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Real Estate

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FinCEN Expands Scope of “All Cash” GTOs *Anti-Money Laundering Efforts Continue to Target the Real Estate Sector*

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Continuing its efforts to deter the use of real estate as a vehicle to launder proceeds of criminal activity, the Financial Crimes Enforcement Network (FinCEN) recently announced its plan to extend the reach and time frame of its existing Geographic Targeting Orders (GTOs) targeting “all cash” real estate deals. The new GTOs expand reporting requirements of “all cash” real estate purchases in Manhattan and Miami-Dade County by also including all New York City boroughs (Brooklyn, Queens, the Bronx and Staten Island), Broward and Palm Beach counties (just north of Miami, Fla.), as well as Bexar County, Texas and Los Angeles, San Diego, San Francisco, San Mateo, and Santa Clara counties in California. The new GTOs will begin on August 28, 2016, and continue for another 180 days. During that period, U.S. title insurance companies will be required to identify the natural persons behind shell companies and other entities used to engage in “all cash” purchases of luxury real estate.

Although the GTOs are directed at U.S. title insurance companies, the trends in transparency and enforcement affect all sectors of the real estate industry. Not only has the federal government pushed for disclosure of the true owners behind shell companies, but just last month, on July 20, 2016, the Department of Justice filed the largest forfeiture action to date, seeking to forfeit more than \$1 billion in assets—including real estate—tied to an international money-laundering scheme.

Who Is Impacted by these GTOs?

The original GTOs issued in [January 2016](#) required title insurance companies and any of their subsidiaries or agents to file with FinCEN a Form 8300 within 30 days of closing, identifying the true beneficial owners of limited liability companies and other entities that purchase high-end real estate using cash, certified

check, cashier's check, traveler's check, or a money order in any form if the real estate purchase exceeded \$3 million in Manhattan or \$1 million in Miami-Dade County. The GTOs defined a beneficial owner as an individual who, directly or indirectly, owns 25 percent or more of the equity interests of the purchaser entity. As originally issued, the reporting requirements were in place for 180 days, beginning on March 1, 2016, and expiring on August 27, 2016. During this period, title insurers were required to not only identify the purchaser, the individual primarily responsible for representing the purchaser, and the beneficial owner(s) of the purchaser, but to obtain and record a copy of the natural person's driver's license, passport or other similar identifying documentation, as well as to retain the records for five years, making those records available to FinCEN or other regulatory bodies at their request.

Now, beginning the day after the initial GTOs are set to expire, the new GTOs will also require title insurers to continue the reporting requirements discussed above for another 180 days, from August 28, 2016, until February 23, 2017, for "all cash" real estate purchases of \$1.5 million or more in Brooklyn, Queens, the Bronx and Staten Island, and \$3 million or more in Manhattan. In Florida, Miami is covered under the new GTOs for purchases of \$1 million or more, adding Broward and Palm Beach counties, also at purchases of \$1 million or more. Behar County, Texas, which includes the San Antonio area, is now covered under the new GTOs for purchases of \$500,000 or more, and in California, San Diego, Los Angeles, San Francisco, San Mateo and Santa Clara counties are now covered for purchases of \$2 million or more.

It is significant to note that while the original GTOs defined "all cash" to include a cashier's check, a certified check, traveler's check and money orders in any form, the new GTOs add personal and business checks to the definition of "all cash" purchases.

Both the original and new GTOs require title insurers to include certain items on the Form 8300, such as the date of closing, the total amount transferred, the total purchase price, and the address of the real property involved in the transaction. Title insurers must also indicate in the comments section to the Form 8300 certain information, including a unique identifier for the GTO. An additional requirement is that if a Form 8300 is filed by an agent of the covered title insurer, the agent must include the name of the covered title insurer in the Form.

Under both the original and new GTOs, the covered title insurance companies are responsible for compliance with the terms of the GTOs by each of their officers, directors, employees and agents. The company and individuals can be held liable both civilly and criminally for violating any terms of the GTOs.

Notably, FinCEN has stated that a significant portion of the covered real estate transactions reported under the original Manhattan and Miami GTOs have indicated possible criminal activity associated with the persons reported to be the beneficial owners behind the shell companies.

Anti-Money Laundering Efforts Continue to Target Real Estate

Real estate continues to be a major focus not only of regulators, but also of prosecutors. In fact, in its largest Kleptocracy Asset Recovery Initiative (Initiative) case to date, the Department of Justice filed a \$1 billion *in rem* civil action seeking to forfeit assets traceable to an international money-laundering conspiracy, including luxury real estate in Manhattan and Beverly Hills. Not only is the Department of Justice looking to seize the subject assets, it has also referenced some of the individuals alleged to have been closely connected to the scheme, including high-ranking government officials. "Kleptocrat" or "kleptocracy" is the term used when foreign officials steal from their own government at the expense of their citizens.

The funds at issue in the recent case were allegedly fraudulently diverted from a Malaysian investment fund, 1MDB, and used to purchase high-end real estate and other luxury assets, including the rights and interests in the motion picture *The Wolf of Wall Street*, the Time Warner Penthouse in Manhattan, and several properties in Beverly Hills. The referenced officials allegedly involved were able to conceal their diversion of funds by providing false information to banks and hiding beneficial ownership information.

FinCEN released the expanded GTOs exactly one week after the DOJ announced its 1MDB action, highlighting the importance of the federal government's initiative to increase financial transparency, especially with regard to uncovering beneficial ownership. Now more than ever, it is vital to know with whom one is dealing and to conduct proper due diligence. Money-laundering schemes occur on U.S. soil, as well as abroad, and in both instances, U.S. real estate is frequently used to launder the proceeds of crimes. Even more disturbing, public officials have been implicated in international money-laundering conspiracies that involve the fraudulent diversion of public funds. In fact, in the 1MDB action, various public officers have been tied to the alleged diversion of funds from an investment firm owned by the Malaysian government. These kleptocrats allegedly used luxury real estate and other high-value property to launder their illicit funds, and allegedly did so by hiding the true beneficial owner information behind the purchases.

Launched by the DOJ in 2010, the Initiative targets the proceeds of high-level corruption in foreign countries. When illicit funds pass through the U.S., whether through its banks or other financial institutions, the Initiative seeks to seize and ultimately return the assets to the countries affected.

Government Focus on Transparency Continues

While it is unknown at this time whether the information collected by FinCEN will result in referrals to law enforcement, the real estate industry should take note of the U.S. government's comprehensive effort to increase financial transparency and should scrutinize cash buyers with respect to beneficial ownership and sources of cash.

Besides tracking "all cash" real estate deals, the federal government has been pushing for transparency in other areas. In May 2016, the Treasury Department and FinCEN released their finalized Customer Due Diligence Rule, which added a new requirement under the Bank Secrecy Act's Anti-Money Laundering (AML) program that financial institutions identify and verify the beneficial owners or "natural persons" behind legal entity customers or "shell companies" and other corporate forms. At that same time, Treasury announced its intent to send beneficial ownership legislation to Congress which would require companies formed in the U.S. to file beneficial ownership information with the Treasury Department, as well as clarify FinCEN's authority to collect bank wire transfer information under its GTOs.

Not only has the government ramped up its efforts to increase financial transparency, the banking industry is also on board, officially providing full support to beneficial ownership legislation pending in both the House and the Senate. The bipartisan bill, Incorporation Transparency and Law Enforcement Assistance Act, would require states to collect beneficial ownership information from limited liability companies and other corporate structures that may be used to launder money and finance terrorism. A trade group consisting of several large banks recently wrote a letter to the authors of the bipartisan bill to express the banks' support of the legislation, as well as to suggest a new provision that would allow banks and other financial institutions to access the beneficial ownership information when performing their own due diligence.

Best Practices

- **GTO Training.** It is important to ensure each individual at a title insurance company is properly trained on the GTOs and their terms, because not only will the company be held liable, but FinCEN could penalize the individuals as well. FinCEN has held individual compliance officers liable for failing to assess risk and conduct due diligence in its AML programs. See, e.g., *U.S. Dep't of Treasury v. Haider*, No. 15-1518 (D. Minn. Jan. 8, 2016), which found that compliance officers and other employees in charge of compliance programs can be held individually liable under the Bank Secrecy Act.
- **Evaluate and Update Compliance Programs.** Given the recent focus on increasing transparency and eliminating money laundering by tracking cash purchases of real estate, real estate companies should also evaluate existing compliance measures and consider whether additional risk-based measures are warranted. All compliance programs should be tailored to the nature of the business.
- **Beware of Red Flags.** One should be diligent in asking questions to understand the persons or entities with whom one is transacting business. In light of heightened scrutiny on customer due diligence, failure to make reasonable inquiries could later be viewed by law enforcement and prosecutors as evidence of potential willful blindness or aiding and abetting money laundering.

Red flags might include: closing the deal with “all cash”; using legal entities or other opaque structures without disclosure of all beneficial owners; presenting all identification that is foreign, or difficult to verify; including multiple real estate purchases in a short time frame by the same entity; waiving inspection requirements; buyers rushing to complete the transaction; foreign or non-resident parties to the transaction whose sole purpose is capital investment (with no intent to reside at the property); a buyer demonstrating a lack of concern regarding risks, fees or related transaction costs; the buyer paying the balance of closing costs using offshore bank accounts; or completely anonymous transactions using attorneys and attorneys’ trust accounts.

- **Keep Up to Date on Developments.** Given the recent events and crimes in which real estate was used as a conduit to launder illicit funds, it is clear that FinCEN’s focus on the real estate industry is far from complete. FinCEN has described the GTOs as “consistent with an incremental approach to our work on real-estate issues.” Moreover, “persons involved in real estate closings and settlements” are only temporarily exempted from the Bank Secrecy Act’s requirement to establish an AML program until FinCEN can gather additional information on how real estate is used in money-laundering schemes. As demonstrated by these new GTOs, FinCEN can expand its targeting orders in a number of ways, including geographical reach and time frames. FinCEN could expand its orders to the commercial real estate sector as its investigation into the use of “all cash” continues. It is important to stay tuned to these developments and ensure one’s business is compliant with the various laws, rules, and regulations.

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