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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, financial institution, law enforcement, policymaker, and regulatory stakeholders. Global 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 domestic and 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. Although real estate transactions often intersect with financial institutions that are subject to anti-money laundering (AML) and combating the financing of terrorism (CFT) requirements, AML/CFT gaps remain.

The U.S. Department of the Treasury's 2020 *National Strategy to Counter Illicit Finance* states that "Treasury is committed to working with Congress to minimize the risks of the laundering of illicit proceeds through real estate purchases"—and identifies REML as among its top 12 AML priorities and supporting actions.

Key reported REML risks and vulnerabilities include

- real estate transactions involving opaque legal entities that obscure the natural persons who benefit from such property ownership;
- use of nominee purchasers or title holders to conceal the true property owners;
- complicit professionals in the real estate industry;
- all-cash sales of high-value real estate that do not involve mortgage lenders; and
- use of commercial real estate transactions to commit fraud, tax evasion, and money laundering, including international transfers involving politically exposed persons (PEPs) and organized crime figures.

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), reports that national security and foreign policy gaps remain in U.S. efforts to stop REML. A wide range of financial transparency advocacy organizations share FATF's concerns.

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. Under current Treasury rules, however, U.S. real estate agents and other DNFBPs involved in real estate transactions are not subject to comprehensive AML/CFT measures. According to FATF's most recent (2016) 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. This includes real estate brokers and agents, title or title insurance company representatives, closing agents, appraisers, inspectors, attorneys, and others.

On December 2, 2021, FinCEN issued an Advance Notice of Proposed Rulemaking (ANPRM) to contemplate further AML recordkeeping and reporting requirements for certain persons involved in real estate transactions.

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.

"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." Nevertheless, they are exempt under FinCEN rules from requirements to file Suspicious Activity Reports (SARs or Form 111) and Currency Transaction Reports (CTRs), and from maintaining a customer identification program (CIP) for AML recordkeeping purposes. Such persons remain exempt from establishing AML programs, despite a 2003 FinCEN ANPRM contemplating a rulemaking for additional AML requirements on persons involved in real estate closings and settlements.

Other Reporting Requirements

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 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 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 the U.S. 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 non-financed 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 academic 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. Treasury also found that, as of April 2019, 35% of all real estate transactions reported under GTOs involved subjects identified in a SAR. 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 William M. (Mac) Thornberry National Defense Authorization Act FY2021 (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. A key issue for Congress may focus on the oversight of FinCEN's implementation of the AMLA, including the CTA.

As described in the December 2021 ANPRM, FinCEN is considering multiple rulemaking approaches for addressing REML risks and vulnerabilities. One option could be to issue a tailored AML reporting requirement on a certain class of domestic financial institutions within the nonfinanced sector of the real estate market, pursuant to 31 U.S.C. 5318(a)(2), as amended by Section 6102(a) of the AMLA; such a requirement could be an alternative to or in addition to the BSA's general requirements. A second option could be to promulgate more general requirements for SAR reporting and AML program establishment for persons involved in real estate closings and settlements. FinCEN is also considering whether to take an "iterative" approach to rulemaking in order to address REML in residential and commercial sectors separately.

Additional key questions include (1) which persons in the real estate sector should be responsible for AML recordkeeping and reporting requirements; (2) what should be the geographic scope and transactions threshold, if any, of future AML rulemaking; and (3) how to define the scope of legal entities whose transactions in real estate would be subject to AML requirements—including whether to include trusts and legal entities formed under the laws of foreign jurisdictions.

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