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REAL PROPERTY, PROBATE & TRUST LAW SECTION — THE FLORIDA BAR

June 9, 2003

BY E-MAIL

ATTN: Section 352 – Real Estate Settlements
Financial Crimes Enforcement Network
United States Department of the Treasury
Email: regcomments@FinCEN.treas.gov

Re: Comments of The Real Property, Probate and Trust Law Section of The Florida Bar in Response to Advance Notice of Proposed Rulemaking – Anti-Money Laundering Requirements for Persons Involved in Real Estate Closings and Settlements

Ladies and Gentlemen:

The Real Property, Probate and Trust Law Section of The Florida Bar ("The Section")[1] respectfully submits the following comments in response to the advance notice of proposed rulemaking issued on April 3, 2003 (the "Advance Notice") by the United States Department of the Treasury ("Treasury") and the Financial Crimes Enforcement Network ("FinCEN").[2] The Advance Notice solicits comments on, among other issues, whether attorneys should be required to conduct due diligence on their clients in connection with any real estate closing, appoint an anti-money laundering ("AML") compliance officer, conduct an internal audit of their AML programs, and comply with other AML program requirements under Section 352 of the USA PATRIOT Act.

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[1] The Florida Bar is the professional licensing authority of approximately 72,000 attorneys in the State of Florida. Of this total, approximately 8,033 actively practice real estate law.

[2] The Advance Notice was published in 68 Fed. Reg. 17,569 (Apr. 10, 2003).

SUMMARY

The Section submits that real estate attorneys should **not** be subject to any AML program requirement. From a practical perspective, the implementation by real estate attorneys of any Section 352 AML program requirement (e.g., conducting due diligence on their client's identity and source of funds, appointing a compliance officer, training employees, and auditing the AML program) would: (1) unnecessarily duplicate the AML compliance practices already conducted by financial institutions; (2) protract the real estate closing process; and (3) result in significant compliance fees and expenses being passed on to the buyer or seller of a real estate transaction. From a legal perspective, the inclusion of real estate attorneys within the USA PATRIOT Act Section 352 AML program requirement would: (1) impose on real estate attorneys a duty to conduct basic due diligence on the identity of their clients – which would cause clients to feel distrustful of their attorney and would discourage clients from communicating fully and frankly with their attorney; and (2) impose on real estate attorneys a de facto obligation to report questionable transactions to law enforcement authorities – thus conflicting with long-standing rules of client confidentiality and attorney-client privilege.

Accordingly, The Section requests that Treasury and FinCEN exercise their Congressionally-authorized discretion under Section 352 to exempt real estate attorneys from any AML program requirement.

BACKGROUND

Section 352 of the landmark USA PATRIOT Act requires every "financial institution" to establish an AML program which must include at least four things: (1) written policies, procedures, and controls; (2) an AML compliance officer; (3) an ongoing employee training program; and (4) an independent audit function to test the efficacy of the AML program.[3] Although Section 352 does not expound what "written policies, procedures, and controls" should look like, most AML programs adopted by depository institutions, broker dealers, mutual funds and other financial institutions generally contain customer identification procedures, customer due diligence procedures, suspicious activity reporting procedures, and large currency transaction reporting procedures. The customer identification and customer due diligence procedures are typically risk-based in nature, meaning the higher the risk-profile of the bank customer or the transaction itself, the more due diligence that must be performed on that customer.

The term "financial institution" in Section 352 is undefined, but the Bank Secrecy Act – which the USA PATRIOT Act amends – defines "financial institution" to include, among other things, "persons involved in real estate closings and settlements."[4] Accordingly, Section 352 of the USA PATRIOT Act requires, among other financial institutions, "persons involved in real estate closings and settlements" to adopt an AML program.

In analyzing what persons could be viewed as being "involved in real estate closings and settlements," the Advance Notice identifies real estate brokers, mortgage brokers, title insurance companies, escrow

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[3] See 31 U.S.C. § 5318(n)(1)(a).
[4] See 31 U.S.C. § 5312(a)(2)(U).

agents and appraisers as persons that are involved in a typical real estate transaction.[5] The Advance Notice also identifies real estate attorneys who represent buyers or sellers as "often play[ing] a key role in real estate closings and thus merit consideration . . . in the closing and settlement process."[6] According to Treasury and FinCEN,

> [w]hen engaging in conduct subject to anti-money laundering regulations, attorneys, like other professionals, should take the basic steps contemplated by section 352 to ensure that their services are not being abused by money launderers.[7]

Accordingly, the view espoused by Treasury and FinCEN in the Advance Notice – if enacted into a final rule – could very well require real estate attorneys (ranging from solo practitioners to law firms to in-house corporate legal departments to community legal aid clinics) to adopt an AML program that, under Section 352 of the USA PATRIOT Act, would require them to – at a minimum – have written policies telling them what due diligence should be performed on which clients, including what to do when suspicious transactions arise; hire an AML compliance officer; train their office staff in AML compliance on an ongoing basis; and hire an auditor to test the efficacy of the law firm's or in-house legal department's or community legal aid clinic's AML efforts.

Section 352 also gives Treasury plenary discretion to "exempt from the application of Section 352 AML standards any financial institution that is not subject to the provisions of" Treasury's anti-money laundering regulations codified at 31 C.F.R. Part 103.[8] Real estate attorneys currently are not subject to those regulations and, accordingly, are eligible for exemption from the Section 352 AML program requirement.

DISCUSSION

A. Imposition of an AML Program Requirement on Real Estate Attorneys Poses Serious Practical Problems

From a practical perspective, the implementation of any AML program for real estate attorneys would: (1) be duplicative in light of financial institutions that currently implement their own AML practices during any given real estate closing; (2) protract the real estate closing process; and (3) result in significant compliance expenses being passed on to the buyer or seller of a real estate transaction.

1. Imposition of an AML Program Requirement on Real Estate Attorneys Would Be Duplicative in Light of Existing AML Program Requirements on Financial Institutions That Would Likely Be the First Line of Defense When Clients Deliver Closing Funds to Their Attorneys

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[5] Advance Notice, 68 Fed. Reg. at 17,570.

[6] Id.

[7] Id., 68 Fed. Reg. at 17,571.

[8] 31 U.S.C. § 5318(h)(2).

Real estate attorneys and their law firms rarely, if ever, handle real estate closings by receiving hard currency from their clients or their client's counterparties. Instead, most funds received by real estate attorneys come in the form of: (a) wire transfers inbound from a U.S. depository institution or from a U.S. correspondent of a non-U.S. bank; or (b) checks or similar negotiable instruments. By the time purchasers and sellers come to the closing table, they have already visited their respective banks and obtained official or cashier's checks or instructed their bank or broker dealer to wire funds into the account designated by the counter-party. In this respect, other financial institutions who already are required under Section 352 to have AML programs in place perform basic KYC on the customer and, if appropriate, conduct due diligence on the source of funds. Because implementation of AML programs is already required of other financial institutions such as banks and broker dealers, the creation of a second line of AML defense that requires real estate attorneys to adopt and implement an AML program is unnecessarily duplicative and serves no value-added role in our nation's ongoing fight against money laundering and terrorism financing.

Indeed, FinCen and Treasury have, in a similar advance notice of proposed rulemaking under Section 352, exempted from the Section 352 AML program requirement certain dealers in precious metals, stones or jewels on the rationale that other "financial institutions" already are required to implement AML programs and, therefore, provide the necessary safeguard to mitigate money laundering risk.[9]

While virtually all real estate transactions are financed by banks which are already required to implement effective AML programs, other real estate transactions that are not financed by banks usually involve other financial institutions that also are required to implement AML programs. In those rare instances where a transaction is financed in hard currency (a "cash deal"), federal law already imposes on real estate attorneys an obligation to file a currency transaction report on Form 8300. In either case, the attorney must check a box stating whether the transaction appears "suspicious."

Moreover, real estate attorneys already have an obligation under their state bar rules – discussed in Section B.1 herein – to divulge information where the attorney "reasonably believes" that the disclosure of client information is necessary to "prevent a client from committing a crime." Therefore, real estate lawyers today cannot turn a blind eye to money laundering where they "reasonably believe" real estate closing funds are tainted. Indeed, to do so would result in the attorney violating state law, which could result in sanctions against the attorney by state bar authorities, including disbarment.

Accordingly, imposition of an AML program on real estate attorneys is duplicative.

2. Imposition of an AML Program Requirement on Real Estate Attorneys Would Protract the Closing Process

The proposal in the Advance Notice that real estate attorneys adopt Section 352-type AML programs would have the unforeseen consequence of converting common and relatively straightforward legal transactions – the purchase and sale of real estate – that are often closed in a matter of a few hours into a possibly protracted process where attorneys on each side of the transaction must reach a certain level of comfort that their own client and their client's counterparty is not using a closing as a means of laundering dirty money. This delay could result in additional hours being added to the process, if not days, until both

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[9] See United States Department of the Treasury and Financial Crimes Enforcement Network, Anti-Money Laundering Programs for Dealers in Precious Metals, Stones, or Jewels, Advance Notice of Proposed Rulemaking, 68 Fed. Reg. 8,480, 8,482 (Feb. 21, 2003) ("Therefore, there is substantially less risk that a retailer that purchases goods exclusively or almost exclusively from dealers [already] subject to the proposed rule will be abused by money launderers.").

real estate attorneys have investigated their client's identity and verified the source of the funds being used in the transaction.

3. Imposition of an AML Program Requirement on Real Estate Attorneys Would Add Significant Closing Costs to the Buyer or Seller in a Real Estate Transaction

A Section 352-type AML program for real estate attorneys – in addition to adoption of written policies and procedures which have been discussed above – would also require the hiring or appointment of an AML compliance officer, the ongoing training of employees, and the auditing of the effectiveness of the AML program. To achieve compliance with these minimum requirements, real estate attorneys would be required to spend significant time and expense – much of which would be passed on to their clients.

Real estate attorneys, like most attorneys in private practice in the United States, generally charge a fee for services rendered on the basis of the amount of time spent working on a real estate transaction. An AML program requirement that would require a real estate attorney to do some basic investigation on the identity of his or her client and then verify that identify, as well as the source of funds, would increase the time that an attorney would take on a real estate transaction. This, of course, would result in a larger legal fee than a client would normally pay today for assistance with a closing. The increased legal fee would be particularly onerous for low- to moderate-income buyers or sellers of residential real estate.[10]

In addition to increased legal fees, the costs and expenses of real estate attorneys similarly would increase. Real estate attorneys, like most attorneys in private practice in the United States, generally pass through to their clients the costs incurred in working on a real estate transaction. A law firm, in-house legal department, and even a legal aid clinic with a real estate practice would need to hire a compliance officer knowledgeable in AML compliance generally. Alternatively, a firm, in-house legal department or legal aid clinic could appoint another attorney, but that attorney would need to engage in the uneasy task of becoming familiar with AML law and acceptable best practices and compliance. Moreover, the training of employees (especially for larger law firms) on an ongoing basis in AML compliance would add more expense. And appointing an internal or external auditor to test the efficacy of the real estate firm's AML program poses yet another significant expense. Most or all of these expenses – like other out-of-pocket costs and expenses incurred by a typical real estate attorney – likely would be passed on to the real estate attorney's client as part of the client's closing costs. While some larger law firms might have the resources to assume much of these costs, smaller law firms, solo real estate practitioners and legal aid clinics in particular would be more likely to pass through these costs directly to their clients, causing overall real estate closings to be more costly.

B. Long-Standing and Well-Settled Principles of Client Confidentiality and the Attorney-Client Privilege Would Be Compromised If Real Estate Attorneys Were Required To Conduct AML Practices In Connection With Real Estate Closings

[10] In this regard, there is a long-standing federal policy to promote affordable housing. The increased legal fees and AML-related expenses that low- to moderate-income clients would pay would make the acquisition of a first home more expensive with little AML benefit, as discussed in Section A.1 above.

Besides the practical problems raised by the proposed AML program requirement on real estate attorneys, the proposal raises several legal problems. Specifically, an AML program requirement on attorneys would conflict with the attorney obligation to maintain client confidentiality and the attorney-client privilege.

1. Current Law: The Attorney's Duty To Keep Strictly Confidential Information Related to His or Her Client

The oldest known privilege for confidential communications is the attorney-client privilege.[11] The purpose of the attorney-client privilege is to elicit "full and frank communication" between attorneys and their clients and thereby promote broader public interests by protecting the client's confidential communications from coerced disclosure.[12]

The attorney-client privilege and rules regarding client confidentiality have historically been left to the states in our Union to legislate and interpret.[13] Rules of professional conduct throughout the states address the fundamental nature of confidentiality and attorney-client privilege. In the State of Florida, for example, the Rules Regulating The Florida Bar (the "Florida Bar Rules") are similar to the American Bar Association's Model Rules of Professional Conduct (the "Model Rules") and prohibit an attorney from revealing "information relating to the representation of a client unless the client consents."[14] The comments to The Florida Bar Rules explain the basis for this rule:

> [a] fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.[15]

The basis for the rule is perfectly logical: a client will not approach an attorney for advice or representation if he or she suspects the attorney has an obligation to report him or her to law enforcement authorities (in a criminal setting, for instance) or divulge his or her confidences to a counterparty (in a commercial setting, for instance).[16]

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[11] See United States v. Zolin, 491 U.S. 554, 562 (1989); Swidler & Berlin v. United States, 524 U.S. 399, 403 (1988); Upjohn Co. v. United States, 449 U.S. 383, 389 (1981); Neu v. Miami Herald Publishing Co., 462 So. 2d 821, 826 (Fla. 1985).

[12] See Swidler & Berlin, 524 U.S. at 403. See also Upjohn Co., 449 U.S. at 389 (stating that protecting confidential disclosures encourages full and frank communication between clients and their attorneys); Trammel v. United States, 445 U.S. 40, 51 (1980) (stating that attorney-client privilege rests on lawyer's need to know all relevant facts in order to provide effective legal advice); Fisher v. United States, 425 U.S. 391, 403 (1976) (stating that purpose of attorney-client privilege is to encourage full disclosure between clients and their attorneys).

[13] See, e.g., FED. RULE EVID. 501 advisory committee's note ("federal law should not supersede that of the States in substantive areas such as privilege absent a compelling reason. The Committee believes that in civil cases in the federal courts . . . there is no federal interest strong enough to justify departure from State policy.").

[14] FLA. RULES OF PROF'L CONDUCT, RULE 4-1.6 (2003).

[15] Id. (emphasis added).

[16] Hunt v. Blackburn, 128 U.S. 464, 470 (1888) (stating that effective legal assistance is not practically available unless client is free from apprehension of disclosure of his confidential communications to attorney).

There is only one narrow yet important exception to the otherwise strict attorney-client confidentiality obligation of most state bar rules. Where the attorney "reasonably believes" that the disclosure of client information is necessary to "prevent a client from committing a crime" or "to prevent a death or substantial bodily harm to another," the attorney must divulge that information.[17] While the crime prevention exception is mandatory in nature, the attorney has no obligation to conduct any due diligence on the identity or background of his or her client.

2. Imposition of an AML Program Requirement Necessarily Would Impose Upon Real Estate Attorneys a Duty To Audit Their Client

A Section 352-type AML program in effect would impose a duty to verify a client's identification and under certain circumstances conduct due diligence on a client's source of funds in connection with a real estate closing.

As Treasury and FinCEN are aware, any meaningful AML policies and procedures under Section 352 will require "persons engaged in real estate closings and settlements" to do some basic due diligence on the background of the buyer of real property – tantamount to the "know-your-customer" or KYC procedures employed by depository institutions and other broker dealers today. Accordingly, if real estate attorneys were required to implement Section 352-type AML policies and procedures when dealing with a client, they could very well be identifying and verifying who their client is, asking questions about the source of the clients' funds, and checking client names on anti-terrorist databases such as the OFAC database. Further, real estate clients frequently are corporate clients, which could result in the additional burden of having to repeat the client identification and verification process for all the key decision-makers or controlling equity holders of a company.

Not surprisingly, courts have rarely been asked to resolve whether an attorney has a duty to investigate his client. When they have, courts have stated that clients do not pay attorneys to conduct due diligence on them. In New Jersey v. Zwillman,[18] for example, an attorney was prosecuted and convicted for falsifying claims in a scheme to defraud an insurance company. On appeal, the attorney took exception to the trial court's claim that the attorney had a duty to determine the truthfulness of his client's case. In reversing the trial court, the appellate court explained that

> [i]t is not an attorney's responsibility to decide the truth or falsity of a client's representations unless he has actual knowledge or unless from facts within his personal knowledge or his professional experience he should know or reasonably suspect that the client's representations are false. The duty of the attorney is to seek for his client all that the client is entitled to under the law and not to act in the first instance as judge and jury.[19]

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[17] Id.

[18] 270 A.2d 284 (N.J. App. Div. 1970).

[19] 270 A.2d at 289 (emphasis added).

While a lawyer should make adequate preparation including inquiry into relevant facts of his representation, and while he or she should not accept as true that which he should not reasonably believe to be true, he does not have the responsibility to "audit" the affairs of his client or to assume, without reasonable cause, that a client's statement of the facts cannot be relied upon.[20] The attorney need not question or disbelieve what his client tells him unless there is some tangible reason to do so.[21] Indeed, to do otherwise would offend traditional understandings of attorney-client relations, insofar as it would undermine the parties' abilities to trust one another.[22] As the United States Court of Appeals for the Sixth Circuit has stated: "Although an attorney must not turn a blind eye to the obvious, an attorney should be able to give his clients the benefit of the doubt."[23]

It is not surprising, then, that even the Securities and Exchange Commission (the "SEC") in its implementation earlier this year of Section 307 of the Sarbanes Oxley Act – which creates a new federal law exception to the otherwise strict attorney-client confidentiality standard – did not require outside counsel to audit, investigate or otherwise conduct due diligence on the intentions of their clients.[24] In establishing standards of professional conduct for attorneys who appear and practice before the SEC on behalf of public companies, an attorney must report "evidence" of a "material violation" of securities laws or "breach of fiduciary duty or similar violation" by the issuer up-the-ladder within the company to the chief legal counsel or the chief executive officer of the company (or the equivalent thereof). If those officers do not respond appropriately to the evidence, the attorney is required to report the evidence to the audit committee, another committee of independent directors, or the full board of directors. While this rule amplifies somewhat the traditional crime prevention exception to state bar rules regarding attorney-client confidentiality, it does not impose on the attorney a duty to investigate the intentions of his client. The SEC believes that "because the rule does not require actual knowledge of the violation, there generally is no duty to investigate evidence of a material violation before reporting the potential violation."[25]

Accordingly, a Section 352-type AML program requirement would undermine the attorney-client relationship at the outset and pit attorney against client into a *de facto* adversarial position by putting real

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[20] ABA Comm. on Ethics and Professional Responsibility, Formal Op. 335, at 92 (1974) (emphasis added).

[21] The Florida Bar Rules, like most state bar rules of professional conduct, state that an attorney may have a duty to investigate a client's representations where circumstances would lead the attorney to believe or suspect that the client may be engaging in crime or fraud to avoid assisting the client. See FLA. RULES OF PROF'L CONDUCT, RULE 4-1.2(d)(2003). See Section B.1 supra.

[22] In Williams v. Whitmill, No. 84 C 4910, slip. op. (N.D. Ill. 1986), for example, the court held that counsel for a plaintiff prisoner in a habeas corpus proceeding did not have to "automatically suspect" their client when he gave them certain documents that later proved to be forgeries, even though the court previously had determined in another proceeding that the plaintiff had engaged in conduct that lacked veracity.

[23] United States v. Wuliger, 981 F.2d 1497, 1505 (6th Cir. 1992).

[24] Securities and Exchange Commission, Implementation of Standards of Professional Conduct for Attorneys, Final Rule, 68 Fed. Reg. 6,296 (Jan. 29, 2003).

[25] Fed. Reg. at 71,682 (emphasis added). See Sean A. SeLegue, THE NEW FRONTIER: LAWYERS AS WHISTLEBLOWERS, presented in Practicing Law Institute, Patents, Copyrights, Trademarks and Literary Property Course Handbook Series, January – March 2003 (stating that "[t]he proposed [SEC] rule . . . is not intended to impose upon an attorney, whether employed or retained by the issuer, a duty to investigate evidence of a material violation or to determine whether in fact there is a material violation").

estate attorneys in the awkward position of auditing the identity of their clients and the source of their clients' funds before consummating a real estate closing.

3. Imposition of an AML Program Requirement Necessarily Would Impose Upon Real Estate Attorneys a Duty To Violate the Attorney-Client Privilege by Reporting Suspicious Activity

Once client information is investigated and other KYC-type information is obtained, any meaningful AML policies and procedures will tell the holder of that information what to do when a yellow or red flag arises in the KYC process or other suspicious activity is detected. Simply sitting on information of a possibly suspect transaction produced in the course of the KYC process – without doing more – would emasculate the effectiveness of any AML program. Accordingly, the AML policies and procedures envisioned by Section 352 of the USA PATRIOT Act would in practical effect cause "persons engaged in real estate closings and settlements" to report suspicious transactions to law enforcement authorities so such authorities can determine whether the client is a money launderer or terrorist financier.

In the case of a bank, broker dealer, money service business or casino, for example, a suspicious activity report ("SAR") is filed when the facts and circumstances warrant the filing of a SAR. In the case of a real estate attorney, while neither Section 352 nor the Advance Notice makes any mention of a SAR or similar filing requirement, it is not unreasonable to expect some type of suspicious transaction reporting procedure to be built into a real estate attorney's AML program as a best practice. Under state bar rules governing client confidentiality, divulging client confidences on grounds of suspicion alone would result in a violation of the attorney's duty of confidentiality. As discussed above, an attorney must divulge client confidences only where the attorney "reasonably believes" that the disclosure of client information is "necessary" to "prevent a client from committing a crime." In other words, this objective standard applies so that a client's future criminal conduct might be prevented – not where an attorney suspects that suspicious activity of a possible crime took place. By limiting the reporting obligation to future crimes, state bar rules serve the public interest of helping to prevent future crimes. The state bar reporting standards do not apply where a crime already took place. An AML program, however, in effect would cause the reporting of money laundering that might have taken place.

In this regard, the courts are loathe to turn attorneys into informants for the government. In United States v. Sindel, for example, the United States Court of Appeals for the Eighth Circuit held that the attorney-client privilege protects disclosures made by clients to attorneys, including client identity, where the disclosure would necessarily disclose confidential communications.[26] There, an office of Treasury – the IRS – sought to enforce a summons requesting that the attorney provide identifying information regarding payors of cash payments of $10,000 or more as required on the IRS' suspicious transaction reporting form 8300.[27] The court held that the attorney could not release the information of a client where it would reveal the substance of confidential communications.[28] To require attorneys to report "suspicious" transactions would change the role of the attorney from advocate to government agent and

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[26] United States v. Sindel, 53 F.3d 874 (8th Cir. 1995).

[27] Id. at 875-76.

[28] Id. at 876.

impose on the attorney a duty to divulge which is not mandated by state or federal law or state bar rules of professional conduct.[29]

Treasury and FinCEN cite one case — United States v. Moffitt, Zwerling & Kemler, P.C.[30] — to support their position that "attorneys already must exercise due diligence when they receive funds from clients where there is an indication that the funds may be tainted . . . ."[31] That case sets no across-the-board standard that attorneys should exercise due diligence in dealing with client funds and, accordingly, should not be applied here. Instead, Moffitt is limited to its unique facts where a client — the leader of a major cocaine ring — retained a law firm by paying his legal fees "with a wad of bills fished from his pocket that amounted to $17,000; the next day he delivered another $86,800 in cash, stored in a cracker box or a shoe box. Much of the $103,800 was in the form of $100 bills."[32] The attorneys of the law firm willfully disregarded "a mass of evidence" that "pointed convincingly to the conclusion that the cash fee constituted, or was derived from, drug trafficking proceeds."[33] With respect to willfully disregarding the truth, the court noted that the client and law firm "were engaging in some sort of wink and nod ritual whereby they agreed not to ask — or tell — too much."[34] The attorney-client relationship in Moffitt is in stark contrast to the typical real estate closing in which attorneys meet every-day purchasers and sellers and otherwise almost always have no objective basis for questioning the good faith nature of the funds received by the law firm in a closing.

While the Moffitt due diligence standard may be imposed in the criminal context where an attorney is representing an individual whose only source of income is known to be derived from drug trafficking, the same does not hold true in a transactional setting such as real estate closings and settlements where clients typically come in with a cashier's check or official check in hand and whose funds have been previously screened by the financial institution at which they bank. Of course, if a client walks into a real estate attorney's office for help on a property closing and tenders $10,000 in cash as a good faith deposit, the attorney will likely, with or without the implementation of an AML program, question the source of the funds. At a minimum, the attorney will know that pursuant to federal law, the attorney must disclose to the IRS the receipt of cash funds in excess of $10,000 in a currency transaction report.

Requiring the implementation of an AML program by real estate attorneys damages the attorney-client relationship by effectively imposing on the attorney a duty to conduct due diligence on his or her client. Additionally, rules of professional conduct already impose on attorneys a duty to disclose confidential

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[29] See also United States v. Gertner, 873 F. Supp. 729 (Mass. Dist. Ct. 1995) (holding that attorney-client privilege would be violated by requiring law firm to disclose identity of client from whom firm received cash payments exceeding $10,000).

[30] 83 F. 3d 660 (4th Cir. 1996).

[31] Advance Notice, 68 Fed. Reg. at 17,571.

[32] 83 F.3d at 663.

[33] 83 F.3d at 666.

[34] Id. In fact, the law firm's behavior in Moffitt was so extreme that the district court disqualified the firm from the case because it tried to dissuade its own client from negotiating with the government because of the unfavorable effect a guilty plea might have on the law firm's fee. According to the court, "[t]his conduct disappoints. It falls short of what America expects from the members of one of its most privileged professions." 83 F.3d at 671. Accordingly, Treasury and FinCEN should not rely on Moffitt for any proposition that attorneys have an obligation to engage in due diligence on their clients.

information if the attorney reasonably believes the disclosure of the information is necessary to prevent a client from committing a crime. Failure to adhere to a state's rules of professional conduct can result in suspension of an attorney's license to practice law or even disbarment.

Therefore, to include real estate attorneys representing either a purchaser or seller under the umbrella of persons "involved in real estate closings and settlements" unnecessarily conflicts with fundamental principles of client confidence and attorney-client privilege.

C. Non-U.S. Governments Recently Have Faced Serious Legal and Practical Difficulties in Imposing Obligations on Lawyers Similar to AML Program Requirements

Some countries have already implemented laws requiring professionals, such as lawyers, to act as "gatekeepers" to the financial and business markets.[35] In the United Kingdom, for example, these laws require attorneys to file suspicious transaction reports ("STR") with the National Criminal Intelligence Service.[36] The effectiveness and observance by the United Kingdom Bar of the STR requirement has been seriously questioned.[37] The National Criminal Intelligence Service has publicly noted that the incidence of reporting by U.K. solicitors is extremely low and appears to reflect non-observance by the legal profession in the United Kingdom.[38]

The Canadian government has implemented similar STR requirements on Canadian attorneys.[39] The Canadian Bar has challenged the constitutionality of the STR requirement on lawyers, notwithstanding that the Canadian law contained an exception to the reporting requirement for privileged communications between the lawyer and the client. On November 20, 2001, the British Columbia Supreme Court issued an injunction against implementation of the reporting requirement, noting that the law raised serious constitutional concerns and could compromise the independence of the bar from the government.[40] The Canadian federal government agreed to suspend implementation of the reporting requirement until a final decision on the merits of the case is issued. A trial on the merits of the constitutional challenge is expected in the Summer of 2003.

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[35] See Task Force on Gatekeeper Regulation and the Profession, Report to the House of Delegates (available on www.abanet.org/leadership/recommendations03/104.pdf).

[36] Section 93 (as amended) of the CRIMINAL JUSTICE ACT 1993; Sections 49-54 of the DRUG TRAFFICKING ACT 1994 and the TERRORISM ACT 2000.

[37] *NCIS Reports Record Suspicious Financial Transaction Disclosures, Press Release*, 27/01, Aug. 1, 2001.

[38] Id. Solicitors made only 1.9% of SARs (known as "disclosures" in the U.K.) while accountants made 0.7%.

[39] Proceeds of Crime (Money Laundering) Act, S.C. 2000, c. 17, and the implementing regulations, Proceeds of Crime (Money Laundering) Suspicious Transaction Reporting Regulations, PC 2001-1500, August 28, 2001, effective November 8, 2001.

[40] The Law Society of British Columbia v. Attorney General of Canada, and Federation of Law Societies v. Attorney General of Canada, 2001 BCSC 1593, Docket No. L013116 (Nov. 20, 2001).

The views expressed by various legal professional associations throughout the world regarding "gatekeeper" regulations underscore the widespread concerns with an intrusion into client confidential information and the attorney-client relationship. On September 23, 2002, the German Federal Bar stated that "[a] relationship based on trust between the client and his lawyer is a fundamental prerequisite for the lawyer to be able to fulfill his tasks, which constitute considerably the maintenance and defense of a free society and the rule of law." The Council for the Bars and Laws Societies of the European Union recently stated that "[c]lients are more likely to be inhibited in disclosing relevant circumstances to attorneys where they believe the lawyer is under an obligation to make reports to the government."[41]

The legal problems and practical difficulties exhibited with STR-type attorney reporting obligations in certain jurisdictions outside the United States will find themselves in the United States if FinCEN and Treasury ultimately require that real estate attorneys implement AML practices when representing a client in connection with a real estate closing.

CONCLUSION

For the reasons set forth above, Treasury and FinCEN should exempt real estate attorneys from any USA PATRIOT Act AML program requirement.

The Section thanks the staff of Treasury and FinCEN for this opportunity to comment and appreciates the consideration of its views as set forth in this letter. Should there be any questions regarding our comments, please feel free to contact Norwood Gay at (800) 275-6273 or by email at rngay@thefund.com.

Respectfully submitted,

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[41] Comments of the Council for the Bars and Law Societies of the European Union, dated September 11, 2002, p.2.