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**RE: Comments on FinCEN Proposed Rule: Anti-Money Laundering Regulations for Residential Real Estate Transfers - Docket Number FINCEN-2024-0005**

Dear Director Gacki,

Founded in 1908, The Texas Land Title Association (TLTA) is a statewide trade association representing the Texas title insurance industry and currently serving over 20,000 professionals involved in the safe and efficient transfer of real estate. In the course of their daily work, our membership serves over a million consumers each year. With active members in virtually every county in Texas, TLTA membership comprises over 80 percent of all title insurance agents and underwriters licensed to do business in Texas. TLTA appreciates the opportunity to comment on the Financial Crimes Enforcement Network (FinCEN) Notice of Proposed Rulemaking (NPRM) regarding the Anti-Money Laundering Regulations for Residential Real Estate Transfers (the Proposal). While we appreciate the desire to surveil the activities of Politically Exposed Persons (PEPs), we have significant concerns regarding the proposed rule's necessity, approach, and its impact on small businesses and the consumer.

***Necessity: The Proposal will create significant costs for small business and consumers to provide the Federal Government information already in its possession.***

The Proposed Rule requires title industry members to perform substantial reporting and record-keeping requirements for non-financed transfers of residential real property to legal entities and trusts. As you know, FinCEN rejected this same approach as unnecessary in 2003. Despite the national threat that certain terrorist organizations presented, FinCEN wisely determined the impact of such an approach on small businesses and the burden it would place on Americans outweighed the potential utility of the desired information.

The burden on American businesses and consumers remains the same today, but there is significantly less benefit to the Proposal because FinCEN readily admits that much of the

required information is already reported to the Federal Government under a variety of laws and regulations including:

- The Foreign Investment in Real Property Tax Act (FIRPTA)
- Compliance with the Office of Foreign Assets Control (OFAC) and its Specially Designated Nations (SDNs)
- Suspicious Activity Reports (SARs); and
- The Corporate Transparency Act (CTA) and the accompanying Beneficial Ownership rules.

As justification, the Proposal states that the proposed mass surveillance program will “enable law enforcement to access information about potential criminal activity in a more timely and efficient manner.”<sup>1</sup> While TLTA appreciates that this effort would be more efficient for law enforcement than conducting research, seeking warrants, and issuing subpoenas, we question the relative efficiency given the burden this imposes on those required to conduct, file, and maintain the reports.

The Proposal will require significant investment in systems and training, in addition to ongoing operational costs. According to the Proposal, it will impact approximately 850,000 transactions per year with annual maintenance costs of \$460,000,000 for an increased cost of **\$500 per transaction** on an ongoing basis – a relatively large portion of the typical transaction costs in a residential sale. Moreover, this figure does not include any associated startup costs such as training and systems implementation for what will inevitably be a complex due diligence process with potential regulatory, civil, and criminal liability.

The imposition of this new burden will certainly not result in efficiency for the small escrow or title businesses, particularly considering the new liability this creates for the Reporting Persons. The regulated must expend the resources necessary to ensure that rules are followed and mandates by government are met when facing this form of liability. Any notion of efficiency is subordinate to this goal.

In sum, the substantial increase in costs and liability to the small escrow or title business is not worth the marginal gains in efficiency for law enforcement especially where the majority of the requested information is already provided to the federal government through existing programs.

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<sup>1</sup> Federal Register. (2024, February 16). Proposed Rules, 89(33), 12430.

**Lack of Evidence of Necessity: *FinCEN has not demonstrated the need for this Proposal in light of the current data on the relative effectiveness of this form of surveillance.***

There is no clear evidence that the affected transactions pose a significant and unaddressed money laundering risk that justifies the Proposal’s broad and costly regulatory intervention.

The Proposal points to the success of the Geographical Targeting Orders (GTOs) begun in 2016, which requires title insurers to report identifying information of parties in residential cash transactions which involve an entity and a transaction of a certain size. This program was targeted and limited to a very small number of selected counties and cities.

According to the Proposal, FinCEN found that 42% of transactions reported under the GTOs involve individuals or entities that were the subject of a Suspicious Activity Report (SAR). From there the Proposal reasons that, “[i]n other words, persons of potential interest to law enforcement due to their engagement in suspicious activity are also engaging in a type of transaction known to be used as a method of money-laundering...”<sup>2</sup>

We must challenge this conclusion. Perhaps there are incidences of persons of potential interest to law enforcement purchasing property with cash and using entities. But according to the Bank Policy Institute’s study of SARs, only 4% of those SARs surveyed had an inquiry from law enforcement.<sup>3</sup> Even assuming those 4% had some real utility for law enforcement, applying this observation to FinCEN’s 42% SAR hit rate, only 2.5% of the reports under the GTO pilot program resulted in any theoretical usefulness for law enforcement. The percentage of useful reports will fall dramatically if this program is greatly expanded to include every county in the US and every residential cash, gratuitous, or “hard money lender” transaction involving an entity.<sup>4</sup>

The other concerns raised by the Proposal do not justify its means. The reference to illicit funds in the real estate market “distort[ing] real estate prices” is not established by the citation to the use of the Paycheck Protection Program (PPP) funds during COVID. This is a very distinct and distant scenario from the specter of Russian oligarchs buying up residential property. In other words, the amount of disfavored transactions the Proposal anticipates identifying, and perhaps preventing, is so small that a significant impact on residential prices or availability cannot be credibly established.<sup>5</sup>

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<sup>2</sup> Federal Register. (2024, February 16). Proposed Rules, 89(33), 12426.

<sup>3</sup> We note that an inquiry is many steps away from actual apprehension and prosecution of or asset seizure from a targeted foreign Politically Exposed Person (PEP).

<sup>4</sup> BPI Staff. (2018, October 29). Getting to Effectiveness – Report on U.S. Financial Institution Resources Devoted to BSA/AML & Sanctions Compliance [Webpage]. Retrieved from <https://bpi.com/getting-to-effectiveness-report-on-u-s-financial-institution-resources-devoted-to-bsa-aml-sanctions-compliance/>

<sup>5</sup> Federal Register. (2024, February 16). Proposed Rules, 89(33), 12426.

Similarly, in an exhaustive footnote, the Proposal lists various cases where real property appeared to be involved in money laundering. However, it seems there is not even one recorded instance where information from the GTO program led to the discovery of money laundering.

Multiple studies have found that front end surveillance is of little use in identifying money laundering. Repeated efforts by the U.S. Government Accountability Office (GAO) to study the efficacy of SARs have noted “limited or no investigative action” by law enforcement from receipt of information by FinCEN and that FinCEN is unable to report if referrals result in criminal prosecutions.<sup>6</sup>

In fact, most discoveries of money laundering are unearthed through investigations and judicial proceedings *after* an arrest or prosecution. The lack of evidence that surveillance significantly aids in the prosecution of money launderers or deters illegal activity demands caution before burdening small businesses and the US taxpayers with the proposed reporting and record retention requirements.<sup>7</sup>

If adopted, the Proposal would result in an astronomical cost per arrest or asset seizure, or put another way, a very inefficient creation of costs relative to any law enforcement utility. To illustrate, consider Forbes magazine’s 2022 “World’s Billionaire List.” The list included 83 Russians, 68 of which the magazine identified as “Russian Oligarchs.” If Russian Oligarchs and PEPs are the primary targets of the Proposal with annual maintenance expenses estimated at \$460 million, and if it results in the seizure of assets or legal action against each Russian Oligarch within one year, then the surveillance expenses borne by US taxpayers **for each arrest or seizure would be approximately \$6,764,705.88.**<sup>8</sup>

In Texas, we have a saying when we engage in cost benefit analysis: Is the juice worth the squeeze? Given the scope of the target and the costs created per transaction, we humbly suggest that it is not.

**Impact on Small Businesses: *The majority of TLTA’s members will be disproportionately burdened by detrimental compliance costs.***

There is no question about the squeeze on the consumer and business that would result from this Proposal. The requirement to file detailed reports for certain real estate transactions introduces new liabilities, increases operational complexities, and imposes

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<sup>6</sup> Levi, M., & Reuter, P. (2006). Money Laundering. In M. Tonry (Ed.), Crime and Justice: A Review of Research (Vol. 34, p. 342). Chicago: University of Chicago Press.

<sup>7</sup> Michel, N., & Schulp, J. J. (2022, July 26). Revising the Bank Secrecy Act to Protect Privacy and Deter Criminals. CATO Policy Analysis No. 932. Retrieved from <https://www.cato.org/policy-analysis/revising-bank-secrecy-act-protect-privacy-deter-criminals>

<sup>8</sup> Tognini, G., & Hyatt, J. (2022, April 7). Forbes Ultimate Guide To Russian Oligarchs. Forbes. Retrieved from <https://www.forbes.com/sites/giacomotognini/2022/04/07/the-forbes-ultimate-guide-to-russian-oligarchs/?sh=4b54a5d9276d>

financial burdens that many small entities are ill-equipped to manage. Small businesses will disproportionately bear the costs of compliance. A majority of our members are small companies, and many are located in rural counties with small populations. In Texas, there is a substantial presence of independent title agents, with many being family-operated businesses that have been passed down through generations.

Compliance with the rule will necessitate certain fixed costs. Consider the impact of hiring an extra employee to manage a new, comprehensive, and significant compliance requirement. The relative cost of adding an employee is considerably higher for a small firm with 4-10 employees than for a larger organization with 100 or 1000 employees.

Larger firms may be able to purchase or even develop in house expertise to attempt to safely retain and protect consumers' Non Public Information (NPI) that the Proposal requires. However, for smaller firms, this represents a huge expense and reliance on expertise by vendors outside of the day-to-day business of title insurance.

To put the proposed \$500 per transaction cost into perspective, escrow fees in Texas are typically around the \$500 level for residential transactions.<sup>9</sup> Therefore, the Proposal may **double the costs** of the escrow function in the reportable transactions. While the Proposal contemplates passing these costs onto the consumer (contrary to the White House's recently expressed concern about real estate transaction costs for consumers), the Texas Department of Insurance strictly regulates the fees and costs that title companies may charge to consumers. Thus, Texas title companies will likely have to absorb the Proposal's costs.

We believe that the Proposal's cost estimates are underestimated. The hourly value of the highly skilled professions involved in this process are significantly above your stated estimates in Texas and even more so in our metropolitan areas.

We will defer the discussion on initial costs of implementation to other commenters and focus solely on the ongoing expenses of such a program. The exchange of information between consumers, their agents, and settlement professionals involves extensive communication. Adding the requirement to collect, verify, and prepare additional information for government reporting, under severe penalty for non-compliance, significantly increases both the time and costs involved.

For those transactions that do not close, the title agent is left to shoulder the cost for this enhanced due diligence work but without compensation. This not uncommon situation should neither be underestimated nor overlooked in FinCEN's cost calculations.

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<sup>9</sup> Escrow fees are unregulated in Texas. This is a rough average as escrow fees vary from zero and up depending on market area and transaction type.

The Proposal notes that in 2002, FinCEN “explained its concern that many of these financial institutions were sole proprietors or small businesses, and FinCEN intended to avoid imposing ‘unreasonable regulatory burdens with little or no corresponding anti-money laundering benefits.’” The 2002 observation remains as valid today as when FinCEN first articulated it.<sup>10</sup>

***Bad Timing: The residential real estate economy is in crisis and the Proposal will exacerbate the economic pain.***

Although it may take months to adopt the Proposal and perhaps a year or more to implement, the real estate industry is currently in a financial crisis with no clear indication of when it might abate. High interest rates, low inventory, and inelastic home prices are all combining to create a historic gridlock in the residential real estate market. Even in Texas, often regarded as one of the strongest markets, many of our members are witnessing a 50% drop in year-over-year revenues.

The Proposal admits that “...FinCEN is unable to quantify the economic benefits of the proposed rule...”<sup>11</sup> We, on the other hand, would be remiss not to highlight the extra punishing nature of this rule at a time when small businesses dependent on the real estate market are in such distress.

***Increased Scope: The amount of transactions reportable under the Proposal are much greater than FinCEN anticipates.***

The Texas title industry is experiencing an increase in cash transactions and entities in this context are more ubiquitous than ever. Many individuals and families are moving to Texas from states with much higher property values. Additionally, we are approaching a demographic phenomenon whereby “Baby Boomers” are downsizing to smaller homes and/or relocating for retirement and elder care. Both of these populations have the ability and incentive to purchase their new homes with cash. We are witnessing this trend, especially in rural and shoulder areas where smaller title agents serve these markets. Anecdotally, our members in West Texas tell TLTA that they are observing 30% cash transactions. The frequency of property being placed or sold into entities has increased due to traditional estate tax incentives, the recent federal tax reform bill, and the proliferation of self-help electronic legal products. It is our informed impression that the amount of potential properties falling under the scope of this rule is significantly greater than would have existed in 2003.

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<sup>10</sup> Federal Register. (2024, February 16). Proposed Rules, 89(33), 12427.

<sup>11</sup> Federal Register. (2024, February 16). Proposed Rules, 89(33), 12444.

**NPI: *The Rule will create a new “treasure trove” for Cyber criminals.***

Another important impact of this Proposal would be requiring the title industry to retain the Non Public Information (NPI) of consumers for a period of 5 years. In addition to federal regulation regarding the handling and exposure of NPI by businesses, our industry is under many new legislative and regulatory regimes at the state level requiring new duties of care and notices regarding security breaches concerning NPI. In the past year, two prominent and very large title insurance companies in the US suffered cyber incidents, continuing a trend of data breaches that has been occurring with unsettling frequency. Without this Proposal, title companies and agents would be working hard to properly dispose of this information to mitigate their compliance liability and sanction exposure to these privacy laws while protecting the consumer NPI. However, this Proposal would be a step backwards, requiring the Reporting Person to hold onto a data set that would be an attractive (regulatorily required) bonanza publicly known to the cyber-criminal to target.

**Compliance Liability: *The Proposal creates significant compliance risks to innocent members of the real estate community.***

Title industry professionals are not members of law enforcement. The Texas title industry should not be deputized or commandeered by federal law enforcement. The small businesses and citizens making up this industry are simply endeavoring to offer a service to consumers. By no fault of their own, and simply because of where they sit in the chain of real estate transactions, the Proposal imposes serious liability on industry members. Enlisting title professionals in this surveillance effort is not only costly due to factors previously articulated, but the industry will now face significant fines resulting from compliance requirements. These sanctions may not always be equitable as has been witnessed in other contexts of BSA enforcement where FinCEN and the OCC have fined banks for the same incidents despite the banks’ successfully passing annual OCC AML audits.<sup>12</sup>

Our membership is greatly concerned about new exposure to government sanctions and fines resulting from an effort to address certain foreign policy goals.

**Unlicensed Practice of Law: *The Proposal forces non-lawyer escrow agents to engage in unlawful in legal analysis.***

In addition to increased compliance liability to FinCEN for this Proposal and the many various institutions enforcing data privacy resulting from the Proposal, the Proposal will expose title industry professionals to violations of state statutes for the unlicensed practice of law.

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<sup>12</sup> Michel, N. J., & Schulp, J. J. (2022, July 26). Revising the Bank Secrecy Act to Protect Privacy and Deter Criminals. CATO Policy Analysis, No. 932. Retrieved from <https://www.cato.org/policy-analysis/revising-bank-secrecy-act-protect-privacy-deter-criminals>

### ***Cooperative Housing***

The ability to read and evaluate ownership rights within a corporation are out of the scope of our professional duties and skill sets. Additionally, to do so may constitute the unlicensed practice of law.

### ***Transferee Entities***

The Proposal outlines a distinction between a transferee entity and a transferee trust or an individual. These legal determinations are beyond the scope of our professional duties and skill sets and again could violate state law regarding the unlicensed practice of law.

The inability of lay people within the title industry to parse through the legal exceptions regarding the status of a reportable trust transaction begs another important question. If certain transactions are not required to be reported and this information is reported out of the abundance of caution concerning federal compliance is the escrow officer creating a new liability to the consumer who has had their privacy violated outside of the auspices of this rule?

### ***Regulated Entities***

The Proposal seeks to exempt regulated industries in a manner basically following the exemptions outlined in the Corporate Transparency Act (CTA). Again, these legal determinations are beyond the scope of our professional duties and skill sets and could violate state law regarding the unlicensed practice of law.

The challenge faced by non-lawyers in the title industry to understand legal exceptions concerning the status of a transaction involving a reportable trust introduces a new liability for consumers whose privacy is breached beyond the requirements of this rule.

### ***Unregistered Pooled Investment Vehicles***

The Proposal states that "...PIVs that are investment companies and are registered with the SEC would be exempt from the definition of a transferee entity. The difference between registered and unregistered PIVs turns in part on whether the PIV is or is not excluded from registration requirements as an investment company under the Investment Company Act of 1940." This again presents a complexity that requires legal analysis. The vast majority of escrow officers and title agents (Closers) are not attorneys and are prohibited from engaging in legal analysis. Therefore, as mentioned above regarding the other proposed exemptions, any attempt by a Closer to determine the status of an exemption in this context risks violation of state law and potential liability exposure vis-a-vis the consumer.<sup>13</sup>

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<sup>13</sup> Federal Register. (2024, February 16). Proposed Rules, 89(33), 12433.

## ***Large Operating Companies***

To the extent certain large operating companies are exempt from the rule, please cross apply our observations concerning the limitation of the Reporting Person on making this legal determination.

***Workability: The Proposal as presented is unworkable and requires significant attention to address these issues.***

## ***“Residential”***

There are many aspects of this rule which present serious workability issues. For example, what is “residential real property?” Your Proposal says vacant or unimproved real property “that is zoned, or for which a permit has been issued, for occupancy by one to four families” is residential for the purpose of this rule.<sup>14</sup> The Proposal also acknowledges that this is an expansion of the definition that was used for the GTOs. Inclusion of vacant or unimproved land in the definition of “residential real property” renders this rule completely unworkable for title professionals.

The title industry, and more specifically title plants, in Texas do not track ordinance, zoning or permit information. Not only is that cost prohibitive, but it is not central to the question of the status of insurable title. Please note that Texas has a “title plant law” requiring this specialized form of real property data keeping and maintenance. This rule, if implemented, would require the Texas title industry to engage in a completely new area of due diligence requiring millions of dollars in database infrastructure and maintenance, training, and legal analysis.

Of course, the question still remains whether these statuses can be reliably determined, considering that a permit, despite being filed, remains unknown until it is issued, regardless of the way its issuance is made public.

Zoning is in constant flux as well. Both zoning and permitting takes place at the city or county level which are political subdivisions with datasets that the industry does not currently engage. On a transaction basis, if it could be accomplished, it is a reasonable assumption that it would increase the cost of each title policy by hundreds if not thousands of dollars. It would be costly and inefficient to conduct this new area of due diligence on an *ad hoc* basis. Given that transactions under this rule may represent as much as 30% of overall transactions in certain parts of Texas, and by FinCEN’s estimation, easily 15% of all transactions nationwide, it would be necessary to create systems that conduct this due diligence **on every single transaction** in order to ensure compliance with the Federal Rule. Thus, even if the title agent could charge a “FinCEN Surveillance Fee” to recoup the costs

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<sup>14</sup> Federal Register. (2024, February 16). Proposed Rules, 89(33), 12430-12431.

of compliance from those involved in the reportable transactions, the consumers in Texas who are not paying cash will bear a significant portion of this compliance burden in their title insurance premium.

### ***Reporting Cascade Complications***

The Proposal describes a cascade of parties responsible for becoming the Reporting Person charged with reporting the Real Estate Report. The cascade describes five different potential parties based on their role in the transaction. Among these are a mix of title professionals and those not in our industry, namely attorneys. The Proposal also contemplates and describes a “Designation Agreement” whereby parties who may be in the cascade must work it out among themselves who will be the Reporting Person on a transaction-by-transaction basis.

Although the Proposal estimates an eyepopping \$500 cost per transaction, it is not clear if the costs associated with obtaining, coordinating, and maintaining such designation agreements are included in this estimation. Any agreement among parties, especially those without pre-existing relationships, will take time. This time includes negotiations between various professionals and will necessarily incur costs. For example, now an attorney who drafts a deed will require the written assurance that one of their colleagues in the cascade will be the responsible party. Even if over time this process matures into a boilerplate form, it will not be without significant expense and complications for the foreseeable future of the rule.

### ***Dollar Tracing***

The requirement that the Reporting Person piece together and report on the sources of all monies in the transaction is overly burdensome to the extent it is at all workable. For example, the information on a wire transfer is very limited and does not contain the information required by the proposed rule.

### ***Citizen Participation***

Texans value their privacy. Texas, for example, does not have mandatory sales price disclosure. The culture has a long tradition of protecting privacy when it comes to the financial aspect of real property ownership. It has been reported to TLTA that the GTO project has created friction at the closing table as consumers incredulously ask why their private information must be collected and reported. Therefore, a key workability question that our membership is struggling with is: What do we do if the citizen refuses to provide this information?

Does this mean that the consumer will not be allowed to transfer their property? The inability to submit to surveillance in this context may create conflicts with fundamental property rights and the ability to alienate one’s property. Our current assumption is that

escrow professionals would have to refuse to conduct the transaction without the full participation of the consumer.

Of course, this also begs the question of what if there is participation, but not complete participation, or if the information rendered is incorrect? Does the escrow officer prevent the closing? What if the escrow officer's judgement is incorrect? Are they now subject to a lawsuit for interfering with the transaction and causing its failure to close?

**The Rights of Texans: *This surveillance threatens fundamental rights of citizens.***

The negative impact to the rights of hundreds of thousands of real property consumers that this Proposal represents cannot go without comment. It is highly unlikely that the average consumer will be aware of this Proposal prior to adoption. Therefore, we must raise an objection to the intrusion into the privacy of Texans who own, or seek to own, real property and question the legal foundations of this Proposal.

FinCEN has for years enjoyed the automatic surveillance of citizens' financial activities when citizens use the negotiable instruments of a bank. In this rule making FinCEN cites the Bank Secrecy Act (BSA) as statutory authority. *California Bankers Assn. v. Shultz*, 416 U.S. 21 (1974) is often cited as the primary caselaw authority for such a rule. It should be noted that neither of the two cases that form the foundation of the Bank Secrecy Act and federal power have addressed the question of the citizen's rights when their information is automatically rendered to the government. In the first instance, the court in *Shultz* found that the depositors did not have standing to challenge the statute in that instance. In the subsequent case, which began to address the rights of the citizens, the court reasoned that since a legal process was used (ie: a subpoena), the rendering of their information was Constitutionally permissible, and they lacked some reasonable expectation of privacy given their choice to have a relationship with the bank.<sup>15</sup>

However, rather than the citizens' records being preserved and subject to a legal process, such as a warrant or subpoena, the current rules imposed on banks result in automatic surveillance of a citizen's financial activities. The Constitutionality of this regime is not an entirely closed question. We think it important that we not overlook this important fact as we examine the current Proposal and distinguish the deputization and surveillance required of banks versus the same imposition applied to escrow officers, title companies, and attorneys.

In *Shultz*, the Supreme Court's majority reasoned that a bank is a party to the negotiable instrument. Given that the information sought involves the banks' negotiable instrument, they are not "mere bystanders." Therefore, it is permissible for the bank to render the information that they share some role in if there is a "legal process" as part of the information sharing. But what if the citizen does not avail themselves to a bank in the

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<sup>15</sup> *United States v. Miller*, 425 U.S. 435 (1976).

standard relationship but must instead use a temporary ad hoc third party for the purpose of an escrow exchange?<sup>16</sup>

This is a very different relationship. Unlike in *Shultz* where the bank can be construed as a party to the transaction, it is well understood that an escrow officer is a neutral third party. There is no privity in the relationship between the citizen and the escrow officer. Moreover, the escrow officer cannot be considered such a party as banks under the theory in *Shultz* because it is not the escrow officer's negotiable instrument being utilized. The escrow officer is a temporary custodian of monies and information that belongs to the consumer.

*Shultz* and *Miller* which specifically address financial records obtained under the BSA, both emphasize the use of a "legal process". It is not clear how a rule requiring the automatic rendering of information to the government meets that description. We recognize that there has been the development in other cases such as the privacy of phone records of the so-called "third party doctrine" whereby a citizen is argued to have lost 4<sup>th</sup> amendment protection to information held by a third party. However, the view that a nearly inescapable ministerial necessity like the use of an escrow officer in a real property transaction subject the citizen to the loss of privacy encompassed by the "third party doctrine" perhaps strains the credulity of the doctrine itself.

Additionally, the Proposal enters even further into the private activities of an individual when a third party such as an escrow officer is not involved. The Proposal endeavors to include the attorney drafting the deed or aiding in the conveyance of a property into an entity even when consideration is not involved. Is it FinCEN's contention that the attorney is akin to a party to the transaction by performing these functions on behalf of their client? Can attorney client privilege be so easily dismissed simply because the activities can in some limited instances be conducted by a non-attorney? Attorney client privilege and more specifically the ethical duty to respect the confidentiality of information applies beyond the ministerial function involved. In fact, the existence of the transaction itself is a matter of confidentiality of the attorney on behalf of the client.<sup>17</sup>

## Recommendations

### ***Success Tracking***

We recommend that FinCEN completely revisit the foundational aspects of this Proposal. A necessary element of the Proposal should be the ability to measure its success. If FinCEN deems it worth doubling the cost of a real estate escrow transaction in order to

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<sup>16</sup> *California Bankers Assn. v. Shultz*, 416 U.S. 21 (1974).

<sup>17</sup> Model Rules of Professional Conduct. Rule 1.6 Confidentiality of Information. Retrieved from [https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/rule\\_1\\_6\\_confidentiality\\_of\\_information/](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_6_confidentiality_of_information/)

implement this surveillance system, it should be ready to demonstrate the results of the program. This will allow the program to be objectively evaluated in the future.

In many ways, the GTO program was an opportunity for this. Yet, FinCEN has not quantified any actual material gains by law enforcement from the GTO program such as asset seizures or arrests. Instead, FinCEN relies on a seemingly impressive overlap of SARs to GTOs reported transactions which under the slightest scrutiny fails to justify the program and its expense. Not only does FinCEN fail to point to any seizure or arrest resulting from the GTOs, it cannot indicate how many reports led to a secondary investigation. Without some form of success tracking infrastructure, the rule basically becomes a non-falsifiable program based on the general faith that it must be of some value. In the face of such extreme expense and hardship for the Reporting Person and the consumer, we suggest that a system of measurement and oversight be made part of the program.

### ***Legal Principles & Consumer Safety***

Additionally, we encourage FinCEN to consider the novel elements of this program relative to past programs under the BSA and thoughtfully evaluate the impact on civil rights, privacy, consumer safety, and legal principles. As discussed, there are significant Constitutional questions regarding the rights of citizens attempting to purchase or dispose of real property. The invasion of privacy not only is a harm in itself, but the record retention requirements of Reporting Persons (not to mention the federal database in FinCEN's custody) creates an opportunity for criminals to engage in identity theft and other forms of fraud and mischief which significantly endangers the consumer. Finally, legal principals such as attorney client privilege, confidentiality, and the unlicensed practice of law should not be so casually dismissed as witnessed in this Proposal.

### ***Liability Protection & Safe Harbors***

More attention should be paid to the "on the ground" workability of the rule. Any liability of the Reporting Person should be minimized with affirmative liability protection as a result of performing the tasks necessary to comply with the rule. Additionally, the rule should contain good faith safe harbors against FinCEN enforcement when honest mistakes are made or consumers are not forthcoming or participatory.

### ***Answer the Unanswered Questions***

FinCEN should take seriously practical implementation questions such as how one is to determine the "residential real property" status without undue costs and maintenance of information not currently kept by the title industry.

## Conclusion

In light of these considerations, we urge FinCEN to reconsider the Proposal's approach. We recommend a more targeted strategy that focuses on specific, demonstrable risks and leverages existing regulatory frameworks and technologies to address money laundering in the real estate sector without imposing undue burdens on small businesses. A balanced approach, that respects Constitutional rights and supports the industry's ability to operate effectively, is crucial to ensuring the rule's success and acceptance.

Respectfully,



Rodney Anderson  
President



Leslie Midgley, CAE  
Executive Vice President and CEO



Aaron Day  
Vice President of Government  
Relations and Counsel