

the thresholds).<sup>5</sup> Narcotics traffickers have also tried to launder cash proceeds by exchanging them for checks from a real estate company.<sup>6</sup>

In money laundering, the initial or placement stage is the stage at which funds from illegal activity, or funds intended to support illegal activity, are first introduced into the financial system. This could occur, for example, in the real estate industry through the payment for real estate with a large cash down payment.

In the second or layering stage of money laundering, the illicit funds are further disguised and distanced from their illegal source through the use of a series of frequently complex financial transactions. This could occur in the real estate industry when, for instance, multiple pieces of real estate are bought and resold, exchanged, swapped, or syndicated, making it more difficult to trace the true origin of the funds.<sup>7</sup>

The third or integration phase of money laundering occurs when the illegal funds appear to have been derived from a legitimate source. In the context of the real estate industry, this could occur when real estate is sold by a money launderer to a bona fide purchaser and the purchaser, or his or her financial institution, provides the money launderer with a check that the money launderer then has the ability to represent as the proceeds of a legitimate business transaction.

The real estate industry itself has taken steps to identify potential money laundering vulnerabilities. For instance, the American Land Title Association has identified several potential "red flag" situations involving real estate transactions, including:

- Where a prospective buyer is paying for real estate with funds from a high risk country, such as a "non-cooperative country or territory" as designated by the Financial Action Task Force ("FATF") or a country designated by the Secretary as "a primary money laundering concern" pursuant to section 311 of the Act;
- Where the seller requests that the proceeds of a sale of real estate be sent to a high risk country;
- Where a person is seeking to purchase real estate in the name of a nominee and has no apparent legitimate explanation for the use of a nominee;
- Where a person is acting, or appears to be acting, as an agent for an

undisclosed party and is reluctant or unwilling to provide information about the party or the reason for the agency relationship;

- Where a person does not appear to be sufficiently knowledgeable about the purpose or use of the real estate being purchased;
- Where the person appears to be buying and selling the same piece of real estate within a short period of time or is buying multiple pieces of real estate for no apparent legitimate purpose;
- Where the prospective purchaser or seller seeks to have the documents reflect something other than the true nature of the transaction; and
- Where the person provides suspicious documentation to verify his or her identity.

FinCEN solicits comment on the experience of the real estate settlement industry with money laundering schemes, the existence of any safeguards in the industry to guard against money laundering, and what additional steps may be necessary to protect the industry from abuse by money launderers, including those who finance terrorist activity.

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

The BSA identifies a person involved in a real estate closing or settlement as a financial institution. The statute includes no definition of the term and FinCEN has not had an occasion to define the term in a regulation. Moreover, the legislative history provides no insight into how Congress intended the term to be defined. Because section 5312(a)(1)(U) uses the phrase "persons involved in real estate closings and settlements" (emphasis added), a reasonable interpretation of the section could therefore cover participants other than those who actually conduct the real estate settlement or closing.<sup>8</sup>

The universe of participants in real estate transactions is potentially broad, even in the simplest residential real estate transaction. The typical residential real estate transaction may involve the following participants:

- A real estate broker or brokers,
- One or more attorneys, who represent the purchaser or the seller,
- A bank, mortgage broker, or other financing entity,
- A title insurance company,

- An escrow agent, and
- An appraiser, who may assess the condition and value of the real estate, as well as various inspectors.

Moreover, the participants involved, and the nature of their involvement, could vary with the contemplated use of the real estate, the nature of the rights to be acquired, or how these rights are to be held. Real estate may be acquired for any one or number of purposes, including, without limitation, residential, commercial, portfolio investment, or development purposes. As for the nature of the rights to be acquired, the real estate may be held in fee simple, under a lease agreement or as security for indebtedness. Finally, real estate may be held directly or through various investment vehicles, such as real estate investment trusts, real estate limited partnerships, or entities commonly referred to as "syndicates" of real estate investors.

The guiding principle in defining the phrase "persons involved in real estate closings and settlements" is to include those persons whose services rendered or products offered in connection with a real estate closing or settlement that can be abused by money launderers. Equally as important is identifying those persons who are positioned to identify the purpose and nature of the transaction. Another factor may be the importance of various participants to successful completion of the transaction, which may suggest that they are well positioned to identify suspicious conduct. In addition, professionals may have very different roles, in different transactions, that greatly impact on their exposure to money laundering. At one end of the spectrum may be those professionals involved in structuring a real estate deal (and thus in the best position to observe and prevent their use for money laundering); at the other end, those whose role may be far from the financial aspects, such as property inspectors. Finally, involvement with the actual flow of funds used to purchase the property is a significant factor.

As noted above, attorneys often play a key role in real estate closings and settlements and thus merit consideration along with all the other professionals involved in the closing and settlement process. Section 352 requires that a financial institution take steps to detect and prevent itself from being abused by money launderers, and to comply with existing BSA requirements, such as reporting the receipt of cash or cash equivalents in an amount over \$10,000 on Form 8300. This provision does not independently impose any reporting requirements on

<sup>5</sup> See, e.g., *U.S. v. High*, 117 F.3d 464 (11th Cir. 1997).

<sup>6</sup> See *U.S. v. Leslie*, 103 F.3d 1093 (2d Cir. 1997).

<sup>7</sup> See *U.S. v. Nattier*, 127 F.3d 655 (8th Cir. 1997) (embezzler engaged in a number of real estate purchases through real estate firm in an attempt to conceal the source of the funds).

<sup>8</sup> Thus, for example, in a settlement or closing involving residential property, the term could cover participants other than the settlement agent listed on the HUD-1 form, as required by RESPA.