NAELA
National Academy of Elder Law Attorneys

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April 16, 2024

Andrea M. Gacki
Director
Financial Crimes Enforcement Network
U.S. Department of Treasury
2070 Chain Bridge Road
Vienna, VA 22182

Submitted via Regulations.gov

Re: Proposed Anti-Money Laundering Regulations for Residential Real Estate Transfers (FINCEN-2024-0005)

Dear Ms. Gacki:

As advocates for older adults, people with disabilities, and their families, the National Academy of Elder Law Attorneys (NAELA) appreciates the opportunity to comment on the above-referenced rule. First, we oppose the rule's application to certain non-financed residential real estate transfers, enumerated in more detail below, that are commonly employed by underserved and vulnerable communities of older adults and individuals with disabilities to benefit themselves or members of their immediate families. Second, the proposed rule also fails to reconcile, and violates, legal obligations applicable to attorneys with respect to professional conduct, attorney-client privilege, and the Model Rules of Professional Conduct of the American Bar Association (ABA). For these two reasons, these transfers, like those incident to divorce or death, should be excluded.

NAELA represents over 4,000 elder and special needs law attorneys and 31 chapters, with members in every state. We are the only professional, non-profit association of attorneys that conditions membership on a commitment to the Aspirational Standards for the Practice of Elder and Special Needs Law Attorneys. Extending beyond the benchmark set by the American Bar Association's Model Rules of Professional Conduct, these standards recognize the need for holistic, person-centered legal services to meet the needs of older adults, people with disabilities, and their caregivers.

NAELA concurs in great part with the American Bar Association's April 8, 2024, comments opposing any proposed rules which would require lawyers to disclose information relating to the legal representation of their clients in non-financed residential real estate transfers as contrary to professional conduct rules, attorney-client privilege, and the ABA Model Rules, many of which have been adopted by numerous states.[1] NAELA agrees that the proposed rule-making is overbroad, superfluous, and unnecessary; lacks

[1] https://www.regulations.gov/comment/FINCEN-2024-0005-0092

clear Congressional intent; and exceeds FinCEN's regulatory authority, thus violating the Administrative Procedure Act.

The proposed rule states that it is meant to capture both sales and non-sale transfers, such as gifts and "transfers to trusts."[2] This is extremely broad and burdensome for older adults and individuals with disabilities. NAELA notes that "non-financed" transfers include contributions of a home to a *revocable* or *irrevocable living trust, qualified personal residence trust, intentionally defective grantor trust, charitable remainder trust,* a *qualified terminal interest in property trust benefitting the contributing homeowner(s),* or a *testamentary trust*. Whether intentionally or not (because the rule paints all transfers to trusts with a broad stroke), the term, as presently defined in the proposed regulation, could also encompass transfers to a *third-party common law discretionary trust*, a *discretionary support trust*, or a *trust for the support of an incapacitated beneficiary*, including and not limited to a *supplemental* or *special needs trust benefitting a disabled family member of the contributing homeowner(s)*. Such transfers generally do not involve the transfer of residential real estate purchased in cash within the past 365 calendar days. As with the transfers of non-financed residential realty, such non-financed residential realty transfers resulting from divorce, death or bankruptcy should be specifically excluded. Such transfers generally cannot "present a high risk for money laundering." Further, any earlier monetary transactions related to acquisition of these residences, through a prior mortgage or cash purchase, would have already been disclosed with arguably more onerous reporting requirements by financial service companies and mortgage companies subject to existing federal reporting requirements. Additionally, when seeking to acquire a tax identification number or an employer identification number, the responsible trustees have additional federal government reporting requirements due to the Internal Revenue Service.[3] As such, imposing additional reporting requirements concerning such non-financed residential real estate transfers to FinCEN would not "provide data relevant to a possible violation of law or regulation" other than information already reported. Instead, it would create a financial and administrative burden on both the reporter and the Department of the Treasury, potentially distracting the latter from combatting money laundering, terrorist financing and other illicit activities.

We therefore respectfully request that lawyers be exempt from reporting and that the exemptions for transfers incident to divorce, death and bankruptcy be expanded to include transfers to at least the above-enumerated trusts in italics.

Finally, we are gravely concerned that the proposed rule makes no mention of, and presumably fails to consider, the above-enumerated transfers of residential real property for other policy reasons given that these trusts are critical to the growing population of seniors and individuals with disabilities who rely on legal transfers to live with dignity in their homes and/or continue to qualify for public benefits to which they are entitled. Indeed, we assert that a disproportionate number of "low dollar transfers" are effectuated for the benefit of members of underserved communities or their families—this includes not only individuals with disabilities and older adults, but likely members of communities who historically

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[2] 89 FR 12436.
[3] 26 USC §6012(a)(4) and (a)(5).

have been unable to accumulate significant wealth through real property. As such, the proposed rule contravenes the U.S. Government's policies outlined in Executive Orders 13985 and 14091 which charge the Federal Government with advancing equity for all, including communities that have long been underserved, which includes persons with disabilities.[4] Specifically, Section 5 of Executive Order 14091 (issued on Feb. 16, 2023, therefore subsequent to this proposed rule's NPRM issued in 2021), states, "Agencies shall, consistent with applicable law…identify and address barriers for individuals with disabilities, as well as older adults, to participate in the engagement process" regarding "Federal policies and programs that affect them." Moreover, federal policies and programs are expected to deliver equitable outcomes—specifically, Section 3(d)(ii) of E.O. 14091 requires each agency head to "identify opportunities, as appropriate and consistent with applicable law, to incorporate into new regulations and to modify their respective agencies' regulations, internal- and public-facing guidance, and other policies to include advancing equity as part of their respective agencies' missions." NAELA believes this proposed rule fails to meet these important charges to advance equity.

Conclusion

We thank FinCEN for its consideration of these comments and are happy to provide additional background and a more detailed legal analysis of the issues surrounding this topic. We request that the full text of our comments be sent, along with the full text of the supporting materials cited, and considered part of the formal administrative record for purposes of the Administrative Procedure Act.

If you have any questions or would like to set up a discussion, please reach out to Thomas Harlow, NAELA's Interim Chief Executive Officer, at tharlow@naela.org.

Sincerely,

Bridget O. Swartz

Bridget O'Brien Swartz
President
National Academy of Elder Law Attorneys

[4] https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-advancing-racial-equity-and-support-for-underserved-communities-through-the-federal-government/