

# Enhancing Transparency in Real Estate: FinCEN's New Reporting Requirements for Non-Financed Transfers

## Corporate News: A Legal Update

By Karen Tobin on February 8, 2024

On February 7, 2024 FinCEN issued a Notice of Proposed Rulemaking that would require certain professionals involved in real estate closings and settlements to report information to FinCEN about non-financed transfers of residential real estate to legal entities or trusts. FinCEN's proposal targets residential real estate transfers considered high-risk for money laundering.

FinCEN states that illicit actors often favor non-financed transfers or "all-cash" sales of residential real estate to avoid scrutiny from financial institutions that have anti-money laundering (AML) program and Suspicious Activity Report (SAR) filing requirements under the Bank Secrecy Act. To obscure their identities, illicit actors often hold residential real estate in a legal entity or trust. These types of transfers have been identified as vulnerable to money laundering, and FinCEN believes that the risk of illicit activity is sufficient to require reporting.

If finalized, the rule would aim to promote transparency while minimizing potential business burden. Professionals involved in real estate closings and settlements would remain exempt from the anti-money laundering compliance program requirements of the Bank Secrecy Act. The rule would require businesses, including attorneys, performing specified closing or settlement functions for the non-financed sale or transfer of residential real property to an entity or trust, to collect and report information to FinCEN. This information includes: Beneficial ownership information for the legal entity (transferee entity) or trust (transferee trust) receiving the property, information about individuals representing the transferee entity or transferee trust, information about the business filing the report (the reporting person), information about the residential real property being sold or transferred, information about the transferor (e.g., the seller), and information about any payments made.

The proposed rule would require reporting within 30 days after transfers of various types of residential real property, including single-family houses, townhouses, condominiums, and cooperatives, as well as buildings designed for occupancy by one to four families. It would also require reporting on transfers of land that is vacant or unimproved, but that is zoned, or for which a permit has

been issued, for occupancy by one to four families. In the case of reportable purchases, there is no threshold purchase price for the transfer; in other words, the transfer would be reportable irrespective of purchase price. Likewise, transfers of ownership for which no consideration is exchanged, such as a gift, would need to be reported. Exempted types of transfers would be those involving an easement, occurring as the result of the death of the property's owner, resulting from a divorce, or made to a bankruptcy estate. Generally, for a transfer to be reportable, it would need to be non-financed, meaning that it does not involve an extension of credit that is both secured by the transferred property and extended by a financial institution subject to an anti-money laundering program and suspicious activity reporting obligations. However, in addition, transfers financed by private lenders that do not have an obligation to maintain an anti-money laundering program and a requirement to file Suspicious Activity Reports would also be covered by the reporting requirement.

Who would be responsible for filing the report? The obligation to file Real Estate Reports would generally apply to settlement agents, title insurance agents, escrow agents, and attorneys. However, only one such real estate business would be required to file a report for any given reportable transfer. The rule identifies two ways in which the reporting person would be determined. The default method ("Cascade Method") 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. For example, the first function on the list is the business listed as the agent on the closing or settlement statement. If no such business is involved in the transfer, then the reporting obligation would apply to any business that performed the second function on the list (i.e., the business that prepared the closing or settlement statement), and so on down the list. As an alternative method, which is designed to provide flexibility and reduce potential business burden, the real estate businesses that perform the functions described in the cascading list may enter into a written agreement with each other to designate a professional that would file the report.

The reporting person would be required to keep a copy of the Real Estate Report for five years, along with a form signed by the transferee or transferee's representative certifying that the transferee's beneficial ownership information is correct. Copies of any designation agreement would be required to be kept by the reporting person and other parties to it.

FINCEN is encouraging the public to provide written comments in response to the proposed rule.

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