

Advance Notice of Proposed Rulemaking Issued by FinCEN for Potential New Real Estate Sector Reporting Requirements

February 9, 2022

Source: Saiber Real Estate Law Alert

On December 8, 2021, the Federal Crimes Enforcement Network (“FinCEN”) division of the United States Treasury published an Advance Notice of Proposed Rulemaking (“ANPRM”) (Anti-Money Laundering Regulations for Real Estate Transactions, 86 Fed. Reg. 69589, Dec. 8, 2021) seeking to solicit public comment on a potential rule designed to tighten reporting requirements imposed by the Bank Secrecy Act. The proposed rule applies to specific persons involved in real estate transactions and will require the collection, reporting and retaining of information. FinCEN’s objective in strengthening such regulations is to address the vulnerability of the U.S. real estate market to money laundering and other illicit activity.

FinCEN has consistently been concerned about the opportunities for corrupt officials and illicit actors to launder proceeds of criminal activity through real estate purchases in the U.S. The Geographic Targeting Orders (“GTOs”) initiated by FinCEN under 31 U.S.C. § 5326(a) reflect the regulatory agency’s efforts to effectively control money laundering by imposing specific reporting requirements on title insurance companies involving all-cash residential real estate transactions. While GTOs are helpful in providing important data for money laundering investigations, the regulations are considered to be overly limited in scope and in particular exclude commercial real estate transactions.

In its continuing efforts to close regulatory gaps in non-financed transactions, FinCEN recently issued an ANPRM focused on the implementation of recordkeeping and reporting requirements for non-financed real estate transactions.

Highlights of the ANPRM proposed changes include:

1. Implementing a nationwide recordkeeping and reporting requirement for entities and individuals participating in transactions involving non-financed purchases of real estate for both residential and commercial real estate transactions. Under such requirement attorneys, law firms, real estate agents and/or other client-interacting participants may be designated as mandated reporters.
- 2.

Two proposed rules relate to the recordkeeping requirements. The first, promulgated under 31 U.S.C. 5318(a)(2) involves implementing specific limited reporting requirements similar to those currently required of title insurance companies in the non-financed residential and commercial real estate markets. The second option involves imposing Anti-Money Laundering (“AML”) monitoring and reporting requirements,

including the filing of Suspicious Activity Reports (SARs) and establishing AML/Countering the Financing of Terrorism programs under 31 U.S.C. § 5318(g)(1) and 31 U.S.C. § 5318(h).

3.

Consideration is being given as to the geographic scope of the regulation. It is proposed to be nationwide, for residential and commercial transactions, with no minimum transaction threshold.

4.

Creating separate reporting rules for non-financed residential and commercial real estate markets to accommodate the higher degree of complexity in the commercial real estate market than the residential real estate market. Consideration is being given for an approach that would initially impose requirements on residential real estate transactions and subsequently implement rules for commercial real estate transactions.

FinCEN seeks comment on the potential new regulations with respect to the type of real estate transaction, the required information to be reported and retained, the geographic scope, the reporting value dollar threshold, and other pertinent comments related to the proposed ruling. Written comments may be submitted on or before February 21st, 2022 to Federal E-rulemaking Portal: <http://www.regulations.gov>. Include 1506-AB54 in the submission. Refer to Docket Number FINCEN-2021-0007.

If you have any questions about the above alert, please contact Stephanie Edelstein, Nino Coviello, or Randi Schillinger of Saiber LLC's Real Estate practice group.