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U.S. Treasury Department Will Require Certain Title Insurance Companies and Their Agents To Report the Identities of the Ultimate Beneficial Owners of Entities Used To Buy Manhattan or Miami Residential Real Estate in All-Cash Purchases

On Jan. 13, 2016, the Financial Crimes Enforcement Network of the U.S. Department of the Treasury (FinCEN) issued Geographic Targeting Orders (GTOs) applicable to certain U.S. title insurance companies and their subsidiaries and “agents” (collectively, the Targeted Title Insurance Companies), requiring the Targeted Title Insurance Companies “involved” in a Covered Transaction (as defined below) to

- (i) report to FinCEN on an electronic Form 8300 within 30 days of the closing of a Covered Transaction the identity of the individual primarily responsible for representing (the Buyer Representative) any legal entity (*i.e.*, corporation, limited liability company, partnership or similar business entity, domestic or non-U.S.) that purchases (the Buyer Entity) residential real property located in Miami-Dade County, Florida for a purchase price over US\$1 million or in the Borough of Manhattan for a purchase price over US \$3 million (each, a Covered Property) that is ***unfinanced and paid for, at least partially***, with currency, a cashier’s check, certified check, traveler’s check or money order (a Covered Transaction);
- (ii) record a copy of the Buyer Representative’s driver’s license or passport;
- (iii) report to FinCEN the identity of the Buyer Entity;
- (iv) report to FinCEN the identity of the ultimate beneficial owner, which is any individual who directly or indirectly owns 25% or more of the equity of the Buyer Entity (the UBO);

- (v) record a copy of the UBO's driver's license or passport;
- (vi) report to FinCEN the date of closing, the total amount transferred by currency and/or checks, the total purchase price of the Covered Property and the address of the Covered Property; and
- (vii) report to FinCEN information about the Targeted Title Insurance Companies.

If the Purchaser Entity is a limited liability company – which frequently is the case – the Targeted Title Insurance Companies must disclose the name, address and taxpayer identification number of all of its members. Although not discussed in the GTOs, it would appear that common law trusts would not qualify as Buyer Entities subject to being reported.

Effective Period

The FinCEN press release states that the GTOs are effective for six months, from March 1, 2016, to Aug. 27, 2016. We expect FinCEN to extend the effectiveness of the GTOs for one or more additional temporary periods after Aug. 27, 2016, until FinCEN adopts some type of regulation or order of general applicability requiring the reporting and record-keeping, on a national basis, described in the GTOs.

Record-Keeping Obligation

Under the GTOs, Targeted Title Insurance Companies will be required to retain all records relating to compliance with the GTO for a five-year period from the last day that the GTO is in effect, including any renewals thereof. Thus, at a minimum, records will need to be kept until at least Aug. 27, 2021. The records should be stored in a manner such that they can be easily retrieved to respond to a law enforcement records request or compulsory legal process, including requests from FinCEN.

Open Questions

One thing that the GTOs leave undefined is who precisely is an “agent” of a title insurance company. Read literally, attorneys, accountants, and other third party agents working on behalf of a Targeted Title Insurance Company in connection with the purchase of a Covered Property appear to be subject to the GTO's reporting requirements. Also undefined is the term “involved.” To what degree is an agent of a Targeted Title Insurance Company “involved” in a Covered Transaction? Moreover, does the Buyer Representative include real estate brokers? Many Manhattan- or Miami-based real estate brokers are often the only points of contact in the United States for non-resident alien real estate purchasers, and these brokers assist their clients in closing on their properties.

Past Regulatory Efforts and Possible Future Regulatory Efforts

This is not the first time the United States Government has attempted to require anti-money laundering (AML) controls in residential real estate purchases. In April 2003, FinCEN published an Advance Notice of Proposed Rulemaking seeking comment on, among other questions, whether “persons involved in real estate closings and settlements,” such as title agents and real estate attorneys, should be required to adopt AML programs. FinCEN abandoned that AML program effort of nearly 13 years ago (and has temporarily exempted “persons involved in real estate closings and settlements” from having to adopt an AML program), but FinCEN in February 2012 began requiring residential mortgage lenders and originators to adopt AML programs and to file suspicious activity reports. A series of *New York Times* articles published earlier in 2015 regarding how U.S. legal entities controlled by unknown domestic and foreign individuals were purchasing high-end residential real estate in Manhattan on an all-cash basis appears to have caused FinCEN to become concerned that transactions of this type might be effected in an attempt to hide illicit proceeds. FinCEN is now covering the Targeted Title Insurance Companies because, according to FinCEN, “[t]itle insurance companies play a central role that can provide FinCEN with valuable information about real estate transactions of concern.” FinCEN has added that it “appreciates the

assistance and cooperation of the title insurance companies and the American Land Title Association in protecting the real estate markets from abuse by illicit actors.”

We believe the GTOs will be the first in a series of U.S. Government steps to track and, if appropriate, seize or freeze residential real estate properties purportedly acquired through ill-gotten gains. If so, this can pose legal and compliance risks to financial institutions, real estate developers, title insurance agents, and other third parties who unwittingly participate in transactions of this type.

This *GT Alert* was prepared by **Jared E. Dwyer, Carl A. Fornaris, Robert J. Ivanhoe, Gary A. Saul, Mark P. Schnapp, Wendy Li, and Shannon Bothwell**. Questions about this information and the applicability of GTOs can be directed to:

- > [Jared E. Dwyer](mailto:dwyerje@gtlaw.com) | +1 305.579.0564 | dwyerje@gtlaw.com
- > [Carl A. Fornaris](mailto:fornarisc@gtlaw.com) | +1 305.579.0626 | fornarisc@gtlaw.com
- > [Robert J. Ivanhoe](mailto:ivanhoer@gtlaw.com) | +1 212.801.9333 | ivanhoer@gtlaw.com
- > [Gary A. Saul](mailto:saulg@gtlaw.com) | +1 305.579.0846 | saulg@gtlaw.com
- > [Mark P. Schnapp](mailto:schnappm@gtlaw.com) | +1 305.579.0541 | schnappm@gtlaw.com
- > [Wendy Li](mailto:liw@gtlaw.com) | +1 212.677.8787 | liw@gtlaw.com
- > [Shannon Bothwell](mailto:bothwells@gtlaw.com) | +1 305.579.0544 | bothwells@gtlaw.com
- > Or your [Greenberg Traurig](#) attorney

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| Berlin-GT Restructuring⁻ +49 (0) 30 700 171 100 | London[*] +44 (0)203 349 8700 | Phoenix +1 602.445.8000 | Warsaw[~] +48 22 690 6100 |
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| Boston +1 617.310.6000 | Mexico City⁺ +52 55 5029.0000 | San Francisco +1 415.655.1300 | Westchester County +1 914.286.2900 |
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