
THE GEORGE WASHINGTON UNIVERSITY

WASHINGTON, DC

Public Interest Comment¹ on

The Financial Crimes Enforcement Network’s Proposed Rule

Anti-Money Laundering Regulations for Residential Real Estate Transfers

Docket ID No. FINCEN-2024-0005

RIN: 1506-AB54

APRIL 15, 2024

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REGULATORY STUDIES CENTER

The George Washington University Regulatory Studies Center improves regulatory policy through research, education, and outreach. As part of its mission, the Center conducts careful and independent analyses to assess rulemaking proposals from the perspective of the public interest. This comment on the Financial Crimes Enforcement Network’s proposed rule establishing new reporting requirements for non-financed residential real estate transactions does not represent the views of any particular affected party or special interest, but is designed to evaluate the effect of FinCEN’s proposal on overall consumer welfare.

Introduction

The Financial Crimes Enforcement Network (FinCEN) aims to “combat money laundering and promote national security through the collection, analysis, and dissemination of financial intelligence and strategic use of financial authorities.”³ Pursuant to the Currency and Financial Transactions Report Act of 1970 (the Bank Secrecy Act, or “the BSA”), the Secretary of the Treasury has delegated authority to FinCEN to “implement, administer, and enforce compliance

¹ This comment reflects the views of the author, and does not represent an official position of the GW Regulatory Studies Center or the George Washington University. The Center’s policy on research integrity is available at <https://regulatorystudies.columbian.gwu.edu/about#integrity>.

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³ Financial Crimes Enforcement Network, “What We Do,” <https://www.fincen.gov/what-we-do>.

with the BSA.”⁴ The BSA requires financial institutions to establish Anti-Money Laundering and Countering the Financing of Terrorism (AML/CFT) programs, which include: the development of internal policies and procedures; the designation of a compliance officer; ongoing employee training; independent audit functions to test programs; and the requirement that institutions report suspicious transactions using “suspicious activity reports” (SARs).⁵

Previously, individuals involved in residential real estate transactions had been exempt from the requirement to establish AML/CFT programs. Due to the threat posed by money laundering in the residential real estate space, FinCEN issued this proposed rule on February 16, 2024, to create a streamlined version of the suspicious activity report (SAR) for non-financed residential real estate transactions.

Rulemaking Background

Compelling Public Need

FinCEN identified two distinct policy reasons for this proposed rule: the effect of money laundering on the residential real estate market and data availability challenges for law enforcement. According to the National Money Laundering Risk Assessment (NMLRA), the U.S. real estate market provides one of the largest and most stable investment opportunities in the world but is vulnerable to money laundering through non-financed residential real estate transactions.⁶ (Non-financed residential real estate transactions might include cash purchases as well as non-sale purchases, such as gifts.)⁷ The market is vulnerable due to the exemption of “persons involved in real estate closings and settlements” from anti-money laundering (AML) regulations and the ease of anonymising both ownership and the source of funding for non-financed transactions.⁸ The NMLRA presents multiple instances in which individuals from sanctioned countries and foreign intelligence officials purchased residential real estate in the U.S. using laundered funds.⁹ Beyond the negative effects of crime generally, non-financed real estate purchases can also distort housing

⁴ Anti-Money Laundering Regulations for Residential Real Estate Transfers, 89 Fed. Reg. 12427 (proposed February 16, 2024).

⁵ Id.

⁶ National Money Laundering Risk Assessment p. 75-76, 2024, retrieved from <https://home.treasury.gov/system/files/136/2024-National-Money-Laundering-Risk-Assessment.pdf>.

⁷ Anti-Money Laundering Regulations for Residential Real Estate Transfers, 89 Fed. Reg. 12436 (proposed February 16, 2024).

⁸ National Money Laundering Risk Assessment p. 76-77.

⁹ Id., p. 77-78.

values and disadvantage legitimate market participants.¹⁰ Money laundering in the residential real estate market adds noise to the market’s price signal and can crowd out honest buyers.¹¹

The diffuse nature of the U.S. real estate market makes it challenging for law enforcement to find perpetrators of money laundering. The data sources available to law enforcement officers are often “incomplete [and] unreliable,” and the “non-uniformity” of real estate transaction practices from state to state increases the burden on officers attempting to combat money laundering.¹²

History of FinCEN’s Anti-money Laundering Regulations for Residential Real Estate

Since 2002, residential real estate transactions have broadly been exempt from AML/CFT program requirements. FinCEN initially exempted “persons involved in real estate closings and settlements” and “loan and finance companies” from the requirement that financial institutions establish AML/CFT regulations. FinCEN needed additional time to study the relevant parties in the residential real estate space to consider whether AML/CFT regulation was necessary and to consider the small business burden that regulation might impose.¹³ FinCEN issued an ANPRM on the subject in 2003 but never proposed regulation.¹⁴

FinCEN began tightening AML/CFT regulations for real estate in the 2010s. In 2012, the bureau eliminated the exemption for “loan and finance companies” and required that those companies establish AML/CFT programs and submit SARs. In 2014, FinCEN issued similar requirements for government-sponsored entities, such as Fannie Mae and Freddie Mac.¹⁵

In 2016, FinCEN started issuing Residential Real Estate Geographic Targeting Orders (GTOs) to address the money laundering risk in non-financed residential real estate transactions. The Residential Real Estate GTOs “require title insurance companies to file reports and maintain records concerning non-financed” residential real estate transactions above a given price in certain metropolitan areas.¹⁶ Through the Residential Real Estate GTOs, FinCEN confirmed the risk of money laundering in non-financed residential real estate transactions. FinCEN uses the data from Residential Real Estate GTOs to study the “money laundering typology” and to support money laundering investigations conducted by law enforcement partners.¹⁷ Despite the reported success

¹⁰ Id., p. 75.

¹¹ Anti-Money Laundering Regulations for Residential Real Estate Transfers, 89 Fed. Reg. 12445 (proposed February 16, 2024).

¹² Id., 89 Fed. Reg. 12430.

¹³ Id., 89 Fed. Reg. 12427.

¹⁴ Id.

¹⁵ Id.

¹⁶ Id.

¹⁷ Id., 89 Fed. Reg. 12427-12428.

of the Residential Real Estate GTOs, FinCEN describes them as a “temporary information collection measure” and not a permanent policy solution.¹⁸

Current Regulatory Environment

FinCEN issued an ANPRM in 2021 to solicit comments on AML regulations for residential real estate. Commenters had mixed thoughts on the value of full AML/CFT obligations for people involved in residential real estate transactions. A few commenters suggested attaching AML/CFT requirements to existing processes, such as the IRS Form 1099-S or expanding the Residential Real Estate GTOs.¹⁹

Separate from this rulemaking, FinCEN’s final rule Beneficial Ownership Reporting Requirements (“BOI Reporting Rule”) took effect on January 1, 2024.²⁰ The BOI Reporting Rule requires certain entities to file reports with FinCEN: beneficial owners of an entity; and individuals who have filed with the government to create or register an entity to do business.²¹ Like this proposal, the BOI Reporting Rule aims to combat money laundering and corruption through legal entities, while minimizing the effect on small businesses.

This Proposed Rule

This proposed rule would create a new report called the Real Estate Report which designated reporting persons would file for reportable transfers.²² The Real Estate Report is a streamlined version of the SAR form associated with AML/CFT requirements. For non-financed residential real estate transactions, FinCEN chose a modified reporting requirement because many entities involved in these transactions are small businesses that lack the capacity to administer AML/CFT programs. The Real Estate Report would collect information including the reporting persons in the transaction, transferee entities and trusts, signing individuals, transferors, the residential property itself, and reportable payments.²³ The reporting requirements FinCEN proposes would replace the Residential Real Estate GTOs.

What Are Reportable Transfers?

Reportable transfers are “a transfer of any ownership interest in residential real property to a transferee entity or transferee trust,” with exceptions for some lower-risk transactions.²⁴ The

¹⁸ Id., 89 Fed. Reg. 12428.

¹⁹ Id.

²⁰ Beneficial Ownership Information Reporting Requirements, 87 Fed. Reg. 59498, (September 30, 2022).

²¹ Id.

²² Anti-Money Laundering Regulations for Residential Real Estate Transfers, 89 Fed. Reg. 12428 (proposed February 16, 2024).

²³ Id., 89 Fed. Reg. 12424.

²⁴ Id., 89 Fed. Reg. 12435.

proposed rule would create exceptions for financed transfers²⁵—when someone gets a line of credit to complete the transaction—and for low risk transfers due to circumstances such as easements, death, or divorce.²⁶ FinCEN explicitly states that there are no exceptions based on property value or price threshold; FinCEN claims that criminals “do not exclusively invest in luxury or high-value property,” and any price threshold could be abused by bad actors.²⁷

Who Are Reporting Persons?

The reporting person for a transaction is the person responsible for filling out the Real Estate Report. They can either be identified through a cascading reporting order (the “reporting cascade”) or through a written agreement between the parties involved in the transaction.²⁸ Only one person must submit the report for the transaction. If determined through the reporting cascade, the reporting person is the person with the highest level of duties listed in the reporting cascade who is involved in the transaction.²⁹ The proposal states, “Although potential reporting persons will likely communicate with each other regarding the need to file a report, there would be no requirement to verify that any other potential reporting person in fact filed it.”³⁰

Regulatory Analysis

General Comments

Opportunities for Sensitivity Analysis

A number of the costs associated with FinCEN’s proposal come from time spent on trainings and the time it takes to complete the Real Estate Report. FinCEN provides some estimated cost ranges based on the number of participants, the number of annual transfers, and different wage rates.³¹ However, FinCEN’s regulatory impact analysis does not appear to include sensitivity analysis based on varying time estimates. Small variations in time across a large number of people can result in a significant difference in cost estimates. FinCEN should conduct sensitivity analysis

²⁵ Id.

²⁶ Id., 89 Fed. Reg. 12436.

²⁷ Id.

²⁸ Id., 89 Fed. Reg. 12437.

²⁹ The types of job duties included in the reporting cascade include real estate professionals providing certain settlement services in the settlement process, the person that underwrites an owner’s title insurance policy for the transferee, the person who disburses the greatest amount of funds in connection with the transfer, the person that prepares an evaluation of the title status, or the person who prepares the deed (89 Fed. Reg. 12437-12438). Some of these individuals are directly involved in transactions, while others are not.

³⁰ Id., 89 Fed. Reg. 12437.

³¹ Id., see NPRM footnotes 215-216.

using different time estimates to see how the costs of the rule would change if reporting takes longer than anticipated.

Equity and Distributional Effects

FinCEN should consider who purchases in cash without nefarious reasons, and if the lack of a price threshold on this regulation could negatively affect some groups more than others. For example, victims of domestic violence could opt to purchase a home without financing to avoid a paper trail leading their abuser to their new address. Some demographic groups may distrust institutions due to discrimination and may not want to purchase a home with financing. People without immigration status in the U.S. may not be able to procure financing for a home purchase. Immigrant communities sometimes pool cash to help a community member purchase property. In each of these scenarios, the Real Estate Report could constitute a burden and disproportionately affect these, and other, populations.

FinCEN's argument against including price thresholds in this proposed rule is that money laundering risks exist at lower prices in the non-luxury residential real estate markets.³² However, FinCEN's current real estate reporting measures, the Residential Real Estate GTOs, *do* include price thresholds. FinCEN could implement this proposal with a total transaction price threshold at \$50,000 as a pilot program.³³ FinCEN could use the data collected after the first year of the program to review and adjust or eliminate the threshold based on the number of legal transactions unnecessarily captured by the reporting regime.

Alternative Approaches

Circular A-4 recommends that agencies provide policy alternatives with variation in costs and benefits.³⁴ All of the policy alternatives³⁵ FinCEN provides are more stringent than the proposal and likely have higher costs, painting the bureau's preferred proposal in the best light. It would have been beneficial for the bureau to provide a less stringent option as a comparison.

Behavioral Effects

FinCEN must prepare for the possibility that the proposed rule could affect criminal behavior patterns. The proposed rule exempts transfers between individuals from the reporting requirements.³⁶ By explicitly exempting transfers between individuals, FinCEN may inadvertently

³² Id., 89 Fed. Reg. 12428.

³³ \$50,000 is the lowest price threshold for current Residential Real Estate GTOs (see NPRM footnote 37).

³⁴ Office of Management and Budget, Circular A-4 (2023), p. 21. Retrieved from <https://www.whitehouse.gov/wp-content/uploads/2023/11/CircularA-4.pdf>.

³⁵ Id., 89 Fed. Reg. 12457.

³⁶ Anti-Money Laundering Regulations for Residential Real Estate Transfers, 89 Fed. Reg. 12435 (proposed February 16, 2024).

incentivize criminals to change their behavior patterns and begin to transfer properties between individuals, rather than legal entities.

As FinCEN develops this reporting requirement, the bureau should incorporate a retrospective review regime to determine if the reporting requirement captures all of the transactions they anticipated. If the requirement captures fewer transactions than expected, FinCEN should review the regulation to determine if the lower number is due to a flaw in the regulatory requirements or due to changes in criminal behavior, or another non-criminal change in how the market operates. Without planning for retrospective review, FinCEN may not be able to tell if the reporting requirement functions properly.

Potential for Harmonization with BOI Rule

Although FinCEN is clear about the differences between reporting requirements under this rule compared to the BOI Reporting Rule, the bureau must consider opportunities to harmonize this proposal with the BOI Reporting Rule. FinCEN notes that some information collected by the Real Estate Report overlaps with information requested under the BOI Reporting Rule. The information collected by the Real Estate Report would include tailored information about certain high-risk transactions and the beneficial ownership of involved entities, while the BOI Reporting Rule collects beneficial ownership information linked to entities, rather than individual transactions.³⁷ While these reporting requirements do serve different purposes, FinCEN must find ways to make the reporting data work together.

One alternative approach to the proposed rule could be establishing the Real Estate Report as a companion report to the information collected under the BOI Reporting Rule. For example, the Real Estate Reports could be filed with the BOI reports based on the legal entities involved. If the reports are filed together, law enforcement could select an entity from the information collection efforts under the BOI Reporting Rule and view any relevant transactions cataloged by the Real Estate Report, or select a single transaction and view the relevant beneficial ownership information.

Regardless, FinCEN should take steps to ensure that data collected via the BOI Reporting Rule and data from the Real Estate Report can be easily merged. One of the chief concerns justifying this rulemaking is the challenge posed by disjointed data on real estate transactions. FinCEN argued that law enforcement spends significant time finding and wrangling data on non-financed real estate transactions. Now that the bureau collects beneficial ownership information and has proposed to collect the information described in the Real Estate Report, it should ensure that the data collected can be used together with minimal processing.

³⁷ Id., 89 Fed. Reg. 12429.

Information Reporting and Burden

Real Estate Report Not Published

This proposed rule is fundamentally about the creation and implementation of the Real Estate Report, yet FinCEN has not published the draft Real Estate Report form for review on RegInfo.gov.³⁸ While FinCEN accepted comments on the form, there is nothing available for the public to review. Without being able to review the form, stakeholders are prevented from providing reasonable, informed feedback on the potential burdens imposed. Additionally, practitioners may not be able to evaluate the accuracy of FinCEN's estimated burden hours and related costs without reviewing the form. FinCEN should publish a draft Real Estate Report as soon as possible so practitioners can review the form and offer informed, specific suggestions for improvement.

Reporting Cascade Could Be Burdensome

As described earlier, FinCEN states “Although potential reporting persons will likely communicate with each other regarding the need to file a report, there would be no requirement to verify that any other potential reporting person in fact filed it.”³⁹ FinCEN should require some accountability to ensure that someone submits the report. By not requiring that participants in the transaction verify who is filing the report, FinCEN potentially adds burden to the potential reporting persons. There is the potential for an increased time burden, if potential reporting persons need to determine who must submit the report and if they spend time confirming that someone else already submitted the report. There could be added psychological burden, if potential reporting persons are not able to confirm that someone else submitted the report, or if they are unable to get in touch with people that have the information they need.

If a report is not submitted at all, potential reporting persons could be exposed to additional legal burden, regardless of whether the failure to submit the report is due to malicious intent or a simple miscommunication between different people in the reporting cascade. Conversely, by not requiring coordination between potential reporting persons, FinCEN also creates the possibility that multiple people could submit a Real Estate Report for a single transaction. This could increase the burden on agency staff responsible for filing reports, and it could create confusion for agency staff if some information is inconsistent between two reports.

FinCEN could easily add a section to the Real Estate Report in which potential reporting persons print the name of the designated reporting person and sign it, acknowledging the selection of a single reporting person. The reporting cascade could still be used to determine who is the ultimate

³⁸ See RegInfo.gov, accessed April 15, 2024, at this link: https://www.reginfo.gov/public/do/PRAViewIC?ref_nbr=202402-1506-003&icID=265249.

³⁹ Anti-Money Laundering Regulations for Residential Real Estate Transfers, 89 Fed. Reg. 12437 (proposed February 16, 2024).

reporting person, if the group chooses that path. The cascade could also provide a useful data point for potential reporting persons in deciding who should bear the responsibility. Whatever FinCEN decides, it should include an explicit designation of the reporting person to eliminate the potential for burdens across stakeholders.

Recommendations

1. FinCEN should conduct sensitivity analysis with regard to training time and transaction time. FinCEN's estimates may be on the low end.
2. FinCEN should consider instituting a \$50,000 price threshold at the start of the program and assessing and adjusting the threshold based on the data collected through the program.
3. FinCEN should incorporate a plan for retrospective review to evaluate the regulation after implementation, particularly focusing on behavioral responses to the rule's implementation.
4. FinCEN should consider ways to connect the Real Estate Report to the reporting requirements in the BOI Rule and make the databases work together to benefit law enforcement.
5. FinCEN should release a draft Real Estate Report as soon as possible so practitioners can comment on the form.
6. FinCEN should add some requirement that members of the reporting cascade confirm who is submitting the report.