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Via Electronic Mail to regcomments@fincen.treas.gov

June 9, 2003

Financial Crimes Enforcement Network ("FinCEN")
P.O. Box 39
Department of the Treasury
Vienna, VA 22183-0039

ATTN: Section 352 "Real Estate Settlements"

Re: Advance Notice of Proposed Rulemaking; Anti-Money Laundering Program Requirements for "Persons Involved in Real Estate Closings"; 31 CFR 103

Dear Sir or Madam:

LandSafe, Inc. ("LandSafe") is a settlement service provider and vendor manager for the mortgage lending industry. As a wholly owned subsidiary of Countrywide Financial Corporation ("CFC"), it has provided various settlement services since its creation in 1994. Through its various subsidiaries, LandSafe offers value-added real estate closing services for the residential real estate market. The services include appraisal, credit reporting, flood determination, inspection services and title and escrow products.

LandSafe appreciates the opportunity to comment upon the above-referenced, proposed rulemaking (the "Proposal"). As a settlement services provider involved with real estate closings, LandSafe is uniquely positioned to understand the Proposal and its possible impact upon consumers, lenders and the various settlement providers. It is clear that many settlement service providers are concerned that the Proposal will complicate their current operations and will not provide the meaningful benefits to FinCEN's objectives that would justify its adoption as to residential transactions.

General Comments

Depending upon the final rule that results from the Proposal, it could have a broad impact upon the settlement participants and lenders. LandSafe will focus its comments primarily on those aspects of the Proposal that will directly affect settlement service providers like LandSafe. We also agree with and support many of the comments submitted by the Mortgage Bankers Association of America ("MBA") and the American Land Title Association ("ALTA"), and some of the issues that they have raised will be discussed herein in more detail.

Before turning to the specific issues raised by FinCEN in the Proposal, there are a few general policy considerations that should be identified. First, as stated by the MBA in its comments, the definition of "person(s) involved in real estate closing" should be limited to those who have a direct, hands-on role in the real estate transaction. There are

relatively few participants in real estate transactions who can realistically launder money and FinCEN must try to identify and "control" those participants in a way that will not adversely or unreasonably impact the other parties involved with the transactions. This concern is also related to the issue that the Proposal should focus upon the actual closing activities that are provided by a particular participant, rather than the name or type of institution that is involved.

Second, we believe that residential real estate transactions are a very poor vehicle for laundering money. Although it is possible that repeat refinancings or property flipping schemes could be used to launder funds, real property is relatively illiquid and the source of funds for the vast majority of residential purchases are provided by regulated lenders that are already responsible under the Bank Secrecy Act ("BSA") for "know-your-customer" issues and the oversight of loan fundings.

Therefore, it would be much more effective for FinCEN to focus on the initial source of funds, which would better identify wrongdoers who obtain large sums of cash that could be used later to begin the repeat refinancings or other efforts to launder the funds. The key is to stop the initial cash from being received by the bad actor, rather than trying to follow the cash through subsequent "cleansing" transactions. Therefore, anti-laundering efforts must use and enforce the existing Suspicious Activity Report and Cash Transaction Report rules under the BSA. It is unlikely that settlement agents would be able to identify anything but the most obvious suspicious activities or laundering efforts.

Furthermore, it is much more likely that commercial real estate ventures, using fictitious corporations with multiple investor/owners, will provide a more effective way to transfer and launder large sums of money. Commercial transactions can involve corporate entities that are minimally tracked by the states where they are created. Corporate checks for large sums can be used at closings with almost no oversight or control. False information can be easily provided for directors; shares of stock can be transferred for little or no consideration; cash can also be transferred and co-mingled by wrongdoers through corporate accounts for false expenses; large payments can be hidden within corporate accounts and transactions; and lenders have often been misled by false financial records to provide large, multi-million dollar loans. The S&L crisis showed that lenders can be lulled into making bad loans to bad people, but the bulk of the damage was caused by commercial deals, not residential transactions. The same is true for the money laundering issue that FinCEN is currently trying to address.

Issues Submitted for Comments

The following specific comments are provided in response to the four (4) issues raised in the Proposal:

1. What Are the Money Laundering Risks in Real Estate Closings and Settlements?

At the outset, it is interesting to note that the real estate transaction itself is not the critical event in any of the specific stages or "phases" of money laundering identified in the Proposal. The crux point of laundering "risk" at each phase of the laundering process is that checks are obtained from some type of bank or financial institution and then used in the real estate closing. The fact that the suspects or bad actors use real estate

transactions is secondary to the fact that the funds were initially received and then laundered. This confirms the above comments on this point.

ALTA (American Land Title Association) has submitted a list of possible “red flag” situations and they have been listed in the Proposal. Five (5) of those may be objectively suspicious enough to be recognized by the realtor(s), mortgage broker(s) and/or closing or escrow agent(s) involved with a given transaction. However, the following three (3) scenarios are too subjective and should not be included in the list of suspicious activities.

- Where a person is acting, or “appears to be acting”, as an agent for an undisclosed party and is reluctant or unwilling to provide information about the party or the reason for the agency relationship;
- Where a person does not “appear” to be sufficiently knowledgeable about the purpose or use of the real estate being purchased;
- Where the person “appears” to be buying and selling the same piece of real estate within a short period of time or is buying multiple pieces of real estate for no “apparent” legitimate purpose;

The above scenarios do not have an objective, factual basis to determine if the actions are truly suspicious. Whether a closing agent “feels” or “suspects” that a client is acting strangely, or does not have the requisite level of knowledge to buy a home, could result in unfair and discriminatory actions against that customer. Various federal statutes prohibit lenders from discriminating against homebuyers, and that underlying principle has become the norm throughout the residential real estate market. However, there are no such limits on commercial transactions, and commercial brokers routinely inquire about the financial strength of would-be purchasers. In fact, some level of financial due diligence by commercial brokers is expected by both sellers and lenders.

Further, any residential settlement or closing agent that makes accusations against anyone should be concerned about civil liability for wrongfully accusing a customer about their intentions. There must be objective facts as to suspicious activities in order to support any actions against a customer. It would be fairly unusual for a settlement agent or realtor to ask a residential customer why they are buying a piece of property, or whether they have a “legitimate purpose” to do so. Realistically, in addition to the civil liability issues, it seems unlikely as a matter of normal business practice that residential settlement service providers would challenge customers as described above.

Current Safeguards

FinCEN has asked commentators to identify any safeguards that are currently in place in the industry which guard against money laundering, and what additional steps may be necessary to protect the industry from abuse by money launderers. Most settlements or closings involve the provision of a deed of title, mortgage deed or deed of trust, as well as other documents that must be notarized. Most states also have specific requirements for notaries to confirm a signatory’s identity, as well as some level of recordkeeping for the signatures that are notarized. The requirement of a government issued, official identification card, passport or other document is the single most important and effective safeguard against money laundering in the residential real estate market.

Secondly, as discussed above, the existing Bank Secrecy Act provides an effective tool to prevent large cash transfers and to report suspicious activities. Most, if not all, settlement agents and service providers are familiar with the $10,000 cash limits imposed by the BSA. As described in the Countrywide comment letter, most lenders also have pre-closing, due diligence file reviews that are used to assure that the borrowers, property and documents all "match" and are correct. Although these procedures are not specifically designed to identify money laundering, they could be useful in recognizing bad faith efforts to change the names of property owners, or to provide sham mortgages. Finally, the recent problems with property "flipping" around the country have resulted in new FHA rules and heightened awareness by lenders and title insurance underwriters of the problem.

2. How Should "Persons Involved in Real Estate Closings and Settlements" Be Defined?

FinCEN has asked commentators to help define the above concept and to identify those entities or individuals which can "effectively identify and guard against money laundering ..." As described in the Proposal, the above phrase is not defined in the BSA, its 2001 amendments dealing with terrorist activities, nor in its legislative history. Therefore, FinCEN must first determine if residential settlement servicer providers should be included within the concept of "financial institutions" under the BSA. For the reasons described above, there are solid arguments to support the position that residential transactions should be excluded from BSA coverage altogether.

Turning to commercial transactions, the definition of the phrase is easier and its likely impact more logical. FinCEN has identified that a person's involvement with the " … <u>actual flow of funds …</u>" (emphasis added) is a significant factor in defining the term, and it is a persuasive point. Therefore, one could use the control and/or actual transfer of funds as the determining factor for the coverage of the Proposal. Unless a party actually handles the funds, or has a reasonable basis, within the custom and practice of the industry, to know the details of transaction funding, they should be exempt from the Proposal. The "reasonableness" test used includes the concept of a party being unaware, or put on "inquiry" notice, or having "actual" notice of a party's suspicious activities.

FinCEN lists the following transaction participants as possible subjects for commentary. Using the above definition and criteria as a measurement for evaluating the below participants in commercial real estate matters, we have set forth those parties we believe should be *excluded* under this Proposal:

- A *title insurance company*, since they are focused upon the chain of title and usually have no knowledge of the flow of funds. However, title agents who also handle the closing or settlement would be covered with regard to those duties.
- An *appraiser or inspector*, since they are not involved in the flow of funds. Although they may be involved with flipping, it is important to distinguish between fraudulent transactions, *per se*, and money laundering.

However, commercial real estate agents and brokers often have detailed knowledge about the parties and the financial aspects of deals. Their "point-of-sale" control could be

useful in enforcing an anti-money laundering program, since they often have first-hand knowledge about the transaction parties and recommend lenders to their customers.

In addressing this issue, it is helpful to identify other individuals or entities that are definitely *not* in a position to safeguard against wrongdoing. That issue is discussed in more detail below.

3. Should Any Persons Involved in Real Estate Closings or Settlements Be Exempted From Coverage Under Section 352?

We agree with Treasury's statement in the Proposal that there are categories of "persons" or entities which should be exempted hereunder because they are already subject to similar requirements or the risk is sufficiently small as to warrant those entities being exempt. An example of the first type would be financial institutions, credit card issuers, loan and finance companies and others which are already subject to such regulations or were included in an earlier request for comments being considered by FinCEN.

Turning to the second category that should be excluded from the Proposal, FinCEN must decide whether residential loan transactions should be covered. As stated previously herein, LandSafe would argue against such inclusion as being overly broad and not supported by a balancing of the adverse costs and inconvenience against the public policy benefits to be achieved by such regulation. However, given that position, the following participants should be excluded in any case:

- *Title abstractors*: these participants rarely know the financial details about pending transactions. They are usually independent contractors who work for title insurance companies or provide title searches to closing agents. They are often sole-proprietors and their business is fast-paced and based upon the volume of searches that can be performed in a day. Further, their function involves a review of the land records to determine if title is "clear"; they do not usually focus on detailed transactional "histories" that would identify flips or suspect transfers. Simply stated, they make a list of liens and then check-off the releases of those liens, as quickly as possible. They receive minimal compensation for a very narrow job function that has become even more limited in recent times.

  If they are included in the Proposal, or required to expand their job function to identify "suspect" transactions, their fees will undoubtedly increase significantly, and that increase will be passed onto consumers.

4. How Should the Anti-Money Laundering Program Requirement for "Persons involved in Real Estate Closings and Settlements" Be Structured?

The two specific areas addressed in this request are (1) the viability of such a program with a smaller company or sole proprietorship; and (2) programs companies currently have in place that would serve the purposes of preventing fraud and other illegal activities.

The above discussion should make it clear that there is a legitimate distinction to be made between residential loan service providers and commercial real estate

professionals. There are fewer sole practitioners in the commercial real estate market and those that exist usually have a level of sophistication to handle compliance with the Proposal. This is distinctly different from the residential market service providers, who are more often smaller firms and/or sole proprietors. Unfortunately, the nature of money laundering requires that all of the participants in commercial real estate transactions who handle the "flow of funds", as described above, should be required to comply with the Proposal. Otherwise, would-be wrongdoers would be able to use the smaller establishments that are exempt from compliance.

As for current programs to prevent fraud, the types of procedures described in the Proposal should be reasonable to prevent commercial transaction money laundering. Larger firms that handle such work already are familiar with the filing of Suspicious Activity Reports and have procedures in place to prevent fraud and better control the disbursement of funds. Most residential loan service providers would have to implement new procedures, hire new staff and increase residential closing costs to effectuate the type of programs required by the Proposal.

Perhaps a new "Source of Funds Affidavit" could be required for commercial transactions, requiring borrowers to confirm the source of funds used to acquire property. Transactions that involve flips might be more apparent, as would repeat refinancings. It would also provide an objective vehicle for commercial closing agents to inquire about suspicious transactions or funding sources.

Conclusion

FinCEN must carefully consider the impact that the Proposal will have upon settlement service providers. There must be a clear showing that the final Proposal will help to prevent money laundering without adversely impacting consumers or the settlement service providers upon which they rely. The final Proposal must strike a balance between the national security interest in preventing money laundering and the need to maintain the residential real estate industry and the efficient settlement services that have supported it so well during the last decade.

If FinCEN decides to include residential closing agents and service providers in the final Proposal, it must demonstrate a clear and convincing need for such a broad program. Unless residential transactions can be shown factually, with specific data, to be an existing problem of significant proportions, FinCEN should refrain from causing the increase in costs that the Proposal would likely cause within the residential real estate market.

Sincerely,

Donald H. Blanchard

Cc: Michael Faine, COO

Sandor E. Samuels, Esq.