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The Voice For Real Estate®

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REVISED

August 20, 2009

United States Department of the Treasury
Financial Crimes Enforcement Network
Re: RIN 1506-AB02
Docket Number TREAS-FinCEn-2009-0002

[Electronically submitted: https://www.regulations.gov]

Ladies and Gentlemen:

On behalf of 1.2 million members of the National Association of REALTORS® (NAR), I am pleased to submit comments to the United States Department of Treasury, Financial Crimes Enforcement Network (FinCEN) regarding the advanced notice of proposed rulemaking (ANPR) on Anti-Money Laundering (AML) Program and Suspicious Activity Report (SAR) Requirements for Non-Bank Residential Mortgage Lenders and Originators.

The National Association of REALTORS®, "The Voice for Real Estate," is America's largest trade association, including NAR's five commercial real estate institutes and its societies and councils. REALTORS® are involved in the residential and commercial real estate industries and belong to one or more of 1,400 local associations or boards and to 54 state and territory associations of REALTORS®. NAR appreciates this opportunity to comment on several questions included in the ANPR.[1]

1. **What are the money-laundering risks in the non-bank residential mortgage finance sector?**

NAR's knowledge of this subject is limited to FinCEN research. According to FinCEN's most recent report on suspected money laundering in the residential real estate industry[2]:

> [o]ver 75% percent of the entities suspected to be involved in residential real estate-related money laundering were identified as individuals unaffiliated with residential real estate-related businesses . . . . Within the sampled SARS, the most commonly reported professions associated with the residential real estate industry and suspected of being involved in residential real estate-related structuring and/or laundering were builders, contractors and rehabbers, who

[1] FR Vol. 74, pg 35830 (July 21, 2009)
[2] *Suspected Money Laundering in the Residential Real Estate Industry – An Assessment Based Upon Suspicious Activity Report Filing Analysis, April 2008*.

were mentioned in only about 5.5 percent of all filing narratives. In these instances, the impetus to structure and/or launder generally appeared to be tax evasion.

The FinCEN report also notes that other persons, professions and businesses involved in structuring, money laundering and associated crimes tied to residential real estate included escrow companies, real estate companies and title companies, each mentioned in 3.11 percent of reported occurrences.[3] Based on the limited research to date and the small sample considered in the FinCEN report, NAR believes it is not appropriate to impose comprehensive AML and SAR regulations across the entire real estate industry.

2. Should FinCEN pursue an incremental approach to regulation of loan and finance companies that focuses first on persons engaged in non-bank residential mortgage lending or origination?

If FinCEN determines to proceed with a proposed rule, NAR supports an incremental approach, as contemplated by FinCEN, focused on non-bank residential mortgage lending and origination, for the reasons listed in the ANPR:

- Non-bank residential mortgage lenders and originators are primary providers of mortgage finance.
- In most cases they deal directly with the consumer.
- They are in a unique position to assess and identify money laundering risks and fraud while directly assisting consumers with their financial needs and protecting them from the abuses of financial crime.

NAR believes that the entities that deal with the financial aspect of a real estate transaction, such as mortgage lenders and originators, are best positioned and trained to achieve FinCEN's regulatory objectives. NAR members are primarily involved in the marketing, sale, and purchase of real estate and are not in a position to verify or investigate detailed personal and financial information about their clients. In fact, because such information verification and investigation is unrelated to their function in the transaction, real estate brokers and agents may be disinclined or even unable to do so. Additionally, by focusing AML regulation on non-bank real estate lenders and originators, FinCEN can effectively close the regulatory gap existing between "depository institutions and non-bank residential mortgage lenders and originators."[4] And as further noted by FinCEN, "such regulations would complement efforts underway by mortgage companies to comply with the nationwide licensing system and registry under development since the passage of the . . . SAFE Act . . . . As mortgage companies implement systems and procedures to comply with the SAFE Act, there will be opportunities for them to review and enhance their educational training and other training programs to ensure that employees are able to identify and appropriately deal with fraud, money laundering and other financial crimes."[5]

6. Should any persons or transactions be exempted from coverage of AML or SAR regulations?

On July 30, 2008, President Bush signed into law the Secure and Fair Enforcement Mortgage Licensing Act of 2008 (SAFE Act) as part of the Housing and Economic Recovery Act. This Act sets forth

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[3] Ibid, Table 1, pg 15
[4] Ibid pg 35832 (third column)
[5] Ibid. pg 35832 (first column)

procedures, requirements, education, testing, and standards including mandatory registration and state licensing of mortgage loan originators through the creation of a Nationwide Mortgage Licensing System and Registry (NMLSR).

Under the SAFE Act, a loan originator is defined as a person who takes a mortgage loan application and offers or negotiates the terms of the mortgage and is compensated for doing so. A loan originator includes a person who assists a consumer in obtaining, or applying for, a mortgage loan by advising on loan terms, collecting information on behalf of the consumer, or preparing the loan package. Additionally, a loan processor or underwriter acting as an independent contractor is covered and therefore is required to be licensed under the SAFE Act. Specifically exempted from the definition of loan originator are licensed real estate agents and brokers who only perform real estate brokerage activities and receive no compensation from a lender, mortgage broker or their agents for loan origination activities.

NAR believes real estate agents and brokers should also be specifically excluded from being considered to be persons engaged in non-bank residential mortgage lending or origination, if they only perform real estate brokerage activities and receive no compensation from a lender, mortgage broker or their agents for loan origination activities.

Conclusion

NAR members are committed to doing their part in the global fight against money laundering. NAR has a webpage on Realtor.org to educate our members about AML issues; to emphasize the need to comply with applicable laws such as reporting cash transactions over $10,000 on IRS form 8300; and to provide links to reports and websites of other agencies and organizations for additional detailed information, including FinCEN, the Office of Foreign Asset Control (OFAC), the Financial Action Task Force (FATF) and the Internal Revenue Service (IRS). NAR will continue to take steps to raise the visibility of this issue with the objective of informing our members of AML "red flags" and to voluntarily assist in combating money laundering activities involving the purchase and sale of real estate. Thank you for this opportunity to comment on this important topic. NAR looks forward to working with FinCEN to combat money laundering in the U.S. real estate sector.

Sincerely,

Charles McMillan, CIPS, GRI
2009 President, National Association of REALTORS®