

U.S. Treasury Issues Notice of Anti-Money Laundering Regulations for Residential Real Estate Transfers

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On Feb. 7, the U.S. Department of the Treasury's Financial Crimes Enforcement Network (FinCEN) issued a notice of proposed rulemaking (NPRM)¹ in response to illicit finance risks identified in the U.S. residential real estate sector. If adopted, the proposed rule will have a sweeping impact on the real estate industry, requiring specific persons involved in residential real estate transactions to submit reports to FinCEN and maintain records of cash residential real estate transactions with legal entities or trusts.

Purpose

Non-financed transfers of residential real property are transactions in which the buyer does not rely on external financing extended by a financial institution, such as a bank or mortgage lender, to complete the purchase. These transactions may be carried out by small businesses or individuals and often involve all-cash payments. FinCEN believes that non-financed transfers of residential real property involving legal entities and trusts present significant money laundering risks because such transactions evade the scrutiny of financial institutions that are required to maintain anti-money laundering (AML) and customer identification programs, conduct due diligence, monitor transactions, and file suspicious activity reports under the Bank Secrecy Act (BSA). Further, non-financed transactions provide an opportunity for illicit actors to use legal entities to hold residential properties, making it exceedingly difficult to determine the source of funds used for the purchase.

Streamlined Approach

The NPRM sets forth a streamlined mechanism for persons involved in real estate closings and settlements to report standardized information about all reportable transfers. FinCEN's goal is to ascertain valuable information to combat money

laundering and other illicit activities while avoiding the overburdening of reporting persons and unduly impeding business activities. Under the proposed rule, reporting persons would remain exempt from the BSA's AML compliance program requirements.

Who is a reporting person?

Under the NPRM, only one reporting person would be designated for any given reportable non-financed transfer of residential real property. The reporting person would be identified either by written agreement between the real estate professionals involved or pursuant to the reporting order outlined in the NPRM.

The proposed cascade of possible designated reporting persons is as follows:

1. The real estate professional listed as the closing or settlement agent on a settlement/closing statement
2. The title insurance agent that underwrites the title insurance policy associated with the transfer
3. The person that disburses the greatest amount of funds in connection with the reportable transfer, whether through an escrow account, trust account, or lawyer's trust account
4. The person that prepares an evaluation of title status
5. The person who prepares the deed, e.g., an attorney or the closing agent

Note that if a real estate professional meets any of the foregoing criteria and if no one else fulfills a role higher in the cascade, that professional is required to act as the reporting person.

Information to Be Reported and Stored

The NPRM states that a reporting person would be required to report information identifying (1)

¹ The unpublished report may be accessed [here](#).

the transferee entity or trust, (2) the beneficial owners of the transferee entity or trust, and (3) certain individuals signing documents on behalf of the transferee entity or transferee trust (signing individual). The reporting person also would be required to report information concerning the reporting person, the transferor, the real estate transferred, and certain payment information. This information would be documented in a Real Estate Report that must be filed with FinCEN within 30 days after the closing date. The reporting person would also be required to maintain for a period of five years a copy of that report, along with a certification by the transferee's representative as to the identities of the beneficial owners of the transferee.

Circumstances in Which a Real Estate Report Must Be Filed

Residential Real Property Implicated

Reportable residential real property includes single-family houses, townhouses, condominiums, cooperatives, and apartment buildings designed for one to four families located in the United States.

Reportable Transferees: Transferee Entities and Trusts

Reporting would be required if a transferee entity or trust has an ownership interest (i.e., rights to

the property that are demonstrated through a deed or through stocks, shares, membership, a certificate, or other contractual agreement evidencing ownership) in residential real property. A reportable transferee may be a corporation, partnership, estate, association, limited liability company, or trust.

Beneficial Ownership Reporting Requirements

FinCEN aligns proposed definitions of "beneficial ownership" with those contained in the Corporate Transparency Act (CTA) and its implementing regulations.

Consistent with the CTA, the proposed rule provides that a beneficial owner of a transferee entity is "any individual who, directly or indirectly, either exercises substantial control over the transferee entity or owns or controls at least 25 percent of the ownership interests of the transferee entity."²

Conclusion

Lowenstein Sandler is monitoring this NPRM for further developments. As always, we are available to assist with your AML compliance needs. For any questions on AML or this article, please contact the authors at LSAMLTeam@lowenstein.com.

² In the CTA, a person who exercises substantial control is anyone who serves as a "senior officer" of the CTA reporting company; has authority over the appointment or removal of any senior officer or a majority of the board of directors (or similar body); directs, determines, or has substantial influence over important decisions made by the CTA reporting company; or has any other form of substantial control over the CTA reporting company. 31 CFR 1010.380(d)(1).

Contacts

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