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Financial Crimes Enforcement Network
Global Investigations Division
P.O. Box 39, Vienna, VA 22183

RE: Anti-Money Laundering Regulations for Real Estate Transactions 1506–AB54; Docket Number FinCEN—2021—0007

The undersigned real estate organizations appreciate this opportunity to comment on the Financial Crimes Enforcement Network's (FinCEN) advance notice of proposed rulemaking (ANPRM) relating to the anti-money laundering regulations for real estate transactions. We represent commercial and multifamily real estate owners, operators, investors, lenders, developers, agents, and service providers, including law firms, data providers, property managers, and accountants.

While we appreciate and support the broad goal of preventing the use of LLCs or any form of real estate to finance illicit acts, money laundering, or terrorism, FinCEN should proceed cautiously to not harm legitimate real estate capital flows in the process.

We also appreciate that FinCEN is seeking "to maximize benefits while minimizing burdens on reporting financial institutions and nonfinancial trades or businesses."[1] As part of this effort, anti-money laundering (AML) rules and requirements should focus on risk while not overburdening legitimate actors with unnecessary or duplicative compliance, which will only increase costs without meaningfully combating money laundering.

Our industry stands ready to assist FinCEN and to work productively to identify weaknesses. As it moves forward, we also urge FinCEN to appropriately tailor the processes to detect illicit finance while allowing legitimate commerce and actors to invest in commercial real estate, moving incrementally with a focus on areas of the highest risk. In this spirit, we suggest that FinCEN:

I. **Study the commercial and multifamily real estate markets to tailor future regulation to how those markets function;**
II. **Leverage the Corporate Transparency Act and the beneficial ownership database to reduce the necessary scope of further action on the ANPRM; and**
III. **Distinguish nonbank commercial real estate lenders from true all-cash transactions.**

Our comments are discussed in further detail below.

[1] 86 Fed. Reg. 69589 (Dec. 8, 2021).

I. FinCEN should first study the CRE market and tailor future regulation to how those markets function.

FinCEN is appropriately seeking to gain a better understanding of commercial and multifamily markets before it proposes any regulations under the Bank Secrecy Act (BSA) that would apply in the context of those markets. As noted in the ANPRM, the existing Geographic Targeting Orders (GTOs), to date, have been limited to all-cash residential real estate transactions in certain locations. Commercial and multifamily real estate (collectively, "CRE") transactions are significantly different from residential transactions in terms of economics, due diligence, sophistication, and documentation. At its core, CRE comprises income producing properties. The distinct features of commercial real estate transactions could serve to mitigate some of risks, as many complex CRE transactions involves multiple parties who demand transparency to protect their investments, whether those investments are equity or debt.[2] Illicit finance is a threat to those investments.

While the ANPRM cites reports[3] that warn of vulnerabilities in commercial real estate, especially all-cash transactions, the reports do not analyze the specific vulnerabilities or examine whether those same susceptibilities exist inside the banking system as well. For example, if a non-financed CRE transaction is funded by a bad actor's shell company that has an account at a U.S. depository institution, the vulnerability already existed in other areas of the financial system, not solely in a commercial real estate investment. Likewise, when funds come from an attorney using an Interest on Lawyers Trust Account (IOLTA) at a bank, the vulnerability exists because of improper use of the IOLTA, not because of commercial real estate.[4] These types of vulnerabilities are more appropriately addressed in the banking sector.

We look forward to working with FinCEN to identify and mitigate any vulnerabilities that arise in CRE markets. Accordingly, we encourage FinCEN to further study the CRE market, identify specific vulnerabilities unique to the CRE market, and propose appropriate, targeted action to mitigate those risks. This analysis should include understanding the full slate of existing regulations and practices, as well as the new, potentially duplicative beneficial ownership reporting requirements that will come online, as discussed further below.

Requesting information about CRE in the ANPRM is a good start. However, we urge FinCEN to also leverage other resources, including CRE experts at the federal prudential regulators, to develop the level of understanding of CRE necessary to maximize benefits while minimizing burdens on reporting financial institutions and nonfinancial trades or businesses, and tailor any

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[2] CRE transactions, both financed and non-financed, are generally between sophisticated parties represented by legal counsel and include third parties such as escrow agents, brokers, and title companies. In bank and nonbank financed transactions, multiple capital sources with varying repayment priorities will increase demands for information as lenders and investors determine the expenses of the property and how it will affect repayment risk.

[3] FinCEN's own 2006 and 2011 reports on money laundering in the commercial real estate industry were before the updated Customer Due Diligence rules requiring that financial institutions conduct beneficial ownership reporting. The regulation was finalized in 2016, and the reporting requirements became effective in May 2018.

[4] See, *"National Money Laundering Risk Assessment"* p. 34 (2018).

regulatory approaches to CRE. Our organizations stand ready to connect FinCEN to industry experts on areas of interest that FinCEN may identify.

Based on that background, FinCEN will be well situated to take an incremental approach, starting with areas with the highest risk.

II. The Corporate Transparency Act will provide FinCEN with beneficial ownership information on CRE owners.

A useful approach to maximizing benefits while minimizing burdens on reporting financial institutions and nonfinancial trades or businesses would be to leverage other reporting requirements, and limit the scope of any new regulatory actions to regulatory gaps. For example the full implementation of the 2019 Corporate Transparency Act (CTA) will provide federal authorities with an additional tool to detect illicit finance. The ANPRM lists key factors that FinCEN identifies as contributing to the "systemic vulnerability" of the U.S. real estate market:

- Lack of transparency;
- Attractiveness of the real estate market; and
- Lack of industry regulation.

In the discussion on transparency, the ANPRM focuses on the lack of beneficial ownership information of a legal entity as a key vulnerability. When fully implemented, the CTA and federal database of beneficial owners will provide law enforcement with a powerful tool to identify bad actors behind legal entities.

As FinCEN works to finalize the CTA regulations, the statutorily mandated federal beneficial ownership database and its integration with the financial system should be a factor in considering how to address money laundering risk in real estate. For example, if FinCEN is collecting beneficial ownership data, it would be duplicative to have a party to a real estate transaction also collect and report that data.

Combined with property records, IRS Form 8300 (*Report of Cash Payments Over $10,000 in a Trade or Business*) and the federal beneficial ownership data base would appear to satisfy many of the information requirements FinCEN seeks to implement in this ANPRM.[5] FinCEN should take the current IRS reporting requirements and the CTA into account when deciding how to implement additional AML requirements on the sector.

III. Bank and nonbank financed CRE transactions should not be equated with all-cash transactions.

In a footnote to the ANPRM, FinCEN describes a broad definition of "non-financed" that includes any commercial mortgage or financing not underwritten by a depository institution. In doing so, the ANPRM suggests that nonbank CRE loans have risks comparable to the risks of

[5] IRS Form 8300 requires business to report cash payments of more than $10,000 to the federal government.

all-cash transactions.[6] This not the case. Accordingly, we urge FinCEN to distinguish nonbank CRE mortgages from all-cash transactions.

Nonbank CRE credit transactions require extensive due diligence, including AML and Know Your Customer (KYC) controls to mitigate risk. Even if a nonbank lender is not obligated under the Bank Secrecy Act (BSA) to maintain or conduct certain money laundering checks, good businesses and risk management are essential in protecting the lender's investment. A counterparty may also require additional AML screening or processes. Nonbank lenders are also required to report cash payments above $10,000 via IRS Form 8300 and can voluntarily file Suspicious Activity Reports (SAR) as well.

From a business standpoint, standard due diligence is designed to elicit and confirm detailed information about the transaction, including information about the borrower or sponsor. CRE mortgage underwriting typically evaluates four major factors:

- The credit and experience of the borrower/sponsor(s);
- The strength of the market in which the property securing the debt is located;
- The competitiveness of the collateral (property) in its market, and the property's ability to generate adequate cash flow relative to the anticipated debt; and
- The structure of the loan, including amortization, reserves, and any credit enhancements.

For many CRE loans, a borrower/sponsor will be personally liable for repayment of the principal and interest on the loan, which is known as "recourse." Even in the case of non-recourse loans (where the sponsor's other assets are not pledged to repay the mortgage), lenders are careful to understand the borrower/sponsor and their experience, as a mismanaged property is a threat to the lender's investment and ultimate repayment.

Lenders want assurances that their investment will not be threatened by bad actors and illicit finance, which includes an analysis of the borrower and all relevant counterparties. Unlike residential loans, many CRE loans do not fully amortize, which means that a borrower will either have to refinance the loan at the end of the term or sell the property (where another owner may take out a mortgage). This is a common and accepted business practice in CRE lending. As such, lenders and borrowers are cognizant of how they will be repaid. A life insurance company loan on an apartment building could be refinanced by a bank, in the commercial mortgage-backed securities (CMBS) market, or even with the government sponsored enterprises (GSEs). Lenders and investors have no incentive to undermine the integrity of a loan or jeopardize their ultimate repayment with AML risk. To the contrary, they are highly incentivized to assure repayment.

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[6] "For the purposes of this ANPRM, the terms ''non-financed purchase,'' ''non-financed transaction,'' ''all-cash purchase,'' and ''all-cash transaction'' refer to 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, and that is made, at least in part, using currency or value that substitutes for currency (including convertible virtual currency (CVC)), or a cashier's check, a certified check, a traveler's check, a personal check, a business check, a money order in any form, or a funds transfer." 86 Fed. Reg. 69589, note 1.

The lack of a full suite of BSA-level AML compliance programs cannot be equated to the absence of AML controls whatsoever. As discussed above, bank and nonbank CRE lenders and investors employ due diligence on borrower/sponsors for business purposes. They also engage in AML checks, including KYC, OFAC checks, and credit reports. And even if a commercial bank is not underwriting the mortgage, a bank is likely to be involved as an escrow account, transferring funds, or holding funds, which activates their BSA procedures.

FinCEN should focus its efforts on true all-cash transactions and not enact duplicative or superfluous regulations on nonbank transactions that present very little money laundering risk.

Conclusion

The real estate industry supports efforts to provide the law enforcement community with the tools necessary to stop money laundering, terrorism financing, or other crimes. However, we urge that any compliance regime be structured in a manner that does not discourage beneficial CRE finance and investment.

Our organizations thank you for the opportunity to comment on this important issue, and we look forward to working with FinCEN and other federal authorities to develop effective processes to protect the U.S. real estate market from illicit finance. We urge FinCEN to work with us to further study the specific risks to CRE; the potentially duplicative compliance elements being imposed on the market; how the CTA will impact information available to law enforcement; and the costs of such compliance versus the benefits.

Please contact David McCarthy, Managing Director, Head of Policy at the CRE Finance Council (dmccarthy@crefc.org) with any questions.

Sincerely,

CRE Finance Council

CCIM Institute

ICSC

Institute for Real Estate Management

Mortgage Bankers Association

Nareit

National Apartment Association

National Association of REALTORS®

National Multifamily Housing Council

The Real Estate Roundtable