#23 Weiner

June 9, 2003

VIA E-MAIL (regcomments@fincen.treas.gov)

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

Re: Advance Notice of Proposed Rulemaking for Persons Involved in Real Estate Closings and Settlements

Ladies and Gentlemen:

The American College of Real Estate Lawyers ("ACREL" or the "College") is pleased to present these comments to the Financial Crimes Enforcement Network ("FinCEN") pursuant to a request for public comment regarding the definition of "persons involved in real estate closings and settlements" made by FinCEN in an advance notice of proposed rulemaking ("ANPRM") issued on April 10, 2003 and published in 68 Fed. Reg. 17,569 (Apr. 10, 2003).

The matters being addressed by FinCEN under the ANPRM are of fundamental importance to the commercial real estate industry. ACREL appreciates the opportunity to share with FinCEN the perspective of ACREL's members and sincerely desires that our comments will assist FinCEN in shaping a workable approach to the complex, nuanced, and sensitive issues it is confronting. For the reasons more fully explained in this letter, the College offers the following primary observations:

1. **Designated Party to Perform Due Diligence and Others Should be Able to Rely on that Due Diligence**. To facilitate the smooth operation of the real estate and financial markets, ACREL believes that FinCEN needs to develop a clear and specific protocol whereby one of the parties to a real estate closing and settlement be required to provide a written confirmation to the other parties that the appropriate anti-money laundering ("AML") due diligence has been undertaken under Section 352 of the United and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 ("Patriot Act"), Pub. L. No. 107-56, 115 Stat. 272 (Oct. 26, 2001). The other parties to the closing and settlement would be entitled to rely reasonably on this confirmation and would not be required to engage in costly and time consuming due diligence investigations that would be duplicative and redundant of the confirming party's due diligence investigations.

2. **Anti-Money Laundering Requirements in Conflict with Attorney-Client Privilege and Client Confidentiality**. The AML requirements, which include the development of internal policies, procedures, and controls and the requirement that a participant involved in a real estate closing and settlement develop an independent audit function to test the AML programs, are at odds with the attorney-client privilege and the duty of client confidentiality. To the extent any Section 352 AML requirements are imposed on lawyers, those requirements must be carefully developed so that they do not conflict with the attorney-client privilege and the duty of client confidentiality.

In addition to these observations, ACREL believes that certain real estate closings and settlements should be exempt from the Section 352 AML program requirements. As more fully explained in this letter, these exemptions include real estate and loan transactions below a significant amount where the transaction is financed by an institutional lender, certain transactions to the extent AML due diligence has been previously performed, transactions where real estate is not the principal asset being conveyed at the closing and settlement, transactions not involving the conveyance of an interest in real estate at the closing and settlement, and mineral and royalty interests.

Before addressing the points above, we would like to provide background information on the College.

Background of College

ACREL was founded in 1978 and has grown from its 125 charter members to a current membership of approximately 900 prominent real estate lawyers practicing in all 50 states and several foreign countries. The College was organized to afford lawyers distinguished for their skill, expertise, and high standards of professional and ethical conduct in the practice of real estate law an opportunity to gather together and address issues of common interest and importance to real estate practitioners and the real estate industry. Membership in the College is by invitation, based not only on a candidate's accomplishments as a practitioner but also on his or her commitment to the improvement of real estate law and practice through teaching, writing, bar related activities, the promotion of legislation, or other public service. ACREL members are recognized as both able practitioners and serious students of real estate law. They are expected to contribute actively to the fulfillment of the College's objectives, among which are to: (i) promote high standards of professional and ethical responsibility in the practice of real estate law, (ii) address issues of importance to real estate law and the real estate industry by participation in law reform matters and legislative, administrative and judicial initiatives where appropriate, and (iii) cooperate and consult with national, state and local bar organizations,

government agencies, and other groups that have an interest in real estate law and practice and the real estate industry.

Discussion

ACREL's comments will focus primarily on the question raised by FinCEN regarding the role of participants in real estate closings and settlements. Our comments will place particular emphasis on the unique role played by commercial real estate lawyers in the real estate closing and settlement process. Our comments, however, will also discuss the importance of preserving established market efficiencies in the commercial real estate industry and the critical importance of avoiding costly and time consuming AML due diligence activities that are duplicative of those adequately performed by others.

1. **Designated Party to Perform Due Diligence and Others Should be Able to Rely on that Due Diligence**.

(a) **Market Efficiencies Require that One Party be Responsible for Section 352 Due Diligence Activities**.

Numerous participants are involved in a commercial real estate closing and settlement. These participants include those typically involved directly in the closing and settlement process, such as the lender, the escrow agent, the title insurance company, the broker, and the real estate lawyer. Others involved in the real estate closing and settlement process have a less direct role, such as the appraiser, the surveyor, and the property inspector. The dominance any particular participant has in any given closing and settlement will vary as well, depending on the specific circumstances of the transaction and the goals and objectives of the participants.

Some participants in a commercial real estate closing and settlement are already obligated to comply with regulations imposing AML due diligence activities. A prime example are the traditional mortgage banking institutions that provide financing to borrowers in a commercial real estate transaction. These institutions are required by federal law to comply with AML due diligence on their customers through, among other things, established "know your customer" rules. These institutions generally have the resources, technical capabilities, and knowledge to perform the necessary AML due diligence in a cost effective, timely manner and to report any suspect transactions to federal authorities.

If one or more participants in a commercial real estate closing and settlement have already undertaken and performed the Section 352 AML due diligence investigations, ACREL believes that it is neither economical nor sensible to impose the Section 352 AML requirements on all of the other participants in a real estate closing and settlement. Although the benefit of performing duplicative and redundant AML due diligence investigations is marginal at best, the

burden of these investigations would impose significant costs and time delays on the closing and settlement process.[1] The efficiencies of the commercial real estate industry, a multi-*trillion* dollar enterprise that is central to the American economy, would be undermined with no appreciable benefit in detecting and preventing money laundering and terrorist financing.[2]

ACREL thus proposes that FinCEN establish a protocol that would require that one of the participants involved in a real estate closing and settlement have primary responsibility of performing the Section 352 AML due diligence investigations and confirming to the other participants the results of those investigations. These comments will refer to the confirming participant as the "Confirming Party." In most cases, this responsibility would be determined at or near the inception of the transaction so as to avoid any ambiguity or misunderstanding as to which participant would serve as the Confirming Party and to afford the Confirming Party sufficient time to perform the AML due diligence investigations. This responsibility would be contemporaneously confirmed in writing. In some transactions, it may be necessary or appropriate to have the function of the Confirming Party performed by more than one person or entity. If so, the Confirming Parties would agree on which AML due diligence investigations each would perform for the relevant persons involved in the real estate closing and settlement.

The Confirming Party would likely be the participant in the real estate closing and settlement process who is best positioned, in relation to the other participants, to perform AML due diligence investigations. Depending on the transaction in question, the Confirming Party may be the lender, the escrow agent, the title insurance company, or the broker. The Confirming Party would certify to the other participants in writing (the "AML Certification") at or before the closing and settlement that the Confirming Party has performed the necessary AML due diligence activity for the real estate closing and settlement and that such due diligence has not revealed or detected any money laundering or terrorist financing activity. The other participants would be entitled to rely on the AML Certification and would not have to perform independent AML due diligence investigations unless the recipient of the AML Certification had an

[1] The time delay issue cannot be understated. Commercial real estate transactions are carefully scheduled to close and settle to coincide with the business interests and objectives of the parties. Delays will be costly and may threaten the successful consummation of transactions. Suppose, for example, that A enters into a contract of sale with B to sell a commercial office building. The appropriate AML due diligence is performed and no money laundering concerns exist. Suppose further that B assigns its right, title, and interest under the contract to C five days before the scheduled closing date. Which person involved in the real estate closing and settlement has an obligation to investigate C? Will there be sufficient time before the closing and settlement to perform the necessary AML due diligence?

[2] To comply with newly mandated AML compliance requirements, securities firms alone are expected to spend nearly $700 million on compliance over the next several years. "Costs of Compliance With Patriot Act Are High," by Tamara Loomis, *New York Law Journal* p. 1 (May 8, 2003).

unreasonable basis for relying on the AML Certification. An example of an unreasonable basis for reliance would be a recipient who had actual knowledge or a compelling reason to believe that the Confirming Party or one of the participants involved in the real estate closing and settlement was engaging in money laundering or terrorist financing. In those transactions involving more than one Confirming Party, each Confirming Party would execute and deliver the AML Certification regarding the person(s) on whom it has performed the AML due diligence.

The AML Certification approach has several advantages. First, it ensures that the participant involved in the real estate closing and settlement who is best positioned to detect and prevent money laundering or terrorist financing would be charged with performing the necessary AML due diligence investigations. Second, the AML Certification approach would minimize duplicative AML due diligence activities and the resulting costs and time delays. Multiple participants would not be required to perform the same AML due diligence on the same parties. Third, the approach would provide a mechanism enabling each of the participants involved in the real estate closing and settlement to rely on the commitments of others so that they would not be liable for violations of the Patriot Act arising from the failure of others to conduct the AML due diligence they were to perform pursuant to the federally-mandated protocol.[3]

(b) **Participants Best Positioned to Perform AML Due Diligence**.

In determining whether and to what extent the Section 352 AML requirements should be imposed on "persons involved in real estate closings and settlements," an important area of inquiry is which participants are best positioned to perform the AML due diligence activities. To answer this inquiry, it is important to consider the roles that these persons play in the negotiation and closing of commercial real estate transactions.

In almost every commercial real estate transaction it is the seller or buyer who actually identifies potential transactions, determines whether to pursue a particular opportunity, and decides whether to enter into a business relationship with the other parties. The seller or buyer typically does not make these decisions in isolation. For example, the seller or buyer will likely engage one or more advisors to assist in the decision-making process. The seller or buyer

[3] Once the necessary AML due diligence has been completed, absent material changes in facts or circumstances or the passage of a lengthy period of time, it should not be required to be duplicated in a subsequent related transaction to the extent the same parties and properties are involved. For example, if due diligence were properly conducted for a closing and settlement of each individual loan that is to be later included in the sale or securitization of a mortgage portfolio that is sold to a limited number of institutional investors, the only additional due diligence that should be required would be that relating to the limited number of institutional investors buying the portfolio, the sole parties to the "new" transaction for which due diligence had not been previously performed. Of course, in sales involving public investors (such as in the case of a Real Estate Mortgage Investment Conduit ["REMIC"]), it would be impractical to perform AML due diligence on the members of the investing public who purchase investment certificates in the REMIC.

may engage a real estate broker who specializes in commercial real estate transactions. They may also consult with investment bankers, accountants, and investment advisors capable of introducing the buyer or seller to properties or investors, financing sources, or investment opportunities. A lender may consult with a mortgage banker to identify potential loan opportunities and a buyer or investor may rely on the mortgage banker to identify available financing sources.

The realities of custom and practice in the commercial real estate industry dictate that the persons who are actually responsible for bringing together disparate parties and brokering the many types of commercial real estate transactions (as well as the actual buyers, sellers, lenders, and escrow agents) are usually in the best position to identify and screen the participants involved in a real estate closing and settlement to discern the true purpose and nature of the transaction and determine the source of funds utilized and destination of sums paid and/or disbursed. These persons are directly engaged in the real estate closing and settlement process and should shoulder the responsibility of performing any required AML due diligence.

With assistance of counsel, buyers and sellers are capable of bearing the responsibility for adhering to laws that would require them to perform AML due diligence, such as inquiring into the backgrounds of the parties with whom they are dealing and determining whether they are involved with individuals from "high risk countries," "non-cooperative countries," or countries designated as "primary money laundering concerns." If the buyer or seller conclude or suspect that illicit funds may be involved, they should reject the business opportunities.

Other persons involved in the real estate closing and settlement process, such as the escrow agent and advisors to the buyer and seller, are likewise capable of performing the required AML due diligence. The advisors and the escrow agents are generally knowledgeable about the types of transactions they facilitate and the parties they serve or represent and bring together. To the extent FinCEN seeks to impose AML requirements on persons involved in real estate closings and settlements, FinCEN should assign responsibility for Section 352 compliance to those parties actually involved in the real estate closing and settlement process (i.e., the seller, buyer, lender, escrow agent, and advisors) the primary responsibility for preventing abuse by money launderers and those who finance terrorist activity.

Assuming that FinCEN assigns the primary responsibility for Section 352 AML compliance to the Confirming Party, the College suggests that FinCEN fashion a set of "red flags" that could alert other participants of possible money laundering or terrorist financing activities. These participants, although not having primary compliance responsibility with the Section 352 AML program requirements, would be required to bring the "red flag" situation to the attention of the Confirming Party or perform further investigations or due diligence. These "red flags" should be based on demonstrated factual situations where the probability of money

laundering or terrorist financing is unusually high rather than, for example, generalized racial, ethnic, or religious profiling characteristics. Red flag situations should not be predicated on those facts that may be benign in a commercial real estate transaction, such as the presence of undisclosed principals, the origination of funds from a non-domestic financial institution, or the lack of specific knowledge about a real estate transactions by a participant.[4]

(c) **Lawyers Not Best Positioned to Perform AML Due Diligence**.

(i) **Situation Where AML Program Requirements May Possibly be Imposed Directly on Real Estate Lawyers**. ACREL envisions just a single situation where Section 352 AML program requirements may possibly be imposed directly on real estate lawyers. If a real estate lawyer is directly and personally involved in the transfer, receipt, movement, holding, or delivery of funds, securities, or monetary instruments used in a transaction (whether such funds, securities, or instruments are to be the source of the money to be loaned, the purchase price to be advanced, or the equity to be invested, and whether received or later disbursed by wire transfer, check, or cash), then the real estate lawyer has stepped outside the role of providing legal advice and should thus assume some level of responsibility for complying with the Section 352 AML program requirements.

(ii) **Situations Where AML Program Requirements Should Not be Imposed on Real Estate Lawyers**. Lawyers are among the professionals who may be involved in commercial real estate closings and settlements, but they are not typically in the best position to perform the type of extensive AML due diligence envisioned by the Patriot Act.[5] But, even where they are, the role of real estate lawyers in a real estate closing and settlement differs substantially from transaction to transaction and from client to client, depending on both the

[4] The situations described in this sentence often occur in a commercial real estate transaction. Legitimate business needs may require the insistence that the identity of the principals not be disclosed. For example, undisclosed principals were used in The Rouse Company's acquisition of the Columbia, Maryland "new town" project to avoid price gouging were the identity of the buyer actually known in the marketplace. The same strategy was used by The Walt Disney Company in its acquisition of some of the property forming a part of Disney World in Orlando and that company's unsuccessful foray into Northern Virginia in the 1990s to develop an historical theme park. The origination of funds from a foreign country should also not automatically signal a red flag. If a country or bank is on a publicly available government list (such as the list published by the Office of Foreign Asset Control ("OFAC")) of suspect persons or countries, additional due diligence may be required. The relative knowledge of a participant in a real estate closing or settlement is too subjective. For example, an elderly client may lack specific knowledge of the details of a transaction. Some clients who invest in commercial real estate may lack the technical expertise and professional knowledge commonly found in those who deal with real estate investments on a regular basis. But in each of those examples the lack of knowledge or relative expertise should not brand that client as a suspected money launderer or terrorist.

[5] In the residential real estate context, however, the national trend differs. The current national trend is there is minimal or no lawyer involvement in residential real estate transactions and financings.

lawyer's overall relationship with the client and the circumstances or needs of the closing and settlement. In many instances a lawyer will not have a realistic opportunity to discover or influence the aspects of real estate transactions that would be relevant to a prohibited money laundering or terrorist financing activity. For example, a real estate lawyer may be retained to play a tangential role as special or local counsel in reviewing and commenting on transaction documents prepared by others or in delivering a legal opinion on the enforceability of a transaction document under local law, or in performing solely property-related due diligence investigations (such as title and survey review or analysis of zoning entitlements). In none of these types of activities is the lawyer likely to find, or even be in a position to discover, potential "red flags" suggesting that one or more of the parties may be seeking to engage in money laundering or may be providing financial support for terrorist activities. Surely these lawyers would not be required to undertake costly and time consuming AML due diligence given the absence of any demonstrable cost-benefit to such an undertaking.

At the same time, the College acknowledges that a commercial real estate lawyer may play a primary or significant role in designing and structuring (as distinguished from simply drafting or negotiating) (a) the business terms of a real estate transaction that would directly relate to or affect the flow of funds from one party to another, or (b) the ownership or purchasing entity under circumstances where the ownership of such entity directly or indirectly includes either non-U.S. principals from suspect countries or otherwise possesses indicia that would lead a reasonable person to inquire whether that entity's business operations could reasonably be expected to function efficiently as a shelter for the movement of funds that are unrelated to the legitimate needs of the underlying operating businesses. In either of these situations, it is possible that a lawyer might be in a position to discover or influence certain aspects of a real estate transaction that would be relevant to a prohibited activity; however, these situations are in ACREL's experience, the exception rather than the rule.[6] But, as discussed in the comments

[6] It is unclear whether a real estate lawyer has a duty to investigate non-client persons involved in the real estate closing and settlements, i.e., does the AML investigation obligation extend to all persons involved in the real estate closing and settlement? An example will illustrate this concern. Suppose A sells a building to B who leases it to C and B obtains mortgage financing from D and mezzanine financing from E, each of whom is represented by separate lawyers. Does A's lawyer have to perform AML due diligence only on A or on B though E as well? If so, in addition to banks, brokers, title companies, and others investigating each party, each lawyer will be investigating each party involved in the real estate closing and settlement. This approach seems cost-inefficient, duplicative, and burdensome. In addition, it appears unlikely that a lawyer would possess the personal expertise or capability to ferret out relevant factual information about a participant in the real estate closing or settlement other than, perhaps, the lawyer's own client. It is unclear how a lawyer would realistically go about performing AML "due diligence" on another party to the transaction that is probably represented by its own counsel. If the lawyer wanted to do anything other than request a certificate from such other party that attests to the absence of any money laundering or terrorist financing activity, the lawyer would probably have to hire a private investigative firm, or use some combination of Internet searches, review of public filings, and other readily available sources or services to ascertain the bona fides of such other party or on such other party's ownership structure or business operations. There is no reason to think that a lawyer would have any special expertise or investigative capability that would be sufficient or

below, the imposition of any AML due diligence requirements on lawyers would seriously undermine the attorney-client privilege and the duty of client confidentiality. For those reasons, ACREL believes that it is not feasible to impose any AML requirements on lawyers unless those requirements are carefully designed and tailored so that they do not run afoul of the attorney-client privilege and the duty of client confidentiality.

2. **Section 352 Requirements in Conflict with Attorney-Client Privilege and Client Confidentiality**.

The attorney-client privilege is the oldest privilege known to the common law for confidential communications. *See Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). As the *Upjohn* Court observed, the purpose of the attorney-client privilege "is to encourage full and frank communication between attorneys and their clients," which in turn "promotes broader public interests in the observance of law and the administration of justice." See James M. McCauley, "*Feds Draft Lawyers to Fight War on Terrorism: Anti-Money Laundering Laws and the USA Patriot Act*," Va. L. Reg. 6 (May 2003).

The duty of confidentiality is expressed in the ABA Model Rules of Professional Conduct. Subject to certain limited exceptions, Model Rule 1.6(a) prohibits an attorney from revealing "information relating to the representation of a client unless the client gives informed consent." Comment 2 to Model Rule 1.6 expresses the concept as follows:

> A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. . . . This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

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appropriate to produce a more reliable result than could be achieved by other professionals who are participating in the transaction. Moreover, of course, the lawyer's client would end up paying for the full cost of such additional investigations, including the lawyer's fees for supervising the investigation (or at least ensuring that the investigation is completed), even though the lawyer's skills are likely to add little, if any, value to the investigative effort.

Logically, a client will not consult with an attorney if the client suspects the attorney has an obligation to report the client to law enforcement authorities (e.g., in a criminal setting) or divulge the client's confidences to a counterparty (e.g., in a commercial setting). In a 1996 decision, the United States Court of Appeals for the Ninth Circuit pointedly noted "[the] valuable social service of counseling clients and bringing them into compliance with the law cannot be performed effectively if clients are scared to tell their lawyers what they are doing, for fear that their lawyers will be turned into government informants." *United States v. Chen*, 99 F.3rd 1495, 1500 (9th Cir. 1996).

The duties of loyalty and confidentiality, however, are not absolute. For example, the "crime fraud exception renders otherwise privileged information subject to disclosure when the client made or received the communication with the intent to further an unlawful or fraudulent act, and the client ultimately carries out the crime or the fraud. . . . Furthermore, and notwithstanding the role of lawyers as zealous advocates on behalf of their clients, existing laws and ethical rules prohibit lawyers in every state from knowingly assisting clients in illegal or fraudulent activity, financial or otherwise." *Comments of the ABA Task Force on Gatekeeper Regulation and the Profession on the Financial Action Task Force Consultation Paper Dated May 22, 2002*, American Bar Association Task Force on Gatekeeper Regulation and the Profession at p. 8 (August 23, 2002) (citation omitted). (the "*Gatekeeper Comments*").

The *Gatekeeper Comments* go on to state:

> [T]o the extent that lawyers knowingly allow their services to be used by clients to facilitate money laundering or other illegal activity, they are violating existing law as well as rules of professional conduct. These existing laws and rules of professional conduct impose devastating personal and professional consequences upon an attorney who crosses the line from counselor to co-conspirator. . . . However, it is imperative that a clear line be drawn between a co-conspirator in money laundering activity, and an innocent person who is unwittingly involved in another's misconduct. *Gatekeeper Comments* at pp. 9-10.

The Section 352 AML requirements, if applied to lawyers, would seriously undermine the attorney-client privilege and the duty of client confidentiality. The AML requirements would obligate the lawyer to perform due diligence investigations on his or her client. These investigations may entail investigations into the client's ethnicity, political beliefs, religion, or race. The investigations may also require an analysis of, and investigation into, the client's source of funds, investors, and affiliates. These due diligence activities cannot be easily reconciled with the attorney-client privilege and the duty of client confidentiality. A lawyer should be not required to audit his or her client's bona fides, intentions, or source of funds. This

function not only places the lawyer in an awkward position with the client, but it also forces the lawyer to assume an adversarial relationship with the client. Obviously, an adversarial relationship is inimical to the attorney-client relationship.

The AML program requirements under Section 352 do not on their face appear to impose a suspicious activity or suspicious transaction reporting requirement on lawyers. But the effectiveness of such requirements would be non-existent if the lawyer could simply be allowed not to disclose the suspicious activity. Thus, at some point it appears logical that Section 352 could be a precursor to a requirement that the lawyer report to the government or other body any suspicious activity of the client relating to money laundering or terrorist financing. If that is the case, such a requirement would invert the attorney-client privilege. Lawyers are not governmental informants and the imposition of such a reporting requirement would be contrary to every state or federal law or state bar rules of professional conduct.

The independent audit function envisioned under Section 352 fares no better. To test the effectiveness of a lawyer's AML program, Section 352 requires that the lawyer engage an independent auditor to test the effectiveness of the lawyer's AML program. This means that the auditor would have free access to the client's files and records and hence privileged and confidential information.

The better course of action in this area was expressed by the Gatekeeper Task Force in its February 2003 report to the ABA House of Delegates, which advocates lawyers educating their clients about money laundering :

> The legal profession already is subject to extensive ethical requirements and enforcement of those requirements. Lawyers who engage in illegal or unethical conduct, including money laundering, can be and have been disbarred. Lawyers are obligated under existing ethical rules to counsel their clients to abide by the law. If a client refuses to do so, a lawyer is obliged to withdraw from the representation. Existing state ethical rules permit -- not mandate -- a lawyer to disclose client confidential information when the lawyer has reason to "know" that a client intends to engage in criminal activity. In these circumstances, the better course would be to ensure that lawyers are well-informed and educated about the nature and typologies of money laundering activity, so they can continue to uphold their ethical obligations, self-police themselves, and make disclosures when appropriate based on knowledge of intended criminal conduct.

Report of the ABA Task Force on Gatekeeper Regulation and the Profession 8 (Feb. 2003).

3. **Certain Transactions Should be Excluded from the AML Requirements**.

ACREL believes that certain real estate closings and settlements should be exempt from the Section 352 AML program requirements because the likelihood of money laundering or terrorist financing is remote or non-existent and, as a result, the cost of compliance would be reduced or eliminated. These transactions include the following:

- Real estate and loan transactions below a significant amount (e.g., $10,000,000) where the transaction is financed by an institutional lender. The rationale for this exemption is that the institutional lender is required to perform (or cause others to perform) federally-mandated industry-standard AML due diligence. The threshold dollar amount should be significant enough so that (a) countless transactions are not swept into a regulatory regime where adequate due diligence is already being performed and (b) the cost and burden of performing the AML due diligence bears a relationship with the dollar size of the transaction.

- "Upstream transactions" to the extent that AML due diligence was performed on the "downstream transaction." For example, the resale of individual loans as part of a securitization should not require new AML due diligence on the underlying transaction, but only on the source of the funds for the securitization. This concept is more fully explored in footnote 3 of this letter. ACREL urges FinCEN to be sensitive to the effect any Section 352 AML program would have on the secondary and securitization markets.

- Transactions where real estate is not the principal asset being conveyed at the closing and settlement. Examples include the sale of a business that, in part, owns commercial real estate. For instance, a biotechnology company is bought by another biotechnology company, and the selling company has a research facility. The principal asset being conveyed is the intellectual property rights of the selling company and its marketplace share, not the research facility. These types of transactions can take any number of permutations, but the end result is that real estate is not the principal asset being conveyed at the closing and settlement.

- Transactions not involving the conveyance of an interest in real estate at the closing and settlement. These transactions include the payment of monthly mortgage payments, the execution and delivery of a lease, delivery of a real estate contract, and the funding of deposits into escrow. The ANPRM suggests that non-fee conveyances may be included within the ambit of the phrase "real estate closing and settlement." This suggestion is misplaced. Common usage of the terms "closing and settlement" envision a fee conveyance (typically by deed) or

the conclusion of a real estate financing transaction. Leases and other non-fee conveyances are not included within such phrase. This view would also be consistent with the position that the focus should be on the actual conveyance of the real property interest (either by deed or mortgage) and not on the secondary and securitization markets.

- Mineral, royalty, and similar interests should be specifically excluded from the Section 352 AML program requirements. States differ on whether such interests even constitute interests in real property.

The list above is not intended to constitute an exhaustive catalogue of the types of real estate closing and settlement transactions that should not be regulated by the Patriot Act, but they are intended to provide guidance for the types of transactions that are either too small to be regulated or for which duplicative, unnecessarily costly, and burdensome AML due diligence should not be required.

4. **Adverse Affect on Commercial Real Estate Industry, Including Capital Markets**.

Although ACREL unqualifiedly endorses the goals of the Patriot Act in detecting and preventing money laundering and terrorist financing, the College is concerned about the negative impact the imposition of the Section 352 AML program requirements will have on the commercial real estate industry and on capital markets. To our knowledge, no empirical data have been presented or exist that demonstrate that money laundering in real estate transactions or in the lending industry (including capital markets) has become so pervasive to warrant federal regulation. The College thus desires to avoid the creation of a new regulatory regime that will certainly have an adverse economic impact on the nation's multi-trillion dollar commercial real estate industry and lending industries.

The development of new, burdensome regulations will require not only the implementation of costly and complex procedures intended to cause compliance with such regulations, but also the implementation of additional procedures to verify or confirm that such procedures are effective. However, there is no assurance that these new regulations will result in the curtailment of substantial money laundering or terrorist financing. Unlike cash, stocks, or bonds, real estate is by nature an illiquid investment. The College is not aware of any cost/benefit analysis having been conducted that might show the necessary balance between the substantial costs to be borne by the commercial real estate and lending industries and the degree of success the proposed regulations can reasonably be expected to achieve. We urge FinCEN to taken into account the economic impact of any proposed regulatory programs on the commercial real estate and lending industries and to conduct a cost/benefit analysis confirming the need and appropriateness of such an AML program.

Conclusion

ACREL desires to assist FinCEN in developing effective and meaningful rules to detect and prevent money laundering and terrorist financing in real estate closings and settlements. These rules must be developed in light of the critical roles that the attorney-client privilege and duty of client confidentiality play in the American judicial system. At the same time, we have recommended a proposal that would impose the burden of AML requirement compliance on the party who is best positioned to perform the Section 352 due diligence and to have the other parties reasonably rely on that due diligence.

The development of regulations in this complex area will not be easy, nor will it be without challenge. Please understand that ACREL is willing to avail its time and expertise to FinCEN as the rulemaking process progresses. If FinCEN desires to engage in a dialogue with ACREL, please contact the undersigned and I will ensure that such a dialogue begins. Again, thank you for your time in considering the views of ACREL in an area vitally important to the commercial real estate industry and our membership.

Very truly yours,

Sanford A. Weiner
President

cc: ACREL Board of Governors