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December 29, 2021

FinCEN Solicits Comments on Striking Expansion of Anti-Money Laundering Obligations to Real Estate Sector

The Financial Crimes Enforcement Network (FinCEN) issued an [Advance Notice of Proposed Rulemaking \(ANPRM\)](#) on December 6, 2021, soliciting comments on the potential extension of the Bank Secrecy Act (BSA), and the attendant anti-money laundering (AML) compliance obligations, to the real estate sector. The notice makes clear that FinCEN is considering broad regulation of the industry, potentially imposing information collection and reporting requirements on a large number of industry participants involved in real property transactions. The expansion of the entire BSA/AML regime—which has imposed a large and growing obligation on the financial industry for decades—to the real estate sector would be striking if the final rule goes that far. If proposed elements to the rule are implemented, for the first time, real estate industry participants would be subject to criminal prosecution for willful failure to establish, implement, and maintain an effective AML program. The U.S. Department of Justice (DOJ) recently showed that it is not afraid to bring a stand-alone criminal case charging this offense, when it charged four founders of BitMEX, a cryptocurrency derivatives exchange (*United States v. Hayes et al.*, 20 Cr. 500 (SDNY)).

The potential rule aims to enhance anti-money laundering/counterterrorism financing (AML/CTF) obligations in the United States by creating more transparency regarding certain types of real estate transactions—to assist law enforcement authorities in identifying illicit actors laundering criminal proceeds in the purchase of U.S. real estate. For the past several years, FinCEN has reported success with more limited AML/CTF requirements that have targeted title insurance companies involved in cash sales of residential real property. On that basis, FinCEN is now considering regulation of other industry participants who may be involved in real property transactions that do not flow through—and, thus, are not currently tracked and vetted by—traditional financial institutions (e.g., banks and mortgage lenders). FinCEN is considering expanding the requirements beyond residential real estate to commercial transactions as well, which could have significant implications for commercial real estate transactions involving nontraditional financing structures.

FinCEN seeks input from real estate professionals and other interested parties to help maximize efforts to address money laundering while minimizing burdens on industry. Comments are due February 7, 2022.

### **Where Do We Stand: Background and Current Law?**

In the 2020 National Strategy for Combating Terrorist and Other Illicit Financing, the U.S. Department of the Treasury (DOT) identified money laundering risks in real estate purchases as a critical area of concern. Real estate market vulnerability was highlighted as a key action item for strengthening the U.S. AML/CFT framework.

Under existing regulations, participants in financed real estate transactions are subject to AML/CFT scrutiny insofar as the banks and other financial institutions involved in lending are required to comply with BSA obligations. These requirements include implementing effective internal controls to prevent money laundering, conducting customer and transactional due diligence and monitoring, and making reports to U.S. authorities regarding transactions identified as potentially suspicious. These current regulations extend beyond banks to nonbank residential mortgage lenders and originators (RMLOs), and housing-related Government Sponsored Enterprises (GSEs). Additionally, since 2016, Geographic Targeting Orders (GTOs) have required title insurance companies to file reports and maintain records concerning all-cash purchases of residential real estate above \$300,000 in certain metropolitan areas of the United States.

## What's on the Table?

In the ANPRM, FinCEN seeks comments on the scope of possible nationwide recordkeeping and reporting requirements expanding beyond banks and title insurers to others in the residential and commercial real estate sectors. The rule could require covered persons to collect, report, and retain information about non-financed purchases of real estate. Specifically, FinCEN is seeking comments on the anticipated burdens and benefits of potential recordkeeping and reporting requirements, the persons who should be subject to a reporting requirement to maximize AML impact and minimize burden on industry, the geographic scope and transaction threshold that should be in scope for reporting, as well as the types of purchases and types of real estate that should be covered by the rule.

FinCEN asks 82 specific questions, split into seven categories:

- 1. General information regarding the real estate market.** FinCEN seeks to better understand the residential and commercial real estate market. The ANPRM asks 20 questions about typical transactions including, what professionals are involved, what products and services are used, what type of due diligence is conducted, and how payments are made.
- 2. What are the money laundering risks in real estate transactions?** The ANPRM acknowledges the different practices, customs, and requirements for real estate transactions in diverse jurisdictions. FinCEN asks for comments regarding particular industry practices that have potential for abuse.
- 3. Which real estate transactions should be covered?** FinCEN seeks comments on which entities and purchases should be covered, including the geographic scope of the rule. Given the distinction between AML/CTF risks raised by residential versus commercial real estate transactions, FinCEN asks whether the AML/CFT risk posed by commercial real estate transactions is sufficient to justify the burdens that reporting or AML/CFT programs could impose. The questions also include whether the geographic coverage of a rule should be limited to higher-risk locations, or whether there are particular transactional value thresholds that could be adopted to limit the administrative burden of requiring reports on potentially low-risk transactions.

Given the common use of shell companies, FinCEN asks which types of entities involved in transactions should be covered by the rule. Under the GTOs, cash purchases by the following legal entities are reportable transactions: corporations, limited liabilities companies, partnerships, other small business entities, and other businesses whose common stock or analogous equity are regulated by the Securities and Exchange Commission (SEC) or a self-regulatory organization registered with the SEC, or an entity solely owned by such business. The ANPRM suggests FinCEN is considering including transactions involving trusts in the rule as well. FinCEN also asks for comments on how to address natural persons purchasing property for another (straw man purchasers).

- 4. Which persons should be required to report information concerning real estate transactions to FinCEN?** The ANPRM asks for comments on which entities involved in every nonfinanced transaction should be required to meet recordkeeping and reporting requirement imposed by FinCEN. FinCEN acknowledges the many professionals involved in real estate transactions (such as brokers, agents, title companies, closing agents, attorneys, and financial institutions or nonfinancial trades or businesses), and the ANPRM seeks input on which players would be best suited to provide information to assist with AML/CTF efforts. Additionally, the ANPRM suggests potentially imposing different reporting obligations for different entities, noting that the GTOs currently in place only impose requirements on title companies, leaving an opportunity for bad actors to decline to purchase title insurance and evade AML/CTF transparency.

Additionally, FinCEN notes that certain commercial real estate transactions may qualify as a cash transaction and subject the involved entities to reporting requirements. For example, entities financing a purchase by issuing bonds could qualify as a "cash" transaction and subject the entity to reporting or AML/CFT program requirements.

**5. What information should FinCEN require regarding real estate transactions covered by a proposed regulation?** The ANPRM seeks to better understand what information is necessary to achieve its goals without being overly burdensome. In this section, FinCEN asks what information the proposed rule should require about purchasers, sellers, the underlying transaction, and the funds used.

**6. What are the potential burdens or implementation costs of a potential FinCEN regulation?** To minimize burdens to industry, the ANPRM seeks information on how the proposed regulations could be implemented into current programs or procedures. FinCEN specifically asks for more details about the costs of collecting information or implementing a long-term program. To ensure the most effective rule with minimal burdens, the ANPRM also asks specific questions about alternative methods and suggestions the industry proposes.

**7. Should FinCEN promulgate general AML/CFT record-keeping and reporting requirements for "persons involved in real estate closings and settlements"?** The ANPRM proposes two potential types of requirements for the nature of record-keeping and reporting requirements. One option would be to target a class of real estate market players who have access to particularly valuable information and require those individuals and/or entities to maintain certain AML/CTF procedures, including the collection and reporting of relevant transactional information to U.S. authorities. The second option FinCEN proposes is the promulgation of more generalized requirements for persons involved in nonfinanced real estate closings and settlements to file SARs and establish AML/CFT programs. It bears noting that the implementation of AML/CTF programs can be burdensome and would likely include requirements to establish effective policies and procedures, appoint a compliance officer, implement employee training programs and transaction monitoring, and undergo independent testing.

## Takeaways

While the breadth of the new rules remains uncertain, FinCEN has made clear that it views the real estate market as a key AML/CTF risk area, and that imposing reporting obligations on title insurance companies has provided valuable information to assist U.S. authorities in preventing and detecting money laundering and terrorist financing. The regulations that could result from this rulemaking process may impose significant burdens on an industry that has, to date, operated mostly free of AML/CTF regulation. Interested industry stakeholders have until February 7, 2022, to submit comments as to the many critical aspects of this rule. Particularly given the agency's relative unfamiliarity with this industry, the comments FinCEN receives have the potential to significantly affect the final rulemaking process.

We will continue monitoring developments and provide an update as these regulations take shape. In the meantime, interested parties should consult with counsel regarding the potential implications of the FinCEN notice in relation to their particular business and consider whether comments on any aspect of the agency's proposal would be prudent.

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