# AGENDA

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| **CHAIR** | Chris Kutzkey (CA) |
| **VICE CHAIR** | John Kmiecik (IL) |
| **COMMITTEE LIAISON** | Brenda Small (DC) |
| **STAFF EXECUTIVE** | Marcia Salkin, Christie DeSanctis, Melanie Wyne (DC) |

**PURPOSE:** To identify, monitor and recommend positions on federal legislative and regulatory issues that affect the operations of REALTORS® businesses and the ability of NAR to meet REALTOR® needs (i.e., RESPA, telecommunications, telemarketing, data security/privacy, visa reform, electronic signatures/closings, etc.) and to recommend federal legislative or regulatory strategies in furtherance of those positions.

**9:00am – 9:10am** **I. Call to Order – Chris Kutzkey**
a. Welcome and Introductions
b. Presidential RPAC Challenge

**9:10am – 9:15am** **II. Ownership Disclosure and Conflict of Interest Statement – John Kmiecik**

**III. Approval of the 2017 REALTORS® Legislative Meeting Committee Minutes – Chris Kutzkey**

**9:15am – 9:20am** **IV. Call for Action on Tax Reform – Dan Blair, Senior Legislative Representative, NAR**

**9:20am – 9:30am** **V. Report of the Federal Technology Policy Advisory Board – John Kmiecik**
a. Net Neutrality
b. Patent Reform
c. Data Privacy/Security
d. Copyright/MLS Database

**9:30am – 9:45am** **VI. Money Laundering and Terrorism Financing - Action Item – Chris Kutzkey**
a. Report of the Committee Beneficial Ownership Conference Call
b. Beneficial Ownership - Issue Summary
c. Money Laundering – Issue Summary
d. FinCEN Advisory to Financial Institutions and Real Estate Firms and Professionals

**9:45am – 10:45am** **VII.** **Consumer Financial Protection Bureau Update**

a. Guest Speakers:
   Loretta Salzano, Founding Partner, Franzén & Salzano, P.C.
   Brian Levy, Of Counsel, Katten & Temple, LLP
b. Open forum discussion with Guest Speakers

**10:45am – 11:00am** **VIII.** **Legislative/Regulatory Issues Update – Staff**

a. RESPA Update – Consent Orders
b. Federal License Law Legislation

**11:00 am – 11:30am** **IX.** **New Business**

**X.** **Committee Updates – Chris Kutzkey**

a. 2018 Chair and Vice Chair Announcement
b. New Federal Technology Policy Committee
c. Additional 2017 Announcements

**XI.** **2018 Committee Announcements – John Kmiecik**

a. Approval of 2018 Committee Goals
b. The Hub - Overview

**XII.** **Closing Remarks – Chris Kutzkey**

NATIONAL ASSOCIATION OF REALTORS®
2017 REALTORS® CONFERENCE AND EXPO

# OWNERSHIP DISCLOSURE AND CONFLICT OF INTEREST POLICY

## Ownership Disclosure Policy

Members of any NAR decision-making body must disclose the existence of any of the following: (1) an ownership interest* in, (2) a financial interest** in, or (3) service in a decision-making capacity for any entity prior to speaking to an NAR decision-making body on any matter involving that entity.

After making the required disclosure, such member may participate in the discussion and vote on the matter unless that member has a conflict of interest as defined below.

## Conflict of Interest Policy

A member of any NAR decision-making body has a conflict of interest whenever that member:

(1) is a principal, partner, or corporate officer of a business providing, or being considered as a provider of, products or services to NAR ("Business"); or

(2) serves on the board of directors of the Business unless the individual's only relationship to the Business is service as NAR's representative on such board; or

(3) holds an ownership interest* of more than one percent of the Business.

Members with a conflict of interest must immediately disclose such conflict of interest prior to participating in any discussions or vote of an NAR decision-making body that pertains to the Business. Such members may not participate in any discussions related to that Business other than to respond to questions asked of them by other members of the body. A member may not vote on any matter in which the member has a conflict of interest.

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*Ownership interest is defined as the cumulative holdings of the individual; the individual's related spouse, children, and siblings; and of any trust, corporation, or partnership in which any of the foregoing individuals is an officer, director, or owns in the aggregate at least 50% of the (a) beneficial interest (if a trust), (b) stock (if a corporation), or (c) partnership interests (if a partnership).

**Financial interest means any interest involving money, investments, extension of credit or contractual rights.
(As approved by the Leadership Team in September, 2015)

# MINUTES

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| **CHAIR** | Chris Kutzkey (CA) |
| **VICE CHAIR** | John Kmiecik (IL) |
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**CALL TO ORDER:** Chair Chris Kutzkey called the meeting to order at 10am.

**OPENING REMARKS:** The Chair welcomed the Committee, introduced Vice Chair John Kmiecik and staff executives, and reminded the group of NAR's Conflict of Interest/Ownership policy.

**APPROVAL OF PREVIOUS MEETING MINUTES:** The minutes of the Business Issues Policy Committee meeting of November 2016 were approved.

**SUMMARY OF ACTIONS TAKEN:**

The Committee received the report of the Dodd-Frank/CFPB Work Group friom Work Group Chair Anthony Lamacchia (MA), and approved a motion to support the following recommendation of the Work Group. The motion was also subsequently approved by the Public Policy Coordinating Committee, Executive Committee and the Board of Directors during the May meeting.

> *That NAR continue to support the existence of a federal agency such as the Consumer Financial Protection Bureau (CFPB) designed specifically to protect consumers' interests with regard to financial products and services. Further, it recommends that NAR support policy proposals that restructure the CFPB or similar agency from the current single-director arrangement to a qualified five member board with no more than three members from one political party. The existing independent agency structure and funding sources for an agency such as the CFPB should be preserved.*
>
> **Rationale:** The Dodd-Frank – CFPB Work Group recommends that NAR support the existence of an independent federal agency, like the Consumer Financial Protection Bureau (CFPB), that promotes necessary consumer protection laws and responsible lending practices to advance the pursuit of homeownership. Such an agency is essential to identifying problematic financial services industry practices that harm consumers and is most effective when important procedural safeguards are in place to avoid unwarranted executive overreach.

To best accomplish this role, the CFPB or similar agency should be structured as a five-member board to ensure accountability and policy consistency, while reducing arbitrary decision-making and abuses of power that may occur with a single-director structure. With no more than three members of one political party serving on the board at any given time, the structure would help ensure the agency's authority reins in and protects against egregious or excessive enforcement actions while promoting proper consideration and analysis of formal rules and informal guidance before being issued. Board members should be appointed by the President and confirmed by the Senate, serving initial staggered five-year terms.

Further, maintaining the CFPB's independent agency organization preserves the existing funding sources and only allows for removal of board members based on inefficiency, neglect of duty, or malfeasance in office. Such independence shields the agency from political pressures and bureaucratic impediments that may inhibit protection of consumer homeownership interests.

*The Committee also dealt with the following reporting items:*

1. The Business Issues Policy Committee received the report of the Federal Technology Policy Advisory Board. The Advisory Board heard two presentations: (1) an overview of the NAR Reach technology incubator and demonstrations by three of the 2017-18 Reach companies (HouseCanary, Notarize, TrustedMail), and (2) a presentation by the Center for REALTOR® Technology (CRT) on the need for robust data security practices and steps that REALTORS® can take to secure their data. That presentation led the Advisory Board to discuss the current definition of personally identifiable information (PII) and the need to monitor the evolution of information that would not be considered personally identifiable information (PII) on its own but may become PII when combined with other readily available information. Finally, the Board received a legislative/regulatory issue update on the following tech policy issues: net neutrality, data privacy/security and patent litigation reform.

2. The Committee then heard a presentation by Lawrence Scheinert, the Director of the Office of Special Measures within the U.S. Treasury Department's Financial Crimes Enforcement Network (FinCEN). Mr. Scheinert talked about the agency's experience with the expanded Geographic Targeting Orders (GTOs) which require title companies to report on the beneficial ownership of business entities making all cash residential real estate purchases in a number of major U.S. metros to combat money laundering.

3. Dan Blair, NAR Senior Legislative Representative, and Christie DeSanctis, NAR Regulatory Representative, briefed the Committee on the legislative and regulatory outlook in the new 115th Congress and Trump Administration.

4. With limited meeting time remaining, the Committee's members were directed to the Committee briefing materials for an update on ongoing federal business issues and invited to contact staff with any questions. Staff will also circulate a brief status overview document with links to the more extensive issue summaries included in the Committee briefing packet. Those issues include: (1) recent Consumer Protection Bureau (CFPB) enforcement activities, (2) status of the *PHH Corp. v. Consumer Financial Protection Bureau*court case, (3) Real Estate Settlement Procedures Act (RESPA) issues, (4) Department of Labor worker

classification guidance, (5) reauthorization of the EB-5 Visa Regional Center Program, (6) repeal and replacement of the Affordable Care Act (ACA), and (7) Association Health Plan (AHP) legislation.

5. When polled, the Committee members indicated interest in holding webinars in the coming months; anticipated topics include data security practices and exploring the development of federal policy on beneficial ownership disclosures as a component of anti-money laundering efforts.

6. Finally, the Committee were made aware of the upcoming NAR E-Summit planned for June in Washington, D.C.

With no further business, the Committee was adjourned at 12:00pm.

## NAR Committee:

Federal Technology Policy Advisory Board

## What is the fundamental issue?

Net neutrality is shorthand for the concept that Internet users should be in control of what content they view and what applications they use on the Internet. More specifically, net neutrality requires that broadband networks be free of restrictions on content, sites, or platforms. Networks should not restrict the equipment that may be attached to them, nor the modes of communication allowed on them. Finally, networks should ensure that communication is not unreasonably degraded by other communication streams.

## I am a real estate professional. What does this mean for my business?

The business of real estate is increasingly conducted on-line. Streaming video, virtual tours and voice-over-internet-protocol are just some of the technologies that are commonly used by real estate professionals today. In the future, new technologies will be adopted which will no doubt require unencumbered network access.

Some real estate professionals, realty website operators and real estate industry affiliated content providers believe net neutrality provisions are necessary to prevent broadband providers (cable and telephone companies, primarily) from implementing possibly discriminatory practices that could negatively impact real estate professionals' use of the Internet to market their listings and services. Some possible examples include practices that would (1) limit the public's access to real estate websites, (2) limit a real estate firm access to online service providers who may be in competition with the network operators' (ISP's) own services, e.g. Internet phone services, or (3) charging certain websites more for the broadband speeds necessary to properly transmit or display audio or video content such as online property tour, podcast or phone services.

## NAR Policy:

NAR supports legislative and regulatory efforts to ensure that broadband providers adhere to net neutral practices. NAR is concerned about the FCC's "fast lanes" proposal and has commented in opposition to that proposal in 2015.

The business of real estate is increasingly conducted on-line. Streaming video, virtual tours and voice-over-internet-protocol are just some of the technologies that are commonly used by real estate professionals today. Net neutral practices will be essential to ensure that real estate content can be freely and efficiently distributed online.

NAR supports seven principles to guide lobbying efforts on any legislation to require broadband providers to adhere to net neutral practices:

1. Consumers are entitled to access the lawful Internet content of their choice;

2. Consumers are entitled to run applications and services of their choice, subject to the needs of law enforcement;
3. Consumers are entitled to connect their choice of legal devices that do not harm the network;
4. Consumers are entitled to competition among network providers, application and service providers, and content providers;
5. Network providers should not discriminate among internet data transmissions on the basis of the source of the transmission as they regulate the flow of network content;
6. Broadband providers must be transparent about the service they provide and how they run their network and;
7. These principles should apply to both wireless and wireline networks.

## Opposition Arguments:

Opponents of network neutrality fear that excessive regulation of Internet Service Providers will create a disincentive to invest in new or additional Internet infrastructure ultimately leading to poor service for consumers.

## Legislative/Regulatory Status/Outlook

On December 21, 2010, the Federal Communications Commission (FCC) issued new rules on net neutrality. Under these rules, wired broadband providers were "prohibited from blocking lawful content, applications, services and the connection of nonharmful devices to the network." Wireless broadband providers, however, were allowed more flexibility, reflecting the technical limitations on the amount of traffic a wireless network can handle. Both wired and wireless broadband providers would have been subject to transparency requirements, which require them to let consumers know how they manage network activity. The new rules also allowed internet service providers to charge usage-based fees for broadband, so customers using more bandwidth may be charged more for service than customers using less bandwidth.

On January 14, 2014, the U.S. Court of Appeals for the District of Columbia ruled that key elements of the FCC's 2010 Open Internet Order are invalid. By tossing out these rules, ISPs are now free to charge content companies higher fees to deliver Internet traffic faster or otherwise more efficiently.
On May 15, 2014, the FCC issued a new proposed rule for comment. This rule would allow large content providers like Netflix and Facebook and others to negotiate separate, exclusive deals with Internet Service Providers to carry their content on faster connections. This has been termed "Internet fast lanes."

NAR filed comments opposing the Commission's "fast lanes" proposal. In addition the Association organized a broad real estate coalition including over 100 MLSs, large firms and industry associations opposing the FCC's proposal.

The FCC published its Open Internet order in March 2015. The Order seeks to prevent Internet Service Providers from blocking Web traffic, slowing it down or setting up paid fast lanes.

Several ISPs and their industry associations have filed lawsuits challenging the FTC's authority to implement this order. It is likely to take several years for these lawsuits to wind their way through the

courts. On June 14, 2016, the D.C. Court of Appeals ruled in favor of the FCC's net neutrality regulations to ensure an open internet in the U.S. In the ruling, internet providers aren't allowed to block, slow, or sell faster delivery of legal content on their networks. ISPs appealed this decision to the Supreme Court.

On April 27, 2017 the FCC issued a proposal to rollback the 2015 Open Internet Order. This proposal would:

- Eliminate Title II regulation of Internet Service Providers thereby eliminating FCC authority to regulate ISPs.
- Shift regulatory authority for privacy and anticompetitive concerns to the Federal Trade Commission.
- Eliminate the Internet Conduct Standard, a broad rule giving the FCC the authority to act if a broadband provider acts in a manner that is anticompetitive or harmful to consumers.
- Seeking public comment on "Bright Line Rules" or rules that prohibit the control of the flow of web traffic like blocking, degrading or creating fast lanes should be eliminated or modified.

NAR filed comments with the FCC opposing rollback of open internet rules. The FCC will issue its order likely early in 2018. At the same time, Congress is negotiating with stakeholders to see if an agreement can be reached on a legislative solution. These talks are still underway.

NAR will continue to work the Congress and the FCC to protect members ability to freely share lawful content on the internet.

## Current Legislation/Regulation (bill number or regulation)

FCC Notice of Proposed Rulemaking entitled “Restoring Internet Freedom", WC Docket No.17-108.

## Legislative Contact(s):

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Daniel Blair, dblair@realtors.org, 202-383-1089

## Regulatory Contact(s):

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## NAR Committee:

Federal Technology Policy Advisory Board

## What is the fundamental issue?

In 2011, Congress passed legislative reforms to patent law in response to growing concerns that the patent system was unable to deal with challenges presented by the ever growing number of patent applications being submitted and the increasing complexity of the technology for which a patent is being requested. In addition, the growing number of cases of licensing demands being made by holders of obscure software patents, as well as number of patent lawsuits being filed, pointed to the need for reform. Many in the tech industry believe that 2011's reforms did not adequately address the issue of "patent trolls" and that additional legislation is necessary to reduce the costs of litigation caused by "non-practicing patent entities."

## I am a real estate professional. What does this mean for my business?

The real estate industry is more and more dependent on the use of information technology and software products to market properties and manage their businesses. An increase in patent-infringement claims can drag unsuspecting real estate professionals into expensive and time-consuming litigation putting all REALTORS® at risk.

The CIVIX lawsuit is a good example. The CIVIX owns a very broad patent on any online service that provides "systems and methods for remotely accessing a select group of items from a database." As a result of this patent infringement lawsuit, a number of MLSs have been required to pay licensing fees to this patent holder. Patent reform could help to more narrowly tailor patents and reduced the scope of future infringement lawsuits.

NAR has recently learned that several large brokers have been sued for alleged infringement of a patent dealing with property valuation. New "trolls" pop up all the time and increasingly REALTORS® and MLSs are the subject of their demands to license bogus patents. The problem is only growing worse over time.

## NAR Policy:

NAR believes that curbing questionable patent litigation is a needed reform. However, improving patent system transparency and patent quality are equally important. While the Patent Trademark Office (PTO) has taken important steps to improve the system, more work is needed.

Without needed reforms that assure that asserted patent rights are legitimate, the ability of businesses owned by REALTORS®, many of which are small businesses, to grow, innovate and better serve modern consumers will be put at risk.

## Opposition Arguments:

Opponents argue that proposed reform could sweep in legitimate business practices, reducing the value of patent assets and chill innovation.

## Legislative/Regulatory Status/Outlook

NAR has been lobbying on its own behalf and as part of the United for Patent Reform Coalition to support common sense patent litigation reforms.

Chairman of the House Judiciary Committee, Bob Goodlatte (R-VA) indciates that patent reform legislation is on his list of priorities but no legislation has been introduced at this time. It is uncertain what position the new Administration will take.

## Current Legislation/Regulation (bill number or regulation)

None at this time.

## Legislative Contact(s):

Melanie Wyne, mwyne@realtors.org, 202-383-1234

Daniel Blair, dblair@realtors.org, 202-383-1089

## Regulatory Contact(s):

Melanie Wyne, mwyne@realtors.org, 202-383-1234

## NAR Committee:

Federal Technology Policy Advisory Board

## What is the fundamental issue?

Public concern about the confidentiality of personal medical, financial and consumer data has put pressure on policy makers to increase regulation on the uses of this information. The recent popularity of marketers to use online advertising targeted to individual consumers has also concerned members of Congress. With the recent data breaches of large retailers, a number of privacy and data security bills have been introduced in Congress. Many of these measures will likely: apply privacy regulations to both online and offline data collection, storage and flow; require privacy notices and impose other information safeguards.

## I am a real estate professional. What does this mean for my business?

Real estate professionals collect, store and share a great deal of consumer information. Often, the collected data is of a sensitive financial nature. The current proposals for comprehensive privacy legislation would require nearly all real estate professionals and REALTOR® Associations to comply with the new rules. NAR is working to ensure that any future privacy law takes into account the burden on small businesses and is narrowly tailored to reduce its impact on members.

Of note is the recent trend in email fraud targeting homebuyers who are approaching closing. Fraudulent emails appearing to come from a trusted source (agent, title company) instruct the buyer to wire funds to a fraudulent account. This scam further heightens the need for REALTORS® and their clients to pay attention to data security.

## NAR Policy:

NAR recognizes the importance of protecting client data entrusted to them and supports common sense data privacy and security safeguards that are effective but do not unduly burden our members' ability to efficiently run their businesses. Proposed regulations must be narrowly tailored to avoid burdening businesses, especially small businesses that lack the resources available to larger entities.

**NAR Data Privacy & Security Principles**
REALTORS® recognize that as data collection continues to become a valuable asset for building relationships with their clients, so does their responsibility to be trusted custodians of that data. Consumers are demanding increased transparency and control of how their data is used. For this reason, REALTORS® endorse the following Data Privacy and Security principles:

- **Collection of Personal Information Should be Transparent**

REALTORS® should recognize and respect the privacy expectations of their clients. They are encouraged to develop and implement privacy and data security policies and to communicate those policies clearly to their clients.

- **Use, Collection and Retention of Personally Identifiable Information**

REALTORS® should collect and use information about individuals only where the REALTOR® reasonably believes it would be useful (and allowed by law) to administering their business and to provide products, services and other opportunities to consumers. REALTORS® should maintain appropriate policies for the, reasonable retention and proper destruction of collected personally identifiable information.

- **Data Security**

REALTORS® should maintain reasonable security standards and procedures regarding access to client information.

- **Disclosure of Personally Identifiable Information to Third Parties**

REALTORS® should not reveal personally identifiable data to unaffiliated third parties unless: 1) the information is provided to help complete a consumer initiated transaction 2) the consumer requests it; 3) the disclosure is required by/or allowed by law (i.e. investigation of fraudulent activity); or 4) the consumer has been informed about the possibility of such disclosure through a prior communication and is given the opportunity to decline (i.e. opt-out.)

- **MaintainingConsumer Privacy in Business Relationships with Third Parties**

If a REALTOR® provides personally identifiable information to a third party on behalf of a consumer, the third party should adhere to privacy principles similar to the REALTOR® that provide for keeping such information confidential.

- **Single Federal Standard**

NAR supports a single federal standard for data privacy and security laws in order to streamline and minimize the compliance burden.
View NAR's page on Data Privacy and Security

## Opposition Arguments:

Opponents to legislative and regulatory efforts generally oppose the scope of limitations on various business practices that may significantly curtail certain business models or create what is viewed to be excessive costs for business. Others believe that proposed legislation/regulations do too little to protect consumers.

## Legislative/Regulatory Status/Outlook

NAR expects data breach legislation to see legislation introduced in the 115th Congress. NAR supports the approach taken by Senator Warner (D-VA) in his 2016 discussion draft. That draft bill:

1. Covers all entities handling sensitive information – there are no exemptions for banks, telcos, third parties, etc.

2. The scope of the bill is appropriate:
    - A breach of security is the acquisition of data (not access or acquisition);
    - Sensitive account/personal information are narrowly defined terms (not expansive);
    - The trigger for notice is risk-based (requiring what is defined as financial harm).

3. Has reasonable data security standards for non-banks;

4. Has enforcement by banking regulators for banks, and by FTC for non-banks;

5. Has equivalent enforcement by all banking regulators and the FTC, with requirement that the agencies coordinate on equivalent enforcement and penalties; and

6. Gives all covered entities the benefit of solid preemption of state and common law.

Finally, NAR has developed an educational toolkit for members and has developed an online training course available through REALTOR® University. To view the toolkit visit: www.nar.realtor/law-and-ethics/nars-data-security-and-privacy-toolkit

## Current Legislation/Regulation (bill number or regulation)

None at this time

## Legislative Contact(s):

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Daniel Blair, dblair@realtors.org, 202-383-1089

## Regulatory Contact(s):

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**NAR Business Issues Policy Committee**

**Final Report on**
**Policy Supporting Disclosure of Beneficial Ownership Information by a Business Entity**

## I. BENEFICIAL OWNERSHIP POLICY RECOMMENDATION

**Policy Recommendation**: The Business Issues Policy Committee recommends **that NAR support the disclosure of beneficial ownership of business entities at the time those entities are registered with the states, with appropriate consideration given to address legitimate business privacy concerns**.

**Rationale**: Anonymous shell companies are increasingly being used by corrupt foreign and domestic interests to launder money via real estate purchases. Currently, there are no federal laws requiring the identities of the "beneficial owners," i.e. the individuals who control and benefit from these companies. This has created obstacles for law enforcement agencies' enforcement of anti-money laundering (AML) laws.

Legislation has been introduced to address this problem by requiring the disclosure of the beneficial owners of a shell company when it is formed and registered with its home state. If a state prefers not to collect this data, it could choose to have Treasury take on the responsibility. The information would not be made public, and only would be disclosed to law enforcement or financial institutions that request it in order to fulfill their AML responsibilities. Allowing law enforcement to have access to such information will improve tracking of illicit money laundering schemes, and thereby reduce growing pressures to impose bank-like AML responsibilities on real estate professionals.

## II. BACKGROUND

Real estate firms and professionals engaged in brokerage or property management activities are not required to implement formal anti-money laundering or anti-terrorist financing (AML/TF) programs, like regulated financial institutions. However, the U.S. Department of Treasury has the authority to change this and expand coverage of these requirements, but has yet to do so. To date, the Department of Treasury implements a risk-based analysis approach, focusing regulation on high-risk entities such as financial institutions rather than non-financial professions, like real estate professionals. NAR supports continued efforts to combat money laundering and the financing of terrorism through the regulation of entities using this risk-based analysis, which would likely find very little risk of money laundering involving real estate agents or brokers. Regulations that would require real estate agents and brokers to adopt anti-money laundering programs would prove burdensome and unnecessary given the existing AML/TF regulations that already apply to U.S. financial institutions.

Recently, the Financial Crimes Enforcement Network (FinCEN), Treasury's lead agency on AML/TF requirements, issued an Advisory to Financial Institutions and Real Estate Firms and Professionals to provide information on money laundering risks for real estate transactions. The Advisory provides examples of money laundering in the real estate sector, how shell companies

and all-cash purchases may be linked to illicit activity, and ways in which real estate professionals' can voluntarily file suspicious activity reports.

While NAR has been engaged in efforts to combat money laundering, such as voluntarily filing of suspicious activity reports, NAR does not have policy regarding the misuse of anonymous shell companies for laundering money. To participate in the growing debate on this issue, the Business Issues Policy Committee began learning about the issue during the May Midyear meetings, where Lawrence Scheinert, Director, Office of Special Measures for the U.S. Treasury's Financial Crimes Enforcement Network (FinCEN) addressed the group, offering important background and insight into money laundering through the purchase of real estate.

According to FinCEN, anonymous shell companies are often established by high profile buyers for privacy or for risk management purposes to purchase real estate and other assets. However, anonymous shell companies have also been used to fund corrupt domestic and foreign interests, such as laundering money through real estate purchases. To address this issue, legislation has been introduced that would require disclosure of the beneficial owners of a corporation or LLC upon creation to prohibit a shell company from masking the actual ownership interests.[1]

When a company is set up, there is no requirement to disclose the real people who control or profit from its activities. Individuals are able to conceal their identity by using others to represent the company, such as an attorney who lacks control or an economic stake in the company. This legislation would require disclosure of the beneficial owners when the company is formed. That information would be made available only to law enforcement officials and financial institutions complying with their *Bank Secrecy Act* anti-money laundering (AML) obligations. The goal of the legislation is to limit the use of an anonymous shell company to launder money, perpetrate fraud, or finance terrorism.

To learn more about this issue, the Committee was briefed in July by an industry expert from the Financial Accountability and Corporate Transparency (FACT) Coalition via webinar. During the webinar, the Committee learned about anonymous shell companies, historic problematic actions, and the various legislative proposals circulating in Congress. Prior to the webinar, an issue summary developed by staff was circulated to the Committee. (Attached to the Committee's Annual Meeting agenda.) Following the webinar, the Committee was surveyed on the issues raised during the webinar and NAR's future role. Staff then provided feedback to questions raised by members on the survey.

In September, the Committee held a conference call to discuss whether NAR should develop policy to support the disclosure of beneficial ownership of business entities. A quorum of Committee members were present on the call. Discussion during the call focused on a number of important issues including:

[1] There are several bipartisan legislative measures in the House and the Senate that would require beneficial ownership information to be reported to law enforcement agencies, and *imposing no requirements on real estate professionals*. The information would not be publicly available and would be collected by the individual state (S. 1454) or the state could elect to have the Federal Government collect (H.R. 3089; S. 1717).

- *Impact on the real estate industry*: Members were concerned with how real estate professionals and the sales transaction would be impacted if such policy were enacted. No requirements would be imposed on real estate agents or brokers, as the beneficial ownership information would only be submitted when a corporation or LLC is created, and when necessary to update the reported information. Law enforcement officials' access to information on the true owners of anonymous shell companies would be collected, well before any real estate transaction or real estate professionals could be impacted. It was also noted that by aiding the enforcement of existing money laundering laws and regulation, this could also mitigate the need for additional regulations that might require real estate professionals to take on additional bank-like AML responsibilities.

- *Collection of information*: Committee members debated who should be responsible for collecting this information – the state or Federal Government – and the benefits and drawbacks to each. Under current legislation, the state would be responsible for collecting the information, unless the state elects to have the Federal Government collect the information. Where the information would be stored and by which level of government also raised security and privacy concerns, especially in light of recent breaches of non-public personal identifiable information. Operational concerns such as these would be worked out through implementing regulations.

- *Privacy concerns*: Members were especially concerned with the legitimate reasons buyers and sellers use anonymous shell companies for real estate transactions. It was explained that shell companies could continue to conduct these transactions anonymously, and only during creation of that business entity would the beneficial owners be disclosed to the state or Federal Government, which would then only be revealed for specific uses, such as law enforcement purposes. The ownership information reported would not be made public.

- *Impact on businesses:* The Committee raised concerns with potential impact on business operations, as well as those seeking to legitimately create a shell company. Staff explained some of the exceptions to the requirements, including publicly traded companies and those with brick and mortar stores with employees. No additional obligations would be imposed on the business outside the process to create the entity and required updating of information when changes occur.

- *NAR involvement:* Several members had issues with why NAR should be involved in an issue related to the creation of business entities, and staff explained how engaging on issues, beyond those impacting the real estate sales transaction, are necessary to illustrate real estate professionals' continued support for anti-money laundering initiatives. This is especially important at a time when federal regulators are increasing scrutiny of real estate sales transactions to stop money-laundering schemes. Staff are also continuously meeting with administration officials to discuss these issues.

After the discussion, final policy was adopted by unanimous consent to **support the disclosure of beneficial ownership of business entities at the time those entities are registered with the states, with appropriate consideration given to address legitimate business privacy concerns**.

## NAR Committee:

Business Issues Policy Committee

## What is the fundamental issue?

Anonymous shell companies have long been used to purchase real estate and other assets. Traditional reasons for establishing such companies have included a desire by high profile buyers for privacy or for risk management purposes. Anonymous shell companies have also sometimes been used to fund corrupt domestic and foreign interests, such as laundering money through real estate purchases. To address this issue, legislation has been introduced that would require disclosure of the beneficial owners of a corporation upon creation to prohibit a shell company from masking the actual ownership interests. Such information could limit the potential criminal intent for creating an anonymous company, such as to launder money, perpetrate fraud, or finance terrorism.

## I am a real estate professional. What does this mean for my business?

Real estate professionals should understand their existing legal responsibilities and the current efforts to combat money laundering and the financing of terrorism. Continued partnership with enforcement agencies will help in detecting and addressing the use of real estate in illegal financing activities.

At this time, real estate firms and professionals engaged in brokerage or property management activities are not required to implement formal anti-money laundering or anti-terrorist financing (AML/TF) programs, as do regulated financial institutions. However, the U.S. Department of Treasury has the authority to change this and expand coverage of these requirements. To date, the Department of Treasury implements a risk-based analysis approach, focusing regulation on high-risk entities such as financial institutions rather than non-financial professions.

Recently, the Financial Crimes Enforcement Network (FinCEN), Treasury's lead agency on AML/TF requirements, issued an Advisory to Financial Institutions and Real Estate Firms and Professionals to provide information on money laundering risks for real estate transactions. The Advisory provides examples of money laundering in the real estate sector, how shell companies and all-cash purchases may be linked to illicit activity, and ways in which real estate professionals' can voluntarily file suspicious activity reports.

## Existing NAR Policy:

NAR supports continued efforts to combat money laundering and the financing of terrorism through the regulation of entities using a risk-based analysis. Any risk-based assessment would likely find very little risk of money laundering involving real estate agents or brokers. Regulations that would require real estate agents and brokers to adopt anti-money laundering programs would prove burdensome and

unnecessary given the existing AML/TF regulations that already apply to United States financial institutions.

## Action Needed:

NAR has no policy that would allow it to weigh in on the issue of disclosure of beneficial ownership of anonymous shell companies. Policy would be needed for NAR staff to participate in the growing debate.

## Proponents Arguments:

Proponents believe the burdens of extensive anti-money laundering requirements imposed on real estate professionals would outweigh any perceived benefits. Efforts are better focused on those institutions involved in financing and handling buyer funds, as opposed to those settlement service providers, like real estate professionals, who are not involved with the transfer of funds to purchase real estate.

Disclosure of beneficial ownership would allow law enforcement to better track and identify illegal money laundering activities. Proper limits on access to this ownership data would also preclude potential abuses.

## Opposition Arguments:

Some believe that real estate agents and brokers should be required to have specific anti-money laundering plans and procedures in place based on their involvement in domestic and foreign real estate purchases. While a majority of the risk and regulatory burdens to combat money-laundering fall with the financial sector, there are a number of Designated Non-Financial Businesses and Professions (DNFBPs) that are often implicated in financial activities, such as lawyers and real estate professionals, which are linked to illegal arrangements. The risk is especially great with real estate professionals operating in high-end luxury markets.

Opponents of the collection of beneficial ownership information believe that doing so could result in abuses of the information and harm to those who use a shell structure for legitimate purposes.

## Background:

The USA PATRIOT Act, the Bank Secrecy Act, and Executive Order 13224 have increased the level of the government's scrutiny of financial transactions in an effort to prevent money laundering and block the financial dealings of terrorists. Under the USA PATRIOT Act, financial institutions are required to create AML and customer identification programs. Treasury's Office of Foreign Assets Control (OFAC) administers and enforces economic and trade sanctions based on U.S. foreign policy

and national security goals against targeted foreign countries and individuals. OFAC publishes a list of individuals and companies owned or controlled by, or acting for or on behalf of, targeted countries collectively called "Specially Designated Nationals (SDNs)."

There are several duties imposed on real estate professionals, including:

1. Real estate brokers and agents must report, using IRS form 8300, any single or series of related transactions in which they receive cash in excess of $10,000.

2. SDN assets are blocked, and all businesses (including real estate agents and brokers) have a responsibility to ensure that they are not dealing with any SDN by checking the list provided by OFAC. The SDN list can be found at: www.treasury.gov/sdn.

NAR has and continues to work closely with the Department of Treasury and has previously developed voluntary guidelines for real estate professionals to follow for possible money laundering situations and how to report those situations. NAR continues to educate real estate agents and brokers of their responsibilities under current law.

## Legislative/Regulatory Status/Outlook:

Increasingly, Congress and the Administration have come to recognize the gap that exists in collection of beneficial ownership information. A 2016 report on the United States by the Financial Action Task Force (FATF), an international organization designed to combat illicit finance schemes, revealed that the lack of timely access to adequate, accurate, and current beneficial ownership information remains a fundamental deficiency in an otherwise robust AML regulatory regime. As a result, legal persons in the U.S. continue to be abused for ML/TF purposes through shell companies that mask true ownership interests and intentions.

Currently, there is no requirement to systematically make beneficial ownership information available to law enforcement agencies, allowing anonymous shell companies to fund illicit activities, including purchasing real estate to launder money. According to FATF, these risks are magnified by the enormous size of the U.S. economy, the large number of companies formed in the U.S., and the lack of comprehensive AML/TF requirements for DNFBPs.

There are several bipartisan legislative measures in the House and the Senate that would close this gap by requiring beneficial ownership information to be reported to law enforcement agencies, and imposing no requirements on DNFBPs. The information would not be publicly available and would be collected by the individual state (S. 1454) or the state could elect to have the Federal Government collect (H.R. 3089; S. 1717). Allowing law enforcement to have access to such information will improve tracking of illicit financing schemes early on in the process, before the real estate market could be implicated.

## Current Legislation:

H.R. 3089, Reps. Maloney (D-NY) and King (R-NY), *Corporate Transparency Act*.

S. 1717, Sens. Wyden (D-OR) and Rubio (R-FL), *Corporate Transparency Act*.

S. 1454, Sens. Whitehouse (D-RI) and Grassley (R-IA), *True Incorporation Transparency for Law Enforcement (TITLE) Act*.

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## NAR Committee:

Business Issues Policy Committee

## What is the fundamental issue?

Real estate professionals should understand their responsibilities in the current efforts being made to combat money laundering.

## I am a real estate professional. What does this mean for my business?

The USA PATRIOT Act, the Bank Secrecy Act, and Executive Order 13224 have increased the level of the government's scrutiny of financial transactions in an effort to prevent money laundering and block the financial dealings of terrorists. Under the USA PATRIOT Act, financial institutions are required to create anti-money laundering (AML) and customer identification programs. The Office of Foreign Assets Control (OFAC) of the U.S. Department of the Treasury administers and enforces economic and trade sanctions based on U.S. foreign policy and national security goals against targeted foreign countries and individuals. OFAC publishes a list of individuals and companies owned or controlled by, or acting for or on behalf of, targeted countries collectively called Specially Designated Nationals (SDNs).

The laws impose the following duties on real estate professionals:

1. Real estate brokers and agents must report, using IRS form 8300, any single or series of related transactions in which they receive cash in excess of $10,000.
2. SDN assets are blocked, and all businesses (including real estate agents and brokers) have a responsibility to ensure that they are not dealing with any SDN by checking the list provided by OFAC. The SDN list can be found at: www.treasury.gov/sdn.

At this time, real estate firms and professionals engaged in brokerage or property management activities are not required to implement formal anti-money laundering or anti-terrorist financing (AML/TF) programs, as do regulated financial institutions. However, the U.S. Department of Treasury has the authority to change this and expand coverage of these requirements. To date, the Department of Treasury implements a risk-based analysis approach, focusing regulation on high-risk entities such as financial institutions rather than non-financial professions.

Recently, the Financial Crimes Enforcement Network (FinCEN), Treasury's lead agency on AML/TF requirements, issued an Advisory to Financial Institutions and Real Estate Firms and Professionals to provide information on money laundering risks for real estate transactions. The Advisory provides examples of money laundering in the real estate sector, how shell companies and all-cash purchases may be linked to illicit activity, and ways in which real estate professionals' can voluntarily file suspicious activity reports. FinCEN also continues tracking data reported by title companies involved in certain high-end real estate transactions through Geographic Targeting Orders (GTOs).

## NAR Policy:

NAR supports continued efforts to combat money laundering and the financing of terrorism through the regulation of entities using a risk-based analysis. Any risk-based assessment would likely find very little risk of money laundering involving real estate agents or brokers. Regulations that would require real estate agents and brokers to adopt anti-money laundering programs would prove burdensome and unnecessary given the existing AML/TF regulations that already apply to United States financial institutions.

## Opposition Arguments:

Some believe that real estate agents and brokers should be required to have specific anti-money laundering plans and procedures in place. NAR believes that such requirements would be overly burdensome compared to the risks. NAR worked with the Department of the Treasury to develop suggested voluntary guidelines for real estate professionals to follow to be on guard for possible money laundering situations and how to report those situations.

## Legislative/Regulatory Status/Outlook

In 2003, FinCEN issued an advance notice of proposed rulemaking regarding anti-money laundering program requirements for "person involved in real estate closing and settlements" including real estate agents. NAR submitted comments stating "without evidence suggesting that regulation would substantially benefit the fight against money laundering, the burden on brokers of having to adopt and implement anti-money laundering programs clearly outweighs any perceived benefit." In proposed rules published in 2010, FinCEN deferred proposing rules for real estate agents and others until it could conduct further research and analysis on business operation and money laundering vulnerabilities. FinCEN released its Final Rule in 2012, which continues to defer on covering real estate brokers and agents pending further study and analysis.

NAR continues to monitor closely and has worked with FinCEN to develop an educational publication informing real estate agents and brokers of their responsibilities under current law. To date, educational items have included a fact sheet, suggested voluntary guidelines, and a FinCEN/NAR podcast. The Association of Real Estate Licensing Law Officials (ARELLO) has published the NAR Fact Sheet, which is now being distributed by many state real estate offices.

Increasingly, Congress and the Administration are focusing on the lack of collection of beneficial ownership information that has allowed anonymous shell companies to fund corrupt domestic and foreign interests, such as laundering money through real estate purchases. To address this issue, legislation has been introduced that would require disclosure of the beneficial owners of a corporation or LLC upon creation to prohibit a shell company from masking the actual ownership interests. There are several bipartisan legislative measures in the House and the Senate that would require beneficial ownership information to be reported to law enforcement agencies, and imposing no requirements on real estate professionals. The information would not be publicly available and would be collected by the individual state (S. 1454) or the state could elect to have the Federal Government collect (H.R. 3089; S. 1717).

## Current Legislation/Regulation (bill number or regulation)

In early 2016, FinCEN began to issue Georgraphic Targeting Orders (GTOs), imposing new data collection and reporting requirements on specific title companies involved in certain high-end real estate transactions. These GTOs required title companies to identify natural persons with 25 percent or greater ownership interest in a legal entity making an all cash real estate purchase. The first GTOs were specifically directed at all cash real estate purchases in excess of $3 million dollars and $1 million dollars in the Borough of Manhattan in New York and Miami-Dade County, Florida, respectively.

FinCEN discovered that a significant portion of the reported covered transactions in the GTOs were linked to possible criminal activity by the individuals revealed to be the beneficial owners of the shell company purchasers. As a result, FinCEN has continued expanding and extending the covered geographic areas where title companies must comply with the GTO's data collection and reporting requirements. The latest GTO, effective until March 20, 2018, covers the following geographic areas and transactions:

- $500k and above – Bexar County, Texas
- $1m and above – Miami-Dade, Broward, and Palm Beach Counties, Florida
- $1.5m and above – New York City Boroughs of Brooklyn, Queens, Bronx, and Staten Island
- $2m and above – San Diego, Los Angeles, San Francisco, San Mateo, and Santa Clara Counties, California
- $3m and above – New York City Borough of Manhattan
- $3m and above - City and County of Honolulu, Hawaii

In accordance with the GTOs, title companies, and their agents, must file a report with FinCEN regarding covered purchases of residential real property meeting the requirements above when such purchases are made without a bank loan or similar external financing and is paid at least in part by using currency or a cashier's check, a certified check, a traveler's check, a personal check, a business check, or a money order. Pursuant to the recently passed legislation that directed Treasury to allow investigators to obtain additional records to better target illicit Russian activity, the GTOs will now include wire funds transfers.

The GTOs do not impose any new obligations on real estate professionals. However, it is important for members to be aware of these and the potential impact on real estate sales transactions. In the event a transaction is covered by a GTO, the title company may consult with the real estate professional to obtain information necessary to report in compliance with the order. Such communications should not affect the real estate sales transaction or timeline for closing as title companies are required to report GTO covered transactions to FinCEN within 30 days of the closing.

For more information, visit NAR's Issue Brief on the Geographic Targeting Orders (GTOs).

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UNITED STATES DEPARTMENT OF THE TREASURY
FinCEN
FINANCIAL CRIMES ENFORCEMENT NETWORK

# ADVISORY

**FIN-2017-A003** **August 22, 2017**

# Advisory to Financial Institutions and Real Estate Firms and Professionals

***Drug traffickers, corrupt officials, money launderers, and other criminals seek to exploit real estate transactions to hide their illicit profits, conceal their identities, and launder funds.***

**This Advisory should be shared with:**

- *Real Estate Professionals*
- *Organization Executives*
- *Comptroller/Treasury/ Accounting Departments*
- *Compliance Departments*
- *Legal Departments*

The Financial Crimes Enforcement Network (FinCEN) is issuing this advisory to provide financial institutions and the real estate industry with information on money laundering risks associated with certain real estate transactions. As highlighted by recent Geographic Targeting Orders (GTOs) issued by FinCEN, real estate transactions involving luxury property purchased through shell companies—particularly when conducted with cash and no financing—can be an attractive avenue for criminals to launder illegal proceeds while masking their identities.[1]

Each type of financial institution—defined by law to also include "persons involved in real estate closings and settlements"—has certain anti-money laundering obligations and can provide valuable reporting on potential money laundering and terrorist financing.[2] While real estate brokers, escrow agents, title insurers, and other real estate professionals are not required to, FinCEN encourages them to voluntarily report suspicious transactions involving real estate purchases and sales. As with other financial institutions under the Bank Secrecy Act (BSA), a safe harbor from liability exists with respect to the filing of suspicious activity reports, including voluntary ones, by persons involved in real estate closings and settlements.[3]

1. Although FinCEN to date has focused on residential real estate, money laundering can also involve commercial real estate transactions.
2. FinCEN—a bureau of the U.S. Department of the Treasury—administers and issues regulations pursuant to the Bank Secrecy Act (BSA). The BSA is the commonly used term for statutory enactments requiring U.S. financial institutions to assist U.S. government agencies to detect and prevent money laundering, terrorism finance, and other illegal activity. The BSA's definition of "financial institution" includes "persons involved in real estate closings and settlements." 31 U.S.C. § 5312(a)(2)(U). While that term has not yet been defined under FinCEN's regulations, it is not intended to include individual buyers and sellers.
3. *See* 31 U.S.C. § 5318(g)(3).

## Money Laundering Risks in the Real Estate Sector

Real estate transactions and the real estate market have certain characteristics that make them vulnerable to abuse by illicit actors seeking to launder criminal proceeds. For example, many real estate transactions involve high-value assets, opaque entities, and processes that can limit transparency because of their complexity and diversity. In addition, the real estate market can be an attractive vehicle for laundering illicit gains because of the manner in which it appreciates in value, "cleans" large sums of money in a single transaction, and shields ill-gotten gains from market instability and exchange-rate fluctuations.[4] For these reasons and others, drug traffickers, corrupt officials, and other criminals can and have used real estate to conceal the existence and origins of their illicit funds.

**Example: Corruption and Residential Real Estate**

A high-profile case illustrating money laundering risks in the real estate sector involves 1Malaysia Development Berhad (1MDB), a Malaysian sovereign wealth fund. In 2016, the U.S. Department of Justice sought forfeiture of over $1 billion in assets—including luxury real estate—associated with funds stolen by corrupt foreign officials from 1MDB. This included a hotel, two homes, and a mansion in Beverly Hills, CA; a home in Los Angeles, CA; a condominium, two apartments, and a penthouse in New York, NY; and, a townhouse in London, England; all with a collected value estimated at approximately $315 million.

This money laundering risk in the real estate market was a principal driver of FinCEN's decision to issue GTOs, which, as described below, have provided greater insight into illicit finance risks in the high-end real estate market. FinCEN's analysis of BSA and GTO reported data, law enforcement information, and real estate deed records, as depicted by the case studies in this advisory, indicates that high-value residential real estate markets are vulnerable to penetration by foreign and domestic criminal organizations and corrupt actors, especially those misusing otherwise legitimate limited liability companies or other legal entities to shield their identities. In addition, when these transactions are conducted without any financing *(i.e.*, "all-cash"), they can potentially avoid traditional anti-money laundering (AML) measures adopted by lending financial institutions, presenting increased risk.

FinCEN encourages both financial institutions subject to mandatory suspicious reporting requirements, as well as real estate professionals filing voluntary suspicious activity reports, to keep the risks detailed below in mind when identifying and reporting suspicious transactions.

4. Money laundering is a crime orchestrated to conceal the source of illegal proceeds so that the money can be used without detection of its criminal source. Visit www.fincen.gov for further information.

## *Use of Shell Companies Decreases Transparency*

Criminals launder money to obscure the illicit origin of their funds. To this end, money launderers can use a number of vehicles to reduce the transparency of their transactions. One such vehicle, highlighted in the below case study, is the use of shell companies. Shell companies are typically non-publicly traded corporations, limited liability companies (LLCs), or trusts that have no physical presence beyond a mailing address and generate little to no independent economic value.[5] Most shell companies are formed by individuals and businesses for legitimate purposes, such as to hold stock or assets of another business entity or to facilitate domestic and international currency trades, asset transfers, and corporate mergers. Shell companies can often be formed without disclosing the individuals that ultimately own or control them (*i.e.*, their beneficial owners) and can be used to conduct financial transactions without disclosing their true beneficial owners' involvement. Criminals abuse this anonymity to mask their identities, involvement in transactions, and origins of their wealth, hindering law enforcement efforts to identify individuals behind illicit activity.[6]

**Example: Drug Trafficking, Luxury Real Estate, and Shell Companies**

An example of abuse of the luxury real estate sector involves current Venezuelan Vice President Tareck El Aissami and his frontman Samark Lopez Bello. The U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) designated El Aissami under the Foreign Narcotics Kingpin Designation Act for playing a significant role in international narcotics trafficking. Lopez Bello was designated for providing material assistance, financial support, or goods or services in support of the international narcotics trafficking activities of, and acting for or on behalf of, El Aissami.[7] In addition, OFAC designated shell companies tied to Lopez Bello that were used to hold real estate.[8] Lopez Bello is tied to significant property and other assets, which were also blocked as a result of OFAC's action.

The misuse of shell companies to launder money is a systemic concern for law enforcement and regulatory agencies, but it is of particular concern in the "all-cash" segment of the real estate market, which currently has fewer AML protections.

5. For further information on shell companies, see FinCEN Guidance FIN-2006-G014 "Potential Money Laundering Risks Related to Shell Companies" (November 2006) and FinCEN's SAR Activity Review Trends, Tips, and Issues: Issue 1 (October 2000), Issue 2 (June 2001), and Issue 7 (August 2004).
6. In May 2018, many financial institutions will be required to implement customer due diligence obligations and collect beneficial ownership information on their legal entity customers at account opening. See, 81 Fed. Reg. 91 (May 2016).
7. *See* "Treasury Sanctions Prominent Venezuelan Drug Trafficker Tareck El Aissami and His Primary Frontman Samark Lopez Bello" (February 2017).
8. *Id*. Generally, under U.S. law, the assets and accounts of a designated individual, entity, or country must be frozen or blocked by U.S. individuals or entities.

### *Use of "All-Cash" Real Estate Purchases Further Decreases Transparency*

Criminals can use all-cash purchases to make payments in full for properties and evade scrutiny—on themselves and the origin of their wealth—that is regularly performed by financial institutions in transactions involving mortgages.[9] All-cash transactions account for nearly one in four residential real estate purchases, totaling hundreds of billions of dollars nationwide, and are particularly exposed to abuse.[10] All-cash transactions account for an even larger stake in some U.S. markets. For instance, nearly 50 percent of residential real estate sales in Miami-Dade County were all-cash transactions in 2015 and 2016.[11] Many all-cash transactions are routine and legitimate, however, they also present significant opportunities for exploitation by illicit actors.

**Example: Fraud, Money Laundering, and All-Cash Purchases**

An example highlighting fraud and money laundering through all-cash transactions involves real estate agent Anthony Keslinke, who in 2016 was jailed, ordered to pay $1,427,916 in restitution to victims, and forfeited $3,808,831. Keslinke was the leader of both a large-scale bank fraud conspiracy and a separate money laundering conspiracy. Between 2011 and 2014, Keslinke used straw buyers and altered records and documents to purchase real estate with cash throughout Northern California, which he then resold at significant financial gain.[12]

## FinCEN's Geographic Targeting Orders (GTOs)

In 2016 and 2017, FinCEN issued GTOs to better understand the vulnerabilities presented by the use of shell companies to engage in all-cash residential real estate transactions. A GTO is an order issued by FinCEN under the BSA that imposes additional recordkeeping or reporting requirements on financial institutions or other businesses in a specific geographic area.[13] In this case, FinCEN issued GTOs requiring certain U.S. title insurance companies to record and report information, including beneficial ownership, about legal entities used to make non-financed purchases of high-value residential real estate in seven major U.S. geographic areas.[14]

9. The BSA and FinCEN regulation generally require covered financial institutions—including those providing financing—to conduct diligence on their customers and their source of wealth.
10. The National Association of Realtors (NAR) consistently reports monthly figures on all-cash sales for existing homes to near 25 percent. *See* http://www.realtor.org/topics/existing-home-sales.
11. *See* the Miami Association of Realtors' 2016 Yearly Market Summaries for Single Family Homes and Townhouses and Condos.
12. *See* the Internal Revenue Service's (IRS) "Examples of Money Laundering Investigations – Fiscal Year 2016."
13. *See* 31 U.S.C. § 5326(a), 31 CFR § 1010.370, and Treasury Order 180-01.
14. *See* "GTOs Involving Certain Real Estate Transactions Frequently Asked Questions" (August 2016), "FinCEN Renews Real Estate "GTOs" to Identify High-End Cash Buyers in Six Major Metropolitan Areas" (February 2017), and "FinCEN Targets Shell Companies Purchasing Luxury Properties in Seven Major Metropolitan Areas" (August 2017).

As of May 2, 2017, over 30 percent of the real estate transactions reported under the GTOs involved a beneficial owner or purchaser representative that had been the subject of unrelated Suspicious Activity Reports (SARs) filed by U.S. financial institutions. In other words, the beneficial owners or purchaser representatives in a significant portion of transactions reported under the GTO had been previously connected to a wide array of suspicious activities, including:

- A beneficial owner suspected of being connected to over $140 million in suspicious financial activity since 2009 and who sought to disguise true ownership of related accounts.
- Two beneficial owners (husband and wife) involved in a $6 million purchase of two condominiums were named in nine SARs filed from 2013 – 2016 in connection with allegations of corruption and bribery associated with South American government contracts.
- A beneficial owner suspected of being connected to a network of individuals and shell companies that received over $6 million in wire transfers with no clear business purpose from entities in South America. Much of these funds were used for payments to various real estate related businesses.
- Eleven SARs filed from 2008 through 2015 named either the buyer (an LLC), beneficial owner, or purchaser's representative involved in a GTO-reported $4 million purchase of a residential unit. Law enforcement records indicate that both the purchaser's representative and his business associate were associated with a foreign criminal organization involved in narcotics smuggling, money laundering, health care fraud, and the illegal export of automobiles.

## Review of U.S. Anti-Money Laundering Regulations in the Real Estate Sector

The real estate sector is one of many within the U.S. economy for which anti-money laundering (AML) safeguards have been established to protect the U.S. financial system.[15] More specifically, covered financial institutions—including depository institutions, loan or finance companies, and housing government-sponsored enterprises like Fannie Mae and Freddie Mac—generally have obligations to establish AML programs, report suspicious activity to FinCEN using Suspicious Activity Reports (SARs), and understand their customers and their source of wealth. In addition, beginning in May 2018, many financial institutions will be required to implement customer due diligence obligations and collect beneficial ownership information on their legal entity customers opening accounts.[16] FinCEN provides substantial guidance and information on how to implement these requirements effectively.[17]

15. 31 U.S.C. § 5318(h) requires financial institutions, including "persons involved in real estate closings and settlements," to establish an anti-money laundering program that includes, at a minimum: (A) the development of internal policies, procedures, and controls; (B) the designation of a compliance officer; (C) an ongoing employee training program; and (D) an independent audit function to test programs.
16. 81 Fed. Reg. 91 (May 2016).
17. For additional information, see https://www.fincen.gov/resources/financial-institutions/mortgage-co-broker.

While FinCEN currently has exempted them from these broader obligations, persons involved in real estate closings and settlements do participate in efforts to safeguard the U.S. real estate industry and financial system from money laundering and terrorism financing through their existing AML/CFT requirements.[18] They, like all U.S. persons engaged in trade and business, must file reports on transactions in currency and certain monetary instruments involving more than $10,000 (commonly referred to as "Form 8300").[19] They also may be required to annually report on foreign bank and financial accounts they own or control, report the transportation of currency across the U.S. border, and keep associated records, as well as respond to FinCEN-issued GTOs.[20] In addition, as other financial institutions under the BSA, persons involved in real estate closings and settlements—which may include real estate brokers, escrow agents, title insurers, and other real estate professionals—can voluntarily report suspicious activity and such disclosures would be protected from liability under the BSA's safe harbor.

The real estate industry recognizes the seriousness and importance of protecting the U.S. real estate market from abuse. For example, the National Association of Realtors has issued red flags and voluntary guidelines to assist real estate professionals minimize the risk of real estate becoming a vehicle for money laundering.[21]

## Mandatory Reporting of Suspicious Activity

A covered financial institution is required to file a SAR if it knows, suspects, or has reason to suspect a transaction conducted or attempted by, at, or through the financial institution involves funds derived from: illegal activity, attempts to disguise funds derived from illegal activity, is designed to evade regulations promulgated under the BSA, lacks a business or apparent lawful purpose, or involves the use of the financial institution to facilitate criminal activity.[22]

## Voluntary Reporting of Suspicious Activity

SARs play an important role in assisting law enforcement to combat crime as they identify possible illicit activity and criminals. FinCEN encourages persons involved in real estate closings and settlements—which may include real estate brokers, escrow agents, title insurers, and other real estate professionals—to voluntarily file a SAR to report any suspicious transactions.[23] These persons are well-positioned to identify potentially illicit activity as they have access to a more complete view and understanding of the real estate transaction and of

18. *See* FinCEN's advance notice of proposed rulemaking "Anti-Money Laundering Program Requirements for 'Persons Involved in Real Estate Closings and Settlements'" (April 2003).
19. 31 CFR § 1010.330 (Form 8300). A Form 8300 also may be filed voluntarily for any suspicious transaction, even if the total amount does not exceed $10,000.
20. 31 CFR §§ 1010.350 (FBAR), 1010.340 (CMIR), 1010.430 (recordkeeping), and 1010.370 (GTO).
21. *See* "Tips for Spotting Global Money Laundering Schemes" (January 2017) and "Anti-Money Laundering Guidelines for Real Estate Professionals" (November 2012).
22. 31 C.F.R. §§ 1020.320, 1021.320, 1022.320, 1023.320, 1024.320, 1025.320, 1026.320, 1029.320, and 1030.320.
23. For instructions on how to file a SAR with FinCEN see https://www.fincen.gov/resources/filing-information.

those involved in the transaction. For example, real estate brokers may have greater insight as to the potential purpose for which a property is being purchased or the possible origin of a purchaser's funds. When reporting suspicious activity, persons involved in real estate closings and settlements should note that they can benefit from protection from civil liability.[24]

Real estate brokers, escrow agents, title insurers, and other real estate professionals can identify potential suspicious transactions by reviewing available facts and circumstances. Real estate professionals may determine a transaction is suspicious after evaluating whether the real estate transaction:

- Lacks economic sense or has no apparent lawful business purpose. Suspicious real estate transactions may include purchases/sales that generate little to no revenue or are conducted with no regard to high fees or monetary penalties;
- Is used to purchase real estate with no regard for the property's condition, location, assessed value, or sale price;
- Involves funding that far exceeds the purchaser's wealth, comes from an unknown origin, or is from or goes to unrelated individuals or companies; or
- Is deliberately conducted in an irregular manner. Illicit actors may attempt to purchase property under an unrelated individual's or company's name or ask for records (e.g., assessed value) to be altered.

## Filing Suspicious Activity Reports (SARs)

To report suspicious transactions, financial institutions—including persons involved in real estate closings and settlements—should electronically submit a SAR through FinCEN's BSA E-Filing System. Additional information on how to complete and file a SAR is available at FinCEN's public website here.

When filing a mandatory or voluntary SAR involving a real estate transaction, financial institutions should provide complete and accurate information, including relevant facts in appropriate SAR fields, and information about the real estate transaction and the circumstances and reasons why such transaction may be suspicious in the narrative section of the SAR.

**FinCEN also requests that financial institutions reference this advisory and include the key term**

***"ADVISORY REAL ESTATE"***

**in the SAR narrative and in SAR field 33(z) (Money Laundering-Other)** to indicate a connection between the suspicious activity being reported and real estate property.

24. *See* 31 U.S.C. § 5318(g)(3)(A). Persons filing SARs should also note that FinCEN protects the confidentiality of such filings.

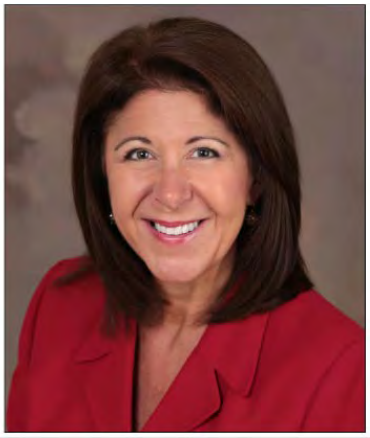
## For Further Information

Additional questions or comments regarding the contents of this advisory should be addressed to the FinCEN Resource Center at FRC@fincen.gov, (800) 767-2825 (Option 9), or (703) 905-3591 (Option 9). ***Financial institutions wanting to report suspicious transactions that may potentially relate to terrorist activity should call the Financial Institutions Toll-Free Hotline at (866) 556-3974 (7 days a week, 24 hours a day)***. The purpose of the hotline is to expedite the delivery of this information to law enforcement. Financial institutions should immediately report any imminent threat to local-area law enforcement officials.

**FinCEN's mission is to safeguard the financial system from illicit use and combat money laundering and promote national security through the collection, analysis, and dissemination of financial intelligence and strategic use of financial authorities.**

**Consumer Financial Protection Bureau Update**

**Guest Speakers**



**Loretta Salzano** founded Franzén and Salzano in 1997 after serving as in-house counsel to financial institutions. Loretta is also a founder of ComplyShare, a quality control and compliance company.

Loretta advises real estate brokers, banks, mortgage lenders, title companies and other settlement service providers on how to increase their business while remaining within the confines of the laws of all 50 states and federal law. Loretta's practice focuses on RESPA, TILA, fair lending, compensation, marketing, disclosures and other matters related to real estate-related products and services. She drafts and negotiates contracts, including marketing agreements, service agreements and compensation agreements. Loretta also assists clients in responding to regulatory examinations and actions.

Loretta was named a Top Compliance Lawyer by Mortgage Compliance Magazine, is a Fellow of the American College of Consumer Financial Services Attorneys and serves as Legal Counsel to the Mortgage Bankers Association of Georgia and to Rainbow Village, a transitional housing program. She is active in many industry and professional associations and frequently speaks on lending issues. Loretta's firm serves as the Georgia editor to Houselaw. Loretta received her B.A. with High Distinction from the University of Michigan and her J.D. from the
University of Michigan Law School.

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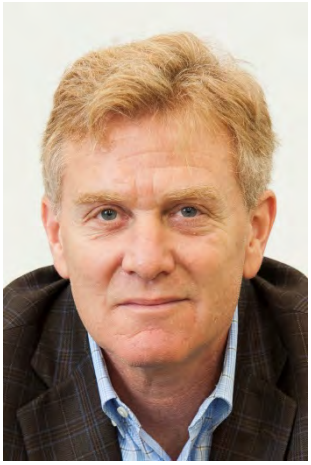

**Brian S. Levy**, Of Counsel with Katten & Temple, LLP since 2009, provides compliance, transactional and regulatory guidance for banks, mortgage originators and related providers. Brian has unique sales and in-house experience (including management of mortgage origination joint ventures with REALTORS®) enabling him to provide practical and creative guidance and training on matters such as RESPA (web marketing, MSA's, lead sharing, desk leases, AfBA's, etc.), mortgage repurchase defense, loan sales, LO Compensation and other regulatory requirements and enforcement issues for mortgage lenders, banks and other settlement service providers.

Brian is a frequent conference speaker and was the 2006 Chairman of RESPRO. Among other articles and publications, Mortgage Banking's April 2016 edition contained Brian's article, *CFPB's Enforcement-First Approach,* analyzing the CFPB's enforcement-based method of providing compliance guidance. Brian was General Counsel for a regional bank in Milwaukee WI for 15 years and prior to that worked for 5 years in private practice handling primarily commercial real estate law with what is now the international law firm DLA. Brian graduated from the University of Illinois at Urbana-Champaign, (A.B., 1986, Summa Cum Laude and Phi Beta Kappa) and Harvard Law School (J.D., 1989).

Brian can be reached at 262/241-7977 or blevy@kattentemple.com and can be followed on Twitter @BrianSLevy.

## NAR Committee:

Business Issues Policy Committee

## What is the fundamental issue?

For a number of years, the Consumer Financial Protection Bureau (CFPB) has been working to harmonize the Real Estate Settlement Procedures Act (RESPA) and Truth in Lending Act (TILA) disclosures and regulations. While the final rule is an improvement over the 2012 proposed rule, there still have been questions, complications, and costs related to the implementation that began on October 3, 2015.

## I am a real estate professional. What does this mean for my business?

The new integrated disclosures replace the long-standing Good Faith Estimate (GFE) and HUD-1 settlement statement. Like any new process, there has been a learning curve with unanticipated questions still unanswered. This uncertainty has generated a degree of risk aversion on the part of lenders that has led to a more tightly lender-controlled closing process. Of concern is a requirement that the Closing Disclosure (CD) be issued three days before closing, what adjustments can be made to the CD after it has been issued, and the potential delays that could result. Additionally, agents have reported a growing reluctance of lenders and title companies to share the CD out of fear of liability for disclosing clients' nonpublic personal information.

## NAR Policy:

NAR supports a RESPA/TILA harmonization that adds transparency, simplifies disclosures, and reduces burdens to settlement service providers, including real estate professionals. RESPA and TILA are confusing statutes with sometimes conflicting disclosures and procedures. A single reformed set of rules and initial disclosures could benefit settlement service providers and consumers, ultimately improving the settlement process.

## Opposition Arguments:

Opponents of NAR policy believe that each requirement imposed by the RESPA and TILA laws is necessary to ensure that consumers are adequately protected. Some would like to see more efforts to control costs. Some at the other end of the spectrum would simply like to get rid of this rule.

## Legislative/Regulatory Status/Outlook

The final Know Before You Owe (KBYO) mortgage disclosure rule was issued November 20, 2013, and went into effect on October 3, 2015.

In the final rule, the CFPB largely addressed NAR’s major concerns regarding the proposed 3-day waiting period to close transactions and dropped many provisions including the “all in” APR that would

have been problematic. However, concerns of possible closing delays and how the mortgage transaction interacts with the real estate transaction remained. For instance, real estate agent access to the CD continues to be problematic. Many lenders have argued that the privacy requirements of the Gramm-Leach-Bliley Act (GLBA) or Regulation P prohibit lenders from releasing the CD to the real estate agent. However, an exception to the law and regulation already allows lenders to distribute the CD to third parties, including real estate professionals.

As a result, NAR advocated for a period of restrained enforcement and liability for the rule. It was through NAR member efforts during the 2015 REALTOR® Legislative Meetings that almost 300 U.S. Senators and Representatives signed a letter to CFPB Director Richard Cordray asking him to grant a period of restrained enforcement, which the CFPB subsequently granted. In June 2016, NAR sent a letter to the CFPB requesting guidance on several concerning issues still causing problems for consumers and industry, including seeking: clarity on lenders' ability to share the CD with third parties; insight on revising the CD to reflect changes in circumstances (the so-called "black hole"); and extension of post-consummation timelines to correct minor errors to reduce impact on the secondary market.

On July 29, 2016, the CFPB issued a proposed rule addressing some of these concerns. As advocated for by NAR, the CFPB included language acknowledging that sharing the CD with real estate professionals is permitted under existing privacy laws (GLBA and Regulation P). Thus, regardless of when this proposed rule is finalized, KBYO does not impact the existing privacy law exception. It is therefore NAR's position that lenders' continued reluctance to share the CD out of fear of liability for disclosing clients' nonpublic personal information remains unwarranted.

On October 18, 2016, NAR sent a comment letter to the CFPB commenting on the proposed rule urging the CFPB to: (1) emphasize that lenders and title agents should share the CD with real estate agents, in accordance with existing privacy law and regulation; (2) ensure lenders are able to revise the CD to reflect valid changes in circumstances; (3) extend post-consummation timelines to correct minor KBYO errors; and (4) implement additional modifications to decrease consumer and industry uncertainty.

On July 7, 2017, the Consumer Financial Protection Bureau (CFPB) released the final rule amending the "Know Before You Owe" (KBYO or TRID) mortgage disclosure rule. As advocated for by NAR, the final rule clarifies the ability to share the Closing Disclosure (CD) with third parties - a victory for real estate professionals nationwide.

The final rule was published in the Federal Register on August 11, making it effective on October 10, 2017. Mandatory compliance is required by October 1, 2018.

At the same time as the final rule was released, the CFPB issued a proposed rule looking at the outstanding "black hole" issue related to creditors' ability to use a CD to reflect changes in costs imposed on consumers. On October 10, 2017, NAR sent a letter to the CFPB commenting on the proposed rule. In the comment letter, NAR advocated for adoption of the proposed rule, which allows for lenders' flexibility in being able to reissue a CD to determine if a closing cost was disclosed in good faith, regardless of when the CD is provided relative to consummation. NAR explained the advantages to having information early on in the closing process, which helps facilitate improved communication and an overall more transparent process for the consumer.

CFPB Press Release

CFPB Final Rule

October 19, 2016 - NAR Comment Letter to CFPB

October 10, 2017 - NAR Comment Letter to CFPB

## Current Legislation/Regulation (bill number or regulation)

CFPB Final Rule
Public Law 111-203 (HR 4173, The Dodd Frank Wall Street Reform and Consumer Protection Act).

## Legislative Contact(s):

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Daniel Blair, dblair@realtors.org, 202-383-1089

## Regulatory Contact(s):

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## NAR Committee:

Business Issues Policy Committee

## What is the fundamental issue?

Are marketing agreements legitimate under the Real Estate Settlement Procedures Act (RESPA)? What is the right way to do one?

## I am a real estate professional. What does this mean for my business?

Actions by the Consumer Financial Protection Bureau (CFPB) have departed from longstanding prior interpretations of the *Real Estate Settlement Procedures Act* (RESPA), calling into question whether and under what circumstances real estate professionals can receive money for marketing other settlement services and service providers. This has led to much confusion in the industry and numerous lawsuits.

## NAR Policy:

NAR believes that real estate professionals and brokers should be able to be compensated for services performed and marketing done. NAR supports improved guidance from the CFPB and specifically rejects the contention that the marketing of settlement services is a mere referral.

## Opposition Arguments:

Marketing agreements are a subterfuge for paying real estate professionals and brokers a fee for referrals.

## Legislative/Regulatory Status/Outlook

Responsibility for enforcement of RESPA transferred from HUD to the CFPB in 2012. NAR and its industry partners have long disputed a 2010 HUD ruling that the sale of home warranty contracts by real estate agents for compensation was a per se violation of RESPA. NAR believes HUD erroneously limited the ability of real estate professionals to market home warranty products to the detriment of consumers who benefit from such products. Legislation has been introduced over the years to exempt home warranty companies from RESPA, which NAR has supported.

The CFPB has also embarked on a broader effort to prohibit the use of marketing service agreements (MSAs). In addition to engaging in various enforcement actions, on October 8, 2015, the CFPB issued Compliance Bulletin 2015-05 addressing MSAs, which offered little additional guidance on the CFPB's insight for enforcement actions.

On June 4, 2015, the CFPB issued a decision against PHH Corporation and a number of other defendants for violating Section 8 of RESPA by paying for referrals when there is a federally related mortgage. CFPB Director Cordray's decision called into question a number of practices relating to reinsurance arrangements and attempted to expand the agency's statute of limitations authority. As a

result of the CFPB's actions, on July 30, 2015, Wells Fargo and Prospect Mortgage joined a growing number of lending institutions to discontinue participation in MSAs with real estate agents and brokers. The PHH case continues to be litigated at the U.S. Court of Appeals for the District of Columbia and NAR has filed two amicus, or "Friend of the Court," briefs defending properly implemented MSAs in this case.

On October 11, 2016, the D.C. Circuit Court held in favor of PHH and stating that payments for bona fide services provided and made at fair market value do not violate RESPA. The court also held that the unilateral authority of the CFPB vested in a single person (the Director of the CFPB) was unconstitutional. The CFPB appealed the decision (issued by a three-judge panel) to the full bench ("en banc") of the D.C. Circuit, which reheard the case on May 24, 2017. The court's granting of the petition for rehearing en banc wholly vacates the panel's decision, including the conclusion that PHH did not violate Section 8(c)(2) of RESPA, allowing for the possibility that the panel of ten judges reconsider this issue. A decision has yet to be issued, but the focus of the rehearing was on the constitutionality of the CFPB's single director structure rather than the RESPA concerns.

In the meantime, the CFPB has continued enforcement actions with respect to payments tied directly to referrals. In January 2017, the CFPB issued multiple enforcement actions for RESPA violations against a mortgage lender, mortgage servicer, and two real estate brokers for accepting illegal payment for referrals related to lead agreements, marketing service agreements, desk-licensing agreements, and/or steering of consumers to pre-qualify for mortgages. Over the summer, reports revealed the CFPB's investigation of a third party marketing platform for RESPA violations, but details have not been released.

NAR continues to work with the CFPB and industry partners to ensure that appropriate guidance is provided in the absence of clear direction from the agency. NAR recently published a list of Do's and Don'ts for real estate professionals when engaging in co-marketing activities via social media and other web-based marketing tools. The educational piece is intended to help real estate professionals comply with RESPA when co-marketing. NAR will also work with Congress to ensure that any future legislative changes improve RESPA without imposing undue burdens on NAR members.

For best practices on online co-marketing, see NAR's Co-Marketing Do's and Don'ts

For a brief overview of the PHH case, see NAR's Issue Brief.

For best practices on MSAs, see NAR's RESPA Do's & Don'ts for MSAs.

## Current Legislation/Regulation (bill number or regulation)

None at this time.

## Legislative Contact(s):

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# PROPOSED 2018 COMMITTEE GOALS

**BUSINESS ISSUES COMMITTEE**
Chair: Chris Kutzkey (CA)
Vice Chair: John Kmiecik (IL)
Liaison: Brenda Small (DC)

**Committee Purpose:**
To identify, monitor and recommend positions on federal legislative and regulatory~~,~~ issues that affect the operations of REALTOR® businesses and the ability of NAR to meet REALTOR® needs (i.e., RESPA, money laundering, telecommunications, telemarketing, association volunteer liability, bankruptcy, immigration/visa reform, licensing, and worker classification) and to recommend legislative or regulatory strategies in furtherance of those positions.

**Staff Contacts:**
Marcia Salkin, 202-383-1092, Christie DeSanctis, 202-383-1102, Melanie Wyne, 202-383-1234

**Proposed 2018 Goals:**

1. ***Anti-money Laundering:*** Represent the interests of real estate professionals in any efforts to impose onerous anti-money laundering regulations on the real estate industry.
2. ***Real Estate Settlement Procedures Act (RESPA)/Know Before You Owe:*** Continue to address issue/concerns arising with the implementation of RESPA and the TRID/Know Before You Owe rules, and improve NAR guidance and outreach on these issues
3. ***Foreign Investment:*** Represent the best interests of current and prospective property owners, as well as real estate professionals, should immigration and visa reform be considered.
4. ***Federal Preemption:*** Continue NAR's long tradition of ensuring that federal laws do not preempt the ability of the states to determine the appropriate rules governing the real estate sales profession.

**Rationale:** Federal legislation and regulations of business practices continue to impact and, in some cases, limit the ability of real estate practitioners to conduct their businesses in an efficient and effective manner. While the business of real estate has traditionally been regulated at the state level, NAR represents the interest of its members to ensure that federal legislation and regulations support or do not needlessly hinder the ability of REALTORS®, realty firms and REALTOR® associations to conduct business.