

# 24 Henry

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Comments Delivered by Electronic Communication

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“ATTN: Section 352—Real Estate settlements.”

Ladies and Gentlemen:

This document contains comments of the American Escrow Association, (“AEA”) a national trade association representing escrow settlement and other real estate closing/settlement agents. These comments directly address questions raised in FinCEN’s advance notice of proposed rulemaking (“ANPRM”), dated April 10, 2003, involving possible future requirements of real estate settlement agents under section 352 of the USA PATRIOT ACT.

The AEA appreciates the opportunity the Department has afforded us to have direct conversations with staff on industry practices as well as to submit written comment at this time. The four areas raised in the ANPRM are addressed as follows:

I. Money Laundering risks. The ANPRM lays out the stages and points in the transactional framework in which money laundering potential exists. As the settlement agent AEA members have involvement at different stages of the transaction including early on with earnest money/deposit funds. The activity is based on written instructions from the principals, lenders and other parties, taking into account applicable legal requirements. However, in the case of large cash deposit amounts the current common practice is to direct customers to banking institutions. This takes into account internal control and safety issues that are of concern to companies. When the cash is converted to a money instrument, such as a bank check, the transaction can go forward and, in general, the bank will perform any required reporting or other federal obligation intended to aid the detection of money laundering. However, if currency is received by the escrow settlement agent, or multiple (cash-equivalent) financial instruments are received by the settlement agent for application at closing, the settlement agent will take into account and apply the rules of section 6050I of the Internal Revenue Code. Thus, reporting on IRS Form 8300 will occur as required. The reporting requirement is the context in which settlement agents have historically viewed their obligations involving the detection and deterring of money laundering. In this new era that focuses on terrorist activity AEA members are continuing to receive information from their companies about “what to look for.” The AEA certainly agrees with the list of red flag situations compiled by the American Land Title Association and listed in the ANPRM. However a hallmark of the settlement agent is to follow instructions, acting, at all times, as a neutral third party. Hence it is, at the least, a strange and difficult role for the escrow agent to attempt to become intrusive with regard to the backgrounds and motives of any principal.

Nevertheless the actual individual conducting the settlement can notify higher management at the company of red-flag type concerns they may have.

## II. Definitional issues.

The AEA concedes that an escrow settlement agent is a person within the statutory coverage and therefore should meet, in your phrasing, “the basic steps contemplated by section 352.” We also agree that other participants such as transactional attorneys should be covered. Just as one example, there are money-related withholding requirements and exceptions under the Foreign Investment in Real Property Tax Act of 1980. The escrow settlement agent may have some involvement but an attorney may have a much higher level of knowledge and involvement because they may be seeking a withholding exemption for their foreign (non-U.S. entity) client.

AEA members have significant experience in settlements of commercial real estate transactions ranging from single buildings to ranch land to real estate investment trusts. However, due to the many variations that occur, we do not have general comments at this time directed specifically to the roles of various parties in the commercial real estate context. We will make available, upon the Department’s request, a panel of experienced individuals to describe practices and processes, and answer questions, about commercial transactions.

## III. Exemptions (based on category of persons involved).

We have no recommendations at this time. Smallness of the company should be taken into account for the details of the required standards, as discussed under IV.

## IV. Structuring of the Requirements.

The statute requires that a company’s program of detecting and deterring terrorist-directed international money laundering include the four elements set forth in the Background section of the ANPRM. The AEA believes that the first three should be appropriate to the size of and existing safeguards within a company. Any company should be capable of developing internal policies, procedures and controls, designating a compliance officer and having ongoing employee training (using, for example, information drawn from the FinCEN and AEA Internet pages.) All of these are already part and parcel (albeit in other contexts) of all real estate escrow settlement operations. The fourth requirement, an independent audit function, should be the focus of drafting attention, as this could be quite expensive and burdensome if an outside party or lengthy set of procedures is required. The ability of a small company to segregate duties and responsibilities so that one employee could be responsible for the first three elements (and any other program such as direct reporting on IRS Form 8300) and another employee be the testing person would sufficiently meet the purposes of the statute. We also do not see the need for a formal attesting of compliance. The level of documentation should generally be recording the occurrence of the testing, any deficiencies noted and corrected or follow-up action required and implemented.

The AEA would be pleased to follow-up on these written comments with any other information that could be useful to FinCEN and the Department in drafting requirements on real estate settlement agents under section 352 of the statute.

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Respectfully submitted:

/s/ Milre J. Henry  
AEA President 2002-2003