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VIA E-MAIL

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 <u>Real Estate Closings and Settlements</u>

To FinCEN Staff:

The Section of Real Property, Probate and Trust Law ("Section") of the American Bar Association ("ABA") is pleased to submit the following comments to the Treasury Department's Financial Crimes Enforcement Network ("FinCEN") in response to the request for public comment on the advance notice of proposed rulemaking ("ANPRM") regarding the definition of "persons involved in real estate closings and settlements." These views are being presented only on behalf of the Section. They have not been approved by the House of Delegates nor the Board of Governors of the ABA and should not be construed as representing the position of the ABA.

At the outset, the Section notes that FinCEN will receive comments from the ABA Task Force on Gatekeeper Regulation and the Profession ("Gatekeeper Task Force"). The Section has consulted with the Gatekeeper Task Force in the development of these comments, but the comments in this letter are only those of the Section and not those of the Gatekeeper Task Force.

The Section has nearly 30,000 members who practice in the real property, probate, and trust law disciplines. Based on membership, the Section is the third largest in the ABA. Many of these practitioners practice real estate law on a full time basis. The Section's real property law members represent a broad spectrum of practice specialties, ranging from those who handle residential real estate closings to those who deal with highly sophisticated, multi-billion dollar commercial real estate transactions. Geographically, the members practice in rural and metropolitan areas and internationally. These members are sole practitioners, small law firm members, national law firm members, in-house counsel, and global law firm members. Because of the broad range of practice backgrounds, the expanse of geographic coverage, and considerable in-depth expertise in the real property arena, the Section is uniquely qualified to provide comments on the phrase “persons involved in real estate closings and settlements.”

The ANPRM indicates that FinCEN desires that the comments focus on the real estate sector in general and on various transaction types, and that FinCEN is “particularly interested in receiving comments addressing commercial real estate transactions.” The Section’s comments will thus be confined, in large measure, to commercial real estate transactions. Our comments will also attempt to respond to the four general questions raised in the ANPRM in the order in which they are presented in the ANPRM.

Before commenting on each question posed by FinCEN and without conceding the merit or appropriateness of imposing anti-money laundering (“AML”) requirements on the commercial real estate industry, the Section makes two fundamental observations regarding the imposition of any AML requirements on real estate lawyers:

- **Adverse Effect on Attorney-Client Privilege**. The Section believes that imposing the Section 352 AML program requirements on lawyers would adversely affect the attorney-client privilege and would detract from the role that lawyers play in assisting members of society to understand and comply with the rule of law. The Section requests that FinCEN give due regard to the critical role played by lawyers in the American legal system, which depends on lawyers to advise clients regarding the scope, meaning, and application of law to business transactions. These principles are more fully articulated in this letter.

- **“Financial Intermediaries” Standard**. To the extent FinCEN seeks to impose the Section 352 requirements on lawyers, the Section strongly believes that these requirements should be carefully tailored so that they apply, at most, to those lawyers who act as financial intermediaries and actually handle the receipt and transmission of cash proceeds through accounts that they actually control in the act of closing a commercial real estate transaction. The Section is of the view, as more fully detailed in this letter, that the AML requirements should be imposed only on clearly defined financial intermediaries and then only in a commercial real estate transactions of a sufficient size to warrant the increased cost of compliance with the regulations.

With these fundamental observations in mind, this letter will address the questions posed by FinCEN in the ANPRM in the order presented in the ANPRM.

1. **<u>What are the money laundering risks in real estate closings and settlements?</u>**

The first topic on which FinCEN seeks comment deals with the money laundering risks in real estate closings and settlements. The Section does not believe a material money laundering risk exists in the commercial real estate industry. This is not to say that money laundering does not occur in the commercial real estate industry. The Section, however, is not aware that it presents the degree of concern that justifies the imposition of a federally-mandated AML regime that has the potential to impede the efficient settlement of billions of dollars of real estate transactions that close every year.

In support of the statement that the real estate industry "could" be vulnerable at all stages of the money laundering process by virtue of dealing with high value products, the ANPRM points to a 1996 report by the National Institute of Justice and three appellate court decisions. The 1996 report states that "real estate transactions offer excellent money laundering opportunities" and opportunities to "legitimate and repatriate illegal funds." The report, however, does not point to any empirical data, research, or studies to support this statement.

Based on the strength of the 1996 report and decisional law, FinCEN seeks to impose a regulatory regime on a multi-*trillion* dollar industry that is vital to the domestic economy. Indeed, the institutional real estate market (principally pension funds) alone has a value in excess of $4.2 trillion. Before imposing any regulatory regime on such an important sector of the national economy, the Section believes that it is prudent for FinCEN to demonstrate through empirical data and research that the commercial real estate industry is, in fact, a source of money laundering activity in need of this form of federal regulation.

The three cases cited in the ANPRM do not appear to compel the imposition of AML program requirements on the commercial real estate industry. Indeed, at least one of the cases does not involve commercial real estate at all; rather, it deals with the purchase and sale of personal residences. *U.S. v. High*, 117 F.3d 464 (11th Cir.). Moreover, none of the cases suggests that real estate lawyers had a role in the criminal money laundering activity.1

The Section believes that FinCEN should provide more substantial and substantive evidence, through empirical data, research, or studies, that the commercial real estate industry is, in fact, a significant source of money laundering activity that would justify the

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[1] *U.S. v. Leslie*, 103 F.3rd 1093 (2nd Cir. 1997), does not suggest that one of the defendant's real estate lawyer and real estate broker were involved in the money laundering activity. Rather, one of the defendants called the lawyer and broker as witnesses to support the defendant's contention that the defendant thought that the transaction in question was legitimate. Both witnesses testified that the defendant had been trying to obtain loans to acquire a parcel of property.

imposition of AML program requirements on the entire industry. This is important because the scheme as now suggested could bring significant uncertainty, inefficiencies, delays, and increased costs to this enormous national industry.

In terms of existing safeguards in the real estate settlement industry that serve to guard against money laundering, nearly all of the closing proceeds of any transaction (whether through the purchase and sale of property or though mortgage financing transactions) are transmitted through traditional financial institutions, such as banks. These institutions currently have considerable AML programs in place that already afford effective opportunities to detect and prevent money laundering.

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

2.1 **Definition of Phrase Refers to Deed Conveyances and Financing Transactions**.

The words "real estate closings and settlements" have a generally understood meaning within the commercial real estate industry. The ANPRM describes the two customary methods of conducting a real estate closing or settlement: the "New York style" and the "escrow closing" style. The former is typically an in-person event while the latter usually does not involve an in-person meeting.

Regardless of the style or convention of the closing, the generally accepted meaning of the phrase "real estate closing and settlement" entails both a deed conveyance transaction and a real estate financing transaction. For a deed conveyance transaction, "real estate closing and settlement" means the process by which a deed or other similar instrument is used to convey record title to real property from a seller to a buyer. In a leading treatise on American real property law, a "closing" is defined as follows: "A real estate contract is said to close on the fulfillment of all its conditions, when the buyer has paid the price and the seller conveys the quality of title promised in the contract." *Thompson on Real Property (Thomas Edition)* § 94.04, 335. The key event is thus the actual conveyance of record title to the property.

For a real estate financing transaction, "real estate closing and settlement" "refers to the final steps of the transaction whereat the consideration is paid, *mortgage is secured*, deed is delivered or placed in escrow, etc." *Black's Law Dictionary* 231 (Fifth Edition, 1979; emphasis supplied). Decisional law supports this view. *See, e.g.*, Gaona v. Town & Country Credit, 324 F.3d 1050 (8^{th} Cir. 2003) (under Minnesota law, a "closing" means "the process whereby the documents creating a security interest in real property become effective between the borrower and the lender); Henderson v. Lemna, 394 N.E.2d 1070, 1072 (Ill. 1979) (the closing of a real estate sale means "the final steps of the transactions whereat the consideration is paid, mortgage is secured, deed is placed in escrow, etc." (quoting *Black's Law Dictionary*). In addition to these authorities, federal regulations define "settlement" as "the process of executing legally binding documents regarding a lien on property that is subject to a federally related mortgage loan. This process may also be called 'closing' or 'escrow' in different jurisdictions." 24 CFR § 3500.2(b) (Regulation X issued pursuant to the Real Estate Settlement Procedures Act).2

The Section believes that FinCEN should develop a definition of "real estate closings and settlements" that is consistent with the ordinary meaning of those words within the commercial real estate industry. The Section notes, however, that the ANPRM may unintentionally expand the scope of the phrase "real estate closings and settlements" beyond the parameters of its generally understood meaning. In Section I (Background) of the ANPRM, FinCEN defines a real estate closing or settlement as "the process in which the purchase price is paid to the seller and title is transferred to the buyer" (footnote omitted). This statement is consistent with customary usage, but a later portion of the ANPRM refers to "lease agreements." Within the commercial real estate industry, the execution and delivery of a commercial lease agreement (regardless of product type involved, such as office, retail, industrial, or warehouse) is typically not considered a "real estate closing or settlement." The same holds true whether the lease is a typical space lease for a term of years or a long-term ground lease. Usually, in a lease transaction, no settlement or closing agent is involved and no or limited funds change hands so no "closing" occurs.

The Section suggests that FinCEN narrowly construe the meaning of the phrase "real estate closings and settlements" to avoid bringing within its regulatory ambit a vast array of commercial real estate transactions that are not considered within the generally understood meaning of that phrase. Examples include the execution and delivery of construction contracts, condominium declarations, property management agreements, development agreements, brokerage sales and listing agreements, licenses, easement agreements, restrictive covenant agreements, and other non-deed based documentation in

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[2] State statutory law is likewise consistent with these definitions. For example, Maine law defines "settlement" as the time when the settlement agent has received the loan funds, loan documents and other documents and funds to carry out the terms of the contract between the parties and the settlement agent reasonably determines that all conditions for disbursement of the settlement proceeds as required by applicable law or such contracts have been satisfied. 33 Maine Rev. Stat. § 522. *See also* Md. Real Prop. § 7-109 ("Settlement" means the process of executing and delivering to the lender or the agent responsible for settlement, legally binding documents evidencing or securing a loan secured by a deed of trust or mortgage encumbering real property in this State); Minn. Stat. § 58.02 ("Closing" means either or both of the following: (1) the process whereby the real estate contract between a buyer and a seller is consummated; or (2) the process whereby the documents creating a security interest in real property become effective between the borrower and the lender); R.I. Stat. § 5-20-8.1 ("Closing" means the time at which real estate is transferred from seller to buyer and consideration is delivered to the seller or to a settlement agent with the intention of imminent delivery upon the recording of pertinent documents and other ministerial acts associated with settlement).

which no monetary consideration usually exchanges hands.3

Although deed conveyances and real estate secured financing transactions may fall within the purview of "real estate closings and settlements," FinCEN should recognize that these transactions may range from no consideration transactions to multi-billion dollar transactions. The question thus arises whether all of these transactions should be equally treated and regulated through the imposition of AML requirements. The Section suggests that FinCEN establish both a volume based threshold and a monetary based threshold for compliance with the Section 352 AML requirements.

For the volume based threshold, the Section questions whether the same requirements should apply, along with the attendant costs, for those participants in real estate closings and settlements who are involved in these activities on an infrequent or sporadic basis. A lawyer who acts as the escrow agent for just a few real estate transactions on an annual basis probably should not be subject to the same regulatory regime (e.g., the requirement to have a designated compliance officer) as one whose practice is primarily involved with real estate closings and settlements having significant monetary value.

For the monetary based threshold, the Section suggests that FinCEN consider imposing the Section 352 requirements only on real estate closings and settlements involving a certain threshold dollar amount. It would seem sensible to apply these requirements to more monetarily significant real estate transactions rather than to every real estate transaction, regardless of the dollar amount involved. The higher dollar real estate closings and settlements would seem to present a greater risk of significant money laundering activity as opposed to lower value real estate closings and settlements.

The expansion of the phrase "real estate closings and settlements" to areas of commercial real estate not involving a deed conveyance or a real estate secured financing transaction would impose significant, and unwarranted, burdens on the commercial real estate industry.

2.2 **Role of Participants in Real Estate Closings and Settlements**.

FinCEN correctly states in the ANPRM that a typical commercial real estate transaction involves a number of participants, including real estate brokers, lawyers (sometimes several firms) representing each of the parties, the financing entity, the title

[3] Another type of transaction that should be exempted involves transfers of ownership interests in entities that own real estate. Although it is true that the purchase and sale of all of the membership interests in a limited liability company that owns a single commercial real estate asset could be used to effectively transfer the asset, sweeping these transactions under the regulations could have wide-ranging and unintended consequences. For example, would the transfer of stock of a public company owning real estate (and the vast majority do) be a regulated transaction?

insurer, and the escrow agent. Other parties include surveyors, title officers, inspectors, accountants, contractors, architects, appraisers, and engineers, most of whom seldom, if ever, are involved in the flow of funds at a closing. The involvement of each participant is not static: it will change and fluctuate from transaction to transaction and, often, even within an individual transaction. For example, a real estate broker may take an activist role in a specific commercial real estate sales transaction but may adopt a more limited, tangential role in another commercial real estate sales transaction. Another example is a lawyer who is simply engaged to review the form of the deed on behalf of the buyer of an undeveloped parcel of commercial real estate in a rural area as opposed to a lawyer who is engaged to structure and negotiate the acquisition of an improved parcel of valuable commercial real estate in the central business district of a large city. Yet another example is a lawyer who is engaged by another lawyer to serve as local counsel for the purpose of rendering a legal opinion on state or local law issues or to perform local due diligence activities or to participate in the formation of a new entity in that local jurisdiction.

The degree of familiarity of the participants with their principals will also vary from deal to deal. One broker or lawyer may be intimately familiar with a seller or buyer in one transaction but may have little or no familiarity with a seller or buyer (or all of the participants in that party) in another deal. It is not at all unusual for a lawyer to be asked to represent a client only in a single transaction or, perhaps, only for a discrete portion of a transaction. Although a prudent lawyer will undertake some due diligence on the client, he or she may be dealing with certain representatives of the client and not have complete information on all aspects of the client's business.

2.3 **Role of Attorneys and Attorney-Client Privilege and Client Confidentiality**.

The ANPRM discusses the "key role" attorneys often play in real estate closings and settlements and the role of attorneys in structuring real estate transactions and points to the requirement under the Bank Secrecy Act that financial institutions report the receipt of cash or cash equivalents in an amount over $10,000 on Form 8300. 26 U.S.C. § 6050-1. On the basis that this requirement under the Bank Secrecy Act does not independently impose any reporting requirements on financial institutions, FinCEN apparently reasons that the application of Section 352 requirements to attorneys in connection with activities relating to real estate closings and settlements does not raise issues of, or pose obligations inconsistent with, the attorney-client privilege.

The Section notes that the statute on which Form 8300 is based does not require or suggest that the lawyer, in making such reports, pass judgment on the propriety of the client's conduct. Indeed, when a Form 8300 disclosure would reveal the substance of a confidential communication, courts have held that disclosure is not required. *E.g., In re Grand Jury Proceedings (Anderson)*, 906 F.2d 1485, 1488 (10th Cir. 1990).

Although the Gatekeeper Task Force will address in greater detail the adverse affect the Section 352 requirements would have on the attorney-client privilege and client confidentiality, the Section desires to make clear that it does not agree with the rationale articulated by FinCEN in the ANPRM. Although the Section 352 AML requirements do not per se impose reporting requirements, they do require the performance of certain due diligence activities in connection with the development of internal policies, procedures, and controls and might require that an independent audit function be created to ensure that the AML programs are effective in detecting and preventing money laundering.

To the extent these policies, procedures, and controls seek to impose duties of inquiry or investigation into a client's background, bona fides, or business dealings, they may inappropriately intrude into areas protected by the attorney-client privilege and client confidentiality. The types of due diligence activities envisioned by Section 352 are akin to the "know your customer" rules found in the banking industry. By forcing a lawyer to investigate a client's intentions and the source of the funds to be used in a real estate closing or settlement, a lawyer would be compelled to engage in an adversarial relationship with his or her client. Plainly, this approach would severely undermine the attorney-client privilege.

The prospect of an independent audit function is equally troubling. An independent auditor would necessarily have to review and investigate a client's files (including the attorney's work product), thereby exposing the attorney to a breach of the attorney-client privilege. It is difficult to determine how an independent audit function could operate effectively without an examination of the client's files and the attorney's work product. These activities may run afoul of the attorney-client privilege and client confidentiality rules that govern lawyers in every state. As noted in the February 2003 report of the Gatekeeper Task Force, a requirement that attorneys report activities of their clients "would undermine the independence of the bar from the government, erode the essential trust relationship between the attorney and the client which is a bedrock of the U.S. administration of justice and rule of law, and compromise the principle of confidentiality in communications between a lawyer and the client." In addition, these regulations, if imposed on lawyers, would be inconsistent with the laws in most of the 50 states. The Section urges that FinCEN be sensitive to these critically important concerns.

The Section strongly believes that existing ethical rules and requirements are adequate to compel lawyers to comply with all applicable laws in practicing law and that imposing the Section 352 AML program requirements on lawyers would not advance further compliance by lawyers with AML laws. Existing laws and ethical rules prohibit lawyers in every jurisdiction from knowingly assisting clients in illegal or fraudulent activity, financial or otherwise. For example, Rule 1.2(d) of the ABA Model Rules of Professional Conduct states:

> A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

As discussed in the comments prepared by the Gatekeeper Task Force dated August 23, 2002 relating to the Financial Action Task Force Consultation Paper dated May 30, 2002, the Gatekeeper Task Force noted:

> Model Rule 8.4 provides that it is professional misconduct for a lawyer to engage in conduct "involving dishonesty, fraud, deceit or misrepresentation," or "conduct that is prejudicial to the administration of justice." Sections 1956 and 1957 of Title 18 of the United States Code provide criminal sanctions for any lawyer who aids in the commission of a money laundering offense. Therefore, to the extent 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.

The consequences for non-compliance are severe, such as possible disbarment and the loss of the privilege to practice law and criminal sanctions. The Section is not aware of any evidence suggesting that the existing laws affecting lawyers are inadequate to satisfy the government's needs to detect and prevent money laundering. As stated in the February 2003 report of the Gatekeeper Task Force:

> 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.

For the reasons outlined above, the Section believes that imposing the Section 352 AML program requirements on lawyers would adversely affect the attorney-client privilege and would detract from the role that lawyers play in assisting members of society to understand and comply with the rule of law. The Section requests that FinCEN give due regard to the critical role played by lawyers in the American legal system, which depends on lawyers to advise clients regarding the scope, meaning, and application of law to business transactions.

2.4 **Financial Intermediaries Standard**.

To the extent FinCEN seeks to impose the Section 352 requirements on lawyers, the Section strongly believes that these requirements should be carefully tailored so that they apply, at most, only to those lawyers who act as financial intermediaries and actually handle the receipt and transmission of cash proceeds through accounts that they actually control in the act of closing a commercial real estate transaction. The discussion below provides the rationale for this approach.

Regardless of the scope of services performed or degree of familiarity of the participants, it is important that FinCEN focus on those participants in a commercial real estate transaction who actually handle the receipt and transmission of financial proceeds pursuant to a closing of a commercial real estate transaction. These participants are in the best position to inquire into the source or origin of the closing funds and the disposition of the funds. An escrow agent, or other participant (often the bank or financial institution with an existing relationship with the seller or buyer) acting as the disbursing agent, or "financial intermediary," in the commercial real estate transaction is better-positioned to make these inquiries and to detect and prevent money laundering. The ANPRM indicates that it is important to identify the level of involvement with the actual flow of funds used to purchase the property, and the Section believes the focus of inquiry should be on those participants who, acting as financial intermediaries, actually handle the receipt and transmission of cash proceeds through accounts that they actually control in the act of closing a commercial real estate transaction. The Section observes that the Gatekeeper Task Force has advocated such a "financial intermediary" approach in dealing with suspicious transaction reporting requirements for lawyers.

A participant who acts as a financial intermediary may not know, in all cases, the origin of the funds other than the identity of the transmitting financial institution. In those circumstances, FinCEN should allow the financial intermediary to rely on a certificate or other appropriate form of confirmation from other participants in the real estate closing regarding the bona fides of the closing funds or the fact that another participant has undertaken the requisite AML due diligence for the closing. As long as the financial intermediary is able to rely reasonably on such certificate or other appropriate form of confirmation, the financial intermediary should not be required to undertake further due diligence activities. These additional activities would be duplicative of AML due diligence performed by others and would likely yield no additional meaningful benefit in the effort to ferret out money laundering activities.

For clarity and certainty to those involved in real estate closings and settlements, FinCEN should carefully prescribe when a participant, acting as a financial intermediary, is considered to be actually handling the receipt and transmission of cash proceeds through accounts that the participant actually controls in the act of closing and settling a commercial real estate transaction. Participants in a commercial real estate closing and settlement need clearly defined guidelines so that they will know whether and when they have to comply with the Section 352 requirements. For example, closing proceeds transmitted to a participant's account would logically trigger the Section 352 requirements. Conversely, a lawyer who directs a third party escrow agent to release the closing proceeds in a commercial real estate closing should not be considered as actually handling the receipt and transmission of financial proceeds pursuant to a closing of a commercial real estate transaction.

2.5 **<u>International Real Estate Closings and Settlements</u>**.

FinCEN should clarify whether it intends for the regulations to cover not only commercial real estate closings and settlements that close wholly within the United States but also cross-border, or international, commercial real estate closings and settlements where one or more of the participants is a United States citizen or domestic entity. For example, would the Section 352 requirements apply to a domestic-based entity that acquires an office building in Great Britain where the closing funds are transmitted from a domestic financial institution to the British-based seller? The globalization of the world economy has led to a significant increase in the volume of these types of cross-border real estate closings, and FinCEN should determine whether Section 352 reaches into this area and, if so, the extent to which it applies.

3. **<u>Should any persons involved in real estate closings or settlements be exempted from coverage under Section 352?</u>**

The ANPRM states that FinCEN "wishes to make it clear that it does not intend to cover purchasers and sellers of their *own* real estate. . . . The question of exemption is specifically directed to real estate professionals, and those who trade in real estate on a commercial basis." The Section questions the rationale for such a broad exemption. Rather than impose AML requirements on the sellers or buyers of commercial real estate, such as pension funds, FinCEN seeks to impose the requirements on the other participants in a commercial real estate transaction, not including the principals whose money is actually involved in the transaction. Under this approach, a pension fund that owns a shopping center may sell it to another pension fund without being subject to any AML requirements. Presumably, other participants in this transaction, such as the broker, lender, or lawyer, who are the least likely to know about any money-laundering scheme, would have the burden of complying with the applicable AML requirements under Section 352. And it would seem to be more likely that the person or entity engaged in money laundering activities would not be the ancillary service providers but the principals themselves (i.e., the seller or buyer). As a result, these parties are the ones against whom the AML requirements should more appropriately apply.

The Section believes the exclusion should apply to purchasers and sellers of their own personal residences and to other real estate professionals involved in a commercial real estate transaction who have only a tangential relationship with the closing or settlement process. Examples of those having a tangential relationship include a property surveyor, an appraiser, local counsel who performs local due diligence or renders opinions relating to local law issues (e.g., enforceability opinions in commercial real estate financing transactions), and an environmental consultant. A lawyer who serves as local counsel will often not know the actual client. Because local counsel typically receive their assignments on a referral basis from the primary lawyer involved in the transaction, local counsel would not be in a position to make any level of substantive inquiry into the client or its business affairs.

Because, as noted earlier, the focus of a real estate “closing and settlement” is on the actual conveyance of record title to the real property asset, other real property transactions affecting the asset (such as the sale of residential mortgages on the secondary market and securitization transactions affecting real estate) should not be subject to the AML requirements.

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

As noted above, the Section urges FinCEN to be sensitive to the costs of imposing Section 352 AML requirements on the commercial real estate industry. Section 352 of the USA Patriot Act requires the establishment of an AML program, including, at a minimum, the following:

- The development of internal policies, procedures, and controls. These should be appropriate for the level of risk of money laundering identified.

- The designation of a compliance officer.

- An on-going employee training program.

- An independent audit function to test the programs.

Section 352 of the USA Patriot Act directs the Treasury Secretary to "consider the extent to which the requirements imposed under [Section 352 of the USA Patriot Act] are commensurate with the size, location, and activities of the financial institutions to which such regulations apply."

The participants in a commercial real estate transaction vary widely in their level of involvement, their financial resources, their staffing and "back office" support, and their acumen in detecting and preventing money laundering. For example, sole practitioners and small firms handling a few real estate closings a year may incur significant costs in adopting AML requirements, such as engaging compliance officers and auditors to test the efficacy of the programs in place. These costs could cause them not to offer these services. In many areas of the country, however, these lawyers are the only source of real estate closing services. The benefit in detecting and preventing money laundering may be negligible or non-existent. But the cost will be significant and, in some cases, prohibitive. The impact of these costs may be less draconian in larger organizations, but the consumer will ultimately shoulder the burden of paying the expense of all of these programs.

As noted earlier, any AML regime needs to be predicated on clear and definitive rules so as to enable those involved in a real estate closing or settlement to know whether they are subject to the Section 352 requirements. It may be constructive for FinCEN, along with the other measures outlined in this letter, to formulate guidelines to assist participants in this compliance effort. Although not necessarily embracing all of the "red flags" developed by the American Land Title Association and noted in the ANPRM, the Section feels these types of guidelines would be helpful in providing meaningful regulatory guidance to the real estate industry. These red flags need to be developed to ensure they are compatible with common sense and are designed solely for the goal of detecting money laundering or terrorist financing activities. In short, a participant should not be left guessing whether it is subject to the Section 352 requirements and, if so, whether that participant has complied with the requirements.

Conclusion

The Section is supportive of FinCEN's efforts to develop a meaningful regulatory regime for the detection and prevention of money laundering in the commercial real estate industry. But for the reasons set forth in the Section's comments, it may be premature to impose Section 352 AML requirements on the commercial real estate industry absent a meaningful cost-benefit analysis demonstrating that such requirements are necessary.

Given the complexity of the task in defining the contours of the phrase "persons involved in real estate closings and settlements," the Section would appreciate the opportunity to engage in a meaningful, constructive, and substantive dialogue with FinCEN as it evaluates the comments received and formulates the actual rules for this definition. The impact the rules would have on the commercial real estate industry are significant. This in part underscores the need to have a forum, either formal or informal, to explore possible solutions to this issue. The Section stands ready to meet with FinCEN staff at any time to engage in such a dialogue. To that end, I encourage FinCEN to contact Kevin L. Shepherd, the chair of the Section's USA Patriot Act Task Force, at 410.244.7772 or klshepherd@venable.com. The Task Force looks forward to working with FinCEN as these rules are developed.

Again, the Section thanks the staff of FinCEN and Treasury for this opportunity to comment and sincerely appreciates the careful consideration of our views.

Very truly yours,

Dennis I. Belcher

Dennis I. Belcher
Chair

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