

(9) Proceed southwesterly on State Route 729 for approximately 2.8 miles to the State Route 729 bridge at North Fork Creek; then

(10) Proceed southeasterly (downstream) along the meandering North Fork Creek for approximately 4 miles to the confluence of North Fork Creek with Goose Creek; then

(11) Proceed southwesterly (upstream) along the meandering Goose Creek for approximately 5.6 miles to State Route 734 at Carters Bridge; then

(12) Proceed southeasterly on State Route 734 for approximately 2.4 miles, crossing onto the Middleburg map, to State Route 629; then

(13) Proceed southerly on State Route 629 for approximately 1 mile to the road's intersection with U.S. Route 50 at BM 341 at Dover, then continue in a straight line due south for approximately 150 feet to the Little River; then

(14) Proceed southwesterly (upstream) along the meandering Little River for approximately 8 miles to the State Route 626 bridge at Halfway; then

(15) Proceed northwesterly on State Route 626 for approximately 0.3 mile to State Route 706, and then continue northwesterly on State Route 706 for approximately 1.6 miles, crossing onto the Rectortown map, to Burnt Mill Run; then

(16) Proceed west-southwesterly (upstream) along Burnt Mill Run for approximately 0.4 mile to State Route 705; then

(17) Proceed south-southwesterly on State Route 705 for approximately 0.5 mile to State Route 715; then

(18) Proceed west-northwesterly on State Route 715 for approximately 0.4 mile to State Route 709 at Zulla; then

(19) Proceed south-southwesterly on State Route 709 for approximately 4.6 miles, crossing onto the Marshall map, to Interstate Highway 66 (0.6 mile south of Brookes Corner); then

(20) Proceed west-northwesterly on Interstate Highway 66 for approximately 4.0 miles, crossing onto the Orlean map, to State Route 732 (locally known as Ramey Road); then

(21) Proceed westerly on State Route 732 approximately 2 miles to State Route 731 (locally known as Ashville Road) near Ashville; then

(22) From the intersection of State Routes 732 and 731, proceed northwesterly in a straight line, crossing onto the Upperville map, to the marked 1,304-foot peak on Little Cobbler Mountain, then northerly in a straight line to the marked 1,117-foot peak on Little Cobbler Mountain, and then continue northerly in a straight line to the marked 771-foot peak near the

northern end of Little Cobbler Mountain; then

(23) Proceed west in a straight line for approximately 2.7 miles to the 595-foot elevation point on State Route 724, southeast of Markham, and continue west in a straight line for approximately 3.1 miles, crossing onto the Linden map, to the point where the line meets the intersection of State Route 726 and an unnamed side road (near a cemetery), approximately 0.7 mile southwest of the intersection of State Route 726 and State Route 55 (near Belle Meade); then

(24) Proceed northeasterly along State Route 726 for approximately 0.7 mile to State Route 55; then

(25) Proceed east-northeast in a straight line for approximately 1.7 miles to the point where the line meets State Route 688 at BM 629 in Wildcat Hollow; then

(26) Proceed northerly and then northeasterly on State Route 688 for approximately 5.5 miles, crossing over and back between the Linden and Upperville maps and then continuing on the Upperville map, to the road's intersection with U.S. Route 17; then

(27) Proceed northerly on U.S. Route 17 for approximately 2.0 miles, crossing onto the Ashby Gap map, to U.S. Route 50 (just east of Paris); then

(28) Proceed east-northeasterly in a straight line for approximately 1.5 miles to the marked 797-foot elevation point located along State Route 618 at a fork in the road approximately 0.65 miles north of U.S. Route 50; then

(29) Proceed southeasterly in a straight line for approximately 0.9 mile to U.S. Route 50 at BM 625, which is located at a bridge over an unnamed branch of Panther Skin Creek; then

(30) Proceed south-southeasterly in a straight line for approximately 2.9 miles, crossing onto the Upperville map, to the intersection of State Routes 712 and 710 at Kerfoot; then

(31) Proceed southeasterly on State Route 710 for approximately 2.5 miles, crossing onto the Rectortown map, to the State Route 710 bridge over Goose Creek; then

(32) Proceed northeasterly (downstream) along the meandering Goose Creek for approximately 10.9 miles to State Route 626 at Bentons Bridge; then

(33) Proceed northwesterly on State Route 626 for approximately 4.0 miles, crossing onto the Bluemont map, to State Route 630 at Unison; then

(34) Proceed northeasterly on State Route 630 for approximately 0.75 mile to Dog Branch; then

(35) Proceed northwesterly along Dog Branch for approximately 1.75 miles to State Route 719; then

(36) Proceed north-northeasterly on State Route 719 for approximately 2 miles to State Route 734 at Airmont; then

(37) Proceed east-southeasterly on State Route 734 for approximately 0.7 mile to State Route 735; then

(38) Proceed northeasterly on State Route 735 for approximately 2 miles to State Route 725; then

(39) Proceed north-northeasterly in a straight line for approximately 4.4 miles, crossing over the northwest corner of the Lincoln map and then onto the Purcellville map, to the intersection of State Routes 711 and 690, (northwest of Purcellville); then

(40) Proceed north-northeasterly on State Route 690 for approximately 3.1 miles to State Route 9, then proceed east on State Route 9 for approximately 0.2 mile to the continuation of State Route 690, then proceed northerly on State Route 690 for approximately 5.3 miles, crossing onto the Harpers Ferry map, to the road's intersection with the 600-foot elevation line immediately south of the road's marked 592-foot elevation point (located 0.75 mile east-northeast of the radio facilities at the 1,424-foot peak of Short Hill Mountain); then

(41) Proceed northerly along the 600-foot elevation line for approximately 4 miles to the intersection of the 600-foot elevation line with the Harpers Ferry National Historical Park south boundary, approximately 0.2 mile south of the point where the Washington and Frederick Counties, Maryland, boundary line intersects with the south bank of the Potomac River; then

(42) Proceed east and north approximately 0.75 mile along the Harpers Ferry National Historical Park boundary line, returning to the south bank of the Potomac River and the beginning point.

Dated: November 3, 2011.

**John J. Manfreda,**  
*Administrator.*

[FR Doc. 2011-28930 Filed 11-7-11; 8:45 am]

**BILLING CODE 4810-31-P**

## DEPARTMENT OF THE TREASURY

### Financial Crimes Enforcement Network

#### 31 CFR Parts 1010 and 1030

RIN 1506-AB14

#### Anti-Money Laundering Program and Suspicious Activity Reporting Requirements for Housing Government Sponsored Enterprises

**AGENCY:** Financial Crimes Enforcement Network ("FinCEN"), Treasury.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** FinCEN, a bureau of the Department of the Treasury (“Treasury”), is issuing proposed rules 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 proposal to require these organizations to establish anti-money laundering programs and report suspicious activities is intended to help prevent fraud and other financial crimes.

**DATES:** Written comments on this notice of proposed rulemaking (“NPRM”) must be submitted on or before January 9, 2012.

**ADDRESSES:** You may submit comments, identified by Regulatory Identification Number (RIN) 1506–AB14, by any of the following methods:

- *Federal E-rulemaking Portal:*

<http://www.regulations.gov>. Follow the instructions for submitting comments. Include 1506–AB14 in the submission. Refer to Docket Number FINCEN–2011–0004.

- *Mail:* FinCEN, P.O. Box 39, Vienna, VA 22183. Include 1506–AB14 in the body of the text. Please submit comments by one method only. Comments submitted in response to this NPRM will become a matter of public record. Therefore, you should submit only information that you wish to make publicly available.

*Inspection of comments:* Public comments received electronically or through the U. S. Postal Service sent in response to a notice and request for comment will be made available for public review as soon as possible on <http://www.regulations.gov>. Comments received may be physically inspected in the FinCEN reading room located in Vienna, Virginia. Reading room appointments are available weekdays (excluding holidays) between 10 a.m. and 3 p.m., by calling the Disclosure Officer at (703) 905–5034 (not a toll-free call).

**FOR FURTHER INFORMATION CONTACT:** The FinCEN regulatory helpline at (800) 949–2732 and select Option 6.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

*A. Statutory and Regulatory Provisions*

The Bank Secrecy Act (“BSA”) <sup>1</sup> authorizes the Secretary of the Treasury

(the “Secretary”) to issue regulations requiring financial institutions to keep records and file reports that the Secretary determines “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.” <sup>2</sup> In addition, the Secretary is authorized to impose anti-money laundering (“AML”) program requirements on financial institutions. <sup>3</sup> The authority of the Secretary to administer the BSA has been delegated to the Director of FinCEN. <sup>4</sup>

The BSA defines the term “financial institution.” <sup>5</sup> The term includes, in part, “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.” <sup>6</sup>

With the enactment of 31 U.S.C. 5318(g) in 1992, <sup>7</sup> Congress authorized the Secretary to require financial institutions to report suspicious transactions. As amended by the USA PATRIOT Act, <sup>8</sup> subsection (g)(1) states:

The Secretary may 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. <sup>9</sup>

As amended by the USA PATRIOT Act, the BSA requires financial institutions to establish AML programs that include, at a minimum: (1) The development of internal policies, procedures, and controls; (2) the

L. 91–508), its amendments, and the other statutes referring to the subject matter of that Act. These statutes are codified at 12 U.S.C. 1829b, 12 U.S.C. 1951–1959, and 31 U.S.C. 5311–5314 and 5316–5332, and notes thereto.

<sup>2</sup> 31 U.S.C. 5311.

<sup>3</sup> 31 U.S.C. 5318(h).

<sup>4</sup> See Treasury Order 180–01 (Sept. 26, 2002).

<sup>5</sup> 31 U.S.C. 5312(a)(2).

<sup>6</sup> 31 U.S.C. 5312(a)(2)(Y).

<sup>7</sup> 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, Public Law 102–550; it was expanded by section 403 of the Money Laundering Suppression Act of 1994 (the Money Laundering Suppression Act), Title IV of the Riegle Community Development and Regulatory Improvement Act of 1994, Public Law 103–325, to require designation of a single government recipient for reports of suspicious transactions.

<sup>8</sup> Public Law 107–56 sec. 352(c), 115 Stat. 322, codified at 31 U.S.C. 5318 note. Public Law 107–56 is the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (“USA PATRIOT Act”).

<sup>9</sup> 31 U.S.C. 5318(g)(1).

designation of a compliance officer; (3) an ongoing employee training program; and (4) an independent audit function to test programs. <sup>10</sup> 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.” <sup>11</sup>

FinCEN has promulgated AML program and Suspicious Activity Report (“SAR”) regulations for a number of financial institutions. These financial institutions include banks, brokers or dealers in securities, mutual funds, insurance companies, futures commission merchants and introducing brokers in commodities, money services businesses, and casinos. <sup>12</sup>

*B. FinCEN’s Anti-Mortgage Fraud Initiatives*

FinCEN has placed efforts to combat mortgage fraud and related criminal activity as one of its highest priorities in recent years. FinCEN’s efforts have included the analysis of SARs and other data reported to FinCEN, often together with other data sets and information available to the Government, to support and inform regulatory and law enforcement investigations, proceedings and prosecutions at the Federal, State and local levels. Since 2006, FinCEN has published a broad range of information focused on mortgage fraud in order to advise on trends and patterns, and to provide indicators to help the financial industry protect itself against fraud and other financial crime. <sup>13</sup> Criminal activity can arise at

<sup>10</sup> 31 U.S.C. 5318(h).

<sup>11</sup> USA PATRIOT Act, Public Law 107–56 sec. 352(c), 115 Stat. 322, codified at 31 U.S.C. 5318 note.

<sup>12</sup> See 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, and 1026.320.

<sup>13</sup> See Mortgage Loan Fraud Update (SARs Jan. 1–Mar. 31, 2011), June 2011, [http://www.fincen.gov/news\\_room/rp/files/MLF\\_Update\\_1st\\_Qtly\\_11\\_FINAL\\_508.pdf](http://www.fincen.gov/news_room/rp/files/MLF_Update_1st_Qtly_11_FINAL_508.pdf); Mortgage Loan Fraud Update (SARs Jan. 1–Dec. 31, 2010), Mar. 2011, [http://www.fincen.gov/news\\_room/rp/files/MLF\\_Update\\_4th\\_Qtly\\_10\\_FINAL\\_508.pdf](http://www.fincen.gov/news_room/rp/files/MLF_Update_4th_Qtly_10_FINAL_508.pdf); Mortgage Loan Fraud Update (SARs July 1–Sept. 30, 2010), Jan. 2011, [http://www.fincen.gov/news\\_room/rp/files/MLF\\_Update\\_3rd\\_Qtly\\_10\\_FINAL.pdf](http://www.fincen.gov/news_room/rp/files/MLF_Update_3rd_Qtly_10_FINAL.pdf); Mortgage Loan Fraud Update (SARs Apr. 1–June 30, 2010), Dec. 2010, [http://www.fincen.gov/news\\_room/rp/files/MLF\\_Update\\_2nd\\_Qtly\\_10\\_FINAL.pdf](http://www.fincen.gov/news_room/rp/files/MLF_Update_2nd_Qtly_10_FINAL.pdf); Mortgage Loan Fraud Update: SAR Filings Jan. 1–Mar. 31, 2011, [http://www.fincen.gov/news\\_room/rp/files/MLF\\_Update\\_1st\\_Qtly\\_11\\_FINAL.pdf](http://www.fincen.gov/news_room/rp/files/MLF_Update_1st_Qtly_11_FINAL.pdf); Advisory to Financial Institutions on Filing Suspicious Activity Reports Regarding Home Equity

<sup>1</sup> “Bank Secrecy Act” is the name that has come to be applied to the Currency and Foreign Transactions Reporting Act (Titles I and II of Pub.

different times in the product cycle of residential mortgage related transactions, affecting a range of persons in the primary and secondary markets. In the traditional money laundering sense, criminals may attempt to invest the proceeds of illegal activity in a range of assets, including real estate, such as through direct purchase or in paying down loans.<sup>14</sup> The purpose of fraud, regardless of whether in conjunction with a mortgage or other real estate related transaction, is overwhelmingly for criminal profit, and the proceeds of such fraud often are laundered through one or more transactions involving financial intermediaries. The victim of mortgage fraud might be an individual losing equity in a home, or a defrauded lender or investor. Fraud may have an impact on the securitization of mortgages, potentially affecting the availability of mortgages and the cost to borrowers.

Fraud in the residential mortgage markets may occur in a variety of situations, affecting a variety of actors. Fraud may occur at the loan origination stage, involving material misrepresentations or omissions, false statements, straw buyers, false appraisals, identity theft, etc.<sup>15</sup> Fraud may occur in the context of loan modifications, including when unscrupulous actors seek to take advantage of homeowners struggling to meet their mortgage payments.<sup>16</sup> Fraud may occur in home equity conversion

loans (“HECMs”), commonly known as reverse mortgages.<sup>17</sup> FinCEN analysis and many law enforcement investigations have revealed mortgage related fraud to be part of organized criminal activity involving multiple properties and various types of criminal activity including the foregoing.<sup>18</sup> Often, mortgage fraud may only be discovered after default or in the context of foreclosure proceedings, repurchase demands, collateral reviews, audits, examinations or insurance investigations.<sup>19</sup> FinCEN has determined, as a result of individual investigations and through its broader analyses, that criminal activity and actors in the residential mortgage market may be connected with a range of other organized criminal activity affecting a range of financial institutions.<sup>20</sup>

FinCEN continues to support broader Administration efforts to combat mortgage fraud and mitigate vulnerabilities to abuse. On April 6, 2009, Treasury Secretary Geithner, together with the Attorney General, Housing and Urban Development Secretary and others, announced a multi-agency crackdown targeting loan modification fraud and foreclosure rescue scams; this included a new FinCEN-led effort to “marshal information about possible fraudulent actors, drawing upon a variety of data available to law enforcement, regulatory agencies, and the consumer protection community, for the purpose of identifying and proactively referring potential criminal targets to participating law enforcement authorities.”<sup>21</sup>

In November 2009, President Obama established the Financial Fraud Enforcement Task Force (“FFETF”) to hold accountable those who helped bring about the last financial crisis, and to prevent another crisis from happening.<sup>22</sup> The Treasury Department and FinCEN are among the members of the Task Force.<sup>23</sup> FinCEN has actively participated in the FFETF’s Mortgage Fraud Working Group (“MFWG”), including in the MFWG’s Mortgage Fraud Summits around the country.<sup>24</sup> The foregoing experiences have affirmed the importance of SARs filed by depository institutions in efforts to combat mortgage fraud.

By this NPRM, FinCEN proposes 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”) (collectively, the “Housing Government Sponsored Enterprises” or “Housing GSEs”). FinCEN believes that the proposed regulations would augment FinCEN’s initiatives in this area.<sup>25</sup> The Housing GSEs are involved in providing financing to the residential mortgage market and thus may be exposed to the risk of fraud, particularly when investing in whole mortgage loans. Although the respective elements of the businesses of the Banks and Fannie Mae and Freddie Mac may differ, all of them are involved in providing financing to the residential mortgage market and thus may be exposed to fraud risks. While purchasing mortgage loans, extending loans secured by mortgages and other real estate related collateral, and engaging in a variety of related financial

Conversion Mortgage Fraud Schemes, Apr. 2010, [http://www.fincen.gov/statutes\\_regs/guidance/pdf/fin-2010-a006.pdf](http://www.fincen.gov/statutes_regs/guidance/pdf/fin-2010-a006.pdf); Filing Trends in Mortgage Loan Fraud, Feb. 2009, [http://www.fincen.gov/news\\_room/nr/pdf/20090225a.pdf](http://www.fincen.gov/news_room/nr/pdf/20090225a.pdf); Mortgage Loan Fraud: An Update of Trends Based upon Analysis of Suspicious Activity Reports, Apr. 2008, [http://www.fincen.gov/news\\_room/rp/files/MortgageLoanFraudSARAssessment.pdf](http://www.fincen.gov/news_room/rp/files/MortgageLoanFraudSARAssessment.pdf); Suspected Money Laundering in the Residential Real Estate Industry, Apr. 2008, [http://www.fincen.gov/news\\_room/rp/files/MLR\\_Real\\_Estate\\_Industry\\_SAR\\_web.pdf](http://www.fincen.gov/news_room/rp/files/MLR_Real_Estate_Industry_SAR_web.pdf); Money Laundering in the Commercial Real Estate Industry, Dec. 2006, [http://www.fincen.gov/news\\_room/rp/reports/pdf/CREAssessment.pdf](http://www.fincen.gov/news_room/rp/reports/pdf/CREAssessment.pdf); Mortgage Loan Fraud: An Industry Assessment Based Upon Suspicious Activity Report Analysis, Nov. 2006, [http://www.fincen.gov/news\\_room/rp/reports/pdf/mortgage\\_fraud112006.pdf](http://www.fincen.gov/news_room/rp/reports/pdf/mortgage_fraud112006.pdf).

<sup>14</sup> See Suspected Money Laundering in the Residential Real Estate Industry, Apr. 2008, [http://www.fincen.gov/news\\_room/rp/files/MLR\\_Real\\_Estate\\_Industry\\_SAR\\_web.pdf](http://www.fincen.gov/news_room/rp/files/MLR_Real_Estate_Industry_SAR_web.pdf); Money Laundering in the Commercial Real Estate Industry, Dec. 2006, [http://www.fincen.gov/news\\_room/rp/reports/pdf/CREAssessment.pdf](http://www.fincen.gov/news_room/rp/reports/pdf/CREAssessment.pdf).

<sup>15</sup> For a description of commonly reported fraud related to loan origination, see, e.g., Mortgage Loan Fraud: An Industry Assessment Based Upon Suspicious Activity Report Analysis, Nov. 2006, [http://www.fincen.gov/news\\_room/rp/reports/pdf/MortgageLoanFraud.pdf](http://www.fincen.gov/news_room/rp/reports/pdf/MortgageLoanFraud.pdf).

<sup>16</sup> See Mortgage Loan Fraud: Loan Modification and Foreclosure Rescue Scams, May 2010, [http://www.fincen.gov/news\\_room/rp/files/MLFLoanMODForeclosure.pdf](http://www.fincen.gov/news_room/rp/files/MLFLoanMODForeclosure.pdf).

<sup>17</sup> See FinCEN Advisory FIN–2010–005, Advisory to Financial Institutions on Filing Suspicious Activity Reports Regarding Home Equity Conversion Mortgage Fraud Schemes, April 27, 2010, [http://www.fincen.gov/statutes\\_regs/guidance/pdf/fin-2010-a005.pdf](http://www.fincen.gov/statutes_regs/guidance/pdf/fin-2010-a005.pdf).

<sup>18</sup> See, e.g., Department of Justice, Press Release, Financial Fraud Enforcement Task Force Announces Results of Broadest Mortgage Fraud Sweep in History (June 17, 2010), <http://www.justice.gov/opa/pr/2010/June/10-opa-708.html>; and speech of Attorney General Eric Holder at the Operation Stolen Dreams Press Conference (June 17, 2010) (noting participation of FinCEN), <http://www.justice.gov/ag/speeches/2010/ag-speech-100617.html>.

<sup>19</sup> See, e.g., Mortgage Loan Fraud Update: Suspicious Activity Report Filings from July 1–September 30, 2009 (February 2010), [http://www.fincen.gov/news\\_room/rp/files/MLF\\_Update.pdf](http://www.fincen.gov/news_room/rp/files/MLF_Update.pdf).

<sup>20</sup> See Mortgage Loan Fraud Connections with Other Financial Crime: An Evaluation of Suspicious Activity Reports Filed by Money Services Businesses, Securities and Futures Firms, Insurance Companies and Casinos, Mar. 2009, [http://www.fincen.gov/news\\_room/nr/pdf/20090316.pdf](http://www.fincen.gov/news_room/nr/pdf/20090316.pdf).

<sup>21</sup> See <http://www.treasury.gov/press-center/press-releases/Pages/tg83.aspx>; see also Treasury Department Press Release, Federal, State Partners

Convene to Discuss Ongoing Anti-Fraud Efforts in Housing Markets (September 17, 2009), <http://www.treasury.gov/press-center/press-releases/Pages/tg291.aspx>.

<sup>22</sup> See Executive Order 13519 (November 17, 2009).

<sup>23</sup> See remarks of Timothy Geithner, Secretary, U.S. Department of the Treasury, on “The Financial Fraud Enforcement Task Force”, Nov. 17, 2009, <http://www.treasury.gov/press-center/press-releases/Pages/tg408.aspx>.

<sup>24</sup> See <http://www.fincen.gov/frauden/taskforce.html>; <http://www.justice.gov/opa/pr/2010/February/10-opa-192.html>; <http://www.justice.gov/opa/pr/2010/March/10-opa-316.html>; and <http://www.stopfraud.gov/news/news-04232010.html>.

<sup>25</sup> FinCEN recently proposed regulations that would require non-bank residential mortgage lenders and originators to establish AML programs and file SARs. If adopted, that rule would apply regulatory requirements to mortgage companies and brokers analogous to those currently applicable to banks and other financial institutions. See Anti-Money Laundering Program and Suspicious Activity Report Filing Requirements for Residential Mortgage Lenders and Originators, Notice of Proposed Rulemaking, 75 FR 76677 (December 9, 2010).

activities, the Housing GSEs have access to 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.<sup>26</sup> While current fraud reporting obligations on the Housing GSEs, discussed below, have value in combating fraud, the usefulness could be increased by including the Housing GSEs within FinCEN's framework to support broader regulatory and law enforcement efforts to combat mortgage fraud and related financial crimes, consistent with the purposes of the BSA.

### C. 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")<sup>27</sup> 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. The Reform Act provided for the abolishment of the Office of Federal Housing Enterprise Oversight ("OFHEO") and the Federal Housing Finance Board ("FHFB") one year after the date of enactment. These agencies, together with the Housing and Urban Development Government Sponsored Enterprise Mission Teams, were combined to establish FHFA.<sup>28</sup>

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.<sup>29</sup> FHFA is responsible for ensuring that the Housing GSEs operate in a safe and sound manner, including being

capitalized adequately and maintaining internal controls, that they carry out their public policy missions, and that their activities 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 OFHEO and FHFB.<sup>30</sup>

Fannie Mae and Freddie Mac were chartered by Congress primarily to establish secondary market facilities for residential mortgages.<sup>31</sup> 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, 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), and promote access to mortgage credit throughout the nation.

The Federal Home Loan Banks were organized under the Federal Home Loan Bank Act ("Bank Act").<sup>32</sup> The Banks are financial cooperatives; only members of a Bank may purchase the capital stock of a Bank, and only members or certain eligible housing associates (such as State housing finance agencies) may obtain access to secured loans, known as advances, or other products provided by a Bank.<sup>33</sup> Each Bank is managed by its own board of directors and serves the public interest by enhancing the availability of residential mortgage and community lending credit through its member institutions.<sup>34</sup> 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.<sup>35</sup> The Bank Act also requires each Bank to establish an affordable housing program (known as "AHP") and contribute a specified portion of its previous year's net income to support that program.<sup>36</sup>

## II. Notice of Proposed Rulemaking—In General

This NPRM would define financial institution for certain purposes of the BSA to include the Housing GSEs. Specifically, this NPRM proposes SAR requirements and AML program requirements.

### A. Housing GSEs Proposed To Be Defined as Financial Institutions

The BSA does not expressly enumerate any of the Housing GSEs among the entities defined as "financial institutions" under the BSA.<sup>37</sup> Nevertheless, the BSA definition of financial institution is broad, listing numerous types of businesses, including commercial banks and other depository institutions. The BSA also authorizes the Secretary to include additional types of businesses within the BSA definition if the Secretary determines that they engage in any activity "similar to, related to, or a substitute for" any activity of any of the listed businesses.<sup>38</sup>

The Housing GSEs work closely with other BSA-defined financial institutions—in fact the majority of their members or servicers 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 statutory definition under 31 U.S.C. 5312(a)(2).

The main role of the Housing GSEs is to support the primary mortgage market and affordable housing programs through the purchase, guarantee and securitization of mortgage loans, and the extension of loans (known as "advances" in the Federal Home Loan Bank System) secured primarily by mortgage loans and real estate related assets. Typically, a significant portion of these mortgage loans are made by

<sup>26</sup> See Section II.B., *infra*, for a review of current fraud detection and reporting by the Housing GSEs.

<sup>27</sup> Division A of the Housing and Economic Recovery Act of 2008 ("HERA"), Public Law 110-289, 122 Stat. 2654 (2008).

<sup>28</sup> 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).

<sup>29</sup> The Housing GSEs are defined as FHFA regulated entities in Safety and Soundness Act, as amended, 12 U.S.C. 4501 *et seq.* The 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)).

<sup>30</sup> 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>.

<sup>31</sup> See 12 U.S.C. 1451, 1716.  
<sup>32</sup> 12 U.S.C. 1423, 1432(a).  
<sup>33</sup> 12 U.S.C. 1426(a)(4), 1430(a), 1430b.  
<sup>34</sup> 12 U.S.C. 1427.

<sup>35</sup> 12 U.S.C. 1424; 12 CFR part 1263.

<sup>36</sup> 12 U.S.C. 1430(j).

<sup>37</sup> 31 U.S.C. 5312(a)(2) and (c)(1). The BSA definition includes institutions that are already subject to federal regulation such as banks, savings associations, credit unions, securities broker-dealers, and futures commission merchants. Money services businesses (such as money transmitters and currency exchanges) are also defined as financial institutions under the BSA, and, like the former categories, under FinCEN's implementing regulations. The BSA definition also includes dealers in precious metals, stones, or jewels; pawnbrokers; loan or 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.*).

<sup>38</sup> 31 U.S.C. 5312(a)(2)(Y).

commercial banks, credit unions and thrifts, which are already financial institutions under the BSA and subject to FinCEN's regulations.<sup>39</sup> The Housing GSEs also establish and manage affordable housing programs, similar to affordable housing and community reinvestment programs of commercial banks and thrifts in underserved markets. Some of the Banks also have acquired member asset programs, known as "AMA," whereby they acquire fixed-rate, single-family mortgage loans from participating member institutions, which are also generally commercial banks or other depository institutions already included within the BSA's definition of financial institutions. In summary, the Housing GSEs provide liquidity, through loan purchases and collateralized advances, that permit banks and other customers to offer a broad range of credit products and related services.

FinCEN believes, as discussed above, 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 is proposing to exercise its authority under 31 U.S.C. 5312(a)(2)(Y) to define these entities as financial institutions. As explained more fully below, this rulemaking would define Housing GSEs as financial institutions for the purpose of requiring them to establish AML programs and file SARs. This NPRM is supported by the FHFA, their primary regulator.

While this NPRM proposes to define the Housing GSEs as "financial institutions" under our BSA authority, the Housing GSEs will not be considered "Financial Institutions" within the regulatory meaning of the term under FinCEN's regulations at 31 CFR 1010.100(t). Placement within the regulatory definition of "Financial Institution" would trigger other recordkeeping and reporting requirements that FinCEN does not consider appropriate for the Housing GSEs at this time. The term Housing Government Sponsored Enterprise is proposed to be added as a new defined term at 31 CFR 1010.100(III).

In light of FinCEN's efforts to combat mortgage fraud, money laundering and terrorist financing, and the anticipated value of adding information to FinCEN's database to support law enforcement, FinCEN requests comment about whether there are other types of mortgage related businesses and professions that might encounter similar risks and vulnerabilities to those

presented by the Housing GSEs. Specifically, FinCEN requests comment on whether there are other entities that engage in mortgage related activities that are "similar to, related to, or a substitute for" financial services that are provided by BSA-defined financial institutions that should be defined as financial institutions under the BSA in subsequent rulemakings; for example: Private mortgage insurers and reinsurers, mortgage servicers, and other types of businesses in the primary and secondary mortgage markets.

FinCEN also requests comments about 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.

#### *B. Suspicious Activity Reporting and AML Program Requirements*

Under the rules proposed by this NPRM, the Housing GSEs would be required to file SAR forms directly with FinCEN, as do other financial institutions subject to SAR filing regulations. FinCEN expects that the transition to compliance with FinCEN's regulation will not be difficult or costly, because the Housing GSEs already have policies, procedures and training programs in place to comply with the FHFA's current fraud reporting regulation, which is very similar to the proposed SAR reporting regulation.

As part of a final rule adopted on January 27, 2010, FHFA issued new fraud reporting regulations, codified at 12 CFR part 1233, "Reporting of Fraudulent Financial Instruments."<sup>40</sup> That regulation requires each Housing GSE to submit a timely report to FHFA upon discovery that it has purchased or sold a fraudulent loan or financial instrument, or suspects a possible fraud relating to the purchase or sale of any loan or financial instrument. In addition, each Housing GSE must establish and maintain internal controls, policies, procedures, and operational training programs to discover such transactions. The regulation applies to all programs and products of the Housing GSEs.<sup>41</sup>

Accordingly, FinCEN believes that most, if not all, of the Housing GSEs should already have anti-fraud programs in place that would satisfy most of

FinCEN's AML program and SAR regulatory requirements. The only additional actions that may be required to comply with the proposed regulations (in addition to reporting a wider range of suspected financial crime than is currently required) would be minor modifications to existing policies and procedures to formalize and implement two of FinCEN's regulatory requirements that are not expressly required under the FHFA's regulations; specifically: (1) The appointment of a compliance officer to monitor for compliance with FinCEN's regulations, and (2) periodic independent testing to monitor for compliance. Housing GSEs that anticipate the need to submit a relatively low number of SAR forms may establish procedures to submit individual forms via FinCEN's established systems, so that the Housing GSE likely may be able to file SARs without reliance on, or changes to, their existing systems. FinCEN will issue guidance, if necessary, to clarify FinCEN's regulations and assist the Housing GSEs with compliance related matters.

Upon the designation of the Housing GSEs as "financial institutions" under the BSA, the Housing GSEs, as well as their directors, officers, and employees, and agents will become subject to the BSA's liability safe harbor for financial institutions that file SARs at 31 U.S.C. 5318(g)(3). This safe harbor is intended to encourage financial institutions to report suspicious activities, even if, as here, the proposed 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 are currently accustomed to report.

FinCEN further requests comment about whether there are other types of entities that engage in mortgage related activities that should be defined as financial institutions or loan or finance companies under the BSA in subsequent rulemakings, as part of FinCEN's incremental approach, discussed in more detail in the proposed rulemaking Anti-Money Laundering Program and Suspicious Activity Report Filing Requirements for Residential Mortgage Lenders and Originators,<sup>42</sup> to address vulnerabilities in the mortgage finance sector.

<sup>40</sup> 75 FR 4255 (Jan. 27, 2010).

<sup>41</sup> 75 FR 4255, 4258-4259. Should FinCEN issue a final rule imposing AML and SAR requirements on the Housing GSEs, FHFA may amend these regulations to avoid any conflicts or duplicative requirements with FinCEN's regulations, consistent with the requirements of the Safety and Soundness Act, as amended.

<sup>42</sup> See 75 FR 76677, December 9, 2010. <http://docket.access.gpo.gov/2010/pdf/2010-30765.pdf>.

<sup>39</sup> 31 U.S.C. 5312(a)(2).

### III. Section-by-Section Analysis

#### A. Definition of Housing Government Sponsored Enterprises

Section 1010.100(l)(1) defines the key terms used in the proposed rules. The definitions reflect FinCEN's determination that AML program and SAR requirements should be applied to the Housing GSEs, which are defined as Regulated Entities under 12 U.S.C. 4502(20) subject to the general supervision and regulation of the FHFA. 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 proposed definition does not include any entity-affiliated party<sup>43</sup> 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 these regulations to the FHFA. FHFA is the general regulator for the Housing GSEs and enforces its own statutes and regulations regarding safety and soundness. FHFA will be FinCEN's delegate for examination for compliance with these proposed regulations, and FinCEN will work with FHFA to coordinate and direct such delegated compliance examination activities. FinCEN will continue to retain enforcement authority under the BSA, including for the imposition of civil penalties for violations of the BSA and these regulations.

#### C. Anti-Money Laundering Program

Section 1030.210(a) requires that each Housing GSE develop and implement an anti-money laundering 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 proposed rule is intended to give Housing GSEs the flexibility to design their programs to mitigate their own enterprise-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, customers, distribution channels, and geographic locations. As explained above, a Housing GSE's assessment of customer-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 all the information necessary to make its AML program effective. Such information includes, but is not limited to, relevant customer information on individual borrowers and the retail financial institutions who are the Housing GSEs customers. The specific means to obtain such information is left to the discretion of the Housing GSE, although FinCEN anticipates that the Housing GSE may need to amend existing agreements to ensure that the Housing GSE receives necessary customer information. We do not anticipate that this requirement will entail obtaining information not already received in the ordinary course of business by the Housing GSEs, particularly with regard to information on individual borrowers. For purposes of making the required risk assessment, a Housing GSE must consider all relevant information, including whether the retail financial institutions who 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 these entities, 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 that 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 compliance 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 § 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. In order 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 rule and money laundering and fraud risks generally so that red flags associated with existing or potential customers can be identified. 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 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 implemented promptly or reviewed by senior management. A Housing GSE may 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

<sup>43</sup> See 12 U.S.C. 4502(11).

FinCEN or its delegates, under the terms of the BSA.

#### 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 or aggregate at least \$5,000 in funds or other assets. It is important to recognize that transactions are reportable under this 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 proposed rule also contains a provision in § 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 rule does not explicitly so require; for example, in the case of a transaction falling below the \$5,000 threshold in the proposed rule.

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.<sup>44</sup>

A determination as to whether a report is required must be based on all the facts and circumstances relating to the transaction and customer of the Housing GSE in question. Different fact patterns will require different judgments. Some examples of red flags

<sup>44</sup> 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.

associated with existing or potential customers are referenced in previous FinCEN reports on mortgage fraud.<sup>45</sup> 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.<sup>46</sup>

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, only one report is required to be filed, provided it contains all relevant facts and each institution maintains a copy of the report and any supporting documentation.

The proposed rule is intended to require that a Housing GSE evaluate customer activity and relationships for fraud, money laundering and other financial crime risks, and design a suspicious transaction monitoring 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 or any Federal, State, or local law enforcement agency, or any Federal regulatory authority that examines the Housing GSE for compliance with the BSA. Because FinCEN's SAR regulations provide that supporting documentation is deemed to be filed with the SAR, the regulatory authorities referenced in the previous sentence are consistent with those regulatory authorities to whom a SAR may be disclosed, as discussed in the rules of construction below. For situations requiring immediate attention, Housing GSEs are to

<sup>45</sup> See note 13, *supra*.

<sup>46</sup> 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 as possible, while protecting the primary and secondary mortgage markets and the financial system as a whole from fraud, money laundering and other financial crimes.

telephone the appropriate law enforcement authority in addition to filing a SAR.

Section 1030.320(c) provides that filing Housing GSEs must maintain copies of SARs and the underlying related documentation for a period of five years from the date of filing. As indicated above, supporting documentation is to be made available to FinCEN and the specified 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 proposed rule or is filed voluntarily).<sup>47</sup> Thus, the section requires that a SAR and information that would reveal the existence of that SAR ("SAR information") be kept confidential and not be disclosed, except as authorized within the rules of construction. The proposed rule 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, or 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, transactions, 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.<sup>48</sup>

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 information<sup>49</sup> or for use in a

<sup>47</sup> See 31 U.S.C. 5318(g)(2).

<sup>48</sup> 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.

<sup>49</sup> For purposes of this rulemaking, "non-public information" refers to information that is exempt from disclosure under the Freedom of Information Act.

private legal proceeding, including a request under 31 CFR 1.11.<sup>50</sup>

Section 1030.320(e) provides protection from liability for making reports of suspicious transactions, and for failures to disclose the fact of such reporting to the full extent provided by 31 U.S.C. 5318(g)(3). The protection afforded the GSEs in title 12 by FHFA explicitly requires “good faith,”<sup>51</sup> unlike 31 U.S.C. 5318(g)(3) which contains no such requirement. Legal authority weighs heavily in favor of the proposition that this safe harbor is not subject to a “good faith” limitation.<sup>52</sup>

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 comply with the rule may constitute a violation of the BSA and the BSA 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 generally 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 101.540 implement sections 314(a) and 314(b)<sup>53</sup> of the USA PATRIOT Act,

<sup>50</sup> 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.

<sup>51</sup> 12 CFR 1233.5.

<sup>52</sup> 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) (good faith requirement).

<sup>53</sup> 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

respectively, and generally apply to any financial institution listed in 31 U.S.C. 5312(a)(2).<sup>54</sup> 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 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, a final regulation would apply only to the Housing GSEs, none of which are small entities for purposes of this requirement. Accordingly, FinCEN hereby certifies that a final regulation is not likely to have a significant economic impact on a substantial number of small business entities for purposes of the Regulatory Flexibility Act. Therefore, the provisions of the Regulatory Flexibility Act do not apply. See 5 U.S.C. 601(2) and 603(a).

#### **V. Paperwork Reduction Act**

The proposed regulation pertains to the Housing GSEs. As a result, the proposed regulation 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 Order 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 the final rule is designated a “significant regulatory action” although not economically

an anti-money laundering program. \* \* \*

1010.540(a)(1).

<sup>54</sup> This proposed rule would define the Housing GSEs as financial institutions under section 5312(a)(2)(Y).

significant, under section 3(f) of Executive Order 12866. Accordingly, the rule has been reviewed by the Office of Management and Budget.

#### **VII. Unfunded Mandates 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 proposed regulation, 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 proposed to be 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 (III) to read as follows:

#### **§ 1010.100 General definitions.**

\* \* \* \* \*

(III) *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(III) 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 [Reserved]

**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 delegates, 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 one month from the effective date of this section.

**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 delegates 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]**

Dated: November 2, 2011.

James H. Freis, Jr.,  
Director, Financial Crimes Enforcement Network.

[FR Doc. 2011–28820 Filed 11–7–11; 8:45 am]

BILLING CODE 4802–10–P

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 52**

[EPA–R03–OAR–2011–0730; FRL–9487–5]

**Approval and Promulgation of Air Quality Implementation Plans; Virginia; Consumer and Commercial Products**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** EPA is proposing to approve a State Implementation Plan (SIP) revision submitted by the Commonwealth of Virginia. The SIP revision adds a new chapter (9VAC5–45—Consumer and Commercial Products) in order to control volatile organic compounds (VOC) from portable

fuel containers, consumer products, architectural and industrial (AIM) coatings, adhesives and sealants, and asphalt paving operations within the Northern Virginia and Fredericksburg VOC Emissions Control Areas. The SIP revision also includes new and revised documents incorporated by reference into the Virginia regulations (9VAC5–20–21—Documents Incorporated by Reference) in order to support the new and revised regulations. This action is being taken under the Clean Air Act (CAA).

**DATES:** Written comments must be received on or before December 8, 2011.

**ADDRESSES:** Submit your comments, identified by Docket ID Number EPA–R03–OAR–2011–0730 by one of the following methods:

A. *www.regulations.gov.* Follow the on-line instructions for submitting comments.

B. *Email:* fernandez.cristina@epa.gov.

C. *Mail:* EPA–R03–OAR–2011–0730, Cristina Fernandez, Associate Director, Office of Air Program Planning, Mailcode 3AP30, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103.

D. *Hand Delivery:* At the previously-listed EPA Region III address. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

*Instructions:* Direct your comments to Docket ID Number EPA–R03–OAR–2011–0730. EPA's policy is that all comments received will be included in the public docket without change, and may be made available online at *www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *www.regulations.gov* or email. The *www.regulations.gov* Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to EPA without going through *www.regulations.gov*, your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your