



CITIZENS FOR  
RESPONSIBILITY &  
ETHICS IN WASHINGTON

Policy Division  
Financial Crimes Enforcement Network  
P.O. Box 39  
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*Via online portal*

Re: Comment of Citizens for Responsibility and Ethics in Washington in response to *Anti-Money Laundering Regulations for Real Estate Transactions*, U.S. Financial Crimes Enforcement Network, RIN 1506-AB54, 86 Fed. Reg. 69589 (December 8, 2021)

Citizens for Responsibility and Ethics in Washington (“CREW”) respectfully submits this comment in response to the advance notice of proposed rulemaking (“ANPRM”) that the U.S. Financial Crimes Enforcement Network (“FinCEN”) issued on December 8, 2021 in order to address the systemic vulnerabilities to money laundering and other corrupt and illicit financial activity in the United States real estate market. CREW is a nonpartisan anti-corruption and good government watchdog organization and appreciates this opportunity to communicate with FinCEN as you begin the process of regulating a market awash in corrupt and illegal financial activity.

### **Introduction**

FinCEN’s real estate rulemaking comes at an auspicious time. In the fall of 2021, the International Consortium of Investigative Journalists (“ICIJ”) published the results of a massive investigation into international financial corruption. That investigation, based on information collected in the so-called Pandora Papers leak of nearly 12 million financial documents, revealed the nature and extent of the problems facing the American real estate industry. The ICIJ found, for example, that an American real estate investment company accepted millions of dollars from foreign sources to purchase hundreds of residential real estate properties in American suburbs, drastically increasing prices and rents, leaving some Americans

homeless.<sup>1</sup> These revelations--namely, that American real estate investment funds were accepting foreign source money, obscured in many cases by anonymous shell corporations--came on top of the more familiar instances of real estate abuse: for example, the ICIJ found that King Abdullah II of Jordan used shell companies to purchase 14 luxury properties across the United States and United Kingdom,<sup>2</sup> and that an organization involved in an international pedophilia scandal used opaque offshore trusts to invest millions of dollars into American real estate.<sup>3</sup>

These revelations are not isolated or unique incidents. Residential and commercial real estate have been prime targets for money launderers and corrupt actors for decades, as FinCEN explains in its introduction to the ANPRM.<sup>4</sup> Over the past decade, FinCEN has taken a piecemeal approach to combatting money laundering and terrorist financing by issuing Real Estate Geographic Targeting Orders (“GTOs”) aimed at specific sectors in specific markets. While these GTOs have played an important role in the fight against illicit financial activity in these sectors, it is now far past time for FinCEN to design and implement a comprehensive regulatory framework. This is the task at hand.

This comment is intended to provide FinCEN with high-level and specific suggestions that we encourage you to consider as you draft your proposed regulation. First, we have one overarching point that we believe should form the foundation for any regulatory regime you develop to combat illicit activities in the American real estate sector: financial corruption and other illicit activities have an immense and far reaching impact on real people. This is a reality that is too often glossed over in discussions of financial corruption. FinCEN must not fall into that trap.

#### **A. Financial Corruption in the Real Estate Industry Harms Everyday Americans**

The Pandora Papers exposé of Pretium Partners (and their subsidiary Progress Residential), the investment fund that owns thousands of residential properties across the country, tells a damning tale.<sup>5</sup> Pretium raised capital from, among others, various offshore trusts that the ICIJ traced back to wealthy foreign investors, to invest in distressed real estate following the 2008 financial crisis. The real estate investment arm, Progress Residential, has since become a powerhouse in

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<sup>1</sup> Spencer Woodman, Margot Gibbs and Peter Whoriskey, “How a billion dollar housing bet upended a Tennessee neighborhood,” ICIJ, Dec. 15, 2021, <https://www.icij.org/investigations/pandora-papers/how-a-billion-dollar-housing-bet-upended-a-tennessee-neighborhood/>.

<sup>2</sup> “Offshore havens and hidden riches of world leaders and billionaires exposed in unprecedented leak,” ICIJ, Oct. 3, 2021, <https://www.icij.org/investigations/pandora-papers/global-investigation-tax-havens-offshore/>.

<sup>3</sup> Spencer Woodman, “As Catholic order fought sex abuse claims, secret trusts devoted to it poured millions into rental properties,” ICIJ, Oct. 5, 2021 <https://www.icij.org/investigations/pandora-papers/legion-of-christ-us-property-evictions-offshore/>.

<sup>4</sup> See, e.g., 86 Fed. Reg. 69589, 69590.

<sup>5</sup> Woodman, Gibbs, and Whoreisky.

the American residential real estate market, acquiring up to 2,000 residential properties per month with “rapid, all-cash offers,” the specific type of transaction FinCEN is examining in this rulemaking. In doing so, Progress has upended lives, and deeply harmed communities across the country. During the pandemic, Progress allegedly routinely violated the national eviction moratorium, and appears to have concentrated its eviction filings in predominantly Black and Brown communities.

Progress is far from the only bad actor. According to a recent *Washington Post* study, real estate investors wielding all-cash offers have been snapping up residential real estate at a breakneck pace, a practice that has contributed to the wild escalation of real estate valuation across the country.<sup>6</sup> In doing so, these funds have, as Sen. Sherrod Brown (D-OH) explained in a recent Senate Banking Committee hearing, “bought up properties, they raised rents, they cut services, they priced out family home buyers, and they forced renters out of their homes.”<sup>7</sup> The negative results of this behavior have, as is so often the case, fallen the hardest on Black and Brown Americans: over the last year, 30 percent of home sales in majority Black neighborhoods were to investors, compared with 12 percent in other Zip codes.<sup>8</sup> This practice has contributed to the racial wealth gap: home ownership is the primary means of accumulating generational wealth, and Black and Brown Americans have a lower home ownership rate than White Americans.<sup>9</sup> When investors buy properties in predominantly minority neighborhoods that might otherwise be the first home purchases for families, and as the practice causes property values to soar and prices out lower income families, the racial wealth gap increases.<sup>10</sup>

In addition to the direct harms inflicted on communities across the country, illicit activity in the real estate market has had a direct impact on our institutions of government. Specifically, former President Trump’s ascent to the presidency in 2016, and his subsequent unwillingness to divest from his sprawling real estate business, demonstrated how the industry’s embrace of unregulated and opaque transactions

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<sup>6</sup> Kevin Schaul and Jonathan O’Connell, “Investors bought a record share of homes in 2021. See where,” *Washington Post*, Feb. 16, 2022,

<https://www.washingtonpost.com/business/interactive/2022/housing-market-investors/?itid=hp-top-table-main>.

<sup>7</sup> How Institutional Landlords are Changing the Housing Market, Hearing Before the Senate Committee on Banking, Housing, and Urban Affairs, 117th Cong. (Feb. 10, 2022), [https://www.banking.senate.gov/hearings/how-institutional-landlords-are-changing-the-housing-market?itid=lk\\_inline\\_enhanced-template](https://www.banking.senate.gov/hearings/how-institutional-landlords-are-changing-the-housing-market?itid=lk_inline_enhanced-template).

<sup>8</sup> Schaul and O’Connell.

<sup>9</sup> Christian E. Weller and Lily Roberts, “Eliminating the Black-White Wealth Gap is a Generational Challenge,” *Center for American Progress*, Mar. 19, 2021, <https://www.americanprogress.org/article/eliminating-Black-White-wealth-gap-generational-challenge/>.

<sup>10</sup> Schaul and O’Connell. *See also*, Sarah Burd-Sharps and Rebecca Rasch, Impact of the US Housing Crisis on the Racial Wealth Gap Across Generations, Social Science Research Council, Jun. 2015, [https://www.aclu.org/sites/default/files/field\\_document/discrimlend\\_final.pdf](https://www.aclu.org/sites/default/files/field_document/discrimlend_final.pdf); and, Rakech Kochhar and Anthony Cilluffo, “How wealth inequality has changed in the U.S. since the Great Recession, by race, ethnicity and income,” *Pew Research Center*, Nov. 1, 2017, <https://www.pewresearch.org/fact-tank/2017/11/01/how-wealth-inequality-has-changed-in-the-u-s-since-the-great-recession-by-race-ethnicity-and-income/>.

could allow for foreign and corrupt operators to use the market to gain political influence. Trump's real estate empire is heavily reliant on all-cash transactions from anonymous and overseas shell corporations: more than one fifth of all Trump condominiums purchased in the United States since 1980 were bought by anonymous shell companies in this manner, according to an investigation by *Buzzfeed News*.<sup>11</sup> And 83% of these transactions occurred in high risk markets that were currently or eventually subject to FinCEN's GTOs.<sup>12</sup> Critically, despite the Trump organization having never been prosecuted for money laundering, FinCEN's inability to collect and analyze information about these transactions left the public to question whether the Commander in Chief was acting on behalf of potentially corrupt or criminal individuals funneling illicit money into his pockets, or on behalf of the United States. This failure to regulate the real estate industry played an integral part in the decline in the public's trust in government, a problem of institutional legitimacy that endures to this day.

## **B. Specific Suggestions**

CREW offers the following answers to a number of the questions FinCEN raises in its ANPRM.

### **1. Which real estate transactions should FinCEN's rule cover?**

FinCEN's regulation should cover both residential and commercial real estate: CREW strongly urges FinCEN to reject an iterative approach in favor of broadly covering both residential and commercial non-financed real estate transactions in its proposed rule. While FinCEN's GTOs cover non-financed residential real estate transactions in a limited number of geographic areas, FinCEN has yet to apply AML/CFT reporting requirements to any non-financed commercial property transactions even though FinCEN itself notes it has "serious concerns with the money laundering risks associated with the commercial real estate sector."<sup>13</sup> For example, FinCEN reports "an increasing trend towards using commercial real estate-related accounts to launder money for PEPs" and "SAR filings involving commercial real estate fraud almost tripled between 2007 and 2010."<sup>14</sup>

FinCEN rightly cites Department of Justice ("DOJ") actions in support of covering commercial real estate under the proposed rule. For example, DOJ has exposed "drug trafficking organizations funneling illicit proceeds into an investment firm and then

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<sup>11</sup> Thomas Frank, "Secret Money: How Trump Made Millions Selling Condos To Unknown Buyers," *Buzzfeed News*, Jan. 12, 2018, <https://www.buzzfeednews.com/article/thomasfrank/secret-money-how-trump-made-millions-selling-condos-to>

<sup>12</sup> Frank.

<sup>13</sup> 86 Fed. Reg. 69589, 69596.

<sup>14</sup> *Id.*

using the proceeds to invest in commercial real estate ventures,” and “corrupt Russian officials and organized crime figures defrauding the Russian Treasury and transferring the fraud proceeds through shell corporations into Manhattan commercial real estate.”<sup>15</sup> In addition, DOJ successfully recovered a luxury boutique hotel in Beverly Hills, as well as high-end real estate in Beverly Hills, New York and London, based on a \$700 million civil forfeiture action allegedly involving misappropriated funds that had been laundered through the United States and several other jurisdictions.<sup>16</sup> Based on these actions, any failure to include commercial real estate transactions in its proposed rule substantially increases the risk that they will be viewed as an attractive safe haven for money laundering and other illicit activities.

FinCEN has found that the most commonly reported entities associated with commercial real estate-related money laundering are property management, real estate investment, realty, and real estate development companies.<sup>17</sup> Yet, participants in all-cash real estate transactions, which frequently involve small businesses and sole proprietors, are not presently covered by the same AML/CFT requirements applicable to banks and other financial institutions that finance real estate transactions through loans.<sup>18</sup> Since participants in non-financed real estate transactions often lack the same regulatory oversight and financial and legal incentives to monitor their dealings, it makes them particularly vulnerable to money laundering and other illicit activities.<sup>19</sup> That risk will only escalate if non-financed commercial real estate transactions continue to remain outside the scope of FinCEN’s reporting requirements.

FinCEN should not limit the regulation’s scope based on geography or by land use: DOJ actions show that without guardrails money laundering and other illicit activities have no geographic boundaries. The same concern applies to farmland. For example, DOJ successfully brought money laundering charges against three individuals who used an Oklahoma quarter horse farm to launder millions of dollars

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<sup>15</sup> *Id.*; see generally Financial Crimes Enforcement Network, “FinCEN Sees Growth in Suspected Money Laundering in Commercial Real Estate Industry,” Dec. 5, 2006; Financial Crimes Enforcement Network, “Commercial Real Estate Financing Fraud: Suspicious Activity Reports by Depository Institutions from January 1, 2007–December 31, 2010,” Mar. 2011.

<sup>16</sup> Department of the Treasury, “National Strategy for Combating Terrorist and Other Illicit Financing,” 17–18 (2020) (“2020 National Strategy”), <https://home.treasury.gov/system/files/136/National-Strategy-to-Counter-Illicit-Financev2.pdf>; Department of Justice, “United States Reaches Settlement to Recover More Than \$700 Million in Assets Allegedly Traceable to Corruption Involving Malaysian Sovereign Wealth Fund,” Oct. 30, 2019, <https://www.justice.gov/opa/pr/united-states-reaches-settlement-recover-more-700-million-assets-allegedly-traceable>.

<sup>17</sup> 86 Fed. Reg. 69589, 69596.

<sup>18</sup> 86 Fed. Reg. 69589, 69593.

<sup>19</sup> *Id.*

through its operations.<sup>20</sup> In that case, the ranch was “a front for a multimillion-dollar money-laundering scheme orchestrated by one of the most feared and dangerous Mexican drug cartels.”<sup>21</sup>

For this reason, CREW strongly urges that the proposed rule not limit its scope geographically or by land use since it would only increase the risk that money laundering and other illicit activities would move into jurisdictions outside FinCEN’s designated areas. Not only would geographic and land use boundaries completely undermine the overall efficacy of the program, FinCEN risks creating safe havens that could prove to be extremely difficult to unwind at a future date once this avenue for corruption becomes embedded in a community.

FinCEN’s definition of “legal entities” should include trusts: CREW strongly urges FinCEN to include “trusts” within its definition of “legal entities” subject to FinCEN reporting requirements. Because trusts, whether foreign or U.S. based, can be used effectively to shield a person’s identity, they are particularly susceptible to money laundering risks.<sup>22</sup> Accordingly, FinCEN’s reporting regime should be expanded to add “trusts” to its list of legal entities covered by its AML/CFT requirements, which currently includes “a corporation, limited liability company, partnership or other similar business entity, whether formed under the laws of a state, or of the United States, or a foreign jurisdiction.”<sup>23</sup> CREW agrees that these entities should continue to be covered because they fit within the “known money laundering typology of using shell companies to obscure the ultimate owners of real estate,” while publicly traded companies should continue to be excluded since they are already subject to material disclosure requirements mandated by the Securities and Exchange Commission.<sup>24</sup>

FinCEN’s regulation should cover transactions involving legal entities and natural persons: CREW strongly urges FinCEN to include both natural persons as well as legal entities under the proposed rule. As the Department of the Treasury has noted, criminals often attempt to conceal the true ownership of property by using nominee purchasers or title holders who were sometimes another member of the criminal organization but were often a family member or personal associate of the criminal.<sup>25</sup>

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<sup>20</sup> Valerie Patriarca and Andrea Day, How a Mexican drug cartel hid millions behind a horse farm, *CNBC News*, Jun. 12, 2014, <https://www.cnb.com/2014/06/12/how-a-mexican-drug-cartel-hid-millions-behind-a-horse-farm.html>; Department of Justice, “Federal Prison Terms Handed Down in Multi-Million Dollar Money Laundering Conspiracy Involving Los Zetas Drug Trafficking Proceeds, Extortion and Bribery,” Sept. 5, 2013, <https://www.justice.gov/usao-wdtx/pr/federal-prison-terms-handed-down-multi-million-dollar-money-launde-ring-conspiracy>.

<sup>21</sup> *Id.*

<sup>22</sup> 86 Fed. Reg. 69589, 69599.

<sup>23</sup> 86 Fed. Reg. 69589, 69598.

<sup>24</sup> *Id.*

<sup>25</sup> 2020 National Strategy, 17–18.

As FinCEN rightly points out, any transaction threshold may enable money launderers to structure their behavior to avoid a reporting requirement.<sup>26</sup> For this reason, CREW supports eliminating a minimum threshold for covered real estate transactions.

## **2. Which persons should be required to report information concerning real estate transactions to FinCEN?**

FinCEN should require reporting from a broad group of “gatekeepers”: Due to the often layered and opaque nature of real estate transactions, CREW strongly urges FinCEN to require reporting from certain gatekeepers, including, but not limited to, real estate lawyers, accountants, individuals in private equity fields and other persons who help facilitate these transactions, which have been shown to be particularly vulnerable to money laundering activity.

FinCEN correctly reports that commercial real estate transactions can be particularly complex. For example, these types of investments often involve “purpose-built legal entities and indirect ownership chains as parties create tailored corporate entities to acquire or invest in a manner that limits their legal liability and financial exposure,” resulting in an “opaque field full of diverse foreign and U.S. domiciled legal entities associated with transactions worth hundreds of millions.”<sup>27</sup> FinCEN notes that lawyers, accountants, and individuals in private equity “often facilitate commercial real estate transactions, working at different stages of the transaction and operating with differing amounts of beneficial ownership and financial information related to buyers and sellers.”<sup>28</sup>

On this basis, CREW urges FinCEN to require at least the following persons to report information regarding non-financed transactions when they represent or participate in the planning or execution of transactions for their client concerning the buying and selling of real property:

- (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

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<sup>26</sup> *Id.*

<sup>27</sup> 86 Fed. Reg. 69589, 69595-69596.

<sup>28</sup> 86 Fed. Reg. 69589, 69595.

(xi) money service businesses.<sup>29</sup>

Due to their familiarity with the parties, terms, payment, and property involved in a particular real estate transaction, the persons listed above are in the best position to accurately identify and report the information most likely to be sought by FinCEN, which we have outlined below.<sup>30</sup>

FinCEN should adopt certain measures to alleviate unnecessary costs and burdens:

To alleviate unnecessary costs and to minimize the burden on reporting entities, CREW supports FinCEN adopting a cascading hierarchy based on the types of participants involved in a particular transaction, as is the case for IRS Form 1099-S.<sup>31</sup> CREW would similarly support FinCEN allowing parties to enter into a designation agreement to designate the person with primary responsibility for reporting the required information to FinCEN.<sup>32</sup>

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

Accurate information about beneficial owners is necessary to trace the identity of those persons who use non-financed residential and commercial real estate transactions for money laundering and other illicit activities and who might otherwise hide their identity behind a corporate structure.

Reporting requirements for covered transactions: At a minimum, FinCEN should require the following information to be reported for each covered transaction:

1. Address of property (Note: when transaction involves multiple properties, provide addresses for each property);
2. Date of closing;
3. Total purchase price and other payment terms or conditions;
4. Method of payment (i.e., currency, cashier's check, certified check, traveler's check, personal check, business check, money order, funds transfer; virtual currency; or other payment method used to transfer or exchange property);
5. Source of funds;
6. Purpose of the transaction; and
7. Intended use of the proceeds of the sale.

Reporting requirements for covered parties: At a minimum, FinCEN should require

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<sup>29</sup> See Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001 amending Council Directive 91/308/EEC on prevention of the use of the financial system for the purpose of money laundering, OJ. L. 344, 76– 82 (Dec. 28, 2001).

<sup>30</sup> 86 Fed. Reg. 69589, 69600.

<sup>31</sup> 86 Fed. Reg. 69589, 69598; IRS Instructions for Form 1099-S (01/2022), Proceeds From Real Estate Transactions.

<sup>32</sup> *Id.*



the following information to be reported about covered parties and gatekeepers:

1. *Buyers*: Information about the legal identity, address, contact information, and name of the individual primarily responsible for representing the buyer as a legal entity. We also encourage FinCEN to consider adopting the European Union's requirement that buyers present proof of incorporation and legal ownership.
2. *Sellers*: Information about the legal identity, address, contact information, and name of the individual primarily responsible for representing the seller as a legal entity;
3. *Designated Reporting Individual*: Information about the individual's address, contact information, and name of the individual designated to serve as Reporting Individual and their affiliation or relationship to any buyer, seller, or gatekeeper;
4. *Beneficial Owners*: Information about the identity of the Beneficial Owner(s) with a copy of the Beneficial Owner's driver's license, passport or other similar identifying information, as well as their address and contact information;
5. *Business Organizations involving Multiple Legal Entities*: FinCEN should require additional information from complex business organizations, since, for some business organizations, the beneficial ownership interest flows through ownership interests in legal entities that own other legal entities.
  - a. For business organizations whose beneficial ownership interest flows through one or more legal entities, FinCEN should require information for each legal entity in the ownership chain as follows: legal identity, address, contact information and the individual primarily responsible for representing the legal entity.
6. *Gatekeepers*: Information about the legal entity, and the address, contact information and primary representative for any of the following gatekeepers involved in a covered transaction:
  - a. Real estate lawyers and law firms;
  - b. real estate agents/brokers/settlement agents;
  - c. title insurance companies;
  - d. title and escrow agents and companies;
  - e. real estate investment companies;
  - f. real estate development companies;
  - g. real estate property management companies;
  - h. real estate auctions houses;
  - i. investment advisers;
  - j. private money lenders; and
  - k. money service businesses.

## **Conclusion**

CREW thanks you for your prompt and thorough action to begin this critical process. You are tasked with developing a regulatory framework that will clean up an industry that is awash in corrupt and illicit cash. It is a monumental undertaking. As we have explained, this is an industry that touches the lives of every single American. Endemic corruption and illicit activity in this market has had a profound impact: it has contributed to the expanding racial wealth gap and the resulting decline in Black and Brown generational wealth, and the ongoing crisis of faith in our government. This is the promise of your project. You have it in your power to take a major step towards fixing a system that has helped keep generations of poor, Black, and Brown Americans from achieving the American dream. This is precisely why it is so critical that you design a powerful and comprehensive regulatory regime that helps end financial corruption in this industry and drive out the bad actors who exploit the leniencies in our system. We are committed to working closely with you to ensure the success of this project, and look forward to establishing a close working relationship with your team.

Sincerely,

A handwritten signature in blue ink, appearing to read "Noah Bookbinder". The signature is fluid and cursive, with a prominent initial "N" and a long, sweeping underline.

Noah Bookbinder  
President