



FinCEN Notice of Proposed Rulemaking

FinCEN Proposes Rules to Combat Illicit Financing of Residential Real Estate Transfers

In February of 2024, the U.S. Department of Treasury's Financial Crimes Enforcement Network ("FinCEN") announced proposed rules that would apply to certain residential real estate transactions, in an attempt to address vulnerabilities in the residential real estate sector as it relates to laundering of money through the purchase of residential real property in the United States. These proposed rules may have a wide-ranging impact on residential real estate transactions if enacted. Importantly, FinCEN has given the public a comment period up until April 16, 2024 to voice their opinion on these proposed rules.

The Notice of Proposed Rulemaking ("NPRM") announced on February 16, 2024 is intended by FinCEN to work alongside the Corporate Transparency Act, passed in 2021 by Congress and put into force earlier this year, to shed light on illicit financial activities and provide transparency as to those who do business in the United States.¹ While FinCEN has previously issued rules and regulations that impact the real estate industry and require certain information to be reported, these latest proposed rules in the February 2024 NPRM go further than any prior rule and require certain persons involved in real estate transactions to file reports

¹ Federal Register, Vol. 89, No. 33, 12424 – 12470 (<https://www.govinfo.gov/content/pkg/FR-2024-02-16/pdf/2024-02565.pdf>).

with FinCEN and maintain records relating to the beneficial owners of entities and trusts involved in real estate transactions.

More specifically, the NPRM proposes the creation of a new requirement for non-financed residential real estate transactions. Whereas previously, under FinCEN exemptions, certain persons involved in such non-financed transfers of residential real estate were not required to report or maintain information about such transactions, the new reporting requirement would impose on those same persons the need to file and maintain a record of what is referred to by FinCEN as a ‘Real Estate Report’. This Report would identify the person reporting the information, the legal entity to which the residential real property is transferred, the beneficial owners of that transferee entity, the person that transfers the residential real property, and the property being transferred.

The parameters and procedures involved in the filing of this ‘Real Estate Report’ are outlined in Part 1031 of the Regulations that relate to ‘Rules for Persons Involved in Real Estate Closings and Settlements.’ The newly proposed Subpart C specifies the reporting requirement, and states that such residential real property transfers “shall be reported to FinCEN by the reporting person... [and] shall include the information described in... this section.”² This rule applies broadly to ‘reportable transfers’ which, under the proposed rules, are any transfers of an ownership interest in “real property located in the United States containing a structure designed principally for occupancy by one to four families” as well as vacant or unimproved land zoned, or for which a permit has been issued, for construction of similar structures.³ When it comes to real estate transfers involving shares in a cooperative housing corporation, if such a transfer

² 31 C.F.R. § 1031.320(a).

³ 31 C.F.R. § 1031.320(b)(1)(i)-(ii).

does not involve extension of credit the transfer must be reported so long as the transfer is “(A) secured by the transferred residential real property; and (B) extended by a financial institution that has both an obligation to maintain an anti-money laundering program and an obligation to report suspicious transactions.”⁴ The newly proposed rule does exempt certain transfers, including those involving an easement, any transfer “resulting from the death of an owner of residential property” or those incident to divorce or dissolution of a marriage, as well as any transfers to bankruptcy estates.⁵

The proposed rules also have certain procedures to follow in order to determine who is required to report this information to FinCEN. The defined ‘reporting person’ under the proposed rules is “the person engaged within the United States as a business in the provision of real estate closing and settlement services that is the person listed as the closing or settlement agent on the closing or settlement statement for the transfer.”⁶ If no such person exists, another reporting person must be determined under the procedures and may be the person that prepares the closing or settlement statement for the transfer, the person that files with the recordation office the deed or other instrument transferring ownership, the person that underwrites an owner’s title insurance policy, the persons that disburses in any form the greatest amount of funds in connection with the transfer, or other persons as the case may be in connection with that specific transfer.⁷

As for the ‘Real Estate Report’ itself, the proposed rules explain that certain information must be provided by the reporting person involved in the residential real estate transfer. For the reporting person themselves, they must inform of their full legal name, the category of reporting

⁴ 31 C.F.R. § 1031.320(b)(1)(A)-(B).

⁵ 31 C.F.R. § 1031.320(b)(2)(i)-(iv).

⁶ 31 C.F.R. § 1031.320(c)(1)(i).

⁷ 31 C.F.R. § 1031.320(c)(1)(ii)-(vii).

person for which they qualify as determined under the subparagraph (c) outlined above, and the street address of the reporting person's principal place of business.⁸ For transferee entities, the information that must be provided is more extensive and includes the following categories of information:

- Full Legal Name of entity
 - Doing business name, if any
- Complete current address with entity principal place of business
- Unique Tax ID number
 - IRS TIN or, if none available, a tax ID number issued by a foreign jurisdiction
- For each beneficial owner of an entity, the beneficial owner's
 - Full legal name
 - Date of birth
 - Current residential street address
 - Citizenship and unique ID number
 - IRS TIN or, if none issued, unique ID number and issuing jurisdiction from non-expired foreign passport⁹

For individuals who are not beneficial owners of an entity but appear as a signing individual, these persons must also report the same information as beneficial owners. Aside from transferee entities, transferee trusts must also provide similar information, including the following categories:

- Full Legal Name of trust
- Date of trust instrument execution
- Street address of trust place of administration
- Unique Tax ID number
 - IRS TIN or, if none available, a tax ID number issued by a foreign jurisdiction
- Whether transferee trust is revocable
- For each trustee that is a legal entity, the trustee's
 - Full legal name
 - Doing business name, if any
 - Complete current address with trustee's principal place of business
 - Unique Tax ID number

⁸ 31 C.F.R. § 1031.320(d).

⁹ 31 C.F.R. § 1031.320(e)(1).

- IRS TIN or, if none available, a tax ID number issued by a foreign jurisdiction
- For each beneficial owner of the transferee trust, the beneficial owner must report:
 - Full legal name
 - Date of birth
 - Current residential street address
 - Citizenship and unique ID number
 - IRS TIN or, if none issued, unique ID number and issuing jurisdiction from non-expired foreign passport¹⁰

Similar to the situation with a transferee entity, for individuals who are not beneficial owners of a transferee trust, but appear as a signing individual, those persons must also report the same information as beneficial owners.¹¹

As for the transferor, the information that must be reported is similar to the above information requested for transferee entities and trusts, depending on whether the transferor is an individual or a legal entity, or even a trust.¹² Regarding the real property itself, certain information must also be reported and includes the street address, if any, as well as a legal description, such as “the section, lot and block, of each residential real property that is the subject of the reportable transfer.”¹³ The last piece of information required to be included in such ‘Real Estate Report’ concerns payments. Under the proposed rules, the reporting person must report information “concerning each payment, other than a payment disbursed from an escrow or trust account held by a transferee entity or transferee trust, that is made by or on behalf of the transferee entity or transferee trust regarding a reportable transfer” including:

- Amount of payment, consisting of total consideration paid
- Method by which payment was made
- Name and account number of financial institution where payment was made from, if applicable

¹⁰ 31 C.F.R. § 1031.320(e)(2).

¹¹ *Id.*

¹² 31 C.F.R. § 1031.320(f).

¹³ 31 C.F.R. § 1031.320(g).

- Name of any payor on any wire, check or other payment if payor is not a transferee entity or transferee trust¹⁴

While the proposed rules are not yet in effect and may take several months or even years before they are issued and go into effect, the potential requirements and imposition on residential real estate transactions cannot be understated. It will be imperative for professionals involved in residential real estate transfers to understand the requirements that may be relevant and ensure that all records are kept to ensure compliance.

Kenneth K. Yoon and
Spencer C. Serling
March 26, 2024

IRS CIRCULAR 230 DISCLOSURE: ANY STATEMENTS REGARDING FEDERAL TAX LAW CONTAINED HEREIN ARE NOT INTENDED OR WRITTEN TO BE USED, AND CANNOT BE USED, FOR THE PURPOSES OF AVOIDING PENALTIES THAT MAY BE IMPOSED UNDER FEDERAL TAX LAW OR TO PROMOTE, MARKET, OR RECOMMEND TO ANOTHER PARTY ANY TRANSACTION OR MATTER ADDRESSED HEREIN.

¹⁴ 31 C.F.R. § 1031.320(h).