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ALERTS

Proposed Rule Requires Real Estate Professionals Closing All-Cash Residential Deals To Report To FinCEN

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Highlights

FinCEN recently proposed a new rule to require real estate professionals to file transactional reports

The proposed rule requires certain entity and trust transactions in residential real estate to be reported to federal government

Real estate agents, brokers, and other service providers may be required to implement AML reporting programs to comply

The U.S. Department of the Treasury's Financial Crimes Enforcement Network (FinCEN) recently published a proposed rule requiring certain professionals involved in real estate closings and settlements to report information to FinCEN about non-financed transfers of residential real estate to legal entities or trusts.

The proposed rule is intended to combat and deter money laundering by increasing transparency in the U.S. residential real estate sector. It is defined by FinCEN as being "tailored to target residential real estate transfers considered to be high-risk for money laundering, while minimizing potential business burden." The new rule will not require

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reporting transfers made to individuals.

Comments on the proposed rule are due within 60 days of its Feb. 16, 2024, publication in the Federal Register.

Key Reporting Requirements in the Proposed Rule

1. What Transactions Must Be Reported?

The proposed rule requires “non-financed residential real estate transaction[s]” be reported when the transferee is a legal entity or trust. This includes both sales and non-sale transfers, like gifts and trust transfers. There is no minimum dollar value reporting threshold.

A “non-financed transfer” is defined as any transfer that does not involve an extension of credit extended by a financial institution that has both an obligation to maintain an anti-money laundering (AML) program and an obligation to report suspicious transactions. These are sometimes referred to as “all-cash” transactions.

The proposed rule does not apply to transactions where the transferee is a natural person; it includes exceptions for transfers resulting from death, divorce, or bankruptcy.

2. Who Must Report?

The proposed rule applies to “persons engaged as a business in the provision of real estate closing and settlement services within the United States.” Most likely these reporting persons will include settlement agents, title insurance agents, escrow agents, and attorneys performing specified closing or settlement functions.

3. What Information Needs to Be Reported?

For each transaction, the real estate professional must file a real estate report that identifies the:

- Reporting person
- Legal entity or trust to which the residential real property is transferred
- Beneficial owners of that transferee entity or transferee trust
- Person that transfers the residential real property
- Property being transferred, along with certain transactional information about the transfer

4. When Are Reports Due?

The proposed rule would require the real estate professional to file real estate reports with FinCEN no later than 30 days after the date of closing.

Key Takeaways

Reporting real estate professionals, called “Covered Real Estate Businesses” under the rule, will not be required to develop AML programs like those at most U.S. financial institutions.

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However, real estate professionals will need to institute policies and reporting procedures to ensure that they timely file and comply with the applicable reporting requirements. These procedures will require methods and document retention policies and procedures for identifying beneficial owners for certain trusts and legal entities.

Receiving information relating to the beneficial ownership of these businesses and entities may also require real estate professionals to institute their own compliance systems to implement screening procedures to ensure they are not facilitating transactions for illicit and/or prohibited persons or entities. The proposed rule adds to FinCEN's previous Residential Real Estate Geographic Targeting Order program imposed on title companies and would replace it with national reporting requirements.

Given the many settlement and transactional providers and professionals involved in real estate transactions, the proposed rule identifies a “cascade” of reporting obligations. Compliance with these multi-party reporting requirements may require real estate professionals to coordinate and identify the services and position of the other professionals and providers relative to their transactions to ensure reporting requirements are met.

To obtain more information, please contact the Barnes & Thornburg attorney with whom you work or Sal LaViña at 424-239-3743 or spl@btlaw.com, Josh Hollingsworth at 317-261-7854 or joshua.hollingsworth@btlaw.com, Katie Mills at 310-284-3820 or katie.mills@btlaw.com, or Molly Stewart (paralegal) at 646-746-2018 or mstewart@btlaw.com.