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Sent Electronically

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FinCen
Department of the Treasury
Washington, D.C.

ATTN: Section 352 – Real Estate Settlements
RIN 1506-AA28

Dear Sir or Madam:

The Mortgage Bankers Association of America (MBA) appreciates the opportunity to comment on the Department of the Treasury's (Treasury) Advance Notice of Proposed Rulemaking (ANPR) regarding the Uniting and Strengthening America by Providing Appropriate Tools to Restrict, Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act or "the Act") as it applies to "persons involved in real estate closings and settlements."

MBA is a trade association representing approximately 2,600 members involved in all aspects of real estate finance. Our members include national and regional lenders, full service mortgage companies, mortgage brokers, mortgage conduits, and service providers. MBA encompasses residential mortgage lenders, both single-family and multifamily, and commercial mortgage lenders. Our membership also includes settlement service providers, law firms and title insurance companies, which perform real estate closings and settlements. Our comments, however, are provided from the perspective of mortgage companies who finance residential and commercial real estate transactions and the impact this rule may have on these entities and the ease or cost of consummating mortgage transactions secured by real estate.

MBA is primarily concerned with the adoption of an overly broad definition of "persons involved in real estate closings and settlements" that would encompass mortgage companies. Subjecting mortgage companies to this rule would impose three layers of regulations on many of our members -- the rules for depository institutions (which are currently applicable to mortgage company subsidiaries); the anticipated rule for "loan and finance companies"; and the rule for "persons involved in real estate closings and

settlements." We seek specific exclusion for mortgage companies from this rule, as they will be the focus of future regulations.

We believe a narrow definition of "persons involved in real estate closings and settlement" is warranted in order to craft appropriate regulations for those entities and individuals who actually conduct a real estate closing or settlement. Treasury must avoid imposing multiple anti-money laundering rules on mortgage companies. Therefore, we ask that Treasury exclude other financial institutions from the scope of this rule if they are already covered or will be covered by USA PATRIOT Act regulations.

Because this rule has the potential to affect aspects of the mortgage finance transaction, it has important implications for the mortgage lending industry. We offer comments on the ANPR in an effort to ensure that any such implications do not jeopardize the efficiency of the mortgage marketplace. We ask that Treasury consider the limited risk of money laundering in connection with real estate transactions and recognize that the settlement stage is not when significant investigative requirements should be imposed. Finally, we ask that specific issues be considered when structuring a final rule for "persons involved in real estate closings and settlements."

The real estate industry wants to do its part to ensure terrorist organizations cannot use real estate to fund their activities; but we ask that Treasury recognize that the illiquid nature of real estate makes it less susceptible to money laundering than other assets. Moreover, we ask that Treasury recognize the limited resources available to many who would likely qualify as "persons involved in real estate closings and settlements" and note that closing is not the time that extensive verification procedures should be imposed.

As in past economic downturns, the real estate sector provides a key stimulus for economic recovery. Federal Reserve Chairman Alan Greenspan stated in recent remarks before the Congressional Joint Economic Committee that "the ability of households to tap into equity accrued in residential properties should continue to bolster consumer spending and the purchase of new homes." Standards that overwhelm the settlement industry or substantially increase settlement costs would stifle mortgage originations and real estate transfers.

A. GUIDING PRINCIPLES

To be effective, anti-money laundering efforts must be sustainable over the long term and must provide for communication among all financial institutions. This means that requirements must be *flexible.* Rigid obligations to report specific categories of transactions using specific forms submitted through specific channels become progressively less effective over time, as persons intent on evasion learn how to avoid triggering those obligations. Moreover as the industry changes, the anti-money laundering rules must be sufficiently flexible to meet new demands. Electronic mortgages and electronic settlements are rapidly gaining acceptance. As a result, anti-

money laundering rules must be sufficiently flexible to accommodate changing industry practices.

Rules must be *institution-neutral;* meaning the activity of closing or settling real estate should be paramount, rather than the type of institution conducting the activity. Final rules should be narrowly tailored to risks specific to real estate settlements and closings, rather than the financing of the transaction and the activities incident to making and holding residential and commercial mortgages. These activities are more appropriately dealt with in rules applicable to loan and finance companies. Treasury, therefore, should exclude from the scope of *this* rule, banks, savings associations, mortgage companies, mortgage brokers or other financiers of real estate if they are already covered by, or will be covered by, a companion rule implementing the Act. A well-defined scope of activity will avoid duplication of coverage and allow for better, more targeted rules.

A security system involving multiple participants must also be *coordinated across the entire financial services industry* to be effective. Every participant must know its role and be aware of the roles played by fellow participants. All parties to a transaction must be able to rely on one another. In the financial services context, this means there should be free communication between financial institutions about nascent suspicions and known or potential threats. Open communication will dramatically improve all financial institutions' effectiveness and the timeliness of their responses. The safe harbor provision found in section 314 of the Act will go a long way toward facilitating proper communication among financial institutions. As stated in the Act, financial institutions will have to follow specific regulations promulgated by Treasury to benefit from the safe harbor. As Treasury deliberates those standards, we respectfully ask that regulators avoid imposing large hurdles, such as cumbersome reporting requirements, in-depth investigative obligations or prior approval from Treasury, before information can be shared between settlement services and lenders without fear of liability.

The concept of "coordination and communication" also means there should be a *division of labor* within the financial services industry. Not all institutions have the same resources, technological capabilities or level of interaction with the customer. Allowing each segment of the financial services industry to contribute according to its unique strengths will increase the overall effectiveness of the industry at combating money laundering. Lenders may have to rely on settlement services in certain cases. As a result, MBA supports the safe harbor provided in final rules on Section 326 issued May 9, 2003. 68 Fed. Reg. 25090. The final rule provides a safe harbor for depository institutions that contract with other financial institutions for verification of identification assistance. We believe adoption of this principle is particularly important in the context of this ANPR in light of the growth and acceptance of nationwide lending. While lenders perform a significant amount of due diligence on the borrower and the property, a lender may not meet face-to-face with the borrower and, therefore, may not be in a position to check a driver's license in all cases. To facilitate compliance with the USA PATRIOT Act, the lender may wish to contract with the entity performing the settlement to check

the borrower's identification. The reverse is likely as well, especially in California, other western states, and with electronic settlements, where the settlement service may never physically meet the borrower.

Finally, consideration should be paid to the *costs* of complying with the rule. Treasury is aware of the costs of anti-money laundering activities and has indicated its desire to avoid creating excessive burdens. 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.

We would like to turn now to specific questions requested in the ANPR.

B. TREASURY'S QUESTIONS

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

As previously stated, MBA believes that the risk of money laundering in real estate closings -- as in real estate finance -- is small. Real estate is less susceptible to money laundering because of the illiquid nature of the asset. Current industry practices undertaken in the sale and financing of commercial and residential real estate make it less attractive to money launderers.

Commercial real estate transactions are protected 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 levels of due diligence scrutiny performed by diverse parties render commercial real estate an improbable vehicle for money laundering. 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.

Residential real estate transactions that are financed also involve significant underwriting of the buyer (or borrower in the case of a refinance), but generally do not involve investigation of the seller of real estate (or payee lender in the case of a refinance). Lenders investigate the borrower's creditworthiness with multiple credit repositories, verify the borrower's income usually through original pay stubs and copies of tax returns (which are randomly checked independently with the IRS), verify

employment, and verify the source of funds by contacting the depository institution holding the funds. We believe that the level of scrutiny involved in financed transactions deters money launderers. With respect to residential real estate, we believe Treasury and the American Land Title Association have properly identified the risks associated with money laundering for terrorist activities.

Although not specifically identified in the ANPR, Treasury representatives suggested in meetings with MBA that multiple refinances are potential "red flags" for money laundering. Again we presume that Treasury would only be concerned with cash-out refinances, as rate/term refinances do not pose any money-laundering risk because the amount financed is not being increased. With regard to cash-out refinances, we do not believe these transactions present a significant money laundering risk. Most cash-out transactions involve small amounts of "cash" relative to the value of the home, and the borrower is generally required to maintain a substantial amount of equity in the home. We do not see a substantial benefit to requiring tracking and investigation of borrowers who refinance frequently.

The tracking of refinance activity is extremely difficult, as borrowers frequently do not use the same lender or settlement agent on subsequent loans. As communicated in MBA's letter to Charles Klingman, Office of Consumer Affairs and Community Policy, Department of the Treasury, on July 19, 2002, the only way to accurately track multiple refinances is to check the land records to determine a pattern of multiple mortgage refinancings. In order to check this information, however, a more detailed title examination would have to be performed than is typical today. Today, title companies generally undertake abbreviated title examinations dating back only to the last mortgage on a particular property unless specifically requested to go back farther at an additional cost to the borrower. We see limited value in requiring a more extensive title search because it is unclear what the information would prove. A borrower with multiple cash-out refinances may simply be a savvy homeowner who takes advantage of rates and the equity in his or her home. As noted earlier in this letter, this tactic was identified by Alan Greenspan as a key source of American economic stimulus. In order to avoid delays in mortgage closings and increased costs, we respectfully ask that Treasury not impose requirements on *any* financial institution, including "persons involved in real estate closings and settlements," to track multiple refinances.

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

The ANPR states that the universe of participants in real estate transactions is potentially broad and could include: real estate brokers, attorneys, banks, mortgage brokers or other financial entities, title insurance companies, escrow agents, appraisers or inspectors. Because Section 5312(a)(1)(U) uses the term "persons *involved* in real estate closings and settlements" (emphasis added), Treasury contends that a reasonable interpretation of the section could, therefore, cover participants other than those who actually conduct the real estate settlement or closing.

MBA does not support an overly inclusive definition. MBA believes that "persons involved in real estate closings and settlements" should be limited to those individuals who are directly responsible for conducting the real estate settlement or closing. Because of different state laws, individuals conducting real estate settlements may be independent settlement agents or attorneys. In some cases, a title company or real estate broker may conduct the closing. It is a fair assumption that Congress was aware of this fact and rather than compile a list of entities eligible to conduct settlements (and risk excluding a category), it chose the more generic language "persons involved in real estate closings and settlements."

Settlement agents provide valuable services that we believe will be complementary to any rules imposed on loan and finance companies. In sum, they serve as "gatekeepers" to the transaction and see both sides of the transaction: the buyer/borrower and the seller/payee.

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

Banks, savings associations, mortgage companies and mortgage brokers, which are already covered or will be covered by a separate rule, should not be subject to rules for "persons involved in real estate closings and settlements." Imposing multiple anti-money laundering rules on the same entity will result in duplicative procedures; higher training, implementation and auditing costs; confusion and inconsistent enforcement. We, therefore, strongly support Treasury's suggestion that financial institutions already covered or to be covered by separate regulations implementing the USA PATRIOT Act not be included within the definition of "persons involved in real estate closings and settlements." An overly broad definition will frustrate Treasury's ability to craft regulations specific to the real estate settlement and closing industry. Rules that *may* be appropriate for settlement agents, such as obtaining the seller's personal identification information, would not be appropriate for lenders. A property seller would undoubtedly be reluctant to disclose a social security number, for example, to a lender as a condition to granting the buyer a loan. The lender has no formal relationship with the seller.

MBA generally supports the guiding principles outlined in the ANPR for defining the term. Specifically, the ANPR states the objective of including "persons involved in real estate closings and settlement" is to include those persons whose services rendered or products offered in connection with a real estate closing or settlement…can be abused by money launders." It is clearly the abuse that is relevant under the USA PATRIOT Act. As a result, we also believe the following entities, which are incidental to the real estate settlement, should also be excluded from coverage in this rule provided they do not conduct a real estate settlement: credit repositories; hazard, flood and other casualty insurers; mortgage insurers; tax and flood certification services; real estate brokers; providers of life and disability insurance; termite inspectors; appraisers and home inspectors; courier services etc. These entities do not pose a significant risk of money laundering because they are generally not in a position to manipulate the

transaction or abuse the mortgage finance system to defer large sums of money to themselves or their principals. Moreover, most of the entities listed above do not have direct contact with the buyer/borrower or seller/payee. Inclusion of other parties tangentially linked to the closing, such as appraisers and home inspectors would require completely different standards than individuals and entities conducting settlements that may meet face-to-face with buyers (and sellers), handle title examinations, transfer title, execute legal documents, and receive and disburse large sums of money.

The ANPR suggests that buyers and sellers of their own real estate should be excluded from coverage of the Act. While this statement by itself is clear, the proposal clouds the issue by further indicating that the "question of exemption is specifically directed to real estate professionals, and those who trade in real estate on a commercial basis." 68 Fed. Reg. 17571. Based on this language, it is unclear whether a mortgage company that takes back real estate through foreclosure (i.e., real estate owned (REO)) would be subject to these rules because it "trades in real estate on a commercial basis." Id.

REO is an unfortunate, but not an unanticipated, by-product of financing a loan that cannot be repaid. MBA views the activity of selling REO to be concomitant with financing, and therefore, should be excluded from coverage in the rules for "persons involved in real estate closings and settlements." Lenders should be able to look to one set of rules for the business of financing real estate. Moreover since the selling of real estate is not the business of conducting real estate settlements, we believe it is inappropriate to include sellers of REO within this rule.

The USA PATRIOT Act when fully implemented will have other control points that do not necessitate a redundancy of this nature. To the extent a buyer finances the purchase of the REO, the transaction will be covered by the Act under rules issued for "loan and finance companies." If the transaction were not financed, it would be covered by rules applicable to those conducting the real estate closing or settlement. Moreover, Section 365 of the 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. 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 seller of money orders and other instruments.

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

To the greatest extent possible, final anti-money laundering standards should conform to current business practices so as not to impose additional delays and costs in the settlement process. Persons involved in real estate settlements vary in size, from large companies to sole proprietors. Requiring extensive money laundering and record keeping requirements for these entities, especially small companies, will require additional technology and resources that may not be feasible. There is no doubt that additional costs imposed on this industry will be passed on to home buyers and persons

refinancing their homes. Moreover, extensive requirements will cause delays in real estate settlements and closings. Imposing greater investigation at a time when financing is approved, documents are prepared (and maybe even executed), and/or funding is made is ill advised. Delays of any kind at this stage of the transaction would be detrimental to all parties. Residential sales contracts provide for a settlement deadline, which if missed, could result in the loss of the buyer's earnest money deposit and loss of the right to purchase the real estate. A delay in settlement could also cause an interest rate lock to expire, resulting in a higher interest rate for the borrower or causing the deal to be cancelled.

With these concerns in mind, we outline some considerations in developing rules to comply with both Sections 352 and 326:

- Persons involved in real estate settlements should be able to rely on notaries to authenticate signatures and identities without fear of liability under the USA PATRIOT Act.

- Verification procedures of "customer" information, where the customer is not an individual, (e.g., corporation, partnership, etc), should permit *copies* of documents showing the existence of the entity.

- The term "customer" should not be defined to include a financial institution, such as a "loan and finance" company, if covered or to be covered by separate regulations implementing the USA PATRIOT Act.

- Rules should recognize the rapidly developing electronic real estate settlement and electronic note and related documents. Any rule implementing the USA PATRIOT Act must provide sufficient flexibility not to disrupt or overly burden this option.

- A safe harbor should be offered to "persons involved in real estate closing and settlements" if they contract with other financial institutions to collect or verify customer identification. Likewise, financial institutions, including "loan and finance companies," must be granted that safe harbor if using a person involved in real estate closings and settlements to perform customer identification and verification procedures.

- Persons involved in real estate closings and settlements should have a duty to report or communicate "suspicious" activities to the entity financing the transaction (in addition to notifying Treasury), especially if the suspicious activity does not result in a duty by the settlement agent to terminate the settlement or closing.

Conclusion

MBA appreciates the opportunity to comment. As stated earlier, we believe a narrow definition of "persons involved in real estate closings and settlement" is warranted in order to craft appropriate regulations for those entities and individuals who actually conduct a real estate closing or settlement. Treasury must avoid imposing multiple anti-money laundering rules on mortgage companies and, therefore, we ask that Treasury exclude other financial institutions from the scope of this rule if they are already covered or will be covered by USA PATRIOT Act regulations. We ask that Treasury consider the limited risk of money laundering in connection with real estate transactions and recognize that the settlement stage is not when significant investigative requirements should be imposed. Finally, we ask that specific issues be considered when structuring a final rule for "persons involved in real estate closings and settlements."

Representatives of MBA would be happy to furnish additional information if desired. Please do not hesitate to call me, Vicki Vidal, Government Affairs, (202) 557-2861 or Leanne Tobias, Commercial/Multifamily, (202)557-2840, for further information.

Most sincerely,

Jonathan L. Kempner
President & Chief Operating Officer