

CLIENT ALERT

FinCEN House Rules: Proposed AML Rules to Combat Money Laundering in Residential Real Estate

FEBRUARY 20, 2024

INTRODUCTION

On February 16, 2024, the U.S. Department of the Treasury's Financial Crimes Enforcement Network (**FinCEN**) issued a proposed rule (the **Proposed Rule**) requiring certain persons involved in U.S. residential real estate closings and settlements (**Reporting Persons**) to: (i) submit an abridged version of a Suspicious Activity Report (SAR), referred to as a **Real Estate Report**, electronically to FinCEN; and (ii) keep records on non-financed (i.e., all-cash) transfers of certain classes of residential real property to specified legal entities and trusts.¹

WHAT TYPES OF PROPERTY ARE SUBJECT TO REPORTING?

The Proposed Rule covers a wide range of residential real property—including single-family homes, townhouses, condominiums, cooperatives, and buildings designed for one to four families—even if there is a commercial element to the property.² It also covers vacant or unimproved land zoned or permitted for the construction of a structure designed principally for occupancy by one to four families.³ There is no threshold purchase price for the transfer, and even a gifted property would need to be reported.⁴

EXEMPTIONS

Certain transfers are exempt, such as those that are made directly to an individual or a bankruptcy estate and those that occur via easement, as a result of the property owner's death, or through divorce or dissolution of marriage.

⁵ An exemption also applies to transfers involving an extension of credit to the transferee if the credit (i) is secured by the transferred residential real property and (ii) is extended by a financial institution that has both an obligation to maintain an AML program and a requirement to file SARs.⁶

WHO IS REQUIRED TO REPORT?

Reporting Persons would be determined through a “cascading” approach based on the function performed by the person engaged within the United States in the real estate closing and settlement. If no person is involved in the transfer as described in the first tier of potential Reporting Persons, the reporting obligation falls to the person involved in the transfer as described in the second tier, if any, and so on. Professionals involved in real estate

closings and settlements would generally remain exempt from the AML compliance program requirements of the Bank Secrecy Act.^[7]

The cascading approach would work as follows^[8]:

- (i) First, the closing or settlement agent on the closing or settlement statement.
- (ii) Second, the person who prepares the closing or settlement statement.
- (iii) Third, the person who files the deed or other instrument transferring ownership with the recordation office.
- (iv) Fourth, the person who underwrites an owner's title insurance policy for the transferee.
- (v) Fifth, the person who disburses the greatest amount of funds in connection with the transfer—including from an escrow account, trust account, or lawyers' trust account.
- (vi) Sixth, the person who evaluates the status of the title.
- (vii) Seventh, the person who prepares the deed or other instrument transferring ownership.

Attorneys are most likely to fall within the first, fifth, or seventh tier.

WHAT TYPES OF TRANSFERS ARE SUBJECT TO REPORTING?

The Proposed Rule would require reporting only if the transferee of an ownership interest in residential real property is a **Transferee Entity** or a **Transferee Trust**.^[9] A Transferee Entity is generally any person other than a Transferee Trust or an individual, with exceptions for certain highly regulated entities and trusts that are less likely to be used by illicit actors to launder money.^[10] A Transferee Trust is any legal arrangement created when a person places assets under the control of a trustee for the benefit of one or more persons or for a specified purpose, whether formed under the laws of the United States or abroad, *regardless* of whether residential real property is titled in the name of the trust itself or in the name of the trustee.^[11]

WHAT INFORMATION IS REQUIRED TO BE REPORTED TO FINCEN?

Reporting Persons are required to report information regarding (i) themselves;^[12] (ii) beneficial ownership of the Transferee Entity or Transferee Trust receiving the property;^[13] (iii) individuals representing the Transferee Entity or Transferee Trust;^[14] (iv) the transferor (e.g., the seller);^[15] (v) the residential real property being sold or transferred;^[16] and (vi) any payments made.^[17] The Reporting Person must also report whether the transfer involved credit extended by a person who is not a financial institution with an obligation to maintain an AML program and SAR filing obligations.^[18]

Although they serve different purposes, the Proposed Rule adopts or adapts certain definitions from the Corporate Transparency Act's BOI Reporting Rule where appropriate.^[19]

WHAT ARE THE KEY DATES?

The public has until April 16, 2024, to submit comments to the Proposed Rule. The final rule would not become effective until one year following the date of the final rule issuance.^[20]

The Reporting Person would be required to file the Real Estate Report no later than thirty days after the date of closing.^[21]

^[7] Anti-Money Laundering Regulations for Residential Real Estate Transfers, 89 Fed. Reg. 12424 (proposed Feb. 16, 2024) (to be codified at 31 C.F.R. pt. 1031) (NPRM); see 31 C.F.R. § 1031.320(k) (proposed).

^[2] See § 1031.320(b)(1) (proposed).

^[3] § 1031.320(b)(1) (proposed).

^[4] NPRM § IV.C.

^[5] § 1031.320(b)(2) (proposed).

^[6] NPRM § IV.C.1 (“Transfers financed by a private lender or the seller, neither of which are likely to have AML compliance programs and SAR filing obligations, would not fall within this exception.”).

^[7] See § 1031.320(m)(2) (proposed).

^[8] § 1031.320(c)(1) (proposed). Alternatively, Reporting Person may agree with any other person described in § 1031.320(c)(1) to designate such other person as the Reporting Person. § 1031.320(c)(3) (proposed).

^[9] § 1031.320(b)(1) (proposed).

^[10] See § 1031.320(j)(10) (proposed).

^[11] See § 1031.320(j)(11) (proposed).

^[12] § 1031.320(d) (proposed).

^[13] § 1031.320(e)(1)–(2) (proposed).

^[14] § 1031.320(e)(3) (proposed).

^[15] § 1031.320(f) (proposed).

^[16] § 1031.320(g) (proposed).

^[17] § 1031.320(h) (proposed).

^[18] § 1031.320(i) (proposed).

^[19] See § 1031.320(j) (proposed).

^[20] Because of the significance of the Proposed Rule, and because of how busy FinCEN is with the implementation of the Corporate Transparency Act, in addition to its day-to-day matters, we do not see the final rule being adopted before the end of third quarter 2024. And, of course, a change in White House administration could result in a final rule being delayed or abandoned. This is not FinCEN's first attempt to impose AML reporting obligations on persons engaged in real estate closings and settlements—which is one of the categories of persons that are a “financial institution” under the Bank Secrecy Act.

^[21] § 1031.320(k) (proposed).

5 Min Read

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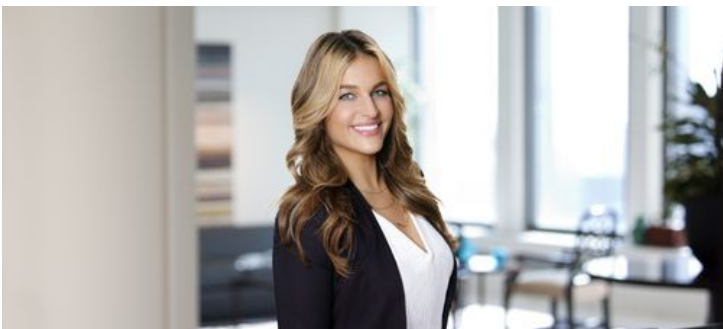
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