

Leap Year Insights

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FinCEN's Proposed Rulemaking: Enhancing Transparency in Residential Real Estate



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While many Americans are struggling to achieve the dream of homeownership, there are criminals that abuse the housing market for financial gain. To avoid the scrutiny of financial institutions that have anti-money laundering (AML) programs and Suspicious Activity Report (SAR) filing requirements under the Bank Secrecy Act, these criminals purchase residential real estate in “all cash” transactions using illegally obtained funds. They then transfer the property to a legal entity to further obscure their identity.

To combat these illicit transactions, title companies across the country are currently required to maintain records and file reports on non-financed residential real estate transactions. These reports, Geographic Targeting Orders (GTOs), only apply to certain high-value residential real estate transactions in specific geographic areas. The purchase price threshold is \$300,000 for a transaction to be reportable under the current rules. As of October 22, 2023, these GTOs require reporting for transactions in the following locations: Litchfield County in Connecticut; Adams, Arapahoe, Clear Creek, Denver, Douglas, Eagle, Elbert, El Paso, Fremont, Jefferson, Mesa, Pitkin, Pueblo, and Summit counties in Colorado; Bexar, Tarrant, Dallas, Harris, Montgomery, and Webb counties in Texas; Miami-Dade, Broward, and Palm Beach counties in Florida; The five boroughs of New York City; San Diego, Los Angeles, San Francisco, San Mateo, and Santa Clara counties in California; The city of Honolulu and Hawaii, Maui, Kauai, and Honolulu counties in Hawaii; Clark County in Nevada; King County in Washington; Suffolk and Middlesex counties in Massachusetts; Cook County in Illinois; The city and county of Baltimore in Maryland; Montgomery, Anne Arundel, Prince George's and Howard counties in Maryland; Arlington and Fairfax counties, and the cities of Alexandria, Falls Church, and Fairfax in Virginia; Fairfield County in Connecticut; and The District of Columbia.

The Financial Crimes Enforcement Network's (FinCEN) most recent proposal, Anti-Money Laundering Regulations for Residential Real Estate Transfers, focuses on expanding the scope of these GTOs by removing the minimum threshold purchase price and expanding the geographic scope that would trigger reporting requirements.

Key Components of the Proposed Rule:

- 1. Nationwide Applicability:** The proposed rule would uniformly apply to any property located in the United States, which includes the District of Columbia, Indian lands and territory or possession of the United States, as opposed to focusing on certain geographic regions.
- 2. No Threshold Purchase Price:** There will be no threshold purchase price for a transaction to be reportable. This means that even gifts, or other transfers without consideration, may be reportable under the proposed rule as outlined below.
- 3. Reportable Transfers:** If at least one of the new owners is a “transferee entity” or “transferee trust”, a transfer of residential property would be reportable. Included in these categories are LLC's, partnerships, corporations, and trusts. The reporting requirements would apply to both foreign and domestic entities. Note that there are some

proposed exemptions of highly regulated entities and trusts, such as banks, security exchanges, and depository institution holding companies.

4. **Reportable Information:** If a transaction is reportable under the new rule, individuals involved in closing the transaction (such as attorneys, title companies, settlement agents) would be required to file a report on the transferee entity or transferee trust. This information would include a description of the entity, its beneficial owners, and the property being transferred. The report would also need to include information on the transferor.

Some have raised concerns that these heightened reporting requirements may impose a great burden on the real estate business. In response to these concerns, FinCEN has proposed “a streamlined reporting framework” designed to enhance transparency within real estate transactions while minimizing unnecessary burdens. The proposed rule is narrowly tailored to focus in on only the classes of activities that the Treasury deems high-risk, such as the use of identity obfuscating vehicles in non-financed residential real estate transactions and non-financed real estate transfers to trusts. The proposed rules will not apply to legal entities that the Treasury believes have sufficient AML/CFT compliance obligations involving real estate transactions or that are already subject to government supervision and reporting requirements. Non-profit and other charitable organizations are also exempt from reporting requirements under this proposal, because the Treasury does not believe that they pose a sufficient risk of being used for money laundering.

To further minimize unnecessary burdens of these reporting requirements, FinCEN proposes to use a “cascade” method to determine who is required to file the report, eliminating the need for multiple people within a transaction to file a report. This method would use a list of functions that a business may perform in a real estate transaction, and whoever appears highest on the list would be required to file the report for that particular transaction. Alternatively, the real estate businesses involved in the transaction may enter into a written agreement that would designate the individual required to file the report.

This proposed rulemaking represents a significant step toward creating a more resilient and transparent residential real estate market. By expanding the geographic scope, removing transaction thresholds, and emphasizing beneficial ownership disclosure, FinCEN aims to combat money laundering within the residential real estate market. While businesses involved in real estate transactions may face initial challenges in adapting to the new reporting requirements, maintaining financial integrity within the real estate sector will likely benefit the market and its participants as a whole.