

## EXPERT ANALYSIS

### New Anti-Money Laundering Regulatory Initiative Targets Real Estate Industry

By Schulte Roth & Zabel

On Jan. 13, the Financial Crimes Enforcement Network, a bureau of the U.S. Department of the Treasury responsible for anti-money laundering 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.<sup>1</sup>

FinCEN’s initiative takes the form of geographic targeting orders. The GTOs, which are issued pursuant to FinCEN’s authority under the Bank Secrecy Act,<sup>2</sup> are limited to certain purchases of residential real estate by legal entities without a bank loan or other external financing. The GTOs apply to purchases of more than \$3 million in Manhattan and more than \$1 million in Miami-Dade County.

Title insurance companies will be required to report to FinCEN certain information about these transactions, including:

- 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.
- If the purchaser is a limited liability company, the names, addresses and taxpayer identification numbers of all of its members.
- The identity of the individual primarily responsible for representing the purchaser in the transaction.

The report must be filed on a Form 8300<sup>3</sup> through the Bank Secrecy Act E-Filing system within 30 days of the closing of the real estate transaction.

Significantly, the reporting obligation applies only when at least part of the purchase price is paid by currency or a monetary instrument, which includes any form of cashier’s check, certified check, traveler’s check or money order. It does not apply if 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.

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.<sup>4</sup> Under this exemption, there is no discretionary disclosure. Additionally, since BSA records, including FinCEN 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.<sup>5</sup>



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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, and especially in Manhattan.

The GTOs are temporary and are scheduled to be in effect only from March 1 through Aug. 27. FinCEN’s press release notes that the information reported during this six-month period 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.”<sup>6</sup> In the GTOs, FinCEN has defined beneficial ownership in a manner consistent with its proposed rule on customer due diligence, which likewise applies to those with a direct or indirect ownership interest of at least 25 percent.<sup>7</sup>

The Bank Secrecy Act has long provided the federal government with statutory authority to impose anti-money laundering regulations on those involved in the real estate industry.<sup>8</sup> 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 engage in reporting and recordkeeping. But real estate purchases that are made using cash and do not involve financing fall outside of these regulations.

In the past, FinCEN has hinted at its interest in issuing AML regulations for the real estate industry. It even published an advance notice of proposed rulemaking in 2003, which contemplated imposing AML requirements on those involved in real estate closing and settlements. However, it 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 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.”<sup>9</sup>

## NOTES

<sup>1</sup> FinCEN Director Jennifer Shasky Calvery, Remarks at the ABA/ABA Money Laundering Enforcement Conference (Nov. 16, 2015); FinCEN Director Jennifer Shasky Calvery, Remarks at the West Coast AML Forum (May 6, 2015).

<sup>2</sup> See 31 U.S.C.A. § 5326(a) and 31 C.F.R. § 1010.370.

<sup>3</sup> An electronic copy of FinCEN Form 8300 (Report of Cash Payments Over \$10,000 Received in a Trade or Business) is available at <https://www.irs.gov/pub/irs-pdf/f8300.pdf>.

<sup>4</sup> See 5 U.S.C.A. § 552(b)(3) and 31 U.S.C.A. § 5319.

<sup>5</sup> See 5 U.S.C.A. §§ 552a(j)(2) and (k)(2); Notice of Alterations of Three Privacy Act Systems of Records, 79 Fed. Reg. 20969, 20974 (Apr. 14, 2014).

<sup>6</sup> 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 at [https://www.fincen.gov/news\\_room/nr/files/Real\\_Estate\\_GTO-NYC.pdf](https://www.fincen.gov/news_room/nr/files/Real_Estate_GTO-NYC.pdf) and [https://www.fincen.gov/news\\_room/nr/files/Real\\_Estate\\_GTO-MIA.pdf](https://www.fincen.gov/news_room/nr/files/Real_Estate_GTO-MIA.pdf).

<sup>7</sup> 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.” Customer Due Diligence Requirements for Financial Institutions, 79 Fed. Reg. 45151, 45170 (proposed Aug. 4, 2014).

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

<sup>9</sup> Louise Story, *U.S. Will Track Secret Buyers of Luxury Real Estate*, N.Y. TIMES, Jan. 13, 2016, <http://www.nytimes.com/2016/01/14/us/us-will-track-secret-buyers-of-luxury-real-estate.html>.



(L-R top row): Jeffrey A. Lenobel, Gary Stein, Betty Santangelo, Lisa A. Prager; (L-R bottom row): Julian M. Wise, Jennifer M. Opheim, Seetha Ramachandran and Melissa G.R. Goldstein are attorneys with Schulte Roth & Zabel.

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