PROPOSED rule

For some time, the U.S. Department of the Treasury's Financial Crimes Enforcement Network (FinCEN) has taken an interest in the real estate industry as it relates to money laundering in the real estate sector. Illicit actors often favor non-financed transfers or "all-cash" sales of residential real estate to avoid law enforcement scrutiny due to anti-money laundering reporting requirements for banks and other financial institutions.

Beginning in 2016, FinCEN required title insurance companies to report certain cash transactions in specific Geographic Targeting Orders (GTOs) to increase transparency in real estate transactions.

According to FinCEN, the success of the GTO program has demonstrated the need for additional geographic coverage and further regulation of the real estate sector nationwide. On February 16, 2024, FinCEN proposed a new rule to extend anti-money laundering measures to the real estate sector on a nation-wide basis.

Scope of Regulations and Required Information

The proposed rule would require certain professionals involved in the closing or settlement of residential real estate transfers to report information to FinCEN about certain non-financed sales and transfers and keep records of the transactions.

The proposed rule would include nationwide reporting requirements and, unlike the current GTO program, there would be no purchase price threshold for reporting. A new reporting form called a "Real Estate Report" would be used for filings.

The proposed rule would require reporting on transfers of single-family homes, townhouses, condominiums and cooperatives, as well as buildings designed for occupancy by one to four families. It would require reporting on transfers of vacant or unimproved land that is zoned, or for which a permit has been issued, for occupancy by one to four families.

For a transfer to be reportable it must be non-financed, meaning that it does not involve an extension of credit that is (1) secured by the transferred property and (2) extended by a financial institution subject to Anti-Money Laundering (AML) program and Suspicious Activity Reporting (SAR) obligations. Transfers financed by private lenders without an obligation to maintain an AML program or to file SARs would be covered by the reporting requirement.

CONTINUED

The proposed rule would require businesses 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 certain 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)
- Information about any payments made

Only one Real Estate Report would be filed for each transaction. The rule proposes a cascading process to determine the reporting person responsible for filing a Real Estate Report, listing seven different real estate functions and requiring the reporting function of the person performing the highest function on the list. The list of functions in prioritized order is as follows:

1. The person listed as the settlement agent on a settlement statement
2. The person that prepares the settlement statement
3. The person that files the deed for recordation
4. The person that issues owner's title insurance policy
5. The person that disburses the greatest amount of funds
6. The person that did a title examination
7. The person that prepares the deed

This means that, in most cases, the reporting person will be the settlement agent, title insurance company or an attorney involved in the transaction. The real estate businesses that perform the functions described in the above list may enter into a written agreement with each other to designate one among them to file the report.

A Real Estate Report must be filed within 30 days after the date of the property's transfer to comply with the proposed rule. The reporting person would be required to keep a copy of the Real Estate Report for a period of five years, along with a form signed by the transferee or a transferee's representative, certifying the transferee's beneficial ownership information is correct.

Timeline and Impact of Regulations

FinCEN released its Notice of Proposed Rulemaking on February 16, 2024. There is a 60-day comment period that will be followed by additional review. It is anticipated that any final rule related to this proposed rule would not be adopted prior to the end of 2024. An effective date is expected to occur within the year after the rule's adoption. There will be a separate Notice of Proposed Rulemaking related to the form to be used for Real Estate Reports later in 2024.

What FNF is doing

This proposed rule introduces a significant new requirement for title insurance companies, approved attorneys and others in the title industry. FNF Corporate Compliance continues to work with American Land Title Association (ALTA) to provide feedback to FinCEN on the expected impact to FNF and the title industry. Experience with the existing GTO reporting requirements has provided valuable information for us on how federal reporting requirements have affected the industry and how it will likely affect us in the future.

FNF will continue to monitor and report important developments throughout this rulemaking period.