



GLOBAL FINANCIAL INTEGRITY

GFI Comment Submission to FiNCEN on ANPRM to Curb Illicit Financial Flows in the US Real Estate Sector



Lakshmi Kumar and Kaisa de Bel



GLOBAL FINANCIAL INTEGRITY

February 17, 2022

By electronic submission (via the Federal E-Rulemaking Portal)

Mr. Him Das, Acting Director
Financial Crimes Enforcement Network
U.S. Department of the Treasury
P.O. Box 39 Vienna, VA 22183

Re: Anti-Money Laundering Regulations for Real Estate Transactions. (Docket #: FINCEN-2021-0007; RIN: 1506-AB54; Document #: 2021-26549)

Global Financial Integrity (GFI) appreciates the opportunity to submit comments to the Financial Crimes Enforcement Network (“FinCEN”) of the United States (U.S.) Department of the Treasury (Treasury) in response to the advance notice of proposed rulemaking (“ANPRM”) regarding “Anti-Money Laundering Regulations for Real Estate Transactions.”

Global Financial Integrity (GFI) is a Washington, DC-based think tank focused on illicit financial flows, corruption, illicit trade, and money laundering. Through high-caliber analyses and fact-based advocacy, GFI works with partners to increase transparency in the global financial and trade system, and address the harms inflicted by trade misinvoicing, transnational crime, tax evasion, and kleptocracy.

GFI has worked tirelessly for a decade advocating and promoting the importance of beneficial ownership and financial transparency measures in various asset classes, including real estate. Of note is GFI’s following work and analysis:

- [Acres of Money Laundering: Why U.S. Real Estate is a Kleptocrat’s Dream](#)
- [Private Investments, Public Harm: How the Opacity of the Massive U.S. Private Investment Industry Fuels Corruption and Threatens National Security](#)
- [The Future of Beneficial Ownership in the United States: Trade, Transportation, and National Security Implications](#)
- [The Library Card Project: The Ease of Forming Anonymous Companies in the United States.](#)

The last few years have seen civil society groups, journalists, and governments expose a veritable avalanche of real estate money laundering (REML) cases that span the globe, including in the U.S. These cases have exposed the ease with which kleptocrats, criminals, sanctions evaders, and corrupt government officials choose the U.S. real estate market as their preferred destination to hide and launder proceeds from illicit activities.

In August 2021, GFI published a report titled, “Acres of Money Laundering: Why U.S. Real Estate is a Kleptocrat’s Dream” and found that more than \$2.3 billion was laundered through U.S. real estate in cases reported between 2015 and 2020. Eighty-two percent of those cases involved foreign sources of money, and well over 50% involved politically exposed persons (PEPs). This high influx of foreign and corrupt money poses a serious threat to U.S. national security and underscores the need for comprehensive regulations tackling the money laundering risk in the U.S. real estate sector.

1100 17th Street, NW, Suite 505 | Washington, DC | 20036 | USA
Tel. +1 (202) 293-0740 | Fax. +1 (202) 293-1720 | www.gfintegrity.org

President & CEO: Tom Cardamone

Board: Lord Daniel Brennan (Chair), Dr. Rafael Espada (Vice Chair), Dr. Huguette Labelle (Secretary), Segun Apata, Leonard McCarthy, John Cassara, Caroline Kende-Robb, Sarah Pray, Raymond Baker (Founding President/Treasurer)

Weaknesses of the current Geographic Targeting Orders approach

The current U.S. regulatory approach of using GTOs which are temporary and location specific were valuable in its inception. However, the GTOs policy has several shortcomings, including limitations inherent to a temporary, location specific order. For the reasons outlined below the GTOs cannot act as a substitute for a comprehensive rule that tackles the risk of money laundering in the U.S. real estate sector.

1. The limited geographic reach of the GTOs presupposes where real estate money laundering takes places. As evidenced by GFI's research, the majority of real estate money laundering cases between 2015 – 2020 were not concentrated in luxury residential real estate markets but involved properties located outside of the GTO geographic scope.
2. The current GTO threshold of \$300,000 is arbitrary and ignores the fact that money laundering schemes can occur through the purchase and sale of multiple properties with lower values.
3. The GTOs only apply to all-cash purchases made by specific legal vehicles, and simply require title insurance companies to report beneficial ownership information of the buyer. The narrow scope of the GTOs ignores typologies that utilize trusts, the use of natural persons as third parties, typologies such as overvaluation and undervaluation, and schemes initiated by the seller.
4. The GTOs' emphasis on title insurance companies as the sole gatekeepers responsible for the record keeping and reporting of high-risk real estate transactions enables criminals to easily circumvent AML checks.
5. The GTOs only apply to residential real estate, leaving the commercial sector completely opaque and vulnerable to money laundering activity.

Summary of GFI's recommendations to inform new Anti-Money Laundering Regulations for Real Estate Transactions

Given the weaknesses of the current regulatory system, GFI welcomes the readiness of FinCEN to issue a permanent rulemaking. This will provide much needed reform to an opaque sector rife with money laundering risk and ensure that the U.S. is in line with other allies in curtailing the use of the U.S. economy as a safe haven for illicit proceeds. The most effective way to address the problem of real estate money laundering would be to promulgate general and traditional AML/CFT requirements for persons involved in real estate transactions by using FinCEN's authority under 31 U.S.C. 5318(h)(1)-(2) and 31 U.S.C. 5318(g)(1), including the full suite of Customer Due Diligence (CDD) obligations and the filing of Suspicious Activity Reports (SARs). The second option before FinCEN would be to create a reporting requirement under 31 U.S.C. 5318(a)(2). If FinCEN opts to promulgate a rule under the latter BSA provision, such proposed rule should at a minimum remedy the shortcomings of the GTO approach and include the following elements:

1. A permanent and nationwide regime.
2. No monetary reporting threshold for transactions.
3. Application to both residential and commercial real estate
4. A cascading reporting obligation for multiple real estate professionals, including title and escrow companies and agents, real estate agents and brokers, and real estate attorneys to ensure that a reporting requirement falls on at least one entity in the real estate transaction.
5. Application to both transactions by legal entities and natural persons.
6. Requirement to submit beneficial ownership information of both the buyer and the seller, as well as information on source of funds, identification of PEPs, and other key pieces of information of the transaction.

GFI through its comment provides language and recommendations that can strengthen any proposed rule. Below is a short summary of some of the key issues that GFI would like to bring to FinCEN's attention and are dealt with in greater detail throughout this comment.

- a. **A cascading reporting rule that accounts for evasion tactics used by money launderers:** Each U.S. state has its own laws and customs regulating the real estate sector. A rule that would only cover one type of real estate professional would therefore provide money launderers with an easy evasion tactic to exploit. Instead, FinCEN should adopt a reporting obligation for multiple real estate professionals in a cascading order to ensure the requirement falls on at least one U.S.-based entity involved in the transaction.
- b. **The rule should cover transfers of ownership that do not constitute a sale:** The current real estate GTO defines 'Covered Transaction' to only refer to purchases of residential real property by a legal entity. However, numerous cases of real estate money laundering simply involve the transfer of ownership or creation of equitable interest in the property without an actual sale. FinCEN should expand the types of transactions covered under any new rule to include direct/indirect transfers of ownership or creation of equitable interest in the property.
- c. **The rule should cover transactions by trusts:** The GTOs, except for a singular non-public GTO,¹ have failed to address the ownership risks associated with trusts.² An increasing proportion of housing is now owned by legal entities and arrangements, including trusts. In cities like LA, 23% of rental units are owned by trusts. Both foreign and some domestic family trusts are excluded from the purview of the Corporate Transparency Act. Yet, these types of legal arrangements are used by PEPs to purchase real estate. GFI therefore recommends that transactions by all different classes of legal entities and legal arrangements be included in any prospective rule.
- d. **FinCEN should provide a usable definition of 'residential' and 'commercial' real estate:** Under the GTOs, FinCEN clarified the term 'residential real property' to mean 'property designed principally for the occupancy of from one to four families.' However, there appears to be a fair amount of confusion within the industry as to what is covered by this classification. For example, would the purchase of 100 'one to four family' property units by a corporate entity within one building be treated as residential or commercial? FinCEN should clarify and restrict the definition of 'residential real estate' to cover only individual purchases of residential property. Commercial real estate, on the other hand, should cover properties acquired with the purpose of generating income, including the (mass) acquisition of apartments, nursing homes and student dwellings.
- e. **FinCEN should not limit its focus to 'non-financed' transactions:** The GTOs currently are restricted to all-cash transactions. However, GFI recommends that the term 'non-financed' should not be treated as a synonym for 'all-cash' transactions. The term 'financing' in real estate transactions does not only include conventional loans provided by financial institutions that are regulated under BSA, but it also means financing provided by private lenders, foreign financial institutions, online marketplaces like Zillow, private equity, bond issuance etc. that are not subject to AMLCFT requirements. Therefore, it is recommended that FinCEN define the term 'financed' and narrow it to

¹ ACDC Working Paper (2022). "The impact of ownership transparency policies on illicit purchases of US property". p. 8

² U.S. Government Accountability Office (2020). "Anti-Money Laundering: FinCEN Should Enhance Procedures for Implementing and Evaluating Geographic Targeting Orders." <https://www.gao.gov/products/gao-20-546>

exclude mechanism that do not have robust due diligence and reporting mechanisms.

Responses to the ANPRM questions

Table of contents:

A. General information regarding the real estate market6

B. What are the money laundering risks in real estate transactions?20

C. Which real estate transactions should FinCEN’s rule cover?25

D. Which persons should be required to report information concerning real estate transactions to FinCEN?35

E. What information should FinCEN require regarding real estate transactions covered by a proposed regulation? 42

F. What are the potential burdens or implementation costs of a potential FinCEN regulation?45

G. Should FinCEN promulgate general AML/CFT recordkeeping and reporting requirements for “persons involved in real estate closings and settlements”?47

A. General information regarding the real estate market

1. Describe a typical residential real estate transaction.

3. What are the products, services, activities, or affiliations associated with residential real estate transactions?

The process for a typical residential real estate transaction is outlined in the illustrative diagram below and usually involves a buyer, a seller, real estate agents, attorneys, lenders, title and escrow agents and legal entities/legal arrangements that are utilized to hold ownership of the home. The overview below is based on GFI's review of industry documents,³ however the process might vary depending on local laws and customs.

Step	Description	Actors involved
Home listing and selection	The buyer identifies and submits an offer on a property listed by the seller, after which both parties negotiate the purchase price.	<ul style="list-style-type: none">• Buyer / seller• Real estate agents
Financing	If the buyer does not have the full purchase price in cash, they need to secure external financing. As part of the mortgage application, the lender typically runs a title search and requests an appraisal of the home's value. However, although a mortgage is the most common source of financing, there is a wide range of financing options.	<ul style="list-style-type: none">• Buyer / seller• Real estate agents• Mortgage broker• Lender• Attorney
Due diligence and closing	Steps in the due diligence and closing process include opening an escrow account, conducting a title search, obtaining title insurance, home and pest inspections, and other due diligence checks. After these checks, the closing agent will send a formal notice of closing date and time. The buyer typically reviews the closing documents with their attorney or real estate agent before signing the papers at closing.	<ul style="list-style-type: none">• Buyer / seller• Real estate agents• Attorneys• Escrow agent• Lender/bank• Title agent or abstractor• Title insurance company• Home inspector• Closing agent

The process for residential real estate transactions differs most significantly at the financing stage. Generally, the industry makes a distinction between 'all-cash transactions' and 'financed transactions.' The share of all-cash real estate transactions is on the rise, but the National Association of Realtors (NAR) reports that, as of 2021, 87% of home buyers financed the purchase of their home. Zooming further into the types of financed transactions, the NAR found that conventional mortgages are the most common source of loans (69% of the types of loans used), followed by government-backed loans from the Federal Housing Administration (FHA) (15%) and Veterans Administration (VA) (9%), and finally 'other' sources of financing (4%).⁴ The U.S. Census Bureau uses a similar distinction in sources of financing for home purchases, but clubs 'other types of financing' with conventional mortgages, finding that 74% of home purchases was funded that way, followed by FHA loans (14%), cash (6%) and VA loans (6%).⁵

However, as the use of the 'other' category in both the NAR and the Census Bureau data suggests, the distinction between 'financed', 'non-financed' and 'cash' purchases is not that clear-cut in reality. Financing includes not only

³ Sources reviewed include: Investopedia (2021) "12 Steps of a Real Estate Closing" <https://www.investopedia.com/articles/mortgages-real-estate/10/closing-home-process.asp>. Redfin, "10 Steps to closing on a house" <https://www.redfin.com/guides/steps-to-closing-on-a-house>. Paperless Pipeline, "The Complete Real Estate Transaction Guide". <https://www.paperlesspipeline.com/blog/real-estate-transaction-process>.

⁴ National Association of Realtors (2022). "Tackling Home Financing and Downpayment Misconceptions". <https://www.nar.realtor/blogs/economists-outlook/tackling-home-financing-and-downpayment-misconceptions>

⁵ U.S. Census Bureau (2021). "Quarterly Sales by Price and Financing". https://www.census.gov/construction/nrs/pdf/quarterly_sales.pdf

conventional loans provided by financial institutions regulated under the Bank Secrecy Act. There is a wide range of loan options available to the buyer. This includes government-issued loans, private loans, seller financing, tapping your retirement savings by using self-directed IRAs, rent-to-own deals, or even crowdfunding financing.⁶ New, creative financing options especially blur the line between ‘cash’ and ‘financed’ transactions. This includes new ‘cash offer financing options’, allowing buyers to make a cash offer without actually paying cash. Through this, buyers enlist a company like Zillow, Ribbon or Homeward to pay cash on their behalf and promise the seller a quick closing, and then pay the company back using a mortgage loan.⁷ Similarly, the last few years have seen technology companies and brokerages enter the market as direct buyers, also called ‘iBuyers’. Using algorithms to determine an offer price after a seller lists a property on their website, these corporate entities use either their own cash, venture capitalist funds or Wall street-backed funds to offer sellers a quick closing, after which they take ownership of the property to rent or flip it.⁸ Another grey area is the ‘subject-to’ transaction, which allows the buyer to purchase a property ‘subject to’ continuing to meet the term of the home’s existing financing arrangement. With ‘subject-to’ transactions, the buyer takes over the mortgage payments from the seller, without any official agreement to that effect with the lender.⁹

2. Describe a typical commercial real estate transaction.

3. What are the products, services, activities, or affiliations associated with commercial real estate transactions?

Commercial real estate transactions are generally much more complex than residential real estate transactions. There are many ways to invest in commercial real estate, but a general distinction can be made between direct investments in which the buyer buys (an ownership stake in) a property, and an indirect investment, where an investor buys shares in a fund or a publicly or privately held company that manages a portfolio of real estate. Examples of indirect investments are investments in private equity real estate funds and real estate investment trusts (REITs).

In a typical commercial real estate transaction, the property is purchased and held by a special purpose legal entity such as an LLC, partnership, or joint venture. Unlike residential real estate, where there is usually only one equity player (the mortgage holder) and one debt player (the mortgage bank), commercial properties are often financed by multiple debt- and equity players.

The table below provides the typical stages of a commercial real estate transaction, including the actors involved, and is based on a review by GFI of various industry sources.¹⁰ The table is a simplified overview and therefore not exhaustive. Moreover, due to the complexities in commercial real estate, these stages are usually not linear but overlap.

Step	Description	Actors involved
------	-------------	-----------------

⁶ Hippo, “7 creative ways to finance a home” <https://www.hippo.com/blog/7-creative-ways-finance-home-purchase>

⁷ Bahney, A. (Jun 2, 2021). “All-cash offers are king in this hysterical real estate market. Here's what you need to know”. CNN Business. <https://www.cnn.com/2021/06/02/homes/all-cash-home-buyers-feseries/index.html>

⁸ National Association of Realtors. “Direct Buying”. <https://www.nar.realtor/direct-buying>

⁹ The Balance (October 19, 2021). “How Subject-To Loans Work. <https://www.thebalance.com/buying-subject-to-an-existing-loan-1798423>

¹⁰ Sources reviewed include: National Due Diligence Services, “Commercial vs Residential Transactions: The Complexities & Needed Due Diligence” <https://www.alta.org/file.cfm?name=031418commercialvsresidential> ; Bona Law PC (2019) “Anatomy of a Commercial Real Estate Transaction for California Real Estate Investors” <https://www.titlesanddeeds.com/anatomy-of-a-commercial-real-estate-transaction-for-california-real-estate-investors/>; World Economic Forum (2016) “Understanding the Commercial Real Estate Investment Ecosystem” http://www3.weforum.org/docs/WEF_IU_Understanding_the_Commercial_Real_Estate_Investment_Ecosystem.pdf; JD Supra (2019) “Anatomy of a Real Estate Transaction – Parts of the Transaction” <https://www.jdsupra.com/legalnews/anatomy-of-a-real-estate-transaction-36496/>.

Discovery & Evaluation	The buyer conducts market research, identifies investment opportunities, and conducts an underwriting analysis of property.	<ul style="list-style-type: none"> • Buyer • Broker • Market consultant
Pre-contract period	<ul style="list-style-type: none"> • Negotiation of purchase and sales agreement. • Evaluation of financial performance and conditions of the property. • Buyer issues letter of intent. • Signing of the contract. • Buyer makes a deposit to show commitment to purchase. 	<ul style="list-style-type: none"> • Buyer • Brokers • Attorneys • Appraiser • Escrow agent
Due diligence period (partially overlaps with financing)	<ul style="list-style-type: none"> • Independent experts are hired to inspect the property (both for the buyer and mortgage lender). • Title survey by title insurance company. • ALTA survey. • Insurance advisors review property and provide insurance quotes. • Financial analysis. • Seller provides information about property. • Buyer reviews all information, after which they may cancel the contract. 	<ul style="list-style-type: none"> • Buyer • Seller • Lender • Lender's attorney • Real estate attorney • Real estate broker • Environmental and pest consultant • Title company • Surveyors • Insurance advisor and provider
Financing (overlaps with due diligence period)	<p>The buyer, usually a special purpose legal entity, must ensure it can deliver the cash required for closing. This will usually be a combination of debt and equity financing. About a quarter of commercial investments are all-cash transactions. Common financing structures are:</p> <ul style="list-style-type: none"> - Mortgage loan financing (debt secured by a lien on the property). - Mezzanine loan financing (debt secured by a pledge of equity in a property-owning entity). - Issuance of preferred equity. 	<ul style="list-style-type: none"> • Buyer • Buyer's attorney
	<p>Debt based financing</p> <ul style="list-style-type: none"> • The buyer or mortgage broker looks for a loan for the purchase price and applies. • The lender evaluates the property and the borrower's capacity to repay. • Attorney of the lender prepares loan documents. • Negotiation and closing of mezzanine loan if required. <p>Loan closing happens at the same time as closing on the real estate acquisition.</p> <p>In addition to a loan for the purchase price, the buyer may require a construction loan, bridge loan or permanent loan.</p>	<ul style="list-style-type: none"> • Mortgage broker • Lender • Lender's attorney • Agency MBS (Commercial mortgage may be backed by HUD, Fanny Mae, Freddy Mac) • Title company / surveyor • Other due diligence professionals (e.g., accountants)
	<p>Cash/Equity based financing</p> <p>The buyer often forms a corporation, partnership or LLC as an acquisition vehicle, in which one or more investors contribute capital. If enough money is pooled for an all-cash purchase, no additional loans are required.</p> <ul style="list-style-type: none"> • Equity investors negotiate terms of LLC operating agreement. • LLC's usually have several classes of ownership units: <ol style="list-style-type: none"> 1) Preferred equity: secured investors. Subordinate to debt providers but receiving a preferred return payment. 	<p>Buyer is a legal entity with:</p> <ul style="list-style-type: none"> • preferred equity owners • common equity owners • manager

GLOBAL FINANCIAL INTEGRITY

	<p>2) Common equity: investors sharing in any profits the company makes. Often have voting rights.</p> <p>3) Manager carried interest: makes no capital contributions, but manages investment and receives fixed management fee.</p>	
Closing preparation	<p>Buyer's tasks:</p> <ul style="list-style-type: none"> Ensures it can deliver the cash required for closing & down payment (through loans, equity, and mezzanine lending). Buyer prepares for property ownership by establishing relationships with service and utilities providers or agrees to assume seller's providers. Buyer hires a property management company. <p>Seller's tasks:</p> <ul style="list-style-type: none"> Attorney prepares the deed and other conveyance documents. Arranges to pay off the loan. Transfers utility accounts to the buyer. Works with the title company to address title concerns. <p>Title company / escrow agent: ensures all documents are recorded, signed and notarized before closing date.</p> <ul style="list-style-type: none"> Ensures title concerns are addressed. Issues title insurance requirements and endorsements required by buyer and mortgage lender. Prepares closing settlement statement (allocating transaction costs between seller and buyer). Collaborates with mortgage lenders to ensure the closing and opening are properly recorded. <p>Signing authority verification: Buyer and seller (legal entities) provide proof of signing power for individuals.</p>	<ul style="list-style-type: none"> Buyer Seller Attorneys Title company Escrow agent Property management company Lenders
Closing	<p>The title to the real estate passes from seller to buyer:</p> <ul style="list-style-type: none"> Buyer transfers cash purchase price. Buyer delivers loan documents to lender. Escrow agent disburses money (loan proceeds or cash) to seller when preconditions in escrow agreement are met and lender approves. Seller delivers possession and ownership of property by conveyance of possession items (deed; bill of sale; keys etc.) and financial items (assignment and assumption of leases and contracts etc.). 	<ul style="list-style-type: none"> Buyer Seller Attorney Title company Escrow agent Real estate agent Property manager

4. What percentage of residential real estate transactions involve purchases by legal entities or trusts?

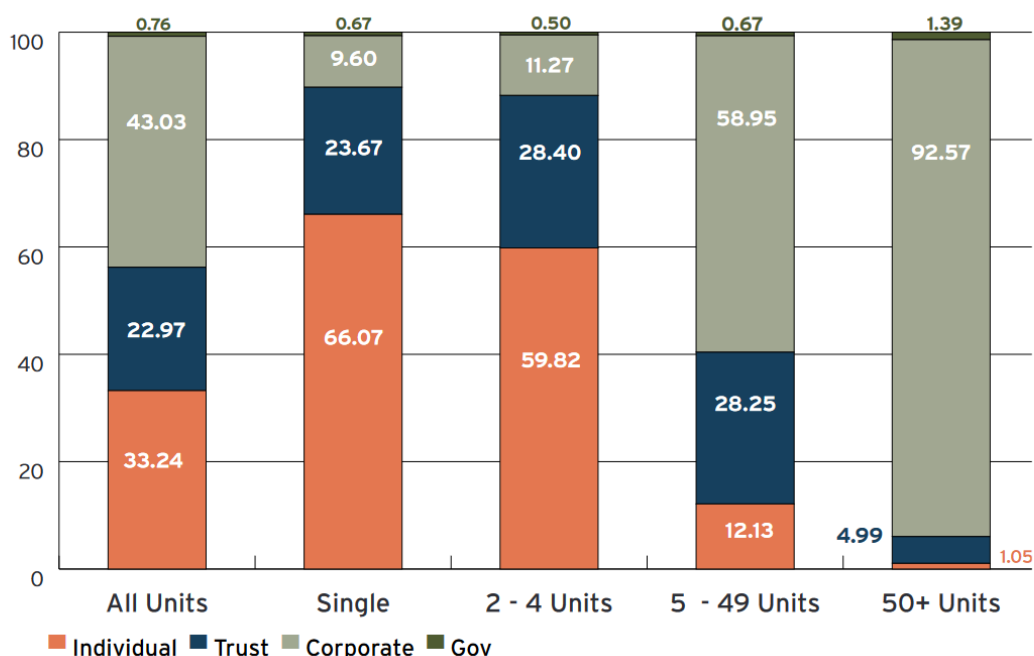
The proportion of housing owned by corporate entities has increased significantly over the past two decades. In a Zillow dataset of 32.6 million residential real estate transactions between 2010 and 2019, corporations were found to be the buyer in 13.9% (4.5 million) of the transactions, and trusts in 3.4% (1.1 million).¹¹ According to the *New York Times*, close to 50% of residential real estate transactions above \$5 million across the U.S. involved LLC purchasers in 2014, compared to 38% in 2008.¹² A study by the NGO Strategic Actions for a Just Economy (SAJE) on corporate ownership in the rental market found that corporate owners now own a greater share of U.S. rental properties than individual investors. Only 41.23% of U.S. rental properties are owned by individual investors, while 45% are owned

¹¹ ACDC Working Paper (2022). "The impact of ownership transparency policies on illicit purchases of US property". p. 12.

¹² Story, L. & Saul, S. (Feb. 7, 2015), Stream of Foreign Wealth Flows to Elite New York Real Estate, *New York Times* <https://www.nytimes.com/2015/02/08/nyregion/stream-of-foreign-wealth-flows-to-time-warner-condos.html>; Kaysen, R. (March 28, 2015), Masquerading As a Two-Family Home <https://www.nytimes.com/2015/03/29/realestate/masquerading-as-a-two-family-home.html>.

by corporate entities including LLPs, LPs and LLCs, and 2.5% by trusts.¹³ The ownership share of individual investors is even smaller in some cities like Los Angeles, where in 2019 a mere 33% of rental units were owned by individual investors, 43% by corporate entities and 23% by trusts.¹⁴ The GTOs, with the exception of a singular non-public GTO,¹⁵ have failed to address the ownership risks associated with trusts. Analysis like those conducted by Washington D.C. based organization, The Sentry in their publication *Embezzled Empire* shows that trusts were used by Francis Selemani, the Congolese President's brother, to purchase real estate in the greater Washington D.C. area.¹⁶

Table 1: Los Angeles Rental Composition Ownership by Units (2019)



Source: Strategic Actions for a Just Economy (2021), "Beyond Wall Street Landlords"

Finally, GFI's own analysis revealed that the use of anonymous shell companies, trusts and complex corporate structures also continues to be the number one real estate money laundering typology. The report, analyzing cases of real estate money laundering between 2015 and 2020, found that 82% of the cases involved the use of a legal entity or corporate structure to mask ownership and obfuscate the identity of the real owner.¹⁷

5. What kinds of professionals are most common in real estate transactions, such as real estate brokers, settlement agents, title insurers, attorneys, etc.? Does this differ for residential and commercial real estate? What kinds of professionals or participants are most able to request, verify, and report documentation related to purchasers? Is title insurance required in most of the transactions? If not, how common is the use of title insurance?

¹³ Strategic Actions for a Just Economy (2021), "Beyond Wall Street Landlords", p. 14, https://www.saje.net/wp-content/uploads/2021/03/Final_A-Just-Recovery-Series_Beyond_Wall_Street.pdf.

¹⁴ Ibid, p. 19.

¹⁵ ACDC Working Paper (2022). "The impact of ownership transparency policies on illicit purchases of US property". p. 8.

¹⁶ The Sentry (November 2021) "Embezzled Empire. <https://cdn.thesentry.org/wp-content/uploads/2021/11/EmbezzledEmpire-TheSentry-Nov2021.pdf>.

¹⁷ Global Financial Integrity (2021). "Acres of Money Laundering: Why U.S. Real Estate is a Kleptocrat's Dream." p. 28. <https://gfintegrity.org/report/acres-of-money-laundering-why-u-s-real-estate-is-a-kleptocrats-dream/>.

Every state has its own laws, regulations, customary practices, and procedures regulating the real estate sector. As such, the type of professionals involved vary by state. Generally, the most common professionals involved in real estate transactions are real estate agents and brokers, title companies and agents, escrow companies and agents, attorneys and lenders. In 2021, 88% of buyers purchased their home through a real estate agent or broker, and 90% of sellers were assisted by a real estate agent when selling their home.¹⁸ A 2001 study found that title insurance was used in 85% of all residential real estate transactions.¹⁹ A lender's title insurance policy is usually required by the lender when the purchase is made with a loan. However, an owner's title insurance policy is optional and therefore not commonly used in all-cash transactions.²⁰ A 2016 American Land Title Association (ALTA) survey found that less than half of homebuyers purchase an owner's title insurance policy.²¹ This suggests that the involvement of title insurance companies is much less common in all-cash transactions than it is in financed real estate transactions. Moreover, while the use of title insurance is common in most states, Iowa state law explicitly prohibits the sale of commercial title insurance. Instead, the state-run Title Guaranty Division of the Iowa Finance Authority is the only entity authorized to sell title coverage in Iowa.²² Under this system, real estate transactions do not involve title insurance agents, because a state-certified abstractor provides an examination of the home's history, and any title issues must be remedied before closing. Clearing the title may only be completed by attorneys licensed in Iowa, as this is considered a practice of law. As such, a legal opinion by an attorney is required as evidence of title.

Some states require an attorney to be part of the real estate transaction in some way.²³ There are at least 15 states where it is legally required for the attorney to conduct the closing process or certify the title.²⁴ In states like Massachusetts, for example, title agents as such do not exist. The examination of title abstracts and the issuance of title opinions is considered a practice of law, so only attorneys are permitted to perform this function.²⁵ Similarly, real estate transactions in Puerto Rico are different from many U.S. states in that an attorney-notary handles the closing. This system is rooted in the civil law notary tradition common across Latin America, where the notary public must be an attorney admitted to the practice of law.²⁶ An additional four states are attorney states not by law, but by custom.²⁷ That is to say, the involvement of an attorney is not legally required but it is custom for the attorney to be involved in the transaction.

Beyond legal requirements, a review of common closing practices across the states indicates that attorneys are the most common professionals involved in a real estate closing, followed by title and escrow companies, lenders and then real estate agents or brokers.²⁸ The table below is based on a review by GFI of various industry sources and is meant to serve as an illustrative guide on the challenges of imposing a reporting obligation on a singular real estate professional.

¹⁸ National Association of Realtors (2021). "2021 Profile of Home Buyers and Sellers" p. 6,

<https://cdn.nar.realtor/sites/default/files/documents/2021-highlights-from-the-profile-of-home-buyers-and-sellers-11-11-2021.pdf>

¹⁹ Arrunada, B. (2001) "A Global Perspective on Title Insurance", Housing Finance International, p. 4.

<https://www.arrunada.org/files/research/ARRUNADA%202001%20A%20global%20perspective%20on%20title%20insurance.pdf>

²⁰ ALTtitle.com. "Did you know that owner's title insurance is optional?" <https://alttitle.com/owners-title-insurance-is-optional/>.

²¹ ALTA (September 2016). "Consumer Title Insurance Shopping Survey". p. 9. <https://www.alta.org/publications/press-release.cfm?ALTA-Consumer-Survey-Shows-40-Confused-by-Title-Fee-Calculation-on-Closing-Disclosure>

²² Iowa Title Guaranty (2021) "Iowa Title Guaranty Overview", p.4 <https://www.iowafinance.com/content/uploads/2021/06/ITG-Program-Overview-Manual.pdf>

²³ The Legal Description (2020) "Attorney State Breakdown" http://media.octoberresearch.com/pdfs/2020_Attorney_State_Breakdown.pdf.

²⁴ Ibid. These states include: Connecticut, Delaware, Georgia, Massachusetts, North Carolina, Rhode Island, South Carolina, West Virginia, Alabama, Louisiana, Mississippi, North Dakota, Oklahoma, South Dakota and Wyoming.

²⁵ Ibid, p. 6.

²⁶ Asociacion de Notarios de Puerto Rico (2003), Comment on Advance Notice of Proposed Rule Anti-Money Laundering Programs for Persons Involved in Real Estate Settlements and Closings 68 FR 17569. <https://www.fincen.gov/sites/default/files/shared/salichs.pdf>

²⁷ These states include: Illinois, New Jersey, New York and Ohio. See: The Legal Description (2020) "Attorney State Breakdown" http://media.octoberresearch.com/pdfs/2020_Attorney_State_Breakdown.pdf.

²⁸ Sandy Gadov "State by State Closing Guide" <https://sandygadov.com/state-by-state-closing-guide/>.

Table 1: Class of Professionals Involved in Closing by State²⁹

	Attorney ³⁰	Title company or agent	Lender	Real estate Broker/agent	Escrow agent
Alabama	X: Lawyer must certify title.	X			
Alaska		X	X		X
Arizona		X			X
Arkansas	X	X (typically handles escrow)			
California		X	X		X
Colorado	X	X		X	
Connecticut	X: has to close the transaction.				
Delaware	X: has to close the transaction.				
D.C.	X	X			
Florida	X	X			
Georgia	X: has to close the transaction.				
Hawaii	X	X			X
Idaho		X	X		
Illinois	X: varies by location. In Chicago, an attorney typically reviews and approves title documents.	X	X		
Indiana	X	X	X	X	
Iowa	X			X	
Kansas	X	X	X	X	X
Kentucky	X: transaction requires supervision by attorney. ³¹	X			
Louisiana	X: attorney must examine and certify title.	X (notary must authenticate)			
Maine	X				
Maryland	X	X			
Massachusetts	X: has to close the transaction.				
Michigan	X	X	X	X	
Minnesota	X	X	X	X	

²⁹ This overview is based on a review by GFI of various industry sources, including: The Legal Description (2020) “Attorney State Breakdown” http://media.octoberresearch.com/pdfs/2020_Attorney_State_Breakdown.pdf; Sandy Gadow “State by State Closing Guide” <https://sandygadow.com/state-by-state-closing-guide/>; Homelight (2021). “Some States Require a Real Estate Attorney at Closing — Does Yours?” <https://www.homelight.com/blog/states-that-require-real-estate-attorney-at-closing/>

³⁰ Highlighted in blue indicates a legal requirement (as opposed to customary practice).

³¹ Department of Justice (2015). “Kentucky Bar Association Opinion KBA U-58 Prohibiting Real Estate Closings By Non-Attorneys”. <https://www.justice.gov/atr/kentucky-bar-association-opinion-kba-u-58-prohibiting-real-estate-closings-non-attorneys>

Mississippi	X: required to examine and certify title.	X			
Missouri	X	X	X	X	
Montana	X	X			X
Nebraska	X	X	X	X	
Nevada		X			X
New Hampshire ³²	X: must close the transaction				
New Jersey	X: varies by location. In the northern region, attorneys typically conduct closing.	X: In the southern regions, title agents typically conduct closing.			
New Mexico		X			X
New York	X: attorney state by custom				
North Carolina	X: has to close transaction but need not be physically present.		X		
North Dakota	X: attorney's opinions required to issue title insurance policy	X	X		
Ohio	X: attorney required to review closing documents ³³	X			
Oklahoma	X: must conduct a title examination.	X	X	X	
Oregon		X			X
Pennsylvania	X	X		X	
Rhode Island	X: must certify title.	X			
South Carolina	X: must close transaction				
South Dakota	X	X	X	X	
Tennessee	X	X	X		
Texas		X			X
Utah		X	X		
Vermont ³⁴	X: must close transaction				
Virginia	X	X			
Washington	X	X	X		X
West Virginia	X: must close transaction		X	X	
Wisconsin	X	X	X		

³² Conflicting information in reviewed sources about legal requirements of attorney's involvement.

³³ Cassone Law Offices (2021). "Do you need an attorney to close on a property in Ohio?".

<https://www.cassonelaw.com/blog/2021/12/do-you-need-an-attorney-to-close-on-a-property-in-ohio/>

³⁴ Conflicting information in reviewed sources about legal requirements of attorney involvement.

Wyoming	X: has to offer a title opinion to obtain title insurance and has to prepare deed.	X	X	X	
Total:	42	39	20	13	11

When involved in a transaction, all these professionals are in contact with the purchaser one way or another and therefore in a position to request, verify, and report documentation related to purchasers. However, attorneys and real estate agents are likely to have the closest and most direct contact with the client, and real estate agents are usually involved in all facets of the transactions.³⁵ A 2016 ALTA survey found that homebuyers rank real estate agents, followed by loan officers, attorneys, title or settlement companies and housing counselors, as being the most useful to understand the closing process and answer questions about the home buying experience.³⁶

Commercial Real Estate

The most common actors involved in a commercial real estate transaction are outlined in the table in response to Question 2 under this Section. An important distinction between residential and commercial real estate in that regard is the significant role for lawyers and escrow agents in commercial real estate transactions. Because of the complexity of the financing structures and the fact that these transactions virtually always involve a corporation, LLC, LLP or other legal entity, additional steps are required to assess the fitness and ability of interested parties to complete the terms of the contract.³⁷

6. What are the typical transaction costs to close a residential real estate deal? For commercial real estate? Typically, what percentage of the sale price do these costs represent?

The average cost of selling a house typically adds up to 10% of the sale price.³⁸ This may include various types of costs, including real estate commission fees (typically 5-6% of the sale price), capital gains taxes, home repairs, closing costs and other costs.³⁹ The closing costs specifically include fees to cover the real estate transaction, including loan closing fees, property fees, insurance fees, real estate agent fees and title insurance fees.⁴⁰ The average closing costs are 2-5% of the sale price for the buyer, and 1-3% of the sale price for the seller.⁴¹ These percentage shares are similar for commercial real estate transactions.⁴²

10. What percentage of residential real estate purchases are all-cash transactions?

The U.S. residential real estate sector is a \$33 trillion dollar market.⁴³ According to industry data from Redfin, all-cash purchases occur in approximately 30% of residential real estate transactions, putting that figure at a seven-year high

³⁵ U.S. Government Accountability Office (2020). "Anti-Money Laundering: FinCEN Should Enhance Procedures for Implementing and Evaluating Geographic Targeting Orders." p. 29. <https://www.gao.gov/assets/gao-20-546.pdf>.

³⁶ ALTA (September 2016). "Consumer Title Insurance Shopping Survey". p. 7. <https://www.alta.org/publications/press-release.cfm?ALTA-Consumer-Survey-Shows-40-Confused-by-Title-Fee-Calculation-on-Closing-Disclosure>

³⁷ Ibid, p. 41.

³⁸ Rocket Homes (2022) "The Cost of Selling A House Explained", <https://www.rockethomes.com/blog/home-selling/cost-of-selling-a-house>

³⁹ Ibid.

⁴⁰ Rocket Homes (2022) "What Are Closing Costs?" <https://www.rockethomes.com/blog/home-buying/closing-costs>

⁴¹ Rocket Homes (2022) "The Cost of Selling A House Explained", <https://www.rockethomes.com/blog/home-selling/cost-of-selling-a-house>

⁴² Rochford Law and Real Estate Title (2019) "Understanding Commercial Closing Costs" <https://info.rochfordlawyers.com/resources/understanding-commercial-closing-costs>.

⁴³ Department of Treasury (2020). National Strategy for Combating Terrorist and Other Illicit Financing 2020. P. 16. <https://home.treasury.gov/system/files/136/National-Strategy-to-Counter-Illicit-Financerv2.pdf>

in 2021.⁴⁴ The National Association of Realtors (NAR) places this figure at a more modest 25%.⁴⁵ This percentage also varies according to buyer: for instance, NAR data indicates that 39% of residential real estate purchases by foreign buyers occur in all-cash.⁴⁶ These differing numbers also indicate that the term ‘all-cash’ or the term ‘financed’ may be differently defined by Redfin and the NAR. Please refer to the response to Questions 1 and 3 under Section A for a detailed discussion on the challenges of classifying transactions as ‘financed’ or ‘all-cash. FinCEN must ensure that any proposed rule appreciates these nuances and does not inadvertently exempt transactions that do not have sufficient AML/CFT due diligence.

11. What percentage of commercial real estate purchases are all-cash transactions?

The \$16 trillion U.S. commercial real estate sector is infinitely more complex in process, financing, and make up of investors than the U.S. residential market.⁴⁷ Nevertheless, all-cash commercial real estate transactions are not uncommon in the sector. According to 2019 data from the National Association of Realtors, approximately 24% of commercial real estate transactions under \$2.5 million were all-cash transactions.⁴⁸ The biggest markets for commercial real estate by property deal volume include Dallas, Los Angeles, and Manhattan.⁴⁹

The recent GFI report found that 35.7% of money laundering cases analyzed involved the use of commercial real estate to hide illicit funds.⁵⁰ Properties purchased varied widely, including office parks, steel plants, luxury hotels, motels, a mental health facility, supermarkets, and condominium developments. Many of the cases involved both commercial and residential real estate as vehicles for money laundering.⁵¹ While commercial real estate was connected to fewer REML cases than residential real estate cases, on average the values of the commercial real estate properties involved in the schemes were markedly higher than residential real estate.⁵² One notable case involved the embezzlement of \$100 million from Kuwait’s Department of Defense that was used to purchase an entire 157-acre ‘mountain’ in Beverly Hills with no questions asked about the financing.⁵³

Although these all-cash transactions pose a money laundering risk, the complexity of financing structures in commercial real estate acquisitions warrants a rulemaking that also covers certain forms of financed commercial real estate transactions. Especially in commercial real estate, financing can take many forms and the distinction between

⁴⁴ Redfin (2021). “Share of Homes Bought With All Cash Hits 30% for First Time Since 2014.” [https://www.redfin.com/news/all-cash-home-purchases-2021/#:~:text=Nearly%20one%2Dthird%20\(30%25\),were%20purchased%20with%20all%20cash.](https://www.redfin.com/news/all-cash-home-purchases-2021/#:~:text=Nearly%20one%2Dthird%20(30%25),were%20purchased%20with%20all%20cash.)

⁴⁵ National Association of Realtors (2021). “All-Cash Sales are Rising Sharply Amid Intense Buyer Competition.” <https://www.nar.realtor/blogs/economists-outlook/all-cash-sales-are-rising-sharply-amid-intense-buyer-competition>

⁴⁶ National Association of Realtors (2021). “International Transactions in U.S. Residential Real Estate.” p. 5. <https://cdn.nar.realtor/sites/default/files/documents/2021-international-transactions-in-us-residential-real-estate-07-26-2021.pdf>

⁴⁷ Nareit (2018). “Estimating the Size of the Commercial Real Estate Market in the U.S.” <https://www.reit.com/data-research/research/nareit-research/estimating-size-commercial-real-estate-market-us#:~:text=Breadcrumb&text=The%20total%20size%20of%20commercial>

⁴⁸ National Association of Realtors (2019). “Commercial Lending Report.” p. 14. <https://cdn.nar.realtor/sites/default/files/documents/2019-commercial-lending-survey-04-02-2019.pdf>.

⁴⁹ National Association of Realtors (2020). “16 U.S. Metros Are in Top 30 Largest Commercial Markets Globally in 2020; NYC is the Number One CRE Market.” <https://www.nar.realtor/blogs/economists-outlook/16-u-s-metros-are-in-top-30-largest-commercial-markets-globally-in-2020-nyc-is-the-number-one-cre>. Global Financial Integrity (2021). “Acres of Money Laundering: Why U.S. Real Estate is a Kleptocrat’s Dream.” p. 33. <https://gfintegrity.org/report/acres-of-money-laundering-why-u-s-real-estate-is-a-kleptocrats-dream/>

⁵⁰ Global Financial Integrity (2021). “Acres of Money Laundering: Why U.S. Real Estate is a Kleptocrat’s Dream.” p. 20. <https://gfintegrity.org/report/acres-of-money-laundering-why-u-s-real-estate-is-a-kleptocrats-dream/>

⁵¹ Ibid.

⁵² Ibid.

⁵³ Prince, T. (2019, June 25). Dmytro Firtash: Who is the Ukrainian Tycoon wanted by the U.S. on Bribery charges? RFERL. <https://www.rferl.org/a/dmytro-firtash-who-is-the-ukrainian-tycoon-wanted-by-the-u-s-on-bribery-charges-/30020239.html>; Ridgwell, H. (2016, May 12). All Aboard! Kleptocracy tour shows shady side of London. VOA. <https://www.voanews.com/europe/all-aboard-kleptocracy-tour-shows-shady-side-london>; Liubakova, H. (2018, June 5). Sold out London: how Britain capital became home to the super-rich. Medium. <https://medium.com/@hanna.liubakova/sold-out-london-how-britains-capital-became-home-to-the-super-rich-432ad6bfdcd>.

financed and non-financed is often vague. For example, it is unclear whether the issuance of bonds would be considered ‘financed’ or ‘non-financed’. More details on how financed and non-financed should be defined is addressed under Section of this comment.

12. Are the beneficial owners of legal entity purchasers involved in real estate transactions normally identified by some participant in a real estate transaction?

The GTOs in 2016 introduced for the first time a legal requirement that the beneficial owner of a legal entity was to be identified when making a residential real estate purchase. Prior to this and during the GTO’s operation, the use of legal entities to hide identity and facilitate real estate transactions remains a preferred money laundering typology in the real estate sector. GFI’s own analysis of reported money laundering cases over a five-year period found that 82.14% of cases utilized a legal entity to hide owner identity and facilitate the real estate money laundering scheme. Similar investigations from the *Miami Herald*, the International Consortium for Investigative Journalists, and The Sentry show that legal entities are employed to hide money laundering,⁵⁴ tax evasion, corruption,⁵⁵ and unfair housing practices.⁵⁶ In each case researchers and civil society struggle to identify the beneficial owner, suggesting that, unless required by law, there is little incentive within industry to ask probing questions.

Similarly, despite FinCEN calling on real estate professionals to submit SARs voluntarily in 2017, it has never disclosed how many SARs have been filed in the intervening years. This suggests that, without a legal requirement, there is little interest within the industry to add additional business costs and address the negative impacts from unchecked real estate purchases.⁵⁷

Finally, a new report from the Anti-Corruption Data Collective found that the GTO policy did not result in a reduction in the use of legal entities to make residential purchases.⁵⁸ This seemingly indicates that the simple disclosure of ownership is an insufficient deterrence and no substitute for a rule that requires additional information on source of funds and payment methods.

13. How do due diligence processes, if any, differ for commercial or residential properties?

The Real Estate Settlement Procedures Act (RESPA) governs residential home sales, and its main objective is to protect homebuyers from fraud and deception. RESPA does not apply to commercial real estate. In absence of these legal protections, buyers and sellers need to perform more detailed due diligence on the property than other parties in the transaction. This results in a more complex and drawn-out due diligence process for commercial real estate transactions. This in turn enhances the role of legal professionals in commercial real estate deals.⁵⁹

Similarly, the role of escrow agents and companies is also very important in the commercial due diligence process. Commercial sales involve much larger sums of money than residential transactions, and the financing will often come

⁵⁴ Wieder, B., Dasgupta, S., Wang, K. (Jan 25, 2022). “Men tied to Italian mob money-laundering case still able to snap up South Florida properties”. *Miami Herald*. <https://www.miamiherald.com/news/business/real-estate-news/article255762051.html>

⁵⁵ The Sentry (November 2021) “Embezzled Empire”. <https://cdn.thesentry.org/wp-content/uploads/2021/11/EmbezzledEmpire-TheSentry-Nov2021.pdf>.

⁵⁶ Strategic Actions for a Just Economy (2021), “Beyond Wall Street Landlords”. https://www.saje.net/wp-content/uploads/2021/03/Final_A-Just-Recovery-Series_Beyond_Wall_Street.pdf.

⁵⁷ Global Financial Integrity (2021). “Acres of Money Laundering: Why U.S. Real Estate is a Kleptocrat’s Dream.” p. 73. <https://gfintegrity.org/report/acres-of-money-laundering-why-u-s-real-estate-is-a-kleptocrats-dream/>

⁵⁸ ACDC Working Paper (2022). “The impact of ownership transparency policies on illicit purchases of US property”.

⁵⁹ Global Financial Integrity (2021). “Acres of Money Laundering: Why U.S. Real Estate is a Kleptocrat’s Dream.” p. 41. <https://gfintegrity.org/report/acres-of-money-laundering-why-u-s-real-estate-is-a-kleptocrats-dream/>

from many different sources. Combined with the lack of regulation in commercial real estate deals, escrow is often formal and tightly controlled.⁶⁰

14. What do persons involved in real estate transactions do if they have any suspicions about a transaction, customer, or source of funds?

In 2017, FinCEN issued an advisory for the real estate sector to be shared with financial institutions, real estate brokers, escrow agents, title insurers and other real estate professionals.⁶¹ The advisory calls on real estate professionals to voluntarily file Suspicious Activity Reports (SARs) to report any suspicious transactions. However, these positive efforts are without any real teeth because most actors listed are not subject to mandatory AML/CFT requirements under the BSA. FinCEN additionally has never disclosed how many SARs have been filed since the advisory was issued, so it remains unclear whether persons involved in real estate transactions actually make use of this reporting mechanism when they have suspicions about a transaction, customer, or source of funds.

15. How often are attorneys used in all-cash residential or commercial real estate transactions? Why are they used?

A real estate transaction requires more than just a buyer and a seller. Even a simple home purchase involves a variety of professional facilitators like real estate agents, one or more attorneys, and escrow agents. These professionals are also known as “gatekeepers,” because while they are meant to safeguard the financial system, their professional expertise often provides an entry point for criminals seeking to misuse the financial system and real estate market for money laundering purposes. As a result, gatekeepers can knowingly or unwittingly assist criminals in laundering their illicit proceeds through real estate transactions.⁶²

According to the Financial Action Task Force (FATF), lawyers in particular play a significant role as gatekeepers during real estate transactions.⁶³ Attorneys are often well-placed to identify the source of funds of a property buyer. This is not only because they have a more direct relationship with the client, but also because they often play an important intermediary role in the flow of funds to purchase a property.⁶⁴ For example, attorneys sometimes use Interest on Lawyer Trust Accounts (IOLTA) to pool and handle money from all their clients. Customers may deposit their funds in an IOLTA, and then have their attorney wire it along for a real estate purchase. This anonymizes money transmissions without oversight by banks because banks holding these accounts have no knowledge of the beneficial owners of the funds in the account. Lawyers, however, know who the clients are that deposit money in these accounts. In addition, attorneys often act as the registering agent for anonymous companies or trusts used to purchase real estate and therefore best positioned to identify and verify the identity of the beneficial owner.⁶⁵ A recent GFI report found that anonymous companies and complex corporate structures are the most common REML typologies.⁶⁶ Because attorneys are often responsible for forming these entities, they are well positioned to identify the beneficial owner of the legal entity.

⁶⁰ National Due Diligence Services, “Commercial vs Residential Transactions: The Complexities & Needed Due Diligence”.

<https://www.alta.org/file.cfm?name=031418commercialvsresidential>

⁶¹ FinCEN (2017). Advisory to Financial Institutions and Real Estate Firms and Professionals.

https://www.fincen.gov/sites/default/files/advisory/2017-08-22/Risk%20in%20Real%20Estate%20Advisory_FINAL%20508%20Tuesday%20%28002%29.pdf

⁶² Global Financial Integrity (2021). “Acres of Money Laundering: Why U.S. Real Estate is a Kleptocrat’s Dream.” p. 45.

<https://gfintegrity.org/report/acres-of-money-laundering-why-u-s-real-estate-is-a-kleptocrats-dream/>

⁶³ FATF (2016). Mutual Evaluation Report United States of America. p. 142. <https://www.fatf-gafi.org/media/fatf/documents/reports/mer4/MER-United-States-2016.pdf>.

⁶⁴ U.S. Department of Treasury (2020). “National Strategy for Combating Terrorist and Other Illicit Financing 2020.” p. 20. <https://home.treasury.gov/system/files/136/National-Strategy-to-Counter-Illicit-Financev2.pdf>. U.S. Department of Treasury (2018).

“National Money Laundering Risk Assessment 2018.” p. 34. https://home.treasury.gov/system/files/136/2018NMLRA_12-18.pdf.

⁶⁵ Global Financial Integrity (2021). “Acres of Money Laundering: Why U.S. Real Estate is a Kleptocrat’s Dream.” p. 50.

<https://gfintegrity.org/report/acres-of-money-laundering-why-u-s-real-estate-is-a-kleptocrats-dream/>.

⁶⁶ Ibid, p. 14.

The role of lawyers is especially important in commercial real estate transactions. As commercial real estate transactions virtually always involve a corporation, LLC, or LLP, additional steps are required to assess the fitness and ability of interested parties to complete the terms of the contract. These required additional steps are referred to as the “due diligence process” and are almost always carried out by lawyers or law firms advising parties on either side of the transaction.⁶⁷

Given a lawyer’s unique position in a real estate transaction, there is credible risk they could knowingly or unwittingly facilitate money laundering in specific real estate transactions. The U.S. Treasury conducted a study of real properties forfeited to the Department of Justice, and found that lawyers and real estate agents were found to be the most commonly complicit.⁶⁸ Of the cases studied in the GFI report cited throughout this comment, at least 35.7% of cases used lawyers/firms to help obscure the origin of the money and move it into real estate.⁶⁹ In its 2018 and 2020 national money laundering risk assessments, the U.S. Treasury Department indicated that the use of interest on lawyer trust accounts (IOLTAs) posed a particularly high money laundering risk, because they anonymized money transmissions without much oversight by banks.⁷⁰

16. How often are real estate brokers or agents used in all-cash residential real estate transactions? Why are they used?

Real estate agents are involved in the majority of residential real estate transactions. In 2020, 88% of buyers purchased their home through a real estate agent or broker, and 90% of sellers were assisted by a real estate agent when selling their home.⁷¹ Buyers mostly use real estate agents to find the right home and negotiate the terms of the sale. Sellers use real estate agents to help them price the property competitively, market the home, and sell it within a specified timeframe.

In the GFI analysis of real estate money laundering cases, real estate agents were the second most common real estate professional to be either willfully or unwittingly involved in the schemes. At least 25% of the cases analyzed used real estate agents or brokers to help move illicit money into real estate.⁷² This lines up with a 2020 U.S. Treasury assessment of federal cases involving real estate forfeitures, which found that real estate agents were among the most common complicit professionals.⁷³

17. Is the decision to use real estate brokers, or agents, or attorneys different for all-cash real estate transactions?

GFI’s analysis did not reveal a particular preference for any class of real estate professional based on payment method. But the analysis did reveal that for money laundering activities in the real estate sector, attorneys were most

⁶⁷ Ibid, p. 41.

⁶⁸ U.S. Treasury Department (2020). “National Strategy for Combatting Terrorist and Other Illicit Financing”. p. 17. <https://home.treasury.gov/system/files/136/National-Strategy-to-Counter-Illicit-Financev2.pdf>

⁶⁹ Global Financial Integrity (2021). “Acres of Money Laundering: Why U.S. Real Estate is a Kleptocrat’s Dream.” p. 16. <https://gfintegrity.org/report/acres-of-money-laundering-why-u-s-real-estate-is-a-kleptocrats-dream/>

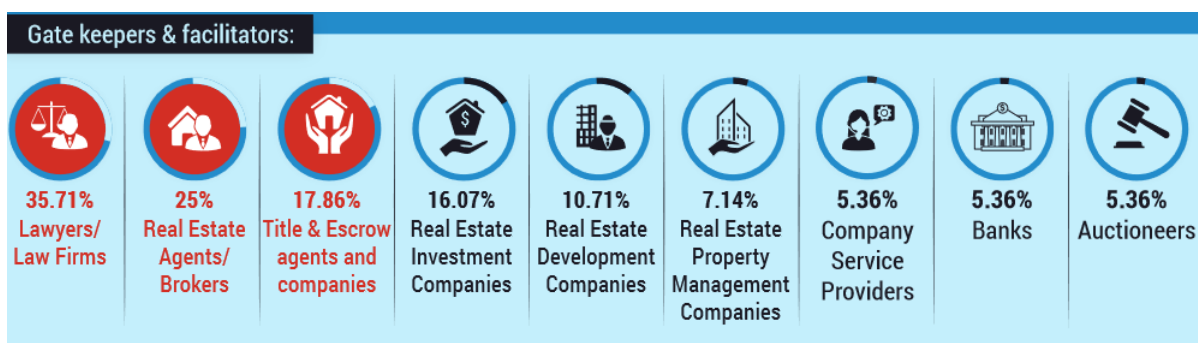
⁷⁰ U.S. Department of Treasury (2020). National Strategy for Combating Terrorist and Other Illicit Financing 2020. p. 20-21. <https://home.treasury.gov/system/files/136/National-Strategy-to-Counter-Illicit-Financev2.pdf>. U.S. Department of Treasury (2018). National Money Laundering Risk Assessment 2018. p.34. https://home.treasury.gov/system/files/136/2018NMLRA_12-18.pdf.

⁷¹ National Association of Realtors (2021), 2021 Profile of Home Buyers and Sellers” p. 6, <https://cdn.nar.realtor/sites/default/files/documents/2021-highlights-from-the-profile-of-home-buyers-and-sellers-11-11-2021.pdf>

⁷² Global Financial Integrity (2021). “Acres of Money Laundering: Why U.S. Real Estate is a Kleptocrat’s Dream.” p. 16. <https://gfintegrity.org/report/acres-of-money-laundering-why-u-s-real-estate-is-a-kleptocrats-dream/>.

⁷³ Department of Treasury (2020). National Strategy for Combating Terrorist and Other Illicit Financing 2020. P. 17. <https://home.treasury.gov/system/files/136/National-Strategy-to-Counter-Illicit-Financev2.pdf>

frequently used to carry out the transaction followed by real estate agents and other professional intermediaries (seen in the diagram below).⁷⁴



The analyzed cases further revealed three distinct levels of involvement of gatekeepers and facilitators: (1) the gatekeepers or financial institutions were directly complicit; (2) the gatekeepers exhibited willful blindness, and (3) the absence of any requirement created a safe space where uncomfortable questions are never asked. Cases involving PEPs, high net worth individuals (HNIs) or Ultra-HNIs showed a higher degree of use and involvement of gatekeepers in the money laundering scheme. Wealthy criminals have the resources to employ a network of gatekeepers to willingly, or willfully blindly, integrate their ill-gotten gains into the financial system.

18. Please describe when an escrow account must be used for a real estate transaction.

There are no federal laws requiring the use of an escrow account when buying a house in the U.S.⁷⁵ However, certain types of mortgage loans do require the use of an escrow account. For example, loans insured and guaranteed by the Federal Housing Administration require an escrow account.⁷⁶ In other cases, the lender may decide whether or not an escrow account is used. So, while a transaction involving a mortgage will usually require escrow, these requirements typically do not exist in an all-cash deal.

19. Please explain how payment is most often tendered for real estate purchases (e.g., mortgage, domestic wires, foreign wires, checks, currency, CVC). Which of these categories of payment are higher-risk?

Typically, all-cash purchases and money originating from high-risk jurisdictions with weak AML/CFT regulation should be considered high-risk. Banks break down this assessment based on their client profile. However, when it concerns payment for real estate purchases, GFI's report did not necessarily see a preference for one payment over another. Large amounts of cash can be moved through domestic wires or foreign wires, used to pay back mortgages, paid with checks, currency, and CVC. With commercial real estate transactions, it becomes harder to categorize one specific payment method as high-risk over all others.

The determining factor for risk is to examine the standard and quality of AML/CFT supervision the payment method is subject to. Standards and quality can differ based on institution type, for example private lenders versus BSA-regulated financial institutions, or banks in a country with systemic corruption versus banks in a country with robust rule of law and AML/CFT protections. At the same time, the high-risk nature of payments can be obfuscated by layering transactions through lower risk payment methods. Ultimately, the decision on payment risk and analysis is subjective and the culmination of many factors including client type, payment method, size of payment, geographic location, and purpose of payment.

⁷⁴ Global Financial Integrity (2021). "Acres of Money Laundering: Why U.S. Real Estate is a Kleptocrat's Dream." p. 16.

<https://gfintegrity.org/report/acres-of-money-laundering-why-u-s-real-estate-is-a-kleptocrats-dream/>.

⁷⁵ Open Escrow, "Do you 'Have To' Use Escrow When Selling a Home?" <https://openescrownow.com/use-escrow-when-selling-home/>

⁷⁶ Realtor.com (2014). "Escrow Accounts: What Home Buyers Need to Know". <https://www.realtor.com/advice/finance/escrow-accounts-what-you-need-to-know/>

20. Please note any differences not already covered in provision of services for residential real estate transactions versus those for commercial real estate transactions.

Refer to answers under Question 25.

B. What are the money laundering risks in real estate transactions?

21. Describe the potential money laundering and illicit finance risks and vulnerabilities arising in the U.S. real estate market. Are these risks different for the residential and commercial real estate sectors?

22. Identify specific activities and services that present the highest and lowest money laundering risks, as well as factors related to parties, the transaction, and the property, bearing on risk and its assessment. What kinds of transactions and customers are highest and lowest risk? How are those risks mitigated and what are the associated costs of that mitigation?

The ‘Acres of Money Laundering’ report by GFI found that more than \$2.3 billion was laundered through U.S. real estate in cases reported between 2015 and 2020.⁷⁷ The bulk of these cases (91%) involved at least one piece of residential property, while 35.71% of the cases involved commercial real estate properties either exclusively or in addition to residential properties.⁷⁸ However, while commercial real estate is connected to fewer real estate money laundering cases than residential real estate, the values of commercial real estate properties involved in the schemes are markedly higher than residential real estate.⁷⁹ Examples of commercial real estate that have been used for money laundering include office parks and towers, steel plants, luxury hotels, supermarkets and condominium developments.

There are several reasons why the U.S. real estate market is so attractive for money laundering activities and as a safe haven of illicit money. First, the value of real estate is generally stable and appreciates over time. This allows criminals to accumulate wealth while erasing its nefarious origins. Second, real estate can be used to turn an initially illicit investment into a legitimate income-generating enterprise, through rentals, property flips or property developments. Third, the increased scrutiny over the ownership and use of bank accounts under the Bank Secrecy Act (BSA) has meant that criminals have to find new ways to hide their money. Fourth, by safeguarding wealth in assets where ownership interests are hard to trace, criminals can protect their wealth from asset recovery efforts in their home jurisdiction, whether from legitimate authorities or the next usurper of power. It is especially attractive for money launderers to use real estate in countries with strong rule of law protections like the U.S. At the same time, real estate transactions – both commercial and residential – are subject to limited oversight in the U.S. This is especially true for all-cash purchases or purchases made without a loan from entities with AML program and SAR requirements under the Bank Secrecy Act (BSA). As such, all-cash transactions and transactions financed by unregulated private lenders are particularly high risk, as these types of transactions are not subject to scrutiny on source of funds or identification of a beneficial owner. This makes it easy for criminals to hide ownership of these assets, while at the same time being able to flaunt in plain sight the evidence of ill-gotten wealth. Anonymous purchases of real estate combined with a lack of AML/CFT requirements on real estate gatekeepers, is a key vulnerability in the U.S. exploited by illicit actors.

GFI’s case analysis revealed that techniques aimed at obfuscating the identity of the real owner are the most popular money laundering techniques. At least 82% of the analyzed cases used a corporate structure of some kind, and 53%

⁷⁷ Global Financial Integrity (2021). “Acres of Money Laundering: Why U.S. Real Estate is a Kleptocrat’s Dream.” p. 14.

<https://gfintegrity.org/report/acres-of-money-laundering-why-u-s-real-estate-is-a-kleptocrats-dream/>

⁷⁸ Ibid, p. 16.

⁷⁹ Ibid, p. 20.

involved the use of third parties, such as family members, business associates, or lawyers to hide the true beneficial owner of the property.⁸⁰

Additionally, gatekeepers have repeatedly facilitated real estate money laundering through willful blindness or direct complicity. The absence of any AML requirement creates a safe space where uncomfortable questions are never asked by attorneys, real estate agents, title and escrow companies or investment advisers. In GFI's analysis, cases involving politically exposed persons (PEPs), high net worth individuals (HNIs) or ultra-HNIs especially showed a higher degree of use and involvement of gatekeepers in the money laundering scheme, because they have the resources to employ a network of gatekeepers to integrate their ill-gotten gains into the financial system.⁸¹ The GFI study further found that the top gatekeeper utilized to facilitate money laundering schemes are lawyers, who can help form the corporation buying the property, act as a registering agent, funnel money for the property purchase through their firm's accounts, or act as a director or front man of the legal entity that owns the real estate. In its 2018 and 2020 national money laundering risk assessment, the U.S. Treasury Department indicated that the use of interest on lawyer trust accounts (IOLTAs) pose a particularly high money laundering risk, because they anonymize money transmissions without much oversight by banks.⁸² Another oft used and high-risk service provided by lawyers is acting as a registering agent for anonymous companies or trusts used to purchase real estate.

The origin of the buyer and its money can also be a key risk indicator. GFI found that the majority of real estate money laundering cases in the U.S. involved foreign sources of money. Of the reported cases between 2015 and 2020, 82% involved money from abroad, with countries from Latin America constituting the bulk of cases, while cases from Asia constituted the highest value of money laundered through U.S. real estate.⁸³ The report's findings also found the significant involvement of politically exposed persons (PEPs) in real estate money laundering cases. Well over half of the cases analyzed by GFI involved a PEP, with the top three PEP countries all from within the Western hemisphere (Mexico, Venezuela, and Guatemala), followed by Malaysia and Nigeria.⁸⁴

23. What are the money laundering risks associated with all-cash purchases of real estate by natural persons?

There are several real estate money laundering methodologies that do not involve the use of legal entities. One significant shortcoming of the GTOs is their limited application to only one money laundering typology of all-cash purchases made by specific legal vehicles. As such, the GTOs ignore many other real estate money laundering typologies that can be conducted by natural persons without the involvement of a legal entity. Money laundering risks associated with all-cash purchases of real estate by natural persons include the use of third parties, overvaluation and undervaluation schemes, and successive sales schemes.

The GFI study referenced throughout this report found that the use of third parties was the second most popular real estate money laundering technique, behind the use of company structures. In over half (53.57%) of the identified cases, third parties such as family members, business associates, lawyers or other real estate professionals were used to hide the true beneficial owner of the property.⁸⁵ These third parties are used to purchase a property and act

⁸⁰ Global Financial Integrity (2021). "Acres of Money Laundering: Why U.S. Real Estate is a Kleptocrat's Dream." p. 16. <https://gfintegrity.org/report/acres-of-money-laundering-why-u-s-real-estate-is-a-kleptocrats-dream/>.

⁸¹ Ibid, p. 29.

⁸² U.S. Department of Treasury (2020). National Strategy for Combating Terrorist and Other Illicit Financing 2020. <https://home.treasury.gov/system/files/136/National-Strategy-to-Counter-Illicit-Financev2.pdf>; U.S. Department of Treasury (2018). National Money Laundering Risk Assessment 2018. https://home.treasury.gov/system/files/136/2018NMLRA_12-18.pdf.

⁸³ Global Financial Integrity (2021). "Acres of Money Laundering: Why U.S. Real Estate is a Kleptocrat's Dream." p. 16. <https://gfintegrity.org/report/acres-of-money-laundering-why-u-s-real-estate-is-a-kleptocrats-dream/>.

⁸⁴ Ibid.

⁸⁵ Global Financial Integrity (2021). "Acres of Money Laundering: Why U.S. Real Estate is a Kleptocrat's Dream." p. 28. <https://gfintegrity.org/report/acres-of-money-laundering-why-u-s-real-estate-is-a-kleptocrats-dream/>.

as the legal owner, which provides distance between the illicit funds and the money launderer, disguises ownership and can make discovery and seizure of property difficult. For example, in a case from Illinois, a licensed real estate broker used his own name to purchase residential properties to conceal the true buyer, who was a suspected drug trafficker.⁸⁶

In addition to all-cash purchases of real estate, money laundering risks are also present in financed transactions by natural persons. For example, Paul Manafort allegedly laundered money he made while advising a pro-Russian regime in Ukraine, through mortgage schemes. After he purchased a \$2.85 million condo in Manhattan through a shell company, he transferred the unit into his own name and then borrowed money against it with a value exceeding the home value. To obtain the \$3.4 million loan, Manafort falsely told the bank that the property was a second home for his daughter, while in reality he rented it out on Airbnb. Additionally, he caused an insurance broker to provide false information to the bank through an outdated insurance report, thereby hiding a previous mortgage on the property.⁸⁷

24. Is it possible to estimate the extent to which residential property values are affected by money laundering transactions? Is there a similar estimate for commercial real estate?

Real estate money laundering can lead to a distortion in real estate prices, adversely affecting housing affordability and harming small businesses within the community. It is difficult to assess the extent to which money laundering activities affect property values, but such estimates do exist for real estate markets overseas. For example, a Canadian study on 'Money Laundering in British Columbia Real Estate' found that the degree of money laundering activity in British Columbia had raised housing prices, contributing to BC's affordability issue. The panel estimated that money laundering in British Columbia made housing prices "3.7 percent to 7.5 percent higher than they would be in the absence of all money laundering".⁸⁸

Moreover, there is a growing body of research connecting certain real estate transactions that are high risk for money laundering to issues of housing affordability.⁸⁹ This includes real estate transactions with foreign, corporate, and other opaque ownership structures. A study by the Institute for Policy Studies examined the luxury housing boom in Boston and found that 35% of the examined units were owned by LLCs or trusts, obfuscating the real beneficial owner. Among the negative impacts of the "luxury boom" in Boston identified by the study are higher land and housing costs and higher risks of criminal activity including money laundering and tax avoidance.⁹⁰ Additionally, a 2015 study by a think tank in the UK found that overseas investments were causing prices to rise across the UK housing market.⁹¹ Similarly, the Pandora Papers investigation in 2021 revealed that offshore trusts "holding hundreds of millions of dollars for the Legion of Christ, a wealthy Roman Catholic order disgraced by an international pedophilia scandal" secretly held ownership stakes in "residential buildings in Florida, Texas, Iowa, Indiana, and Illinois."⁹² A new report from the Anti-Corruption Data Collective (ACDC) examines the existing literature around money laundering and real estate. The

⁸⁶ FinCEN (2021) "FinCEN Recognizes the Significant Impact of Bank Secrecy Act Data on Law Enforcement Efforts" <https://www.fincen.gov/news/news-releases/fincen-recognizes-significant-impact-bank-secrecy-act-data-law-enforcement>

⁸⁷ Andrews, J. (2018, August 10). Why financial criminals use real estate to launder money. Curbed. <https://archive.curbed.com/2018/8/10/17674584/money-laundering-real-estate-paul-manafort-trial>.

⁸⁸ Expert Panel on Money Laundering in BC Real Estate (2019) "Combating Money Laundering in BC Real Estate". p. 57. https://news.gov.bc.ca/files/Combating_Money_Laundering_Report.pdf.

⁸⁹ FACT Coalition (2021). "The Global is Local - Linking the Fight against Corruption with Fair Housing in the U.S." (video). <https://thefactcoalition.org/video-september-9th-panel-the-global-is-local/>.

⁹⁰ Institute for Policy Studies (2018) "Towering Excess: The Perils of the Luxury Real Estate Boom for Bostonians" p.2-3. <https://inequality.org/wp-content/uploads/2018/09/Towering-Excess-Report-Final.pdf>

⁹¹ Collinson, P. (21 Nov, 2015) "Is it time to close the door to foreign buyers of British property?", The Guardian. <https://www.theguardian.com/money/blog/2015/nov/21/foreign-buyers-british-property>

⁹² Woodman, S. (Oct 5, 2021) "As Catholic order fought sex abuse claims, secret trusts devoted to it poured millions into American rental properties" <https://www.icij.org/investigations/pandora-papers/legion-of-christ-us-property-evictions-offshore/>

report identified a Singaporean study which found that “cross-border cash limits and enhanced real estate agent regulations lead to a reduction in the price of properties purchased by persons linked to offshore shell companies.”⁹³

In the rental market, rising levels of corporate ownership and opaque ownership structures are associated with predatory tendencies including poor maintenance, rising rents and fees, harassment, and eviction of tenants.⁹⁴ There are many large corporate landlords who hide their ownership behind a web of LLCs, allowing them to evade accountability for poor living conditions. Generally, corporate ownership can be linked to vacancy and speculation in the rental market, which can also lead to rising price levels in the real estate market.

Beyond housing affordability alone, real estate money laundering activities in the commercial sector can have devastating effects on local economies generally. For example, the commercial real estate investments by two Ukrainian oligarchs, Ihor Kolomoisky and Gennadiy Bogoliubov, left a trail of destruction across the U.S.⁹⁵ The duo built a commercial real estate empire in the U.S. allegedly to hide the billions of dollars they misappropriated from PrivatBank, one of the largest banks in Ukraine – only to default on mortgages, mismanage their office towers and leaving former factory employees jobless after deserting their manufacturing and steel plants.⁹⁶

25. What are the money laundering risks of commercial versus residential transactions?

Money laundering risks exist in both residential and commercial real estate transactions. However, as commercial real estate transactions are more complex in process, financing and in the makeup of its investors, the risks are different and warrant a separate, more tailored AML approach.⁹⁷

First, commercial real estate usually involves multiple ownership interests, which makes identification of the beneficial owner much more complex than in residential real estate transactions. While a residential transaction typically involves one or two owners, commercial transactions usually involve contracts between two or more legal entities with ownership chains that can be extraordinarily lengthy and spread both horizontally across multiple jurisdictions, and vertically in terms of number of layers between the company acquiring the property and the beneficial owner. This means that ownership interests can be split between one legal entity or a group of conglomerates with thousands of investors, each owning a small portion. The multiplicity of ownership interests alone can make it challenging to identify the beneficial owner. Sometimes, the majority stake-holders of the commercial property are also the criminal actors laundering money. But in other cases where the investment has been made through indirect means, such as real estate investment funds or the EB-5 investment program, in which the criminal merely holds a small stake, identifying the beneficial owner does not help identify the money launderer. This allows criminals to launder millions without being the majority stakeholder.

Second, commercial real estate transactions are long and complicated. It is often a multi-staged process, from discovery to closing, and can involve several rounds of due diligence. A typical commercial real estate transaction

⁹³ ACDC Working Paper (2022). “The impact of ownership transparency policies on illicit purchases of US property”. Agarwal, S., Chia, L.E. & Sing, T.F. (2020). “Straw Purchase or Safe Haven? The Hidden Perils of Illicit Wealth in Property Markets.”

⁹⁴ Strategic Actions for a Just Economy (2021), “Beyond Wall Street Landlords”. https://www.saje.net/wp-content/uploads/2021/03/Final_A-Just-Recovery-Series_Beyond_Wall_Street.pdf.

⁹⁵ Michel, C. (17 Oct, 2021) “A Ukrainian Oligarch Bought a Midwestern Factory and let it Rot. What was Really Going On?” <https://www.politico.com/news/magazine/2021/10/17/ukrainian-oligarch-midwestern-factory-town-dirty-money-american-heartland-michel-kleptocracy-515948>

⁹⁶ Michel, C. & Massaro, P. (2021, June 3). The U.S. Midwest is Foreign Oligarchs’ New Playground. Foreign Policy. <https://foreignpolicy.com/2021/06/03/the-u-s-midwest-is-foreign-oligarchs-new-playground/>

⁹⁷ Global Financial Integrity (2021). “Acres of Money Laundering: Why U.S. Real Estate is a Kleptocrat’s Dream.” p. 35 - 41.. <https://gfintegrity.org/report/acres-of-money-laundering-why-u-s-real-estate-is-a-kleptocrats-dream/>.

can easily take up to a year, but at a minimum requires a couple of months to complete.⁹⁸ Moreover, commercial transactions often deal with large sums of money coming from several debt and equity players on both sides of the deal. This means that a reporting obligation should be placed on a gatekeeper that is involved through the lifecycle of the deal and has an intimate knowledge of the parties and financial arrangements.

Third, all-cash purchases are more prevalent in commercial real estate transactions (below US\$2.5 million) than in residential real estate transactions. In 2018, 24% of all U.S. commercial real estate transactions were all-cash transactions.⁹⁹ This number is even higher when foreign investors are involved, with 58% of those commercial transactions being all-cash as of 2019.¹⁰⁰ This can be contrasted with 39% of residential real estate transactions being all-cash purchases by foreign buyers.¹⁰¹ These types of transactions, especially from AML/CFT vulnerable countries, are recognized as high-risk transactions.

Fourth, unlike residential transactions, commercial transactions can be structured and financed not only through bank loans, but also through debt and equity markets. The complexity of the financing arrangements presents its own money laundering risks that are separate from risks associated with more straightforward residential real estate transactions and include money laundering vulnerabilities unique to capital markets and capital market financing.¹⁰²

Fifth, real estate agents for commercial real estate are distinct from residential real estate. As the two types of transactions are significantly different in process, goal, clients and outcome, real estate agents serving the sectors may also be different. Therefore, outreach and guidance on AML compliance rules must be individually targeted to real estate agents that serve these distinct markets.

Sixth, pricing of commercial properties is less transparent than the pricing of residential properties. While residential real estate benefits from online real estate marketplace companies like Redfin and Zillow that provide details on historical pricing and average market rates, prices on commercial real estate by comparison are non-transparent and are confined to specialized databases accessible to professionals working in the space. This in turn can make the identification of over- or undervalued properties harder.

Seventh, some entities that invest in commercial real estate are both inherently complex and high risk for money laundering. Institutional investors form the bulk of investors in the commercial real estate sector. Sovereign wealth funds (SWFs), family offices, pooled investment vehicles and citizenship through investment programs like EB-5 all invest in real estate. In recent years, SWFs like 1MDB, the Fundo Soberano de Angola,¹⁰³ and the Saudi Public Investment Fund¹⁰⁴ have faced allegations of corruption and laundering money from these funds into real estate. Similarly, EB-5 programs have been utilized to launder money that came from helping the North Korean and Iranian governments evade sanctions.¹⁰⁵ Moreover, pooled investment vehicles like private equity funds that do not have

⁹⁸ Glickman Kovago & Jacobs (2019, October 14). Why do commercial real estate deals take so long?

<https://glickmankovago.com/commercial-real-estate-deals-take-long/>.

⁹⁹ National Association of Realtors (2019). Commercial Lending Report 2019. p. 14,

<https://cdn.nar.realtor/sites/default/files/documents/2019-commercial-lendingsurvey-04-02-2019.pdf>.

¹⁰⁰ National Association of Realtors (2020). Commercial Real Estate International Business Trends. p. 8,

https://cdn.nar.realtor/sites/default/files/documents/2020-commercial-real-estate-international-business-trends-02-28-2020_0.pdf.

¹⁰¹ National Association of Realtors (2020). Profile of International Transactions in U.S. Residential Real Estate 2020. p. 4.

<https://cdn.nar.realtor/sites/default/files/documents/2020-international-transactions-in-us-residential-real-estate-08-06-2020.pdf>

¹⁰² FATF (2009). Money Laundering and Terrorist Financing in the Securities Sector. <https://www.fatf-gafi.org/media/fatf/documents/reports/ML%20and%20TF%20in%20the%20Securities%20Sector.pdf>.

¹⁰³ Mendes, C. (2019, March 23). Angola Says it Recovers \$3.35 billion of assets from Quantum. Bloomberg.

<https://www.bloomberg.com/news/articles/2019-03-23/angola-says-it-recovers-3-35-billion-of-assets-from-quantum>.

¹⁰⁴ Logan, T. (2021, March 30). How eight fancy Boston condos figure into fight over the Saudi throne. The Boston Globe.

<https://www.bostonglobe.com/2021/03/30/business/how-eight-fancy-boston-condos-figure-into-fight-over-saudi-throne/>.

¹⁰⁵ United States v. \$4,083,935.00 of funds associated with Dandong Chengtai Trading Limited,

AML/ CFT obligations have been used to launder Colombian drug money into commercial real estate.¹⁰⁶ These vulnerabilities, stemming from the absence of AML requirements for pooled investment vehicles and family offices, the lack of customer due diligence (CDD) guidance for assessing SWFs, and the difficulty in assessing source of funds for EB-5 programs, all make them high risk vehicles subject to abuse by criminal actors laundering money through commercial real estate.

Eight, there is a significant role for lawyers in commercial real estate transactions. Because commercial real estate transactions virtually always involve a corporation, LLC or LLP, additional steps are required to assess the fitness and ability of interested parties to complete the terms of the contract. Such due diligence checks are often carried out by attorneys or law firms advising parties on either side of the transaction. While the Real Estate Settlement Procedures Act (RESPA) governs residential home sales, it does not apply to commercial transactions, necessitating the more complex and drawn-out due diligence process.¹⁰⁷

Overall, criminals that launder money through commercial real estate can be particularly sophisticated money launderers because they have to navigate higher and non-transparent price points and the complexity of financing and management. These criminals will often be high net-worth individuals or high net-worth criminal enterprises that are not looking for quick and easy ways to launder their gains but have the capital to look at long-term horizons. As such, sophisticated money laundering techniques require sophisticated and nuanced solutions.

C. Which real estate transactions should FinCEN's rule cover?

The most effective way to address the wide range of real estate money laundering methodologies would be to promulgate general and traditional AML/CFT requirements for persons involved in real estate transactions by using FinCEN's authority under 31 U.S.C. 5318(h)(1)-(2) and 31 U.S.C. 5318(g)(1), including CDD and the filing of SARs. Please refer to Section G for further details. However, if FinCEN were to instead adopt a specific reporting requirement under 31 U.S.C. 5318(a)(2), the responses to questions under Sections C-F in this comment provide recommendations on how to create a strong and robust reporting regime.

26. What general factors should FinCEN consider in determining which transactions to cover?

FinCEN should consider the following factors to help develop the scope and coverage of any rule addressing the risk of money laundering in the real estate sector.

- a. The U.S. today remains the only G7 country that does not require compliance with AML/CFT requirements by professionals involved in the real estate sector.

\$500,000.00 of funds associated with Chi Yupeng [Defendants in Rem]. Forfeiture In Rem and civil complaint (2018, January 25). <https://www.courthousenews.com/wp-content/uploads/2018/01/Dandong-Chengtai-Trading-ac.pdf>. United States v. one ownership interest in the Cleveland international fund – medical mart fund et al. [Defendants in Rem]. Forfeiture In Rem and civil penalties (2018, July 18). <https://www.justice.gov/usao-dc/press-release/file/1081921/download>

¹⁰⁶ FACT Coalition, Transparency International U.S. Office & Global Financial Integrity (2021). "Private Investments, Public Harm". p. 30. <https://secureservercdn.net/50.62.198.97/34n.8bd.myftpupload.com/wp-content/uploads/2021/12/Private-Investments-Public-Harm-How-the-Massive-and-Opaque-US-Private-Equity-Industry-Fuels-Corruption-and-Threatens-National-Security.pdf?time=1643915261>

¹⁰⁷ Herrin, D. & Jared, C. "Commercial vs Residential Transactions: The complexities & needed due diligence. National Due Diligence Services." <https://www.alta.org/file.cfm?name=031418commercialvsresidential>

- b. Real estate transactions – both commercial and residential – are subject to limited oversight in the U.S, with gatekeepers involved in commercial real estate transactions having no specific reporting or due diligence obligations.
- c. The GTO policy is inadequate and insufficient to meet the existing money laundering risks in the real estate sector, for the following reasons:
 - (i) GFI’s analysis revealed that the main weakness of the GTOs is its limited geographic reach, covering only 22 metropolitan areas. Furthermore, 60.71% of the cases analyzed by GFI involved one or more non-GTO counties, thus showing that criminal behavior is not just concentrated in areas typically considered luxury real estate markets in the U.S.¹⁰⁸
 - (ii) The GTOs are limited not only by their focus on specific U.S. real estate markets, but also by applying only to *all-cash purchases* made by specific *legal vehicles*. The GTOs therefore ignore many of the other real estate money laundering typologies described including leases, successive sales, the use of third parties.¹⁰⁹
 - (iii) The GTO language does not explicitly indicate whether purchases made by trusts are effectively addressed.
 - (iv) The GTOs are implicitly biased towards *buyer-side* REML schemes by making ‘buyer identity disclosure’ the centerpiece of the GTO process. This ignores REML typologies like overvaluation, undervaluation, and renovation that are often initiated by the *seller*.
 - (v) The GTOs still place the primary responsibility of raising REML red flags on financial institutions. The GTOs only require title insurance companies to identify the beneficial owner of a real estate purchase. Based on publicly available information reported from the U.S. Treasury and the Government Accountability Office, it appears that the GTO reports are then cross-referenced with suspicious activity reports to check for any high-risk actors.¹¹⁰ Because title insurance companies are not required to ask for source of funds, it appears that unless a bank files a SAR, the REML scheme has a much lower chance of detection.
 - (vi) Title insurance is not required by law in any of the 50 states when making an all-cash real estate purchase.¹¹¹ By only making title insurance companies and their agents responsible for reporting obligations, the rule makes it very easy for high-net-worth criminal actors to get around the reporting requirements and continue their money laundering activities.
 - (vii) The GTOs do not include commercial real estate, even though GFI’s analysis revealed that 35.71% of reported cases involved commercial property.¹¹²

¹⁰⁸ Global Financial Integrity (2021). “Acres of Money Laundering: Why U.S. Real Estate is a Kleptocrat’s Dream.” p. 19.

<https://gfintegrity.org/report/acres-of-money-laundering-why-u-s-real-estate-is-a-kleptocrats-dream/>.

¹⁰⁹ For examples please refer to Global Financial Integrity (2021). “Acres of Money Laundering: Why U.S. Real Estate is a Kleptocrat’s Dream.” p. 34. <https://gfintegrity.org/report/acres-of-money-laundering-why-u-s-real-estate-is-a-kleptocrats-dream/>.

¹¹⁰ U.S. Government Accountability Office (2020). “Anti-Money Laundering: FinCEN Should Enhance Procedures for Implementing and Evaluating Geographic Targeting Orders.” <https://www.gao.gov/assets/gao-20-546.pdf>.

¹¹¹ Global Financial Integrity (2021). “Acres of Money Laundering: Why U.S. Real Estate is a Kleptocrat’s Dream.” p. 49. <https://gfintegrity.org/report/acres-of-money-laundering-why-u-s-real-estate-is-a-kleptocrats-dream/>.

¹¹² Ibid, p.20.

- d. Well over 50% of the reported cases in the U.S. involved politically exposed persons, which is particularly problematic considering the lack of guidance from FinCEN on PEP identification.¹¹³
- e. 82.14% of all real estate money laundering cases reported/investigated over a five-year period involved illicit overseas money that was parked in the U.S. real estate sector.¹¹⁴

27. Should FinCEN's proposed rule be limited to residential real estate or should FinCEN cover transactions involving other forms of real estate (e.g., commercial, farmland). If you believe FinCEN should cover other forms of real estate, should FinCEN do so in conjunction with the regulation of residential real estate transactions or separately?

For any rulemaking to be meaningful, it must address both residential and commercial real estate. *The New York Times* investigation into shell company ownership of real estate in New York provided evidence as early as 2017 that the Iranian government for two decades was able to own and make profit through valuable U.S. commercial real estate in New York.¹¹⁵ Since then, there have been numerous other high-profile examples of money laundering in commercial real estate, including investments made through the 1MDB scam, the Ukrainian oligarch Kolomoisky laundering money through Ohio, West Virginia, and Kentucky and, more recently, news reports indicating that luxury New York apartments are being built with Kazakh finances that have shadowy origins.¹¹⁶ Yet, there has been no rulemaking similar to target the commercial real estate sector. Moreover, data from the National Association of Realtors indicates that 24% of commercial real estate transactions under \$2.5 million in the U.S. are all-cash, and furthermore 58% of commercial real estate investments by foreign buyers are all-cash purchases.¹¹⁷ Laundering continues unabated because there is no rule to target these transactions within the commercial sector.

While the rulemaking might require distinct requirements for commercial and residential transactions, FinCEN is strongly urged that any rule must be issued without delay to target the ongoing high-risk money laundering threat in both commercial and residential real estate.

Expand the scope of 'Covered Transaction'

FinCEN should also additionally expand the types of transactions covered under any new rule to include transfers of ownership (i.e., change in ownership of real estate that does not constitute a sale). The current real estate GTO defines 'Covered Transaction' to only refer to *purchases* of residential real property by a legal entity. However, numerous cases of real estate money laundering involve the transfer of ownership or creation of equitable interest in the property *without an actual sale*. For example, India's largest TBML fraudster Nirav Modi transferred his New York property to his wife by transferring the company that held the property to a trust established by his sister for the benefit of his wife and children.¹¹⁸ Similarly, a property owned by a hypothetical 'Mr. A' through ABC LLC as part of a money laundering scheme, could be easily transferred to 'Ms. B' by simply changing the ownership of ABC LLC. Another scenario is where the title deed is directly altered to reflect a change in ownership. Therefore, the term 'Covered

¹¹³ Ibid, p. 66 - 70.

¹¹⁴ Ibid, p. 24.

¹¹⁵ Wang, V. (2017, June 29). Manhattan Skyscraper Linked to Iran can be seized by U.S., Jury finds. *The New York Times*. <https://www.nytimes.com/2017/06/29/nyregion/650-fifth-avenue-iran-terrorism.html>

¹¹⁶ Gould, J. (Jan 13, 2022). "How shady Kazakh cash is building NYC's poshest pads". *New York Post*. <https://nypost.com/2022/01/13/how-shady-kazakh-cash-is-building-nycs-poshest-pads/>

¹¹⁷ Global Financial Integrity (2021). "Acres of Money Laundering: Why U.S. Real Estate is a Kleptocrat's Dream." p. 33. <https://gfintegrity.org/report/acres-of-money-laundering-why-u-s-real-estate-is-a-kleptocrats-dream/>.

¹¹⁸ Srivas, A. (2018, September 2). Months before PNB scam blew up, Nirav Modi bought property in New York. *Business Standard*. https://www.business-standard.com/article/current-affairs/months-before-pnb-scam-blew-up-nirav-modi-bought-property-in-new-york-118090200078_1.html.

Transaction' should be expanded to include any a) transfer of ownership or b) creation of equitable interest, c) wholly or in part, d) directly or indirectly in the property.

28. How should FinCEN define “residential real estate”?

29. How should FinCEN define “commercial real estate”?

Residential Real Estate

The 'Frequently Asked Questions' section of the current real estate GTO clarifies the term “Residential real property” to mean “real property (including individual units of condominiums and cooperatives) designed principally for the occupancy of from one to four families.”¹¹⁹ The FAQ on its own leaves much room for interpretation: it is unclear based on the clarification of the term provided by FinCEN if a condominium with one-hundred units that is designed principally for the occupancy of one to four families would also technically be subject to reporting requirements. If FinCEN's intent is to restrict the definition to cover only individual purchases of residential property, the definition should necessarily reflect that. Examining this issue further, the use of the term ‘1 to 4 family residential property’ is a common industry standard and is also a term defined in law. Section [12 CFR § 1263](#), which concerns federal home loan banks, defines the term to mean:

- “(1) Real property that is solely residential, including one-to-four family dwelling units or more than four family dwelling units if each dwelling unit is separated from the other dwelling units by dividing walls that extend from ground to roof, such as row houses, townhouses, or similar types of property;*
- (2) Manufactured housing if applicable State law defines the purchase or holding of manufactured housing as the purchase or holding of real property;*
- (3) Individual condominium dwelling units or interests in individual cooperative housing dwelling units that are part of a condominium or cooperative building without regard to the number of total dwelling units therein; or*
- (4) Real property which includes one-to-four family dwelling units combined with commercial units, provided the property is primarily residential.*

A plain reading of this definition would suggest that the term includes individual condominium units, cooperative housing, row houses, and any combination of real property with commercial units as long as the property is primarily residential. The same regulations also define the term ‘dwelling unit’ to mean “a single room or a unified combination of rooms designed for residential use.”¹²⁰ (1) and (3) of the definition state “one-to-four family dwelling units or more than four family dwelling units if each dwelling unit is separated from the other dwelling units by dividing walls that extend from ground to roof such as row houses, townhouses, or similar types of property” and “that are part of a condominium or cooperative building without regard to the number of total dwelling units therein,” both suggesting that the number of units does not restrict the classification of the property as residential. This would mean that a private equity firm that bought a street of row houses and subsequently leased it, would not have engaged in a commercial real estate transaction for the purposes of these regulations, even if the transaction is for investment purposes to turn a profit.

While the term ‘multifamily property’ is not included in the GTO, the definition for multifamily property under the same subchapter [12 CFR § 1263](#) provides valuable information on the limits of the term one to four family property.¹²¹

As per the regulations, the term ‘multifamily property’ means:

- “(1) Real property that is solely residential and includes five or more dwelling units;*
- (2) Real property that includes five or more dwelling units combined with commercial units, provided that the*

¹¹⁹ FinCEN (Oct 29, 2021). “Frequently Asked Questions.” p.2. https://www.fincen.gov/sites/default/files/shared/REGTO1121_FAQ.pdf

¹²⁰ [12 CFR § 1263.1](#)

¹²¹ Ibid.

property is primarily residential; or
(3) Nursing homes, dormitories, or homes for the elderly.”

Reading the three definitions together, there appears to be a fair amount of confusion even within industry about what is covered by the term ‘multi-family’ and ‘one to four family residential property.’ It is unclear if purchasing 100 units of a ‘one to four family property’ would mean that the property now falls under the multi-family property definition and would therefore be treated as commercial, or, irrespective of how many units are purchased, the definition of ‘one to four family property’ is only meant to provide information on the property type (i.e. rowhouse, condominium, apartment etc.). This confusion goes to the very heart of the issue that FinCEN is seeking to define and cover. A discussion thread within industry provides numerous examples of this confusion, with one specific example cited where a single owner purchased 300 plus units in a condominium that was reported as a ‘one to four family residential property.’¹²² A 2010 newsletter from the Federal Financial Institutions Examination Council also addresses the question and states: *“Incorrect reporting of the “multifamily dwelling” property type often occurs due to a misunderstanding of the HMDA definition of multifamily dwelling.”*¹²³

Unless the intention of FinCEN is to treat residential and commercial under one single rule, it is necessary that FinCEN provides a clarification on whether the number of units purchased of a ‘one to four family property’ has any bearing on it continuing to be classified as “one to four family property” and therefore as ‘residential real property’. Bearing in mind this confusion with a term that already has a pre-existing definition, it is recommended that FinCEN adopt a definition for residential real estate that intends to target individual ownership,¹²⁴ or ownership that would qualify as a mom-and-pop landlord - usually 5 units or under.¹²⁵ The definition should also include property that is mixed used but that is still primarily residential.

Commercial Real Estate

Based on the considerations provided above, commercial real estate transactions should be defined to address the complexity of deal types, actors involved, and financing arrangements. A definition for ‘commercial real estate’ should aim to identify:

- a. Ownership of residential real property that is commercial in nature, i.e., with the purpose of generating income - including the acquisition of apartments, nursing homes and student dwellings with the purpose of reselling or leasing;
- b. Ownership of any real property that can be used for business or income generation (offices, retail space, hotels etc.);
- c. Include land that is used as, suitable for being used as, or being developed into property as described under a) or b).

¹²² BankersOnline.com Forum (2011 - 2016). “Multifamily or 1-4 family???”

<https://www.bankersonline.com/forum/ubbthreads.php/topics/1514969/multifamily-or-1-4-family>

¹²³ CRA HMDA Reporter (December 2010). <https://www.ffiec.gov/hmda/pdf/10news.pdf>

¹²⁴ Including isolated or incidental transactions

<https://codelibrary.amlegal.com/codes/newyorkcity/latest/NYCrules/0-0-0-38974>

¹²⁵ Strategic Actions for a Just Economy (2021), “Beyond Wall Street Landlords”. pp. 10, 22. https://www.saje.net/wp-content/uploads/2021/03/Final_A-Just-Recovery-Series_Beyond_Wall_Street.pdf.

In applying any definition of commercial real estate, FinCEN should also look to see how the phrase “to do business” is defined across all 50 states with respect to real estate. This is essential to ensure that no real estate transactions are inadvertently excluding from any proposed rule.¹²⁶

30. Should FinCEN’s proposed rule be limited to transactions involving legal entities or should it cover natural persons as well? If not, why?

31. Assuming FinCEN’s proposed rule is limited to purchases by legal entities, which legal entities should any rule cover? Is the definition of “legal entity” in the Real Estate GTOs too broad or too narrow? Should trusts be covered?

FinCEN’s proposed rule should cover all legal entities that can be used to acquire and hold real estate. Currently, it appears that the GTOs, barring the exception of one non-public GTO,¹²⁷ do not include trusts.¹²⁸ As detailed in response to Question 4 under section A, trusts should be covered because a growing percentage of real property used for residential purposes is owned through trusts and various reports and cases have provided evidence on the use of trusts to hide money laundering and corruption. Additionally, since the passage of the CTA, it is believed that the new beneficial ownership registry created under FinCEN will capture beneficial ownership details of legal entities that are created or registered to do business in the U.S. However, because of the qualification of the term ‘to do business’, real estate purchases for residential purposes using foreign LLCs and foreign trusts would not always be covered. Additionally, U.S.-based family trusts are not required to be registered with the State. This again may exclude them from the purview of the Corporate Transparency Act.

U.S. and foreign family trusts have been used to launder money through properties in the Washington, D.C. area by PEPs such as Yahya Jammeh, the former President of the Gambia,¹²⁹ and Francis Selemani, the brother of former DRC president Joseph Kabila.¹³⁰ This weakness in the Corporate Transparency Act means that, even though a transfer of ownership of residential real estate held by a US legal entity that does not constitute a sale will get captured by the BO registry by virtue of the requirements under the Corporate Transparency Act,¹³¹ this is not the case when a transfer or change in interest is through a foreign legal entity, foreign trust or U.S. family trusts.

GFI recommends that all these transactions by these different classes of legal entities/legal arrangements be included in any prospective rule. By only applying to certain classes of entities, it would allow money launderers and criminals to abuse the gaps in the language of the Corporate Transparency Act and the manner in which information is housed in FinCEN’s beneficial ownership registry.

Finally, transactions by natural persons should also be covered. GFI’s analysis revealed that reported money laundering schemes do not always involve a legal entity. Some schemes use third parties or use overvaluation and undervaluation which is initiated by the seller and not always disguised through a legal entity. The example of Harvard University’s fencing coach overvaluing his home to mask what in effect was a bribe payment is one such excellent

¹²⁶ Wolters Kluwer (2020). “What Constitute Doing Business, 2020 Edition”. <https://www.wolterskluwer.com/en/expert-insights/what-constitutes-doing-business>.

¹²⁷ ACDC Working Paper (2022). “The impact of ownership transparency policies on illicit purchases of US property”.

¹²⁸ FinCEN (Oct 29, 2021). “Geographic Targeting Order”.

https://www.fincen.gov/sites/default/files/shared/REGTO1121_Generic%20Order.pdf

¹²⁹ Global Financial Integrity (2021). “Acres of Money Laundering: Why U.S. Real Estate is a Kleptocrat’s Dream.” p. 48.

<https://gfintegrity.org/report/acres-of-money-laundering-why-u-s-real-estate-is-a-kleptocrats-dream/>.

¹³⁰ The Sentry (November 2021) “Embezzled Empire. <https://cdn.thesentry.org/wp-content/uploads/2021/11/EmbezzledEmpire-TheSentry-Nov2021.pdf>.

¹³¹ Hahn Loeser & Parks LLP (August, 2021). “The Corporate Transparency Act To Take Effect in The Coming Year: What Business Owners Need to Know”. <https://www.jdsupra.com/legalnews/the-corporate-transparency-act-to-take-7949272/>

example.¹³² An example on the use of third parties by natural persons includes a case from Illinois, where a licensed real estate broker used his own name to purchase residential properties to conceal the true buyer, who was a suspected drug trafficker.¹³³

32. Should FinCEN's proposed rule be limited to non-financed transactions (all-cash)?

33. Assuming FinCEN's proposed rule is limited to non-financed transactions, how should FinCEN define the term "non-financed transaction"?

FinCEN's proposed rule should a) not just be limited to 'non-financed' transactions, but if FinCEN's proposed rule is limited to non-financed transactions b) the term 'non-financed' should not be treated as a synonym for 'all-cash' transactions.¹³⁴ Additionally, there are differing impacts on commercial and residential real estate transactions if a reporting obligation is restricted simply to non-financed transactions. These are laid out below and must be considered before a reporting obligation defines 'non-financed' to mean simply 'all-cash', which would inadvertently create numerous money laundering loopholes that renders any proposed rule ineffective.

The term 'financing' in real estate transactions means and could include several things:

- a. Mortgage or loan provided by a financial institution regulated by the Bank Secrecy Act with a requirement to conduct AML/CFT due diligence;
- b. Financing through a private lender;
- c. Financing provided by the seller;
- d. Financing provided by non-bank residential mortgage lenders and originators that fall under the BSA but are subject to state regulation;
- e. Financing provided by a bank located overseas through an international mortgage or overseas mortgage for high net-worth clients.¹³⁵

For commercial real estate transactions, in addition to the financing options listed above, financing is also provided by:

- f. Private Equity, Venture Capital, and other pooled investment vehicle financing;
- g. Issuance of bonds, Debt funds, REITs, and other forms of capital market financing;
- h. Institutional Investors like pension funds and sovereign wealth funds;
- i. Crowdfunding platforms;
- j. EB-5 investment programs.

While the Bank Secrecy Act requires certain financial institutions such as banks, credit unions and mortgage companies to conduct AML/CFT checks when they provide financing,¹³⁶ this same requirement to conduct AML/CFT due diligence does not exist for real estate transactions 'financed' through e.g., the seller, private lender, pooled investment vehicles, and capital market financing. For example, the latest of four forfeiture complaints for proceeds of alleged fraud and theft from PrivatBank in the Ukraine seeks the forfeiture of a property for which seller financing

¹³² See further details on this case in response to questions 32 and 33 below.

¹³³ FinCEN (2021) "FinCEN Recognizes the Significant Impact of Bank Secrecy Act Data on Law Enforcement Efforts" <https://www.fincen.gov/news/news-releases/fincen-recognizes-significant-impact-bank-secrecy-act-data-law-enforcement>

¹³⁴ A detailed response on how the lines between financed and all-cash can be blurred is provided in response to Question 2 and 3 under Section A.

¹³⁵ HSBC. "How to finance an overseas property". <https://internationalservices.hsbc.com/buy-property-abroad/how-to-finance-an-overseas-property/>

¹³⁶ The Bank Secrecy Act (BSA), [31 USC 5311](#)

was used.¹³⁷ Even amongst financial institutions, FATF's 2016 evaluation found that Residential Mortgage Lenders and Originators (RMLOs) "do not seem to be aware of the PEPs requirement" and had a "...low understanding of risks...(which) reflected in the very low number of SARs being reported by them."¹³⁸ This evaluation by the FATF of an entity that has AML/CFT due diligence requirements is particularly concerning and relevant because GFI's own analysis into the issue of real estate money laundering and PEPs showed a disproportionate number of reported cases (i.e. 53.57%) of money laundering through real estate involved a PEP.¹³⁹ Additionally, a 'financed' real estate transaction could mean financing provided by a bank in high-risk jurisdictions where the AML/CFT compliance is not as robust as that in the United States. Financing in that context could also include line of credit facilities provided by a bank in an offshore jurisdiction that runs into the hundreds of thousands or millions of dollars for high-net-worth individuals or large enterprises.

Finally, at best the term 'financed' only addresses the AML/CFT risk of the buyer, because a bank or other BSA-regulated entity would only conduct CDD checks on the client applying for a loan. This, in turn, excludes any due diligence requirements for the 'seller' and, as GFI's analysis revealed, seller-initiated money laundering schemes are also typical typologies within the sector. For example, in 2016, Harvard's former fencing coach Peter Brand accepted bribes in the college admission scandal in the form of an overvalued home sale. The \$1 million sale of his home in Needham, MA caught the attention of Needham's Director of Assessing. Given that the assessed value of the home was only \$550,000, he noted that there was "no rhyme or reason for the sale price [of the home]." The buyer of the overpriced home was a businessman from Maryland who resold it at a \$324,000 loss 17 months later. The real return on his investment? His son was admitted to Harvard and joined the fencing team soon after the acquisition of the home.¹⁴⁰

It is also important to note that when it comes to real estate transactions, there is an effectiveness issue even amongst banks. GFI's analysis of real estate money laundering cases in the U.S. across a five-year period found cases where money launderers were able to secure millions in loans to make real estate purchases. For example, the former governor of Tamaulipas, Tomas Yarrington, used shell companies registered in names of his associates to obtain millions in loans to purchase real estate in Texas.¹⁴¹ Alternatively, there are cases where money launderers used their illicit gains to pay off a mortgage, thereby integrating the dirty money back into the financial system. For example, an Alaskan resident used embezzled funds from his employer to pay off his mortgage.¹⁴²

Nevertheless, if FinCEN's proposal is to limit the reporting obligation only to 'non-financed' transactions for residential real estate transactions, the term 'financed' transactions should be very narrowly defined to include only financing provided by:

- a. Financial institutions that are based in the U.S. and that have full AML/CFT obligations under the Bank Secrecy Act.¹⁴³

Commercial Real Estate Transactions:

With residential, while not ideal, it is still possible to capture a significant number of risks if the definition of the term 'financed' is kept purposefully narrow and the term 'non-financed' is not simply used as a synonym for 'all-cash'

¹³⁷ Department of Justice (Jan 20, 2022). "United States Files Civil Forfeiture Complaint for Proceeds of Alleged Fraud and Theft from PrivatBank in Ukraine". <https://www.justice.gov/opa/pr/united-states-files-civil-forfeiture-complaint-proceeds-alleged-fraud-and-theft-privatbank>

¹³⁸ Global Financial Integrity (2021). "Acres of Money Laundering: Why U.S. Real Estate is a Kleptocrat's Dream." p. 66. <https://gfintegrity.org/report/acres-of-money-laundering-why-u-s-real-estate-is-a-kleptocrats-dream/>.

¹³⁹ Ibid.

¹⁴⁰ Ibid, p. 87.

¹⁴¹ Ibid, p. 31.

¹⁴² Ibid, p.85.

¹⁴³ Bank Secrecy Act, 1970 [31 USC 5311](#)

transactions. However, this distinction would be artificial for commercial real estate transactions and create both an impossible regulatory burden and a plethora of convenient loopholes for money launderers to exploit.

As set out in answers to Question 2 under Section A and Question 25 under Section B, it is not atypical for commercial real estate transactions to involve multiple legal entities that act together to make a purchase. Even if a proposed rule were to exclude from its reporting obligations transactions that received financing from a financial institution with full AML/CFT obligations, this would in no way curb the money laundering risk. A financial institution under its AML/CFT program would be only required by law to conduct customer due diligence on its client (i.e., in this case the party requesting the loan). If a high-net worth individual has acquired their money through corruption or fraud and decides to invest in commercial real estate with an investment partner who applies for the loan, as in the case of Jho Low in the 1MDB scam or Kolomoisky in the Privat Bank scandal, a financial institution would be under no obligation to carry out AML/CFT checks on them, unless they too were making a request for financing. Additionally, in a commercial real estate transaction, financing from an institution that has a robust AML/CFT program can apply to only one part of the deal that can easily be spun off into a separate legal entity. Requiring financing to apply to the whole deal or a portion of it, creates unnecessary burden for both FinCEN and for industry that must subsequently make complicated assessments to determine whether the ‘financed’ carve-out would apply. Ultimately, because of the myriad ways in which a commercial deal can be structured and the absence of any requirement under law to have standard language for closing or purchase agreements, a money launderer could simply structure the financing to avail the exception that FinCEN might grant and continue to launder money through the U.S. real estate sector with little inconvenience.

Therefore, in the case of commercial real estate transactions, the term ‘financed’ would simply be too complex to narrow it down and too easy to evade. For the sake of an effective rule, it is necessary that in the case of commercial real estate transactions, irrespective of how the term ‘financed’ or ‘non-financed’ is defined, all transactions should be included.

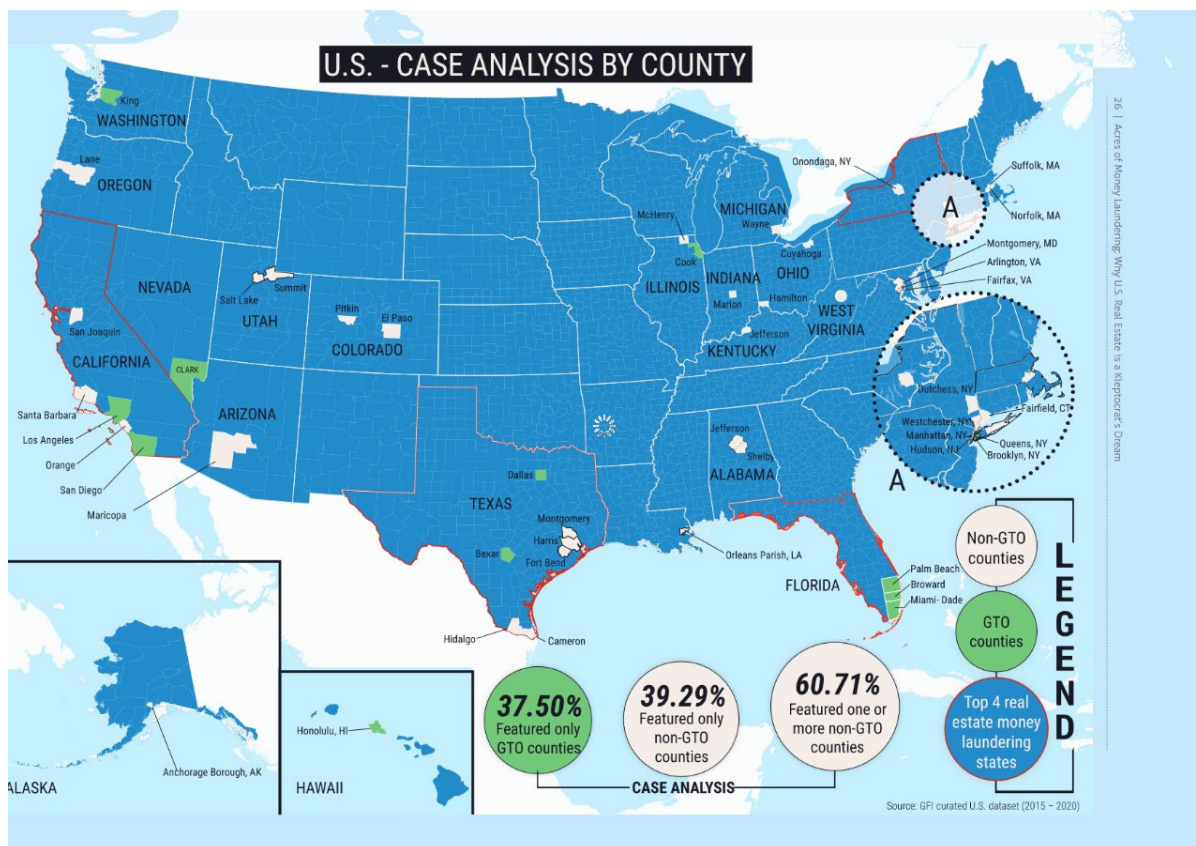
34. Should FinCEN geographically limit the scope of any proposed regulation?

No, the proposed regulation should not be geographically limited in scope. The risk of money laundering in the real estate sector exists across the U.S. and is not concentrated in specific cities or counties that are typically considered luxury real estate markets. To appropriately address this risk, the proposed real estate transparency regulation should have nationwide coverage.

The main weakness of the current regulatory regime of Geographic Targeting Orders (GTO) is its limited geographic reach, covering only 22 metropolitan areas. GFI’s analysis of real estate money laundering cases between 2015 and 2020 revealed that criminal behavior took place across 25 states, even though only select counties in nine of these states are subject to a GTO. Particularly revealing is that 64% of cases occurred in states that have never been subject to a GTO, including real estate money laundering cases tied to Iranian sanctions evasion that occurred in Alaska¹⁴⁴ and a host of other non-GTO counties. Even when the analysis is broken down to look at occurrences of real estate money laundering on a county basis, 60.71% of the cases included at least one or more counties that were not subject to a GTO. Moreover, the number of cases that involved only non-GTO counties (39.29%) exceeded the number of cases that only involved GTO counties (37.50%) (see diagram below).¹⁴⁵ These findings demonstrate that geographically limited regulations do not appropriately address the scope of the real estate money laundering risks within the U.S.

¹⁴⁴ U.S. Department of Justice. (2020, June 3). Justice Department Seeks Forfeiture of More than \$20 Million in Assets Relating to Unlawful Use of U.S. Financial System to Evade and Violate Iranian Sanctions. <https://www.justice.gov/opa/pr/justice-department-seeksforfeiture-more-20-million-assets-relating-unlawful-use-us-financial>

¹⁴⁵ Global Financial Integrity (2021). “Acres of Money Laundering: Why U.S. Real Estate is a Kleptocrat’s Dream.” p. 19-20, 25-27. <https://gfintegrity.org/report/acres-of-money-laundering-why-u-s-real-estate-is-a-kleptocrats-dream/>.



Moreover, compliance with a proposed regulation that does not apply everywhere across the U.S. could be more burdensome for industry actors. Under a geographically limited rule, covered professionals would first have to check for every transaction whether it is within the regulation's scope. This potentially reduces overall efficiency and raises costs for compliance. A new rule that makes the reporting requirement applicable to the whole country would provide a more effective way for reporting entities and enforcement agencies to monitor and curb serious money laundering risks to the U.S. real estate sector.

35. Are there any jurisdictions or geographic areas within the United States in which residential real estate transactions have unique customs or requirements that would make designing a rule to cover such jurisdictions in conjunction with the remainder of the country problematic?

Please refer to the answers for Question 5 under Section A and answers to Questions 37 – 42 under Section D.

36. Should FinCEN provide a lower limit or de minimis amount for the reporting threshold for transactions?

No, the proposed regulation should not provide a monetary reporting threshold for transactions. Money laundering schemes can occur through the purchase of one property of significant value, or the purchase and sale of multiple properties with lower values. The real estate money laundering cases identified in GFI's report involve properties with a value ranging from \$200,000 to \$500 million. Money laundering schemes that involve the flipping of homes often feature low-value homes. In one example, a Las Vegas real estate broker was charged in 2018 for allegedly helping Mexican and Central American drug cartels to launder criminal profits through the purchase, renovation and sale of Las Vegas real estate.¹⁴⁶ While the total value of the money laundering scheme added up to \$250 million, one of the

¹⁴⁶ United States of America v. Luis Eduardo Rodriguez. Indictment. (2018, June 28). <https://www.justice.gov>.

properties was purchased for only \$220,000.¹⁴⁷ Similarly, in a new investigation from the *Miami Herald*, an Italian real estate developer, Antonio Velardo, along with three other individuals created a property empire in Southern Florida that did not reach the GTO trigger, providing further evidence that money laundering in the real estate sector is not solely concentrated in the high-end real estate market. Velardo and his associates used a network of companies to purchase homes that “were typically inexpensive and often purchased in foreclosure, with an average price of roughly \$120,000.”¹⁴⁸ However, “taken together the purchases added up to more than \$16 million.”¹⁴⁹ Through this scheme the perpetrators were able to purchase a total of 130 properties, primarily through cash transactions. The investigations also revealed that “a significant number of the properties were subsequently sold to linked entities, typically at a steep markup and sometimes in a matter of days.”¹⁵⁰

Finally, a dollar threshold requires reporting entities to check individually if every real property purchase meets the stated monetary trigger. This in turn makes the reporting requirement cumbersome and expensive, and limits automation efforts within the industry, thereby keeping business costs high. Eliminating the monetary threshold in a new rule will permit standardization of processes and easier monitoring of the rules both within the industry and for FinCEN.

D. Which persons should be required to report information concerning real estate transactions to FinCEN?

37. Should FinCEN require any, a subset, or all of the following entities to report information regarding non-financed transactions: (i) Real estate lawyers and law firms; (ii) real estate agents/brokers/settlement agents; (iii) title insurance companies; (iv) title and escrow agents and companies; (v) real estate investment companies; (vi) real estate development companies; (vii) real estate property management companies; (viii) real estate auctions houses; (ix) investment advisers; (x) private money lenders; and (xi) money service businesses?

38. Which financial institutions and nonfinancial trades and businesses are in a position to ascertain and report: (i) The identity of the legal entity or legal arrangement purchaser of the real estate; (ii) the natural person(s) who are the direct or indirect owners of the legal entity or arrangement purchaser; (iii) the specific details of the transactions (e.g., date of sale, location of property, sale price, and any other terms or conditions); (iv) the source of funds; (v) the form of payments (e.g., wire transfer, check, currency, etc.); (vi) the purpose of the transaction; (vii) the intended use of the proceeds of a sale; and (viii) the businesses involved in the transfer of funds?

39. What are the potential benefits and costs of promulgating a transaction reporting requirement that covered real estate brokers and agents, title agencies and/or insurance companies, or attorneys? What burden (quantify if possible) would it place on such entities?

40. What would be the best way to assign reporting requirements to ensure a reporting requirement falls on at least one financial institution or nonfinancial trade or business for every non-financed transaction by a

[gov/usao-sdny/press-release/file/1077121/download](https://www.usdoj.gov/usao-sdny/press-release/file/1077121/download)

¹⁴⁷ Osborne, L. (Jul 3, 2018). “Las Vegas Real Estate Broker Accused of Laundering Drug Money”. <https://www.occrp.org/en/daily/8280-las-vegas-real-estate-broker-accused-of-laundering-drug-money>

¹⁴⁸ Wieder, B., Dasgupta, S., Wang, K. (Jan 25, 2022). “Men tied to Italian mob money-laundering case still able to snap up South Florida properties”. *Miami Herald*. <https://www.miamiherald.com/news/business/real-estate-news/article255762051.html>

¹⁴⁹ Ibid.

¹⁵⁰ Ibid.

GLOBAL FINANCIAL INTEGRITY

1100 17th Street, NW, Suite 505 | Washington, DC | 20036 | USA
Tel. +1 (202) 293-0740 | Fax. +1 (202) 293-1720 | www.gfintegrity.org

legal entity purchaser?

41. Should FinCEN require reports from multiple financial institutions or nonfinancial trades or businesses involved in a non-financed purchase of residential real estate, or should FinCEN propose a reporting requirement via a cascading hierarchy based on the types of entities involved in a particular transaction, as is the case for IRS Form 1099-S? 82

Please refer to answers to Questions 27, 32, and 33 under Section C for a detailed response on the types of transactions that should be covered under any proposed rule. Additionally, in addition to responses under this Section, please refer to responses under Section F for a detailed response to Question 38.

At present, there exists no uniform mandatory requirement across all 50 States for a specified class of real estate professionals to be present or involved in a real estate transaction.¹⁵¹ The GTOs place the reporting responsibility on the title insurance company and its agents.¹⁵² However, title insurance is not legally required anywhere in the U.S. for all-cash purchases, and because of this it is very easy to subvert the GTO requirements if title insurance is not purchased.¹⁵³ Previous assessments of the GTOs and comments from the American Land Title Association have described the ease with which the reporting requirements can be evaded.¹⁵⁴ Therefore, for high-net worth actors seeking to launder money in the U.S. real estate market, the function of a title check, if needed, can be performed without the services of a title insurance company.

A compilation of the most common or required professionals involved in each state during the closing process of residential real estate transactions is included in response to Question 5 under Section A. The compilation, based on a wide variety of public sources, is meant to serve as an illustrative guide to the widely differing practices for residential real estate closing in the U.S. and highlights the dangers of limiting reporting requirements on real estate to a title insurance company or another singular class of real estate professional.

For any new rule to be meaningful and effective, it must account for evasion tactics that money launderers can easily exploit. A cascading rule is one such method to create a reporting obligation but also ensures that there is accountability through the process.

Any proposed cascading rule for reporting real estate transactions must address the following:

- a. The sequence of the cascade may be different for residential and commercial because the actors who are best positioned to obtain the necessary information may be different between the two. For both residential and commercial, it should include actors who have the most direct relationship with the client, are involved in all or many facets of the transaction and/or play an intermediary role in the flow of funds to purchase a property.
- b. It must cover purchases of residential and commercial real estate and address both regular real estate purchases and subsequent direct or indirect changes in ownership or creation of equitable interest in the property. Please see the table below for an overview of these types of ownership changes.

¹⁵¹ Please refer to GFI's response to Question 5 under Section A of this comment.

¹⁵² <https://www.fincen.gov/news/news-releases/fincen-renews-real-estate-geographic-targeting-orders-12-metropolitan-areas>

¹⁵³ For examples, please refer to: Global Financial Integrity (2021). "Acres of Money Laundering: Why U.S. Real Estate is a Kleptocrat's Dream." p. 49. <https://gfintegrity.org/report/acres-of-money-laundering-why-u-s-real-estate-is-a-kleptocrats-dream/>.

¹⁵⁴ American Land Title Association, letter to FinCEN re: Docket Number FINCEN-2021-0005; RIN 1506-AB49: Beneficial Ownership Information Reporting Requirements.

- c. Any cascading reporting obligation should require the entity responsible for reporting the information to FinCEN, to inform other entities lower in the hierarchy that such report has been made. This allows industry to create their own internal checks and if necessary, file a report for failure to receive such notice with FinCEN and the cascade of reporting entities that are part of the transaction.
- d. The reporting obligation should be triggered at the closing stage of the real estate transaction and should be received by FinCEN no later than 30 days (in line with other BSA filing requirements) or 90 days (in line with HUD filing requirements if it helps provide industry ease to file it concurrently with other reporting obligations) after closing. The rationale for the report being filed at the closing stage of the transaction is to ensure that the different parties in any cascading sequence have an opportunity to ensure that such a report will be filed by someone within the cascade, similar to the IRS form 1099-S.
- e. All entities reporting information under the cascade must be registered/licensed to do business in the U.S. This makes it easier for enforcement, as the professionals based in real estate transactions are often situated in multiple jurisdictions, especially in cross-border transactions (i.e., where the money laundered originates from outside the U.S.).

Considering the above reflections, GFI recommends the following cascading for a residential real estate reporting requirement:

Purchase of Residential Real Estate			
S. No	Actor	Rationale	Need for cascade
1.	Title Insurance Company or its agent	<ul style="list-style-type: none"> - Experience in reporting data to FinCEN through the GTO process. - Up to 85% of residential real estate transactions in the U.S. use title insurance according to one study.¹⁵⁵ - Title agents often simultaneously act as the escrow, closing or settlement agent. 	<p>Title insurance is not mandatory anywhere and even prohibited by law in states like Iowa, where a written legal opinion by an attorney is provided as evidence of title.¹⁵⁶</p> <p>It is also easy to circumvent title insurance in other states. While lenders generally require title insurance, an owner's policy is not required in non-financed transactions. A recent survey from ALTA indicated that 27.4% respondents did not purchase owner's title insurance and 23.7% of respondents were unsure if they purchased title insurance, suggesting there is a lower</p>

¹⁵⁵ Arrunada, B. (2001) "A Global Perspective on Title Insurance", Housing Finance International, p. 4.

<https://www.arrunada.org/files/research/ARRUNADA%202001%20A%20global%20perspective%20on%20title%20insurance.pdf>

¹⁵⁶ Iowa Title Guaranty (2021) "Iowa Title Guaranty Overview", p.3 <https://www.iowafinance.com/content/uploads/2021/06/ITG-Program-Overview-Manual.pdf>. In Iowa, if the lawyer is wrong, the homebuyer or mortgage lender can sue the lawyer for damages. State law explicitly prohibits the sale of commercial title insurance (Iowa Code § 515.48). This was upheld by the Iowa Supreme Court, finding that 'the prohibition of title insurance is necessary to protect citizens from needless consumer costs and invidious industry practices' (Chicago Title Insurance Company v. Huff).

			incentive to go through a title agent unless required to do so. ¹⁵⁷
2.	Escrow Company or escrow agent	<ul style="list-style-type: none"> - In those cases where the title agent does not fulfil the role of escrow, closing or settlement agent, an escrow agent performs the function that is most similar to that. - In cross-border transactions it is unlikely that escrow will be foregone. - Intermediary role in the flow of funds, so might be in the best position to identify source of funds. 	<p>The presence of an escrow agent is not mandatory.</p> <p>There is no clear data on how many residential transactions use escrow and if there is a difference between purely domestic residential real estate transactions versus transactions in which the money originates outside the U.S.</p> <p>Finally, there is nothing that prevents the lawyer for a buyer who is based overseas acting as the escrow agent.</p>
3	<p>Attorneys¹⁵⁸</p> <p>i. Buyer's attorney</p> <p>ii. Seller's attorney</p>	<ul style="list-style-type: none"> - More than any other real estate professional, attorneys were most commonly found to be part of closings across states and are the only actors that are legally required to be involved in the real estate transaction in some states.¹⁵⁹ - Attorneys often have the most direct relationship with the client and are therefore able to easily obtain the required information.¹⁶⁰ 	<p>It is important from an enforcement standpoint to ensure that the reporting entity is based in the U.S. The buyer's attorney or the seller's attorney may or may not be licensed to do business in the U.S.</p> <p>Because there is no requirement that an attorney be present across all 50 states. It is possible to have a transaction that is entirely conducted by the buyer and seller.</p> <p>-For cross-border transactions, GFI identified reported cases where lawyers based overseas finalized the purchase of property.¹⁶¹</p>

¹⁵⁷ Additionally, 93% of respondents to the survey were present homeowners. See: Consumer Title Insurance Shopping Survey, September 2016, p.9, available at <https://www.alta.org/publications/press-release.cfm?ALTA-Consumer-Survey-Shows-40-Confused-by-Title-Fee-Calculation-on-Closing-Disclosure>

¹⁵⁸ Finally, it should be noted that any proposed rule while assessing industry practice and regulatory burden should also consider its impact on the average home buyer. A recent survey conducted by ALTA found that on average homeowners in order or preference found real estate agents, lenders, attorneys, title/settlement companies found the most helpful in answering questions about the closing process and the home buying experience. See: Consumer Title Insurance Shopping Survey, September 2016, p.7, available at <https://www.alta.org/publications/press-release.cfm?ALTA-Consumer-Survey-Shows-40-Confused-by-Title-Fee-Calculation-on-Closing-Disclosure>.

¹⁵⁹ In at least 7 states, it is legally required for an attorney to conduct the closing. In at least 10 states, attorneys do not have to conduct the closing, but must be involved in the preparation of certain documents (like deeds or financing instruments) or certifying title. For more information refer to Question 5 under Section A.

¹⁶⁰ Additionally, Attorneys often play an intermediary role in the flow of funds, for example through IOLTAs and act as registering agent for a legal entity or arrangement and are therefore best placed to identify the beneficial owners.

¹⁶¹ Global Financial Integrity (2021). "Acres of Money Laundering: Why U.S. Real Estate is a Kleptocrat's Dream." p. 87. <https://gfintegrity.org/report/acres-of-money-laundering-why-u-s-real-estate-is-a-kleptocrats-dream/>. Wieder, B., Dasgupta, S., Wang, K, (Jan 25, 2022). "Men tied to Italian mob money-laundering case still able to snap up South Florida properties". Miami Herald. <https://www.miamiherald.com/news/business/real-estate-news/article255762051.html>

4	Real Estate Broker/Agent ¹⁶²	<p>The real estate agent/broker is the final back stop if the other professionals are not used or not based in the U.S. It is less likely that a property purchased in the U.S. would not have at least one U.S. based real estate agent/broker.</p> <p>Additionally, real estate agents often have a direct relationship with the client and are therefore in a position to provide the required information.</p>	<p>The seller's agent/broker is the final backstop if there is no title insurance and if the other reporting entities are either not part of the transaction or not licensed in the U.S.</p>
	i. Buyer's broker/agent		
	ii. Seller's broker/agent		

In addition to a regular real estate purchase, the reporting obligation should also be triggered when the responsible reporting parties are involved in a transaction that changes ownership directly or indirectly through transfer or creation of equitable interest. Any rule that would exclude such subsequent ownership changes would create an obvious loophole which could be exploited by bad actors to evade the reporting requirements. The table below provides an overview of the type of ownership changes that FinCEN should take into consideration:

Change in ownership directly/indirectly through transfer/change in equitable interest	
Type of ownership change	Consideration
Through a U.S./foreign legal entity that is captured under the CTA.	Any change in ownership would be reported to FinCEN and captured in the BO registry housed within FinCEN
Through a U.S. legal entity/arrangement that is not captured under the CTA, including certain trusts.	Change in ownership would not be recorded under the CTA. Therefore, any purchases made through this method should be red flagged.
Ownership or beneficiary change in a foreign legal entity/arrangement not registered to do business.	Because the BO registry only captures legal entities registered to do business, ¹⁶³ residential real estate purchases made through a foreign legal entity/arrangement would not be captured by the BO registry. These should be flagged in the first instance.
When ownership from a natural person is transferred to a legal entity or another natural person, (e. g. by transfer of title on the deed).	For transfer/creation of equitable interest from a natural person to legal entity, the scenarios and risks stated above would apply.

¹⁶² Finally, it should be noted that any proposed rule while assessing industry practice and regulatory burden should also consider its impact on the average home buyer. A recent survey conducted by ALTA found that on average homeowners in order or preference found real estate agents, lenders, attorneys, title/settlement companies found the most helpful in answering questions about the closing process and the home buying experience. See: Consumer Title Insurance Shopping Survey, September 2016, p.7, available at <https://www.alta.org/publications/press-release.cfm?ALTA-Consumer-Survey-Shows-40-Confused-by-Title-Fee-Calculation-on-Closing-Disclosure>

¹⁶³ § 5336. Beneficial ownership information reporting requirements

(2) The term Applicant means

“(A) files an application to form a corporation, limited liability company, or other similar entity under the laws of a State or Indian Tribe; or

“(B) registers or files an application to register a corporation, limited liability company, or other similar entity formed under the laws of a foreign country to do business in the United States by filing a document with the secretary of state or similar office under the laws of a State or Indian Tribe.

See: <https://www.congress.gov/116/bills/hr6395/BILLS-116hr6395enr.pdf>

	If it is a direct transfer from a natural person to another natural person, unless an attorney is involved in the transfer, FinCEN would only be able to access that information through local property records.
--	--

Commercial Real Estate Transaction

Unlike residential real estate transactions, commercial real estate transactions always involve contracts between two or more legal entities. Legal entities are used because the financing and the transaction itself are often incredibly complex and expensive, and all parties to the deal are interested in limiting liability. These deals can be as low as US\$1 million (e.g., a shop or a strip mall), but transactions can also run to the tune of billions of dollars (e.g., hotels, condominium developments). Further, when a transaction includes, for example, large corporations involved in hotel acquisitions, the ownership chain can be extraordinarily lengthy and spread both horizontally across multiple jurisdictions and vertically in terms of the number of layers between the company acquiring the property and the beneficial owner. For example, GFI's report covers the complex legal structures used in the 1MDB scam to acquire Park Lane hotel.¹⁶⁴

This means that ownership interests can be split between one legal entity or a group of conglomerates with thousands of investors, each owning a small portion. The multiplicity of ownership interests alone can make the process of identifying the beneficial owner challenging if not impossible for many of the real estate gatekeepers typically covered by AML obligations in countries across the world, including the G7. Additionally, in cases like the acquisition of the Park Lane Hotel by Jho Low in the 1MDB scam or the acquisition of the Plaza Hotel by Subrata Roy, the beneficial owners (who held the majority stake) of the commercial property were also the criminal actors laundering money.¹⁶⁵ But in other cases where the investment has been made through indirect means – as in the case of real estate investment funds or the EB-5 investment program – identifying the beneficial owner does not help identify the money launderer. In those cases, criminals are able to launder millions without being the majority stakeholder.¹⁶⁶ Therefore, unless there is also a requirement to check for source of funds, it becomes easy for criminals to launder money through commercial real estate by simply investing in a minority stake.

Due to these and other differences between residential and commercial real estate, FinCEN should take the following in consideration when designing the reporting obligations for commercial real estate:

- a. It is recommended that beneficial ownership information along with ownership details of persons holding at least a 10% equity interest, and their source of funds, should be reported under any proposed rule.
- b. Much like with residential real estate transactions, any proposed rule must include appropriate reporting mechanisms for transfer of ownership interests that do not constitute a sale.
- c. Attorneys play an important role in commercial real estate transactions. Research on the commercial sector strongly provides evidence that the exhaustive due diligence requirements to mitigate risk are usually carried out by the attorneys on either side of the deal.¹⁶⁷ Much of the information that is recommended for FinCEN

¹⁶⁴ Global Financial Integrity (2021). "Acres of Money Laundering: Why U.S. Real Estate is a Kleptocrat's Dream." p. 38.

<https://gfintegrity.org/report/acres-of-money-laundering-why-u-s-real-estate-is-a-kleptocrats-dream/>.

¹⁶⁵ Ibid, p. 37.

¹⁶⁶ For examples, please refer to Cases 7, 8 and 12 in: Global Financial Integrity (2021). "Acres of Money Laundering: Why U.S. Real Estate is a Kleptocrat's Dream." p.40, p. 42, p. p.56. <https://gfintegrity.org/report/acres-of-money-laundering-why-u-s-real-estate-is-a-kleptocrats-dream/>.

¹⁶⁷ <https://www.surgacentral.com/>

to collect under Section E of this comment is already provided with the intention to ensure the availability of funds.

- d. In addition to attorneys, conversations with industry experts and industry sources identify escrow as one of four key steps that every commercial real estate transaction goes through.¹⁶⁸ Including the escrow company/agent is critical in ensuring that the rule adequately covers the widest set of possible risks.
- e. Apart from escrow agents and attorneys, it is recommended that both the real estate agents for the buyer and seller, followed by the buyer and seller themselves are included in any cascade. This provides a necessary backstop to mitigate against possible money laundering evasion tactics. The inclusion of the buyer and seller along with attorneys are particularly necessary in order to ensure that FinCEN is able to understand changes in ownership interests that do not constitute a sale. In case of commercial real estate transactions, the buyer and seller would qualify as non-financial trade or business and could therefore also be subject to reporting requirements under 31 U.S.C. 5318(a)(2) BSA.
- f. It should also be noted that the requirement for real estate professionals involved in commercial real estate transactions to report information is not novel. The IRS form 1099-S creates reporting obligations for the sector which professionals already have the capacity and expertise to carry out. Expanding this to include reporting information to FinCEN would create some necessary burden but would only require that from professionals that already have the knowledge, familiarity, and experience to provide this information.

42. What should FinCEN consider when assigning the reporting burden with respect to potential evasion of the reporting requirements?

FinCEN should consider the following:

- a. While some states require certain licensed professionals to be part of a real estate transaction, there is no uniformity across all 50 states as to what type of professional must be present. This necessitates a cascading requirement that considers the multiplicity of laws across the country, but also provides a (U.S.-licensed) back-stop for transactions that are cross-border or entirely conducted by the buyer and seller. Please refer to the answer to Questions 37-41 above for additional information.
- b. Attorneys are the most common professionals involved in real estate closings, and legally required to be a part of the closing process in almost 20 states. A cascading rule that does not include attorneys would ignore both industry practice and the preponderance of state law requirements. To ease any burden, it is recommended that attorneys be included with specific reference to the function they perform in a real estate transaction similar to the IRS Form 1099-S.¹⁶⁹
- c. GFI analysis revealed that a majority (over 80%) of the reported real estate money laundering schemes originated from funds obtained outside the U.S. This in turn means that the professionals executing the transactions, from the attorney to the real estate agent, on the buyer's side could also be based overseas. To ensure ease of enforcement, it is easier within any reporting cascade to require that the reporting obligation is met by non-financial trade or business/real estate professionals licensed to do business in the U.S.

¹⁶⁸ Commercial vs Residential Transactions The Complexities & Needed Due Diligence, p.12

<https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwi8gYKW5fX1AhWBmHIEHSHZCBkQFnoECAUQAQ&url=https%3A%2F%2Fwww.alta.org%2Ffile.cfm%3Fname%3D031418commercialvsresidential&usg=AOvVaw3G5IZESU6FKfeB9aBvLEuK>

¹⁶⁹ Refer to answer to Question 41 for further detail.

- d. Even if the potential rule would define the term ‘Covered Transaction’ to include any transfers/change in ownership or interest in the commercial/residential real estate, there is an ongoing gap that would exist with respect to potential evasion of the reporting requirements. Under the new proposed beneficial ownership registry under the Corporate Transparency Act, beneficial ownership information is collected on any legal entity registered to do business.¹⁷⁰ The CTA also requires FinCEN to be notified of any change in ownership of said legal entity.¹⁷¹ However, because the CTA is designed to capture ownership information of legal entities registered to do business in the State, it does not capture foreign legal entities, foreign trusts or U.S.-based family trusts that may be used to acquire residential real estate. A transfer of ownership from Person A to Person B of a foreign legal entity that holds a single-family home, would not necessitate a reporting requirement to FinCEN. Therefore, at the very least FinCEN should red-flag real estate transactions that will not be captured through a cascading reporting obligation coupled with a cross-examination of the data within the FinCEN registry, i.e., transactions that involve - a) a foreign legal entity or foreign legal arrangement; b) U.S. legal entities and legal arrangement that are not captured by the beneficial ownership registry housed in FinCEN; c) change in ownership through any change made to the title deed).

E. What information should FinCEN require regarding real estate transactions covered by a proposed regulation?

43. What information should FinCEN require to be reported regarding the legal entity (or if applicable, natural person) purchasing real estate in a covered transaction?

44. Should FinCEN require information about the seller? If so, what information should FinCEN require regarding the seller?

46. What information should FinCEN require regarding the real estate underlying the transaction?

47. Should FinCEN require information regarding the source of funds used to purchase real estate?

48. How can FinCEN craft the information required to avoid overly burdensome or duplicative reporting requirements?

FinCEN should require four basic pieces of information to be recorded:

S. No	Type of Information
1	Basic Information on transaction
2.	Identity information
3.	Source of funds and payment
4.	Indication of whether transaction involves a PEP

¹⁷⁰ ‘§ 5336. Beneficial ownership information reporting requirements

(2) The term Applicant means

“(A) files an application to form a corporation, limited liability company, or other similar entity under the laws of a State or Indian Tribe; or

“(B) registers or files an application to register a corporation, limited liability company, or other similar entity formed under the laws of a foreign country to do business in the United States by filing a document with the secretary of state or similar office under the laws of a State or Indian Tribe.

See: <https://www.congress.gov/116/bills/hr6395/BILLS-116hr6395enr.pdf>

¹⁷¹“(D) UPDATED REPORTING FOR CHANGES IN BENEFICIAL OWNERSHIP.—In accordance with regulations prescribed by the Secretary of the Treasury, a reporting company shall, in a timely manner, and not later than 1 year after the date on which there is a change with respect to any information described in paragraph (2), submit to FinCEN a report that updates the information relating to the change.” See: <https://www.congress.gov/116/bills/hr6395/BILLS-116hr6395enr.pdf>

a. Basic Information on transaction

This is important to ensure that any report filed has basic information about the address of the property, the date of closing, listing, and purchase price of the property, and any other relevant terms that are typically collected within the industry and that would be useful for FinCEN to include in any reporting obligation.

b. Identity information:

This should include details about the identity of both the buyer and seller because real estate money laundering schemes can be initiated by both buyer and seller.¹⁷² If any party to the transaction is a legal entity or arrangement, information about the individual responsible for representing that legal entity or arrangement should be provided, as well as the identity of the legal entity or arrangement itself. Additionally, identifying the beneficial owner often is critical to identifying the criminal actor trying to launder illicit money. In a residential transaction, any such reporting rule should use the definition of beneficial owner under the CTA as opposed to the definition of beneficial owner that exists under the CDD rule. To effectively analyze reporting information submitted on real estate purchases made through legal entities, it is important that the standard used is in line with the information that will be captured in FinCEN's newly created beneficial ownership registry. Two different definitions would limit FinCEN's ability to carry out effective analysis and monitoring of changes in ownership that are through transfer or creation of an equitable interest.

For commercial real estate, as referenced through various answers under Sections C to F, simply capturing the identity of the beneficial owner does not always help identify the beneficial owner because of the complex nature of these transactions. It is therefore recommended that the identity of equity ownership stakes of 10 percent and above are also captured in any reporting required for both the buyer and the seller.

c. Source of funds and Payment information:

Understanding the source of funds used to carry out a real estate transaction is critical to counter the risk of real estate money laundering. Identifying the source of funds can raise red flags and provide key indicators of money laundering activity. For example, when there is no identifiable source of income or when there is a disparity between the source of income and type and value of real estate investment. A rule that would only require the identification of the beneficial owner, and not information on the source of funds, would have serious shortcomings. First, it would still place the primary responsibility of raising real estate money laundering red flags on financial institutions. This shortcoming was exposed under the current regulatory regime of GTOs which only requires title insurance companies to identify beneficial owners of a real estate purchase. Based on publicly available information reported by the U.S. Treasury and Government Accountability Office, it appears that the GTO reports are then cross-referenced with suspicious activity reports to check for any high-risk actors.¹⁷³ Because title insurance companies under the GTO are not required to ask for the source of funds, it appears that, unless a bank files a SAR, there is a much lower chance of detecting a real estate money laundering scheme. That risk is even higher when it concerns a non-financed real estate transaction without the involvement of a financial institution. The same issue would potentially arise if the proposed regulation does not require information on source of funds.

Moreover, investments in commercial real estate are often made through indirect means, such as real estate investment funds. In this case, identifying the beneficial owner also does not help to identify the money launderer because criminals are able to launder millions without being the majority stakeholder. Therefore, unless there is also

¹⁷² Global Financial Integrity (2021). "Acres of Money Laundering: Why U.S. Real Estate is a Kleptocrat's Dream." p. 34.

<https://gfindegrity.org/report/acres-of-money-laundering-why-u-s-real-estate-is-a-kleptocrats-dream/>.

¹⁷³ U.S. Government Accountability Office (2020). "Anti-Money Laundering: FinCEN Should Enhance Procedures for Implementing and Evaluating Geographic Targeting Orders." <https://www.gao.gov/assets/gao-20-546.pdf>.

a requirement to check for source of funds, it becomes easy for criminals to launder money through commercial real estate by simply investing in a minority stake.

The source of funds information can be collected through a checklist to indicate, for example, what percentage of the purchase was funded through gift, loan, savings or other sources. Additionally, the form can provide categories to indicate whether the payment was received from one account or through multiple accounts. Were the accounts U.S. based or were they based overseas? If based outside the U.S., the reporting entity should list the country and the bank. The information should be collected for both the buyer and seller in any transaction.

d. Identifying whether a PEP is involved in the transaction

The last FATF mutual evaluation report of the U.S. in 2016 stated very clearly that the U.S. had “significant shortcomings” in both how the country defined the term PEP, and the limited types of actors responsible for PEP CDD.¹⁷⁴ FinCEN itself issued an advisory in June 2018 stating that the term PEP “is not included within FinCEN’s regulations.”¹⁷⁵ When looking at the relationship between PEPs and real estate transactions in the U.S., financial institutions alone are tasked with detecting suspicious PEP behavior instead of intermediaries or gatekeepers that have a more proximate relationship to the real estate transaction. Even amongst financial institutions, FATF’s 2016 evaluation found that Residential Mortgage Lenders and Originators (RMLOs) “do not seem to be aware of the PEPs requirement” and had a “...low understanding of risks...(which) reflected in the very low number of SARs being reported by them.”¹⁷⁶

Finally, the U.S. definition of PEP has long limited itself to senior foreign political figures and excluded domestic PEPs and those working with international organizations (IOs). Even for foreign PEPs, there is little guidance on the complexities involved in PEP identification in differing geographic and socio-political contexts. GFI’s own analysis into the issue of real estate money laundering and PEPs showed a disproportionate number of reported real estate money laundering cases (i.e., 53.57%) involving a PEP.¹⁷⁷ Therefore, it is vital that a box be checked to indicate whether the transaction involves a PEP – both foreign and domestic.

49. How should FinCEN require reports under any potential regulation be filed? Should FinCEN utilize an existing BSA form or develop a new reporting form for any proposed regulation?

FinCEN should develop a new reporting form for any proposed regulation. Conversations with title insurance industry experts revealed that the temporary nature and differing monetary thresholds for the GTOs mean that the REML identification process has remained manual, raising costs for title insurance companies, and reducing overall efficiency in detection. Additionally, current GTO reports are filed using the form for Currency Transaction Reports (CTR), which is designed to capture the use of cash in the financial system and not the details of a real estate transaction. This has created confusion within industry. Additionally, the form appears to require filers to fill out the form in one sitting and does not permit a user to save their work and return to it at a later point. This leads to additional challenges and reduces efficiency in the process. Without a new form, these challenges would only be further exacerbated with a reporting obligation that is permanent, nationwide, and one that is applicable to multiple classes of real estate professionals. Finally, a dedicated form would also allow FinCEN to capture a much wider range of

¹⁷⁴ FATF (2016). Mutual Evaluation Report United States of America. p.210. <https://www.fatf-gafi.org/media/fatf/documents/reports/mer4/MER-United-States-2016.pdf>.

¹⁷⁵ FinCEN (2018). “Advisory on Human Rights Abuses Enabled by Corrupt Senior Foreign Political Figures and their Financial Facilitators”. p. 2. https://www.fincen.gov/sites/default/files/advisory/2018-06-12/PEP%20Facilitator%20Advisory_FINAL%20508.pdf.

¹⁷⁶ FATF (2016). Mutual Evaluation Report United States of America. p. 122 and 128. <https://www.fatf-gafi.org/media/fatf/documents/reports/mer4/MER-United-States-2016.pdf>

¹⁷⁷ Global Financial Integrity (2021). “Acres of Money Laundering: Why U.S. Real Estate is a Kleptocrat’s Dream.” p. 66. <https://gfintegrity.org/report/acres-of-money-laundering-why-u-s-real-estate-is-a-kleptocrats-dream/>.

relevant real estate transaction information as indicated in response to Questions 43-48 under this Section. FinCEN should therefore ensure that there is a separate and distinct form for any reporting obligation that targets the real estate sector.

F. What are the potential burdens or implementation costs of a potential FinCEN regulation?

50. What would be the costs, burdens, and benefits associated with collecting, storing, and reporting real estate transactional information to FinCEN?

51. How would FinCEN's regulatory requirements be integrated into your current compliance program?

52. How much time will you need to successfully integrate these requirements into your current systems and procedures?

Much of the information recommended to be collected and reported under a new reporting regime under Section E is information that is already routinely collected by the industry in the regular course of business, both for the purchase of a home or when a rental application is filed. At a minimum, applicants and prospective buyers are required to provide proof of identification, proof of credit, salary slips, bank statements, pay stubs, social security number, rental history, place of employment and employment history for financed home purchases and, more routinely, even for residential leases.¹⁷⁸ These forms often require details on the current place of employment of the prospective buyer/renter, immigration status (visa status can affect rates of financing),¹⁷⁹ and annual income. In all cases, the information written on the form is corroborated by the agent through a document check. With real estate purchases that are financed, similar information is collected by lending institutions including the provision of a proof of funds letter.¹⁸⁰ Therefore, the processes and the forms needed to collect this information are not new and are part of good business practice already within the real estate industry. Filing recommended parts of this information with FinCEN would be a simple additional step and require a process that could be easily adopted and automated if a rule were to apply across the country and not be differentiated by differing monetary thresholds that trigger a reporting requirement.

Reporting obligations to target money laundering/illicit finance risks within the commercial real estate sector are not new. Countries like Canada and Singapore have both specifically targeted the commercial real estate sector by requiring developers and real estate agents involved in the sector to conduct full AML/CFT due diligence. Additionally, there is also dedicated AML/CFT software for the commercial real estate sector provided by companies like Surga Central, with customers based in New Zealand, Australia, and the United Kingdom.¹⁸¹ In 2018, the company developed an AML module designed to assist customers in the relevant jurisdictions to comply with AML obligations. The module helps customers store AML-related info against contacts, companies and the deals involved in transacting real estate.¹⁸²

¹⁷⁸ Apartmentguide (2021). "Apartment Rental Application: 11 Items You'll Need" <https://www.apartmentguide.com/blog/apartment-application-items-you-need/>

¹⁷⁹ Mittal, R. (May 13, 2021). "Are you eligible for loans in the U.S.? Here are the visas that are and those that aren't". <https://economictimes.indiatimes.com/nri/invest/are-you-eligible-for-loans-in-the-u-s-here-are-the-visas-that-are-and-those-that-arent/articleshow/82600835.cms?from=mdr>

¹⁸⁰ Realtor.com (2021). "Proof of funds letter for a real estate purchase: why home buyers need it, bad" <https://www.realtor.com/advice/finance/proof-of-funds-letter-for-real-estate-purchase/>

¹⁸¹ <https://www.surgacentral.com/>

¹⁸² Information based on e-mail exchange and demo presentation by the company.

Only certain authorised staff have access to the AML data to ensure a high level of privacy. For instance, the module allows users to include the AML officer's assessment of whether the contact is a Politically Exposed Person, is suspicious, and the assessment of risk. Documents used to validate identity can also be stored in the secure database. Once the AML officer is satisfied, they can indicate that Customer Due Diligence (CDD) has been completed and, if necessary, set a future date for review. A real estate broker does not have access to the AML information, but can see a signal to indicate if CDD.

Lastly, since 2014 major U.S.-based commercial brokerage firms JLL, CBRE, Savills, BNP Paribas Real Estate, and Cushman Wakefield have as part of AML requirements in the EU formed the Legal and Compliance Initiative Real Estate Group that aims to set responsibilities and standards to scrutinize suspicious transactions checks that have been completed.”¹⁸³ All of this provides evidence that the sector already has the necessary tools, expertise, and experience to meet any proposed reporting obligation.

59. Please list any legislative, regulatory, judicial, corporate, or market-related developments that have transpired since FinCEN issued the 2003 ANPRM that you view as relevant to FinCEN’s current proposed issuance of AML regulations.

The U.S. has in recent years taken note of the serious risk posed by the real estate sector as a gateway to illicit finance.¹⁸⁴ However, the U.S. continues to lag behind other advanced economies, including the G7 and real estate hubs like Singapore, in creating comprehensive AML/CFT requirements for the entirety of the real estate sector in line with international best practices. International legislative and regulatory developments do not only apply to residential real estate, but also recognize the risks in the commercial real estate sector. For example, Singapore and Canada focus their attention on real estate developers as well as real estate agents, and the EU has imposed AML obligations on the private investment industry.

Simultaneously, the increased presence of private equity and other corporate actors in the U.S. real estate market has added to the opacity in real estate ownership across the sector, including the housing market. In combination with the housing affordability crisis that the U.S. is facing, it is relevant to consider the effect of real estate money laundering on housing prices and rent levels.

In light of these developments, it is imperative that FinCEN does not delay further rulemaking again. Below is a selection of developments for FinCEN to consider, highlighting the importance of prioritizing this rulemaking for both the residential and commercial real estate market.

International best practices	· FATF recommendation 22, on CDD and record-keeping requirements for DNFBPs, has included the real estate sector since 2012. ¹⁸⁵
	· FATF has published several guidance documents, including a report on ML/TF in the real estate sector in 2007, and guidelines for a risk-based approach for real estate agents in 2008. ¹⁸⁶
Legislative and regulatory developments	· The EU has gradually expanded CDD and record-keeping requirements for real estate professionals between 2005 - 2018, now including real estate agents, letting agents and attorneys involved in real estate transactions. G7 member countries France, Germany, and the UK have passed legislation based on these provisions. ¹⁸⁷

¹⁸³ Urvashi Verma, PropTech firm creates platform to prevent money laundering, December 13, 2018 <https://inbuildingtech.com/proptech/money-laundering-proptech/>

¹⁸⁴ U.S. Department of Treasury (2020). National Strategy for Combating Terrorist and Other Illicit Financing 2020. <https://home.treasury.gov/system/files/136/National-Strategy-to-Counter-Illicit-Financev2.pdf>, p. 20-21; U.S. Department of Treasury (2018). National Money Laundering Risk Assessment 2018. https://home.treasury.gov/system/files/136/2018NMLRA_12-18.pdf, p. 34.

¹⁸⁵ FATF (2012). “The FATF Recommendations”. <https://www.fatf-gafi.org/publications/fatfrecommendations/documents/fatf-recommendations.html>

¹⁸⁶ FATF (2007). “Money Laundering & Terrorist Financing Through the Real Estate Sector”. <https://www.fatf-gafi.org/media/fatf/documents/reports/ML%20and%20TF%20through%20the%20Real%20Estate%20Sector.pdf>. FATF (2008). “FATF Guidance on the Risk-Based Approach for Real Estate Agents”. <https://www.fatf-gafi.org/documents/documents/fatfguidanceontherisk-basedapproachforrealestateagents.html>

¹⁸⁷ For a full overview, see Global Financial Integrity (2021). “Acres of Money Laundering: Why U.S. Real Estate is a Kleptocrat’s Dream.” p.8. <https://gfintegrity.org/report/acres-of-money-laundering-why-u-s-real-estate-is-a-kleptocrats-dream/>

	<ul style="list-style-type: none"> · The EU includes investment firms within its definition of ‘financial institution’ since 2015, rendering investment advisers subject to the same CDD standards as banks and other reporting entities.¹⁸⁸ · Canada includes the real estate sector in its AML regime under the PCMLTFA since 2006, covering both real estate agents and real estate developers. · The Land Owner Transparency Act was introduced in British Columbia, Canada in 2020. · The UK introduced Unexplained Wealth Orders as an alternative way to deal with real estate money laundering in 2017. · Singapore introduced AML obligations for real estate developers in 2018.¹⁸⁹
Judicial developments	<ul style="list-style-type: none"> · The European Court of Justice decided in 2007 that AML obligations on attorneys do not constrain client confidentiality or attorney-client privilege. The European Court of Human Rights confirmed this decision in 2012.¹⁹⁰
Market-related developments	<ul style="list-style-type: none"> · The U.S. is facing a dramatic housing shortage, with spiking home prices and rents across the country.¹⁹¹ · In Canada’s British Columbia, money laundering was found to have contributed to the nation’s affordability crisis.¹⁹² · Increasing levels of opaque corporate ownership of U.S. housing units.¹⁹³ · Investments in U.S. real estate by Private Equity and Sovereign Wealth Fund, both high-risk entities for money laundering, are booming.¹⁹⁴

G. Should FinCEN promulgate general AML/CFT recordkeeping and reporting requirements for “persons involved in real estate closings and settlements”?

Yes, FinCEN should promulgate general AML/CFT recordkeeping and reporting requirements for “persons involved in real estate closings and settlements.” When the United States in 1988 amended the definition of financial institutions

¹⁸⁸ Directive (EU) 2015/849, Article 3 (2), May 20, 2015, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32015L0849>.

¹⁸⁹ Allen & Gladhill (2019). “Upcoming new anti-money laundering and countering of terrorist financing responsibilities for developers”. <https://www.allenandgladhill.com/media/3843/ag-upcoming-new-anti-money-laundering-and-countering-of-terrorism-financing-responsibilities.pdf>

¹⁹⁰ Case 305/05, Ordre des Barreaux Francophones et Germanophone v. Conseil des Ministres, 2007 E.C.R. I-5305, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62005CJ0305&from=EN>. Michaud vs. France, no. 12323/11, ECHR, 2012, §127.

¹⁹¹ Parrott, J. & Zandi, M. (March 2021). “Overcoming the Nation’s Daunting Housing Supply Shortage”. Moody’s Analytics <https://www.moodyanalytics.com/-/media/article/2021/overcoming-the-nations-housing-supply-shortage.pdf>

¹⁹² Expert Panel on Money Laundering in BC Real Estate (2019) “Combatting Money Laundering in BC Real Estate”. https://news.gov.bc.ca/files/Combating_Money_Laundering_Report.pdf.

¹⁹³ Strategic Actions for a Just Economy (2021), “Beyond Wall Street Landlords”. https://www.saje.net/wp-content/uploads/2021/03/Final_A-Just-Recovery-Series_Beyond_Wall_Street.pdf.

¹⁹⁴ Skadden (2022). “Private Equity and Sovereign Wealth Interests Converge in US Real Estate”. <https://www.skadden.com/insights/publications/2022/01/2022-insights/corporate/private-equity-and-sovereign-wealth-interests-converge>

in the BSA to include ‘persons involved in real estate closings and settlements’,¹⁹⁵ it became one of the first countries to target the risks of money laundering in the real estate sector. The U.S. Patriot Act enacted in the aftermath of 9/11 with the goal of strengthening national security, directed FinCEN to apply AML/CFT program requirements on real estate professionals more than 20 years ago. However, the two decade long ‘temporary exemption’ granted by FinCEN has created some of the loopholes that today allow kleptocrats, hostile governments, drug traffickers, and human rights abusers to launder their money in U.S. real estate.¹⁹⁶ It has also hindered the development of any further legislative efforts to target other gatekeepers, all of which exacerbates the vulnerabilities of the U.S. real estate sector to money laundering.

A FATF report looking at real estate money laundering found that real estate transactions “when not covered by AML/CFT obligations, often bec(ame) the weakest link ..” in the real estate transaction.¹⁹⁷ The FATF, the global standard setting body for AML/CFT requirements, has long recommended that the best way to address the money laundering risk in the real estate sector is to ensure that the most vulnerable points and actors in the transaction are covered by robust AML/CFT obligations in line with its 40 recommendations. This is the approach that the rest of the world, including large real estate hubs, have taken in addressing money laundering risks to the sector. In fact, the U.S. remains the only G7 country to not impose AML/CFT regulations on real estate professionals.

In defining the classes of real estate professionals to be included in the phrase “persons involved in real estate closing and settlements”, FinCEN’s ANPRM from 2003 appropriately addresses the manner in which the phrase should be interpreted. The ANPRM from 2003 states that “a reasonable interpretation of the section could therefore cover participants other than those who actually conduct the real estate settlement or closing.”¹⁹⁸ The ANPRM provides an illustrative list of the participants in a real estate transaction to include:

- a. A real estate broker or brokers,
- b. One or more attorneys, who represent the purchaser or the seller,
- c. A bank, mortgage broker, or other financing entity,
- d. A title insurance company,
- e. An escrow agent, and
- f. An appraiser, who may assess the condition and value of the real estate, as well as various inspectors

Additionally, FinCEN should consider including developers who play a vital role in newbuilds and already have AML/CFT obligations in countries like Canada and Singapore.¹⁹⁹ GFI’s own research would indicate that the list should be given the widest possible interpretation to includes real estate investment companies, pooled investment vehicles, and to account for newer developments in the real estate sector like the increasing role of financing by companies like Zillow (see for further reference, the answer to question 1 under section A), and cryptocurrency. Ensuring the broadest interpretation would allow FinCEN to appropriately decide which person, bearing in mind a risk-based approach, would be best conducted to carry out the full suite of AML/CFT obligations.

¹⁹⁵ 31 USC §5312(a)(2)(U)

¹⁹⁶ 67 FR 21110: FinCEN Interim final rule ‘Anti-Money Laundering Programs for Financial Institutions’; 31 CFR §1010.205(b)(v)

¹⁹⁷ FATF (2007). Money laundering & terrorist financing through the real estate sector. P. 4. <https://www.fatf-gafi.org/media/fatf/documents/reports/ML%20and%20TF%20through%20the%20Real%20Estate%20Sector.pdf>

¹⁹⁸ FinCEN (2003). ANPRM. <https://www.treasury.gov/press-center/press-releases/Documents/js1751.pdf>

¹⁹⁹ FINTRAC. “Real estate developers or sales representatives, and real estate developers”. [---

GLOBAL FINANCIAL INTEGRITY](https://www.fintrac-canafe.gc.ca/re-ed/real-eng; Tang, W.E. & Cardoz, N (21 December 2018). “Singapore: Impact of the new Developers (Anti-Money Laundering and Terrorism Financing) Bill. https://www.mondaq.com/money-laundering/766306/impact-of-the-new-developers-anti-money-laundering-and-terrorism-financing-bill.</p></div><div data-bbox=)

An important lesson from the EU and other G7 countries is that AML/CFT obligations are ineffective without appropriate supervisory and oversight mechanisms. Across the G7, as evidenced by GFI's research, SAR filings for the real estate sector, remain very low. A recent push by authorities across the G7 has seen an exponential increase in SAR filings from the sector. For example, France saw a 977% increase in real estate agent STRs between 2015 – 2019; Germany saw a 300% increase in real estate agent STRs between 2017 – 2019; and the UK saw a 35% increase in SARs submitted by real estate agents between 2018 and 2020. However, the overall numbers remain low as indicated in the table below. Therefore, is it vital that FinCEN when creating AML/CFT obligations for persons involved in real estate closings and settlements, also identifies appropriate oversight and supervision mechanisms.

Comparing U.S. Real estate SAR numbers to the rest of the G7²⁰⁰

	Total SARs:	SARs in real estate sector	% of total SARs
U.S. (2020)	2,503,204	Loan company regarding commercial or residential mortgage: 5,384	0.21%
<i>Title agent GTO reports (2016 – 2019)</i>		Title Agents GTO reports (2016-2019): 23,659	
UK (2019 – 2020)	573,085	Real estate agents: 861	0.15%
		Legal professionals: 3,006	0.52%
Canada (2019-2020)	386,102	Unknown	Unknown
France (2019)	95,731	Real estate agents: 376	0.39%
		Notaries: 1,816	1.89%
		Lawyers: 12	0.013%
Germany (2019)	114,914	In connection with a real estate transaction: 1,266	1.1%
		<i>Of which notaries and lawyers: 38</i>	0.03%
		<i>Of which real estate agents: 84</i>	0.07%
		<i>Of which financial institutions: 1000</i>	0.87%
Italy (2019)	105,789	'Other non-financial operators', which includes real estate brokers but also antiquities traders and other Designated Non-Financial Business and Profession (DNFBP) categories: 61	0.058%
		Notaries: 4,630	4.38%
		Lawyers and law firms: 66	0.062%
Japan (2020)	432,202	Real estate agents: 7	0.0016%

At the same time, it would be a mistake to reduce the scope of the new rule out of a concern about ensuring compliance, since law enforcement agencies rarely have sufficient resources to conduct all the oversight that is needed. Instead, FinCEN should design the rule with the understanding that the vast majority of industry participants are law abiding and will meet their legal obligations. For example, when one escrow agent in the aviation industry was criticized for failing to conduct due diligence on a “shell company client” later found to be controlled by a corrupt official, the escrow agent explained that it had no legal obligation to conduct a due diligence review but that it “[a]bsolutely” would have “if all escrow agents were required by law to know their customers.”²⁰¹ The new rule should

²⁰⁰ Global Financial Integrity (2021). “Acres of Money Laundering: Why U.S. Real Estate is a Kleptocrat’s Dream.” p. 72-73. <https://gfintegrity.org/report/acres-of-money-laundering-why-u-s-real-estate-is-a-kleptocrats-dream/>.

²⁰¹ Keeping Foreign Corruption Out of the United States: Four Case Histories,” hearing before the U.S. Senate Permanent Subcommittee on Investigations, S. Hrg. 111-540, (Feb. 4, 2010), at 16.

be designed with confidence that the real estate industry can be relied on, as a whole, to follow the law and do its part to safeguard the United States against money laundering and terrorist financing.

Conclusion

Much like other money laundering vehicles, real estate money laundering involves the migration of ill-gotten wealth from the developing world into the world's leading financial centers. In the U.S. context, this has meant easier sanctions evasion by the Iranian government, the loss of hundreds of jobs across West Virginia and Ohio after it was discovered that the millions invested into these states were just a real estate laundering scheme, and the contribution that corrupt money in the U.S. real estate sector plays in further eroding global democratic norms. The unchecked abuse of the real estate sector also reveals the underbelly of professional money laundering networks, where the very individuals meant to safeguard the financial system instead are given carte blanche over laws and ethical codes.

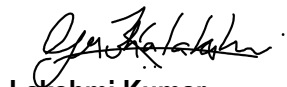
FinCEN through this ANPRM has embarked on an effort to create a robust regulatory framework. The ANPRM if incorporated fully into a final rule will address the systemic vulnerabilities presented by the U.S. real estate sector and limit the ability of criminal actors to use and abuse the U.S. real estate market as a safe haven. We are hopeful that the recommendations provided throughout this comment can assist in creating a strong rule, that balances the risk to U.S. national security with ongoing practices within the sector.

We thank you again for the opportunity to present these comments. In case you have any questions, or would like additional information on GFI's work in this regard, please reach out to **Lakshmi Kumar, Policy Director** at lkumar@gfintegrity.org and **Kaisa de Bel, Policy Analyst** at kdebel@gfintegrity.org

Sincerely,



Tom Cardamome
Executive Director



Lakshmi Kumar
Policy Director