



March 24, 2003

James F. Sloan, Director  
Financial Institutions Criminal Enforcement Network

Via Facsimile

Dear Director Sloan:

As Executive Editor of BankersOnline.com, I am submitting comments and suggestions to FinCEN on the 314(a) search request process on behalf of our large user community. Because of the enormous usership of the BankersOnline.com site by financial services professionals, we believe we are in a unique position to gather and present feedback from institutions of all sizes and all charter types. On March 20, 2003, we asked our users to submit information about their experience with the search process. The overwhelming response we received speaks volumes about the level of frustration and confusion with the current requests.

First, however, we want to express our great appreciation to FinCEN for its continued willingness to make adjustments to the process and to provide further guidance to financial institutions. While we believe there are still problems with the current process, we think FinCEN deserves high praise for the many improvements it has already made. We recognize that the search procedure is part of a Congressional mandate in the USA PATRIOT Act and that FinCEN is doing yeoman's work in coordinating the multitude of requests from a wide range of law enforcement authorities and responding to what must be a huge volume of inquiries from financial institutions. Among the noteworthy advances:

- When your agency declared a moratorium on the requests in November, 2002, it became clear that your goal was to attempt to fashion a workable process that accomplished the PATRIOT Act goals, while minimizing the burden on recipients of the requests;

- The development of the instructions and FAQ released on February 6, 2003 was quite helpful. Our users had, on the whole, very positive comments about the usefulness of those documents;

- The recent move toward a tab delimited file format to facilitate electronic searches was very beneficial.

The Notice issued on March 21, 2003 also signified major progress. The bankers we spoke with were elated to learn that searches which fall outside the general search timeframe are only required to be completed if they can be done electronically. It was also encouraging to hear that FinCEN is screening requests from law enforcement agencies and that the requests represent only the most significant, primarily terrorist related, investigations. Assurance that future indexes would include all subjects and aliases was also good news.

Having said that, we believe there is still room for improvement and clarification. With that goal in mind, we present the following suggestions and questions for your consideration:

### **FORMAT ISSUES**

A. Many users commented that receiving multiple emails with multiple Word attachments is burdensome, because they have to open, print, and save each attachment separately. If the Word documents could be consolidated, it would be helpful. Ideally, except for exigent circumstances, institutions should receive a single email with one tab delimited file and one Word file attached to it. Page breaks could be used to delineate separate requests.

B. On the tab delimited file:

1. clearly label the columns so it's possible to understand what each data field represents. (With the current format, users sometimes find it difficult to discern, for example, which is a last name and which is a first name);
2. construct the file so that it separates the data into additional fields. There should be separate fields, for example, for last name, first name, street address, city, state, and zip code. This would allow for flexibility to accommodate the needs of different systems;
3. use a consistent, uniform format, where the information is organized the same way each time;
4. Avoid over-use of capital letters.

C. Despite multiple requests to the contrary, some institutions are still receiving the search requests via both fax and email. In some instances, the faxed copies are going to a machine shared by several departments. This is not only inconvenient, but it also jeopardizes the confidential nature of the request.

D. Improve the reference numbers to better differentiate between requests.

### **THIRD PARTY VENDORS**

A. Several commenters expressed frustration over the fact that their OFAC software vendor has not been able to obtain the subject names and information in order to utilize the OFAC software to run the 314(a) subject names against their institution's customer base. If more vendors were allowed to have the information in order to help automate the searches, it would save considerable time.

B. If FinCEN is not the source of the hold-up on this, it would be helpful for FinCEN to explain what the roadblock is and why at least one vendor is able to run these searches while others, apparently, are not.

## **TIME PERIODS**

A. Bankers believed the time periods described in the February 6, 2003 instructions and FAQ were reasonable. Many did not understand (although, upon closer reading, it is clear), that those were intended to be "normal" time periods and might not represent the actual time period used in every search request. The requests that encompassed longer time periods created significant concerns -- particularly the one dating back to 1994, even leading management of some institutions to question whether they should even attempt the search at all. The 3/21 announcement that longer searches need not be performed unless they can be done electronically came as a huge relief to many institutions.

Without that relief, institutions were facing a significant financial burden that could, if continued, have endangered the very safety and soundness of the institutions because of the personnel costs involved (including, in some cases, the use of outside temps). The possible need to utilize temp workers also created information security concerns.

B. The lengthier searches create problems stemming from:

- the need for additional manpower resources;
- lack of automation in some areas of the institutions;
- previous conversions/processor changes;
- acquisitions;
- off-site storage of older records.

Confining the expanded searches to those that can be performed electronically is a major positive step.

C. Where requests do encompass a longer time period, even for electronic searches only, institutions believe the timeframe for the search should be lengthened accordingly.

D. It is important to use boldface type or other attention-getting tools to call attention to search requests that cover longer time periods. One bank president processing requests did not note the different timeframes. He was totally unaware of them until comments made on the BankersOnline.com message board caused him to take a second look.

## **GEOGRAPHIC LIMITATIONS**

A. Institutions strongly urge FinCEN and the law enforcement agencies that originate search requests to limit the searches geographically, whenever possible. Indeed, if these requests were being sent via subpoena rather than the 314(a) process, institutions could file motions to quash, attacking the subpoena on the grounds the request is overbroad and unduly burdensome. The same standards should apply to the 314(a) process and law enforcement agencies should be urged to carefully review the nature of the investigation, determine where records are likely to be found, and narrow the scope of the request accordingly.

B. If the results of the first searches show that a subject may have had dealings with a financial institution in another locale, the geographic scope can be expanded and a second request can be made.

## **LAW ENFORCEMENT AGENCIES**

A. Several commenters suggested that FinCEN should develop guidance for law enforcement agencies to follow in formulating search requests. Many of the agencies are not familiar with the recordkeeping of financial institutions and do not understand

the magnitude of the impact a search request may have on the daily operations of the institutions. FinCEN can help guard against abuse in the process by educating the agencies about what is reasonable and feasible. For example, some agencies requested that account "information" be provided in response to the search, without any mention of how this could be provided in compliance with the Right to Financial Privacy Act.

- B. Other BankersOnline.com users suggested they believe it would be helpful for FinCEN to develop a form for agencies to use in their certifications to FinCEN so that the information is requested in a consistent way each time. With the current process, institutions must carefully scrutinize each word in each request in order to avoid missing any special instructions.
- C. In terms of timeframes, the majority of commenters expressed a belief that no search request, whether electronic or otherwise, should be permitted beyond the five year BSA record retention timeframe, and they believe the vast majority of searches should be restricted to the 12 months for accounts, 6 months for transactions with noncustomers or not associated with an account. The varying time periods make it difficult to organize and administer the various searches.
- D. A careful analysis of the costs and potential benefits of any search should always be undertaken before a search request is disseminated.

There is a widely held perception that law enforcement agencies are just using this process on a carte blanche basis with little thought to the attendant burden being placed on financial institutions. Without feedback on how the search results are being used, it is difficult for financial institutions to either have a sense for how effective 314(a) really is or to judge whether their efforts are worthwhile.

#### **CLARIFICATIONS NEEDED**

- A. What constitutes a "match"?
- B. Should institutions be conducting searches by name, and, separately, by TIN? Is it a "match" if one, but not the other, corresponds to the data in the search request?
- C. The instructions say "Any record described above that is not maintained in electronic form need only be searched if it is required to be kept under federal law or regulation." Is there a master list somewhere of records that are "required to be kept under federal law or regulation"?

#### **TRANSMISSION METHOD**

Finally, some Bankers Online users expressed concern over the method by which these search requests are currently being transmitted through unencrypted email. Since the names on the list are highly confidential, consideration should be given to changing to a more secure procedure. One suggestion was that the search requests could be placed on a secure Web site for which each institution is given a login name and password. An email could be sent to notify institutions that new search requests had been posted. They would then log in to retrieve the search instructions. Perhaps this could even be piggybacked onto the already secure network developed for the PACS filing system.

In conclusion, we wish to thank you for your consideration of these comments and suggestions. Your agency has shown itself to be highly responsive to the practical difficulties and operational challenges posed by these requests and we appreciate your continued willingness to work to improve the process.

Sincerely,

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