

February 18, 2022

The Honorable Himamauli Das
Acting Director
Financial Crimes Enforcement Network (FinCEN)
Attn: Global Investigations Division
P.O. Box 39
Vienna, VA 22183

Via Federalregister.gov Public Comment Online Portal

Re: Docket No. FINCEN-2021-0007; RIN 1506-AB54: Anti-Money Laundering
Regulations for Real Estate Transactions

Dear Acting Director Das:

On behalf of the 1.5 million members of the National Association of REALTORS® (NAR), I submit the following comments in response to the Financial Crimes Enforcement Network's (FinCEN) Advanced Notice of Proposed Rulemaking (ANPRM) to implement anti-money laundering regulations for real estate transactions. NAR supported the *Anti-Money Laundering Act of 2020*, including the *Corporate Transparency Act (CTA)*, and has long supported effective, tailored solutions to combating money laundering and terrorist financing, including the collection of beneficial ownership information (BOI). NAR supports FinCEN's efforts to improve our nation's current anti-money laundering systems, including implementing systems to prevent illicit money laundering through real estate transactions.

I. Overview: NAR Supports Limited AML Reporting Requirements for Title Insurance Companies in Non-Financed, Residential Real Estate Transactions

NAR recognizes that money laundering and terrorist financing in real estate transactions remain a challenge to regulators and a threat more broadly. As such, NAR supports FinCEN's implementation of risk-based, pragmatic anti-money laundering (AML) and countering the financing of terrorism (CFT) solutions. We believe that FinCEN's current Geographic Targeting Orders (GTOs) provide a proven and effective template for the nationwide collection and reporting of BOI in real estate transactions. Implementing a nationwide recordkeeping and reporting requirement for title insurance companies, similar to those in place under the GTOs, would facilitate transparency in real estate sales and support law enforcement efforts to detect and stop illicit financial flows involving the real estate industry. Such BOI recordkeeping and reporting requirements also would align well with other recent steps to enhance transparency in financial transactions by collecting and reporting BOI, such as the CTA and FinCEN's Customer Due Diligence (CDD) rule for financial institutions. As the CTA rule is implemented, FinCEN is encouraged to evaluate its impact, including compliance and collection of that information, prior to implementing any permanent requirements on the real estate industry that would be duplicative. As discussed in

detail below, imposing such a requirement upon real estate professionals would not be effective in achieving FinCEN's AML/CFT goals. In addition, NAR believes that the imposition of any requirements for commercial real estate transactions is not appropriate, particularly given the lack of reliable data demonstrating the need for such requirements across an extremely large and complex industry.

NAR further believes FinCEN's alternative proposed regulation to mandate full AML/CFT program requirements, including the establishment of AML compliance programs and a mandatory filing requirement for Suspicious Activity Reports (SARs), would be both overly burdensome and less effective than a BOI recordkeeping and reporting requirement. Eighty-seven percent of NAR's members are independent contractors, small businesses, and sole proprietors. Unlike banks and other financial institutions which have the means and experience to implement sophisticated AML/CFT programs, real estate professionals and their businesses would be hamstrung by such a requirement. Limited resources and insufficient AML experience would make it nearly impossible for these practitioners to meaningfully comply with a regulation that requires submitting SARs, designating an AML/CFT compliance officer, establishing AML/CFT training programs for appropriate employees, or conducting independent compliance testing pursuant to the Bank Secrecy Act (BSA). As a result, such requirements could have a negative impact on the real estate market as a whole, and provide little tangible benefit in return. Further, additional regulation could have the unintended consequence of potentially increasing real estate costs, which could be harmful to potential homeowners in an already strained real estate market.

NAR believes that BOI collection, and FinCEN's robust implementation and enforcement of the CTA and CDD rule, will help FinCEN effectively curb money laundering, terrorist financing, and other illicit financial crimes involved in real estate transactions. The CTA will require covered legal entities created for the purposes of real estate transactions, including non-financed transactions, to provide BOI to FinCEN upon their creation. The CDD rule already requires covered legal entities to provide BOI to financial institutions upon the opening of a new account. This overlapping system of safeguards will help ensure that potential bad actors will be identified even before they enter the real estate market and may be deterred from choosing to enter at all.

To ensure effective implementation of such regulations, NAR believes robust education for real estate professionals is essential. NAR strongly recommends that FinCEN coordinate with state regulators to better understand licensure and ongoing education requirements for real estate professionals, which vary greatly across the U.S. NAR urges FinCEN to develop broadly accessible and uniform educational programming which defines key terminology, such as "non-financed" and "residential," according to industry standards. NAR is committed to supporting implementation of such a solution by working with FinCEN to pursue education and training efforts for the real estate sector.

II. Background Information on NAR and Real Estate Transactions

NAR is America's largest trade association, with a member base composed of residential and commercial brokers, salespeople, property managers, appraisers, counselors, and others engaged in the real estate industry. Eighty-seven percent of NAR's members are independent contractors, and many are small business owners and sole proprietors. NAR's members are involved in all aspects of the

residential and commercial real estate industries, and belong to one or more of some 1,200 local associations and 54 state and territory associations of NAR.

Real estate professionals involved in residential transactions include title companies, real estate brokers and agents, appraisers, escrow agents, attorneys, settlement agents, lenders, and financial institutions, among others. The traditional role of real estate professionals includes assisting both commercial and residential buyers with tasks such as:

- 1) identifying available properties that match the needs and desires of clients, i.e. size, style, features, location, accessibility to schools, transportation, shopping, and other personal preferences;
- 2) recommending lenders and other third-party service providers;
- 3) facilitating the negotiation process to reach an agreement on transaction details, such as purchase price, the inclusion or exclusion of repairs and furnishings, contingencies, and appropriate inspections and disclosures, and the date of possession;
- 4) scheduling many third-party services, including home inspection and appraisal, to ensure timely progression of the transaction.

Real estate professionals generally assist both commercial and residential sellers with tasks such as:

- 5) establishing a selling price or range by using comparable market analysis;
- 6) providing advice on how to improve the appearance of the property;
- 7) marketing the property to potential buyers, and other agents;
- 8) reviewing offers;
- 9) ensuring all required disclosures are made and the purchase contract is complete and accurate; and
- 10) coordinating with the buyer's agent and third parties to meet deadlines to ensure time progression of the transaction.

Despite their valuable role guiding clients through real estate sales and purchases, there are certain aspects of real estate transactions relevant to FinCEN's proposed regulation for which real estate professionals are not responsible. Specifically, real estate agents and brokers are not responsible for verifying clients' employment, source of income, or funds; investigating or inquiring into a client's background; or completing any substantial due diligence checks on clients. In addition, real estate professionals are not involved in arranging financial transactions. Rather, the role of the real estate agent is limited to helping clients understand the buying and selling process broadly, by providing general information and education as to market dynamics, financing, housing inventory and availability.

A. *Real Estate Industry Data*

The U.S. real estate industry is vast and involves millions of people conducting trillions of dollars of transactions every year. Owning a home or running a business is the dream of millions of law-abiding individuals and families, and NAR members are proud to help people attain those dreams

every day.¹ The great breadth of the industry should inform the scope of any AML requirements, including considerations regarding the actual utility of required reports to regulators and law enforcement, compliance costs, and whether there is a clear need, supported by data, to impose a new obligation or set of obligations under the BSA to a particular type of real estate transaction. Further, any regulation imposed on the real estate industry may inevitably slow real estate transactions as the industry adjusts to new reporting requirements, and in turn affect the performance of the U.S. economy overall. Practically, transactional delays mean that potential buyers and sellers will not be able to purchase homes or sell homes as quickly, creating uncertainty and instability for many. For this reason, we encourage FinCEN to consider the overarching economic impact its regulations may have, and opt for the most narrowly tailored rule that achieves the AML/CFT goals, in order to mitigate economic harm.

The state of the housing market is essential to the performance of the national economy and the provision of jobs. In 2021, consumer spending for housing and utilities, and investments in residential and non-residential construction totaled \$4.5 trillion, the equivalent of 19 percent of total GDP of \$23.9 trillion. The real estate, rental, and leasing industry value-added totaled \$2.96 trillion or 12 percent of total GDP.²

In 2021, the number of existing home sales totaled 6.12 million, with an average sales price of \$368,500 or a total dollar sales volume of approximately \$2.25 trillion.³ In addition, and based on 11 months of data on sales of newly constructed, single-family reported by the U.S. Census Bureau, NAR estimates that such home sales in 2021 totaled 763,000 units with an average sales price of \$449,518, or a total dollar sales volume of \$343 billion.

Further, Real Capital Analytics reported \$808.7 billion of commercial real estate sales transactions in 2021. Combined residential and commercial real estate transactions therefore totaled \$3.409 trillion in 2021. Of these transactions, 76.3 percent were sales of newly constructed, single-family

¹ According to the NAR *2021 Home Buyers and Sellers Generational Report*, Millennial buyers, aged 22 to 40, make up the largest share of homebuyers at 37 percent. The vast majority were also first-time homebuyers. Homebuyers aged 41 to 55 continue to represent the most racially diverse group of buyers. In 2019, twenty-seven percent of this group of buyers identified as Hispanic / Latino, Black / African American, or Asian / Pacific Islander. Further, homeownership is the primary pathway for moving up the economic ladder and accumulating wealth and is associated with positive educational, health, and other desirable social outcomes. As of 2021 Q2, a homebuyer who purchased a typical home 30 years ago accumulated \$349,258 in housing wealth due to price appreciation and the payment of the principal. National Association of Realtors®, *Metro Area Housing Wealth Gains*, at <https://www.nar.realtor/research-and-statistics/research-reports/metro-area-housing-wealth-gains>. NAR is dedicated to continue helping buyers of all backgrounds realize their dreams of becoming homeowners.

² U.S. Bureau of Economic Analysis, *Gross Domestic Product, Fourth Quarter and Year 2021 (Advance Estimate)* (Jan. 27, 2022), at https://www.bea.gov/sites/default/files/2022-01/gdp4q21_adv.pdf.

³ National Association of Realtors®, “*Existing Home Sales*” and “*Sales Price of Existing Homes*” (2021), at https://cdn.nar.realtor/sites/default/files/documents/ehs-12-2021-overview-2022-01-20_0_0.pdf.

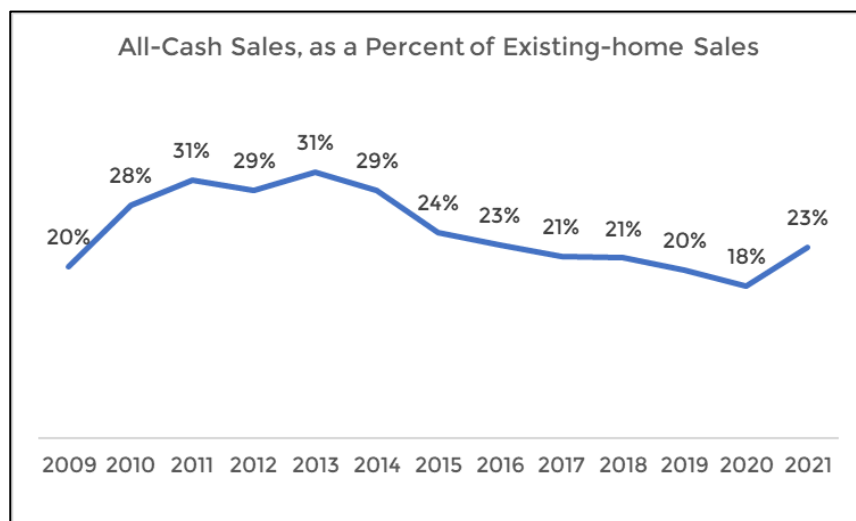
homes and existing-homes, and 23.7 percent were commercial real estate sales.

The following graph summarizes these statistics:

NAR estimate of residential and commercial real estate transactions in 2021					
	Units	Average sales price	Dollar volume (in billions)	% share by dollar volume	
Existing-home sales	6,120,000	\$ 368,500	\$2,255.2		/1
New 1 -family home sales	763,000	\$ 449,518	\$343.0		/2
<i>Existing and new residential sales</i>	<i>6,883,000</i>		<i>\$2,598.2</i>	<i>76.3%</i>	
Office			\$139.2		
Retail			\$76.9		
Industrial			\$166.1		
Hotel			\$44.5		
Apartment			\$335.3		
Seniors Housing & Care			\$17.8		
Dev Site			\$28.9		
<i>Total commercial sales volume in 2021</i>			<i>\$808.7</i>	<i>23.7%</i>	<i>/3</i>
Total residential and commercial real estate sales			\$3,406.9		
Sources of data:					
/1 NAR					
/2 NAR estimate based on US Census Bureau data for January-December 2021					
/3 Real Capital Analytics					

In 2021, all-cash purchases accounted for 23 percent of existing-home purchases, according to transactions reported in NAR's monthly REALTORS® Confidence Index Survey. As such, of the \$2.25 trillion in existing home sales in 2021, nearly \$518 billion in transactions would be potentially subject to any new regulations under the BSA.

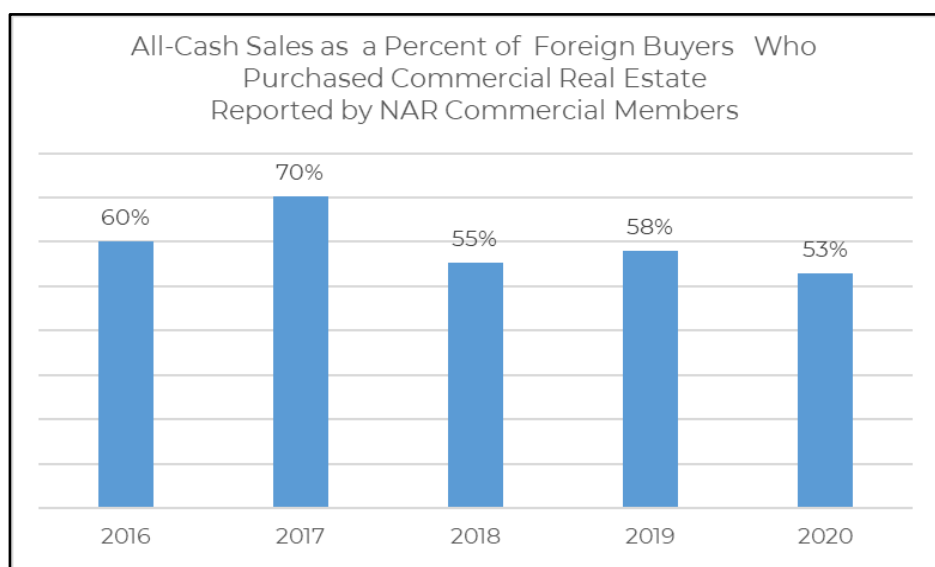
The following graph summarizes the percentage of non-financed existing home sales since 2009, and reflects that the percentage has fluctuated over time in a range of 18 to 31 percent of sales.



NAR is unable to provide data on what percent of all commercial real estate sales in 2021 were non-financed or all-cash transactions. There is a dearth of substantial information from the real estate industry on the percentage of financed versus non-financed transactions. NAR believes such data is essential to informing any regulations imposed on commercial sales. The issue is further complicated by the fact that FinCEN intends to define “non-financed” transactions covered by potential regulations as “any real estate purchase or transaction that is not financed via a loan, mortgage, or other similar instrument, issued by a bank or non-bank residential mortgage lender or originator” Stated otherwise, if a transaction does not involve funds provided through a financial institution already subject to AML regulations under the BSA, it is “non-financed.” But the commercial real estate industry in particular involves a wide variety of possible approaches to financing, including loans and credit provided in the normal course of business by reputable lenders or investors that are not subject to the BSA. Many people operating in the commercial real estate industry would regard a certain transaction as “financed” when FinCEN would not. Finally, although FinCEN has collected its own data since 2016 on residential sales through the GTOs, data provided under the GTOs has not pertained to commercial sales.

In 2021, foreign buyers, defined as non-U.S. citizens with permanent residences outside the U.S., non-immigrant visa holders, or recent immigrants, made up 8.6 percent of all commercial buyers, according to NAR’s Quarterly Market Surveys. Between 2016 and 2020, an average of 59 percent of commercial real estate transactions involving foreign buyers involved all-cash purchases. This data, set forth below, is reported by NAR members who represented foreign buyers in commercial real estate deals, and published in [NAR’s Commercial Real Estate International Business Trends](#). Accordingly, foreign buyers in all-cash transactions comprised only about five percent of commercial real estate buyers in 2021.

The following graph summarizes the percentage of commercial real estate sales made by foreign buyers that involved all-cash purchases on a yearly basis from 2016 to 2020.



B. *NAR Client Relationships Differ from Those of Financial Institutions and Others*

The relationships between real estate professionals and their clients are unique. Unlike traditional financial institutions, attorneys, accountants, and private equity professionals, with whom clients generally maintain ongoing, long-term business relationships, real estate professionals represent clients on an as-needed, case-by-case basis. Consumers engage real estate professionals exclusively when buying or selling real estate. It is not common for a consumer to work with a real estate agent for an extended duration outside of the context of real estate transactions. Additionally, real estate professionals are not always involved in performing all real estate sale closings and therefore, gaps may continue to exist with any specific reporting requirements lacking a cascading, hierarchical reporting structure to capture sought-after information. For instance, certain states, such as Delaware, New York and South Carolina, among others, require that attorneys perform real estate transaction closings.

III. Overview of Existing Regulations Impacting the Real Estate Market

A. *Existing AML Requirements in the Real Estate Industry*

Significant AML efforts already exist in the real estate industry. FinCEN soon will obtain substantial BOI information from business entities' incorporation through implementation of the CTA, and that database will be accessible to other regulators, law enforcement, and financial institutions upon consent of the customer. The CTA requires defined corporate entities to disclose to FinCEN their "beneficial owners" in an effort to prevent bad actors from abusing legal entities, remaining anonymous, and concealing the proceeds of criminal acts. Likewise, the CDD rule requires many legal entities, including entities created to facilitate real estate transactions, to disclose BOI to financial institutions upon the opening of a new account.

Further, FinCEN has authorized GTOs since 2016, which impose BOI reporting requirements on title insurance companies for all-cash residential real estate transactions by certain legal entities occurring in particular locations around the U.S. with a value of at least \$300,000. The GTO program has been extremely effective at assisting law enforcement in identifying investigative leads. As FinCEN states in the ANPRM, the GTO program "has been highly useful to the investigation of money laundering and financial crimes."⁴ In its 2017 report, *Advisory to Financial Institutions and Real Estate Firms and Professionals*, FinCEN also explained that "[a]s of May 2, 2017, over 30 percent of the real estate transactions reported under the GTOs involved

⁴ ANPRM at 69595. According to the U.S. Government Accountability Office, law enforcement representatives reported that GTO filings provided information which initiated investigations, or more likely, provided a "secondary source" of information to assist ongoing investigations. More specifically, law enforcement representatives told the GAO that, in addition to serving as investigative leads, information from GTO filings assisted in identifying assets for seizure or forfeiture; using the underlying documents associated with a GTO filing as evidence in support of prosecutions; and "strategic analysis" — that is, the identification of patterns or trends in illegal activity. One example of such strategic analysis was that law enforcement agents were "able to associate GTO reporting with foreign actors, SAR activity, and high-risk AML typologies otherwise not found in the original GTO filings." See generally U.S. Government Accountability Office, *Anti-Money Laundering — FinCEN Should Enhance Procedures for Implementing and Evaluating Geographic Targeting Orders* (July 2020).

a beneficial owner or purchaser representative that had been the subject of unrelated Suspicious Activity Reports (SARs) filed by U.S. financial institutions.” NAR believes that any new BOI recordkeeping and reporting requirements applicable to the real estate industry should track the definition of “beneficial owner” under the GTOs, in order to minimize confusion regarding what needs to be reported and maximize consistency and predictability.

NAR and other industry groups continue to provide ongoing education to their members on these requirements and related potential AML risks and challenges, including by maintaining the NAR Voluntary AML Guidelines for Real Estate Professionals. In particular, NAR’s Guidelines advise real estate professionals on identifying red flags and on how to file voluntary SARs if appropriate. In this vein, NAR remains committed to educating real estate professionals about AML challenges and risks, and will continue to update our AML best practices for our members.

Real estate agents and brokers are also subject to other, related federal and state regulations. For instance, real estate professionals are required to file Form 8300 with the IRS to report sales involving over \$10,000 in currency in the course of a single transaction or two or more related transactions. In addition, state and local laws regulate licensure for real estate sales agents and brokers, providing requirements as to how these professionals must conduct business.

While NAR recognizes that there are potential money laundering risks in real estate transactions, the vast majority of real estate sales are legitimate, and the GTOs success indicates that nationwide BOI reporting may address any potential risks; on the contrary, there is no such indicator that full-scale AML/CFT requirements pursuant to the BSA imposed upon real estate professionals would achieve the outcome FinCEN seeks. The 14 criminal and civil forfeiture cases cited in footnote 3 of the ANPRM represent only a handful of outlier situations over several years, when compared to the breadth of the entire industry over time.⁵ Likewise, the ANPRM indicates that an estimated \$2.3 billion were laundered through the U.S. real estate market between 2016 and 2021.⁶ As the total combined residential and commercial real estate sales in 2021 alone was valued at \$3.409 trillion, the money laundered through the real estate industry during the

⁵ The cases cited in footnote 3 of the ANPRM typically involve extremely complicated investigations and prosecutions that took the Department of Justice, the Federal Bureau of Investigation, and other law enforcement agencies many years to build and develop, despite being staffed by trained and experienced investigators, and despite being armed with grand jury subpoena power to compel the production of documents and witness testimony; the power to compel the production of documents and evidence from foreign countries; the ability to conduct undercover operations; and the power to execute search warrants and otherwise obtain phone and email communications. For example, the cited cases involve the former President of Gambia and Paul Manafort, a former advisor to the President of the United States. Not only are the outlier enforcement cases cited in footnote 3 few and far between when compared to the vast size of the real estate market, but it is not reasonable to expect an untrained real estate agent running a small business and lacking access to the compulsory legal process wielded by the U.S. government to investigate and determine that the source of funds behind a transaction represent could represent illicit funds when the U.S. government itself needs years to do so.

⁶ ANPRM at 69591.

preceding five years made up less than .07 of one percent of 2021's total sales, let alone sales from the preceding five years.

Although money laundering is a serious issue and the enforcement cases are significant, assessing the statistics in complete context strongly suggests that the complicated and demanding step of imposing full AML compliance program requirements upon the real estate industry would be neither necessary nor workable. Rather, expanded BOI reporting requirements will give law enforcement and regulators the actionable information that they need to identify, investigate and prosecute potential bad actors seeking to launder illicit funds. Indeed, during recent remarks before the American Bankers Association/American Bar Association Financial Crimes Enforcement Conference, the Acting Director of FinCEN focused on the need for required BOI reporting for all-cash deals in order to defeat attempted money laundering and improve transparency in the real estate market.

B. *Broader Financial Regulations Impacting the All-Cash Market*

In addition to the existing requirements that contribute to the prevention of money laundering in real estate, NAR encourages FinCEN to also consider the broader and evolving regulatory framework that surround real estate sales, including those involving the financed segment of the market. Financial regulators are continuously imposing new requirements or taking action that may inadvertently drive the market towards or against all-cash buyers. FinCEN should consider how such regulations might artificially inflate the number of non-financed real estate sales, and potentially undermine AML reporting requirements. Additionally, because such changes may disproportionately affect certain regions, FinCEN should take into account this regional variation in considering where to focus AML efforts as it has done with the GTOs.

For example, in the wake of the tragedy that occurred in Surfside, Florida, where a condo building collapsed and killed nearly 100 people, Fannie Mae issued guidance for condo associations requiring that lenders gather extensive compliance documentation prior to financing a purchase. Condominium associations must now maintain significant reserve requirements, costly architectural and/or engineering studies, building safety inspections, and an expensive review process with Fannie Mae and Freddie Mac, which are proving hard to meet in many instances, disproportionately impacting buyers with traditional financing. As a result of these new underwriting requirements, sellers may only be able to transfer their properties to all-cash buyers. In a market like Miami, where condominiums and foreign buyers are plentiful, such regulations will likely drive up all-cash purchases, which means any non-targeted, AML requirements under the BSA could result in an over-collection of data that may not be useful to tracking the few potential illicit transactions.

NAR was shocked by the events in Surfside, and supports efforts to protect consumers. Regardless, the implementation timeline of the guidance and its potential effect on a liquid condominium market will likely have unintended consequences. Freddie Mac will soon impose similar guidance for underwriting condominium purchases. Together they account for more

than half of all financed transactions. NAR highlights this example to underscore the potential regulatory levers underlying increased cash real estate purchases that have nothing to do with illicit money laundering, and encourage FinCEN to consider regional nuances in crafting the proposed AML regulations.

IV. NAR's Primary Concerns Regarding Expansive AML Regulations Under the BSA

While NAR supports FinCEN's implementation of tailored reporting requirements, NAR opposes a rule requiring the implementation of full AML/CFT compliance program requirements, including the filing of mandatory SARs. Such programs would be onerous for small business owners and sole proprietors to implement because they generally have limited resources and would be unable to absorb the high compliance costs associated with traditional AML/CFT programs currently required for financial institutions such as banks, money transmitters and broker-dealers. Mandating full AML/CFT compliance program requirements could also cause substantial business harm by creating real estate transactional delays, causing significant delays in the closing process for real estate transactions, which could lead to economic challenges for sellers and buyers and the national economy as a whole.

States have given little attention to these AML issues. As a result, there is a dearth of formal training and education around AML/CFT issues for licensees. With limited understanding and awareness, full-scale AML compliance programs would be completely ineffective if imposed upon real estate professionals. Prior to implementing any regulation, including the narrower BOI reporting requirement, it is essential to coordinate education with state licensing agencies. NAR is committed to assisting with the implementation of industry-wide educational efforts.

Real estate professionals should not be, in effect, "deputized" to investigate and enforce money laundering laws because they are not well-positioned and lack the institutional experience to serve in a quasi-law enforcement, investigatory or regulatory capacity. Most agents and brokers are not adequately equipped to perform, for example, the transaction monitoring and full customer due diligence performed by financial institutions under their AML compliance programs and necessary for mandatory SAR filings. Further, real estate professionals do not have access to consumers' personal information, nor do they collect such information during real estate sales and are discouraged from doing so to protect the clients as well as not violate any state laws and to be mindful of fair housing issues. As such, real estate professionals should not be tasked with investigating purchasers or their sources of funds. Requiring real estate professionals to submit mandatory SARs also will exacerbate the phenomenon of "defensive" SAR filings and produce an overabundance of SAR filings that are not "highly useful," as required by the AML Act, thereby undermining law enforcement's ability to accurately identify and prosecute bad actors. FinCEN has reported that there already were about 3 million SARs filed in 2021, but it is unclear the effectiveness of such vast information collection compared to more targeted pertinent solicitation of information.

Further, requiring real estate professionals to aggregate large amounts of sensitive information regarding purchasers could enhance privacy risks and violate state laws prohibiting such actions. Therefore, any additional federal regulatory

compliance requirements involving sensitive consumer information could potentially conflict with current state and local regulations imposed on real estate transactions and professionals, including, for example, licensure requirements and earnest money reporting, and actually increase liability.

The imposition of full AML/CFT compliance program requirements also would create intense resource demands upon the government that it is not currently capable of satisfying. The imposition of such requirements would mean that there would have to be an agency designated as the BSA/AML examiner for the real estate industry – for example, the Securities and Exchange Commission examines broker-dealers for BSA/AML compliance, just as the Office of the Comptroller of the Currency examines national banks. In order to perform this function adequately, competently and fairly, agency representatives would need to be fully trained in the nuances of BSA/AML requirements, and the agency would need to have sufficient staff and other resources. Given the fact that FinCEN has delegated authority to the Internal Revenue Service (IRS) for examining residential mortgage lenders and originators for BSA/AML compliance, the IRS presumably also would be designated as the BSA/AML examiner for the real estate industry. But the IRS is already severely resource-challenged after years of budget cuts, while its responsibilities – such as enforcing portions of the Affordable Care Act – have only grown. Neither the IRS nor any other agency is well-positioned to take on the massive task of examining an industry as vast and complicated as the real estate industry for BSA/AML compliance.

Finally, NAR is committed to removing discriminatory barriers and ensuring that individuals of all backgrounds have access to the real estate market, including individuals from outside the United States. As such, NAR is concerned about the potential for any regulations which may disproportionately impact individuals of certain nationalities, races, or other protected classes, particularly any regulations which go beyond the BOI recordkeeping and existing transactional reporting requirements. Specifically, NAR is mindful of the unintended consequences of “de-risking,” which refers to the categorical refusal to do business with an individual or category of individuals perceived as being associated with a heightened risk of involvement in money laundering or terrorist financing. Government and watchdog groups have noted that de-risking can unfairly prevent targeted individuals from participating in the U.S. and global financial system. For example, in April 2020, the Government Accounting Office (GAO) emphasized its concerns surrounding the de-risking consequences of AML/CFT obligations by writing to the Board of Governors of the Federal Reserve System and the Federal Deposit Insurance Corporation. Further, in June 2018, the GAO issued a statement to Congress regarding the perils of de-risking. We share these concerns. To the extent that any potential regulations may directly or indirectly promote de-risking, NAR urges FinCEN to be mindful of any potential discriminatory impact and build mechanisms to avoid this harmful outcome.

V. NAR’s Recommendations for Proposed Regulations

NAR supports FinCEN’s goal of implementing an effective system to collect and permit authorized uses of information concerning potential money laundering associated with non-financed transactions.⁷ To do so, NAR recommends that FinCEN require nation-wide reporting of BOI similar to the reporting requirement

⁷ ANPRM at 69589.

currently imposed under the GTOs. There should be no minimum monetary threshold for BOI reporting for non-financed deals, in order to lend clarity and simplicity to the reporting regime, and to prevent bad actors from structuring their transactions to try to avoid reporting requirements. This reporting requirement should only cover non-financed, residential real estate transactions involving entities or individuals, and should exclude commercial real estate transactions. This reporting could be accomplished through a relatively simple and clear form, similar to the single-page BOI reporting form currently proposed by FinCEN and already used by many financial institutions for the CDD rule. As the ANPRM notes, FinCEN received specific authority to create this very type of targeted reporting requirement by the AML Act of 2020, which amended 31 U.S.C. § 5318(a)(2) in order to authorize the Secretary of the Treasury to “require a class of domestic financial institutions . . . to maintain appropriate procedures, including the collection and reporting of certain information as the Secretary of the Treasury may prescribe by regulation, to . . . guard against money laundering, the financing of terrorism, or other forms of illicit finance.”⁸ Ultimately, NAR supports regulations that provide uniformity, predictability, and clarity, and that are not unduly burdensome to the industry.

Particularly in light of the breadth of the real estate industry, this balanced and targeted reporting regime would align with the dictates and purpose of the AML Act of 2020, which amended the BSA to make clear that regulators should consider the fact that “[f]inancial institutions are spending private compliance funds for a public and private benefit, including protecting the United States financial system from illicit finance risks.” The AML Act further provides that programs to combat money laundering and the financing of terrorism should not only be reasonably-designed and appropriately risk-based, but also should produce only reports or records that are “highly useful” to the government in criminal, tax, or regulatory investigations, risk assessments, or proceedings, and intelligence or counterintelligence activities to protect against terrorism.

A. *FinCEN Should Adopt the Definitions of the GTOs, Which Have Proven Workable for the Industry and Helpful to FinCEN.*

NAR believes that the appropriate content of recordkeeping and reporting requirements for residential real estate transactions should include the date and amount of the transaction, as well as the location of the property being sold. It also should include the full name, date of birth, current address, and unique identifying number from an acceptable identification document of (i) all individual purchasers, or (ii) the “beneficial owners” of any “legal entity” making the purchase. For the purposes of the unique identifying number, FinCEN should consider allowing the use of an acceptable FinCEN unique identifier, as envisioned by the CTA.

FinCEN should adopt the definitions of “beneficial owner” and “legal entity” FinCEN used for the Geographic Targeting Orders, and not those from the CTA. These definitions have proved both feasible for the industry and helpful to law enforcement.

⁸ ANPRM at 69597.

“Beneficial Owner” means each individual who, directly or indirectly, owns 25% or more of the equity interests of the legal entity purchasing real property in the Covered Transaction.⁹

“Legal Entity” means a corporation, limited liability company, partnership or other similar business entity, whether formed under the laws of a state, or of the United States, or a foreign jurisdiction, other than a business whose common stock or analogous equity interests are listed on a securities exchange regulated by the Securities Exchange Commission (“SEC”) or a self-regulatory organization registered with the SEC, or an entity solely owned by such a business.¹⁰

FinCEN seeks comment as to whether trusts should be covered by the proposed rule.¹¹ If trusts are covered, NAR believes applying the same rule used by the CTA and the CDD rule is the most effective way to address the inclusion of trusts. Only those legal trusts formed through a filing with a State or Tribal Authority should be subject to the proposed reporting requirements. Attempting to track trusts not so created would not be feasible for reporting purposes.

BOI reporting should be accomplished through a simple and clear form, similar to the current, single-page BOI reporting form proposed by FinCEN and already used by many financial institutions for the CDD rule. This form can be included in the typical package of documents which accompany residential real estate closings.

B. *Commercial Real Estate Transactions Should Not Be Covered by the Rule*

Commercial real estate transactions should not be covered by FinCEN’s proposed rule for several reasons. First, and as previously noted, there is a lack of data on the frequency of cash-only or otherwise “non-financed” commercial real estate transactions. Such data is essential to informing the development of any regulations imposed on commercial sales. Unlike residential sales, data on commercial sales were not collected through FinCEN’s existing GTOs. Also as noted, FinCEN’s technical definition of a “non-financed” transaction may be difficult to implement or be understood in the commercial real estate industry, in which deals are funded not by simple mortgages, but often through potentially complex lending arrangements. Perhaps more importantly, much of such “non-financed” lending comes through insurance companies – which themselves are covered by the BSA for the purposes of certain insurance products, and therefore are familiar with AML risk mitigation – or established and reputable non-bank lenders, which maintain AML compliance programs due to their contractual obligations with partner banks. Accordingly, the potential money laundering risks posed by such “non-financed” transactions in the commercial real estate industry are very low, and certainly lower than the potential money laundering risks posed by all-cash transactions for residential real estate transactions.

Second, the formation and use of legal entities for purchasing is extremely common and typically necessary for all commercial real estate transactions. As the ANPRM concedes, “[b]uyers may use shell companies in many

⁹ ANPRM 69594, n. 49.

¹⁰ ANPRM 69594, n. 50.

¹¹ ANPRM at 69600.

legitimate circumstances, such as when buyers use legal entities to shield themselves and their assets from liability related to the purchase of real property or as a means of protecting their privacy. Special purpose investment vehicles are used almost invariably across all commercial real estate transactions, for legitimate reasons. Because this is a standard and commonly accepted practice across the industry, the use of a legal entity for purchasing commercial real estate is, standing alone, simply not a red flag for potential money laundering.

Last, commercial real estate transactions often involve highly complex corporate structures with multiple entities, thereby making reporting BOI challenging. Requiring the identification and reporting of the person who is either a 25 percent owner in a company or, potentially, who otherwise “controls” the company likely will pose an onerous burden on the reporter, as well as result in inconsistent and inaccurate information being reported to FinCEN.

C. *Title Insurance Companies and, Alternatively, the Settlement Agent Should Be Responsible for FinCEN’s Proposed Reporting and Recordkeeping.*

FinCEN should first consider the collection of information under the CTA prior to introducing any new reporting requirements to prevent duplication of the same data. Should there be a gap in such information collected, then, based on the existing reporting requirements imposed on title insurance companies under the GTOs, title insurance companies are best positioned to fulfill proposed recordkeeping and reporting requirements. It serves AML efforts to expand the GTOs rather than to build an entirely new reporting system. Like with the GTOs, imposing the reporting responsibilities on title insurance companies will “streamline[] the implementation” of new regulations, in part because title insurance companies have already implemented systems for effectuating similar requirements.¹² Further, title insurance companies “play a central role in the vast majority of real estate transactions.”¹³ The U.S. Government Accountability Office confirmed in its 2020 report that “title insurance companies told [FinCEN] that only a small percentage of real estate transactions do not include the purchase of title insurance.”¹⁴ For these reasons, title insurance companies are best situated to fulfill the proposed recordkeeping and reporting requirements.

In addition, to prevent bad actors from exploiting a loophole under the existing GTOs by declining to purchase title insurance, it is important that FinCEN avoid putting the reporting onus any one particular group. In the event that title insurance is not present in a non-financed transaction, the responsibility should be assumed by whomever serves as the “settlement agent.” Such a cascading hierarchy of reporting responsibility will ensure that buyers cannot avoid reporting requirements by cutting any one group out of the transaction. NAR further recommends that FinCEN follow the definition of “settlement agent” used by the IRS for Form 1099-S. For the

¹² ANPRM at 69594.

¹³ ANPRM at 69594.

¹⁴ U.S. Government Accountability Office, *Anti-Money Laundering — FinCEN Should Enhance Procedures for Implementing and Evaluating Geographic Targeting Orders*, p. 14 (July 2020).

purposes of this form, the IRS defines the “settlement agent” as the “person responsible for closing the transaction.”¹⁵

Many different real estate professionals may be involved in covered transactions and the individual responsible for preparing and finalizing the transfer of ownership may vary. This role may include title agencies, real estate agents, attorneys, and title insurers, among others. NAR supports adopting a “cascading hierarchy” of responsibility framework similar to the existing structure under IRS Form 1099-S. The reporting mechanism should be clear and not duplicative or cause greater challenges for title companies or settlement agents. Because different persons and/or entities may be involved in a real estate transaction closing, such a framework would ensure reporting occurs even if a given person is not involved in a certain closing, by having the requirement fall to others involved.

Additionally, NAR requests that FinCEN include absolute safe harbor provisions in its proposed rule to protect individuals who file reports with FinCEN, including voluntary SARs, from potential civil liability. Such a safe harbor provision would facilitate compliance with the rule and encourage reporting and would be consistent with the existing safe harbor provision for mandated SARs filed by financial institutions.

D. *FinCEN Should Adopt Robust Privacy and Data Security Protections*

As with the CTA, FinCEN should create robust privacy and data security protections for the BOI data that it will collect regarding real estate transactions and should make the data potentially available only to regulators and law enforcement upon request and under appropriate protocols. Although FinCEN still needs to issue proposed regulations regarding the privacy and data security provisions of the CTA, the statutory terms of the CTA require each requesting agency to establish and maintain a secure system to store BOI, establish privacy and data security protocols, and certify compliance with the Secretary of Treasury on a semi-annual basis. The forthcoming CTA regulations also will need to limit access to the BOI database information in two ways. First, the BOI database information will only be available to requesting agencies upon written request describing the reasons for the request. Second, access to the BOI database information will be limited to personnel who must go through appropriate training, use identity verification to obtain access to the BOI database information, and must also be authorized—by agreement with the Secretary of Treasury—to access that information. Violations of these regulations may lead to criminal or civil penalties. These CTA privacy and data security provisions for BOI should provide a guidepost for handling any BOI collected from real estate transactions. Use of an acceptable FinCEN identifier unique to individuals and entities being reported upon, as the CTA envisions, also should enhance privacy and data security protections.

Lastly, FinCEN should develop robust educational programs on AML reporting requirements for professionals in the real estate industry. NAR would volunteer to help facilitate such trainings and/or partner with state and local agencies to raise awareness about the proposed rule. In addition to greater education, there should also be clear definitions of key terms used

¹⁵ ANPRM at 69598.

by FinCEN. For example, “all-cash” transactions, and “residential real estate” must be clearly defined based upon industry standards.

VI. Conclusion

Standardized recordkeeping and reporting requirements for BOI in all non-financed, residential real estate transactions will promote greater transparency in the use of legal entities, assist law enforcement in detecting and stopping illicit financial flows, and further reduce the risk posed to our industry by potential money laundering and terrorist financing.

NAR greatly values FinCEN's continued efforts to combat money laundering and terrorist financing. NAR remains engaged with this issue, and with educating our members on your efforts. We welcome opportunities to work with you now and in the future as you develop and implement AML regulations pertaining to real estate transactions.

If you have any questions, please contact me, or Nia Duggins, Senior Business Issues Policy Representative at 202-383-1085 or NDuggins@NAR.REALTOR.

Sincerely,

A handwritten signature in gold ink that reads "Leslie Rouda Smith". The signature is written in a cursive, flowing style.

Leslie Rouda Smith
2022 President, National Association of REALTORS®