

administrative and procedural in nature and are not expected to have a substantive effect on the regulated industry.

#### List of Subjects in 30 CFR Part 943

Intergovernmental relations, Surface mining, Underground mining.

Dated: February 27, 2003.

Ervin J. Barchenger,

*Acting Regional Director, Mid-Continent Regional Coordinating Center.*

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## DEPARTMENT OF THE TREASURY

### 31 CFR Part 103

RIN 1506-AA28

#### Financial Crimes Enforcement Network; Anti-Money Laundering Program Requirements for "Persons Involved in Real Estate Closings and Settlements"

**AGENCY:** Financial Crimes Enforcement Network ("FinCEN"), Treasury.

**ACTION:** Advance notice of proposed rulemaking.

**SUMMARY:** FinCEN is in the process of implementing the requirements delegated to it under the USA Patriot Act of 2001, in particular the requirement pursuant to section 352 of the Act that financial institutions establish anti-money laundering programs. The term "financial institution" includes "persons involved in real estate closings and settlements." FinCEN is issuing this advance notice of proposed rulemaking ("ANPRM") to solicit public comments on a wide range of questions pertaining to this requirement, including how to define "persons involved in real estate closings and settlements," the money laundering risks posed by such persons, and whether any such persons should be exempted from this requirement.

**DATES:** Written comments may be submitted on or before June 9, 2003.

**ADDRESSES:** Commenters are encouraged to submit comments by electronic mail because paper mail in the Washington, DC area may be delayed. Comments submitted by electronic mail may be sent to [regcomments@fincen.treas.gov](mailto:regcomments@fincen.treas.gov) with the caption in the body of the text, "ATTN: Section 352—Real estate settlements." Comments may also be submitted by paper mail to FinCEN, PO Box 39, Vienna, VA 22183-0039, "ATTN: Section 352 " Real estate settlements." Comments should be sent by one method only. Comments may be

inspected at FinCEN between 10 a.m. and 4 p.m., in the FinCEN Reading Room in Washington, DC. People wishing to inspect the comments submitted must request an appointment by telephoning (202) 354-6400 (not a toll-free number).

#### FOR FURTHER INFORMATION CONTACT:

Office of Chief Counsel, FinCEN, (703) 905-3590; Office of the General Counsel (Treasury), (202) 622-1927; or the Office of the Assistant General Counsel for Banking and Finance (Treasury), (202) 622-0480 (not toll-free numbers).

#### SUPPLEMENTARY INFORMATION:

##### I. Background

On October 26, 2001, the President signed into law the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) Act of 2001 (Pub. L. 107-56) ("the Act"). Title III of the Act, also known as the International Money Laundering Abatement and Financial Anti-Terrorism Act of 2001, made a number of amendments to the anti-money laundering provisions of the Bank Secrecy Act ("BSA"), which are codified in subchapter II of chapter 53 of title 31, United States Code. These amendments are intended to make it easier to prevent, detect, and prosecute international money laundering and the financing of terrorism.

Section 352(a) of the Act, which became effective on April 24, 2002, amended section 5318(h) of the BSA. As amended, section 5318(h)(1) requires every financial institution including persons involved in real estate settlements and closings under section 5312(a)(1)(U) to establish an anti-money laundering program that includes, at a minimum: (i) The development of internal policies, procedures, and controls; (ii) the designation of a compliance officer; (iii) an ongoing employee training program; and (iv) an independent audit function to test programs. When prescribing minimum standards for anti-money laundering programs, section 352 directs the Secretary of the Treasury to "consider the extent to which the requirements imposed under [section 352 of the Act] are commensurate with the size, location, and activities of the financial institutions to which such regulations apply." The Secretary has delegated the authority to administer the BSA to the Director of FinCEN.

On April 29, 2002, and again on November 6, 2002, FinCEN temporarily exempted certain financial institutions, including persons involved in real estate closings and settlements, from the

requirement to establish an anti-money laundering program.<sup>1</sup> The purpose of the temporary exemption was to enable Treasury and FinCEN to study the affected industries and to consider the extent to which anti-money laundering program requirements should be applied to them, taking into account the specific characteristics of the various entities defined as "financial institutions" by the BSA.

A real estate closing or settlement is the process in which the purchase price is paid to the seller and title is transferred to the buyer.<sup>2</sup> The process may be carried out in different ways, depending on a number of factors, including location. In the eastern states, typically the parties meet and exchange documents in what is sometimes referred to as a "New York style" or "table closing." In the western states, the parties may not meet, instead relying on the services on an escrow agent to handle the documents in what is sometimes referred to as a "Western style" or an "escrow closing."<sup>3</sup> The person actually conducting the process may be an attorney, a title insurance company, an escrow company, or another party.

##### II. Issues for Comment

###### 1. What Are the Money Laundering Risks in Real Estate Closings and Settlements?

The real estate industry could be vulnerable at all stages of the money laundering process by virtue of dealing with high value products.<sup>4</sup> Money launderers have used real estate transactions to attempt to disguise the illegal source of their proceeds. For example, narcotics traffickers have purchased property with monetary instruments that they purchased in structured amounts (that is, multiple purchases each below the BSA reporting thresholds that in aggregate exceeded

<sup>1</sup> See 31 CFR 103.170, as codified by interim final rule published at 67 FR 21110 (April 29, 2002), as amended at 67 FR 67547 (November 6, 2002) and corrected at 67 FR 68935 (November 14, 2002).

<sup>2</sup> Whether the process is referred to as a settlement or a closing may vary by jurisdiction. See, e.g., 24 CFR 3500.2 explaining that settlement for purposes of the Real Estate Settlement Procedures Act of 1974 ("RESPA") may also be called a "closing" depending on the jurisdiction.

<sup>3</sup> See, 11 Thompson on Real Property, sec. 94.04.

<sup>4</sup> According to a report published by the National Institute of Justice, "real estate transactions offer excellent money laundering opportunities," and, in particular, opportunities to "legitimate and repatriate illegal funds." Barbara Webster and Michael S. McCampbell, National Institute of Justice, International Money Laundering: Research and Investigation Join Forces, September 1996, pages 5 and 6.