

# 26 Hunter

Cendant Corporation

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United States Department of the Treasury  
Financial Crimes Enforcement Network  
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**ATTENTION: ANPRM- Sections 352 – Real Estate Settlements**

Ladies and Gentlemen:

I am writing on behalf of Cendant Corporation (Cendant) in response to the Financial Crimes Enforcement Network's ("FinCEN") advanced notice of proposed rulemaking (the "ANPRM") on 'persons involved in real estate closings and settlements' anti-money laundering obligations under the USA PATRIOT Act. *See* 68 Fed.Reg. 17569 (April 10, 2003). Cendant is a diversified global provider of business and consumer services within the hospitality, real estate, vehicle, financial and travel sectors. Cendant's hospitality division is the world's leading franchisor of hotels through ownership of brand names that include Ramada®, Days Inn®, Howard Johnson®, Travelodge®, Knights Inn®, Super 8 Motel®, Wingate Inn®, Villager Lodge/Premier® and AmeriHost®, a leading operator of branded time share resorts (Fairfield® and Trendwest®) and the world's leading time share exchange service (RCI®). In addition, Cendant is a leader in franchised residential real estate brokerage operations through Coldwell Banker, ERA and Century 21®. Cendant also owns NRT Incorporated, the largest residential real estate brokerage firm in the country. In addition, Cendant Corporation is a leading residential mortgage company (Cendant Mortgage) and provider of employee relocation services (Cendant Mobility).

The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001 (Public Law 107-56) section 352, requires financial institutions (as defined in the Bank Secrecy Act 31 U.S.C. 5312) (BSA), to establish anti money laundering programs to help prevent, detect and prosecute international money laundering and the financing of terrorism. As defined, the term "financial institution" is very broad and includes all "persons involved in real estate closings and settlements".

The ANPRM specifically requests public comment as to whether real estate brokers should be deemed a "financial institution" and thus subject to the USA Patriot Act. Real estate brokers should not be considered a financial institution under section 5312(a) (1) (U) of the BSA. Other than holding earnest money deposits in some state jurisdictions, real estate brokers do not receive or distribute money on behalf of the

parties to a real estate transaction. Thus the burden of compliance by brokers would likely outweigh any benefit in terms of detecting money laundering schemes.

For example, in certain states where a listing broker may serve as an escrow agent, the parties will sign a real estate contract and the broker will collect an earnest money deposit. The deposit is, typically 10 percent of the sales price (if the sales price is \$250,000 the agent would collect a deposit of \$25,000). The check is made payable to the listing brokerage company and is immediately deposited into the brokerage company's trust account. All funds deposited into the company trust account are subject to state trust rules and are not controlled by the broker. An example of typical trust fund restrictions is as follows:

- a. Sponsoring brokers shall deposit only escrow moneys received in connection with any real estate transaction in a company escrow account.
- b. Every escrow account shall be maintained at a federally insured depository.
- c. Commingling is prohibited. Each sponsoring broker shall deposit only escrow moneys received in connection with any real estate transaction in an escrow account. This account is separate from personal and other business accounts.
- d. The sponsoring broker shall provide a receipt to the payor of cash constituting escrow funds and shall retain a copy of the receipt.
- e. All escrow monies accepted by a sponsoring broker shall be placed in the escrow account not later than the next business day following the transaction.
- f. In the event of a dispute over the return or forfeiture of any escrow moneys, the broker shall hold the deposit until there is written authorization from all parties or until a civil action is filed, at which time payment may be made into the court or until the funds are turned over to the State Treasurer because of inactivity.
- g. Each sponsoring broker who accepts earnest money shall maintain at their place of business a bookkeeping system that consists of, a journal that shows the chronological sequence in which funds are received and disbursed; a ledger showing a single particular transaction or the respective parties to a buy/sell/lease relationship; a monthly reconciliation statement to ensure agreement between the journal, ledger and bank statements and; a master account log identifying all escrow account numbers, even if such account numbers fall under another

umbrella account number. All records shall be maintained for at least five years.

- h. Monies can only be withdrawn and released to the settlement service providers/closing agent from the trust account upon written authorization from both parties (buyer and seller).

Unless the regulations proposed by FinCen are carefully drafted, they could have the effect of including real estate brokers which engage in the brokering of real estate transactions notwithstanding that the direct handling of monies is an ancillary and de-minimus part of their core business. As described above, a real estate brokers' main objective is to facilitate the purchase or sale of the property. Brokers are not actively involved in the financial aspects of closings nor are brokers actively involved in the transfer of large sums. Accordingly, there is little risk of money-laundering occurring in connection with brokers. In addition, the regulations should not include real estate brokerage franchisors (i.e., Coldwell Banker, ERA and Century 21® systems). Real estate franchisor's do not even come into contact with customers, and do not receive or distribute any money on behalf of parties to a real estate transaction.

The nominal risk of money laundering does not outweigh the financial and administrative burden of the duplicative regulatory scheme contemplated. Federal and State regulations already require real estate brokers to report, on IRS Form 8300, the receipt of over \$10,000 in currency or monetary instruments and state trust rules regulate deposits, disbursement and record-keeping requirements. Real property sales – typically involving one or more brokers and purchasers and sellers- do not present money-laundering risks requiring significant additional regulation. More publicity about money laundering issues, rather than additional regulatory requirements, will better serve the Government's goals.

Cendant's comments are set forth below on the specific "issues for comment" identified in the ANPRM.

### **1. What are the money laundering risks in real estate closings and settlements?**

Real estate investment does not appear to be a choice vehicle for money laundering since it is not a liquid investment. Our experience reveals that sales do not involve a significant risk of money laundering in the industry. Other than holding earnest money deposits in some jurisdictions (money which the brokers do not control), real estate brokers do not receive or distribute money on behalf of the parties to a real estate transaction. Moreover, the broker will receive its commission only after the funds have flowed to the seller's settlement service provider. Real estate brokers do not receive or transmit money on behalf of the parties to a real estate transaction. The brokers are limited to receiving commission payments, almost exclusively by check, at the closing. In certain states where the broker holds the money in escrow, the same restrictions on

accepting cash and monetary instruments apply. The broker may not accept cash in excess of \$10,000, without completing Form 8300 and the deposit money is subject to state trust restrictions. In addition, even in the case of commercial sales the same provisions apply. An intermediary (usually an attorney or closing agent) are specifically-identified parties who are authorized to disperse the large proceeds at the closing table only after receiving written authorization from both buyer and seller.

Our view is that, in this specially controlled market for real estate sales where money laundering poses a minimal risk, existing law and practice adequately address real estate brokerage activities. To the extent that FinCEN regulates closing agents, it appears that duplication of information would occur in almost every transaction. Real estate brokers generally do not act as closing agents and typically rely upon title and escrow companies or attorneys in order to facilitate the financial aspect of these transactions.

**2. How should persons involved in real estate closings and settlements be defined?**

“Persons involved in real estate closings and settlements” should be defined to exclude persons tangentially involved in the closing of the purchase transaction and include only the person that disburses valuable consideration on behalf of the purchaser of real property. Therefore, real estate licensees, real estate brokers, licensed real estate sales associates and real estate brokerage franchisors should be excluded from the definition.

**3. Should any persons involved in real estate closings or settlements be exempted from coverage under section 352?**

Yes. Real estate brokers should be exempt. As noted above, sufficient controls exist to prevent money laundering by real estate brokers representing purchasers and sellers of real property. Moreover, to the extent that the Patriot Act may regulate lenders, mortgage companies, title companies and escrow companies, the information sought by the Government will already be provided.

**4. How should the anti-money laundering program requirement for persons involved in real estate closings and settlements be structured?**

Real estate brokers and sales associates are not persons involved in real estate closings and settlements. Therefore, they should be exempt from any anti money laundering program requirements. The real estate anti money laundering program requirements should apply to persons and businesses at greater risk for money laundering and other terrorist activity.

Thank you for considering Cendant's comments on FinCEN's advance notice of proposed rulemaking concerning anti-money laundering programs for persons involved in real estate closings and settlements.

Sincerely,