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# FINCEN – WHAT IS IT AND WHAT DO WE NEED TO KNOW?



# WHAT IS FINCEN?

## **“FinCEN”**

- Financial Crimes Enforcement Network
- Established in 1990
- Bureau of U.S. Dept. of Treasury

## **Legal Authority**

- Bank Secrecy Act (“BSA”), codified at 12 U.S.C. §§1829b, 1951-1959 and 31 U.S.C. §§5311-5314, 5316-5332, regulations implementing the BSA in 31 C.F.R. Ch. X, Currency and Financial Transactions Reporting Act of 1970, as amended by Title III of USA Patriot Act of 2001

## **Purpose**

- Enforcement of Anti-Money Laundering (“AML”) laws
- Track purchases by terrorists, drug traffickers, corrupt officials, etc.
- Detect, deter and disrupt terrorist financing networks

## **Effect on Real Estate Transactions**

- Govt. found “Bad Guys” buying real estate with “dirty money”
- Lack of reporting through banks and lenders b/c no loans utilized
- GTO requires reporting underlying ownership for “Covered Transactions”

# TIME FOR LAUNDRY!



# WHAT IS FINCEN?

Anti-Money Laundering Act of 2020 (AML) which was attached to the National Defense Authorization Bill of 2020 (which was passed in early 2021 when Congress overrode President Trump's veto in 2020). The AML contains the Corporate Transparency Act (CTA) where Congress tells FinCEN it shall actually make the rules contained here: <https://home.treasury.gov/news/press-releases/jy1974> [home.treasury.gov].

# WHAT IS FINCEN?



Its mission is “to safeguard the financial system from illicit use and combat money laundering and promote national security through the collection, analysis, and dissemination of financial intelligence and strategic use of financial authorities.”

# WHY FINCEN?

## MONEY LAUNDERING

### STEP 1

Money deposited into banks in small amounts not triggering any duty to report.

### STEP 2

Money transferred through various transactions, including real estate, to make the audit trail hard to follow

### STEP 3

Money rinsed through repeated transactions, so money laundered and appearing to have legitimate origins. Now the money is “clean”.

# WHY FINCEN?

## **Real Estate and Money Laundering**

- “Illicit actors are exploiting the U.S. residential real estate market to launder and hide the proceeds of serious crimes with anonymity, while law-abiding Americans bear the cost of inflated housing prices,” - FinCEN Dir. Andrea Gacki
- Real estate has been consistently indicated as a risk in National Money Laundering Assessment since at least 2015
- Customer due diligence for real estate has been part of Financial Action Task Force recommendations since 2012
- “[t]he purchase of real estate allows for the movement of large amounts of funds all at once in a single transaction as opposed to multiple transactions of smaller values.” See Financial Action Task Force, Guidance for a Risk Based Approach: Real Estate Sector (July 2022)
- Anticorruption group Global Financial Integrity estimated “at a minimum, US\$2.3 billion was laundered through the real estate sector in the U.S.” between 2015-2020

# WHAT IS A GTO?



## “GTO” – Geographic Targeting Order

FinCEN Director may issue orders regarding recordkeeping and reporting on domestic financial institutions or non-financial trades or business

**Requires title insurers, their subsidiaries and their agents, to collect and report beneficial ownership information about certain buyers in “Covered Transactions,” in certain types of real property transactions, located in certain counties in the United States**

First GTO issued in January, 2016, extended and revised about every 6 months

May be renewed after initial 180 day period



# WHAT IS A GTO?



Initially Covered Miami and NYC but expanded to 69 counties

- Focused on all cash residential transactions by legal entities
- Originally was high dollar but later changed to \$300k (\$50k in Baltimore)

GTOs proved highly valuable to FinCEN

- 40% of GTO reports correlated to a bank SAR (FinCEN Director during Congressional Testimony)
- 7% involve a subject of an ongoing FBI investigation

# WHAT DOES FINCEN DO?

## **Receiving and maintaining financial transactions data**

- Suspicious Activity Reports (SARs)
- Currency Transaction Reports

## **Data analysis and dissemination for law enforcement purposes**

- Works with: U.S. Department of Homeland Security, U.S. Internal Revenue Service, the U.S. Securities and Exchange Commission, the Federal Deposit Insurance Corporation, the Federal Bureau of Investigation, and U.S. Immigration and Customs Enforcement.
- Identify sanction evasion with Office of Terrorism and Financial Intelligence (TFI)

## **Cooperation with international bodies and foreign governments**

### **FinCEN Exchange**

- FinCEN's voluntary public-private partnership brings together law enforcement, national security agencies, and financial institutions to help combat financial crime.

# THE NEW RULE



## **What is Covered?**

- All cash purchases of residential real estate where the buyer is a legal entity or trust

## **What must be Reported?**

- Basic transaction information (closing date, purchase prices, parties names, etc.)
- Beneficial ownership info (focused on buyer)
- Payments information

## **Who must Report?**

- Generally the settlement agent, with guidelines if there is no settlement agent

## **When?**

- 30 days after closing

# THE NEW RULE

## WHAT IS COVERED

### WHAT IS COVERED?

How does the Rule define Residential Real Estate?

1. Real property designed for 1-4 family occupancy, including condos and dual use properties
2. Vacant or unimproved land zoned (or permitted) for construction for 1-4 family occupancy
3. Shares in a cooperative housing corporation
4. Includes sales anywhere in the US (50 states), DC, Puerto Rico, overseas territories, and
5. Indian lands.

• **Questions to think about:**

- How do you determine a deal is residential today?
- What documents/data are available to you in a cash deal to support a conclusion?
- Vacant land versus improved property?

# THE NEW RULE-WHAT IS COVERED



## **What constitutes an all-cash deal**

- In general: a lack of any funding coming from a bank, mortgage broker or mortgage banker or other source that has an AML (anti-money laundering) obligation
- Funding must be secured by the property

## **What is not included?**

- Private or seller financing

## **Question to consider:**

- How will you determine if a lender has an AML obligation?

# THE NEW RULE-WHAT IS COVERED

Buyer (or transferee) is a **legal entity or trust**

- Defines transferee entity as anyone other than a trust or individual
- Transferee trust is any arrangement where a person places assets under the control of a trustee for the benefit of one or more persons
- Reporting still applies even if a co-purchaser is not someone that must report

There are limited exceptions for certain entities

- Similar to CTA exceptions: companies that have beneficial ownership registered with other federal or state regulators

Questions:

- How will you know if an exception applies to the buyer/transferee?
- What will you do if an individual buyer decides late in process to use LLC or trust to hold title?

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# THE NEW RULE-WHAT TRANSACTIONS ARE EXEMPT

An illustration of a hand holding a white rectangular sign with a black border. The word "EXEMPT" is written in large, bold, red capital letters on the sign. The hand is orange and is holding the sign from the bottom left. The background is a solid teal color.

**EXEMPT**

1. Grant, transfer, or revocation of an easement;
2. Transfer resulting from the death of an owner of residential real property;
3. Transfer incident to divorce or dissolution of a marriage;
4. Transfer to a bankruptcy estate; or
5. Transfer for which there is no reporting person.



# THE NEW RULE – WHO MUST REPORT



## Defining a Reporting Person:

Primary responsibility is on settlement agents

- Lays out a **waterfall or cascade** (similar to 1099 report) for deals where there is no settlement agent
  - **First choice:** the person who is listed as the closing or settlement agent on a closing or settlement statement
  - **Second choice:** the person that prepares the closing or settlement statement.
  - **Third choice:** the person that files the deed for recordation
  - **Fourth choice:** the person that issues the owner's title insurance policy
  - **Fifth choice:** the person that disperses the greatest amount of funds
  - **Sixth choice:** the person that did a title examination
  - **Final choice:** the person that prepares the deed, if no deed is involved, any other legal instrument.
- Applies to attorneys the same as non attorney agents

## THE NEW RULE – WHO MUST REPORT



# THE NEW RULE – WHO MUST REPORT

Sharing is caring



## **Designation Agreement:**

The parties in the waterfall can agree to designate someone lower on the waterfall to do the reporting.

Agreement must be in writing and be specific to each transaction

- Requirements

1. The date of the agreement;
2. The name and address of the transferor;
3. The name and address of the transferee entity or transferee trust;
4. Information described in in paragraph (g) identifying transferred residential real property;
5. The name and address of the person designated through the agreement as the reporting person with respect to the transfer; and
6. The name and address of all other parties to the agreement.

# THE NEW RULE – WHO MUST REPORT

Reasonable Reliance – 1031.320(a), (j)

“The reporting person may reasonably rely on information collected from others under the conditions described in paragraph (j)\*

\*Reporting person may rely upon information provided by other persons, absent knowledge of facts that would reasonably call into question the reliability of the information provided to the reporting person

# THE NEW RULE-WHAT IS REPORTED

## Transaction Information:

- Information concerning the property
  - Street address
  - Legal description (section, lot, block)
- Information about reporting person
  - Full legal name
  - Category under the waterfall
  - Business address
- Information about seller/transferor
  - If individual: Full legal name, **date of birth**, current residential address and IRS TIN
  - If Entity: Full legal name, DBA, current business address, TIN or **foreign equivalent**
  - If Trust: Full name of trust as listed on trust agreement; date trust agreement executed, TIN (if available) and legal name, address and TIN for Trustee





FIND YOUR INNER CALMNESS  
....THERE IS MORE

# THE NEW RULE-WHAT IS REPORTED

## Transferee/Buyer Information:

- Entities
  - Legal Name of entity & DBA
  - Current address for principal place of business
  - Unique identifying number either IRS TIN, foreign equivalent or entity registration number
- Beneficial owner and Signor info
  - Full legal name
  - Date of birth
  - Current residential address
  - Citizenship
  - Unique ID (either IRS TIN, foreign equivalent)

For Reasonable Reliance Purposes – the person providing this information can certify “the accuracy of the information in writing to the best of the person’s knowledge.” 1031.320(j)(2)

# THE NEW RULE-WHAT IS REPORTED

## Transferee/Buyer Information:

- Trust
  - Full name as shown on trust instrument
  - Date instrument is executed
  - Street address for trust administration
  - Unique identifying number either IRS TIN, foreign equivalent or entity registration number
  - Whether trust is revocable
- Trustee info
  - Legal name, any DBA, address, unique ID
- Beneficial Owner info
  - Legal name, date of birth, residential address, citizenship, unique ID
  - How do they qualify as a beneficial owner
- Signor info
  - Same as trustee info plus indication of capacity





# THE NEW RULE-WHAT IS REPORTED

## Beneficial Owners:

- Same definition as under Corporate Transparency Act
  - any individual who, directly or indirectly, either exercises substantial or owns or controls at least 25 percent of the ownership interests
  - Substantial control includes
    - Senior officer
    - Authority to appoint board or senior officers
    - Directs decision making on important financial decisions including transfers of assets
- For Trusts:
  - Trustee
  - Beneficiary that is the SOLE recipient of income/principal
  - Grantor/settlor under a revocable trust
  - If an entity holds one of the covered positions, then the BO of that entity
- Both for profit and nonprofit entities or trusts are covered

# THE NEW RULE-WHAT IS REPORTED



## Transferor/Seller Information:

- Full legal name
- Trade name or d/b/a
- Complete current address
  - Street address that is principal place of business
  - If outside of US, primary location in US where the transferor entity conducts business (if any)
  - Unique identifying number (if any)
    - IRS TIN/SSN

(Note: Same information that is required for Legal Entity that is a Transferee)

# THE NEW RULE-WHAT IS REPORTED

## Transferor/Seller – Trust Information:

- Full legal name
- Date trust instrument was executed
- Unique identifying number (if any)
- For individual who is trustee of trust (Note: same as for transferee trust)
  - Full legal name
  - Current residential address
  - Unique identifying number
- For legal entity who is trustee of trust (Note: same as for transferee trust)
  - Full legal name
  - Trade name or d/b/a
  - Complete current address
  - Unique identifying number

# THE NEW RULE-WHAT IS REPORTED

## Payments Information:

- Total purchase price
  - Includes any amount paid outside of closing
- Each payment by Transferee to the settlement agent
  - Amount of payment
  - Method of payment (wire, ACH, certified check, etc.)
  - Name of financial institution payment was drawn on and the account number
  - Name of any payor on the wire or check if payor is not the transferee
- Info on if there is any private or hard money lending

## THE NEW RULE-WHAT IS REPORTED

The Residential Real Estate Reports (RRERs) are about the collection of information concerning the Buyer (and other requirements) to determine who actually owns the property. These RRERs are what we've really been talking about because that's where all the workflow and collection of information takes place that has to be reported by settlement agents. While both the BOI and RRER requirements in the CTA, the Texas Order doesn't affect the Residential Real Estate Reports, and as of January 21, 2025 we still are a go for December 1, 2025.

## THE NEW RULE-WHAT IS REPORTED

Under the Beneficial Ownership Information portion of the CTA – entities are supposed to self-report information concerning who the person that actually owns the corp or llc are in the FinCEN portal. (If Vladmir owns ABC, LLC, Financial Crimes Enforcement Network wants to seize the accounts associated with ABC, LLC.) This portion of the CTA has been halted by the injunction entered in Texas. (Note: Other courts have found the CTA Constitutional so we shouldn't get too excited.) The BOI reporting isn't that juicy for title agents because their attorneys should look at the exceptions and give them a pretty quick answer.

## THE NEW RULE-WHAT IS REPORTED



# THE NEW RULE-WHAT IS REPORTED

## How to Collect Information:

Rule allows reporting person to collect information from the transferee as long as they get a written certification of the information.

CERTIFICATION OF BENEFICIAL OWNER(S)			
<i>The information contained in this Certification is sought pursuant to Section 1020.230 of Title 31 of the United States Code of Federal Regulations (31 CFR 1020.230).</i>			
All persons opening an account on behalf of a legal entity must provide the following information:			
1. Last Name of Natural Person Opening Account	2. First Name	3. Middle Initial	3a. Title
4. Name and type of Legal Entity for Which the Account is Being Opened			
4a. Legal Entity Address	4b. City	4c. State	4d. ZIP/Postal Code
SECTION I (To add additional individuals, see page 3)			
Please provide the following information for an individual(s), if any, who, directly or indirectly, through any contract arrangement, understanding, relationship, or otherwise owns 25% or more of the equity interests of the legal entity listed above. Check here <input type="checkbox"/> if no individual meets this definition and complete Section II.			
5. Last Name	6. First Name	7. M.I.	8. Date of birth (MM/DD/YYYY)
9. Address	10. City	11. State	12. ZIP/Postal Code
13. Country	14. SSN (U.S. Persons)	15. For Non-U.S. persons (SSN, Passport Number or other similar identification number)	
15a. Country of issuance:			
Note: In lieu of a passport number, Non-U.S. Persons may also provide a Social Security Number, an alien identification card number, or number and country of issuance of any other government-issued document evidencing nationality or residence and bearing a photograph or similar safeguard.			
SECTION II			
Please provide the following information for an individual with significant responsibility for managing or directing the entity, including, an executive officer or senior manager (e.g., Chief Executive Officer, Chief Financial Officer, Chief Operating Officer, Managing Member, General Partner, President, Vice President, Treasurer); or Any other individual who regularly performs similar functions.			
16. Last Name	17. First Name	18. M.I.	18a. Title
19. Date of birth (MM/DD/YYYY)	20. Address	21. City	22. State
23. ZIP/Postal Code	24. Country	25. SSN (U.S. Persons)	26. For Non-U.S. persons (SSN, Passport Number or similar identification number)
26a. Country of issuance:			
Note: In lieu of a passport number, Non-U.S. Persons may also provide a Social Security Number, an alien identification card number, or number and country of issuance of any other government-issued document evidencing nationality or residence and bearing a photograph or similar safeguard.			
I, _____ (name of person opening account), hereby certify, to the best of my knowledge, that the information provided above is complete and correct.			
Signature: _____		Date: _____	



# NEW RULE-RECORDKEEPING

- Five years from date of filing the report
- Must maintain reports and compliance documents
  - Certifications and copies of records for beneficial ownership reporting
- Expected cost is \$28m/year

# NEW RULE-IMPACT



Game  
Over

- First Year costs: between \$267.3 million and \$476.2 million
  - Estimates 75 minutes for initial training per staff person
- Each year costs: between \$245.0 million and \$453.9 million.
  - Estimates 850,000 filings per year
  - Estimates 4,604,167 hours of staff time to issue reports per year
  - Estimates 30 minutes annually of training

# NEW RULE-PENALTIES

What if you can't get the information?

- No good faith attempt provision
  - However, you will have a lot of reportable info in your file
- Industry can always file voluntary suspicious activity reports
- Attorney client privilege likely does not apply
  - Most US circuit courts have held that the identity of a client is not subject to the privilege
  - See ***United States v. Goldberger & Dublin, P.C., 935 F.2d 501 (2nd Cir. 1991).***

## NEW RULE-PENALTIES



# NEW RULE-PENALTIES

## Criminal Liability

### Type of Violation

Willful violation

Willful violation while violating another  
law of the United States

Structuring or assisting in structuring a  
Transaction to avoid the currency transaction  
reporting

### Penalty

Up to \$250,000 fine and 5 years in prison

Up to \$500,000 fine and 10 years in prison

Fine and up to five years in prison



# NEW RULE-PENALTIES

## Civil Liability

### Type of Violation

Willful violation (a separate violation occurs for  
(up to each day the violation continues and each  
location a violation occurs)

Failure to file a report, material misstatement or  
omission

Structuring or assisting in structuring a transaction  
to avoid the currency transaction reporting

Negligence

### Penalty

Greater of the amount involved  
\$100,000) or \$25,000

Not to exceed the amount involved in  
the transaction

Not to exceed the amount involved in the  
transaction

Not to exceed \$500 or \$50,000 if a pattern of  
negligence is found

\*Negligent violations could result in a civil penalty not more than \$1,394 for each violation and an additional civil money penalty of up to \$108,489 for a pattern of negligent activity.

# QUESTIONS