DUE PROCESS
INSTITUTE

July 8, 2019

Policy Division, Financial Crimes Enforcement Network
P.O. Box 39
Vienna, VA 22183

RE: Commentary re: Docket #FINCEN-2018-0017 and OMB Control #1506-0049

Dear Sir/Madam:

The Due Process Institute is a nonprofit, bipartisan, public interest organization that works to honor, preserve, and restore procedural fairness in the criminal justice system. The Financial Crimes Enforcement Network (FinCEN), a bureau of the United States Department of the Treasury, is currently seeking to renew without change its 314(a) "information sharing" program. We write to raise concerns with the current program in the hopes that FinCEN might consider those concerns in future regulatory rulemaking, as well as to encourage FinCEN to cease its efforts to pursue legislative and regulatory attempts to expand this program.

Section 314(a) of the USA PATRIOT Act of 2001 directed the Secretary of the Treasury to 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."[1] Thereafter, FinCEN established the 314(a) "information sharing" program through the issuance of a rule[2] that, despite the legislative mandate that law enforcement share information *with* financial institutions, actually demands the opposite. Section 314 is, in its current form, a mechanism by which FinCEN can: (1) mandate that financial institutions provide information about their accountholders and related transactions; and (2) "encourage" and then monitor communications about such matters between financial institutions. Specifically, Section 314(a) requires financial institutions to respond to law enforcement demands for information that are communicated through or from FinCEN regarding individuals, entities, and organizations that are "reasonably suspected" of two different categories of criminal conduct: "terrorist acts" and "money laundering activities." Section 314(b) encourages financial institutions to share information with one another regarding individuals, entities, organizations, and countries "suspected of possible terrorist or money laundering activities," and subsequently provides them some immunity from liability for sharing the information so long as they meet a long list of regulatory obligations.

[1] Pub. L. 107–56, Title III, § 314, Oct. 26, 2001. Emphasis added.
[2] 31 C.F.R. Part 1010.520.

As the program currently operates, upon FinCEN's request, an incredibly broad array of "financial institutions" (defined below) must search their records and respond to FinCEN if they have certain information with respect to a particular person or entity, not the other way around as was originally contemplated. It is a one-way street of information. Importantly, while FinCEN must be the direct requestor for the records, it frequently serves as a conduit for requests from federal law enforcement agencies, with whom FinCEN will share any results it receives. According to FinCEN's own reporting,[3] these requests reach "more than 43,000 points of contact at more than 22,000 financial institutions to locate accounts and transactions."

FinCEN currently has the authority to demand information from any "financial institution" as defined by the Bank Secrecy Act, which includes a staggering amount of entities, including but not limited to: insured banks; private bankers; foreign bank branches located in the U.S.; credit unions; registered brokers and dealers; investment bankers; currency exchanges; credit card system operators; entities who issue, redeem, or cash traveler's checks, checks or money orders; insurance companies; pawnbrokers; precious metals dealers; precious stone or jewel dealers; finance companies; loan companies; travel agencies; telegraph companies; money transmitters; companies that sell cars, airplanes, or boats; persons involved in real estate closings and settlements; most casinos; and even the U.S. Postal Service.[4]

In practice, Section 314(a) involves a staggeringly invasive look into financial records. It is, in essence, warrantless surveillance issued on an extremely low standard (i.e. a "reasonable" suspicion that is not tested by a neutral fact-finder or third party). For a Section 314(a) demand, FinCEN will typically issue a demand that a financial institution determine whether a target, or many separate targets, have had an account with an institution, or engaged in any transaction with an institution. If the answer is yes to any of those inquiries, the institution must specify the account, and, in the case of transaction, must describe the transaction, including listing all parties (whether they were originally targeted or not), describe the source of the funds and the amounts involved. At a minimum, the financial institution must report to FinCEN any elated account numbers, the date and type of any transactions, any Social Security number, Passport number, date of birth, address, etc.[5] Thus, for example, if a target has received funds from an institution's account holder, the institution must also disclose all of this information about its own account holder, irrespective of whether that person is suspected in any way of wrongdoing.

Section 314(b) information sharing is functionally an alert between institutions explaining that the institutions should consider de-banking a particular entity or should disallow certain transactions. For example, if a customer has been subject to a Section 314(a) demand, institutions often share that information with any other institution that might consider doing business with that customer. Even if a person merely engaged in what is ultimately an innocent transaction with a target of a Section 314(a) demand, financial institutions are encouraged to share information in a Section 314(b) alert, which has the effect of discouraging entities from doing any business with the innocent participant mentioned in the original demand. These persons are often de-banked,

[3] FinCEN's 314(a) Fact Sheet, dated August 30, 2016, available at: https://www.fincen.gov/statutes_regs/patriot/pdf/314afactsheet.pdf.
[4] 18 U.S.C. 5312(a)(2).
[5] 31 C.F.R. §1010.520(b)(3)(ii).

causing customers to be improperly excluded from authentic financial markets, home-buying, and other legitimate services.

Despite frequently claiming that the extraordinary powers granted to it under Section 314(a) are justified because of national security and terrorism concerns, FinCEN reports that, as of September 26, 2017, it had made 3,347 demands pursuant to Section 314(a), with the *vast* majority of those – 2,785 –relating to suspected money laundering investigations rather than suspected terrorist activities.[6] It is also important to note that while these numbers might seem small, they are somewhat misleading. Each demand typically lists multiple "subjects of interest," ranging from a few dozen to more than 100.[7] For example, in May 2016 FinCEN made 36 demands under Section 314(a).[8] However, those 36 demands encompassed 427 "subjects of interest."[9] The actual number of distinct searches made under this program, distinct from the number of demands, is almost certainly greater by at least a factor of 10. However, by FinCEN's own reporting, the extraordinary powers it claims under the Section 314 program are not justified by national security concerns involving terrorism. Instead, it has become a short-cut investigative tool that circumvents important constitutional and privacy principles.

Despite the fact that statutory law clearly limits the Section 314 program to two categories of reportable activity (i.e. terrorist acts or money laundering), regulators at FinCEN have been trying to expand their authority for at least the past decade. Specifically, in 2009, FinCEN issued a short document characterized as "guidance" that purported to expand the categories of reportable activity under 314(b) data-sharing. In this document, FinCEN asserted that because suspected "money laundering activities" (as defined by 18 U.S.C. 1966 and 1957) can already be shared, then so too can *any* activity that merely *relates* to numerous other underlying criminal activities.[10] These underlying criminal activities, otherwise known as "specified unlawful activities" (or SUAs) include more than 100 distinct additional federal crimes, including all federal drug offenses, even those related to drug paraphernalia, criminal customs controls, copyright protections, computer fraud and abuse crimes, provisions of the Endangered Species Act, and nearly every imaginable crime in between.[11] This regulatory "guidance" was not subject to public notice and comment, as per actual regulatory rulemaking.

Apparently, certain financial institutions have reasonably declined to share information beyond the statutorily defined suspected terrorist or money laundering activities for fear of running afoul of existing financial privacy laws despite the existence of FinCEN's "guidance" document. Based at least in part because of this reluctance, FinCEN has thereafter supported the introduction of multiple bills in past Congresses to amend Section 314 to increase the breadth of activities that are covered by both the mandated government reporting *and* the "encouraged data-sharing" between financial institutions. These bills were attempts to explicitly expand both

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[6] FinCEN, 314(a) Fact Sheet, Sept. 26, 2017, https://www.fincen.gov/sites/default/files/shared/314afactsheet.pdf.
[7] FinCEN, Law Enforcement Information Sharing with the Financial Industry 2016-17, Sept. 26, 2017, https://www.fincen.gov/sites/default/files/shared/leinfosharing.pdf.
[8] Id.
[9] Id.
[10] FinCEN, Guidance on the Scope of Permissible Information Sharing Covered by Section 314(b) Safe Harbor of the USA PATRIOT Act, FIN-2009-G002, at 2 n. 6, June 16, 2009.
[11] 18 U.S.C. § 1956(c)(7).

Sections 314(a) and (b) to encompass inquiries into financial and other personal and business records on the mere suspicion of any law enforcement entity that a person or company engaged in any transaction that might have involved any of the well over 100 federal crimes set out in Section 1956(c)(7). FinCEN has also sponsored the introduction of various opaque bill provisions that purport to have Congress grant it broad regulatory authority to, in effect, seek the same dangerous expansions of its Section 314 program via regulation rather than by statute.

These proposed expansions of Section 314 would have extraordinary privacy implications for nearly any consumer, impose significant burdens on a myriad of unsophisticated small business owners, and create massive potential liability for those entities that either fail to perfectly comply with extremely complex regulatory demands or fail to appropriately react to the enormous amount of information that they will be given by other entities. Most significantly, this expansion would radically expand government surveillance on completely innocent participants in the economy. Unlike a vast amount of other information gathered by law enforcement for investigative purposes, none of Section 314's requirements are premised on any meaningful quantum of suspicion and require only the most generalized concern that a target of an inquiry has been involved in some sort of unlawful activity. And based on a nearly standard-less amount of suspicion, the government can force a "financial institution" to turn over all of a target's information, as well as the information of anyone with whom the target has transacted business.

Furthermore, 314(b) in effect encourages financial institutions to spy on their own customers and report to each other any suspicions they might have, and then, per Bank Secrecy Act provisions, are legally required to file detailed reports containing any and all information in their possession. And while Section 314(b) sharing is "voluntary," if an institution fails to file Suspicious Activity Reports (SARs) as expected, it could find itself the subject of a criminal prosecution. Particularly because Section 314(a) demands can be issued on mere suspicion of criminal conduct rather than pursuant to a warrant that requires judicial approval, it is a near certainty that the numbers of these demands would increase exponentially under the proposed expansions. And unfortunately, industry professionals report that as a matter of regular order, everyone identified in a 314(a) request is generally de-banked and, in essence, the same is mostly true for those persons caught up by 314(b) data-sharing, lest the institution risk liability for non-compliance with other anti-money laundering provisions. The numbers of persons being de-banked as a result of an expanded Section 314 program therefore would rise significantly. When a financial institution is faced with a massive influx of information about potentially suspicious activity, coupled with civil or even criminal liability if the institution fails to act on the information, many institutions will simply choose to stop doing business with current or potential customers they deem to be risky, particularly customers who carry low balances. This further exacerbates problems with money insecurity for the poor, and, ironically, diverts transactions into less transparent channels that bear greater risks of money laundering activities.

In our opinion, the existing statutory framework of Section 314 and its implementing regulations already give significant cause for concern and fail to adequately protect Americans' Fourth Amendment and privacy rights. Previous attempts to expand this program through statutory or regulatory means are even more concerning. It is our hope that FinCEN will reevaluate the necessity and efficacy of the Section 314 program and ultimately abandon the practice of warrantless bulk searches and seizures of financial records, or at the very least, adopt

clear legal standards and procedural measures consistent with our foundational Constitutional rights. It is also our hope that FinCEN will discontinue its attempts to expand this program by lobbying Congress to amend the authorizing statute or via pursuing additional rulemaking.

We thank you for this opportunity to submit commentary regarding our concerns involving the Section 314 “information sharing” program.

Sincerely,

The Due Process Institute