

Alert: Anti-Money Laundering Program for Non-Bank Mortgage Lenders and Originators

July 17, 2009

On July 15, 2009, the Financial Crimes Enforcement Network (“FinCEN”) issued an advance notice of proposed rulemaking (“ANPRM”) to solicit public comment pertaining to the possible application of anti-money laundering (“AML”) program and suspicious activity report (“SAR”) regulations to a specific sub-set of loan and finance companies: non-bank residential mortgage lenders and originators (“Non-Bank RMLOs”). This ANPRM considers imposing on companies performing certain services with respect to residential mortgages, analogous requirements to those currently applicable to regulated depository institutions performing those same services. Federally regulated depository institutions are already required to have AML programs which include, at a minimum: (1) the development of internal policies, procedures and controls; (2) the designation of a compliance officer; (3) an ongoing employee training program; and (4) an independent audit function to test AML programs.

FinCEN is contemplating an incremental approach to the implementation of AML regulations for loan and finance companies that would focus first on those businesses that are engaged in residential mortgage lending or origination and are not currently subject to any AML program requirement under the Bank Secrecy Act (“BSA”) or other federal law. FinCEN believes these “Non-Bank RMLOs” are in a unique position to assess and identify money laundering risk and fraud while directly assisting consumers with their financial needs and protecting them from the abuses of financial crime. FinCEN further believes that new regulations requiring such Non-Bank RMLOs would augment FinCEN’s initiatives in this area.

The ANPRM solicits comments on all aspects of the potential impact of applying the BSA’s AML requirements to Non-Bank RMLOs which include:

- What are the money laundering risks in the non-bank residential mortgage finance sector?
- Should FinCEN pursue an incremental approach to regulation of loan and finance companies that focuses on persons engaged in non-bank residential mortgage lending or origination?
- How should persons engaged in non-bank residential mortgage lending or origination be defined?
- How should the anti-money laundering requirements for persons engaged in non-bank residential mortgage lending or origination be structured?

- Should FinCEN require persons engaged in non-bank residential mortgage lending or origination to file SARs or comply with any other BSA requirements?
- Should any persons or transactions be exempt from coverage of AML or SAR regulations?

FinCEN is also seeking input on: (a) estimates and financial projections on the likely costs of complying with AML program and SAR reporting regulations by specific types of Non-Bank RMLOs; (b) the impact of any such regulatory requirements on industry profitability, growth and business practices; (c) the impact of these requirements on consumers seeking to obtain residential mortgages; (d) the effectiveness of examining for and enforcing compliance with these requirements; and (e) the advisability of establishing some minimum transaction threshold value or annual volume threshold below which some or all of these requirements would not apply.

FinCEN is soliciting comments on this ANPRM and encourages all interested parties to provide their views. The comments are due to FinCEN thirty (30) days after publication in the Federal Register. We will advise you of the publication date once it occurs.

As part of McGlinchey Stafford's long-standing experience in the residential mortgage lending area, we have developed significant proficiency in counseling and creating anti-money laundering programs for our financial institution clients and will be glad to answer any questions you may have regarding the ANPRM and assist you in preparing any comments you may wish to submit to FinCEN in response to the ANPRM. In addition, if an "interim rule" or "final rule" is issued by FinCEN requiring Non-Bank RMLOs to establish AML programs, we have created AML programs for our financial institution clients previously required to have such programs and would welcome the opportunity to assist you with any new AML program to which you may become subject.