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June 9, 2003

Financial Crimes Enforcement Network
P.O. Box 39
Vienna, VA 22183-0039
Attention: Section 352 - "Real Estate Settlements"

Re: Notice of Proposed Rulemaking on Anti-Money Laundering Programs for "Persons Involved in Real Estate Closings and Settlements"

Ladies and Gentlemen:

Dechert LLP ("Dechert") appreciates the opportunity to comment on the Notice of Proposed Rulemaking issued pursuant to Section 352 of the USA PATRIOT Act[1] by the Financial Crimes Enforcement Network of the Department of Treasury, titled "Anti-Money Laundering Program Requirements for 'Persons Involved in Real Estate Closings and Settlements'" ("Proposal").[2]

Dechert is an international law firm with a wide-ranging real estate practice that serves clients worldwide. A large number of our real estate clients could potentially be subject to new anti-money laundering regulations as "persons involved in real estate closings and settlements" under the Proposal. The comments that follow reflect concerns that certain members of the finance and real estate industries, including some of our clients, have raised, but they represent our own views and are not intended to reflect the views of the clients of the firm.

In an effort to combat future terrorist attacks, Congress enacted the USA PATRIOT Act to broaden the government's powers to terminate financial opportunities for money launderers and potential terrorist financiers. Section 352 of the USA PATRIOT Act requires each "financial institution" to establish anti-money laundering programs. Title III of the Act broadens the definition of "financial institution" as used in the Bank Secrecy Act[3] to include thousands of new businesses, including persons involved in real estate closings and settlements. Many of these businesses are now subject to federal requirements to establish anti-money laundering programs, compliance training, and auditing in relation to their

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[1] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 252 (2001).
[2] 68 Fed. Reg. 17,569 (Apr. 10, 2003).
[3] 31 U.S.C. § 5312(a)(2)(A) (2002).

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financial activities. The Treasury Department deferred application of this requirement to persons involved in real estate closings and settlements for one year. The Proposal now seeks to extend these requirements to the real estate industry.

We fully support FinCEN in its aim of preventing money laundering and the financing of terrorist activities. While we agree with the principles underlying the measures required by the Proposal, we would like to express concern about the breadth of the application of the Proposal. Any regulation under the process begun with this Proposal should be narrowly crafted and reflect a careful balancing of the benefits to be obtained against the burden of potentially costly compliance. In this rule making process, the Treasury ought to carefully assess the quality of data likely to be produced by the potentially wide range of regulated parties and the likelihood of the availability of more and better data from other sources in connection with these transactions.

We believe the regulatory burden imposed under this Proposal should lay lightly on the commercial real estate industry because:

- First, commercial real estate transactions pose little money laundering risk since the illiquidity and transparency of real estate ownership are not attractive to money launderers. There is a lack of evidence showing that a substantial risk exists in this marketplace, especially when weighed against the burden that would be imposed by the regulations.

- Second, there already exists a comprehensive framework for the identification of money laundering activities with respect to depository institutions under the Bank Secrecy Act (Subchapter II, Chapter 53 of Title 31, United States Code) and under regulations which are likely to be issued under subsequent rule making activity with respect to commercial banks, loan and finance companies.

- Third, the commercial real estate sector provided a key stimulus for economic recovery, and the Proposal contemplates placing additional financial and administrative burdens on the industry. Imposing new reporting and record-keeping requirements could substantially increase settlement costs, stifling mortgage originations, real estate transfers, and capital formation which would weaken what has been a stabilizing factor in this time of economic uncertainty.

- Fourth, and finally, the multiplicity of participants in the commercial real estate transactional process such as appraisers, environmental engineers, surveyors, mortgage bankers and brokers, title agents and the like are unlikely to have any significant and important information bearing on the possibility of money laundering activities given their function in commercial real estate transactions and are generally small businesses unequipped to deal with significant regulatory training, policing, audit and record keeping responsibilities.

The following are Dechert's responses to specific questions that were posed in the Proposal.

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

The Treasury Department argues that "[t]he real estate industry could be vulnerable at all stages of the money laundering process by virtue of dealing with high value products."[4] Dechert recognizes that "traditional" financial institutions are not the only ones whose legitimate operations could be targeted as conduits for money laundering. However, Dechert believes that real estate transactions do not pose a significant money laundering risk.

Anonymity and liquidity, two characteristics important to money launderers, typically do not exist in real estate transactions. Real estate transactions generally involve illiquid and visible assets. As money launderers are primarily concerned with controlling funds without attracting attention to the underlying activity or the persons involved, real estate transactions would not be an attractive source to disguise illicit funds. Even more, money launderers would not be able to redeem real estate interests as quickly as they could using other means of laundering because real estate transactions, especially commercial real estate transactions, involve very low levels of liquidity.

Commercial real estate transactions are often not implicated in the placement or layering stages of money laundering, when launderers place and convert their illicit funds into the financial system. At the integration stage, in which the funds re-enter the legitimate market, the launderer could then choose to invest the funds into real estate. However, the *2002 National Money Laundering Strategy*[5] fails to identify commercial real estate transactions as a conduit for money launderers to integrate illicit funds into the economy.

Commercial real estate transactions are also less attractive to money launderers than other investments because of the substantial due diligence associated with the consummation of the transaction, all of which typically entails the investigation of the buyer's authority and ability to perform the transaction, as well as investigation of the condition and performance of the real estate. Typically, this investigation includes, at a minimum, the seller and the purchaser, and third party service providers engaged by them. The introduction of debt financing into a transaction ensures that close scrutiny is performed by the lender(s) associated with a transaction, and that the borrower's identity and financial standing are vetted along with the condition and performance of the real estate. The sale of real estate mortgages into the commercial secondary market for securitization purposes entails additional levels of scrutiny of property performance and the owner's ability to make timely interest and principal payments. Multiple avenues of due diligence scrutiny performed by diverse parties render commercial real estate an improbable vehicle for money laundering.

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[4] Anti-Money Laundering Program Requirements for "Persons Involved in Real Estate Closings and Settlements," 68 Fed. Reg. at 17,569.
[5] DEP'T OF THE TREASURY, THE NAT'L MONEY LAUNDERING STRATEGY FOR 2002 (2002), *available at* http://www.treas.gov/press/releases/dcs/monlaund.pdf.

The risk that commercial real estate vehicles would be used for money laundering is even more remote in that property acquired by terrorist organizations could not be readily sold without additional due diligence scrutiny of these organizations as sellers.

Additionally, the real estate industry has been proactive in identifying potential money laundering vulnerabilities. For example, the American Land Title Association has already identified potential "red flag" situations involving real estate transactions.[6] Yet the Proposal would subject the entire industry to new regulations. At a minimum, persons involved in real estate closings and settlements would have to develop anti-money laundering programs and collect certain information from customers, keep this information in readily-accessible formats for at least five years, and cooperate with law enforcement in turning this information over, all of these requirements notwithstanding the privacy requirements of other laws. These persons would have to sustain the burdensome economic and time constraints in order to train for compliance and establish periodic auditing systems. These requirements would unduly burden businesses that money launderers are unlikely to use. Put simply, in the absence of a clear showing that commercial real estate transactions serve as a source for abuse by money launderers, the Treasury Department should proceed with caution in imposing heavy regulatory burdens on the real estate industry. The real estate market has proven to be a source of stability and strength in the current economic downturn, and such impositions could slow down the market and negatively impact the economy.

II. How Should "Persons Involved in Real Estate Closings and Settlements" Be Defined? Should Any Person Involved in Real Estate Closings or Settlements Be Exempted From Coverage Under Section 352?

The Proposal casts a wide net in defining participants in real estate transactions to whom anti-money laundering regulations would apply. In construing "persons involved in real estate closings and settlements," FinCEN notes that "a reasonable interpretation of the [term] could . . . cover participants other than those who actually conduct the real estate settlement or closing."[7] Significantly, FinCEN suggests that the term could encompass any entity in "[t]he universe of participants in real estate transactions," including, among others, "[a] bank, mortgage broker, *or other financing entity*."[8] Such a broad definition could lead to significant new regulations being imposed on real estate agents, mortgage brokers, real estate escrow agents, real estate attorneys, title agents, appraisers, and commercial real estate financiers, among others.

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[6] Examples of "red flag" situations include transactions where (i) a customer tries to buy real estate in another name with no apparent reason, (ii) a customer acts as an intermediary for an undisclosed party and will not say why or comment on his or her relationship to the person, or (iii) a customer doesn't know much about the property he or she is buying. Anti-Money Laundering Program Requirements for "Persons Involved in Real Estate Closings and Settlements," 68 Fed. Reg. at 17,570.
[7] Anti-Money Laundering Program Requirements for "Persons Involved in Real Estate Closings and Settlements," 68 Fed. Reg. at 17,570.
[8] *Id.* (emphasis added).

First, Dechert recommends that the scope of coverage be limited to entities that otherwise are not and will not be subject to reporting and record-keeping requirements under the USA PATRIOT Act. Since certain entities could arguably fall under different categories of financial institutions that are or could potentially become subject to the USA PATRIOT Act, the regulations should explicitly specify that such entities are not considered "persons involved in real estate closings and settlements." For example, the definition of "persons involved in real estate closings and settlements" should not encompass mortgage lenders, banks and savings associations. Including these entities in the definition of "persons involved in real estate closings and settlements" could subject them to multiple regulatory schemes, such as--the rules for depository institutions (which are currently applicable to mortgage company subsidiaries), the anticipated rules for "loan and finance companies", and/or the rules for "persons involved in real estate closings and settlements." This would result in duplicative procedures, higher training, implementation and auditing expenses, confusion, and inconsistent enforcement.

In furtherance of the foregoing, Dechert suggests that only minimal benefit would be derived from imposing additional regulations on loan and finance companies that are not acting as depository institutions, since the transfer of money in real estate transactions would most likely result in a reportable event, even absent such additional regulation. Section 365 of the USA PATRIOT Act requires any person who is engaged in a trade or business to file a currency transaction report if, in the course of such trade or business, it receives more than $10,000 in coins and currency, and other cash transactions that involve payment of the sale price using a bank draft, wire transfer or other instrument would be covered by the Bank Secrecy Act requirements imposed on depository institutions or sellers of money orders and other instruments.

Second, this proposed definition should be narrowly construed to apply only to those individuals who are actually in a position to identify suspicious activity. For many of the individuals listed in the Proposal, they do not have a long term or ongoing relationship with the transacting parties, since they only become involved in the transaction at the time of closing. Furthermore, many of these parties, such as appraisers and inspectors, examine the property, but have no interaction with the transacting parties. Thus, it would be unlikely for these parties to come into possession of information regarding any suspicious activities.

Third, under the Proposal, attorneys would have to report "suspicious" activities of their clients. It would be extremely burdensome for attorneys to gather and maintain the required information on all parties involved in a real estate transaction, and the benefit of imposing such requirements is unclear. Attorneys do not normally "touch the money" in a deal and arguably are not in the best position to monitor suspicious activities. Furthermore, imposing these requirements could have negative implications for attorneys' ethical obligations and the attorney-client relationship. The Treasury Department should receive comfort from the fact that attorneys are bound by numerous legal obligations with regard to not engaging in or fostering criminal activity and, therefore, should find attorneys exempt from these reporting and record-keeping obligations.

In pursuit of a laudable goal, it appears the Treasury Department seeks to cover participants who are unlikely to have critical information but who will be enormously burdened by the

disclosure and record-keeping obligations that we anticipate will be promulgated under the USA PATRIOT Act. This would inevitably increase the cost of real estate transactions. To effectively prevent money laundering in real estate transactions, the Treasury Department should regulate only those persons directly involved in the real estate transaction with the ability to observe and assess suspicious activity.

III. How Should the Anti-Money Laundering Program Requirement for Persons Involved in Real Estate Closings and Settlements be Structured?

The anti-money laundering program requirements should be very narrowly tailored and commensurate with the current business practices of the entities that are ultimately subject to these regulations. Since financial institutions such as commercial banks and loan and finance companies are or will be subject to record-keeping and reporting requirements, there is less of a need for broad regulations over other "persons involved in real estate closings and settlements."

Consideration should be paid to the costs of complying with the proposed regulations. The Treasury Department is aware of the costs of anti-money laundering activities and has indicated its desire to avoid creating excessive burdens, which is especially important in times of economic hardship. Since limited resources are available to many who would likely qualify as "persons involved in real estate closings and settlements," the costs imposed on the industry would most likely be passed on to the consumers. Standards that increase settlement costs and burdens would lead to additional delays and stifle mortgage originations and real estate transfers.

Therefore, to the greatest extent possible, any requirements imposed should conform to current business practices so as not to result in additional delays and costs for the real estate industry, which has proved time and time again to be a key stimulus for economic recovery. We do not believe real estate is a primary vehicle for money launderers and we hope that the limited risk in this area will prompt rules that do not impose overwhelming burdens on the industry.

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Dechert appreciates the opportunity to comment on FinCEN's Advance Notice of Proposed Rulemaking on Anti-Money Laundering Program Requirements for "Persons Involved in Real Estate Closings and Settlements" under Section 352 of the USA PATRIOT Act. Dechert asks that the Treasury Department consider the relatively small risk that commercial real estate transactions pose, as compared to the proposed burdens, when determining the scope of the final regulations, and to recognize that the settlement stage is not when significant investigative requirements should be imposed. The Treasury Department must avoid confusion and inefficiencies by excluding financial institutions from the scope of this rule if they are already covered or will be covered by other USA PATRIOT Act regulations and by exempting from coverage those parties that are not in a position to identify suspicious activity. Along with narrowing the scope of the regulations, we ask that the Treasury Department structure the requirements under the regulations to closely mirror current business standards, so as to minimize the negative effects on the industry and the economy as a whole.

If Dechert can be of any further assistance in this regard, please do not hesitate to contact Richard Jones, Esq. at 215-994-2501.

Sincerely yours,

Dechert LLP