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August 20, 2009

Financial Crimes Enforcement Network (FinCEN)
P. O. Box 39
Vienna, VA 22183

**Re: RIN 1506-AB02, Advanced Notice of Proposed
Rulemaking (ANPR) on applying Anti-Money Laundering
Program and Suspicious Activity Report Requirements
to Non-Bank Residential Mortgage Lenders and
Originators**

Dear Sir or Madam:

The American Bankers Association (ABA)¹ appreciates the opportunity to offer comment as FinCEN considers whether to apply anti-money laundering (AML) program and suspicious activity report (SAR) requirements to non-bank residential mortgage lenders and originators.

Generally, while ABA supports extending requirements for anti-money laundering where appropriate as a logical and prudential step to protect lenders and the financial system from fraudulent criminal activities, we question whether it is necessary to apply the full Bank Secrecy Act (BSA) compliance regime to non-bank mortgage lenders. It is absolutely true that mortgage fraud has been a growing problem, and we commend FinCEN for focusing efforts in this area. Earlier this year, FinCEN published the third and fourth in a series of white papers on mortgage fraud.² However, these analyses have relied on SARs filed by depository institutions and yet, many of the problems associated with the mortgage meltdown occurred outside regulated depositories.³

¹ ABA brings together banks of all sizes and charters into one association. ABA works to enhance the competitiveness of the nation's banking industry and strengthen America's economy and communities. Its members – the majority of which are banks with less than \$125 million in assets – represent over 95 percent of the industry's \$13.6 trillion in assets and employ over 2 million men and women.

² See <http://www.fincen.gov/mortgagefraud.html>. In addition, FinCEN is also an active partner in the interagency effort to target foreclosure rescue scams and loan modification fraud. See U. S. Treasury April 6, 2009, press release, <http://www.treas.gov/press/releases/tg83.htm>.

³ "Moreover, the Federal Reserve has reported that only six percent of all the higher-priced loans were extended by the CRA-covered lenders to lower income borrowers or neighborhoods in the local areas that are the focus of CRA evaluations." *Financial Regulatory Reform: A New Foundation: Rebuilding Financial Supervision and Regulation*, U. S. Treasury, June 17, 2009, p. 69. See also http://www.minneapolisfed.org/publications_papers/pub_display.cfm?id=4136.

FinCEN believes, and ABA agrees, that non-bank mortgage lenders and originators “are in a unique position to assess and identify money laundering risks.” However, instead of extending expensive AML requirements to this sector, ABA recommends that FinCEN – at this time – only apply SAR filing requirements to non-bank mortgage lenders. That would avoid imposing the complexity and burden of the full panoply of BSA requirements, would ensure that FinCEN receive timely information about potentially suspicious activities, and would extend the safe harbor for reporting to non-bank mortgage lenders. FinCEN has already encountered challenges with applying the full BSA mandate to money services businesses (MSBs), especially smaller institutions that do not have the means or understanding to comply fully with BSA/AML requirements. Similar challenges and the low level of risk have caused FinCEN to defer applying the full BSA/AML regime to non-bank mortgage lenders in the past. It would not make sense to replicate the problems FinCEN faces with MSBs by extending the full elements of BSA/AML to non-bank mortgage lenders – but it would make perfect sense and would accomplish FinCEN’s goals if it applied SAR requirements to non-bank mortgage lenders.

Background

All financial institutions are required to establish AML programs. At a minimum, a financial institution’s program must include: (1) appropriate internal policies and controls; (2) a designated compliance officer; (3) ongoing employee training; and (4) independent audits. In addition, recognizing the variation among institutions, their business models and their risk profiles, existing rules provide that a financial institution’s AML program should be appropriate to its size, operations, and risks. The Bank Secrecy Act definition of financial institutions is broad and includes loan or finance companies as well as companies involved in real estate closings and settlements. In 2002, FinCEN temporarily exempted loan and finance companies and real estate settlement companies from AML program requirements. Then, in early 2003, FinCEN considered extending AML requirements to these groups but did not impose such a requirement. Now, FinCEN is again considering applying AML requirements to these companies, including the possibility of doing so through an incremental approach. If FinCEN decides to do this in stages, it would first apply these requirements to business entities engaged in residential mortgage lending or origination that are not currently subject to AML requirements. FinCEN believes expanding the requirement to these entities would supplement the agency’s current mortgage fraud initiatives.

ABA Comments

Risks in the Non-Bank Residential Mortgage Finance Sector. ABA supports extending SAR requirements to non-bank depository institutions. FinCEN correctly notes that mortgage assets are relatively illiquid, which is one reason that AML program requirements have not been applied to this sector in the past. However, there has been a steady increase in mortgage fraud, as noted by FinCEN in its four white papers and as reported by the Federal Bureau of Investigation (FBI).⁴ With the increase in mortgage fraud in recent years, it would be logical to enlist the help of the many non-bank depositories involved in the mortgage process by having them report suspicious activities. Of course, to detect suspicious activities, non-bank mortgage lenders will need some system in place to monitor and assess transactions, but it may not need to cover the breadth of controls or components of a depository institution's BSA/AML program.

While ABA agrees that applying the requirements of SAR filing to non-bank mortgage lenders and originators is appropriate, it is equally important that the requirements be risk-based and tailored to the individual company. As with any other financial institution, the SAR requirements for non-bank mortgage lenders should be closely related to the products and services offered by the company, the channels of delivery that the company uses, the customers it serves, and the geographies where it operates. For example, a company that serves a small customer base in a rural community and only provides mortgages in face-to-face transactions does not need the same level of monitoring and detection programs that a large company that provides mortgages nationwide to a broad variety of customers, some through electronic channels without meeting face-to-face.⁵

It is also worth noting that most, if not nearly all, mortgage transactions will involve the services of financial institutions already subject to BSA/AML program requirements and SAR reporting. While it does make sense to add SAR filing requirements to non-bank mortgage lenders to supplement this information, nothing has been presented that would indicate that imposing the full panoply of BSA/AML requirements to non-bank mortgage lenders would substantially improve the information already available to FinCEN and law enforcement through the current information it receives.

⁴ See http://www.fbi.gov/hq/mortgage_fraud.htm. FinCEN has also reported a steady increase in SARs reporting mortgage fraud in both the *SAR Activity Review, Trends, Tips and Issues* and *SAR Activity Review – By the Numbers*.

⁵ As noted in the preamble, larger institutions are already likely to have fraud detection systems in place that can serve as the basis for these requirements. And, while it might be appealing to apply the full BSA/AML requirements to large non-bank mortgage companies, the problem that FinCEN will encounter, very similar to the problem that it encounters already with MSBs, is the vast number of companies that are very small with very limited resources. Equally important to consider is that FinCEN does not have the resources to enforce compliance or educate the vast numbers of providers. As suggested later in this comment, leveraging the SAFE Act infrastructure may afford a way of addressing these resource constraints.

Incremental Approach. The Bank Secrecy Act definition of “financial institution” includes “persons involved in real estate closings and settlements” and a “loan or finance company” but does not define those latter terms. In addition, FinCEN notes there is a “regulatory gap” in AML requirements with respect to non-bank residential mortgage lenders and originators. Imposing a SAR filing requirement should strengthen the sector’s existing anti-fraud programs. Adding a SAR requirement also will expand information that is available to FinCEN on mortgage-related financial crimes.

Since the primary focus of law enforcement and regulators’ concerns has been the residential mortgage markets, FinCEN suggests focusing on residential mortgages as a first step, deferring action on commercial real estate and other types of non-bank consumer and commercial finance to a later date. ABA agrees that an incremental approach is appropriate. ABA also agrees that beginning with residential lending is logical. For example, recent programs, such as the Administration’s Home Affordable Modification Program (HAMP),⁶ have stressed the importance of the residential mortgage markets. Moreover, most FBI investigations have concentrated on residential mortgage markets while recent interagency efforts that focus on foreclosure scams have targeted residential markets.⁷ Therefore, the most logical and appropriate place to begin would be the residential mortgage sector.⁸

Defining “persons engaged in non-bank residential mortgage lending or origination. Even a simple mortgage transaction may involve many players, including those who originate, fund, broker, purchase, transfer, service, securitize, and insure the loan. FinCEN believes the focus should be on those who are in the best position to detect suspicious activities. One possible approach to determine and identify which entities should be covered would be to build on definitions set forth in the SAFE Act⁹ and apply these requirements to the non-bank entities and individuals covered by the SAFE Act.

ABA believes using the SAFE Act definitions as a starting point offers several advantages. First, using the SAFE Act definitions and final guidance will incorporate an accepted industry standard, thereby minimizing confusion. Second, the SAFE Act distinguishes between employees of banks and those mortgage originators not employed by banks. This will parallel the distinction between those already covered by

⁶ See <http://www.treas.gov/press/releases/tg33.htm>.

⁷ See <http://www.treas.gov/press/releases/tg181.htm>.

⁸ As an aside, since commercial transactions are more likely to involve sectors of the financial industry, including depository institutions, that are already subject to SAR filing requirements, suspicious transactions that affect that sector of the market are more likely to be captured under existing requirements.

⁹ The Secure and Fair Enforcement for Mortgage Licensing Act of 2008 which requires all mortgage loan originators to meet certain standards, including licensing or registration with a national database.

BSA/AML obligations as insured depository institutions and those that are currently not covered. Since the SAFE Act requires non-bank mortgage originators to be licensed and listed in the unified database,¹⁰ FinCEN would have a simple mechanism to identify and reach out to those affected by any new FinCEN requirements. Finally, there is one further advantage to building on the SAFE Act requirements: one of the elements imposed on entities subject to SAFE Act licensing is regular and ongoing education; by building on that, FinCEN could work with the appropriate regulators to incorporate a suspicious activity reporting training component into the required education standards.

Applying SAR requirements or other AML requirements. As noted by FinCEN in the preamble to the proposal, SARs are a valuable tool for law enforcement. The requisite due diligence needed to detect possible suspicious activities also serves as an added deterrent that helps protect against financial crimes. Therefore, in addition to requiring these entities to file SARs, FinCEN is also considering requiring these entities to file currency transaction reports (CTRs) instead of the IRS Form 8300 to report large cash transactions and possibly retain certain records.

In the past, FinCEN has deferred applying the full spectrum of BSA/AML requirements to non-bank mortgage lenders and service providers for valid reasons, primarily the low level of risk presented by these companies. The real goal is to enlist the assistance of these companies in detecting suspicious transactions. ABA does not have a position on whether it would make more sense for a non-bank mortgage lender to file a CTR instead of a Form 8300. However, given the limited number of cash transactions in this sector, if they are required to report suspicious transactions and since a large cash payment would likely raise suspicions and be reported, ABA believes that applying the CTR requirement is unnecessary.

Exemptions. One of the questions that FinCEN raises is whether any entities or classes should be exempted from the requirements. ABA believes that this question may be answered by building on the definition of those subject to licensing under the SAFE Act. By using that definition, any appropriate exceptions would be pre-determined by the SAFE Act definition. Perhaps more important, though, is that since one of the underlying tenets of the SAFE Act is to facilitate the detection of fraud,¹¹ it is especially appropriate to build on that definition for FinCEN's rule.

¹⁰ The database for these entities is a system recently developed by the Conference of State Bank Supervisors (CSBS) and the American Association of Residential Mortgage Regulators (AARMR).

¹¹ SAFE Act section 1502.

Costs. In addition, FinCEN is interested in information about the possible costs that might be imposed by these new requirements, what impact such requirements might have on this sector of the industry (including impact on the industry's profitability), what effect these could have on consumers shopping for mortgages, and whether some type of minimum threshold would be worthwhile. Again, ABA defers to the affected industry with regard to specific cost estimates, but we believe that simply applying SAR filing requirements to non-bank mortgage lenders will help protect the industry from fraud and, more important, will strengthen existing protections for consumers while minimizing costs on the industry that would come from imposing the full weight of BSA/AML regulation. By providing appropriate guidance for those affected and allowing these entities to take a risk-based approach to compliance, the costs should be minimized. And, as FinCEN notes, it should be possible for many of the larger non-bank mortgage lenders to build on existing fraud detection programs without excessive burdens.

Conclusion

In conclusion, ABA believes that FinCEN can accomplish its fundamental goal of enlisting the help of non-bank mortgage lenders to detect and report suspicious transactions by merely applying SAR filing requirements to this sector. Applying the full spectrum of BSA/AML compliance is unnecessary to achieve this goal. By extending the SAR requirements law enforcement will have better access to information about suspicious transactions and non-bank mortgage lenders will have the benefit of the safe harbor for reporting the information. ABA also believes that FinCEN can build on the SAFE Act's licensing program both to identify and reach those affected.

By taking this more accessible step, FinCEN does not preclude expanding BSA/AML obligations for mortgage lenders in the future as warranted. However, it does enable FinCEN to act quickly now to fulfill the most important policy goal of enhancing suspicious activity reporting in an area of immediate concern.

Thank you for the opportunity to comment. If you need additional information or have any questions, please contact the undersigned by telephone at 202-663-5029 or by e-mail at rowe@aba.com.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert G. Rowe, III". The signature is fluid and cursive, with a horizontal line extending to the right from the end of the name.

Robert G. Rowe, III
Vice President & Senior Counsel