrorism/terrorist financing cases and 1,887 money laundering cases. Offenses prosecuted include: violations of the Office of Foreign Assets Control (OFAC) economic sanctions programs; arms smuggling; alien smuggling; drug trafficking; investment fraud; and identity theft.

Unlike the OFAC's list of [Specially Designated Nationals](#), FINCEN's periodic lists are not freely available on the Internet, but are posted on a secure website open only to designated financial institution personnel. Moreover, unlike the OFAC lists, these lists are to be researched only once. There is no requirement that institutions be on alert for future transactions or that they block or freeze accounts. Once a law enforcement agency learns that a financial institution has identified records that match a query, the actual records are not made available. To gain access to them, the law enforcement agency must make use of proper process and serve the financial institution with an investigative demand letter; a criminal search warrant; an investigative subpoena; or a court order, as appropriate.

The voluntary program is aimed at helping institutions seek input from other institutions to confirm or negate suspected money laundering or terrorist financing. It permits financial institutions that are required to have anti-money laundering programs and "associations of financial institutions," to register with FINCEN to share information with other financial institutions provided they are likewise registered for this purpose. Once registered, financial institutions may share with one another certain information relative to identifying

persons, entities, or countries suspected of money laundering or terrorist activity. Provided any information shared is used only for identifying money laundering or terrorist activity, the financial institutions are guaranteed a safe harbor. Under [12 U.S.C. 5311, note](#), financial institutions sharing information under this program do so without fear of liability for disclosing the information or for not notifying the subject.

Because these information-sharing programs have proven useful, there have been calls for improving them. From the point of view of financial institutions, greater clarification with respect to the type of information that can be shared with one another would be welcomed. They would also encourage any effort that FINCEN makes toward broadening the type of information relayed from law enforcement agencies regarding money laundering and terrorist financing. At least one regulator, the Comptroller of the Currency (OCC), is on [record](#) as favoring any effort to amend the Bank Secrecy Act to permit financial institutions to share information with one another on suspected criminal activities other than money laundering and terrorist finances.

Although FINCEN's financial institution information-sharing programs are independent of the SAR reporting requirements, the confidentiality obligations imposed upon the SAR reporting regime may have an effect upon how an institution responds to either of these programs. A financial institution which has filed a SAR is under a [statutory obligation](#) not to notify the subject of the SAR. The regulations, however, impose further confidentiality obligations. Other than permitting financial institutions to file copies of a SAR with appropriate state and local law enforcement authorities, the regulations require complete confidentiality about the filing of the SAR. They specify that a financial institution and its officers and employees are prohibited from disclosing either the fact that a SAR has been filed or the contents of the SAR. A [FINCEN regulation](#) mandates confidentiality for any "SAR or any information that would reveal the existence of a SAR." FINCEN and federal banking agency regulations contain provisions attempting to lay out precisely what information may not be disclosed; nonetheless, financial institutions may find the distinctions difficult to make in practice. The federal courts, moreover, have wrestled with interpreting these regulations in the context of document requests in civil litigation. A judge magistrate's opinion in a recent case, [Wultz v. Bank of China Limited](#), is a case in point. The opinion reviews a set of conflicting court decisions and finds a rule of construction in an OCC regulation to be ambiguous. Overall, the opinion offers an illustration of the difficulty financial institutions may face in determining exactly what they may share with another institution seeking information through the FINCEN voluntary program when SAR reports are implicated.