

February 4, 2011

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

Re: RIN 1506-AB02, Anti-Money Laundering (AML) Program & Suspicious Activity Report (SAR)  
Filing For Residential Mortgage Lenders and Originators

Dear Sir or Madam:

The American Bankers Association (ABA)<sup>1</sup> appreciates the opportunity to comment on FinCEN's proposal to impose AML and SAR requirements on residential mortgage lenders and originators. The proposal is designed to close a perceived regulatory gap by expanding activities and transactions which must be reported to FinCEN as suspicious. Fundamentally, FinCEN's goal is to help address fraud and abuse in residential real estate lending, including workout programs.

ABA agrees that there have been significant problems with mortgage fraud, especially with workout programs and foreclosures. As a result, law enforcement, especially the President's Financial Fraud Enforcement Task Force, have increased their attention to these crimes. However, ABA believes that there is a more straightforward, less burdensome and simpler solution to address the problem, which is likely for those reasons to be more successful in combating fraud. By simply requiring non-bank mortgage lenders and originators to report suspicious transactions, FinCEN would develop the type of information contemplated by the Bank Secrecy Act (BSA) without unnecessary complexity. Additional steps, such as requiring full AML programs, impose unnecessary regulatory burdens that will far outweigh the potential benefits to law enforcement and will, in practice, distract firms from the goal of the changes, threatening to convert a law-enforcement effort into another paper-work compliance exercise. Furthermore, implementing a SAR program can be accomplished much more quickly than a more extensive requirement, especially at a time when mortgage lending is undergoing substantial change. In that regard we would note that the Federal Reserve recently suspended action on three mortgage loan initiatives to allow for a comprehensive and coordinated approach.<sup>2</sup>

## Discussion

The proposal is intended to capture information from those best positioned to identify effectively and guard against fraud, money laundering, and other financial crimes. ABA believes this is a worthwhile and important goal and fully supports efforts that effectively and efficiently provide law enforcement with the information needed to detect and deter criminal activities.

As proposed, loan finance companies would be defined as non-bank residential mortgage lenders and originators within the United States. The proposal would require those entities to establish

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<sup>1</sup> The ABA represents banks of all sizes and charters and is the voice for the nation's \$13 trillion banking industry and its 2 million employees. The majority of ABA's members are banks with less than \$165 million in assets. Learn more at [www.aba.com](http://www.aba.com).

<sup>2</sup> <http://www.federalreserve.gov/newsevents/press/bcreg/20110201a.htm>

AML programs and report suspicious activities. When ABA commented on the ANPR in August 2009, we questioned whether there were any benefits from extending AML program mandates to these entities since many of those covered are likely to be very small businesses or sole proprietorships where full AML program requirements make little sense and often will be impractical. Were FinCEN to impose such AML program mandates then FinCEN must develop adequate guidance for smaller entities that recognizes their unique nature, such as how to satisfy training requirements, model templates for policies and procedures, and explanations about how the company can satisfy the independent audit testing in conjunction with other testing. Although the proposal would specify that those affected would have to create an AML program commensurate with the business' size, location and activities, ABA strongly recommends that FinCEN take a more proactive approach, especially since many smaller companies will not otherwise have the resources to comply. For many smaller companies, the standard four pillars of an AML program, such as approval by a board of directors that may not exist, will only serve to cause confusion and frustration by those affected and undermines the enforcement quality of the program.

Unless FinCEN provides substantial guidance and training for those affected, ABA suspects that the program is unlikely to work. That is why we strongly recommend that FinCEN limit the requirement to reporting suspicious transactions. Without imposing the four pillars of an AML program, it would still be possible for non-bank mortgage lenders and originators to provide useful information to law enforcement. ABA believes that limiting the proposal to SAR filing would achieve FinCEN's goal and provide needed information for law enforcement in an efficient and effective way. Even this straightforward limitation will entail considerable compliance effort to assure that SARs are reported properly and are handled with the necessary confidentiality.

***Entities Not Covered.*** As proposed, a number of entities would clearly be excluded from coverage by the proposal, and ABA supports these exclusions. Banks or entities registered with and supervised by the SEC or CFTC, as well as individuals they employ, would clearly be excluded. Since these entities are subject to separate BSA requirements, it is logical to exclude them. For clarity, ABA also urges FinCEN to clarify that non-bank mortgage lenders or originators which are subsidiaries of banks and other companies already subject to existing BSA/AML requirements clearly be excluded since they already are covered.

Second, real estate agents or others involved in real estate closing and settlements would be excluded. Based on the premise stated in the proposal to cover an existing regulatory gap and encourage suspicious information to be reported by those in the best position to detect possible criminal activity in mortgage lending, it is unclear why these entities and individuals should be omitted. Real estate agents and settlement service providers are the ones who are most closely connected with the customer and who are possibly in the best position to detect suspicious transactions. When FinCEN initially considered real estate transactions in 2003, they did consider a more expansive approach that would have covered these individuals. If real estate agents and those involved in closing and settlements are excluded in this first phase, ABA urges FinCEN both to explain carefully why it is logical to exclude them and indicate whether they are the logical next step for coverage. As an aside, if the premise is to provide additional information for law enforcement and if FinCEN limits the requirement to SAR filing, then it would be simple to expand coverage to real estate agents and settlement service providers.

Third, the proposal would exclude individuals financing the sale of their own real estate. ABA supports this exclusion since it makes no sense to apply BSA/AML requirements to isolated transactions, to say nothing of the inability to supervise and enforce compliance.

Finally, the proposal would not offer a *de minimis* exclusion for lenders or originators who handle a low volume of mortgage finance transactions. Given the compliance complexities associated with a *de minimis* exclusion, offering one would be unlikely to alleviate burden, and ABA suspects that it would not likely be used.

**Supervision and Oversight.** Under the proposal the IRS would be given the task of supervising compliance with these new mandates. While this is consistent with the approach taken for MSBs, ABA questions whether FinCEN has considered if IRS has sufficient resources, especially human resources, to supervise non-bank residential mortgage lenders and loan originators. This is critical, as is the need for FinCEN to ensure that it has sufficient staff and resources to provide guidance for these new entities. Given that these requirements will apply to entities currently not familiar with AML requirements, FinCEN must devote appropriate resources to establish the program. Without adequate resources, the effort will lose credibility. Again, costs and burdens for supervising compliance would be greatly eased if FinCEN limited the requirement to simple SAR filing.

To the extent that non-bank residential lenders are affiliated with insured depository institutions that are already obligated to file SARs and conduct AML programs, it would be advisable that such affiliated operations be supervised by the affiliate's prudential regulator giving appropriate consideration to the risk profile of the non-bank entity within the common enterprise.

**SAR Filing Requirements.** As proposed, the steps for SAR filing would be consistent with other SAR mandates, with a \$5,000 threshold and reports based on all facts and circumstances; ABA supports the consistent treatment since it minimizes confusion. Perhaps most important, the rules on confidentiality and the safe harbor for filing would apply, a step that ABA strongly supports.

**Regulatory Burden.** FinCEN suggests that these requirements are likely to complement existing anti-fraud efforts. However, ABA questions the accuracy of this assertion. FinCEN offers nothing to validate this claim, and while it is likely that companies take steps to protect themselves against fraud, there is nothing to demonstrate that these companies actually do maintain formal anti-fraud programs. It is especially unlikely that smaller providers or sole proprietors have any formal anti-fraud program. Therefore, ABA suspects that the proposal will require construction of entirely new processes.

Overall, FinCEN estimates that the efforts needed to meet the AML program requirements would average three hours per year. ABA believes this is a grossly understated figure and anticipates that the industry would face far greater time and effort to meet the proposed mandates. Similarly, the estimate that the average annual burden for SAR filing will be limited to two hours for one report and that the average number of reports will be one per covered entity is also a gross understatement. At a minimum, such estimates are extremely inconsistent with the data FinCEN has been providing on mortgage fraud over the past several years. Rather, ABA estimates the time, effort and costs associated with SAR filing are likely to be much more substantial, especially in the initial years when companies will have to institute new programs and software to monitor and report mortgage fraud. FinCEN has provided no evidence to support its estimates, so it is hard to give them credibility. We

do not believe that the cost analysis by FinCEN meets its obligations for a robust evaluation and consideration of costs and benefits. However, ABA hopes that the many other changes to mortgage markets will start to reduce problems of fraud, and so the expansive changes needed to comply with this proposal may entail unnecessary costs that far outweigh the benefits.

Thank you for the opportunity to comment.

Sincerely,

A handwritten signature in black ink, reading "Robert G. Rowe, III". The signature is written in a cursive style with a horizontal flourish at the end.

Robert G. Rowe, III  
Vice President & Senior Counsel