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FINCEN PROPOSES NEW REPORTING RULE TARGETING NON-FINANCED TRANSFERS OF RESIDENTIAL REAL PROPERTY WHICH MAY HAVE UNINTENDED CONSEQUENCES

The Financial Crimes Enforcement Network ("**FinCEN**"), the bureau of the U.S. Department of Treasury responsible for collecting, analyzing and disseminating financial intelligence to support law enforcement recently released a Notice of Proposed Rulemaking[1] to require reporting to FinCEN in connection with certain non-financed transfers of residential real estate.

The initiative is a vast expansion of temporary, geographically focused reporting requirements, i.e. Geographic Targeting Orders.[2] At a high level, the proposal, if finalized, would require certain "reporting persons" (which FinCEN anticipates will mostly be settlement agents, title insurers or attorneys) involved in the transfer of residential real property to a "transferee entity" (which FinCEN will define as a variety of legal entities with certain exemptions)[3] to provide FinCEN with certain information regarding the transaction, the transferor and the transferee and its beneficial owners, if the transaction is not financed by a bank or similarly regulated entity with anti-money laundering ("**AML**") program requirements and Suspicious Activity Reporting ("**SAR**") requirements.

FinCEN (which is also responsible for implementing the Corporate Transparency Act (the "**CTA**") under which, as of January 1, 2024, it began collecting beneficial ownership information on over 30 million existing and future legal entities) says that this additional information collection requirement with respect to particular residential real estate transactions will assist governmental agencies with addressing illicit finance vulnerabilities and restrict the ability of illicit actors to launder money through the purchase of residential real estate.

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1 Anti-Money Laundering Regulations for Residential Real Estate Transfers, Fed. Reg. Vol. 89, No. 33, page 12424 (proposed February 16, 2024).

2 The most recent Geographic Targeting Order ("GTO") available here was issued on October 22, 2023 and will expire on April 18, 2024. GTOs have a maximum duration of 6 months and FinCEN has been issuing increasingly expanded versions of them every six months starting in 2016.

3 Although the proposed rule draws on several concepts from the CTA regulations with respect to identification of beneficial owners, it notably only includes 16 of the 23 exemptions included in those regulations to reduce unnecessary reporting burdens.

At first glance, the rule seems narrowly tailored, and FinCEN intended for it to be focused on "a particular class of activity the [U.S. Treasury Department] deems high risk." Nevertheless, and although FinCEN states that is imposing a streamlined reporting requirement that can be completed without subjective analysis of what it considers inherently suspicious activity, the rule, as currently proposed, is still broad enough to include large categories of transactions that are unlikely to involve illicit activity and may lead to unintended consequences. Some groups, such as, large non-bank institutional lenders that invest in and hold residential mortgages for investment purposes should take note and be prepared to comment on how the rule would affect their industry.

FinCEN is accepting comments to the proposed role through April 16, 2024 and has set forth a series of specific questions for which they are seeking input.[4] Because this proposed rule, once adopted, may serve as a template for additional AML regulation across the broader real estate sector (potentially including commercial real estate) and because it may be viewed as a test case for FinCEN to consider similarly tailored SAR requirements in other contexts, it deserves thoughtful industry attention.

Details concerning the above referenced CTA reporting requirements and exemptions are provided in our prior briefing (available here).

4 Anti-Money Laundering Regulations for Residential Real Estate Transfers, Fed. Reg. Vol. 89, No. 33, page 12442 (proposed February 16, 2024).

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