

Alert

New AML Regulatory Initiative Targets Real Estate Industry

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On Jan. 13, 2016, the Financial Crimes Enforcement Network (“FinCEN”), a bureau of the U.S. Department of the Treasury responsible for anti-money laundering (“AML”) enforcement, announced a new initiative aimed at “real estate secrecy.” The announcement comes on the heels of recent public statements by FinCEN Director Jennifer Shasky Calvery highlighting regulators’ concerns about money laundering in the real estate market, including the use of shell companies by criminals to purchase luxury residential real estate.¹

FinCEN’s initiative takes the form of Geographic Targeting Orders (“GTOs”). The GTOs, which are issued pursuant to FinCEN’s authority under the Bank Secrecy Act,² are limited to purchases by legal entities of residential real estate valued at more than \$3 million in Manhattan, and more than \$1 million in Miami-Dade County, without a bank loan or other external financing. Title insurance companies will be required to report to FinCEN certain information about these transactions, including: (1) the identity of the beneficial owner (or owners) of the legal entity, defined as an individual who owns, directly or indirectly, 25 percent or more of the entity; (2) if the purchaser is a limited liability company (“LLC”), the names, addresses and taxpayer identification numbers of all of its members; and (3) the identity of the individual primarily responsible for representing the purchaser in the transaction. The report is required to be filed on a Form 8300³ through the Bank Secrecy Act (“BSA”) E-Filing system within 30 days of the closing of the real estate transaction.

Significantly, the reporting obligation only applies when at least part of the purchase price is paid by currency or a monetary instrument, which includes a cashier’s check, certified check, traveler’s check or money order in any form. It would not apply where the purchase was paid for entirely by wire transfer, even though such purchases are colloquially understood as “cash” purchases. The reporting obligation is unlikely to affect co-op purchases, which typically do not require title insurance.

All reports required to be filed under the BSA, including FinCEN Form 8300s, and information contained in these records, are exempt from disclosure under the Freedom of Information Act (“FOIA”).⁴ Under this exemption, there is no discretionary disclosure. Additionally, since BSA records, including FinCEN

¹ [Prepared Remarks of FinCEN Director Jennifer Shasky Calvery](#), delivered at the ABA/ABA Money Laundering Enforcement Conference (Nov. 16, 2015); [Prepared Remarks of FinCEN Director Jennifer Shasky Calvery](#), delivered at the West Coast AML Forum (May 06, 2015).

² See 31 U.S.C. § 5326(a) and 31 C.F.R. § 1010.370.

³ An electronic copy of FinCEN Form 8300 (Report of Cash Payments Over \$10,000 Received in a Trade or Business) is available [online](#).

⁴ See 5 U.S.C. § 552(b)(3) and 31 U.S.C. § 5319.

Form 8300s, are maintained in a FinCEN system of records database that has been exempted from the access provisions of the Privacy Act, they cannot be disclosed under the Privacy Act either.⁵

The GTOs are being issued in response to increased attention to buyers of real estate who make “all-cash” purchases through LLCs or other shell corporations and never reveal their identities. Although purchasing real estate through LLCs has been a long-standing and accepted practice in the real estate industry, a series of articles in *The New York Times* last year focused on how foreign buyers, some of whom have been the subject of government investigations, have been able to safeguard their assets (while concealing their identities) by purchasing luxury real estate in the United States, especially Manhattan.

The GTOs are temporary and are scheduled to be in effect only from March 1 through August 27, 2016. FinCEN’s press release notes that the information reported during this six-month timeframe will be shared with law enforcement agencies to enhance their ability to “identify the natural persons involved in transactions deemed vulnerable to abuse for money laundering.”⁶ In the GTOs, FinCEN has defined beneficial ownership in a manner consistent with FinCEN’s proposed rule on customer due diligence, which likewise applies to persons with a direct or indirect ownership interest of at least 25 percent.⁷

Statutory authority has long existed under the Bank Secrecy Act for the federal government to impose AML regulations on those involved in the real estate industry.⁸ Even so, FinCEN has only relatively recently issued regulations requiring non-bank lenders and originators in the real estate finance area, as well as the government-sponsored entities that issue mortgage-backed securities, to develop AML programs, and to engage in reporting and record-keeping. But where real estate transactions are conducted in cash and do not involve financing, they fall outside of these regulations. In the past, FinCEN has hinted at its interest in issuing AML regulations for the real estate industry, even publishing an Advance Notice of Proposed Rule Making in 2003, which contemplated imposing AML requirements on persons involved in real estate closing and settlements. But FinCEN never issued a final rule.

Though temporary and limited to two geographic markets, the new GTOs represent FinCEN’s first attempt to impose AML requirements on those involved in all-cash transactions in the real estate industry. In connection with the GTOs, Director Shasky Calvery commented that if the information collected through the GTOs reveals that many sales involved suspicious money, FinCEN will develop permanent reporting requirements across the country. The chief of the FBI’s financial crimes section, Patrick Fallon, also noted, “We fully intend to encourage expansion of [the GTOs], so, not only to different geographic areas but as far as the time frame as well.”⁹

⁵ See 5 U.S.C. §§ 552a(j)(2) and (k)(2); FinCEN’s Notice of Alterations of Three Privacy Act System of Records, 79 Fed. Reg. 20969, 20974 (April 14, 2014).

⁶ For FinCEN’s summary of the GTOs, see Press Release, FinCEN, “[FinCEN Takes Aim at Real Estate Secrecy in Manhattan and Miami](#)” (Jan. 13, 2016). The GTOs are available on FinCEN’s website [here](#) and [here](#).

⁷ The FinCEN proposed rule on customer due diligence for financial institutions defines a beneficial owner as, in part, an “individual, if any, who, directly or indirectly, through any contract, arrangement, understanding, relationship or otherwise, owns 25% or more of the equity interests of a legal entity customer.” Final Rule, Customer Due Diligence Requirements for Financial Institutions, 79 Fed. Reg. 45151, 45170 (Aug. 4, 2014).

⁸ See 31 U.S.C. § 5312(a)(2)(U) (defining financial institution to include “persons involved in real estate closings and settlements”).

⁹ “U.S. Will Track Secret Buyers of Luxury Real Estate,” *The New York Times* (Jan. 13, 2016).

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If you have any questions concerning this *Alert*, please contact your attorney at Schulte Roth & Zabel or one of the authors.

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