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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 it’s participants as a whole.

Government response to consultation on Building Safety Levy suggests it may not just apply to ‘higher-risk buildings’ in England

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In this article, we discuss the key findings from the UK government’s response to the consultation on its new powers to impose a ‘Building Safety Levy’ (“Levy”) under the Building Safety Act 2022 (“BSA 2022”).

The BSA 2022 established the power for the UK government to create the new Levy, with the principle purpose of reclaiming the costs that the government has or will incur in the remediation of building safety defects.

Following the government’s launch of a consultation on this proposed Levy in November 2022, the results of such consultation and the government’s response (the “Response”) was released in January 2024, which sought to cover more details regarding the Levy, such as the methodology for its calculations, the collection process, managing disputes and further exemptions.

Background to the Levy

BSA 2022 was ultimately the result of the tragic fire that befell on Grenfell Tower in 2017, with the legislative power to impose the Levy being created to allow the government to ensure that financial assistance to fund the various building safety remediation works needed did not fall on the taxpayers.

As highlighted in the Response: "*the government's building safety approach is focused on protecting leaseholders. In our view, it is fair that the industry that caused the cladding problem have profited from government support and gain from the restoration of confidence in the housing market should contribute to remedying the problems they have caused*".

Application of the Levy

Whilst the Levy was originally intended to apply only to ‘higher-risk buildings’, the scope of its application now cover ‘all relevant buildings’ built in England that comprise or contain (a) one or more dwellings, or (b) other accommodation including temporary accommodation. Specifically envisaged within this scope are buildings that are being converted to residential use, private retirement housing, built-to-rent developments, purpose-built student accommodation, hotels and certain hospitals.

The Response does however specify some exemptions, which include affordable housing, non-social homes built by not-for-profit Registered Providers, NHS facilities (including hospitals, medical homes and GP practices), criminal justice accommodation, children’s homes, domestic abuse facilities, armed forces accommodation, care homes and nursing homes, and developments of fewer than 10 units (or, with respect to purpose-built student housing, buildings with fewer than 30 bedspaces).

Further exclusions are being sought in the latest consultation, which include hotels, non-NHS hospitals and temporary accommodation for the homeless.

Methodology of calculation

Whilst we yet to have details of the amount or figures for the Levy, the Response does now provide details of the principles applicable to its calculation.

Charged on a square meter basis, the Levy is intended to fairly reflect the difference in value between different sizes of new development. Further clarification on how size is to be calculated is being sought in the latest consultation.

Payable by the developers to the relevant local authorities as collection agencies, the rate per square meter of the Levy to be determined by each local authority (as opposed to a blanket rate across England). The purpose of this is to then allow local authorities to apply a rate that best reflects local land values and house prices.

Methodology of process

The Response details that specified levy information (including floor areas) will need to be included as part of the initial application for building control approval; failure to provide such information may result in immediate rejection of the application. The local authority will then have five weeks from submission of the levy information to serve either a ‘notice of levy liability’ or confirmation that no payment is due/no Levy is applicable.

Developers will then have 28 days to request an independent review by the local authority, with a further 28 days for the local authority to conclude the review. If the developer is still dissatisfied with the decision, it will have 21 days to launch a challenge at the First Tier Tribunal.

To the extent that there is liability, the Levy will become payable after works have commenced. The Response also favours a single payment of the Levy as opposed to a two-step payment process that was originally proposed by the government, the intention being to provide the developer with some flexibility and discretion as to when the payment is made, provided that the Levy is paid before a completion certificate is issued. To the extent that the Levy is payable but is not paid, the primary sanction would be to withhold or reject the developments' final building control certification.

Commencement

There is currently no indication as to when the Levy will become effective, or when it is likely to be effective. The Response did also come with the announcement of a further consultation being launched. As such, further, and potentially more confirmatory, details regarding the Levy is expected from the government's response to such consultation. Once these are published, we shall follow up with a further update as we look to explore how the new Levy will impact developers in respect of existing and future property financings.

There’s No Going Back: The Finality of Mortgage Foreclosures

February 28, 2024

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In New York, it is settled precedent that a judgment of foreclosure and sale is final as to all questions at issue between the parties[1]. Thus, once a final judgment is entered, both parties have no recourse or ability to raise a new defense or counterclaim. A recent case from the Supreme Court of New York illustrates this point.

In *Jones v. Flushing Bank*, the plaintiff, Monique Jones (“Jones”), executed a note secured by a mortgage covering real property. Both the note and the mortgage were executed in March of 2005 in favor of Flushing Bank (the “Bank”). Jones then conveyed the property to Big Time Holdings, LLC (“Big Time”) in June of 2005. In July, 2014, Jones defaulted under the note and mortgage by failing to make the payments due thereunder. That November, the Bank commenced a foreclosure action on the property and labeled the complaint “Commercial Mortgage Foreclosure Action.” Jones and Big Time asserted an affirmative defense stating that the property was not a commercial property. The Bank moved for summary judgment on the complaint. Jones and Big Time then cross-moved for leave to amend their answer to assert additional counterclaims. In September, 2015, the Supreme Court for Queens County, New York granted the Bank’s motion for summary judgment, in essence denying the cross motion.

In December of 2016, the court granted the Bank’s motion for a judgment of foreclosure and sale of the property, denying a motion from Jones and Big Time asking for leave to reargue the Bank’s motion for summary judgment and to remove the action from a commercial foreclosure. The court issued an order and judgment of foreclosure and sale which was not appealed by either Jones or Big Time.

In December of 2018, Jones and Big Time sued the Bank to recover damages for negligence, fraud, breach of contract, and violation of New York’s General Business Law in connection with the mortgage – alleging that Jones applied for a residential mortgage loan and that the Bank failed to disclose that it had placed the request as a commercial mortgage loan. The Bank moved to dismiss the action, stating that the claim was barred by *res judicata* and collateral estoppel. The court granted the Bank’s motion. Jones and Big Time appealed, bringing the case to the Supreme Court of New York, Second Department (the “Court”), to decide whether Jones and Big Time were estopped from bringing the action.

The Court upheld the decision, reminding the parties that the doctrine of *res judicata* provides that “once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy.”[2] The Court also stated that for foreclosure actions, a judgment of foreclosure and sale is final as to all questions at issue and concludes all matters of defense which might have been raised in the action. The Court concluded that Jones and Big Time were barred from bringing these new actions because they were either raised or could have been raised in the previous action.

This case reaffirms the long held precedent that a judgment of foreclosure is final. It also serves to remind us that certainty in the law is a paramount principle that we rely upon in the commercial community.

[1] *Jones v. Flushing Bank*, 212 A.D.3d 791, 793 (N.Y. App. Div. 2023)

[2] *Jones v. Flushing Bank*, 212 A.D.3d 791, 793 (N.Y. App. Div. 2023) (quoting *Chapman Steamer Collective, LLC v. KeyBank N.A.*, 163 A.D.3d at 761, 81 N.Y.S.3d 501)

Recent Transactions

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Here is a rundown of some of Cadwalader's recent work on behalf of clients:

- Represented Wells Fargo Bank, N.A. as lender in a $550 million floating-rate mortgage loan secured by 10 garden-style and mid-rise luxury apartment buildings in Florida, North Carolina, South Carolina and Texas
- Represented JP Morgan, Citi and Deutsche Bank as lenders on three life sciences properties in San Francisco and Cambridge, owned by BLX, with a loan amount of $1.2 Billion
- Represented Deutsche Bank and the Bank of Montreal as lender in a $333 million financing of a portfolio of 16 hotel properties located throughout the United States
- Represented a lender in connection with the $485 million refinancing of 118 self-storage centers located throughout the country