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Billing Code 4810-02

DEPARTMENT OF THE TREASURY

Financial Crimes Enforcement Network

31 CFR Chapter X

RIN 1506-AB54

Anti-Money Laundering Regulations for Real Estate Transactions

AGENCY: Financial Crimes Enforcement Network (“FinCEN”), Treasury.

ACTION: Advance notice of proposed rulemaking.

SUMMARY: FinCEN is issuing this advance notice of proposed rulemaking (ANPRM) to solicit public comment on potential requirements under the Bank Secrecy Act (BSA) for certain persons involved in real estate transactions to collect, report, and retain information. The systemic money laundering vulnerabilities presented by the U.S. real estate sector, and consequently, the ability of illicit actors to launder criminal proceeds through the purchase of real estate, threatens U.S. national security and the integrity of the U.S. financial system. Accordingly, FinCEN intends to begin the rulemaking process to address such vulnerabilities. As a first step in this rulemaking process, FinCEN is

issuing this ANPRM to seek initial public comment on questions that will assist FinCEN in the consideration and preparation of a proposed rule.

DATES: Written comments are welcome, and must be received on or before 60 days after publication of this document in the *Federal Register*.

ADDRESSES:

Comments may be submitted, identified by Regulatory Identification Number (RIN) 1506-AB54, by any of the following methods:

Federal E-rulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments. Include 1506-AB54 in the submission. Refer to Docket Number FINCEN–2021–0007.

Mail: Financial Crimes Enforcement Network, Global Investigations Division, P.O. Box 39, Vienna, VA 22183. Include 1506-AB54 in the body of the text. Refer to Docket Number FINCEN–2021–0007.

Please submit comments by one method only.

FOR FURTHER INFORMATION CONTACT:

FinCEN: The FinCEN Regulatory Support Section at 1-800-767-2825 or electronically at frc@fincen.gov.

SUPPLEMENTARY INFORMATION:

I. Background

The goal of this rulemaking process is to implement an effective system to collect and permit authorized uses of information concerning potential money laundering

associated with non-financed transactions¹ in the United States real estate market.

FinCEN expects that doing so will strengthen the United States' national security and the integrity of the U.S. financial system. With this ANPRM, FinCEN seeks input on how it should implement such a system, consistent with the Bank Secrecy Act (BSA), to maximize benefits while minimizing burdens on reporting financial institutions and nonfinancial trades or businesses.

Money laundering vulnerabilities exist throughout the United States real estate market. These vulnerabilities are not limited to any particular sector. Although in recent years FinCEN has focused its information collection efforts on non-financed purchases of residential real estate by shell companies, FinCEN believes that other areas of the real estate market, such as commercial real estate and certain real estate purchases by natural persons, may merit regulatory coverage.

For this rulemaking process, FinCEN is considering how best to focus its regulatory attention on residential and commercial real estate transactions. FinCEN notes that money laundering risks stem from transactions in both the commercial and residential real estate sectors, and both merit appropriate regulatory treatment. At the same time, FinCEN recognizes that an iterative approach may be warranted given the complexities and differences between different market sectors and the potential burdens that new reporting and recordkeeping requirements may have for businesses. If an

¹ For the purposes of this ANPRM, the terms “non-financed purchase,” “non-financed transaction,” “all-cash purchase,” and “all-cash transaction” refer to any real estate purchase or transaction that is not financed via a loan, mortgage, or other similar instrument, issued by a bank or non-bank residential mortgage lender or originator, and that is made, at least in part, using currency or value that substitutes for currency (including convertible virtual currency (CVC)), or a cashier’s check, a certified check, a traveler’s check, a personal check, a business check, a money order in any form, or a funds transfer.

iterative approach is warranted, FinCEN could initially focus on residential real estate followed by additional action to promulgate regulations covering the commercial real estate sector, as well as any other regulatory gaps that may exist with money laundering vulnerabilities involving real estate. FinCEN invites comments regarding the approach that it should take with respect to regulatory treatment of residential and commercial real estate and the money laundering threats presented by these sectors.

This ANPRM seeks comment to assist FinCEN in preparing a potential proposed rule that would seek to impose nationwide recordkeeping and reporting requirements on certain persons participating in transactions involving non-financed purchases of real estate. FinCEN has not previously imposed the BSA's general recordkeeping and reporting requirements on businesses involved in non-financed real estate transactions, but FinCEN has imposed more specific transaction reporting requirements on title insurance companies in the form of time-limited Geographic Targeting Orders under 31 U.S.C. 5326(a). This ANPRM seeks public comment on whether FinCEN should impose a similar, ongoing, and expanded reporting requirement through regulations. Such a rule could be promulgated under 31 U.S.C. 5318(a)(2). FinCEN invites comments on alternative approaches to address the risk of money laundering in non-financed real estate transactions, including, for example, potentially promulgating general BSA recordkeeping and reporting requirements for "persons involved in real estate settlements and closings" under 31 U.S.C. 5318(g)(1) and related program requirements under 31 CFR 5318(h).²

² 31 U.S.C. 5312(a)(2)(U).

FinCEN seeks comment on the potential scope of any such regulations, including, among other things: the persons who should be subject to the requirements; which types of real estate purchases should be covered; what information should be reported and retained; the geographic scope of such a requirement; and the appropriate reporting dollar-value threshold. FinCEN also invites general comments regarding the risk of money laundering and other illicit financial activities in the real estate market and the extent to which any reporting requirements would address that risk.

II. Money Laundering in Real Estate

Treasury, working with law enforcement partners, has highlighted the money laundering risks and typologies associated with the U.S. real estate market. As Treasury explained in its 2020 National Strategy for Combating Terrorist and Other Illicit Financing, “[c]riminals with widely divergent levels of financial sophistication use real estate at all price levels to store, launder, or benefit from illicit funds.” In that report Treasury identified the risks of the laundering of illicit proceeds through real estate purchases as a main vulnerability and key action item for strengthening the U.S. Anti-Money Laundering/Countering the Financing of Terrorism (AML/CFT) framework. Law enforcement actions—including complaints, indictments, and prosecuted cases—confirm the conclusions in the report on the linkages between real estate transactions and money laundering and other illicit activities.³

³ See, e.g., *United States v. Real Property Located in Potomac, Maryland, Commonly Known as 9908 Bencross Drive, Potomac, MD 20854*, Case No. 20-cv-02071, Doc. 1 (D. MD Jul. 15, 2020); *United States v. Raul Torres*, Case No. 1:19CR390, Doc. 30 (N.D. Ohio Mar. 30, 2020); *United States v. Bradley*, No. 3:15-cr-00037-2, 2019 U.S. Dist. LEXIS 141157 (M.D. Tenn. Aug. 20, 2019); *United States v. Paul Manafort*, Case 1:18-cr-00083-TSE, Doc. 14 (E.D. Va. Feb. 26, 2018); *United States v. Miller*, 295 F. Supp. 3d 690 (E.D. Va. 2018); *United States v. Patrick Ifediba, et al.*, Case No. 2:18-cr-00103-RDP-JEO,

Indeed, as the Congressional Research Service recently noted, real estate money laundering “schemes can involve a wide range of conventional domestic criminals, as well as transnational criminals, including drug cartels and human traffickers, international terrorists, and foreign kleptocrats (corrupt high-level officials).”⁴ As such, “[t]he purchase of real estate, often combined with methods to conceal a purchaser’s identity and source of funds, can allow criminals to integrate ill-gotten proceeds into the legal economy[.]”⁵

Reports by foreign governments, international standard setters, and a variety of reports by non-governmental organizations (NGOs), inter-governmental organizations, academics, trade organizations, media, and other members of civil society confirm the substantial risk that the real estate market presents for the money laundering problem.

In January 2007, for example, the Financial Action Task Force (FATF), as the global standard setter for combatting money laundering, terrorism financing, and proliferation finance, published a wide-ranging report and series of recommendations that highlighted the vast scope of the money laundering problem in the real estate sector. The FATF has issued guidance—most recently in June 2021—recommending AML/CFT

Doc. 1 (N.D. Alabama Mar. 29, 2018); *Atty. Griev. Comm’n of Md. v. Blair*, 188 A.3d 1009 (MD Ct. App. 2018); *United States v. Coffman*, 859 F. Supp. 2d 871 (E.D. Ky. 2012); *United States v. Delgado*, 653 F.3d 729 (8th Cir. 2011); *United States v. Fernandez*, 559 F.3d 303 (5th Cir. 2009); *United States v. 10.10 Acres Located on Squires Rd.*, 386 F. Supp. 2d 613 (M.D.N.C. 2005); *State v. Harris*, 861 A.2d 165 (Super. Ct. App. Div. 2004); “United States Reaches Settlement to Recover More Than \$700 Million in Assets Allegedly Traceable to Corruption Involving Malaysian Sovereign Wealth Fund,” Press Release, Department of Justice (Oct. 30, 2019), <https://www.justice.gov/opa/pr/united-states-reaches-settlement-recover-more-700-million-assets-allegedly-traceable>; “Acting Manhattan U.S. Attorney Announces \$5.9 Million Settlement of Civil Money Laundering And Forfeiture Claims Against Real Estate Corporations Alleged to Have Laundered Proceeds of Russian Tax Fraud,” Press Release, Department of Justice (May 12, 2017), <https://www.justice.gov/usao-sdny/pr/acting-manhattan-usattorney-announces-59-million-settlement-civil-money-laundering-and>.

⁴ “Money Laundering in the U.S. Real Estate Sector,” Congressional Research Service (Nov. 9, 2021).

⁵ *Id.*

requirements for certain entities involved in real estate transactions.⁶ Further, in the FATF’s 2016 Mutual Evaluation Report (MER) of the United States, the FATF identified numerous money laundering vulnerabilities in the U.S. real estate sector, noting that “purchasers often use legal persons to hold real estate and the opaqueness of legal persons . . . is a vulnerability which can be exploited by illicit actors.”⁷ Of note, the FATF found the United States’ failure to regulate real estate transactions in line with the FATF standards to be a significant deficiency in the U.S. AML/CFT regime.

The European Union has regulated real estate transactions for the purposes of AML/CFT efforts since 2001.⁸ In 2019, the European Parliament Research Service (EPRS), the European Parliament’s in-house research service, published a briefing indicating the widespread use of real estate in money laundering, and in particular, highlighted the necessity of identifying purchasers of real estate and proper regulatory coverage of professionals involved in such transactions via AML reporting mechanisms.⁹

Concerns about the abuse of the real estate market have also been extensively reported by the press, academia, and civil society organizations. For example, in February 2015, *The New York Times* published a series of articles entitled “Towers of Secrecy” on the use of shell companies to purchase high-value residential real estate in

⁶ See generally “Money Laundering & Terrorist Financing through the Real Estate Sector,” Financial Action Task Force (Jun. 29, 2007); see “International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation: The FATF Recommendations,” Financial Action Task Force, pp. 19–20 (Jun. 2021).

⁷ “Anti-money laundering and counter-terrorist financing measures in the United States – 2016,” Mutual Evaluation Report, Financial Action Task Force, p. 120 (Dec. 2016).

⁸ See “Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001 amending Council Directive 91/308/EEC on prevention of the use of the financial system for the purpose of money laundering,” OJ. L. 344, pp. 76–82 (Dec. 28, 2001).

⁹ See Cécile Remeur, “Understanding money laundering through real estate transactions,” European Parliament Research Service, PE 633.154, pp. 5–7 (Feb. 2019).

New York City.¹⁰ The *Times* also found that shell companies purchased nearly half of the most expensive residential properties in the United States.¹¹ The articles identified a specific set of real estate transactions as a high potential money laundering risk: the use of shell companies to pay for residential properties in cash at the time of closing, without a corresponding mortgage.¹²

In February 2021, the National Association of Realtors (NAR), an industry trade organization, issued voluntary guidelines for real estate professionals that highlighted the vulnerability of the U.S. real estate market to money laundering, stating that “many non-financial businesses and professions are also vulnerable to potential money laundering schemes” and “[r]eal estate is believed to be used in money laundering schemes, making real estate professionals likely to encounter money laundering activities in the course of their business.”¹³

In August 2021, Global Financial Integrity (GFI),¹⁴ an NGO, published a study finding that an estimated \$2.3 billion had been laundered through the U.S. real estate

¹⁰ See generally Louise Story, et al., “Towers of Secrecy,” Parts 1 – 7, *N.Y. Times*, (Feb. 7– Dec. 14, 2015), <https://www.nytimes.com/news-event/shell-company-towers-of-secrecy-real-estate>.

¹¹ See Louise Story & Stephanie Saul, “Stream of Foreign Wealth Flows to Elite New York Real Estate,” *N.Y. Times* (Feb. 7, 2015), <https://www.nytimes.com/2015/02/08/nyregion/stream-of-foreign-wealth-flows-to-time-warner-condos.html>.

¹² See also, e.g., Vandana Ajay Kumar, “Money Laundering: Concept, Significance and its Impact,” *European Journal of Business and Management*, p. 117 (Vol 4 No.2 2012) (“The real estate sector is the largest and most vulnerable sector for money laundering. Real estate is important for money laundering, because it is a non-transparent market where the values of the objects are often difficult to estimate and where big value increases can happen and is an efficient method to place large amounts of money.”); see also generally “Money Laundering in Real Estate,” Conference Report, Terrorism, Transnational Crime and Corruption Center, Schar School of Policy and Government, George Mason University (Mar. 25, 2018).

¹³ “Anti-Money Laundering Voluntary Guidelines for Real Estate Professionals,” National Association of Realtors, p. 1 (Feb. 21, 2021).

¹⁴ According to its website, GFI is “a Washington, DC-based think tank focused on illicit financial flows, corruption, illicit trade and money laundering.” “About us,” Global Financial Integrity, <https://gfintegrity.org/about/>.

market over the previous five years. The study further noted that among the cases it reviewed, over 50% involved Politically Exposed Persons (PEPs).¹⁵ Moreover, the study found that the “use of anonymous shell companies and complex corporate structures continue[d] to be the number one money laundering typology” involving real estate.¹⁶

And most recently, in November 2021, The Sentry,¹⁷ an NGO, published a report detailing the use of real estate purchases in the United States and elsewhere by PEPs to launder proceeds from political corruption. According to this report, these PEPs used a network of shell companies to move funds abroad and purchase millions of dollars of real estate, including 17 properties for a total of \$6.6 million in Washington, DC, and Johannesburg, South Africa. The report further highlighted the use of shell companies and trusts to obscure the true owners of the properties.¹⁸

Several key factors contribute to the systemic vulnerability of the U.S. real estate market to money laundering. Those factors include, but are not limited to, lack of

¹⁵ The term “PEP” generally includes a current or former senior foreign political figure, their immediate family, and their close associates. “Politically Exposed Persons — Overview,” FFIEC BSA/AML Examination Manual, p. 290 (V5 2015); *see also* “Joint Statement on Bank Secrecy Act Due Diligence Requirements for Customers Who May Be Considered Politically Exposed Persons,” Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, Financial Crimes Enforcement Network, National Credit Union Administration, Office of the Comptroller of the Currency (Aug. 21, 2020). For a clear example of the vulnerabilities of the U.S. residential real estate sector for use to conceal funds by corrupt PEPs, a 2020 forfeiture complaint filed by the Department of Justice states that the former president of The Gambia, Yayha Jammeh, and his spouse, used funds derived from corruption to purchase residential properties in the United States. *See United States v. Real Property Located in Potomac, Maryland, Commonly Known as 9908 Bentcross Drive, Potomac, MD 20854*, Case No. 20-cv-02071, Doc. 1 (D. MD Jul. 15, 2020).

¹⁶ Lakshmi Kumar & Kaisa de Bel, “Acres of Money Laundering: Why U.S. Real Estate is a Kleptocrat’s Dream,” *Global Financial Integrity*, p. 4 (Aug. 2021).

¹⁷ According to its website, The Sentry “is an investigative and policy team that follows the dirty money connected to African war criminals and transnational war profiteers and seeks to shut those benefiting from violence out of the international financial system.” “About The Sentry,” The Sentry, <https://thesentry.org/about/>.

¹⁸ “Embezzled Empire: How Kabila’s Brother Stashed Millions in Overseas Properties,” The Sentry, p. 3 (Nov. 2021).

transparency, attractiveness of the U.S. real estate market as an investment vehicle, and the lack of industry regulation.

First, the lack of transparency in the real estate market contributes to its vulnerability to money laundering activity. Real estate may be held directly or indirectly through nominees, legal entities (such as one or more shell holding companies), or through various investment vehicles. Buyers may use shell companies in many legitimate circumstances, such as when buyers use legal entities to shield themselves and their assets from liability related to the purchase of real property or as a means of protecting their privacy. Illicit actors, however, can take advantage of the opacity of shell companies or other legal entities or arrangements to mask their identity as the true beneficial owners of the property and their involvement in real estate transactions.

Second, the attractiveness of the U.S. real estate market as a stable vehicle for maintaining and increasing investment value also contributes to its vulnerability to money laundering activity. Illicit actors seek to conceal the origins of their illicit funds in a way that grows as an investment, “cleans” as much money as possible with each transaction, and allows them to enjoy the fruits of their illicit activity while minimizing potential losses from market instability and fluctuating exchange rates. Consequently, real estate—especially in a relatively stable market with strong private property protections such as in the United States—is an attractive asset to facilitate money laundering.

Third, the lack of industry regulation for non-financed transactions exacerbates the money laundering vulnerabilities of the U.S. real estate market. Non-financed purchases of real estate currently are not subject to AML/CFT regulatory requirements

because they do not involve financing underwritten by a financial institution subject to BSA requirements. This leaves a substantial portion of the real estate market without the same AML/CFT protections and safeguards as those applicable to banks, casinos, or other financial institutions. Moreover, data on real estate purchases is held in a patchwork of different state and county databases, making investigation and analysis difficult.

FinCEN recognizes the efforts by trade organizations for real estate professionals, such as the NAR (real estate agents and brokers) and the American Bar Association (settlement attorneys), to establish voluntary AML/CFT guidelines that their members may consider implementing to protect against illicit actors seeking to launder illicit funds.¹⁹ FinCEN considers the issuance of such guidelines as a positive step and indicative of the commitment of the vast majority of real estate professionals to protecting the U.S. real estate sector from illicit activity. Such guidelines, however, are not mandatory or subject to oversight or enforcement and may therefore be avoided by illicit actors. There is also limited information concerning how widely the industry has implemented such best practices and voluntary guidelines, or what other measures are in place to combat money laundering in the real estate sector. In view of this, FinCEN believes that there is a need for regulatory action notwithstanding industry efforts. FinCEN welcomes comments, however, on how the industry has implemented these voluntary guidelines, any challenges in implementation, their effectiveness, and whether FinCEN should consider including elements of existing voluntary guidelines in any potential rule.

¹⁹ See generally “Anti-Money Laundering Guidelines for Real Estate Professionals,” <https://www.nar.realtor/articles/anti-money-laundering-guidelines-for-real-estate-professionals>.

In sum, the U.S. real estate market can be an effective vehicle for money laundering and can involve businesses and professions that facilitate (even if unwittingly) acquisitions of real estate in the money laundering process. Accordingly, FinCEN views the structure of the U.S. real estate market to present money laundering vulnerabilities and considers that regulatory action is warranted to collect information from businesses and professions operating in the real estate sector in order to protect U.S. national security and the U.S. financial system.

III. Current Law

The Currency and Foreign Transactions Reporting Act of 1970, as amended by the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (“USA PATRIOT Act”), the Anti-Money Laundering Act of 2020 (“AML Act”), and other legislation, is the legislative framework commonly referred to as the BSA.²⁰ The Secretary of the Treasury (“Secretary”) has delegated to the Director of FinCEN the authority to implement, administer, and enforce compliance with the BSA and associated regulations.²¹ The purposes of the BSA include requiring certain reports or records that “are highly useful . . . in criminal, tax, or regulatory investigations, risk assessments, or proceedings,” or “in intelligence or counterintelligence activities, including analysis, to protect against international terrorism.”²²

²⁰ The BSA is codified at 12 U.S.C. 1829b, 12 U.S.C. 1951–1960, 31 U.S.C. 5311–5314 and 5316–5336, and includes notes thereto, with implementing regulations at 31 CFR chapter X.

²¹ Treasury Order 180–01 (Jan. 14, 2020).

²² 31 U.S.C. 5311. Section 5311 was amended by Section 6002 of the AML Act to add the following additional purposes of the BSA: “(2) prevent the laundering of money and the financing of terrorism through the establishment by financial institutions of reasonably designed risk-based programs to combat money laundering and the financing of terrorism; (3) facilitate the tracking of money that has been sourced

Under the BSA, the Secretary may require any financial institution, including “persons involved in real estate closings and settlements,” to report any suspicious transaction relevant to a possible violation of law or regulation (a “suspicious activity report,” or “SAR”).²³ The BSA also requires each financial institution to establish AML/CFT programs, including, at a minimum, “(A) the development of internal policies, procedures, and controls; (B) the designation of a compliance officer; (C) an ongoing employee training program; and (D) an independent audit function to test programs.”²⁴ The Secretary may prescribe minimum standards for such programs, and may exempt any financial institution from the application of such standards.²⁵ Under the BSA, as amended by Section 6102(c) of the AML Act, the Secretary is also authorized to “require a class of domestic financial institutions or nonfinancial trades or businesses to maintain appropriate procedures, including the collection and reporting of certain information as

through criminal activity or is intended to promote criminal or terrorist activity; (4) assess the money laundering, terrorism finance, tax evasion, and fraud risks to financial institutions, products, or services to—(A) protect the financial system of the United States from criminal abuse; and (B) safeguard the national security of the United States; and (5) establish appropriate frameworks for information sharing among financial institutions, their agents and service providers, their regulatory authorities, associations of financial institutions, the Department of the Treasury, and law enforcement authorities to identify, stop, and apprehend money launderers and those who finance terrorists.”

²³ 31 U.S.C. 5318(g), 5312(a)(2)(U).

²⁴ 31 U.S.C. 5318(h)(1)(A)–(D).

²⁵ 31 U.S.C. 5318(h)(2)(A), 5318(a)(6). Pub. L. 107–56, Title III, Sec. 352(c), 115 Stat. 322 (Oct. 26, 2001), provided that: “Before the end of the 180-day period beginning on the date of enactment of this Act [Oct. 26, 2001], the Secretary [of the Treasury] shall prescribe regulations that consider the extent to which the requirements imposed under this section [amending this section and enacting provisions set out as a note above] are commensurate with the size, location, and activities of the financial institutions to which such regulations apply.” In 2021, Section 6101 of the AML Act amended the factors the Secretary must consider: “(i) [f]inancial institutions are spending private compliance funds for a public and private benefit, including protecting the United States financial system from illicit finance risks; (ii) the extension of financial services to the underbanked and the facilitation of financial transactions, including remittances, coming from the United States and abroad in ways that simultaneously prevent criminal persons from abusing formal or informal financial services networks are key policy goals of the United States; and (iii) effective AML/CFT programs safeguard national security and generate significant public benefits by preventing the flow of illicit funds in the financial system and by assisting law enforcement and national security agencies with the identification and prosecution of persons attempting to launder money and undertake other illicit activity through the financial system.” 31 U.S.C. 5318(h)(2)(B)(i)–(iii).

the Secretary of the Treasury may prescribe by regulation, to . . . guard against money laundering, the financing of terrorism, or other forms of illicit finance.”²⁶

FinCEN’s regulations implementing the BSA require banks, non-bank residential mortgage lenders and originators (“RMLOs”), and housing-related Government Sponsored Enterprises (“GSEs”) to file SARs and establish AML/CFT programs,²⁷ but FinCEN’s regulations exempt other persons involved in real estate closings and settlements from the requirement to establish AML/CFT programs, and the regulations do not impose a SAR filing requirement on such persons.²⁸

IV. Prior Rulemakings

In 2002, FinCEN temporarily exempted certain financial institutions, including “persons involved in real estate closings and settlements” and “loan and finance companies,” from the requirement to establish an AML/CFT program. FinCEN explained that it would “continue studying the money laundering risks posed by these institutions in order to develop appropriate anti-money laundering program requirements,” but that additional time was needed to consider the businesses that would be subject to such requirements, as well as the nature and scope of the AML/CFT risks associated with those businesses.²⁹ FinCEN also explained its concern that many of these financial institutions were sole proprietors or small businesses, and FinCEN intended to

²⁶ 31 U.S.C. 5318(a)(2) (as amended by Section 6102(c) of the AML Act).

²⁷ 31 CFR parts 1020, 1029, 1030.

²⁸ 31 CFR 1010.205(b)(1)(v).

²⁹ 67 FR 21110-21112 (Apr. 29, 2002). FinCEN initially exempted persons involved in closings and settlements for six months, and then subsequently extended the temporary exemption indefinitely. 67 FR 67547 (Nov. 6, 2002).

avoid imposing “unreasonable regulatory burdens with little or no corresponding anti-money laundering benefits.”³⁰

In 2003, FinCEN issued an ANPRM regarding the AML/CFT program requirement for “persons involved in real estate closings and settlements” (“2003 ANPRM”). The 2003 ANPRM solicited comments on the money laundering risks in real estate closings and settlements, how to define “persons involved in real estate closings and settlements,” whether any persons involved in real estate closings and settlements should be exempted from the AML/CFT program requirement, and how to structure the requirement in light of the size, location, and activities of persons in the real estate industry.³¹ FinCEN received 52 comments on the 2003 ANPRM from individuals, various institutions and associations of interested parties, law firms, state bar associations, an office within the Department of Justice (DOJ), and an office within the Internal Revenue Service (IRS).³² Many comments suggested that the threat of money laundering through real estate warranted appropriate regulation, but commenters disagreed over the specific businesses that should be covered. FinCEN did not propose regulations in response to these comments, and persons involved in real estate closings and settlements continue to be exempt from the AML/CFT program requirement.

FinCEN subsequently focused on the money laundering vulnerabilities in financed real estate transactions, as approximately 80% of real estate transactions are

³⁰ *Id.*

³¹ 68 FR 17569 (Apr. 10, 2003).

³² *See* FinCEN’s website to review comments submitted, at <https://www.fincen.gov/comments-advance-notice-proposed-rule-anti-money-laundering-programs-persons-involved-real-estate>.

financed by a loan from a financial institution.³³ FinCEN published a number of reports tracking the rise of mortgage fraud SARs covering geographic trends and fraud typologies. These SARs, which were filed by banks and other financial institutions, underscored the illicit activity that can occur in the primary and secondary residential mortgage markets.³⁴

In a 2012 final rule, FinCEN eliminated the exemption for “loan and finance companies,” and required such companies—defined as non-bank residential mortgage lenders and originators (“RMLOs”)—to file SARs and comply with AML/CFT program obligations.³⁵ In a 2014 final rule, FinCEN extended similar requirements to the housing-related Government Sponsored Enterprises (“GSEs”)—Fannie Mae, Freddie Mac, and the Federal Home Loan Banks.³⁶ FinCEN explained that these entities were involved in providing financing to the residential mortgage market, making them vulnerable to fraud and other financial crimes.³⁷ By purchasing mortgage loans, extending loans secured by mortgages and other real estate-related collateral, and engaging in a variety of related financial activities, these entities are in a unique position to provide 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.³⁸

³³ The 80% coverage noted here is an estimate based on industry sources discussed below. *See* Note 45 *infra*.

³⁴ *See, e.g.*, “Mortgage Loan Fraud: An Industry Assessment Based on Suspicious Activity Report Analysis,” Financial Crimes Enforcement Network (Nov. 2006); “Suspicious Activity Related to Mortgage Loan Fraud,” Financial Crimes Enforcement Network, Advisory, FIN-2012-A009 (Aug. 16, 2012).

³⁵ 77 FR 8148 (Feb. 14, 2012) (codified at 31 CFR Part 1029).

³⁶ 79 FR 10365 (Feb. 25, 2014) (codified at 31 CFR Part 1030).

³⁷ *Id.*

³⁸ *Id.*

In a 2020 final rule, FinCEN also imposed additional AML/CFT obligations on banks lacking a federal functional regulator, ensuring that such entities would be subject to requirements to have an AML/CFT program, meet Customer Identification Program (CIP) and Customer Due Diligence (CDD) requirements, including the verification of beneficial owners of legal entity accounts, in addition to their existing SAR obligations (which would include reporting on transactions involving suspicious real estate transactions).³⁹

Each of those regulations helped to ensure that many participants in financed real estate transactions were subject to AML/CFT program and reporting requirements, including to evaluate and protect against AML/CFT risks and identify and report suspicious activity.

V. Real Estate Geographic Targeting Orders

FinCEN has taken a different approach to all-cash real estate transactions (*i.e.*, real estate transactions without financing by a bank, RMLO, or GSE), which represent approximately 20% of real estate sales. When property is purchased without financing, the transaction generally does not involve a bank or other financial institution subject to AML/CFT program requirements. Instead, all-cash real estate transactions may involve only relatively small businesses or individuals involved in closing and settlement, and the participants may lack financial incentives to closely monitor the nature of the transactions. Consequently, there exists a vulnerability that illicit actors can exploit to

³⁹ 85 FR 57129 (Sep. 15, 2020) (codified at 31 CFR 1020.210).

launder the proceeds of criminal activity by purchasing real estate through all-cash transactions.

In addition, all-cash real estate transactions in which individuals use shell companies to purchase high-value residential real estate, primarily in certain large U.S. cities, are a particular concern. FinCEN identified money laundering typologies associated with such transactions and uncovered numerous specific examples of all-cash purchases of residential real estate that potentially involved money laundering activities.⁴⁰

According to the NAR and the U.S. Census Bureau,⁴¹ in 2020, 5.64 million existing residential homes and 822,000 new homes were sold in the United States, for a total of 6.46 million transactions.⁴² It is projected that existing and new home sales will total 5.88 million and 740,000, respectively, in 2021.⁴³ With a median sale price of

⁴⁰ See, e.g., “Advisory to Financial Institutions and Real Estate Firms and Professionals,” Financial Crimes Enforcement Network, FIN-2017-A003 (Aug. 22, 2017).

⁴¹ Statistics regarding residential real estate transactions are normally divided between new and existing home sales. Generally, the Census Bureau tracks new home sales, while the most accurate data for existing home sales is generated by NAR. Existing home sales constitute approximately 90% of the residential real estate transaction market. See “New Home Sales vs. Existing Home Sales,” U.S. Census Bureau, <https://www.census.gov/construction/nrs/newvsexisting.html>.

⁴² “Quick Real Estate Statistics,” National Association of Realtors (Nov. 11, 2020), <https://www.nar.realtor/research-and-statistics/quick-real-estate-statistics>; “Existing-Home Sales Recede 2.0% in August,” National Association of Realtors (Sep. 22, 2021), <https://www.nar.realtor/newsroom/existing-home-sales-recede-2-0-in-august>; “Summary of August 2021 Existing Home Sales Statistics,” National Association of Realtors (Sep. 22, 2021); Lawrence Yun, “2021 International Transactions in U.S. Residential Real Estate,” National Association of Realtors (Jul. 21, 2021), <https://cdn.nar.realtor/sites/default/files/documents/2021-07-26-nar-real-estate-forecast-summit-international-transactions-in-us-residential-real-estate-lawrence-yun-presentation-slides-07-26-2021.pdf>; “New Houses Sold by Sales Price: United States (Q1),” U.S. Census Bureau (2021), <https://www.census.gov/construction/nrs/pdf/quarterlysales.pdf>.

⁴³ “Existing-Home Sales Recede 2.0% in August,” National Association of Realtors (Sep. 22, 2021), <https://www.nar.realtor/newsroom/existing-home-sales-recede-2-0-in-august>; “Summary of August 2021 Existing Home Sales Statistics,” National Association of Realtors (Sep. 22, 2021); Lawrence Yun, “2021 International Transactions in U.S. Residential Real Estate,” National Association of Realtors (Jul. 21, 2021), <https://cdn.nar.realtor/sites/default/files/documents/2021-07-26-nar-real-estate-forecast-summit-international-transactions-in-us-residential-real-estate-lawrence-yun-presentation-slides-07-26-2021.pdf>;

approximately \$350,000 for both new and existing homes as of July 2021,⁴⁴ the total value of U.S. residential real estate sales is expected to exceed approximately \$2.31 trillion in 2021.

Although a significant portion of those residential real estate transactions are financed by regulated RMLOs, GSEs, and depository institutions, non-financed real estate transactions can largely avoid financial institutions that are subject to AML/CFT requirements. As previously noted, other businesses and professions involved in real estate transactions, such as real estate brokers and agents, title company representatives, and closing agents (including attorneys when involved), currently are not subject to AML/CFT reporting obligations, and some of these, such as title insurance and real estate agents, are not mandatory in many transactions.

According to figures published by NAR, in both 2020 and 2021, approximately 19% of existing residential home sale were non-financed transactions.⁴⁵ The Census Bureau has further estimated that approximately 4.4% of new home sales are non-financed transactions.⁴⁶ Given that existing home sales comprise approximately 90% of the residential real estate market in the United States, FinCEN estimates that the all-cash

“Monthly New Residential Sales,” U.S. Census Bureau, Release CB21-155 (Sep. 24, 2021), <https://www.census.gov/construction/nrs/pdf/newressales.pdf>.

⁴⁴ “Existing-Home Sales Climb 2.0% in July,” National Association of Realtors, (Aug. 23, 2021), <https://www.nar.realtor/newsroom/existing-home-sales-climb-2-0-in-july>; “Monthly New Residential Sales, August 2021,” U.S. Census Bureau, Release CB21-155 (Sep. 24, 2021), <https://www.census.gov/construction/nrs/pdf/newressales.pdf>; *see also* “Summary of August 2021 Existing Home Sales Statistics,” National Association of Realtors (Sep. 22, 2021), <https://cdn.nar.realtor/sites/default/files/documents/ehs-08-2021-summary-2021-09-22.pdf>.

⁴⁵ Lawrence Yun, “2021 International Transactions in U.S. Residential Real Estate,” National Association of Realtors (Jul. 21, 2021), <https://cdn.nar.realtor/sites/default/files/documents/2021-07-26-nar-real-estate-forecast-summit-international-transactions-in-us-residential-real-estate-lawrence-yun-presentation-slides-07-26-2021.pdf>.

⁴⁶ “New Houses Sold by Type of Financing (Table Q7),” U.S. Census Bureau (2021), <https://www.census.gov/construction/nrs/pdf/quarterlysales.pdf>.

purchase rate of real estate transactions in the United States is approximately 18.5%. Based on the NAR estimates of total home sales and median sale prices, this means that approximately 1.21 million residential real estate transactions, with an approximate value of \$463 billion, likely proceed without any AML reporting obligations.⁴⁷

The types of AML/CFT vulnerabilities in these reports led FinCEN to begin issuing Geographic Targeting Orders (GTOs) in January 2016 (“Real Estate GTOs”). The Real Estate GTOs required title insurance companies to file reports and maintain records concerning all-cash purchases of residential real estate above a certain threshold in select metropolitan areas of the United States. Under 31 U.S.C. 5326, FinCEN may issue such GTOs that impose additional reporting or recordkeeping requirements on financial institutions and nonfinancial trades or businesses in a geographic area for a limited period of time, if FinCEN has reasonable grounds to conclude that such requirements are necessary to carry out the purposes of the BSA or to prevent evasions thereof.⁴⁸ The Real Estate GTOs initially required some of the largest title insurance companies in the United States to report “beneficial ownership”⁴⁹ information on “legal

⁴⁷ Other businesses in the real estate industry have estimated even higher rates of non-financed transactions. For instance, Redfin, a nationwide real estate brokerage, reported that 30% of home sales were all-cash transactions between January and April 2021. “Share of Homes Bought With All Cash Hits 30% for First Time Since 2014,” Redfin.com (Jul. 15, 2021), <https://www.redfin.com/news/all-cash-home-purchases-2021/>; *see also* “Buying a house? Here’s where all-cash deals are most competitive,” CNBC.com (Dec. 12, 2020), <https://www.cnbc.com/2020/12/11/buying-a-house-heres-where-all-cash-deals-are-most-competitive.html> (reporting that Realtor.com, a nationwide real estate listing website, indicated that 36 percent of home sales in the U.S. were non-financed). Accordingly, the use of the NAR and Census Bureau estimates are therefore conservative, and if anything, the scope of the money laundering vulnerability they create is much worse.

⁴⁸ *See* 31 U.S.C. 5326; 86 FR 62914 (Nov. 15, 2021).

⁴⁹ For the GTO, “beneficial owner” has been defined as an individual who, directly, or indirectly, owns 25 percent or more of the equity interests of the legal entity that purchased the residential property. For the purposes of this ANPRM the term “beneficial owner” refers to that term as defined in the Real Estate GTOs and not the term as defined by the Corporate Transparency Act, Title LXIV of the AML Act.

entities”⁵⁰ used to purchase “residential real property”⁵¹ in Manhattan and Miami in “Covered Transactions”.⁵² The information that the GTOs required the title insurance companies to report included: (i) information about the transaction, including the price and address of the real estate purchased; and (ii) beneficial ownership information—such as name, social security number, and ID number and type—for the beneficial owners of certain legal entities purchasing property in Covered Transactions. The responsibility for reporting information to FinCEN was placed on title insurance companies because the title insurance industry is concentrated among a limited number of participants and title insurance companies play a central role in the vast majority of real estate transactions. This allowed FinCEN to streamline implementation of the GTOs and the collection of information.⁵³

The Real Estate GTOs issued in 2016 provided FinCEN and law enforcement with new data that connected non-financed residential property purchases with the individuals who were the beneficial owners of the legal entities making those purchases.

⁵⁰ For the purposes of the 2016 Real Estate GTO, “legal entity” meant a corporation, limited liability company, partnership, or other similar business entity, whether formed under the laws of a state or of the United States or a foreign jurisdiction. In later Real Estate GTOs, FinCEN excluded from the definition of legal entity any entity for which the shares are publicly traded on a U.S. stock exchange.

⁵¹ For purposes of the Real Estate GTOs, “residential real property” means real property (including individual units of condominiums and cooperatives) designed principally for the occupancy of from one to four families.

⁵² Here, “Covered Transaction” means a transaction reportable under the GTO. The 2016 GTO defined Covered Transactions as transactions involving a covered business where: (i) a legal entity; (ii) purchased residential real property; (iii) located in the Borough of Manhattan in NY, or Miami-Dade County in Florida; (iv) for a total purchase price of \$1,000,000 or more in Miami, or \$3,000,000 or more in Manhattan; (v) the purchase was made without a bank loan or other similar financing; and (vi) the purchase was made, at least in part, using a monetary instrument (*e.g.*, a cashier’s check, currency or a money order). Later Real Estate GTOs changed the parameters of Covered Transactions to include new geographic areas, modify the reporting threshold, and cover additional payment methods.

⁵³ Such reports were made to FinCEN by submitting existing BSA reporting forms. Initially title insurance companies reported GTO information to FinCEN via FinCEN Form 8300 (Report of Cash Payments Over \$10,000 Received in a Trade or Business). Later iterations of the Real Estate GTO required the GTO information to be reported via FinCEN Form 104 (Currency Transaction Report).

FinCEN began to receive feedback from law enforcement partners that the information was useful for generating new investigative leads, identifying new subjects in ongoing cases, and informing forfeiture efforts, among other things. To further understand the links between opaque transactions and individuals engaged in potentially illicit activity, and to give law enforcement more time to analyze and use the newly collected data, FinCEN renewed the initial GTOs and included additional metropolitan areas.

Since 2016, and most recently in October 2021, FinCEN has renewed the Real Estate GTOs multiple times (collectively, the Real Estate GTO program) and made modifications to their terms to address perceived gaps in the data collected. The number of covered jurisdictions has expanded from two to nine metropolitan areas,⁵⁴ and the orders now cover all U.S. title insurance companies operating in those areas. Subsequent GTO renewals have expanded the types of reportable all-cash transactions to include those involving additional monetary instruments, such as personal and business checks, and those involving wire transfers.⁵⁵ Over the course of the Real Estate GTO program, FinCEN lowered the reporting transaction threshold from \$3 million to \$300,000 in order to better understand the risks of transactions in the non-luxury market.⁵⁶ Lastly, real

⁵⁴ These areas are: (1) the Texas counties of Bexar (includes San Antonio), Tarrant, and Dallas; (2) the Florida counties of Miami-Dade, Broward, and Palm Beach; (3) all New York City boroughs: Brooklyn, Queens, Bronx, Staten Island, and Manhattan; (4) the California counties of San Diego, Los Angeles, San Francisco, San Mateo, and Santa Clara; (5) the City and County of Honolulu in Hawaii; (6) the Nevada county of Clark (includes Las Vegas); (7) the Washington county of King (includes Seattle); (8) the Massachusetts counties of Suffolk and Middlesex (includes Boston and Cambridge, respectively); and (9) the Illinois county of Cook (includes Chicago).

⁵⁵ This expansion of the GTOs to cover wire transfers was authorized by the Countering America's Adversaries through Sanctions Act ("CAATSA"), Pub. L. 115-44 (Aug. 2, 2017) (codified at 31 U.S.C. 5326).

⁵⁶ FinCEN found that money laundering risks existed at lower price thresholds, and thus the current GTO set a \$300,000 threshold for all covered jurisdictions.

estate transactions involving purchases by publicly traded companies have been exempted.⁵⁷

Evidence of money laundering via U.S. real estate transactions has increased over the last several decades, including during the period when the Real Estate GTO program has been in place. FinCEN understands from various law enforcement agencies that the Real Estate GTO data has been highly useful to the investigation of money laundering and financial crimes.

In evaluating reporting from the Real Estate GTOs issued since 2016, FinCEN and law enforcement agencies believe that a substantial proportion of the reported transactions for the purchase of property involved a beneficial owner who was also the subject of a SAR.⁵⁸ For example, a FinCEN advisory published in May 2017 stated that the proportion of such overlap was more than 30%.⁵⁹ In other words, a significant number of the beneficial owners of the legal entities engaged in non-financed real estate purchases reported under the GTOs have a nexus to reported suspicious activity. The overlap between subjects of GTO reports and SARs suggests a link between all-cash purchases of residential real estate and individuals determined by financial institutions to have been engaged in suspicious activity. These connections between Real Estate GTO reports and other illicit activity have proven highly useful for FinCEN and law

⁵⁷ FinCEN concluded that the beneficial owners of real estate purchases by publicly traded companies are identifiable through other regulatory filings.

⁵⁸ Notably, during the GTO program, independent of any GTO reports, SARs filed by banks related to suspected money laundering in residential real estate transactions increased.

⁵⁹ See “Advisory to Financial Institutions and Real Estate Firms and Professionals,” Financial Crimes Enforcement Network, FIN-2017-A003, p. 5 (Aug. 22, 2017).

enforcement in identifying patterns of criminal activity and links between various illicit enterprises to support investigations.

Law enforcement input and actions further indicate that residential real estate presents significant money laundering risk. Federal and State law enforcement agencies have informed FinCEN that both SARs and GTO reports related to real estate transactions have provided greater insight regarding assets held by persons of investigative interest, have resulted in asset forfeiture actions, and have helped generate leads and identify new subjects for investigation. Additionally, beyond the investigations that have been described above, a review of complaints, indictments, and prosecuted cases provides numerous examples of the linkages between real estate transactions and money laundering, as well as other illicit activities.⁶⁰ Accordingly, the usefulness of the Real Estate GTO reporting data to law enforcement suggests that a regulatory requirement to ensure consistent reporting on a nationwide basis would facilitate law enforcement and national security agency efforts to combat illicit activity in this sector.⁶¹

VI. Commercial Real Estate

In contrast to FinCEN's use of Real Estate GTOs to focus on all-cash transactions involving residential real estate, FinCEN decided at the time not to impose a reporting requirement on all cash commercial real estate transactions. The commercial real estate market is both more diverse and complicated than the residential real estate market and

⁶⁰ See Note 3 *supra*.

⁶¹ Moreover, one study found that the Real Estate GTOs had the added ameliorative effect of decreasing anonymous capital flows into the U.S. housing markets, thereby lessening the overall likelihood of BSA evasion via the real estate sector. See Hundtofte, C. Sean and Rantala, Ville, "Anonymous Capital Flows and U.S. Housing Markets," University of Miami Business School, p. 23 (May 28, 2018); *see also* Nicholas Nehemas & Rene Rodriguez, "How dirty is Miami Real Estate? Secret home deals dried up when feds starting watching," Miami Herald (Jul. 18 2018), <https://www.miamiherald.com/news/business/real-estate-news/article213797269.html>.

presents unique challenges to applying the same reporting requirements or methods as residential transactions. In commercial real estate, possible payments structures are more complex than in the residential real estate market. For example, while the line between financed and non-financed transactions is relatively well-defined in the residential real estate market, this is not necessarily the case with commercial real estate transactions. An entity may, for example, finance the purchase of a large commercial property via the issuance of bonds. It is unclear whether such a transaction would be viewed to be a cash transaction from the point of view of the entities required to report such a transaction. A commercial real estate “transaction” may also involve many transactions. In some cases, such as the development of a large commercial real estate project, there may be many transactions involved in the development and conveyance of a commercial real estate property over the course of months or years.

In part due to such added complexity and opacity, the risks and vulnerabilities associated with the residential real estate sector covered by the GTOs may be compounded in transactions involving commercial real estate, as there are additional types of purchasing options and financing arrangements available for parties seeking to build or acquire property worth up to hundreds of millions of dollars.⁶² Lawyers, accountants, and individuals in the private equity fields—all positions with minimal to no AML/CFT obligations under the BSA—often facilitate commercial real estate transactions, working at different stages of the transaction and operating with differing amounts of beneficial ownership and financial information related to buyers and sellers.

⁶² “COVID-19 and the Future of Commercial Real Estate Finance,” Congressional Research Service (Oct. 19, 2020).

Commercial real estate transactions also often involve purpose-built legal entities and indirect ownership chains as parties create tailored corporate entities to acquire or invest in a manner that limits their legal liability and financial exposure.⁶³ The result is an opaque field full of diverse foreign and U.S. domiciled legal entities associated with transactions worth hundreds of millions of dollars that makes up one of the United States' most lucrative industries.

Broadly speaking, FinCEN has serious concerns with the money laundering risks associated with the commercial real estate sector. In its 2006 and 2011 reports, FinCEN detailed various types of suspicious transactions indicative of money laundering in the commercial real estate industry. In the 2006 report, FinCEN analyzed a random sampling of SARs involving commercial real estate-related transactions in which the SAR narratives described transactions or activities involving suspected money laundering and related illicit activity. The types of illicit activity found in that analysis included: structuring, money laundering, international transfers, tax evasion, and other illicit activity. Among the report's key findings, FinCEN found that property management, real estate investment, realty, and real estate development companies were the most commonly reported entities associated with commercial real estate-related money laundering. The most suspicious activity highlighted in the report was money laundering to promote tax evasion. The report further noted that there appeared to be an increasing trend towards using commercial real estate-related accounts to launder money for PEPs.⁶⁴ In the 2011 report, which focused on commercial real estate financing fraud, FinCEN

⁶³ See generally Douglas E. Cornelius, Esq. Goodwin Procter LLP, John P. O'Neill, Esq. Holland & Knight, LLP, "Closing Commercial Real Estate Transactions," (May 9, 1995).

⁶⁴ See generally "FinCEN Sees Growth in Suspected Money Laundering in Commercial Real Estate Industry," Financial Crimes Enforcement Network (Dec. 05, 2006).

found that SAR filings involving such fraud almost tripled between 2007 and 2010.

FinCEN's analysis found that the top four reported fraud categories were: false documents, misappropriation of funds, collusion-bank insider, and false statements.⁶⁵

In 2018, the National Money Laundering Risk Assessment noted the vulnerability of commercial real estate to illicit activity, highlighting a 2013 case involving the laundering of drug proceeds by a real estate agent through real estate, including commercial properties.⁶⁶ More recently, DOJ actions have demonstrated that vulnerabilities associated with the commercial real estate sector are actively being exploited by criminals to launder a significant amount of funds. DOJ actions have exposed, for example, drug trafficking organizations funneling illicit proceeds into an investment firm and then using the proceeds to invest in commercial real estate ventures,⁶⁷ and corrupt Russian officials and organized crime figures defrauding the Russian Treasury and then transferring the fraud proceeds through shell corporations into Manhattan commercial real estate.⁶⁸

Finally, in August 2021, the NGO GFI reported that based on its review of 125 cases from the United States, United Kingdom, and Canada involving real estate money laundering, more than 30% of the cases involved commercial real estate and those cases

⁶⁵ See "Commercial Real Estate Financing Fraud: Suspicious Activity Reports by Depository Institutions from January 1, 2007–December 31, 2010," Financial Crimes Enforcement Network, p. 1 (Mar. 2011).

⁶⁶ "National Money Laundering Risk Assessment," p. 38 (2018).

⁶⁷ "Justice Department Seeks Forfeiture of Third Commercial Property Purchased with Funds Misappropriated from PrivatBank in Ukraine," Press Release, Department of Justice (Dec. 30, 2020), <https://www.justice.gov/opa/pr/justice-department-seeks-forfeiture-third-commercial-property-purchased-funds-misappropriated>; *U.S. v. Real Property at 7505 and 7171 Forest Lane, Dallas, Texas 75230*, Case No. 1:20-cv-23278, Doc. 1 (S.D. Fl. Aug. 6, 2020).

⁶⁸ "Acting Manhattan U.S. Attorney Announces \$5.9 Million Settlement of Civil Money Laundering and Forfeiture Claims Against Real Estate Corporations Alleged to Have Laundered Proceeds of Russian Tax Fraud," Press Release, Department of Justice (May 12, 2017), <https://www.justice.gov/usao-sdny/pr/acting-manhattan-us-attorney-announces-59-million-settlement-civil-money-laundering-and>.

generally involved significantly higher property values than the residential real estate cases studied.⁶⁹

In sum, while the Real Estate GTOs to date have not included commercial real estate transactions, FinCEN invites comments on the money laundering risks and structure of the commercial real estate sector so that it may proactively consider possible next steps with respect to reporting or other requirements in relation to commercial real estate transactions given the demonstrated vulnerability of the commercial real estate industry to exploitation. FinCEN is particularly interested in comment concerning the volume and/or type of money laundering vulnerabilities associated with commercial and with residential real estate, and any unique factors or complexities regarding non-financed transactions in each segment, to enable FinCEN to assess appropriate regulatory treatment for residential and commercial real estate purchases.

VII. Real Estate Purchases by Natural Persons

FinCEN recognizes the potential for non-financed purchases by natural persons to facilitate money laundering and other illicit activity. Indeed, the use of natural person nominees can facilitate money laundering involving domestic and foreign bribery and corruption schemes, sanctions evasion, tax evasion, drug trafficking, and fraud, among other types of offenses. As highlighted in the 2020 National Strategy for Combating Terrorist and Other Illicit Financing, a Treasury assessment of federal cases involving real properties forfeited to DOJ's Assets Forfeiture Fund between 2014 and June 2017 that were valued at over \$150,000 identified that, in addition to the use of complicit

⁶⁹ "New Report Finds U.S. Real Estate Sector a Safe Haven for Money Laundering," Press Release, Global Financial Integrity (Aug. 9, 2021), <https://gfintegrity.org/press-release/new-report-finds-u-s-real-estate-sector-a-safe-haven-for-money-laundering/>.

professionals and misuse of legal entities, “criminals often attempted to conceal the true ownership of property by using nominee purchasers or title holders.”⁷⁰ These individuals were sometimes another member of the criminal organization but were often a family member or personal associate of the criminal.⁷¹ FinCEN is considering the extent to which these risks can be addressed. Accordingly, FinCEN solicits comments on money laundering risks associated with non-financed real estate transactions conducted by natural persons, the extent to which rules that apply to entities (which may still be involved in transactions by natural persons) would address those risks, and whether additional regulatory or statutory measures should be considered to close remaining gaps with regard to natural persons associated with real estate transactions.

VIII. Scope of Potential Rules

Given the vulnerabilities of the U.S. real estate sector to money laundering and other illicit activities, FinCEN believes that additional regulatory steps may be needed to ensure consistent reporting on a nationwide basis.

FinCEN therefore invites comment through this ANPRM on appropriate regulatory frameworks to do so, including possible nationwide recordkeeping and reporting requirements pursuant to 31 U.S.C. 5318(a)(2) or other potential mechanisms. FinCEN believes that any proposed regulation should require certain persons to collect, report, and retain information about specified non-financed purchases of real estate. FinCEN is considering proposing such a rule that would apply throughout the United States and would contain no lower reporting dollar threshold.

⁷⁰ “National Strategy for Combatting Terrorist and Other Illicit Financing,” pp. 17–18 (2020).

⁷¹ *Id.*

A. Nature of Recordkeeping and Reporting Requirements

As explained above, FinCEN's existing regulations require banks, RMLOs, and GSEs to comply with the BSA's general recordkeeping and reporting requirements, including the requirement to file SARs and to establish AML/CFT programs. In contrast, FinCEN's GTOs have subjected title insurance companies in the non-financed real estate market to a more specific reporting requirement applicable to all covered transactions. FinCEN seeks comment on promulgating a similar specific reporting requirement, either as an alternative or addition to the BSA's general requirements. Such a specific reporting requirement could be imposed under 31 U.S.C. 5318(a)(2), as amended by Section 6102(a) of the AML Act, which authorizes the Secretary to "require a class of domestic financial institutions . . . to maintain appropriate procedures, including the collection and reporting of certain information as the Secretary of the Treasury may prescribe by regulation, to . . . guard against money laundering, the financing of terrorism, or other forms of illicit finance." A specific reporting requirement issued under this authority may be an appropriately tailored way to increase the transparency of the non-financed sector of the real estate market and provide law enforcement, national security agencies, and financial institutions with highly useful information

In the alternative, FinCEN could promulgate more general requirements for certain persons involved in non-financed real estate closings and settlements by requiring such persons to file SARs pursuant to FinCEN's authority under 31 U.S.C. 5318(g)(1) and by requiring them to establish AML/CFT programs under 31 U.S.C. 5318(h)(1)–(2). Such an approach would involve the application of AML/CFT program rules that traditionally include four requirements—adoption of AML/CFT policies and procedures,

designation of an AML/CFT compliance officer, establishment of an AML/CFT training program for appropriate employees, and independent testing of the program to ensure compliance.⁷² FinCEN seeks comments on how such requirements, as well the fifth requirement, CDD rules⁷³ containing beneficial ownership requirements, would affect the real estate industry.⁷⁴ In evaluating any potential imposition of general AML/CFT requirements, FinCEN must consider the extent to which the standards for AML/CFT programs are commensurate with the size, location, and activities of persons in this industry. Accordingly, FinCEN is especially interested in comments that would allow it to consider such factors. FinCEN is also particularly interested in the costs, burdens, and benefits associated with the implementation of AML/CFT programs, SAR reporting, and other FinCEN regulatory requirements. Commenters are urged to address the ability of various real estate-related businesses to gather this information for greater transactional transparency, as well as to support the effective administration of a SAR reporting program.

FinCEN seeks comment on the approach that would most effectively address money laundering concerns and minimize burdens for persons involved in non-financed real estate transactions.

B. Scope of Persons Subject to a Reporting Requirement

⁷² See, e.g., “Rules for Loan or Finance Companies,” 31 CFR 1029.210.

⁷³ 81 FR 29398 (May 11, 2016) (codified at 31 CFR 1010.230 and other sections in chapter X). For certain categories of financial institutions, FinCEN has included explicit requirements to conduct customer due diligence and to identify and verify the identity of beneficial owners of legal entity customers, subject to certain exclusions and conditions. See generally *id.*

⁷⁴ See generally 86 FR 17557 (Apr. 5, 2021).

FinCEN seeks comment on which persons should be required to collect information, maintain records, and report information regarding non-financed purchases of real estate. Thus far, the Real Estate GTOs have required reporting from title insurance companies. However, title insurance is not mandatory in every jurisdiction within the United States, and declining to purchase title insurance could enable evasion of a reporting requirement limited to title insurance companies. FinCEN therefore seeks comment on whether there are other persons involved in non-financed real estate closings and settlements who should be considered.

Typical closing transactions may involve several participants, performing distinct, but complementary, functions, in addition to the buyer and seller. A typical real estate transaction, for example, may involve real estate brokers and agents (representing sellers and buyers); one or more attorneys who represent the buyer or the seller; a title or title insurance company representative, which may include an attorney; a closing agent (title or escrow); an appraiser, who may assess the value of the real estate; and an inspector to identify code violations and needed repairs before closing.

Certain transaction participants may also be better positioned than others to understand the nature and purpose of the transaction, the source of funds, and the identity of the buyer, particularly natural persons or the beneficial owners behind any legal entity purchaser. Other transaction participants may have greater importance to the successful completion of a transaction or face different incentives, which may suggest that they could be well-positioned and motivated to identify owners behind legal entities in the transaction.

In addition, the participants and the nature of their involvement can vary depending on a variety of factors, including state and local laws, the contemplated use of the real estate, the location of the property, the location and nationality of the buyer, the nature of the rights to be acquired, and how such rights are to be held or transferred upon resale of the property or via terms of an investor agreement. Real estate may also be held directly, through one or more shell holding companies, through trusts, or through other investment vehicles. Real estate may be acquired for a number of purposes, including residential or commercial use, portfolio investment, or development purposes, among other reasons. As to the nature of the rights to be acquired, the real estate may be held in *fee simple*, under a lease agreement, or as security for indebtedness. In addition, real estate transactions can involve the transfer of title, legal ownership, or equitable ownership, or a combination thereof. Each of the variables may influence the participants involved in such real estate transactions.

Real estate professionals may have different roles in different transactions that affect their exposure to money laundering. Some professionals may be directly involved in marketing and structuring a real estate deal and are thus able to identify all relevant parties to the transaction. Other participants may have business roles that may not be customer-facing or may focus specifically on the details of the property without any knowledge of the financing (or lack thereof), and therefore are not in a position to identify parties for recordkeeping and reporting purposes. Finally, it may be relevant to identify those financial institutions or nonfinancial trades or businesses that are primarily involved in the transfer and presentation of purchase funds in exchange for title or other rights.

To address money laundering concerns, it may be necessary to ensure that a recordkeeping and reporting requirement attaches to some entity involved in every non-financed transaction. At the same time, FinCEN seeks to minimize the burden on reporting entities and to avoid unnecessary and duplicative reporting. FinCEN seeks comments on whether to assign a hierarchical, cascading reporting obligation on different entities depending on which are involved in a particular covered transaction, in a manner similar to the IRS's regulation for submitting Form 1099-S ("Proceeds from Real Estate Transactions").⁷⁵ For that IRS regulation, the "person responsible for closing the transaction," which may be a settlement agent or attorney, for instance, depending on the nature of the transaction, is required to file the Form 1099-S. And if there is no "person responsible for closing the transaction," the reporting requirement then falls to other persons involved in the transaction, such as the purchaser's broker. In that way, the IRS regulation ensures that for every transaction, some entity involved is required to report. FinCEN is considering, and invites comments on, such an approach. FinCEN also solicits comments on whether and how to assign a reporting requirement to any or all of the following entities: title insurance companies, title or escrow companies, real estate agents or brokers, real estate attorneys or law firms, settlement or closing agents, as well as other entities listed below in the comments section.

FinCEN also invites comments on any additional financial institutions or nonfinancial trades or businesses that should be covered by a proposed regulation. Finally, FinCEN is aware that there are substantial differences in practices, customs, and

⁷⁵ See 26 CFR 1.6045-4 (Information reporting on real estate transactions with dates of closing on or after January 1, 1991).

requirements for real estate transactions in different jurisdictions within the United States and invites comment on those differences and how to best design a rule that takes into account such jurisdictional differences.

C. Geographic Scope and Transaction Threshold

Although the Real Estate GTOs have been targeted at particular geographic locations within the United States, FinCEN's preliminary view is that fully addressing the money laundering vulnerabilities in the real estate market requires a nationwide rule. While money laundering activity in real estate transactions may be more common in some areas than others, it can occur in any location. Indeed, a survey of recent state and federal court indictments and prosecuted cases demonstrates that real estate money laundering is not limited to the jurisdictions covered by the Real Estate GTOs.⁷⁶ Because such activity can occur in any location, limiting the scope of the regulations by geography may simply push money laundering activity into other locations. A uniform national requirement would also provide consistency and predictability to businesses

⁷⁶ See, e.g., *United States v. Real Property Located in Potomac, Maryland, Commonly Known as 9908 Bencross Drive, Potomac, MD 20854*, Case No. 20-cv-02071, Doc. 1 (D. Md. Jul. 15, 2020) (purchase of property in Potomac, MD); *United States v. Raul Torres*, Case No. 1:19CR390, Doc. 30 (N.D. Ohio Mar. 30, 2020) (purchase of multiple properties in Cleveland, OH); *United States v. Bradley*, No. 3:15-cr-00037-2, 2019 U.S. Dist. LEXIS 141157 (M.D. Tenn. Aug. 20, 2019) (purchase of multiple properties in Wayne County, MI); *United States v. Coffman*, 859 F. Supp. 2d 871 (E.D. Ky. 2012) (purchases of properties in Kentucky and South Carolina); *United States v. Paul Manafort*, Case 1:18-cr-00083-TSE, Doc. 14 (E.D. Va. Feb. 26, 2018) (purchase of a property in Virginia); *United States v. Miller*, 295 F. Supp. 3d 690 (E.D. Va. 2018) (purchase of properties in Virginia and Delaware); *Atty. Griev. Comm'n of Md. v. Blair*, 188 A.3d 1009 (MD Ct. App. 2018) (purchase of properties in Washington, DC and Maryland); *United States v. Patrick Ifediba, et al.*, Case No. 2:18-cr-00103-RDP-JEO, Doc. 1 (N.D. Ala. Mar. 29, 2018) (purchase of multiple properties in Alabama); *United States v. Delgado*, 653 F.3d 729 (8th Cir. 2011) (purchase of multiple properties in Kansas City, MO); *United States v. Fernandez*, 559 F.3d 303 (5th Cir. 2009) (purchase of multiple properties in El Paso, TX); *United States v. 10.10 Acres Located on Squires Rd.*, 386 F. Supp. 2d 613 (M.D.N.C. 2005) (purchase of two properties in North Carolina); *State v. Harris*, 861 A.2d 165 (Super. Ct. App. Div. 2004) (purchase of multiple properties in a non-GTO-covered jurisdiction in New Jersey); see also Lakshmi Kumar & Kaisa de Bel, "Acres of Money Laundering: Why U.S. Real Estate is a Kleptocrat's Dream," *Global Financial Integrity*, p. 29 (Aug. 2021) (highlighting money laundering cases outside of jurisdictions covered by the Real Estate GTOs).

required to maintain records and make reports. FinCEN nevertheless invites comment on the geographic reach of any proposed regulation, whether the geographic coverage should be limited, and any underlying information to support such limitations. Commenters are invited to comment particularly on the differences in practices, customs, and requirements for real estate transactions in geographic areas of the United States that merit specific consideration because of their relevance to the potential for the abuse of real estate transactions by money launderers.

FinCEN also welcomes comment on the appropriate transaction threshold, if any, for a reporting requirement. FinCEN's GTOs contain a \$300,000 threshold. Other BSA reporting requirements have other thresholds.⁷⁷ However, any transaction threshold may enable money launderers to structure their behavior to avoid a reporting requirement. A survey of court cases indicates that real estate used in money laundering is not limited to properties that sell for greater than \$300,000, the current GTO threshold.⁷⁸ For these reasons, FinCEN is considering a reporting requirement with no transaction threshold. According to figures published by NAR, existing residential home sales of less than \$100,000 constitute less than 5% of overall sales.⁷⁹ Therefore, not setting a minimum threshold appears unlikely to substantially increase the burden on entities required to

⁷⁷ See, e.g., 31 U.S.C. 5316(a)(1)(requirement to report importing or exporting monetary instruments of more than \$10,000 at one time); 31 CFR 1010.330(a)(requirement to report receipt of currency in excess of \$10,000 in the course of trade or business).

⁷⁸ See, e.g., *United States v. Bradley*, No. 3:15-cr-00037-2, 2019 U.S. Dist. LEXIS 141157 (M.D. Tenn. Aug. 20, 2019) (multiple transactions under \$10,000); *Atty. Griev. Comm'n of Md. v. Blair*, 188 A.3d 1009 (MD Ct. App. 2018) (several transactions under \$20,000); *United States v. Coffman*, 859 F. Supp. 2d 871 (E.D. Ky. 2012) (purchases of property for under \$150,000); *United States v. Delgado*, 653 F.3d 729 (8th Cir. 2011) (multiple transactions under \$100,000); *United States v. 10.10 Acres Located on Squires Rd.*, 386 F. Supp. 2d 613 (M.D.N.C. 2005) (transaction under \$50,000).

⁷⁹ "Summary of August 2021 Existing Home Sales Statistics," National Association of Realtors (Sep. 22, 2021).

report under any future regulation. FinCEN solicits comments, however, on whether a minimum threshold should be included.

D. Purchases by Certain Entities

Under the Real Estate GTOs, only cash purchases by the following “legal entities” are reportable transactions: “a corporation, limited liability company, partnership or other similar business entity, whether formed under the laws of a state, or of the United States, or a foreign jurisdiction, other than a business whose common stock or analogous equity interests are listed on a securities exchange regulated by the Securities and Exchange Commission (“SEC”) or a self-regulatory organization registered with the SEC, or an entity solely owned by such a business.” Given the known money laundering typology of using shell companies to obscure the ultimate owners of real estate, FinCEN believes these entities should likely be covered in any proposed regulation. FinCEN seeks comment on which “legal entities” should be included.

Additionally, FinCEN seeks specific comment on whether to include trusts—broadly defined as a legal “relationship in which one person holds title to property, subject to an obligation to keep or use the property for the benefit of another”—within the reporting requirement.⁸⁰ FinCEN notes that recent high profile DOJ enforcement actions, including a forfeiture action to recover an alleged \$3.5 million in corrupt proceeds laundered through the purchase of a Potomac, Maryland, mansion via a trust,

⁸⁰ “Definition of Trust,” Internal Revenue Service, <https://www.irs.gov/charities-non-profits/definition-of-a-trust>.

indicate that consideration of any proposed rule should also include the risks presented by U.S. and foreign trusts.⁸¹

Due to the inherent opacity of purchases by legal entities, the Real Estate GTOs focused on purchases by such entities. However, FinCEN is also concerned about real estate money laundering risks involving natural persons, such as the use of nominees or “straw-man” purchasers. FinCEN is thus considering the extent to which any proposed rule should address this issue. FinCEN is particularly interested in comments broadly addressing the most appropriate way to treat natural persons in regulations addressing money laundering in the real estate sector. Moreover, FinCEN seeks views on how the use of natural persons in money laundering schemes could be addressed by potential rules covering entities (which may still be involved in most transactions by natural persons).

E. Type of Real Estate

FinCEN is considering the best approach to extending reporting requirements or other regulatory treatment to both residential and commercial real estate given the important differences between the residential and commercial real estate markets. FinCEN is especially interested in how such a regulation might be structured to address the differences between commercial and residential real estate transactions and whether the risk in non-residential real estate is sufficient to justify the burdens that a reporting requirement for non-residential real estate could impose. FinCEN also invites comments on whether to address both commercial and residential real estate sectors in the same rule or to take an iterative approach.

⁸¹ See *United States v. Real Property Located in Potomac, Maryland, Commonly Known as 9908 Bentscross Drive, Potomac, MD 20854*, Case No. 20-cv-02071, Doc. 1 (D. Md. Jul. 15, 2020).

IX. Request for Comment

FinCEN seeks comments on the questions listed below, but invites any other relevant comments as well. FinCEN encourages commenters to reference specific question numbers to facilitate FinCEN's review of comments.

A. General information regarding the real estate market

FinCEN is issuing this ANPRM to solicit public comment on issues pertaining to potential BSA recordkeeping and reporting requirements. FinCEN invites the views of real estate businesses and professionals, trade organizations, law enforcement, federal agencies, state, local, and Tribal governments, NGOs, members of civil society, and any other interested parties. A variety of perspectives on the U.S. real estate market will provide FinCEN with the information essential for any future rulemaking.

1. Describe a typical residential real estate transaction.
2. Describe a typical commercial real estate transaction.
3. What are the products, services, activities, or affiliations associated with residential real estate transactions? Commercial real estate transactions?
4. What percentage of residential real estate transactions involve purchases by legal entities or trusts?
5. What kinds of professionals are most common in real estate transactions, such as real estate brokers, settlement agents, title insurers, attorneys, etc.? Does this differ for residential and commercial real estate? What kinds of professionals or participants are most able to request, verify, and report documentation related to purchasers? Is title insurance required in most of the transactions? If not, how common is the use of title insurance?

6. What are the typical transaction costs to close a residential real estate deal?
For commercial real estate? Typically, what percentage of the sale price do these costs represent?
7. What sort of due diligence is normally conducted, before or at closing, regarding (i) the parties to a transaction (particularly of any natural persons who are the beneficial owners of the buyer or seller); (ii) the source of funds for any transaction; and (iii) other key aspects of the transaction? Does this process differ for commercial and residential transactions?
8. What sort of existing recordkeeping or reporting requirements, unrelated to BSA compliance, exist for real estate transactions? If so, what information must be recorded or reported, to whom, for how long, and what entity provides oversight and ensures compliance? Do these requirements differ for residential and commercial real estate transactions?
9. Please describe any “best practices” related to due diligence on the seller and buyer of residential or commercial real estate; confirmation of the legality of the transaction; inquiries as to the source of acquisition funding; and any other issues that may relate to the marketing, negotiation of terms, and closing of the transaction.
10. What percentage of residential real estate purchases are all-cash transactions?
11. What percentage of commercial real estate purchases are all-cash transactions?

12. Are the beneficial owners of legal entity purchasers involved in real estate transactions normally identified by some participant in a real estate transaction?
13. How do due diligence processes, if any, differ for commercial or residential properties?
14. What do persons involved in real estate transactions do if they have any suspicions about a transaction, customer, or source of funds?
15. How often are attorneys used in all-cash residential or commercial real estate transactions? Why are they used?
16. How often are real estate brokers or agents used in all-cash residential real estate transactions? Why are they used?
17. Is the decision to use real estate brokers, or agents, or attorneys different for all-cash real estate transactions?
18. Please describe when an escrow account must be used for a real estate transaction.
19. Please explain how payment is most often tendered for real estate purchases (e.g., mortgage, domestic wires, foreign wires, checks, currency, CVC).
Which of these categories of payment are higher-risk?
20. Please note any differences not already covered in provision of services for residential real estate transactions versus those for commercial real estate transactions.

B. What are the money laundering risks in real estate transactions?

FinCEN solicits comment on money laundering activities (in general terms, not identifying actual parties or properties involved) in connection with real estate transactions, the existence of any safeguards in the sector to prevent money laundering, and what additional steps may be necessary to protect the real estate industry from abuse by money launderers.

21. Describe the potential money laundering and illicit finance risks and vulnerabilities arising in the U.S. real estate market. Are these risks different for the residential and commercial real estate sectors?
22. Identify specific activities and services that present the highest and lowest money laundering risks, as well as factors related to parties, the transaction, and the property, bearing on risk and its assessment. What kinds of transactions and customers are highest and lowest risk? How are those risks mitigated and what are the associated costs of that mitigation?
23. What are the money laundering risks associated with all-cash purchases of real estate by natural persons?
24. Is it possible to estimate the extent to which residential property values are affected by money laundering transactions? Is there a similar estimate for commercial real estate?
25. What are the money laundering risks of commercial versus residential transactions?

C. Which real estate transactions should FinCEN's rule cover?

The questions in Part IX, Sections C–E, may be most relevant for any proposed rule imposing a specific reporting requirement pursuant to 31 U.S.C. 5318(a)(2), as

amended by Section 6102(c) of the AML Act, but commenters may examine these questions in the context of a proposed rule promulgating traditional AML/CFT requirements for “persons involved in real estate closings and settlements.”

26. What general factors should FinCEN consider in determining which transactions to cover?
27. Should FinCEN’s proposed rule be limited to residential real estate or should FinCEN cover transactions involving other forms of real estate (*e.g.*, commercial, farmland). If you believe FinCEN should cover other forms of real estate, should FinCEN do so in conjunction with the regulation of residential real estate transactions or separately?
28. How should FinCEN define “residential real estate”? Is the definition used for the Real Estate GTOs either under- or over-inclusive?
29. How should FinCEN define “commercial real estate”?
30. Should FinCEN’s proposed rule be limited to transactions involving legal entities or should it cover natural persons as well? If not, why?
31. Assuming FinCEN’s proposed rule is limited to purchases by legal entities, which legal entities should any rule cover? Is the definition of “legal entity” in the Real Estate GTOs too broad or too narrow? Should trusts be covered?
32. Should FinCEN’s proposed rule be limited to non-financed transactions (all-cash)?
33. Assuming FinCEN’s proposed rule is limited to non-financed transactions, how should FinCEN define the term “non-financed transaction”?
34. Should FinCEN geographically limit the scope of any proposed regulation?

35. Are there any jurisdictions or geographic areas within the United States in which residential real estate transactions have unique customs or requirements that would make designing a rule to cover such jurisdictions in conjunction with the remainder of the country problematic?
36. Should FinCEN provide a lower limit or *de minimis* amount for the reporting threshold for transactions?

D. Which persons should be required to report information concerning real estate transactions to FinCEN?

37. Should FinCEN require any, a subset, or all of the following entities to report information regarding non-financed transactions: (i) real estate lawyers and law firms; (ii) real estate agents/brokers/settlement agents; (iii) title insurance companies; (iv) title and escrow agents and companies; (v) real estate investment companies; (vi) real estate development companies; (vii) real estate property management companies; (viii) real estate auctions houses; (ix) investment advisers; (x) private money lenders; and (xi) money service businesses?
38. Which financial institutions and nonfinancial trades and businesses are in a position to ascertain and report: (i) the identity of the legal entity or legal arrangement purchaser of the real estate; (ii) the natural person(s) who are the direct or indirect owners of the legal entity or arrangement purchaser; (iii) the specific details of the transactions (*e.g.*, date of sale, location of property, sale price, and any other terms or conditions); (iv) the source of funds; (v) the form of payments (*e.g.*, wire transfer, check, currency, etc.); (vi) the purpose of the

transaction; (vii) the intended use of the proceeds of a sale; and (viii) the businesses involved in the transfer of funds?

39. What are the potential benefits and costs of promulgating a transaction reporting requirement that covered real estate brokers and agents, title agencies and/or insurance companies, or attorneys? What burden (quantify if possible) would it place on such entities?
40. What would be the best way to assign reporting requirements to ensure a reporting requirement falls on at least one financial institution or nonfinancial trade or business for every non-financed transaction by a legal entity purchaser?
41. Should FinCEN require reports from multiple financial institutions or nonfinancial trades or businesses involved in a non-financed purchase of residential real estate, or should FinCEN propose a reporting requirement via a cascading hierarchy based on the types of entities involved in a particular transaction, as is the case for IRS Form 1099-S?⁸²
42. What should FinCEN consider when assigning the reporting burden with respect to potential evasion of the reporting requirements?

E. What information should FinCEN require regarding real estate transactions covered by a proposed regulation?

43. What information should FinCEN require to be reported regarding the legal entity (or if applicable, natural person) purchasing real estate in a covered transaction?

⁸² See generally 26 CFR 1.6045-4.

44. Should FinCEN require information about the seller? If so, what information should FinCEN require regarding the seller?
 45. What information should FinCEN require about the financial institution or nonfinancial trade or business reporting the transaction to FinCEN?
 46. What information should FinCEN require regarding the real estate underlying the transaction?
 47. Should FinCEN require information regarding the source of funds used to purchase real estate?
 48. How can FinCEN craft the information required to avoid overly burdensome or duplicative reporting requirements?
 49. How should FinCEN require reports under any potential regulation be filed? Should FinCEN utilize an existing BSA form or develop a new reporting form for any proposed regulation?
- F. What are the potential burdens or implementation costs of a potential FinCEN regulation?*
50. What would be the costs, burdens, and benefits associated with collecting, storing, and reporting real estate transactional information to FinCEN?
 51. How would FinCEN's regulatory requirements be integrated into your current compliance program?
 52. How much time will you need to successfully integrate these requirements into your current systems and procedures?
 53. Estimate the initial projected cost of implementation and the projected long-term support costs for ongoing program maintenance. Do you anticipate

being able to integrate implementation costs into your existing compliance-related budget?

54. Would certain financial institutions or nonfinancial trades or businesses incur higher costs compared to others? Why?
55. If program or other requirements were limited to purchases above a certain price threshold, how would this affect: (i) the burden of implementing such potential rules; and (ii) the utility of such potential rules for addressing money laundering issues in the real estate market?
56. What are the key benefits for a particular stakeholder (e.g., a business, if the commenter is a business), if any, assuming issuance of the rules?
57. Are there alternative methods you believe FinCEN should consider as part of the overall rulemaking process that would effectively address the risk of money laundering in the all-cash real estate market? Please describe in detail.
58. What would be the costs, burdens, and benefits associated with requiring a new form that would report key elements of information deemed highly significant by FinCEN?
59. Please list any legislative, regulatory, judicial, corporate, or market-related developments that have transpired since FinCEN issued the 2003 ANPRM that you view as relevant to FinCEN's current proposed issuance of AML regulations.

G. Should FinCEN promulgate general AML/CFT recordkeeping and reporting requirements for "persons involved in real estate closings and settlements"?

As explained above, FinCEN is considering promulgating a specific reporting requirement under 31 U.S.C. 5318(a)(2), as amended by Section 6102(c) of the AML Act, and the questions in Part XI, Sections C–E relate to such a requirement. The following questions for comment are generally intended to collect information about a potential rule that would instead apply traditional AML/CFT requirements to “persons involved in real estate closings and settlements” in lieu of a more specific requirement.

60. How should the term “persons involved in real estate closings and settlements” be defined?
61. What general factors should FinCEN consider in determining the scope of such a rule? That is, what businesses involved in residential or commercial real estate transactions should be required to comply with any potential rules, and what businesses should be excluded? What kinds of transactions, if any, should be excluded?
62. What are the potential benefits and costs to including real estate brokers and agents, title agencies and/or insurance companies, or real estate attorneys in the definition of “persons involved in real estate closings or settlements”?
63. Describe any requirements that FinCEN could promulgate that adequately address these risks apart from typical AML/CFT programs, recordkeeping, and reporting obligations.
64. Describe your views on whether typical customer identification and verification, AML, SAR, and CTR rules would appropriately address risks in the real estate market and what burden they would entail. What specific

factors or characteristics in your business model would justify deviating from the typical AML/CFT program, recordkeeping, and reporting obligations?

65. What are the benefits and drawbacks of a new form requirement to file key information deemed important by FinCEN versus full AML/CFT program requirements? Which would be better and why?
66. Are there particular concerns that smaller businesses may have regarding the implementation of an AML/CFT program?
67. Please describe any programs that persons involved in real estate closings and settlements may already have in place to meet existing legal obligations, in addition to the requirement to report on Form 8300 the receipt of over \$10,000 in currency and certain monetary instruments. In addition, detail your views on any voluntary best practices or guidelines you adopted to prevent money laundering, fraud or other financial crimes, the effectiveness of those programs, and whether any such practices should be integrated into any AML/CFT or SAR rules.
68. Do you think it is appropriate for customer identification and verification requirements to be applied to persons purchasing and selling real estate? Would such requirements lead to a change in your business practices?
69. Please detail any aspects of possible FinCEN rules that may cause your business to operate at a competitive disadvantage compared to any businesses that offer similar services, if such businesses would be outside the scope of any FinCEN rules.

70. Should due diligence requirements, if any, apply equally with respect to buyers and sellers or should only buyers be included? Should it apply to all or should only certain types of buyers and sellers included?
71. Should AML/CFT programmatic requirements, if any, apply to residential transactions, commercial transactions, or both?
72. Should the rules be structured to require collection of information about only the most vulnerable or high-risk transactions? If so, how could FinCEN minimize the burdens of such a requirement?
73. Should FinCEN implement information collection requirements only for transactions meeting a specified cost or value threshold? Should other criteria or standards be included to trigger such collection requirements?
74. How might such a rule impact your business? What benefits, costs, and burdens does the commenter anticipate if all the AML/CFT requirements in the CDD rules are incorporated into any proposed rules?
75. Assuming FinCEN proposes to issue traditional AML requirements, please describe the major impacts the business expects upon issuance of final rules. What specific requirements in these regulations do you expect may have the greatest impact on your operations?
76. Assuming FinCEN proposed to issue a new form requirement, what information should be included, to what AML/CFT benefit, and would the ability to mitigate or prevent money laundering risk in the industry be reduced when compared to implementing traditional AML/CFT requirements?

77. How would FinCEN's regulatory requirements be integrated into your business' current compliance program?
78. How much time would a covered business need to successfully integrate AML/CFT requirements into current systems and procedures?
79. Estimate the initial projected cost of implementation, and the projected long-term support costs for ongoing program maintenance. Do you anticipate being able to integrate or share implementation costs into your existing compliance-related budget?
80. Would certain businesses incur higher costs compared to others? Why?
81. If program or other requirements were limited to purchases above a certain price threshold, how would this impact: (i) the burden of implementing such potential rules; and (ii) the utility of such potential rules for addressing money laundering issues in the real estate market?
82. What are the key benefits for your business, if any, assuming issuance of the rules?

X. Regulatory Planning and Review

This advance notice of proposed rulemaking is a substantive, non-significant regulatory action under Executive Order 12866 and has not been reviewed by the Office of Management and Budget.

XI. Conclusion

With this ANPRM, FinCEN seeks input on the questions set forth above.

FinCEN welcomes comments on all aspects of the ANPRM, and all interested parties are encouraged to provide their views.

By the Department of the Treasury.

Dated: December 2, 2021.

Himamauli Das,
Acting Director,
Financial Crimes Enforcement Network.