

financial institutions. FinCEN therefore does not believe that application of section 352 requirements to attorneys in connection with activities relating to real estate closings or settlements raises issues of, or poses obligations inconsistent with, the attorney-client privilege.<sup>9</sup> In fact, attorneys already must exercise due diligence when they receive funds from clients where there is an indication that the funds may be tainted, and cannot simply accept funds without the risk that their fees will be subject to forfeiture.<sup>10</sup> When engaging in conduct subject to anti-money laundering regulations, attorneys, like other professionals, should take the basic steps contemplated by section 352 to ensure that their services are not being abused by money launderers.

FinCEN accordingly seeks comment on which participants in the real estate closing or settlement process are in a position where they can effectively identify and guard against money laundering in such transactions. Information and comment may, among other things, address both the extent to which various participants have access to information regarding the nature and purpose of the transactions at issue and the importance of the participants' involvement to successful completion of the transactions. Information and comment should focus on the real estate sector in general and on various transaction types. FinCEN is particularly interested in receiving comments addressing commercial real estate transactions. Comments are welcome from those involved centrally in the real estate settlement process, *i.e.*, those who may act as an agent for all parties and are responsible for reviewing the form and type of payment, as well as being aware of the parties to the real estate transaction, and those who view their involvement as more peripheral.

<sup>9</sup> The recent resolution by the American Bar Association opposing the imposition of suspicious activity reporting obligations on attorneys recognizes the distinction between anti-money programs and reporting requirements. See Task Force on Gatekeeper Regulation and the Profession, Report to the House of Delegates (available on [www.abanet.org/leadership/recommendations03/104.pdf](http://www.abanet.org/leadership/recommendations03/104.pdf)) (accepting the concepts of reasonable compliance training and due diligence to minimize risk of lawyers' involvement in illegal money laundering activity).

<sup>10</sup> See *U.S. v. Moffitt, Zwerling & Kemler, P.C.*, 83 F.3d 660 (4th Cir. 1996) (firm that "tiptoed" around the most pertinent questions regarding the source of fees received from drug dealer required to forfeit fees shown to be derived from proceeds of narcotics trafficking).

### *3. Should Any Persons Involved in Real Estate Closings or Settlements Be Exempted From Coverage Under Section 352?*

FinCEN also solicits comments regarding whether there should be an exemption for any category of persons involved in real estate closings and settlements. In this connection, FinCEN anticipates that persons that are already subject to separate anti-money laundering program rules (or that will be subject to separate rules) will not also be subject to the anti-money laundering rules for persons involved in real estate closings and settlements.<sup>11</sup> Comments regarding possible exemptions should be designed to enable FinCEN to evaluate whether the risk of money laundering through a category of persons is sufficiently small that a proposed anti-money laundering program rule could be crafted that would exempt the category while also providing adequate protection for the industry from the risks of money laundering. In addition, FinCEN wishes to make it clear that it does not intend to cover purchasers and sellers of their own real estate, although they, too, are "persons involved in real estate settlements and closings." The question of exemption is specifically directed to real estate professionals, and those who trade in real estate on a commercial basis.

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

In applying section 352 of the Act to persons involved in real estate closings and settlements, FinCEN must consider the extent to which the standards for anti-money laundering programs are commensurate with the size, location, and activities of persons in this industry. FinCEN recognizes that while large businesses are involved in real estate closings and settlements, businesses in this industry may be smaller companies or sole proprietors. FinCEN thus seeks comment on any particular concerns these smaller businesses may have regarding the implementation of an anti-money laundering program.

FinCEN also recognizes that persons involved in real estate closings and settlements may have some programs in place to meet existing legal obligations,

<sup>11</sup> For example, banks already must comply with anti-money laundering rules. See 31 CFR 103.120. Similarly, loan and finance companies fall within the definition of a financial institution under the BSA, and are currently being studied by FinCEN for inclusion in the anti-money laundering rules.

such as the requirement to report on Form 8300 the receipt of over \$10,000 in currency and certain monetary instruments. These businesses may also have procedures in place to protect them against fraud. FinCEN therefore seeks comment on what types of programs persons involved in real estate closings and settlements have in place to prevent fraud and illegal activities, and the applicability of such programs to the prevention of money laundering.

## III. Conclusion

With this ANPRM, FinCEN is seeking input to assist it in determining how to implement the requirements of section 352 with respect to persons involved in real estate closings and settlements. FinCEN welcomes comments on all aspects of a potential regulation and encourages all interested parties to provide their views.

## IV. Executive Order 12866

This ANPRM is not a "significant regulatory action" for purposes of Executive Order 12866. It neither establishes nor proposes any regulatory requirements. Instead, it seeks public comment on a wide range of questions concerning the extent to which the anti-money laundering program mandates of section 352 of the USA Patriot Act should apply to persons involved in real estate closings and settlements.

Dated: April 3, 2003.

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## DEPARTMENT OF HOMELAND SECURITY

### Coast Guard

### 33 CFR Part 117

[CGD08-03-007]

RIN 1625-AA09

### Drawbridge Operation Regulation; Apalachicola River, River Junction, FL

**AGENCY:** Coast Guard, DHS.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Coast Guard proposes to establish a drawbridge operation regulation for the draw of the CSX Railroad swing bridge across the Apalachicola River, mile 105.9, at River Junction (near Chattahoochee), Florida. The regulation will allow for the bridge to be unmanned and remain closed during hours of infrequent traffic with