ACMA

AMERICAN COLLEGE OF MORTGAGE ATTORNEYS

June 6, 2003

VIA E-MAIL

Financial Crimes Enforcement Network (FinCEN)
United States Department of Treasury
Attn: Section 352 Real Estate Settlements
P.O. Box 39
Vienna, VA 22183-0039

Re: *Proposed Rules Concerning Anti-Money Laundering Requirements for "Persons Involved in Real Estate Closings and Settlements"*

Ladies and Gentlemen:

The American College of Mortgage Attorneys ("ACMA") herewith submits its comments to the Treasury Department's Financial Crimes Enforcement Network ("FinCEN"), in response to the request for public comment on the advance notice of its proposed rule with respect to those "persons involved in real estate closing and settlements" who should, in accordance with Section 352 of the USA Patriot Act ("Act"), be involved in formal anti-money laundering investigations and submissions to FinCEN.

ACMA is an organization of attorneys located in all 50 states who are skilled and experienced in the preparation of residential and commercial real estate mortgages, lending transactions secured by real estate, and related practice. ACMA includes in-house attorneys and private practitioners who have distinguished themselves in lecturing, writing, publishing, teaching, drafting, and legislation (other than as a legislator) and have been selected by their peers as acknowledged specialists in this field. The comments submitted herewith are solely those of ACMA. FinCEN has stated that it is "particularly interested in receiving comments addressing commercial real estate transactions." The vast majority of ACMA members are highly experienced and knowledgeable in commercial real estate transactions, and the following comments are confined primarily to a discussion of the effect of the proposed rule on such transactions.

ACMA submits that mortgage and real estate attorneys should not be subject to any requirements under the Act, i.e., they should be exempt from being considered as "financial institutions" or "involved in "real estate closing and settlements". These "financial institutions" would have substantial due-diligence obligations to insure that their clients are not abusing their services for money-laundering purposes. These duties would include (at a minimum) development of internal policies, procedures and controls; designation of compliance officers; ongoing employee-training programs; and audit functions to test compliance programs. The imposition of such obligations would, in our opinion, significantly – and detrimentally -- alter the attorney-client relationship in connection with an attorney's representation of parties to a real estate transaction involving the transfer by a deed, or otherwise, and/or the financing of real estate. As

15245 SHADY GROVE ROAD • SUITE 130 • ROCKVILLE, MD 20850
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cogently stated in the comments of the ABA Task Force on Gatekeeper Regulation and the Profession, any requirement that attorneys report to the federal (or any) government regarding the activities of their clients "would undermine the independence of the bar from the government, erode the essential trust relationship between the attorney and the client which is a bedrock of the U.S. administration of justice and rule of law, and compromise the principle of confidentiality in communications between the lawyer and the client".

The attorney-client privilege is, as noted by the ABA Task Force on Gatekeeper Regulation and the Profession, a "bedrock" of the American system of jurisprudence. It protects clients against (among other things) government persecutions and overzealous or unwarranted regulation. The importance of the attorney-client privilege and the rules concerning client confidentiality cannot be overstated. These rules, as set forth in the state bar ethical rules in effect in virtually every state and in the American Bar Association Model Rules of Professional Conduct, prohibit attorneys from revealing information relating to the representation of clients without their consent. This preserves the attorney-client relationship by assuring the client that full and frank communication can occur without fear of disclosure of that communication to third parties. The single exception to this rule has been a recent modification to the state bar rules in many states, which requires attorneys to divulge information disclosed by clients when such disclosure may be necessary to prevent the commission of a crime or death or bodily harm to others. However, under this very limited exception, attorneys have no obligation to conduct investigations of clients – and, indeed, they are neither in a position to do so nor do they typically have the background or training for such investigations. The proposed rule would dramatically undermine the attorney-client relationship and create a serious and unresolvable conflict of interest, i.e., if clients are advised that they may be or are currently being investigated by their attorneys for governmental purposes, they will be understandably reluctant to confide in their attorneys or be able to obtain legal advice regarding sensitive and proprietary information. Attorneys participating in such a system would be serving two masters, i.e. the government and the client.

In addition, attorneys who are sole practitioners or practice in smaller firms simply will not be able, on a cost-effective basis, to carry out the functions required under the proposed rule. They will not have the time, financial means, or ability to develop the requisite internal policies, hire compliance officers, or provide training programs -- and certainly will not be able to establish and carry out independent audit functions involving the client's intentions and the source of its funds, which additionally would place attorneys in the awkward, and perhaps unethical, position of informing on their clients to federal authorities without their clients' knowledge or consent. To impose such requirements on attorneys would significantly increase the cost of legal services and may even cause some attorneys to abandon this area of the practice of law. This in turn would create major business disruptions throughout the country, particularly in non-urban areas where such attorneys provide virtually all of the legal services required by their clients. At the very least, it would be prudent to establish minimum volume and dollar-amount thresholds on real estate attorneys to avoid unduly burdening and regulating a multi-trillion dollar industry.

It would be more practical and effective to impose the requirements of the proposed rule only on those "financial institutions" that are customarily and directly involved in providing or

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handling funds at commercial real estate purchase and financing transactions, such as banks, insurance companies, and other mortgage lenders. The procedures mandated by the proposed rule would not be unduly burdensome for such institutions (which are already subject to numerous governmental reporting and regulatory requirements, including "know your customer" requirements and the reporting of transactions relative to receipts of over $10,000 in currency and other monetary instruments) or change their basic operations, nor would they inhibit commercial transactions as would application of the proposed rules to attorneys. ACMA is not aware of any cost-benefit studies or empirical data that demonstrate that the applicability of the proposed rule to attorneys involved in real-estate closings would achieve the results desired by FinCEN.

With respect to mortgage loan closings involving institutions that make commercial mortgage loans to purchasers of real property who either are individuals or entities such as corporations, limited liability companies or partnerships, the imposition of the requirements of the proposed rule on attorneys would provide no apparent benefit. As noted above, most of these loans involve funding by financial institutions that are already subject to anti-laundering and related governmental scrutiny and reporting requirements. To institute such requirements for attorneys would only mean that these closings would be significantly delayed in order to ensure compliance with the proposed rule and that there would be significant increases in transactional costs to all borrowers. Many closings (and almost all in some parts of the country) are conducted without the physical presence of the parties (who sign documents separately in advance and forward them to the lender or other party actually conducting the closing) or their attorneys, and/or involve individuals or the use of ownership entities that often are created for the specific purpose of holding title to the real estate. The institution of the proposed rule likely would require the attorneys for both lenders and borrowers to be present at the closing, along with all of their clients, in order to properly and completely investigate the individuals and/or entities receiving or providing funds at the closing. Such a requirement would often add a significant closing expense to clients. In addition, requiring individual attorneys or small firms to comply with the mandated procedures of the proposed rule may prevent such attorneys from economically handling such closings from a cost standpoint, because of the inability to spread the costs involved over a large number of clients. Further, it would seem impractical -- if not impossible --for attorneys representing borrowers to effectively investigate the source of funding of loans from financial institutions making the loans in question or to check the background of the principals of the parties to the transaction. The attorney, who may be acting only as local counsel in the transaction or may not even have met the client before the closing (or who very often will never meet the client at any stage of the transaction), often will have no knowledge of the identity of all the shareholders or the constituent members or partners of a corporate, limited liability company or partnership client that is purchasing property or obtaining a loan, especially at "second tier" or non-management levels. At the very least, an attorney involved in a real estate closing should be able to rely on a FIRPTA-type affidavit or certification from another participant at the closing as to the source and nature of the funds and/or the fact that such other participant has performed appropriate due-diligence functions regarding the parties to the transaction and their business purpose and constituent members, for the purpose of complying with applicable anti-laundering and terrorism statutes and regulations.

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In summary, ACMA believes that the proposed rule would: (1) dramatically and detrimentally change the nature and custom of real estate closings; (2) significantly and adversely affect the attorney-client relationship, delay loan closings and increase their cost with minimal benefit in return; (3) cause uncertainty, confusion and inefficiency in the closing process; (4) possibly force solo practitioners and small firms out of the business of closing real estate purchase-and-sale and loan transactions; and (5) unjustly and unnecessarily place attorneys attempting to comply with the rule in the position of potentially incurring severe sanctions and penalties for violating existing (and longstanding) rules of client confidentiality, conflict of interest, and attorney-client communications under long-standing state laws and ethical standards. The end result would be that an activity that has traditionally been the subject matter of state laws and regulations would become a matter of investigation and enforcement under federal law. In every state, existing laws and ethical rules prohibit attorneys from knowingly assisting their clients in any matter that is illegal or fraudulent (whether involving a financial transaction or otherwise). Furthermore, attorneys are already subject to existing money-laundering laws.

For the foregoing reasons, ACMA recommends that real estate attorneys be excluded from the definition of “persons involved in real estate closings and settlements” and be exempt from compliance with the proposed anti-laundering provisions of the Act. ACMA also believes that the proposed rule should not apply to secondary-market mortgage (or “capital markets”) transactions, i.e., where mortgage loans are “packaged,” securitized, and sold to investors. However, ACMA understands (and is supportive of) the reasoning and background leading up the proposed rule, and is willing to engage in a dialog with FinCEN to assist in the development of a meaningful, workable and practical rule with clearly defined guidelines.

Thank you for affording us the opportunity to express our views on this important matter.

Respectfully submitted,

Stephen A. Bromberg
President

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