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National Association of Federally-Insured Credit Unions

February 18, 2022

Policy Division
Financial Crimes Enforcement Network
P.O. Box 39
Vienna, VA 22183

RE: Anti-Money Laundering Regulations for Real Estate Transactions (Docket No.: FINCEN-2021-0007; RIN No.: 1506-AB54)

Dear Sir or Madam:

On behalf of the National Association of Federally-Insured Credit Unions (NAFCU), I am writing in response to the Financial Crimes Enforcement Network's (FinCEN) advance notice of proposed rulemaking (ANPR) regarding requirements under the *Bank Secrecy Act* (BSA) for certain persons involved in real estate transactions to collect, report, and retain information. NAFCU advocates for all federally-insured not-for-profit credit unions that, in turn, serve over 127 million consumers with personal and small business financial service products. NAFCU understands the risks identified in a non-financed real estate transaction pose threats to our financial system but urges FinCEN to not impose additional reporting requirements on financial institutions as they are not in the best position to provide the requested information and the reporting would be duplicative of existing requirements that credit unions and other financial institutions already adhere to. This includes any new reporting requirement or an expansion of an existing reporting requirement. Other parties involved in a non-financed real estate transaction are better suited to providing FinCEN with the requested information. It is inappropriate to involve financial institutions in the collection, reporting, or retaining of information pertaining to non-financed real estate transactions.

General Comments

Since the passage of the *Currency and Foreign Transactions Reporting Act*, as amended by the *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001* (commonly referred to as the BSA), NAFCU members continue to experience evolving threats of illicit finance, money laundering, terrorist financing, and related financial crimes. Credit unions continue to play an important role in identifying and mitigating risks to our financial system. NAFCU appreciates FinCEN's vigilance in tracking, identifying, and communicating novel threats to financial institutions and the agency's continued studies of risks posed by the real estate market. FinCEN has studied these risks since the early 2000s and has initiated targeted efforts in mitigating those risks. However, current regulations exempt certain

persons involved in real estate closings and settlements from having to establish a BSA/AML compliance program.

This ANPR would require the collection and reporting of non-financed transactions for both residential and commercial real estate transactions. As a threshold matter, regulatory BSA/AML compliance burdens continue to increase. According to NAFCU's *2021 Federal Reserve Meeting Survey*, over 79 percent of respondents expect the burdens to increase over the next five years. This may be due, in part, to the legislative changes with the passage of the *Corporate Transparency Act* and the *AML Act of 2020*. It is vitally important that FinCEN continue to weigh the benefits with the burdens in imposing additional reporting requirements on financial institutions. Given the complexity of transactions and evolving threats, NAFCU members are finding that they are filing more required reports than in previous years. In NAFCU's *July 2021 Economic & CU Monitor* survey, 65 percent of respondents reported that the number of suspicious activity reports (SARs) has slightly or significantly increased in the past five years. In addition, 79 percent of respondents reported that the number of currency transaction reports (CTRs) filed in the past five years has slightly or significantly increased. NAFCU urges FinCEN to consider the increased compliance burdens when proposing any new reporting requirements on financial institutions.

Financial institutions are not in the best position to provide details on non-financed real estate transactions

Certainly, financial institutions can provide information for a financed real estate transaction; however, they are not likely to be in the best position to provide FinCEN with details on non-financed transactions. Some of the details requested are pieces of information that a financial institution would have difficulty obtaining in a non-financed transaction. As FinCEN acknowledges in the ANPR, most non-financed real estate transactions do not involve a financial institution. These transactions typically involve real estate agents, title companies, escrow companies, and real estate attorneys. Because non-financed real estate transactions do not typically involve financial institutions, they are not in the best position to provide details on a non-financed real estate transaction. Placing financial institutions in the position of obtaining details on non-financed real estate transactions would be cumbersome and difficult given their level of involvement. Instead, FinCEN should focus on the actual parties involved in a non-financed transaction to determine who is in the best position to provide details.

FinCEN specifically asks whether financial institutions can report the identity of the legal entity or purchaser, the direct owners of the legal entity, and the details of the transaction including the date of sale, location of property, sale price, the source of funds, the form of payment, the purpose of the transaction, and the intended use of the sale proceeds. Some of the requested details may be difficult for financial institutions to report in a non-financed transaction such as the date of sale, location of property, sale price, and the intended use of sale proceeds depending on the type of transaction. Available information for a non-financed real estate transaction would be at the purchase asset transaction level and may only be one-sided. More specifically, financial institutions may have information about one of the parties depending on the relationship with the institution or information about the underlying real estate asset. Additionally, the amount of

research involved in obtaining the requested information would be extremely time consuming and cumbersome on the part of the financial institution, depending on the parties involved in the transaction and the existing relationships.

For instance, a buyer may transfer purchase assets from a financial institution for a non-financed transaction to an escrow or title company, but the financial institution may not have any information on the seller or other party to the transaction. A purchaser could use a cashier's check; however, the recipient of the check may not be the seller or other party to the transaction. It may be to an escrow or title company, or straw person. Or a funds transfer may not include seller information. Financial institutions already monitor for suspicious activity and may further research these transactions to determine if the activity rises to the level of "suspicious". FinCEN's suggestion of tying the proposed reporting requirement to at least one financial institution involved in the transfer of purchase assets or multiple financial institutions involved may not provide FinCEN with all the necessary information regarding a non-financed real estate transaction and will instead increase reporting requirements on those that are not in the best position to provide all the requested details. Instead FinCEN will obtain fragmented information from financial institutions on either side of a non-financed transaction whereas FinCEN may obtain wholly complete information from parties involved in the real estate transaction itself. For these reasons, financial institutions are not in the best position to provide FinCEN with details on non-financed real estate transactions. NAFCU urges FinCEN to focus on the actual parties involved in a non-financed transaction to determine who is in the best position to provide details.

Financial institutions should not be subject to additional duplicative reporting requirements

FinCEN suggests that the best person to identify the buyer and parties involved in the transaction may be the person involved in the transfer of purchase assets yet does not account for all the sources of existing information provided by financial institutions. Currently, FinCEN regulations require financial institutions to file CTRs, SARs, and wire transmittal information that provide information that may relate to non-financed real estate transactions. Credit unions monitor and report, as necessary, any non-financed transaction that rises to the level of suspicion warranting the filing of a SAR. This includes additional due diligence in filling out the required SAR. As highlighted earlier, the number of SARs and CTRs filed by NAFCU members continues to increase, providing FinCEN with robust financial transaction information that may be useful in detecting non-financed transactions. FinCEN and law enforcement may then leverage the existing reporting mechanisms in place to make follow-up requests as necessary.

Requiring a separate report for financial institutions involved in the transfer of purchase assets is duplicative of already existing reporting requirements. FinCEN must ensure that it only implements new reporting requirements on financial institutions when the agency cannot obtain the information through existing reporting mechanisms. Any new reporting requirement increases the operational burdens and compliance costs on financial institutions. Financial institutions would need to increase staffing levels to ensure due diligence and investigations could properly be completed, and possibly invest in other software necessary to assist in researching real property. In an environment where BSA/AML compliance costs and burdens are both increasing, NAFCU

requests that FinCEN leverage existing sources of information before implementing new reporting requirements for financial institutions.

FinCEN and other parties involved in the non-financed real estate transaction will likely have the best access to the information

It is unclear who exactly is the best party with the most access to the information FinCEN is requesting of a non-financed real estate transaction, but individuals involved in the closing of the transaction, such as a title or escrow company would certainly be in a better position to access such information than a financial institution. In most jurisdictions, legal possession of real property requires one to hold title, thus a title company will likely be a party involved in a real estate transaction regardless of financing. Given the speed at which a non-financed real estate transaction closes, it necessitates factoring in timing of who is the best party to report. Hypothetically, if a reporting requirement were to be imposed upon a financial institution, the transaction could already be closed and title passed to the buyer by the time the financial institution completes its due diligence in collecting and reporting all the requested information. It is commonly known that all-cash, non-financed transactions speed up the closing process, reinforcing the idea that the parties involved in the real estate transaction itself are in a better position to collect and report the information versus a financial institution.

Title companies already provide FinCEN with information on non-financed real estate transactions through the Geographic Targeting Orders (GTOs), and perhaps the agency should expand this reporting to cover a broader national geographic scope and lower or eliminate the threshold to capture more transactions. FinCEN notes that law enforcement finds the GTOs highly useful in their investigations and they have generally been successful. Currently the GTOs contain most of the information FinCEN is seeking, including beneficial ownership information, purchase price, method of payment, and address. As noted in the Department of the Treasury's 2020 National Strategy for Combatting Terrorist and Other Illicit Financing, once the GTOs were put in place in 2016, there was a dramatic decline in non-financed transactions, possibly indicating that these transactions were pushed to traditional financed transactions.

Expanding coverage of the GTO reporting program to encompass a broader geographic footprint would mean coverage of both financed and non-financed transactions in their entirety. Moreover, this would be a consistent reporting approach, fulfilling one of FinCEN's stated goals with this ANPR. NAFCU urges FinCEN to evaluate whether those parties involved in the closing of a real estate transaction are in the best position to provide accurate and timely information regarding non-financed real estate transactions.

FinCEN may also be in a better position to share beneficial ownership information with law enforcement. With the recent publication of the notice of proposed rulemaking regarding beneficial ownership information, FinCEN will have the most robust and timely database of the true identities of legal entities that ultimately purchase real estate. Credit unions and other financial institutions may only access this information with the consent of the reporting company, therefore there will be instances where the beneficial ownership information on file with the financial institution is not

the most up to date because there has not been a triggering event warranting an update. Although beneficial ownership is just one piece of the information FinCEN is seeking for non-financed transactions, certainly the agency is in the best position to share this information. Moreover, law enforcement is able to request access to the information as well. FinCEN should consider ease of access to beneficial ownership information when determining what party must report this for a non-financed transaction.

Conclusion

NAFCU appreciates the opportunity to share our members' views on this matter. FinCEN's need for information regarding non-financed real estate transactions is understandable; however, financial institutions should not bear the burden of any new reporting requirement, nor should any existing reporting requirement be expanded to account for transactions that they are not in the best position to provide. FinCEN should continue to determine the best parties involved in the real estate closing to determine ultimate responsibility for the collection and reporting of information. NAFCU reiterates that it is inappropriate to involve financial institutions in the collection, reporting, or retaining of information pertaining to non-financed real estate transactions. Should you have any questions or require additional information, please do not hesitate to contact me at (703) 842-2249 or kschafer@nafcu.org.

Sincerely,



Kaley Schafer
Senior Regulatory Affairs Counsel