

FinCEN proposes new reporting requirements for residential real estate transactions

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FinCEN announced its long-awaited proposed rule targeting illicit finance in the real estate sector and, on the same day, Treasury released its 2024 national illicit finance risk assessments.

On February 7, the Department of the Treasury's (Treasury) Financial Crimes Enforcement Network (FinCEN) announced a [proposed rule](#) designed to increase transparency in certain residential real estate transactions (the Proposed Rule).¹ The Proposed Rule follows FinCEN's [advance notice of proposed rulemaking](#) (the ANPRM) issued in December 2021, which sought comment on potential regulations that would extend certain recordkeeping and reporting requirements under the Bank Secrecy Act (BSA) to businesses involved in real estate transactions. The Proposed Rule adopts a more "streamlined reporting framework" relative to the ANPRM and stops short of requiring real estate professionals to maintain anti-money laundering and countering the financing of terrorism (AML/CFT) compliance programs.

Instead, the Proposed Rule would require certain professionals involved in the non-financed transfer of residential real estate to legal entities or trusts to submit a "Real Estate Report" to FinCEN, which would contain key details about the transaction, the parties involved, and the beneficial ownership of the legal entity or trust that receives the property. FinCEN solicited comment on the Proposed Rule and its reporting framework—comments are due by April 16, 2024.

On the same day FinCEN announced the Proposed Rule, Treasury released the 2024 National Risk Assessments on [Money Laundering](#) (the NMLRA), [Terrorist Financing](#), and [Proliferation Financing](#) (collectively, the Risk Assessments), which highlight the most significant illicit finance threats, vulnerabilities, and risks facing the United States.² Although many of the concerns identified in the Risk Assessments overlap with the concerns identified in risk assessments released in recent years, Treasury notably highlighted the risks arising from the lack of comprehensive AML/CFT regulations in certain sectors, including the investment adviser (IA) sector, reflecting Treasury's increasing efforts to impose AML/CFT compliance requirements across the financial industry, including non-traditional financial services sectors.

What would the Proposed Rule require?

Scope of the Proposed Rule

Although FinCEN has reported for many years on money laundering and illicit finance through real estate transactions,³ the agency to date has taken an incremental approach to regulating the real estate sector and has not imposed comprehensive AML/CFT regulations for the real estate industry. In 2012 and 2014, for example, FinCEN issued rules that extended AML/CFT program obligations to residential mortgage loan originators and housing-related government-sponsored enterprises, respectively.⁴ Subsequently, in 2016, FinCEN began to issue Residential Real Estate Geographic Targeting Orders (GTOs), which require title insurance companies to submit reports concerning non-financed purchases of residential real estate above a certain price threshold by legal entities in select metropolitan areas of the United States.

⁵ More recently, in 2021, FinCEN released the ANPRM, which solicited comment on whether FinCEN should expand AML/CFT program and suspicious activity report (SAR) filing requirements to persons involved in real estate closings and settlement, similar to the requirements that apply to financial institutions.

After considering public comments, FinCEN decided against extending AML/CFT program and SAR-filing requirements to the real estate sector, reasoning that those requirements would be overly burdensome to persons involved in real estate transactions, many of which are small businesses that lack the means or expertise to maintain a compliance program or make the risk-based judgments necessary to identify and report suspicious activity. Instead, the Proposed Rule would require certain businesses—including settlement agents, title insurance agents, escrow agents, and attorneys—to submit a new type of SAR, which will be referred to as a Real Estate Report,⁶ for non-financed transfers of residential real estate to legal entities and trusts.⁷ Submitting Real Estate Reports would be mandatory for covered transactions and the reports would be exempted from the confidentiality requirements that otherwise apply to SARs.

Real Estate Report filing requirements

Overview

The Proposed Rule would impose reporting requirement for all “reportable transfers,” which are defined as non-financed transfers of an ownership interest⁸ in residential real estate to a legal entity (a Transferee Entity) or trust (a Transferee Trust). The reporting responsibilities would apply to certain persons involved in real estate closing and settlement (Reporting Persons), which include settlement agents, title insurance agents, escrow agents, and attorneys, and others.

Reporting requirements under the Proposed Rule would only apply to transfers of *residential* real estate property, which is broadly defined to include single family houses, townhouses, condominiums, and cooperatives, as well as apartment buildings. Although reporting requirements would not apply to *exclusively* commercial property, the Proposed Rule would apply to property that is *partially* commercial (e.g., a single-family residence that is located above a commercial enterprise). Reporting requirements would also apply to certain types of land on which a residence has not yet been built (e.g., property zoned for residential real estate).⁹ Under the Proposed Rule, there is no minimum purchase price for a transaction to be reportable under the Proposed Rule, which is a departure from the current GTO reporting requirements. Moreover, reporting requirements would apply regardless of whether consideration is exchanged; however, transfers involving an easement or that occur as a result of death, divorce, or bankruptcy would be exempt.

For a transaction to be reportable under the Proposed Rule, it must be “non-financed,” meaning it does not involve an extension of credit that is (1) secured by the transferred property and (2) extended by a financial institution that is subject to the AML/CFT program and SAR filing requirements of the BSA. Accordingly, transactions financed by a private lender that is not required to maintain an AML/CFT program or file SARs would fall within the scope of reporting requirements.

In addition, reporting requirements would only apply if at least one of the new owners of residential real property is a Transferee Trust or Transferee Entity (whether domestic or foreign).¹⁰ Transferee Trusts are broadly defined to include any legal arrangement created when a person places assets under the control of a trustee for the benefit of one or more persons or for a specified purpose.¹¹ In the case of Transferee Trusts, a trust would be exempt if it is (1) a securities reporting issuer, (2) a trust in which the trustee is a securities reporting issuer, or (3) a subsidiary of an exempt trust.

Transferee Entities are similarly broadly defined to include any person other than an individual or Transferee Trust, and thus would include corporations, partnerships, estates, associations, limited liability companies, and limited partnerships. However, the Proposed Rule would exempt certain categories of entities from the scope of the Transferee Entity definition (and thus from the scope of reporting requirements). Specifically, certain highly regulated entities would be exempt from the definition of Transferee Entity, including securities reporting issuers, banks and other financial institutions, money services businesses, brokers or dealers in securities, other Exchange Act or Commodity Exchange Act registered entities, and subsidiaries of exempt entities. Importantly, certain entities that are exempt from reporting requirements under FinCEN’s Beneficial Ownership Information Reporting Rule (BOI Reporting Rule) would *not* be exempt under the Proposed Rule, including large operating companies (entities with a physical operating presence in the United States that meet certain thresholds for revenue and employee count).

What must be reported?

Real Estate Reports would contain certain fundamental details about the transaction, the payment, the parties, and the Transferee Entity or Transferee Trust.¹² In particular, Real Estate Reports would be required to include:

- The beneficial ownership of the Transferee Entity or Transferee Trusts and identifying information about the beneficial owners (including name, address, and a unique identifying number);
- Information concerning individuals representing the transferee;
- Information about the Reporting Person and transferor (e.g., the seller), including name, address, and a unique identifying number;
- Information about the property, including the address; and
- Information about the payments made, including the total consideration, method of payment, and the accounts used.

For Transferee Entities, the definition of “beneficial owner” is the same as the definition used under the BOI Reporting Rule. Specifically, a “beneficial owner” is defined as any individual who indirectly exercises “substantial control” over the Transferee Entity or owns or controls at least 25 percent of the Transferee Entity’s ownership interests.¹³ The beneficial owner of a Transferee Trust, meanwhile, is any individual who (1) is a trustee; (2) otherwise has authority to dispose of transferee trust assets; (3) is a beneficiary who is the sole permissible recipient of income and principal from the transferee trust or who has the right to demand a distribution of, or to withdraw, substantially all of the assets of the transferee trust; (4) is a grantor or settlor of a revocable trust; or (5) is the beneficial owner of a legal entity or trust that holds one of these aforementioned positions.

Who is required to file the Real Estate Report?

Only one Reporting Person would be required to file a Real Estate Report for a given transfer, and transfers that do not involve a Reporting Person would not be covered by reporting requirements. In addition, Reporting Persons would not be required to report changes to beneficial ownership of a Transferee Entity or Transferee Trust on an ongoing basis (unlike the BOI Reporting Rule).

The Reporting Person for a transfer would be determined in one of two ways:

- A “**cascade method**,” which would use a list of seven different functions that a real estate business may perform in a sale or transfer of residential real property, with the reporting obligation for any sale or transfer applying to the business that performed a function that appears highest on the list. The cascade would begin with real estate professionals providing certain settlement services in the settlement process (in particular, those that serve as closing or settlement agent or prepare a closing or settlement statement), followed by persons that underwrite an owner’s title insurance, disburse the greatest amount of funds, prepare the evaluation of the title status, or prepare the deed associated with the transfer.
- By **written agreement** among the real estate businesses that perform the functions described in the cascading list.

FinCEN has solicited public comment on the Proposed Rule generally (including its potential burdens), as well as the scope of the rule and the information that must be reported. Stakeholders are encouraged to make their voices heard.

When is a Real Estate Report required?

Reporting Persons would be required to file a Real Estate Report within 30 days after the date of the property’s transfer and would also be required to retain a copy of the Real Estate Report as well as other documents related to the transaction for a period of five years.¹⁴

National Illicit Finance Risk Assessments

On the same day FinCEN announced the Proposed Rule, Treasury released the Risk Assessments, which identify the most significant threats and vulnerabilities facing the United States through money laundering, terrorist financing, and proliferation financing. The Risk Assessments are intended to help the public and private sector understand the current illicit finance environment and inform their risk mitigation strategies. The findings of the Risk Assessments will inform Treasury’s 2024 National Strategy for Combatting Terrorist and Other Illicit Finance, which Treasury will release in the coming weeks.

The concerns identified in the NMLRA are consistent, at a high level, with those identified in the most recent iterations of the reports released in 2022,¹⁵ finding that fraud, drug trafficking, cybercrime, human trafficking and human smuggling, and corruption continue to generate the largest amount of illicit proceeds laundered through the United States. Consistent with prior risk assessments, Treasury also highlighted the use of virtual assets, corporate entities, luxury and high-value goods, as well as AML/CFT compliance failures by financial institutions as key money laundering vulnerabilities. As it has

in prior NMLRAs, Treasury also highlighted vulnerabilities arising from the “the lack of comprehensive AML/CFT coverage” in other sectors. Treasury called particular attention to vulnerabilities through the IA industry, foreshadowing FinCEN’s recently released proposed rule that would extend AML/CFT requirements to certain IAs (which will be discussed in a forthcoming client update).¹⁶

Notably, Treasury also identified the lack of AML/CFT requirements for third-party payment processors, attorneys, and accountants as significant money laundering vulnerabilities. Although there is no indication that Treasury intends to issue rules extending AML/CFT requirements to attorneys and accountants (and legislation to that effect has stalled), the NMLRA reflects Treasury’s increasing focus on AML/CFT compliance outside traditional financial services sectors and, like the Proposed Rule, the potential expansion of AML/CFT rules to additional industries.

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- ¹ FinCEN, Press Release, FinCEN Proposes Rule to Combat Money Laundering and Promote Transparency in Residential Real Estate (February 07, 2024), <https://www.fincen.gov/news/news-releases/fincen-proposes-rule-combat-money-laundering-and-promote-transparency>.
- ² Treasury, Press Release, Treasury Publishes 2024 National Risk Assessments for Money Laundering, Terrorist Financing, and Proliferation Financing (February 7, 2024), <https://home.treasury.gov/news/press-releases/jy2080>.
- ³ See, e.g., FinCEN, Suspected Money Laundering in the Residential Real Estate Industry: An Assessment Based Upon Suspicious Activity Report Filing Analysis (April 2008), https://www.fincen.gov/sites/default/files/shared/MLR_Real_Estate_Industry_SAR_web.pdf.
- ⁴ 77 Fed. Reg. 8148 (Feb. 14, 2012) (codified at 31 CFR part 1029); 79 Fed. Reg. 10365 (Feb. 25, 2014) (codified at 31 CFR part 1030).
- ⁵ FinCEN has renewed and expanded the GTOs multiple times since 2016 to cover additional areas and methods of payment.
- ⁶ Real Estate Reports are technically a category of SAR. Notably, the Anti-Money Laundering Act of 2020 (AMLA) amended the BSA and directed FinCEN to “establish streamlined ... processes to, as appropriate, permit the filing of noncomplex categories of reports of suspicious activity.” See AMLA, section 6202 (codified at 31 U.S.C. 5318(g)(D)(i)(1)). AMLA also authorizes FinCEN to require a class of domestic financial institutions or non-financial trades or businesses to maintain appropriate procedures, including the collection and reporting of information to prevent money laundering and illicit finance.
- ⁷ This reporting framework is intended to capture transactions viewed as high risk on the basis that (a) they do not involve financial institutions that are subject to the BSA, and (b) they involve legal entities and trusts, which are commonly used to disguise the true source, ownership, and origin of assets and funds.
- ⁸ A person would be deemed to hold an “ownership interest” for purposes of the Proposed Rule if the person has rights to the property that are demonstrated through a deed or, for an interest in a cooperative housing corporation, through stock, shares, membership, a certificate, or other contractual agreement evidencing ownership.
- ⁹ Property can fall within the parameters of the Proposed Rule in three ways: (1) it is real property that includes a structure designed principally for occupancy by one to four families; (2) it is land that is vacant or unimproved, and that is zoned, or for which a permit has been issued, for

occupancy by one to four families; or (3) it is a share in a cooperative housing corporation.

- ¹⁰ As a result, transfers would remain reportable even if other transferees are not Transferee Entities or Transferee Trusts (e.g., one of the transferees is an individual).
- ¹¹ Specifically, Transferee Trusts are defined as “any legal arrangement created when a person (generally known as a settlor or grantor) places assets under the control of a trustee for the benefit of one or more persons (each generally known as a beneficiary) or for a specified purpose, as well as any legal arrangement similar in structure or function to the above, whether formed under the laws of the United States or a foreign jurisdiction. A trust is deemed to be a transferee trust regardless of whether residential real property is titled in the name of the trust itself or in the name of the trustee in the trustee’s capacity as the trustee of the trust.”
- ¹² FinCEN intends to develop a standard Real Estate Report form that Reporting Persons may use, and FinCEN intends to provide a separate opportunity later in 2024 for the public to comment on the proposed Real Estate Report form.
- ¹³ The definition of beneficial owner and its underlying terms are discussed in greater depth in our October 6, 2022 [client update](#).
- ¹⁴ Specifically, Reporting Persons would be required to keep a copy of the Real Estate Report for a period of five years, along with a form, signed by the transferee or a transferee’s representative, certifying that the transferee’s beneficial ownership information is correct. The reporting person would also be required to keep a copy of any designation agreement.
- ¹⁵ The 2022 Risk Assessments are discussed in our March 9, 2022, [client update](#).
- ¹⁶ FinCEN, FinCEN Proposes Rule to Combat Illicit Finance and National Security Threats in Investment Adviser Sector (February 13, 2024), <https://www.fincen.gov/news/news-releases/fincen-proposes-rule-combat-illicit-finance-and-national-security-threats>.