

Update: FinCEN Issues Revised Regulations that Aim to Discover and Prevent Money Laundering

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On November 15, 2018, the Financial Crimes Enforcement Network (FinCEN) issued its [sixth Geographic Targeting Order](#) (GTO) aimed at preventing money laundering in all-cash residential real estate purchases made by legal entities.^[1] Since promulgating its first related regulations in 2016 (discussed [here](#)), FinCEN has issued revisions and extensions approximately every six months. These latest revisions (effective November 17, 2018 through May 15, 2019^[2]) significantly broaden prior regulations by decreasing the threshold dollar amount, including sales involving cryptocurrencies, and expanding the list of targeted geographic areas.

Expansion of Covered Transactions

The GTO applies to all transfers of (1) residential real property (2) purchased without a bank loan (3) by a legal entity^[3] (4) for \$300,000 or more, (5) using, at least in part, currency or a cashier's check, a certified check, a traveler's check, a personal check, a business check, a money order in any form, a funds transfer, or virtual currency, (6) in any one of the following areas:

- [California](#): the counties of San Diego, Los Angeles, San Francisco, San Mateo (Oakland & Hayward), and Santa Clara (Palo Alto & San Jose)^[4]
- [Florida](#): the counties of Miami-Dade,^[5] Broward (Ft. Lauderdale), and Palm Beach^[6]
- [Hawaii](#): the City and County of Honolulu^[7]
- [Illinois](#): the county of Cook (Chicago)
- [Massachusetts](#): the counties of Suffolk (Boston) and Middlesex (greater Boston area)
- [Nevada](#): the county of Clark (Las Vegas)
- [New York](#): the boroughs of Brooklyn, Queens, Bronx, Staten Island,^[8] and Manhattan^[9]

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- Texas: the counties of Bexar (San Antonio),^[10] Tarrant (Ft. Worth), and Dallas
 - Washington: the county of King (Seattle)

The foregoing list of criteria expands on the previous regulations in three ways. First, it applies a uniform (and much lower) threshold dollar amount to all geographic locations. Second, it includes virtual currencies (e.g., Bitcoin) among the qualifying forms of payment. Third, it adds seven new counties: Cook County in Illinois; Suffolk and Middlesex Counties in Massachusetts; Clark County in Nevada; Tarrant and Dallas Counties in Texas; and King County in Washington.^[11]

Reporting and Record Retention Requirements Remain

Although the scope of the regulations has broadened, the reporting information and records retention requirements remain the same. The only difference to note is that title companies will now report applicable transactions within thirty days of the closing by e-filing a FinCEN Currency Transaction Report, instead of using the old IRS Form 8300.

As before, failure to comply with these reporting and records retention requirements could result in civil or criminal penalties.^[12]

Takeaways and Predictions

Legitimate purchasers still need not be concerned. The information reported by title companies remains available only to FinCEN and applicable law enforcement agencies because the revised regulations continue to maintain the confidentiality of reports filed under the Bank Secrecy Act.^[13] Thus, for individuals who have practical reasons for keeping their home addresses out of the public directory (e.g., public figures and high net-worth individuals), there is no new cause for alarm.

The revisions, do, however, show a steady effort by FinCEN to expand its reach and mitigate work-arounds available under previous regulations. For example, the inclusion of additional geographic areas makes it more difficult to avoid reporting by purchasing property in another high-end but non-regulated market. Further, the significantly lower dollar-amount threshold captures even more of the residential real estate inventory available in these expensive markets.^[14] Of course, the revisions do not address all potential means of working around these regulations, for example, setting closing dates outside of the effective period, purchasing commercial instead of residential property, or excluding title companies from transactions by declining to purchase title insurance (although attorneys should note that the latter may trigger a duty to inquire^[15]). Additionally, questions remain with regard to what extent title companies are protected if they rely on shareholder lists or LLC agreements that contain incorrect or outdated information.^[16]

Regardless of any remaining flaws or questions, as long as the director of FinCEN continues to find that reasonable grounds exist to promulgate further GTOs,^[17] we expect to see new and improved versions approximately every six months. Stay tuned, as there is surely more to come.

[1] This sixth Geographic Targeting Order ("GTO") is available at [here](#) (last visited Nov. 28, 2018). FinCEN is authorized to promulgate these regulations by Treasury Order 180-01, available [here](#) (last visited Nov. 28, 2018).

[2] Because the regulations are promulgated pursuant to section 5326 of the Banking Secrecy Act, they are not effective for more than 180 days. See 31 U.S.C. § 5326(d).

[3] “Legal Entity” is defined in the GTO as “a corporation, limited liability company, partnership or other similar business entity, whether formed under the laws of a state or of the United States, or a foreign jurisdiction.” See GTO, *supra* note 1 at 4.

[4] These five counties in California were added in FinCEN's second GTO, effective August 28, 2016, available [here](#).

[5] Miami-Dade County was the subject of one of FinCEN's two initial GTOs, effective March 1, 2016, available [here](#).

[6] The counties of Broward and Palm Beach were added in FinCEN's second GTO, effective August 28, 2016, available [here](#).

[7] The City and County of Honolulu were added in FinCEN's fourth GTO, effective September 22, 2017, available [here](#).

[8] These four boroughs were added in FinCEN's second GTO, effective August 28, 2016, available [here](#).

[9] The borough of Manhattan was the subject of one of FinCEN's two initial GTOs, effective March 1, 2016, available [here](#).

[10] Bexar County was added in FinCEN's second GTO, effective August 28, 2016, available [here](#).

[11] Although, some of these new criteria may have been included in prior, secret orders. See *infra* note 15.

[12] See GTO, *supra* note 1 at 5.

[13] See 31 C.F.R. § 103.100(a)(3)(iv), available at [here](#), (last visited Nov. 28, 2018); see also *FOIA Exemptions and Exclusions*, [here](#), (last visited Nov. 28, 2018) (Exemption Three) (“Information that is prohibited from disclosure by another federal law.”); *id.* (Exemption Eight) (“Records that are

contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of any agency responsible for the

regulation or supervision of financial institutions.”).

[14] FinCEN previously sought to prevent these first two work-arounds by keeping certain revised GTO's confidential, sharing them only with title companies and their agents. See Nicholas Nehamas & Kevin G. Hall, [The hunt for dirty money in Miami real estate is working—and will continue, feds say](#), Miami Herald, Mar. 21, 2018, , (last visited Nov. 28, 2018); [New Geographic Targeting Order Shrouded in Secrecy](#), World Wide Land Transfer, May 23, 2018, , (last visited Nov. 28, 2018) (reporting that title companies and their agents received the GTO by mail); *FinCEN keeps GTO details private*,

The Title Rep., May 31, 2018, <https://www.thetitlereport.com/Articles/FinCEN-keeps-GTO-details-private-73277.aspx>, (last visited Nov. 28, 2018)

(reporting that FinCEN rejected its FOIA request for the GTO).

[15] Attorneys for sellers of residential property who discover that the purchaser plans to pay cash and has declined to purchase title insurance should be wary. These circumstances are uncommon enough that they may trigger a duty to inquire into whether the purchaser is a Specially Designated

National or Blocked Person that the seller is prohibited from doing business with under regulations promulgated by the Office of Foreign Assets Control

(“OFAC”). See 31 C.F.R. § 501.101 et seq.; ABA, *Formal Opinion 463*, May 23,

30, 2018); see also *Sanctions Search List*, <https://sanctionssearch.ofac.treas.gov/>, (last visited Nov. 30, 2018) (providing access to an easy search of the list online, as well as a downloadable list). Regardless of whether there is a duty to inquire, however, best practice is to raise the issue with your client and seek a representation and warranty or disclosure that is sufficient to establish that the purchaser is not someone the seller is prohibited from doing business with per OFAC.

[16] Although, FinCEN has provided some additional guidance on the GTOs and their impact on title companies in the last three years. See Advisory FIN-2017-003, available

at

https://www.fincen.gov/sites/default/files/advisory/2017-08-22/Risk%20in%20Real%20Estate%20Advisory_FINAL%20508%20Tuesday%20%28002%29.pdf, (last visited Nov. 30, 2018); see also Kevin Shepherd, *Real Estate Industry In Anti-Money Laundering Crosshairs*, Law360, Aug. 24, 2017, <https://www.law360.com/articles/957068/real-estate-industry-in-anti-money-laundering-crosshairs> (last visited Nov. 30, 2018). The American

Land title Association (“ALTA”) has also provided some helpful tools, available at <https://www.alta.org/business-tools/fincen.cfm>, (last visited Nov. 28,

2018).

[17] See 31 U.S.C. § 5326(a) (“If [FinCEN] finds . . . that reasonable grounds exist for concluding that additional recordkeeping and reporting requirements are necessary . . . [it] may issue [a GTO].”).

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