America's Credit Unions

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Primer on Potential ICE Encounters Onsite at Credit Unions

Background

A number of credit unions have questions on and are seeking assistance in navigating situations involving (1) the presence of ICE and whether they can be restricted if those officials attempt to enter the credit union's premises, including branch locations and attendant parking lots, and (2) whether and under what circumstances can the credit union share the financial records of members who possess an Individual Taxpayer Identification Number (ITIN) as their method to confirm personal identity obtained through the Customer Identification Program (CIP) process. Below is an analysis of these questions.

Additional resources related to ICE and questions regarding the protection of financial assets and financial preparedness in the face of deportation may be found here:

- ICE Resources:
  - ICE Enforcement and Removal Operations
  - ICE Language Access Program
- Considerations for Financial Preparedness:
  - This CNBC article provides a high-level summary and links to additional resources.

America's Credit Unions will continue to update this resource as more questions arise.

1. **Entry of ICE Officials Upon Credit Union Premises**

Generally, the Fourth Amendment protects against unreasonable searches, including searches of private spaces. Credit unions are considered to be both public and private

places and have the right, theoretically, to deny entry to ICE officials to private areas. In general, ICE agents may enter public areas of credit unions. If ICE comes to one of your facilities, they have the right to enter any public areas on the property. ICE agents must be allowed access to any portion of the property that an ordinary member of the public, would be allowed to enter.

For example, parking lots and lobbies are treated differently as they are considered to be public places, meaning that the credit union would not be able to restrict access. However, in order to enter private areas of a credit union, ICE agents would need a judicial warrant. As such, for added protection and distinction, a credit union may choose to designate certain areas with a "Private" sign.

Categorized below are instances where ICE may have the authority to enter onsite under limited circumstances:

- **I-9 Audits**

  An I-9 audit occurs when ICE reviews a company's Employment Eligibility Verification Forms (Form I-9), which requires employers to verify that their workers are legally authorized to work in the United States.

  As part of an I-9 audit, ICE may conduct an on-site inspection to verify compliance. The first step in this process occurs when ICE issues a Notice of Inspection (NOI), which informs an employer that they must produce the I-9 forms of their employees within three business days. ICE may issue the NOI by appearing in person with no advance notice.

- **Site Visits**

  Site visits are part of ICE's routine enforcement, often connected to visa compliance programs like H-1B or L-1. These visits may be conducted to verify that employers are complying with the terms of employment outlined in visa status petitions for *sponsored employees rather than members*.

- **Immigration Raids**

  ICE agents may conduct an immigration raid where agents seek to apprehend individuals they believe are violating federal immigration law. These actions may be

more targeted, and ICE agents may demand to speak to a particular individual or search the premises.

- **Judicial Warrants**

If ICE agents produce a warrant that has been signed by a judge, employees must grant the agents access to the specific areas listed in the warrant. This means that ICE has been granted access to search particular areas or search for particular persons within the facility.

This does not mean that ICE agents have unlimited access to an entire facility, unless the signed warrant specifies as such. ICE agents may only search the nonpublic areas that are specified in the warrant. If ICE agents attempt to enter nonpublic areas beyond what is allowed in the warrant, employees and staff have the legal right to refuse entry.

- **Administrative Warrants**

If ICE agents produce an "administrative warrant," – a document that may contain the word 'warrant' but lacks a judge's approval – employees have the right to refuse entry to nonpublic areas. An administrative warrant is a document produced by federal immigration enforcement authorities that directs law enforcement officers to arrest or detain a particular individual that is suspected of violating U.S. immigration laws. In contrast to a judicial warrant, an administrative warrant does not give ICE agents the authority to enter nonpublic spaces to carry out the arrest. An administrative warrant, by itself, does not impose any legal duties to comply with the demands of ICE agents. An administrative warrant may resemble the appearance of a judicial warrant, particularly to someone who lacks legal training. If staff are unsure whether a warrant produced by ICE is a judicial warrant or an administrative warrant, they should contact legal counsel immediately.

2. **Credit Union Sharing Information Regarding Members with an ITIN**

Generally, FinCEN's Anti-Money Laundering rules require credit unions to develop and maintain a Customer Identification Program (CIP) (31 C.F.R. 1020.220). As part of that requirement, they must obtain a potential member's identification number. If that member is a non-U.S. person, meaning that the member is neither a U.S. citizen nor a legal permanent resident, they would need to provide the credit union with an ITIN, among other acceptable

documents (i.e., foreign passport, matricular card, etc.). The ITIN is used by noncitizens and nonpermanent residents who need to file taxes but who are not otherwise qualified to obtain a Social Security number. Moreover, the ITIN allows noncitizen and non-legal resident taxpayers to be compliant with U.S. tax laws. The ITIN, more fundamentally, serves as a presumptive identifier of potential illegal immigration status.

The Gramm-Leach-Bliley Act (GLBA) and Regulation P protect consumers' nonpublic personal information from being disclosed to third parties barring proper disclosure and/or an applicable exception. Regulation P defines a consumer as "an individual who obtains or has obtained a financial product or service from you that is to be used primarily for personal, family, or household purposes, or that individual's legal representative", and does not appear to differentiate based on immigration status.

Section 1016.15 of the GLBA provides general exceptions to the sharing prohibition, including:

> "To the extent specifically permitted or required under other provisions of law and in accordance with the Right to Financial Privacy Act of 1978 (12 U.S.C. 3401 *et seq.*) to law enforcement agencies (including the Bureau, a Federal functional regulator, the Secretary of the Treasury, with respect to 31 U.S.C. Chapter 53, Subchapter II (Records and Reports on Monetary Instruments and Transactions) and 12 U.S.C. Chapter 21 (Financial Recordkeeping), a state insurance authority, with respect to any person domiciled in that insurance authority's state that is engaged in providing insurance, and the Federal Trade Commission), self-regulatory organizations, or for an investigation on a matter related to public safety."

Accordingly, a credit union is permitted to share information when the government follows the Right To Financial Privacy Act (RFPA) procedures. However, section 1016.15 also provides further exceptions for the government:

> "(i) To comply with Federal, state, or local laws, rules and other applicable legal requirements;
> (ii) To comply with a properly authorized civil, criminal, or regulatory investigation, or subpoena or summons by Federal, state, or local authorities; or

> (iii) To respond to judicial process or government regulatory authorities having jurisdiction over you for examination, compliance, or other purposes as authorized by law."

Unfortunately, dissimilar to the defined procedures and clear safe harbor of the RFPA, there is not much information on the above three exceptions. For example, the regulation does not define what a "properly authorized civil or criminal investigation" is. As such, if a credit union does not receive a RFPA request or subpoena, it will need to make a risk-based decision regarding the provision of nonpublic personal information to ICE. Credit unions that receive such requests should speak with competent legal counsel to determine the appropriate next steps.

It should be noted that ICE and other law enforcement could obtain the *name* of a suspected undocumented immigrant through a FinCEN process known as Section 314(a). From this, ICE could obtain a subpoena for the suspected undocumented immigrant's bank records.