

FinCEN Regulations Will Aim to Discover and Prevent Money Laundering

Article By:

Kaitlin Riley Duran

On January 13, 2016, the Department of Treasury issued temporary regulations aimed at preventing money laundering.[1] These regulations target the practice of purchasing real estate using entities, such as limited liability companies or corporations, instead of using an individual's legal name. Legitimate purchasers have practical reasons for this practice, such as privacy and personal safety, since the use of such vehicles shields the identity of the true purchaser from the public and other parties to the transaction. Public figures and high net-worth individuals, for example, often have good reason to keep their home addresses out of the public directory. These new regulations, however, intend to uncover and identify those individuals who use this entity-based anonymity not for legitimate concerns, but to launder illicit funds.

Covered Transactions:

The temporary regulations were issued by the Financial Crimes Enforcement Network (FinCEN), a bureau of the Department of Treasury, in the form of Geographic Targeting Orders (GTOs). The GTOs will apply to all cash residential real estate purchases of at least \$1 million in Miami-Dade County and at least \$3 million in Manhattan in which the proposed title holder is an entity. The GTOs will be in effect from March 1, 2016 until August 27, 2016, and will require US title companies to disclose the identities of the natural persons behind these entity-purchasers.

Reporting Requirements:

Title companies and their subsidiaries and agents will be required to provide to FinCEN with the following information, using a [FinCEN Form 8300](#), within 30 days after an applicable purchase's closing:

- The identity of the legal entity purchasing the residential real property (the "Purchaser");
- The identity of the individual primarily responsible for representing the Purchaser (the "Purchaser Representative"), and a copy of the Purchaser Representative's driver's license, passport or similar identifying documentation;
- The identity of the beneficial owner of the Purchaser, defined as any individual who directly or

indirectly owns 25% or more of the equity of the Purchaser (the “Beneficial Owner”), and a copy of the Beneficial Owner’s driver’s license, passport or similar identifying documentation;

- The address of the subject property, the date of the closing, the total purchase price and the means by which the purchase price was paid (cash, check, etc.); and
- Information about the title company preparing the report.

The title companies must retain all identifying information for at least five years following expiration of the GTOs. The information must be stored in an accessible manner and, upon request, must be available to FinCEN or any other appropriate law enforcement or regulatory agency. Title companies may face civil or criminal penalties for violating any of the terms of the GTOs.[2]

Similar disclosure requirements are not entirely new in New York. On May 18, 2015, the New York City department of finance issued rules to prevent owners from hiding purchases of real estate through shell companies. These rules amended the New York City Real Property Transfer Tax Return form ([NYC-RPT](#)), to require disclosure of identifying information including the name, address and SSN or EIN of all the members of a multi-member LLC involved in a real estate transaction.[3]

Takeaways and Predictions:

Legitimate purchasers should not be concerned. Even though disclosure of the information is required, only FinCEN and applicable law enforcement agencies will have access to the required reporting information provided by title companies. Further, as with other reporting information required by the Bank Secrecy Act, the information will not be accessible by Freedom of Information Act (FOIA) request.[4] Likewise, the information disclosed in a NYC-RPT form does not become a matter of public record and is only available to the Department of Finance.

It is likely that the GTOs are only the first step toward permanent reporting regulations of wider geographic applicability. FinCEN has considered such reporting requirements for almost fifteen years,[5] so these requirements will probably not disappear after the six-month effective period. As written, the GTOs allow potential purchasers to evade the requirements by moving transaction closing dates before or after the current GTO effective period. Individuals seeking to launder illicit funds could use other strategies to avoid the reporting requirements. For example, purchasers could buy property in Brooklyn instead of Manhattan or just outside Miami-Dade County, where luxury real estate prices are equally high. They could buy commercial, not residential properties. Purchasers wanting to hide their identities could name someone else as the owner of an LLC and after the real estate transaction is complete, purchase the LLC. Additionally, purchasers may avoid the reporting requirements by not purchasing title insurance.

Moreover, there are other concerns to be addressed: for example, will the title companies be protected if they rely on shareholder lists or LLC agreements that contain incorrect or outdated information? Hypothetically, a purchaser could provide an operating agreement showing only one member of an entity, and following the closing add additional members. Currently, no system in place can track such changes. Because of these and other ambiguities in the temporary regulations, the American Land Title Association (ALTA), a lobbying group that represents more than 5,500 title companies, has written a [letter](#) to FinCEN asking Treasury officials to clarify the GTOs and to apply a reasonable and good-faith test for determining insurers’ compliance.

The temporary, limited nature of the GTOs, and their loopholes and uncertainties, suggest that the GTOs will serve as a trial run for FinCEN to determine the requirements and processes that will be imposed in future, permanent regulations.

[1] *FinCEN Takes Aim at Real Estate Secrecy in Manhattan and Miami*, “Geographic Targeting Orders” Require Identification for High-End Cash Buyers, FinCEN.gov (Jan. 13, 2016), www.fincen.gov/news_room/nr/html/20160113.html.

[2] Geographic Targeting Order, https://www.fincen.gov/news_room/nr/files/Real_Estate_GTO-NYC.pdf (last visited Jan. 19, 2016); Geographic Targeting Order, https://www.fincen.gov/news_room/nr/files/Real_Estate_GTO-MIA.pdf (last visited Jan. 19, 2016).

[3] NYC Department of Finance, *ACRIS Tax Form Creation Changes*, available at <http://www1.nyc.gov/site/finance/taxes/acris.page> (last visited Jan. 20, 2016).

[4] Interview with FinCEN hotline representative, Financial Crimes Enforcement Network (Jan. 19, 2016); *see also*, *FOIA Exemptions and Exclusions*, FinCEN.gov, https://www.fincen.gov/foia/foia_exemptionsexclusions.html (describing FOIA exemptions 3, information that is “prohibited from disclosure

by another federal law,” and 7(C), information that “[c]ould reasonably be expected to constitute an unwarranted invasion of personal privacy”) (last

visited Jan. 19, 2016).

[5] In 2003, FinCEN issued an advance notice of proposed rulemaking seeking commentary on similar reporting requirements for the real estate industry. Interested parties, including many bar associations, submitted a total of fifty-two commentary letters, and no subsequent regulations were

passed until now. *See “USA Patriot Act Updated for Real Estate Attorneys”* American Bar Association, (Dec. 4, 2006), available at http://www.americanbar.org/content/newsletter/publications/rpte_e_report_home/ShepherdPatriotAct.html.

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