PROBATE & ESTATE PLANNING SECTION

Attachment for

Friday, March 15, 2024

Committee on Special Projects

and

Meeting of the Council of the Probate and Estate Planning Section

at the University Club of Michigan State University
3435 Forest Rd, Lansing, MI 48910

Or *via* Zoom

Probate & Estate Planning Section of the
State Bar of Michigan

You are invited to the March meetings of the Committee on Special Projects (CSP) and the Council of the Probate & Estate Planning Section:

Friday, March 15, beginning at 9 AM
at the University Club of Michigan State University
3435 Forest Rd, Lansing, MI 48910

Remote participation by Zoom will be available. So, you are also invited . . .

to a Zoom meeting.
When: Mar 15, 2024, 09:00 AM Eastern Time (US and Canada)

Register in advance for this meeting:

https://us02web.zoom.us/meeting/register/tZYrdOiurDMqGtN2N6RoTEuA14JCMo3_1NCq

After registering, you will receive a confirmation email containing information about joining the meeting. If you are calling in by phone, email your name and phone number to Angela Hentkowski ahentkowski@stewardsheridan.com, we will put your name in a zoom user list that will identify you by name when you call in.

Please note that the Zoom feature of these meetings entails that they will be recorded.

This will be a regular in-person and remote meetings of the Council of the Probate & Estate Planning Section. The Council meeting will be preceded by a meeting of the Council's Committee on Special Projects (CSP), which will begin at 9:00 AM. The CSP meeting will end at about 10:15 AM, and the Council meeting will begin shortly thereafter. The agenda and meeting materials will be posted on the Probate & Estate Planning Section page of the SBM website. Once those things are posted, you should be able to download them from: http://connect.michbar.org/probate/events/schedule.

Richard C. Mills
Section Secretary

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Officers of the Council
for 2023-2024 Term

Office	Officer
Chairperson	James P. Spica
Chairperson Elect	Katie Lynwood
Vice Chairperson	Nathan R. Piwowarski
Secretary	Richard C. Mills
Treasurer	Christine M. Savage

Council Members
for 2023-2024 Term

Council Member	Year Elected to Current Term (partial, first or second full term)	Current Term Expires	Eligible after Current Term?
Glazier, Sandra D.	2021 (1st term)	2024	Yes
Hentkowski, Angela M.	2021 (2nd term)	2024	No
Mysliwiec, Melisa M. W.	2021 (2nd term)	2024	No
Nusholtz, Neal	2021 (2nd term)	2024	No
Sprague, David	2021 (1st term)	2024	Yes
Wrock, Rebecca K.	2021 (1st term)	2024	Yes
Mayoras, Andrew W.	2022 (2nd term)	2025	No
Silver, Kenneth	2022 (2nd term)	2025	No
Dunnings, Hon. Shauna L.	2022 (1st term)	2025	Yes
Chalgian, Susan L.	2022 (1st term)	2025	Yes
Shelton, Michael D.	2022 (1st term)	2025	Yes
Borst, Daniel W.	2022 (1st term)	2025	Yes
Augustin, Ernscie	2023 (1st term)	2026	Yes
Mallory, Alexander S.	2023 (1st term)	2026	Yes
Anderton V, James F.	2023 (2nd term)	2026	No
David, Georgette E.	2023 (2nd term)	2026	No
Hilker, Daniel	2023 (2nd term)	2026	No
Krueger III, Warren H.	2023 (2nd term)	2026	No

Ex Officio Members of the Council

Christopher Ballard; Robert D. Brower, Jr.; Douglas G. Chalgian; Henry M. Grix; Mark K. Harder; Philip E. Harter; Dirk C. Hoffius; Shaheen I. Imami; Robert B. Joslyn; Mark E. Kellogg; Kenneth E. Konop; Marguerite Munson Lentz; Nancy L. Little; James H. LoPrete; Richard C. Lowe; David P. Lucas; John D. Mabley; John H. Martin; Michael J. McClory; Douglas A. Mielock; Amy N. Morrissey; Patricia Gormely Prince; Douglas J. Rasmussen; John A. Scott; David L.J.M. Skidmore; James B. Steward; Thomas F. Sweeney; Fredric A. Sytsma; Marlaine C. Teahan; Lauren M. Underwood; W. Michael Van Haren; Susan S. Westerman; Everett R. Zack

State Bar of Michigan
Probate and Estate Planning Section

2023–24 Standing Committees

Standing Committee	Mission	Chairperson	Members
Amicus Curiae	Review litigants' applications and Courts' requests for the Section to sponsor amicus curiae briefs in pending appeals cases relating to probate, and estate and trust planning, and oversee the work of legal counsel retained to prepare and file amicus briefs	Andrew W. Mayoras	Ryan P. Bourjaily Patricia Davis Angela Hentkowski Scott Kraemer Neil J. Marchand Kurt A. Olson David L.J.M. Skidmore Trevor J. Weston Timothy White
Annual meeting	Plan the Section's Annual Meeting	James P. Spica [as Chair]	[Chair only]
Awards	Periodically make recommendations regarding recipients of the Michael Irish Award, and consult with ICLE regarding periodic induction of members in the George A. Cooney Society	Mark E. Kellogg [as immediate past Chair]	David L.J.M. Skidmore David Lucas [as 2nd and 3rd most recent past Chairs]
Budget	Develop the Section's annual budget	Richard C. Mills [as immediate past Treasurer]	Christine M. Savage Nathan R. Piwowarski [as incoming Treasurer and immediate past Secretary]
Bylaws	Review the Section's Bylaws, to ensure compliance with State Bar requirements, to include best practices for State Bar Sections, and to assure conformity to current practices and procedures of the Section and the Council, and make recommendations to the Council regarding such matters	David Lucas	Christopher A. Ballard John Roy Castillo Nancy H. Welber
Charitable and Exempt Organizations	Consider federal and State legislative developments and initiatives in the fields of charitable giving and exempt organizations, and make recommendations to the Council regarding such matters	Rebecca K. Wrock	Celeste E. Arduino Robin Ferriby Brian Heckman Richard C. Mills John McFarland Kate L. Ringler Matt Wiebe
Citizens Outreach	Provide opportunities for education of the public on matters relating to probate, and estate and trust planning	Kathleen M. Goetsch	Ernscie Augustin Kathleen Cieslik David Lucas Hon. Michael J. McClory Neal Nusholtz

State Bar of Michigan
Probate and Estate Planning Section
2023–24 Standing Committees

Committee on Special Projects	Consider matters relating to probate, and estate and trust planning, and make recommendations to the Council regarding such matters	Melisa M.W. Mysliwiec	[Committee of the whole]
Court Rules, Forms, & Proceedings	Consider matters relating to probate, and estate and trust planning, and make recommendations to the Council regarding such matters	Georgette E. David	JV Anderton Susan L. Chalgian Hon. Michael L. Jaconette Andrew W. Mayoras Hon. Michael J. McClory Dawn Santamarina Marlaine C. Teahan
Electronic Communications	Oversee all matters relating to electronic and virtual communication matters, and make recommendations to the Council regarding such matters	Angela Hentkowski	Michael G. Lichterman Richard C. Mills [as Secretary]
Ethics & Unauthorized Practice of Law	Consider matters relating to ethics and the unauthorized practice of law with respect to probate, and estate and trust planning, and make recommendations to the Council regarding such matters	Alex Mallory	William J. Ard Raymond A. Harris J. David Kerr Neil J. Marchand Robert M. Taylor Amy Rombyer Tripp
Guardianship, Conservatorship, & End of Life Committee	Consider matters relating to Guardianships and Conservatorships, and make recommendations to the Council regarding such matters	Sandra Glazier	William J. Ard Michael W. Bartnik Kimberly Browning Kathleen A. Cieslik Georgette E. David Kathleen M. Goetsch Elizabeth Sue Graziano Raymond A. Harris Hon. Michael L. Jaconette Hon. Michael J. McClory Hon. David M. Murkowski Kurt A. Olson Nathan R. Piwowarski Katie Lynn Ringler Hon. Avery Rose Dawn Santamarina David L.J.M. Skidmore James B. Steward Paul S. Vaidya Karen S. Willard

State Bar of Michigan
Probate and Estate Planning Section
2023–24 Standing Committees

Legislation Development and Drafting	Consider matters with respect to statutes relating to probate, and estate and trust legislation, consider the provisions of introduced legislation and legislation anticipated to be introduced with respect to probate, and estate and trust planning, draft proposals for legislation relating to probate, and estate and trust planning, and make recommendations to the Council regarding such matters	Robert P. Tiplady and Richard C. Mills	Aaron A. Bartell Howard H. Collens Georgette David Stephen Dunn Kathleen M. Goetsch Daniel S. Hilker Michael G. Lichterman David P. Lucas Katie Lynwood Alex Mallory Nathan Piwowarski Christine M. Savage James P. Spica David Sprague
Legislation Monitoring & Analysis	Monitor the status of introduced legislation, and legislation anticipated to be introduced, regarding probate, and estate and trust planning, and communicate with the Council and the Legislation Development and Drafting Committee regarding such matters	Michael D. Shelton	Stephen Dunn Brian K. Elder Elizabeth Graziano Daniel S. Hilker Katie Lynwood David Sprague
Legislative Testimony	As requested and as available, the Members of the Section will give testimony to the Legislature regarding legislation relating to probate, and estate and trust planning	Melisa M.W. Mysliwiec [as CSP Chair]	[Various Section Members]
Membership	Strengthen relations with Section members, encourage new membership, and promote awareness of, and participation in, Section activities	Angela Hentkowski	Ernscie Augustin Susan L. Chalgian Kate L. Ringler
Nominating	Nominate candidates to stand for election as the officers of the Section and the members of the Council	David P. Lucas [as most senior immediate past Chair]	David L.J.M Skidmore Mark E. Kellogg [as 1st and 2nd most recent past Chairs]
Planning	Periodically review and update the Section's Plan of Work	James P. Spica [as Chair]	Katie Lynwood Nathan Piwowarski Richard C. Mills Christine M. Savage Mark E. Kellogg [as Officers and immediate past Chair]

State Bar of Michigan
Probate and Estate Planning Section
2023–24 Standing Committees

Probate Institute	Work with ICLE to plan the ICLE Probate and Estate Planning Institute	Nathan Piwowarski [as Vice Chair]	[Chair only]
Real Estate	Consider real estate matters relating to probate, and estates and trusts, and make recommendations to the Council regarding such matters	Angela Hentkowski	Carlos Alvorado-Jorquera Jeffrey S. Ammon JV Anderton William J. Ard Leslie A. Butler Patricia Davis J. David Kerr Angela Hentkowski Michael G. Lichterman Melisa M.W. Mysliwiec Michael D. Shelton David Sprague James B. Steward
State Bar & Section Journals	Oversee the publication of the Section's Journal, and assist in the preparation of periodic theme issues of the State Bar Journal that are dedicated to probate, and estates and trusts	Melisa M.W. Mysliwiec, Managing Editor	Diane Kuhn Huff Nancy L. Little Neil J. Marchand Richard C. Mills Kurt A. Olson Molly P. Petitjean Rebecca K. Wrock
Tax	Consider matters relating to taxation as taxation relates to probate, and estates and trusts, and make recommendations to the Council regarding such matters	JV Anderton	Daniel Borst Jonathan Beer Mark DeLuca Stephen Dunn Robert Labe John McFarland Neal Nusholtz Christine M. Savage

The Probate and Estate Planning Section Chair and Chair Elect are ex-officio Members of each Standing Committee.

State Bar of Michigan
Probate and Estate Planning Section

2023–24 Ad Hoc Committees

Ad Hoc Committee	Mission	Chairperson	Members
Assisted Reproductive Technology	Review the 2008 Uniform Probate Code Amendment for possible incorporation into EPIC with emphasis on protecting the rights of children conceived through assisted reproduction, and make recommendations to the Council regarding such matters	Nancy H. Welber	Christopher A. Ballard Edward Goldman Nazneen Hasan Christina Lejowski James P. Spica Lawrence W. Waggoner
Electronic Wills	Review proposals for electronic wills, including the Uniform Law Commission's draft of a Uniform Law, and make recommendations to the Council regarding such matters	Kathleen Cieslik	Kimberly Browning Georgette David Sandra Glazier Douglas A. Mielock Neal Nusholtz Christine M. Savage James P. Spica
Fiduciary Exception to the Attorney-Client Privilege	Consider whether there should be some exception to the rule that beneficiaries of an estate or trust are entitled to production of documents regarding the advice given by an attorney to the fiduciary, and make recommendations to the Council regarding such matters	Warren H. Krueger, III	Aaron A. Bartell Ryan P. Bourjaily
Nonbanking Entity Trust Powers	Consider whether there should be legislation granting trust powers to nonbanking entities, and make recommendations to the Council regarding such matters	James P. Spica and Robert P. Tiplady	JV Anderton Laura L. Brownfield Kathleen Cieslik Elise J. McGee Mark K. Harder Richard C. Mills Carol A. Sewell Joe Viviano
Premarital Agreements	Consider whether there should be legislation regarding marital property agreements, and	Christine M. Savage	Daniel W. Borst Georgette David Stephen Dunn Sandra Glazier Angela Hentkowski David Sprague
Uniform Community Property Disposition at Death Act	Consider the Uniform Community Property Disposition at Death Act promulgated by the Uniform Law Commission and make recommendations to the Council regarding the subject of that Act	James P. Spica	Kathleen Cieslik Richard C. Mills Christine M. Savage David Sprague Rebecca Wrock

Undue Influence	Consider the definition of undue influence and attendant evidentiary presumptions, and make recommendations to the Council regarding such matters	Kenneth F. Silver	Sandra Glazier Hon. Michael L. Jaconette Warren H. Krueger, III John Mabley Andrew W. Mayoras Hon. David Murkowski Kurt A. Olson David L.J.M. Skidmore
Uniform Fiduciary Income & Principal Act	Consider the Uniform Fiduciary Income and Principal Act promulgated by the Uniform Law Commission, and make recommendations to the Council regarding such matters	James P. Spica	Anthony Belloli Kathleen Cieslik Marguerite Munson Lentz Richard C. Mills Robert P. Tiplady Joe Viviano
Uniform Partition of Heirs Property Act	Consider the Uniform Partition of Heirs Property Act promulgated by the Uniform Law Commission and make recommendations to the Council regarding the subject of that Act	James P. Spica	Marguerite Munson Lentz Alex Mallory Elizabeth McLachlan Christine Savage David Sprague Rebecca Wrock
Various Issues Involving Death and Divorce	Should EPIC be changed so that a pending divorce affects priority to serve in a fiduciary position; Should Council explore whether EPIC should be changed so that a pending divorce affects intestacy, elective share, exemptions and allowances, etc. Should "affinity" be defined to prevent elimination of stepchildren's gifts by operation of law after divorce or, instead, should there be an exception allowing gifts to stepchildren on a showing of, Perhaps, clear and convincing evidence demonstrating that the Settlor would not have intended the omission of the stepchild?	Daniel Borst Sean Blume	Georgette David Hon. Shauna Dunnings Katie Lynwood Andy Mayoras Elizabeth Siefker

The Probate and Estate Planning Section Chair and Chair Elect are ex-officio Members of each Ad Hoc Committee.

State Bar of Michigan
Probate and Estate Planning Section

2023–24 Liaisons

Association	Liaison
Alternative Dispute Resolution Section	John Hohman
Business Law Section	Mark E. Kellogg
Elder Law and Disability Right Section	Angela Hentkowski
Family Law Section	Anthea E. Papista
Institute of Continuing Legal Education	Lindsey DiCesare and Rachael Sedlacek
Law Schools	Savina Mucci
Michigan Bankers Association	David Sprague
Michigan Legal Help/Michigan Bar Foundation	Kathleen Goetsch
Michigan Probate Judges Association	Hon. Shauna Dunnings
Probate Registers	Ryan J. Buck
Real Property Law Section	Angela Hentkowski
Supreme Court Administrative Office	Georgette E. David
State Bar	Jennifer Hatter
Taxation Section	Neal Nusholtz
Uniform Law Commission	James P. Spica

The mission of each Liaison is to develop and maintain bilateral communication between his or her association and the Probate and Estate Planning Section of the State Bar of Michigan on matters of mutual interest and concern.

(2022 - 09)

CSP Materials

MEETING OF THE COMMITTEE ON SPECIAL PROJECTS OF THE COUNCIL OF THE PROBATE AND ESTATE PLANNING SECTION OF THE STATE BAR OF MICHIGAN

The Committee on Special Projects, or CSP, is our Section's "committee of the whole." The CSP flexibly studies, in depth, a limited number of topics and makes recommendations to Council.

All Section members are welcome to participate and are able to vote.

AGENDA

Friday, March 15, 2024

9:00 – 10:00 AM

In person meeting at the University Club of Michigan State University
3435 Forest Rd, Lansing, MI 48910

Remote participation by Zoom is available. Register in advance at:
https://us02web.zoom.us/meeting/register/tZYrdOiurDMqGtN2N6RoTEuA14JCMo3_1NCq

After registering, you will receive a confirmation email containing information about joining the meeting. If you are calling in by phone, please email your name and phone number to Angela Hentkowski at ahentkowski@stewardsheridan.com. We will put your name in a Zoom user list that will identify you by name when you call in.

1. **Sandra D. Glazier – 10 minutes**

   Re: Anti-Money Laundering Regulations for Residential Real Estate Transfers

   Sandy will introduce rules proposed in the Federal Register related to Anti-Money Laundering Regulations for Residential Real Estate Transfers, see 89 FR 12424 (proposed February 16, 2024) (to be codified at 31 CFR § 1031). https://www.federalregister.gov/documents/2024/02/16/2024-02565/anti-money-laundering-regulations-for-residential-real-estate-transfers. Specifically, it is proposed that Chapter X of Title 31 of the Code of Federal Regulations be amended by adding Part 1031—Rules for Persons Involved in Real Estate Closings and Settlements.

   Sandy seeks a straw-poll as to whether CSP should recommend that Council analyze this further for the purpose of weighing in. Written comments on this proposed rule must be submitted on or before April 16, 2024. Exhibit 1A is the Federal Register. The Request for Comment begins on p. 12442 of the Federal Register.

2. Sandra D. Glazier – Guardianship, Conservatorship & End of Life Committee – 35 minutes

Re: Death with Dignity Act

The Committee met recently to analyze SB 678, 680, and 681 (with a majority of the discussion focused on SB 681) and there are a number of concerns. Attached as Exhibit 2A is the Committee's report. Attached as Exhibit 2B is SB 681. Attached as Exhibit 2C is a summary of a guardian's role related to Do Not Resuscitate ("DNR") Orders prepared by Judge Mack. Attached as Exhibit 2D are 2013 materials on the Authority of Guardians to Make End of Life Decisions, also prepared by Judge Mack.

The Committee seeks direction.

EXHIBIT 1A

Anti-Money Laundering Regulations for Residential Real Estate Transfers

89 FR 12424

proposed February 16, 2024

DEPARTMENT OF THE TREASURY

Financial Crimes Enforcement Network

31 CFR Chapter X

RIN 1506–AB54

Anti-Money Laundering Regulations for Residential Real Estate Transfers

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

ACTION: Notice of proposed rulemaking.

SUMMARY: FinCEN is issuing a proposed rule to require certain persons involved in real estate closings and settlements to submit reports and keep records on identified non-financed transfers of residential real property to specified legal entities and trusts on a nationwide basis. Transfers made directly to an individual would not be covered by this proposed rule. The proposed rule describes the circumstances in which a report must be filed, who must file a report, what information must be provided, and when a report is due. These reports are expected to assist the U.S. Department of the Treasury; Federal, State, and local law enforcement; and national security agencies in addressing illicit finance vulnerabilities in the U.S. residential real estate sector and to curtail the ability of illicit actors to anonymously launder illicit proceeds through the purchase of residential real property, which threatens U.S. economic and national security.

DATES: Written comments on this proposed rule must be submitted on or before April 16, 2024.

ADDRESSES: Comments may be submitted by any of the following methods:

- *Federal E-Rulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Refer to Docket Number FINCEN–2024–0005 and RIN 1506–AB54.
- *Mail:* Policy Division, Financial Crimes Enforcement Network, P.O. Box 39, Vienna, VA 22183. Refer to Docket Number FINCEN–2024–0005 and RIN 1506–AB54.

Please submit comments by one method only.

FOR FURTHER INFORMATION CONTACT: The FinCEN Regulatory Support Section at 1–800–767–2825 or electronically at *frc@fincen.gov.*

SUPPLEMENTARY INFORMATION:

I. Executive Summary

The U.S. Department of the Treasury (Treasury) has long recognized the illicit finance risks posed by abuse of the U.S. real estate market and of legal entities and trusts by criminals and corrupt officials to launder ill-gotten gains through transfers of residential real estate. The abuse of U.S. residential real estate markets threatens U.S. economic and national security and can disadvantage individuals and small businesses that seek to compete fairly in the U.S. economy. The proposed rule is designed to enhance transparency nationwide in the U.S. residential real estate market and to assist Treasury, law enforcement, and national security agencies in protecting U.S. economic and national security interests by requiring certain persons involved in real estate closings and settlements to file reports and maintain records related to identified non-financed transfers of residential real estate to specified legal entities and trusts on a nationwide basis, including information regarding beneficial owners of those entities and trusts.

Among the persons required by the Bank Secrecy Act (BSA) to maintain anti-money laundering (AML) programs are "persons involved in real estate closings and settlements."[1] Yet, for many years, FinCEN has exempted such persons from comprehensive regulation under the BSA and has issued a series of time-limited and geographically focused "geographic targeting orders" (GTOs) to the real estate sector in lieu of more comprehensive regulation. Information received in response to FinCEN's GTOs relating to non-financed transfers of residential real estate (Residential Real Estate GTOs) have demonstrated the need for increased transparency and further regulation of this sector. This notice of proposed rulemaking (NPRM) thus proposes a new reporting requirement for non-financed residential real estate transactions, consistent with the BSA's longstanding directive to impose AML requirements on persons involved in real estate closings and settlements. At the same time, FinCEN has carefully considered the comments received in response to an advance notice of proposed rulemaking (ANPRM) on Anti-Money Laundering Regulations for Real Estate Transactions, and FinCEN appreciates the burdens that traditional AML program and SAR requirements may impose on persons involved in real estate transactions. This NPRM therefore proposes a streamlined reporting framework designed to minimize unnecessary burdens while also enhancing transparency. Although certain information collected under this proposed rule may also be available to law enforcement, in some instances, through the new beneficial ownership reporting requirements imposed by the Corporate Transparency Act (CTA), the CTA's reporting regime and this proposed rule serve different purposes.

In contrast to the beneficial ownership reporting requirements outlined in the CTA, this proposed rule is a tailored reporting requirement that would capture a particular class of activity that Treasury deems high-risk and that warrants reporting on a transaction-specific basis. More specifically, the proposed rule would require certain persons involved in residential real estate closings and settlements to file, and to maintain a record of, a streamlined version of a Suspicious Activity Report (SAR), referred to here as a "Real Estate Report." The persons subject to these reporting and recordkeeping requirements would be deemed reporting persons for purposes of the proposed rule and would be determined through a "cascading" approach based on the function performed by the person in the real estate closing and settlement. The "cascade" is designed to minimize burdens on persons involved in real estate closings and settlements while avoiding gaps in reporting and incentives for evasion. To provide some flexibility in this cascade approach, real estate professionals would also have the option to designate a reporting person from among those in the cascade by agreement.

The information required to be reported in the Real Estate Report would identify the reporting person, the legal entity or trust to which the residential real property is transferred, the beneficial owners of that transferee entity or transferee trust, the person that transfers the residential real property, and the property being transferred, along with certain transactional information about the transfer. The reporting person would be required to file the Real Estate Report no later than 30 days after the date of closing. Because of the streamlined nature of these Real Estate Reports compared to traditional SARs, as well as the flexible "cascade" framework, persons subject to this reporting requirement would not need to maintain the types of AML programs otherwise required of financial institutions under the BSA.[2]

[1] 31 U.S.C. 5312(a)(2)(U).

[2] 31 U.S.C. 5318(h).

II. Background

A. Illicit Finance Risks in the U.S. Real Estate Sector

As Secretary of the Treasury (Secretary) Yellen noted at the 2023 Summit for Democracy, "[c]orrupt actors have for decades anonymously stashed their ill-gotten gains in real estate. Those looking to exploit our system have been able to—with anonymity—store illicit proceeds in an appreciating asset . . . Treasury is working to remove that anonymity[.]"[3] The Secretary has made increasing transparency in the domestic and international financial system a national priority, noting that "illicit proceeds . . . equaling an estimated two percent of U.S. gross domestic product (GDP) flow through the U.S. financial system each year. Permitting illicit actors to benefit from the stability and security of the U.S. financial system weakens financial transparency, distorts markets, and hurts ordinary Americans."[4] Treasury's Strategic Plan for 2022 to 2026 makes clear that one indicator of success in combatting illicit actors' abuse of the U.S. financial system is achieving an "updated regulatory framework for real-estate [sic] to effectively cover cash transactions."[5]

The United States' stable real estate market and strong property rights protections make U.S. residential real estate attractive to illicit actors looking to launder the proceeds of crime and corruption. This is particularly the case for non-financed transfers that are currently outside the purview of the due diligence requirements imposed on regulated financial institutions pursuant to the BSA. For purposes of this rule, a non-financed transfer is any transfer that does not involve an extension of credit to the transferee secured by the transferred residential real property[6] and extended by a financial institution that has both an obligation to maintain an AML program and an obligation to report suspicious transactions. Money launderers exploit the absence of an obligation on any party to a non-financed transfer to conduct due diligence.

As a result, and as the Administration's 2021 U.S. Strategy for Countering Corruption notes, the United States' real estate market is a significant destination for the laundered proceeds of illicit activity. Treasury's 2022 National Money Laundering Risk Assessment (2022 NMLRA) also reflects this. The 2022 NMLRA identifies a lack of transparency in non-financed real estate transfers in particular as a key weakness in the U.S. Anti-Money Laundering and Countering the Financing of Terrorism (AML/CFT) regulatory regime.[7]

International bodies, such as the Financial Action Task Force (FATF) and non-government organizations, have likewise noted the sector's appeal for illicit actors intent on laundering funds.[8] In particular, the FATF has recommended that the United States take appropriate action to address money laundering risks in relation to non-financed transfers of real estate.[9] Furthermore, open-source investigative reports have demonstrated that criminal actors frequently employ legal entities, such as limited liability companies (LLCs), to launder money, including through real estate. In August 2021, Global Financial Integrity (GFI), a non-governmental organization, published a study estimating that at least $2.3 billion had been laundered through the U.S. real estate market from 2015 to 2020 and the "use of anonymous shell companies and complex corporate structures continue[d] to be the number one money laundering typology" involving real estate.[10] Additionally, over 50 percent (30 of the 56 cases the study examined) involved politically exposed persons (PEPs), which the FATF has found "may be able to use their political influence for profit illegally [and] . . . thus may present a risk higher than other customers."[11] GFI also highlighted that legal entities and trusts are frequently used to make such purchases, and that purchases are rarely made in the name of the PEP. For example, a 2020 forfeiture complaint filed by the Department of Justice (DOJ) alleged that a former president of a country in Africa and his spouse used funds derived from corruption to purchase U.S. residential properties worth millions of dollars via a trust.[12] Such crimes undermine the national security goals of the United States, one pillar of which is countering corruption.[13] FinCEN's own December 2022 analysis revealed that between March and October 2022—the eight months following the invasion of Ukraine—Russian oligarchs sent millions of dollars to their children to purchase residential real estate in the

[3] U.S. Department of the Treasury, Remarks by Secretary Janet L. Yellen on Anti-Corruption as a Cornerstone of a Fair, Accountable, and Democratic Economy at the Summit for Democracy (Mar. 28, 2023), *available at https://home.treasury.gov/news/press-releases/jy1371*.

[4] *Id;* U.S. Department of the Treasury, Strategic Plan 2022–2026 (2022), p. 23, *available at https://home.treasury.gov/system/files/266/Treasury StrategicPlan-FY2022-2026.pdf*.

[5] *Id*, at p. 24.

[6] For the purposes of this proposed rule, "residential real property" means: (1) real property located in the United States containing a structure designed principally for occupancy by one to four families; (2) vacant or unimproved land located in the United States zoned, or for which a permit has been issued, for the construction of a structure designed principally for occupancy by one to four families; or (3) shares in a cooperative housing corporation.

[7] The White House, United States Strategy for Countering Corruption (Dec. 2021), p. 22, *available at https://www.whitehouse.gov/wp-content/uploads/2021/12/United-States-Strategy-on-Countering-Corruption.pdf*; U.S. Department of the Treasury, National Money Laundering Risk Assessment (Feb. 2022), p. 5, *available at https://home.treasury.gov/system/files/136/2022-National-Money-Laundering-Risk-Assessment.pdf*.

[8] The FATF is a global standard-setter of anti-money laundering and counter terrorist financing guidelines. The FATF has noted that "[c]riminals gravitate towards sectors that apply or are believed to apply less comprehensive regulation and mitigation measures or where supervision is found to be lacking," and that "[t]he purchase of real estate allows for the movement of large amounts of funds all at once in a single transaction as opposed to multiple transactions of smaller values." *See* Financial Action Task Force, Guidance for a Risk Based Approach: Real Estate Sector (July 2022), p. 18, *available at https://www.fatf-gafi.org/content/dam/fatf-gafi/guidance/RBA-Real-Estate-Sector.pdf.coredownload.pdf*.

[9] *See* Financial Action Task Force, United States Mutual Evaluation Report (Dec. 2016), p. 1, *available at https://www.fatf-gafi.org/content/dam/fatf-gafi/mer/MER-United-States-2016.pdf.coredownload.inline.pdf*.

[10] Global Financial Integrity, "Acres of Money Laundering: Why U.S. Real Estate is a Kleptocrat's Dream" (Aug. 2021), pp. 13–16, *available at https://gfintegrity.org/report/acres-of-money-laundering-why-u-s-real-estate-is-a-kleptocrats-dream/*. According to its website, GFI is "a Washington, DC-based think tank focused on illicit financial flows, corruption, illicit trade and money laundering." *See* Global Financial Integrity, "About," *available at https://gfintegrity.org/about/*.

[11] Financial Action Task Force, Guidance for a Risk Based Approach: Real Estate Sector (July 2022), pp. 29–30, *available at https://www.fatf-gafi.org/content/dam/fatf-gafi/guidance/RBA-Real-Estate-Sector.pdf.coredownload.pdf; see e.g.*, U.S. Department of Justice, Press Release, Over $1 billion in misappropriated 1MDB Funds Now Repatriated to Malaysia (Aug. 5, 2021), *available at https://www.justice.gov/opa/pr/over-1-billion-misappropriated-1mdb-funds-now-repatriated-malaysia*. The term "PEP" generally includes a current or former senior foreign political figure, their immediate family, and their close associates. *See* Federal Financial Institutions Examination Council, FFIEC BSA/AML Examination Manual, Politically Exposed Persons—Overview (v5 2015), p. 290; *see also* Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, Financial Crimes Enforcement Network, National Credit Union Administration, and Office of the Comptroller of the Currency, Joint Statement on Bank Secrecy Act Due Diligence Requirements for Customers Who May Be Considered Politically Exposed Persons (Aug. 21, 2020), *available at https://www.federalreserve.gov/newsevents/pressreleases/files/bcreg20200821a1.pdf*.

[12] *See* Complaint for Forfeiture, *U.S. v. Real Property Located in Potomac, Maryland, Commonly Known as 9908 Bentcross Drive, Potomac, MD 20854* (D. Md. July 15, 2020) (Case No. 20–cv–02071).

[13] The White House, National Security Strategy (Oct. 2022), p. 36, *available at https://www.whitehouse.gov/wp-content/uploads/2022/10/Biden-Harris-Administrations-National-Security-Strategy-10.2022.pdf*.

United States, often via legal entities, demonstrating the appeal of residential real estate even to the potential targets of U.S. sanctions.[14]

As numerous public law enforcement actions illustrate, non-financed purchases of residential real estate by certain legal entities and trusts are acutely vulnerable to exploitation by illicit actors, due to a general lack of AML regulations covering or applicable to transfers conducted in this manner.[15] While many non-financed residential real estate transfers may involve no illicit funds, a substantial proportion of such non-financed transactions are conducted by persons also engaged in activity characterized by other financial institutions as suspicious, and reporting on such non-financed residential real estate transactions is of significant value to law enforcement. For example, the individuals and entities identified in Residential Real Estate GTO reports correlate with traditional SAR filings by financial institutions; FinCEN has found that approximately 42 percent of non-financed real estate transfers captured by the Residential Real Estate GTOs are conducted by individuals or legal entities on which a SAR has been filed. In other words, persons of potential interest to law enforcement due to their engagement in suspicious activity are also engaging in a type of transaction known to be used as a method of money-laundering: the non-financed purchase of residential real estate through a legal entity.

In addition to the law enforcement and national security concerns regarding abuse of the residential real estate sector, money laundering through residential real estate can distort real estate prices and potentially make it more difficult for legitimate buyers and sellers to participate in the market. In particular, the presence of illicit funds in the real estate sector can affect housing prices.[16] Legitimate buyers are also adversely affected by illicit actors' preference to avoid financing, as sellers generally favor such "all-cash" offers due to the speed with which a sale can be closed.[17]

Due to the illicit finance risks presented and the attendant economic burdens of market abuse, FinCEN's public efforts to counter money laundering in the real estate sector have focused on the use of legal entities by illicit actors to obfuscate ownership of residential real property.[18] The reasoning behind this focus on legal entities is discussed extensively in FinCEN's December 2021 Anti-Money Laundering Regulations for Real Estate Transactions ANPRM (2021 ANPRM), which highlighted how, as evidenced by open source investigative articles, law enforcement actions, and feedback from FinCEN's Residential Real Estate GTOs program, individuals intent on laundering money through residential real estate frequently take advantage of the opacity of shell companies or other legal entity structures to mask true beneficial ownership of a property and their involvement in real estate transfers.[19]

B. FinCEN's Prior Regulation of the Real Estate Sector

1. Current Law

Enacted in 1970, the Currency and Foreign Transactions Reporting Act, generally referred to as the BSA, is designed to combat money laundering, the financing of terrorism, and other illicit financial activity.[20] The Secretary is authorized to administer the BSA and to require financial institutions to keep

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[14] *See* FinCEN, Financial Trend Analysis—Trends in Bank Secrecy Act Data: Financial Activity by Russian Oligarchs in 2022 (Dec. 2022).

[15] *See, e.g., U.S.* v. *Delgado*, 653 F.3d 729 (8th Cir. 2011) (drug trafficking, money laundering); *U.S.* v. *Fernandez*, 559 F.3d 303 (5th Cir. 2009) (drug trafficking, money laundering); Complaint for Forfeiture, *U.S.* v. *All the Lot or Parcel of Land Located at 19 Duck Pond Lane Southampton, New York* 11968, Case No. 1:23–cv–01545 (S.D.N.Y. Feb. 24, 2023) (sanctions evasion); Indictment and Forfeiture, *U.S.* v. *Maikel Jose Moreno Perez*, Case No. 1:23–cr–20035–RNS (S.D. Fla. Jan. 26, 2023) (bribery, money laundering, conspiracy); Motion for Preliminary Order of Forfeiture and Preliminary Order of Forfeiture, *U.S.* v. *Colon*, Case No. 1:17–cr–47–SB (D. Del. Nov. 18, 2022) (drug trafficking, money laundering); *U.S.* v. *Andrii Derkach*, Cr. No. 22–432 (E.D.N.Y. Sept. 26, 2022) (sanctions evasion, money laundering, bank fraud); Doc. No. 10 at p. 1, *U.S.* vs. *Ralph Steinmann and Luis Fernando Vuiz*, Case No. 22–2–306–CR–Gayles/Torres (S.D. Fla. July 12, 2022) (bribery, money laundering); *U.S.* v. *Jimenez*, 2022 U.S. Dist. LEXIS 77685, 2022 WL 1261738 (S.D.N.Y. Apr. 28, 2022) (Case No. 1:18–cr–00879) (false claim fraud, wire fraud, money laundering, identity theft); Complaint for Forfeiture, *U.S.* v. *Real Property Located in Potomac, Maryland, Commonly Known as 9908 Bentcross Drive, Potomac, MD 20854*, Case No. 20–cv–02071 (D. Md. July 15, 2020) (public corruption, money laundering); Final Order of Forfeiture, *U.S.* v. *Raul Torres*, Case No. 1:19–cr–390 (N.D. Ohio Mar. 30, 2020) (operating an animal fighting venture, operating an unlicensed money services business, money laundering); *U.S.* v. *Bradley*, 2019 U.S. Dist. LEXIS 141157, 2019 WL 3934684 (M.D. Tenn. Aug. 20, 2019) (Case No. 3:15–cr–00037–2) (drug trafficking, money laundering); Indictment, *U.S.* v. *Patrick Ifediba, et al.*, Case No. 2:18–cr–00103–RDP–JEO, Doc. 1 (N.D. Ala. Mar. 29, 2018) (health care fraud); Redacted Indictment, *U.S.* v. *Paul Manafort*, Case 1:18–cr–00083–TSE (E.D. Va. Feb. 26, 2018) (money laundering, acting as an unregistered foreign agent); *U.S.* v. *Miller*, 295 F. Supp. 3d 690 (E.D. Va. 2018) (wire fraud); *U.S.* v. *Coffman*, 859 F. Supp. 2d 871 (E.D. Ky. 2012) (mail, wire, and securities fraud); *U.S.* v. *10.10 Acres Located on Squires Rd.*, 386 F. Supp. 2d 613 (M.D.N.C. 2005) (drug trafficking); *Atty. Griev. Comm'n of Md.* v. *Blair*, 188 A.3d 1009 (Md. Ct. App. 2018) (money laundering drug trafficking proceeds); *State* v. *Harris*, 861 A.2d 165 (NJ Super. Ct. App. Div. 2004) (money laundering, theft); *see also* U.S. Department of Justice, Press Release, United States Reaches Settlement to Recover More Than $700 Million in Assets Allegedly Traceable to Corruption Involving Malaysian Sovereign Wealth Fund (Oct. 30, 2019), *available at https://www.justice.gov/opa/pr/united-states-reaches-settlement-recover-more-700-million-assets-allegedly-traceable;* U.S. Department of Justice, Press Release, Acting Manhattan U.S. Attorney Announces $5.9 Million Settlement of Civil Money Laundering And Forfeiture Claims Against Real Estate Corporations Alleged to Have Laundered Proceeds of Russian Tax Fraud (May 12, 2017), *available at https://www.justice.gov/usao-sdny/pr/acting-manhattan-us-attorney-announces-59-million-settlement-civil-money-laundering-and;* U.S. Department of Justice, Press Release, Associate of Sanctioned Oligarch Indicted for Sanctions Evasion and Money Laundering: Fugitive Vladimir Vorontchenko Aided in Concealing Luxury Real Estate Owned by Viktor Vekselberg (Feb. 7, 2023), *available at https://www.justice.gov/usao-sdny/pr/associate-sanctioned-oligarch-indicted-sanctions-evasion-and-money-laundering.* Moreover, as the FATF noted in July 2022, "[d]isparities with rules surrounding legal structures across countries means property can often be acquired abroad by shell companies or trusts based in secrecy jurisdictions, exacerbating the risk of money laundering." International bodies, such as the FATF have found that "[s]uccessful AML/CFT supervision of the real estate sector must contend with the obfuscation of true ownership provided by legal entities or arrangements[.]" Financial Action Task Force, Guidance for a Risk Based Approach: Real Estate Sector (July 2022), p. 17, *available at https://www.fatf-gafi.org/content/dam/fatf-gafi/guidance/RBA-Real-Estate-Sector.pdf.coredownload.pdf.*

[16] *See, e.g.,* Richard Vanderford, "Fraudulent Covid Aid Drove Up U.S. House Prices, Report Says," *The Wall Street Journal* (June 22, 2023).

[17] *See* The White House, United States Strategy for Countering Corruption (Dec. 2021), p. 7, *available at https://www.whitehouse.gov/wp-content/uploads/2021/12/United-States-Strategy-on-Countering-Corruption.pdf;* Financial Action Task Force, Guidance for a Risk Based Approach: Real Estate Sector (July 2022), p. 19, *available at https://www.fatf-gafi.org/content/dam/fatf-gafi/guidance/RBA-Real-Estate-Sector.pdf.coredownload.pdf.*

[18] *See, e.g.,* FinCEN, Press Release, FinCEN Renews and Expands Real Estate Geographic Targeting Orders (Apr. 21, 2023), *available at https://www.fincen.gov/news/news-releases/fincen-renews-and-expands-real-estate-geographic-targeting-orders-1* (announcing the renewal of an effort to combat illicit finance by collecting information on legal entity purchases of real estate); FinCEN, FIN–2017–A003, Advisory to Financial Institutions and Real Estate Firms and Professionals (Aug. 22, 2017), p. 2 (noting that high-value residential real estate markets are vulnerable to penetration by foreign and domestic criminal organizations and corrupt actors, especially those misusing otherwise legitimate LLCs or other legal entities to shield their identities).

[19] 86 FR 69589 (Dec. 8, 2021).

[20] *See* 31 U.S.C. 5311. Certain parts of the Currency and Foreign Transactions Reporting Act, its amendments, and the other statutes relating to the subject matter of that Act, have come to be referred to as the BSA. The BSA is codified at 12 U.S.C. 1829b, 12 U.S.C. 1951–1960, and 31 U.S.C. 5311–5314 and 5316–5336, and includes notes thereto, with implementing regulations at 31 CFR Chapter X. The Anti-Money Laundering Act of 2020, Section 6003(1) (Definitions), defines the BSA as section 21 of the Federal Deposit Insurance Act (12 U.S.C. 1829b), Chapter 2 of Title I of Public Law 91–508 (12 U.S.C. 1951 *et seq.*), and 31 U.S.C. chapter 53, subchapter II.

records and file reports that "are highly useful in criminal, tax, or regulatory investigations or proceedings" or in the conduct of "intelligence or counterintelligence activities, including analysis, to protect against international terrorism." [21] The Secretary delegated the authority to implement, administer, and enforce compliance with the BSA and its implementing regulations to the Director of FinCEN.[22]

The BSA requires each covered financial institution to establish an AML/CFT program, which must include, at a minimum, "(A) the development of internal policies, procedures, and controls; (B) the designation of a compliance officer; (C) an ongoing employee training program; and (D) an independent audit function to test programs." [23] The BSA also authorizes the Secretary to require covered financial institutions to report any suspicious transaction relevant to a possible violation of law or regulation (a "suspicious activity report" or "SAR").[24] Among the financial institutions subject to those requirements under the BSA are "persons involved in real estate closings and settlements." [25]

FinCEN's regulations implementing the BSA require banks, non-bank residential mortgage lenders and originators (RMLOs), and housing-related Government Sponsored Enterprises (GSEs) to file SARs and establish AML/CFT programs.[26] However, FinCEN's regulations exempt other persons involved in real estate closings and settlements from the requirement to establish AML/CFT programs, and the regulations do not impose a SAR filing requirement on such persons.[27]

2. FinCEN's Real Estate Exemption

In 2002, FinCEN temporarily exempted certain financial institutions, including "persons involved in real estate closings and settlements" and "loan and finance companies," from the requirement to establish an AML/CFT program. FinCEN explained that it would "continue studying the money laundering risks posed by these institutions in order to develop appropriate AML program requirements." [28] That additional time was needed to consider the businesses that would be subject to such requirements, as well as the nature and scope of the AML/CFT risks associated with those businesses.[29] FinCEN also explained its concern that many of these financial institutions were sole proprietors or small businesses, and FinCEN intended to avoid imposing "unreasonable regulatory burdens with little or no corresponding anti-money laundering benefits." [30]

In 2003, FinCEN issued an ANPRM regarding the AML/CFT program requirement for "persons involved in real estate closings and settlements" (2003 ANPRM). The 2003 ANPRM solicited comments on the money laundering risks in real estate closings and settlements, how to define "persons involved in real estate closings and settlements," whether any persons involved in real estate closings and settlements should be exempted from the AML/CFT program requirement, and how to structure the requirement in light of the size, location, and activities of persons in the real estate industry.[31] FinCEN received 52 comments on the 2003 ANPRM from individuals, various institutions and associations of interested parties, law firms, state bar associations, an office within DOJ, and an office within the Internal Revenue Service (IRS).[32] Many comments suggested that the threat of money laundering through real estate warranted appropriate regulation, but commenters disagreed over the specific businesses that should be covered. FinCEN did not propose regulations in response to these comments, and persons involved in real estate closings and settlements continue to be exempt from the AML/CFT program requirement.

3. FinCEN's Targeted Actions in the Real Estate Sector

While maintaining the exemption for persons involved in real estate closings and settlements, FinCEN has taken targeted action to address certain vulnerabilities in the real estate sector. In a 2012 final rule, FinCEN eliminated an exemption for "loan and finance companies," and required such companies—defined as RMLOs—to file SARs and comply with AML/CFT program obligations.[33] In a 2014 final rule, FinCEN extended similar requirements to the housing-related GSEs—Fannie Mae, Freddie Mac, and the Federal Home Loan Banks.[34] In a 2020 final rule, FinCEN also imposed additional AML/CFT obligations on banks lacking a federal functional regulator, ensuring that such entities would be subject to requirements to have an AML/CFT program and meet Customer Identification Program (CIP) and Customer Due Diligence (CDD) requirements, including the verification of beneficial owners of legal entity accounts, in addition to their existing SAR obligations (which would include reporting on transactions involving suspicious real estate transactions).[35]

To address non-financed transfers of residential real estate that do not involve a bank or other lender, FinCEN also began to issue Residential Real Estate GTOs in 2016.[36] The Residential Real Estate GTOs require title insurance companies to file reports and maintain records concerning non-financed purchases of residential real estate above a certain price threshold by certain legal entities in select metropolitan areas of the United States.

Information received in response to the Residential Real Estate GTOs has confirmed the money laundering risks involved in non-financed transfers of residential real estate and provided FinCEN and its law enforcement partners with additional data about that money laundering typology. The data obtained through the Residential Real Estate GTOs has connected non-financed residential real property purchases by certain legal entities with the true beneficial owners making the purchases, thereby decreasing the ability of criminals to hide their identities while laundering money through real estate. FinCEN regularly receives feedback from law enforcement

[21] 31 U.S.C. 5311(1).

[22] Treasury Order 180–01, Paragraph 3(a) (Jan. 14, 2020), *available at https://home.treasury.gov/about/general-information/orders-and-directives/treasury-order-180-01.*

[23] 31 U.S.C. 5318(h)(1)(A)–(D).

[24] 31 U.S.C. 5318(g).

[25] 31 U.S.C. 5312(a)(2)(U).

[26] 31 CFR parts 1020, 1029, 1030.

[27] 31 CFR 1010.205(b)(1)(v).

[28] 67 FR 21110, 21111 (Apr. 29, 2002).

[29] *Id.* FinCEN initially exempted persons involved in closings and settlements for six months, and then subsequently extended the temporary exemption indefinitely. *Id.*; 67 FR 67547, 67548 (Nov. 6, 2002).

[30] 67 FR 21110, 21112 (Apr. 29, 2002).

[31] 68 FR 17569 (Apr. 10, 2003).

[32] *See* FinCEN's website to review comments submitted, *available at https://www.fincen.gov/comments-advance-notice-proposed-rule-anti-money-laundering-programs-persons-involved-real-estate.*

[33] 77 FR 8148 (Feb. 14, 2012) (codified at 31 CFR part 1029).

[34] 79 FR 10365 (Feb. 25, 2014) (codified at 31 CFR part 1030).

[35] 85 FR 57129 (Sept. 15, 2020) (codified at 31 CFR 1020.210).

[36] *See* 31 U.S.C. 5326; 31 CFR 1010.370; Treasury Order 180–01 (Jan. 14, 2020), *available at https://home.treasury.gov/about/general-information/orders-and-directives/treasury-order-180-01.* In general, a GTO is an order administered by FinCEN which for a finite period of time imposes additional recordkeeping or reporting requirements on domestic financial institutions or other businesses in a given geographic area, based on a finding that the additional requirements are necessary to carry out the purposes of, or to prevent evasion of, the BSA. The statutory maximum duration of a GTO is 180 days, though it may be renewed.

partners that they use the information to generate new investigative leads, identify new and related subjects in ongoing cases, and support prosecution and asset forfeiture efforts. Taking that input into account, FinCEN has renewed the time-limited Residential Real Estate GTOs multiple times and has expanded them to cover additional metropolitan areas and methods of payment, yielding additional insight into the risks in both the luxury and non-luxury residential real estate markets.[37] The information on real estate purchases thus enables investigators to connect real estate transactions with other suspicious financial activity. Although the Residential Real Estate GTOs have been effective, they were intended to be a temporary information collection measure that is limited in duration, not a permanent solution to a nationwide problem.[38] The proposed nationwide reporting framework for certain residential real estate transfers, if finalized, would replace the current Residential Real Estate GTOs.

4. The 2021 Real Estate ANPRM

On December 8, 2021, FinCEN published an ANPRM requesting comment on potential AML regulations for certain real estate professionals.[39] The 2021 ANPRM solicited public comment on whether and how to address money laundering vulnerabilities in the U.S. real estate market, including whether a transactional reporting requirement, triggered when a real estate purchase meets certain conditions, should be imposed on real estate professionals under the BSA. The 2021 ANPRM also solicited comment on whether, in lieu of a transactional reporting requirement, FinCEN should promulgate AML/CFT program requirements and SAR filing requirements for persons involved in real estate closings and settlements, similar to those that are in place for banks and other financial institutions. The 2021 ANPRM further sought comment concerning many aspects of real estate transfers, including: views on the scope of potential regulation of non-financed residential and commercial real estate transfers by legal entities and legal arrangements such as trusts; the sector's vulnerability to money laundering; differences in residential and commercial real estate transfers; due diligence best practices present in the industry; and the costs of any potential regulations.

In response to the 2021 ANPRM, FinCEN received 151 public comments from a wide variety of stakeholders, including real estate industry associations, law firms and associations, non-governmental organizations, credit unions, Members of Congress, academics, and members of the public. Approximately 41 were unique comments and 110 were uniform statements submitted by members of the title insurance industry.

In general, commenters were split in their opinions on whether FinCEN should require transactional reports[40] or require persons involved in real estate closings and settlements to have full AML/CFT program obligations.[41] One commenter wrote that if FinCEN were to apply new reporting measures, it should work with the IRS to amend IRS Form 1099–S to include buyer-side information, along with the seller-side information it already collects.[42] Still other commenters suggested expanding the Residential Real Estate GTOs program to cover the entire nation either all at once or incrementally.[43] FinCEN has considered all the comments that it received in response to the 2021 ANPRM in drafting this proposed rule.

III. FinCEN's Proposed Approach to a Real Estate Reporting Requirement

A. Streamlined SAR Requirement

FinCEN has considered the extent to which non-financed residential real estate transactions should be subject to the standard AML program and SAR-filing requirements that the BSA applies to other financial institutions. By subjecting financial institutions to those requirements and expressly including "persons involved in real estate closings and settlements" among the types of financial institutions specified in the statute, the BSA appears to indicate an expectation that such persons comply with the same AML/CFT rules currently applicable to other types of financial institutions. Although FinCEN originally issued an exemption in 2002 that relieved persons involved in real estate closings and settlements from that obligation, that exemption was intended to be only temporary while FinCEN continued to study money laundering risks in the real estate sector.[44]

After many years of study and several targeted and temporary actions to enhance transparency in the real estate sector, FinCEN is of the view that the money laundering risks for non-financed residential real estate transactions warrant comprehensive AML/CFT regulations. As explained above, such transactions can be used to facilitate and obscure illicit activity. And, as several commenters on the ANPRM have urged, AML programs and SAR-filing obligations would provide highly useful information to law enforcement about those transactions. FinCEN recognizes, however, that the standard AML program and SAR-filing requirements may be especially burdensome to persons involved in real estate transactions, as many of them may be small businesses or individuals who cannot easily implement an AML program designed to identify and report suspicious activity. Such programs, which require financial institutions to make risk-based judgments about transactions and suspicious activity, may also be ineffective if small businesses and individuals in the real estate sector have difficulty implementing them.

For these reasons, FinCEN is proposing a streamlined reporting requirement that differs from the requirements typically imposed on other financial institutions. In particular, section 5318(g) of the BSA authorizes the Secretary to require financial institutions to report, via SARs, any "suspicious transactions relevant to a possible violation of law or regulation."[45] But the BSA affords the Secretary flexibility in implementing that requirement, and indeed directs the Secretary to consider "the means by or

[37] FinCEN found that money laundering risks existed at lower price thresholds, and thus the current Residential Real Estate GTOs set a $300,000 threshold for all covered jurisdictions, except for the City and County of Baltimore, for which the threshold is $50,000.

[38] *See supra* note 36.

[39] *See* 86 FR 69589 (Dec. 8, 2021).

[40] National Association of Realtors, ANPRM Comment (Feb. 18, 2022), pp. 1, 14, *available at https://www.regulations.gov/comment/FINCEN-2021-0007-0128.*

[41] *See* Transparency International U.S., ANPRM Comment (Feb. 18, 2022), p. 9, *available at https://www.regulations.gov/comment/FINCEN-2021-0007-0115;* The FACT Coalition, ANPRM Comment (Feb. 18, 2022), p. 3, *available at https://www.regulations.gov/comment/FINCEN-2021-0007-0122;* California Reinvestment Coalition, ANPRM Comment (Feb. 18, 2022), p. 2, *available at https://www.regulations.gov/comment/FINCEN-2021-0007-0126;* Coalition for Integrity, ANPRM Comment (Feb. 21, 2022), pp. 3–4, *available at https://www.regulations.gov/comment/FINCEN-2021-0007-0127;* Louise Shelley and Ross Delston, ANPRM Comment (Feb. 21, 2022), p. 2, *available at https://www.regulations.gov/comment/FINCEN-2021-0007-0151.*

[42] American Escrow Association, ANPRM Comment (Feb. 18, 2022), pp. 13–17, *available at https://www.regulations.gov/comment/FINCEN-2021-0007-0124.*

[43] *See* Prosperus Title, ANPRM Comment (Feb. 18, 2022), p. 1, *available at https://www.regulations.gov/comment/FINCEN-2021-0007-0125;* Marisa N. Bocci, ANPRM Comment (Feb. 21, 2022), p. 3, *available at https://www.regulations.gov/comment/FINCEN-2021-0007-0150;* RESPRO, ANPRM Comment (Feb. 21, 2022), p. 2, *available at https://www.regulations.gov/comment/FINCEN-2021-0007-0152.*

[44] *See* 67 FR 21110 (Apr. 29, 2002).

[45] 31 U.S.C. 5318(g)(1)(A).

form in which the Secretary shall receive such reporting," including relevant "burdens," "efficiency," and "benefits." [46] A new provision added to the BSA by section 6202 of the Anti-Money Laundering Act of 2020 (AML Act) further directs FinCEN to "establish streamlined . . . processes to, as appropriate, permit the filing of noncomplex categories of reports of suspicious activity." In assessing whether streamlined filing is appropriate, FinCEN must determine, among other things, that such reports would "reduce burdens imposed on persons required to report[,]" while at the same time "not diminish[ing] the usefulness of the reporting to Federal law enforcement agencies, national security officials, and the intelligence community in combating financial crime, including the financing of terrorism[.]" [47]

Based on that authority, FinCEN is proposing to streamline the SAR reporting requirement for purposes of this rule and to create a new form—the Real Estate Report—to reflect this streamlined approach. FinCEN believes that a streamlined reporting requirement, without an accompanying AML/CFT program, is appropriate, as the proposed rule would impose a requirement to report basic, standardized information about all relevant transactions, nationwide.

FinCEN believes the proposed streamlined reporting requirement would enhance the usefulness of BSA reporting to Federal law enforcement agencies, national security officials, and the intelligence community for combating financial crimes. The information collected would contain crucial details about a typology of real estate transfers that present acute illicit finance risks and for which there is broad consensus that regulation is needed—information that would not otherwise be routinely identified and reported in a traditional SAR.

FinCEN also believes that a streamlined filing requirement would reduce the potential burden on reporting persons. The filing requirement would be triggered when the conditions set forth in the proposed rule are met, which FinCEN believes will reduce the overall burden for most filers, compared to those that would be required when implementing a traditional AML program. The streamlined filing requirement, unlike the requirements for filing a traditional SAR, would entail no risk-based judgment about when to file and no narrative assessment. Thus, similar to a Currency Transaction Report (CTR), Form 8300, or report filed under the Residential Real Estate GTOs, the proposed Real Estate Report would not require filers to make discretionary decisions.[48] Because of this, while FinCEN's traditional SAR authority mandates that SARs be guided by a financial institution's AML/CFT program designed to ensure that those discretionary decisions are made appropriately, FinCEN believes that an AML/CFT program is not necessary for reporting persons to accurately prepare and file useful reports under the proposed rule.[49] For this reason, the proposed rule would exempt persons involved in real estate closings and settlements from the BSA's requirement to establish AML/CFT programs—effectively maintaining the current exemption for such persons under 31 U.S.C. 5318(h)(1), in light of the new reporting requirement.[50]

The proposed rule would also exempt reporting persons from the confidentiality provisions that the BSA applies to suspicious activity reporting.[51] These confidentiality provisions typically serve to ensure that banks and other such financial institutions do not alert SAR subjects to the fact that a SAR is being filed based on a suspicion with respect to the subject, potentially inducing a behavior change and reducing the utility of the SAR. However, as the triggering criteria for the filing of the proposed streamlined filing (a non-financed transfer to certain legal entities and trusts) would be known by all parties to the transfer, including those whose information will be collected and reported to FinCEN, the same confidentiality considerations do not apply.[52]

B. The Corporate Transparency Act

FinCEN notes that certain information collected under this proposed rule—most notably the beneficial ownership information of certain legal entities—will be collected and available to law enforcement in certain instances by virtue of the new beneficial ownership reporting requirements imposed by the CTA and implemented through the Beneficial Ownership Information Reporting Requirements Rule (BOI Reporting Rule).[53] However, the CTA's reporting regime and this proposed rule would serve different purposes. This proposed rule is designed as a tailored reporting requirement that would capture a particular class of activity that Treasury deems high-risk—namely, non-financed residential real estate transfers to certain legal entities and trusts—and that, given the risk, warrants reporting on a transaction-specific basis. The resulting reports could readily alert law enforcement to the persons involved in a transfer of assets that carries significant illicit finance risk. Indeed, as with traditional SARs, reports under this proposed rule would require reporting on specific real estate transactions and allow Treasury and law enforcement to connect money laundering through real estate with other types of potentially illicit activities and to conduct broad money laundering trend analysis. In contrast, the BOI Reporting Rule requires companies to file reports about the beneficial ownership of certain legal entities; however, this information is unlikely to shed light on purchases of real estate by criminal actors or allow law enforcement to map out purchases of residential real estate by individual criminals and money launderers as well as their networks. Although some information about real estate purchases may in some cases be separately available through other sources such as state land registries (as discussed

[46] 31 U.S.C. 5318(g)(5)(B)(i)–(iii).

[47] *See* AML Act, section 6202 (*codified at* 31 U.S.C. 5318(g)(D)(i)(1)). Section 6102(c) of the AML Act also amended 31 U.S.C. 5318(a)(2) to give the Secretary the authority to "require a class of domestic financial institutions or nonfinancial trades or businesses to maintain appropriate procedures, including the collection and reporting of certain information as the Secretary of the Treasury may prescribe by regulation, to . . . guard against money laundering, the financing of terrorism, or other forms of illicit finance." FinCEN believes this authority also provides an additional basis for the reporting requirement proposed in this NPRM.

[48] Under the BSA and its implementing regulations, "each financial institution other than a casino shall file a [CTR] of each deposit, withdrawal, exchange of currency or other payment or transfer, by, through, or to such financial institution which involves a transaction in currency of more than $10,000[.]" 31 CFR 1010.311; *see also* 31 U.S.C. 5313. Under the BSA, relevant IRS statutes, and associated implementing regulations, "[a]ny [individual, trust, estate, partnership, association, company or corporation] who, in the course of a trade or business . . . receives currency in excess of $10,000 in 1 transaction (or 2 or more related transactions) shall . . . [file a Form 8300] with respect to the receipt of currency." 31 CFR 1010.330(a)(1)(i); *see also* 31 U.S.C 5331; 26 U.S.C. 7701(a)(1).

[49] *See* 31 U.S.C. 5318(g)(5)(C).

[50] *See* 31 CFR 1010.205(b)(v).

[51] *See* 31 U.S.C. 5318(g)(2).

[52] 31 U.S.C. 5318(a)(7).

[53] The BOI Reporting Rule implements the CTA's reporting provisions. In recognition of the fact that illicit actors frequently use corporate structures to obfuscate their identities and launder ill-gotten gains, the BOI Reporting Rule requires certain legal entities to file reports with FinCEN that identify their beneficial owners. *See* 87 FR 59498 (Sept. 30, 2022). Access by authorized recipients to BOI collected under the CTA are governed by other FinCEN regulations. *See* 88 FR 88732 (Dec. 22, 2023).

below), the inclusion of both beneficial ownership information and real estate transaction information in a single report as proposed in this NPRM will enable law enforcement to access information about potential criminal activity in a more timely and efficient manner.

In addition, the information to be reported under this proposed rule would differ from the information to be reported under the CTA in several ways. For instance, the proposed rule would require reporting of certain information about beneficial owners that is not required to be reported under the CTA reporting regime.[54] A discussion of the content of the proposed Real Estate Report is included in Section IV.E. Furthermore, reports filed pursuant to the BOI Reporting Rule—Beneficial Ownership Information Reports—and reports filed pursuant to this proposed rule—Real Estate Reports—would be housed in different databases with differing access privileges. The proposed Real Estate Reports would be stored electronically in the same database as traditional SAR and other BSA reports, in keeping with the nature, purposes, and use of those reports.

Nevertheless, although they serve different purposes, the proposed rule adopts or adapts certain definitions from the BOI Reporting Rule where appropriate. These definitions are discussed in more detail in Section IV.B.

C. Lack of Alternative Sources of Relevant Information

While other investigative methods and databases may be available to law enforcement seeking information on persons involved in non-financed transfers of residential real property, such sources of information are often incomplete, unreliable, and diffuse, resulting in a misalignment between these sources and the potential risks posed by the transfers.[55] Furthermore, the non-uniformity of the title transfer processes across states and the fact that the recording of title information is largely done at the local level complicates and hinders investigative efforts. An investigator could spend months or even years going through the electronic or physical property records databases of the over 3,000 counties in the United States, only some of which have digitized their records. Furthermore, although certain data about non-financed transfer could be obtained through the Residential Real Estate GTOs, those GTOs currently cover only 68 cities and counties are currently covered by the Residential Real Estate GTOs. In order to verify how many non-financed purchases of residential real estate a known illicit actor has made, law enforcement may have to issue subpoenas to each jurisdiction and potentially travel in-person to many counties to find the relevant information. Law enforcement is also likely to experience difficulty in finding beneficial ownership information for non-financed transfers of residential real estate to legal entities or trusts not registered in the United States. This is particularly key as international buyers contributed approximately $59 billion to the existing-home U.S. residential real estate market from April 2021 to March 2022 and 44 percent of international purchases were non-financed, compared to 24 percent for all existing-home buyers.[56]

The disjointed nature of existing local databases also poses a significant obstacle to a common investigative methodology employed by law enforcement when it searches for perpetrators of money laundering and other criminal activity—namely, identifying networks of individuals that have potentially engaged in suspicious activity. A search of the proposed Real Estate Reports would be far more efficient than searching incomplete commercial databases or potentially visiting thousands of county-level deed offices. FinCEN assesses that law enforcement would benefit from access to information about transfers that reflect an identified money laundering typology in one central location managed and hosted by the U.S. government. Finally, existing commercial databases do not collect important information that is the focus of this rule, including funds transfer information.

IV. Section-by-Section Analysis

The proposed rule would impose reporting and recordkeeping requirements related to certain transfers of residential real property (reportable transfers). The reporting and recordkeeping obligations would primarily apply to "reporting persons," who are certain persons involved in real estate closings and settlements. Generally, the reporting person would be identified on the basis of their order in a "cascade" of specific functions performed by various persons involved in facilitating the closing or settlement of a real estate transaction. The proposed rule would also allow persons in the cascade to designate the reporting person amongst themselves.

The reporting person would be required to report information identifying the transferee entity or trust, the beneficial owners of the transferee entity or trust, and certain individuals signing documents on behalf of the transferee entity or transferee trust (signing individual), as well as information concerning the reporting person, the transferor, the real estate transferred, and certain payment information. The reporting person would be required to file a Real Estate Report with FinCEN and maintain a copy of that report, along with a certification by the transferee's representative as to the identities of the beneficial owner(s) of the transferee, for a period of five years. If the persons involved in facilitating the closing or settlement enter into a designation agreement with regard to the reporting person, then the parties to the agreement would also be required to retain that agreement for a period of five years.[57]

A. Residential Real Property in Reportable Transfers

1. Reportable Residential Real Property

The proposed rule is meant to broadly capture residential real property such as single-family houses, townhouses, condominiums, and cooperatives, as well as apartment buildings designed for one to four families. These properties would be captured even if there is also a commercial element to the property, such as a single-family residence that is located above a commercial enterprise. The proposed rule would also include certain types of land on which a residence is not yet built. The criteria for whether property falls within the parameters of the rule can be met in one of three ways: (1) it is real property that includes a structure

[54] For example, the CTA reporting regime will only indirectly require trusts to report their beneficial owners if an individual indirectly owns or controls a reporting company through a trust.

[55] *See generally* Sarah Mancini, Kate Lang, and Chi Wu, "Mismatched and Mistaken: How the Use of an Inaccurate Private Database Results in SSI Recipients Unjustly Losing Benefits," National Consumer Law Center (Apr. 2021), *available at https://www.nclc.org/wp-content/uploads/2022/08/RptMismatchedFINAL041421.pdf.*

[56] *See* National Association of Realtors, 2022 International Transactions in U.S. Residential Real Estate (July 2022), pp. 4–5, *available at https://cdn.nar.realtor/sites/default/files/documents/2022-international-transactions-in-us-residential-real-estate-07-18-2022.pdf?_gl=1*3orrzx*_gcl_au*MTc4MTk3NTgzOS4xNjg3OTg1MTYy.* The overall dollar value of international investment in residential real estate was comparatively low from 2021–2022 compared to the prior ten years due, in part, to investment and travel restrictions accompanying the COVID–19 pandemic. FinCEN believes this dollar value, in the absence of pandemic conditions, may therefore experience some mean reversion.

[57] *See* 31 CFR 1010.430(d).

designed principally for occupancy by one to four families; (2) it is land that is vacant or unimproved, and that is zoned, or for which a permit has been issued, for occupancy by one to four families; or (3) it is a share in a cooperative housing corporation. This definition modifies and expands the definition of "residential real property" used in the Residential Real Estate GTOs.

Although shares of a cooperative are generally treated under state law as personal property rather than real property, FinCEN believes that the money laundering risks for residential cooperatives are similar to those of condominiums and other residential real property. A cooperative is a corporation, and the owners of the cooperative are the corporation's shareholders. Receiving ownership of shares in a cooperative therefore differs from receiving ownership of real property, as it does not include the filing of a deed specifying that ownership of a piece of real property has been transferred. However, the fundamental purpose of owning shares in a cooperative is to possess a piece of real property—generally a unit in an apartment owned by the cooperative. As the primary purpose for owning shares in a cooperative is to occupy real property, and because the market for cooperatives overlaps with the market for condominiums and other types of real property, FinCEN believes that it is appropriate to treat shares of a cooperative as residential real property for purposes of this rule. Without this treatment, money laundering risks may be unduly incentivized to shift investments to this segment of the real estate market.

The proposed rule also makes clear that reportable residential real property includes property located in the United States, which is defined in the BSA implementing regulations to mean any State, the District of Columbia, the Indian lands (as that term is defined in the Indian Gaming Regulatory Act), and territory or possession of the United States.[58] FinCEN believes this geographical scope is appropriate and that more limited coverage would likely push illicit activity into non-covered areas. Furthermore, a uniform national approach will provide consistency and predictability for businesses required to maintain records and make reports under this proposed rule.

[58] 31 CFR 1010.100(hhh).

2. Ownership Interests in Reportable Residential Real Property

For purposes of the proposed rule, a person may hold an ownership interest in residential real property if the person has rights to the property that are demonstrated through a deed or, for an interest in a cooperative housing corporation, through stock, shares, membership, a certificate, or other contractual agreement evidencing ownership.

Deeds are documents demonstrating title over property and recording changes in ownership and are effective when signed by the transferor and delivered to the transferee. They are generally publicly recorded, and although not all deeds are filed as such, the majority are, and there are benefits to doing so, such as preempting disputes over ownership and effecting the ability to sell the property.

The ownership interests of a cooperative housing corporation are not reflected on a deed and are instead typically demonstrated through stock or shares. The holder of each ownership interest has the right to dispose of that stock or share, the value of which primarily reflects the value of the residence attached to the interest.

B. Transferees in Reportable Transfers

1. Transferee Entities

The proposed regulation would require reporting only if a transferee of an ownership interest in residential real property is a transferee entity or a transferee trust, as those terms are defined. Such a transfer would be reportable even if one or more other transferees (*i.e.*, those that are neither a transferee entity nor transferee trust) also receive an ownership interest in the same property as part of the same transaction. Generally, the proposed rule provides that a "transferee entity" is any person other than a transferee trust or an individual. For example, a transferee entity may be a corporation, partnership, estate, association, or limited liability company. However, the definition of a "transferee entity" contains exceptions for certain highly regulated entities.[59]

[59] For example, as discussed further below, individuals and trusts (outside of statutory trusts) are excepted from the definition of "transferee entity." In addition, certain types of legal entities that are exempt from the requirement to report beneficial ownership information under the CTA are also excepted. Trusts are considered "transferee trusts" rather than "transferee entities" to ensure the proposed rule differentiates between legal entities and legal arrangements.

The proposed definition is informed by comments submitted in response to the 2021 ANPRM. In general, the 2021 ANPRM commenters recognized the money laundering risks presented by transfers of residential real estate to certain legal entities and supported coverage of them in any potential regulation.[60] Some commenters stated that only legal entities that are not covered by the CTA should be covered by any potential regulation of the real estate sector, as their beneficial ownership information will not be collected under the BOI Reporting Rule.[61] However, as discussed below, FinCEN believes that this would leave a serious regulatory gap that would prevent the proposed rule from achieving its purpose of addressing illicit finance risk in the residential real estate sector. One commenter suggested that FinCEN use the definition of "legal entity" that appears in FinCEN's 2020 CDD Rule.[62]

a. Regulated Entities

Although this rule does not rely on the CTA for its legal authority, FinCEN is proposing to adopt many of the CTA's exemptions for purposes of this proposed definition, insofar as the policy rationales for those exemptions align with the goals of this proposed rule. The exemptions that FinCEN proposes to adopt would apply to legal entities that FinCEN believes have sufficient AML/CFT compliance obligations in the real estate context, and which are already subject to more government supervision, or have disclosure requirements that obviate the need for inclusion in this proposed rule.

[60] *See* Global Financial Integrity, ANPRM Comment (Feb. 17, 2022), pp. 10, 24, 30, 39, *available at https://www.regulations.gov/comment/FINCEN-2021-0007-0102;* American Land Title Association, ANPRM Comment (Feb. 17, 2022), p. 1, *available at https://www.regulations.gov/comment/FINCEN-2021-0007-0020;* Transparency International U.S., ANPRM Comment (Feb. 18, 2022), pp. 3, 5, *available at https://www.regulations.gov/comment/FINCEN-2021-0007-0115;* The FACT Coalition, ANPRM Comment (Feb. 18, 2022), pp. 2, 4, *available at https://www.regulations.gov/comment/FINCEN-2021-0007-0122;* California Reinvestment Coalition, ANPRM Comment (Feb. 18, 2022), pp. 2–3, *available at https://www.regulations.gov/comment/FINCEN-2021-0007-0126;* Coalition for Integrity, ANPRM Comment (Feb. 21, 2022), p. 4, *available at https://www.regulations.gov/comment/FINCEN-2021-0007-0127;* Anti-Corruption Data Collective, ANPRM Comment (Feb. 18, 2022), p. 3, *available at https://www.regulations.gov/comment/FINCEN-2021-0007-0153.*

[61] *See* American Land Title Association, ANPRM Comment (Feb. 17, 2022), p. 2, *available at https://www.regulations.gov/comment/FINCEN-2021-0007-0020.*

[62] Financial & International Business Association, ANPRM Comment (Feb. 21, 2022), p. 2, *available at https://www.regulations.gov/comment/FINCEN-2021-0007-0142.*

The exclusions in the proposed rule that align with the CTA's exemptions largely turn on whether the entity in question is supervised by a government agency, is a government agency, or has disclosure requirements that may diminish illicit finance risk in the context of residential real property.[63]

Specifically, the proposed rule would exclude U.S. governmental authorities, securities reporting issuers, and certain banks, credit unions, depository institution holding companies, money service businesses, brokers or dealers in securities, securities exchange or clearing agencies, other Exchange Act registered entities, insurance companies, state-licensed insurance producers, Commodity Exchange Act registered entities, public utilities, financial market utilities, and registered investment companies, as well as any legal entity whose ownership interests are controlled or wholly owned, directly or indirectly, by any of the above.

For example, in the residential real estate context, FinCEN assesses that the illicit finance risk of non-financed transfers is adequately diminished when a business must register its securities with the Securities and Exchange Commission (SEC) under Section 12 of the Securities Exchange Act of 1934 or must file Forms 10–K or other supplementary and periodic information under section 15(d) of the Securities Exchange Act of 1934. Persons who beneficially own more than five percent of a covered class of equity securities for these businesses must publicly file with the SEC certain information relating to such beneficial ownership.[64] Persons who are a director or an officer or who beneficially own more than 10 percent of such registered equity security (insiders) also must publicly report their ownership and transactions.[65]

b. Non-Profit Organizations

The definition of transferee entity in the proposed rule should be read to include non-profit organizations.[66]

FinCEN and at least four major federal financial institution regulators (the Federal Reserve Board of Governors, the Federal Deposit Insurance Corporation, the National Credit Union Administration, and the Office of the Comptroller of the Currency have made clear that the U.S. government does not view the charitable sector as a whole as presenting a uniform or unacceptably high risk of being used or exploited for money laundering, terrorist financing, or sanctions violations. The agencies have also recognized that the vast majority of charities and other non-profit organizations comply with the law and properly support charitable and humanitarian causes.[67] The FATF also has made clear that only a small subset of non-profits sending funds cross-border should be considered high risk as it relates to serving as potential vehicles of terrorist financing.[68]

However, non-profit organizations (a subset of which are often referred to as charities), have proven vulnerable to abuse by certain illicit actors and have been implicated in illicit finance schemes, including fraud, money laundering, tax evasion, and terrorist financing.[69] FinCEN's consultations with law enforcement indicate that charities are routinely the subjects of investigations involving fraud and money laundering, and a review of criminal cases involving illicit finance crimes and non-profit organizations shows that such organizations are vulnerable to exploitation by illicit actors. Indeed, charities purporting to support such causes as AIDS research, police and firefighters, disabled youth, childhood hunger, and veterans' issues have been investigated and prosecuted for fraud and money laundering.[70] Further, non-profit organizations have been used by corrupt governmental officials to extort money from individuals seeking zoning approvals and permits;[71] manipulated to engage in bribery of corrupt foreign officials;[72] and exploited to finance terrorism.[73]

Illicit funds funneled through non-profit organizations are often invested in residential real estate. For instance, in July 2021, the 11th Circuit affirmed the conviction and forfeiture judgments involving multiple non-profit organizations in Florida.[74] The defendants that exploited the non-profits were convicted of conspiracy to commit wire fraud, operation of an illegal gambling business, conspiracy to commit money laundering, and money laundering.[75] The court found that funds laundered through the non-profits were used to purchase three residential real estate properties in Florida, which were subsequently forfeited.[76]

One 2021 ANPRM commenter specifically stated that FinCEN should

[63] See 31 U.S.C. 5336(a)(11)(B)(xxi).

[64] See 15 U.S.C. 78m(d)(1), (g)(1); 17 CFR 240.13d–1.

[65] See U.S. Securities and Exchange Commission, "Officers, Directors, and 10% Shareholders," *available at https://www.sec.gov/education/smallbusiness/goingpublic/officersanddirectors.*

[66] Under U.S. tax law, non-profit organizations include tax-exempt organizations: charitable organizations, churches and religious organizations, private foundations, and other non-profits such as civic leagues, social clubs, labor organizations, and business leagues, under Internal Revenue Code Section 501(c)(3), as well as political organizations subject to Section 527 to the Internal Revenue Code. See IRS, "Exempt Organization Types," *available at https://www.irs.gov/charities-non-profits/exempt-organization-types.*

[67] Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, FINCEN, National Credit Union Administration, and Office of the Comptroller of the Currency, Joint Fact Sheet on Bank Secrecy Act Due Diligence Requirements for Charities and Non-Profit Organizations (Nov. 19, 2020), *available at https://www.fincen.gov/sites/default/files/shared/Charities%20Fact%20Sheet%2011_19_20.pdf.*

[68] Financial Action Task Force, Risk of Terrorist Abuse of Non-Profit Organisations (June 2014), p. 8, *available at https://www.fatf-gafi.org/content/dam/fatf-gafi/reports/Risk-of-terrorist-abuse-in-non-profit-organisations.pdf.coredownload.pdf.*

[69] See U.S. Department of the Treasury, "Protecting Charitable Organizations," *available at https://home.treasury.gov/policy-issues/terrorism-and-illicit-finance/protecting-charitable-organizations* (noting that "terrorists have exploited the charitable sector to raise and move funds, provide logistical support, encourage terrorist recruitment, or otherwise support terrorist organizations and operations"); U.S. Department of Justice, Press Release, Charity Founders Sentenced to Prison for Using Non-Profit to Steal from Donors and Cheat on Their Taxes (Nov. 6, 2020), *available at https://www.justice.gov/usao-sdca/pr/charity-founders-sentenced-prison-using-non-profit-steal-donors-and-cheat-their-taxes; see generally* Organization for Economic Cooperation and Development, Report on Abuse of Charities for Money-Laundering and Tax Evasion (Feb. 2009), *available at https://www.oecd.org/tax/exchange-of-tax-information/42232037.pdf;* World Bank, Combatting the Abuse of Non-Profit Organizations (June 2015), *available at https://elibrary.worldbank.org/doi/pdf/10.1596/978-0-8213-8547-0;* Financial Action Task Force, Combating the Terrorist Financing Abuse of Non-Profit Organisations (Nov. 2023), *available at https://www.fatf-gafi.org/content/dam/fatf-gafi/guidance/BPP-Combating-TF-Abuse-NPO-R8.pdf.coredownload.inline.pdf.*

[70] *See U.S.* v. *Lyons*, 472 F.3d 1055, 1061–1065 (9th Cir. 2007); *Dhafir* v. *U.S.*, *2015 U.S. Dist. LEXIS* 197346, 2015 WL 13727329 (N.D.N.Y. June 25, 2015).

[71] *See generally U.S.* v. *Hairston*, 46 F.3d 361 (4th Cir. 1995).

[72] *See generally U.S.* v. *Chi Ping Patrick Ho*, 984 F.3d 191 (2d Cir. 2020) (in which a Chinese think tank registered in Hong Kong and in the United States as a public charity exploited a charity in Uganda to engage in money laundering and bribery under the Foreign Corrupt Practices Act).

[73] *See Sotloff* v. *Qatar Charity*, 2023 U.S. Dist. LEXIS 93911, 2023 WL 3721683 (S.D. Fla. May 30, 2023) (financial support for Hamas, Al Qaeda, and ISIS); *In re Terrorist Attacks on September 11, 2001*, U.S. Dist. LEXIS 247199*, *344 (S.D.N.Y. Apr. 27, 2020) (financial support for Al Qaeda); *Strauss* v. *Credit Lyonnais, S.A.*, 925 F. Supp. 2d 414, 415 (E.D.N.Y. 2013) (financial support for Hamas); U.S. Department of the Treasury, Press Release, Treasury Targets Hizballah Finance Official and Shadow Bankers in Lebanon (May 11, 2021), *available at https://home.treasury.gov/news/press-releases/jy0170* (highlighting a non-profit providing funding for Hizballah).

[74] *U.S.* v. *Masino*, 2021 U.S. App. LEXIS 22615, 2021 WL 3235301 (11th Cir. July 30, 2021); *U.S.* v. *Masino*, 2019 U.S. Dist. LEXIS 34862, 2019 WL 1045179 (N.D. Fla. Mar. 5, 2019).

[75] *U.S.* v. *Masino*, 2021 U.S. App. LEXIS 22615, 2021 WL 3235301 (11th Cir. July 30, 2021).

[76] *U.S.* v. *Masino*, 2019 U.S. Dist. LEXIS 34862, 2019 WL 1045179 (N.D. Fla. Mar. 5, 2019), *aff'd U.S.* v. *Masino*, 2021 U.S. App. LEXIS 22615, 2021 WL 3235301 (11th Cir. July 30, 2021).

cover purchases by non-profits.[77] Another commenter detailed the regulations that cover non-profits and advocated against covering them.[78] Having considered the circumstances and comments in totality, FinCEN believes that non-profit organizations are vulnerable to abuse by illicit actors seeking to launder illicit proceeds through residential real estate. Accordingly, they would be captured under the proposed definition of transferee entity.

c. Unregistered Pooled Investment Vehicles

Pooled investment vehicles (PIVs) that are not registered with the SEC may be transferee entities for purposes of the proposed rule. Broadly, PIVs can include investment companies registered with the SEC, such as mutual funds and exchange-traded funds, as well as unregistered investment companies, such as private real estate investment trusts, certain real estate funds, special purpose financing vehicles, and private funds (which are usually categorized by their sponsors according to the investment strategy they pursue, and include funds such as hedge funds, private equity funds, and venture capital funds).[79] Under the proposed rule, PIVs that are investment companies and are registered with the SEC would be exempt from the definition of a transferee entity. The difference between registered and unregistered PIVs turns in part on whether the PIV is or is not excluded from registration requirements as an investment company under the Investment Company Act of 1940.[80] PIVs that meet these exclusion requirements, and are therefore not registered with the SEC, do not have disclosure and reporting requirements that govern similar but public PIVs, such as mutual funds or exchange-traded funds.

Furthermore, unregistered PIVs are not subject to comprehensive AML/CFT regulation and are therefore vulnerable to abuse by illicit actors. The risks they present may be significant—the private fund sector, for example, holds approximately $20 trillion assets under management—a number that has more than doubled over the past decade and is comparable to the holdings of highly regulated U.S. banks.[81] In recent years, private funds have been used by sanctioned persons, corrupt officials, tax evaders, and other criminal actors as a gateway to the U.S. financial system. This includes funds stolen from Malaysia's sovereign wealth fund, 1MDB;[82] Venezuela's state-owned oil and natural gas company, PDVSA;[83] and funds from a large-scale cryptocurrency fraud scam.[84]

Unregistered PIVs have also been used to hide criminal proceeds in real estate. In one particular example, a criminal actor had a substantial ownership interest in a private fund and used it to both obfuscate and provide a veneer of legitimacy to illicit funds to make U.S. real estate purchases.[85] Illicit actors may also hold a minority, non-controlling interest in an unregistered PIV, resulting in the unregistered PIV channeling that investor's illicit funds into real estate, as unregistered PIVs are not generally required to establish the identities of investors or look into the investor's source of funds.[86]

Outside of the real estate sector, the lack of comprehensive AML/CFT coverage for unregistered PIVs has posed major national security challenges, enabling U.S. adversaries to invest in, and thereby gain access to, sensitive and emerging U.S. technologies.[87] In fact, according to a 2018 Department of Defense report, unregistered PIVs such as private funds and special purpose vehicles have allowed jurisdictions whose interests compete with the United States to "access the crown jewels of U.S. innovation," including in the realms of artificial intelligence, sensors, virtual reality, self-driving vehicles, robotics, microchips, and facial and other image recognition technologies, without such activity being reviewed by the Committee on Foreign Investment in the United States or other relevant government authority, where required.[88]

[77] *See* The FACT Coalition, ANPRM Comment (Feb. 18, 2022), p. 4, *available at https://www.regulations.gov/comment/FINCEN-2021-0007-0122.*

[78] *See* Kirton McConkie, ANPRM Comment (Feb. 7, 2022), pp. 1–8, *available at https://www.regulations.gov/comment/FINCEN-2021-0007-0017.*

[79] The term "pooled investment vehicle" has a particular definition in Rule 206(4)–8 under the Investment Advisers Act of 1940. *See* 17 CFR 275.206(4)–8. However, the term is used more broadly in this NPRM. For information on private funds, *see* U.S. Securities and Exchange Commission, "Private Fund Adviser Overview," *available at https://www.sec.gov/divisions/investment/guidance/private-fund-adviser-resources.* Section 202(a)(29) of the Advisers Act defines the term "private fund" as an issuer that would be an investment company, as defined in section 3 of the Investment Company Act of 1940 (15 U.S.C. 80a–3), but for section 3(c)(1) or 3(c)(7) of that Act. Section 3(c)(1) excludes a privately-offered issuer having fewer than a certain number of beneficial owners. Section 3(c)(7) excludes a privately-offered issuer the securities of which are owned exclusively by "qualified purchasers" (generally, persons and institutions owning a specific amount of investments). *See* U.S. Securities and Exchange Commission, "Investment Company Registration and Regulation Package," *available at https://www.sec.gov/investment/fast-answers/divisionsinvestmentinvcoreg121504#P84_14584.*

[80] *Id.*

[81] *See* U.S. Securities and Exchange Commission, "Private Fund Statistics," *available at https://www.sec.gov/divisions/investment/private-funds-statistics.* This figure reflects the assets of private funds managed by registered investment advisers only. Form PF is filed by certain investment advisers registered with the SEC to report confidential information about the private funds they advise. Form PF is not filed by investment advisers that advise private funds but that are not registered with the SEC. Form PF provides the SEC and Financial Stability Oversight Council (FSOC) with important information about the basic operations and strategies of private funds and has helped establish a baseline picture of the private fund industry for assessing systemic risk.

[82] Peter Grant, "1MDB probe may be good news for Park Lane Hotel Investors," *The Wall Street Journal* (July 26, 2016), *available at https://www.wsj.com/articles/1mdb-probe-may-be-good-news-for-park-lane-hotel-investors-1469554543.*

[83] *See generally* Criminal Complaint, *U.S.* v. *Guruceaga*, Case No. 1:18–cr–20685 (S.D. Fla. July 23, 2018).

[84] U.S. Department of Justice, Press Release, Former Partner of Locke Lord LLP Convicted in Manhattan Federal Court Of Conspiracy To Commit Money Laundering And Bank Fraud In Connection with Scheme To Launder $400 Million Of OneCoin Fraud Proceeds (Nov. 21, 2019), *available athttps://www.justice.gov/usao-sdny/pr/former-partner-locke-lord-llp-convicted-manhattan-federal-court-conspiracy-commit-money#:~:text=SCOTT%2C%20a%20former%20equity%20partner,and%20operated%20for%20that%20purpose.*

[85] *See, e.g.*, Peter Grant, "1MDB probe may be good news for Park Lane Hotel Investors," *The Wall Street Journal* (July 6, 2016), *available at https://www.wsj.com/articles/1mdb-probe-may-be-good-news-for-park-lane-hotel-investors-1469554543;* Complaint, *U.S.* v. *"The Wolf of Wall Street" Motion Picture*, Case No. 2:16–cv–05362–DSF–PLA (C.D. Cal. 2016); Will Parker, "Meet the secretive Kazakh company backing the Upper West Side's latest skyscraper," The Real Deal: Real Estate News (Apr. 14, 2018), *available at https://therealdeal.com/new-york/2018/04/13/meet-the-secretive-kazakh-company-backing-the-upper-west-sides-latest-skyscraper/;* Miranda Patrucic, Vlad Lavrov, and Ilya Lozovsky, "Kazakhstan's Secret Billionaires," OCCRP (Nov. 5, 2017), *available at https://www.occrp.org/en/paradisepapers/kazakhstans-secret-billionaires.*

[86] *See., e.g.*, U.S. Department of Justice, Press Release, Acting Manhattan U.S. Attorney Announces Settlement of Civil Forfeiture Claims Against Over $50 Million Laundered Through Black Market Peso Exchange (Nov. 12, 2020), *available at https://www.justice.gov/usao-sdny/pr/acting-manhattan-us-attorney-announces-settlement-civil-forfeiture-claims-against-over.*

[87] Cory Bennett and Bryan Bender, "How China acquires 'The Crown Jewels' of U.S. technology," Politico (May 22, 2018), *available at https://www.politico.com/story/2018/05/22/china-us-tech-companies-cfius-572413.*

[88] Michael Brown and Pavneet Singh, "China's Technology Transfer Strategy: How Chinese Investments in Emerging Technology Enable A Strategic Competitor to Access the Crown Jewels of U.S. Innovation," Defense Innovation Unit Experimental (Jan. 2018), *available at https://nationalsecurity.gmu.edu/wp-content/uploads/2020/02/DIUX-China-Tech-Transfer-Study-Selected-Readings.pdf;* Paul Mozur and Jane Perlez, "China Tech investment flying under the radar, Pentagon warns," The New York Times (Apr. 7, 2017).

FinCEN therefore believes that unregistered PIVs generally present sufficient illicit finance risk to warrant inclusion in the definition of a transferee entity. These unregistered PIV may include entities such as private funds,[89] certain market intermediaries,[90] certain companies that primarily engage in the business of acquiring mortgages,[91] certain funds maintained by charitable organizations,[92] and certain church plans.[93]

d. Large Operating Companies

The proposed definition would capture certain legal entities that are known as "large operating companies" in the CTA and BOI Reporting Rule context. Within that framework, a large operating company is an entity that: "employs more than 20 employees on a full-time basis in the United States;" "filed in the previous year Federal income tax returns in the United States demonstrating more than $5,000,000 in gross receipts or sales in the aggregate;" and "has an operating presence at a physical office within the United States[.]" [94] When explaining why this exemption was added to the CTA, Senator Sherrod Brown noted:

> The justification for the exemption of entities that have both physical operations and at least 20 employees in the United States is that those entities' physical U.S. presence will make it easy for U.S. law enforcement to discover those entities' true owners. Like other exemptions in the bill, this exemption should be narrowly construed to exclude entities that do not have an easily located physical presence in the United States, do not have multiple employees physically present on an ongoing basis in the United States, or use strategies that make it difficult for U.S. law enforcement to contact their workforce or discover the names of their beneficial owners.[95]

Senator Brown cautioned however, that "[t]his exemption should be subject to continuous, careful review by Treasury . . . to detect and prevent its misuse." [96]

One of the primary purposes of the proposed rule is to identify transferee entities that engage in non-financed residential real estate transfers. While it may be easier for law enforcement to identify beneficial owners behind large operating companies in comparison to shell companies, the very fact that a legal entity has engaged in activity that FinCEN has identified as presenting an illicit finance risk—the use of identity obfuscating vehicles in a non-financed residential real estate transfer—is valuable information for law enforcement, both to support individual investigations and to allow for aggregated analysis of money laundering in the U.S. real estate sector.

However, certain large operating companies may fall within other exclusions provided for in the proposed rule. For example, a company required to register its securities with the SEC under section 12 of the Securities Exchange Act of 1934 would be excluded.

2. Transferee Trusts

The proposed rule defines "transferee trust" as any legal arrangement created when a person (generally known as a settlor or grantor) places assets under the control of a trustee for the benefit of one or more persons (each generally known as a beneficiary) or for a specified purpose, as well as any legal arrangement similar in structure or function to the above, whether formed under the laws of the United States or a foreign jurisdiction. The proposed rule further notes that a trust is deemed to be the transferee trust regardless of whether residential real property is titled in the name of the trust itself or in the name of the trustee in their capacity as the trustee of the trust. However, the proposed rule excludes trusts that are securities reporting issuers, which includes companies that must register securities with the SEC and become subject to periodic reporting and disclosure requirements. FinCEN considers these trusts to be more tightly supervised and, because they are required to make certain public disclosures, they present a lower illicit finance risk. For similar reasons, trusts that have a trustee that is a securities reporting issuer are not covered by the proposed rule. Furthermore, the proposed rule excludes statutory trusts from being transferee trusts; instead, a statutory trust could be considered to be a transferee entity, unless one of the exemptions to the definition of "transferee entity" applies.

Multiple 2021 ANPRM commenters highlighted the use of trusts to facilitate exploitation of the real estate market for the purpose of laundering money, were largely supportive of including them in any regulation, and suggested that transfers to trusts be covered, particularly since the CTA did not explicitly provide for reporting of beneficial ownership information from trusts.[97] Other commenters recognized that trusts can present illicit finance risks but were only supportive of covering certain types.[98] As discussed in detail above, FinCEN believes that non-financed residential real estate transfers to trusts present a high risk for money laundering. The reporting of all non-financed transfers of residential real estate in which the transferee is a trust would provide data relevant to a possible violation of law or regulation.

3. Beneficial Owners of Transferee Entities and Transferee Trusts

The proposed Real Estate Report would collect information about the beneficial owners of transferee entities and transferee trusts. Where possible, FinCEN has aligned the proposed rule's definitions of beneficial ownership with those contained in the CTA and its implementing regulations.

a. Determining the Beneficial Owners of Transferee Entities

Consistent with the CTA, the proposed rule provides that a beneficial owner of a transferee entity is "any

[89] Private funds often are excluded from the definition of "investment company" under 15 U.S.C. 80a–3(c)(1) and/or 15 U.S.C. 80a–3(c)(7).

[90] Certain market intermediaries are excluded from the definition of "investment company" under 15 U.S.C. 80a–3(c)(2).

[91] Certain investment vehicles that are primarily engaged in "purchasing or otherwise acquiring mortgages and other liens on and interests in real estate" are excluded from the definition of "investment company" under 15 U.S.C. 80a–3(c)(5)(C).

[92] Certain investment vehicles maintained by certain charitable organizations are excluded from the definition of "investment company" under 15 U.S.C. 80a–3(c)(10).

[93] Certain church plans are excluded from the definition of "investment company" under 15 U.S.C. 80a–3(c)(14).

[94] 31 U.S.C. 5336(a)(11)(B)(xxi).

[95] Senator Sherrod Brown, "National Defense Authorization Act," Congressional Record 166: 208, p. S7311 (Dec. 9, 2020), *available at https://www.congress.gov/116/crec/2020/12/09/CREC-2020-12-09-pt1-PgS7296.pdf.*

[96] *Id.*

[97] *See,* Global Financial Integrity, ANPRM Comment (Feb. 17, 2022), pp. 3, 30, *available at https://www.regulations.gov/comment/FINCEN-2021-0007-0102;* Coalition for Integrity, ANPRM Comment (Feb. 21, 2022), p. 4, *available at https://www.regulations.gov/comment/FINCEN-2021-0007-0127;* The FACT Coalition, ANPRM Comment (Feb. 18, 2022), p. 4, *available at https://www.regulations.gov/comment/FINCEN-2021-0007-0122;* Transparency International U.S., ANPRM Comment (Feb. 18, 2022), pp. 3, 8, *available at https://www.regulations.gov/comment/FINCEN-2021-0007-0115;* American College of Trust and Estate Counsel, ANPRM Comment (Feb. 4, 2022), pp. 1–22, *available at https://www.regulations.gov/comment/FINCEN-2021-0007-0013;* Anti-Corruption Data Collective, ANPRM Comment (Feb. 18, 2022), p. 3, *available at https://www.regulations.gov/comment/FINCEN-2021-0007-0153;* California Reinvestment Coalition, ANPRM Comment (Feb. 18, 2022), p. 1, *available at https://www.regulations.gov/comment/FINCEN-2021-0007-0126.*

[98] *See* American College of Trust and Estate Counsel, ANPRM Comment (Feb. 4, 2022), pp. 1–22, *available at https://www.regulations.gov/docket/FINCEN-2021-0007/comments?filter=ACTEC;* National Association of Realtors, ANPRM Comment (Feb. 18, 2022), p. 13, *available at https://www.regulations.gov/comment/FINCEN-2021-0007-0128.*

individual who, directly or indirectly, either exercises substantial control over the transferee entity or owns or controls at least 25 percent of the ownership interests of the transferee entity." However, as the owners or directors of tax-exempt organizations do not hold a direct ownership stake in the organization, the reportable beneficial owners would be limited only to the individuals who exercise substantial control.

Comments on the 2021 ANPRM were generally supportive of using the CTA's definition of the beneficial owner in any potential regulation. However, one commenter suggested FinCEN use the definition of beneficial owner set out in the Residential Real Estate GTOs.

FinCEN considered that definition as well as other definitions for beneficial ownership for transferee entities. However, FinCEN believes that the BOI Reporting Rule's definition would be best suited to capture potentially obfuscated ownership of residential real property in high-risk non-financed transfers, particularly since it will always result in the identification of at least one beneficial owner via the "substantial control" component of the definition, even if no individual meets the 25 percent "ownership interests" threshold. In addition, the use of consistent definitions of beneficial ownership across regulations would reduce the potential for confusion.

b. Determining the Beneficial Owners of Transferee Trusts

The proposed rule would collect information about the beneficial owners of trusts, defined as any individual who, at the time of the real estate transfer to the trust: (1) is a trustee; (2) otherwise has authority to dispose of transferee trust assets, such as may be the case with a trust protector;[99] (3) is a beneficiary who is the sole permissible recipient of income and principal from the transferee trust or who has the right to demand a distribution of, or to withdraw, substantially all of the assets of the transferee trust; (4) is a grantor or settlor of a revocable transferee trust; or (5) is the beneficial owner of a legal entity or trust that holds one of the positions described in (1)–(4), taking into account the exceptions that apply to transferee entities and transferee trusts.

This proposed definition leverages the BOI Reporting Rule's approach to ascertaining the beneficial owners of a trust. Although the BOI Reporting Rule does not require reporting of beneficial ownership information by most trusts, as most trusts are not "reporting companies" for purposes of the CTA, the rule does require certain information to be reported about the beneficial owners of trusts when an individual is considered to own or control a reporting company through a trust. In line with that approach, each of the defined beneficial owners of a transferee trust has either ownership or control over trust assets, including over any real property transferred to the trust. For example, an individual who is the sole permissible recipient of both income and principal from the trust, or has the right to demand a distribution of, or withdraw, substantially all of the assets from the trust, has an ownership or controlling interest in the assets held in trust. Other individuals with authority to dispose of trust assets, such as trustees and grantors or settlors that have retained the right to revoke the trust, will be considered as controlling the assets held in trust. In the case of legal entities or trusts with ownership or control of trust assets, the beneficial owners of those legal entities or trusts also would be beneficial owners of the trust.

c. Beneficial Ownership as a Transactional Reporting Requirement

The proposed rule would not require reporting persons to report changes to beneficial ownership of a transferee entity or transferee trust on an ongoing basis. The proposed rule is concerned only with real estate transfers, and it is not within the scope or intention of these regulations to require reporting persons to conduct ongoing monitoring of ownership of residential real property. While at least one 2021 ANPRM commenter supported the introduction of ongoing monitoring for change of ownership, most commenters did not address this issue. FinCEN assesses that it would likely represent a large and impractical burden to place an obligation on reporting persons that would require them to investigate changes to beneficial ownership of residential real estate that continues to be owned by a client transferee entity or trust, or to require transferee entities or transferee trusts to report changes in beneficial ownership to a real estate professional involved in their transfer of residential real property after the transfer has been concluded.

C. Reportable Transfers

The proposed rule would define a reportable transfer as a transfer of any ownership interest in residential real property to a transferee entity or transferee trust, with certain exceptions. These proposed exceptions are meant to reflect FinCEN's intent to capture only higher risk transfers and therefore the definition exempts most financed transfers, as well as certain types of other low-risk transfers. Under the proposed rule, transfers would be reportable irrespective of the value of the property or the dollar value of the transaction; there is no dollar threshold for a reportable transfer. As such, gifts and other similar transfers of property may be reportable. Importantly, transfers would only be reportable if a reporting person is involved in the transfer and if the transferee is either a legal entity or trust. Transfers between individuals would not be reportable.

1. Exception for Financed Transfers

First, certain financed transfers would be excepted. Specifically, the exception would apply to transfers involving an extension of credit to the transferee, but only if the credit is secured by the transferred residential real property and is extended by a financial institution that has both an obligation to maintain an AML program and a requirement to file SARs. Transfers financed by a private lender or the seller, neither of which are likely to have AML/CFT compliance programs and SAR filing obligations, would not fall within this exception. The purpose of the exception is to avoid duplication of required due diligence, as banks and other financial institutions subject to AML/CFT program requirements and SAR filing obligations must already extend them to any mortgages offered in a financed residential real estate transfer. Unlike in the non-financed space, these due diligence obligations of covered financial institutions mitigate the risks of money laundering through real estate for financed transactions and lead to reporting on suspicious transactions.

Some commenters on the 2021 ANPRM highlighted that non-financed purchases make up a significant portion of the residential real estate market.[100]

[99] A trust protector is a person given power within the trust to take certain types of significant actions, such as the right to oversee the trustee's decisions, to remove the trustee, or to amend or terminate the trust. *See* section 808 of the Uniform Trust Code (2003), *available at https://www.uniformlaws.org/viewdocument/committee-archive-76?CommunityKey=193ff839-7955-4846-8f3c-ce74ac23938d&tab=librarydocuments;* Andrew T. Huber, "Trust Protectors: The Role Continues to Evolve," American Bar Association (Jan.–Feb. 2017), *available at https://www.americanbar.org/groups/real_property_trust_estate/publications/probate-property-magazine/2017/january_february_2017/2017_aba_rpte_pp_v31_1_article_huber_trust_protectors/.*

[100] *See* Global Financial Integrity, ANPRM Comment (Feb. 17, 2022), p. 15, *available at https://www.regulations.gov/comment/FINCEN-2021-0007-0102;* Transparency International U.S., ANPRM Comment (Feb. 18, 2022), p. 3, *available at https://*

Continued

Most commenters who addressed the issue were supportive of FinCEN covering non-financed transfers.[101] Some explicitly stated that only non-financed transfers should be covered, but two comments stated that FinCEN should cover both non-financed and financed transfers.[102] Two commenters were not supportive of covering non-financed transactions, either because they believe real estate professionals are already reporting on potential financial crimes through other FinCEN forms, such as the Form 8300, or because they believe most settlement agents already force funds through financial institutions that have traditional AML/CFT program requirements.[103] However, FinCEN believes that further regulation is needed and its experience with the Residential Real Estate GTOs program has shown that existing reporting through Form 8300s and the minimal involvement of financial institutions subject to AML/CFT program requirements are not sufficient to obviate the illicit finance threat posed by non-financed transfers of residential real property.

2. Exceptions for Low-Risk Transfers

Exceptions also would exist for transfers that are the result of a grant, transfer, or revocation of an easement; transfers that occur as a result of the death of an owner of the residential real property; transfers that are the result of divorce or dissolution of marriage; or transfers to a bankruptcy estate. FinCEN views easements, which involve rights to use land for a specified purpose, as presenting little illicit finance risk. Transfers incidental to death, divorce, or bankruptcy are governed by preexisting legal documents, such as wills, or generally involve the court system through probate, divorce, or bankruptcy proceedings. FinCEN believes these circumstances present a relatively low risk for purposes of laundering money.

3. No Exceptions Based on the Property's Value or Purchase Price

Residential real properties with a wide range of values are used by illicit actors to launder money, including residential real properties transferred for no consideration.[104] Criminal networks interested in cleaning funds do not exclusively invest in luxury or high-value property, but also launder money through low-value real estate. FinCEN believes that any dollar threshold would enable money launderers to structure payments to avoid reporting requirements. Accordingly, the proposed rule does not provide exceptions for transfers above or below a set dollar value. Furthermore, it is meant to capture both sales and non-sale transfers, such as gifts and transfers to trusts. The transfer of residential real property to a trust by the settlor or grantor may therefore be reportable, although FinCEN expects that such reporting will be significantly limited by the exception for transfers of financed residential real property and by the exception for transfers occurring as a result of death. The latter, in particular, would exempt transfers by an executor of the grantor or settlor's property to a testamentary trust.

FinCEN believes that the inclusion of low dollar value transfers in the proposed rule is unlikely to significantly increase the burden on potential reporting persons versus a scenario in which a dollar threshold is imposed. For example, according to the U.S. Census Bureau, residences costing less than $125,000 accounted for less than 0.5 percent of all new residences sold in 2022, and residences costing less than $300,000 accounted for 7 percent of all new residences sold in 2022.[105] The American Land Title Association (ALTA) has indicated to FinCEN that a uniform reporting threshold, regardless of what the threshold is, would decrease compliance burdens for industry compared to thresholds that vary across jurisdictions. With respect to non-sale transfers made for no consideration, such as transfers made to a trust, FinCEN notes that the proposed rule provides the previously discussed exception for transfers that most often involve no consideration, such as those that occur due to death or divorce, which substantially narrows the scope of coverage. However, FinCEN welcomes comments on the potential burdens related to the reporting of non-sale transfers.

4. No Application to Transfers Without a Reporting Person

FinCEN believes that the proposed rule would capture the majority of sale and non-sale transfers of residential real estate. However, transfers that do not involve a typical real estate-related professional as reflected in the cascade of potential reporting persons would not be captured.

5. No Application to Transfers to Natural Persons

Transfers made directly to individuals would not be reportable under this regulation. Therefore, if the transferred property's title is in the name of one or more individuals, with no ownership interests held by a transferee entity or a transferee trust, the transfer would not be reportable under the rule.

Some 2021 ANPRM commenters recognized that non-financed transfers of residential real estate to individuals present money laundering risk and supported their coverage by any potential regulation.[106] Other commenters, however, stated that the burden of covering natural person purchases would be too large for the industry to bear and expressed privacy concerns.[107]

All non-financed transfers of residential real estate are less regulated than financed transfers and are inherently more vulnerable to money

www.regulations.gov/comment/FINCEN-2021-0007-0115.

[101] *See* Global Financial Integrity, ANPRM Comment (Feb. 17, 2022), p. 15, *available at https://www.regulations.gov/comment/FINCEN-2021-0007-0102;* Transparency International U.S., ANPRM Comment (Feb. 18, 2022), p. 3, *available at https://www.regulations.gov/comment/FINCEN-2021-0007-0115;* League of Southeastern Credit Unions & Affiliates, ANPRM Comment (Feb. 7, 2022), pp. 1–4, *available at https://www.regulations.gov/comment/FINCEN-2021-0007-0011;* Illinois Credit Union League, ANPRM Comment (Feb. 21, 2022), p. 1, *available at https://www.regulations.gov/comment/FINCEN-2021-0007-0137.*

[102] *See* Louise Shelley and Ross Delston, ANPRM Comment (Feb. 21, 2022), p. 1, *available at https://www.regulations.gov/comment/FINCEN-2021-0007-0151;* Anti-Corruption Data Collective, ANPRM Comment (Feb. 18, 2022), p. 3, *available at https://www.regulations.gov/comment/FINCEN-2021-0007-0153.*

[103] *See* Morgan, Lewis, & Bockius, ANPRM Comment (Feb. 18, 2022), pp. 2–3, *available at https://www.regulations.gov/comment/FINCEN-2021-0007-0123;* Prosperus Title, ANPRM Comment (Feb. 18, 2022), 1–2, *available at https://www.regulations.gov/comment/FINCEN-2021-0007-0125.*

[104] For example, whereas the Residential Real Estate GTOs utilize a $300,000 threshold for most covered jurisdictions, a $50,000 threshold applies for the City and County of Baltimore to take into account local money laundering trends.

[105] U.S. Census Bureau, "Table Q1. New Houses Sold by Sales Price: United States," *available at https://www.census.gov/construction/nrs/pdf/quarterly_sales.pdf.*

[106] *See* Global Financial Integrity, ANPRM Comment (Feb. 17, 2022), p. 24, *available at https://www.regulations.gov/comment/FINCEN-2021-0007-0102;* The FACT Coalition, ANPRM Comment (Feb. 18, 2022), p. 3, *available at https://www.regulations.gov/comment/FINCEN-2021-0007-0122;* California Reinvestment Coalition, ANPRM Comment (Feb. 18, 2022), pp. 2–3, *available at https://www.regulations.gov/comment/FINCEN-2021-0007-0126;* Coalition for Integrity, ANPRM Comment (Feb. 21, 2022), p. 4, *available at https://www.regulations.gov/comment/FINCEN-2021-0007-0127;* Anti-Corruption Data Collective, ANPRM Comment (Feb. 18, 2022), p. 3, *available at https://www.regulations.gov/comment/FINCEN-2021-0007-0153.*

[107] *See* National Federation of Independent Business, ANPRM Comment (Dec. 22, 2021), p. 1, *available at https://www.regulations.gov/comment/FINCEN-2021-0007-0007;* American Land Title Association, ANPRM Comment (Feb. 17, 2022), p. 2–5, *available at https://www.regulations.gov/comment/FINCEN-2021-0007-0020.*

laundering. However, FinCEN has not yet conducted a review of residential real estate purchases by natural persons sufficient to conclude that those transactions present a high risk for money laundering. To be sure, illicit actors often use natural person nominees or straw purchasers—such as a spouse, relative, or employee—to acquire real estate while obscuring beneficial ownership.[108] Such nominees or straw purchasers are unlikely to disclose that they are receiving ownership of real estate on behalf of the illicit actor. Requiring the reporting of information about transfers to individuals would significantly increase the number of reports filed and significantly increase burden on industry. Although the BSA would provide privacy protections for reports filed under the proposed rule, for the reasons stated above, FinCEN is not proposing to cover residential real estate purchases by natural persons at this time.

D. Reporting Persons

The proposed rule would impose a filing and recordkeeping obligation on certain persons involved in real estate closings and settlements. The proposed rule would designate only one reporting person for any given reportable transfer. The reporting person would be identified in one of two ways: by way of a cascading reporting order or by way of a written agreement between the real estate professionals described in the cascading reporting order.

1. The Reporting Cascade

Through the cascade, a real estate professional would be a reporting person required to file a report and keep records for a given transfer if the person performs a function described in the cascade and no other person performs a function described higher in the cascade. For example, if no person is involved in the transfer as described in the first tier of potential reporting persons, the reporting obligation would fall to the person involved in the transfer as described in the second tier of potential reporting persons, if any, and so on. The cascade includes only persons engaged as a business in the provision of real estate closing and settlement services within the United States.

For any reportable transfer, a potential reporting person would need to determine whether there is another potential reporting person involved in the transfer who sits higher in the cascade. Although potential reporting persons will likely communicate with each other regarding the need to file a report, there would be no requirement to verify that any other potential reporting person in fact filed it.

The proposed cascade is as follows:[109]

First, *real estate professionals providing certain settlement services in the settlement process*—In the first instance, the reporting obligation would rest with real estate professionals providing certain settlement services at the termination of the settlement process. Specifically, the cascade first designates as a reporting person the person listed as the closing or settlement agent on a settlement (or closing) statement, which is common to the vast majority of residential real property transfers. This ensures that a potential reporting person familiar with the intricacies of the transfer, including transactional information and details about the parties involved, will be the most frequent reporting person. This, in turn, will ensure that the reports are more accurate and useful to law enforcement and will lessen the burden on reporting persons. In the event that no person is directly identified as a closing or settlement agent on the statement, the reporting obligation would fall on the person that prepared the closing or settlement statement. If no person prepared a closing or settlement statement, the reporting obligation falls to the person that files the deed or other instrument that transfers ownership of the residential real property.

Second, *the person that underwrites an owner's title insurance policy for the transferee*—If no person executes the specific settlement functions in the first tier of the cascade, the reporting obligation would then fall upon the person that underwrites the title insurance policy associated with the real property transfer. Such policies are typically underwritten by large title insurance companies that issue policies providing indemnity in the event the title of the transferred property is later determined to have a defect or encumbrance.[110] Title insurance companies have been the reporting persons for the Residential Real Estate GTOs since 2016 and have demonstrated the ability to gather information and file reports containing information similar to that which would be collected under the proposed rule. Given that the underwriting function is further removed from the termination of the settlement process than the settlement services described in the first tier of the cascade, and so further removed from information to be collected, FinCEN assesses that persons underwriting such policies should be second line reporting persons. Title insurance agents may serve as settlement agents and if serving such a first-tier function, would have easier access to the necessary information in that capacity.

Third, *the person that disburses the greatest amount of funds in connection with the reportable transfer*—In the event that no person executes the specific settlement functions in the first tier of the cascade, and no person underwrites a title insurance policy, the third tier of the cascade would require reporting by the person that disburses the greatest amount of funds in connection with residential real property transfer. The proposed rule notes that such disbursement may be in any form, including from an escrow account (which is frequently used to settle real estate transfers), from a trust account, or from a lawyer's trust account. Such reporting persons will have visibility into funds transfer information associated with the residential real property transfer and FinCEN believes that, by virtue of this, they should be able to obtain the information this proposed rule would collect with relatively little burden. However, this tier of the cascade would only cover persons involved in real estate settlements and closings who are disbursing funds via third-party accounts and excludes direct transfers from transferees to transferors and disbursements coming directly from banks.

Fourth, *the person that prepares an evaluation of the title status*—In the event that no person participates in the transfer who falls within the first three tiers of the cascade, the reporting person would be the person who prepares an

[108] *See, e.g.*, U.S. Department of the Treasury, National Strategy for Combatting Terrorist and Other Illicit Financing (2020), pp. 17–18, *available at https://home.treasury.gov/system/files/136/National-Strategy-to-Counter-Illicit-Financev2.pdf.*

[109] The types of businesses involved in a real estate closing or settlement vary depending on the type of transaction and on the jurisdiction. As such, the reporting cascade (*see* Proposed amendments *infra* 31 CFR 1031.320(c)) is itemized to capture a broad array of potential businesses. However, FinCEN believes that, for any transaction, the functions described in first three tiers of the reporting cascade would be performed by only one business, with no other separate business performing the other two functions. FinCEN therefore treats the reporting cascade as having five functional groupings.

[110] The U.S. title insurance market is concentrated, with four national underwriters accounting for approximately 81 percent of total industry premiums as September 2022. Fitch Rating, U.S. Title Insurance Outlook 2023 (Dec. 2, 2022), *available at https://www.fitchratings.com/research/insurance/us-title-insurance-outlook-2023-02-12-2022.*

evaluation of the status of the title. Such an evaluation may take the form of a title check, which is typically performed by title insurance companies in lieu of providing actual insurance or an opinion letter, which is rendered by attorneys.

Fifth, *the person who prepares the deed*—Finally, should no person identified in the first four tiers of the cascade participate in the real property transfer, the reporting obligation would fall to the preparer of the deed associated with the transfer. A deed is typically prepared by an attorney, but it may also be prepared by a non-attorney settlement or closing agent or by the transferee itself.

2. Capturing Both Sale and Non-Sale Transfers

The reporting cascade is designed to capture both sales of residential real estate and non-sale transfers of residential real estate. It assigns a reporting obligation based on the functions fulfilled by the various real estate professionals involved in the closing and settlement process, regardless of whether the transfer is a sale or non-sale. FinCEN believes that it is necessary to capture non-sale transfers to ensure uniform coverage of non-financed transfers and to ensure that nominees do not purchase homes for criminal actors and then transfer the title on free of charge to a legal entity or trust.

During a typical closing and settlement for a non-financed transfer of residential real estate, a transferee will offer to purchase a residential real property for a given price. This offer can occur through a representative, such as a real estate agent, attorney, or registered agent, or it may come directly from the transferee itself. If the transferor accepts the offered price, either directly or through a representative, the parties can proceed toward the settlement process, normally through a sales contract. It is at this point that title agencies or companies and escrow agents or companies typically become involved in the process. Title agencies will conduct an examination of the title to ensure it is free from defects, such as liens or other encumbrances. Escrow companies may at this point hold a deposit or "earnest money" from the transferee that the transferee would forfeit should it be responsible for breaking the purchase contract.[111] A transferee may also, and usually does, purchase a title insurance policy, which ensures that the title of the property is free from defects and indemnifies the transferee should a title defect later come to light. As noted above, a transferee may opt, in lieu of title insurance, to obtain a title check from the title insurance company or an opinion letter from an attorney.[112] However, neither title insurance nor a title check is required to close or settle non-financed transfers of residential real property.

The transfer can then move toward settlement, which is also sometimes referred to as "closing." According to ALTA, settlement is "[t]he process of completing a real estate transaction in accordance with written instructions during which deeds, mortgages, leases, and other required instruments are executed and/or delivered, an accounting between the parties is made, the funds are disbursed, and the appropriate documents are recorded in the public record."[113] At settlement, a closing or settlement agent—which is most often a title agent but can be a representative of an escrow company or an attorney—will prepare a "settlement statement," which normally contains an itemized list of all of the fees or charges that the buyer and seller will pay during the settlement portion of the transfer.[114] At settlement, the settlement statement and other closing documents are signed by the parties to the transfer and, if applicable, funds are disbursed to the transferor. This typically occurs via an escrow account, but also occurs at times via a trust account or attorney trust account or via a direct transfer of funds between the transferee and transferor (though, due to its risky nature, this practice is not common). Following the execution of the settlement statement and other closing documents and the disbursal of funds, the settlement agent will file the deed (the instrument which effects the transfer of ownership of the property) with the relevant local land registry or recordation office. Deeds are typically prepared by attorneys, but may be prepared by the settlement agent, escrow officer, or the transferee itself.[115]

A transfer of residential real estate that does not involve a purchase, such as a transfer that is a gift or that is made to a trust, involves a closing and settlement process that is distinct from the process described above that exists for typical sales of residential real estate. For example, such non-sale transfers would not involve a settlement agent or settlement statement or the transfer of funds through escrow. They may, however, involve an attorney or other real estate professional who prepares or files the deed, provides title insurance, or provides a title evaluation.

3. Designation Agreements

Although the reporting cascade would identify the real estate professional who would be primarily responsible for filing a Real Estate Report, the real estate professionals described in the reporting cascade may enter into a written agreement to designate another person in the reporting cascade as the reporting person. For example, if a real estate professional involved in the transfer provides certain settlement services in the settlement process, as described in the first tier of the cascade, that person may enter into a written designation agreement with a title insurance company underwriting the transfer as described in the second tier of the cascade, through which the two parties agree that the title insurance company would be the designated reporting person with respect to that transfer. The person who would otherwise be the reporting person must

[111] "Escrow is [a] transaction in which an impartial third-party acts in a fiduciary capacity for all or some of the parties . . . in performing [s]ettlement services according to local practice and custom." American Land Title Association, ALTA Best Practices 4.0 (May 23, 2023), p. 4, *available at https://www.alta.org/best-practices/download.cfm?bestPracID=97&type=pdf.*

[112] DarrowEverett LLP, "Are Attorney Opinion Letters a Viable Alternative to Title Insurance" (Feb. 23, 2023), *available at https://www.darroweverett.com/attorney-opinion-letter-advantages-risks-title-insurance/*; Fannie Mae, B7–2–06, Attorney Title Opinion Letter Requirements; Attorney Title Letter Opinion Requirements (Dec. 13, 2023), *available at https://selling-guide.fanniemae.com/Selling-Guide/Origination-thru-Closing/Subpart-B7-Insurance/Chapter-B7-2-Title-Insurance/2522435591/B7-2-06-Attorney-Title-Opinion-Letter-Requirements-04-06-2022.htm.*

[113] American Land Title Association, ALTA Best Practices 4.0 (May 23, 2023), p. 4, *available at https://www.alta.org/best-practices/download.cfm?bestPracID=97&type=pdf.*

[114] "The title agent and settlement agent are often the same entity that performs two separate functions in a real estate transaction. The terms title agent and settlement agent are often used interchangeably." American Land Title Association, "ALTA Urges CFPB to Preserve Role of Independent Third-party Settlement Agents" (Nov. 8, 2012), p. 26, *available at https://www.alta.org/news/news.cfm?20121108-ALTA-Urges-CFPB-to-Preserve-Role-of-Independent-Third-party-Settlement-Agents; see, e.g.*, American Land Title Association, "ALTA Model Settlement Statements," *available at https://www.alta.org/trid/#statements;* Consumer Finance Protection Bureau, What is a HUD–1 Settlement Statement? (Sept. 4, 2020), *available at https://www.consumerfinance.gov/ask-cfpb/what-is-a-hud-1-settlement-statement-en-178/.*

[115] *See Redfin.com*, "Steps to closing on a house," *available at https://www.redfin.com/guides/steps-to-closing-on-a-house;* American Land Title Association, ALTA Best Practices 4.0 (May 23, 2023), p. 4, *available at https://www.alta.org/best-practices/download.cfm?bestPracID=97&type=pdf; see generally* American Land Title Association, "ALTA Urges CFPB to Preserve Role of Independent Third-party Settlement Agents" (Nov. 8, 2012), *available at https://www.alta.org/news/news.cfm?20121108-ALTA-Urges-CFPB-to-Preserve-Role-of-Independent-Third-party-Settlement-Agents.*

be a party to the agreement; however, it is not necessary that all persons involved in the transfer who are described in the reporting cascade be parties to the agreement.

While the agreement must be in writing and must identify the date of the agreement, the name and address of the transferor, the name and address of the transferee entity or transferee trust, the property, the name and address of the designated reporting person, and the name and address of all other parties to the agreement, there is no required format for the designation agreement. All parties to the agreement would be required to retain a copy for a period of five years.

4. Employees, Agents, and Partners

If an employee, agent, or partner acting within the scope of such individual's employment, agency, or partnership would be the reporting person in a reportable property transfer, then the individual's employer, principal, or partnership is deemed to be the reporting person. In that case, it is the responsibility of the reporting person (*i.e.*, the employer, principal, or partnership) to ensure that a report is filed. Accordingly, FinCEN expects that, in most cases, individuals will not be reporting persons. However, there may be certain cases (*e.g.*, sole proprietorships) where the responsibility to file a report rests with an individual.

5. Consultations With Real Estate Professionals

The cascade is designed to both prevent an increased burden on reporting persons by ensuring that multiple real estate professionals do not have to collect information and file a report about the same transfer, while at the same time minimizing opportunities for reporting evasion by ensuring a report is filed for most reportable transfers. In the course of developing this cascading reporting order, FinCEN held extensive discussions with real estate professionals and the IRS, which employs a somewhat similar cascading reporting structure for its Form 1099–S.[116] These discussions suggest that potential reporting persons involved in a real estate closing or settlement would be aware of one another's presence or absence in the process at the time of closing, and that the reporting chain would be easily interpreted by persons involved in real estate closings and settlements.

Several 2021 ANPRM commenters suggested the use of a reporting cascade.[117] Some commenters recommended that title and escrow companies and agents, real estate agents and brokers, real estate attorneys, and other real estate professionals be the reporting persons in any potential regulation, to ensure that a broad swath of real estate professionals are included and to prevent reporting loopholes.[118] One commenter suggested that title insurance companies that are already affiliated with heavily regulated financial institutions, such as banks, should not be required to report; FinCEN is not proposing this path because it is unclear who would decide this or how it would be determined.[119] Another commenter stated that FinCEN should place any compliance obligations on the seller, but FinCEN believes this would place too much burden on individuals who are not real estate professionals.[120] Two commenters suggested requiring only title insurance companies to report in the residential context, and only secondarily requiring escrow agents to report if title insurance is not purchased.[121]

Rather than to include or exclude any particular persons involved in real estate settlements and closings based on the titles they hold, FinCEN decided to design a reporting cascade based on the functions performed in a closing or settlement. This functional approach will ensure that the professional closest to the proposed information to be reported is most often the reporting person, thereby increasing efficiency and lessening overall burden. FinCEN notes that, as a result of this functional approach, specific real estate professionals such as real estate agents, brokers, and attorneys are not directly subject to obligations in the reporting cascade. They acquire reporting obligations only if they perform the specified functions.

Several commenters on the 2021 ANPRM argued against inclusion of attorneys, claiming that attorney-client privilege should prevent attorneys involved in real estate closings and settlements from reporting information, including beneficial ownership information.[122] In this proposed rule, FinCEN would require reporting by attorneys only when they perform certain functions—functions that generally may be performed by non-attorneys. Although some jurisdictions in the United States require a licensed attorney to perform certain closing or settlement functions, FinCEN believes that the functions described in the cascade may generally be performed by both attorneys and non-attorneys. Indeed, FinCEN believes that the same reporting obligations should apply to

[116] *See* 29 CFR 1.6045–4 (Information reporting on real estate transactions with dates of closing on or after January 1, 1991).

[117] *See* Global Financial Integrity, ANPRM Comment (Feb. 17, 2022), p. 11, *available at https://www.regulations.gov/comment/FINCEN-2021-0007-0102;* Transparency International U.S., ANPRM Comment (Feb. 18, 2022), p. 10, *available at https://www.regulations.gov/comment/FINCEN-2021-0007-0115;* Senator Sheldon Whitehouse, ANPRM Comment (Feb. 18, 2022), p. 4, *available at https://www.regulations.gov/comment/FINCEN-2021-0007-0118;* The FACT Coalition, ANPRM Comment (Feb. 18, 2022), p. 3, *available at https://www.regulations.gov/comment/FINCEN-2021-0007-0122;* California Reinvestment Coalition, ANPRM Comment (Feb. 18, 2022), p. 3, *available at https://www.regulations.gov/comment/FINCEN-2021-0007-0126;* National Association of Realtors, ANPRM Comment (Feb. 18, 2022), p. 15, *available at https://www.regulations.gov/comment/FINCEN-2021-0007-0128.*

[118] *See* Global Financial Integrity, ANPRM Comment (Feb. 17, 2022), p. 11, *available at https://www.regulations.gov/comment/FINCEN-2021-0007-0102;* League of Southeastern Credit Unions & Affiliates, ANPRM Comment (Feb. 7, 2022), pp. 3–4, *available at https://www.regulations.gov/comment/FINCEN-2021-0007-0011;* American Land Title Association, ANPRM Comment (Feb. 17, 2022), p. 3, *available at https://www.regulations.gov/comment/FINCEN-2021-0007-0020;* Transparency International U.S., ANPRM Comment (Feb. 18, 2022), p. 10, *available at https://www.regulations.gov/comment/FINCEN-2021-0007-0115;* The FACT Coalition, ANPRM Comment (Feb. 18, 2022), p. 3, *available at https://www.regulations.gov/comment/FINCEN-2021-0007-0122;* American Escrow Association, ANPRM Comment (Feb. 18, 2022), pp. 13–17, *available at https://www.regulations.gov/comment/FINCEN-2021-0007-0124;* California Reinvestment Coalition, ANPRM Comment (Feb. 18, 2022), p. 3, *available at https://www.regulations.gov/comment/FINCEN-2021-0007-0126;* Illinois Credit Union League, ANPRM Comment (Feb. 21, 2022), p. 1, *available at https://www.regulations.gov/comment/FINCEN-2021-0007-0137;* Palmera Consulting, ANPRM Comment (Feb. 21, 2022), p. 4, *available at https://www.regulations.gov/comment/FINCEN-2021-0007-0141;* Louise Shelley and Ross Delston, ANPRM Comment (Feb. 21, 2022), p. 2, *available at https://www.regulations.gov/comment/FINCEN-2021-0007-0151.*

[119] *See* Prosperus Title, ANPRM Comment (Feb. 18, 2022), p. 1, *available at https://www.regulations.gov/comment/FINCEN-2021-0007-0125.*

[120] *See* Morgan, Lewis, & Bockius, ANPRM Comment (Feb. 18, 2022), p. 3, *available at https://www.regulations.gov/comment/FINCEN-2021-0007-0123.*

[121] *See* Anti-Corruption Data Collective, ANPRM Comment (Feb. 18, 2022), p. 1, 4, *available at https://www.regulations.gov/comment/FINCEN-2021-0007-0153;* National Association of Realtors, ANPRM Comment (Feb. 18, 2022), p. 14, *available at https://www.regulations.gov/comment/FINCEN-2021-0007-0128.*

[122] *See* Joint Editorial Board for Uniform Real Property Acts, ANPRM Comment (Feb. 5, 2022), pp. 1–2, *available at https://www.regulations.gov/comment/FINCEN-2021-0007-0014;* American Bar Association, ANPRM Comment (Feb. 7, 2022), pp. 1–12, *available at https://www.regulations.gov/comment/FINCEN-2021-0007-0018;* Marisa N. Bocci, ANPRM Comment (Feb. 21, 2022), p. 5, *available at https://www.regulations.gov/comment/FINCEN-2021-0007-0150.*

attorneys and non-attorneys alike when they perform the same functions in reportable transfers of residential real property. Furthermore, FinCEN expects that reporting of factual information about a real estate transfer would not implicate attorney-client privilege, in most cases. Also, the proposed rule provides that potential reporting persons, including attorneys, may enter into designation agreements with other real estate professionals described in the cascade, thereby passing the reporting obligation to another professional.

E. Information To Be Reported

1. Description of Information

The proposed rule requires reporting persons to report and maintain records of certain information regarding reportable transfers. This includes certain information about any reporting persons, transferee entities, transferee trusts, signing individuals, transferors, the residential real property, and reportable payments. To a large degree, this information is similar to the transactional information required to be reported through traditional SARs. FinCEN emphasizes that Real Estate Reports, like SARs, would be housed in FinCEN's secure BSA Portal and would not be accessible to the general public; FinCEN imposes strict limits on the use and re-dissemination of the data it provides to its law enforcement and other agency partners.

The following discussion addresses in more detail some of the types of information the rule proposes to collect.

1. *Name and address:* The proposed rule would collect the name and address of the principal place of business for reporting persons, transferee entities and transferee trusts, and transferors that are entities. For legal entities that are trustees of transferor trusts, the proposed rule would collect the place of trust administration. It would collect the name and a residential address for each individual who signed documents on behalf of the transferee (signing individuals), all beneficial owners of a transferee entity or transferee trust, individual transferors, and individuals who are trustees of transferor trusts.

2. *Citizenship:* The proposed rule would collect citizenship information for all beneficial owners of a transferee entity or transferee trust. FinCEN proposes to collect this information to better analyze the volume of illicit funds entering the United States via entities or trusts beneficially owned by non-U.S. persons. FinCEN cannot do this type of broad analysis without collecting citizenship information. For instance, traditional SARs already collect this type of information and FinCEN was able to analyze SARs in aggregate to identify Russian investment in the U.S. economy, including the real estate sector, after the invasion of Ukraine.[123]

3. *Unique identifying number:* The proposed rule would collect a unique identifying number for each person (whether an individual or entity) whose name and address are required to be reported. For any individual for whom a unique identifying number would be collected, a unique identifying number can be an IRS Taxpayer Identification Number (TIN) or, if they do not have one, a foreign equivalent or a foreign passport number. For an entity, a unique identifying number can be an IRS TIN or, if the entity does not have one, a foreign equivalent or a foreign registration number. FinCEN chose to include the collection of TINs, such as Social Security Numbers (SSNs) or Employer Identification Numbers (EINs), for transferee entities, transferee trusts, beneficial owners of transferee entities and trusts, as well as for certain individuals signing documents on behalf of the transferee entity or trust during the residential real estate transfer, for a number of reasons. Reporting TINs provides law enforcement with the most efficient means to identify potential individuals involved in illicit activity and connect those persons to other transactions during investigations. Unlike names, addresses, and dates of birth, which can be common across multiple individuals, TINs are unique to a given individual, entity, or trust. Consequently, collections of TINs would cut down on flagging of individuals, entities, and trusts that are not the intended subject of an investigation, which will allow law enforcement to more efficiently pursue leads, conduct investigations, and identify illicitly acquired assets. FinCEN's consultations with law enforcement have confirmed that law enforcement views access to TIN information as extremely helpful for streamlining investigative work. Law enforcement officials also indicated to FinCEN that it is relatively easy for illicit actors to create a false identity using a combination of name, address, and date of birth, and often do so, thereby impeding an investigation from the outset. However, law enforcement noted that obtaining a false TIN was orders of magnitude more difficult and that collection of such information was therefore crucial to their investigations. Moreover, TINs are routinely collected in other BSA reports, including SARs.[124] Accordingly, the proposed rule would collect TINs for certain persons involved in covered residential real estate transfers.

4. *Representative capacity of signing individual:* For any signing individual, the proposed rule would collect a description of the capacity in which the individual is authorized to act as the signing individual for the transferee entity or transferee trust, such as whether the signing individual is a legal representative. Additionally, if the signing individual is acting in that capacity as an employee, agent, or partner, the proposed rule would collect the name of the employer, principal, or partnership.

5. *Information concerning payments:* The proposed rule would collect the total consideration paid by *all* transferees regarding the residential real property, as well as the total amount paid by the transferee entity or trust, the method of each payment made by the transferee entity or transferee trust, the accounts and financial institutions used for each such payment, and, if the payor is anyone other than the transferee entity or transferee trust, the name of the payor on the payment form. With respect to the reporting of payments made by the transferee entity or transferee trust, the proposed rule seeks only to capture transactions where the greatest risk for money laundering is present—the movement of funds from accounts held or controlled by the transferee—and therefore exempts payments made *from* escrow or trust

[123] *See* FinCEN, FIN–2023–Alert002, FinCEN Alert on Potential U.S. Commercial Real Estate Investments by Sanctioned Russian Elites, Oligarchs, and their Proxies (Jan. 25, 2023), *available at https://www.fincen.gov/sites/default/files/shared/FinCEN%20Alert%20Real%20Estate%20FINAL%20508_1-25-23%20FINAL%20FINAL.pdf;* FinCEN, FIN–2022–Alert002, FinCEN Alert on Real Estate, Luxury Goods, and Other High-Value Assets Involving Russian Elites, Oligarchs, and their Family Members (Mar. 16, 2022), *available at https://www.fincen.gov/sites/default/files/2022-03/FinCEN%20Alert%20Russian%20Elites%20High%20Value%20Assets_508%20FINAL.pdf.*

[124] FinCEN, FinCEN Suspicious Activity Report (FinCEN SAR) Electronic Filing Requirements (Aug. 2021), p. 62, *available at https://bsaefiling.fincen.treas.gov/docs/XMLUserGuide_FinCENSAR.pdf; see also* FinCEN, Report of Cash Payments Over $10,000 Received in a Trade or Business (FinCEN Form 8300) Electronic Filing Requirements (Aug. 2021), p. 28, *available at https://bsaefiling.fincen.treas.gov/docs/XMLUserGuide_FinCEN8300.pdf* (indicating Form 8300s require TINs to be reported); FinCEN, FinCEN Currency Transaction Report (CTR) Electronic Filing Requirements (Aug. 2021), p. 27, *available at https://bsaefiling.fincen.treas.gov/docs/XMLUserGuide_FinCENCTR.pdf* (indicating CTRs required TINs to be reported); FinCEN, FinCEN Report of Foreign Bank and Financial Accounts (FBAR) Electronic Filing Requirements (Aug. 2021), p. 29, *available at https://bsaefiling.fincen.treas.gov/docs/XMLUserGuide_FinCENFBAR.pdf* (indicating FBARs require TINs to be reported).

accounts held by the reporting person. Accordingly, the rule would require the reporting of payments made *from other* escrow or trust accounts, payments made *into any* escrow or trust accounts (to prevent illicit actors from trying to circumvent the reporting requirement), and payments sent directly from the transferee to the transferor. For example, if the payment path is (1) from the transferee's bank account to a trust account, (2) from that trust account to an escrow account held by the reporting person, and then (3) from that escrow account to the transferor, the reporting person would need to provide the payment details of the first leg of the payment path. FinCEN notes that the reporting requirement would include the reporting of payments that the reporting person may consider as being paid outside of closing, such as a payment made between a buyer and seller through bank accounts located outside of the United States. FinCEN proposes to collect payment information because financial information is key to ensuring that the reports meet the threshold for being highly valuable to law enforcement. The payment information behind real estate transfers conducted in a manner that has been identified as high risk for money laundering would help support law enforcement investigations, as it can help connect beneficial owners to suspicious activity or funding sources. The collection of this information may also serve as a deterrent to those thinking about attempting to launder money through the U.S. residential real estate sector.

6. *Information concerning the residential real property:* The proposed rule would require the address of the relevant property, if applicable, and a legal description, such as the section, lot, and block. This information would be reported for each property involved in the transfer. For example, if a four-unit town home is transferred to a transferee entity, all four addresses would be reported.

Commenters on the 2021 ANPRM had diverse views on what information should or should not be collected under any potential regulation. Most commenters who thought that information should be collected were in favor of collecting transferee side information, including beneficial ownership information.[125] However, other commenters said that only basic information that is already collected in the course of a closing about the transferee should be collected, and that requiring real estate professionals to collect beneficial ownership information would be too burdensome.[126] FinCEN recognizes that while most of the information that would be collected under this proposed rule is provided to the most frequent reporters in the normal course of a closing, beneficial ownership information is not. FinCEN addressed concerns about the burden of collecting beneficial ownership information in this proposed rule by making sure that reporting persons can collect this information through a form, which is then certified by the transferee as being accurate, as will be discussed further below.

Some commenters advocated for the collection of transferor information as well.[127] FinCEN opted to collect only minimal transferor information, as the primary party of interest to law enforcement is the new owner of property that has been transferred in a manner that presents money laundering concerns.

Commenters also mentioned collecting certain funds payment information,[128] identifying PEPs involved in the transfer,[129] beneficial ownership verification,[130] information about the property being transferred,[131] and any representatives of the transferee in the transfer.[132] Elements of each of these are included in the proposed rule, except for PEP identification and beneficial owner verification, which FinCEN believes would require reporting persons to undertake independent research that would represent a dramatically increased burden, compared to collecting information from the transferee.

2. Collection of Information

FinCEN expects that the reporting person will have access to some, but not all, of the reportable information in the normal course of business. In particular, the reporting person may not have on hand the identifying information for the beneficial owners of the transferee entity or trust. The proposed rule therefore includes guidelines for how the reporting person should collect this information.

The reporting person may collect the information directly from a transferee or a representative of the transferee, so long as the person certifies that the

[125] *See* Global Financial Integrity, ANPRM Comment (Feb. 17, 2022), pp. 27–28, 44–45, *available at https://www.regulations.gov/comment/FINCEN-2021-0007-0102;* Transparency International U.S., ANPRM Comment (Feb. 18, 2022), pp. 8–9, *available at https://www.regulations.gov/comment/FINCEN-2021-0007-0115;* The FACT Coalition, ANPRM Comment (Feb. 18, 2022), p. 4, *available at https://www.regulations.gov/comment/FINCEN-2021-0007-0122;* California Reinvestment Coalition, ANPRM Comment (Feb. 18, 2022), p. 3, *available at https://www.regulations.gov/comment/FINCEN-2021-0007-0126.*

[126] *See* American Land Title Association, ANPRM Comment (Feb. 17, 2022), pp. 2–4, *available at https://www.regulations.gov/comment/FINCEN-2021-0007-0020;* American Escrow Association, ANPRM Comment (Feb. 18, 2022), pp. 13–17, *available at https://www.regulations.gov/comment/FINCEN-2021-0007-0124.*

[127] *See* Global Financial Integrity, ANPRM Comment (Feb. 17, 2022), pp. 27–28, *available at https://www.regulations.gov/comment/FINCEN-2021-0007-0102;* Senator Sheldon Whitehouse, ANPRM Comment (Feb. 18, 2022), p. 4, *available at https://www.regulations.gov/comment/FINCEN-2021-0007-0118;* The FACT Coalition, ANPRM Comment (Feb. 18, 2022), p. 4, *available at https://www.regulations.gov/comment/FINCEN-2021-0007-0122;* California Reinvestment Coalition, ANPRM Comment (Feb. 18, 2022), p. 3, *available at https://www.regulations.gov/comment/FINCEN-2021-0007-0126;* Coalition for Integrity, ANPRM Comment (Feb. 21, 2022), p. 4, *available at https://www.regulations.gov/comment/FINCEN-2021-0007-0127.*

[128] *See* Global Financial Integrity, ANPRM Comment (Feb. 17, 2022), pp. 27–28, *available at https://www.regulations.gov/comment/FINCEN-2021-0007-0102;* Transparency International U.S., ANPRM Comment (Feb. 18, 2022), p. 9, *available at https://www.regulations.gov/comment/FINCEN-2021-0007-0115;* Senator Sheldon Whitehouse, ANPRM Comment (Feb. 18, 2022), p. 4, *available at https://www.regulations.gov/comment/FINCEN-2021-0007-0118;* The FACT Coalition, ANPRM Comment (Feb. 18, 2022), p. 4, *available at https://www.regulations.gov/comment/FINCEN-2021-0007-0122;* California Reinvestment Coalition, ANPRM Comment (Feb. 18, 2022), p. 3, *available at https://www.regulations.gov/comment/FINCEN-2021-0007-0126;* Coalition for Integrity, ANPRM Comment (Feb. 21, 2022), p. 4, *available at https://www.regulations.gov/comment/FINCEN-2021-0007-0127;* Anti-Corruption Data Collective, ANPRM Comment (Feb. 18, 2022), p. 3, *available at https://www.regulations.gov/comment/FINCEN-2021-0007-0153.*

[129] *See* Global Financial Integrity, ANPRM Comment (Feb. 17, 2022), pp. 27–28, *available at https://www.regulations.gov/comment/FINCEN-2021-0007-0102;* Transparency International U.S., ANPRM Comment (Feb. 18, 2022), p. 9, *available at https://www.regulations.gov/comment/FINCEN-2021-0007-0115;* The FACT Coalition, ANPRM Comment (Feb. 18, 2022), p. 4, *available at https://www.regulations.gov/comment/FINCEN-2021-0007-0122;* California Reinvestment Coalition, ANPRM Comment (Feb. 18, 2022), p. 3, *available at https://www.regulations.gov/comment/FINCEN-2021-0007-0126.*

[130] *See* Transparency International U.S., ANPRM Comment (Feb. 18, 2022), p. 9, *available at https://www.regulations.gov/comment/FINCEN-2021-0007-0115.*

[131] *See* Global Financial Integrity, ANPRM Comment (Feb. 17, 2022), pp. 44–45, *available at https://www.regulations.gov/comment/FINCEN-2021-0007-0102;* American Land Title Association, ANPRM Comment (Feb. 17, 2022), p. 6, *available at https://www.regulations.gov/comment/FINCEN-2021-0007-0020;* Anti-Corruption Data Collective, ANPRM Comment (Feb. 18, 2022), p. 3, *available at https://www.regulations.gov/comment/FINCEN-2021-0007-0153.*

[132] *See* Global Financial Integrity, ANPRM Comment (Feb. 17, 2022), pp. 44–45, *available at https://www.regulations.gov/comment/FINCEN-2021-0007-0102;* American Escrow Association, ANPRM Comment (Feb. 18, 2022), p. 16, *available at https://www.regulations.gov/comment/FINCEN-2021-0007-0124.*

information is correct to the best of their knowledge. The certification may be collected using a form that may be provided by FinCEN, similar to the one provided with respect to the CDD Rule, which requires certain financial institutions collect beneficial ownership information from legal entity customers, or the reporting person may incorporate a certification into a document of their own design, including existing closing documents used by the reporting person.[133]

FinCEN could have proposed that reporting persons must personally conduct extensive research to verify beneficial ownership and other information provided to them, but is proposing the use of a certification due to its comparative lesser burden on filers. The use of certifications will also ensure uniform information collection standards are met across reportable transfers. Any certification form signed in the course of a transfer must be retained by the reporting person for five years. Although the reporting person may rely on the information collected from other parties as described above, the reporting person may not report information that the reporting person knows, suspects, or has reason to suspect is inaccurate or incomplete. As an alternative, FinCEN considered requiring reporting persons to undertake the verification of the information to be reported. However, FinCEN is instead proposing the use of a written certification form because this approach would present a lower burden on reporting persons when compared with a scenario in which they would independently verify information through their own research. Allowing parties to the transfer and their representatives to provide information directly, while attesting to its accuracy, will reduce time and resources expended by reporting persons while ensuring that the most accurate information is provided to law enforcement and that compliance can be monitored more effectively. The proposed rule would also allow the flexibility of the reporting person collecting the information by any other means, so long as the transferee's representative (whether a signing individual or other type of representative) attests to its accuracy.

F. Filing Procedures

A reporting person must electronically file a Real Estate Report with FinCEN, following the reporting form's instructions, no later than 30 calendar days after the date on which the transferee entity or transferee trust receives the ownership interest in the residential real property. This is to ensure that reporting of time sensitive information about residential real estate closings and settlements is not unduly delayed.

G. Records Retention

Reporting persons must maintain a copy of any Real Estate Report they have filed and any certifications as to the identities of the beneficial owner(s) of a transferee entity or transferee trust for five years from the date of filing and keep them available at all times for inspection as authorized by law.

All parties to a designation must similarly retain a copy of the agreement for five years from the date of signing and keep it available at all times for inspection as authorized by law.

H. Exemptions

The proposed rule would exempt reporting persons and Federal, State, local, or Tribal government authorities from the confidentiality provision in 31 U.S.C. 5318(g)(2) prohibiting the disclosure to any person involved in the transaction that the transaction has been reported.[134] As noted above, FinCEN recognizes that financial institutions who file SARs are subject to restrictions prohibiting the disclosure of the existence of the SAR to any of its subjects. However, this would not be feasible with the proposed Real Estate Report, as reporting persons would need to collect information directly from the subjects of the Report. Moreover, all parties to a non-financed residential real estate transfer that is subject to the proposed rule would already be aware that a report would be filed, given that such filing is non-discretionary, rendering confidentiality unnecessary.

Furthermore, persons involved in real estate closings and settlements are exempt from the requirement to maintain an AML program requirement.[135] For the reasons discussed earlier, that exemption will continue to apply to persons involved in real estate closings and settlements under the proposed rule. However, the exemption does not apply to reporting persons who are financial institutions otherwise required to establish an AML/CFT program under FinCEN's regulations.

V. Final Rule Effective Date

FinCEN is proposing an effective date of one year from the date the final rule is issued. A one-year effective date is intended to provide real estate professionals with sufficient time to review and prepare for implementation of the rule. FinCEN solicits comment on the proposed effective date for this rule.

VI. Request for Comment

FinCEN seeks comments on the questions listed below, but invites any other relevant comments as well. FinCEN encourages commenters to reference specific question numbers to facilitate FinCEN's review of comments.

1. What would the cost and hour burden of filing reports as detailed by this NPRM be for your profession? Please quantify, if possible, the anticipated burden this proposed rule would represent for the designated reporting persons.

2. What percentage of residential real property transfers involve transfers to the types of entities described in the regulation as "transferee entities" and "transferee trusts"?

3. What are the benefits and drawbacks to having a cascading hierarchy of reporting persons, as proposed?

4. Will real estate professionals know or be able to discover the other real estate professionals performing functions in the closing process as laid out by the reporting cascade?

5. Please provide feedback on the order of the proposed cascading reporting hierarchy. Does it include those real estate professionals who are most able to obtain and report the required information? Should any person involved in real estate closings and settlements present in the proposed cascade be removed? Added? Why?

6. Are there potential loopholes in the proposed cascading reporting order? If so, how might they be overcome? For example, would specifically adding real estate agents and brokers close any reporting gaps?

7. How likely are potential reporting persons to enter into designation agreements? Are there any particular challenges associated with entering into such an agreement? With documenting that such an agreement has been made?

8. What are typical costs to close a residential real estate deal? What percentage of the sale price do these costs typically represent?

9. What sort of due diligence is normally conducted, before or at closing for residential properties, regarding (i) the parties to a transfer; (ii) the source of funds for any transfer; and (iii) other key aspects of the transfer?

10. What sort of existing recordkeeping or reporting requirements, unrelated to BSA

[133] *See* 31 CFR 1010.230.

[134] 31 U.S.C. 5318(a)(7) (which allows the Secretary to prescribe appropriate exemptions).

[135] 31 CFR 1010.205(b)(1)(v).

compliance, exist for non-financed residential real estate transfers? If any, what information must be recorded or reported, to whom, and for how long? What entity provides oversight?

11. Should FinCEN limit the scope of any final rule to only non-financed transfers? What are the benefits and drawbacks to doing so?

12. What adjustments, if any, should be made to the proposed definition of a reportable transfer?

13. Should the rule except transfers that involve a qualified extension of credit to "all" transferees or to "any" transferee?

14. What percentage of residential real estate transfers are non-financed?

15. What adjustments, if any, should be made to the proposed definition of "residential real property"? Is the description of such property as "designed principally for occupancy by one to four families" a clear industry standard?

16. Are the beneficial owners of transferee entities or transferee trusts routinely identified by some participant in the transfer?

17. What information, if any, should be reported about transfers involving tax-exempt organizations?

18. What do persons involved in real estate closings and settlements do if they have any suspicions about a transfer of residential real property, customer, or the payments supporting the transfer?

19. What roles do attorneys play in non-financed sales and non-sale transfers of residential real estate? Are there attorney-client privilege concerns with reporting these transfers, as proposed in the rule? If so, what is the basis for these concerns?

20. Please describe the purpose of the use of an escrow account, trust account, or lawyers' trust account in a real estate transfer. Do these accounts present money laundering concerns? Is the use of these accounts sufficiently captured in the proposed rule? Are there attorney-client privilege concerns around the use of lawyer's trust accounts, and if so, what is the basis for these concerns?

21. How are opinion letters used in the real estate closing and settlement process? Are there attorney-client privilege concerns around the use of opinion letters? If so, what is the basis for those concerns?

22. Are there other attorney-client privilege concerns, such as around attorneys acting as settlement agents, drafting or filing deeds, or reporting any of the required information? What is the basis for those concerns?

23. How do factors related to parties to the transfer, the payments related to the transfer, and the property itself bear on money laundering risk assessment? What kinds of transfers and customers are highest and lowest risk? How are those risks mitigated and what are the associated costs of that mitigation?

24. Is it possible to estimate the extent to which residential real property values are affected by money laundering through real estate?

25. Please provide comments on the proposed definition of transferee entity.

26. Please provide comments on the proposed definition of transferee trust.

27. Please provide comments on the proposed definition of beneficial owners of transferee entities.

28. Please provide comments on the proposed definition of beneficial owners of transferee trusts.

29. Please provide comments on any other definition in the proposed rule.

30. Please provide comments on the proposed coverage of transfers of residential real estate to transferee entities and transferee trusts, including the benefits and drawbacks to covering each.

31. Are there any areas within the geographic scope of this proposed rule that have unique customs or requirements that should be taken into account?

32. Please comment on how aware real estate professionals involved in residential real property transfers are of other categories of real estate professionals that may be involved in a given closing or settlement.

33. What are the benefits of the rule as proposed?

34. Is the information FinCEN proposes to be reported regarding non-financed residential real estate transfers to transferee entities and transferee trusts sufficient, over- or under-inclusive? What information should be added or removed and why?

35. Should FinCEN ask for citizenship information of beneficial owners of transferee entities and transferee trusts? Why or why not?

36. Is the information FinCEN proposes to be reported regarding reporting persons sufficient, over- or under-inclusive? What information should be added or removed and why?

37. Please provide comments on the proposed collection of TINs for transferors and transferees and their beneficial owners.

38. Is the information FinCEN proposes to be reported regarding signing individuals sufficient, over- or under-inclusive? What information should be added or removed and why?

39. Is the information FinCEN proposes to be reported regarding transferors sufficient, over- or under-inclusive? What information should be added or removed and why?

40. Is the information FinCEN proposes to be reported regarding the description of the transferred property sufficient, over- or under-inclusive? What information should be added or removed and why?

41. Is the information FinCEN proposes to be reported regarding payments sufficient, over- or under-inclusive? What information should be added or removed and why? Would it be useful to reporting persons to have space on the reporting form to explain or discuss suspected or observed suspicious activity?

42. Should FinCEN require information regarding additional information about the source of funds for covered residential real estate transfers? How would or should reporting persons go about ascertaining source of funds information?

43. How should FinCEN consider real estate transfers to foreign trusts and charitable trusts? Foreign non-profits? Do these present sufficient money laundering risk that they should be covered by any final rule? Why or why not?

44. If program or other requirements were limited to purchases above a certain price threshold, how would this affect: (i) the burden of implementing such potential rules; and (ii) the utility of such potential rules for addressing money laundering issues in the real estate market?

45. What are the key benefits for a reporting person, if any, assuming issuance of the rules?

46. Please list any legislative, regulatory, judicial, corporate, or market-related developments that have transpired since FinCEN issued the 2021 ANPRM that you view as relevant to FinCEN's current proposed issuance of AML regulations.

47. Are there particular concerns that small businesses may have regarding the implementation of this proposed rule?

48. What would be the value of covering partially non-financed residential real estate transfers? What level of financing would be sufficient to alleviate that concern?

49. FinCEN understands that for certain residential real estate transfers involving multiple investors, such as with unregistered PIVs, or large operating companies, there may be multiple financing methods involved in a single residential transfer. Please detail in the context of the proposed rule how due diligence checks on partially financed residential real estate transfers involving multiple entities

may differ from due diligence checks on fully financed residential real estate transfers multiple entities.

50. This NPRM is focused on residential real estate. Do the same considerations for type of purchaser covered and professionals required to report apply to the commercial real estate sector?

VII. Regulatory Analysis

This regulatory impact analysis (RIA) evaluates the anticipated effects of the proposed rule in terms of its expected costs and benefits to affected parties, among other economic considerations, as required by Executive Orders 12866, 13563, and 14094 (E.O. 12866 and its amendments).[136] This RIA also includes assessments of the potential economic impact on small entities pursuant to the Regulatory Flexibility Act (RFA) and reporting and recordkeeping burdens under the Paperwork Reduction Act of 1995 (PRA), as well as analysis required under the Unfunded Mandates Reform Act of 1995 (UMRA).[137]

As discussed in greater detail below, the proposed rule is expected to promote national security objectives[138] and enhance compliance with international standards[139] by improving law enforcement's ability to identify the natural persons associated with transactions conducted in the U.S. residential real estate sector and thereby diminish the ability of corrupt and other illicit actors to launder their proceeds through real estate purchases in the United States. More specifically, the collection of the proposed streamlined SARs, Real Estate Reports, in a repository that would be readily accessible to law enforcement is expected to increase the efficiency with which resources can be utilized to identify such natural persons, or beneficial owners, when they have conducted non-financed purchases of residential real property using legal entities or trusts.

The following RIA first describes the economic analysis FinCEN undertook to inform its expectations of the proposed rule's impact and burden.[140] This is followed by certain pieces of additional and, in some cases, more specifically tailored analysis as required by E.O. 12866 and its amendments,[141] the RFA,[142] the UMRA,[143] and the PRA,[144] respectively. Requests for comment related to the RIA—regarding specific findings, assumptions, or expectations, or with respect to the analysis in its entirety—can be found in the final subsection[145] and have been previewed and cross-referenced throughout the RIA.

A. Assessment of Impact

This proposed rule has been determined to be a "significant regulatory action" under Section 3(f) of Executive Order 12866 because it may raise legal or policy issues. The following assessment indicates that the proposed rule may also be considered significant under Section 3(f)(1), as the proposed rule is expected to have an annual effect on the economy of $200 million or more.[146] Consistent with certain identified best practices in regulatory analysis, the economic analysis conducted in this section begins with a review of FinCEN's broad economic considerations, identifying the relevant market failures (or fundamental economic problems) that demonstrate the need or otherwise animate the impetus for the policy intervention as proposed.[147] Next, the analysis turns to details of the current regulatory requirements and the background of market practices against which the proposed rule would introduce changes and establishes baseline estimates of the number of entities and residential real property transactions FinCEN expects could be affected in a given year. The analysis then briefly reviews the content of the proposed rules with a focus on the specifically relevant elements of the proposed definitions and requirements that most directly inform how FinCEN contemplates compliance with the proposed requirements would be operationalized. Next, the analysis proceeds to outline the estimated costs to the respective affected parties that would be associated with such operationalization. Finally, the analysis concludes with a brief discussion of certain alternative policies FinCEN considered and could have proposed, including an evaluation of the relative economic merits of each against the expected value of the rule as proposed.

1. Broad Economic Considerations

The proposed rule principally addresses two broad problems. First, is the problematic use of the United States' residential real estate market to facilitate money laundering and illicit activity. Second, and related, is the difficulty of determining who beneficially owns legal entities or trusts that may engage in non-financed transactions, either because this data is not available to law enforcement or access is not sufficiently centralized to be meaningfully usable for purposes of market level risk-monitoring or swift investigation and prosecution. The second problem contributes to the first, making money laundering and illicit activity through residential real property more difficult to detect and prosecute, and thus more likely to occur. Although FinCEN is unable to quantify the economic benefits of the proposed rule, FinCEN expects that the proposed rule would generate benefits by mitigating those two problems. In other words, FinCEN expects that the proposed rule could make law enforcement investigations of illicit activity and money laundering in residential real estate less costly and more effective, and it would thereby generate value in the reduction of social costs associated with such activity.

a. The Problem of Money Laundering and Illicit Activity via Residential Real Property

First, and most significantly, real estate money laundering can facilitate a broad range of illicit activity, and such activity entails significant social costs. For example, crimes such as tax evasion deprive governments of funds that could otherwise be used for public services or infrastructure investment.[148] Other crimes such as financial fraud deprive

[136] *See infra* Section VII.B.

[137] Pursuant to its UMRA-related analysis, FinCEN has not anticipated material changes in expenditures for State, local, and Tribal governments, but because the proposed rule would impose new reporting and recordkeeping requirements on select entities in the private sector in connection with certain residential property transfers, FinCEN considers expenditures these private entities may incur as part of the regulatory impact in its assessment below.

[138] *See* The White House, United States Strategy on Countering Corruption (Dec. 6, 2021), *available at https://www.whitehouse.gov/wp-content/uploads/2021/12/United-States-Strategy-on-Countering-Corruption.pdf.*

[139] *See* Financial Action Task Force, The FATF Recommendations (Feb. 2012; last updated Nov. 2023), *available at https://www.fatf-gafi.org/en/publications/Fatfrecommendations/Fatf-recommendations.html; see also Financial Action Task Force,* United States Mutual Evaluation Report (Dec. 2016), p.1., *available at https://www.fatf-gafi.org/content/dam/fatf-gafi/mer/MER-United-States-2016.pdf.coredownload.inline.pdf.*

[140] *See* Section VII.A.

[141] *See* Section VII.B.

[142] *See* Section VII.C.

[143] *See* Section VII.D.

[144] *See* Section VII.E.

[145] *See* Section VII.F.

[146] Executive Order 12866 (Sept. 30, 1993), section 3(f)(1); *see also* Section VII.A.4.

[147] Broadly, the anticipated economic value of a proposed rule can be measured by the extent to which it might reasonably be expected to resolve or mitigate the economic problems identified by such review.

[148] Organization for Economic Co-Operation and Development (OECD), Report on Tax Fraud and Money Laundering Vulnerabilities in the Real Estate Sector (2007), *available at https://www.oecd.org/ctp/exchange-of-tax-information/42223621.pdf* (finding that real estate is a preferred choice of criminals for hiding ill-gotten gains and that tax fraud schemes are often closely linked with these activities).

victims of their property, chilling legitimate investment and business activity that can yield economic benefits. Crimes involving various forms of corruption can hinder economic development and discourage legitimate businesses from operating in affected areas.[149] More generally, certain direct and indirect costs of crime include: [150]

- funding that must be provided by local, state, tribal, territorial, and Federal Governments to support law enforcement, the judiciary, and correctional services;
- financial losses sustained by crime victims, such as lost money and stolen or damaged property;
- physical, psychological, and long-term financial harm incurred by crime victims and their families, lost productivity and wages, and lower quality of life as a result of victimization; and
- heightened fear of crime, reduced ability to stem blight, loss of commercial and other investment, and increased burden on social service organizations in local communities.[151]

In addition to facilitating crime and its associated costs, money laundering creates distinct economic problems in the real estate markets in which it occurs. When a market is economically efficient, the public may rely upon the price(s) at which transactions occur to convey meaningful information,[152] in some cases including information about buyers' and sellers' valuations. Such information enables people to make optimal allocation choices—whether to participate in a given market, what investments to make, or how much to produce, for example. In this setting, money laundering creates price distortion by adding noise to the price signal. When price distortion occurs, the information necessary to make optimal decisions may become difficult or impossible to decipher from observable market behavior. Misallocations of goods and services that harm both producers and consumers may ensue and, in the extreme, markets can break down. Some evidence that this occurs in the real estate market has been documented.[153]

One way to think about how this noise is introduced in the residential real property market is to consider a property transaction by which money is laundered as a bundled good.[154] This would imply that the observable price at which the residential real property is transferred does not reflect simply the buyer's private valuation of the property, but their willingness to pay for money laundering services as well. This implicit bundling can lead to economic inefficiencies in both the number of and counterparties with whom trades occur and the prices at which they occur.

For example, if a residential real property seller is unaware that they are being compensated for both the transfer of their property as well as for their provision of money laundering services, the price at which they agree to the transfer will be inefficiently low.[155] In the case where such a seller is unwilling to provide money laundering services at any price, this would have caused the bundled price reflecting their private valuations to be infinite, and as such no transaction would have occurred. Another kind of allocative inefficiency could occur if the seller is unable to distinguish between a buyer's price that reflects a bundled value versus one that does not. Allocative efficiency requires that a good be traded with the counterparty whose willingness and ability to pay is highest. Therefore, in a case where a buyer with money laundering intent and a buyer with none both offer to transact at the same price, allocative efficiency would require the seller to trade their residential real property with the buyer without money laundering intent (because their private valuation of the property exceeds that of the money launderer by the proportion of the money launderer's bid that reflects their willingness to pay for money laundering services instead). In cases where this inability to distinguish between buyers of a bundled product versus genuine homebuyers leads to extreme allocative inefficiency, buyers without money laundering intent can be "crowded out" of the residential real property market to deleterious effect.

As a consequence of transactions occurring that inefficiently allocate housing, or transactions occurring at prices that are misaligned with equilibrium market prices, money laundering through residential real property purchases can have disparate effects on regional economic conditions depending on the nature of pre-existing housing supply-demand imbalances in a specific geographic market. For example, by creating additional demand in markets where the quantity of housing demanded already exceeds local supply, transactions for purposes of money laundering can exert additional upward pressure on home prices.

While money laundering may appear to be concentrated in high-end real estate properties and luxury markets, its spillover effects, if left unchecked, could in some instances disproportionately affect low-income and otherwise high-risk communities, undermining other economic policy objectives aimed at helping these

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[149] *See, e.g.*, John McDowell and Gary Novis, "The Consequences of Money Laundering and Financial Crime," Economic Perspectives: An Electronic Journal of the U.S. Department of State," Focus (May 2001), *available at https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwi24f3B5d6AAxUvhIkEHcC4DpIQFnoECBMQAQ&url=https%3A%2F%2Fwww.hsdl org%2F%3Fview%26did%3D3549&usg=AOvVaw2pg7gw7lpKPhWiw1Nq9mgF&opi=89978449*.

[150] U.S. Department of Justice, Bureau of Justice Statistics, "Costs of Crime," *available at https://bjs.ojp.gov/costs-crime*.

[151] For an example in the context of money laundering via commercial real estate, *see, e.g.*, Casey Michel, "A Ukrainian Oligarch Bought a Midwestern Factory and Let it Rot. What Was Really Going On?" Politico (Oct. 17, 2021), *available at https://www.politico.com/news/magazine/2021/10/17/ukrainian-oligarch-midwestern-factory-town-dirty-money-american-heartland-michel-kleptocracy-515948* (detailing how a corrupt Ukrainian tycoon laundered hundreds of millions of dollars by purchasing vast stretches of property in an economically depressed community in rural Illinois); *see also* U.S. Department of Justice, Press Release, Justice Department Seeks Forfeiture of Two Commercial Properties Purchased with Funds Misappropriated from PrivatBank in Ukraine (Aug. 6, 2020), *available at https://www.justice.gov/opa/pr/justice-department-seeks-forfeiture-two-commercial-properties-purchased-funds-misappropriated* (announcing forfeiture actions involving the same Ukrainian oligarch who, the DOJ alleged, purchased hundreds of millions of dollars in real estate and businesses across the country).

[152] For an example of this principle applied to capital asset pricing, *see, e.g.*, Eugene F. Fama, "Efficient Capital Markets: A Review of Theory and Empirical Work," The Journal of Finance, vol. 25, no. 2 (1970), pp. 383–417, *available at https://doi.org/10.2307/2325486*.

[153] *See e.g.*, European Parliamentary Research Service, "Understanding money laundering through real estate transactions" (Feb. 2019), p. 7, *available at https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/633154/EPRS_BRI(2019)633154_EN.pdf* (finding that "[d]istortions of real estate prices and the concentration on limited sectors may have an impact beyond those areas and lead to increases in real estate prices, thus pricing people with legal sources of funds out of the market and reduc[ing] housing affordability, something that has been witnessed in several cities in both developed and developing countries . . . resulting in . . . displacement of less affluent households").

[154] For a general description and examples of product bundling, *see, e.g.*, William James Adams and Janet L. Yellen, "Commodity Bundling and the Burden of Monopoly," The Quarterly Journal of Economics, vol. 90, no. 3 (1976), pp. 475–98; *see also* Yongmin Chen, "Equilibrium Product Bundling," The Journal of Business, vol. 70, no. 1 (1997), pp. 85–103.

[155] *See* U.S. Department of the Treasury, National Money Laundering Risk Assessment (Feb. 2022), p. 58, *available at https://home.treasury.gov/system/files/136/2022-National-Money-Laundering-Risk-Assessment.pdf*. Treasury explained in its 2022 National Money Laundering Risk Assessment, "[g]iven the relative stability of the real estate sector as a store of value, the opacity of the real estate market, and gaps in industry regulation, the U.S. real estate market continues to be used as a vehicle for money laundering and can involve businesses and professions that facilitate (*even if unwittingly*) acquisitions of real estate in the money laundering process" (emphasis added).

communities.[156] As such, money laundering through real estate—though it represents only a relatively small percentage of GDP and takes place in a minority of real estate transfers—can catalyze significant market failures when concentrated in areas that are economically distressed or with low housing volume. In some cases, this distortion can contribute to housing bubbles in affected areas, which may eventually burst and lead to economic instability in impacted regions.[157]

b. The Problem of High Search Costs

The U.S. real estate sector is considered an attractive target for money laundering due to several factors that make it conducive to stashing and obscuring the origin of illicit funds.[158] One significant factor is the opacity of beneficial ownership in non-financed real estate transfers to legal entities and trusts. Because these transfers can serve to obscure the identities of beneficial owners, they are acutely vulnerable to exploitation by illicit actors.[159] This mechanism to obfuscate the origin of funds and associated natural persons can effectively incentivize the marginal bad actor to seek new sources of illicit gain or exploit current sources with greater impunity. Opaque ownership in non-financed real estate transactions can be thought of in economic terms as effectively enhancing the liquidity of ill-gotten funds, thereby increasing the overall profitability of the original activity that engendered a need for money laundering.

Similar economic problems exist when beneficial ownership information and real estate transaction information is available, but search costs to obtain that information to link a bad actor to illicit activity are so high as to frustrate or prevent investigative use. To the extent those costs mean that illicit activity is not subsequently investigated or prosecuted, this allows the individual to update their perceived probability of being detected or punished for that illicit activity downward. In a model where the expected value of illicit behavior is a function of both the expected payoff and the risk (or expected severity) of punishment, the problem of high search costs increases the expected value by decreasing the perceived risk of punishment. In cases where the expected value of a certain illicit behavior increases because the anticipated risk or severity of punishment decreased, potential illicit actors may be more likely to engage in such behavior. This updated belief can also lead an individual to mistakenly update their expectations about punishment risk or severity associated with other illegal activities.[160] When this occurs, the coincidence of money laundering and other illicit activity may subsequently rise, which in turn may exacerbate the depressive effects of the original money laundering activities on the local economy in a self-reinforcing cycle.[161]

FinCEN assesses that a regulatory requirement to ensure consistent reporting of non-financed real estate transfers made to legal entities and trusts on a nationwide basis would reduce law enforcement search costs for such information, thereby facilitating law enforcement and national security agency efforts to combat illicit activity. In this manner the proposed policy is expected to directly address the two main problems considered and in so doing create economic value.

2. Baseline and Affected Parties

To assess the anticipated regulatory impact of the proposed rule, FinCEN took several factors about the current state of the residential real estate market into consideration. This is consistent with established best practices and certain requirements[162] that the expected economic effects of a proposed rule be measured against the status quo as a primary counterfactual. Among other factors, FinCEN's economic analysis of regulatory impact considered the proposed rule in the context of existing regulatory requirements, relevant distinctive features of groups likely to be affected by the rule, and pertinent elements of current residential real estate market characteristics and common practices. Each of these elements is discussed in its respective subsection below.

a. Regulatory Baseline

While there are no specific Federal rules that would directly and fully duplicate, overlap, or conflict with the proposed rule,[163] there are nevertheless components of the proposed requirements that mirror, or are otherwise consistent with, reporting and procedural requirements of existing FinCEN rules and orders, as well as those of other agencies. To the extent that a person would have previous compliance experience with these elements of the regulatory baseline, FinCEN expects that some costs associated with the proposed rule would be lower because the incremental changes in behavior from current practices would be smaller. FinCEN reviews the most proximate components from these existing rules and orders in greater detail below.

i. Residential Real Estate GTOs

Under the Residential Real Estate GTOs, title insurance companies are required to report: "(i) The dollar

[156] *See, e.g.*, Money Laundering in Real Estate, Conference Report by the Terrorism, Transnational Crime and Corruption Center at George Mason University (Mar. 25, 2018), *available at traccc.gmu.edu/wp-content/uploads/2020/09/2018-MLRE-Report_0.pdf.*

[157] "Anti Money Laundering and Economic Stability," International Monetary Fund Finance & Development Magazine (Dec. 2018), *availability at https://www.imf.org/en/Publications/fandd/issues/2018/12/imf-anti-money-laundering-and-economic-stability-straight.*

[158] *See, e.g.*, Final Report: Commission of Inquiry into Money Laundering in British Columbia, Cullen Commission (June 2022), p. 772, *available at https://cullencommission.ca/files/reports/CullenCommission-FinalReport-Full.pdf.* (highlighting structural and regulatory factors as incentives for using real estate to launder funds, including "minimal reporting of suspicious transactions . . . on the part of real estate professionals"), *citing* Transparency International, "Doors Wide Open: Corruption and Real Estate in Four Key Markets" (2017), pp. 24, *available at https://images.transparencycdn.org/images/2020-Report-Real-estate-data-Shining-a-light-on-the-corrupt.pdf;* Mohammed Ahmad Naheem, "Money Laundering and Illicit Flows from China—The Real Estate Problem," Journal of Money Laundering Control (2017), p. 23, *available at https://www.emerald.com/insight/content/doi/10.1108/JMLC-08-2015-0030/full/html.*

[159] *See* Financial Action Task Force, Guidance for a Risk Based Approach: Real Estate Sector (July 2022), pp. 17, 29, *available at https://www.fatf-gafi.org/content/dam/fatf-gafi/guidance/RBA-Real-Estate-Sector.pdf.coredownload.pdf* ("[d]isparities with rules surrounding legal structures across countries means property can often be acquired abroad by shell companies or trusts based in secrecy jurisdictions, exacerbating the risk of money laundering." International bodies, such as the FATF, have found that "[s]uccessful AML/CFT supervision of the real estate sector must contend with the obfuscation of true ownership provided by legal entities or arrangements[.]").

[160] This activity is consistent with a representativeness heuristic bias. *See* Amos Tversky and Daniel Kahneman, "Judgment under Uncertainty: Heuristics and Biases: Biases in judgments reveal some heuristics of thinking under uncertainty," Science, Vol. 185, no. 4157 (1974), pp. 1124–1131.

[161] Louise Shelley, "Money Laundering into Real Estate," in *Convergence: Illicit Networks and National Security in the Age of Globalization,* (Michael Miklaucic and Jacqueline Brewer eds., National Defense University Press 2013), p. 140 (noting how property purchased by money launderers that is left vacant may be allowed to decay so "criminal investors can subsequently buy neighboring properties at depressed costs, thereby increasing their territorial influence"); *see also* Final Report: Commission of Inquiry into Money Laundering in British Columbia, Cullen Commission (June 2022), p. 774, *available at https://cullencommission.ca/files/reports/CullenCommission-FinalReport-Full.pdf* (noting the ability of criminal actors to develop influence and power at a local level, such as in cases where a large real estate portfolio is owned in a small town or neighborhood).

[162] Office of Management and Budget, Circular A-4 (Nov. 9, 2023), *available at https://www.whitehouse.gov/wp-content/uploads/2023/11/CircularA-4.pdf.*

[163] 5 U.S.C. 603(b)(5).

amount of the transaction; (ii) the type of transaction; (iii) information identifying a party to the transaction, such as name, address, date of birth, and tax identification number; (iv) the role of a party in the transaction (*i.e.*, originator or beneficiary); and (v) the name, address, and contact information for the domestic financial institution or nonfinancial trade or business."[164]

As discussed above,[165] FinCEN recognizes that the Residential Real Estate GTOs collect beneficial ownership information on certain non-financed purchases of residential real property by legal entities that meet or exceed certain dollar thresholds in select geographic areas. However, the Residential Real Estate GTOs are narrow in that they are temporary, location-specific, and limited in the transactions they cover. The proposed rule is wider in scope of coverage and, if finalized, would collect additional useful and actionable information previously not available through the Residential Real Estate GTOs. As such, the proposed nationwide reporting framework for certain residential real estate transfers, if finalized, would replace the current Residential Real Estate GTOs.

Some evidence suggests that, despite the restricted scope of reporting persons under the existing Residential Real Estate GTOs to title insurance carriers only, certain additional categories of real estate professionals may already be familiar—and have experience—with gathering the currently required reportable information. For example, FinCEN observes that in some markets presently under a Residential Real Estate GTOs, realtors and escrow agents often assist Direct Title Insurance Carriers with their reporting obligations despite not being subject to any formal reporting requirements themselves. Some may even have multiple years' worth of guidance and informational support by the regional or national trade association of which they are a member in how best to facilitate and enable compliance with existing FinCEN requirements. For instance, in 2021, the National Association of Realtors advised that while "[r]eal estate professionals do not have any affirmative duties under the Residential Real Estate GTOs," such entities should nevertheless expect that "a title insurance company may request information from real estate professionals to help maintain its compliance with the Residential Real Estate GTOs. Real estate professionals are encouraged to cooperate and provide information in their possession."[166] Thus, the historical Residential Real Estate GTOs' attempt to limit the definition of reporting persons to Direct Title Insurance Carriers does not seem to have completely forestalled the imposition of time, cost, and training burdens on other real estate transfer related entities. As such, the proposed cascade approach might not mark a complete departure from current practices and the related burdens of Residential Real Estate GTO requirements, as they may already in some ways be functionally applicable to multiple prospective reporting persons in the proposed cascade.

ii. BOI Reporting Rule

Furthermore, following the enactment of the CTA, beneficial ownership information of certain legal entities is required to be submitted to FinCEN. However, as set out in the preamble to this proposed rule, the information needed to ascertain money laundering risk in the residential real estate sector differs in key aspects from what will be collected under the CTA, and, accordingly, the information collected under this proposed rule differs from that collected under the CTA.[167]

For example, FinCEN believes that a critical part of the proposed rule is that it would alert law enforcement to the fact that a real estate transfer vulnerable to a known money laundering typology has taken place. While beneficial ownership information collected under the CTA may be available, that information concerns the ownership composition of a given entity at a given point in time. As such reporting does not dynamically extend to include information on the market transactions of the beneficially owned legal entity, it would not alert law enforcement officials focused on reducing money laundering that any real estate transfer has been conducted, which includes those particularly vulnerable to money laundering such as non-financed transfers of residential property.

Furthermore, the scope of entities that are the focus of the real estate rule is broader than the CTA, as certain entities such as most types of trusts are not covered by the CTA. Because legal trusts generally do not have an obligation to report beneficial ownership under the CTA, their incremental burden of compliance with the proposed Real Estate Report requirements may be moderately higher insofar as the activities of collecting, presenting, or certifying beneficial ownership information are less likely to have already been performed for other purposes.

iii. CDD Rule

The CDD Rule's beneficial ownership requirement addressed a regulatory weakness that enabled persons looking to hide ill-gotten proceeds to potentially access the financial system anonymously. Among other things, covered financial institutions were required to identify and verify the identity of beneficial owners of legal entity customers, subject to certain exclusions and exemptions; beneficial ownership and identification therefore became a component of AML requirements.

FinCEN is also aware that financial institutions subject to the CDD Rule are required to collect some beneficial ownership information from legal entities that establish new accounts. However, those entities do not necessarily also own real estate and financial institutions are not required to file a report of that beneficial ownership information with FinCEN. In addition, the proposed rule covers non-financed transfers of residential real estate that do not involve financial institutions covered by the CDD Rule. The rule would also collect additional information relevant to the real estate transfers that is currently not collected under the CDD Rule.

iv. Other

In the course of current residential real estate transactions, some parties that under the proposed rule might be deemed "transferors" already prepare and report portions of the proposed requisite information to other regulators. For example, the IRS collects taxpayer information through Form 1099–S on seller-side proceeds from reportable real estate transfers for a broader scope of reportable real estate transactions than the proposed rule.[168] This information, however, is generally unavailable for one of the primary purposes intended by FinCEN's proposed rule, as there are significant statutory limitations on the ability of the IRS to share such

[164] 85 FR 84104 (Dec. 23, 2020).

[165] *See* discussion of Residential Real Estate GTOs, *supra* Section II.B.3; *see also* Section III.A.

[166] *See* National Association of Realtors, "Anti-Money Laundering Voluntary Guidelines for Real Estate Professionals" (Feb. 16, 2021), p. 3, *available at https://www.narfocus.com/billdatabase/clientfiles/172/4/1695.pdf.*

[167] *See supra* Section III.B, which provides a full discussion on the differences between the information collected for the CTA and the information collected under the proposed rule, both in terms of the depth of the information collected and the context in which it is collected.

[168] Reportable real estate for purposes of IRS Form 1099–S includes, for example, commercial and industrial buildings (without a residential component) and non-contingent interests in standing timber, which are not covered under the proposed rule.

information with federal law enforcement or other federal agencies.[169] In addition to these statutory limitations on IRS disclosure of taxpayer information, details about the buyer's beneficial ownership (the focus of the proposed rule) largely fall outside the scope of transaction information reported on the Form 1099–S.

However, IRS Form 1099–S is nonetheless relevant to the proposed rule's regulatory baseline, given the process by which the filing may be prepared and submitted to the IRS. Similar to what is proposed for the Real Estate Report, the person responsible for filing the form IRS Form 1099–S can either be determined through a cascade of the various parties who may be involved in the closing or settlement process, or, alternatively, certain categories of the involved parties may enter into a written agreement at or before closing to designate who must file Form 1099–S for the transaction. The agreement must identify the designated person responsible for filing the form, but it is not necessary that all parties to the transaction, or that more than one party even, enter into the agreement.[170] The agreement must: (1) identify by name and address the person designated as responsible for filing; (2) include the names and addresses of each person entering into the agreement; (3) be signed and dated by all persons entering into the agreement; (4) include the names and addresses of the transferor and transferee; and (5) include the address and any other information necessary to identify the property.[171] The proposed rule's designation agreement requires, and is limited to, the same five components that may be included in a designation agreement accompanying Form 1099–S. Therefore, the exercise of designation as well as the collection of information and signatures it involves, as contemplated by the proposed rule, may already occur in connection with certain transfers of residential real property and in these cases be leveraged at minimal additional expense.

[169] *See generally* 26 U.S.C. 6103 (covering confidentiality and disclosure of returns and return information).

[170] IRS, Instructions for Form 1099–S, *available at https://www.irs.gov/instructions/i1099s;* 26 CFR 1.6045–4(e).

[171] *Id.*

b. Baseline of Affected Parties

i. Transferees

1. Legal Entities

According to a recent study[172] that analyzed Ztrax data[173] covering 2,777 U.S. counties and over 39 million residential housing market transactions from 2015 to 2019, the proportion of average county-month non-financed residential real estate transactions by legal entities was approximately 11 percent during the five-year period analyzed. When the sample is divided into counties that, by 2019, were under Residential Real Estate GTOs versus those that were never under GTOs, the proportions of average county-month non-financed sales to total purchases are approximately 13.6 percent and 11.2 percent, respectively.

Legal entities that purchase residential real estate vary by size and complexity of beneficial ownership structure. FinCEN analysis of the 2018 RHFS data found that micro investors or small business landlords who owned 1–2 units owned 66 percent of all single family and multifamily structures with 2–4 units. Conversely, investors in the residential rental market who owned at least 1000 properties owned only 2 percent of single-family homes and multi-family structures.

2. Legal Trusts

The proposed rule would extend the scope of reportable transactions to include non-financed purchases of residential real property by legal trusts when such a trust falls within the definition of "transferee trust" and is not exempted.[174] Historically, residential real property purchases by transferee trusts have not been covered under the current Residential Real Estate GTOs and the entities themselves are typically[175] not subject to beneficial ownership reporting requirements under the CTA. Therefore, FinCEN expects that legal trusts would be more homogenously newly affected by the proposed rule than legal entities, discussed above, as a cohort of affected parties.[176]

Establishing a baseline population of potentially affected transferee trusts based on the existing population of legal trusts is challenging for several reasons. These reasons include the general lack of comprehensive and aggregated data on the number,[177] value, usage, and holdings of trusts formed in the United States, which in turn is a result of heterogeneous registration and reporting requirements, including instances where neither requirement currently exists. Because domestic trusts are created and administered under state law, and states have broad authority in how they choose to regulate trusts, there is variation in both the proportion of potential transferee trusts that are currently required to register as trusts in their respective states as well as the amount of information a given legal trust is required to report to its state about the nature of its assets or its structural complexity. Thus, limited comparable information may be available at a nationwide level besides what is reported for federal tax purposes and what is available is unlikely to represent the full population of potentially affected parties that would meet the proposed definition of transferee trust if undertaking the non-financed purchase of residential real property.

International heterogeneity in registration and reporting requirements for foreign legal trusts creates similar difficulties in assessing the population of potentially affected parties that are not originally registered in the United States. Further complicating this assessment is the exogeneity and unpredictability of changes to foreign tax and other financial policies, which studies in other, related contexts have shown, generally affect foreign demand for real estate.[178]

While it is difficult to know exactly how many existing legal trusts there are, and within that population, how many

[172] *See* Matthew Collin, Florian Hollenbach, and David Szakonyi, "The impact of beneficial ownership transparency on illicit purchases of U.S. property," Brookings Global Working Paper #170, (Mar. 2022), p. 14, *available at https://www.brookings.edu/wp-content/uploads/2022/03/Illicit-purchases-of-US-property.pdf.*

[173] Zillow, Transaction and Assessment Database (ZTRAX), *available at https://www.zillow.com/research/ztrax/.*

[174] *See* Section IV.B.2; *see also infra* proposed amendment 31 CFR 1031.230.

[175] FinCEN notes that while most trusts are not reporting companies under the BOI Reporting Rule, a reporting company would be required to report a beneficial owner that owned or controlled the reporting company through a trust.

[176] *See* Section VII.A.2.b.i.1.

[177] FinCEN notes that while the U.S. Census Bureau does produce annual statistics on the population of certain trusts (NAICS 525—Funds, Trusts, and Other Financial Vehicles), such trusts are unlikely to be affected by the proposed rule and thus their population size is not informative for this analysis.

[178] *See, e.g.*, Cristian Badrinza and Tarun Ramadorai, "Home away from home? Foreign demand and London House prices," Journal of Financial Economics 130 (3) (2018), pp. 532–555, *available at https://doi.org/10.1016/j.jfineco.2018.07.010; see also* Caitlan S. Corback and Benjamin J. Keys, "Global Capital and Local Assets: House Prices, Quantities, and Elasticities," Technical Report, National Bureau of Economic Research (2020), *available at https://www.nber.org/papers/w27370.*

own residential real estate (as a potential indicator of what proportion of new trusts might have a view to purchase residential real property), there is nevertheless a consistency in the limited existing empirical evidence that would support a conjecture that proportionally few of the expected reportable transactions would be likely to involve a transferee trust. A recent study of U.S. single-property residential transactions that occurred between 2015 and 2019 identified a trust as the buyer in 3.3 percent of observed transfers. FinCEN also conducted additional analysis of publicly available data that might help to quantify the proportion of trust ownership in residential real estate. Based on the Department of Housing and Urban Development and Census Bureau's Rental Housing Finance Survey (RHFS), identifiable trusts accounted for approximately 2.5 percent of rental housing ownership and approximately 8.2 percent of non-natural person ownership of rental housing.[179]

To the extent that trusts' current residential real property holdings are linear in the number of housing units and current holdings is a reliable proxy for future purchasing activity, FinCEN does not expect the proportion of non-financed residential real property transfers in which the transferee is a non-excepted legal trust to exceed 5 percent of potentially affected transactions. No further refinements to this upper-bound-like estimate, based on the number of existing trusts that may be affected, would be feasible without a number of additional assumptions about market behavior that FinCEN declines to impose in the absence of better/more data. The public is invited to provide such data, if available.

3. Excepted Transferees

Exceptions to the general definitions of transferee entities and transferee trusts apply to certain highly regulated entities and trusts that are subject to BSA program requirements or to other significant regulatory reporting requirements.

For example, PIVs that are investment companies and registered with the SEC under section 8 of the Investment Company Act of 1940 would be excepted, while unregistered PIVs engaging in reportable transfers would not. Unregistered PIVs would instead be required to provide the transaction's reporting person with the proposed specified information, particularly including the required information regarding their beneficial owners. FinCEN analysis of costs below assumes that any such unregistered PIV stood up for a reportable transfer would generally have, or have low-cost access to, the proposed information necessary for filing the proposed Real Estate Reports. FinCEN expects that a PIV that is not registered with the SEC—which can have at maximum four investors whose ownership percent is or exceeds 25 percent (the threshold for the ownership prong of the beneficial ownership test for entities)—would likely either (1) be an extension of that large investor, or (2) have a general partner who actively solicited known large investors. In either case, the unregistered PIV is likely to have most of the beneficial ownership information that would be required to complete the proposed Real Estate Report and access to the beneficial owner(s) to request the additional components of required information not already at hand.

Operating companies subject to the Securities Exchange Act of 1934's current and periodic reporting requirements, including certain special purpose acquisition companies (SPACs) and issuers of penny-stock, would also be excepted transferees under the proposed rule. FinCEN notes that the percent ownership threshold for beneficial ownership for SEC regulatory purposes is considerably lower than as defined in the CTA and related Exchange Act beneficial ownership-related disclosure obligations usually apply to more control persons at such a registered operating company.[180] Additionally, disclosures about the acquisition of real estate, including material non-financed purchases of residential property, are already required in certain periodic reports filed with the SEC.[181] Therefore, an incremental informational benefit from not excepting SEC-registered operating companies as transferees for the purposes of the proposed Real Estate Report reporting requirements may either not exist or, at best, be very low while the costs to operating companies of reporting and compliance with an additional federal regulatory agency are expected to be comparatively high.

ii. Reporting Entities

Because the proposed reporting cascade is ordered by function performed, or service provided, rather than by defined occupations or categories of service providers,[182] attribution of work to the capacity in which a person is primarily employed is necessarily imprecise.[183] To account for the need to map from services provided to entities providing such services as a prerequisite to estimating the number of potentially affected parties, FinCEN acknowledges, but abstracts from, the common observation that title agents and settlement agents are "often the same entity that performs two separate functions in a real estate transaction," and that "the terms title agent and settlement agent are often used interchangeably."[184] For purposes of the remaining RIA, FinCEN groups potential reporting persons by features of their primary occupation and treats them as functionally distinct members of the cascade.[185] In total, FinCEN estimates there may be up to approximately 172,753 reporting persons and 642,508 employees of those persons that could be affected by the proposed rule. Of this total, the distribution of potential reporting persons as identified by primary occupation[186] is settlement agents (3.6 percent of potential reporting persons, 9.8 percent of the potentially affected labor force), title insurance companies (0.5 percent, 6.6 percent), real estate escrow agencies (10.9 percent, 10.5

[179] *See* U.S. Census Bureau, Rental Housing Finance Survey (2021), *available at https://www.census.gov/data-tools/demo/rhfs/*"/*l*"/?s_tableName=TABLE2.

[180] *See* discussion of SEC-registered operating companies, *supra* Section IV.B.1.a.

[181] *See, e.g.*, U.S. Securities and Exchange Commission, Instructions to Item 2.01 on Form 8–K; *see also* 17 CFR 210.3–14.

[182] *See* description of reporting cascade, *supra* Section IV.D.1; *see also* proposed 31 CFR 1031.320(c)(1).

[183] Insofar as the various compliance burdens estimated below could be improved by either changes to the methodology or the sources of data incorporated, FinCEN is soliciting public input.

[184] *See* Nam D. Pham, "The Economic Contributions of the Land Title Industry to the U.S. Economy," ndp Consulting (Nov. 2012), p. 6, *available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2921931*. This study was included as an appendix to a 2012 American Land Title Association comment letter submitted to the Consumer Financial Protection Bureau (CFPB) on the Real Estate Settlement Procedures Act (RESPA).

[185] FinCEN's RIA assumes that the first three functions identified in the proposed waterfall (being listed as the closing or settlement agent, preparing the closing or settlement statement, and filing the deed or other instrument) would be performed, if at all, by a single person, such that there are five distinct members of the cascade.

[186] FinCEN notes that the capacity in which a reporting person facilitates a residential real property transfer may not always be in the capacity of their primary occupation. However, as analysis here relies on the U.S. Census Bureau's annual Statistics of U.S. Business Survey, which is organized by NAICS code, the following nominal primary occupations (NAICS codes) are used for grouping and counting purposes: Title Abstract and Settlement Offices (541191), Direct Title Insurance Carriers (524127), Other Activities Related to Real Estate (531390), Offices of Lawyers (541110), and Offices of Real Estate Agents and Brokers (531210).

percent), attorneys [187] (9.3 percent, 16.7 percent), and other real estate professionals [188] (75.5 percent, 56.4 percent). For purposes of cost estimates throughout the remaining analysis, FinCEN computed the following fully loaded average hourly wages by the respective primary occupation categories: settlement agents, $70.33; title insurers, $70.46; real estate escrow agencies, $84.15; attorneys, $88.89; and other real estate professionals, $84.15.

c. Market Baseline

i. Reportable Transfers

The scope of residential real estate transactions that would be affected by the proposed rule is jointly defined by the (1) the nature of the property transferred, (2) the nature of the consideration proffered, and (3) the legal organization of the party to whom the property is transferred.[189] For purposes of identification, the defining attribute for the nature of the property is that it is principally designed or demonstrably intended to become, the residence of one to four families, including cooperatives and unimproved land.[190] Additionally, the property must be located in the United States as defined in the BSA implementing regulations, including U.S. territories.[191] Transfers that would be deemed reportable exclude all transactions where the transferees receive any extension of credit from a financial institution subject to AML/SAR Reporting program requirements that is secured by the residential real property being transferred. Reportable transfers would also generally exclude transfers associated with an easement, death, divorce, or bankruptcy and transfers for which there is no reporting person. Because certain transfer characteristics that would cause a transfer to be excluded are not consistently identified across sources of transfer data, FinCEN estimates of the number below may generally be considered an upper bound of the expected affected transactions.

FinCEN considered several different sources of information and a mosaic of piecewise informative statistics to inform its estimate of the reportable transaction baseline. When considering existing home sales, FinCEN reviewed the National Association of Realtors Confidence Index Survey data on all-cash residential home sales between October 2008 and April 2021. In this data, the upper bound of all-cash transactions for existing home sales over this period was 35 percent,[192] which totaled to 7,500,000.[193] FinCEN also used data from the U.S. Census Bureau to review the number of new home sales between 1988–2022. FinCEN utilized peak and trough values for new home sales and percent of cash transactions—as a proxy for non-financed transactions—from the historical range provided by the Census Bureau.[194] In analysis of this data, FinCEN observed that the upper bound number of all-cash transactions for new home sales was 9.6 percent,[195] which totaled to 1,283,000 for the analysis.[196] Considering yet another source, FinCEN reviewed Redfin data covering a period between 2000 to 2022 on investor purchases of existing homes to consider as a proxy for legal entity and trust purchases.[197] This data would suggest an upper bound of approximately 20 percent.[198] However, Redfin investor purchase data is unlikely to capture all the legal entity and trust purchases that are covered under the proposed rule, is likely to include purchases by entities that would be exempt from the proposed rule, and only covers the purchase of existing residential real estate (*i.e.*, non-new developments).

FinCEN additionally made attempts to factor in the rule's inclusion of U.S. territories by including the number of new and existing home sales in Puerto Rico in 2022 in the final estimate of total potentially reportable transfers.[199] In 2022, FinCEN identified 9,962 existing home sales and 953 new home sales in Puerto Rico. Added to the previous totals, this brought the total number of estimated existing and new home sales in the United States to 7,509,962 and 1,283,953, respectively.

To account for quit claims to LLCs with zero consideration—*i.e.*, real estate transfers that would not be captured in Census or home sales data—FinCEN reviewed various county deed databases to estimate the annual number of quit claims to LLCs for zero-dollar consideration in the United States. FinCEN reviewed deed data from the following U.S. County databases: Cook County, Illinois; Cuyahoga County, Ohio; Monroe County, Ohio; Anderson County, Texas; Dallas County, Texas; Arapahoe County, Colorado; Routt County, Colorado; Berrien County, Michigan; Roscommon County, Texas; Garland County, Arkansas. Counties were selected based upon the ability to: (i) search for quit claim deeds, (ii) search for deeds with zero-dollar consideration, (iii) conduct a keyword search that included "LLC" in the title of the grantee, and (iv) search within the 2022 calendar year. FinCEN notes that its attempt to create a representative sample was likely limited by its search query requirements and the limitations of county databases in terms of searchability. This analysis was conducted across 10 counties in 6 states and the results are included below in Table 1:[200]

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[187] The estimate of potentially affected attorneys is calculated as ten percent of the total SUSB population of Offices of Lawyers. This estimate is based on the average from FinCEN analysis of U.S. legal bar association membership, performed primarily at the state level, identifying the proportion of (state) bar members that are members of the organization's (state's) real estate bar association. FinCEN considers this proxy more likely to overestimate than underestimate the number of potentially affected attorneys because, while not all members of a real estate bar association actively facilitate real estate transfers each year, it was considered less likely that an attorney would, in a given year, facilitate real estate transfers in a way that would make them a candidate reporting person for purposes of the proposed rule when such an attorney had not previously indicated an interest in real estate specific practice (by electing to join a real estate bar).

[188] NAICS Code 531210 (Offices of Real Estate Agents and Brokers).

[189] *See* discussion of affected transferees, *supra* Section VII.A.2.b.i.

[190] *See* discussion, *supra* Section IV.A; *see also* proposed 31 CFR 1031.320(b).

[191] 31 CFR 1010.100(h).

[192] *See* National Association of Realtors, "All-Cash Sales are Rising Sharply Amid Intense Competition" (May 24, 2021), *available at* https://www.nar.realtor/blogs/economists-outlook/all-cash-sales-are-rising-sharply-amid-intense-buyer-competition.

[193] *See* Calculated Risk, "NAR: Existing-Home Sales Decreased to 5.61 million SAAR in April" (May 19, 2022), *available at https://www.calculatedriskblog.com/2022/05/nar-existing-home-sales-decreased-to.html.*

[194] *See* U.S. Census Bureau, "Houses Sold by Type of Financing," *available at https://census.gov/construction/nrs/xls/soldfinc_cust.xls.*

[195] *Id.*

[196] *Id.*

[197] *See* Lily Katz and Sheharyar Bokhari, "Investors Are Buying Roughly Half as Many Homes as They Were a Year Ago," Redfin News (Feb. 25, 2023), *available at https://www.redfin.com/news/investor-home-purchases-q4-2022/.* Note that "all-cash" is the term used by Redfin. FinCEN does not know how Redfin defines "all-cash."

[198] There was a paucity of publicly available information regarding the legal entity and trust components of overall non-financed residential real estate transfers. The Redfin estimate, *supra* note 198, was limited to investor purchases of existing homes only, and therefore still contains gaps. Nonetheless, the Redfin estimate was the most recently available data and provided the highest bound estimate on the role of non-natural persons in residential real estate transfers based on publicly available data.

[199] *See* Lalaine C. Delmendo, "Puerto Rico Residential Real Estate Market Analysis 2023," Global Property Guide (Apr. 11, 2023), *available at https://www.globalpropertyguide.com/Caribbean/Puerto-Rico/Price-History.*

[200] Counties were selected based on the ability to search for the above criteria via each county's online database.

Table 1: Deed Analysis

State	County	Quit Claims to LLCs with No Consideration	Total Deeds	Percentage
Illinois	Cook	3,069	139,428	2.20%
Ohio	Cuyahoga	1,676	57,492	2.92%
Texas	Dallas	185	123,689	0.15%
Colorado	Arapahoe	141	80,397	0.18%
Michigan	Berrien	96	7,762	1.24%
Ohio	Monroe	142	1,036	13.71%
Texas	Anderson	2	4,709	0.04%
Michigan	Roscommon	29	3,206	0.90%
Colorado	Routt	12	4,722	0.25%
Arkansas	Garland	6	9,220	0.07%
Totals:		**5,358**	**431,661**	**1.24%**

As a result, the total number of estimated quit claims to LLCs covered by the rule is approximately 110,389.

While these sources do not provide a complete picture of the potential number of reportable transfers in the United States, they are useful in providing an approximate range for estimation and highlight the fact that the potential range of transfers each year is dependent on multiple potential factors and conditions. Overall, the sources FinCEN reviewed suggest that hundreds of thousands of transfers may be covered under the proposed rule.

FinCEN also estimates that annually anywhere between 5.23 million—6.98 million existing homes that have been purchased would be exempt from the purview of the rule. Similarly, among new home sales, FinCEN estimates that annually a range of between 305 thousand—1.26 million transactions will be exempt (See Table 2 below).

Table 2: Transactions Exempted

Category	Exemption Estimates	
	Lower Bound	*Upper Bound*
Existing Home Sales exempted	5,230,313	6,984,265
New Home Sales exempted	305,848	1,259,231

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FinCEN acknowledges the conditionality that likely exists between variables used in its analysis, but notes the limitations associated with publicly available data on non-financed, residential real estate purchases by legal entities and trusts. In the exercise above, FinCEN had to rely on independent estimates of specific characteristics (*i.e.*, non-financed, legal entity) to estimate the potential number of covered transactions and exempted transactions.

On the basis of available data, studies, and qualitative evidence, and in the absence of large, unforeseeable shocks to the U.S. residential housing market, FinCEN analysis suggests that the number of potentially reportable transfers would be between approximately 800,000 and 850,000 annually.

ii. Current Market Characteristics

FinCEN took certain potentially informative aspects of the current market for residential real property into consideration when forming its expectations about the anticipated economic impact of the proposed rule. Among other things, FinCEN considered trends in the observable rate of turnover in the stock of existing homes. Additionally, FinCEN reviewed recent studies and data from the academic literature estimating housing supply elasticities on previously developed versus newly developed land.

FinCEN also considered recent survey results of the residential real estate holdings of high-net-worth individuals and the proportion of survey respondents who self-reported the intent to purchase additional residential real estate in the coming year.

Further, FinCEN reviewed studies of trends in the financing and certain distributional characteristics of shared equity housing, which includes co-operatives that could be affected by the proposed rule.

iii. Current Market Practices

1. Settlement and Closing

FinCEN assessed the role of various persons in the real estate settlement and closing process to determine a quantifiable estimate of each profession or industry's overall participation in that process. Accordingly, FinCEN conducted research based on publicly available sources to assess the general participation rate of the different types of reporting persons in the proposed rule's cascade. As part of its analysis, FinCEN noted a recent blog post citing data from the ALTA that 80 percent of homeowners purchase title insurance when buying a home.[201]

To better understand the distribution of the other types of persons providing residential real property transfer services to the transactions that would be affected by the proposed rules, FinCEN utilized county deed database records to approximate a randomly selected and representative sample of residential real estate transfers across the United States.[202] FinCEN made efforts to collect deed data that reflected a representative, nation-wide sample, both in terms of the number and geographic dispersion of deeds, but acknowledge selection was nevertheless constrained in part by the feasibility to search by deed type, among other factors.[203] To the extent that the same analysis would yield substantively different results if performed over a larger sample (with either more geographic locations, more observations per location, or both), the public is invited to share such data or the results of analysis based on such data.

The final analysis included 100 deeds, of which 97 involved at least one of the following potential reporting persons: (i) Title Abstract and Settlement Offices, (ii) Direct Title Insurance Carriers, or (iii) Offices of Lawyers. A candidate reporting person was deemed to be involved with the creation of the deed if either (i) a company or firm performing one of these functions was included on the deed or (ii) an individual performing or employed by a company or firm performing one of these functions was included on the deed. FinCEN assessed the distribution of alternative entities identified on the remaining deeds, categorizing by reporting person type. Based on this qualitative analysis, FinCEN tentatively anticipates that approximately three percent of reportable transaction might have a reporting person other than a settlement agent, title insurer, or attorney.

2. Records Search

Currently, law enforcement searches a variety of state and commercial databases (that may or may not include beneficial ownership information), individual county record offices, and/or use subpoena authority to trace the suspected use of criminal proceeds in the non-financed purchase of residential real estate. Even after a significant investment of resources, the identities of the beneficial owners may not be readily ascertainable. This fragmented and limited approach can slow down and decrease the overall efficacy of investigations into money laundering through real estate. This was one reason that FinCEN introduced the Residential Real Estate GTOs, which law enforcement has reported have significantly expanded their ability to investigate this money laundering typology. At the same time, the Residential Real Estate GTOs had certain restrictions that limited its usefulness nationwide. The proposed rule builds on and is intended to replace the Residential Real Estate GTOs framework and creates reporting and recording requirements for specific residential real estate transfers that would apply nationwide.

3. Description of Proposed Requirements

a. Transactions

The proposed rule does not require residential real estate transfers to be reported if the transfer involves: (i) an extension of credit to the transferee that is secured by the transferred residential real property and is extended by a financial institution that has both an obligation to maintain an AML program and an obligation to report suspicious transactions under this chapter; (ii) a grant, transfer, or revocation of an easement; (iii) a transfer resulting from the death of an owner of residential real property; (iv) a transfer incident to divorce or dissolution of a marriage; (v) a transfer to a bankruptcy estate; or (vi) a transfer that does not involve a reporting person.

b. Reporting Persons

The proposed rule would require a reporting person, as determined by either the reporting cascade or as pursuant to a designation agreement,[204] to complete and electronically file a

[201] *See* American Land Title Association, Home Closing 101, "Why 20% of Homeowners May Not Sleep Tonight." (June 3, 2020), *available at https://www.homeclosing101.org/why-20-percent-of-homeowners-may-not-sleep-tonight/*.

[202] In total, FinCEN evaluated ten deeds from eleven different U.S. counties in 2022 (removing deeds that were deemed to be out of scope). The 11 counties selected for the purposes of this analysis included: Garland County, Arkansas; Routt County, Colorado; Sarasota County, Florida; Polk County, Georgia; Montgomery County, Maryland; Berrien County, Michigan; Middlesex County, New Jersey, Cuyahoga County, Ohio; Indiana County, Pennsylvania; Greenwood County, South Carolina; and Dallas County, Texas.

[203] The process of searching deeds across different U.S. counties is challenging from a data perspective. For example, FinCEN's research found that, in some counties, deeds could only be searched in-person; FinCEN was therefore unable to include these counties in the potential sample. Furthermore, certain other deeds were deemed not relevant for the scope of the rule and hence were excluded.

[204] *See* discussion of designation agreement, *supra* Section IV.D.3.

Real Estate Report containing certain information about the beneficial ownership of the legal entity(ies) or trust(s) involved in the non-financed exchange of residential real property. To facilitate the reporting person's completion of the required report, the transferee engaged in the non-financed property transfer would need to provide a certified copy of their beneficial ownership information [205] via a form or other attestation to the completeness and accuracy of the reported information.

c. Required Information

The proposed rule would require certain professionals or businesses to report to FinCEN information about the transferor and the transferee behind the residential real estate transfer. This would include information on the legal entity or trust, its beneficial owners, and payment information. The collected information would be maintained by FinCEN in an existing database accessible to authorized users.

3. Expected Economic Effects

This section describes the main economic effects FinCEN anticipates the various affected parties identified above [206] may experience. Because the primary value of the proposed rule would be in the extent to which it is able to address or ameliorate the economic problems discussed under the RIA's broad economic considerations,[207] the remainder of this section focuses primarily on the estimates of reasonably anticipated, quantifiable costs to affected parties.[208] FinCEN aggregate cost estimates suggest that first year costs will be between approximately $267.3 million and $476.2 million and that the current dollar value of the aggregate costs in subsequent years will be between approximately $245.0 million and $453.9 million annually. FinCEN also invites public comment on these estimates.

a. Costs to Entities in the Reporting Cascade

i. Training

FinCEN recognizes that the proposed rule would impose certain costs on businesses positioned to provide services to non-financed residential real property transfers even in the absence of direct participation in a specific covered transaction, including the costs of preparing informational material and training personnel about the proposed rule generally as well as certain firm-specific policies and procedures related to reporting, complying, and documenting compliance.

To estimate expected training costs, FinCEN adopted a parsimonious model similar, in certain respects, to the methodology used by FinCEN when publishing the RIA for the 2016 CDD Rule (CDD Rule RIA).[209] Taking into consideration, however, that, unlike reporting entities under the CDD rule, only one group of the proposed rule's affected reporting persons has pre-existing experience with other FinCEN reporting and compliance requirements, the estimates of anticipated training time here are revised upward from the CDD Rule RIA to 75 minutes for initial training and 30 minutes for annual refresher training. FinCEN's method of estimation assumes that an employee who has received initial training once will then subsequently take the annual refresher training each following year. This assumption contemplates that more than half of the original training would not be firm-specific and remains useful to the employee regardless of whether they remain with their initial employer or change jobs within the same industry. As in the CDD Rule RIA high estimate model, FinCEN estimates that two-thirds of untrained employees receive the initial (lengthier) training each year. However, because the initial training is assumed to provide transferrable human capital in this setting, turnover is not relevant to the assignment to initial training in periods following Year 1. Thus, in the revised model, FinCEN calculates annual training costs as the combination of the expected costs of providing two-thirds of the previously untrained workforce per industry [210] with initial (lengthier) training and all previously trained employees with the refresher (shorter) training. Time costs are proxied by an industry-specific fully loaded average wage rate per industry.

Table 3 below presents the corresponding per person estimated training costs by primary occupation without adjustment for wage growth.

Table 3: Training Costs

Estimated Per Person Training Costs		Initial Training		Refresher (Year 2+)	
Primary Business Categories	*Fully Loaded Hourly Wage*	*Time (hours)*	*Total*	*Time (hours)*	*Total (unadjusted)*
Title Abstract and Settlement Offices	$70.33	1.25	$87.91	0.5	$35.16
Direct Title Insurance Carriers	$84.15	1.25	$105.18	0.5	$42.07
Other Activities Related to Real Estate	$70.46	1.25	$88.07	0.5	$35.23
Offices of Lawyers	$88.89	1.25	$111.11	0.5	$44.45
Offices of Real Estate Agents and Brokers	$70.46	1.25	$88.07	0.5	$35.23

[205] *See* description of required transferee beneficial ownership information, *supra* Section IV.E.6.

[206] *See* Section VII.A.2.b.

[207] *See* Section VII.A.1.

[208] *See* Section VII.A.2.b.

[209] *See* 81 FR 29397 (May 11, 2016) (*codified at* 31 CFR 1010.230).

[210] As previously grouped by NAICS code, *see supra* Section VII.A.2.b.ii.

To model industry-specific hiring inflows in periods following Year 1, FinCEN converted the Bureau of Labor Statistics (BLS) projected 10-year cumulative employment growth rates for 2022–2032 [211] for the NAICS code mostly closely associated with a given industry available. Additionally, inflation data from the Federal Reserve Bank of St. Louis was utilized to estimate annual wage growth given the opportunity cost of training is assumed to be equivalent to the wage of employees.[212] Utilizing these inputs, and summing costs across all industries expected to be affected, FinCEN estimates that the aggregate initial year training costs would be approximately $44.3 million dollars and the undiscounted aggregate training costs in each of the subsequent years would range between approximately $20.2 and $27.3 million.

ii. Reporting

The total costs associated with reporting a given non-financed property transaction will likely vary with the specific facts and circumstances of the transfer. For instance, the cost of the time needed to prepare and file a report could differ depending on which party in the cascade is the reporting person because parties receive different compensating wages. The costs associated with the time to determine who is the reporting person will also vary by the number of potential parties who may assume the role and thus might be parties to a designation agreement.

FinCEN estimates an average per-party cost to determine the reporting person of 30 (15) minutes for the party that assumes the role if a designation agreement is (not) required and 15 minutes each for all non-reporting parties (assuming each tier in the cascade corresponds to one reporting person). Therefore, the range of potential time costs associate with determining the reporting person is expected to be between 15 to 90 minutes.[213] Recently, FinCEN received updated information from parties currently reporting under the Residential Real Estate GTO indicating that the previously estimated time cost of 20 minutes for that reporting requirement was less than half the average time expended per report in practice. Based on this feedback, the filing time burden FinCEN anticipates for the proposed rule accordingly incorporates a 45-minute estimate for the collection and reporting of the subset of Real Estate Report required information that is similar to information in reports filed under the Residential Real Estate GTOs, although FinCEN recognizes that certain transactions may require significantly more time.[214] Mindful of these outliers, FinCEN estimates an average 2 hour per reportable transaction time cost to collect and review transferee and transaction-specific reportable information and related documents, and an average 30 minute additional time cost to reporting.

Table 4 below presents FinCEN's estimates of the various potential per-party per-transaction reporting costs associated with a preparing and filing the proposed Real Estate Report.

[211] U.S. Bureau of Labor Statistics, Employment Projections, "Employment by industry, occupation, and percent distribution, 2021 and projected 2031," *available at https://data.bls.gov/projections/nationalMatrix?queryParams=541100&ioType=i* (reflects projections for the closest NAICS code, across all occupations, and not on a specific occupation code basis [legal services]); U.S. Bureau of Labor Statistics, Employment Projections, "Employment by industry, occupation, and percent distribution, 2021 and projected 2031," *available at https://data.bls.gov/projections/nationalMatrix?queryParams=524120&ioType=i* (direct insurance [except life, health, and medical] carriers); U.S. Bureau of Labor Statistics, Employment Projections, "Employment by industry, occupation, and percent distribution, 2021 and projected 2031," *available at https://data.bls.gov/projections/nationalMatrix?queryParams=531000&ioType=i* (real estate).

[212] *See* Federal Reserve Bank of St. Louis, 10-Year Breakeven Inflation Rate (as of July 18, 2023), *available at https://fred.stlouisfed.org/series/T10YIE*.

[213] This upper bound estimate is based on an assumption that, at maximum, five distinct functional roles could be concurrently provided to a reportable transfer. *See supra* note 186.

[214] At present, FinCEN is unable to assess the extent to which the underlying distribution of completion times exhibits skew or the extent to which current timing outliers may more accurately represent the associated burden unique to newly affected transactions. FinCEN is therefore requesting additional data via public comments in the event that such data exists and would materially alter the related expected burden estimates below.

Table 4: Transaction Reporting Costs

Estimated Per Transaction Reporting Costs		Non-Reporting Party		Reporting Party			
		Designation-Related		*Designation-Related*		*Designation-Independent*	
Primary Business Categories	*Fully Loaded Hourly Wage*	*Time (hours)*	*Total*	*Time (hours)*	*Total*	*Time (hours)*	*Total*
Title Abstract and Settlement Offices	$70.33	0.25	$17.58	0.25	$17.58	2.75	$193.40
Direct Title Insurance Carriers	$84.15	0.25	$21.04	0.25	$21.04	2.75	$231.40
Other Activities Related to Real Estate	$70.46	0.25	$17.61	0.25	$17.61	2.75	$193.76
Offices of Lawyers	$88.89	0.25	$22.22	0.25	$22.22	2.75	$244.45
Offices of Real Estate Agents and Brokers	$70.46	0.25	$17.61	0.25	$17.61	2.75	$193.76

Based on the range of expected reportable transactions and the wages associated with different persons in the potential reporting cascade, FinCEN anticipates that the proposed rule's reporting costs may be between approximately $158.2 million [215] and $314.2 million.[216]

Because FinCEN expects reporting persons to be able to rely on technology previously purchased and already deployed in the ordinary course of business (namely, computers and access to the internet) to comply with the proposed reporting requirements, no line item of incremental expected IT costs has been ascribed to reporting.

iii. Recordkeeping

The proposed rule would impose recordkeeping requirements on reporting persons as well as, in certain cases, members of a given reportable transaction's cascade that are not the reporting person. The primary variation in expected recordkeeping costs would flow from the conditions under which the reporting person has assumed their role. Additional variation in costs may result from differences in the dollar value assigned to the reporting person's time costs as a function of their primary occupation.[217]

If the reporting person assumes the role as a function of their position in the proposed reporting cascade, this would imply that no meaningfully distinct person involved in the transfer provided the preceding service(s). In this case, the reporting person's recordkeeping requirements would be limited to the retention of compliance documents (such as the transferee's certification of beneficial ownership information) for a period of five years in a manner that preserves ready availability for inspection as authorized by law.[218] Recordkeeping costs would therefore include those associated with creating and/or collecting the necessary documents, storing the records in an accessible format, and securely disposing of the records after the required retention period has elapsed. FinCEN anticipates that over the full recordkeeping lifecycle, each reportable transaction would, on average, require one hour of the reporting person's time, as well as a record processing and maintenance cost of ten cents. Because FinCEN expects that records will primarily be produced and recorded electronically and estimates its own processing and maintenance costs at ten cents per record, it has applied the same expected cost per reportable transaction to reporting persons.[219] On aggregate, this would result in recordkeeping costs between approximately $56.3 million and $75.6 million associated with one year's reportable transactions.

If the reporting person has instead assumed the role as the result of a designation agreement, the proposed rule would impose additional recordkeeping requirements on both the reporting person and at least one other member of the proposed reporting cascade. This is because the existence of a designation agreement implies the existence of one or more distinct alternative parties to the reportable transaction that provided a preceding service or services as described in the proposed cascade. While the proposed rule only stipulates that "the person who would otherwise be the reporting person but for the agreement" would also be anticipated to incur recordkeeping costs, FinCEN expects the minimum number of additional parties required to retain a readily accessible copy of the designation

[215] This estimate assumes the lowest number of cascade participants (1), the lowest number of estimated annual transfers (800,000), reported by the entity with the lowest estimated wage rate ($70.33/hr.).

[216] This estimate assumes the maximum number of cascade participants (five (*see* note 186), each compensated at .25 times their respective average wage rate), the highest number of estimated annual transfers (850,000), reported by the entity with the highest estimated wage rate ($89.88/hr.).

[217] See discussion of reporting entity hourly wage rates, *supra* Section VII.A.2.b.ii.

[218] *See* discussion of recordkeeping requirements, *supra* Section IV.G; *see also* proposed amendment 31 CFR 1031.320(l).

[219] This is based on the assumption that reporting persons may face comparable market rates for the same technological services. However, FinCEN invites the public to provide additional data on the market rates faced by potentially affected parties.

agreement for a five-year period would, in practice, depend on the number of alternative reporting parties servicing the transaction in a capacity that precedes the designated reporting person's in the proposed cascade, as it would otherwise be difficult to demonstrate the prerequisite sequence of conditions were met to establish the "but for" of the proposed requirement. Conservatively assuming that each service in the proposed cascade is provided by a separate party, this would impose an incremental recordkeeping cost on at least two parties per transaction and at most five.[220] Because FinCEN estimates of reporting costs already assign the costs of preparing a designation agreement to the reporting person (when a transaction includes a designation agreement), the incremental recordkeeping costs it estimates here pertain solely to the electronic dissemination, signing, and storage of the agreement. This is assigned an average time cost of five minutes per signing party to read and sign the designation agreement, as well as a ten-cent record processing and maintenance cost per transaction. Thus, designation agreement-specific recordkeeping costs are expected to include a time cost of 10–50 minutes (assuming one signing party per tier of the cascade) and $0.20–$0.50 per reportable transaction that involves a designation. This corresponds to expected annual aggregate costs ranging from approximately $9.5 million[221] to $28.6 million.[222] FinCEN notes that it assumes that rational parties to a reportable transaction would not enter into a designation agreement if the expected cost of doing so, including compliance with the proposed recordkeeping requirements, were not elsewhere compensated in the form of efficiency gains or other offsetting cost savings associated with other components of compliance with the proposed rule, such as training or reporting costs. As such, the estimates provided here should only be taken to reflect a pro forma accounting cost.

Table 5 below presents FinCEN's estimates of the various potential per-party per-transaction costs associated with the proposed Real Estate Report recordkeeping requirements.

Table 5: Recordkeeping Costs Per Party

Estimated Per Transaction Recordkeeping Costs		Non-Reporting Party		Reporting Party			
		Designation-Related		*Designation-Related*		*Designation-Independent*	
Primary Business Categories	*Fully Loaded Hourly Wage*	*Time (minutes)*	*Total**	*Time (minutes)*	*Total**	*Time (hours)*	*Total* (unadjusted)*
Title Abstract and Settlement Offices	$70.33	5	$5.96	5	$5.96	1	$70.43
Direct Title Insurance Carriers	$84.15	5	$7.11	5	$7.11	1	$84.25
Other Activities Related to Real Estate	$70.46	5	$5.97	5	$5.97	1	$70.56
Offices of Lawyers	$88.89	5	$7.51	5	$7.51	1	$88.99
Offices of Real Estate Agents and Brokers	$70.46	5	$5.97	5	$5.97	1	$70.56

* Total Recordkeeping cost estimates include both labor (wages) and technology costs ($0.10)

b. Government Costs

To implement the proposed rule, FinCEN expects to incur certain operating costs that would include approximately $8.5 million in the first year and approximately $7 million each year thereafter. These estimates include anticipated novel expenses related to technological implementation,[223] stakeholder outreach and informational support, compliance monitoring, and potential enforcement activities as well as certain incremental increases to pre-existing administrative and logistic expenses.

While such operating costs are not typically considered part of the general economic cost of a proposed rule, FinCEN acknowledges that this treatment implicitly assumes that resources commensurate with the novel operating costs exist. If this assumption does not hold, then operating costs

[220] *See supra* note 186.

[221] This estimate assumes the lowest estimated number of annual transfers occurs and that the designation agreement is between only the two reporting persons with the lowest and second lowest hourly wage rate.

[222] This estimate assumes the highest estimated number of annual transfers occurs and that all members of the cascade (compensated at their respective average wage rates) are party to the designation agreement.

[223] Technological implementation for a new reporting form contemplates expenses related to development, operations, and maintenance of system infrastructure, including design, deployment, and support, such as a help desk. It includes an anticipated processing cost of $0.10 per submitted Real Estate Report.

associated with a rule may impose certain economic costs on the public in the form of opportunity costs from the agency's forgone alternative activities and those activities' attendant benefits. Putting that into the context of this proposed rule, and benchmarking against FinCEN's actual appropriated budget for fiscal year 2022 ($161 million),[224] the corresponding opportunity cost would resemble forgoing approximately five percent of current activities annually.

4. Economic Consideration of Policy Alternatives

a. Proposed Requirements Without the Option To Designate

Instead of the rule as proposed, FinCEN could have required the reporting person to be determined strictly by the reporting cascade without an option to designate. Given the expectation that rational parties to a transaction would prefer to assign tasks to the party for whom it is least costly to complete, this alternative could only have been as cost effective as the proposed approach (which includes the option to designate) in the event that the reporting cascade would otherwise always assign requirements to the party with the lowest associated compliance costs. In all other cases, the alternative would be more costly. FinCEN therefore declined to propose a standalone reporting cascade.

b. Traditional SAR and AML Program Requirements

Instead of the proposed streamlined reporting requirement, FinCEN could have proposed to impose the full traditional SAR and AML program requirements on the various real estate professionals included in the proposed reporting cascade. While this would almost certainly lead to the production of significantly more reports, and hence, potentially more transaction-related information available to law enforcement, the costs accompanying this alternative would be commensurately more significant and would likely disproportionately burden small businesses. Such weighting of costs towards smaller entities could increase transaction costs associated with residential real property transactions both directly via program-related operational costs and indirectly via the potential anticompetitive effects of program costs.

c. Alternative Certification Requirements

Instead of allowing the transferee legal entity or trust to certify to the reporting person that the beneficial ownership information they have provided is accurate to the best of their knowledge, FinCEN could have required the reporting person to certify the transferee's beneficial ownership information. This alternative would likely be accompanied by a number of increased costs, including a potential need for longer, more detailed compliance training, lengthier time necessary to collect and review documents supporting the reported transferee beneficial ownership information required, and increased recordkeeping costs. There may also be costs associated with transactions that might not occur, if for example, a reporting person is unwilling or unable to certify the transferee's information. If certain reporting persons are better positioned to absorb the risks associated with certifying transferee beneficial ownership information, this could also have an anticompetitive effect. In this scenario, it is foreseeable that smaller businesses could be at a disadvantage.

B. Executive Orders 12866, 13563, and 14094

Executive Orders 12866, 13563, and 14094 (E.O. 12866 and its amendments) direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, and public health and safety effects; distributive impacts; and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. E.O. 13563 also recognizes that some benefits are difficult to quantify and provides that, where appropriate and permitted by law, agencies may consider and discuss qualitatively values that are difficult or impossible to quantify.[225]

This proposed rule has been designated a "significant regulatory action;" accordingly, it has been reviewed by the Office of Management and Budget (OMB).

C. Regulatory Flexibility Act

When an agency issues a rulemaking proposal, the RFA[226] requires the agency either to provide an initial regulatory flexibility analysis (IRFA) with a proposed rule or certify that the proposed rule would not have a significant economic impact on a substantial number of small entities. Although this proposed rule might apply to a substantial number of small entities, it is nonetheless not expected to have a significant economic impact given that FinCEN has attempted to minimize the burden on reporting persons by streamlining the reporting requirements and providing for an option to designate the reporting person. Accordingly, FinCEN certifies that the proposed rule would not have a significant economic impact on a substantial number of small entities. The basis for doing so is discussed in further detail below.

1. Estimate of the Number of Small Entities to Whom the Proposed Rule Will Apply

As discussed above,[227] the proposed rule would apply to a variety of individuals and employers in real estate-related businesses[228] insofar as such persons facilitate specifically non-financed transfers of residential property.[229] The extent to which the proposed rule would apply to a person or business is therefore contingent on the extent to which they provide one of the services enumerated in the proposed reporting cascade[230] to a non-exempt,[231] non-financed[232] transfer of residential property[233] to a transferee entity[234] or transferee trust.[235]

Because the rule proposes to introduce a streamlined reporting

[224] FinCEN, Congressional Budget Justification and Annual Performance Plan and Report FY 2024 (2023), *available at https://home.treasury.gov/system/files/266/15.-FinCEN-FY-2024-CJ.pdf.*

[225] Executive Order 13563, 76 FR 3821 (Jan. 21, 2011), section 1(c) ("Where appropriate and permitted by law, each agency may consider (and discuss qualitatively) values that are difficult or impossible to quantify, including equity . . . and distributive impacts.")

[226] 5 U.S.C. 601 *et seq.*

[227] *See* Section VII.2.b.ii.

[228] FinCEN acknowledges that because non-profit organizations are not exempt as transferees, certain small non-profits may also be affected by the proposed rule if they engage in the non-financed transfer of residential property. However, because non-profit organizations are typically accustomed to preparing and maintaining governing documents and financial records for accountability purposes (*e.g.*, with donors, to maintain tax-status, or for state regulatory purposes), it is generally expected that the beneficial ownership information that would need to be collected and provided to a reporting person would be relatively inexpensive to repackage for purposes of compliance with the proposed rule.

[229] The proposed rule would not impose the full traditional SAR and AML program requirements on such businesses. *See* Section VII.A.5.b.

[230] *See* Section IV.D.1.

[231] *See* Section IV.C.2; *see also* Section IV.C.4; *see also* Section IV.C.5; *see also* Section VII.A.2.c.i.

[232] *See* Section IV.C.1.

[233] *See* Section IV.A.1.

[234] *See* Section IV.B.1; *see also* Section IV.B.3.

[235] *See* Section IV.B.2.

requirement that is transaction-specific and tailored to a relatively small subset[236] of residential property transfers, and because only one member of the proposed reporting cascade would be required to file the proposed Real Estate Report per reportable transfer, the estimates below of the total potential number of small entities to whom the rule would apply will necessarily exceed the number of small entities that in practice will likely be affected by the rule, possibly by an order of magnitude or more. As previously explained,[237] the proposed obligation to file a Real Estate Report follows a cascade stratified by the services provided to each non-financed residential transfer uniquely, not the primary occupation of the person providing the service. Therefore, while each tier of the proposed reporting cascade has, for purposes of estimating the broadest extent of persons to whom the rule could apply,[238] been mapped to a primary business category, this should not be misinterpreted as an expectation that each business in each enumerated primary business category provides the specific services to the specific transactions that would trigger a compliance requirement under the proposed rule. FinCEN does not currently have comprehensive or reliable data from which to more generally[239] and accurately parse small businesses that theoretically could, in the ordinary course of business, provide a cascade-identified service to a transfer deemed reportable from those small businesses that do so in practice, but welcomes public comments that would inform such an exercise.[240]

The number of small entities to whom the proposed rule would apply is additionally sensitive to both how firm size is determined and the vintage of data used for the estimates. As illustrated in the footnotes to Table 6 below, while the consensus across data sources and methodological approaches is that an upper bound of potentially affected small entities includes approximately 160,800 firms (by the following primary business classifications: approximately 6,300 Title and Settlement Agents, 800 Direct Title Insurance Carriers, 18,000 persons performing Other Activities Related to Real Estate, 15,700 Offices of Lawyers, and 120,000 Offices of Real Estate Agents and Brokers), the point estimates differ non-trivially by how 'small' is operationally defined, and do not do so unidirectionally[241] across methodologies and data sources. The differences between the smallest and largest estimated values per industry group can lead to small business impact analyses that differ in anticipated magnitudes of effect by over 28,900 firms collectively, meaning that an incremental change of $100 in cost per firm could vary in aggregate estimated impact on small businesses by almost $3 million. Because estimates of aggregate economic effects can thus depend to such an extent on methodological choices rather than business fundamentals, FinCEN instead considered economic effects estimated and presented at a per-firm by primary business category level of analysis as more informative.

The following table (Table 6) further illustrates the extent to which an estimate of the population of potentially affected small entities depends on how the term 'small' is defined, as operationalized over the most recent vintages of data available from the Census Bureau,[242] but it can also be used to approximate potential aggregate economic effects as a function of the per-firm cost analysis below while allowing the reader greater flexibility to impose the assumptions about the extent to which various small businesses would be implicated by the proposed rule, as each deems most reasonable.

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[236] *See* Section VII.A.2.b.i.1; *see also* Section VII.A.2.C.i.

[237] *See* description of services provided by cascade tier, *supra* Section IV.D.1; *see also* explanation of mapping services to primary occupation data, *supra* Section VII.A.2.b.ii.

[238] Measured as all persons who by virtue of primary occupation could foreseeably provide at least one service identified in the cascade.

[239] For example, in FinCEN's deed analysis (*see* Section VII.A.2.c.iii.1), only three of one hundred transfers that would have been reportable under the proposed rule did not involve a settlement agent, title insurer, or attorney, suggesting that in most transactions a person primarily employed in other activities related to real estate, a real estate agent or broker, and their businesses may be unlikely to become the reporting person on a reportable transfer and thereby be affected by the proposed rule. However, because that finding speaks to the proportion of transactions that involved services from categories of primary business and not the proportion of businesses that provide cascade-identified services to reportable transfers, FinCEN declines to make conclusive inferences from that study for this purpose of estimating the population of affected businesses.

[240] *See* Section VII.F.

[241] Meaning that no method of operationalizing the term 'small' or vintage of data consistently yields either the smallest or the largest numerical value of the population estimate.

[242] For estimates based on the number of employees, FinCEN used the 2021 SUSB Annual Data Tables by Establishment Industry, U.S. Census Bureau, 2021 SUSB Annual Data Tables by Establishment Industry (Nov. 27, 2023), *available at https://www.census.gov/data/tables/2021/econ/susb/2021-susb-annual.html*. For receipts data-based estimates, FinCEN used the 2017 SUSB Annual Data Tables by Establishment Industry, U.S. Census Bureau, 2017 SUSB Annual Data Tables by Establishment Industry (May 2021), *available at https://www.census.gov/data/tables/2017/econ/susb/2017-susb-annual.html*.

Table 6: Proportion of Potentially Affected Small Entities by Definition of 'Small'

			Firms Deemed 'Small' as Defined by		
Primary Business Categories	*NAICS Code*	*Maximum Annual Receipts for 'Small' Designation*[a]	*<20 Employees in 2021*[b]	*<500 Employees in 2021*	*Average Receipts below SBA threshold in 2017*[c]
Title Abstract and Settlement Offices	541191	$19.5 million	90.89%	97.29%	99.24%
Direct Title Insurance Carriers	524127	$47 million	90.05%	99.87%	95.35%
Other Activities Related to Real Estate	531390	$19.5 million	97.00%	99.70%	99.09%
Offices of Lawyers	541110	$15.5 million	95.45%	99.87%	99.32%
Offices of Real Estate Agents and Brokers	531210	$15 million	98.85%	99.90%	99.64%

[a] 13 CFR 121.201.

[b] These estimates correspond to the following number of firms as reported in the SUSB 2021 data (<20, <500): Title and Abstract Settlement Offices, 6,023 and 6,571, respectively; Direct Title Insurance Carriers, 796 and 865, respectively; Other Activities Related to Real Estate, 18,185 and 18,692, respectively; Offices of Lawyers, 15,308 and 16,017, respectively; and Office of Real Estate Agents and Brokers, 128,951 and 130,331, respectively.

[c] Data on firm receipts is only available in years that end in two or seven; to utilize SBA receipts thresholds, 2017 survey data is the most recent usable vintage. These estimates correspond to the following number of firms as reported in the SUSB 2017 data: Title Abstract and Settlement Offices (6,782), Direct Title Insurance Carriers (738), Other Activities Related to Real Estate (15,474), Offices of Lawyers (16,262), and Offices of Real Estates Agents and Brokers (106,461).

2. Expectations of Impact

At this time, it is unclear how individual small entities or categories of small entities may choose to respond to the proposed rule, as a broad range of potentially optimal behaviors and outcomes are possible. FinCEN has carefully considered the economic impact associated with the spectrum of possible scenarios a small entity might face and summarizes its expectations of economic impacts in the paragraphs below. To preliminarily clarify why certain costs are presented on a per-firm basis while others are presented per transaction, it is important to keep the distinction in mind between the anticipated costs of compliance, like training, that are independent of participation in reporting activity and those that are transaction-based, or conditional, on participation in a reportable transfer, like reporting and recordkeeping. Further, and within transaction-based costs, there are costs incurred by the reporting person that are independent of a designation agreement, costs incurred by the reporting person only when a designation agreement exists, and costs incurred by non-reporting persons when a designation agreement exists.[243]

The table below (Table 7) presents FinCEN estimates of the average annual payroll costs per employee at each of the types of small entities to whom the proposed rule would apply. This data provides a benchmark against which the anticipated costs of the proposed rule can be compared. FinCEN believes that an assessment of economic impact relative to individual payroll expenses is more appropriate for the purposes of this exercise because an analysis alternatively based on business receipts would need to rely upon the most recent SUSB that includes revenue data. That survey is approximately seven years old and predates the impacts of the COVID–19 pandemic on the residential real estate market, the market which is the specific domain to which the proposed rule would apply. Payroll data is available for more recent vintages of the survey and is therefore more likely to reflect the number, distribution, and labor costs of the businesses to whom the proposed rule would apply. Furthermore, because estimated costs have been presented at a per-employee and per-transaction level throughout the RIA, FinCEN expects that the individual business reading the analysis, and best apprised of its own annual revenues, should have the requisite pieces of information necessary to individually assess the potential impact relative to its own unique facts and circumstances.

[243] *See* Section VII.A.4.a.

Table 7: Average Annual Payroll Expense per Employee at Small Entity by Primary Business

			Average Payroll/Number of Employees by Operational Definition of 'Small'		
Primary Business Categories	*NAICS Code*	*Maximum Annual Receipts for 'Small' Designation*[a]	*<20 Employees (2021, unadjusted)*	*<500 Employees (2021, unadjusted)*	*Average Receipts below SBA threshold (2017, unadjusted)*
Title Abstract and Settlement Offices	541191	$19.5 million	$56,759.15	$63,006.04	$57,719.33
Direct Title Insurance Carriers	524127	$47 million	$61,332.52	$77,798.41	$59,706.51
Other Activities Related to Real Estate	531390	$19.5 million	$75,867.45	$83,902.18	$94,179.03
Offices of Lawyers	541110	$15.5 million	$73,259.85	$90,790.19	$98,885.14
Offices of Real Estate Agents and Brokers	531210	$15 million	$59,335.71	$61,692.48	$61,693.20

[a] 13 CFR 121.201.

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a. Scenario 1: Little to No Effect

Some small entities can reasonably be expected to experience little to no economic impact from the rule. The kinds of small entities that would face this scenario include both those unaffected because they *ex ante* do not participate in reportable transfers and those that ensure they do not *ex post*.

Among other examples, this would be the case for all small entities that, in the ordinary course of business, do not provide services to the non-financed transfers of residential property to which the proposed rule pertains. FinCEN notes that, at present, there is no comprehensive data regarding the distribution of cascade-identified services used in connection with the proposed reportable transfers that is organized by firm size of the service providers and their primary business categories. It is therefore not known if, for example, the majority of parties to the proposed reportable transfers have historically obtained services from predominantly larger firms in a given industry. While some evidence on the market concentration of title insurers suggests this might be the case for their services in real estate transactions more generally,[244] it is unclear how transferable that observation would be to non-financed transactions exclusively. In cases where a small business in one of the identified primary business categories does not participate in non-financed, non-exempt transfers of residential property to a transferee entity or transferee trust, the proposed rule would not apply, and therefore no costs associated with training, reporting, or recordkeeping would be incurred.

Alternatively, some small entities to whom the proposed rule would apply (based on the previous provision of services to transactions that would become reportable) might, in light of the reporting requirement, preemptively adopt a business policy of not providing services to non-financed residential property transfers or otherwise form arrangements to ensure they do not become the reporting person. This would allow them to similarly forgo the need to implement training programs or incur compliance costs related to reporting or recordkeeping to the same extent as those small businesses who had never previously facilitated the proposed newly reportable transfers. Admittedly, these strategies may not be entirely cost-free as certain firms may incur some costs in the form of forgone transactions. Additionally, there may also be some transaction costs to forming the kinds of alternative arrangements, external business agreements, or partnerships necessary to ensure reportable transfers remain substantially unaffected, as desired. In many cases, FinCEN contemplates that a small business may ensure

[244] A recent article indicated that the top ten title insurers in 2022 enjoyed an 88.4 percent market share. *See* American Land Title Association, ALTA Reports Full-Year, Q4 2022 Title Insurance Premium Volume (May 8, 2023), *available at https://www.prnewswire.com/news-releases/alta-reports-full-year-q4-2022-title-insurance-premium-volume-301817499.html.*

accordingly via relatively informal arrangements, such as verbally (or else, absent formal consideration), with longstanding providers of contemporaneous closing services to the types of residential property transactions that would otherwise require the small business to file a Real Estate Report under the proposed rule.

While such arrangements might be formed at the minimal cost of a short phone call or in the course of an informal conversation, all of which would be considered de minimis costs, other forms of agreement might be more costly to certain small businesses. FinCEN notes that in keeping with the general principle of Coase Theorem,[245] nothing prevents potential private bargaining arrangements by which an otherwise obligated reporting person might transfer the bulk of their responsibilities via an ex ante agreement to compensate their respective counterparty's costs associated with a designation agreement,[246] either via performance of the related documentation exercise or via financial consideration commensurate with the designation agreement-specific costs. A more detailed estimate of such costs is articulated in the scenario analysis that follows.

b. Scenario 2: Partial Effect

Other small entities may only be marginally affected. These kinds of small entities may include some that already have experience reporting under the Residential Real Estate GTO to the extent that such title insurers qualify as 'small.'[247] Such entities already have expended resources to establish a compliance infrastructure, and given the similarities between the requirements under the Residential Real Estate GTOs and the requirements that would be imposed under the proposed rule, some of those costs would not to be replicated to comply with the proposed rule. Therefore, the economic impact of the proposed rule on such entities will likely be less than it would be for entities who are not currently subject to the Residential Real Estate GTOs. The category of marginally affected small entities would also include entities that are categorically unlikely to become the reporting person when participating in reportable transfers.

For example, small entities that facilitate a reportable transaction along with other members of the reporting cascade may, by the nature of the service they provide, always reside in a tier below other service-providing entities and/or because of being further removed from the details required for the proposed Real Estate Report, may be unlikely to be designated in place of higher tier cascade members. Similarly, the nature of the service they provide may make it less likely that a reportable transfer occurs in which their service is the only third-party service obtained. As such, the main costs incurred as a consequence of the proposed rule would be associated with training,[248] which would still be necessary to ensure proper recordkeeping[249] associated with designation agreements and preparedness for reporting[250] in the rare event either is required. FinCEN notes that, as proposed, no designation agreement with a lower-tier service provider is required if a higher-tier party to a transaction files the required Real Estate Report, and entities in tiers lower than the reporting person are not required to verify or document verification that the higher-tier party filed the report. Therefore, to the extent that a marginally affected small entity of the type described here incurs reporting[251] or recordkeeping costs,[252] it would only be in instances where the tiers above it were absent from a deal, in which case it may still have the ability to designate the reporting requirements if lower tier services are being provided by an additional party to the transaction.

For small entities whose primary costs burden will be associated with employee training, such costs would represent an increase in payroll expense of approximately 0.2 percent per trained employee (see Tables 8 and 9 below, derived from Tables 3 and 7 above). Such a change is not expected to be economically significant. FinCEN further notes that while its RIA incorporates estimates that are informed by the previous CDD model of how training is operationalized, the proposed rule itself is silent on the manner, format, and duration of training, and the proportion of a business's workforce that needs to be trained. Therefore, to the extent that a small business may effectively train a sufficient proportion of its workforce to the necessary degree of familiarity with the proposed rule's reporting requirements to ensure appropriate compliance at costs lower than FinCEN estimates, it is expected to do so at its discretion.

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[245] *See* R.H. Coase, "The Problem of Social Cost." The Journal of Law and Economics, vol. 3 (Oct. 1960). While Coase Theorem traditionally pertains to the resolution of externality problems by private parties given an initial allocation of property rights, the principle is expected in this context to apply similarly to the assignment of the proposed reporting requirement (and related costs) between businesses servicing a reportable transfer given an original assignment of the reporting responsibility.

[246] *See* discussion of designation agreement specific recordkeeping costs, *supra* Section VII.A.4.a.iii.

[247] *See* Section II.B.3; *see also* Section VII.A.1.a.i.

[248] *See* Table 3; *see generally* Section VII.A.4.a.i.

[249] *See* Section VII.G; *see also* discussion of recordkeeping costs, *supra* Section VII.A.4.a.iii; *see also* discussion of recordkeeping costs, *infra* Section VII.C.2.c and Table 11.

[250] *See* Section VII.E; *see also* discussion of expected reporting costs, *supra* Section VII.A.4.a.ii; *see also* discussion of reporting costs, *infra* Section VII.C.2.c and Table 10.

[251] *Id.*

[252] *Supra*, note 250.

Table 8: Initial Training Costs as a Fraction of Payroll

Per Person Initial Training Costs as a Fraction of Individual Annual Payroll Expense			Average Payroll/Number of Employees 'Small' as Defined by		
Primary Employment	*NAICS Code*	*Maximum Annual Receipts for 'Small' Designation*	*< 20 Employees (2021)*	*< 500 Employees (2021)*	*Average Receipts below SBA threshold[a] (2017)*
Title Abstract and Settlement Offices	541191	$ 19.5 million	0.15%	0.14%	0.15%
Direct Title Insurance Carriers	524127	$ 47 million	0.17%	0.14%	0.18%
Other Activities Related to Real Estate	531390	$ 19.5 million	0.12%	0.10%	0.09%
Offices of Lawyers	541110	$ 15.5 million	0.15%	0.12%	0.11%
Offices of Real Estate Agents and Brokers	531210	$ 15 million	0.15%	0.14%	0.14%

[a] 13 CFR 121.201.

Table 9: Refresher Training Costs as a Fraction of Payroll

Per Person Refresher Training Costs (Unadjusted) as a Fraction of Individual Annual Payroll Expense			Average Payroll/Number of Employees 'Small' as Defined by		
Primary Employment	*NAICS Code*	*Maximum Annual Receipts for 'Small' Designation*	*< 20 Employees (2021, unadjusted)*	*< 500 Employees (2021, unadjusted)*	*Average Receipts below SBA threshold[a] (2017, unadjusted)*
Title Abstract and Settlement Offices	541191	$ 19.5 million	0.06%	0.06%	0.06%
Direct Title Insurance Carriers	524127	$ 47 million	0.07%	0.05%	0.07%
Other Activities Related to Real Estate	531390	$ 19.5 million	0.05%	0.04%	0.04%
Offices of Lawyers	541110	$ 15.5 million	0.06%	0.05%	0.04%
Offices of Real Estate Agents and Brokers	531210	$ 15 million	0.06%	0.06%	0.06%

[a] 13 CFR 121.201.

c. Scenario 3: Full Effect

The small entities that would be most affected are those that would, as a consequence of the proposed rule, incur the full reporting requirement with certainty.

This could occur because no other members of the proposed reporting cascade participate in a given reportable transfer or because, when other cascade members participate in a reportable transfer, no designation agreement reassigns the reporting requirement away from the small entity. In this

scenario, the small entity would incur the full or near full expected costs associated with training, reporting, and recordkeeping.[253] Tables 10 and 11 below indicated that this would introduce a cost comparable to an approximately 0.5 percent increase in average small entity annual payroll expense for one employee per transaction.[254]

Table 10: Reporting Costs as a Fraction of Payroll

Per Transaction Reporting Costs as a Fraction of Individual Annual Payroll Expense			Average Payroll/Number of Employees 'Small' as Defined by		
Primary Employment			*< 20 Employees (2021, unadjusted)*	*< 500 Employees (2021, unadjusted)*	*Average Receipts below SBA threshold[a] (2017, unadjusted)*
Non-Reporting Party	Designation-Related	Title Abstract and Settlement Offices	0.03%	0.03%	0.03%
		Direct Title Insurance Carriers	0.03%	0.03%	0.04%
		Other Activities Related to Real Estate	0.02%	0.02%	0.02%
		Offices of Lawyers	0.03%	0.02%	0.02%
		Offices of Real Estate Agents and Brokers	0.03%	0.03%	0.03%
Reporting Party	Designation-Related	Title Abstract and Settlement Offices	0.03%	0.03%	0.03%
		Direct Title Insurance Carriers	0.03%	0.03%	0.04%
		Other Activities Related to Real Estate	0.02%	0.02%	0.02%
		Offices of Lawyers	0.03%	0.02%	0.02%
		Offices of Real Estate Agents and Brokers	0.03%	0.03%	0.03%
	Designation-Independent	Title Abstract and Settlement Offices	0.34%	0.31%	0.34%
		Direct Title Insurance Carriers	0.38%	0.30%	0.39%
		Other Activities Related to Real Estate	0.26%	0.23%	0.21%
		Offices of Lawyers	0.33%	0.27%	0.25%
		Offices of Real Estate Agents and Brokers	0.33%	0.31%	0.31%

[a] 13 CFR 121.201.

[253] In the event that the small entity is the reporting person because no other person described in the cascade is involved in the transfer, costs are reduced by the absence of additional time needed to determine the reporting person and the absence of time associated with the preparation, circulation, and recordkeeping associated with a designation agreement.

[254] FinCEN notes that because the proposed rule is intended to replace the current Residential Real Estate GTOs reporting requirement, framing the expected economic impact in terms of cost increases may overstate the anticipated incremental burden of compliance, particularly for small direct title insurance carriers.

Table 11: Recordkeeping Costs as a Fraction of Payroll

Per Transaction Total Recordkeeping Costs as a Fraction of Individual Annual Payroll Expense			Average Payroll/Number of Employees 'Small' as Defined by		
Primary Employment			*< 20 Employees (2021, unadjusted)*	*< 500 Employees (2021, unadjusted)*	*Average Receipts below SBA threshold[a] (2017, unadjusted)*
Non-Reporting Party	Designation-Related	Title Abstract and Settlement Offices	0.011%	0.009%	0.010%
		Direct Title Insurance Carriers	0.012%	0.009%	0.012%
		Other Activities Related to Real Estate	0.008%	0.007%	0.006%
		Offices of Lawyers	0.010%	0.008%	0.008%
		Offices of Real Estate Agents and Brokers	0.010%	0.010%	0.010%
Reporting Party	Designation-Related	Title Abstract and Settlement Offices	0.011%	0.009%	0.010%
		Direct Title Insurance Carriers	0.012%	0.009%	0.012%
		Other Activities Related to Real Estate	0.008%	0.007%	0.006%
		Offices of Lawyers	0.010%	0.008%	0.008%
		Offices of Real Estate Agents and Brokers	0.010%	0.010%	0.010%
	Designation-Independent	Title Abstract and Settlement Offices	0.12%	0.11%	0.12%
		Direct Title Insurance Carriers	0.14%	0.11%	0.14%
		Other Activities Related to Real Estate	0.09%	0.08%	0.07%
		Offices of Lawyers	0.12%	0.10%	0.09%
		Offices of Real Estate Agents and Brokers	0.12%	0.11%	0.11%

[a] 13 CFR 121.201.

* Total Recordkeeping cost estimates include both labor (wages) and technology costs ($0.10)

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Alternatively, a small entity, for reasons of its own, might adopt a business policy to always be the reporting person on reportable transactions. In this case it would incur the incremental additional costs associated with preparing [255] and circulating a designation agreement [256] whenever higher-tier parties to the transaction participate but its cost profile would otherwise resemble the other types of 'full effect' small entities. The economic impact does not appear to be significant in these cases, which would be expected to impose the highest costs.[257]

While the general consensus of this analysis across the potential scenarios that a small business could find itself in, as a consequence of the proposed rule, is that the related incremental costs are not likely to be economically significant, it may also be worth nothing that an economically significant cost generally need not imply that the economic impact on a given firm or industry would also be significant. While that could be the case, the former is not a sufficient condition for the latter.

Because a non-financed residential property transfer involving one or more potential reporting persons, unless exempt, must be reported, the parties between whom the ownership transfers may have relatively little bargaining power over the extent to which incremental costs related to the proposed rule are passed-through. Parties may have few viable alternatives to compensating the reporting person for its additional compliance-related services other than to conduct the transaction with no reporting persons involved in the transfer. This may be undesirable to the parties engaged in the transfer for a number of risk and/or convenience-related reasons that outweigh the marginal increase in transaction fees. As such, even in a

[255] *See* description of designation agreement time costs, *supra* Section VII.A.4.a.ii.

[256] *See* description of designation agreement time and technology costs, *supra* Section VII.A.4.a.iii; *see also* Table 8.

[257] Because the RFA does not statutorily define "significant" the SBA has acknowledged that what is "significant" will vary depending on the economics of the industry or sector to be regulated. The agency is in the best position to gauge the small entity impacts of its regulations." *See* Small Business Administration, How to Comply with the Regulatory Flexibility Act (updated Aug. 2017), page 18*available at https://advocacy.sba.gov/wp-content/uploads/2019/06/How-to-Comply-with-the-RFA.pdf*. Nevertheless, it has suggested that one potentially appropriate measure of an economically significant impact is one that "exceeds 5 percent of the labor costs of the entities in the sector." *Id.* p 19. FinCEN analysis here identifies a maximum average per transaction cost of approximately 0.5 percent, which is a full order of magnitude smaller than the proposed SBA threshold.

scenario under which small entities would face the highest incremental costs,[258] it still may not be the case that the direct economic impact on these small entities will be significant.

3. Certification

Having considered the various possible outcomes (as grouped above by scenarios FinCEN anticipates as most likely) for small entities under the proposed reporting requirements, FinCEN certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. FinCEN invites comments from members of the public.

D. Unfunded Mandates Reform Act

Section 202 of the UMRA [259] requires that an agency prepare a statement before promulgating a rule that may result in expenditure by state, local, and Tribal governments, or the private sector, in the aggregate, of $177 million or more in any one year.[260] Section 202 of the UMRA also requires an agency to identify and consider a reasonable number of regulatory alternatives before promulgating a rule. FinCEN believes that the preceding assessment of impact [261] satisfies the UMRA's analytical requirements, but invites public comment on any additional factors that, if considered, would materially alter the conclusions of the RIA.

E. Paperwork Reduction Act

The new reporting requirements in this proposed rule are being submitted to OMB for review in accordance with the PRA.[262] Under the PRA, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by OMB. Written comments and recommendations for the proposed collection can be submitted by visiting *www.reginfo.gov/public/do/PRAMain.* Find this document by selecting "Currently Under Review—Open for Public Comments" or by using the search function. Comments are welcome and must be received by April 16, 2024. In accordance with the requirements of the PRA and its implementing regulations, 5 CFR part 1320, the following details concerning the collections of information are presented to assist those persons wishing to comment.

Reporting and Recordkeeping Requirements: The provisions in this proposed rule pertaining to the collection of information can be found in paragraph (a) of proposed 31 CFR 1031.320. The information that would be required to be reported by the proposed rule would be used by the U.S. Government to monitor and investigate money laundering in the U.S. residential real estate sector. The information required to be maintained by the proposed will be used by federal agencies to verify compliance by reporting persons with the provisions of the proposed rule. The collection of information is mandatory.

OMB Control Numbers: 1506–XXX.

Frequency: As required.

Description of Affected Public: Residential Real Estate Settlement Agents, Title Insurance Carriers, Escrow Service Providers, Other Real Estate Professionals.

Estimated Number of Responses: 850,000 [263]

Estimated Total Annual Reporting and Recordkeeping Burden: 4,604,167 burden hours [264]

Estimated Total Annual Reporting and Recordkeeping Cost: $396,610,297.74 [265]

General Request for Comments under the Paperwork Reduction Act: Comments submitted in response to this notice will be summarized and included in a request for OMB approval. All comments will become a matter of public record. Comments are invited on the following categories: (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on reporting persons, including through the use of technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services required to provide information.

F. Additional Requests for Comment

1. In addition, FinCEN generally invites comment on the accuracy of FinCEN's regulatory analysis. FinCEN specifically requests comments—including data or studies—that provide additional insight on the following: What would be the short-term costs, burdens, and benefits associated with using a new reporting form to file the proposed information? The long term? What would be the costs, burdens, and benefits associated with collecting and storing the information detailed in this NPRM?

2. Would FinCEN's proposed regulatory requirements be integrated into current compliance programs in ways that are significantly more (or less) costly than anticipated in the RIA? How much time would be needed to successfully integrate them into current systems and procedures?

3. Would reporting persons and their employers integrate implementation costs into their existing budgets in ways that substantially differ from the expectations described in the RIA? If so, how might this affect the reliability or accuracy of the estimated costs?

4. Is FinCEN correct in assuming that, in a single reportable real estate transaction, only one business would perform any of the functions described in the first three tiers of the reporting cascade? If not, please provide details about, or examples of instances where, multiple parties with functions described in the first three tiers of the cascade would participate in a single transaction. If multiple parties do participate, would this result in an impact on the burden of compliance with the rule?

5. Of the affected parties identified in this analysis, would certain nonfinancial trades or businesses incur higher costs compared to others under this proposed rule? Why?

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[258] For example, the full costs of newly implementing a training program, filing the proposed Real Estate Report (potentially on that includes a designation agreement), and complying with the proposed recordkeeping requirements.

[259] *See* 2 U.S.C. 1532(a).

[260] The U.S. Bureau of Economic Analysis reported the annual value of the gross domestic product (GDP) deflator in 1995 (the year in which UMRA was enacted) as 71.823; and in 2022 as 127.215. *See* U.S. Bureau of Economic Analysis, "Implicit Price Deflators for Gross Domestic Product," Table 1.1.9, *available at https://apps.bea.gov/iTable/?reqid=19&step=2&isuri=1&categories=survey%23eyJhcHBpZCI6MTksInN0ZXBzIjpbMSwyLDMsM10sImRhdGEiOlthIkNhdGVnb3JpZXMiLCJTdXJ2ZXkiXSxblk5JUEFfVGFibGVfTGlzdCIsIjEzIl0sWyJGaXJzdF9ZZWFyIiwiMTk5NSJdLFsiTGFzdF9ZZWFyIiwiMjAyMSJdLFsiU2NhbGUiLCIwIl0sWyJTZXJpZXMiLCJBll1dfQ.* Thus, the inflation adjusted estimate for $100 million is 127.215 divided by 71.823 and then multiplied by 100, or $177 million.

[261] *See* Section VII.A.5; *see generally* Section VII.A.

[262] *See* 44 U.S.C. 3506(c)(2)(A).

[263] This estimate represents the upper bound estimate of reportable transfers per year as described in greater detail above in Section VII.A.2.c.i.

[264] This estimate includes the upper bound estimates of the time burden of compliance, as described in greater detail above, with the proposed reporting and recordkeeping requirements. *See* Section VII.A.4.a.ii; Section VII.A.4.a.iii.

[265] This estimate includes the upper bound estimates of the wage and technology costs of compliance, as described in greater detail above, with the proposed reporting and recordkeeping requirements. *See* Section VII.A.4.a.ii; Section VII.A.4.a.iii.

6. Please detail any aspects of the proposed rule that may cause a business to operate at a competitive disadvantage compared to any business that offers similar services but would be outside the scope of the proposed rule.

7. To what extent are the services identified in the proposed reporting cascade likely to be primarily provided by small businesses?

8. To what extent might the costs of compliance with the proposed rule dissuade certain small businesses from providing services to reportable transfers? How large is the economic value of such potentially foregone transactions to small businesses? If possible, please provide data that would enable the quantification of these costs.

9. Please detail any aspects of the proposed rule that may cause a small business to operate at a competitive disadvantage compared to other businesses that offers similar services.

10. To what extent might the parties who would be reporting persons under the proposed rule be able to pass the costs of compliance on to downstream customers/clients? Are there concerns about such an allocation of the economic burden of compliance?

11. To the extent that services in the proposed reporting cascade tiers are currently ordered such that a small business would precede a larger business, are there any economic costs to designation or significant transaction frictions that would prevent reassigning the obligation in cases where the larger business is better positioned to absorb compliance costs?

List of Subjects in 31 CFR Part 1031

Administrative practice and procedure, Aliens, Authority delegations (Government agencies), Bankruptcy, Banks and banking, Brokers, Buildings and facilities, Business and industry, Condominiums, Cooperatives, Currency, Citizenship and naturalization, Electronic filing, Estates, Fair housing, Federal home loan banks, Federal savings associations, Federal-States relations, Foreign investments in U.S., Foreign persons, Foundations, Holding companies, Home improvement, Homesteads, Housing, Indian—law, Indians, Indians—tribal government, Insurance companies, Investment advisers, Investment companies, Investigations, Law enforcement, Lawyers, Legal services, Low and moderate income housing, Mortgage insurances, Mortgages, Penalties, Privacy, Real property acquisition, Reporting and recordkeeping requirements, Small businesses, Securities, Taxes, Terrorism, Time, Trusts and trustees, Zoning.

Authority and Issuance

■ For the reasons set forth in the preamble, chapter X of title 31 of the Code of Federal Regulations is proposed to be amended by adding part 1031 to read as follows:

PART 1031—RULES FOR PERSONS INVOLVED IN REAL ESTATE CLOSINGS AND SETTLEMENTS

Subparts A–B [Reserved]

Subpart C—Reports Required To Be Made by Persons Involved in Real Estate Closings and Settlements

Sec.

Authority: 12 U.S.C. 1829b, 1951–1959; 31 U.S.C. 5311–5314, 5316–5336; title III, sec. 314 Pub. L. 107–56, 115 Stat. 307; sec. 701 Pub. L. 114–74, 129 Stat. 599; sec. 6403, Pub. L. 116–283, 134 Stat. 3388.

Subparts A–B [Reserved]

Subpart C—Reports Required To Be Made by Persons Involved in Real Estate Closings and Settlements

§ 1031.320 Reports of residential real property transfers.

(a) *General.* A residential real property transfer as defined in paragraph (b) of this section ("reportable transfer") shall be reported to FinCEN by the reporting person identified in paragraph (c) of this section. The report shall include the information described in paragraphs (d) through (i) of this section. Terms not defined in paragraph (j) of this section are defined in 31 CFR 1010.100. The report required by this section shall be filed in the form and manner, and at the time, specified in paragraph (k) of this section. Records shall be retained as specified in paragraph (l) of this section and are not confidential as specified in paragraph (m) of this section.

(b) *Reportable transfer.* (1) Except as set forth in paragraph (b)(2) of this section, a reportable transfer is a transfer to a transferee entity or transferee trust of an ownership interest in:

(i) Real property located in the United States containing a structure designed principally for occupancy by one to four families;

(ii) Vacant or unimproved land located in the United States zoned, or for which a permit has been issued, for the construction of a structure designed principally for occupancy by one to four families; or

(iii) Shares in a cooperative housing corporation where such transfer does not involve an extension of credit to all transferees that is:

(A) Secured by the transferred residential real property; and

(B) Extended by a financial institution that has both an obligation to maintain an anti-money laundering program and an obligation to report suspicious transactions under this chapter.

(2) A reportable transfer does not include a:

(i) Grant, transfer, or revocation of an easement;

(ii) Transfer resulting from the death of an owner of residential real property;

(iii) Transfer incident to divorce or dissolution of a marriage;

(iv) Transfer to a bankruptcy estate; or

(v) Transfer for which there is no reporting person.

(c) *Determination of reporting person.* (1) Except as set forth in paragraphs (c)(2) and (3) of this section, the reporting person for a reportable transfer is the person engaged within the United States as a business in the provision of real estate closing and settlement services that is:

(i) The person listed as the closing or settlement agent on the closing or settlement statement for the transfer;

(ii) If no person is described in paragraph (c)(1)(i) of this section, the person that prepares the closing or settlement statement for the transfer;

(iii) If no person is described in paragraph (c)(1)(i) or (ii) of this section, the person that files with the recordation office the deed or other instrument that transfers ownership of the residential real property;

(iv) If no person described in paragraph (c)(1)(i), (ii), or (iii) of this section is involved in the transfer, then the person that underwrites an owner's title insurance policy for the transferee with respect to the transferred residential real property, such as a title insurance company;

(v) If no person described in paragraph (c)(1)(i), (ii), (iii), or (iv) of this section is involved in the transfer, then the person that disburses in any form, including from an escrow account, trust account, or lawyers' trust account, the greatest amount of funds in connection with the residential real property transfer;

(vi) If no person described in paragraph (c)(1)(i), (ii), (iii), (iv), or (v) of this section is involved in the transfer, then the person that provides an evaluation of the status of the title; or

(vii) If no person described in paragraph (c)(1)(i), (ii), (iii), (iv), (v), or (vi) of this section is involved in the transfer, then the person that prepares the deed or, if no deed is involved, any

other legal instrument that transfers ownership of the residential real property.

(2) *Employees, agents, and partners.* If an employee, agent, or partner acting within the scope of such individual's employment, agency, or partnership would be the reporting person as determined in paragraph (c)(1) of this section, then the individual's employer, principal, or partnership is deemed to be the reporting person.

(3) *Designation agreement.* (i) The reporting person described in paragraph (c)(1) of this section may agree with any other person described in paragraph (c)(1) to designate such other person as the reporting person with respect to the reportable transfer. The person designated by such agreement shall be the reporting person with respect to the transfer.

(ii) A designation agreement shall be in writing, and shall include:

(A) The date of the agreement;

(B) The name and address of the transferor;

(C) The name and address of the transferee entity or transferee trust;

(D) Information described in in paragraph (g) identifying transferred residential real property;

(E) The name and address of the person designated through the agreement as the reporting person with respect to the transfer; and

(F) The name and address of all other parties to the agreement.

(d) *Information concerning the reporting person.* The reporting person shall report:

(1) The full legal name of the reporting person;

(2) The category of reporting person, as determined in paragraph (c) of this section; and

(3) The street address that is the reporting person's principal place of business in the United States.

(e) *Information concerning the transferee*—(1) *Transferee entities.* For each transferee entity involved in a reportable transfer, the reporting person shall report:

(i) The following information for the transferee entity:

(A) Full legal name;

(B) Trade name or "doing business as" name, if any;

(C) Complete current address consisting of:

(*1*) The street address that is the transferee entity's principal place of business; and

(*2*) If such principal place of business is not in the United States, the street address of the primary location in the United States where the transferee entity conducts business, if any; and

(D) Unique identifying number consisting of:

(*1*) The Internal Revenue Service Taxpayer Identification Number (IRS TIN) of the transferee entity;

(*2*) If the transferee entity has not been issued an IRS TIN, a tax identification number for the transferee entity that was issued by a foreign jurisdiction and the name of such jurisdiction; or

(*3*) If the transferee entity has not been issued an IRS TIN or a foreign tax identification number, an entity registration number issued by a foreign jurisdiction and the name of such jurisdiction;

(ii) The following information for each beneficial owner of the transferee entity:

(A) Full legal name;

(B) Date of birth;

(C) Complete current residential street address;

(D) Citizenship; and

(E) Unique identifying number consisting of:

(*1*) An IRS TIN; or

(*2*) Where an IRS TIN has not been issued:

(*i*) A tax identification number issued by a foreign jurisdiction and the name of such jurisdiction; or

(*ii*) The unique identifying number and the issuing jurisdiction from a non-expired passport issued by a foreign government; and

(iii) The following information for each signing individual, if any:

(A) Full legal name;

(B) Date of birth;

(C) Complete current residential street address;

(D) Unique identifying number consisting of:

(*1*) An IRS TIN; or

(*2*) Where an IRS TIN has not been issued:

(*i*) A tax identification number issued by a foreign jurisdiction and the name of such jurisdiction; or

(*ii*) The unique identifying number and the issuing jurisdiction from a non-expired passport issued by a foreign government to the individual;

(E) Description of the capacity in which the individual is authorized to act as the signing individual; and

(F) If the signing individual is acting in that capacity as an employee, agent, or partner, the name of the individual's employer, principal, or partnership.

(2) *Transferee trusts.* For each transferee trust in a reportable transfer, the reporting person shall report:

(i) The following information for the transferee trust:

(A) Full legal name, such as the full title of the agreement establishing the transferee trust;

(B) Date the trust instrument was executed;

(C) The street address that is the trust's place of administration;

(D) Unique identifying number, if any, consisting of:

(*1*) IRS TIN; or

(*2*) Where an IRS TIN has not been issued, a tax identification number issued by a foreign jurisdiction and the name of such jurisdiction; and

(E) Whether the transferee trust is revocable;

(ii) The following information for each trustee that is a legal entity:

(A) Full legal name;

(B) Trade name or "doing business as" name, if any;

(C) Complete current address consisting of:

(*1*) The street address that is the trustee's principal place of business; and

(*2*) If such principal place of business is not in the United States, the street address of the primary location in the United States where the trustee conducts business, if any;

(D) Name and business address of the trust officer assigned to the transferee trust; and

(E) Unique identifying number consisting of:

(*1*) The IRS TIN of the trustee;

(*2*) In the case that a trustee has not been issued an IRS TIN, a tax identification number issued by a foreign jurisdiction and the name of such jurisdiction; or

(*3*) In the case that a trustee has not been issued an IRS TIN or a foreign tax identification umber, an entity registration number issued by a foreign jurisdiction and the name of such jurisdiction; and

(F) For purposes of this section, an individual trustee of the transferee trust is considered to be a beneficial owner of the trust. As such, information on individual trustees must be reported in accordance with the requirements set forth in paragraph (e)(2)(iii) of this section;

(iii) The following information for each beneficial owner of the transferee trust:

(A) Full legal name;

(B) Date of birth;

(C) Complete current residential street address;

(D) Citizenship;

(E) Unique identifying number consisting of:

(*1*) An IRS TIN; or

(*2*) Where an IRS TIN has not been issued:

(*i*) A tax identification number issued by a foreign jurisdiction and the name of such jurisdiction; or

(*ii*) The unique identifying number and the issuing jurisdiction from a non-expired passport issued by a foreign government; and

(F) The category of beneficial owner, as determined in paragraph (j)(1)(ii) of this section; and

(iv) The following information for each signing individual, if any:

(A) Full legal name;

(B) Date of birth;

(C) Complete current residential street address;

(D) Unique identifying number consisting of:

(*1*) An IRS TIN; or

(*2*) Where an IRS TIN has not been issued:

(*i*) A tax identification number issued by a foreign jurisdiction and the name of such jurisdiction; or

(*ii*) The unique identifying number and the issuing jurisdiction from a non-expired passport issued by a foreign government to the individual;

(E) Description of the capacity in which the individual is authorized to act as the signing individual; and

(F) If the signing individual is acting in that capacity as an employee, agent, or partner, the name of the individual's employer, principal, or partnership.

(3) *Collection of beneficial ownership information from transferees.* The reporting person may collect the information described in paragraphs (e)(1)(ii) and (e)(2)(iii) of this section from the transferee or a person representing the transferee in the reportable transfer, provided the transferee or their representative certifies in writing, to the best of their knowledge, the accuracy of the information.

(f) *Information concerning the transferor.* For each transferor involved in a reportable transfer, the reporting person shall report:

(1) The following information for a transferor who is an individual:

(i) Full legal name;

(ii) Date of birth;

(iii) Complete current residential street address; and

(iv) Unique identifying number consisting of:

(A) An IRS TIN; or

(B) Where an IRS TIN has not been issued:

(*1*) A tax identification number issued by a foreign jurisdiction and the name of such jurisdiction; or

(*2*) The unique identifying number and the issuing jurisdiction from a non-expired passport issued by a foreign government to the individual;

(2) The following information for a transferor that is a legal entity:

(i) Full legal name;

(ii) Trade name or "doing business as" name, if any;

(iii) Complete current address consisting of:

(A) The street address that is the legal entity's principal place of business; and

(B) If the principal place of business is not in the United States, the street address of the primary location in the United States where the legal entity conducts business, if any; and

(iv) Unique identifying number consisting of:

(A) An IRS TIN;

(B) In the case that the legal entity has not been issued an IRS TIN, a tax identification number issued by a foreign jurisdiction and the name of such jurisdiction; or

(C) In the case that the legal entity has not been issued an IRS TIN or a foreign tax identification number, an entity registration number issued by a foreign jurisdiction and the name of such jurisdiction; and

(3) The following information for a transferor that is a trust:

(i) Full legal name, such as the full title of the agreement establishing the trust;

(ii) Date the trust instrument was executed;

(iii) Unique identifying number, if any, consisting of:

(A) IRS TIN; or

(B) Where an IRS TIN has not been issued, a tax identification number issued by a foreign jurisdiction and the name of such jurisdiction;

(iv) For each individual who is a trustee of the trust:

(A) Full legal name;

(B) Current residential street address; and

(C) Unique identifying number consisting of:

(*1*) An IRS TIN; or

(*2*) Where an IRS TIN has not been issued:

(*i*) A tax identification number issued by a foreign jurisdiction and the name of such jurisdiction; or

(*ii*) The unique identifying number and the issuing jurisdiction from a non-expired passport issued by a foreign government; and

(v) For each legal entity that is a trustee of the trust:

(A) Full legal name;

(B) Trade name or "doing business as" name, if any;

(C) Complete current address consisting of:

(*1*) The street address that is the legal entity's principal place of business; and

(*2*) If the principal place of business is not in the United States, the street address of the primary location in the United States where the legal entity conducts business, if any; and

(D) Unique identifying number consisting of:

(*1*) An IRS TIN;

(*2*) In the case that the legal entity has not been issued an IRS TIN, a tax identification number issued by a foreign jurisdiction and the name of such jurisdiction; or

(*3*) In the case that the legal entity has not been issued an IRS TIN or a foreign tax identification number, an entity registration number issued by a foreign jurisdiction and the name of such jurisdiction.

(g) *Information concerning the residential real property.* The reporting person shall report the street address, if any, and the legal description, such as the section, lot, and block, of each residential real property that is the subject of the reportable transfer.

(h) *Information concerning payments.* (1) The reporting person shall report the following information concerning each payment, other than a payment disbursed from an escrow or trust account held by a transferee entity or transferee trust, that is made by or on behalf of the transferee entity or transferee trust regarding a reportable transfer:

(i) The amount of the payment, consisting of the total consideration paid by the transferee entity or transferee trust;

(ii) The method by which the payment was made;

(iii) If the payment was paid from an account held at a financial institution, the name of the financial institution and the account number; and

(iv) The name of the payor on any wire, check, or other type of payment if the payor is not the transferee entity or transferee trust.

(2) The reporting person shall report the total consideration paid or to be paid by all transferees regarding the reportable transfer.

(i) *Information concerning hard money, private, and other similar loans.* The reporting person shall report whether the reportable transfer involved credit extended by a person that is not a financial institution with an obligation to maintain an anti-money laundering program and an obligation to report suspicious transactions under this chapter.

(j) *Definitions.* For purposes of this section, the following terms have the following meanings.

(1) *Beneficial owner*—(i) *Beneficial owners of transferee entities.* (A) The beneficial owners of a transferee entity are the individuals who would be the beneficial owners of the transferee entity on the date of closing if the transferee entity were a reporting

company under 31 CFR 1010.380(d) on the date of closing.

(B) The beneficial owners of a transferee entity that is established as a non-profit corporation or similar entity, regardless of jurisdiction of formation, are limited to individuals who exercise substantial control over the entity, as defined in 31 CFR 1010.380(d)(1) on the date of closing.

(ii) *Beneficial owners of transferee trusts.* The beneficial owners of a transferee trust are the individuals who fall into one or more of the following categories on the date of closing:

(A) A trustee of the transferee trust.

(B) An individual other than a trustee with the authority to dispose of transferee trust assets.

(C) A beneficiary who is the sole permissible recipient of income and principal from the transferee trust or who has the right to demand a distribution of, or withdraw, substantially all of the assets from the transferee trust.

(D) A grantor or settlor who has the right to revoke the transferee trust or otherwise withdraw the assets of the transferee trust.

(E) A beneficial owner of any legal entity that holds at least one of the positions in the transferee trust described in paragraphs (j)(1)(ii)(A) through (D) of this section, except when the legal entity meets the criteria set forth in paragraphs (j)(10)(ii)(A) through (P) of this section. Beneficial ownership of any such legal entity is determined under 31 CFR 1010.380(d), utilizing the criteria for beneficial owners of a reporting company.

(F) A beneficial owner of any trust that holds at least one of the positions in the transferee trust described in paragraphs (j)(1)(ii)(A) through (D) of this section, except when the trust meets the criteria set forth in paragraphs (j)(11)(ii)(A) through (D). Beneficial ownership of any such trust is determined under this paragraph (j)(1)(ii)(F), utilizing the criteria for beneficial owners of a transferee trust.

(2) *Closing or settlement agent.* The term "closing or settlement agent" means any person, whether or not acting as an agent for a title agent or company, a licensed attorney, real estate broker, or real estate salesperson, who for another and with or without a commission, fee, or other valuable consideration and with or without the intention or expectation of receiving a commission, fee, or other valuable consideration, directly or indirectly, provides closing or settlement services incident to the transfer of residential real property.

(3) *Closing or settlement statement.* The term "closing or settlement statement" means the statement of receipts and disbursements for a transfer of residential real property.

(4) *Date of closing.* The term "date of closing" means the date on which the transferee entity or transferee trust receives an ownership interest in residential real property.

(5) *Ownership interest.* The term "ownership interest" means the rights held in residential real property that are demonstrated:

(i) Through a deed, for a reportable transfer described in paragraph (b)(1)(i) or (ii) of this section; or

(ii) Through stock, shares, membership, certificate, or other contractual agreement evidencing ownership, for a reportable transfer described in paragraph (b)(1)(iii) of this section.

(6) *Recordation office.* The term "recordation office" means any State, local, or Tribal office for the recording of reportable transfers as a matter of public record.

(7) *Residential real property.* The term "residential real property" means:

(i) Real property located in the United States containing a structure designed principally for occupancy by one to four families;

(ii) Vacant or unimproved land located in the United States zoned, or for which a permit has been issued, for the construction of a structure designed principally for occupancy by one to four families; or

(iii) Shares in a cooperative housing corporation.

(8) *Signing individual.* The term "signing individual" means each individual who signed documents on behalf of the transferee as part of the reportable transfer. However, it does not include any individual who signed documents as part of their employment with a financial institution that has both an obligation to maintain an anti-money laundering program and an obligation to report suspicious transactions under this chapter.

(9) *Statutory trust.* The term "statutory trust" means any trust created or authorized under the Uniform Statutory Trust Entity Act or as enacted by a State. For the purposes of this subpart, statutory trusts are transferee entities.

(10) *Transferee entity.* (i) Except as set forth in paragraph (j)(10)(ii) of this section, the term "transferee entity" means any person other than a transferee trust or an individual.

(ii) A transferee entity does not include:

(A) A securities reporting issuer defined in 31 CFR 1010.380(c)(2)(i);

(B) A governmental authority defined in 31 CFR 1010.380(c)(2)(ii);

(C) A bank defined in 31 CFR 1010.380(c)(2)(iii);

(D) A credit union defined in 31 CFR 1010.380(c)(2)(iv);

(E) A depository institution holding company defined in 31 CFR 1010.380(c)(2)(v);

(F) A money service business defined in 31 CFR 1010.380(c)(2)(vi);

(G) A broker or dealer in securities defined in 31 CFR 1010.380(c)(2)(vii);

(H) A securities exchange or clearing agency defined in 31 CFR 1010.380(c)(2)(viii);

(I) Any other Exchange Act registered entity defined in 31 CFR 1010.380(c)(2)(ix);

(J) An insurance company defined in 31 CFR 1010.380(c)(2)(xii);

(K) A State-licensed insurance producer defined in 31 CFR 1010.380(c)(2)(xiii);

(L) A Commodity Exchange Act registered entity defined in 31 CFR 1010.380(c)(2)(xiv);

(M) A public utility defined in 31 CFR 1010.380(c)(2)(xvi);

(N) A financial market utility defined in 31 CFR 1010.380(c)(2)(xvii);

(O) An investment company as defined in section 3(a) of the Investment Company Act of 1940 (15 U.S.C. 80a–3(a)) that is registered with the Securities and Exchange Commission (SEC) under section 8 of the Investment Company Act (15 U.S.C. 80a–8); and

(P) Any legal entity whose ownership interests are controlled or wholly owned, directly or indirectly, by an entity described in paragraphs (j)(10)(ii)(A) through (O) of this section.

(11) *Transferee trust.* (i) Except as set forth in paragraph (j)(11)(ii) of this section, the term "transferee trust" means any legal arrangement created when a person (generally known as a settlor or grantor) places assets under the control of a trustee for the benefit of one or more persons (each generally known as a beneficiary) or for a specified purpose, as well as any legal arrangement similar in structure or function to the above, whether formed under the laws of the United States or a foreign jurisdiction. A trust is deemed to be a transferee trust regardless of whether residential real property is titled in the name of the trust itself or in the name of the trustee in the trustee's capacity as the trustee of the trust.

(ii) A transferee trust does not include:

(A) A trust that is a securities reporting issuer defined in 31 CFR 1010.380(c)(2)(i);

(B) A trust in which the trustee is a securities reporting issuer defined in 31 CFR 1010.380(c)(2)(i);

(C) A statutory trust; or

(D) An entity wholly owned by a trust described in paragraphs (j)(11)(ii)(A) through (C) of this section.

(k) *Filing procedures*—(1) *What to file.* A reportable transfer shall be reported by completing a Real Estate Report and collecting and maintaining supporting documentation as required by this section.

(2) *Where to file.* The Real Estate Report shall be filed electronically with FinCEN, as indicated in the instructions to the report.

(3) *When to file.* A reporting person is required to file a Real Estate Report no later than 30 calendar days after the date of closing.

(l) *Retention of records.* A reporting person shall maintain a copy of any Real Estate Report filed by the reporting person and a copy of any certification described in paragraph (e)(3) of this section. In addition, all parties to a designation agreement described in paragraph (c)(3) of this section shall maintain a copy of such designation agreement.

(m) *Exemptions*—(1) *Confidentiality.* Reporting persons, and any director, officer, employee, or agent of such persons, and Federal, State, local, or Tribal government authorities, are exempt from the confidentiality provision in 31 U.S.C. 5318(g)(2) that prohibits the disclosure to any person involved in a suspicious transaction that the transaction has been reported or any information that otherwise would reveal that the transaction has been reported.

(2) *Anti-money laundering program.* A reporting person under this section is exempt from the requirement to establish an anti-money laundering program, in accordance with 31 CFR 1010.205(b)(1)(v). However, as provided in 31 CFR 1010.205(c), no such exemption applies for a financial institution that is otherwise required to establish an anti-money laundering program by this chapter.

§ 1031.321 [Reserved]

Andrea M. Gacki,

Director, Financial Crimes Enforcement Network.

[FR Doc. 2024–02565 Filed 2–7–24; 8:45 am]

BILLING CODE 4810–02–P

EXHIBIT 2A

Guardianship, Conservatorship & End of Life Committee

Committee Report

To: CSP c/o Melisa Mysliwiec

Cc: Members of the Guardianship, Conservatorship & End of Life Committee; James Spica, and Katie Lynwood

From: Sandra Glazier

Re: Death with Dignity Proposed Legislation/SB 678, 680 and 681

Date: March 9, 2024

The Guardianship, Conservatorship & End of Life Committee met on February 27, 2024 to analyze and discuss SB 678, 680 and 681.

Present for the zoom meeting were:

> Hon. Milton Mack, Hon. Michael McClory, Hon. Avery Rose, Rick Mills, Kathleen Goetsch, Georgette David, James Steward, Elizabeth Graziano and Sandy Glazier

The discussion focused on SB 681, which is at the core of the proposed legislation, and is tie barred to SB 678 and 680.

A question was raised as to whether the legislation goes against the core principles of the Hippocratic Oath that physicians take and how the medical community might feel about the bills. It was pointed out that 1 in 5 states have assisted suicide, and this legislation would move the pendulum in Michigan from the contemplated actions resulting in a potential charge of felony murder to acceptable medical care.

While the modern Hippocratic oath no longer proscribes the historical language that "[w]ith regard to healing the sick, I will devise and order for them the best diet, according to my judgment and means; and I will take care that they suffer no hurt or damage**. Nor shall any man's entreaty prevail upon me to administer poison to anyone; neither will I counsel any man to do so**" (emphasis added), the modern oath provides that

> I swear to fulfill, to the best of my ability and judgment, this covenant:
>
> I will respect the hard-won scientific gains of those physicians in whose steps I walk, and gladly share such knowledge as is mine with those who are to follow.
>
> I will apply, for the benefit of the sick, all measures [that] are required, avoiding those twin traps of overtreatment and therapeutic nihilism.
>
> I will remember that there is art to medicine as well as science, and that warmth, sympathy, and understanding may outweigh the surgeon's knife or the chemist's drug.
>
> I will not be ashamed to say "I know not," nor will I fail to call in my colleagues when the skills of another are needed for a patient's recovery.
>
> I will respect the privacy of my patients, for their problems are not disclosed to me that the world may know.

Most especially must I tread with care in matters of life and death. If it is given me to save a life, all thanks. But it may also be within my power to take a life; this awesome responsibility must be faced with great humbleness and awareness of my own frailty.

Above all, I must not play at God.

I will remember that I do not treat a fever chart, a cancerous growth, but a sick human being, whose illness may affect the person's family and economic stability. My responsibility includes these related problems, if I am to care adequately for the sick.

I will prevent disease whenever I can, for prevention is preferable to cure.

I will remember that I remain a member of society, with special obligations to all my fellow human beings, those sound of mind and body as well as the infirm.

If I do not violate this oath, may I enjoy life and art, respected while I live and remembered with affection thereafter.

May I always act so as to preserve the finest traditions of my calling and may I long experience the joy of healing those who seek my help."

Concern was raised about the difficulty in evaluating the potential impact and effect of the proposed legislation without having input from the medical community about the type of drugs that might be administered and their potential effects.

The bills present issues that caused some moral and religious concerns for various members of the committee (and likely some members of the population at large).

The general consensus appeared to be that while most of the members would not choose to take advantage of an opportunity to proactively hasten the moment of their death (other than perhaps to have pain medications mercifully administered under a hospice pain management arrangement) they would not wish to super-impose their own convictions on others. Regardless, many expressed concerned that the very individuals who would likely qualify for the ability to take affirmative action to terminate their lives due to a terminal illness would also likely be vulnerable to undue influence. Concern was raised as to whether the proposed legislation provides adequate protections against nefarious people who may be close to individual's and might attempt to impose their will upon individual's already struggling with their mortality and medical conditions and whether there could ever be fashioned sufficient oversights to protect against such an occurrence when the result of any such undue influence would be death.

All agreed it would be helpful to have a seat at the table to discuss these issues, as they represent an important policy shift from treating the provision of life ending medication as a felony (e.g. Kevorkian was convicted of 2nd degree murder for doing so) to a socially and medically accepted practice.

If the legislation were to move forward, members expressed a desire for certain additional protections to be implemented. They included the following:

- Carve outs like those created for abortion, to address professionals who might be opposed to the concept. While some language is contained in the bill, time did not permit a comparison against the language contained in other Michigan statutes. The suggestion was made to review

the language in those statutes to make sure they were consistent with the language contained in this legislative proposal.

- There may be some benefit to providing input on the legislation because we, as estate planners, don't have a vested interest in the outcome and thereby make sure any legislation if passed drafted in a way that provides sufficient operative protections given the potential implications (death and actions that may conflict with moral and religious beliefs).
- It appears that the application of the legislation would be limited, but nonetheless it would be helpful to clearly identify that guardians and agents could not make the decision to engage in assisted suicide of the principal.
- Since the reality of the legislation would be to legalize suicide (while the legislation indicates that taking action under the legislation would not be considered suicide, suicide is defined as the action of killing oneself intentionally, which is exactly what the legislation envisions), many participating in the discussion indicated that taking a medication with the intention of ending one's own life is suicide by definition.
- While all who participated could envision scenarios where someone might wish to end their own suffering, there was a consensus of concern that others who might inherit or wish to lighten their own load for selfish reasons might unduly influence an already vulnerable individual to seek medical assistance in ending their own life.
- Concerns were also expressed about the ability of a religious medical association to be able to sanction employees or doctors associated with the hospital or organization if taking such actions envisioned under the legislation went against the moral code and parameters of association expected of physicians at such hospitals or organizations. Many felt that such institutions should be able to sanction or remove affiliation of a physician even if they took action outside of the institution or organization (e.g. a doctor who had privileges at a Catholic clinic or hospital and also had their own practice) such as being able to terminate a doctor's affiliation if those actions were taken in contravention of the institutions precepts and conditions of affiliation). Others felt otherwise. No consensus of opinion existed with regard to this issue.
- Concern was also expressed about how lines might be blurred between assisted suicide and letting nature take its course – it can be a slippery slope, especially since many with terminal illness become depressed and may in turn develop mental health conditions as a result of their terminal physical health issues.
- Also, concerns were raised about who would be the person identified in the legislation when a person was in a long term care facility. There were many unanswered questions in this regard and questions about the appropriateness of someone affiliated with the care facility providing such input, when they are generally not even allowed to act as a witness to execution of a designation of patient advocate.
- Further, concerns were also raised that this legislation only act as a leg (as opposed to a replacement) of other end of life options and planning currently available in Michigan. Perhaps this should be expressly set forth in the legislation.
- As it relates to attorneys, because they are often consulted in their role as counselors at law about end of life options, it would be important to include protections for attorneys and other professionals who might be unwilling to even inform a client of this option when it goes against their moral or religious compass.

- Questions were raised as to whether only the patient could administer the drug to themself and what if that patient couldn't because of physical limitations – who then could administer without liability? Should administration at least be under some form of supervision?
- It was felt that the language about the manner of communications by the patient could be clearer.
- Section 19(d) only applies to a prohibition against civil and criminal liability and professional discipline for participating in the physician-assisted suicide envisioned under the statute. It is believed that there should also be a specific prohibition against such liabilities being imposed for refusing to participate in physician-assisted suicide.
- Many felt they could not recommend supporting the legislation without more information.

In searching the web, we were able to locate an advocacy cite https://deathwithdignity.org. Members questioned whether this organization was the impetus for the legislative proposal. Some thought it would be helpful to understand how this legislation compares to similar legislation enacted in other states and how it is working in those states.

Recommendation: Given the potential implications of the proposed legislation, we believe time should be devoted to further exploring and discussing this issue during CSP and the committee respectfully requests the opportunity to do so at the next meeting in March.

EXHIBIT 2B

Guardianship, Conservatorship & End of Life Committee

SB 681

SENATE BILL NO. 681

November 09, 2023, Introduced by Senators CAVANAGH, HERTEL, KLINEFELT, SINGH, MOSS, GEISS, CHANG, POLEHANKI, MCCANN, IRWIN, BAYER and WOJNO and referred to the Committee on Health Policy.

A bill to regulate physician assistance for patient-requested life-ending medication; to require safeguards for determining that a patient is qualified to receive life-ending medication; to require documentation and reporting; to specify certain legal consequences regarding insurance; to provide for civil and criminal immunity and freedom from professional sanctions for persons acting in conformity with this act; to provide for penalties and sanctions for violations of this act; and to repeal acts and parts of acts.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Sec. 1. This act may be cited as the "death with dignity act".

Sec. 2. As used in this act:

(a) "Adult" means an individual who is 18 years of age or older.

(b) "Attending physician" means the physician who has primary responsibility for the care of a patient and treatment of the patient's terminal disease.

(c) "Capable" means that, in the opinion of a court or in the opinion of a patient's attending physician or consulting physician, psychiatrist, or psychologist, the patient has the ability to make and communicate health care decisions to health care providers, including communication through individuals familiar with the patient's manner of communicating if those individuals are available.

(d) "Consulting physician" means a physician who is qualified by specialty or experience to make a professional diagnosis and prognosis regarding a patient's terminal disease.

(e) "Counseling" means 1 or more consultations as necessary between a psychiatrist or psychologist and a patient for the purpose of determining that the patient is capable and not suffering from a psychiatric or psychological disorder or depression causing impaired judgment.

(f) "Health care provider" means a person licensed, registered, or otherwise authorized or permitted by the law of this state to administer health care or dispense medication in the ordinary course of business or practice of a profession, and includes a health care facility.

(g) "Informed decision" means a decision by a qualified patient to request and obtain a prescription for medication to end

the qualified patient's life in a humane and dignified manner, that is based on an appreciation of the relevant facts and is made after being fully informed of information as provided in section 5.

(h) "Medically confirmed" means the medical opinion of the attending physician has been confirmed by a consulting physician who has examined the patient and the patient's relevant medical records.

(i) "Patient" means an adult who is under the care of a physician.

(j) "Physician" means that term as defined in section 17001 or 17501 of the public health code, 1978 PA 368, MCL 333.17001 and 333.17501.

(k) "Psychiatrist" means 1 or more of the following:

(*i*) A physician who has completed a residency program in psychiatry approved by the Accreditation Council for Graduate Medical Education or the American Osteopathic Association, or who has completed 12 months of psychiatric rotation.

(*ii*) A physician who devotes a substantial portion of the physician's time to the practice of psychiatry.

(*l*) "Psychologist" means that term as defined in section 18201 of the public health code, 1978 PA 368, MCL 333.18201.

(m) "Qualified patient" means an adult who has satisfied the requirements of this act to obtain a prescription for medication to end the adult's life in a humane and dignified manner.

(n) "Terminal disease" means an incurable and irreversible disease or progressive pathological condition that has been medically confirmed and will, within reasonable medical judgment, produce death within 6 months.

Sec. 3. (1) A patient who is capable, has been determined by

the attending physician and consulting physician to be suffering from a terminal disease, and has voluntarily expressed the wish to die may make a written request for medication for the purpose of ending the patient's life in a humane and dignified manner in accordance with this act.

(2) An individual is not qualified to make a request for medication under this act solely because of age or disability.

Sec. 4. (1) A written request for medication under this act must comply with section 22, be signed and dated by the patient, and, subject to subsections (2) and (3), be witnessed by 2 or more individuals who, in the presence of the patient, attest that to the best of their knowledge and belief the patient is capable, acting voluntarily, and not being coerced to sign the request.

(2) One of the witnesses must be an individual who, at the time the request is signed, is not any of the following:

(a) A relative of the patient by blood, marriage, or adoption.

(b) An individual who would be entitled to a portion of the estate of the qualified patient upon the qualified patient's death under a will or by operation of law.

(c) An owner, operator, or employee of a health care facility where the qualified patient is receiving medical treatment or is a resident.

(d) The patient's attending physician.

(3) If the patient is in a long-term care facility at the time the written request is made, 1 of the witnesses must be an individual designated by the long-term care facility who has the qualifications specified by the department of health and human services by rule. The department of health and human services shall promulgate rules under the administrative procedures act of 1969,

1969 PA 306, MCL 24.201 to 24.328, to implement this subsection.

Sec. 5. The attending physician shall do all of the following:

(a) Make the initial determination of whether the patient has a terminal disease, is capable, and has made the request for medication to end the patient's life voluntarily.

(b) To ensure that the patient is making an informed decision, inform the patient of all of the following:

(*i*) The patient's medical diagnosis.

(*ii*) The patient's prognosis.

(*iii*) The potential risks associated with taking the medication to be prescribed.

(*iv*) The probable result of taking the medication to be prescribed.

(*v*) The feasible alternatives, including, but not limited to, comfort care, hospice care, and pain control.

(c) Refer the patient to a consulting physician for medical confirmation of the diagnosis and for a determination that the patient is capable and acting voluntarily.

(d) Refer the patient for counseling, if appropriate, under section 7.

(e) Recommend that the patient notify the patient's next of kin.

(f) Inform the patient about the importance of having another individual present when the patient takes the medication prescribed under this act and of not taking the medication in a public place.

(g) Inform the patient that he or she may rescind the request for medication at any time and in any manner, and again inform the patient of the opportunity to rescind the request at the end of the waiting period described in section 10.

(h) Immediately before writing the prescription for medication under this act, verify that the patient is making an informed decision.

(i) Fulfill the medical record documentation requirements of section 13.

(j) Ensure that all appropriate steps are carried out in accordance with this act before writing a prescription for medication to enable the qualified patient to end the qualified patient's life in a humane and dignified manner.

Sec. 6. A patient is not qualified to make a request for medication under this act until a consulting physician has done both of the following:

(a) Examined the patient and the patient's relevant medical records and confirmed, in writing, the attending physician's diagnosis that the patient is suffering from a terminal disease.

(b) Verified that the patient is capable, is acting voluntarily, and has made an informed decision.

Sec. 7. If, in the opinion of the attending physician or the consulting physician, a patient may be suffering from a psychiatric or psychological disorder or depression that causes impaired judgment, the attending physician or consulting physician shall refer the patient for counseling. After referral, a physician shall not prescribe medication to end the patient's life in a humane and dignified manner under this act until the psychiatrist or psychologist who is performing the counseling determines that the patient is not suffering from a psychiatric or psychological disorder or depression causing impaired judgment.

Sec. 8. An attending physician shall not prescribe medication to end a patient's life in a humane and dignified manner unless the

patient has made an informed decision. Immediately before writing a prescription for medication under this act, the attending physician shall verify that the patient is making an informed decision.

Sec. 9. The attending physician shall recommend that the patient notify next of kin of the patient's request for medication under this act. The attending physician shall not deny a request for medication because the patient declines or is unable to notify the patient's next of kin.

Sec. 10. For a qualified patient to receive a prescription for medication to end the qualified patient's life in a humane and dignified manner, the qualified patient shall make both an oral request and a written request as described in section 4, and shall reiterate the oral request to the qualified patient's attending physician not less than 15 days after making the initial oral request. At the time the qualified patient makes the second oral request, the attending physician shall offer the qualified patient an opportunity to rescind the request.

Sec. 11. A patient may rescind the patient's request at any time and in any manner without regard to the patient's mental state. The attending physician shall not prescribe medication under this act unless the physician has offered the qualified patient an opportunity to rescind the request.

Sec. 12. An attending physician shall not write a prescription for medication under this act until 15 days or more after the patient's initial oral request and 48 hours or more after the patient's written request described in section 4.

Sec. 13. All of the following must be documented or filed in a patient's medical record:

(a) Each oral request by the patient for medication to end the

patient's life in a humane and dignified manner.

(b) Each written request as described in section 4 by the patient for medication to end the patient's life in a humane and dignified manner.

(c) The attending physician's diagnosis; prognosis; and determination that the patient is capable, is acting voluntarily, and has made an informed decision.

(d) The consulting physician's diagnosis and prognosis, and the consulting physician's verification that the patient is capable, is acting voluntarily, and has made an informed decision.

(e) A report of the outcome and determinations made during counseling, if performed.

(f) The attending physician's offer to the patient to rescind the patient's request at the time of the patient's second oral request as required under section 10.

(g) A note by the attending physician indicating that all of the requirements of this act have been met and indicating the steps taken to carry out the request, including a notation of the medication prescribed.

Sec. 15. (1) The department of health and human services shall annually review a sample of records maintained under this act. The department of health and human services shall require a health care provider that dispenses medication under this act to file a copy of the dispensing record with the department.

(2) The department of health and human services shall promulgate rules under the administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328, to facilitate collecting information regarding compliance with this act. The information collected is privileged; is exempt from disclosure under the

freedom of information act, 1976 PA 442, MCL 15.231 to 15.246; and is not available for inspection by the public.

(3) The department of health and human services shall generate and make available to the public an annual statistical report of information collected under subsection (2) that does not disclose identifying information.

Sec. 16. (1) A provision in a contract, will, or other agreement, whether written or oral, is not valid to the extent it would affect whether an individual may make or rescind a request for medication to end the individual's life in a humane and dignified manner under this act.

(2) An obligation owed under any existing contract must not be conditioned on or affected by an individual's request or rescission of a request for medication to end the individual's life in a humane and dignified manner under this act.

Sec. 17. The sale, procurement, or issuance of a life, health, or accident insurance or annuity policy or the rate charged for a policy must not be conditioned on or affected by the individual's making or rescinding a request for medication to end the individual's life in a humane and dignified manner under this act. A qualified patient's act of ingesting medication to end the qualified patient's life in a humane and dignified manner must not have any effect on a life, health, or accident insurance or annuity policy.

Sec. 18. This act does not authorize a physician or any other person to end a patient's life by lethal injection, mercy killing, or active euthanasia. Actions taken in accordance with this act do not, for any purpose, constitute suicide, assisted suicide, mercy killing, or homicide under the law.

Sec. 19. (1) Except as otherwise provided in this section and section 20, all of the following apply to actions taken in accordance with this act:

(a) A person is not subject to civil or criminal liability or professional disciplinary action for participating in good-faith compliance with this act. This includes being present when a qualified patient takes the medication prescribed under this act to end the qualified patient's life in a humane and dignified manner.

(b) A professional organization or association or a health care provider shall not subject a person to censure, discipline, suspension, loss of license, loss of privileges, loss of membership, or other penalty for refusing to participate in this act or for participating in good-faith compliance with this act.

(c) A request by a patient for, or an attending physician's provision of, medication in good-faith compliance with this act is not neglect for any purpose of law and does not, in itself, constitute sufficient basis for the appointment of a guardian or conservator.

(d) A health care provider is not under a duty, whether by contract, statute, or other legal requirement, to participate in providing a qualified patient with medication to end the qualified patient's life in a humane and dignified manner. If a health care provider is unable or unwilling to carry out a patient's request under this act and the patient transfers the patient's care to a new health care provider, the prior health care provider shall transfer, on request, a copy of the patient's relevant medical records to the new health care provider.

(2) Notwithstanding any other provision of law, a health care provider may prohibit another health care provider from

participating in this act on the premises of the prohibiting provider if the prohibiting provider has notified the health care provider of the prohibiting provider's policy regarding participating in this act. This section does not prevent a health care provider from providing health care services to a patient that do not constitute participation in this act. Notwithstanding subsection (1), a health care provider that has given notice that it prohibits participation in this act may subject another health care provider that participates in this act after that notification to any of the following sanctions:

(a) Loss of privileges, loss of membership, or other sanction provided under the medical staff bylaws, policies, and procedures of the sanctioning health care provider, if the sanctioned health care provider is a member of the sanctioning health care provider's medical staff and participates in this act while on the premises of the health care facility of the sanctioning health care provider. However, this subdivision does not apply to a health care provider that participates in this act at the private medical office of a physician or other provider.

(b) Termination of a lease, other property contract, or other nonmonetary remedies provided by a lease contract, not including loss or restriction of medical staff privileges or exclusion from a provider panel, if the sanctioned health care provider participates in this act while on the premises of the sanctioning health care provider or on property that is owned by or under the direct control of the sanctioning health care provider.

(c) Termination of contract or other nonmonetary remedies provided by contract if the sanctioned health care provider participates in this act while acting in the course and scope of

the sanctioned health care provider's capacity as an employee or independent contractor of the sanctioning health care provider.

(3) Subsection (2) does not prevent or allow sanctions for either of the following:

(a) Participation in this act while acting outside the course and scope of the health care provider's capacity as an employee or independent contractor.

(b) An attending physician's or consulting physician's contract with the attending physician's or consulting physician's patient to act outside the course and scope of the attending physician's or consulting physician's capacity as an employee or independent contractor of the sanctioning health care provider.

(4) A health care provider that imposes sanctions under subsection (2) shall follow all due process and other policies and procedures that the sanctioning health care provider has adopted that are related to the imposition of sanctions on another health care provider.

(5) Suspension or termination of staff membership or privileges under subsection (2) is not reportable for purposes of qualification for licensure under article 15 of the public health code, 1978 PA 368, MCL 333.16101 to 333.18838. Action taken in accordance with section 4, 5, 6, or 7 is not grounds for investigation or discipline under section 16221 of the public health code, 1978 PA 368, MCL 333.16221.

(6) This act does not allow a lower standard of care for patients in the community where the patient is treated or in a similar community.

(7) As used in this section:

(a) "Notify" means a separate statement in writing to the

health care provider specifically informing the health care provider before the health care provider participates in this act of the sanctioning health care provider's policy about participating in an activity that is covered by this act.

(b) "Participate in this act" means to perform the duties of an attending physician in section 5, the consulting physician function in section 6, or the counseling function in section 7, but does not include any of the following:

(*i*) Making an initial determination that a patient has a terminal disease and informing the patient of the medical prognosis.

(*ii*) Providing information about this act to a patient on the request of the patient.

(*iii*) Providing a patient, on the request of the patient, with a referral to another physician.

(*iv*) An attending physician's or consulting physician's contracting with the attending physician's or consulting physician's patient to act outside of the course and scope of the attending physician's or consulting physician's capacity as an employee or independent contractor of a health care provider.

Sec. 20. (1) A person who without authorization of the patient willfully alters or forges a request for medication under this act or conceals or destroys a rescission of that request with the intent or effect of causing the patient's death is guilty of a felony punishable by imprisonment for not more than 20 years or a fine of not more than $375,000.00, or both.

(2) A person who coerces or exerts undue influence on a patient to either request medication for the purpose of ending the patient's life under this act or destroy the patient's rescission

of a request for medication for the purpose of ending the patient's life is guilty of a felony punishable by imprisonment for not more than 20 years or a fine of not more than $375,000.00, or both.

(3) This act does not limit liability for civil damages resulting from negligent conduct or intentional misconduct by any person.

(4) The penalties in this act do not preclude criminal penalties applicable under other law for conduct that is inconsistent with this act.

Sec. 21. A governmental entity that incurs costs resulting from an individual terminating the individual's life under this act in a public place may recover those costs and reasonable and necessary attorney fees related to enforcing the claim from the estate of the individual.

Sec. 22. A written request for a medication as authorized by this act must be in substantially the following form:

REQUEST FOR MEDICATION TO END MY LIFE

IN A HUMANE AND DIGNIFIED MANNER

I, _____, am an adult of sound mind.

I am suffering from_____, which my attending physician has determined is a terminal disease and which has been medically confirmed by a consulting physician.

I have been fully informed of my diagnosis, the prognosis, the nature of medication to be prescribed and potential associated risks, the expected result, and the feasible alternatives, including comfort care, hospice care, and pain control.

I request that my attending physician prescribe medication that will end my life in a humane and dignified manner.

(INITIAL ONLY 1 OF THE FOLLOWING)

_____I have informed my family of my decision and taken their opinions into consideration.

_____I have decided not to inform my family of my decision.

_____I have no family to inform of my decision.

I understand that I have the right to rescind this request at any time.

I understand the full import of this request, and I expect to die when I take the medication to be prescribed. I further understand that although most deaths occur within 3 hours, my death may take longer and my physician has counseled me about this possibility.

I make this request voluntarily and without reservation, and I accept full moral responsibility for my actions.

Signed: _____ Dated: _____

DECLARATION OF WITNESSES

I declare all of the following:

(a) The individual is personally known to me or has provided proof of identity.

(b) The individual signed this request in my presence.

(c) The individual appears to be of sound mind and not under duress, fraud, or undue influence.

(d) The individual is not a patient for whom I am an attending physician.

_____Witness 1 Dated _____

_____Witness 2 Dated _____

NOTE: One of the witnesses must not be a relative (by blood, marriage, or adoption) of the individual signing this request, must not be entitled to any portion of the individual's estate upon death, and must not own, operate, or be employed at a health care

facility where the individual is a patient or resident. If the individual signing this request is an inpatient at a health care facility, one of the witnesses must be an individual designated by the health care facility.

Enacting section 1. The following acts and parts of acts are repealed:

(a) Section 329a of the Michigan penal code, 1931 PA 328, MCL 750.329a.

(b) 1992 PA 270, MCL 752.1021 to 752.1027.

Enacting section 2. This act takes effect 90 days after the date it is enacted into law.

Enacting section 3. This act does not take effect unless all of the following bills of the 102nd Legislature are enacted into law:

(a) Senate Bill No. 680.

(b) Senate Bill No. 678.

EXHIBIT 2C

Guardianship, Conservatorship & End of Life Committee

Guardians and DNRs - a Summary

1. *Patients at home or in the community:* A guardian cannot sign an "in home" DNR Order. These are special forms that are used only when a patient is NOT in a hospital or skilled nursing facility (for example, the patient is at home or in assisted living).

2. *Patients who are in the hospital or a skilled nursing facility:* If the patient's physician recommends a DNR order or withholding other life-sustaining care, a guardian may agree if:

   A. *Best interest test: A guardian can agree to* a DNR order or withholding other life-sustaining care if these are in the patient's "best interest" AND the patient is one of the following:

      i. The patient is an adult, was competent before the present illness, and is now either terminally ill; in a persistent vegetative state or other coma; is in unbearable incurable pain; or is in any similar condition; or

      ii. The patient is an adult who has never been competent, such as a low-functioning developmentally disabled individual; or

      iii. The patient is a minor. (If the patient is a "mature" minor, the minor's preferences should factor into the decision.)

   B. *Clear and Convincing Evidence Test:* For all other patients, a guardian may agree to a DNR order or agree to withhold any other life-sustaining treatment if there is "clear and convincing evidence" that this is what the patient would have wanted given the patient's present medical circumstances.

3. *How to determine "best interest":* The "best interest" of a patient balances the following factors:

A. Whether the ward ever expressed any view regarding life-sustaining treatment.

B. The wishes of the family.

C. An independent medical opinion.

D. The recommendation, if any, of a bioethics committee.

E. The chances of physical recovery.

F. The chances of mental recovery.

G. The likelihood of physical, psychological, or emotional injury as a result of providing or not providing treatment.

H. The likelihood and duration of survival without treatment.

I. The physical effects of prolonged treatment.

4. *How to determine "clear and convincing" evidence:* Evidence is evaluated on a case-by-case basis to determine if it is "clear and convincing." Important factors are:

A. How solemn and considered the statements are;

B. How long ago the statements were made;

C. Whether the statements apply to the patient's current medical condition or one that is substantially similar.

5. *No court order:* If the guardian follows the guidelines above, the guardian does not need court permission unless someone objects. If someone objects, the Court will hold a hearing.

EXHIBIT 2D

Guardianship, Conservatorship & End of Life Committee

Authority of Guardians to Make End of Life Decisions

THE AUTHORITY OF GUARDIANS TO MAKE

END OF LIFE DECISIONS

Judge Milton L. Mack, Jr.
Chief Judge Wayne County Probate Court
September 23, 2013

The issue of the authority of court-appointed guardians to refuse life-sustaining treatment is a fairly new issue in the law and is largely a function of the increase in the number and types of life-sustaining technologies that are now available in health care. Mouth-to-mouth ventilation and external cardiac massage was only introduced in the 1950s. Technology and longer life spans have dramatically increased the number of cases where the issue of using life-sustaining equipment is raised.

Cardiopulmonary resuscitation (CPR) was originally intended as a means to resuscitate otherwise healthy people whose heartbeat and/or breathing had failed. The literature suggests that the success of CPR led to a general presumption that CPR should be initiated without a formal order from a physician. This presumption then led to the question of whether the presumption should always be followed. It then became necessary to develop do-not-resuscitate (DNR) orders for patients who were not to receive CPR. Because the patient was not always competent to make this decision, this led to the question of whether someone else could make that decision.

The right of a competent patient to decline life-sustaining treatment is well established. Some courts base that right on the constitutional right to privacy while others, like Michigan, recognize it as a common-law right.

The difficult question is how to make end of life decisions when the patient lacks the capacity to make health care decisions.

The Karen Ann Quinlan case, decided by the New Jersey Supreme Court in 1976, was the first recorded case to address this question. That court expressly

recognized the authority of a guardian to discontinue life-sustaining treatment. Karen had collapsed and stopped breathing. She was taken to the hospital where she lapsed into a persistent vegetative state. She was placed on a ventilator for several months. Her parents asked the hospital to discontinue active care but the hospital refused and the legal battle began. Once the Supreme Court ruled in favor of the guardian, Karen was removed from the ventilator. Curiously, the removal of the ventilator did not end her life. She continued to live in a persistent vegetative state until her death from pneumonia, nearly 10 years later, in 1985.

The New Jersey Supreme Court held that the guardian was permitted to render his best judgment as to what Karen would have wanted done. The Court's view was that, whatever that decision was, it should be honored. The court held that the state's interest in preserving life weakens while the individual's right to privacy grows as the degree of bodily invasion grows and the prognosis dims. The Court felt that her right to privacy should not be lost because of her incapacity that prevented her from exercising choice. Following the Quinlan decision, many states enacted statutes to define the authority of a third party to consent to a DNR order.

In Michigan, the authority of guardians to make end of life decisions is not always clear. The relevant statutes give different guidance to different surrogate decision makers. For example, the Estates and Protected Individuals Code (EPIC) provides little explicit guidance for guardians in making these decisions while providing more explicit guidance to patient advocates.

I will try to bring some clarity to the question by examining the leading Michigan cases on the topic as well as Michigan's Do-Not-Resuscitate Act, the Dignified Death Act and the frequently cited Michigan Attorney General's opinion relative to the authority of a guardian to sign a DNR order on behalf of a developmentally disabled adult.

Before I do that, let me summarize my opinion as to the authority of guardians of legally incapacitated adults to make end of life decisions, since this is the most common issue. I will address minors and persons with developmental disabilities later.

First, I believe guardians have the authority to consent to DNR orders based on the common law and the saving language in the DNR Act which states that the Act is cumulative and does not impair the legal right of a guardian to refuse medical treatment. However, with that authority comes responsibility. The guardian's letters of authority are like a driver's license which gives a person the right to drive, but not the right to run a red light.

Second, I do not think a court order is required. If a guardian consults with the treatment team and it is agreed that a DNR order is appropriate and no one objects, court involvement should not be necessary.

Third, in the event of an objection by anyone, a hearing will be held and a decision made as to whether the guardian will be prevented from consenting to a DNR order.

Fourth, at the hearing, the court would first determine whether there is an advance directive, or, using what is called the subjective test, determine what the individual would have wanted based on previously expressed views. The evidentiary standard would be clear and convincing evidence to permit the guardian to consent to a DNR order.

Fifth, and finally, if the substituted judgment test fails to support the issuance of a DNR order, the court could then move to the objective or best interest's analysis for limited types of cases. The *Martin*[1] case, which I will discuss later, acknowledges that the objective analysis test may be appropriate if a person is terminally ill, permanently unconscious, in a persistent vegetative state or in great uncontrollable pain. It is doubtful that *Martin* would permit the use of the objective or best interest test if the patient is conscious and was formerly competent. However, I believe *Martin* would permit the use of this substituted judgment test for the patient who was never competent.

[1] *Martin v Martin (In re Martin),* 450 Mich 204, 538 NW2d 399 (1995), *cert denied* 516 US 1113 (1996).

EPIC

So, how did I arrive at these conclusions? Let's start with EPIC. When it comes to patient advocates, EPIC provides explicit guidance. It provides that:

> A patient advocate may make a decision to withhold or withdraw treatment that would allow a patient to die only if the patient has expressed in a clear and convincing manner that the patient advocate is authorized to make such a decision, and that the patient acknowledges that such a decision could or would allow the patient's death.[2]

It is not necessary that the patient be terminally ill, permanently unconscious, in a permanent vegetative state or in great uncontrollable pain to empower the patient advocate. All that is required for the patient advocate to withhold or withdraw treatment is the written consent of the patient as expressed in the patient advocate designation.

On the other hand, guidance for guardians is limited to this: "the guardian must make provision for the ward's care, comfort, and maintenance" … and "…secure services to restore the ward to the best possible state of mental and physical well-being so that the ward can return to self-management at the earliest possible time."[3] Also, "A guardian may give the consent or approval that is necessary to enable the ward to receive medical or other professional care, counsel, treatment, or service."[4] It can be argued that implicit in the use of the word "may" give consent is the discretion to decline to give consent. The Supreme Court in *Martin* explicitly found that a necessary corollary of the common-law right to informed consent is the right not to consent.

[2] MCL 700.5509(1)(e).
[3] MCL 700.5314(b).
[4] MCL 700.5314(c).

Do-Not-Resuscitate Act

The DNR Act provides express authority for a patient advocate to sign a DNR order.[5] Guardians are omitted. However, the DNR Act only applies to documents that take effect in the event a patient suffers cessation of both spontaneous respiration and circulation in a setting outside of a hospital, a nursing home, or a mental health facility owned or operated by the department of community health.[6] The DNR order is not effective in these facilities. The purpose of these community DNR orders was to protect emergency personnel from lawsuits.

While the DNR Act does not give express authority to a guardian to sign that type of DNR order, the savings clause of the Act provides that: "The provisions of this act are cumulative and do not impair or supersede a legal right that a … guardian … may have to consent to or refuse medical treatment."[7] It can be argued that the legislature is acknowledging the authority of guardians to refuse treatment that may lead to death.

Michigan Dignified Death Act

In contrast, the Michigan Dignified Death Act[8] provides explicit authority to guardians to withhold certain medical treatment in cases involving "advanced illness"[9], including, but not limited to, palliative care or a procedure, medication, surgery, a diagnostic test or a hospice plan of care that may be ordered, provided, withheld or withdrawn by a health professional or a health care facility under generally accepted standards of medical practice that is not prohibited by law.[10] The Act does not specifically speak to DNR orders; however, resuscitation is a "procedure" and the Act permits withholding a "procedure". Still, the Act is

[5] MCL 333.1052, *et seq*.
MCL 333.1055(5)
[7] MCL 333.1066(1)
[8] MCL 333.5651 *et seq.*
[9] Advanced illness is defined to mean a medical or surgical condition with significant functional impairment that is not reversible by curative therapies and that is expected to progress toward death where the physician has diagnosed that the patient has a reduced life expectancy.
[10] MCL 333.5653(1)(d).

limited in that it only permits the guardian the right to refuse medical treatment for a patient with an advanced illness.

Case law

The *Martin* case addresses the authority of a guardian to refuse life-sustaining treatment for an adult while the *Rosebush*[11] case speaks to the authority of a surrogate decision maker to withhold life-sustaining treatment for a minor. Attorney General Opinion No. 7056 addresses the authority of the guardian of a developmentally disabled ward to execute a DNR order under the DNR Act and the Patient Advocate Act. I will address each of these separately.

Adult Guardianships

In *Martin,* the Michigan Supreme Court discussed the authority of a guardian to withhold life-sustaining treatment. The trial court, affirmed by the Court of Appeals, had found the evidence to be clear and convincing that the ward had expressed a preference to decline life-sustaining medical treatment under the circumstances presented.

Mary Martin and Michael Martin were married in 1972. They had three children. On January 16, 1987, Michael suffered a closed head injury in an automobile accident that left him unable to walk or talk. He had a colostomy and a gastrostomy tube for nutrition. Mary was appointed as his guardian. Michael lived in nursing homes after that. Nearly 5 years later, on January 9, 1992, while Michael was in the hospital for an obstructed bowel, Mary contacted the hospital's bioethics committee to determine whether Michael's life-sustaining treatment should be withdrawn. After the bioethics committee consulted with Mary, a family friend, a social worker, Michael's treating physician and nurses at the hospital, the committee issued a report stating that withdrawal of treatment was appropriate, but, court authorization would be required.

Mary filed a petition with the probate court seeking authorization to withdraw treatment. Michael's mother and sister opposed the petition and asked

[11] *In re Rosebush,* 195 Mich App 675, 491 NW2d 633 (1992).

that Mary be removed as Michael's guardian and conservator. Initially, the probate court denied the petition. The Court of Appeals then remanded the case for further findings. On remand, the trial court found that Mary had presented clear and convincing evidence of her husband's wishes to decline life-sustaining treatment under these circumstances. The Court of Appeals affirmed.

The Supreme Court began its analysis by recognizing that the right to refuse treatment is an aspect of the common-law doctrine of informed consent. The Court then made it clear that it was "deciding only that to the extent the right to refuse medical treatment refers to decisions already made and communicated by the patient before losing capacity to make further choices, …it is true that the patient's interest in having those choices honored must survive incapacity."[12]

The Court then discussed the standards to be followed for guiding guardians in carrying out their responsibilities. In general, there are two approaches. First: The best interest standard, which is an objective analysis where the benefits and burdens to the patient of the treatment are assessed by the surrogate in conjunction with statements made by the patient, if such statements are available. It is generally a secondary approach when subjective evidence is lacking. This standard is grounded in the State's parens patriae power.[13] The Court found nothing that prevents the state from grounding any objective analysis on a threshold requirement of pain, terminal illness, foreseeable death, a persistent vegetative state, or affliction of a similar nature.[14]

The subjective analysis represents an effort to identify the wishes of the patient made while the patient was competent. First, the surrogate looks to explicit statements made by the patient. If not available, the surrogate may look to what the patient might have decided, based on evidence of the patient's "value system".[15] This approach has both subjective and objective features to it. This standard is based on a patient's right to self-determination.

[12] *Martin* at 406.
[13] *Martin* at 408.
[14] *Martin* at 408.
[15] *Martin* at 407.

The Court looked to the New Jersey Supreme Court's decision in *In re Conroy*.[16] That court created a hierarchical decision-making continuum which ranged from a purely subjective analysis to a purely objective analysis. The standard to be used in a given case would depend on the facts of the case.

In the *Martin* case the Supreme Court took great pains to explicitly state that the purely subjective analysis was the appropriate standard to apply under the circumstances of *that* case. The Court stated it expressed no opinion about the proper decision-making standard for patients who have never been competent (such as minors or persons with developmental disabilities), patients existing in a persistent vegetative state, patients who are experiencing great pain, or patients who are terminally ill. The Court stated if a patient has any of these conditions, or ailments of a similar nature, a more objective approach may be necessary and appropriate.[17]

The court then added: "The facts of each case present unique circumstances, and it would be unrealistic for us to attempt to establish a rigid set of guidelines to be used in all cases requiring an evaluation of a now-incompetent patient's previously expressed wishes. The number and variety of situations in which the problem of terminating artificial life support arises precludes any attempt to anticipate all of the possible permutations."[18]

The guidance we get from *Martin* is limited, but useful. The stronger the evidence to support a finding that someone is in a persistent vegetative state, is suffering persistent unavoidable pain that outweighs any enjoyment of life or is terminally ill, the closer you will get to the ability to use an objective or best interest analysis.

However, if the patient is conscious and was formerly competent, the Supreme Court requires the use of the subjective analysis if the patient is not in a persistent vegetative state, terminally ill or suffering from persistent unavoidable

[16] *In re Conroy,* 98 NJ 321, 346-348, 486 A2d 1209 (1985).
[17] *Martin* at FN 15.
[18] *Martin* at FN 15.

pain. In its conclusion the Supreme Court used the term “conscious” 4 times. So how did this work for Michael Martin.

The Court acknowledged that conflicting testimony was presented regarding Michael. Dr. Joseph Fischhoff, who was head of the Department of Psychiatry at Wayne State University and chairman of the bioethics committee at Children’s Hospital in Detroit, testified that Michael had no voluntary control over any of his limbs, or any ability to function on a voluntary level, and therefore lacked any meaningful interaction with his environment. Dr. Robert Kreitsch, the director of the Brain Injury Rehabilitation Program at the Mary Free Bed Rehabilitation Center testified that Michael had some ability to carry out voluntary motor commands on his right side, including the ability to pinch and grasp, as well as the ability to recognize faces, respond emotionally, and communicate with others with head nods. It was agreed that Michael was not in a persistent vegetative state or terminally ill.

The Court found that Michael’s life and health were not threatened by his infirmities and he had been competent and able to express his wishes and desires at one time, therefore, it would apply a purely subjective standard. The court required the surrogate decision-maker to show by clear and convincing evidence that Michael’s prior statements regarding withholding life-sustaining treatment illustrated a serious, well thought out, consistent decision to refuse treatment under these exact circumstances or circumstances highly similar to the current situation.

The Court acknowledged that the trial court relied on the testimony of Michael’s wife, including her affidavit. In her affidavit, she said they had discussed what would happen if they ever had a serious accident or disabling or terminal illness about eight years earlier and that Mike’s position was always the same: he did not want to be kept alive on machines and he made her promise that she would never permit it. In reference to movies they had watched depicting people who could not feed or dress themselves, Mike would say: “Please don’t ever let me exist that way because those people don’t even have their dignity.” She recalled that after watching “Brian’s Song,” he said: “If I ever get sick don’t put me

on any machines to keep me going if there is no hope of getting better." He also said that if she put him on a machine he would come back to haunt her. The last conversation on the topic occurred on December 9, 1986, two months before the accident. She was having surgery on New Year's Day and they discussed their wishes if either became severely incapacitated. She told Mike she would not want to be maintained artificially. Mike's response was that he would respect her wishes and expected she would do the same for him. She opined that he would wish to be permitted to die in a dignified manner consistent with his explicit wishes expressed prior to the accident.

The appellants did not dispute these statements but argued that Mary's affidavit was uncorroborated, the comments were remote in time and his comments were general, vague and casual because he had never experienced this form of helplessness. They conceded that they had no reason to question the veracity of Mary's testimony or doubt those conversations took place. Mike's mother admitted that he would not have wanted to be helpless and dependent on others. However, she felt his prior wishes should not control. In addition, they argued that he changed his mind.

The Court, after reviewing Mary's testimony, commented, "This testimony and affidavit cannot be viewed in a vacuum."[19] It is not clear what the Court meant by that comment. The Court cited testimony that Mike's condition was not the type of condition discussed prior to the accident. A doctor testified that he seemed content with his environment. The Court then observed that several witnesses testified that Mike could respond to simple yes or no questions by nodding his head and always indicated no when asked if did not want to go on living. The Supreme Court concluded that the testimony and affidavit of Mary did not constitute clear and convincing evidence of Mike's wishes in this type of situation.

The dissent was sharply critical observing that the majority became the first disinterested body to examine Michael's wishes without being convinced by the

[19] *Martin* at 412.

ample evidence of his prior wishes. The dissent charged the majority with failing to respect the trial court's role as fact finder.

The majority claimed it was not swayed by the witnesses who claimed to perceive that Michael had changed his mind and wanted to live. If that was the case, one might wonder why bother to point out in the opinion that several witnesses testified that Mike indicated a desire to continue living. If that language is deleted from the opinion all that is left is the testimony that he seemed content. In a footnote[20], the dissent cited evidence that Mike did not have the capacity to understand the question of whether he wanted to live or die. In a responding footnote[21], the majority stated they did not rely on that testimony.

Taking the petitioner's testimony as true, the majority simply held that the evidence was not sufficiently clear and convincing. In light of the evidence in this case, one might ask, just what would it take to find evidence that was clear and convincing? The dissent suggested the majority's treatment of the evidence would require a highly formal oral or written statement concerning the patient's specific medical condition.

The *Martin* case was hotly disputed with multiple amicus briefs filed by advocacy groups from around the country. A big problem with *Martin* is the lack of guidance on what constitutes clear and convincing evidence. The Court's comment that "Statements made in response to seeing or hearing about another's prolonged death, do not fulfill the clear and convincing standard"[22] is troublesome. Is such a statement, evidence at all? The Court held as follows: "Only when the patient's prior statements clearly illustrate a serious, well thought out, consistent decision to refuse treatment under these exact circumstances, or circumstances highly similar to the current situation should treatment be refused or withdrawn."[23]

[20] *Martin* at FN 23.
[21] *Martin* at FN 10.
[22] *Martin* at 411.
[23] *Martin* at 411.

The Court found that Mike's pre-accident statements expressed a desire not to live like a vegetable and he was not in a true persistent vegetative state. The dissent pointed out that the bioethics committee found that Mike's condition and level of functioning was equivalent to a persistent vegetative state.[24]

The outcome in *Martin* seems perplexing. Even Michael's mother, who opposed termination of life sustaining treatment, admitted her son would not want to live that way. So, if the Court found the evidence not clear and convincing as to his wishes, why not look at his value system, as suggested in the opinion? Just two months before his accident, Michael told his wife not to put him on a machine if there was no hope of getting better. If the Court was endorsing the *Conway* hierarchical approach, why not move along the hierarchy?

The Court drew a distinction between the formerly competent and the never competent in deciding which standard to use. However, when facing the question of withholding or withdrawing treatment, the former competent and never competent are in the same situation. They are not competent and we often do not know their wishes.

Despite the protestations of the Court in *Martin*, reading the opinion, it is not difficult to conclude that the Court was troubled by the fact that Michael might be indicating a desire to live. Between that and the wide publicity the case generated, it was safer to deny the petition to withhold treatment and limit the precedent of that case

So, what does *Martin* stand for? Keep in mind the Courts statement: "We cannot stress too strongly that the complexity and ramifications of any decision in this area cautions against moving too swiftly or adopting controversial decision-making standards in cases that do not present facts compelling such decision. The right of informed consent extends only to the decisions this particular patient has made. As we noted at the outset, if we are to err, we must err in preserving life. Our first step in this area must be a careful one."[25]

[24] *Martin* at 415.
[25] *Martin* at 409.

Does this mean these cases will be addressed by the Supreme Court on a case-by-case basis? Perhaps, but I still think Martin gives some useful guidance to work with. We know the analysis will range from the purely subjective (clear and convincing evidence of the patient's wishes) to the purely objective (weighing the benefits and burdens of treatment). The court did not limit Michigan to one standard or the other.

The case can be read narrowly to require the purely subjective analysis in cases involving conscious persons who were formerly competent and not in a persistent vegetative state, terminally ill, permanently unconscious or in great uncontrollable pain. On the other hand, other language in the opinion limiting the precedential value to this case, while suggesting other approaches in other cases may be appropriate, seems to permit a broader reading for others who were formerly competent.

I think the starting point for analysis for a previously competent person is whether clear and convincing evidence exists using the subjective analysis. To the extent such evidence is insufficient you would then begin an objective analysis, provided the patient was suffering from great uncontrollable pain, was terminally ill, or in a persistent vegetative state. If none of these conditions are present, only the subjective analysis is available for the formerly competent at this time. However, the Supreme Court, by limiting the application of *Martin* to that case, may have left the door open to the use of the objective or best interest analysis for other formerly competent persons under different circumstances.

Minors

Minors present a different situation. Unlike legally incapacitated adults, minors have never had the legal capacity to make decisions concerning their medical treatment. Someone acting as a surrogate must exercise the right to refuse treatment on their behalf.

The Court of Appeals addressed this issue in *In re Rosebush*. Joelle Rosebush was born on May 20, 1976. A traffic accident on January 12, 1987, severed her spinal cord and she went into cardiac arrest. She was left completely

and irreversibly paralyzed from the neck down and unable to breathe without a respirator. Most, if not all of her cerebral function had been destroyed and left her in a persistent vegetative state. It was uncontroverted that she would never regain consciousness and would never be able to breathe on her own.

Joelle was initially hospitalized until June, 1987. Her parents initially rejected discontinuing life-support and moved her to the Neurorehabilitation Center at the Georgian Bloomfield Nursing Home. By March of 1988, Joelle's parents decided to authorize the removal of life-support systems. They made this decision after consulting with their daughter's treating physicians, the staff, the family's Catholic priest and the family's attorney.

Joelle's case manager sought the assistance of doctors at Children's Hospital of Michigan in effectuating the decision to discontinue life-support. The bio-ethics committee at Children's Hospital authorized Joelle's transfer to that hospital for further evaluation. However, the transfer was blocked after staff members at the Neurorehabilitation Center contacted the Oakland County Prosecutor who obtained a temporary restraining order prohibiting Joelle's transfer or the removal of life-support systems.

Following seven days of trial, the court dissolved the injunction and authorized the parents to remove the ventilator. Joelle died on August 13, 1988.

The prosecutor appealed. The Court of Appeals decided to hear the appeal although it was technically moot with the death of Joelle. The Court found that appellate review was appropriate because the issue involved questions of public importance that may recur and evade review.

The Court of Appeals held that the right to refuse treatment is not lost because of the incompetence or youth of the patient. The Court held that parents are empowered to make decisions regarding withdrawal or withholding of lifesaving or life-prolonging measures on behalf of their children. The question for the Court was what restrictions, if any, should be placed on parents' decision-making authority and what role the courts should play.

The court held that the decision-making process should generally occur in the clinical setting without resort to the courts unless an impasse is reached. They further held that surrogate decision-makers should first act on the best approximation of the patient's preference; but, if that is not known, then act in the best interests of the patient. The court suggested that for a minor of mature judgment, the substituted judgment standard would be appropriate. But for immature minors, the best interest standard should be used.

The *Rosebush* court attempted to formulate an approach that applied to minors and incapacitated adults. This led to a partial dissent which suggested the court should limit its holding to the decision as it affected Joelle. In light of *Martin,* which is the standard for incompetent adults, I think the dissent had its way.

In *Rosebush,* the county prosecutor also argued that termination of life-support for Joelle should subject Joelle's parents and doctors to criminal liability for homicide. The Court of Appeals held that the trial court did not err in refusing to impose criminal liability for the removal of Joelle's life-support systems.

Developmentally disabled

In 2000, the Attorney General issued her opinion on the authority of guardians for developmentally disabled adults to sign patient advocate designations under the Patient Advocate Act and the DNR Act.[26] The Attorney General concluded that a guardian lacked the authority to sign a designation of patient advocate on behalf of the ward since the Patient Advocate Act does not explicitly give that authorization to guardians. In addition, the developmentally disabled person may not sign the designation since a prerequisite to signing such a document is that the person be of sound mind. One could argue that the Attorney General's analysis should only apply to plenary guardianships. What about partial guardianships? Could the court reserve to the ward in a partial guardianship the right to execute a DNR order?

[26] OAG, 2000, No 7,056 (June 20, 2000)

The Court of Appeals in *Martin*[27] observed that the fact a patient has been previously adjudicated incompetent is not controlling because, while a patient may not be competent to make some decisions, the patient may still have the requisite capacity to make a decision regarding medical treatment. The Court cited the fact that this view was embodied in Michigan's patient advocacy statute which explicitly recognizes that an incompetent patient may express a desire not to have life-sustaining medical treatment withheld or withdrawn.[28]

The test for whether a person has the requisite capacity to make a decision to withhold or withdraw treatment was described as "…whether the person (1) has sufficient mind to reasonably understand the condition, (2) is capable to understanding the nature and effect of the treatment choices, (3) is aware of the consequences associated with those choices, and (4) is able to make an informed choice that is voluntary and not coerced.[29] For most developmentally disabled persons, they will lack that capacity; however, for some, it may be reasonable for that person to retain the power to designate a patient advocate.

In any event, the Attorney General applied the same analysis to the DNR Act, noting that the legislature did not provide authority for guardians to sign designations in the DNR Act, which is true; however, the Attorney General did not address the savings clause in the Act which explicitly stated that the act was cumulative and did not impair a legal right a guardian may have to refuse medical treatment.

The Attorney General did not address the authority of guardians to sign DNR orders under the common law or the Michigan Dignified Death Act.

I would agree that neither Act cited by the Attorney General is the *source* of authority for a guardian to withdraw or withhold life-sustaining treatment. I believe that authority exists at common law. The Attorney General did not address this issue.

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[27] *In re Martin,* 200 Mich App 703, 715 (1993).
[28] Citing MCL 700.496(13), now known as MCL 700.5511(1).
[29] *In re Martin,* at 716.

The issue of the authority to make end of life decisions for persons with developmental disabilities was addressed in 2005, by Judge Michael Mack, of the Montmorency County Probate Court. In that case, Edith Shirley was 50 years old and developmentally disabled. The guardian sought an order permitting the discontinuance of life-sustaining treatment. The hospital and treating physicians were unsure of the authority of the guardian to consent to the withdrawal of treatment.

The court found that Edith was suffering from a terminal illness that was not necessarily imminent and that her suffering was unavoidable and would endure throughout her life time. The court found that the administration of CPR would leave her in a worse condition and would likely terrorize her since she would not know why treatment was being conferred and would only feel pain. The court found that the burdens of further treatment outweighed any substantial benefit.

The court found that the appropriate standard to be used would be the objective best interest standard as touched upon in *Martin* because Edith was never competent. As such, the guardian would be authorized to withhold treatment. The court went on to say that the physicians and guardian should, as they do in all other cases, consult with each other, and they and they alone, make the decision when a device should be removed. The testimony revealed that there are no strict medical criteria for such a decision and it varies from patient to patient. The guardian was given the authority to make a medically based, informed decision as to the termination of a particular treatment.

The judge observed that the right to refuse treatment was sown in the common law. He could see no reason why persons with developmental disabilities should be denied that right; after all, the Mental Health Code goes to great lengths to protect and retain the rights of persons with developmental disabilities to make decisions, even minor ones like what color dress to wear.

I would suggest that guardians of developmentally disabled persons have the authority at common law to withdraw or withhold treatment. In the event of a dispute, the court would first determine whether the subjective test would be

appropriate, and, if not, apply the objective best interest standard in deciding whether the guardian would be authorized to withdraw or withhold treatment.

Pending legislation

The legislature is currently considering a series of bills to address the authority of third parties, including guardians, to consent to DNR orders.[30] The bills have passed the House and are pending in the Senate. The bills amend EPIC and the DNR Act. The bills would give explicit authority to court appointed guardians to consent to physician orders to withhold treatment in the hospital and to execute DNR orders. The bills would also permit the execution of DNR orders anywhere outside the hospital setting, including nursing homes.

The bills would provide that at the time a petition is filed to appoint a guardian, the court appointed guardian ad litem would visit the proposed ward and inform the ward that the power of the guardian to execute a DNR order could be restricted. If the ward objected, the guardian would not be given that authority and the letters of authority would be restricted.

The DNR order could not be executed unless the guardian had met with the ward within the last 14 days and the guardian had consulted with the attending physician. This process would have to be repeated annually.

Practical considerations

The murkiest area of the law involves cases where the conscious, formerly competent patient may not be in a vegetative state. Frankly, drawing a distinction between the formerly competent and the never competent seems hard to explain or justify. However, until the legislature speaks, it is not clear that the Supreme Court would authorize use of the objective or best interest analysis for a conscious, formerly competent person who is not in a persistent vegetative state, as defined by medical standards.

[30] HB 4382-4384.

In the meantime, the Wisconsin Supreme Court has provided a useful checklist[31] for those cases where there is little or no evidence of a patient's wishes and the patient is in a persistent vegetative state and the guardian must determine what is presently in the patient's best interests. The court provided 12 criteria to guide the guardian's best-interest determination:

(1) Whether the ward ever expressed any view regarding life-sustaining treatment.
(2) The wishes of the family.
(3) An independent medical opinion.
(4) The recommendation, if any, of a bioethics committee.
(5) The chances of physical recovery.
(6) The chances of mental recovery.
(7) The likelihood of physical, psychological, or emotional injury as a result of providing or not providing treatment.
(8) The likelihood and duration of survival without treatment.
(9) The physical effects of prolonged treatment.
(10) The benefits of continued life with and without treatment.
(11) The motives of those supporting withdrawal.
(12) Any other factors bearing on the best interests of the ward.

Using these factors in making a best-interest assessment of withholding or withdrawing treatment is as good a guide as any. This test appears suitable for the never competent (minors and persons with developmental disabilities) and for the formerly competent in a persistent vegetative state, terminally ill or suffering great pain.

So, what does this mean in the real world when guardians are called upon to make decisions about withholding or withdrawing medical treatment? The simple fact is that, in the real world, family members make these decisions every day, without court intervention. Family members, who serve as guardians, generally do not need court intervention to withhold or withdraw treatment after consulting with medical personnel. The real problem seems to be with the

[31] *In the Matter of the Guardianship of L.W.,* 167 Wis2d 53, 482 NW2d 60 (1992).

authority of professional guardians to make decisions about withholding or withdrawing medical treatment. Perhaps this is because it is assumed that family members will be more inclined to preserve the life of a loved one whereas the patient is generally a stranger to the professional guardian.

For the never competent, the standard to be used will generally be the objective or best interest test, although for minors with mature judgment and some persons with developmental disabilities who are higher functioning, the subjective test may be appropriate.

For the formerly competent who are unconscious, the best interest test is used only if the person is in a persistent vegetative state, suffering from persistent unavoidable pain or terminally ill.

For the formerly competent who are conscious, the subjective test must be used to show by clear and convincing evidence that the patient had previously made statements that clearly illustrated a serious, well thought out, consistent decision to refuse treatment under highly similar circumstances. This is the test used in Martin and it sets a high bar. It is a test that many think was met in that case.

Council Materials

MEETING OF THE COUNCIL OF THE
PROBATE & ESTATE PLANNING SECTION OF THE
STATE BAR OF MICHIGAN
Friday, March 15, 2024

Regular Meeting Agenda

I. Commencement (Jim Spica)

- A. Call to Order and Welcome
- B. Zoom Roll Call
- C. Confirmation of In-Person Attendees
- D. Excused Absences

II. Monthly Reports

- A. Lobbyist's Report (Public Affairs Associates)
- B. Minutes of Prior Council Meetings (Rick Mills) – **Attachment 1**
- C. Chair's Report (Jim Spica)
- D. Chair-Elect's Report (Katie Lynwood)
- E. Treasurer's Report (Christine Savage) – **Attachment 2**

III. Committee Reports

- A. Committee on Special Projects (Mysliwiec)
- B. Amicus Curiae (Mayoras)
- C. Annual Meeting (Spica)
- D. Awards (Kellogg)
- E. Budget (Mills)
- F. Bylaws (Lucas)
- G. Charitable and Exempt Organizations (Wrock)
- H. Citizens Outreach (Goetsch)
- I. Court Rules, Forms, and Proceedings (David)
- J. Electronic Communications (Hentkowski)
- K. Ethics and Unauthorized Practice of Law (Mallory)
- L. Guardianship, Conservatorship, and End of Life (Glazier)

M. Legislation Development and Drafting (Tiplady and Mills)

N. Legislation Monitoring and Analysis (Shelton)

O. Legislative Testimony (Mysliwiec)

P. Membership (Hentkowski)

Q. Nominating (Lucas)

R. Planning (Spica)

S. Probate Institute (Piwowarski)

T. Real Estate (Hentkowski)

U. State Bar and Section Journals (Mysliwiec)

V. Tax (Anderton) – (Tax Nugget by Christine Savage – **Attachment 3**)

W. Assisted Reproductive Technology (Welber)

X. Electronic Wills (Cieslik)

Y. Fiduciary Exception to the Attorney-Client Privilege (Krueger)

Z. Nonbanking Entity Trust Powers (Spica and Tiplady)

AA. Premarital Agreements (Savage)

BB. Uniform Community Property Disposition at Death Act (Spica)

CC. Undue Influence (Silver)

DD. Uniform Fiduciary Income and Principal Act (Spica)

EE. Uniform Partition of Heirs Property Act (Spica)

GG. Various Issues Involving Death and Divorce (Borst and Blume)

IV. Good of the Order

V. Adjournment of Regular Meeting

Departments (Time Permitting): Legal Literature (Jim Spica)

Roundtable (Time Permitting)

Reminder: The next Probate & Estate Planning Council meeting will be Friday, April 19, 2024 at the **University Club of Michigan State University, 3435 Forest Road, Lansing, Michigan 48910**. The Council meeting will begin (almost) immediately after the Committee on Special Projects meeting, which begins at 9:00 AM.

ATTACHMENT 1

MEETING OF THE COUNCIL OF THE
PROBATE & ESTATE PLANNING SECTION OF THE
STATE BAR OF MICHIGAN
Friday, February 16, 2024
Minutes

I. Commencement (Nathan Piwowarski)

A. Call to Order and Welcome

Acting Chairperson Piwowarski called the meeting to order at 10:13 AM noting that the meeting was being recorded and that the resulting recording is to be deleted once the minutes of the meeting have been submitted by the Secretary and accepted by the Council.

B. Zoom Roll Call

Angela Hentkowski, Christine Savage, Ernscie Augustin, Kathleen Cieslik, Sandra Glazier, Melisa M.W. Mysliwiec, Hon. Michael McClory, Marguerite Lentz, Michael Lichterman, Michael Shelton, Rachael Sedlacek (ICLE), Alexander S. Mallory, Neal Nusholtz, Rebecca Wrock, Nathan Piwowarski, Rebecca Bechler (Public Affair Associates), Kenneth Silver, Georgette David, Warren Krueger, Mark E. Kellogg, Andrew Mayoras, James Steward, Jeff Kirkey (ICLE) Jim Ryan (Public Affair Associates), and Andrea Neighbors (administrative assistant)

C. Confirmation of In-Person Attendees

Richard C. Mills, Daniel Hilker, Daniel W. Borst, David Sprague, Susan L. Chalgian, Sara Nicholson and David P. Lucas

D. Excused Absences

James P. Spica, Katie Lynwood, James F. Anderton V., and Hon. Shauna Dunnings

II. Monthly Reports

A. Lobbyist's Report (Public Affairs Associates)

i. The EPIC omnibus package has passed the legislature and is on its way to the Governor.

ii. The Uniform Power of Attorney package is now law.

iii. The Powers of Appointment Act/USRAP technical amendments HB 4863 and 4864 are on the House floor. They have yet to be taken up for a vote.

iv. The Unitrust Act has been introduced and is sitting in House Judiciary

v. Becky Beckler will keep council updated regarding the Guardianship Reform Package.

vi. The end-of-life package (the proposed "Death with Dignity Act") that is in the Senate is getting attention. Senator Hertel is planning on having hearings on the package.

B. Minutes of Prior Council Meeting – January (Richard Mills) – **Attachment 1**. Rick Mills motioned, and it was supported accepting the January minutes as drafted. Motion carried.

C. Treasurer's Report (Christine Savage)

Ms. Savage reported that the last quarter expenses have been received from the State Bar.

III Committee Reports

A. Committee on Special Projects (Mysliwiec):

CSP received an update from the Guardianship, Conservatorship & End of Life Committee regarding the Guardian Task Force Legislation, specifically House Bills 4909 H-3; 4910 H-3; 4911 H-3; 4912 H-3; and 5047 H-3, and the proposed modifications provided to Senator Chang's office recently by the Committee.

It was brought to CSP's attention that the Council's public policy position with respect to this legislation from September only mentioned HBs 4909, 4910, and 4912.

CSP, by a majority vote, recommended that Council update its public policy position adopted in September 2023 as follows: we oppose House Bills 4909 H-3; 4910 H-3; 4911 H-3; 4912 H-3; and 5047 H-3 as drafted, and more particularly that "We support the principle of protecting vulnerable adults but are concerned that these proposals, as drafted, will cause certain unintended consequences."

Ms. Mysliwiec moved to adopt the suggested public policy position.
Support – 19. Opposed – 0. Not voting – 4.

B. Amicus Curiae (Mayoras): Mr. Mayoras reported that the committee met in response to a request to possibly find a feasible way to develop a procedure for requesting publication of unpublished opinions that come out of the Court of Appeals. The committee was unable to come up with a feasible way to request publication for two reasons. First, there is a 21-day time limit for publication. Second, only parties can seek publication.

Mr. Mayoras also reported that the Court of Appeals issued a published decision from the *Bazakis* case that was contrary to federal law ordering a guardian to account for Social Security Administration funds that were withdrawn and deposited into different accounts. The parties resolved their issues, ending the appeal. The Council then authorized a supplemental brief requesting that the Supreme Court vacate the troublesome opinion, which it did.

D. Annual Meeting (Spica): No report.

E. Awards (Kellogg): Mr. Kellogg moved to adopt a new award in honor of George Gregory. The George Gregory Award would honor a member of the Probate and Estate Planning Section for valuable contributions to the Probate and Estate Planning Section's Council. This Award would be bestowed by the Executive Committee of the Probate and Estate Planning Section, in consultation with the Council's Awards Committee, based on nominations by current and former Council members. This Award would be bestowed periodically, typically once each Section year, and typically for the Awardee's valuable contributions during the prior Section year. Guidelines for nomination and selection are that the individual nominated and selected: (i) provides valuable contributions at, and regularly attends, the Section's Council meetings and meetings of the Council's Committees; (ii) is actively involved in Section leadership and governance, such as service as, but not limited to, an Officer of the Council, Chair of a Council Committee, and as Reporter for a Committee's legislation projects. George Gregory's valuable and outstanding service to the Probate and Estate Planning Section and Council exemplify the service for which the George Gregory Award would be bestowed. The Acting Chair declared that the motion passed.

F. Budget (Mills): No report.

G. Bylaws (Lucas): No report.

H. Charitable and Exempt Organizations (Wrock). Ms. Wrock reported that the next committee meeting is on March 1st, anyone would like to join the committee.

I. Citizens Outreach (Goetsch): No report.

J. Court Rules, Forms, and Proceedings (David): Ms. David reported that the committee will be meeting to discuss the recommendation for the modification of a court rule regarding requesting publication of an unpublished Court of Appeal decision.

K. Electronic Communications (Hentkowski): No report.

L. Ethics and Unauthorized Practice of Law (Mallory): Mr. Mallory invited members to join the committee.

M. Guardianship, Conservatorship, and End of Life (Glazier): Ms. Glazier reported that there will be a meeting of the committee on February 27th regarding the Death with Dignity legislative proposal.

N. Legislation Development and Drafting (Mills/Tiplady): No report.

O. Legislation Monitoring and Analysis (Shelton). Mr. Shelton reported that in the Federal Register that there are proposed regulations that require reporting for residential real estate transfers, that are not financed, even gifts transferred to an entity or trust.

P. Legislative Testimony (Mysliwiec): No report.

Q. Membership (Hentkowski): Ms. Hentkowski moved to request $2,200 for the membership reception which will be held that Thursday in Acme after the ICLE reception. The Acting Chair declared the motion passed.

Ms. Hentkowski moved to provide scholarships for registration and up to $250.00 per night hotel fees for up to two nights for either Acme or Novi. The Acting Chair declared the motion passed.

R. Nominating (Lucas): Mr. Lucas reported that the Nominating Committee's role is to make nomination recommendations to the Council for council seats and member positions. If interested, please reach out to the Committee. The Nominating Committee considers participation in Council activities such as meetings and committees.

S. Planning (Spica). Mr. Piwowarski reported that the Executive Committee will be meeting on February 16th.

T. Probate Institute (Piwowarski): Mr. Piwowarski reported that the Probate Institute has 147 registered, 118 in Acme and 29 in Novi, and 16 for the advanced add-on seminar in Acme, *Using a Formula Clause to Gift a Closely Heald Business.* There will be an add-on seminar in Novi, *The Elder Law Institute,* and there are 5 registered so far.

U. Real Estate (Hentkowski): No report.

V. State Bar and Section Journals (Mysliwiec): Ms. Mysliwiec reported that publication agreement for the Journal covers a three-year period and is up for renewal as it expired on December 31st. ICLE proposed a slight increase each year for three years. The issue that went out in January will be $4,300, the remaining 2 issues in 2024 will be $4,500 per issue. The three issues in 2025 will be $4,650 and the three issues in 2026 will be $4,800. The Committee supports the change that has been proposed. Ms. Mysliwiec moved for the Section to approve the renewal of the publishing agreement between the section and ICLE which is set forth in attachment 4 of the February 16, 2024 meeting materials and to authorize Chair Jim Spica to execute the agreement and forward it to the State Bar for signature. The Acting Chair declared that the motion passed.

W. Tax (Anderton): No report.

X. Assisted Reproductive Technology (Welber): No report.

Y. Electronic Wills (Cieslik): No report.

Z. Fiduciary Exception to the Attorney-Client Privilege (Krueger): No report

AA. Nonbanking Entity Trust Powers (Spica): No Report.

BB. Premarital Agreements (Savage): No report.

CC. Uniform Community Property Disposition at Death Act (Spica): No report.

DD. Undue Influence (Silver): Mr. Silver reported that the Committee is still waiting on comments from the judiciary.

EE. Uniform Fiduciary Income and Principal Act (Spica): No report.

FF. Uniform Partition of Heirs Property Act (Spica): No report.

GG. Various Issues Involving Death and Divorce (Borst/Blume): Mr. Borst reported that Hon. Dunnings shared the conclusions from the Committee with a group of judges for their responses.

III. Good of the Order

IV. Adjournment of Regular Meeting at 11:04 a.m.

Respectfully Submitted,

Richard C. Mills, Secretary
The next Council meeting will be held on Friday, March 15, 2024.

ATTACHMENT 2

Probate and Estate Planning Section: 2023-2024
Treasurer's Monthly Activity Report

Carry-Over Fund Balance from 2022-2023		Carry Over Balance
	Fund Balance-Probate/Estate Planning Section	$ 221,440.20

Revenue			January 2024	YTD Revenue (2023-2024)	Budget (2023-2024)
	7-141-40080 Probate/Estate Planning Dues		$ 3,430.00	$ 113,190.00	
	7-141-40085 Probate/Estate Affiliate Dues		$ -	$ 560.00	
	7-141-42025 Seminar Revenue		$ -	$ -	
	7-141-42820 Subscription to Newsletter		$ -	$ -	
	7-141-42175 Hein Publishing Agreement/Royalties		$ -	$ -	
	7-141-42830 Publications Revenue		$ -	$ -	
	7-141-42690 Miscellaneous Revenue		$ 325.00	$ 325.00	
	Total Revenue		**$ 3,755.00**	**$ 114,075.00**	$ -

Expenses			January 2024	Cumulative Expenses	Budget (2023- 2024)
	7-141-67010 Administrative Services		$ 1,026.00	$ 2,182.50	
	7-141-67115 Legislative Consulting		$ 3,000.00	$ 12,000.00	
	7-141-65075 LIstServ		$ -	$ -	
	7-141-67065 Community Support, Donations & Sponsorships		$ -	$ -	
	7-141-62315 Meetings		$ 2,437.00	$ 9,403.41	
	7-141-65420 Seminar Expenses		$ -	$ -	
	7-141-67140 Networking Events		$ -	$ -	
	7-141-67020 Annual Meeting		$ -	$ -	
	7-141-65540 Speaker Expenses		$ -	$ -	
	7-141-61200 Travel		$ 701.43	$ 7,161.85	
	7-141-64005 Telephone		$ -	$ -	
	7-141-64025 Books & Subscriptions		$ -	$ -	
	7-141-65090 Recognition		$ -	$ -	
	7-141-67015 Amicus Brief		$ 700.00	$ 13,700.00	
	7-141-64015 Printing & Copying		$ -	$ -	
	7-141-65460 Newsletter/Publication		$ 100.00	$ 4,400.00	
	7-141-64010 Postage		$ -	$ -	
	7-141-64020 Dues		$ -	$ -	
	7-141-64055 Miscellaneous		$ -	$ -	
Total Expenses			**$ 7,964.43**	**$ 48,847.76**	$ -

Net Income		**$ (4,209.43)**	**$ 65,227.24**	$ -
General Fund plus Net Income (Running Total)		$ 286,667.44	**$ 286,667.44**	$ -

Hearts and Flowers Fund Carry Over Balance	Carry Over Balance	January 2023		
Beginning Deposit Fund Balance	$ -			
Revenue				
Withdrawls				
Total Fund				

State Bar of Michigan

Parent Company : State Bar of Michigan : Sections

Sections Income Statement - Probate and Estate

Jan 2024

Financial Row	Amount (Jan 2024)	Amount YTD (Oct 2023 - Jan 2024)	Last FY YTD (Oct 2022 - Jan 2023)
Income			
42690 - Miscellaneous Revenue	$325.00	$325.00	$325.00
40085 - Section Affiliate Dues	$0.00	$560.00	$455.00
40080 - Section Dues	$3,430.00	$113,190.00	$114,380.00
Total Income	$3,755.00	$114,075.00	$115,160.00
Expenses			
67010 - Administrative Services	$1,026.00	$2,182.50	$0.00
67015 - Amicus Brief	$700.00	$13,700.00	$0.00
67115 - Legislative Consulting	$3,000.00	$12,000.00	$12,000.00
62315 - Meetings	$2,437.00	$9,403.41	$11,223.28
64055 - Miscellaneous	$0.00	$0.00	$2,500.00
65460 - Newsletter/Publication	$100.00	$4,400.00	$0.00
61200 - Travel	$701.43	$7,161.85	$2,858.89
Total Expenses	$7,964.43	$48,847.76	$28,582.17
Increase or Decrease in Net Position	($4,209.43)	$65,227.24	$86,577.83
Net Position, Beginning Of year	$221,440.20	$221,440.20	$232,021.60
Net Position, End of Period	$217,230.77	$286,667.44	$318,599.43

State Bar of Michigan
Parent Company : State Bar of Michigan : Sections
Probate & Estate Section Expense Detail Report
From Oct 2023 to Jan 2024

Account	Date	Type	Document Number	Memo	Linked Bill: Bill To	Description	Debit	Credit	Total Net Amount
60000 - Operating Expenses - Non-Labor							$0.00	$0.00	$0.00
61200 - Travel							$0.00	$0.00	$0.00
	10/24/2023	Journal	JE1595	10/13/2023 travel	Angela Hentkowski	10/13/2023 travel		$550.50	-$550.50
	10/24/2023	Journal	JE1596	10/13/2023 travel	Angela Hentkowski	10/13/2023 travel	$550.50		$550.50
	10/24/2023	Journal	JE1594	10/13/2023 travel	Angela Hentkowski	10/13/2023 travel	$550.50		$550.50
	10/30/2023	Journal	JE1712	10/6/2023 Travel	Andrea Christine Neighbors	10/6/2023 Travel	$480.93		$480.93
	11/13/2023	Journal	JE1981	10/13/2023 Travel	David Lucas	10/13/2023 Travel	$427.56		$427.56
	11/20/2023	Journal	JE2097	10/9/2023 travel	James Spica	10/9/2023 travel	$2,945.53		$2,945.53
	11/20/2023	Journal	JE2092	10/18/2023 Travel	Daniel Hilker	10/18/2023 Travel	$355.17		$355.17
	11/20/2023	Journal	JE2094	9/8/2023 & 10/12/2023 travel	Melisa Mysliwiec	9/8/2023 & 10/12/2023 travel	$681.81		$681.81
	11/20/2023	Journal	JE2093	10/13/2023 Travel	Mark Kellogg	10/13/2023 Travel	$359.53		$359.53
	12/19/2023	Journal	JE3032	Oct-Nov 2023 Meeting Travel	Nathan Piwowarski	Oct-Nov 2023 Meeting Travel	$238.55		$238.55
	12/19/2023	Journal	JE3034	10/13/2023 Meeting Travel	Rebecca Wrock	10/13/2023 Meeting Travel	$420.84		$420.84
	1/17/2024	Journal	JE3373	Christine Savage Probate AM 10-14-2023	Christine Savage	Christine Savage Probate AM 10-14-2023	$357.27		$357.27
	1/23/2024	Journal	JE3485	Katie Lynwood 10-13-2023 meeting travel	Katie Lynwood	Katie Lynwood 10-13-2023 meeting travel	$344.16		$344.16
Total - 61200 - Travel							**$7,712.35**	**$550.50**	**$7,161.85**
62315 - Meetings							$0.00	$0.00	$0.00
	10/24/2023	Journal	JE1597	9/2023-9/2024 Zoom	Angela Hentkowski	9/2023-9/2024 Zoom	$158.89		$158.89
	11/20/2023	Journal	JE2095	10/23/2023 Probate Meeting	University Club of MSU	10/23/2023 Probate Meeting	$1,005.00		$1,005.00
	12/19/2023	Journal	JE3030	10/13/2023 Probate Law Meeting	James Spica	10/13/2023 Probate Law Meeting	$5,802.52		$5,802.52
	1/17/2024	Journal	JE3385	University Club Probate Law 12-15-2023	University Club of MSU	University Club Probate Law 12-15-2023	$1,421.00		$1,421.00
	1/31/2024	Journal	JE3633	University Club Probate Law 1/19/2024	University Club of MSU	University Club Probate Law 1/19/2024	$1,016.00		$1,016.00
Total - 62315 - Meetings							**$9,403.41**	**$0.00**	**$9,403.41**
65460 - Newsletter/Publication							$0.00	$0.00	$0.00
	11/13/2023	Journal	JE1986	Probate Law Journal	Regents U of M/ICLE	Probate Law Journal	$4,300.00		$4,300.00
	1/31/2024	Journal	JE3648	January 2024 E Blast Expense		1/30 Read the Winter Newsletter Now (e-blast)	$100.00		$100.00
Total - 65460 - Newsletter/Publication							**$4,400.00**	**$0.00**	**$4,400.00**
67010 - Administrative Services							$0.00	$0.00	$0.00
	11/27/2023	Journal	JE2196	10/1/2023-10/27/2023 service	Andrea Christine Neighbors	10/1/2023-10/27/2023 service	$1,156.50		$1,156.50
	1/22/2024	Journal	JE3480	Andrea Neighbors Nov 23 - Dec 23	Andrea Christine Neighbors	Andrea Neighbors Nov 23 - Dec 23	$1,026.00		$1,026.00
Total - 67010 - Administrative Services							**$2,182.50**	**$0.00**	**$2,182.50**
67015 - Amicus Brief							$0.00	$0.00	$0.00
	12/19/2023	Journal	JE3043	Bazakis Amicus Brief	Lipson Neilson P.C	Bazakis Amicus Brief	$13,000.00		$13,000.00
	1/17/2024	Journal	JE3377	Lipson Neilson Probate Law 01-09-2024	Lipson Neilson P.C	Lipson Neilson Probate Law 01-09-2024	$700.00		$700.00
Total - 67015 - Amicus Brief							**$13,700.00**	**$0.00**	**$13,700.00**
67115 - Legislative Consulting							$0.00	$0.00	$0.00
	10/18/2023	Journal	JE1441	October 2023	Public Affairs Associates	October 2023	$3,000.00		$3,000.00
	10/30/2023	Journal	JE1724	November 2023	Public Affairs Associates	November 2023	$3,000.00		$3,000.00
	12/18/2023	Journal	JE2981	December 2023	Public Affairs Associates	December 2023	$3,000.00		$3,000.00
	1/17/2024	Journal	JE3383	Public Affairs Probate Law January 2024	Public Affairs Associates	Public Affairs Probate Law January 2024	$3,000.00		$3,000.00
Total - 67115 - Legislative Consulting							**$12,000.00**	**$0.00**	**$12,000.00**
Total - 60000 - Operating Expenses - Non-Labor							**$49,398.26**	**$550.50**	**$48,847.76**

ATTACHMENT 3

Tax Nugget; Corporate Transparency Act
Christine Savage on behalf of the Tax Committee

On September 29, 2022, the U.S. Department of the Treasury's Financial Crime Enforcement Network ("FinCEN") issued a Final Rule regarding beneficial ownership reporting requirements under the Corporate Transparency Act ("CTA"). The CTA aims to combat illicit activity including tax fraud, money laundering, and financing for terrorism by capturing more ownership information for specific U.S. businesses operating in or accessing the country's market. Under the new legislation, businesses that meet certain criteria must submit a Beneficial Ownership Information (BOI) Report to the FinCEN, providing details identifying individuals who are associated with the reporting company.

Who needs to file?

Companies obligated to report are called "reporting companies." A reporting company is required to file a BOI report unless it has an exemption. This includes LLCs, corporations, or any other entity created by filing a document with a U.S. State.

There are two categories of reporting companies:

1. **Domestic Reporting Companies:** These include corporations, limited liability companies, and other entities established by submitting documents to a secretary of state or a similar office within the United States. Nearly every small U.S. business is a reporting company.

2. **Foreign Reporting Companies:** These are entities, such as corporations and limited liability companies, created under the laws of a foreign country that have registered to conduct business in the United States by filing documents with a secretary of state or a similar office.

The most common exemption is the Large Operating Company Exemption. This exemption requires the business to have both 21 or more full-time employees and $5 million or more in sales on the last business tax return. Exemptions also include securities issuers, tax exempt entities, domestic governmental authorities, banks, and many more that don't fall into the above categories.

What information must be reported about a company's beneficial owners?

The details that reporting companies need to include in the BOI report vary based on the date their business was established. On formation or registration, a reporting company is required to submit a report on FinCEN identifying the reporting company's:

1. Full legal name, including trade names and d/b/a names,
2. Business street address,
3. State of formation, and
4. Taxpayer identification number, including an employer identification number.

The BOI report must also include personal information for each "beneficial owner" of the reporting company. This information includes the following for each individual:

1. Full legal name,
2. Date of birth,
3. Current residential address,
4. A unique identifying number from an acceptable identification document (i.e. a drive's license, passport, or other government issued identification document), and
5. An image of the identification document.

The BIO report must also include the same personal information for "applicants" but only for entities formed after January 1, 2024. Entities formed prior to January 1, 2024, are not required to provide applicant information when submitting the report.

Who is considered a beneficial owner of a company?

According to the CTA, a beneficial owner is an individual who, either directly or indirectly:

1. **Exercises Substantial Control:** Substantial control means an individual may have zero ownership of the entity, however, they have the ability to make important decisions for the reporting company. This alone makes them a beneficial owner under FinCEN's regulation. This includes being an officer, manager, having the authority to appoint board members, sell or lease major assets, engage in important contracts for the entity, or other forms of important decision making.

2. **Owns or Controls a Minimum of 25% Ownership Interests:** Any individual with 25% of more of the ownership interests is a beneficial owner. This includes membership in an LLC, shares in a corporation, convertible notes and investment instruments, warrants, or any other form of ownership that either conveys ownership or can be converted into ownership. This is by individual, so if an individual owns 10% directly and an additional 30% through an LLC that invested in a reporting company, they would be over the 25% threshold and need to be included as a beneficial owner.

Who is considered an applicant of a company?

A company obligated to report its company applicants will typically have up to two individuals who may qualify as company applicants:

1. The individual directly submitting the document that establishes or registers the company.

2. In cases involving multiple individuals in the filing process, the individual that is primarily responsible for directing or controlling the filing.

They will only submit a maximum of two company applicants. Company applicants are always individuals and never companies.

What is the effective date and filing deadlines?

The effective date is January 1, 2024.

- If the company existed before January 1, 2024, the deadline for filing the initial beneficial ownership information report is January 1, 2025.
- If the company was created or registered between January 1, 2024, and January 1, 2025, the initial report must be filed within 90 calendar days after receiving notice of the effective creation or registration. This deadline commences either upon the company's actual notice or after a secretary of state or similar office publicly announces its creation or registration, whichever occurs earlier.
- If the company was created or registered on or after January 1, 2025, the initial beneficial ownership information report must be filed within 30 calendar days after receiving notice of the effective creation or registration.

What are the penalties for not filing the CTA report?

The CTA provides that it is unlawful for any individual or reporting company to willfully provide, or attempt to provide, false or fraudulent beneficial ownership information or to willfully fail to report complete or updated beneficiary ownership information.

Failure to adhere to beneficial ownership reporting obligations might lead to civil and criminal penalties including $10,000 fines, penalties of $500 a day, and/or up to 2 years in jail.

Note that rectifying errors or omissions within 90 days of the original report deadline may prevent penalties.