C A T I C

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June 9, 2003

BY E-MAIL

ATTN: Section 352 – Real Estate Settlements
Financial Crimes Enforcement Network
United States Department of the Treasury
Email: regcomments@FinCEN.treas.gov

Re: Notice of Proposed Rulemaking – Anti-Money Laundering Requirements for Persons Involved in Real Estate Closings and Settlements

Dear Sir or Madam:

These comments on the proposed rule are submitted on behalf of Connecticut Attorneys Title Insurance Company (CATIC). CATIC is the nation's second largest Bar-Related® title insurance underwriter. The company has seven offices throughout New England, and issues its policies through a network of more than 2,500 attorney agents.

CATIC submits that real estate attorneys should **not** be subject to any Anti-Money Laundering Program (AML) requirements. If real estate attorneys are not exempted from AML requirements this would: (1) convert real estate attorneys from client advocates to de facto government agents; and (2) destroy client confidentiality and attorney-client privilege. The implementation by real estate attorneys of any AML program would: (1) duplicate the AML compliance efforts of banks and other traditional financial institutions; (2) delay the real estate closing process; and (3) result in significant compliance fees and expenses being passed on to the buyer or seller in a real estate transaction.

DISCUSSION

A. Client Confidentiality and the Attorney-Client Privilege Would Be Destroyed If Real Estate Attorneys Were Required To Perform AML

The purpose of the attorney-client privilege is to elicit "full and frank communication" between attorneys and their clients and thereby promote broader public interests by protecting the client's confidential communications from coerced disclosure.[1]

The attorney-client privilege and rules regarding client confidentiality have historically been left to the states in our Union to legislate and interpret.[2] The comments to the Bar Rules explain the basis for this rule:

> [a] fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation. The client is thereby encouraged to communicate fully and frankly with the lawyer ***even as to embarrassing or legally damaging subject matter***.[3]

The AML policies and procedures envisioned by Section 352 of the USA PATRIOT Act in effect would require "persons engaged in real estate closings and settlements" to report any suspicious information to law enforcement authorities that the customer or client might be a money launderer or terrorist financier. While the Advance Notice makes no mention of a reporting requirement, it is not unreasonable to expect some type of suspicious activity reporting obligation to be built into a real estate attorney AML program. Such a reporting procedure, of course, would destroy the attorney-client privilege.

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[1] See Swidler & Berlin, 524 U.S. at 403. See also Upjohn Co., 449 U.S. at 389 (stating that protecting confidential disclosures encourages full and frank communication between clients and their attorneys); Trammel v. United States, 445 U.S. 40, 51 (1980) (stating that attorney-client privilege rests on lawyer's need to know all relevant facts in order to provide effective legal advice); Fisher v. United States, 425 U.S. 391, 403 (1976) (stating that purpose of attorney-client privilege is to encourage full disclosure between clients and their attorneys); Hunt v. Blackburn, 128 U.S. 464, 470 (1888) (stating that effective legal assistance is not practically available unless client is free from apprehension of disclosure of his confidential communications to attorney).

[2] See, e.g., FED. RULE EVID. 501 advisory committee's note ("federal law should not supersede that of the States in substantive areas such as privilege absent a compelling reason. The Committee believes that in civil cases in the federal courts . . . there is no federal interest strong enough to justify departure from State policy.").

[3] Id. (emphasis added).

B. Imposition Of An AML Program Requirement On Real Estate Attorneys Would Be Duplicative Of Other AML Practices, Delay Closings And Dramatically Increase The Costs Of Real Estate Closings And Will Make Home Ownership Less Affordable.

From a practical perspective, the implementation of any AML program for real estate attorneys would: (1) be duplicative in light of other traditional financial institutions implementing their AML practices in any given closing; (2) lead to substantial delays in the real estate closing process; and (3) result in significant compliance expenses being passed on to the buyer or seller of a real estate transaction.

Most funds received by real estate attorneys come in the form of: (i) wire transfers inbound from a U.S. depository institution or from a U.S. correspondent of a non-U.S. bank; or (ii) checks or similar negotiable instruments. By the time purchasers and sellers come to the closing table they have already visited their respective banks and obtained official or cashier's checks or instructed their bank or broker dealer to wire funds into the account designated by the counter-party. In this respect, other financial institutions who already are required under Section 352 to have AML programs in place perform basic Know Your Customer (KYC) on the customer and, if appropriate, the source of funds. Any efforts by attorneys would be duplicative.

FinCen and Treasury have, in a similar advance notice of proposed rulemaking under Section 352, recognized an exemption for certain dealers in precious metals, stones or jewels because other "financial institutions" already are required to implement AML programs and, therefore, provide the necessary safeguard to mitigate money laundering risk.[4]

The proposal in the Advance Notice that real estate attorneys adopt Section 352-type AML programs would have the unforeseen consequence of converting common and relatively straightforward legal transactions into a protracted process. This delay could result in additional hours being added to the process, if not days.

In addition to the adoption of the written policies and procedures which have been discussed above, a Section 352-type AML program for real estate attorneys would also require the hiring or appointment of a compliance officer, the ongoing training of employees, and the auditing of the effectiveness of the AML program. To achieve compliance with these minimum requirements, real estate attorneys would be required to spend significant time and expense – much of which would be passed on to their clients.

[4] See United States Department of the Treasury, Anti-Money Laundering Programs for Dealers in Precious Metals, Stones, or Jewels, Advance Notice of Proposed Rulemaking, 68 Fed. Reg. 8,480, 8,482 (Feb. 21, 2003) ("Therefore, there is substantially less risk that a retailer that purchases goods exclusively or almost exclusively from dealers [already] subject to the proposed rule will be abused by money launderers.").

CATIC thanks the staff of Treasury and FinCEN for this opportunity to comment and appreciates the consideration of our views. Should there be any questions regarding our comments or regarding this letter, please feel free to contact Richard A. Hogan, Legislative and Regulatory Counsel.

Sincerely,

Richard A. Hogan
Legislative and Regulatory Counsel