



# NATIONAL DISTRICT ATTORNEYS ASSOCIATION

May 5<sup>th</sup>, 2021

The Honorable Michael Mosier  
Acting Director  
Financial Crimes Enforcement Network  
U.S. Department of Treasury  
P.O. Box 39  
Vienna, VA 22183

**Submitted via <http://www.regulations.gov>**  
**Docket Number: FINCEN-2021-0005**  
**RIN: 1506-AB49**

Dear Acting Director Mosier,

I am reaching out on behalf of the National District Attorneys Association (NDAA), the oldest and largest national organization representing state and local prosecutors in the country. NDAA is a national, non-partisan, non-profit membership association providing training, technical assistance and services to prosecutors across the country. With more than 5,000 members nationwide, NDAA is recognized as the leading source of national expertise on the prosecution function and is a valuable resource for the media, academia, government, and community leaders. Today, I write in response to the Advance Notice of the Proposed Rulemaking (ANPRM), “Beneficial Ownership Information Reporting Requirements,” as the Department of Treasury’s Financial Crimes Enforcement Network (FinCEN) begins to implement the Corporate Transparency Act enacted into law on January 1<sup>st</sup>, 2021.

Prosecutors have long recognized the need for the collection of beneficial ownership information as critical to law enforcement investigations into organized transnational criminal operations, terrorism financing, and other unlawful activity.<sup>1</sup> As end users of evidence collected throughout the investigative process, it is imperative that prosecutors have as much information as possible in order to determine the best course of action for prosecuting an individual or entity that has committed a crime. Beneficial ownership data collection is vital to this effort, and law enforcement and prosecutors must have lawful access to that information. Therefore, our membership has a unique interest in the implementation of the Corporate Transparency Act as law enforcement and prosecutors throughout the country advocated for new tools to end the use of anonymous companies to circumvent the criminal code and civil penalties.<sup>2</sup>

NDAA appreciates FinCEN’s commitment to financial transparency and considers the agency a partner in our efforts to hold bad actors accountable while ensuring the integrity of our Nation’s monetary system. To that end, our members feel strongly that one of the most vital pieces of FinCEN’s implementation of the Corporate Transparency Act is the effort to include State, local, and tribal partners in the development and implementation of the new beneficial ownership database, which will collect basic identifying information for the owners of reporting companies, to provide our members with a point of contact for a corporation that was previously anonymous. Fostering new relationships with these units of government and law enforcement, while strengthening existing bonds, will play a significant role in the success of the

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<sup>1</sup> Duffie Stone, *NDAA Letter to Congress on Corporate Transparency Act* (Jul. 20, 2020), [https://ndaa.org/wp-content/uploads/NDAA-CTA\\_7.20.pdf](https://ndaa.org/wp-content/uploads/NDAA-CTA_7.20.pdf); See also Michael Freeman, *NDAA Letter to Congress on Beneficial Ownership* (Jun. 5, 2018), <https://ndaa.org/wp-content/uploads/NDAA-Letter-on-Beneficial-Ownership-Info-Combatting-Terrorism-and-Illicit-Finance-Act-May-2018.pdf>.

<sup>2</sup> See Add. Cyrus Vance, *Report of the Grand Jury of the Supreme Court State of New York First Judicial District* 25 (2019).

new tool. Further, our members are confident that this effort can connect the Federal government, business community, and State and local law enforcement in ways that will develop new lines of communication to promote accountability in our financial systems and root out criminal behavior that harms all of our respective interests.

The Nation's prosecutors are committed to assisting FinCEN in its work to implement the Corporate Transparency Act. Our members offer specific answers to the questions posed by the agency as it works to follow Congress's intent in enacting the new beneficial ownership database. In the following answers, NDAA focuses specifically on the topics and questions that are relevant to our membership and the role prosecutors will play within the new structure of the FinCEN beneficial ownership reporting requirements.

### **NDAA Comments on Specific Questions for Proposed Rulemaking**

#### **(9) How should a company's eligibility for any exemption from the reporting requirements, including any exemption from the definition of "reporting company," be determined?**

- To prevent abuse, the agency should follow the legislative exemptions as written and limit exceptions to those companies to narrow circumstances as outlined in the legislation. Congress chose a broad spectrum of corporations and entities that would be covered by this new rule to ensure law enforcement can access legitimate records of currently anonymous organizations. To preserve the legislative intent of the bill, the agency should limit exceptions to those corporations that fit all of the factors outlined in the legislation.

#### **(10) What information should FinCEN require a reporting company to provide about the reporting company itself to ensure the beneficial ownership database is highly useful to authorized users?**

- FinCEN should ensure reporting companies provide accurate information required by the legislative text including the name, birth date, current address, and unique identification number of the company's beneficial owners. Further, FinCEN should verify this information to ensure it includes accurate addresses and identifying information upon receipt from a covered entity. Finally, this information should include any additional details that a reporting company is willing to provide that would assist law enforcement in contacting and reviewing details on a potential target of a criminal or civil investigation.

#### **(11) What information should FinCEN require a reporting company to provide about the reporting company's corporate affiliates, parents, and subsidiaries, particularly given that in some cases multiple companies can be layered on top of one another in complex ownership structures?**

- To remain in compliance with the legislative purpose, FinCEN should require a company's corporate affiliates, parents, and subsidiaries to be disclosed along with information for any affiliates, parents, and subsidiaries. Law enforcement and prosecutors often find that investigations that deal with company ownership become complicated when the owner of one company is another company or entity. By requiring and providing law enforcement information on a reporting company's corporate affiliates, FinCEN will provide law enforcement with an additional building block in the context of a wide-ranging investigation. This web of corporate ownership creates a veil that law enforcement is currently unable to pierce, and this legislation is intended to break down the barriers to discover the actual owners of a covered entity. If a company's affiliates, parents, and subsidiaries are required to report their beneficial ownership information this will ensure the purpose of the enacted legislation is followed by providing that next block in a longer chain and that law enforcement will be provided with the appropriate information to continue lawful investigations into criminal activity or civil violations.

**(12) Should a reporting company be required to provide information about the reporting company's corporate affiliates, parents, and subsidiaries as a matter of course, or only when that information has a bearing on the reporting company's ultimate beneficial owner(s)?**

- A reporting company should be required to provide information on its corporate affiliates, parents, and subsidiaries as a matter of course to remain consistent with Congress's intent when enacting the legislation. As noted previously, the web of corporate ownership creates a veil that law enforcement is currently unable to pierce, and this legislation is intended to break down the barriers to discover the actual owners of a covered entity. By ensuring that this information is reported as a matter of course, FinCEN will ensure there are no gaps in the beneficial ownership information that is required to be reported in the new database. Law enforcement will have the next building block needed to continue an investigation, which breaks down existing walls when investigators cannot find a point of contact within a corporate entity's ownership structure. Without this information, there will be gaps in the information reported to FinCEN leading back to the original gaps that have caused Federal, State, and local law enforcement to struggle to close investigations involving complex corporations.

**(13) What information, if any, should FinCEN require a reporting company to provide about the nature of a reporting company's relationship to its beneficial owners (including any corporate intermediaries or any other contract, arrangement, understanding, or relationship), to ensure that the beneficial ownership database is highly useful to authorized users?**

- A reporting company should provide FinCEN with additional details regarding the relationship of the beneficial owners to the covered entity, including any specific roles the beneficial owners play involving the day-to-day operation of the company, any additional known personal or corporate addresses, and any additional identifying information the corporation feels appropriate in sharing. As noted in the addendum<sup>3</sup>, law enforcement continues to lack the necessary information to hold bad actors accountable and beneficial ownership information represents only once piece of a larger puzzle. Congress opened the door for FinCEN to acquire the maximum amount of information feasible to assist Federal, State, local, and tribal law enforcement in ongoing investigations. By requiring these additional pieces, FinCEN will be complying with legislative text and ensuring the database is effective in assisting lawful investigations into violations of the law.

**(15) Section 5336(b)(2)(C) requires written certifications to be filed with FinCEN by exempt pooled investment vehicles described in section 5336(a)(11)(B)(xviii) that are formed under the laws of a foreign country.**

***a. By what method should these certifications be filed?***

- Certifications should be filed electronically, whenever possible, but any filing should be consistent with the beneficial ownership filings set up within the new FinCEN database. Consistent filings will ensure both reporting entities and those accessing the database face a minimal burden.

***b. What information should be included in these certifications?***

- The certifications should, at a minimum, include legitimate identifying information including full contact information and any other appropriate details that would allow FinCEN the ability to reach out to an entity for additional information, if needed.

***c. Should there be a mechanism through which such filings could be made to foreign authorities and forwarded to FinCEN, or should such filings have to be made directly to FinCEN?***

- Yes, once again this information should be set up directly within the new FinCEN database with a mechanism for appropriate and timely e-filing to ensure contact information is widely available to the agency and any appropriate parties.

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<sup>3</sup> See Add. Cyrus Vance, *Report of the Grand Jury of the Supreme Court State of New York First Judicial District* 25-26 (2019).

***d. What information should be included in these certifications (e.g., what information would allow authorities to follow up on certifications containing false information)?***

- The information should include a known point of contact with a legitimate means of contact including email, phone number(s), address(es), and any other details the certifying entity can provide to allow authorities to directly contact the organization to update a false or mistaken piece of information.

**e. Should these certifications be accessible to database users, and if so, should they be accessible on the same terms as beneficial ownership information of reporting companies?**

- The certifications should be established and reported in the same manner as the beneficial ownership information and accessed by database users in the exact manner as the beneficial ownership information. This information should only be accessible under the appropriate protocols and by users trained in how to access the FinCEN database. As noted previously, this is to ensure there are no gaps in the information reported to FinCEN and that certification information is only reviewed when the entity in question is part of an ongoing civil or criminal investigation. These protections will assuage any concerns over the handling of the information, while allowing for timely law enforcement access to ensure the information is useful.

**(19) What should reporting companies or individuals holding FinCEN identifiers be required to do to satisfy the requirement of section 5336(b)(1)(D) that they update in a timely manner the information they have submitted when it changes, such as when beneficial owners or holders of FinCEN identifiers (i) transfer substantial control to other individuals; (ii) change their legal names or their reported residential or business street addresses; or (iii) die; or (iv) when a previously acceptable identification document expires? For example, should the reporting companies or individuals be required to file a new report, or provide notice only of the information that has changed?**

- The reporting companies should file a new report to correct any of the changed or mistaken information within the time required under the law. Any reporting company that does not provide a full updated filing should be considered no longer in compliance and therefore in violation of Federal law. For the information reported to FinCEN to be valuable to law enforcement in the context of ongoing investigations, covered entities should complete full new filings each time information has been changed under the conditions highlighted in the law. This also allows for the most updated and accurate information to be accessible to law enforcement and prosecutors.

**(20) Should reporting companies be required to affirmatively confirm the continuing accuracy of previously submitted beneficial ownership information on a periodic basis (e.g., annually)? How should such confirmation be communicated to FinCEN?**

- Reporting companies should submit continued confirmation of the accuracy of previously submitted information. FinCEN should also take appropriate steps to check in with reporting companies who have not met this requirement to ensure compliance. The information should be confirmed through electronic service and reporting companies, in their confirmation, must include verification of existing information by providing the required details to FinCEN as they should be recorded in the system. This will ensure that any mistakes are rectified as FinCEN could confirm that information on file matches the confirmation sent by the reporting company.

**(22) Section 5336(h)(3)(C) contains a safe harbor for persons who seek to correct previously submitted but inaccurate beneficial ownership information pursuant to FinCEN regulations. How should FinCEN's regulations define the scope of this safe harbor? Should the nature of the inaccuracy (e.g., a misspelled address versus the complete omission of a beneficial owner) be relevant to the availability of the safe harbor?**

- The safe harbor provision was intended by Congress to only capture “honest mistakes” from reporting entities. Therefore, FinCEN should take steps to interpret the safe harbor provision

within a narrow scope, focused on misspellings or minor mistakes in providing the detailed information required under the law. However, covered organizations that omit required information outright should fall outside the scope of the safe harbor provision, as a reporting company would have been made aware of the exact information to be required, thus such action could not constitute a mistake.

**(23) What steps should reporting companies be required to take to support and confirm the accuracy of beneficial ownership information?**

***a. Should reporting companies be required to certify the accuracy of their information when they submit it?***

- Yes, as certification assists in avoiding abuse and ensuring the information within the database is useful to law enforcement's ongoing investigations.

***b. If so, what should this certification cover?***

- The certification should cover all details that reporting entities are required to provide to FinCEN. This will ensure there are no gaps or mistakes within the report provided to FinCEN.

***c. Should reporting companies be required to submit copies of a beneficial owner's acceptable identification document?***

- Reporting companies should submit copies of an acceptable identification document to assist FinCEN in certifying that all beneficial owners are reporting accurate information. This requirement ensures that when law enforcement requests information, FinCEN is able to confirm that the database includes accurate and legitimate contact information for each and every beneficial owner.

**(24) What steps should FinCEN take to ensure that beneficial ownership information being reported is accurate and complete?**

- FinCEN should take steps to require companies to certify the accuracy of the information as this will assist reporting entities in ensuring there are no mistakes in the report and provide additional notice that inaccurate information may not fall under the safe harbor. This verification should be done, for example, by pinging passport numbers in the Consolidated Consular Database or checking driver licenses through the appropriate Department of Motor Vehicles database. As previously noted, requiring copies of any required documents and requiring a reporting entity to certify the information entered into the system would assist in ensuring the information is accurate and complete. FinCEN should also provide reminders through the system that misreporting of the information is a criminal violation punishable under Federal law.

**(25) Should a reporting company be required to report information about a company's "applicant" or "applicants" (the individual or individuals who file the application to form or register a reporting company) in any report after the reporting company's initial report to FinCEN? Why or why not?**

- The reporting entity should report information about the individual or individuals who file the application in order to ensure there is a clear point of contact in case of a mistake in filing or incomplete information. Congress intended for this legislation to provide accurate information and an actual point of contact for law enforcement and financial institutions. In the rare case that information is purposefully misreported or lacks a clear point of contact, collecting basic information on the "applicant" will ensure there is an actual individual who can assist in filling the gaps that exist in the reporting entities information.

**(32) When a state, local, or tribal law enforcement agency requests beneficial ownership information pursuant to an authorization from a court of competent jurisdiction to seek the information in a criminal or civil investigation, how, if at all, should FinCEN authenticate or confirm such authorization?**

- FinCEN will not need to take additional steps to authenticate or confirm such authorization as law enforcement, as part of following the protocols. Any additional authentication process could delay or hold up an ongoing investigation. Law enforcement and prosecutors will be trained on the appropriate protocols and will provide FinCEN with authorization from a court of competent jurisdiction, which will ensure there is no unauthorized access of beneficial ownership information.

**(33) Should FinCEN provide a definition or criteria for determining whether a court has “competent jurisdiction” or has “authorized” such an order? If so, what definition or criteria would be appropriate?**

- FinCEN should follow the text of the legislation strictly and define a court of competent jurisdiction as any Federal, State, local, or tribal court that law enforcement approaches to certify the ongoing investigation prior to accessing the beneficial ownership information. FinCEN should not go outside the scope of the legislative text by requiring State, local, and tribal law enforcement to gain authorization from a Federal court or a distant court that lacks proximity and relationships with the appropriate law enforcement agencies. Many law enforcement and prosecuting agencies are not in close proximity to Federal courthouses, further delaying an ongoing investigation if FinCEN limits authorizations to only that venue. Further, Federal courts often lack the awareness of ongoing State and local investigations and may not have sufficient information to make a fully informed decision on whether to authorize the agency to move forward with accessing the beneficial ownership database. It is important to also define an “authorized” individual within the scope of the Corporate Transparency Act, by ensuring this definition provides broad ability for officers of a particular court of jurisdiction to provide sign off prior to law enforcement’s request to review beneficial ownership information. Our members strongly recommend defining “officer of the court” as “someone charged with upholding the law and administering the judicial system”, which can include a judge, clerk, bailiff, sheriff, prosecutor, or lawyer authorized to work within that particular court of jurisdiction.

**(34) As a U.S. Government agency, FinCEN is subject to strict security and privacy laws, regulations, and other requirements that will protect the security and confidentiality of beneficial ownership and applicant information. What additional security and privacy measures should FinCEN implement to protect this information and limit its use to authorized purposes, which includes facilitating important national security, intelligence, and law enforcement activities as well as financial institutions' compliance with AML, CFT, and CDD requirements under applicable law? Would it be sufficient to make misuse of such information subject to existing penalties for violations of the BSA and FinCEN regulations, or should other protections be put in place, and if so what should they be?**

- FinCEN should not impose additional security requirements as the Corporate Transparency Act takes sufficient steps to secure beneficial ownership information collected in the new database. The legislation provides for criminal penalties and restriction of access for any law enforcement authorized user or financial institution that misuses the data collected. It’s important to note that the penalties laid out in the legislation are in addition to the ones already in place from the Bank Secrecy Act.

**(36) How should FinCEN handle updated reporting for changes in beneficial ownership when beneficial ownership information has been previously requested by financial institutions, federal functional regulators, law enforcement, or other appropriate regulatory agencies?**

*a. If a requestor has previously requested and received beneficial ownership information concerning a particular legal entity, should the requester automatically receive notification from FinCEN that an update to the beneficial ownership information was subsequently submitted by the legal entity customer?*

- Yes, automatically receiving notification from FinCEN that an update to the beneficial ownership information of a reporting company ensures law enforcement is acting on accurate information while simultaneously avoiding the concern bad actors will take steps to continuously change their beneficial owners to avoid accountability.

*b. If so, how should this notification be provided?*

- A push or electronic notification from the FinCEN database would be beneficial for law enforcement in being notified about the updated beneficial ownership information for a company. This information should be provided to any authorized individual in a law enforcement or prosecuting agency that has previously accessed the beneficial ownership database to receive details of the updated information.

*c. Should a requesting entity have to opt in to receive such notification of updated reporting?*

- A requesting entity, such as a law enforcement agency, should not be required to opt-in to receive updates, rather FinCEN should take appropriate steps to note when a reporting company's information is accessed by law enforcement and provide each agency that requested information on the reporting company with the update filing.

**(44) What burdens would CTA requirements impose on state, local, and tribal governmental agencies? In particular, what additional time, money, and human resources would state, local, and tribal governments have to secure and expend—or reallocate from other duties, and if the latter what duties would be compromised or services impaired? How, if at all, would any of these burdens or allocations of time or money vary according to the size or other characteristics of a jurisdiction—would smaller jurisdictions find it easier or harder to handle the costs associated with CTA requirements?**

- Law enforcement and prosecution agencies that hold pre-existing relationships with FinCEN or other Federal agencies will likely not require significant infrastructure or funding to establish plans of action and internal protocols to ensure an officer or prosecutor is able to access the database. However, it is likely that smaller jurisdictions will face more significant financial and resource burdens when attempting to access the database and ensure an authorized individual is trained in the appropriate protocols set by FinCEN. The agency can assist in minimizing this burden by offering training and financial resources to jurisdictions that are interested in accessing the beneficial ownership database.

**(46) How can FinCEN best partner with state, local, and tribal governmental agencies to achieve the purposes of the CTA?**

- FinCEN can best partner with the State and local governments and law enforcement agencies by beginning a national education campaign aimed at visiting localities throughout the country, either in person or virtually, to explain this new tool and how local law enforcement can meet the conditions needed to access beneficial ownership information. Dedicating manpower, time, and financial commitment to attending State and local conferences, meeting with local governments, and establishing relationships with existing associations that represent these units of government will allow for a seamless transition as the database is formed and law enforcement gains access. Our members are excited to partner with the agency to bring this new tool to communities across the country to ensure its legal use will hold bad actors accountable.

## **NDA Additional Comments for Proposed Rulemaking**

Our members are also interested in commenting on additional pieces of the beneficial ownership database as enacted by FinCEN. Specifically, State and local law enforcement find that these investigations into financial crimes involve complex webs of criminal behavior that involve actors that may expand beyond our borders.<sup>4</sup> To that end, prosecutors feel strongly that Federal law enforcement and foreign law enforcement entities that meet the specific requirements set out in the Corporate Transparency Act should have direct access to the beneficial ownership database through the proper protocols established by FinCEN. This includes foreign law enforcement agencies with any information sharing agreements or that are considered a “trusted foreign country” to avoid delaying the investigative process. Furthermore, NDA is supportive of ensuring the intent of the legislation is upheld by allowing Federal agency heads to delegate written certification requirements to subordinates and delegate certification-making authority to entire agency departments, subgroups, or classes of employees. To avoid duplicative authentication, agency heads and delegees should be allowed to submit one request and certification per investigation. Allowing equal and timely access, when lawful and appropriate, to all parties in an ongoing investigation is vital to the continuation of law enforcement’s work to hold wrongdoers accountable.

The theme of timely law enforcement access extends to State and local investigators, officers, and prosecutors. FinCEN can facilitate this timely transfer of information through the new beneficial ownership database by ensuring the protocols developed by the agency are modeled after existing procedures that are in place when law enforcement engages with their Federal counterparts to access information in secure Federal databases. For example, FinCEN can look to the existing suspicious activity report (SAR) database as an example of how to best develop protocols for lawful access. Further, FinCEN can work alongside their partners at the Department of Justice to assist in sharing resources and connections to State and local partners to assist in fostering the relationships needed to train and provide immediate access to law enforcement and prosecutors across the country. Important to the implementation of the Corporate Transparency Act is understanding the importance of allowing law enforcement access at all stages of the investigatory process. Law enforcement officers and prosecutors seeking access to the database should not be required to provide a case or docket number to obtain beneficial ownership information. Congress intended for the legislation to provide law enforcement access to beneficial ownership during “ongoing” investigations, intentionally leaving the language broad to allow officers and prosecutors to access the database throughout the course of a criminal or civil investigation.<sup>5</sup> Therefore, FinCEN should provide law enforcement, when requested through the appropriate protocols, access to the beneficial ownership database during all stages of the criminal or civil investigatory process.

The last, but significant, piece of the puzzle for prosecutors involves the architecture of the beneficial ownership database. Within the legislative text, Congress mandated that the Department of Treasury ensure the information collected is “highly useful” to the law enforcement community. In order to meet this mandate, FinCEN should take steps to establish a database that is user-friendly and easily navigable. Authorized users in law enforcement should be able to look up a specific owner and see the companies involved with said individual as well as search for a company and see a complete overview of its beneficial owners. The ownership structures of reporting companies should be clear within the database and any gaps in that structure should be addressed by FinCEN through contacting the entity to clarify any gaps in the report. Furthermore, each change in the record should be reflected within the history of a reporting

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<sup>4</sup> See Max de Haldevang, *Why Iran got away with using a \$500 mln New York skyscraper as a secret slush fund for 22 years*, Quartz (Jun. 30, 2017), <https://qz.com/1019253/iran-used-shell-companies-to-hide-its-sanctions-busting-ownership-of-new-york-skyscraper-650-fifth-avenue/>.

<sup>5</sup> See Cy Vance & Carolyn B. Maloney, *Opinion: True corporate transparency now: A new legislative tool will help fight fraud and terrorism*, New York Daily News (Jan. 27, 2021), <https://maloney.house.gov/media-center/in-the-news/opinion-true-corporate-transparency-now-a-new-legislative-tool-will-help>. See also Carolyn B. Maloney, *Maloney and Vance call on Congress to stop anonymous terrorist and criminal shell corporation money laundering in New York City*, (Mar. 7, 2016), <https://maloney.house.gov/media-center/press-releases/maloney-and-vance-call-on-congress-to-stop-anonymous-terrorist-and-0>.



company or entity to once again paint a full picture for the law enforcement officer accessing the database. By incorporating these structures into the beneficial ownership database, FinCEN will lessen the training burden on Federal, State, local, and tribal agencies accessing the database while streamlining said database to assist law enforcement in thwarting criminal and civil violations of the law.

NDAA greatly appreciates your willingness to consider our input and ideas as the agency moves forward with the rulemaking process. Prosecutors continue to work alongside our Federal, State, local, and tribal partners to root out criminal misuse of our country's banking systems and our members are confident that the successful implementation of the Corporate Transparency Act will further this shared goal.<sup>6</sup> We appreciate your commitment to enacting this historic legislation and look forward to working alongside your agency to preserve the integrity of the Nation's financial system while upholding the rule of law.

Sincerely,



Nancy G. Parr  
NDAA President

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<sup>6</sup> See *Prosecutor Pushes on Beneficial Ownership In Fight Against Financing of Terrorists*, Bloomberg (Jun. 25, 2015), <https://news.bloomberglaw.com/banking-law/prosecutor-pushes-on-beneficial-ownership-in-fight-against-financing-of-terrorists>.

# Addendum

THE GRAND JURY OF THE SUPREME COURT  
OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

REPORT OF THE GRAND JURY  
OF THE SUPREME COURT  
STATE OF NEW YORK  
FIRST JUDICIAL DISTRICT  
ISSUED PURSUANT TO  
CRIMINAL PROCEDURE LAW  
SECTION 190.85 SUBDIVISION (1)(c)

CYRUS R. VANCE, JR.  
DISTRICT ATTORNEY  
NEW YORK COUNTY

After considering the evidence before it and receiving legal instructions from the District Attorney of New York County, this Grand Jury hereby submits a report, pursuant to Criminal Procedural Law § 190.85(1)(c), “[p]roposing recommendations for legislative, executive or administrative action in the public interest based upon stated findings.”

## **INTRODUCTION**

The epidemic of fraud in the conveyance of residential real estate affects every county of the City of New York. This Grand Jury learned that fraudsters target single family homes and residential buildings with one, two or three units. Many of these structures are brownstones that were purchased after World War II, and remained in the same family for over a half-century. Many are traditional one and two-family houses that were once modestly priced at the time of purchase, but have significantly increased in value over the years. All exemplify the “American Dream” of home ownership.

Typically, owners intended the residential property to pass to their legatees or distributees. Unfortunately, often, as the owners advanced in age or became widowed, the properties accumulated liens in the form of unpaid real property taxes and/or water and sewage charges, or fell into disrepair requiring substantial renovation. In recent years, as the value of the New York City real estate market has surged, fraudsters have learned how to identify vulnerable properties and have devised different ways to take over ownership. In fact, the

fair market value of Manhattan residential real estate, as determined by the New York City Department of Finance, has increased by approximately \$17.5 billion from fiscal year 2017/2018 to fiscal year 2018/2019, despite a modest increase of a few thousand residential units.

The victims of residential real estate fraud are largely from the most vulnerable segments of our society – the elderly, the financially disadvantaged, the medically infirm, the uneducated, and the unsophisticated. With the stroke of a pen or the click of a mouse, predators brazenly snatch the accumulated wealth of these families, rooted, for the most part, in their real estate ownership.

This Grand Jury voted multiple charges involving forged documents related to the transfer of New York County residential real property that were recorded or filed with government agencies.<sup>1</sup> We also received evidence about numerous convictions obtained within the past four years, involving similar criminal conduct committed throughout New York City.

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<sup>1</sup> On June 21, 2018, this Grand Jury was impaneled by the Honorable Robert Stolz upon application of New York County District Attorney Cyrus R. Vance, Jr., and extended on July 11, 2018, to a term ending on December 21, 2018.

The Grand Jury heard testimony from dozens of witnesses, including public officials, law enforcement officers, academics, and legal experts. We also received information about community groups and not-for-profit entities that assist homeowners victimized by fraud. A significant number of documents were admitted into evidence from a wide array of sources, including the New York City Register (“City Register”) and the Office of the Sheriff (“Sheriff”), both part of the New York City Department of Finance (“Department of Finance”), the New York County Surrogate’s Court, the Office of the New York County Clerk of the Supreme Court, the New York State Department of State, financial institutions, internet software providers, and numerous vendors of goods and services.

Residential real estate fraud impacts the economic stability and cultural diversity of this and other counties in New York City, and warrants the issuance of a Grand Jury report proposing much needed reforms. This Report details several recommendations. Some recommendations call for changes to the City’s procedures and requirements for filing deeds and other real estate related documents, and the State’s requirements for notarizing documents, which aim to prevent fraudsters from manipulating the system to obtain ownership of others’ properties illegally. Another recommendation seeks to improve the City’s response after an illegal real estate conveyance has already occurred, including additional tools for detecting criminal activity and

identifying culprits earlier, and procedural changes permitting more efficient introduction of evidence before an investigating grand jury. Still other recommendations propose modifications to the penal and criminal procedure laws that would increase criminal sanctions to be commensurate with the gravity of the criminal conduct, and that would restore the residential property to the rightful owner.

This body of 23 citizens raises its collective voice and proposes a five-pillar reform:

1. Tightening regulations pertaining to the licensing of notaries public and the notarization of documents;
2. Instituting new protections for homeowners and improving law enforcement's ability to detect fraud in real estate conveyances;
3. Increasing the felony classification of crimes applicable to the prosecution of a fraudulent conveyance of residential real estate;
4. Implementing a procedure for the restoration of residential real property to the rightful owner; and
5. Expanding the grand jury's evidentiary rules to authenticate business records by affidavit and to permit remote video testimony in limited circumstances.

This Grand Jury is not the first to advocate some of the ways we recommend to advance the five reforms. Yet, we are compelled to echo a

demand for such changes, in part, in frustration with the glacial pace of enacting legislation necessary to tackle these illegal transactions, and, in part, in the hope that legislators, regulators and executives, in considering this Grand Jury’s perspective, will be persuaded to advance these goals.

## **RECORDING THE CONVEYANCE OF REAL PROPERTY**

A deed evidences the conveyance of real property ownership from one party to another. While New York law does not require that a deed be recorded with a government office, it is the recording of a deed that puts the world on notice of the conveyance of real property and the identity of the record owner.

### ACRIS

Deeds, mortgages, contracts of sale, and other supporting documents related to the conveyance of real property in the counties of New York, Queens, Kings, and the Bronx are recorded by the City Register, and maintained in its Automated City Register Information System (“ACRIS”).<sup>2</sup> To record a deed, a person must be registered as an ACRIS user, which requires

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<sup>2</sup> Documents for real property conveyances on Staten Island are recorded in the Office of the Richmond County Clerk.



creating an ACRIS profile and receiving a New York City identification number. This identification number is associated with the person each time he or she accesses ACRIS. The ACRIS profile enables a person to create the necessary cover page that, in turn, will generate the documents required for filing a deed or other real estate-related instruments. ACRIS generates a unique 18-digit “document identification number” on the cover page. Once the instrument is recorded, ACRIS generates another unique 18-digit “City Register File Number” listed in the bottom right-hand corner of the cover page.

ACRIS, designed to increase transparency in real estate transactions, allows the general public electronic access to search property records of the four boroughs by block and lot numbers, and by address. The ACRIS data can be searched through the “index icon,” which displays the transaction in report form. The “image icon” permits the public to view the images of the original documents, including the signatures of the grantor, grantee, notary public, and any other person whose name is listed on the documents. The ACRIS records also show the mailing addresses of the grantor and grantee, the notary public’s name, registration number, county of commission and expiration date of the commission, as well as any watermarks or other identifying features on the document.

To combat a fraudster’s use of this public information to create and subsequently record fraudulent deeds or other instruments that affect title or

equity in real property, the Department of Finance has implemented a system to notify an interested party (by email, text message, or postal mail) when a deed-related or mortgage-related document affecting such party's interest in real property has been recorded with the City Register.

### Role of the Notary Public

The notary public is an intrinsic party to the conveyance of real property. Virtually every document associated with a real estate transaction requires a notarization. New York recognizes two types of notarization of documents, the *acknowledgement* and the *jurat*. Both kinds of notarizations are relevant to the transfer of residential real property. For example, a deed requires an *acknowledgement*, while various supporting affidavits to a deed require a *jurat*.<sup>3</sup>

In both instances, the notary public must positively identify the signer of the document by obtaining proper identification from that person. In the case of a *jurat*, the notary public also administers an oral oath or affirmation.

## **HOW RESIDENTIAL REAL ESTATE FRAUD IS COMMITTED**

Although each case has its own nuances, fraud in the conveyance of residential real estate is essentially a form of identity theft – *property title theft* – of which the homeowner is usually unaware. A fraudster can identify vulnerable

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<sup>3</sup> Some examples of these supporting documents are an “affidavit of compliance with smoke detector requirement for one- and two-family dwellings,” and a “New York City Real Property Transfer Tax Return.”

properties in various ways, for example, by scouring obituaries for recently deceased owners, physically canvassing neighborhoods for unoccupied or dilapidated residences, and checking public records for published liens and violations on properties. We have learned that fraudsters even learn about properties from neighborhood property caretakers.

In many instances, the homeowner's signature on a deed is forged outright. In fact, we received evidence establishing that homeowners who purportedly signed deeds to convey their properties had been deceased several years earlier, or even several decades before the alleged conveyance. In other instances, particularly when the homeowner had died intestate, a distant heir or an imposter masquerading as a legal distributee, signed over a fractional interest in the property in exchange for a sum of money well below the property's market value.<sup>4</sup>

The scammer then records a new deed, usually a "quitclaim" deed, which transfers property "as is" without any warranties on the part of the seller. The new owner may be a limited liability corporation, a straw buyer, or a totally fictitious person. Having gained ownership of the real estate, the fraudster is

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<sup>4</sup> As a result of the subprime mortgage crisis from 2007 through 2010, savvy scammers preyed upon desperate homeowners in default on their mortgages or in foreclosure. These homeowners usually had limited understanding of the legal and property issues involved, and were taken in by promises of financial assistance if they "temporarily" transferred ownership of the property. Not surprisingly, the homeowners were never given the promised funds or assistance, and were usually evicted. This type of real estate fraud was not the focus of this Grand Jury's investigation.

then free to get a mortgage or building loan using the property as collateral, to make renovations, to transfer the property to another shell company, or sell it to a *bona fide* purchaser. Some diabolical criminals even commenced lawsuits against the legitimate owners, using it as an opportunity to extort payment from them in exchange for the return of the deed.

To our astonishment and great concern, this Grand Jury learned that, while it can take as little as a forged deed to transfer ownership of real property, it is extremely challenging, and sometimes impossible, to undo a fraudulent transfer. Often there is no one to represent the true owner and manage the complex process of establishing the fraud and returning the property to the rightful owner. Moreover, the City's procedures are not designed to assist victims of residential fraud in commencing the appropriate actions to reclaim their home.<sup>5</sup> The victims are ill-equipped to mount a legal challenge to evict the fraudster in a housing court action or to commence a "quiet title" action in the Supreme Court to establish which party has legal ownership to real property. The victims are often financially unable to post a bond in support of injunctive relief to restrain a fraudster from further action pending a criminal prosecution.

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<sup>5</sup> In some situations, a convicted defendant has agreed to return the deed voluntarily to the prior owner as a condition of a negotiated plea agreement.

## Office of the Sheriff

To help prevent and deter residential real estate fraud, the Department of Finance has upgraded its notification program to alert homeowners automatically of any deed or other instrument filed against a property with the City Register, and has implemented a system to report suspicious activity to the Sheriff for investigation. Suspicious activity that would trigger a review of conveyances includes residential real property with a sale price far below market value, multiple transfers between several limited liability companies in a short period of time, and transfers by and between people or entities that have committed or have been suspected of committing fraud in the conveyance of real estate.

After receiving additional funding in 2014, the Sheriff has handled over 2000 complaints of fraudulent conveyances of residential real estate. As seen from the annexed map at the end of this Report, these illegal conveyances are more concentrated in certain communities in each of the five boroughs of New York City.

While some complaints arising from family discord are resolved without prosecution, many complaints remain under active investigation or are pending prosecution. The proof required to establish fraud in the conveyance of residential real estate is difficult, time-consuming and expensive to collect.

Witnesses are often scattered throughout the state, or the nation, or even overseas. The necessary documents needed to prove the fraud can be voluminous. Some are difficult to secure with New York legal process, some are difficult to find, and still others are no longer available.

Despite all these obstacles, during the brief span of years from 2015 to date, there were 20 convictions citywide from the Sheriff's efforts.<sup>6</sup> Other convictions resulted from complaints made directly to prosecutors, including over a half dozen convictions obtained by the New York County District Attorney's Office.

The combined fair market value of the Manhattan residential real properties involved in the complaints made to the Sheriff, as determined by the Department of Finance, totaled over \$112 million, as of the date of the complaints.<sup>7</sup>

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<sup>6</sup> One large investigation involved over 400 properties.

<sup>7</sup> This amount increases to approximately \$160 million when combined with complaints regarding other types of Manhattan properties, such as abandoned warehouses or stores.

## RECOMMENDATIONS

## **RECOMMENDATION ONE**

### **IMPOSE NEW REQUIREMENTS ON LICENSED NOTARIES PUBLIC**

The notary public, one of the oldest continuing professions, is the first line of defense for combating real estate deed fraud. In every case before this Grand Jury, a notary public was a willing or unwitting facilitator in the crime. Therefore, the Legislature should establish stricter requirements for the appointment of notaries public, commissioned by the New York State Secretary of State, and for the recordings of their notarial acts.

In virtually every fraudulent transfer described to this Grand Jury, a faulty notarization was essential to the successful completion of the crime. In many instances, the notary public affixed his or her signature and notary seal to documents even though the signer did not appear before the notary, or, in more disturbing cases, to a blank document that contained neither the printed name nor the signature of the signer. We learned that in many cases, the notary public provided the services to someone regarded as a respectable member of the community, such as an attorney or a police officer. Unfortunately, such persons turned out to be criminals.

Fraudsters have also arranged for an individual with fake identification to forge the signature of the purported homeowner or a legal heir on pertinent documents in the presence of the notary public. We also became aware of



situations in which a fraudster purloined a valid notary public stamp and used it to notarize the necessary signatures.

More brazen perpetrators have lifted valid notary commission information from public documents accessible in ACRIS and used it to purchase a phony notary public seal from a retail vendor of notary paraphernalia. To our utter amazement, we heard testimony about a successful undercover law enforcement purchase of a fake New York notary seal from an out-of-state online vendor. The undercover purported to be a commissioned New York State notary and gave the vendor a name, a fake notary public registration number, a fake qualifying county of issuance, and a fake commission expiration date. The vendor, not requiring the purchaser to provide any *verification of the commission*, created the notary seal for a modest fee.

Currently, despite the notary public's crucial role in the transfer of title of real property, New York law imposes little accountability upon the more than 300,000 New York commissioned notaries public. Therefore, we suggest the New York State legislature amend several provisions of Article 6 of the Executive Law governing the appointment and qualifications of a notary public, to impose more stringent controls to prevent fraudulent notarizations and to increase sanctions for failure to comply with the laws and regulations of their public office. Some of our suggestions, supported by the grand jury evidence, pertain to greater scrutiny of the qualifications of the notary public in

the first instance; others pertain to procedures that a notary public should follow in the exercise of his or her official acts. The Legislature should consider implementing the following seven revisions.

1. Fingerprint Notary Public Applicants

A notary public applicant should be fingerprinted as part of the background check prior to his or her appointment as a notary public. This will not only assist the Secretary of State in determining the applicant's true identity, it will also ensure that the notary public applicant has not been convicted of a disqualifying crime.

2. Require Notary Public Education

The law requires a notary public applicant to be familiar with the duties and responsibilities of a notary public prior to obtaining his or her initial commission. *See* Execution Law § 130(1). To that end, prior to taking the written exam, the notary public applicant should be required to complete a designated course of a specified duration, approved by the Secretary of State. A notary public should also be required to take a refresher course of a specified duration prior to reappointment to a four-year commission. Such continuing education would highlight any changes that were made in the law during the four years prior to the renewal of the commission, and would reinforce the notary's understanding of the ethical obligations of this public office.

### 3. Require a Notary Public Bond

A notary public should be required to file an official bond in an amount designated by the Legislature. A bond would provide funds to pay damages suffered due to a notary public's misconduct.<sup>8</sup>

### 4. Require a Notary Seal

A notary public should be required to have and affix a valid rubber stamp or seal to notarized documents. It is already the practice of most New York notaries public to purchase a notary seal. The seal should contain the name of the notary public, the county of the commission, the identifying registration number assigned to the notary public, and the exact commission expiration date, setting forth the month, day and year. The seal should be kept in a locked and secured area under the exclusive control of the notary public. The notary public should be further required to obtain a new notary seal upon renewal of his or her notary public's commission, and should not be permitted to change the expiration date manually. This Grand Jury received evidence of forged documents recorded with the City Register on which the expiration date of the commission was altered by hand writing the two digits of the year onto a blank space, or by crossing out the date and hand writing a new date.<sup>9</sup>

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<sup>8</sup> A majority of states require notaries to be bonded. *See e.g.*, Cal. Gov't Code § 8212 (\$15,000 bond); Wy. St. § 32-1-104 (\$500 bond); *also see* Model Notary Act of 2010 § 3-3, published by the National Notary Association (\$25,000 bond).

<sup>9</sup> This Grand Jury was informed that all but 10 states and United States territories require a notary public to acquire and use a notary seal.

## 5. Provide a Notary Public Certificate

The New York State Secretary of State should provide each notary public with a certificate that verifies the notary public's commission. The notary public should be required to submit a copy of the certificate to a retail vendor to purchase a notary seal.

## 6. Require a Notary Public Journal

The notary public should be required to keep a chronological and contemporaneous *journal* of all notarial acts. The journal should include the date, time, and type of each notarial act (that is, *acknowledgement* or *jurat*), the character of the instrument (for example, deed or mortgage), the full name and address of each individual for whom the notarial act is performed, the signature of each person whose signature is being notarized, a detailed description of the type of photo identification provided by the signer,<sup>10</sup> and the amount of any fee charged.

If the document to be notarized is a deed of any kind, or other document affecting residential real property or required to be filed in relation to residential real property, the notary public should also be required to record the block and lot numbers, and the street address of the property in the journal.

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<sup>10</sup> A survey of the 55 jurisdictions of the United States (which includes all 50 states and all U.S. territories except Puerto Rico) reveals that 18 jurisdictions require a journal for all notarized documents. Of the remaining 37 jurisdictions, 34 recommend keeping such a journal.

The notary public must also have the person signing the document place an inked thumbprint into the journal.<sup>11</sup>

As with the notary public seal, the journal should be kept in a locked and secured area under the exclusive control of the notary public. Additionally, this Grand Jury heard testimony about forged notarized documents that were a decade old by the time a matter was litigated. It is, therefore, prudent to require that the journal be maintained for a period of ten years. Any violation of the recordkeeping requirements should expose the notary public to a civil fine in an amount to be determined by the Legislature.

The journal, the most important tool of the notary public's trade, provides the following benefits to several interested stakeholders:

- It shows the notary public's due diligence and exercise of reasonable care;
- It establishes the signer's identity;
- It corroborates the integrity of notarization; and
- It refreshes the memory of the notary public, months or years after the fact.

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<sup>11</sup> California requires a thumbprint, Cal. Gov't Code § 8206(2)(G), as well as The Model Notary Act of 2010, § 7.2 (7), *Journal Entries*, published by the National Notary Association. Requiring a thumbprint from a legitimate signer also underscores for the signer the seriousness of the transaction, which may prompt him or her to ask pertinent questions about the transaction. Simultaneously, this procedure would have a chilling effect on fraudsters reluctant to provide incriminating details, especially his or her "digit" identifier.

We heard testimony that a journal, voluntarily kept by a New York City notary public, enabled law enforcement to prosecute a person engaged in deed fraud. However, the absence of a journal, or any type of recordkeeping, made it difficult, and in some instances impossible, to identify the culprits and their accomplices, or to gather sufficient evidentiary facts to mount a successful prosecution.

#### 7. Increased Criminal Sanctions

We note that there are unclassified misdemeanors scattered through the chapters of the New York laws that sanction misconduct by a notary public. For example, pursuant to subdivision two of Executive Law § 135-a, a notary public who practices any fraud or deceit in the exercise of his or her powers or in the performance of his or her duties is guilty of an unclassified misdemeanor. *See also* Validation of Official Acts Performed before Filing Official Oath or Undertaking, Public Officers Law § 15, sanctioning a notary who executes any function of his or her office without having taken and duly filed the required oath of office.

Since a notary public is perceived to be a “public officer,” there is some legal support that a notary public falls within the ambit of a “public servant” as defined in Penal Law § 10.00(15). As a result, a notary public may be charged with the crime of Official Misconduct, pursuant to Penal Law § 195.00, a class

A misdemeanor, and Issuing a False Certificate, pursuant to Penal Law § 175.40, a class E felony.

While these offenses redress general misconduct of a notary public or the accessorial liability of a notary public, conduct in connection with the conveyance of residential real property merits more serious sanctions. Moreover, it is a rare case where the evidence establishes, beyond a reasonable doubt, that the notary is an aider and abettor to a fraudster to justify charging the notary public with the traditional felonies of Offering a False Instrument for Filing in the First Degree, Criminal Possession of a Forged Instrument in the Second Degree, and Forgery in the Second Degree.

Thus, the Legislature should create a new offense in Penal Law Article 175 (Offenses Involving False Written Instruments) making it a felony for notaries public to notarize a signature in the absence of the signer on a document involved in a residential real estate transaction that is proven to be false. This statute would criminalize the pre- and/or post-notarized signatures.

The notary public performs an invaluable service in connection with the conveyance of real estate. These proposals underscore the importance of their role in such transactions and provide additional tools to deter fraud by imposing stricter requirements for the notarization of instruments related to residential real property.

## **RECOMMENDATION TWO**

### **IMPLEMENT NEW PROCEDURES TO CURB AND DETECT FRAUD INVOLVING RESIDENTIAL REAL PROPERTY**

Our second recommendation addresses the means to increase protections for homeowners and to improve law enforcement's search capability to uncover and gather evidence necessary for the prosecution of fraudulent residential real estate transactions. Some suggested action is directed to the Department of Finance and other action is directed to the Legislature.

#### **1. Protecting Access to Property Owner Contact Information**

As mentioned above, the Department of Finance has a program that notifies a property owner at the address listed in the property tax system of a deed or any other instrument recorded against his or her property with the City Register. This Grand Jury also learned that it is easy for a property owner to access the Department of Finance webpage to change or update his or her mailing address, email address, telephone number, or other contact information contained in the property tax records.

However, scammers also have access to these webpages, and we heard evidence of cases in which they changed the contact information to a post office box or other address under their control, leaving the true property owner without a means to receive notifications from the Department of Finance. To remedy this situation we encourage the Department of Finance to require the



property owner to create an online account that is password protected, or to register the “change of address” in writing. In addition, prior to accepting the new address, the Department of Finance should notify the property owner at the address on file that a request for a “change of address” has been received, and if that request is unauthorized, the property owner should contact the Department of Finance immediately.

## 2. Optical Character Recognition and Capturing IP Addresses

The evidence gathered by this Grand Jury supports proposed adjustments to the ACRIS system that would advance the efforts of law enforcement in the early detection and pursuit of a fraudster. The Sheriff needs greater capability to search the information maintained in ACRIS, and not be limited to search only for data stored in specified database fields.

This can be readily accomplished by applying Optical Character Recognition (“OCR”) software to documents scanned into the ACRIS system. The functionality of OCR would allow the Sheriff to search for key words or phrases, such as the name or registration number of a notary public. Such a search may reveal affiliations between certain notaries public and persons of interest. It would also enable law enforcement to confirm the validity of a notary public’s registration number to determine whether the notarization was authorized.

This Grand Jury also discovered that ACRIS, a treasure trove of information, can be exploited by the ill-intended. An unscrupulous individual can cobble together the necessary names, signatures, and other pertinent information needed to transfer property fraudulently. Indeed, we learned that during the execution of court-ordered search warrants, law enforcement officers uncovered evidence of fraudsters practicing the signatures of grantors or notaries public from copies of the documents maintained in ACRIS. In other instances, valid notary registration information was lifted from the public filings.

To address this unintended consequence of ACRIS's transparency, the Department of Finance should explore whether OCR software can redact portions of the *imaged* documents, making it more difficult for fraudsters to replicate watermarks, signatures, or any unique markings on the recorded documents. The entire *imaged* document can remain accessible to a property owner, law enforcement, or any member of the public who provides a valid basis for viewing the imaged document.

To further assist law enforcement to identify suspicious transactions or develop evidence needed to prove elements of crimes, ACRIS should capture the IP addresses (the "geo-location") associated with the ACRIS customer, such as the IP address associated with the creation of an ACRIS profile, the creation of a cover page, or the digital submission of documents to the City

Register for recording. Armed with this online identifier, law enforcement would be able to obtain additional information from the appropriate internet service provider to help find persons associated with fraudulent conduct and establish patterns of fraudulent transactions. It is vital that such information is obtained promptly since it is not preserved for very long by internet service providers.

### 3. Photo Identifications and Signatures

We also press the Department of Finance to upgrade the security system of its City Register offices. In particular, we counsel the agency to require that any person who uses cash, or a cash equivalent, such as a money order or teller check, to pay a recording fee or tax to the City Register in connection with the conveyance of residential real estate, to provide a government issued photo identification to the City Register. Similarly, any individual who submits a quitclaim deed in person to the City Register for recording should be required to provide a government issued photo identification.

As an added precaution, visitors to the City Register offices should be photographed and required to sign in at the security checkpoint. The film should be retained for a substantial period of time, to be determined by the Department of Finance, but one that exceeds the current short-term retention period.

These photos would give law enforcement officers important leads. Even the identity of a messenger or other intermediary engaged by the fraudster to make a payment or submit a document would produce valuable evidence, not only to identify the culprit, but to connect him or her to the fraudulent conveyance. We learned of one case in which the photos of the persons who delivered phony instruments to the City Register for recording assisted law enforcement to identify the fraudster and to secure a conviction.<sup>12</sup>

#### 4. Disclosure of Beneficial Owners

We also strongly implore the Legislature to enact new statutes requiring any limited liability company (“LLC”) named as a grantee/owner of residential real estate in New York City to list all of the LLC’s *beneficial owners* on the New York City Real Property Tax Return and the New York State Combined Real Estate Transfer Tax Return filed in support of a deed recorded with the City Register. Currently, an LLC only provides the name and social security number or employer identification number of each of its members. However, a member may not be a beneficial owner.

The Legislature should also amend the New York Limited Liability Law to define a “beneficial owner” as a natural person who directly or indirectly

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<sup>12</sup> As discussed above, we heard evidence about instances in which the purported grantor had been long deceased, sometimes for decades. The Sheriff’s ability to readily determine whether a grantor has died prior to the date of a deed conveying residential real property or the supporting documentation is imperative. We trust that our Report will persuade the

holds, or has been assigned, a membership interest in a limited liability company, and to further require an LLC to include in its articles of organization a list of the beneficial owners along with addresses and a unique identifying number from a government issued identification. This information should be maintained by the New York State Secretary of State in a database that is available to the Department of Finance and to law enforcement.

LLCs are ubiquitous owners of residential and commercial real property in New York City. Ownership of real property in the name of an LLC insulates the LLC's owner from personal risk, may confer potential tax benefits, and heightens privacy. However, an LLC also conceals the identity of the natural person who directly or indirectly exercises substantial control over the LLC, or has a substantial interest in or receives substantial economic benefits from the assets of the LLC. Requiring the names of all beneficial owners would lift the veil of secrecy and would reveal the identity of fraudsters. Access to such information could be restricted to law enforcement and government agencies.

These basic steps would not only further shield the homeowner from fraud, but would bring to light facts that may, in the first instance, halt the fraud, or at least secure the necessary evidence to bring a fraudster to justice.

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Social Security Administration to enter into a memorandum of understanding with the Department of Finance to make its database accessible to the Sheriff.

## **RECOMMENDATION THREE**

### **RAISE THE FELONY CLASSIFICATION FOR OFFENSES RELATED TO FRAUD INVOLVING RESIDENTIAL REAL PROPERTY**

We urge the Legislature to amend the Penal Law to increase the felony classification of certain offenses applicable to the fraudulent conveyance of residential real estate to reflect the severity of this criminal conduct. We highlight two amendments that would modify three specific Penal Law statutes.

This Grand Jury, and prior grand juries, voted to charge individuals who engaged in criminal conduct involving forged deeds and other documents relevant to the illegal conveyance of residential real estate with the crimes of Criminal Possession of a Forged Instrument in the Second Degree, a class D felony, and Offering a False Instrument for Filing in the First Degree, a class E felony. However, given the severity of these offenses and the rampant spread of deed fraud throughout the City of New York, such criminal conduct should be sanctioned at a higher level.

#### **1. Offering a False Instrument for Filing**

One proposal, based on the evidence presented to us, is to reserve the offense of Offering a False Instrument for Filing in the First Degree for all false written instruments involved in the conveyance of residential real property. The new offense should identify the applicable written instruments to include all types of deeds, and related documents, such as mortgages,

assignments of mortgages, satisfaction of mortgages, and contracts of sale, as well as any supporting documents required for the recording of a deed with the City Register or other government office.

The revised offense of Offering a False for Filing in the First Degree should also apply to “an attempt” to offer or present a false written instrument, and be accorded equivalent treatment as the completed filing. A fraudster should not benefit from early detection by proficient law enforcement efforts, or the City Register’s successful thwarting of the recording of a fraudulent document. Indeed, the evidence before us described one incident in which a fraudulent deed was rejected three times by the City Register before the fraudster, through persistence, successfully recorded the deed on its fourth submission. Had the deed not been recorded, each of those attempts would have been regarded, at best, as a class A misdemeanor offense, a poor deterrent to an individual’s resoluteness in getting fraudulent documents filed, and an inappropriate measure of the magnitude of the crime.<sup>13</sup>

The Legislature has recognized the equivalency of an attempt to commit certain crimes with the completed act in cases where the criminal activity is difficult to detect or there is a threat to a wide segment of the population.

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<sup>13</sup> A definition of written instrument can be set forth in a new subdivision of the new Penal Law offense.

Surely the rampant incidence of “identity theft of property title” is such conduct that qualifies for similar treatment.<sup>14</sup>

In addition, the classification of this offense should be elevated from the lowest level felony, a class E felony, to the next level, a class D felony. Such an amendment would increase the maximum term of incarceration from four years to seven years, a punishment that would appropriately reflect the severity of the crime without being overly harsh.

The existing offenses of Offering a False Instrument for Filing in the First and Second Degrees should be recast as second degree and third degree offenses, respectively, and retain their designations as a class E felony, and a class A misdemeanor, respectively.

## 2. Forgery/Criminal Possession of a Forged Instrument

Currently, a forged “deed” or “other instrument which does or may evidence, create, transfer, terminate or otherwise affect a legal right, interest, obligation or status” qualifies as a written instrument for the lower classification of Forgery in the Second Degree, and the companion offense of Criminal Possession of a Forged Instrument in the Second Degree, both class

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<sup>14</sup> The crimes of Penal Law § 176.15, through and including, § 176.40, Insurance Fraud in the Fourth Degree through Insurance Fraud in the First Degree, respectively, provide that a person can be convicted of felony-level insurance fraud when he or she “commits a fraudulent insurance act and wrongfully takes, obtains or withholds, or *attempts* to wrongfully take, obtain or withhold property” of a specified dollar amount. *See also* Penal Law § 470.15 (2)(a) & (2)(b), Money Laundering in the Second Degree, prohibiting the transportation,



D felonies. *See* Penal Law § 170.10(1) and Penal Law § 170.25, respectively. We urge the Legislature to amend the crime of Forgery in the First Degree, a class C felony, to add a new provision in the definition of “written instrument,” Penal Law § 170.15(3), to include “a deed or a part of any type of a deed or other instrument that transfers or otherwise affects residential real property, including a mortgage, an assignment of mortgage, a satisfaction of mortgage, a contract of sale, and any document that is required for recording a deed with a governmental agency.” This amendment would also elevate the corresponding criminal conduct of the “possession” of such a forged written instrument to the higher offense of Criminal Possession of a Forged Instrument in the First Degree, also a class C felony. *See* Penal Law § 170.30.

With these few simple amendments, a fraudster who cheats a homeowner, even with cavalier filings rejected by government agencies, would risk the commission of more serious felonies that impose tougher penalties for these criminal acts.

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transmission, or transfer or the *attempt* to transport, transmit, or transfer monetary instruments of a particular dollar threshold.

## RECOMMENDATION FOUR

### ESTABLISH PROCEDURES TO RESTORE OWNERSHIP MORE EXPEDITIOUSLY

This Grand Jury encourages the Legislature to establish a procedure for the expeditious return of residential real property to the true owner, or to his or her legal distributees or legatees.

We discovered through this investigation, to our dismay, that the arrest, and the ultimate conviction of a person charged with deed fraud does not necessarily restore the residence to the homeowner. Quite to the contrary, as noted above, reclaiming residential real estate is complex, can take several years, and can be prohibitively expensive. By enacting a few new statutes, the Legislature can empower the 62 County District Attorneys and the New York Attorney General to assist victimized homeowners. Additionally, increased community outreach would help stem the tide of deed fraud.

#### Tools for Prosecutors

##### 1. Lis Pendens

The Legislature should amend § 6501 of the Civil Procedure Law and Rules to authorize any local or state prosecutor to file a notice of pendency, or *lis pendens*, upon the filing of an indictment or superior court information charging a felony level offense of Offering a False Instrument for Filing, Forgery, or Criminal Possession of a Forged Instrument, as discussed in

Recommendation Three, in which residential real property is the corpus of the crime. Such action would give notice to the world that a future judgment of conviction could affect title to, or possession, use or enjoyment of the real property. Fraudsters would be prevented from re-conveying the property to a *bona fide* purchaser, or from using the property as collateral for financing or obtaining loans to purchase other real property. This would also block a financial institution from claiming it is a *bona fide* lender entitled to seek subrogation from the victimized owner. The prosecutor would serve notice of the *lis pendens* on the Public Administrator of the appropriate county and the Department of Finance.<sup>15</sup>

## 2. Summary Procedure to Void Title

The Legislature should also create a summary procedure through a new post-conviction motion, added to Article 460 of the Criminal Procedure Law, authorizing the prosecutor to move, upon conviction after trial or upon a plea of guilty to one of the specified felony offenses discussed above, for an order declaring the fraudulent deed void *ab initio*. The prosecutor should also serve notice to all persons who have an interest in the property affected by the fraudulent deed and file a copy of the notice of motion and supporting papers in the office of the appropriate county clerk.

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<sup>15</sup> Such a provisional remedy exists in Article 13A of the Civil Procedure Law & Rules pertaining to Proceeds of a Crime-Forfeiture.

The new procedure should also provide that, if after conducting a hearing and making findings of fact, the court determines that the deed is void *ab initio*, the court would issue an order striking the fraudulent deed from the rolls of the City Register or other appropriate government agency, and directing the Sheriff to convey the residential real property to the previous record owner, or, if the owner is deceased, to his or her legatees or distributees. A copy of the order would also be served on the Public Administrator.

### 3. Rebuttable Presumption

The Legislature should create a rebuttable presumption that when a person is convicted, after trial or upon a plea of guilty, to a felony provision of Offering a False Instrument for Filing, Criminal Possession of a Forged Instrument, or Forgery, involving the fraudulent conveyance of residential real property, the judgment of conviction is evidence that the fraudulent deed is void.

### Increased Community Outreach

Inspired by the evidence, this Grand Jury urges the executives of New York State and New York City to provide additional funds to broaden “preventative” deed fraud education and to designate a liaison from an appropriate city agency to coordinate with the not-for-profits that teach homeowners how to protect themselves from fraud and to how initiate the appropriate civil suits with the assistance of a *pro bono* attorney. *Pro bono*

programs exist at various local bar associations and in some not-for-profits to assist homeowners in various stages of foreclosure. This action would build and expand upon it.

Moreover, the general public needs to understand the harm such criminal conduct inflicts on individual homeowners as well as New York City neighborhoods. Armed with an ability to recognize the red flags of residential real estate fraud and the knowledge of which agencies or entities to notify when fraud is suspected, the public can become the eyes and ears for neighbors and law enforcement in detecting predators who seek to take over homes. Educational lectures and seminars hosted by chambers of commerce and local bar associations in partnership with the Department of Finance and prosecutorial offices should be disseminated through short videos and podcasts that can be seen and heard in various venues, such as senior centers, hospitals, and rehabilitation centers.

By implementing these new tools for prosecutors and by galvanizing the community's assistance, the victims' ability to reclaim their homes would be streamlined and accelerated.

## **RECOMMENDATION FIVE**

### **EXPAND THE RULES OF ADMISSIBILITY OF EVIDENCE BEFORE THE GRAND JURY**

This investigation has illustrated the need to expand the New York rules of evidence pertaining to the admissibility of business records. The Grand Jury heard testimony from a number of custodians of records required to authenticate business records from vendors of goods and services. Some traveled great distances, necessitating at least one overnight stay in the jurisdiction. More than one witness would not testify unless compelled through the domestication of a grand jury subpoena obtained in another state. After responding to a short set of routine questions that lasted only a brief period of time, the documents were received into evidence and the witness was excused.

Other witnesses who provided substantive testimony traveled great distances from other parts of the country and, in one instance, the world. Their appearances resulted in extended stays in our jurisdiction, which were not only costly for the prosecution, and hence, the taxpayers, but created personal inconvenience for the witnesses. In each instance, the witness' testimony was concluded in less than one full grand jury session.

Thus, this Grand Jury implores the Legislature to amend Criminal Procedure Law § 190.30(a)(8) to permit (1) the admission of all business

records in the grand jury through a sworn statement of a custodian of record attesting to the authenticity of the records,<sup>16</sup> and (2) the remote video testimony before the grand jury of witnesses who are without the state of New York, or located more than 100 miles from the grand jury.<sup>17</sup>

The rationale for admitting such evidence by affidavit, or remotely, is three-fold. First, these procedures would reduce the strain on the budgets of the local prosecutors' offices, saving travel and hotel costs, witness fees, and personnel hours spent in compelling out-of-state custodians of records through the domestication of grand jury subpoenas.<sup>18</sup> Second, such changes would eliminate the financial and operational disruptions incurred by businesses through the loss of services of an employee as well as the personal inconvenience to record custodians and substantive witnesses who must travel great distances to provide testimony that could have been received remotely. Third, the amendments would result in a more efficient use of the grand jury's time. Eliminating the need for a parade of live witnesses simply to authenticate

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<sup>16</sup> At least 26 states permit the authentication of all business records by certification or affidavit at trial. Although the amendment supported by the evidence before this Grand Jury addresses authentication in a grand jury proceeding, it is reasonable for the New York Legislature to extend this procedure to business records introduced at trial.

<sup>17</sup> Currently, because of New York's geographical reach, a witness may be required to travel to a New York County grand jury from the tip of Long Island, from the upper northern counties bordering Canada and Vermont, or from the most western counties bordering Pennsylvania.

<sup>18</sup> We learned that most out-of-state businesses are willing to waive domestication of a grand jury subpoena to provide business records voluntarily with a certification or affidavit from a custodian of records.

business records saves the grand jury's time. Additionally, the ability to receive remote testimony from substantive witnesses, who would otherwise need to travel long distances, would better enable the grand jury to hear testimony in a chronological order, which would assist the grand jury in understanding certain transactions.<sup>19</sup> In either case, such simple modifications would better utilize and respect the grand jury's time. Moreover, permitting the introduction of remote testimony is consistent with the rapid advances in technological communication.

The Legislature has already recognized some of these concerns through the exceptions carved out in Criminal Procedure Law § 190.30(a)(8), permitting the authentication of certain business records by affidavit. Indeed, this Grand Jury received subscriber and payment records from an internet service provider and bank account records from various financial institutions that were authenticated solely through an affidavit from a custodian of records, accompanied by a detailed inventory, pursuant to Criminal Procedure Law §§ 190.30 (a)(8)(i) and (ii), respectively.

However, the scope of the current few exceptions is far too narrow. For example, credit card companies do not fall within the definitional ambit of a "financial institution," in subdivision (a)(8)(ii).

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<sup>19</sup> In fact, in one instance a witness before us could have been scheduled to testify remotely during a session that had unused time, and would have been in a logical sequence for the



We urge the Legislature to broaden the scope of business records that can be received into evidence with an affidavit by a custodian of records to include all business records, and to permit certain witnesses to testify before a grand jury convened in New York State through remote video-recording.<sup>20</sup>

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discussion about a transaction.

<sup>20</sup> Based upon the testimony, we are confident that grand jury secrecy can be adequately protected through encryption of the remote testimony and the designation of secure locations for videotaping. The ability to prosecute any witness who provides false testimony to a sitting grand jury from another jurisdiction can also be addressed with simple adjustments to the venue provisions of the Criminal Procedure Law.

## **CONCLUSION**

The prevalence of residential real estate fraud in New York City mandates greater legal protections against predators who seek to dispossess owners of their homes. We need preventative measures to stop widespread and devastating involuntary land loss from families, better tools for the investigation and prosecution of those engaged in such crimes, and simpler means for restoring residential real property to the rightful owners.

WE THE GRAND JURY OF THE SUPREME COURT, STATE OF  
NEW YORK, FIRST JUDICIAL DISTRICT, PURSUANT TO THE  
PROVISIONS OF CRIMINAL PROCEDURE LAW SECTION 190.85(1)(c),  
BASED UPON OUR STATED FINDINGS, SUBMIT THIS REPORT  
RECOMMENDING LEGISLATIVE, EXECUTIVE AND  
ADMINISTRATIVE ACTION IN THE PUBLIC INTEREST.

## APPENDIX

# Deed Fraud Complaints 2014-2018

