

June 5, 2003

**VIA E-MAIL**

FINCEN  
P.O. Box 39  
Vienna, VA 22183-0039  
ATTN: Section 352-Real estate settlements

Re: **Advance Notice of Rulemaking regarding Anti-Money Laundering Program Requirements for “Persons Involved in Real Estate Closings and Settlements”**

To Whom It May Concern:

The following comments pertain to the issues of how “persons involved in real estate closings and settlements” should be defined and “should any persons involved in real estate closings and settlements be exempted from coverage” under Section 352 of the USA Patriot Act of 2001. We recommend that attorneys who are involved in real estate transactions be excluded from the definition and/or from coverage.

The legal profession is already adequately required to do its share of monitoring of illegal activity, including money laundering activities. Attorneys are subject to the rules of the bar and punishment for transgressions of such rules. Illegal or unethical conduct by attorneys is strictly prohibited and carries severe sanctions. In order to avoid involvement in illegal or unethical conduct attorneys must conduct their own internal due diligence of their clients and prospective clients. Already existing reporting requirements for attorneys include reporting of receipt of cash in excess of \$10,000 in a single transaction to both the Internal Revenue Service (“IRS”) and to the Financial Crimes Enforcement Network (“FinCEN”) by filing a joint FinCEN/IRS form with the IRS.<sup>1</sup> Another existing reporting requirement applies to attorneys with respect to reporting of all real estate transactions to the IRS using Form 1099-S.<sup>2</sup> The 1099-S reports can be made available to other government agencies such as FinCEN rather than imposing new or additional reporting requirements on attorneys. Requiring attorneys to make reports of “suspicious”

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<sup>1</sup> Internal Revenue Code § 60501 and 31 U.S.C. 5331.

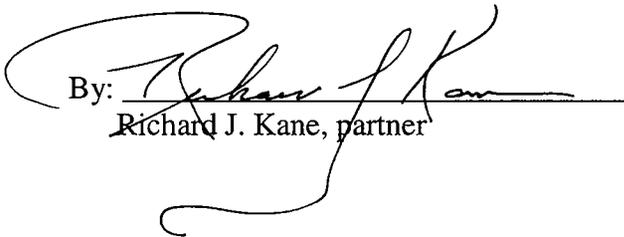
<sup>2</sup> Internal Revenue Code § 6045(e). Information reported includes name, address, taxpayer identification number of transferor, a general description of the real estate transferred, the date of the closing, gross proceeds, and the real estate reporting person’s name, address and taxpayer identification number.

transactions or to release internal due diligence findings would undermine the duty of confidentiality and loyalty an attorney owes to a client.<sup>3</sup> Similarly, imposing obligations of due diligence and record keeping which would be made available to FinCEN for investigation purposes would pose problems with respect to the attorney-client privilege. While attorneys have obligations to society and to the nation, there is a real need for clients to be able to be secure in disclosures to counsel.

Based on the foregoing we recommend that anti-money laundering programs should not be imposed on attorneys involved in real estate closings and settlements.

Sincerely,

Thelen Reid & Priest LLP

By:   
Richard J. Kane, partner

NY #536016 v2

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<sup>3</sup> We refer to the recent recommendations by the American Bar Association opposing suspicious activity reporting by attorneys and incorporate the arguments set forth therein by reference. See American Bar Association Task Force on Gatekeeper Regulation and the Profession, Section of Real Property, Probate and Trust Law, Criminal Justice Section, Section of Litigation, Section of International Law and Practice, Report to the House of Delegates, February 2003.