

ALERTS

FinCEN Commences Rulemaking Process to Implement AML Reporting Requirements for Real Estate Sector

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On Dec. 8, 2021, the U.S. Department of the Treasury's Financial Crimes Enforcement Network ("FinCEN") issued an Advance Notice of Proposed Rulemaking ("ANPRM")^[1] soliciting public comment on a proposal to extend the Bank Secrecy Act ("BSA") compliance and reporting requirements to certain persons or entities involved in real estate transactions. The ANPRM solicits public comment on the scope of those requirements and the persons or entities to which they should apply. Affected parties may include title insurance companies, real estate agents and brokers, real estate attorneys, law firms and settlement and closing agents, among others.^[2] Comments on the ANPRM are due to FinCEN by Feb. 21, 2022.^[3]

Real Estate Transactions and Persons Presently Subject to FinCEN Requirements

The BSA implementing regulations administered by FinCEN currently require banks, non-bank residential mortgage lenders and originators ("RMLOs") and housing-related Government Sponsored Enterprises ("GSEs"), entities typically involved in financed real estate transactions, to establish and implement certain anti-money laundering ("AML") controls, such as maintaining an AML program and filing suspicious activity reports with FinCEN ("SARs").^[4] Other persons involved in real estate closings and settlements are currently exempted from the requirement to establish an AML program,^[5] although FinCEN has used its geographic

targeting order (“GTO”) authority^[6] to impose specific transaction recordkeeping and reporting requirements on title insurance companies involved in “all-cash” or “non-financed” transactions of certain residential real estate, such as the purchase of residential real property in excess of \$300,000 in limited geographic areas, such as Manhattan and Miami, Florida.^[7] Accordingly, certain real estate transactions, such as “non-financed” or “all-cash” real estate purchases outside of these limited areas and not involving title insurance companies, are not currently subject to the BSA’s requirements.^[8]

The ANPRM defines “non-financed” and “all-cash” transactions to refer to “any real estate purchase or transaction that is not financed via a loan, mortgage, or other similar instrument, issued by a bank or non-bank [RMLO], and that is made, at least in part, using currency or value that substitutes for currency (including convertible virtual currency (CVC)), or a cashier’s check, a certified check, a traveler’s check, a personal check, a business check, a money order in any form or a funds transfer.”^[9]

The ANPRM Proposals

The ANPRM emphasizes the need for enhanced regulation to address the “systemic vulnerability of the U.S. real estate market to money laundering,”^[10] echoing the recurring criticism by the Financial Action Task Force (“FATF”) that the U.S.’s failure to regulate real estate transactions in accordance with FATF standards constitutes a significant deficiency in the U.S. AML regime.^[11] In the ANPRM, FinCEN attributes the U.S. real estate market’s vulnerabilities to a lack of transparency in real estate funds transfers, the attractiveness of the U.S. real estate market as an investment vehicle and the lack of industry regulation.^[12]

In order to best address these vulnerabilities while minimizing compliance burdens for industry participants, the ANPRM solicits public comment on the scope of any proposed rulemaking as follows:

- *Nature of Recordkeeping and Reporting Requirements.* The ANPRM proposes two avenues to potential rulemaking in this area. One approach would be to add new requirements similar to those in the GTO regulation to also permanently “require certain persons to collect, report and retain information about specified non financed purchases of real estate.”^[13] The ANPRM notes that this approach “may be an appropriately tailored way to increase the transparency of the non-

financed sector of the real estate market and provide law enforcement, national security agencies, and financial institutions with highly useful information.”[14] The alternative approach would entail FinCEN issuing BSA-implementing regulations to “certain persons involved in non-financed real estate closings and settlements,” which would likely require such persons to adopt and implement an AML/CFT program and file SARs with FinCEN.[15] FinCEN seeks comments on whether one approach is preferred over the other and whether to extend the customer due diligence requirements, which address the identification of beneficial owners of certain legal entities, to the real estate industry.[16]

- *Type of Real Estate.* FinCEN requests comment on whether to address both commercial and residential real estate transactions in the same rulemaking or to “take an iterative approach, starting first with residential transactions and then later addressing commercial transactions.”[17]
- *Scope of Persons Subject to a Reporting Requirement.* FinCEN seeks comment on which persons involved in non-financed real estate closings should be subject to a proposed rule, such as title insurance companies, title or escrow companies, real estate agents or brokers, real estate attorneys or law firms or settlement or closing agents.[18]
- *Geographic Scope and Transaction Threshold.* Although FinCEN stresses that adequately addressing money laundering vulnerabilities in real estate transactions requires a rule with nationwide application, it nevertheless requests input on the geographic scope of any potential rule.[19] For example, short of a nationwide application, rulemaking could be limited to jurisdictions already covered by existing GTOs.
- *Purchases by Certain Entities.* FinCEN seeks comment on whether any future rulemaking should require reporting of other types of legal entities purchasing real estate, such as shell companies and trusts. The ANPRM notes that, to date, GTO reporting requirements have only covered corporations, limited liability companies, partnerships or other similar business entities not listed on an exchange regulated by the Securities and Exchange Commission.[20]

In addition to the broader topics outlined above, FinCEN poses certain specific questions, including: (1) what due diligence is presently conducted regarding the parties to a transaction and source of funds for a

transaction, prior to a real estate closing; (2) what recordkeeping requirements are currently in place for real estate transactions; and (3) how to best address in any future rulemaking the use of natural persons in money laundering schemes involving real estate transactions.[21]

Conclusion

The ANPRM signals FinCEN's increased focus on the prevention of money laundering through the U.S. real estate market. Consequences for the real estate sector could include additional compliance costs and heightened exposure to regulatory action.

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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.

[1] Advanced Notice of Proposed Rulemaking, Anti-Money Laundering Regulations for Real Estate Transactions, 86 Fed. Reg. 69,589 (Dec. 8, 2021) (to be codified at 31 C.F.R. Chapter X) [hereinafter ANPRM], available [here](#).

[2] *Id.* at 69,597.

[3] See News Release: FinCEN Announces Extension of the Comment Period for its Real Estate Advance Notice of Proposed Rulemaking (Feb. 3, 2022), available [here](#).

[4] 31 C.F.R. Parts 1020, 1029, and 1030, respectively.

[5] ANPRM, 86 Fed. Reg. at 69,592.

[6] FinCEN recently issued a final rule clarifying its authority to issue GTOs under 31 U.S.C. § 5326(a), which went into effect on November 15, 2021. See Final Rule, Orders Imposing Additional Reporting and Recordkeeping Requirements, 86 Fed. Reg. 62,914 (Nov. 15, 2021) (codified at 31 C.F.R. § 1010.370), available [here](#). The Final Rule clarifies that FinCEN's authority to issue GTOs extends to "nonfinancial trade[s] or business[es]" within a specific geographic area, and tracks updated language in the BSA to reflect that FinCEN's GTO authority extends to all transactions involving the "transfer of funds (as the Secretary may describe in such order),"

thereby clarifying that covered transactions are not limited to the transfer of U.S. currency. Final Rule, 86 Fed. Reg. at 62,915.

[7] The existing GTOs require title insurance companies to identify the natural persons behind the legal entity used to purchase residential real estate without a bank loan or similar form of external financing (*e.g.*, the individual responsible for representing the legal entity and the 25% or more beneficial owners of such legal entities), and cover the following geographic areas: California (San Diego, Los Angeles, San Francisco, San Mateo and Santa Clara Counties); Florida (Miami-Dade, Broward and Palm Beach Counties); Hawaii (City and County of Honolulu); Illinois (Cook County); Massachusetts (Suffolk and Middlesex Counties); Nevada (Clark County) New York (Boroughs of Brooklyn, Queens, Bronx, Staten Island and Manhattan); Texas (Bexar, Tarrant and Dallas Counties); and Washington (King County). *See, e.g.*, Geographic Targeting Order (Nov. 15, 2018), available [here](#); Geographic Targeting Order (Aug. 22, 2017), available [here](#); Geographic Targeting Order (July 27, 2016), available [here](#).

[8] ANPRM, 86 Fed. Reg. at 69,595.

[9] *Id.* at 69,589 n.1.

[10] *Id.* at 69,591.

[11] ANPRM, 86 Fed. Reg. at 69,590-91. *See also* FATF, Anti-Money Laundering and Counter-Terrorist Financing Measures in the United States: Mutual Evaluation Report at 39 (Dec. 2016), available [here](#). Although FinCEN first issued an ANPRM on AML/OFT program requirements in 2003 for “persons involved in real estate closings and settlements,” FinCEN never finalized this rulemaking. *See* Advanced Notice of Proposed Rulemaking, Anti-Money Laundering Program Requirements for Persons Involved in Real Estate Closings and Settlements, 68 Fed. Reg. 17,569 (Apr. 10, 2003), [here](#).

[12] ANPRM, 86 Fed. Reg. at 69,593.

[13] *Id.* at 69,597.

[14] *Id.*

[15] *Id.*

[16] FinCEN is currently in the rulemaking process to implement the new beneficial ownership reporting requirements imposed pursuant to the

Corporate Transparency Act, enacted into law as part of the National Defense Authorization Act for Fiscal Year 2021. See Advanced Notice of Proposed Rulemaking, Beneficial Ownership Information Reporting Requirements, 86 Fed. Reg. 17,557 (April. 5, 2021); Notice of Proposed Rulemaking, Beneficial Ownership Information Reporting Requirements, 86 Fed. Reg. 69,920 (Dec. 7, 2021).

[17] ANPRM, 86 Fed. Reg. at 69,599.

[18] *Id.* at 69,597.

[19] *Id.* at 69,598.

[20] *Id.*

[21] ANPRM, 86 Fed. Reg. at 69,599.

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