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Belt and Suspenders: Two Key Changes to Reduce Money Laundering Through Residential Real Estate

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Introduction

Until a jury convicted him for conspiring to launder money and for money laundering in July 2011,[1] Álvaro López Tardón enjoyed an opulent lifestyle replete with "fancy cars, seaside condos, designer jewelry, and expensive leather goods."[2] As "the alleged leader of Spain's Los Miami drug gang,"[3] he trafficked an estimated 7,500 kilograms of cocaine from South America to Spain and "launder[ed] more than $14 million in illegal drug proceeds in the United States."[4] López Tardón purchased more than a dozen Miami condos between 2001 and 2006, using cashier's checks to purchase the properties directly from

1. United States v. Tardón, 56 F. Supp. 3d 1309, 1311 (S.D. Fla. 2014).

2. *Drug Kingpin Dethroned: International Investigation Dismantles Criminal Enterprise*, FBI (Feb. 2, 2015), https://www.fbi.gov/news/stories/drug-kingpin-dethroned [https://perma.cc/5RMS-AAMZ].

3. Frederick Reese, *How to Launder Drug Money: Start an LLC and Buy Real Estate*, Mint Press News (Sept. 12, 2013), https://www.mintpressnews.com/how-to-launder-drug-money-start-an-llc-and-buy-real-estate/168778/ [https://perma.cc/YTT6-XFF9].

4. *Drug Kingpin Dethroned*, *supra* note 2; *see also Tardón,* 56 F. Supp. 3d at 1314 ("Tardon distributed multi-thousand kilograms of cocaine in Europe, which he directly imported from South America, and caused to be imported in to Spain. He then laundered $14,358,639.64 in illicit narcotics proceeds from the sale of said cocaine in the United States.").

developers.[5] Relying on illicit funds, López Tardón bought real estate "under the name of a shell company or straw buyer, including 11 purchases" at two high-end Miami condominium complexes.[6]

López Tardón allegedly laundered money by importing cocaine into Spain, then sending the proceeds to the United States using either couriers or wire transfers to dummy accounts.[7] Then, using straw buyers and shell companies, he purchased, among other things, luxury real estate in and around Miami.[8] The FBI estimated that, between 2004 and 2011, López Tardón brought more than $26,000,000 in drug proceeds into the United States.[9]

In many ways, López Tardón's actions are textbook money laundering.[10] After obtaining proceeds from the sale of cocaine, he

5. Jay Weaver, *Miami Jury Convicts Reputed Spaniard Drug Kingpin of Money-laundering*, Miami Herald (June 11, 2014, 1:08 PM), https://www.miamiherald.com/news/local/community/miami-dade/article1965898.html [https://perma.cc/AY56-XFLU] ("Before his arrest in 2011, López Tardón, 39, went on a wild spending spree. He snapped up 13 high-priced condos, including a $1 million-plus penthouse at the Continuum in South Beach, and 17 luxury cars, including a 2008 black Bugatti Veyron for $1.2 million and a 2003 black Ferrari Enzo for almost $1 million."); Reese, *supra* note 3.

6. Jay Weaver, *Reputed Spanish Drug Lord on Trial for Laundering Millions in Miami*, Miami Herald (June 5, 2014), https://www.miamiherald.com/news/local/community/miami-dade/article1965525.html [https://perma.cc/8YRV-BKLG]. Shell companies are "set up, usually offshore, complete with bank accounts in which money can reside during the layering phase." Peter Reuter & Edwin M. Truman, Chasing Dirty Money 31 (2004).

7. *Drug Kingpin Dethroned*, *supra* note 2.

8. *Id.*

9. *International Drug Money Laundering Indictment Unsealed*, FBI (July 14, 2011), https://archives.fbi.gov/archives/miami/press-releases/2011/international-drug-money-laundering-indictment-unsealed [https://perma.cc/52SU-BZG5].

10. *See* Ass'n of Certified Anti-Money Laundering Specialists, Study Guide: CAMS Certification Exam 2–3 (6th ed. 2016). "[M]oney laundering is the process of making dirty money look clean." *Id.* at 1. The Association of Certified Anti-Money Laundering Specialists (ACAMS) identifies three stages of money laundering: placement, layering, and integration. *Id.* at 2–3. Placement consists of "[t]he physical disposal of cash or other assets derived from criminal activity," and routinely involves depositing funds with legitimate businesses. *Id.* at 2. Layering entails separating "illicit proceeds from their source by layers of financial transactions intended to conceal the origin of the proceeds." *Id.* at 3. Layering normally consists of "converting the proceeds of the crime into another form and creating complex layers of financial transactions to obfuscate the source and ownership of funds." *Id.* The final stage, integration, consists of "[s]upplying apparent legitimacy to illicit wealth through the re-entry of the funds into the economy in what appear[] to be

arranged to move the illegally obtained funds from Spain to the United States.[11] He concealed the origin of the funds through a series of transactions that gave his wealth a patina of legitimacy—specifically, he associated his ill-gotten wealth with a luxury car dealership and a gourmet shop in Madrid.[12] Ultimately, López Tardón integrated his illegal funds into the licit financial system through seemingly legitimate, if extravagant, transactions.[13]

Despite the volume of his internationally financed luxury real estate purchases, López Tardón's empire was unraveled not by an analyst combing through spreadsheets to detect abnormal transactions—like one man purchasing thirteen luxury condominiums—but through the cooperation of his associates and confidantes.[14] The Los Miami gang's scheme began to unravel when authorities apprehended López Tardón's Santería priest, Vincente Orlando Cardelle, smuggling cash through Miami International Airport.[15] Prosecutors relied on testimony from López Tardón's "one-time partner . . . to establish[] that López Tardón was involved in drug trafficking."[16] López Tardón's ex-girlfriend, who pled guilty to money laundering charges related to the Los Miami drug gang, "acknowledged investing [López Tardón's] drug profits in Miami's soaring condominium market."[17] Ultimately, identifying and flipping members of López Tardón's inner circle, not the movement of millions of dollars in international wire transfers through anonymous shell companies, proved instrumental to bringing down the Los Miami gang.[18]

United States District Judge Joan Lenard sentenced López Tardón to 150 years' imprisonment.[19] "After his conviction, federal agents seized

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normal business or personal transactions." *Id.* Integration "entails using laundered proceeds in seemingly normal transactions to create the perception of legitimacy." *Id.* ACAMS notes that "money laundering can be achieved through virtually every medium, financial institution or business." *Id.* at 1. *See generally* Office of the Comptroller of the Currency, Money Laundering: A Banker's Guide to Avoiding Problems (2002).

11. *Drug Kingpin Dethroned*, *supra* note 2.

12. Weaver, *supra* note 5.

13. *Id.*

14. *Id.*

15. *Id.*; Brian Hamacher, *5 Busted in Miami Drug Money Laundering Ring*, NBC Miami (July 14, 2011, 1:20 PM), https://www.nbcmiami.com/news/local/5-Busted-in--125576373.html [https://perma.cc/E5NV-KPVJ].

16. Weaver, *supra* note 5.

17. *Id.*

18. *See id.*

19. Jay Weaver, *Spaniard López Tardón Sent to Prison for 150 Years in Miami Money-Laundering Case*, Miami Herald (Sept. 29, 2014),

[López Tardón's] illegally obtained assets, 'including a fleet of luxury cars and [thirteen] condos.'"[20] At sentencing, Judge Lenard described Miami as "replete with people who utilize illegal funds and live a luxurious, unbelievable lifestyle."[21] Since the so-called "Cocaine Cowboys" era in the 1980s,[22] money launderers like López Tardón have helped spur demand for luxury Miami real estate.[23]

Miami real estate is attractive to homebuyers for many reasons. The warm weather, sandy beaches, glamorous nightlife, metropolitan atmosphere, thriving international commerce, distinctive architecture, and syncretic culture are among the many legitimate reasons people choose to purchase high-end real estate in Miami.[24] Although Florida is the most popular state for foreign buyers who seek to purchase U.S. real estate,[25] five states—Florida, California, Texas, New York, and Arizona—account for 53% of total foreign-buyer residential real estate purchases.[26]

Nothing is inherently wrong with attracting customers from overseas. In the aftermath of the housing bubble that spurred the 2008 financial crisis, Miami's luxury real estate market flourished despite Florida's high overall foreclosure rate.[27] Non-U.S. residents, who

https://www.miamiherald.com/news/local/crime/article2296479.html [https://perma.cc/DMB5-5KKN].

20. Gary McPherson, Comment, *Floating on a Sea of Funny Money*, 26 U. MIAMI BUS. L. REV. 159, 172 (2017) (quoting Nicholas Nehamas, *How Secret Offshore Money Helps Fuel Miami's Luxury Real-Estate Boom*, MIAMI HERALD (Apr. 3, 2016, 2:00 PM), http://www.miamiherald.com/news/business/real-estate-news/article69248462.html#storylink=cpy [https://perma.cc/T7M6-DDVK]).

21. Weaver, *supra* note 19.

22. McPherson, *supra* note 20, at 161.

23. *Id.*; Ken Silverstein, *Miami: Where Luxury Real Estate Meets Dirty Money*, THE NATION (Oct. 2, 2013), https://www.thenation.com/article/miami-where-luxury-real-estate-meets-dirty-money/ [https://perma.cc/VZ4M-J7T6]).

24. *See, e.g.*, Phyllis McIntosh, *Miami, Florida: The Magic City*, 3 ENG. TEACHING F. 35, 35–37, 39, 41, 44 (2008); *see also* Silverstein, *supra* note 23 (quoting an anonymous Russian realtor as saying, "Miami is a brand. People from all over the world want property here.").

25. *See* NAT'L ASS'N OF REALTORS, PROFILE OF INTERNATIONAL TRANSACTIONS IN U.S. RESIDENTIAL REAL ESTATE 9 (2018) (noting that Florida accounts for 19% of all residential property purchases by foreigners in the United States; California, the next most popular state for foreign real estate purchasers, accounts for 14% of all such transactions).

26. *Id.*

27. Silverstein, *supra* note 23.

constitute a large proportion of Miami real estate purchasers,[28] are more likely than other buyers to purchase real estate through all-cash transactions.[29] In some markets, such as Florida's Miami-Dade County, all-cash transactions have, in some years, constituted roughly half of all residential real estate sales.[30] These characteristics also make Miami a popular destination for potential abuse. As FinCEN's Advisory to Financial Institutions and Real Estate Firms and Professionals noted, "[m]any all-cash transactions are routine and legitimate, [but] they also present significant opportunities for exploitation by illicit actors."[31]

All-cash transactions—those conducted "without a mortgage or other credit financing," pose an extremely high risk from an anti-money laundering (AML) perspective.[32] This is because the U.S. Bank Secrecy Act and other AML requirements do not effectively cover parties to all-cash transactions.[33] In many instances, American "[r]eal estate agents, brokers and developers, lawyers, and accountants and others involved in the buying and selling of real estate are not covered by anti-money

28. *See* Nicholas Nehamas, *How Secret Offshore Money Helps Fuel Miami's Luxury Real-Estate Boom*, Miami Herald (Apr. 3, 2016, 2:00 PM), http://www.miamiherald.com/news/business/real-estate-news/article69248462.html#storylink=cpy [https://perma.cc/T7M6-DDVK] (noting that in 2015 foreign buyers made 25% of home purchases in Miami-Dade County); *see also* Nat'l Ass'n of Realtors, *supra* note 25 (noting that in 2018 foreign buyers made up 33% of closed sales in Miami).

29. Nat'l Ass'n of Realtors, *supra* note 25 ("Most non-resident foreign buyers made an all-cash purchase (72[%]), while a smaller fraction of resident foreign buyers paid all-cash (30[%])."); *id.* at 24 ("Foreign buyers are more likely to pay cash than all existing home buyers. Forty-seven percent of reported transactions [by foreign buyers] were all-cash sales, compared to 21[%] for all existing home purchases.").

30. Fin. Crimes Enf't Network (FinCEN), U.S. Dep't of the Treasury, Advisory to Financial Institutions and Real Estate Firms and Professionals 4 (2017) (noting that, of 13,164 closed sales for single family homes in Miami-Dade County in 2016, 4,024 were paid in cash); Miami Ass'n of Realtors, Yearly Market Summary—2016: Townhouses and Condos (2017) (noting that, of 13,604 closed sales for townhouses and condos in Miami-Dade County in 2016, 8,209 were paid in cash.)). Thus, all-cash sales accounted for 45.7% of all home sales in Miami-Dade County in 2016.

31. FinCEN, *supra* note 30.

32. Mitchell Lincoln, ACAMS, Auditing to the Inherent Risks of Real Estate Gatekeepers 6 (2017) ("The use of all-cash transactions cannot be understated as a potential money laundering concern. It enables large sums of money to be integrated into the U.S. financial system with little to no traceability. Illicit actors who purchase real estate in cash may utilize the property for asset preservation, rent the property to obtain income or sell the property[,] making it difficult to trace back the monies to their original origins."), *available at* https://www.acams.org/aml-white-paper-auditing-real-estate-gatekeepers/ [https://perma.cc/4L8M-DKYV].

33. *Id.* at 5.

laundering laws, and therefore are not required to conduct due diligence on customers."[34] Unlike real estate transactions financed through traditional loans, in which lenders who are subject to AML reporting requirements must collect and maintain detailed records about transacting parties, all-cash transactions had, until recently, entailed no comparable requirements on the professionals who conduct real estate transactions.[35]

For money launderers, real estate is an ideal laundering mechanism.[36] Through commercial and residential real estate, money launderers can obscure the illicit origins of their funds or use real estate to operate "legitimate front businesses, particularly if they are cash intensive."[37] Once money launderers acquire real estate, that property "can readily serve as collateral in further layering transactions."[38] Historically, money launderers have bought and sold real estate "under false names [using] shell corporations."[39] Shell companies afford numerous advantages to their beneficial owners, including preferential tax treatment, estate planning advantages, limited liability, and anonymity.[40]

The United States does a particularly poor job of regulating shell companies. A 2011 World Bank report concluded that, with respect to obtaining identifying information regarding beneficial ownership, the United States was "[b]y far the worst performer of the countries reviewed."[41] In the United States, most company-registration services

34. Maíra Martini, Transparency Int'l, Doors Wide Open: Corruption and Real Estate in Four Key Markets 18 (2017).

35. Lincoln, *supra* note 32, at 4 ("[Real estate] professionals [were] under no legal obligation to establish an AML compliance program, identify customers, conduct due diligence and report suspicious transactions."). *But see, e.g.*, FinCEN, Geographic Targeting Order Covering Title Insurance Company (2018), *available at* https://www.fincen.gov/sites/default/files/shared/Real%20Estate%20GTO%20GENERIC_111518_FINAL.pdf [https://perma.cc/755B-9E3S].

36. *See* Reuter & Truman, *supra* note 6, at 31.

37. *Id.*

38. *Id.*

39. *Id.*

40. George L. Metcalfe Jr., *The Estate and Tax Planning Benefits of Shell Corporations*, 97 Prac. Tax Strategies 252, 252–55 (2016).

41. Emile van der Does de Willebois et al., Stolen Asset Recovery (STAR) Initiative, WBG, The Puppet Masters 92 (2011) ("Out of [twenty-seven] service providers under U.S. jurisdiction returning a valid response, only [three] said they asked for any form of identity documentation, whereas the others ([twenty-four]) were prepared to form companies without conducting any due diligence whatsoever."), *available at* https://star.worldbank.org/sites/star/files/puppetmastersv1.pdf [https://perma.cc/US9L-CXFM].

providers "did not ask for any proof of identification" for nonresidents who attempted to use their services, despite the fact that company-registration service providers are required to obtain a valid employer identification number for nonresidents.[42] Some states' company-registration service providers are especially accommodating to nonresidents: "[S]ome providers in Wyoming and Nevada actually offered to use their employees' Social Security numbers to spare clients the need to obtain an [employer identification number]."[43] The identification challenge is compounded "[b]ecause so little information is collected on U.S. companies, [making it] impossible to tell how many are shell companies and not operational companies."[44] Nevertheless, "U.S. law enforcement consistently has indicated that the number is high enough to cause grave concerns."[45] Money launderers value the anonymity shell corporations afford them because that anonymity enables them to avoid detection.[46]

The risks associated with money laundering through real estate are significant. Laundered money is used to finance terrorist and human trafficking organizations, circumvent economic sanctions, trade in illegal drugs, and promote political corruption.[47] The United Nations estimates that the "amount of money laundered globally in one year is 2–5% of global GDP, or $800 billion [to] $2 trillion in [2017 U.S.] dollars."[48] The Financial Action Task Force, an intergovernmental

42. *Id.*

43. *Id.*

44. Casey Michel, The United States of Anonymity 11 (2017).

45. van der Does de Willebois et al., *supra* note 41, at 93.

46. *Id.* at 97 ("Many corporate vehicles that are used to launder money are established solely for the purpose of providing anonymous access to financial institutions.").

47. *See* Richard Malish, *Are Lawyers Facilitating Money Laundering?*, NICE Actimize (Apr. 14, 2017), https://www.niceactimize.com/blog/are-lawyers-facilitating-money-laundering-534/ [https://perma.cc/PS54-FUQK]; *see also* Michel, *supra* note 44, at 3.

48. *Money-Laundering and Globalization*, U.N. Office on Drugs & Crime, https://www.unodc.org/unodc/en/money-laundering/globalization.html [https://perma.cc/6TRX-WSPG] (last visited June 27, 2020). The $1.2 trillion range in the estimate reflects the uncertainty inherent in estimating the scale of an activity which, by its nature, is riven with secrecy. The U.N. Office on Drugs and Crime appears to recognize the methodological limits of estimating the total amount of laundered money circulating in the global financial system: "Because of the clandestine nature of money-laundering, it is difficult to estimate the total amount of money that goes through the [money laundering] cycle." *Id.* Money laundering in such large amounts is not a new phenomenon: one 1993 estimate "put the amount of money being derived from criminal enterprises and then laundered in the United States at approximately $300

AML organization, identified real estate "as a clear area of vulnerability," noting that "[r]eal estate accounted for up to 30% of criminal assets confiscated" between 2011 and 2013.[49] As López Tardón recognized, real estate is an especially attractive vehicle for money laundering. In addition to providing criminals with living space, social capital, and bases from which to conduct illicit activities, the sale of real estate can lend the appearance of legitimacy to laundered money.[50] As a result, "the purchase of real estate is a common outlet for criminal proceeds."[51]

The Financial Crimes Enforcement Network (FinCEN), a bureau of the U.S. Department of the Treasury, is responsible for "safeguard[ing] the financial system from illicit use and [combating] money laundering."[52] In recent years, FinCEN has taken steps to reduce anonymity in real estate transactions. Since 2016, FinCEN has required title insurance companies to report identifying information about participants in residential real estate transactions over a certain dollar threshold in select localities.[53] But the limited scope of these efforts and the ample alternatives they leave money launderers indicates that more action is necessary.

billion annually." *See* Scott Sulzer, *Money Laundering: The Scope of the Problem and Attempts to Combat It*, 63 Tenn. L. Rev. 143, 146 (1995).

49. Fin. Action Task Force, Money Laundering and Terrorist Financing Vulnerabilities of Legal Professionals 24 (2013), *available at* http://www.fatf-gafi.org/media/fatf/documents/reports/ML and TF vulnerabilities legal professionals.pdf [https://perma.cc/DG9J-AZXK].

50. *See id.* at 44.

51. Fin. Action Task Force, *supra* note 49, at 44.

52. *What We Do,* FinCEN, https://www.fincen.gov/what-we-do [https://perma.cc/82X2-9Y3V] (last visited June 27, 2020).

53. *FinCEN Targets Shell Companies Purchasing Luxury Properties in Seven Major Metropolitan Areas*, FinCEN (Aug. 22, 2017), https://www.fincen.gov/news/news-releases/fincen-targets-shell-companies-purchasing-luxury-properties-seven-major [https://perma.cc/2FPE-Z556]. FinCEN requires title insurance companies to "fil[e] a FinCEN Currency Transaction Report[] within 30 days of the closings of the [covered transaction]." FinCEN, *supra* note 35, at 2. Federal regulations require some financial institutions to file currency transaction reports for transactions involving the use "of more than $10,000" in currency in most circumstances. *See* 31 C.F.R. §§ 1010.311, 1010.315 (2018). Currency transaction reports primarily exist to prevent companies and individuals from conducting anonymous cash transactions. *See id.* § 1010.312; FinCEN, Casino Industry: Currency Transaction Reporting 4 (2008), https://www.fincen.gov/sites/default/files/shared/CasinoIndustryCTRFilings.pdf [https://perma.cc/M8NM-RBE5] (noting that "an initial objective of the BSA . . . was to require banks to report large cash transactions because the anonymity of cash made it an attractive vehicle for drug traffickers, tax evaders and persons engaged in organized crime").

This Note addresses the United States' reluctance to impose AML reporting requirements on persons involved in real estate transactions and how this reluctance facilitates money laundering on an immense scale. Requiring title insurance companies to report beneficial ownership information to FinCEN is a flawed proxy for identifying shell companies' beneficial owners. The United States should require all shell companies, irrespective of whether they use services provided by financial institutions, to identify their beneficial owners to the Department of the Treasury. Requiring title insurance companies to report on all real estate transactions above an appropriate dollar threshold and requiring shell companies to report the identity of all beneficial owners are complementary approaches that together will reduce the United States' attractiveness as a money laundering destination without unduly burdening financial institutions.

In Part I, this Note examines the USA PATRIOT Act's amendments to the Bank Secrecy Act, which require certain types of businesses to maintain AML compliance programs, as well as the non-intuitive manner in which regulators applied these laws in the context of the real estate industry. Part II addresses the administrative obstacles and policy tradeoffs involved in pursuing a more robust AML policy through title insurance companies. Part III explores FinCEN's approach to addressing money laundering through residential real estate, and concludes that FinCEN's Geographic Targeting Orders (GTOs) have yielded valuable insights, but that requiring title insurance companies to report on beneficial ownership information entails significant inherent limitations. Part III also discusses the limits to an AML approach that relies on title insurance companies, and argues that the government should adopt a complementary approach that addresses anonymous shell companies. Part IV argues that Congress should pass legislation on two fronts: (1) requiring shell companies to disclose identifying information about their beneficial owners to the Internal Revenue Service (IRS); and (2) requiring the IRS to make all such identifying information immediately available to FinCEN. Requiring shell companies to self-report identifying information about their beneficial owners would both reduce the burden on financial institutions and improve the efficacy of real estate-related AML compliance requirements. Rather than rely on imperfect proxies like title insurance companies to provide a modicum of transparency, legislation that looks to the source of the problem—state business entities that provide anonymity—will more effectively address the risks attendant with real estate-based money laundering.

I. Development of AML Law in the United States

The United States has come under justified criticism for failing to limit the risks associated with real estate transactions.[54] Despite pressures to conform to best practices advocated by international watchdogs, the United States has been slow to address the risks presented by real estate-related money laundering.[55] To better examine the origins of the United States' institutional failures to more zealously police money laundering through real estate transactions, an examination of the complex relationship between legal, historical, and economic forces is in order.

The United States enacted the Bank Secrecy Act (BSA) in 1986.[56] Initially conceived as a way to encourage financial institutions to monitor their own activities, the BSA required financial institutions to assess the risk presented by their customers and to report suspicious activities to regulatory authorities.[57] By assembling information about potential financial crimes and centralizing it in FinCEN, the BSA gave law enforcement the tools to prosecute domestic money laundering and financial crimes more effectively.[58] Despite initial successes in increasing the difficulty and cost of laundering money in the United States, "sophisticated launderers and criminals began almost immediately to take advantage of the increasingly open, and porous, global financial system."[59] In the late 1990s and early 2000s, the U.S. government and

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54. Lincoln, *supra* note 32, at 4.

55. *See* Kevin L. Shepherd, *The USA PATRIOT Act: The Complexities of Imposing Anti-Money Laundering Obligations on the Real Estate Industry*, 39 Real Prop. Prob. & Tr. J. 403, 420–22 (2004); Fin. Action Task Force & Asia-Pacific Group on Money Laundering, Anti-Money Laundering and Counter-Terrorist Financing Measures—United States 39 (2016), *available at* https://www.fatf-gafi.org/media/fatf/documents/reports/mer4/MER-United-States-2016.pdf [https://perma.cc/XK8Y-9ZYY].

56. Bank Secrecy Act of 1970, Pub. L. No. 91-508, 84 Stat. 1114 (codified as amended in scattered sections of 12 U.S.C., 18 U.S.C., and 31 U.S.C. (2018)); Robert E. Sims & Leah Castella, *The USA PATRIOT Act of 2001: New Obligations and Opportunities in the Fight Against Global Money Laundering*, Andrews' Bank & Lender Liab. Litig. Rep., Dec. 20, 2001, at 1, 1.

57. Sims & Castella, *supra* note 56.

58. *Id.* (noting that money laundering "investigations were hampered by the inability to secure evidence of financial transactions and criminal activities that occurred beyond U.S. borders").

59. *Id.* (estimating that, in 2001, "professional money launderers charge their clients as much as 25[%] more than they did [in 1986], a fee increase that reflects the increased risk and cost the launderer now faces in America.").

international organizations sought to develop methods to combat international money laundering.[60]

In 2001, the USA PATRIOT Act amended the Bank Secrecy Act to require financial institutions to establish AML compliance programs and set minimum requirements for those programs.[61] The statute defines twenty-seven categories of "financial institution," ranging from more traditional financial entities—such as banks, securities brokers, and credit unions[62]—to "persons involved in real estate closings and settlements."[63]

The BSA authorizes the Department of the Treasury to issue GTOs.[64] GTOs are temporary orders through which the Secretary of the Treasury may require "any domestic financial institution . . . in a geographic area . . . to obtain such information as the Secretary may describe . . . concerning [certain transactions and the persons who participate in them]; to maintain a record of [that] information;" and to report on such transactions.[65] The USA PATRIOT Act extended the maximum effective period for GTOs from sixty days to 180 days.[66] The Secretary of the Treasury may renew a GTO if "reasonable grounds exist for concluding that additional recordkeeping and reporting requirements are necessary."[67] Consequently, while GTOs are ostensibly temporary measures, in practice the Secretary can indefinitely extend GTOs.

In 2003, FinCEN attempted to define "persons involved in real estate closings and settlements."[68] But, in part because of opposition

60. *Id.*

61. *See* USA PATRIOT Act, Pub. L. No. 107–56, § 352, 115 Stat. 272 (2001) (codified as amended at 31 U.S.C. § 5318 (2018)) (amending the Bank Secrecy Act to require financial institutions to develop "internal policies, procedures, and controls;" designate "a compliance officer;" maintain "an ongoing employee training program;" and establish "an independent audit function to test programs"); *see also* Bank Secrecy Act, 31 U.S.C. §§ 5311, 5318, 5312, 5326 (2018).

62. 31 U.S.C. § 5312(a)(2)(A)–(H) (2018).

63. *Id.* § 5312(a)(2)(U).

64. *Id.* § 5326(a).

65. *Id.*

66. *Id.* § 5326(d).

67. *Id.* § 5326(a).

68. Andrew A. Lance et al., *Do Not Pass Go, Do Not Collect $200: FinCEN Imposes Temporary Reporting Requirements on Title Insurance Companies for All Cash Luxury Real Estate Transactions in Manhattan and Miami*, GIBSON, DUNN & CRUTCHER (Feb. 11, 2016), https://www.gibsondunn.com/do-not-pass-go-do-not-collect-200-fincen-imposes-temporary-reporting-requirements-on-title-insurance-companies-for-all-cash-luxury-real-estate-transactions-in-manhattan-and-miami [https://perma.cc/9LW4-APCN].

from groups operating within or adjacent to the real estate industry, FinCEN temporarily abandoned the project.[69] In particular, lawyers—who routinely play prominent roles in real estate closings—and groups representing lawyers opposed rules that could conflict with the attorney-client privilege and client confidentiality.[70] Commentators had harshly criticized the "troubling ambiguities lurking in the phrase 'persons involved in real estate closings and settlements'" as posing significant practical challenges to enforcement, increasing the compliance cost for persons involved in real estate closings and settlements, and conflicting with the ethical duties of attorneys.[71] The legal community's response to additional reporting requirements on "persons involved in real estate closings and settlements" included practical objections rooted in the logistics of real estate closings, as well as categorical ethical objections.[72]

Real estate industry groups have historically opposed attempts by FinCEN to impose additional reporting requirements on persons involved in real estate closings and settlements, raising concerns that "AML requirements would impose onerous burdens on the real estate industry with no corresponding benefit to the fight against money laundering and terrorist financing." *See* Shepherd, *supra* note 55, at 421.

69. Lance et al., *supra* note 68; Shepherd, *supra* note 55, at 421.

70. Shepherd, *supra* note 55, at 430; *see also* Letter from Louis B. Guttman, Chair-Elect, Real Property, Probate and Trust Law Section of the Florida Bar Ass'n, to FinCEN, at 2 (June 9, 2003) ("[T]he inclusion of real estate attorneys within the USA PATRIOT Act [AML reporting] requirement would . . . impose on real estate attorneys a duty to conduct basic due diligence on the identity of their clients—which would cause clients to feel distrustful of their attorney and would discourage clients from communicating fully and frankly with their attorney; and . . . impose on real estate attorneys a de facto obligation to report questionable transactions to law enforcement authorities-thus conflicting with longstanding rules of client confidentiality and attorney-client privilege."), *available at* https://www.fincen.gov/sites/default/files/shared/guttmann.pdf [https://perma.cc/ZP8T-FHWX].

71. Shepherd, *supra* note 55, at 406. The language of 31 U.S.C. § 5312(a)(2)(u) (2018) is inherently ambiguous. Read in the broadest light, a part-time realtor selling a modest home—as "persons involved in real estate closings and settlements"—could be required to implement an AML compliance program. Thus, "regulatory action is required to enumerate the persons that would fit into this category." Lance et al., *supra* note 68.

72. *See, e.g.*, Shepherd, *supra* note 55; Letter from Sanford A. Weiner, President, Am. Coll. of Real Estate Lawyers, to FinCEN, at 4 n.1 (June 9, 2003) ("Commercial real estate transactions are carefully scheduled to close and settle to coincide with the business interests and objectives of the parties. Delays will be costly and may threaten the successful consummation of transactions."), *available at* https://www.fincen.gov/sites/default/files/shared/weiner.pdf [https://perma.cc/KHA6-9FTR]; Letter from Louis B. Guttman to FinCEN, *supra* note 70, at 2.

Although lawyers and legal trade groups criticized the proposed increased AML reporting requirements, the legal profession represents a weak link in the U.S. AML enforcement program.[73] But addressing

73. *See Secret Companies Allow Corrupt Cash to Flood the Biggest Real Estate Markets*, Transparency Int'l (Mar. 29, 2017), https://www.transparency.org/news/pressrelease/secret_companies_allow_corrupt_cash_to_flood_the_biggest_real_estate_market [https://perma.cc/KR4J-4RDQ] ("Australia, Canada and the U.S. rely almost exclusively on banks to stop money laundering, even though a slew of middlemen including real estate agents, accountants, tax planners, lawyers and others participate in deal-making. This makes all-cash deals, which do not require the involvement of a bank and which represent a significant proportion of high-end sales made to overseas investors, especially difficult to track.").

Lawyers' peculiar role as financial intermediaries who are ethically bound to preserve client confidentiality presents a risk for abuse. In one exposé performed by the transparency advocacy group Global Witness, a person posing as an adviser to a minister of a foreign government sought advice from thirteen law firms on how best to move money into the United States while avoiding detection. *Lowering the Bar*, Global Witness (Feb. 1, 2016), https://www.globalwitness.org/en/reports/loweringthebar [https://perma.cc/ZS3U-5SRW]. At twelve of the thirteen firms Global Witness approached, lawyers "suggested using anonymously-owned companies or trusts to hide the fictitious minister's assets," and "recommended using American companies." *Id.* Among the attorneys Global Witness interviewed, some "suggested using their law firms' own bank accounts to help prevent U.S. banks detecting who the money belonged to; some also suggested that they themselves become a trustee of an offshore trust and use this position to open a bank account." *Id.*

Two commentators indicated that the twelve attorneys who provided advice on how best to bring suspicious funds into the United States "made scant effort to explore [the possibility that the requested assistance would violate U.S. AML statutes] or to undertake necessary due diligence," presenting "themselves as willing enablers of transactions to conceal ownership of assets without exploring . . . the legal limits on such transactions." Memorandum from John Leubsdorf, Professor of Law at Rutgers Sch. L., and William H. Simon, Arthur Levitt Professor at Columbia L. Sch., to Global Witness (Jan. 25, 2015), *available at* https://www.globalwitness.org/en/reports/loweringthebar [https://perma.cc/ZS3U-5SRW].

The norms of confidentiality that shroud the legal profession mean that "conduct such as that of these lawyers would not normally come to light." *Id.* Striking a balance between preserving the attorney-client relationship and preventing the laundering of illicit funds through real property implicates policy choices about, among other things, privacy, administrative efficiency, criminal justice, and legal ethics. Though this Note focuses primarily on reducing the anonymity that facilitates money laundering through real estate, an updated discussion is necessary of how best to address the money laundering risks presented by attorneys. *See* Shepherd, *supra* note 55, at 420–22 (discussing the risks for attorneys related to money laundering); *see also* Armen Adzhemyan & Susan M. Marcella, *"Better Call Saul" if You Want Discoverable Communications:*

this weakness directly through the imposition of reporting requirements on attorneys threatened to substantially increase the risk and expense of compliance for attorneys without concomitantly reducing the risks of money laundering.[74] As one commentator noted, "lawyers may not be in the best position to detect money laundering and terrorist financing activities."[75]

Recognizing the high potential costs of including attorneys within the definition of "persons involved in real estate closings and settlements," and seemingly acknowledging challenges the real estate industry faced in the wake of the Great Recession, FinCEN for more than a decade avoided imposing potentially burdensome regulatory requirements on the real estate industry.[76] Until 2016, FinCEN broadly exempted persons involved in real estate closings and settlements from AML reporting requirements imposed on other financial institutions.[77]

The Misrepresentation of the Attorney-Client Privilege on Breaking Bad, 45 N.M. L. Rev. 477, 479 (2015) (addressing the circumstances in which "a lawyer's involvement with a legitimate business transaction using illicit funds vitiate[s] the attorney-client privilege").

74. Shepherd, *supra* note 55, at 434 n.140 ("[A] real estate lawyer may be retained to play a tangential role as special or local counsel in reviewing and commenting on transaction documents prepared by others or in delivering a legal opinion on the enforceability of a transaction document under local law, or in performing solely property-related due diligence investigations (such as title and survey review or analysis of zoning entitlements). In none of these types of activities is the lawyer likely to find, or even be in a position to discover, potential 'red flags' suggesting that one or more of the parties may be seeking to engage in money laundering or may be providing financial support for terrorist activities.") Without a "demonstrable cost-benefit to such an undertaking," an interpretation of 31 U.S.C. § 5312(a)(2)(U) (2018) that excludes many attorneys who participate in real estate transactions would avoid undue compliance costs. *See* Letter from Sanford A. Weiner to FinCEN, *supra* note 72, at 8.

75. Shepherd, *supra* note 55, at 434 & n.140.

76. Lance et al., *supra* note 68. ("Because most real estate transactions involve some form of financing, and are thus subject to the AML scrutiny imposed by financial institutions, FinCEN has been reluctant to impose potentially duplicative requirements on the rest of the industry.").

77. Martini, *supra* note 34, at 18 ("The USA PATRIOT ACT 2001 originally contained provisions that required those involved in real estate closings to perform due diligence on their customers, but they were granted a temporary exemption from that requirement by the Treasury Department, which has never been lifted."); *see also* 31 C.F.R. § 1010.205(b)(1)(v) (2018) (exempting "[persons] involved in real estate closings and settlements" from the requirement to "establis[h] anti-money laundering programs").

II. Modern Developments: Using GTOs to Require Title Insurance Companies to Perform Reporting and Recordkeeping Functions

The policy of broadly exempting persons involved in real estate closings and settlements from AML reporting requirements shifted on January 13, 2016, when FinCEN issued two GTOs "requiring [title insurance companies, their subsidiaries and agents] to collect and report information about the persons involved in certain residential real estate transactions" in Miami-Dade County and Manhattan.[78] Finding that "additional reporting requirements . . . are necessary to carry out the purposes of the Bank Secrecy Act," FinCEN used the GTO mechanism to create additional recordkeeping and reporting requirements on title insurance companies.[79] The January 2016 GTOs covered "real property (including individual units of condominiums and cooperatives) designed principally for the occupancy of from one to four families."[80]

The January 2016 GTOs defined "covered transactions," enumerating the kinds of legal entities and financial instruments, geographic locations, and purchase prices that would trigger reporting requirements for title insurance companies on customers who lack external financing.[81] The GTOs required title insurance companies that conduct covered transactions to report to FinCEN all such transactions

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78. FinCEN, U.S. Dep't of the Treasury, Geographic Targeting Order: Miami (2016), https://www.fincen.gov/sites/default/files/shared/Real_Estate_GTO-MIA.pdf [https://perma.cc/CZQ6-JDUP] [hereinafter FinCEN, Miami GTO]; FinCEN, U.S. Dep't of the Treasury, Geographic Targeting Order: Manhattan (2016), https://www.fincen.gov/sites/default/files/shared/Real_Estate_GTO-NYC.pdf [https://perma.cc/BXL4-JYYZ] [hereinafter FinCEN, Manhattan GTO].

79. FinCEN Miami GTO, *supra* note 78, at 1; FinCEN Manhattan GTO, *supra* note 78, at 1.

80. *Frequently Asked Questions*, FinCEN (Feb. 1, 2016), https://www.fincen.gov/sites/default/files/shared/FAQsRealEstateGTO.pdf [https://perma.cc/6UEW-MM2Y]. Thus, real estate transactions for any other type of property are not subject to reporting requirements.

81. FinCEN Miami GTO, *supra* note 78, at 1–2; FinCEN Manhattan GTO, *supra* note 78, at 1–2. A transaction was a "covered transaction" for the purposes of the GTOs if: (1) a legal entity (2) purchases residential real property located in [the selected county or borough] (3) for a total purchase price in excess of [$1,000,000 in Miami-Dade County; $3,000,000 in the Borough of Manhattan], (4) such purchase is made without a bank loan or other similar form of external financing, and (5) it is made, at least in part, using currency or a cashier's check, a certified check, a traveler's check, or a money order in any form. FinCEN Miami GTO, *supra* note 78; FinCEN Manhattan GTO, *supra* note 78.

within thirty days of completing the transaction.[82] FinCEN required title insurance companies to collect and transmit "information about the identity of the individual primarily responsible for representing the Purchaser, . . . the identity of the Purchase, . . . [and] the identity of the beneficial owner(s) of the Purchaser."[83] Significantly, FinCEN defined "beneficial owner" to mean "each individual who, directly or indirectly, owns 25% or more of the equity interest in the Purchaser."[84] FinCEN also required title insurance companies to include the closing date, the address, the total purchase price, and the "amount transferred in the form of a [monetary instrument]."[85] These requirements did not preclude cash purchases for expensive residential real property.[86] Rather, these requirements compelled individuals and the beneficial owners of limited-liability corporations and other corporations "to identify themselves to authorities."[87]

Then-FinCEN Director Jennifer Shasky Calvery justified the January 2016 GTOs as part of an effort "to understand the risk that corrupt foreign officials, or transnational criminals, may be using

82. FINCEN MIAMI GTO, *supra* note 78, at 2; FINCEN MANHATTAN GTO, *supra* note 78, at 2.

83. FINCEN MIAMI GTO, *supra* note 78, at 2; FINCEN MANHATTAN GTO, *supra* note 78, at 2. FinCEN defined "Purchaser" to mean "the [legal entity] that is purchasing residential real property as part of a Covered Transaction." *E.g.*, FINCEN MIAMI GTO, *supra* note 78 at 3. Beneficial owners covered in the GTOs include "each individual who, directly or indirectly, owns 25% or more of the equity interest in the Purchaser." *E.g.*, FINCEN MIAMI GTO *supra* note 78 at 3. Twenty-five percent has remained the beneficial-ownership threshold necessary to trigger reporting obligations. *Frequently Asked Questions*, FINCEN (Nov. 15, 2018), https://www.fincen.gov/sites/default/files/shared/Real%20Estate%20GTO%20FAQs_111518_FINAL.pdf [https://perma.cc/PM2S-EWV6].

84. FINCEN MIAMI GTO, *supra* note 78, at 3; FINCEN MANHATTAN GTO, *supra* note 78, at 3; RENA S. MILLER & LIANA W. ROSEN, CONG. RESEARCH SERV., IF11014, IMPLEMENTATION OF TREASURY'S NEW CUSTOMER DUE DILIGENCE RULE: A STEP TOWARD BENEFICIAL OWNERSHIP TRANSPARENCY? (2018).

85. *E.g.*, FINCEN MIAMI GTO, *supra* note 78, at 2–3.

86. Nicholas Nehamas & Rene Rodriguez, *How Dirty Is Miami Real Estate? Secret Home Deals Dried Up when Feds Started Watching*, MIAMI HERALD (July 18, 2018, 6:59 PM), https://www.miamiherald.com/news/business/real-estate-news/article131543514.html [https://perma.cc/G485-3TTU].

87. C. Sean Hundtofte & Ville Rantala, *Anonymous Capital Flows and U.S. Housing Markets* 1 (May 28, 2018) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3186634 [https://perma.cc/59Z3-5Q3P]. It bears mention that "[o]nly government officials have access to the information [about the identities of beneficial owners in residential real estate transactions], not the public." Nehamas & Rodriguez, *supra* note 86.

premium U.S. real estate to secretly invest millions in dirty money."[88] Although FinCEN's "rules [had] evolved to make the standard mortgage market more transparent and less hospitable to fraud and money laundering, . . . cash purchases present a more complex gap."[89] FinCEN's decision to focus on title insurance companies stemmed from, in its view, the "central role" that title insurers play in residential real estate transactions.[90] Title insurance companies protect parties to real estate transactions "against losses resulting from unknown defects in the title to [real] property that occur prior to the closing of a real estate transaction" by "cover[ing] the insured party for any covered losses and legal fees that might arise" from title defects.[91] Thus, title insurers are routinely involved in real estate transactions.[92] The choice to regulate title insurance companies both directs attention to actors who often feature prominently in real estate transactions and avoids the contentious debate over whether to subject attorneys and realtors to the reporting requirements.

The January 2016 GTOs remained in effect from March 1, 2016 through August 27, 2016.[93] Subsequent GTOs expanded the geographical reach, lowered the purchase-price threshold, and broadened the list of financial instruments subject to the reporting requirements.[94] The November 2018 GTO required title insurance

88. *FinCEN Takes Aim at Real Estate Secrecy in Manhattan and Miami*, FinCEN (Jan. 13, 2016), https://www.fincen.gov/sites/default/files/news_release/20160113.pdf [https://perma.cc/MY3N-BPTB].

89. *Id.*

90. *Id.* ("FinCEN is covering certain title insurance companies because title insurance is a common feature in the vast majority of real estate transactions.").

91. *Title Insurance*, Nat'l Ass'n of Ins. Comm'rs (Nov. 14, 2018), https://www.naic.org/cipr_topics/topic_title_insurance.htm [https://perma.cc/5H3G-5SYG].

92. *FinCEN Takes Aim at Real Estate Secrecy in Manhattan and Miami*, *supra* note 88. Lenders "have shown a strong preference for the use of title insurance in their lending operations." Harry Mack Johnson, *The Nature of Title Insurance*, 33 J. Risk & Ins. 393, 410 (1966).

93. FinCEN Manhattan GTO, *supra* note 78, at 3; FinCEN Miami GTO, *supra* note 78, at 3.

94. *See, e.g.*, FinCEN, U.S. Dep't of the Treasury, Geographic Targeting Order: Sample (2016), https://www.fincen.gov/sites/default/files/shared/Title_Ins_GTO_Sample_072716.pdf [https://perma.cc/4L7A-XNQW] (expanding the monetary instruments covered by the order to include personal checks and business checks, and extending the geographic reach of the order to include additional counties and boroughs in Florida, New York, Texas, and California); FinCEN, U.S. Dep't of the Treasury, Geographic Targeting Order: Generic (2017), https://www.fincen.gov/sites/default/files/shared/Real%20Estate%20GTO%20February%202017%20-%20Generic.pdf [https://perma.cc/AQ7L-

companies to report to FinCEN identifying information for parties involved in transactions for any non-financed residential real property with a purchase price of $300,000 or more that take place in one of twenty-two counties in nine states.[95] Subsequent GTOs have included minor adjustments, but the geographic scope, dollar amount, and ownership thresholds remain unchanged and are in effect through November 2020.[96]

HBW7]; FINCEN, U.S. DEP'T OF THE TREASURY, GEOGRAPHIC TARGETING ORDER: GENERIC (2017), https://www.fincen.gov/sites/default/files/shared/Real%20Estate%20GTO%20Order%20-%208.22.17%20Final%20for%20execution%20-%20Generic.pdf [https://perma.cc/U6D8-FNLD] (subjecting funds transfers, such as wire transfers or automated clearing house transfers, to the order, and extending the geographic reach of the order to include the city and county of Honolulu, Hawaii); FINCEN, *supra* note 35 (dramatically lowering the dollar threshold for reporting, expanding the geographic scope of the order, and subjecting transactions funded by virtual currency to the order).

95. FINCEN, *supra* note 35, at 1–2. The November 2018 GTO covers transactions in the following localities:

> 1. The Texas counties of Bexar, Tarrant, or Dallas;
>
> 2. The Florida counties of Miami-Dade, Broward, or Palm Beach;
>
> 3. The Boroughs of Brooklyn, Queens, Bronx, Staten Island, or Manhattan in New York City, New York;
>
> 4. The California counties of San Diego, Los Angeles, San Francisco, San Mateo, or Santa Clara;
>
> 5. The City and County of Honolulu in Hawaii;
>
> 6. The Nevada county of Clark;
>
> 7. The Washington county of King;
>
> 8. The Massachusetts counties of Suffolk, or Middlesex; or
>
> 9. The Illinois county of Cook . . . .

Id.

Preliminary data suggests that approximately 57% of all new houses sold in 2018 sold for $300,000 or more. U.S. CENSUS BUREAU & U.S. DEP'T HOUS. & URBAN DEV., MONTHLY NEW RESIDENTIAL CONSTRUCTION JANUARY 2019 (2019), https://www.census.gov/construction/nrc/pdf/newresconst.pdf [https://perma.cc/L7J2-D87X]. As of January 2019, the median sale price for new residential housing sales was $317,200. *Id.* The median sale price for existing single-family home sales was somewhat lower—$249,400—during the same time period. *See Median Sales Price of Existing Single-Family Homes*, FED. RES. BANK OF ST. LOUIS (Feb 21, 2019) https://fred.stlouisfed.org/series/HSFMEDUSM052N [https://perma.cc/GC2J-WKZD]. The $300,000 reporting threshold is thus likely to capture a significant portion of all future residential real estate sales throughout the country.

96. *See* FinCEN, U.S. Dep't of the Treasury, Geographic Targeting Order Covering Title Insurance Company (May 14, 2019), https://www.fincen.gov/

FinCEN's decision to subject to additional scrutiny non-financed residential real estate transactions has generated useful information on the money laundering risks posed by real property sales.[97] During the first year it monitored such transactions, FinCEN "found that about 30[%] of the transactions covered by the GTOs involve a beneficial owner or purchaser representative [who] is also the subject of a previous suspicious activity report."[98] FinCEN concluded that the proportion of suspicious-activity-report filings against people who conduct cash-based transactions for high-end real estate "corroborates FinCEN's concerns

sites/default/files/shared/Real%20Estate%20GTO%20Order%20FINAL%20GENERIC%205.15.2019_508.pdf [https://perma.cc/VF37-W7T2] (extending the November 2018 GTO without changes); FinCEN, U.S. Dep't of the Treasury, Geographic Targeting Order Covering Title Insurance Company (Nov. 8, 2019), https://www.fincen.gov/news/news-releases/fincen-reissues-real-estate-geographic-targeting-orders-12-metropolitan-areas-0 [https://perma.cc/E85P-FC8G] (exempting real estate transactions made by publicly traded U.S. companies but otherwise continuing the previous GTO); FinCEN, U.S. Dep't of the Treasury, Geographic Targeting Order Covering Title Insurance Company (May 8, 2020), https://www.fincen.gov/sites/default/files/shared/Generic%20Real%20Estate%20GTO%20Order%20FINAL%20508_2.pdf [https://perma.cc/7WQL-W7QQ] (extending November 2019 GTO without changes).

97. *See, e.g.*, *FinCEN Renews Real Estate "Geographic Targeting Orders" to Identify High-End Cash Buyers in Six Major Metropolitan Areas*, FinCEN (Feb. 23, 2017), https://www.fincen.gov/sites/default/files/2017-02/Renewed%20GTO%20NR%20FINAL%20%28Posting%29.pdf [https://perma.cc/C88W-8UPJ].

98. *Id.* Suspicious activity reports are the vehicle through which financial institutions "report known or suspected violations of law or suspicious activity." FinCEN, Guidance on Preparing a Complete & Sufficient Suspicious Activity Report Narrative 1 (2003). Suspicious activity reports "have been instrumental in enabling law enforcement to initiate or supplement major money laundering or terrorist financing investigations and other criminal cases" and give FinCEN "a method of identifying emerging trends and patterns associated with financial crimes." *Id.* Financial institutions are required to file suspicious activity reports in several circumstances, such as when they detect activity that "[m]ay involve potential money laundering or other illegal activity." Kathryn Reed Edge, *SARs and PEPs*, Tenn. B.J., Aug. 2018, at 26, 26. Being the subject of a suspicious activity report is not prima facie evidence of financial crime; rather, suspicious activity reports "are intended to report certain financial transactions that the financial institution making the filing knows or reasonably suspects may violate Federal criminal law or that relate to money laundering activity or a violation of the [Bank Secrecy Act]." Alex C. Lakatos & Mark G. Hanchet, *Confidentiality of Suspicious Activity Reports*, 124 Banking L.J. 794, 794 (2007). Because "banks tend to err on the side of reporting, rather than ignoring marginal activity," suspicious activity reports may reflect financial institutions' risk aversion more than wrongdoing on the customer's part. *See id.* at 795.

about the use of shell companies to buy luxury real estate in 'all-cash' transactions."[99]

FinCEN's implementation and subsequent expansion of reporting requirements for title insurance companies has "produc[ed] valuable data that is assisting law enforcement and is serving to inform [FinCEN's] future efforts to address money laundering in the real estate sector."[100] A 2018 study found that by requiring the title insurance companies to report to FinCEN the identities of individuals who own 25% or more of a company conducting a cash transaction for residential real estate, FinCEN introduced scrutiny to an arena that had historically received little attention.[101] Removing some of the anonymity afforded to business entities in the residential real estate market made possible the first meaningful estimates of the value that purchasers in that market ascribe to anonymity.[102] By one estimate, limiting the anonymity of residential real estate transactions reduced the volume of cash-based shell-company purchases of residential real estate in by roughly 70%.[103] Limiting the anonymity available to business entities did not measurably reduce the total volume of residential real estate purchases.[104] This observation has supported speculation that when "the demand from corporate buyers falls, it is possible that other buyers may replace them, and some anonymity-seeking buyers may start buying in their own name or [using] alternative methods to hide their identity."[105] All the same, before the implementation of the GTOs, "[t]he evidence on the whole suggests that anonymity-preferring buyers made up the majority of corporate cash purchases in the U.S."[106] As a result of the GTOs, corporate purchasers of residential real estate have changed their behavior: "When buyers are not able to hide their identity from

99. *FinCEN Renews Real Estate "Geographic Targeting Orders" to Identify High-End Cash Buyers in Six Major Metropolitan Areas*, *supra* note 97. Though it captures an aspect of the transactions in question, the "all-cash" label is misleading: Residential real estate transactions that meet the GTOs' other requirements are covered "[i]f any part of the purchase price was made using a method of payment specified in [the GTO]." *Frequently Asked Questions*, *supra* note 80. It would be more accurate to say that such transactions are non-financed, or fully liquid.

100. *FinCEN Renews Real Estate "Geographic Targeting Orders" to Identify High-End Cash Buyers in Six Major Metropolitan Areas*, *supra* note 97.

101. *See* FinCEN, *supra* note 35, at 3–4.

102. *See* Hundtofte & Rantala, *supra* note 87, at 1.

103. *Id.* at 18 ("[A]ll-cash corporate acquisitions start off at approximately 10% of total purchases by dollar volume, then they fall to approximately 2.5% of total volume.").

104. *Id.*

105. *Id.*

106. *Id.* at 23.

U.S. authorities, these anonymous capital flows mostly disappear and are accompanied by coincident declines in premium housing prices."[107]

Reducing shell companies' ability to maintain anonymity for their beneficial owners has produced potentially negative externalities, as well. Preliminary "findings indicate that the market value of luxury properties has decreased by billions of dollars, and particularly in the areas most affected by regulation."[108] But the reduction in property values in covered localities has neither an unequivocally positive nor negative moral or political quality. While a lower premium for luxury real estate may subvert investor expectations and lead to reduced tax receipts, this same shift may make housing "more affordable to local residents."[109]

III. Limits to Enlisting Title Insurance Companies in the Quest to Prevent Real Estate-based Money Laundering

Despite FinCEN's improving understanding of both real estate-based money laundering and the extended reach of the GTOs, considerable gaps in that understanding remain.[110] The GTOs' limited geographic scope, the ease with which money launderers can avoid the beneficial-ownership-reporting threshold, the fact that the GTOs apply only to transactions for which parties purchase title insurance, the failure to include trusts under the GTOs, and the focus on residential real estate to the exclusion of commercial properties all represent exploitable gaps in the GTOs.[111]

107. *Id.*

108. *Id.* at 23.

109. *Id.* For example, the prevalence of luxury real estate in Miami and its power to attract foreign investors in real estate have contributed to making Miami "one of the least affordable cities in the United States—and one of the least affordable in the English-speaking world." Nicholas Nehamas, *Buying a Home in Miami-Dade Is So Expensive, It Could Hurt the Economy*, Miami Herald (Feb. 9, 2017, 7:00 AM), https://www.miamiherald.com/news/business/real-estate-news/article131543514.html [https://perma.cc/G485-3TTU]. In any event, relying on anonymously purchased housing to prop up the residential real estate market runs the risk of enlisting entire communities in preserving the corruption, drug trafficking, human trafficking, tax evasion, and terrorist financing that are often the impetus for money laundering. *See generally* Reuter & Truman, *supra* note 6.

110. *See, e.g.*, Hundtofte & Rantala, *supra* note 87, at 11.

111. *See id.* (identifying trusts, using a greater number of small dollar purchases, avoiding the use of title companies, and avoiding jurisdictions covered by GTOs as ways for money launderers to avoid the GTOs).

A. Narrow Geographic Reach

The GTOs do not have a broad enough geographic footprint to prevent money laundering through residential real estate. Although the GTOs have subjected residential real estate in select areas to unprecedented scrutiny, residential real estate outside of those areas is currently beyond regulators' reach.[112] Little differentiates a residential property in Chicago from a similarly priced property in Washington, D.C., yet residential property in the nation's capital is not subject to the current GTO's reporting requirement.[113] The GTOs have performed a valuable diagnostic function in singling out select urban localities for additional scrutiny.[114] But despite their diagnostic utility, the GTOs' focus on discrete geographic areas seems more likely to displace, rather than prevent, money laundering through residential real estate unless they are extended throughout the country.[115]

B. High Beneficial Ownership Requirement

The November 2018 GTO, like its predecessors, requires title insurance companies to report identifying information on the natural persons who are the beneficial owners of 25% or more of a shell company.[116] In 2016, the Department of the Treasury considered a rule that would have required some financial institutions to disclose the identity of beneficial owners who own 10% or more of any included legal entity after receiving comments from "non-governmental organizations and many individuals [who] asserted that the proposed 25[%] ownership threshold is too high and that it should be lowered to 10[%] (or eliminated entirely) in the final rule."[117] But in the face of opposition

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112. *See* FinCEN, *supra* note 35, at 1–2. Residential real estate outside of the counties and boroughs enumerated in the GTOs is logically excluded from the Nov. 2018 GTO's coverage.

113. *See id.*

114. *See, e.g.*, Hundtofte & Rantala, *supra* note 87.

115. The concept that areas outside of major metropolitan areas are subject to less scrutiny from law enforcement and regulatory bodies has spread to popular culture. *See, e.g.*, *Ozark, Season 1, Episode 1* (Netflix July 21, 2017), https://www.netflix.com/watch/80117807?trackId=13752289&tctx=0%2C0%2C721ea219-6066-4fa8-969f-739e1cf23d3f-511708524%2C%2C [https://perma.cc/WC2P-DRSS] ("You're right about Chicago. You got the FBI and the ATF and the CIA and they're all . . . they're circling around Chicago. And they're tapping phones, and they're monitoring bank accounts, and I just . . . . We need a new hub. I need a new hub. Okay? This place [rural Missouri]. It's away from every single law enforcement agency in the U.S. and it's cash rich.").

116. *See* FinCEN, *supra* note 35, at 4; *see also* sources cited *supra* note 94.

117. *See* Customer Due Diligence Requirements for Financial Institutions, 81 Fed. Reg. 29,398, 29,403 (May 11, 2016) (to be codified at 31 C.F.R. pts. 1010, 1020, 1023, 1024, 1026).

from private-sector commenters, the Department declined to lower the threshold for beneficial ownership to 10%.[118] The Treasury Department's less aggressive approach to identifying the beneficial owners of legal entities, as some commenters noted, makes it easier for money launderers to avoid disclosure requirements.[119] By dispersing beneficial ownership of a company equally between five or more individuals, enterprising anonymity seekers could avoid the November 2018 GTO's reporting requirements.[120]

C. Properties Without Title Insurance

Residential real estate buyers who do not purchase title insurance are not subject to the November 2018 GTO.[121] Lenders often require purchasers to obtain title insurance as a condition to issuing mortgages.[122] Because "[t]itle insurance protects real estate purchasers . . . from losses that arise after a real estate settlement, but result from unknown liens, encumbrances or other defects [of] the title that existed prior to settlement," ordinary prudence leads many cash buyers to obtain title insurance.[123] But all-cash purchasers may choose to forego title insurance and assume the "unusual but serious perils" of obtaining a defective title.[124] "[E]xcluding title companies from

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118. *Id.* While 31 C.F.R. § 1010 (2018) does not cover persons involved in real estate closings and settlements, the experience of attempting to regulate other financial institutions may inform future attempts to impose more extensive reporting obligations.

119. Customer Due Diligence Requirements for Financial Institutions, 81 Fed. Reg. at 29,410. FinCEN noted that commenters "urged FinCEN to lower this threshold to 10[%], contending that the higher threshold would be too easy to evade and is inconsistent with international AML norms and requirements of [the Foreign Account Tax Compliance Act]" because "this lower threshold would make it more difficult for illicit actors to structure ownership interests to evade the reporting threshold." *Id.* But FinCEN declined to adopt the 10% ownership threshold in its final rule, noting that the practice of "collect[ing] beneficial ownership information at a threshold lower than 25[%] . . . is [not] widely established enough to justify its categorical imposition for all legal entity customers across all covered financial institutions." *Id.*

120. *Id.*

121. *See* FinCEN, *supra* note 35, at 1, 3.

122. *See, e.g.*, Md. Ins. Admin., A Consumer Guide to Title Insurance 1 (2019), *available at* https://insurance.maryland.gov/consumer/documents/publications/titleinsurancebrochure.pdf [https://perma.cc/RC9D-4DCW].

123. *Id.*

124. Johnson, *supra* note 92. More than other purchasers of real property, money launderers and organized criminals may be uniquely well-positioned to self-insure in the event that they obtain defective title to real property, whether by employing parties to conduct title searches independently or by intimidating parties into not asserting their rights to the property.

transactions by declining to purchase title insurance" remains a "potential means of working around" the GTO.[125] An analysis of residential real estate transactions in jurisdictions subject to the GTOs found "evidence of statistically significant short-run substitution away from title insurance."[126] Researchers identified as much as a "25% initial increase in purchases without title insurance" immediately following the implementation of the GTOs.[127] FinCEN "cannot impose any regulation directly on buyers," but instead must regulate financial institutions.[128] Although making title insurance companies the center of the GTOs was a sensible starting point for identifying the natural persons behind residential real estate transactions, buyers committed to maintaining anonymity are still able to do so—and will be able to do so even if FinCEN extends the reach of the GTOs throughout the country.

D. Failure to Cover Trusts

Furthermore, legal arrangements like trusts are excluded from the definition of "legal entity" under the GTOs and could be used to thwart the purposes of the GTO.[129] In 2016, FinCEN clarified that "[a]ll trusts, no matter the purpose, are outside the definition of a legal entity under

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125. Rebecka Manis & Kaitlin Riley Duran, *Update: FinCEN Issues Revised Regulations that Aim to Discover and Prevent Money Laundering*, Schiff Hardin (Dec. 3, 2018), https://www.schiffhardin.com/insights/publications/2018/update-fincen-issues-revised-regulations-that-aim-to-discover-and-prevent-money-laundering [https://perma.cc/U5XX-JLCT]. Declining to obtain title insurance "may trigger a duty [for attorneys] to inquire into whether . . . the seller is prohibited from doing business with [the purchaser]." *Id.* at n.15. But parties to residential real estate transactions who are not represented by counsel are not subject to this additional layer of scrutiny. Hundtofte & Rantala, *supra* note 87, at 11.

126. Hundtofte & Rantala, *supra* note 87, at 21–22.

127. *Id.* at 22 (noting that this phenomenon "recedes to a statistically insignificant +18% when a county-price bracket is under a GTO").

128. *Id.* at 9 (observing that FinCEN is only authorized to "issue geographic targeting orders for financial institutions); *see also* 31 U.S.C. § 5312(a)(2) (2018).

129. *See* FinCEN, *supra* note 35, at 4. FinCEN has justified this different treatment on the grounds that the government does not need to be involved in forming a trust:

> [U]nlike [other] legal entities . . . , a trust is a contractual arrangement between the person who provides the funds or other assets and specifies the terms . . . and the person with control over the assets . . . , for the benefit of those named in the trust deed . . . . Formation of a trust does not generally require any action by the state.

Customer Due Diligence Requirements for Financial Institutions, 81 Fed. Reg. 29,398, 29,412 (May 11, 2016) (to be codified at 31 C.F.R. pts. 1010, 1020, 1023, 1024, 1026).

the GTO."[130] "The type of trustee, individual or corporate, does not" affect whether a trust is subject to a GTO's requirements.[131] In similar circumstances, FinCEN has reasoned that, with respect to trusts and other legal arrangements, financial institutions "may need to take additional steps to verify the identity of a customer that is not an individual, such as obtaining information about persons with control over the account."[132] But the Financial Action Task Force (FATF), an intergovernmental body of which the United States is a member,[133] found that "[t]he U.S. is an attractive destination for domestic and foreign proceeds" in part because "most trustees . . . are not subject to comprehensive [AML and counter-terrorist financing] requirements."[134] Although money launderers have routinely used legal entities in complex schemes, "[t]o a much lesser extent, trusts have been identified in complex [money laundering] schemes."[135] In its most recent report on money laundering risks in the United States, the FATF noted that "there is currently no estimate of the number, size [or] activity of U.S. trusts as these are not created by governments."[136] The FATF observed that trusts were "used to obfuscate the source, ownership, and control of illegal proceeds."[137] But despite the challenge that trusts present to law enforcement, the FATF concluded that "[n]o mechanism is realistically available to authorities to collect [beneficial ownership] information on legal arrangements from the trustee or other parties."[138] The FATF's recognition that trusts present significant money laundering risks highlights the need for additional action to reduce that risk. Indeed, the FATF has called for the United States to implement

130. *FinCEN Addresses GTO Questions*, Am. Land Title Ass'n (Sep. 13, 2016), https://blog.alta.org/2016/09/fincen-addresses-gto-questions.html [https://perma.cc/J2XA-N5WD].

131. *Id.*

132. Customer Due Diligence Requirements for Financial Institutions, 81 Fed. Reg. at 29,412 (quoting Customer Identification Programs for Broker-Dealers, 68 Fed. Reg. 25,113, 25,116 n.30 (May 9, 2003) (to be codified at 31 C.F.R. pt. 103)).

133. *Members and Observers*, Fin. Action Task Force, http://www.fatf-gafi.org/about/membersandobservers/#d.en.3147 [https://perma.cc/BK5S-MMYN] (last visited June 27, 2020).

134. Fin. Action Task Force & Asia-Pacific Group on Money Laundering, *supra* note 55, at 18.

135. *Id.*

136. *Id.* The FATF observed that "the [Bank Secrecy Act] does not impose explicit obligations on trustees," though obligations on trust companies "exten[d] to their role as trustees." *Id.* at 31.

137. *Id.* at 153.

138. *Id.*

a host of measures to mitigate the risks associated with trusts.[139] Among its other recommendations, it argues that the United States should "[e]nsure that trustees are subject to . . . an explicit obligation to obtain and hold adequate, accurate and current information on [the] identity of all parties to trusts, including any other natural person exercising ultimate effective control over trusts."[140] Thus, renewed attention into preventing money laundering through trusts appears to be an important component to stanching the flow of illicit funds through real estate in the United States.[141]

E. Limitation to Residential Real Estate

The GTOs have only subjected residential real estate transactions to additional scrutiny.[142] Commercial real estate transactions—all real estate transactions except for "real property (including individual units of condominiums and cooperatives) designed principally for the occupancy of from one to four families"[143]—are excluded from the GTO reporting requirements.[144] But in terms of the ease with which money launderers can integrate illicitly obtained funds into the legal financial system, little differentiates properties "designed principally for the occupancy of from one to four families" from larger residential real estate developments, or from commercial properties.[145] Like residential real estate, commercial property "is as attractive to criminals as it is to any investor" because it is both "functional . . . [and] provides a veneer of respectability, legitimacy, and normality."[146] FinCEN's "disproportionate focus on residential deals may even have

139. *See, e.g.*, *id.* at 154–55.

140. *Id.* at 155.

141. Although highlighting the challenges trusts present to the enforcement of the U.S. AML regime is important to understanding gaps in the GTO framework, a comprehensive exploration of more effective ways to prevent the use of trusts as vehicles for laundering money is beyond the scope of this Note.

142. *See, e.g.*, FinCEN, *supra* note 35.

143. 12 U.S.C. § 2602(1)(A) (2018).

144. *See* FinCEN, *supra* note 35; FinCEN, *supra* note 30, at 1 n.1 ("Although FinCEN to date has focused on residential real estate, money laundering can also involve commercial real estate transactions.").

145. *See Frequently Asked Questions*, *supra* note 800; Cécile Remeur, European Parliament Research Serv., Understanding Money Laundering Through Real Estate Transactions 2 (2019).

146. Remeur, *supra* note 145 (observing that real estate prices are "generally stable and likely to appreciate over time" and that properties can be used both for their instrumental value or to "generat[e] income").

unintentionally funneled more fraud into the commercial sector."[147] More than one-quarter of all commercial real estate transactions are conducted on an all-cash basis, a greater proportion than all-cash transactions for residential real estate.[148]

Money launderers have many opportunities to obscure their identity in complex commercial real estate transactions. Commercial real estate transactions are "[f]ar more complex than [transactions for] residential property."[149] FinCEN's focus on residential properties may stem from its assessment that financial institutions can more easily identify suspicious behavior in residential real estate transactions.[150] Commercial real estate may be "more vulnerable to abuse" because commercial real estate transactions routinely feature more "complex ownership structures" than residential deals.[151] Unlike commercial real estate transactions, "[i]n residential real estate, closings work in a very systematic way."[152] Commercial real estate transactions "generally [involve] more parties."[153] Companies engaging in commercial real estate transactions "usually have more decision makers on both sides of the deal."[154] The presence of tenants can further complicate commercial real estate transactions.[155] Pricing information is often not readily available for commercial properties: as many as 70% of commercial properties

147. Katherine Clarke & E.B. Solomont, *NYC's Dirty Money Files*, Real Deal (Oct. 3, 2016, 4:00 PM), https://therealdeal.com/issues_articles/nycs-dirty-money-files/ [https://perma.cc/3KT4-PE9L].

148. *Compare* George Ratiu, *Cash Accounts for 26 Percent of Commercial Transactions in REALTOR® Markets*, Nat'l Ass'n of Realtors (June 30, 2016), http://economistsoutlook.blogs.realtor.org/2016/06/30/cash-accounts-for-26-percent-of-commercial-transactions-in-realtor-markets/ [https://perma.cc/6ETN-4ZHW], *with* Scholastica (Gay) Cororaton, *Fewer Cash Sales, Investor Buyers, and Distressed Sales in 2017*, Nat'l Ass'n of Realtors (Feb. 5, 2018), http://economistsoutlook.blogs.realtor.org/2018/02/05/fewer-cash-sales-investor-buyers-and-distressed-sales-in-2017/ [https://perma.cc/V5FA-7TPB] (noting that all-cash transactions accounted for 23% of all residential real estate transactions in 2016, and that "[t]he share of cash sales . . . continued to trend down, to 21[%]in 2017").

149. Simon Bloom & Shannon Oliver, *10 Pitfalls in Commercial Real Estate Transactions*, Construction Fin. Mgmt. Ass'n (Feb. 8, 2017), http://www.cfma.org/content.cfm?ItemNumber=5234 [https://perma.cc/7JSX-U2FM].

150. Clarke & Solomont, *supra* note 147.

151. *Id.*

152. *Differences Between Commercial and Residential Real Estate Transactions*, Landmark Title Assurance Agency (Aug. 3, 2016), https://ltaz.com/real-estate-tips/commercial-residential-real-estate-transactions [https://perma.cc/756X-YGWN] (describing the residential real estate transaction process).

153. *Id.*

154. *Id.*

155. *Id.*

listed for rent do not have an asking price.[156] Against this backdrop, money launderers may find it easier to overpay for commercial properties.[157] Relative to the challenges posed by residential real property, regulators remain comparatively ignorant of the extent to which commercial real estate transactions pose money laundering risks.[158]

Thus, the GTOs contain numerous gaps that allow money launderers to avoid reporting requirements and remain anonymous. Early evidence suggests that purchasers who wish to remain anonymous have adjusted their behavior in response to the GTO disclosure requirements.[159] Some of these characteristics, such as the limited geographic scope and exclusion of non-residential properties, support broadening the coverage of the title insurance company reporting requirements. Maintaining and expanding the GTOs' requirements is desirable because it would give law enforcement ready access to information on real estate transactions shortly after they occur.[160] But the challenges presented by parties who avoid title insurance and who have no single owner with a 25% or greater beneficial ownership interest are structural limits that preserve anonymity. Because of the inherent limitations that intermediaries like title insurance companies have in preventing money laundering through shell companies, denying money launderers access to the U.S. real estate market will require additional action. FinCEN can expand the coverage of its real estate rules through

156. Jackie Swift, *The Behavior of Commercial Real Estate*, Cornell U.: Cornell Res., https://research.cornell.edu/news-features/behavior-commercial-real-estate [https://perma.cc/W2XZ-HTNA] (last visited June 27, 2020) (reporting that, in the commercial real estate context, "owners routinely put buildings on the market without indicating the asking price").

157. Overpayment is a common money laundering tool. Money launderers have used similar methods to launder money by overcharging for goods and services. *See, e.g.*, Joseph A. Mann, *Money Launderers Wash Billions Through International Trade*, Miami Herald (May 11, 2009) https://miamiherald.newsbank.com/doc/news/1281EC27855DB3F8?search_terms=Money+launderers+wash+billions+through+international+trade&text=Money launderers wash billions through international trade&pub%5B0%5D=MIHB&pdate=2009-05-11 [https://perma.cc/5FNN-ZRHM] ("[M]y partner in Latin America spends $1,000 to buy 10,000 pencils at [ten] cents each and ships them to me in Miami. The invoice says the pencils are worth $100 each[;] I pay my partner $1 million. That way, I'm able to move $1 million out of the country."). The same basic mechanism for laundering money through goods and services can extend to overpayment for real estate.

158. *See* Terrorism, Transnat'l Crime & Corruption Ctr., Money Laundering in Real Estate 39 (2018).

159. Hundtofte & Rantala, *supra* note 87, at 19.

160. *See, e.g.*, 31 C.F.R. § 1010.520 (2018) (requiring financial institutions and government agencies to share information with one another).

rulemaking, but complementary legislative action is needed to deny anonymity to shell company owners.

Rather than focus exclusively on preventing real estate-based money laundering through financial institutions, a legislative solution that requires shell companies to identify their beneficial owners to the federal government would provide better, broader, and more useful information to law enforcement.

IV. LEGISLATIVE SOLUTIONS

Information generated by the GTOs targeting residential real estate sales supports the view that individuals who seek anonymity are rational actors who are willing to change their behavior to preserve that anonymity.[161] The public interest in affording this particular species of anonymity to individuals, however, is negligible; whereas the risks are considerable.[162] Federal law already protects the privacy of consumer financial data.[163] Furthermore, the Department of the Treasury can impose penalties on financial institutions that fail to safeguard customer privacy.[164] As the technological and logistical hurdles to identifying beneficial owners have become less onerous in the decades since the

161. *See generally* Hundtofte & Rantala, *supra* note 87; Nicholas Gilmour, *Understanding the Practices Behind Money Laundering—A Rational Choice Interpretation*, 44 INT'L J.L. CRIME & JUSTICE 1 (2016); Alberto Chong & Florencio López-de-Silanes, *Money Laundering and its Regulations* 6 (Inter-American Development Bank, Working Paper No. 590, 2007), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1820066 [https://perma.cc/8J98-Q8L2] ("If money launderers are rational profit-maximizers, like other criminals, deterrence is essential in order to curtail their behavior.").

162. Jodi Vittori, *How Anonymous Shell Companies Finance Insurgents, Criminals, and Dictators*, CTR. FOR SECURITY STUDIES (Sept. 18, 2017), https://css.ethz.ch/en/services/digital-library/articles/article.html/cc9d6a76-aec2-442b-892e-92825a7dbdd1 [https://perma.cc/6V9W-S4CM] ("Because of the secrecy they can provide, anonymous companies represent an important nexus of corruption, money laundering, transnational organized crime, and terrorism, which directly harm U.S. interests.").

163. *See* FINCEN, FEASIBILITY OF A CROSS-BORDER ELECTRONIC FUNDS TRANSFER REPORTING SYSTEM UNDER THE BANK SECRECY ACT 23 (2006) (discussing the laws that "control the collection and use of data by government agencies with the aim of protecting the privacy of individual persons"), *available at* https://www.hsdl.org/?abstract&did=472174 [https://perma.cc/9NGT-VTE6]; *see also* Right to Financial Privacy Act, 12 U.S.C. §§ 3401–22 (2018); Federal Information Security Management Act (codified as amended at 44 U.S.C. §§ 3501–49 (2018); Bank Secrecy Act, 31 U.S.C. § 5319 (2018).

164. *See* 15 U.S.C. §§ 6801–09 (2018); Robert W. Anderson, *Federal Data Privacy and Cybersecurity Laws*, LINDABURY (Mar. 29, 2017), https://www.lindabury.com/firm/articles-resources/federal-data-privacy-cybersecurity-laws.html [https://perma.cc/K7NN-L6QE].

enactment of the BSA and the USA PATRIOT Act, the anonymity beneficial owners enjoy appears not to be a policy worth preserving for its own sake but simply a historical accident stemming from the difficulty of obtaining that information.[165] Contrasted with other desirable shell company attributes—such as limited liability, preferential tax treatment, and estate planning benefits—it is difficult to find independent grounds to justify beneficial owner anonymity from governmental agencies as a public virtue.[166] This is especially true because American business entities are creations of the states.[167]

By only permitting FinCEN to impose requirements on financial institutions, the BSA limits the scope of federal action.[168] Even within the range of potential actions available under existing law, FinCEN has been cautious to avoid promulgating burdensome rules.[169] Through the GTOs, FinCEN has emphasized small, easily attainable goals in its efforts to reduce money laundering through real estate.[170] But these

165. *See* Fin. Action Task Force, Transparency and Beneficial Owner–ship 7 (2014) (noting that "company structures that promote complexity and increase the difficulty for authorities to obtain accurate beneficial ownership information (e.g., shell companies and bearer shares)" may pose greater money laundering risks), *available at* http://www.fatf-gafi.org/media/fatf/documents/reports/Guidance-transparency-beneficial-ownership.pdf [https://perma.cc/2HXX-WVZH].

166. *See, e.g.*, Metcalfe, *supra* note 40; Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability and the Corporation*, 52 U. Chi. L. Rev. 89, 107–08 (1985) (arguing that limited liability encourages risk-averse investors to engage in productive enterprise). An important distinction should be drawn between privacy from the general public and privacy from federal agencies like FinCEN. Valid policy concerns support maintaining anonymity from the general public, as "[t]here are numerous cases in which foreign taxpayers have been attacked and even killed when outside parties have learned about their particular holdings and assets." *See* Metcalfe, *supra* note 40, at 253. Any attempt to deny anonymity to beneficial owners must account for the competing interest in allowing individuals to keep their affairs private from their neighbors while permitting the government to collect valuable information to identify potential money launderers.

167. *See* Phillip I. Blumberg, *The Corporate Entity in an Era of Multinational Corporations*, 15 Del. J. Corp. L. 283, 293 (1990) (describing a view of corporations as "a separate juridical unit created by state action, an artificial creature of the state possessing in addition to its essential 'core' attributes only such limited powers as are granted by the state"); Carliss N. Chatman, *The Corporate Personhood Two-Step*, 18 Nev. L.J. 811, 812 (2018) ("Corporations are defined by state law, and have rights incidental to that status. Corporations also have rights defined by statutes.").

168. 31 U.S.C. § 5318(h) (2018).

169. *See* Customer Due Diligence Requirements for Financial Institutions, 81 Fed. Reg. 29,398, 29,408–15 (May 11, 2016) (to be codified at 31 C.F.R. pts. 1010, 1020, 1023, 1024, and 1026).

170. Clarke & Solomont, *supra* note 147.

easily attainable goals reflect a small subsection of all real estate-based money laundering; and they have displaced, rather than reduced or eliminated, behaviors consistent with money laundering through real estate.[171]

Some states have engaged in an anonymity-promoting "race to the bottom."[172] Delaware, Wyoming, and Nevada "have resisted the imposition of increased transparency and oversight mechanisms."[173] Unlike larger states, which "persist in viewing corporation laws as complex moral and political problems," smaller states like Delaware have viewed corporate laws as "a way of making everybody rich."[174] Because states have strong financial incentives to promote company formation under their laws, individual states are unlikely to lead the charge for corporate transparency.[175]

Federal legislative action is thus the best candidate for meaningfully reducing money laundering through real estate. Since 2008, numerous bills have attempted to address the anonymity that allows money laundering to thrive.[176] The 2019 iteration of the Corporate

171. Hundtofte & Rantala, *supra* note 87, at 21.

172. Michel, *supra* note 44, at 3 ("America's transformation into a haven for financial anonymity has arisen in no small part due to the efforts of a handful of . . . state-level governments."); Tax Justice Network, Financial Secrecy Index 2018: Narrative Report on USA 1, 6 (2018).

173. Michel, *supra* note 44, at 16 (noting that these jurisdictions "have jump-started the U.S.'s transformation into a stalwart of financial secrecy and obscurantism").

174. *Id.* (quoting L.J. Davis, *Delaware Inc.*, N.Y. Times (June 5, 1988), https://www.nytimes.com/1988/06/05/magazine/delaware-inc.html?pagewanted=all&mtrref=undefined [https://perma.cc/5Y2G-4LNB]).

175. Tax Justice Network, *supra* note 172 (noting that, "from the states' perspectives, the end game is to raise revenue for the state by creaming off fees from large numbers of companies incorporating there—and the consequences for everyone else are not considered: a typical offshore attitude," and that "[t]he lobbying and the revenue-raising potential and the lack of strong democratic counterweights in small states[] mean that these places can be fairly described as 'captured states'"). *But see* Michel, *supra* note 44, at 16–17 (noting that "the growing media focus on Delaware's incorporation regulations" has led Delaware legislators to "push to build new transparency mechanisms within their incorporation industry," but acknowledging that "financial secrecy experts have described Delaware's pledged changes as little more than 'window-dressing'"); Clark Gascoigne, *Delaware Bills 'Mere Window-Dressing,' Will Do Nothing to Curb Abuse of Anonymous Companies*, Global Fin. Integrity (June 10, 2014), https://www.gfintegrity.org/press-release/delaware-bills-mere-window-dressing-will-nothing-curb-abuse-anonymous-companies/ [https://perma.cc/G8HN-E3AB].

176. *See* Incorporation Transparency and Law Enforcement Assistance Act, S. 2956, 110th Cong. (2008); S. 569, 111th Cong. (2009); H.R. 6098, 111th Cong. (2010); S. 1483, 112th Cong. (2011); H.R. 3416, 112th Cong. (2011);

Transparency Act would require "corporations and LLCs . . . to disclose their beneficial owners to . . . FinCEN, which would then share that information with law enforcement and financial institutions."[177] The Corporate Transparency Act specifically targets shell companies, excluding several company types from disclosure requirements.[178]

But despite bipartisan support for legislation that would compel shell companies to disclose the identities of their beneficial owners, Congress has not enacted any of the bills that would accomplish this goal.[179] Disagreements over the appropriate channels through which to compel disclosure appear to be at least partly responsible for the impasse. The True Incorporation Transparency of Law Enforcement (TITLE) Act[180] would require states, as opposed to federal agencies, to collect beneficial ownership information at the time of a company's formation, and would expand the definition of financial institutions under the BSA to include "any person engaged in the business of forming corporations or limited liability companies."[181] A competing

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S. 1465, 113th Cong. (2013); H.R. 3331, 113th Cong. (2013); S. 2489, 114th Cong. (2016); H.R. 4450, 114th Cong. (2016); True Incorporation Transparency for Law Enforcement Act, S. 1454, 115th Cong. (2017); Corporate Transparency Act, H.R. 3089, 115th Cong. (2017); S. 1717, 115th Cong. (2017); H.R. 2513, 116th Cong. (2019).

177. Kevin Sun & David Jeans, *Congress Re-examines Bill that Would Expose Beneficial Owners of LLCs*, Real Deal (Mar. 13, 2019, 6:15 PM), https://therealdeal.com/2019/03/13/congress-re-examines-bill-that-would-expose-beneficial-owners-of-llcs/ [https://perma.cc/M2XJ-XD7F]; *see also* Corporate Transparency Act, H.R. 2513.

178. Sun & Jeans, *supra* note 177. The Corporate Transparency Act proposes to exempt most businesses that are regulated by other disclosure-compelling rules, including businesses subject to, for example, the Securities Exchange Act or the Federal Deposit Insurance Act, among others. H.R. 2513 § 5333(d)(4)(C). The Corporate Transparency Act would also exempt businesses with "a physical office within the United States" that "employs more than [twenty] employees on a full-time basis in the United States" and conducts more than $5 million in business. *Id.* § 5333(d)(4)(C)(xiv). Theoretically, these carve-outs define shell companies by what they are not, and do not exempt businesses whose decision makers are subject to other anonymity-denying regulations.

179. Shruti Shah, *Six Bills in Congress (so far) Target Anonymous Companies*, Foreign Corrupt Prac. Act Blog (Aug. 9, 2017, 7:28 AM), http://www.fcpablog.com/blog/2017/8/9/shruti-shah-six-bills-in-congress-so-far-target-anonymous-co.html [https://perma.cc/4HZJ-QLR2].

180. S. 1454, 115th Cong. (2017).

181. Shah, *supra* note 179; S. 1454, 115th Cong. § 4(a)(3)(Z) (2017); Sun & Jeans, *supra* note 177. The TITLE Act would condition funding offered to states under the Edward Byrne Memorial Justice Assistance Grant program on requiring that form "a corporation or limited liability company to provide information about its beneficial owners." *Summary: True Incorporation Transparency for Law Enforcement Act or the TITLE*

proposal "would designate the Internal Revenue Service [as] the point of collection instead" of FinCEN, ostensibly because "this would be a more efficient way of collecting [beneficial ownership] information."[182] But critics of this proposal have noted that this would require law enforcement "to obtain a search warrant to coordinate with the Internal Revenue Service" to identify the beneficial owners of shell companies.[183]

The competing bills primarily disagree over questions of efficiency. Because states could condition the formation of business entities on receiving identifying information about beneficial ownership, states stand in a strong position to collect that information in the first instance. But the TITLE Act would require states to give beneficial ownership information to FinCEN only upon a written request.[184] The TITLE Act does not specify whether such requests would need to be tailored to individual companies or whether FinCEN could make blanket requests to obtain all beneficial ownership information in a state's possession.[185] The TITLE Act's focus on regulating shell companies by expanding the definition of financial institutions risks a narrow regulatory interpretation of "person engaged in the business of forming corporations or limited liability companies" that would undermine the efficacy of the legislation to identify all beneficial owners of shell companies.[186] Moreover, resting the responsibility for collecting beneficial ownership information with states creates the risk that inconsistent approaches to information collection will impede FinCEN's ability to assist law enforcement in fast-moving criminal investigations. Furthermore, states hoping to differentiate themselves as secrecy havens could simply choose to forego the funding available under the TITLE Act. The TITLE Act thus contains numerous shortcomings that undermine its ability to prevent anonymous shell company ownership.

Similarly, requiring the IRS to collect beneficial ownership information makes a degree of intuitive sense. Unlike with FinCEN,

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Act, CONGRESS.GOV, https://www.congress.gov/bill/115th-congress/senate-bill/1454 [https://perma.cc/UJ56-APRD] (last visited June 27, 2020).

182. Sun & Jeans, *supra* note 177.

183. *House Financial Services Subcommittee Hearing on Proposals to Detect and Deter Financial Crimes*, SEC. INDUSTRY & FIN. MKTS. ASS'N (Mar. 13, 2019), https://www.sifma.org/resources/general/house-financial-services-subcommittee-hearing-on-proposals-to-detect-and-deter-financial-crimes/ [https://perma.cc/9EQ8-RXPM].

184. S. 1454 § 531(a)(1)(D)(iii).

185. *See id.*

186. *See* S. 1454 § 4(a)(3)(Z). Without a robust definition that requires everyone who forms or registers a corporation, limited liability company, or other business entity to disclose beneficial ownership information, the TITLE Act proposal risks encountering the same shortcomings as requiring title insurance companies to collect beneficial ownership information.

companies routinely file documents with the IRS.[187] But without modification, the logistical impediments to effective law enforcement would be even more pronounced, as FinCEN would otherwise require search warrants to obtain beneficial ownership information.[188]

Rather than address the problem of anonymous beneficial ownership through financial institutions, which have proven to be imperfect proxies in the quest to root out illicit actors,[189] an approach that requires shell companies to identify beneficial owners on the threat of civil and criminal penalties cuts to the heart of the issue. The Corporate Transparency Act would accomplish this goal, albeit through the logistically puzzling mechanism of requiring covered companies to report directly to FinCEN.[190] Requiring companies to file paperwork directly with FinCEN could easily become a trap for the unwary, exposing to civil and criminal liability parties who pose little-to-no money laundering risk. Moreover, the IRS already collects large amounts of information from the public.[191] Congress could easily resolve this tension through a small statutory tweak. Namely, Congress could require shell companies to submit identifying information for beneficial owners to the IRS at regular intervals while also requiring the IRS to share that identifying information with FinCEN. Not only would this approach minimize the burden on those who use shell companies for legitimate purposes, it would allow FinCEN ready access to data that would both support ongoing investigations into financial crimes and enable FinCEN to develop quantitative models of shell company behavior. In this sense, splitting the difference between FinCEN and the IRS would produce better outcomes for both the public and law enforcement. Requiring shell companies to produce the identity of their beneficial ownership could also facilitate the due diligence efforts of other financial institutions.[192] And requiring shell companies to identify their own beneficial owners would theoretically reduce the burden of identifying individuals who own a smaller portion of the shell company; thus increasing the difficulty that money launderers would face in

187. *See* Sun & Jeans, *supra* note 177; *The Agency, its Mission and Statutory Authority*, IRS, https://www.irs.gov/about-irs/the-agency-its-mission-and-statutory-authority [https://perma.cc/8FB3-DLYS] (last updated Feb. 26, 2020) ("In fiscal year 2015, the IRS collected almost $3.3 trillion in revenue and processed almost 240 million tax returns.").

188. *See House Financial Services Subcommittee Hearing on Proposals to Detect and Deter Financial Crimes*, *supra* note 183.

189. *See id.*

190. H.R. 2513, 116th Cong. § 5333(a)(1)(A) (2019). Requiring shell companies to report information directly to FinCEN would logically increase the burden on those who create and maintain shell companies by requiring them to file paperwork with an additional government agency.

191. *The Agency, its Mission and Statutory Authority*, *supra* note 187.

192. Shah, *supra* note 179.

skirting reporting requirements by distributing ownership so that no one beneficial owner owns more than 25% of the company.[193]

Significantly, requiring shell companies to report their beneficial owners to a federal agency under the Corporate Transparency Act would ameliorate concerns about AML regulations interfering with the attorney-client relationship and the duty of confidentiality. Whereas the American Bar Association objected to the Incorporation Transparency and Law Enforcement Assistance Act on the grounds that it would expand the BSA's definition of "financial institutions" to include "formation agents,"[194] the Corporate Transparency Act would create a duty for shell companies, not the lawyers who serve them, to disclose beneficial ownership information.[195] Rather than incorporating attorneys into the AML regulation system in a way that could interfere with their professional obligations, the Corporation Transparency Act framework goes to the source of shell company anonymity without implicating attorneys' professional-responsibility concerns.

Gaps would still remain under this proposal. Despite the proposed penalties for failing to disclose updated beneficial ownership information, money launderers may well give inaccurate, misleading, or incomplete ownership information.[196] Money launderers could come to rely more heavily on straw buyers—individuals "who allow [their] name, identifiers, and credit rating to be used to . . . purchase . . . real property."[197] But because these gaps are already the subject of AML

193. *See supra* note 83 (discussing the beneficial ownership threshold which triggers reporting requirements under the Nov. 2018 GTO).

194. Letter from Paulette Brown, President, American Bar Association, to Michael G. Fitzpatrick and Stephen F. Lynch (May 24, 2016), *available at* https://www.americanbar.org/content/dam/aba/uncategorized/GAO/2016may24_gatekeeperregandtheprofession.authcheckdam.pdf [https://perma.cc/E5QZ-GG87].

195. H.R. 2531 § 5333(a)(1)(A).

196. *See* J.W. Verret, *Terrorism Finance, Business Associations, and the "Incorporation Transparency Act"*, 70 La. L. Rev. 857, 909 (2010) (arguing that the Incorporation Transparency and Law Enforcement Assistance Act "is founded on an erroneous assumption of reliable self-reporting of ownership information from individuals who are simultaneously engaged in fraud"). This same basic criticism applies to all self-reporting requirements. But Verret's argument loses its persuasive gusto when self-reporting requirements are characterized not as ways to obtain perfect information from dishonest actors, but as ways to limit the extent to which these actors can use legal services to carry out their objectives.

197. FinCEN, Suspected Money Laundering in the Residential Real Estate Industry 1 n.3 (2008) (Though the term "straw buyer" has historically referred to individuals who obtain mortgages on property on behalf of an undisclosed party, the underlying principle is the same regardless of how the property is financed: "The straw buyer generally understands that he will neither occupy the property nor make payments on [a] loan," and "is general paid a fee" by the putative fraudster).

and law-enforcement investigative methods and reflect a degree of dishonesty that would ordinarily require a more detailed, contextual understanding of parties to any given transaction, the gaps are unlikely to be solved through changes in a reporting regime. Rather, beneficial ownership reporting would supplement existing AML regulations and law-enforcement strategies. Mandatory beneficial ownership reporting need not replace the duties FinCEN imposes on title companies to report on all-cash transactions because title insurance companies might still encounter suspicious behavior indicative of criminal conduct. Instead, mandatory beneficial ownership reporting would emphasize the role of shell companies while reducing the comparative burdens on title insurance companies. Requiring shell companies to report their beneficial ownership while also requiring title companies to report suspicious activity to FinCEN for commercial and residential real estate transactions would reflect a significantly more robust AML regime.

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