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Client Alert

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FinCEN Proposes Rule to Target High Risk Residential Real Estate Transfers

On February 7, 2024, the U.S. Department of the Treasury's Financial Crimes Enforcement Network ("FinCEN") issued a proposed rule that would extend reporting and recordkeeping requirements to persons involved in real estate closings and settlements in residential real estate throughout the United States – without a dollar threshold -- where the transferee is a legal entity or trust, subject to certain exclusions. Under the proposed rule, so-called "reporting persons" would be responsible for notifying FinCEN through the newly created Real Estate Report of transactions in non-financed residential real estate purchased by specified legal entities and trusts, including information regarding beneficial owners of those entities and trusts. FinCEN has identified these transactions as posing heightened risks for the laundering of ill-gotten gains by criminals and corrupt officials, and therefore is proposing to require reports of such transactions.

Though FinCEN has long had the authority to require persons involved in real estate closings and settlements to participate in the nation's anti-money laundering and countering the financing of terrorism ("AML/CFT") framework,[1] it only has used that authority in limited ways to date.[2] This proposed rule would create permanent reporting and recordkeeping requirements for persons involved in real estate closings and settlements regardless of their geographic location.[3] Importantly, FinCEN has considered responses to an earlier advanced notice of proposed rulemaking on persons involved in real estate closings and settlements, and has determined that individuals and entities subject to the proposed rule will not be required to maintain AML/CFT programs or be burdened with the filing of Suspicious Activity Reports ("SARs"), unlike the obligations imposed on other financial institutions. Furthermore, these records are not required to be kept confidential.[4]

REPORTABLE TRANSFERS

The proposed rule would require reporting the transfer of residential real estate anywhere in the United States where the real estate transfer: (1) is not financed by a financial institution required to have an AML program and an obligation to report suspicious transactions; (2) is conveyed to an entity or trust (not an individual); and (3) involves real estate closing and settlement service providers.[5] Under the proposed rule, residential real estate includes all real property that is designed principally for occupancy by one to four families, vacant or unimproved land zoned or permitted for the construction of a structure designed principally for occupancy by one to four families, or shares in a cooperative housing corporation. No minimum dollar value threshold must be met for the transfer to be considered a reportable transfer.

However, a number of transactions that would otherwise fall under the framework above are specifically excluded. A reportable transfer would specifically exclude a grant, transfer, or revocation of an easement; a transfer resulting from the death of an owner of residential real property; a transfer incident to divorce or dissolution of a marriage; a transfer to a bankruptcy estate; or a transfer for which there is no reporting person.[6]

Furthermore, conveyances to a certain set of potential transferees are excluded. These include transfers to individuals, securities reporting issuers, banks, insurance companies, defined investment companies, defined statutory trusts, or entities controlled or wholly owned by any of the foregoing.[7] Transfers to these individuals, entities, or trusts would not be required to be reported under the proposed rule.

REPORTING PERSONS

The proposed rule requires that a reportable transfer be disclosed to FinCEN by a reporting person. The reporting person is determined from a “cascade” of potential persons who might be involved in a real estate settlement or closing. In order of responsibility to report, they are:

1. the closing or settlement agent listed on the closing or settlement statement;
2. the person who prepared the closing or settlement statement for the transfer;
3. the person who files the deed or other instrument transferring ownership with the recordation office;
4. the person who underwrites an owner’s title insurance policy for the transferee;
5. the person who disburses in any form, including from an escrow account, trust account, or lawyers' trust account, the greatest amount of funds in connection with the transfer – including an escrow account, trust account, or lawyer’s trust account;
6. the person who provides an evaluation of the status of the title; or
7. the person who prepares the deed or other legal instrument that transfers ownership of the property.

If no person involved in the transfer is set forth in the first tier of potential reporting persons, the reporting obligation falls to the person involved in the transfer as described in the second tier, if any, and then so on. By agreement, these persons may designate one among them to be the reporting person.[8]

If an employee, agent, or partner acting within the scope of such individual's employment, agency, or partnership would be the reporting person, then the individual's employer, principal, or partnership is deemed to be the reporting person. If no person that fits any of these descriptions participates in the transaction, there is no reportable transfer.[9]

INFORMATION REPORTED

The reporting person must use a Real Estate Report to file information concerning the following: (1) reporting person; (2) transferee (either a transferee entity or transferee trust); (3) beneficial owners of the transferee entity or transferee trust and the signing individuals associated with them; (4) transferor; (5) residential real property; (6) information concerning payments; and (7) information concerning hard money, private, or other similar loans.[10] The Real Estate Report requires specific information pertaining to each category above and the rules should be closely observed prior to submitting the Report.

TIMELINE

The public has until April 16, 2024, to submit comments to the proposed rule. The final rule would not become effective until one year following the date of the final rule issuance. The reporting person would be required to file the Real Estate Report no later than thirty days after the date of closing.

We invite all King & Spalding clients and friends to reach out to your firm contact should you desire to provide feedback to FinCEN or have questions concerning this important proposed change to the rules. King & Spalding attorneys are prepared to address this and other developments that pertain to the AML obligations of our clients.

[1] The definition of "financial institution" was expanded with the enactment of the Anti-Drug Abuse Act of 1988 to include persons involved in real estate closings and settlements.
[2] *See* e.g., FinCEN's use of Geographic Targeting Orders to identify all-cash buyers in certain geographic areas on a time-limited basis.
[3] *See* "Anti- Money Laundering Regulations for Residential Real Estate Transfers," 89 FR 12424 (Feb. 16, 2024).
[4] *Id.* at 12470.
[5] *See id.* at 12466.
[6] *Id.*
[7] *Id.* at 12469-70.
[8] *Id.* at 12466-67.
[9] Id. at 12467.
[10] *Id.* at 12467-68.