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U.S. Department of the Treasury

The Honorable Scott Bessent, Secretary

1500 Pennsylvania Avenue, NW

Washington, D.C. 20220

**Re: Concerns Regarding Imminent Application of New Final Rule on FinCEN Real Estate Reporting Regulations to Nonjudicial Foreclosure Transfers Nationwide; Request for Extension and/or Exemption**

Dear Secretary Bessent and Director Gacki:

Our coalition of industry stakeholders wrote to you on January 13, 2026, about significant concerns regarding the application of the new Final Rule (89 Fed. Reg. 70,258) to non-judicial foreclosure sales, mandating substantial new information collection and reporting and imposing significant new legal liability on small businesses nationwide. On January 30, 2026, representatives from several interested divisions of FinCEN, led by Senior Counsel, Dana DuBovis, met with the current President and General Counsel of the United Trustees Association to obtain additional information about the impact of the Final Rule, as enacted

in 31 C.F.R. § 1031, et seq. During the course of our conversation, FinCEN participants inquired about several different areas of concern to the non-judicial foreclosure and servicing industry. The United Trustees Association remains committed to being collaborative, constructive and solutions-oriented with the goal of minimizing unintended consequences that adversely impact mortgage lending and undermine efficient enforcement of security interests. Therefore, we provide the following additional feedback and information as a follow-up to the initial coalition letter and subsequent discussion to assist FinCEN in determining whether to grant an extension of the effective date of the Final Rule, or an express exemption from the Final Rule, regarding the special and limited category of non-financed transactions: non-judicial foreclosure. The following issues were identified as areas where FinCEN was interested in obtaining more information:

**Is a Full Exemption from the Final Rule for Non-Judicial Foreclosure Transfers Warranted?**

Yes, a full exemption from the Final Rule is warranted for non-judicial foreclosures.<sup>1</sup> Following are some considerations to support full exemption:

*Volume of Transactions*

To provide some background on the historical volume of non-judicial foreclosure transactions as compared with standard voluntary sale transactions, we contacted reputable analysts of foreclosure data, including Auction.com. The information we received demonstrates that non-judicial foreclosure sales across the nation represent an extremely small percentage of all residential real property sale transfers. For example, the following sampling of traditionally non-judicial states have the following rates/total numbers of foreclosure transfers as a percentage of all residential real property transfers for 2025: Arizona (0.7%/849), California (0.4 %/1150), Georgia (0.7%/1149), Idaho (0.3%/121), Montana (0.3%/40), Nevada (0.5%/259), Oregon (0.5%/230), Tennessee (0.9%/975), Texas (1.0%/4855), Utah (0.4%/195), Washington (0.4%/333). The spreadsheet provided by Auction.com containing data regarding all foreclosure sale transfers compared to all residential real estate transfers from 2017 to present for all states in the country is attached for your review.

Clearly, foreclosure transfers constitute an extremely small number of all residential real estate sales on an annual basis in each state and nationwide. Non-judicial sales are an even smaller subset of total foreclosure volumes. Many completed sales revert to the foreclosing creditor, which is often an exempt entity. Excluding those sales, the number of

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<sup>1</sup> Based on the commentary published in the Federal Register along with the Final Rule, FinCEN considers judicial foreclosure sale transfers to be exempt under 31 C.F.R. § 1031.320(2)(v).

reportable transfers to *non-exempt entities or trusts* is relatively nominal. Thus, as a preliminary matter, it seems unlikely that reporting to FinCEN on this relatively small number of transactions would result in the identification of enough illicit money laundering activity to justify the substantial additional compliance, staffing and reporting requirements on small trustees and law firms.

#### Unique Nature of Foreclosure Sale Transactions

Non-judicial foreclosures are conducted by public auction for cash, after providing statutory notices to the property owner and other interested parties. As a result, the foreclosure trustee or firm conducting the foreclosure sale has **no ability to determine in advance of the sale which or how many parties may participate in the bidding** for the opportunity to purchase the property. This **lack of foresight and control of the identity of the buyer until the moment the auction is complete** is distinct from the standard purchase and sale transaction through a title, closing or escrow company where the identity of the purchaser/transferee is known at the time the purchase contract is signed. The nature of the foreclosure process intensifies the pressure and expense on the foreclosure trustee or firm as a reporting party because, as described in further detail below, state statutes impose short deadlines to issue the foreclosure deed after the sale auction, limit the power to rescind a completed sale when bidders do not provide timely information, and restrict the nature and amounts of fees and costs that can be charged in conjunction with the non-judicial foreclosure process.

#### State Statutory Limitations and Liability

As discussed in our recent call with FinCEN representatives, application of the FinCEN reporting requirements to non-judicial foreclosures will cause conflicts and inability to comply with state statutes governing non-judicial foreclosures. For example, California Civil Code section 2924h provides in pertinent part:

“(a) Each and every bid made by a bidder at a trustee's sale under a power of sale contained in a deed of trust or mortgage shall be deemed to be an **irrevocable offer** by that bidder to purchase the property being sold by the trustee under the power of sale for the amount of the bid. Any second or subsequent bid by the same bidder or any other bidder for a higher amount shall be a cancellation of the prior bid.

...

(c)... For the purposes of this subdivision, the **trustee's sale shall be deemed final upon the acceptance of the last and highest bid**, and shall be deemed perfected as of 8 a.m. on the actual date of sale **if the trustee's deed is recorded within 21 calendar days after the sale**, or the next business day following the 21st day if the county recorder in which the

property is located is closed on the 21st day. If an eligible bidder submits a written notice of intent to bid pursuant to paragraph (2) of subdivision (c) of Section 2924m, the trustee's sale shall be deemed perfected as of 8 a.m. on the actual date of sale **if the trustee's deed is recorded within 60 calendar days** after the sale or the next business day following the 60th day if the county recorder in which the property is located is closed on the 60th day.”

For one to four-unit residential real property which is subject to the statutory overbid process in Civil Code section 2924m, the identity of the high bidder at the sale is not confirmed until 15 days (if no notice of intent to bid is received) or 45 days after the sale (if a notice of intent to bid was received). This leaves a very short window of time to collect the required information from the transferee before the deed must be issued to maintain the statutory relation back protections; 6 days after the 15-day period expires or 15 days after the 45-day period expires. In order to ensure compliance, the trustee or law firm will have to collect the required information from the high bidder at the live auction within the 15-day period (in case the deed must be issued by the 21st day) and if a post auction bidder is thereafter determined to be the final transferee, the trustee/firm will have to collect the information from that subsequent bidder after the end of the 45-day period and before the 60th day. In theory, the trustee/firm would have an additional 30 to 45 days to report to FinCEN after the deed is issued/recorded. However, in reality, the trustee/firm will have no leverage to force the transferee to respond/provide information or corrective information once the deed is issued, but the trustee will still be on the hook for the reporting obligation and subject to penalties for failure to report or failure to timely submit a complete report upon rejection. For this reason, trustees/firms cannot issue a trustee's deed in California unless they have all of the required reporting information from the transferee (like a standard sale transaction, which will not close until the information is provided to the closing agent). Where a transferee fails to provide the required information, this will result in either late issuance of the trustee's deed (subjecting the transferee's interest to bankruptcy, additional encumbrances or transfers where it does not relate back to the date of sale) or inability to issue the trustee's deed at all, leaving the transferee, the foreclosing lender and the borrower in limbo regarding consummation of the sale and ownership of the property. Since each bid is an irrevocable offer under Civil Code section 2924h, the trustee has no statutory authority to rescind the sale and return the bid funds, but it also cannot issue the deed and risk federal penalties for untimely reporting. This virtually ensures that the trustee will be sued by one of the damaged parties. Washington Revised Statutes section 61.24.060, has a similar relation-back recording statute, and has limited grounds for rescinding a sale as set forth in section 61.24.135 that do not include inability to obtain required FinCEN reporting information.

Similarly in Arizona, once a foreclosure sale is conducted and the high bidder is determined, there are limited reasons to rescind the sale (which do not include failure of the bidder to provide FinCEN reporting information). Arizona Revised Statutes section 33-811 provides: “Within seven business days after receipt of payment by the trustee or the trustee's agent, made in a form that is satisfactory to the trustee, **the trustee shall execute and submit the trustee's deed to the county recorder for recording** and, upon request, shall provide an unrecorded copy of the signed trustee's deed to the purchaser.” Utah Code section 57-1-28(2)(a)(i) requires the trustee to record the deed within 5 business days of receipt of the bid funds.

Based on these four states alone as specific examples, a foreclosure trustee/firm is placed in a very difficult situation if non-judicial foreclosures are covered by the Final Rule, resulting in the inability to record a trustee’s deed in compliance with state law if the required information is not provided, but also left without a statutory basis to rescind the sale. This conundrum alone should substantiate a complete exemption for non-judicial foreclosures.

**If Full Exemption for Non-judicial Foreclosures is Not Granted, Express Authority in the Code to Charge a Reasonable Fee for Administrative Costs of Reporting is Warranted.**

As indicated in our previous discussions, small regional law firms and non-judicial foreclosure trustees receive limited compensation to process ministerial notices of default and foreclosure under state non-judicial foreclosure statutes. While impacted trustees and firms have made efforts to revise their policies and procedures to ensure compliance, application of the Final Rule will cause a substantial compliance and cost burdens and potential liability to the foreclosure trustee/auctioneer/county sheriff, as discussed above. Collection, processing and upload of the required reporting information will be time-consuming and increase staff or vendor costs. Many states limit the fees and costs a foreclosure trustee can charge a borrower or foreclosing lender for its services. In the absence of express statutory authority to charge a reasonable fee for the additional expense of completing the newly-required FinCEN reporting, borrowers, lenders or transferees may challenge the cost or refuse to pay. There is also no express contractual provision allowing the collection of fees related to this new regulatory burden in existing mortgage documents that would authorize recovery of the fee/cost. For example, California Civil Code section 2924c provides:

“(c) **Costs and expenses** that may be charged pursuant to Sections 2924 to 2924i, inclusive, **shall be limited to** the costs incurred for recording, mailing, including certified and express mail charges, publishing, and posting notices required by Sections 2924 to 2924i, inclusive, recording a notice of rescission under this section, postponement

pursuant to Section 2924g not to exceed one hundred dollars (\$100) per postponement and a fee for a trustee's sale guarantee or, in the event of judicial foreclosure, a litigation guarantee. For purposes of this subdivision, a trustee or beneficiary may purchase a trustee's sale guarantee at a rate meeting the standards contained in Sections 12401.1 and 12401.3 of the Insurance Code.”

Civil Code section 2924d limits allowable fees and costs at the sale phase of the foreclosure: “(b)(1) **Upon the sale of property pursuant to a power of sale**, a trustee, or their agent or successor in interest, may demand and receive from a beneficiary, or their agent or successor in interest, or may deduct from the proceeds of the sale, those **reasonable costs and expenses, to the extent allowed by subdivision (c) of Section 2924c**, that are actually incurred in enforcing the terms of the obligation and trustee's or attorney's fees that are hereby authorized to be in an amount which does not exceed four hundred seventy-five dollars (\$475) or 1 percent of the unpaid principal sum secured, whichever is greater. For purposes of this subdivision, the unpaid principal sum secured shall be determined as of the date the notice of default is recorded.”

Once the foreclosure sale is completed, a foreclosure trustee can only charge reasonable costs and expenses that are allowed by Civil Code section 2924c(c), which does not currently allow a “FinCEN Reporting Fee.” Thus, the foreclosure trustee or firm cannot receive from the foreclosing lender/beneficiary, or take from the surplus sale proceeds that would go to the defaulting borrower, the fees and costs incurred if the trustee/firm is required to collect, process and submit FinCEN reporting regarding a non-exempt entity or trust who receives title to the property as a result of the foreclosure. There is also no state or federal authority authorizing the foreclosure trustee or firm to collect a reasonable fee or cost directly from the non-exempt transferee entity or trust. Without statutory or express contractual authority to collect these foreclosure-related fees and costs for the post-sale FinCEN reporting, small foreclosure trustees and law firms will be forced to absorb the additional fees and costs until and unless they can secure amendments to the applicable state statutes for each state in which they operate. In the alternative, amendments could be made to the federal regulations allowing the reporting person in a covered transaction to recover reasonable fees and costs to process the required reporting from the transferee entity or trust. This would eliminate the need for negotiation and enactment of state by state amendments across the nation to address this issue.

### **If Full Exemption for Non-judicial Foreclosures is Not Granted Now, an Extension of the Effective Date of the Final Rule is Necessary**

Foreclosure trustees and firms seek a further extension of the effective date beyond March 1, 2026 to at least January 1, 2027, if an exemption of non-judicial foreclosure sales from

this nationwide reporting obligation will not be provided. An extension is necessary in light of the substantial operational enhancements and burdens before and after a foreclosure sale, which must be addressed by impacted small businesses, the need for amendments to state and/or federal laws to address the nuances of non-judicial foreclosure trustees as FinCEN reporting parties and the ongoing litigation regarding the validity and scope of the Rule [*Fidelity National Financial, Inc., et al. v. Bessent, et al.*, United States District Court Case No. 3:25-cv-00554-WWB (M.D. FL); *Flowers Title Cos. LLC v. Bessent*, No. 6:25-cv-00127 (E.D. Tex. filed Apr. 4, 2025); *Corley v. U.S. Dep't of the Treasury*, No. 5:25-cv-00086 (N.D. Tex. filed Apr. 17, 2025)]. As of the date of this letter, dispositive motions remain pending in these cases, and impacted stakeholders will need time to ensure they can act in accordance with any future rulings and orders.

As discussed above in greater detail, unlike traditional real property closings in which there is a due diligence and escrow period for the reporting person to collect the required information before funds and deeds are exchanged, non-judicial foreclosure sales involve a public auction in which the purchaser is unknown until the day of sale and the funds in many states are due and payable on the day of sale. There are strict deadlines for foreclosure trustees and purchasers to record foreclosure deeds following the acceptance of a high bid, and trustees need more time to provide notice to bidders and implement pre-foreclosure procedures necessary to obtain from non-exempt transferees the required information that must be reported following delivery/recordation of the foreclosure transfer deed. Without more time to implement required notices and information collection practices and train staff to determine the validity and scope of the regulations, the ability of banks, licensed lenders and private individuals to timely enforce their security interests will be adversely impacted. Moreover, the finality of foreclosure sales (to bidders/transferees that fail or refuse to provide all of the required information) are placed in jeopardy, leaving the foreclosing lender and trustee in limbo (unable to deliver the deed because they are unable to ensure ability to timely report the required information to avoid substantial penalties). Many states only allow for the cancellation of a completed foreclosure sale for limited reasons, and a bidder's failure to provide required information under the Final Rule may not constitute adequate grounds in many jurisdictions. Further, demanding the information from each public bidder as a prerequisite in advance of each nonjudicial foreclosure auction may be considered bid chilling, and the refusal of a trustee to issue a foreclosure deed after acceptance of the bid but before receiving the required reporting information will likely result in litigation and delays in the ability to finalize foreclosure sales in non-judicial states.

Optimally, an extension of the effective date of the regulation to at least January 1, 2027 would allow state legislatures to enact reasonable statutes to assist nonjudicial

foreclosure trustees in addressing issues that arise from the refusal of a bidder/transferee to provide the required reporting information and provide sufficient notice for participants in the market to be aware of the impact on foreclosure sale bidding. Since the non-judicial foreclosure process is governed at the state-level and it will be significantly impacted by these federal regulations, the states should be afforded proper time to review and revise their statutory processes accordingly. California's legislature enacts non-urgency legislation during a year that becomes effective on January 1 of the following year. A bill must pass by a 2/3 majority vote to be enacted as urgency legislation that can become effective immediately upon signature by the Governor. Most state legislatures have similar delayed or urgency legislation time periods. However, some state legislatures only have sessions every other year (like Nevada) or have very short sessions in alternating years. As a result, we seek an extension to at least January 1, 2027 in the event we are not able to pass urgency legislation and need to enact non-urgency legislation that becomes effective January 1, 2027. After review, please contact us if you would like to schedule a further discussion of these important concerns.

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Enclosure