

FinCEN Requests Input on Potential AML Requirements for Real Estate Transactions

December 16, 2021

On December 6, the Financial Crimes Enforcement Network (**FinCEN**) **requested** public input, through an advanced notice of proposed rulemaking (the **ANPR**), on the potential imposition of nationwide recordkeeping and reporting requirements on persons involved in certain residential and commercial real estate transactions pursuant to its authority under the Bank Secrecy Act (**BSA**).¹

FinCEN has previously imposed anti-money laundering (**AML**) requirements on certain non-bank participants in financed residential real estate transactions² and has used geographic targeting orders to impose specific recordkeeping and reporting requirements on title insurance companies in certain transactions involving cash purchases of residential real estate by legal entities.³ However, other real estate transactions, including most commercial real estate transactions that do not involve bank financing, generally do not trigger specific AML recordkeeping or reporting requirements.

The ANPR signals that FinCEN views this as a “gap” to be filled; it asserts that “money laundering risks stem from transactions in both the commercial and residential real estate sectors, and both merit appropriate regulatory treatment.” FinCEN seeks comment on, among other things, what parties should be subject to, and which transactions should trigger, such recordkeeping and reporting requirements.

Comments are due by February 7, 2022.

If you have any questions concerning this memorandum, please reach out to your regular firm contact or the following authors

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¹ The Bank Secrecy Act refers to the Currency and Financial Transactions Reporting Act of 1970, as amended by the USA PATRIOT Act of 2001 and other legislation.

² See 31 C.F.R. Parts 1029 and 1030.

³ Press Release, FinCEN Renews Real Estate Geographic Targeting Orders for 12 Metropolitan Areas (Oct. 29, 2021).



KEY TAKEAWAYS

- The ANPR requests input on which transactions will be covered. The ANPR appears mainly focused on non-financed transactions, although there is some lack of clarity especially as it relates to commercial real estate.
 - The ANPR and public commentary refer to extending AML regulations to “all cash” or “non-financed” real estate transactions. Much of the preamble appears to be consistent with coverage only of transactions that do not involve the extension of financing, including with respect to commercial real estate.
 - However, a footnote in the ANPR defining these terms states that they refer to any real estate transaction that is not financed by a loan, mortgage or other similar instrument, issued by a bank or non-bank residential mortgage lender or originator. This could be read to suggest that commercial real estate transactions that are financed by entities that are not banks (such as private debt funds, conduits for commercial mortgage-backed securities or other commercial non-bank lenders) could qualify as “non-financed” transactions and might be subject to any requirements imposed by FinCEN. To the extent that FinCEN looks to capture real estate transactions that are not currently subject to programmatic AML regulation, it could decide to include commercial real estate transactions that are not financed by bank loans, potentially including both all-cash transactions and transactions that are financed by non-bank lenders.
 - FinCEN has not settled on a particular definition in the ANPR and acknowledges that the line between “financed” and “non-financed” transactions may be more difficult to define in commercial real estate transactions since “payments structures are more complex than in the residential real estate market.” The ANPR specifically asks whether a proposed rule should be limited to “non-financed” transactions, and how to define the term.
- The ANPR states that FinCEN is considering whether to address residential and commercial real estate transactions separately. FinCEN notes it may take an “iterative approach” and impose requirements on residential real estate transactions first and then later commercial real estate transactions.
- The ANPR requests comment on who should be subject to reporting and recordkeeping requirements, and specifically asks about the following: (i) real estate lawyers and law firms; (ii) real estate agents/brokers/settlement agents; (iii) title insurance companies; (iv) title and escrow agents and companies; (v) real estate investment companies; (vi) real estate development companies; (vii) real estate property management companies; (viii) real estate auction houses; (ix) investment advisers; (x) private money lenders; and (xi) money service businesses.
- The ANPR also requests comment as to what general approach to take with respect to such requirements. Specifically, it appears that FinCEN is weighing whether to impose (1) a targeted set of requirements with respect to collection and reporting of information on specific types of transactions or (2) the full suite of AML compliance requirements on participants in real estate transaction, including the requirement to file suspicious activity reports and implement an AML program.
- Whether the ANPR advances to a final rule, particularly with respect to commercial real estate, is unclear at this stage.

- The ANPR has support among law enforcement and is styled as part of a “whole-of-government” effort to combat corruption in statements by U.S. Treasury officials,⁴ along with the notice of proposed rulemaking FinCEN released the following day to implement the beneficial ownership reporting requirements of the Corporate Transparency Act.⁵
- The ANPR itself and public statements by U.S. Treasury officials highlight past failed efforts to impose AML requirements on real estate transactions, and describe the ANPR as an attempt to close gaps or loopholes.⁶ The ANPR also cites the Financial Action Task Force’s criticism from its 2016 evaluation of the United States that a “failure to regulate real estate transactions . . . [is] a significant deficiency.”
- Many real estate transactions, and those involved in closing real estate transactions, have previously avoided AML regulation. In 2002, “persons involved in real estate closings and settlements” were specifically exempted by FinCEN from the requirement to implement and maintain an AML program.⁷ In 2003, FinCEN issued an advanced notice of proposed rulemaking regarding the implementation of AML programs by “persons involved in real estate closings and settlements,” but a rule was never finalized.
- The ANPR solicits comments on “whether the risk in non-residential real estate is sufficient to justify the burdens that a reporting requirement for non-residential real estate could impose.”
- In the event that a final rule is implemented, the practical impact for commercial real estate investors seems clear: there may be additional disclosure and diligence requirements regarding who they and their beneficial owners are.
 - The information that would need to be disclosed will depend on the approach taken by FinCEN. In the ANPR, FinCEN asks commentators for feedback on who may be in a “position to ascertain and report” the following: (i) the identity of the legal entity or legal arrangement purchaser of the real estate; (ii) the natural person(s) who are the direct or indirect owners of the legal entity or arrangement purchaser; (iii) the specific details of the transaction (*e.g.*, date of sale, location of property, sale price, and any other terms or conditions); (iv) the source of funds; (v) the form of payment (*e.g.*, wire transfer, check, currency); (vi) the purpose of the transaction; (vii) the intended use of the proceeds of a sale; and (viii) the businesses involved in the transfer of funds.
 - If FinCEN requires broad information reporting in connection with commercial real estate transactions, and particularly if it takes an expansive view of “non-financed” transactions, the following practical implications would need to be considered by stakeholders:
 - Individual investors who have been drawn to invest in real estate-focused funds due to the anonymity that such investments has traditionally provided might be deterred from making such investments.

⁴ Remarks by Secretary of the Treasury Janet L. Yellen at the Summit for Democracy (Dec. 9, 2021),

<https://home.treasury.gov/news/press-releases/jy0524>, Remarks by Deputy Secretary of the Treasury Wally Adeyemo on Anti-Corruption at the Brookings Institution (Dec. 6, 2021), <https://home.treasury.gov/news/press-releases/jy0516>.

⁵ See Beneficial Ownership Information Reporting Requirements, 86 Fed. Reg. 69,920 (Dec. 8, 2021); The William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. 116-283, 134 Stat. 3388 §§ 6401-6403 (2020).

⁶ *Id.*

⁷ 67 Federal Register 21110-21112 (Apr. 29, 2002). FinCEN initially exempted persons involved in closings and settlements for six months, and then subsequently extended the temporary exemption indefinitely. 67 Federal Register 67547 (Nov. 6, 2002).

- Sovereign wealth funds or other partially or wholly government-owned investment vehicles might reconsider U.S. real estate investments given security or diplomatic concerns.
- Property pricing could be impacted given the location and property type-based value of real estate assets. Although reporting to FinCEN or other governmental regulators should not raise competitive issues, if a counterparty or intermediary were to learn the identity of the ultimate investor in a transaction, it (or another party) could use that information to anticipate the investor's strategy and bid up assets in a particular geographical location or within a particular property type.
- Increased transactional costs and extended deal timelines should be accounted for in deal structuring. Before exact disclosure requirements are published, clues as to the time and resources that might be needed can be drawn from other real estate regulatory contexts (*e.g.*, where requirements to disclose investor information apply under current AML regulations or other, similar regimes, like CFIUS).

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