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VIA Email (regcomments@fincen.treas.gov)

Financial Crimes Enforcement Network
U.S. Department of the Treasury
P.O. Box 39
Vienna, VA 22183-0039

Attn: Section 352 Real Estate Settlements

Dear Sir/Madam:

This is in response to the Advance Notice of Proposed Rulemaking and request for comments, set forth at 69 Federal Register 17569-17571 (April 10, 2003) concerning "Anti-Money Laundering Program Requirements for 'Persons Involved in Real Estate Closings and Settlements.'" Consistent with the American Bar Association ("ABA") House of Delegates Resolution 104, adopted at the February 2003 ABA Mid-Year Meeting in Seattle, Washington, and under the authority delegated to the Task Force on Gatekeeper Regulation and the Profession, we are hereby submitting views to the Financial Crimes Enforcement Network ("FinCEN") on the Advance Notice of Proposed Rulemaking. We appreciate the opportunity to provide comments to FinCEN on this most important issue, and we welcome the opportunity to continue a constructive dialogue with FinCEN and other U.S. government officials as further consideration is given to the proposed rulemaking.

Background of the Task Force

The Task Force on Gatekeeper Regulation and the Profession (the "Task Force") was established in February 2002, to address certain issues arising from increased interest among U.S. government regulatory officials, as well as regulatory officials elsewhere in the world, in combating money laundering and enlisting the assistance of certain professionals in this effort (colloquially known as the "Gatekeeper Initiative"). Originally proposed at a meeting of the G-8 in 1999, the Gatekeeper Initiative is directed at certain professionals, including lawyers, accountants, and auditors, who are involved in assisting clients with domestic and international financial transactions and business dealings. It calls on countries to consider enlisting these professionals as "gatekeepers" to the domestic and international financial and business markets to prevent money laundering and terrorist financing by, among other things, adopting certain recommendations promulgated by the Financial Action Task Force ("FATF").

Independently, the U.S. government, through the USA PATRIOT Act of 2001, Pub. L. 107-56, and in particular Title III of the Act (the "International Money Laundering Abatement and Financial Anti-Terrorism Act of 2001"), initiated an effort to impose anti-money laundering requirements on a broad group of new industries and individuals that were viewed as vulnerable to money laundering and terrorist financing risks.

The Task Force was asked to respond to anti-money-laundering initiatives proposed by the Departments of Justice and Treasury, and other federal agencies, that could affect the attorney-client relationship; to review and evaluate relevant ABA policies and model rules concerning disclosure of information relating to the representation of a client; to identify issues and programs for appropriate ABA action and involvement, and develop additional ABA policies and legal education programs; and to solicit the views of appropriate ABA entities and suggest that they consider developing policies to fill any existing policy gaps pertinent to the Gatekeeper Initiative and anti-money laundering compliance that implicate the legal profession.

The Task Force is comprised of representatives from the following ABA entities -- the Sections of International Law and Practice, Criminal Justice, Taxation, Litigation, Real Property, Probate and Trust Law, Business Law, and the Standing Committee on Ethics and Professional Responsibility. It also has a number of at-large members, as well as a liaison to the Task Force on Terrorism and the Law. The Task Force has its own web site on the ABA home page at: http://www.abanet.org/crimjust/taskforce/home.html

The Task Force has been very active on the Gatekeeper Initiative and related issues. We have had a number of meetings with representatives of the Department of Justice and an interagency working group concerning the Gatekeeper Initiative. We have provided formal written comments to the FATF on the Gatekeeper Initiative and the options that are being considered by the FATF in its process of developing a recommendation. The Task Force has participated in meetings with representatives of FATF on two separate occasions. The Task Force also developed and presented a recommendation and report to the ABA House of Delegates, which was overwhelmingly approved during the mid-year meeting of the ABA in Seattle, Washington, in February 2003. This recommendation, which is now ABA policy, opposes any suspicious activity reporting ("SAR") requirement for the profession that would adversely affect the attorney-client privilege, the confidentiality of client information, the independence of the bar, or the overall attorney-client relationship. We have been active in outreach to members of the profession, foreign bar associations, members of Congress, and other client groups in an effort to promote awareness and education about the Gatekeeper Initiative, and some of the concerns that it presents to the profession, clients, and society at large. And the Task Force has been active in promoting formal anti-money laundering education and compliance within the ABA, through its own efforts and those of the constituent Sections within the ABA.

In sum, the Task Force has been actively following and developing expertise on the various anti-money laundering initiatives within the United States and around the

world; it has carefully studied these initiatives and given extensive and careful consideration to the implications of these initiatives to the profession, the clients served by the profession, and the values the profession is entrusted to uphold and protect; and it has been an active promoter of education for the profession in this regard. Therefore, we are very pleased to be able to provide comments to FinCEN on the proposal for rulemaking that again raises many of these important issues and concerns.

Comments on the Proposed Rulemaking

The April 10, 2003 Federal Register Advance Notice of Proposed Rulemaking identifies four specific questions for which FinCEN solicits input from the public. Of those four questions, the Task Force believes that it can provide the most useful comments with regard to two: (1) How Should Persons Involved in Real Estate Closings and Settlement Be Defined?, and (2) How Should the Anti-Money Laundering Program Requirement for Persons Involved in Real Estate Closings and Settlements be Structured?

General Observations

As noted above, the Task Force has given extensive consideration to the impact of anti-money laundering disciplines on the attorney-client relationship, the ethical duties of confidentiality and loyalty that lawyers are bound to uphold for their clients, the independence of the bar from the government, and preserving the common law attorney-client privilege that is one of the bedrocks of the profession and the American justice system. It appears from the Advance Notice of Proposed Rulemaking that FinCEN is not suggesting at this time that lawyers involved in real estate closings and settlements should be subjected to the SAR requirement that financial institutions must observe -- i.e., the obligation to file a secret report with government enforcement authorities when a customer or client provides information or exhibits conduct that raises a "suspicion" that the transaction at issue involves a money laundering risk. See 68 Federal Register at 17570-17571 ("This provision does not independently impose any reporting requirements on financial institutions.").

To impose a SAR requirement on lawyers in real estate closings and settlements would risk jeopardizing the attorney-client privilege, the independence of the bar, the attorney-client relationship, and various binding ethical rules that lawyers must observe regarding confidentiality of client information and the duty of loyalty to clients. These concerns, and the accompanying analysis of U.S. jurisprudence and ethical rules underlying those concerns, are set forth in detailed comments and analysis provided to the FATF, and in a Report to the ABA House of Delegates.[1] In sum, and as explained therein, the obligation of confidentiality in attorney-client communications is at the heart of Model Rule 1.6 of the ABA Rules of Professional Conduct.[2] The importance of

[1] See attachment 1, Comments of the ABA Task Force on Gatekeeper Regulations and the Profession on the Financial Action Task Force Consultation Paper Dated May 30, 2002; attachment 2, Report of the Task Force on Gatekeeper Regulation and the Profession, et al., accompanying Recommendation 104 to the House of Delegates.

[2] See Model Rules of Professional Conduct, Rule 1.6, comments 3, 4, and 9 (1983).

confidentiality in attorney-client communications is expressed in the attorney-client privilege, which is the oldest common law privilege for confidential communications, pre-dating our own Constitution.[3] The privilege, and related concepts of confidentiality, trust, and integrity of the attorney-client relationship, extend well beyond the context of litigation and the rules of evidence. The privilege ensures that the "legal counselor can properly advise the client what to do" and allows the client to be "free to make full disclosure" of all relevant information to his/her counselor for this purpose.[4] As the Supreme Court noted in its seminal 1981 decision, *Upjohn v. United States*, the privilege "encourage[s] full and frank communication between attorneys and their clients, [which in turn] promote[s] public interests in the observance of law and administration of justice."[5]

Government mandates that intrude on client confidentiality may, in some instances, raise Sixth Amendment concerns. For example, in discussing the issue of whether a lawyer can be required to check a box on IRS Form 8300 (a form that requires U.S. persons, including lawyers, to report receipt of over $10,000 in cash or cash equivalents) to indicate if the receipt of the cash was "suspicious", the U.S. Court of Appeals for the Eighth Circuit noted "the serious Sixth Amendment implications of [the] claim that an attorney becomes a de facto agent for the government when compelled to offer an opinion as to whether a particular cash payment was a 'suspicious transaction.'"[6] (The Task Force notes that legislation and regulations passed in Canada, to impose suspicious transaction reporting requirements on lawyers, was recently challenged as inconsistent with the Canadian Constitution. After various courts in Canada imposed an injunction against the law vis-à-vis lawyers, noting the serious constitutional concerns with the law as applied to lawyers, the Canadian government decided to withdraw the regulatory regime as applied to lawyers, and begin a new dialogue with the Canadian legal profession.)[7]

The Task Force believes that FinCEN has appropriately decided not to propose or impose a SAR requirement on lawyers or other persons involved in real estate closings and settlements. For lawyers, any such SAR requirement would raise serious questions regarding the ability of the legal profession to observe its ethical obligations to clients. Specifically, if lawyers were required to file reports on client activities based on a "suspicion" of money laundering, this would clash directly with ethical rules -- as set forth in the ABA Model Rules as well as virtually all state ethics rules -- that require

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[3] 8 John Henry Wigmore, Evidence in Trials at Common Law, section 2290, at 542 (McNaughton Rev. 1961).

[4] Geoffrey C. Hazard, Jr., An Historical Perspective on the Attorney-Client Privilege, 66 CAL. L. REV. 1061, 1061 (1978).

[5] Upjohn Co. v. United States, 449 U.S. 383, 389 (1981).

[6] United States v. Sindel, 53 F.3d 874, 877 (8th Cir. 1995).

[7] See The Law Society of British Columbia v. Attorney General of Canada, Supreme Court of British Columbia, No. L013116 (Vancouver Registry), Order dated April 15, 2003 (suspending further proceedings until November 1, 2004, and conditioning any new Gatekeeper regulations that may be enacted upon the consent of the legal profession). See also, Canadian Department of Finance press release, "Government Amends Anti-Money Laundering Regulations Affecting Legal Profession" (Ottawa, March 24, 2003), at http://www.fin.gc.ca/news03/03--020e.html; Statement of Simon Potter, President of the Canadian Bar Association (April 1, 2003), at http://www.cba.org/CBA/News/2003_Releases.

lawyers to maintain the client confidences absent *knowledge* or firm *belief* that the client is engaging or intends to engage certain types of criminal or fraudulent conduct, and that the client is using the lawyer's services to perpetrate the crime or fraud. The Task Force is unaware of any ethical rule that would specifically countenance the notion of a lawyer being required to disclose confidential information on the basis of a mere *suspicion*, a term which is not defined and does not rise to the level of "knowledge" or "belief".

The SAR requirement in the anti-money laundering field is *mandatory*, and it is enforced through *criminal sanctions*. Even under the ABA Model Rule 1.6 (which may be amended in the future to expand the exception for disclosure of client confidential information), a lawyer is *permitted* to disclose certain client confidences in the specified circumstances; the lawyer is not *required* to do so. The vast majority of states that have comparable disclosure rules also authorize permissive disclosure -- not mandatory disclosure.[8] There is a clear reason for this, based on careful consideration and a balancing of the important interests of society in access to legal counsel versus the need for lawyers to avoid assisting in the perpetration of crime.

A permissive disclosure rule empowers a lawyer, who is bound by a plethora of ethical rules to uphold the rule of law, to make appropriate disclosures that serve society's greater interest and self-police the profession against abuses by unscrupulous clients. At the same time, it avoids the obvious "chilling effect" that a mandatory disclosure rule would have on honest clients seeking counsel on how to abide by the law, as well as on clients who may face legal liability for past actions but are entitled to the assistance of counsel and the opportunity to remedy their past actions with appropriate guidance. Moreover, by eschewing mandatory disclosure, the ethics rules preserve the independence of the bar from government enforcement agencies, which is absolutely critical to the system of justice in the United States. Not unlike the constitutional protection against compelled self-incrimination, the ethics rules reflect an informed and time-tested decision to protect overarching principles critical to our system of justice, even if it means that government enforcement agencies must use their own means (and not independent lawyers assisting private citizens) to advance certain investigative objectives (in this case, in the area of money laundering).

This is not to suggest that clients or lawyers can hide behind ethical rules of confidentiality to promote or participate in money laundering schemes. If a lawyer knowingly assists or participates in money laundering committed by a client, that lawyer is subject to the full force of existing criminal, civil and disciplinary rules prohibiting such conduct. Lawyers who engage in such assistance or abetting of criminal or

[8] Of the fifty states, only 4 have a mandatory disclosure requirement when the lawyer has knowledge that a client intends to commit a crime. In addition, the recent Report of the ABA Task Force on Corporate Responsibility concluded that any amendment to the ABA Model Rules of Professional Conduct should focus on permissible disclosure, not mandatory disclosure. See Report of the ABA Task Force on Corporate Responsibility (March 31, 2003), at pp. 51-53, and fn. 94, at http://www.abanet.org/buslaw/corporateresponsibility/final_report.pdf.

fraudulent conduct have been prosecuted, convicted, debarred or otherwise disciplined severely.[9]

Moreover, under the Bank Secrecy Act, those institutions or persons required to file a SAR with FinCEN are also under an obligation to not inform the customer or client that such a report has been filed. This is the so-called "no-tipping off" rule. The no-tipping off rule, if applied to lawyers, would again create an untenable conflict with existing ethics rules and compromise the independence of the bar. Under Model Rule 1.2, a lawyer is required to abide by a client's decisions and represent the clients interests above all else unless the lawyer knows the client's activities are unlawful or unethical. The duty of loyalty is also reflected in Model Rules 1.4, and 1.7 though 1.11. These rules require a lawyer to provide the client with pertinent information that the lawyer obtains during the course of a representation, and to avoid representing a client in the face of conflicts of interest. To require a lawyer to inform the government of "suspicious" activity of a client, provide information to the government, and then fail to inform the client of this action while representing the client is clearly a violation of the duty of loyalty, and would subject a lawyer to disciplinary action under almost any state bar rule.

A lawyer is also under an obligation to counsel a client to abide by the law, and to withdraw from a representation if the lawyer believes the client intends to abuse the attorney-client relationship such as for the purpose of perpetrating a crime. It is not clear whether a "no-tipping off" rule would frustrate ethical action, or otherwise be violated, when a lawyer determined that he/she faced circumstances requiring counseling or withdrawal. Certainly, a lawyer cannot be prevented from counseling a client to act lawfully, or be liable for withdrawing from a representation, out of legitimate fear of criminal liability for such action if construed to be "tipping off" the client to a SAR requirement.

Although the Advance Notice of Proposed Rulemaking does not specifically seek to impose the SAR requirement on lawyers or other persons involved in real estate closings and settlements, the risk is that once anti-money laundering requirements of due diligence, record-keeping, and internal audit are imposed, the SAR requirement may not be far behind. Moreover, the Notice does not explicitly state that the SAR requirement will not be imposed, and it leaves open the possibility that some form of reporting may actually be required or encouraged by anti-money laundering requirements implemented under Section 352 of the USA PATRIOT Act. The Notice somewhat ambiguously notes that the proposed rulemaking is not intended to "independently impose" reporting requirements; the meaning of this language is unclear. The ABA policy resolution, cited in the Advance Notice of Proposed Rulemaking, see 68 Federal Register at 17571, n. 9, clearly opposes any reporting requirement that triggers the concerns and risks noted

[9] See, e.g., United States v. Abbell, 271 F.3d 1286 (11th Cir. 2001); United States v. Tarkoff, 242 F.3d 991 (11th Cir. 2001). State courts have consistently disciplined lawyers who have been convicted of or found to be complicit in money laundering schemes with clients, either permanently disbarring or suspending the licenses of such attorneys.

above. See attachment 3 for a copy of the ABA resolution as adopted by the ABA House of Delegates.[10]

How Should Persons Involved in Real Estate Closings and Settlements Be Defined?

The Advance Notice of Proposed Rulemaking notes that the report accompanying the ABA resolution (see attachment 2 for a full copy of the report) observed that lawyers should undertake due diligence efforts to avoid complicity or assistance to individuals or entities involved in money laundering schemes.[11] In addition, the ABA resolution itself, as a statement of policy, endorsed the notion of education efforts to ensure that lawyers are informed regarding the scope of money laundering laws and ways to safeguard the profession from being used to facilitate illicit money laundering or terrorist financing activities.[12]

On August 23, 2002, the Task Force submitted detailed and extensive comments to the FATF on the "Consultation Paper" that was released by the FATF on May 30, 2002. See attachment 1. Those comments were appended to the Task Force Report that was submitted to the ABA House of Delegates, and which the Advance Notice of Proposed Rulemaking cited. In those comments, the Task Force provided specific suggestions on various aspects of anti-money laundering programs, focusing on such activities as client identification, record-keeping, internal controls and training.

The Task Force comments urged FATF that any new anti-money laundering requirements should be focused on lawyers when acting as "financial intermediaries" (i.e., those who receive or transfer funds on behalf of clients), so as to ensure that the intent of the Gatekeeper Initiative -- to combat money laundering -- was consistent with FATF's expressed concerns with protecting the attorney-client privilege and not interfere with the attorney-client relationship.[13]

The Task Force believes that a similar focus is appropriate and intended by FinCEN in connection with the proposed rulemaking. The same concerns with regard to preserving attorney-client confidences and the attorney-client relationship are present in connection with any anti-money laundering programs that are imposed on attorneys involved in real estate closings and settlements. Moreover, the authority being exercised under the USA PATRIOT Act, pursuant to section 352 of the Act, specifically cites to FinCEN's delegated authority to regulate "financial institutions". Thus, we believe the intent of the Congress and the purpose of the Act was to address those activities characteristic of financial institutions that are vulnerable to money laundering -- i.e., activities involving the transfer of funds that might be the proceeds of, or otherwise tainted by, illegal activities subject to U.S. anti-money laundering laws. This would not

[10] In that regard, if FinCEN were to consider or believe that a SAR requirement should be applied to those involved in real estate closings and settlements, the Task Force would suggest that lawyers should be exempted from any such requirement. See question 3 in the Notice of Proposed Rulemaking.
[11] See attachment 2, pp. 13-14.
[12] See attachment 3, Recommendation 104 approved by the ABA House of Delegates, p. 1, lines 33-36.
[13] See attachment 1, pp. 10-15.

and should not involve the activities of lawyers where the lawyer is not involved in receiving or transferring funds. Therefore, the Task Force believes that only those lawyers who actually conduct or are responsible for actually conducting the receipt of transfer of proceeds from a buyer to a seller in the context of a real estate closing and settlement should fall within the ambit of "persons involved in real estate closings or settlements."

How Should the Anti-Money Laundering Program Requirement for Persons Involved in Real Estate Closings and Settlements Be Structured?

Regarding the types of due diligence and internal compliance activities that can be undertaken by lawyers, as indicated in our comments to the FATF, many lawyers already conduct due diligence -- such as the client identity, extent of the client's financial resources, and bona fides of client operations -- as part of the client intake process. We believe that ongoing dialogue with members of the profession is necessary to determine how any such anti-money laundering program for the real estate industry should be structured. This is particularly critical to define the scope and best means of implementing any additional due diligence proposals for legal professionals involved in real estate closings and settlements, given the concerns identified above and in the attached comments.

For example, factors such as the nature of the lawyer's practice and institution (a sole practitioner, a mid-sized firm, a major national firm), the role of the lawyer in the closing and settlement (representing the buyer, the seller, serving as due diligence or local counsel), the fact that some clients have legitimate privacy interests regarding the nature of their transaction, institutional structure or business partners (privately-held entities or trusts that enjoy privacy rights under local law), the nature of the client itself and its ownership structure (e.g., an individual, corporation, partnership, limited liability company), and other factors need to be identified and carefully considered. Record-keeping requirements deserve similar attention. One issue that must be considered is the obligation of an attorney where a client demands the return of certain records that are the client's property. Furthermore, the requirement for an internal audit must take into consideration the ethical obligations of lawyers vis-à-vis the confidential nature of information contained in client files, as well as the need to preserve the attorney-client trust relationship that is critical to serving society's interest in legal compliance.[14]

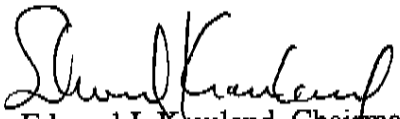
FinCEN should consider the costs to the public and clients when determining what additional due diligence, record-keeping, and internal compliance requirements should be placed on those persons involved in real estate closings and settlements. Lawyers as well as other professionals are likely to incur additional expense associated with these requirements, and those expenses will be passed on in part to the clients that utilize these professionals in real estate closings and settlements. There are potential

[14] See, e.g., United States v. Chen, 99 F.3d 1495, 1500 (9th Cir. 1996) ("[The] valuable social service of counseling clients and bringing them into compliance with the law cannot be performed effectively if clients are scared to tell their lawyers what they are doing, for fear that their lawyers will be turned into government informants.").

collateral costs associated with the effect these requirements will have on the transactions themselves -- for example, if certain transactions cannot be completed or if there is a chill to investment capital coming into certain state or local communities. In this regard, the Task Force suggests that FinCEN ensure that an appropriate cost-benefit analysis be undertaken, to ascertain the extent to which certain aspects of the real estate industry are truly vulnerable to money laundering risks, to determine the anticipated cost and impact on the industry from imposing new anti-money laundering requirements on those involved in closings and settlements, and to consider rules that might minimize those costs (e.g., allocation of anti-money laundering compliance among the parties, or allowing reasonable reliance on the due diligence exercised by one or more professionals involved in the closing).

The Task Force welcomes the opportunity to engage in a dialogue with FinCEN and other U.S. government officials in any effort to structure anti-money laundering programs for those involved in real estate closings and settlements. Certainly, the substantial resources now available within the industry, in terms of various trade associations that represent many of the professions involved in such transactions, as well as members of local bars and relevant ABA Sections, should be tapped for this purpose. Finally, the Task Force expresses its appreciation to FinCEN for soliciting comments on its Advance Notice of Proposed Rulemaking.

Sincerely,



Edward J. Krauland, Chairman
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