



June 9, 2003

Financial Crimes Enforcement Network
P.O. Box 39
Vienna, Virginia 22183-0039

Re: Docket No. 03-8688; Financial Crimes Enforcement Network; Anti-Money Laundering Program Requirements for "Persons Involved in Real Estate Closings or Settlements"

Dear Ladies and Gentlemen:

The National Association of Mortgage Brokers (NAMB) appreciates the opportunity to comment on the referenced proposal (the Advance Notice of Proposed Rulemaking), which the U.S. Department of Treasury (Treasury) and the Financial Crimes Enforcement Network (FinCEN) published on April 10, 2003.

I. Background and General Remarks

NAMB is the nation's largest organization exclusively representing the interests of the mortgage brokerage industry. NAMB has more than 14,000 members and represents mortgage brokers in all 50 states and the District of Columbia. NAMB provides education, certification, industry representation, and publications for the mortgage broker industry. NAMB members subscribe to a strict code of ethics and a set of best business practices that promote integrity, confidentiality, and above all, the highest levels of professional service to the consumer.

NAMB stands behind Congress and President Bush in the fight against terrorism. However, as mortgage brokers are mostly small businesses, they fear the continued addition of rigorous regulation will force many mortgage brokers to stop doing what they do best – putting people in homes – due to the increased costs associated with increased regulation. Further, consumers are affected by an increase in costs through either an elimination of available products or the increased costs associated with the additional regulation will make it prohibitively expensive for a consumer to obtain financing. As the mortgage industry continues to be one of the few bright spots in the economy and homeownership continues to be at record levels, caution should be used in developing any new regulatory requirements (especially those that might impede the levels of homeownership). Many safeguards already exist in the mortgage industry that should be considered in any rulemaking. This comment letter hopes to inform Treasury and FinCEN of

safeguards already being performed by those originating residential mortgage loans that also can work to identify money laundering. This letter does not address all aspects of the risks for money laundering in a real estate closing or settlement; rather it addresses mostly those a mortgage broker may face.

I. Overview of the Mortgage Business

The purchase of a home is typically the largest transaction in which a consumer will ever engage. It also represents an amount of risk for the entity extending the financing. As such, thorough underwriting of the credit risk posed by the consumer and the collateral is undertaken in a typical mortgage loan. It includes obtaining a credit report on the consumer(s) from third party sources, verifying the source of funds (for a downpayment), verifying a consumer's income and employment, reviewing title reports to assure that good title is being provided, obtaining additional reports on the property, and any other reports and information that may be required by the investor in the loan. Much of this information can be used to identify money-laundering schemes.

II. What Are the Money Laundering Risks in Real Estate Closings and Settlements?

FinCEN solicits comment on the experience of the real estate settlement industry with money laundering schemes, the existence of any safeguards in the industry to guard against money laundering, and what additional steps may be necessary to protect the industry from abuse by money launderers, including those who finance terrorist activity. This letter does not address money-laundering schemes that are deliberately engaged in. These activities are already illegal. Rather this letter addresses or identifies some areas, but not all areas, which may be more susceptible to money laundering schemes in connection with real estate settlements and closings.

A. Commercial Transactions

The risks presented for money laundering by real estate transactions are different for commercial real estate transactions and residential transactions. Most often, commercial real estate transactions are entered into by some sort of entity (corporation, partnership, trust) while the vast majority of residential transactions are entered into by individual consumers. Obscuring the source of funds would be easier in a commercial transaction in which the borrower was a corporation or partnership. There should be separate rules for purchases by a corporation, partnership or other entity versus those purchased by individuals. The rules for purchases by entities could have much stricter rules. That will assist in not disrupting the mortgage process for the millions of individuals that legally purchase homes.

B. *Refinancing of Residential Mortgage Loans*

Money-laundering schemes perpetrated in connection with the refinancing of a mortgage loan seem to be a less likely occurrence. If the mortgage loan were refinanced a series of times over a relatively short time frame (in order to slowly launder funds), this might be looked at with suspicion. However, in the recent economic environment, with interest rates falling dramatically over the course of the past several years, this has been a more common occurrence. Further, average consumers are taking part in this behavior to take advantage of the falling rates. Thus, a legitimate practice could be mistaken for illegal behavior.

A money-laundering scheme in which a mortgage is slowly paid off over the term of the loan using illegal funds would be extremely difficult to detect as well as seemingly unlikely. As it is difficult to conceive money-laundering schemes involving refinancings, it seems likely that this is not an avenue found convenient or lucrative for the laundering of money.

C. *Purchase-Money Loans for Residential Property*

It seems that many of the risks detailed in the Advance Notice of Proposed Rulemaking as well as other risks can be detected by a review of the source of funds for the purchase of residential real estate or for the downpayment for a purchase of real estate. A review of the source of funds both for payment of the mortgage loan and the downpayment for the purchase of property occurs on a daily basis in the mortgage industry. Further, the source of funds is given a fairly strict scrutiny during the underwriting process in order to assure that these funds were not gained through illegal means. This could jeopardize the lending institution's financial consideration in the property if the property were to be confiscated by the authorities.

A multitude of information is required to accurately gauge the risk posed by the consumer; this involves a thorough review of the consumer's credit history as well as the collateral itself. One such document generated is the credit report detailing the credit history of the consumer (applicant) requesting credit. This information will list credit extended to consumers for a certain period of time (10 years). For example, a consumer who finances the purchase of a home but pays off the mortgage in a short period of time, this will be shown in the credit report (the date of the initial transaction and the status of the account). Please note that if the transactions are entered into in very short periods of time, no evidence of these transactions may be shown in the credit report as the timing for reporting requirements are not instantaneous.

Another example: A mortgage broker receives an application for a mortgage loan. The consumers will place 20% in downpayment for the purchase of their home. Whether the consumer uses money from its savings, or sells stocks for the downpayment, this source of funds must be verified through bank statements, sale records, etc for a typical mortgage product. Large amounts of cash that have been placed in a consumer's bank account are subject to scrutiny by the institution into which the money was deposited. A source of funds is routinely requested for

downpayments. For downpayments that are a gift from relatives or other individuals or groups, the source of funds for the supplier of funds is routinely requested.

Other factors that might raise concern: a consumer who has only a recent credit history; a consumer that purchases multiple homes; those consumers who payoff a mortgage loan shortly after entering into the transaction; those consumers entering into rapid refinancing with large cash paid out in short periods of time. What is important to note is that many of these scenarios presented can also be legitimate transactions and anti-money laundering concerns must be balanced with these legitimate transactions.

D. Non-Financed Land Transactions

Risks do exist in connection with real estate closings or settlements that do not involve a mortgage broker at all. These include, transactions involving all cash; in a purchase transaction, paying off the seller of real estate in funds that are sent to "high risk" countries, and other such transactions. Mortgage brokers only participate in real estate closings or settlements where third party financing is utilized.

III. How Should Persons Involved in Real Estate Closings and Settlements be Defined?

Critical to an effective rulemaking is not to make it too difficult or too cumbersome for an entity to comply while still meeting the goals set forth under the statute requiring such rulemaking. Entities who engage in a rigorous review of the consumer's credit prior to the lending of money, which will evidence schemes of money laundering, should not be required to adhere to additional cumbersome restrictions and requirements that will only serve to increase the costs of obtaining credit. These entities should either be exempted from the requirements or consideration given to the safeguards already in place.

Further, entities should be captured under only one definition under the defined term of "financial institution" if they are to be captured at all. Multiple layers of review by those engaged in the real estate settlement process with each engaging in the same review is cumbersome, duplicative and will serve to increase the costs of origination for consumers. Further, it may not lead to any further detection of money laundering schemes.

Entities should be captured based upon the risk facing the different type of lending. Commercial lending poses more risk for falling prey to money launderers as the transactions are often purchased and sold between corporations or partnerships. As stated above, obscuring the source of funds for downpayment or repayment of property would be more simple by corporate or partnership structure (as the source of funds can be obscured through many levels of ownership) as opposed to purchase by an individual(s). All cash-transactions for residential property also seem to present more risk and should be under stricter scrutiny. Transactions that typically undergo a strict underwriting process should face less scrutiny as many safeguards are already in place.

IV. Should Any Persons Involved in Real Estate Closings or Settlements be Exempted from Coverage under Section 352?

The Advance Notice of Proposed Rulemaking states that “the guiding principle in defining the phrase ‘persons involved in real estate closings and settlements’ is to include those persons whose services rendered or products offered in connection with a real estate closing or settlement can be abused by money launderers. Equally as important is identifying those persons who are positioned to identify the purpose and nature of the transaction.” While mortgage brokers appear to be positioned to identify the purpose and nature of a transaction, many safeguards already exist, built into the underwriting process for a mortgage loan, that would forestall many money-laundering schemes. These safeguards include verifying a source of funds, verifying income sources, verifying employment, verifying bank records, credit report review, title report review, consumer identification, and other verifications. Many of these safeguards can do an effective job at halting the laundering of money in connection with residential real estate.

However, entities should only be captured under one definition of the defined term “financial institution.” Further, entities should be subject to one set of rules based upon the type of business conducted. In connection with this, the vast majority of mortgage brokers who work with wholesale lenders which are already required to implement an anti-money laundering program will most likely be required to adhere to the same set of regulations by the wholesale lender.

V. How Should the Anti-Money Laundering Program Requirements for Persons Involved in Real Estate Closings and Settlements be Structured?

While it is vitally important to stop money laundering, especially in connection with terrorist activities, a balance must be struck between preventing these schemes and ensuring that the average consumer’s access to credit is not stifled or foreclosed. Mortgage brokers fear that the continued addition of regulation will prevent mortgage brokers from placing families in homes. A balance of the two interests must be made in order to preserve the continued high rates of homeownership.

Further, small entities could be severely impacted by additional cumbersome regulations, in turn making them unable to continue providing credit and placing families in homes. Special consideration should be made in connection with any economic impact these types of requirements might have on small business. Small business remains the backbone of the economy and must also be preserved.

Anti-money laundering programs should be structured based on the type of business conducted and the risks posed by that type of lending. Further, they should be based upon the size and abilities of the entity so as to not disadvantage smaller entities in favor of larger entities. It should also take into consideration the current practices of the industry and how these practices can be used to identify schemes to launder money.

In today's real estate market, especially in certain parts of the country, housing is in short supply. Competing bids are often placed on the same piece of real estate. One consumer may be placed at a disadvantage in the mortgage industry's attempt to comply with an anti-money laundering program. Regulations should not be implemented that might place one similarly situated consumer at a disadvantage over another.

While an anti-money laundering program is a laudable idea, in practice, it could lead to increased liability. While acting in accordance with anti-money laundering programs a mortgage broker could open itself up to fair lending violations in the form of discrimination. For example: A consumer applies for a mortgage loan but their name matches one of the names on a list of suspected terrorists. If the consumer is required to meet additional hurdles that other consumers may not have to meet (based solely on the name of the consumer), the consumer can potentially sue the lending institution for discrimination under the Fair Housing Act. Other areas of liability might exist as well.

Further, it should also be considered that mortgage brokers are most likely not skilled in the art of detection of illegal activities. Some evidence of illegal money-laundering might not be as apparent to a mortgage broker as it would be to an investigator. Entities less sophisticated in identifying illegal activity may need a series of "what to look for"s in order to be more effective. Once a transaction has been identified as a transaction which may be used for laundering money, clear direction should be provided as to how to address it.

A final question that arises is how will any anti-money laundering program be enforced? Is it to be a matter of an examiner's review of whether objectively someone involved in real estate closings or settlements should have been cognizant of a money-laundering scheme? This seems to be a very difficult standard to enforce across the board. This requires some thoughtful consideration. Further, to what type of liability would an entity or individual be subject for failing to comply with the regulations that result in some sort of terrorist activity? Suddenly any regulations imposed could become a double-edged sword – potential liability exists whether one complies or not.

* * *

We thank Treasury and the FinCEN for the opportunity to comment on the Advance Notice of Proposed Rulemaking. If you have any questions about the forgoing discussion, please do not hesitate to contact NAMB's Government Affairs Committee Chair Neill Fendly at (480) 905-8882 or NAMB's Director of Legislative and Regulatory Affairs Stephanie Shaw at (703) 610-0205.

Sincerely,

A handwritten signature in black ink, appearing to read "Armand W. Cosenza, Jr.", with a large, sweeping flourish at the end.

Armand W. Cosenza, Jr., CRMS
President