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FinCEN Publishes Proposed Rule on Non-Financed Residential Real Estate Transactions

On February 7, 2024, the Department of the Treasury's Financial Crimes Enforcement Network (FinCEN) published a proposed rule that is intended to "combat and deter money laundering by increasing transparency in the U.S. residential real estate sector" (the "Proposed Rule").¹ Comments on the Proposed Rule are due within 60 days of its publication in the *Federal Register*.

Background

The Proposed Rule builds on the U.S. government's longstanding focus on the money laundering risks posed by the residential real estate market.

Since 2016, FinCEN has issued Geographic Targeting Orders ("GTOs"), which require U.S. title insurance companies to report certain information regarding "all-cash" purchases of real estate in specified geographic areas.² FinCEN stated in the Proposed Rule that the information obtained from those GTOs has "demonstrated the need for increased transparency and further regulation of this sector."³ The Proposed Rule, if finalized, would replace the existing GTOs.

In recent years, the U.S. government has increasingly focused on the need to more comprehensively apply anti-money laundering ("AML") standards to the residential real estate market. In 2021, the Biden Administration's Strategy on Countering Corruption noted that the "U.S. real estate market has become a significant destination for the laundered proceeds of illicit activity, including corruption," and suggested that further regulation was needed.⁴ After Russia invaded Ukraine in February 2022, U.S. officials focused on real estate as a means for Russian elites and oligarchs to launder illicit wealth. A March 2022 FinCEN alert noted that Russian elites and oligarchs may seek to evade sanctions through the purchase of "high-end residential real estate" and noted that real estate "may offer an attractive vehicle for storing wealth or laundering illicit gains due to its high value, its potential for appreciation, and the potential use of layered and opaque transactions to obfuscate a property's ultimate beneficial owner."⁵

¹ FinCEN, *Fact Sheet: FinCEN Issues Notice of Proposed Rulemaking to Increase Transparency in Residential Real Estate* (Feb. 7, 2024), available [here](#).

² Paul, Weiss, *FinCEN Imposes Anti-Money Laundering Reporting Requirements On "All Cash" Luxury Real Estate Purchases in Manhattan and Miami* (Feb. 2, 2016), available [here](#); FinCEN, *FinCEN Renews and Expands Real Estate Geographic Targeting Orders* (Apr. 21, 2023), available [here](#).

³ FinCEN, *Anti-Money Laundering Regulations for Residential Real Estate Transfers* (filed Feb. 7, 2024), unpublished version available [here](#). Quotations are from the Proposed Rule unless otherwise noted.

⁴ White House, *United States Strategy on Countering Corruption* (Dec. 2021), available [here](#).

⁵ FinCEN, *FinCEN Alert on Real Estate, Luxury Goods, and Other High-Value Assets Involving Russian Elites, Oligarchs, and their Family Members* (Mar. 16, 2022), available [here](#).

Key Elements of the Proposed Rule

- **To whom would the Proposed Rule apply?** The Proposed Rule applies to “persons engaged as a business in the provision of real estate closing and settlement services within the United States” (“Covered Real Estate Businesses”). Under the Proposed Rule, where there is a covered transaction, a Covered Real Estate Business must file a report with FinCEN. The Proposed Rule establishes a “cascade” of reporting for Covered Real Estate Businesses—the reporting obligation falls in the first instance to the business at the top tier, which is the person who is listed as a closing or settlement agent. If no such person was involved in the covered transaction, the obligation falls to a business at the next tier (and then to the next).⁶
- **What transactions are covered by the Proposed Rule?** The Proposed Rule applies to “non-financed residential real estate transaction[s]” where the transferee is a legal entity or trust. It does not cover transactions where the transferee is a natural person.

The Proposed Rule applies to “both sales and non-sale transfers, such as gifts and transfers to trusts.”

The Proposed Rule defines a “non-financed transfer” as “any transfer that does not involve an extension of credit to the transferee secured by the transferred residential real property⁷ and extended by a financial institution that has both an obligation to maintain an AML program and an obligation to report suspicious transactions.”

The Proposed Rule has exceptions for “low-risk transfers,” which include transfers “incidental to death, divorce, or bankruptcy.”

- **Under the Proposed Rule, what information must be reported on a covered transaction?** For each covered transaction, a Covered Real Estate Business must file a “Real Estate Report” which identifies the following (as specified under the Proposed Rule):
 - the reporting person;
 - the legal entity or trust to which the residential real property is transferred;
 - the beneficial owners of that transferee entity or transferee trust;
 - the person that transfers the residential real property; and
 - the property being transferred, along with certain transactional information about the transfer.

The Real Estate Report will “entail no risk-based judgment about when to file and no narrative assessment” about the transaction.

⁶ The subsequent tiers are (in order): “the person that underwrites an owner’s title insurance policy for the transferee”; “the person that disburses the greatest amount of funds in connection with the reportable transfer” such as “from an escrow account (which is frequently used to settle real estate transfers), from a trust account, or from a lawyer’s trust account”; “the person that prepares an evaluation of the title status”; and “the person who prepares the deed[.]”

⁷ For purposes of the Proposed Rule, “residential real property” includes “(1) real property located in the United States containing a structure designed principally for occupancy by one to four families; (2) vacant or unimproved land located in the United States zoned, or for which a permit has been issued, for the construction of a structure designed principally for occupancy by one to four families; or (3) shares in a cooperative housing corporation.”

If finalized, the Proposed Rule would require reporting persons to file Real Estate Reports with FinCEN “no later than 30 days after the date of closing.”

- **Under the Proposed Rule, are Covered Real Estate Businesses required to establish anti-money laundering programs?** No. “[P]ersons subject to this reporting requirement would not need to maintain the types of AML programs otherwise required of financial institutions under the [Bank Secrecy Act].”

Takeaways

The Proposed Rule marks a significant effort by FinCEN to extend AML reporting requirements to the residential real estate sector.

Under the Proposed Rule, Covered Real Estate Businesses will not be required to develop AML programs. However, they will need to put in place procedures and processes to ensure compliance with a final rule, including collecting information required for filing Real Estate Reports such as the beneficial owners of the transferee entity or trust. In addition, they will need to consider whether to take additional steps with the information obtained, such as screening the names of beneficial owners for OFAC-sanctioned parties.

Looking ahead, Treasury has stated that it intends to propose rules this year to apply AML regulations to certain investment advisors and to the commercial real estate sector.

We will continue to monitor developments on this Proposed Rule and provide further updates as appropriate.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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