Title and Settlement Companies Face Substantial Cost to Comply With FinCENâ??s AML Real Estate Rule

Description

ALTA Files Amicus Brief Supporting Fidelityâ??s Challenge to Rule

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FinCENâ??s **final rule** requiring certain industry professionals to report information to the agency about non-financed transfers of residential real estate to a legal entity or trust will have a significant financial and process impact on title and settlement companies.

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The rule, which goes into effect Dec. 1, requires a substantial amount of information that must be gathered and reported.

Reporting Cost

FinCEN believes that it will take 2.75 hours for a reporting person to report on each transfer. This includes two hours for collecting the information and an additional 30-45 minutes to tile the report. Itâ??s expected to take 75 minutes per employee of initial training and technology implementation the first year and 30 minutes for annual refresher courses. ALTA believes the training time estimate is slightly low.

In the final rule, FinCEN estimates the regulation will cost the industry between $401 million and $663 million per year, with a high of $690 million the first year of implementation.

Penalties

There is no penalty structure for this rule, but fines for failure to comply typically follow violations of the **Bank Secrecy Act**. Negligent violations are subject to a civil penalty of not more than $1,394 for each violation and an additional civil penalty of up to $108,489 for a pattern of negligent activity. Meanwhile, willful violations are subject to imprisonment of up to five years or a criminal fine of up to $250,000, or both. Willful violations may also be accompanied by a civil penalty, the amount of which is the greater of (a) $69,733, and (b) the amount involved in the transaction (with a cap of $278,937).

Required Information

The final rule requires that a reporting person provide information about the transfer of residential real property identifying the following:

- The reporting person
- The legal entity (transferee entity) or trust (transferee trust) receiving ownership of the property
- The beneficial owners of the transferee entity or transferee trust

- Certain individuals signing documents on behalf of the transferee entity or transferee trust during the reportable transfer
- The transferor (e.g., the seller)
- The residential real property being transferred
- Total consideration and certain information about any payments made

To be a beneficial owner of a transferee entity, an individual must, either directly or indirectly, exercise â??substantial controlâ?• over the transferee entity, or own or control at least 25% of the transferee entityâ??s ownership interests.

The beneficial owner of a transferee trust is:

- any individual who is a trustee or otherwise has authority to dispose of transferee trust assets
- is a beneficiary who is the sole permissible recipient of income and principal from the transferee trust or who has the right to demand a distribution of, or to withdraw, substantially all of the assets of the transferee trust
- is a grantor or settlor of a revocable trust
- is the beneficial owner of an entity or trust that holds one of these aforementioned positions in the trust.

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Reasonable Reliance on Information

When determining whether a transfer is reportable and when collecting required information, the rule says reporting persons may rely on information provided by any other person, but only if the reporting person does not have knowledge of facts that would reasonably call into question the reliability of the information.

With regard to the beneficial ownership information of transferee entities or transferee trusts, this reasonable reliance standard is slightly more limited. In these situations, the reasonable reliance standard applies only to information provided by the transferee or the transfereeâ??s representative and only if the person providing the information certifies the accuracy of the information in writing to the best of their knowledge.

FinCEN has yet to publish the real estate report (REF) for real estate that professionals can use to submit information for covered transaction. The proposed REF contained 111 fields. Of these, FinCEN expects approximately 60% must be completed to report a given transfer per the requirements specified in the rule. The form may require as few as approximately 40 fields to be completed, according to the agency.

FinCEN anticipates that significantly more fields may be required for certain highly complex reportable transfers, such as those with multiple beneficial owners or multiple sources of funds that would require the same fields to be populated for each owner or source of funds.

Determination of Reporting Persons

FinCEN expects that the obligation to file reports will generally rest with settlement agents, title insurance agents, escrow agents and attorneys. There is only one reporting person for any given reportable transfer.

Record Retention

A report must be filed by the later date of either:

- The final day of the month following the month in which the reportable transfer occurred
- 30 calendar days after the date of closing.

The reporting person is not required to retain a copy of the report. However, they must keep for five years a copy of any certification, signed by the transferee or a transfereeâ??s representative, certifying that the transfereeâ??s beneficial ownership information, as well as a copy of any designation agreement signed. Other parties to the designation agreement similarly need to keep copies of the agreement.

Scope of Transactions

FinCen estimates the rule will require about 800,000 to 850,000 reports to be filed annually.

Data from First American shows that about 10% of home sales in 2024 were all-cash transactions to legal entities or trusts. The top 10 states with the highest percentage of these types of transactions include Hawaii, Arizona, Nevada, Oklahoma, Wisconsin, Delaware, Vermont, Alabama, Florida and California.

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FinCEN has found that from 2017 to early 2024, about 42% of non-financed real estate transfers captured by the Residential Real Estate GTOs were conducted by individuals or legal entities on which a Suspicious Activity Report (SAR) has been filed. In other words, individuals engaging in a type of transaction known to be used to further illicit financial activityâ??the non-financed purchase of residential real estate through a legal entityâ??are also engaging in other identified forms of suspicious activities. FinCEN said the ability to connect these activities across reports allows law enforcement to efficiently identify potential illicit actors for investigation and build out current investigations.

According to a money laundering study by Global Financial Integrity, more than 61% of federal money laundering cases involving real estate between 2016 and 2021 involved at least one transfer in a county not covered by the residential real estate Geographic Targeting Orders.

A **recent study** of U.S. single-property residential purchases that occurred between 2015 and 2019 identified a trust as the buyer in 3.3% of observed transactions. FinCEN does not expect the proportion of reportable transfers involving a transferee trust to exceed 5% of potentially affected transfers.

ALTA Develops Forms to Aid Compliance

ALTA has developed two forms to assist the industry in collecting information needed to comply with the rule.

ALTAâ??s AML Work Group developed collection forms for buyers and sellers. The forms are designed to take advantage of the reasonable reliance standard in the rule. It also includes a certification section copied from a model FinCEN developed for bank compliance with the customer due diligence rule.

You must be logged in and be an ALTA member or a Policy Forms License Holder to access the forms.

The **buyerâ??s form** includes sections to collect information about:

- the person completing the form
- potential exemptions to reporting
- the buyer/transferee in a covered real estate transaction
- the origin of funds used to acquire the subject real estate

The **sellerâ??s form** includes sections to collect information about:

- the person completing this collection form
- potential exempt transactions
- the seller in a covered real estate transaction

ALTAâ??s Advocacy Efforts

ALTA has said the rule places significant burden on small businesses, as well as liability concerns related to data privacy and security. On Sept. 2, ALTA filed a motion requesting permission to file an amicus brief supporting Fidelity National Financialâ??s motion for summary judgment in its challenge to the rule. In the brief, ALTA argues the rule will impose crippling compliance costs on small title companies, while offering only speculative law enforcement benefits.

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ALTAâ??s brief provides the court with a deeper understanding of the title industry as a whole and the impact of the rule on small businesses. It augments Fidelityâ??s argument that FinCEN acted arbitrarily and capriciously in finalizing the rule because it didnâ??t consider all the likely costs that the title industry will bear in complying with the rule.

â??Small businessesâ??the bulk of ALTAâ??s membershipâ??are ill-equipped to absorb these additional costs and regulatory burdens, which will erode already thin profit margins,â?• ALTA said in the brief. â??Moreover, these estimates are deeply flawed because they understate the true costs.â?•

According to ALTA, FinCEN severely underestimated the time, training, and technology needed for compliance. FinCEN assumed reports could be completed in three hours, but ALTA says the reality will require many more hours, additional staff, costly IT upgrades, and extensive training.

As the implementation deadline approaches, FinCEN has not made any additional steps toward narrowing the scope of the rule or reducing its burden, despite ALTAâ??s continued advocacy. In fact, they have not finalized the reporting form after a year of ALTAâ??s engagement on the topic.

The brief further criticized FinCEN for ignoring cybersecurity risks tied to storing highly sensitive BOI, brushing off industry concerns, and assigning arbitrary dollar values to justify the regulation. ALTA also pointed out that existing regulations, such as the Customer Due Diligence (CDD) rule for banks, already capture much of the same BOI that FinCEN seeks, making the new requirements duplicative and unnecessary. Even FinCEN itself has recently admitted that BOI reporting provides only â??marginalâ?• benefits.

â??ALTAâ??s brief focuses on the area where it could add the most value, namely highlighting the additional costs that FinCEN didnâ??t consider,â?• said ALTA CEO Chris Morton. â??While no one can predict how a court will rule in these cases, our hope is that ALTAâ??s efforts will enhance the chances in this case.â?•



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