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Money Laundering in the U.S. Real Estate Sector

Global Trends and Domestic Concerns

Money laundering and other financial crimes in the real estate sector take many forms and continue to challenge real estate professionals, financial institutions, policy makers, law enforcement authorities, and regulatory stakeholders. Domestic and international scrutiny of the real estate market's vulnerability to money laundering has grown in recent years. An issue Congress may consider is how to balance the money laundering risks posed by the real estate sector against differing views on how to implement appropriate oversight.

According to various sources, real estate money laundering (REML) schemes can involve a wide range of conventional domestic criminals, as well as transnational criminals, including drug cartels and human traffickers, international terrorists, and foreign kleptocrats (corrupt high-level officials). The purchase of real estate, often combined with methods to conceal a purchaser's identity and source of funds, can allow criminals to integrate ill-gotten proceeds into the legal economy or park illicit wealth abroad. Real estate transactions may intersect with banks and other financial institutions that are subject to anti-money laundering (AML) and countering the financing of terrorism (CFT) requirements. Some critics posit that current AML/CFT practices may not effectively deter REML.

The U.S. Department of the Treasury's 2018 *National Money Laundering Risk Assessment* identified five key risks and vulnerabilities within the U.S. real estate sector:

- transactions involving luxury residential real estate;
- real estate transactions involving opaque entities;
- all-cash transactions that do not involve mortgage lenders;
- real estate transactions based on falsified loan application information; and
- complicit professionals in the real estate industry.

Congress has enacted legislation to address REML risks and vulnerabilities. In 1988, Congress amended the Bank Secrecy Act (BSA; 12 U.S.C. 1829b, 1951-1959 and 31 U.S.C. 5311-5314, 5316-5366) by adding, "persons involved in real estate closings and settlements" to the definition of a financial institution. In 2001, Congress further amended the BSA to require financial institutions, unless exempted, to establish AML programs. Over the past decade, Treasury has taken other steps to regulate aspects of the real estate sector, particularly with respect to residential mortgage lenders and originators and the government-sponsored enterprises Fannie Mae and Freddie Mac. Nevertheless, the Financial Action Task Force (FATF), the intergovernmental AML/CFT standards-setting body (of which the United States is a member), along with a wide range of U.S. and international financial transparency advocacy organizations, reports that national security and foreign policy gaps remain in U.S. efforts to stop REML.

International Standards

Since 2003, FATF has recommended that real estate agents, as well as lawyers, notaries, accountants, and others categorized as "designated non-financial businesses and professions," (DNFBPs) be subject to AML requirements when facilitating real estate purchase or sale transactions for clients. U.S. real estate agents and other DNFBPs involved in real estate transactions, however, are not subject to comprehensive AML/CFT measures. According to FATF's most recent mutual evaluation report of the United States, this is inconsistent with global AML recommendations.

U.S. Policy

The U.S. AML/CFT regime is statutorily based on the BSA and implemented through regulations in 31 C.F.R. Chapter X. The Treasury's Financial Crimes Enforcement Network (FinCEN) administers the BSA. Unlike banks and certain other financial institutions, the U.S. real estate industry as a whole is not subject to the full application of all BSA/AML requirements; however, certain financial reporting and recordkeeping requirements do apply.

Establishing AML Programs

Within the real estate sector, residential mortgage lenders and originators (since 2012), as well as Fannie Mae and Freddie Mac (since 2014), are subject to the BSA's requirement that financial institutions establish AML programs. Pursuant to 31 U.S.C. 5318(h), such AML programs should encompass the development of AML policies, procedures, and controls; the designation of an AML compliance officer; the provision of ongoing employee training; and the establishment of an independent audit function to test AML programs.

Although "persons involved in real estate closings and settlements" are among the 26 categories of businesses or sectors defined by 31 U.S.C. 5312 as a "financial institution," such persons are exempt from establishing AML programs. Persons involved in real estate closings and settlements are also exempt from requirements to file Suspicious Activity Reports (SARs or Form 111) and Currency Transaction Reports (CTRs), and to maintain a customer identification program (CIP) for AML recordkeeping purposes.

In issuing an Advance Notice of Proposed Rulemaking (ANPRM) in 2003 on AML program requirements for persons involved in real estate closings and settlements, FinCEN expressed a desire to initiate a rulemaking that would place additional AML requirements on persons involved in real estate closings and settlements. FinCEN, however, has not finalized any further rulemaking. In 2017, the President's *Unified Agenda of Regulatory and Deregulatory Actions* included a listing that described FinCEN's plans to issue an ANPRM on AML program requirements for persons involved in real estate closings and settlements. FinCEN withdrew the listing in February 2020, and it did not appear in the spring 2021 agenda.

Other Reporting Requirements

All U.S. persons engaged in trade or business, including those engaged in the U.S. real estate industry, are required to file "Form 8300" with FinCEN and the Internal Revenue Service (IRS) on transactions involving the receipt of over $10,000 in currency and certain monetary instruments, pursuant to 31 U.S.C. 5331 and 26 U.S.C. 6050I (31 C.F.R. 1010.330). Filers may also submit Form 8300 on a voluntary basis for suspicious transactions that do not exceed $10,000.

Individuals, including those employed in the real estate industry, may also be required to file a Currency and Monetary Instrument Reports (CMIRs or Form 105) with Customs and Border Protection (CBP) on cross-border movements into or out of the United States of currency or monetary instruments totaling over $10,000, pursuant to 31 U.S.C. 5316 (31 C.F.R. 1010.340). Individuals and entities may also be required to keep certain records and file annual Reports of Foreign Bank and Financial Accounts (FBARs or Form 114) with FinCEN, pursuant to 31 U.S.C. 5314 (31 C.F.R. 1010.350).

Geographic Targeting Orders

In 2016, FinCEN issued its first Geographic Targeting Order (GTO), pursuant to 31 U.S.C. 5326 (31 C.F.R. 1010.370), requiring U.S. title insurance companies to identify the natural persons behind shell companies used in all-cash purchases of residential real estate in certain specified U.S. metropolitan areas. GTOs are geographically limited, temporary orders (180 days) that require designated businesses or sectors to maintain records and submit reports to FinCEN on certain specified transactions. Since 2016, FinCEN has continued to renew and expand the scope of its GTOs on U.S. title insurance companies.

As required by the GTOs, U.S. title insurance companies, along with their subsidiaries and agents, must submit CTRs to FinCEN and retain related records involving certain residential real estate purchases by legal entities and their beneficial owners (natural persons who directly or indirectly own 25% or more of equity interests). The current GTO, effective through April 29, 2022, covers transactions involving nonfinanced purchases of high-value ($300,000 or more) residential real estate by legal entities (corporations, limited liability companies, partnerships, and other similar business entities) in specified cities, counties, or boroughs of nine U.S. states (California, Florida, Hawaii, Illinois, Massachusetts, Nevada, New York, Texas, and Washington).

Early reports suggest that the GTOs had a dampening effect on the role of shell companies purchasing residential real estate. One study, for example, found that the introduction of GTOs on U.S. title insurance companies led to a 70% drop in corporate entities purchasing loan-free, luxury residential real estate in 2016. FinCEN also reported that, as of May 2, 2017, over 30% of the real estate transactions reported under GTOs involved a beneficial owner or purchaser's representative who was the subject of unrelated SARs filed by U.S. financial institutions. In July 2020, the U.S. Government Accountability Office reported that FinCEN had not yet determined whether or how to address ongoing REML risks through more permanent regulatory tools (GAO-20-546).

Voluntary AML Guidelines and Reporting

FinCEN worked with the National Association of Realtors to develop voluntary AML guidelines for real estate professionals, first published in 2012 and most recently updated in February 2021. In August 2017, FinCEN also issued a public *Advisory to Financial Institutions and Real Estate Firms and Professionals*, which outlines money laundering risks posed by the real estate sector and encouraged real estate professionals—including real estate brokers, escrow agents, and title insurers—to voluntarily file a SAR if a real estate transaction seems suspicious.

Policy Outlook

At the end of the 116th Congress, the Anti-Money Laundering Act of 2020 (AMLA) was enacted as Division F of the FY2021 National Defense Authorization Act (P.L. 116-283). The AMLA contained multiple components, including the Corporate Transparency Act (CTA), which mandated that FinCEN collect beneficial ownership information directly from certain legal entities. On April 1, 2021, FinCEN issued an ANPRM to begin the regulatory process of implementing the CTA. AML experts widely recognize that the establishment of a nationwide beneficial ownership registry of legal entities could be an important step toward strengthening the U.S. AML/CFT regime. Other observers caution that implementation of the CTA may not be a panacea for combating REML.

Policy issues Congress may consider include oversight of FinCEN's progress in implementing the AMLA, including the CTA. AMLA implementation may affect the timeline for AML rulemaking related to the real estate sector, as well as future reissuance of GTOs for U.S. title insurance companies. Observers have further questioned how FinCEN intends to define the scope of "persons engaged in real estate closings and settlements" in any potential AML rulemakings—and how FinCEN may balance the benefits of AML regulations against the potential compliance costs to be absorbed by the real estate sector. Some have also advocated for making the GTOs permanent and extending them to commercial real estate transactions. Some analysts have urged Congress and FinCEN to explore further requirements to ensure that all types of legal entities and arrangements used in REML schemes, including trusts and foreign legal entities, are included in FinCEN's beneficial ownership registry.

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