

Clients & Friends Memo

FinCEN Targets High-Value Real Estate Transactions in New York and Miami

January 19, 2016

On January 13, 2016, the Financial Crimes Enforcement Network (“FinCEN”) announced that it had issued a Geographic Targeting Order (“GTO”) which will temporarily require certain title insurance companies to report the identity of natural persons who make “all-cash” purchases of high-value residential real estate through shell companies in New York County (Manhattan) and Miami-Dade County.^{1 2} The GTO requirements, which will be in effect between March 1, 2016, and August 27, 2016, will apply to situations in which a legal-entity purchaser pays cash in excess of three million dollars in Manhattan and one million dollars in Miami-Dade County.³ They represent FinCEN’s latest effort to identify individuals attempting to hide the proceeds of criminal activity through the anonymous purchase of high-end residential real estate, as well as the real estate agents, lawyers, bankers, and formation agents who assist them.

I. FinCEN’s Use of Geographic Targeting Orders

The Bank Secrecy Act (“BSA”) authorizes FinCEN to issue GTOs upon a finding by the Secretary of the Treasury that additional requirements are necessary to prevent evasion of the BSA’s recordkeeping and reporting provisions.⁴ Upon issuance of a GTO by FinCEN, financial institutions and nonfinancial trades or businesses subject to the BSA within a geographic area may be required to collect and report information regarding any financial transaction in which they are involved, as

¹ See Press Release, U.S. Dept. of the Treas., Fin. Crimes Enforcement Network, FinCEN Takes Aim at Real Estate Secrecy in Manhattan and Miami (Jan. 13, 2016), https://www.fincen.gov/news_room/nr/html/20160113.html.

² An “all-cash” transaction does not only connote the exchange of U.S. currency, but also any transaction where the entire purchase price of the transaction is not financed through typical residential mortgage financing. Note, however, that the GTO does not extend to transactions where the purchase is made entirely by wire transfer, but only those purchases made, “at least in part, using currency or a cashier’s check, a certified check, a traveler’s check, or a money order in any form.” See U.S. DEPT. OF THE TREAS., FIN. CRIMES ENFORCEMENT NETWORK GEOGRAPHIC TARGETING ORDERS, January 13, 2016, https://www.fincen.gov/news_room/nr/files/Real_Estate_GTO-NYC.pdf; https://www.fincen.gov/news_room/nr/files/Real_Estate_GTO-MIA.pdf.

³ See *id.*

⁴ See 31 U.S.C. § 5326; 31 C.F.R. § 1010.370; Treasury Order 180-01.

well as the identity of any persons participating in such transaction.⁵ A GTO is a temporary order that can last up to 180 days and is renewable at the discretion of the Secretary of the Treasury.⁶

In recent years, FinCEN has issued GTOs requiring the reporting of currency transactions with electronics exporters in Miami in excess of \$3,000;⁷ the cashing of federal tax refund checks in Miami-Dade and Broward Counties in excess of \$1,000;⁸ and transactions with garment and textile businesses in Los Angeles in excess of \$3,000.⁹ In each case, the identity and transaction information reported to FinCEN is retained in a database and made available to regulators and law enforcement for purposes of enforcing the BSA and other federal anti-money laundering (“AML”) statutes.

Here, FinCEN’s GTO for title companies requires title insurers to identify the true “beneficial owner” behind a limited liability company or other legal entity that purchases high-value residential real estate in Manhattan or Miami-Dade County in all-cash transactions. This latest risk-based approach by FinCEN to combat money laundering is designed to reduce the ability of individuals to hide the proceeds of criminal activity through anonymous real estate purchases. Title companies that fail to collect and report this information to FinCEN may be subject to penalties or other action.

II. Implications for the Real Estate Industry

The high-value real estate market has thrived in recent years due in part to wealthy foreign buyers and other purchasers who use limited liability companies and other legal entities as the named purchaser. Recently, *The New York Times* estimated that nearly half of homes nationwide worth at least \$5 million are purchased using shell companies; with these figures being even higher in Manhattan and other high-cost jurisdictions.¹⁰ While previous government scrutiny of real estate transactions for money laundering have focused on lending institutions—banks are no strangers to thoroughly vetting the beneficial owners of borrowers and developers—the new GTOs mark the first time that FinCEN has imposed these duties on title companies as a way of identifying the actual persons behind these transactions.

⁵ *Id.*

⁶ 31 U.S.C. § 5326(d).

⁷ U.S. DEPT. OF THE TREAS., FIN. CRIMES ENFORCEMENT NETWORK GEOGRAPHIC TARGETING ORDER, April 15, 2015, https://www.fincen.gov/news_room/nr/pdf/GTO_Miami.pdf.

⁸ U.S. DEPT. OF THE TREAS., FIN. CRIMES ENFORCEMENT NETWORK GEOGRAPHIC TARGETING ORDER, July 8, 2015, https://www.fincen.gov/news_room/nr/pdf/20150710GTO.pdf.

⁹ U.S. DEPT. OF THE TREAS., FIN. CRIMES ENFORCEMENT NETWORK GEOGRAPHIC TARGETING ORDER, September 26, 2014, https://www.fincen.gov/news_room/nr/pdf/LA_GTO_Order9-25-14.pdf.

¹⁰ Louise Story, *U.S. Will Track Secret Buyers of Luxury Real Estate*, N.Y. TIMES, Jan. 13, 2016, <http://nyti.ms/1Oia3JH>.

The use of limited liability companies (“LLC”) and trusts to acquire high-value residential property is not always or even often a nefarious practice. High-net-worth individuals frequently structure the purchase of residential property through LLCs and trusts for legitimate privacy and estate-planning purposes. Similarly, purchasers in commercial real estate transactions use special-purpose entities to isolate liabilities and conform to financing requirements. Regardless of ownership structure, banks vet the ultimate beneficial ownership of borrowers pursuant to their own internal “Know Your Customer” (“KYC”) policies and procedures and other federal regulations. It is possible that the new GTOs may have a chilling effect on new, high-end residential development if individuals with privacy concerns are now likely to have their identities revealed to FinCEN.

Other federal law-enforcement agencies have also expressed interest in what may be uncovered by the new GTOs, with Patrick Fallon, Chief of the Financial Crimes Section of the Federal Bureau of Investigation, stating that he “fully intend[s] to encourage expansion [of the GTO], not only in geographic areas but as far as the time frame as well.” It would not be surprising if regulators look to expand these reporting requirements to other professionals within the real estate industry.

For example, the focus on purchasers of high-value real estate may be a forerunner to new duties being imposed on lenders as well. While residential-construction lenders generally require that developers include representations and warranties in their contracts of sale with unit purchasers regarding such purchasers’ compliance with money laundering laws, lenders’ have not typically done more to investigate end-user identity. Continuing the trend from recent GTOs, regulators could someday require construction lenders to diligence potential unit purchasers as units enter into contract during the term of a construction loan.

III. Conclusion

FinCEN’s recent rulemaking in other sectors that removed the privacy and protection offered by entity-based ownership may signal a trend. For example, in 2015, FinCEN issued proposed rules requiring investment advisors and hedge funds to establish AML programs and report suspicious activities to FinCEN.¹¹ FinCEN was concerned that money-launderers were operating through investment advisors and hedge funds rather than through broker-dealers or banks directly to conceal their identities and avoid AML policies and procedures in place at financial institutions.¹²

Real estate industry professionals should be ready for sustained and more aggressive regulatory action in the real estate market. FinCEN Director Jennifer Shasky Calvery has stated that if the

¹¹ Anti-Money Laundering Program and Suspicious Activity Report Filing Requirements for Investment Advisors, U.S. Dept. of the Treas., Fin. Crimes Enforcement Network, FINCEN-2014-0003 (proposed Aug. 25, 2015) (to be codified at 31 C.F.R. 103).

¹² *Id.*

GTOs in New York and Miami uncover significant sales involving suspicious money, they could be expanded and result in permanent reporting requirements imposed nationwide.¹³

To view the New York GTO, click [here](#). To view the Miami GTO, click [here](#).

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¹³ *Id.*