

Alert | Financial Regulatory & Compliance



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FinCEN Launches Rulemaking Process to Implement Reporting Requirements for Real Estate Sector

On Dec. 6, 2021, the U.S. Department of the Treasury’s Financial Crimes Enforcement Network (FinCEN) issued an **advance notice of proposed rulemaking** (ANPRM) to solicit public comment on potential requirements under the Bank Secrecy Act (BSA) for certain persons involved in real estate transactions to collect, report, and retain information.

Since September 2002, when it published an unrelated ANPRM, FinCEN has consistently expressed concerns with the systemic money laundering vulnerabilities presented by the U.S. real estate sector, both residential and commercial, particularly the ability of illicit actors to launder criminal proceeds through the purchase of real estate.

Money Laundering Risks in the US Real Estate Market

In its 2020 **National Strategy for Combating Terrorist and Other Illicit Financing**, the U.S. Department of the Treasury (“Treasury”) explained that “[c]riminals with widely divergent levels of financial sophistication use real estate at all price levels to store, launder, or benefit from illicit funds.” In that report, Treasury identified the laundering of illicit proceeds through real estate purchases as one of the main vulnerabilities and a key action item for strengthening the U.S. Anti-Money Laundering/Countering the Financing of Terrorism (AML/CFT) framework.

In the ANPRM, FinCEN highlighted an [August 2021 study published by Global Financial Integrity](#), an non-governmental organization, which found that an estimated \$2.3 billion had been laundered through the U.S. real estate market over the previous five years. The study further noted that among the cases it reviewed, over 50% involved Politically Exposed Persons (PEPs).

In support of the foregoing, FinCEN has identified regulatory gaps on non-financed real estate transactions in the United States, and recognized certain money laundering risks and vulnerabilities related to real estate purchases by shell companies of residential real estate and commercial real estate, including:

1. *Residential Real Estate* – In residential real estate transactions, the use of natural person nominees can facilitate money laundering involving domestic and foreign bribery and corruption schemes, sanctions evasion, tax evasion, drug trafficking, and fraud, among other types of offenses.
2. *Commercial Real Estate* – In commercial real estate transactions, payment structures can be more complex than in the residential real estate market and present additional rulemaking challenges because, among other issues, in commercial real estate the line between financed and non-financed transactions that is relatively well-defined in the residential real estate transactions is not always clear. An entity may, for example, finance the purchase of a large commercial property via the issuance of bonds. It is unclear whether such a transaction would be viewed as a cash transaction from the point of view of the entities required to report such a transaction. A commercial real estate transaction may also involve many other transactions, such as in the development of a large commercial real estate project, where there may be several transactions involved in the development phase and subsequent conveyance of a commercial real estate property over the course of months or years.

Current Law¹

The Currency and Foreign Transactions Reporting Act of 1970, as amended by the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), the Anti-Money Laundering Act of 2020, and other legislation comprise the legislative framework commonly referred to as the BSA.

Under the BSA, any financial institution, including “persons involved in real estate closings and settlements,” may be required to report any suspicious transaction relevant to a possible violation of law or regulation (SAR). However, such BSA reporting laws do not currently extend to all participants in a real estate transaction.

FinCEN’s regulations implementing the BSA require banks, non-bank residential mortgage lenders, and originators to file SARs and establish AML/CFT programs, but the same FinCEN regulations (i) exempt other persons involved in real estate closings and settlements from the requirement to establish AML/CFT programs and (ii) do not impose a SAR filing requirement on such persons.

¹ The BSA is codified at 12 U.S.C. § 1829b, 12 U.S.C. §§ 1951-1960, 31 U.S.C. §§ 5311-5314 and §§ 5316-5336, and implementing regulations at 31 C.F.R. chapter X.

Scope of Potential Rules

Accordingly, FinCEN's goal through the ANPRM is to implement an effective system to collect and permit authorized uses of information concerning potential money laundering associated with non-financed transactions in the U.S. real estate market.

As such, FinCEN believes that any proposed regulation should require persons involved in non-financed real estate closings and settlements to collect, report (likely by filing SARs), and retain information about specified non-financed purchases of real estate. Such an approach would involve the application of AML/CFT program rules that traditionally include four requirements: (i) adoption of AML/CFT policies and procedures; (ii) designation of an AML/CFT compliance officer; (iii) establishment of an AML/CFT training program for appropriate employees; and (iv) independent testing of the program to ensure compliance.

FinCEN is considering proposing such a rule that would apply throughout the United States and would contain no lower reporting dollar threshold.

FinCEN will accept written comments in response to the ANPRM until Feb. 7, 2022.

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