

DEPARTMENT OF THE TREASURY

Financial Crimes Enforcement Network

31 CFR Parts 1010 and 1030

RIN: 1506-AB14

Anti-Money Laundering Program and Suspicious Activity Report Filing

Requirements for Housing Government Sponsored Enterprises

AGENCY: Financial Crimes Enforcement Network (“FinCEN”), Treasury.

ACTION: Final Rule.

SUMMARY: FinCEN, a bureau of the Department of the Treasury (“Treasury”), is issuing this Final Rule defining certain housing government sponsored enterprises as financial institutions for the purpose of requiring them to establish anti-money laundering programs and report suspicious activities pursuant to the Bank Secrecy Act. The requirements to establish anti-money laundering programs and report suspicious activities are intended to help prevent fraud and other financial crimes.

DATES: *Effective Date:* This rule is effective [INSERT DATE 60 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

Compliance Date: The compliance date for 31 CFR 1030.210 is [INSERT DATE 180 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: FinCEN Resource Center at (800) 949–2732.

SUPPLEMENTARY INFORMATION:

I. Background

A. Statutory and Regulatory Provisions

FinCEN exercises regulatory functions primarily under the Currency and Foreign Transactions Reporting Act of 1970, as amended by the USA PATRIOT Act of 2001 and other legislation, which legislative framework is commonly referred to as the “Bank Secrecy Act” (“BSA”).¹ The BSA authorizes the Secretary of the Treasury (“Secretary”) to require financial institutions to keep records and file reports that “have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings, or in the conduct of intelligence or counterintelligence activities, including analysis, to protect against international terrorism.”² The Secretary has delegated to the Director of FinCEN the authority to implement, administer, and enforce compliance with the BSA and associated regulations.³ FinCEN is authorized to promulgate anti-money laundering (“AML”) and suspicious activity report (“SAR”) filing requirements for financial institutions subject to the BSA.⁴

The AML program provisions of the BSA require financial institutions to establish programs that include, at a minimum: (1) the development of internal policies,

¹ The BSA is codified at 12 U.S.C. 1829b, 12 U.S.C. 1951–1959, 18 U.S.C. 1956, 18 U.S.C. 1957, 18 U.S.C. 1960, and 31 U.S.C. 5311–5314 and 5316–5332 and notes thereto, with implementing regulations at 31 CFR Chapter X. *See* 31 CFR 1010.100(e).

² 31 U.S.C. 5311.

³ Treasury Order 180-01 (Sept. 26, 2002).

⁴ 31 U.S.C. 5318(g)(1) and 5318(h)(2). 31 U.S.C. 5318(g) was added to the BSA by section 1517 of the Annunzio-Wylie Anti-Money Laundering Act, Title XV of the Housing and Community Development Act of 1992, Pub. L. 102–550; it was expanded by section 403 of the Money Laundering Suppression Act of 1994, Title IV of the Riegle Community Development and Regulatory Improvement Act of 1994, Pub. L. 103–325, to require designation of a single government recipient for reports of suspicious transactions.

procedures, and controls; (2) the designation of a compliance officer; (3) an ongoing employee training program; and (4) an independent audit function to test programs.

When prescribing minimum standards for AML programs, FinCEN must “consider the extent to which the requirements imposed under [the AML program requirement] are commensurate with the size, location, and activities of the financial institutions to which such regulations apply.”⁵ The SAR filing provisions of the BSA authorize FinCEN to require any financial institution, and any director, officer, employee, or agent of any financial institution to report any suspicious transaction relevant to a possible violation of law or regulation, and under other specified circumstances described below.

FinCEN has promulgated AML program and SAR regulations for a number of financial institutions. These financial institutions include banks, casinos, money services businesses, brokers or dealers in securities, mutual funds, insurance companies, futures commission merchants, and introducing brokers in commodities and loan and finance companies.⁶ The BSA’s definition of “financial institution” includes specified categories of businesses and professions, as well as “any business or agency which engages in any activity which the Secretary of the Treasury determines, by regulation, to be an activity which is similar to, related to, or a substitute for any activity in which any business described in [31 U.S.C. 5312(a)(2)(A)-(X)] is authorized to engage.”⁷ Thus, FinCEN

⁵ Pub. L. 107-56 sec. 352(c), 115 Stat. 322, codified at 31 U.S.C. 5318 note.

⁶ 31 CFR 1020.210, 1020.320, 1021.210, 1021.320, 1022.210, 1022.320, 1023.210, 1023.320, 1024.210, 1024.320, 1025.210, 1025.320, 1026.210, 1026.320, 1029.210 and 1029.320.

⁷ 31 U.S.C. 5312(a)(2)(Y).

may promulgate regulations for businesses and professions that are not listed in the statutory definition of financial institution.⁸

With this Final Rule, FinCEN establishes AML program and SAR requirements for the Federal National Mortgage Association (“Fannie Mae”), the Federal Home Loan Mortgage Corporation (“Freddie Mac”), and the Federal Home Loan Banks (“Banks” or “FHL Banks,” collectively, the “Housing GSEs”). FinCEN believes that the Final Rule will augment FinCEN’s regulatory and strategic initiatives. The Housing GSEs are involved in providing financing to the residential mortgage market and thus are exposed to the risk of fraud. Although the business of the Banks differs in a number of respects from that of Fannie Mae and Freddie Mac, all of the Housing GSEs are involved in providing financing to the residential mortgage market and thus are vulnerable to fraud and other financial crimes. Also, both the primary and secondary residential mortgage markets are vulnerable to fraud and money laundering in terms of the proceeds of crime being invested in real property or securitized mortgages and related financial instruments. By purchasing mortgage loans, extending loans secured by mortgages and other real estate related collateral, and engaging in a variety of related financial activities, the Housing GSEs have access to, and are in a unique position to provide, information on suspected mortgage fraud and money laundering that has proven valuable to law enforcement and regulators in the investigation and prosecution of mortgage fraud and other financial crimes. While current fraud reporting by the Housing GSEs, discussed below, has value in combating fraud, the establishment of AML and SAR programs by

⁸ 31 U.S.C. 5312(a)(2).

the Housing GSEs will enable them to support broader regulatory and law enforcement efforts to combat mortgage fraud and related financial crimes consistent with the purposes of the BSA.

B. Establishment and Authority of the Federal Housing Finance Agency and the Housing GSEs

The Federal Housing Finance Regulatory Reform Act of 2008 (the “Reform Act”)⁹ created the Federal Housing Finance Agency (“FHFA”) as an independent agency of the Federal government. FHFA was established on the date of enactment of the Reform Act, July 30, 2008, to be the Federal regulator of the Housing GSEs.¹⁰ FHFA has regulatory authority over Fannie Mae, Freddie Mac, and the Banks (collectively referred to in FHFA regulations as the “regulated entities”), and over the Office of Finance of the Federal Home Loan Bank System.¹¹ FHFA is responsible for ensuring that the Housing GSEs: (1) operate in a safe and sound manner, including being capitalized adequately and maintaining internal controls; (2) carry out their public policy missions; and (3) engage in

⁹ Division A of the Housing and Economic Recovery Act of 2008 (“HERA”), Pub. L. 110–289, 122 Stat. 2654 (2008). The Reform Act provided for the abolishment of the Office of Federal Housing Enterprise Oversight (“OFHEO”) and the Federal Housing Finance Board (“FHFBB”) one year after the date of enactment. These agencies were the primary Federal regulators of Fannie Mae and Freddie Mac, and the Banks, respectively. The agencies, together with the Housing and Urban Development Government Sponsored Enterprise Mission Teams, were combined to establish FHFA.

¹⁰ The authorities, powers, and responsibilities of FHFA are contained in the Federal Home Loan Bank Act, 12 U.S.C. 1421 et seq., as amended by Division A of HERA, and the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (“Safety and Soundness Act”), 12 U.S.C. 4501 et seq., as amended by Division A of HERA. See Notice of Establishment, 73 FR 52356 (Sept. 9, 2008). [http://www.fhfa.gov/webfiles/160/FHFA_%20Notice_of_Establishment_-_73_FR_52356_\(Sept_9%2c_2008\).pdf](http://www.fhfa.gov/webfiles/160/FHFA_%20Notice_of_Establishment_-_73_FR_52356_(Sept_9%2c_2008).pdf).

¹¹ The Housing GSEs are defined as “regulated entities” in the Safety and Soundness Act, as amended, 12 U.S.C. 4501 et seq., and implementing regulations at 12 CFR part 1233. The statutory definition of “regulated entity” provides “[t]he term ‘regulated entity’ means - (A) the Federal National Mortgage Association and any affiliate thereof; (B) the Federal Home Loan Mortgage Corporation and any affiliate thereof; and (C) any Federal Home Loan Bank.” 12 U.S.C. 4502(20).

activities that foster liquid, efficient, competitive, and resilient national housing finance markets. Where FHFA has not acted with superseding regulations, the Housing GSEs continue to operate under regulations promulgated by the Office of Federal Housing Enterprise Oversight (“OFHEO”) and the Federal Housing Finance Board (“FHFB”).¹²

Congress chartered Fannie Mae and Freddie Mac primarily to establish secondary market facilities for residential mortgages to promote access to mortgage credit throughout the nation. Specifically, Congress established Fannie Mae and Freddie Mac to provide stability in the secondary market for residential mortgages, respond appropriately to the private capital market, and provide ongoing assistance to the secondary market for residential mortgages, including activities relating to mortgages on housing for low-and moderate-income families involving a reasonable economic return that may provide less of a return than Fannie Mae’s and Freddie Mac’s other activities.¹³

The Banks were organized under the Federal Home Loan Bank Act (“The Bank Act”).¹⁴ The Banks are financial cooperatives; only members of a Bank may purchase the capital stock of a Bank, and only members, and certain eligible housing associates (such as State housing finance agencies), may obtain access to secured loans, known as advances, or other Bank products.¹⁵ Each Bank is managed by its own board of directors and serves the public interest by enhancing the availability of residential mortgage and

¹² On September 6, 2008, FHFA appointed itself conservator of Fannie Mae and Freddie Mac, pursuant to 12 U.S.C. 4617. <http://www.fhfa.gov/webfiles/1858/NoticeregardingconservatorFNMA.pdf>; <http://www.fhfa.gov/webfiles/1857/NoticeregardingconservatorFHLMC.pdf>.

¹³ 12 U.S.C. 1451, 1716.

¹⁴ 12 U.S.C. 1423, 1432(a).

¹⁵ 12 U.S.C. 1426(a)(4), 1430(a), 1430b.

community lending credit through its member institutions.¹⁶ Any eligible institution (generally a Federally-insured depository institution or State-regulated insurance company) may become a member of a Bank if it satisfies certain criteria and purchases a specified amount of the Bank's capital stock.¹⁷ The Bank Act also requires each Bank to establish an affordable housing program and contribute a specified portion of its previous year's net income to support that program.¹⁸

On January 27, 2010, FHFA issued fraud reporting regulations, codified at 12 CFR part 1233, "Reporting of Fraudulent Financial Instruments," to implement the provisions of the Safety and Soundness Act with respect to the discovery and reporting of fraud, in furtherance of the supervisory responsibilities of FHFA.¹⁹ That regulation requires each Housing GSE to submit timely information on actual or possible fraud on all Housing GSE programs and products,²⁰ including, but not limited to a timely report to FHFA upon discovery that it has purchased or sold a fraudulent loan or financial instrument, or if the Housing GSE suspects a possible fraud relating to the purchase or sale of any loan or financial instrument. As discussed *infra*, certain parts of FHFA reporting format are based upon FinCEN's SAR format. The regulation, and associated guidance subsequently published by FHFA,²¹ requires each Housing GSE to establish and maintain internal controls, policies, procedures, and operational training programs, and

¹⁶ 12 U.S.C. 1427.

¹⁷ 12 U.S.C. 1424; 12 CFR 1263.

¹⁸ 12 U.S.C. 1430(j).

¹⁹ 75 FR 4255 (Jan. 27, 2010).

²⁰ 75 FR 4255, 4258-4259.

²¹ RPG-2011-001 (March 2011),

<http://www.fhfa.gov/webfiles/20685/FHFAFraudReportingGuidance32011.pdf>.

designate a fraud officer to oversee implementation and periodic monitoring (at least annually) of the fraud reporting program.

C. Summary of the Proposed Regulations

On November 8, 2011, FinCEN issued a Notice of Proposed Rulemaking (“NPRM”) to solicit comments on proposed AML and SAR regulations for the Housing GSEs.²² The proposed rules contained standards and requirements that are substantially identical to those in FinCEN’s AML and SAR regulations for banks, mortgage companies, and other financial institutions that offer retail consumer banking services and mortgage loans.

This Final Rule is based on the NPRM and adopts, without significant change, all of the regulatory provisions proposed in the NPRM. The AML regulation promulgates the four minimum requirements noted earlier. The SAR regulation requires reporting of suspicious activity in accordance with the standards and procedures specified in the NPRM and contained in all of FinCEN’s SAR regulations.²³ The Final Rule does not require the Housing GSEs to comply with any other BSA reporting or recordkeeping regulations, such as currency transaction reporting.²⁴

FinCEN believes that much of the effort necessary to meet these regulatory obligations, including information gathering, may be accomplished through business operations already undertaken as part of normal transaction negotiation, including due diligence and review of mortgage loans and related assets for purchase and securitization,

²² 76 FR 69204.

²³ See, e.g., SAR regulations for non-bank residential mortgage lenders and originators at 31 CFR 1029.320. <http://www.fincen.gov/redirect.html?url=http://www.gpo.gov/fdsys/pkg/FR-2012-02-14/pdf/2012-3074.pdf>.

²⁴ 31 CFR 1010.310.

and as collateral for advances and other investments, products, and services. As described in more detail below, the Housing GSEs have been filing SAR-like reports with FHFA for a number of years, and in other respects have supported the anti-fraud and anti-money laundering efforts of various law enforcement and regulatory agencies. FinCEN believes the Final Rule will enhance and strengthen the Housing GSEs' critical role in government and industry efforts to protect consumers, mortgage finance businesses, and the U.S. financial system from mortgage fraud, money laundering, and other financial crimes.

II. Notice of Proposed Rulemaking

The comment period on the NPRM ended on January 9, 2012. FinCEN received five comments. Comments were submitted by a Federal government agency (two letters), a trade association, representatives of some of the Housing GSEs, and a Federal government anti-fraud task force.²⁵ The supporting comments emphasized the value of streamlining the current process under which SAR information from the Housing GSEs reaches FinCEN, and the substantial value of SARs predicted to cover a broader range of suspected financial crimes. FHFA has expressed strong support for FinCEN issuing AML and SAR regulations for the Housing GSEs. The public comments that expressed some opposition to the NPRM were based primarily on speculation that compliance costs and burdens would outweigh any potential benefits to law enforcement, and on the view that the current FHFA fraud reporting requirements are sufficient to support broad based government anti-fraud and anti-money laundering efforts.

²⁵ In addition, FHFA's comment letter states that it "encompasses issues relating to" Freddie Mac and Fannie Mae, as well as FHFA's perspective as the regulator of the Housing GSEs.

A. Housing GSEs Defined as Financial Institutions

As noted in the NPRM, the BSA does not expressly identify any of the Housing GSEs in its definition of “financial institution.” The BSA’s definition of financial institution lists numerous types of businesses, including commercial banks and other depository institutions.²⁶ The definition also includes a “catch-all” provision that authorizes the Secretary to include additional types of businesses if the Secretary determines, by regulation, that they engage in any activity “similar to, related to, or a substitute for” any activity of any of the listed businesses.²⁷

The Housing GSEs work closely with other BSA-defined financial institutions; in fact, the majority of the Housing GSEs’ counterparties and members are commercial banks, thrifts, credit unions, and insurance companies. Many of the products and services offered by the Housing GSEs can be viewed as substitutes for or related to products and services offered by commercial banks and nonbank financial institutions included in the BSA’s definition of financial institution.

The main role of the Housing GSEs is to support the primary mortgage market and affordable housing through the purchase, guarantee, and securitization of mortgage loans and the extension of loans secured primarily by mortgage loans and real estate

²⁶ 31 U.S.C. 5312(a)(2) and (c)(1). The BSA definition includes financial institutions subject to the regulations of a Federal functional regulator, such as banks, savings associations, credit unions, securities broker-dealers, and futures commission merchants. The BSA definition also includes dealers in precious metals, stones, or jewels; money services businesses (such as money transmitters and currency exchanges); pawnbrokers; loan and finance companies; private bankers; insurance companies; travel agencies; telegraph companies; sellers of vehicles, including automobiles, airplanes, and boats; persons engaged in real estate closings and settlements; investment bankers; investment companies; and commodity pool operators and commodity trading advisors that are registered or required to register under the Commodity Exchange Act (7 U.S.C. 1, et seq.).

²⁷ 31 U.S.C. 5312(a)(2)(Y).

related assets. The Banks also provide grants or subsidies for affordable housing and community investment. Typically, a significant portion of these mortgage loans are made by commercial banks, credit unions, and savings and loan associations, which are already financial institutions under the BSA and subject to FinCEN's regulations.²⁸ Some of the Banks also have acquired member asset programs whereby they acquire fixed-rate, single-family mortgage loans from participating member institutions, which also are generally commercial banks or other depository institutions already included within the BSA's definition of financial institutions. Thus, FinCEN believes that the Housing GSEs engage in activities that are "similar to, related to, or a substitute for" financial services that are provided by other BSA-defined financial institutions. For this reason, FinCEN hereby exercises its authority under 31 U.S.C. 5312(a)(2)(Y) to define the Housing GSEs as financial institutions.

One commenter noted that Congress enacted Section 1115 of the Housing and Economic Recovery Act of 2008 ("HERA"),²⁹ which required FHFA to promulgate the fraud reporting regulations at 12 CFR 1233, without adding the Housing GSEs to the list of financial institutions in the BSA, or otherwise requiring the Housing GSEs to comply with FinCEN or FHFA regulations that would require AML and SAR programs. The commenter urged FinCEN to "presume that Congress acted intentionally where it specifically adds language to one statute over another." The commenter further stated that "[I]f Congress had intended for the [Housing] GSEs to be considered financial institutions under the BSA, then the statute would have been amended to specifically

²⁸ 31 U.S.C. 5312(a)(2).

²⁹ See notes 9 and 10.

include the [Housing] GSEs. Rather, Congress enacted separate anti-fraud requirements in HERA that are unique to the FHLBank's wholesale business structure.”

FinCEN is not persuaded by the commenter's analysis regarding Congress's intent, or by the commenter's interpretation of the BSA. Rather, FinCEN believes that Congress enacted the “catch-all” provision at 31 U.S.C. 5312(b)(2)(Y) in order to give the Secretary and his delegate, FinCEN, the discretion, in future regulatory actions, to add businesses and professions to the statutory list of financial institutions, and thereby make them subject to certain provisions of the BSA.³⁰ FinCEN believes that neither Congress, nor any other legislative or regulatory body, would be able to list all of the types of businesses that may be vulnerable to money laundering for all time. As businesses evolve, so do the criminal schemes designed to exploit them for illegal financial gain. The “catch-all” provision implicitly recognizes this fact, and gives FinCEN discretion to determine the types of businesses that should become subject to regulations implementing the BSA.

The scope of the Final Rule is limited. It defines the Housing GSEs as “financial institutions” under 31 U.S.C. 5312(a)(2)(Y) for the purposes of requiring them to establish AML programs and report suspicious activities, as well as allow them to participate in special information sharing procedures to deter money laundering and terrorist activity. The term “Housing government sponsored enterprise” is added as a new defined term at 31 CFR 1010.100(mmm) for these purposes. Notably, the Final Rule does not amend the general definition of “financial institution” under FinCEN's

³⁰ See note 7.

regulations at 31 CFR 1010.100(t) because adding Housing GSEs to the general definition would trigger other recordkeeping and reporting requirements that FinCEN does not consider appropriate for the Housing GSEs at this time.

B. AML Program and SAR Filing Requirements

Under this Final Rule, the Housing GSEs are required to establish and maintain AML programs, and to file SARs directly with FinCEN, as of the regulatory compliance date. As emphasized in the NPRM, FinCEN does not expect the transition to compliance with the Final Rule to be unreasonably difficult or costly, primarily because the Housing GSEs already are required to have policies, management oversight, personnel training, and internal compliance review and various procedures and systems in place to comply with FHFA's current fraud reporting regulation and guidance.³¹ These programmatic features are substantively very similar to those required in all AML regulations issued by FinCEN. Moreover, pursuant to the terms of a Memorandum of Understanding ("MOU") between FinCEN and FHFA, the Housing GSEs have been filing separate reports with FHFA regarding suspicions of fraud, using technical specifications provided by FinCEN, in accordance with FHFA's guidance. FHFA, in turn, has provided this information to FinCEN in the form of SARs (albeit regarding a narrower range of suspicious activity than is covered in FinCEN's typical SAR regulations).³² FHFA agrees that this indirect

³¹ See notes 19, 20, and 21.

³² The first MOU governing this separate fraud reporting arrangement was executed in May 2006 between FinCEN and FHFA's predecessor agency, OFHEO, which established the requirements applicable to Fannie Mae and Freddie Mac. A superseding MOU, with most of the same provisions, was executed by FinCEN and FHFA in July 2010, which established the requirements for Fannie Mae and Freddie Mac, as well as the 12 Federal Home Loan Banks. The Housing GSEs are required to use a data template that "complies with the technical specifications set forth by FinCEN for the [SAR] report for depository institutions." See paragraph II.B.3. of FHFA's guidance on fraud reporting, referenced in note 21.

reporting structure should be restructured to better support the needs of law enforcement and extend the benefit of the BSA's "safe harbor" to the Housing GSEs. FHFA also agrees that a direct reporting structure from the Housing GSEs to FinCEN would be more streamlined than the current practice because direct reporting would, in part, eliminate the burden created by the significant effort FHFA devotes to providing information received from the Housing GSEs and filing to FinCEN as SARs.

The indirect reporting structure is inadequate to support the needs of law enforcement because reports are not available to law enforcement with the same speed they would be if they were filed directly. Additionally, law enforcement does not have the same ease of access to the records supporting any report filed by the Housing GSEs with FHFA as it would if the reports were filed directly with FinCEN under the obligations of the BSA. Direct filing by the Housing GSEs will result in a wider range of information made available to law enforcement more promptly. Finally, the indirect reporting structure does not allow the Housing GSEs to avail themselves of the BSA's "safe harbor." The current reporting regime required by FHFA has its own "safe harbor," but does not cover the same range of reporting as the BSA safe harbor, nor does it offer the same broad protection.

The comments on the NPRM primarily focused on the potential benefits, costs, and burdens of implementing the AML program and SAR filing requirements proposed in the NPRM. Three of the comments express the view that the Housing GSEs have limited access to useful SAR information about specific retail mortgage finance transactions. Two of these comments also stated that: (1) the current FHFA fraud reporting requirements are sufficient to support law enforcement, and any FinCEN SAR

requirement would yield little, if any, additional useful information not already obtained by FHFA; (2) any new SAR requirement would result in duplicative SAR filings on the same suspicious activity, such as one report from a retail bank or non-bank mortgage company, and one report from the Housing GSE; and (3) any new AML and SAR regulations would require the Housing GSEs, particularly the Banks, to implement new detection, monitoring, and reporting practices, controls and systems, and possibly modify existing business models. In their view, the potential costs and burdens associated with any new AML or SAR regulations would not result in any corresponding substantial or justifiable benefit to law enforcement and regulators.

The three previously referenced comments cautioned that the Housing GSEs have limited interactions with parties to a primary market mortgage loan transaction (i.e., the lender, the borrower and various persons typically engaged in closing a primary purchase, refinance or home equity loan transaction) and, therefore, the Housing GSEs have limited access to information on the borrower's qualifications, the terms and circumstances regarding the loan, and other transaction-related information typically included in a SAR. Two of these comments also express the view that, due to the Banks' limited access to transactional information, extending AML and SAR requirements to the Housing GSEs, particularly the Banks, will not provide law enforcement with access to information on fraud related or non-fraud related money laundering or other financial crimes that FHFA does not already receive under the current FHFA reporting regime. These two comments further stated that the Banks, in particular, would likely need to restructure their current business practices, systems, and models to "peer through" their wholesale transactions and obtain information usually gathered at the origination stage to a greater extent than

their current business practices and systems accomplish. The comments therefore urged that any new FinCEN AML or SAR requirements should not require the acquisition of transaction information that is not already obtained by the Housing GSEs in the ordinary course of business under current practices. One comment specifically requested that FinCEN confirm that any new AML and SAR rules will not require the Banks to establish new IT monitoring or data-mining systems of the kind adopted by higher risk institutions engaged in retail banking.

The comments further stated that the current FHFA fraud reporting regulations and guidance are sufficient to provide law enforcement and regulators with information necessary to investigate and prosecute mortgage fraud and fraud related money laundering and other financial crimes typically associated with residential mortgage transactions, and that FinCEN's AML and SAR program requirements therefore are unnecessary.

One comment stated that the rules proposed in the NPRM would require the Banks to duplicate the efforts of "99 percent" of the Banks' customer base (i.e., retail banks and other insured depository institutions, all of whom already have a SAR filing obligation under applicable FinCEN and Federal banking regulations), thus resulting in overlapping or duplicative SAR reports on the same suspicious activity. One of the comments that generally supported the NPRM nonetheless cautioned that the proposed rules could result in "unintended consequences." The comment noted, as an example of an unintended consequence, the likelihood of duplicative, overlapping requirements and SAR filings. One comment concluded simply that the potential additional benefits to law enforcement "appear to be minimal."

The comments noted that the Banks already have expended significant time and resources on establishing and maintaining policies, procedures, systems and employee training to comply with FHFA's fraud reporting requirements. The comments concluded that FHFA requirements, and the programs established to comply with them, should be given time to "mature." The comments expressed the view that any new rules should be issued only if it becomes evident that the current FHFA fraud reporting regime is determined to be inadequate. FinCEN believes the addition of the Housing GSEs within FinCEN's framework for SAR reporting will be the most efficient overall approach.

In the NPRM, FinCEN requested comment on whether it would be appropriate to include in a Final Rule any provisions that account for the differences in the business, operation, and mission of the Banks and Fannie Mae and Freddie Mac. Three comments noted that the practices followed by Freddie Mac and Fannie Mae in connection with due diligence on loan pools, and related consideration of credit, interest rate, and operational risks, differ from those followed and considered by the Banks in connection with examination of loans and other assets as collateral for advances. Two comments stated that if FinCEN goes forward with final rules, FinCEN should take into account the differences in business models and practices of the Banks, on the one hand, and those of Fannie Mae and Freddie Mac, on the other. One comment urged that the requirements and standards in any final rules should be abbreviated and streamlined for the Banks, again arguing that the Banks generally do not obtain detailed borrower and transaction related information from their retail banking members in the ordinary course of business. Three comments, including one from FHFA, also urged that any final rules should be "phased-in" to give the Housing GSEs sufficient time to make changes to policies,

procedures, systems, and business practices that would be deemed appropriate to comply with the Final Rule, and FinCEN's new uniform SAR requirements mandated on July 1, 2012.³³

The comments that supported the NPRM expressed opinions and conclusions largely contrary to those expressed in the comments summarized above. The supporting comments highlight the following benefits, among others, of the rules proposed in the NPRM: (1) the new SAR rules, by requiring the Housing GSEs to file SARs directly with FinCEN, will enhance FinCEN's database, reduce burdens on government resources, and strengthen the mortgage fraud prevention programs and initiatives of the Housing GSEs and FinCEN; (2) the rules will give law enforcement and regulators quicker access to SAR information that is critical to investigations, and keep them better informed about evolving criminal schemes; (3) the rules will enhance coordination on analysis and investigations by FinCEN, FHFA, FHFA-OIG, and other law enforcement authorities on the Federal, State, and local levels that have access to FinCEN's BSA database; and (4) the AML rules will bolster HERA's reporting requirement, which likely will result in better information for investigations and enforcement actions. FinCEN finds these views persuasive and believes the Final Rules will support Administration and government efforts to combat mortgage fraud and other financial crimes.

FinCEN believes that both the AML program and SAR filing requirements are necessary and appropriate for the Housing GSEs and other businesses involved in mortgage finance, in order to give law enforcement and regulatory agencies valuable,

³³ 77 FR 12367 (Feb. 29, 2012).

timely information on specific instances of suspected mortgage fraud and mortgage finance related money laundering, as well as provide insight into emerging patterns of regional and national criminal activity. The information from SARs and other BSA-related information assists law enforcement and regulators with the development of their strategic goals and policies, as well as with the deployment of valuable resources to high crime areas.

FHFA's fraud reporting program is important in that it allows FHFA to both monitor the Housing GSEs' success in identifying fraud and mitigate attendant risks, and assess the impact that involvement in such transactions may have on the Housing GSEs' operational risks and overall safety and soundness. FHFA's reporting system, however, was not designed to support the multi-jurisdictional and inter-governmental investigations, prosecutions, and trend analyses that rely on SAR data and other BSA-related information in FinCEN's databases. Only FinCEN, as the nation's financial intelligence unit and administrator of the BSA, has the authority and resources to collect, analyze, and disseminate this vast amount of information to its Federal, State, and local law enforcement and regulatory partners securely and confidentially. The BSA and FinCEN's implementing regulations also permit sharing of primary and secondary mortgage market transactional information, in a secure and confidential manner, among financial institutions that enroll in FinCEN's 314(b) program.³⁴ These functions cannot be accomplished by FHFA, or any other government agency, under current Federal and State laws and regulations. The faster that information from the Housing GSEs makes its

³⁴ See discussion in section III.E. regarding FinCEN's special information sharing regulations applicable to the Housing GSEs and other financial institutions.

way into the BSA database, the sooner FinCEN and other agencies will be able to access that information to support investigations and enforcement actions related to money laundering, fraud, and other financial crimes.

FinCEN expects there will be transactions involving the Housing GSEs with respect to which two or more SARs will be submitted to FinCEN concerning the same transaction or activity, and in this respect, the SARs arguably may be viewed as “duplicative” or “overlapping.” For example, one SAR may be submitted by the retail-level originator or lender, and one “overlapping” SAR by a Housing GSE regarding the same transaction or activity. Based on the SARs filed to date under the MOU between FinCEN and FHFA, FinCEN believes a number of these “overlapping” SARs likely will concern a specific loan or loan pool repurchased by the originating institution upon the request of the Housing GSE, pursuant to the terms of the Housing GSE’s contract with the originating institution or servicer. For example, a contract may permit a Housing GSE to demand repurchase upon discovery by the Housing GSE, a loan servicer, the originating institution, or a combination of these or other financial professionals, of loan related fraud or delinquency, including payment default, borrower misrepresentation, or some irregularity or discrepancy in the appraisal or loan documentation. The SAR forms, however, also may contain non-overlapping information and – in any event – will reflect the unique perspective and analyses of the two, or more, SAR filers. The availability of different data presented from different business perspectives by organizations with different, but complementary, roles in mortgage finance may be useful for law enforcement to gain a more comprehensive understanding of the transaction and its circumstances. FinCEN views this consequence of the existence of parallel reporting

requirements for banks, non-bank residential mortgage lenders and originators, and Housing GSEs as a significant potential advantage to law enforcement and regulators that justifies the relatively minor additional costs and burdens to be borne by the Housing GSEs. This view is further confirmed by FinCEN's broad experience in requiring SAR reporting from a range of financial institutions, a small percent of which may contain reporting of partially overlapping information, but which together add significant value.

FinCEN's issuance of final AML and SAR rules for non-bank residential mortgage lenders and originators emphasized the critical importance of institutions establishing an AML program and filing SARs in order to prevent and identify mortgage fraud and other financial crimes.³⁵ FinCEN expressed its view that the establishment of a complete AML program is essential for institutions to have an effective SAR filing program. Each of the "four pillars" of an AML program is critical to holding up the overall structure of the program. It would be difficult to expect useful SAR reporting without the pillars of an AML program firmly in place. FinCEN's regulations are structured to ensure that financial institutions are knowledgeable of risks and vigilant against fraud and other crimes. All of FinCEN's AML regulations require covered institutions to implement risk-based programs that take into account the unique risks associated with that particular institution's products and services, as well as the institution's size, market, and other issues. Thus, each Housing GSE's AML program would necessarily be different than those of other Housing GSEs with different business models and practices, as well as different product, geographic, and other risks. As a

³⁵ 31 CFR 1029; 77 FR 8148 (Feb. 14, 2012).

result, FinCEN believes that the AML regulations in this Final Rule inherently recognize the differences in the business models and practices of the Banks, Fannie Mae, and Freddie Mac, and that separate regulatory requirements for the Banks, on the one hand, and Fannie Mae and Freddie Mac, on the other, are unnecessary.³⁶ Under a risk-based approach to implementation of the Final Rule, FinCEN expects prevention of money laundering and other financial crimes, such as mortgage fraud, to be key goals underlying the various policies and procedures in an effective AML program for each Housing GSE. Therefore, the AML regulation proposed in the NPRM is adopted in this Final Rule without significant changes.

FinCEN believes it is important to highlight the value of SARs that will be filed by the Housing GSEs. As one comment noted, law enforcement agencies have advised FinCEN and FHFA that SARs from the Housing GSEs under the present MOU procedures are very useful in the investigation and prosecution of financial crimes. Filing SARs directly with FinCEN will increase the speed and ease with which law enforcement and regulators can access and utilize the information contained in those valuable SARs. Finally, FinCEN's SAR database has been a "one-stop" integrated system for law enforcement and regulator access to valuable information on suspected financial crimes. It is appropriate, efficient, and consistent with FinCEN's statutory mandate to consolidate

³⁶ FHFA is required, when issuing any regulation or guidance, to consider differences between the Banks and the Enterprises (Fannie Mae and Freddie Mac). FHFA also acknowledged in its regulatory policy guidance (RPG-2011-001) that it expects fraud detection and reporting controls, "should be more expansive when a financial instrument is owned or guaranteed versus when a financial instrument serves as collateral." III.A., p.9.

all suspicious activity reports from financial institutions in the database where they can be of the most value.³⁷

As FinCEN explained in the NPRM, the new SAR regulations will require the reporting of a potentially broader range of financial crimes than under FHFA's fraud reporting regulations. This, along with the ability to share information among the Housing GSEs and with other financial institutions, may well result in the Housing GSEs filing more SARs than fraud reports filed pursuant to FHFA's regulations. FinCEN also acknowledges that limited access to transactional information of a residential mortgage loan may limit the ability of a Housing GSE to include in a SAR all of the information typically found in a SAR filed by a retail bank or mortgage company. FinCEN expects that some of the Housing GSEs may need to establish new, or modify existing, policies, procedures, systems, organizational controls, or employee training arrangements. Nonetheless, FinCEN believes that these changes, and any related investments, will not need to be as extensive as some of the comments suggest, and that a substantial part of the new suspicious activity reporting and AML program requirements of this Final Rule may be integrated into existing procedures, controls, systems, and training programs with relatively minor costs. FinCEN emphasizes that each Housing GSE already has established procedures, systems, and controls to submit reports to FHFA when a Housing GSE discovers it has purchased or sold a fraudulent loan or financial instrument (e.g., a mortgage-backed security), or suspects a possible fraud relating to the purchase or sale of

³⁷ 31 U.S.C. 310.

any loan or financial instrument. Under FHFA’s guidance and the MOU, FHFA then transmits some of these reports to FinCEN using a SAR.³⁸

FinCEN believes that new investment in elaborate, expensive systems will not be necessary for the Banks, Freddie Mac, or Fannie Mae to comply with the Final Rule. For those Banks that anticipate the need to submit a relatively low number of SARs, they may establish procedures to submit individual SARs via FinCEN’s established Web-based electronic system, which does not require acquisition of any new systems or modifications to systems used to comply with FHFA filing requirements. FinCEN and other agencies have issued substantial guidance on the development of risk-based AML and SAR reporting programs.³⁹ FinCEN believes the Housing GSEs may build on their existing risk management procedures and prudential business practices to ensure compliance with this Final Rule with minimal cost. In sum, FinCEN believes that the Final Rule does not impose significant costs on the Housing GSEs.

FinCEN also wishes to emphasize that, by the designation of the Housing GSEs as “financial institutions” under the BSA, the Housing GSEs, as well as their directors, officers, employees, and agents, are covered by the BSA’s liability safe harbor for

³⁸ See note 21 regarding FHFA Fraud Reporting Guidance, section II.B.3.

³⁹ See, e.g., Guidance – Preparing a Complete and Sufficient Suspicious Activity Report Narrative (including related PowerPoint Presentation - Keys to Writing a Complete and Sufficient SAR Narrative), Nov. 2003, http://www.fincen.gov/statutes_regs/guidance/html/narrativeguidance_webintro.html; Guidance – Suggestions for Addressing Common Errors Noted in Suspicious Activity Reporting, Oct. 10, 2007, http://www.fincen.gov/statutes_regs/guidance/html/SAR_Common_Errors_Web_Posting.html; Guidance – Suspicious Activity Report Supporting Documentation, June 13, 2007 (FIN-2007-G003), http://www.fincen.gov/statutes_regs/guidance/html/Supporting_Documentation_Guidance.html The SAR Activity Review – Trends, Tips and Issues (Issue 16), Oct. 2009, Section 4, *Law Enforcement Suggestions When Preparing Suspicious Activity Reports*, p. 45., http://www.fincen.gov/statutes_regs/guidance/html/narrativeguidance_webintro.html. See also NPRM, note 45.

financial institutions that file SARs.⁴⁰ This safe harbor is intended to encourage financial institutions to report suspicious activities, even if, as here, the SAR regulation will likely require reporting of a wider range of suspected fraud, money laundering, and financial crimes related to the products and services offered by the Housing GSEs than those entities may currently be accustomed to report.

III. Section-by-Section Analysis

A. Definition of Housing Government Sponsored Enterprise

Section 1010.100(mmm) defines the key terms used in the Final Rule. The definitions reflect FinCEN's determination that AML program and SAR requirements should be applied to the Housing GSEs. The definition of "Housing government sponsored enterprise" includes: 1) the Federal National Mortgage Association; 2) the Federal Home Loan Mortgage Corporation; and 3) each Federal Home Loan Bank. The definition does not include any entity-affiliated party⁴¹ of Fannie Mae, Freddie Mac, or any Bank, including the Office of Finance of the Federal Home Loan Bank System.

B. Compliance and Enforcement

Section 1010.810(b)(10) delegates authority to examine the Housing GSEs for compliance with the requirements of this Final Rule to FHFA. FHFA is the Federal regulator for the Housing GSEs and enforces its own statutes and regulations regarding safety and soundness. FHFA is FinCEN's delegate for examination for compliance with FinCEN's regulations. FinCEN will work with FHFA to coordinate and direct such delegated compliance examination activities. FinCEN retains enforcement authority

⁴⁰ 31 U.S.C. 5318(g)(3).

⁴¹ 12 U.S.C. 4502(11).

under the BSA, including for the imposition of civil penalties for violations of these regulations.

C. Anti-Money Laundering Program

Section 1030.210(a) requires each Housing GSE to develop and implement an AML program reasonably designed to prevent the Housing GSE from being used to facilitate money laundering or the financing of terrorist activities, and other financial crimes, including mortgage fraud. The program must be in writing and must be approved by senior management. A Housing GSE's written program also must be made available to FinCEN upon request.

Section 1030.210(b) sets forth the minimum requirements of a Housing GSE's AML program. Beyond these minimum requirements, however, the Final Rule is intended to give Housing GSEs the flexibility to design their programs to mitigate their own specific risks. Section 1030.210(b)(1) requires the AML program to incorporate policies, procedures, and internal controls based upon the Housing GSE's assessment of the risks of money laundering, terrorism finance, and other financial crimes associated with its products, counterparties, distribution channels, and geographic locations. A Housing GSE's assessment of counterparty-related information is a key component to an effective AML program. Thus, a Housing GSE's AML program must ensure that the Housing GSE obtains the information necessary to make its AML program effective. Such information may, but is not required to, include relevant information on individual borrowers and the financial institutions that are the Housing GSE's counterparties or members. The specific means of obtaining such information is left to the discretion of the Housing GSE.

In the NPRM, FinCEN stated that it anticipated that the Housing GSEs may need to amend existing agreements to ensure that they receive necessary customer information. Upon consideration of the comments on the NPRM, FinCEN highlights that amendment of agreements may not be necessary, and FinCEN emphasizes that the Final Rule does not require such amendments. However, the determination whether agreements may need amendment is a matter that the Housing GSEs' management should consider in assessing risks associated with products and services subject to the AML and SAR requirements. The AML program requirement does not obligate the Housing GSEs to obtain information that they do not already receive in the ordinary course of business under current practices, particularly with regard to information on individual borrowers the Housing GSEs do not receive in the ordinary course of business. For purposes of making the required risk assessment, a Housing GSE must consider all relevant information that is currently available to them, including whether the retail financial institutions that are its customers are subject to AML program requirements under the BSA.

Policies, procedures, and internal controls also must be reasonably designed to ensure compliance with BSA requirements. Housing GSEs may conduct some of their operations through third parties. Some elements of the compliance program may best be performed by personnel of such third parties, in which case it is permissible for a Housing GSE to delegate contractually the implementation and operation of those aspects of its AML program to such an entity, and to rely on the compliance program of such third parties if the third parties are subject to an independent AML program requirement under the BSA. Any Housing GSE that delegates responsibility for aspects of its AML

program to a third party, however, remains fully responsible for the effectiveness of the program, as well as ensuring that examiners are able to obtain information and records relating to the AML program.

Section 1030.210(b)(2) requires that a Housing GSE designate a compliance officer to be responsible for administering the AML program. The person should be competent and knowledgeable regarding BSA requirements and money laundering and fraud issues and risks, and should be empowered with full responsibility and authority to develop and enforce appropriate policies and procedures. The role of the compliance officer is to ensure that (1) the program is implemented effectively; (2) the program is updated as necessary; and (3) appropriate persons are trained and educated in accordance with section 1030.210(b)(3).

Section 1030.210(b)(3) requires that a Housing GSE provide for education and training of appropriate persons. Employee training is an integral part of any AML program. To carry out their responsibilities effectively, employees of a Housing GSE (and of any third party not already receiving training as part of another AML program requirement) with responsibility under the program must be trained in the requirements of the Final Rule and money laundering and fraud risks generally so that they can identify red flags associated with existing or potential customers and transactions. Such training may be conducted by outside or in-house seminars, and may include computer-based training. The nature, scope, and frequency of the education and training program of the Housing GSE will depend upon the employee functions performed. However, those with obligations under the AML program must be sufficiently trained to carry out their

responsibilities effectively. Moreover, these employees should receive periodic updates and refreshers regarding the AML program.

Section 1030.210(b)(4) requires that a Housing GSE provide for independent testing of the program on a periodic basis to ensure that it complies with the requirements of the Final Rule and that the program functions as designed. An outside consultant or accountant need not perform the testing and review. The review may be conducted by an officer, employee or group of employees, so long as the reviewer is not the designated compliance officer and does not report directly to the compliance officer. The frequency of the independent testing will depend upon the Housing GSE's assessment of risks posed by its operations. Any recommendations resulting from such testing should be reviewed by senior management. A Housing GSE may also rely on the testing performed by third parties that are subject to an independent AML program requirement. Section 1030.210(c) states that compliance with the AML program requirements will be determined by FinCEN or its delegate.

D. Reports of Suspicious Transactions

Section 1030.320(a) contains the rules setting forth the obligation of Housing GSEs to report suspicious transactions that are conducted or attempted by, at, or through a Housing GSE and involve, independently or in the aggregate, at least \$5,000 in funds or other assets. It is important to recognize that transactions are reportable under this Final Rule and 31 U.S.C. 5318(g) regardless of whether they involve currency. The \$5,000 minimum amount is consistent with existing SAR filing requirements for other financial institutions.

Section 1030.320(a)(1) contains the general statement of the obligation to file reports of suspicious transactions. The obligation extends to transactions conducted or attempted by, at, or through a Housing GSE. The Final Rule also contains a provision in section 1030.320(a)(1) designed to encourage the reporting of transactions that appear relevant to violations of law or regulation, even in cases in which the Final Rule does not explicitly so require, such as in the case of a transaction falling below the \$5,000 threshold.

Section 1030.320(a)(2) specifically describes the four categories of transactions that require reporting. A Housing GSE is required to report a transaction if it knows, suspects, or has reason to suspect that the transaction (or a pattern of transactions of which the transaction is a part): (i) involves funds derived from illegal activity or is intended or conducted to hide or disguise funds or assets derived from illegal activity; (ii) is designed, whether through structuring or other means, to evade the requirements of the BSA; (iii) has no business or apparent lawful purpose, and the Housing GSE knows of no reasonable explanation for the transaction after examining the available facts; or (iv) involves the use of the Housing GSE to facilitate criminal activity.⁴²

A determination as to whether a report is required must be based on all the facts, circumstances and information to which the Housing GSE has access, in the ordinary course of its business, relating to the transaction and customer of the Housing GSE in question. Different fact patterns and circumstances will require different judgments.

⁴² The fourth reporting category has been added to the suspicious activity reporting rules promulgated since the passage of the USA PATRIOT Act to make it clear that the requirement to report suspicious activity encompasses the reporting of transactions involving fraud and those in which legally derived funds are used for criminal activity, such as the financing of terrorism.

Some examples of red flags associated with existing or potential customers are referenced in previous FinCEN reports and guidance on mortgage fraud and SAR filing. However, the means of commerce and the techniques of money laundering are continually evolving, and there is no way to provide an exhaustive list of suspicious transactions or red flags. FinCEN will continue to pursue a regulatory approach that involves a combination of guidance, training programs, and government-industry information exchange so that implementation of any new AML program and SAR reporting regulations can be accomplished in the most flexible and cost efficient way possible, while protecting the primary and secondary mortgage markets and the financial system as a whole from fraud, money laundering, and other financial crimes.

Section 1030.320(a)(3) provides that the obligation to identify and to report a suspicious transaction rests with the Housing GSE involved in the transaction. However, where more than one Housing GSE, or another financial institution with a separate suspicious activity reporting obligation, is involved in the same transaction (or related transactions), only one report is required to be filed, provided it contains all relevant information and each institution maintains a copy of the report and any supporting documentation related to the SAR. There is, however, no obligation for the Housing GSEs to notify each other or work together in such circumstances. Each Housing GSE must evaluate customer activity and relationships for fraud, money laundering, and other financial crime risks, and design a suspicious transaction monitoring and reporting program that is appropriate for the particular Housing GSE in light of such risks.

Section 1030.320(b) sets forth the filing procedures to be followed by Housing GSEs making reports of suspicious transactions. Within 30 days after a Housing GSE

becomes aware of a suspicious transaction (or within 60 days if no suspect has been identified), it must report the transaction by completing a SAR and filing it with FinCEN. Supporting documentation relating to each SAR is to be collected and maintained separately by the Housing GSE and made available upon request by FinCEN, FHFA or any appropriate Federal, State, or local law enforcement agency, or any Federal regulatory authority that examines the Housing GSE for compliance with the BSA. FinCEN's SAR regulations provide that the documentation supporting a SAR that is maintained by the filer, is deemed to be filed with the SAR. Thus, supporting documentation may be disclosed to the authorities referenced above to whom a SAR form may be disclosed, consistent with the rules of construction, described below. For situations requiring immediate attention, Housing GSEs are to telephone the appropriate law enforcement authority in addition to filing a SAR.

Section 1030.320(c) provides that the filing Housing GSE must maintain copies of SARs and the underlying related documentation for a period of five years from the date of filing.⁴³ As indicated above, supporting documentation is to be made available to FinCEN and appropriate law enforcement and regulatory authorities, upon request.

Section 1030.320(d)(1) reinforces the statutory prohibition against the disclosure by a financial institution of a SAR (regardless of whether the report would be required by the Final Rule or is filed voluntarily).⁴⁴ The section requires that a SAR and information that would reveal the existence of that SAR ("SAR information") be kept confidential

⁴³ FinCEN notes that FHFA's guidance on fraud reporting, RPG-2011-001, also contains a five-year document retention requirement.

⁴⁴ 31 U.S.C. 5318(g)(2).

and not be disclosed, except as authorized within the rules of construction. The regulation includes rules of construction that identify actions an institution may take that are not precluded by the confidentiality provision. These actions include the disclosure of SAR information to FinCEN, FHFA, or appropriate Federal, State, or local law enforcement agencies, or a Federal regulatory authority that examines the Housing GSE for compliance with the BSA. This confidentiality provision also does not prohibit the disclosure of the underlying facts, transactional information, and documents upon which a SAR is based, or the sharing of SAR information within the Housing GSE's corporate organizational structure for purposes consistent with Title II of the BSA, as determined by FinCEN in regulation or in guidance.⁴⁵

Section 1030.320(d)(2) incorporates the statutory prohibition against disclosure of SAR information, other than in fulfillment of their official duties consistent with the BSA, by government users of SAR data. The section also clarifies that official duties do not include the disclosure of SAR information in response to a request for non-public information⁴⁶ or for use in a private legal proceeding, including a request under 31 CFR 1.11.⁴⁷

⁴⁵ On November 23, 2010, FinCEN issued updated guidance for the banking, securities, and futures industries authorizing the sharing of SAR information with parent companies, head offices, and under certain conditions, domestic affiliates. 75 FR 75607 (Dec. 3, 2010). No such guidance has been issued for the Housing GSEs.

⁴⁶ For purposes of this rulemaking, "non-public information" refers to information that is exempt from disclosure under the Freedom of Information Act.

⁴⁷ 31 CFR 1.11 is the Department of the Treasury's information disclosure regulation. Generally, these regulations are known as "Touhy regulations," after the Supreme Court's decision in United States ex rel. Touhy v. Ragen, 340 U.S. 462 (1951). In that case, the Supreme Court held that an agency employee could not be held in contempt for refusing to disclose agency records or information when following the instructions of his or her supervisor regarding the disclosure. An agency's Touhy regulations are the instructions agency employees must follow when those employees receive requests or demands to testify or otherwise disclose agency records or information.

Section 1030.320(e) provides protection from liability for making reports of suspicious transactions, and for nondisclosures of such a report, to the full extent provided by 31 U.S.C. 5318(g)(3). This statutory safe harbor, unlike that afforded to the Housing GSEs under FHFA regulations,⁴⁸ contains no express requirement that the report has been filed in “good faith,” and legal authority strongly supports the proposition that there is no implicit “good faith” limitation to this safe harbor.⁴⁹ One commenter nevertheless suggested that the difference between FHFA safe harbor and the BSA safe harbor could result in the Housing GSEs being subject to civil liability for making reports pursuant to the BSA. FinCEN disagrees with that assessment. Because this Final Rule defines the Housing GSEs as financial institutions under the BSA, a Housing GSE should be able to avail itself of the broader BSA safe harbor for reports it files pursuant to the BSA. Congress has made two safe harbors available to institutions under two separate statutes. These safe harbor provisions do not contradict, supersede, or conflict with one another. Nothing in the law implies that Congress intended to make only the narrower safe harbor applicable when an institution was on its face entitled to both. FinCEN thinks it more persuasive to consider both safe harbors to be applicable according to their terms.

Section 1030.320(f) notes that compliance with the obligation to report suspicious transactions will be examined by FinCEN or its delegates, and provides that failure to

⁴⁸ 12 CFR 1233.5.

⁴⁹ See Stout v. Banco Popular de Puerto Rico, 320 F.3d 26, 31 (1st Cir. 2003) (no good faith requirement), Lee v. Bankers Trust, 166 F.3d 540, 544 (2d Cir. 1999) (same), Henry v. Bank of America, 2010 U.S. Dist. LEXIS 14561 *11-13 (N.D.Cal., Feb. 2, 2010) (same), Eyo v. United States, 2007 U.S. Dist. LEXIS 88088 *15-16 (D.N.J., Nov. 29, 2007) (same), Nieman v. Firststar Bank, 2005 U.S. Dist. LEXIS 38959 *18 (N.D. Iowa, Sept. 26, 2005) (same). But see Lopez v. First Union National Bank, 129 F.3d 1186, 1992 (11th Cir. 1997) (regarding a good faith requirement).

comply with the Final Rule may constitute a violation of the BSA and FinCEN's regulations.

Section 1030.320(g) provides that the new SAR requirement is effective when an anti-money laundering program required by the regulations is required to be implemented.

E. Special Information Procedures to Deter Money Laundering and Terrorist Activity

Section 1030.500 states that the Housing GSEs are covered by the special information procedures to detect money laundering and terrorist activity requirements set forth and cross referenced in sections 1030.520 (cross-referencing to 31 CFR 1010.520) and 1030.540 (cross-referencing to 31 CFR 1010.540). Sections 1010.520 and 1010.540 implement sections 314(a) and 314(b)⁵⁰ of the USA PATRIOT Act, respectively, and generally apply to any financial institution listed in 31 U.S.C. 5312(a)(2).⁵¹ For the sake of clarity, the Final Rule adds subpart E to Part 1030 to confirm that the section 314 rules will continue to apply to the Housing GSEs.

IV. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 et seq.) requires that a regulation that has a significant economic impact on a substantial number of small entities, small businesses, or small organizations must include an initial regulatory flexibility analysis describing the regulation's impact on small entities. Such an analysis need not be

⁵⁰ In addition to falling within the definition of "financial institution" found at 31 U.S.C. 5312(a)(2), participants in the 314(b) program also must be "required ... to establish and maintain an anti-money laundering program..." 31 CFR 1010.540(a)(1).

⁵¹ This Final Rule defines the Housing GSEs as financial institutions under section 31 U.S.C. 5312(a)(2)(Y).

undertaken if the agency has certified that the regulation will not have a significant economic impact on a substantial number of small entities. 5 U.S.C. 605(b). In this case, the Final Rule applies only to the Housing GSEs, none of which is a small entity for purposes of this requirement. Accordingly, FinCEN hereby certifies that this Final Rule will not have a significant economic impact on a substantial number of small entities for purposes of the Regulatory Flexibility Act. Therefore, no analysis under the Regulatory Flexibility Act is required. See 5 U.S.C. 601(2) and 603(a).

V. Paperwork Reduction Act

This Final Rule pertains to the Housing GSEs. As a result, the Final Rule does not contain any information collection requirement that requires the approval of the Office of Management and Budget under the Paperwork Reduction Act. See 44 U.S.C. 3501 *et seq.*

VI. Executive Orders 13563 and 12866

Executive Orders 13563 and 12866 direct agencies to assess costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. It has been determined that this Final Rule is designated a “significant regulatory action,” although not economically significant, under section 3(f) of Executive Order 12866. Accordingly, the Final Rule has been reviewed by the Office of Management and Budget.

VII. Unfunded Mandates Reform Act of 1995 Statement

Section 202 of the Unfunded Mandates Reform Act of 1995 (“Unfunded Mandates Act”), Public Law 104-4 (March 22, 1995), requires that an agency prepare a budgetary impact statement before promulgating a rule that may result in expenditure by the State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year. If a budgetary impact statement is required, section 202 of the Unfunded Mandates Act also requires an agency to identify and consider a reasonable number of regulatory alternatives before promulgating a rule. Taking into account the factors noted above and using conservative estimates of average labor costs in evaluating the cost of the burden imposed by the Final Rule, FinCEN has determined that it is not required to prepare a written statement under Section 202.

List of Subjects in 31 CFR Parts 1010 and 1030

Administrative practice and procedure, Banks, Banking, Brokers, Currency, Federal home loan banks, Foreign banking, Foreign currencies, Gambling, Investigations, Mortgages, Penalties, Reporting and recordkeeping requirements, Securities, Terrorism.

Authority and Issuance

For the reasons set forth in the preamble, Chapter X of Title 31 of the Code of Federal Regulations is amended as follows:

PART 1010 – GENERAL PROVISIONS

1. The authority citation for part 1010 continues to read as follows:

Authority: 12 U.S.C. 1829b and 1951-1959; 31 U.S.C. 5311-5314 and 5316-5332; title III, sec. 314 Pub. L. 107-56, 115 Stat. 307.

2. Amend § 1010.100 by adding new paragraph (mmm) to read as follows:

§ 1010.100 General definitions.

* * * * *

(mmm) Housing government sponsored enterprise. (1) A “housing government sponsored enterprise” is one of the following “Regulated Entities” under 12 U.S.C. 4502(20) subject to the general supervision and regulation of the Federal Housing Finance Agency (FHFA):

- (i) The Federal National Mortgage Association;
- (ii) The Federal Home Loan Mortgage Corporation; or
- (iii) Each Federal Home Loan Bank.

(2) The term “housing government sponsored enterprise” does not include any “Entity-Affiliated Party,” as defined in 12 U.S.C. 4502(11).

3. Amend § 1010.810 by adding new paragraph (b)(10) to read as follows:

§ 1010.810 Enforcement.

* * * * *

(b) * * *

(10) To the Federal Housing Finance Agency with respect to the housing government sponsored enterprises, as defined in § 1010.100(mmm) of this part.

* * * * *

4. New part 1030 added to read as follows:

PART 1030 – RULES FOR HOUSING GOVERNMENT SPONSORED

ENTERPRISES

Subpart A—Definitions

Sec.

1030.100 Definitions.

Subpart B—Programs

1030.200 General

1030.210 Anti-money laundering programs for housing government sponsored enterprises.

Subpart C—Reports Required To Be Made By Housing Government Sponsored

Enterprises

1030.300 General.

1030.310 - 1030.315 [Reserved]

1030.320 Reports by housing government sponsored enterprises of suspicious transactions.

1030.330 Reports relating to currency in excess of \$10,000 received in a trade or business.

Subpart D—Records Required To Be Maintained By Housing Government

Sponsored Enterprises

1030.400 General.

Subpart E—Special Information Sharing Procedures To Deter Money Laundering
and Terrorist Activity

1030.500 General.

1030.520 Special information sharing procedures to deter money laundering and terrorist activity for housing government sponsored enterprises.

1030.530 [Reserved]

1030.540 Voluntary information sharing among financial institutions.

Subpart F—Special Standards of Diligence; Prohibitions, and Special Measures
for Housing Government Sponsored Enterprises

1030.600 - 1030.670 [Reserved]

Authority: 12 U.S.C. 1829b and 1951-1959; 31 U.S.C. 5311-5314 and
5316-5332; title III, sec. 314 Pub. L. 107-56, 115 Stat. 307.

Subpart A—Definitions

§ 1030.100 Definitions.

Refer to § 1010.100 of this chapter for general definitions not noted
herein.

Subpart B—Programs

§ 1030.200 General.

Housing government sponsored enterprises are subject to the program requirements set forth and cross referenced in this subpart. Housing government sponsored enterprises should also refer to subpart B of part 1010 of this chapter for program requirements contained in that subpart that apply to housing government sponsored enterprises.

§ 1030.210 Anti-money laundering programs for housing government sponsored enterprises.

(a) Anti-money laundering program requirements for housing government sponsored enterprises. Each housing government sponsored enterprise shall develop and implement a written anti-money laundering program that is reasonably designed to prevent the housing government sponsored enterprise from being used to facilitate money laundering or the financing of terrorist activities. The program must be approved by senior management. A housing government sponsored enterprise shall make a copy of its anti-money laundering program available to the Financial Crimes Enforcement Network or its designee upon request.

(b) Minimum requirements. At a minimum, the anti-money laundering program shall:

(1) Incorporate policies, procedures, and internal controls based upon the housing government sponsored enterprise's assessment of the money laundering and terrorist financing risks associated with its products and services. Policies, procedures, and internal controls developed and implemented by a housing government sponsored enterprise under this section shall include provisions for complying with the applicable requirements of subchapter II of chapter 53 of title 31, United States Code and this part, and obtaining all relevant customer-related information necessary for an effective anti-money laundering program.

(2) Designate a compliance officer who will be responsible for ensuring that:

(i) The anti-money laundering program is implemented effectively;

(ii) The anti-money laundering program is updated as necessary; and

(iii) Appropriate persons are educated and trained in accordance with paragraph (b)(3) of this section.

(3) Provide for on-going training of appropriate persons concerning their responsibilities under the program. A housing government sponsored enterprise may satisfy this requirement by training such persons or verifying that such persons have received training by a competent third party with respect to the products and services offered by the housing government sponsored enterprise.

(4) Provide for independent testing to monitor and maintain an adequate program. The scope and frequency of the testing shall be commensurate with the risks posed by the housing government sponsored enterprise's products and services. Such testing may be conducted by a third party or by any officer or employee of the housing government sponsored enterprise, other than the person designated in paragraph (b)(2) of this section.

(c) Compliance. Compliance with this section shall be examined by FinCEN or its delegate, under the terms of the Bank Secrecy Act. Failure to comply with the requirements of this section may constitute a violation of the Bank Secrecy Act and of this chapter.

(d) Compliance date. A housing government sponsored enterprise must develop and implement an anti-money laundering program that complies with the requirements of this section on or before **[INSERT DATE 180 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]**.

Subpart C—Reports Required To Be Made by Housing Government Sponsored
Enterprises

§ 1030.300 General.

Housing government sponsored enterprises are subject to the reporting requirements set forth and cross referenced in this subpart. Housing government sponsored enterprises should also refer to subpart C of part 1010 of this chapter for reporting requirements contained in that subpart that apply to housing government sponsored enterprises.

§ 1030.310 - 1030.315 [Reserved].

§ 1030.320 Reports by housing government sponsored enterprises of suspicious transactions.

(a) General—(1) Every housing government sponsored enterprise shall file with FinCEN, to the extent and in the manner required by this section, a report of any suspicious transaction relevant to a possible violation of law or regulation. A housing government sponsored enterprise may also file with FinCEN a report of any suspicious transaction that it believes is relevant to the possible violation of any law or regulation, but whose reporting is not required by this section.

(2) A transaction requires reporting under this section if it is conducted or attempted by, at, or through a housing government sponsored enterprise, it involves or aggregates funds or other assets of at least \$5,000, and the housing government sponsored enterprise knows, suspects, or has reason to suspect that the transaction (or a pattern of transactions of which the transaction is a part):

(i) Involves funds derived from illegal activity or is intended or conducted in order to hide or disguise funds or assets derived from illegal activity (including, without limitation, the ownership, nature, source, location, or control of such funds or assets) as part of a plan to violate or evade any Federal law or regulation or to avoid any transaction reporting requirement under Federal law or regulation;

(ii) Is designed, whether through structuring or other means, to evade any requirements of this chapter or any other regulations promulgated under the Bank Secrecy Act;

(iii) Has no business or apparent lawful purpose or is not the sort in which the particular housing government sponsored enterprise customer would normally be expected to engage, and the housing government sponsored enterprise knows of no reasonable explanation for the transaction after examining the available facts, including the background and possible purpose of the transaction; or

(iv) Involves use of the housing government sponsored enterprise to facilitate criminal activity.

(3) More than one housing government sponsored enterprise may have an obligation to report the same transaction under this section, and financial institutions involved in that same transaction may have separate obligations to report suspicious activity with respect to that transaction pursuant to other provisions of this chapter. In those instances, no more than one report is required to be filed by the housing government sponsored enterprise(s) and any financial institution(s) involved in the transaction, provided that the report filed contains all relevant facts, including the name of each housing government sponsored enterprise or financial institution involved in the

transaction, the report complies with all instructions applicable to joint filings, and each institution maintains a copy of the report filed, along with any supporting documentation.

(b) Filing and notification procedures--(1) What to file. A suspicious transaction shall be reported by completing a Suspicious Activity Report (“SAR”), and collecting and maintaining supporting documentation as required by paragraph (c) of this section.

(2) Where to file. The SAR shall be filed with FinCEN in accordance with the instructions to the SAR.

(3) When to file. A SAR shall be filed no later than 30 calendar days after the date of the initial detection by the reporting housing government sponsored enterprise of facts that may constitute a basis for filing a SAR under this section. If no suspect is identified on the date of such initial detection, a housing government sponsored enterprise may delay filing a SAR for an additional 30 calendar days to identify a suspect, but in no case shall reporting be delayed more than 60 calendar days after the date of such initial detection.

(4) Mandatory notification to law enforcement. In situations involving violations that require immediate attention, such as suspected terrorist financing or ongoing money laundering schemes, a housing government sponsored enterprise shall immediately notify by telephone an appropriate law enforcement authority in addition to filing timely a SAR.

(5) Voluntary notification to FinCEN. Any housing government sponsored enterprise wishing voluntarily to report suspicious transactions that may relate to terrorist

activity may call FinCEN's Financial Institutions Hotline in addition to filing timely a SAR if required by this section.

(c) Retention of records. A housing government sponsored enterprise shall maintain a copy of any SAR filed by the housing government sponsored enterprise or on its behalf (including joint reports), and the original (or business record equivalent) of any supporting documentation concerning any SAR that it files (or is filed on its behalf), for a period of five years from the date of filing the SAR. Supporting documentation shall be identified as such and maintained by the housing government sponsored enterprise, and shall be deemed to have been filed with the SAR. A housing government sponsored enterprise shall make all supporting documentation available to FinCEN or any Federal, State, or local law enforcement agency, or any Federal regulatory authority that examines the housing government sponsored enterprise for compliance with the Bank Secrecy Act, upon request.

(d) Confidentiality of SARs. A SAR, and any information that would reveal the existence of a SAR, are confidential and shall not be disclosed except as authorized in this paragraph (d). For purposes of this paragraph (d) only, a SAR shall include any suspicious activity report filed with FinCEN pursuant to any regulation in this chapter.

(1) Prohibition on disclosures by housing government sponsored enterprises—(i) General rule. No housing government sponsored enterprise, and no director, officer, employee, or agent of any housing government sponsored enterprise, shall disclose a SAR or any information that would reveal the existence of a SAR. Any housing government sponsored enterprise, and any director, officer, employee, or agent of any housing government sponsored enterprise that is subpoenaed or otherwise requested to

disclose a SAR or any information that would reveal the existence of a SAR, shall decline to produce the SAR or such information, citing this section and 31 U.S.C.

5318(g)(2)(A)(i), and shall notify FinCEN of any such request and the response thereto.

(ii) Rules of construction. Provided that no person involved in any reported suspicious transaction is notified that the transaction has been reported, this paragraph (d)(1) shall not be construed as prohibiting:

(A) The disclosure by a housing government sponsored enterprise, or any director, officer, employee, or agent of a housing government sponsored enterprise of:

(1) A SAR, or any information that would reveal the existence of a SAR, to FinCEN or any Federal, State, or local law enforcement agency, or any Federal regulatory authority that examines the housing government sponsored enterprise for compliance with the Bank Secrecy Act; or

(2) The underlying facts, transactions, and documents upon which a SAR is based, including but not limited to, disclosures to another housing government sponsored enterprise or a financial institution, or any director, officer, employee, or agent of a housing government sponsored enterprise or financial institution, for the preparation of a joint SAR; or

(B) The sharing by a housing government sponsored enterprise, or any director, officer, employee, or agent of the housing government sponsored enterprise, of a SAR, or any information that would reveal the existence of a SAR, within the housing government sponsored enterprise's corporate organizational structure for purposes consistent with Title II of the Bank Secrecy Act as determined by regulation or in guidance.

(2) Prohibition on disclosures by government authorities. A Federal, State, local, territorial, or tribal government authority, or any director, officer, employee, or agent of any of the foregoing, shall not disclose a SAR, or any information that would reveal the existence of a SAR, except as necessary to fulfill official duties consistent with Title II of the Bank Secrecy Act. For purposes of this section, “official duties” shall not include the disclosure of a SAR, or any information that would reveal the existence of a SAR, in response to a request for disclosure of non-public information or a request for use in a private legal proceeding, including a request pursuant to 31 CFR 1.11.

(e) Limitation on liability. A housing government sponsored enterprise, and any director, officer, employee, or agent of any housing government sponsored enterprise, that makes a voluntary disclosure of any possible violation of law or regulation to a government agency or makes a disclosure pursuant to this section or any other authority, including a disclosure made jointly with another institution, shall be protected from liability for any such disclosure, or for failure to provide notice of such disclosure to any person identified in the disclosure, or both, to the full extent provided by 31 U.S.C. 5318(g)(3).

(f) Compliance. Housing government sponsored enterprises shall be examined by FinCEN or its delegate for compliance with this section. Failure to satisfy the requirements of this section may be a violation of the Bank Secrecy Act and of this chapter.

(g) Applicability date. This section is effective when an anti-money laundering program required by § 1030.210 of this part is required to be implemented.

§ 1030.330 Reports relating to currency in excess of \$10,000 received in a trade or business.

Refer to § 1010.330 of this chapter for rules regarding the filing of reports relating to currency in excess of \$10,000 received by housing government sponsored enterprises.

Subpart D—Records Required To Be Maintained By Housing Government

Sponsored Enterprises

§ 1030.400 General.

Housing government sponsored enterprises are subject to the recordkeeping requirements set forth and cross referenced in this subpart. Housing government sponsored enterprises should also refer to subpart D of part 1010 of this chapter for recordkeeping requirements contained in that subpart that apply to housing government sponsored enterprises.

Subpart E—Special Information Sharing Procedures To Deter Money Laundering and Terrorist Activity

§ 1030.500 General.

Housing government sponsored enterprises are subject to special information sharing procedures to deter money laundering and terrorist activity requirements set forth and cross referenced in this subpart. Housing government sponsored enterprises should also refer to subpart E of part 1010 of this chapter for special information sharing procedures to deter money laundering and terrorist activity contained in that subpart that apply to housing government sponsored enterprises.

§ 1030.520 Special information sharing procedures to deter money laundering and terrorist activity for housing government sponsored enterprises.

(a) Refer to § 1010.520 of this chapter.

(b) [Reserved]

§ 1030.530 [Reserved]

§ 1030.540 Voluntary information sharing among financial institutions.

(a) Refer to § 1010.540 of this chapter.

(b) [Reserved]

Subpart F—Special Standards of Diligence; Prohibitions, and Special Measures
for Housing Government Sponsored Enterprises

§ 1030.600 - 1030.670 [Reserved]

Date: Feb. 20, 2014

_____/s/_____
Jennifer Shasky Calvery
Director,
Financial Crimes Enforcement Network