



December 29, 2010

FinCEN Proposes New Rule Requiring Residential Mortgage Lenders and Mortgage Originators to Implement Anti-Money Laundering Programs and File Suspicious Activity Reports

On December 9, 2010, the Financial Crimes Enforcement Network (FinCEN) published a notice of proposed rulemaking (NPRM) explaining new requirements for residential mortgage lenders and mortgage originators to establish anti-money laundering (AML) programs and to comply with suspicious activity report (SAR) filing requirements under the Bank Secrecy Act (BSA). FinCEN published the NPRM following the advanced notices of proposed rulemaking published on April 10, 2003 and on July 21, 2009. Written comments for the NPRM are due by February 7, 2011.

Currently the only mortgage lenders and mortgage originators that are subject to the AML and SAR requirements are banks and insured depository institutions. With the NPRM, FinCEN intends to close the “regulatory gap” of BSA’s coverage between mortgage lenders and originators affiliated with banks and those not affiliated with banks. Residential mortgage lenders and originators (*e.g.*, independent mortgage loan companies and mortgage brokers) are the primary providers of mortgage finance—in most cases dealing directly with the consumer—and are viewed by FinCEN to be 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.

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Scope of the NPRM

The BSA defines the term “financial institution” to include “a loan or finance company.” Although the term “loan or finance company” may encompass many categories of entities, in this NPRM, FinCEN is limiting it to “residential mortgage lenders” and “residential mortgage originators.” The NPRM defines the term “residential mortgage lender” as



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The person to whom the debt arising from a residential mortgage loan is initially payable on the face of the evidence of indebtedness or, if there is no such evidence of indebtedness, by agreement, or to whom the obligation is initially assigned at or immediately after settlement. The term “residential mortgage lender” shall not include an individual who finances the sale of the individual’s own dwelling or real property.

The NPRM defines the term “residential mortgage originator” as

A person who takes a residential mortgage loan application and offers or negotiates terms of a residential mortgage loan for compensation or gain.

The term “residential mortgage loan” is an integral part of both definitions listed above, and is defined under the NPRM as any loan “that is secured by a mortgage, deed of trust, or other equivalent consensual security interest” on a 1-to-4 family residential structure or real estate on which a residential structure will be built. This definition is intended to encompass loans secured by residential real property (*e.g.*, condominiums, co-ops, mobile homes intended to be used as dwellings, vacation homes, and time shares).

AML Program

The NPRM requires residential mortgage brokers and residential mortgage originators to develop and implement an AML program reasonably designed to prevent the residential mortgage brokers and originators from being used to facilitate money laundering or the financing of terrorist activities. The AML program must be in writing, approved by senior management, and made available to FinCEN upon request. At a minimum, an AML program must do the following:

- Incorporate policies, procedures, and internal controls based upon the loan or finance company’s assessment of the money laundering and terrorist financing risks associated with its products, customers, distribution channels, and geographic locations.
- Designate a compliance officer (single person or committee) to be responsible for administering the AML program.
- Provide for education and training of appropriate persons to enable them to carry out their responsibilities effectively under the AML program.
- Provide for independent testing of the AML program on a periodic basis (including testing to determine compliance of the company’s agents and brokers with their obligations), and to ensure that the AML program complies with BSA requirements and functions as designed.

Under the NPRM, residential mortgage brokers and originators must develop and implement an AML program on or before the later of six months from the effective date of the regulation, or six months after the date a residential mortgage broker or originator is established.



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SAR Filing Requirements

The NPRM requires that residential mortgage brokers and residential mortgage originators report suspicious transactions that are conducted or attempted by, at, or through a residential mortgage broker or originator and involve or aggregate at least \$5,000 in funds or other assets, and the residential mortgage broker or originator knows, suspects, or has reason to suspect that transactions

- Involve funds derived from illegal activity or are intended or conducted to hide or disguise funds or assets derived from illegal activity;
- Are designed, whether through structuring or other means, to evade the requirements of the BSA;
- Have no business or apparent lawful purpose, and the loan or finance company knows of no reasonable explanation for the transaction after examining the available facts; or
- Involve the use of the residential mortgage broker or originator to facilitate criminal activity.

Within 30 days after a residential mortgage broker or originator becomes aware of a suspicious transaction, such transaction must be reported to FinCEN by completing and filing a SAR. In situations that require immediate attention (*e.g.*, such as suspected terrorist financing or ongoing money laundering schemes), residential mortgage brokers and originators would need to telephone the appropriate law enforcement authority in addition to filing a timely SAR.

Under the NPRM, residential mortgage brokers and originators would also be required to collect and maintain separately supporting documentation relating to each SAR and make it available upon request to FinCEN and other law enforcement or regulatory authorities requiring compliance with the BSA. Copies of SARs and the underlying related documentation must be maintained for five years from the date of the filing and be kept confidential. This means that a SAR and related information may not be disclosed except as authorized under the rules of construction described in the NPRM (*e.g.*, to FinCEN, regulatory, or law enforcement agencies).

The NPRM states that the new SAR requirement applies to transactions occurring after the later of six months from the effective date of a final rule or the establishment of a residential mortgage broker or originator.

The NPRM in its entirety may be found at: <http://edocket.access.gpo.gov/2010/pdf/2010-30765.pdf>.

If you have any questions or wish to comment on the NPRM, please contact Jeffrey M. Telep at +1 202 626 2390 or Jane Cohen at +1 202 661 7842.

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