Calling All Cash Money Millionaires: FinCEN Proposes New Reporting Rules for Cash Residential Real Estate Transfers

*By Warren Seay, Jr. and Rachel E. Collins**

In this article, the authors review proposed rules from the Financial Crimes Enforcement Network intended at increasing transparency in the domestic residential real estate market.

The Financial Crimes Enforcement Network (FinCEN), a division of the U.S. Department of the Treasury, has proposed new rules aimed at increasing transparency in the domestic residential real estate market.[1] These rules would require professionals involved in certain real estate transactions to disclose information about non-financed (cash) transfers of residential real estate to legal entities or trusts. This comes as part of a large-scale effort by the Treasury to increase transparency in the U.S. residential real estate market.

FinCEN's focus is on "all-cash" residential real estate transactions, which have been identified as a common method for money laundering. While financed transactions are subject to anti-money laundering (AML) standards and must file Suspicious Activity Reports (SAR) under the Bank Secrecy Act, non-financed transactions have not been subject to these requirements. The Treasury estimates that 20–30% of residential real estate purchases in the United States are made without financing, and thus, are not subject to AML checks.[2]

Previously, FinCEN introduced geographic targeting orders (GTOs) in Miami and New York City to mitigate all-cash residential real estate transactions. These GTOs required professionals involved in real estate closings and settlements to report the beneficial owners to the agency.

A NEW FORM

The proposed rules would replace the existing GTOs with a nationwide reporting requirement. FinCEN proposes a new form, the Real Estate Report, to streamline the SAR reporting requirements. The Real Estate Report would need to:

1. Identify the business filing the report (the reporting person);

*The authors, attorneys with ArentFox Schiff LLP, may be contacted at warren.seay@afslaw.com and rachel.collins@afslaw.com, respectively.

2. Provide information about the real property being sold or transferred;

3. Provide information about the transferor (e.g., the seller);

4. List beneficial ownership information for the legal entity or trust acquiring the property; and

5. Provide information about any payments made.

The proposed rule would require reporting within 30 days after transfers of various types of residential real estate, including single-family houses, townhouses, condominiums, and cooperatives, as well as buildings designed for occupancy by one to four families and transfers of vacant or unimproved land zoned for occupancy by one to four families. Except for a narrow list of exemptions, all sales under these categories would need to be reported, regardless of the purchase price.

The Real Estate Report assigns one person in the property transfer chain the responsibility for filing reports and recordkeeping, which could be the seller, purchaser, settlement agent, or attorney. Importantly, the rules allow contracting parties to enter into a written agreement designating who will file the report. This designation might, for example, be part of the purchase and sale agreement or escrow documentation and potentially serve to shift or limit liability. The filer must keep a copy for five years along with an attestation form executed by the transferee or transferee's representative certifying the accuracy of the beneficial ownership information.

In residential real estate sales, all parties involved, including sellers, developers, title companies, attorneys, and closing agents, need to be aware of reporting requirements. Consider a situation where a commercial developer builds a residential condominium building or build-to-sale single family community and subsequently sells-off residential units to individual buyers. If a condo unit or single-family home is bought with cash, such sale could trigger a filing requirement with FinCEN.

The consequences of failure to comply with these responsibilities are still unclear. The regulation, in its current form, does not impose direct liability. Instead, Treasury insists that the Real Estate Report would be used by FinCEN and other law enforcement agencies to investigate and prosecute money laundering under existing law.

KEY POINT

FinCEN's proposed rule would apply to various individuals and businesses involved in real estate, specifically those facilitating non-financed transfers of residential real estate property.

NOTES:

[1] https://public-inspection.federalregister.gov/2024-02565.pdf.

[2] https://home.treasury.gov/system/files/136/2024-National-Money-Laundering-Risk-Assessment.pdf.