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U.S. Issues Orders Requiring Identification of All-Cash Buyers of High-End Residential Real Estate

On January 13, 2016, the U.S. Financial Crimes Enforcement Network (“FinCEN”) announced that it will temporarily require U.S. title insurance companies to disclose the identity of the beneficial owners of shell companies making all-cash purchases of high-end residential real estate in Manhattan and Miami-Dade County. FinCEN, a division of the U.S. Department of Treasury, issued the recent Geographic Targeting Orders (the “Orders”) as part of its effort to gather data that will assist law enforcement agencies in combating money-laundering in cities where investors target high-end real estate acquisitions.

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The Orders

The Orders are temporary and will remain in effect from March 1, 2016 through August 27, 2016 as part of a 180-day “trial period”. The Orders apply to residential real estate sales in excess of \$3 million in Manhattan and \$1 million in Miami-Dade County. Title insurance companies will be required to report to FinCEN the identities of the beneficial owner(s) or holder(s) of 25% or more of the direct or indirect equity or beneficial interests in the purchasing entity by filing a FinCEN Form 8300 within 30 days of closing a transaction. Generally, the Form 8300 requires that the following information be provided:¹

- Identity of the legal entity that is purchasing the residential property. Under the Orders, a legal entity is defined to include U.S. or foreign corporations, limited liability companies, partnerships or other similar business entities. The Orders do not expressly provide that a “legal entity” includes trusts, and the American Land Title Association (“ALTA”) has made a request to FinCEN to have trusts excluded from the reporting requirement.
- Identity of the direct or indirect individual beneficial owner(s) or holder(s) of 25% or more of the direct or indirect equity or beneficial interests in the purchasing entity and a copy of their driver’s license, passport, or other similar identifying documentation.
- Information about the key terms of the transaction, including closing date, total purchase price, form of consideration, and address of the property purchased.

Confidentiality

FinCEN is relying on title insurance companies as the reporting intermediary for these transactions, the rationale being that the vast majority of buyers of high-end residential real estate are likely to obtain title insurance. Title insurance companies are required to send the Form 8300 to FinCEN, where the information will be stored on an internal FinCEN database not available to the public. According to FinCEN, this database cannot be accessed through public sources, and will only be made available to law enforcement agencies. FinCEN’s collection of this information is likely to fall under an exemption from the Freedom of Information Act (“FOIA”), which exemption generally provides that information collected for law enforcement purposes is not subject to FOIA requests. However, it remains to be seen whether valid legal claims can or will be brought to challenge whether such FOIA exemption properly applies to the information being collected by FinCEN.

¹The FinCEN Form 8300 is available [here](#).

General Trends in Regulating Real Estate Transactions

The Orders could be viewed as part of a growing trend towards increased transparency in the luxury real estate market and heightened scrutiny of all-cash purchasers of U.S. real estate. Previous FinCEN rules regulating the real estate industry have focused on regulating the mortgage market to deter fraud and money laundering when purchasers utilized financing, but the new Orders aim to close the gap in regulation where no financing is used. A series by *The New York Times* last year² examined the growing number of anonymous real estate transactions, particularly in high-end real estate in New York and other major U.S. cities, and highlighted the risk of money launderers using U.S. real estate as a safe haven for illicit money. In May 2015, the New York City Department of Finance imposed new rules requiring the names of all members of a limited liability company buying or selling property in New York City to be disclosed on real estate transfer tax forms generated by the Automated City Register Information System (“ACRIS”). The tax forms are required to be delivered to the appropriate City Register Office, but are not stored in the public database. The forms are then subsequently submitted to the New York City Department of Finance for tax administration purposes and remain confidential. While the ACRIS disclosure rules were more limited in scope and intent (primarily targeting foreign real estate owners attempting to evade New York City income taxes), the issuance of the FinCEN Orders provides further evidence that increased disclosure in real estate transactions is gaining momentum with law enforcement agencies and could be utilized more commonly and broadly as a tool for targeting illicit transactions. But while it is possible that the Orders may signify broader efforts at regulating money-laundering in high-end all-cash real estate transactions, it remains to be seen whether this is a temporary and limited response or the first step towards more permanent efforts to regulate all-cash transactions.

Implications of the Orders

The effectiveness of the Orders is likely to be impacted by buyers who might forgo obtaining title insurance, despite the risks of not being insured, in order to avoid the reporting obligation. However, it is possible that one of the goals of FinCEN’s Orders will be to monitor whether significant changes in the market occur as all-cash buyers react to the regulations. Any changes, such as a marked decrease in the utilization of title insurance, could potentially provide circumstantial data regarding the amount of all-cash transactions being consummated for illicit purposes.

While the title insurance industry generally seems to be supportive of the Orders, there are concerns as to how effectively title insurers will be able to implement such extensive disclosure requirements. In response to the Orders, ALTA recently published a letter to FinCEN Director Jennifer Shasky Calvery proposing several clarifications to the Orders to ensure greater compliance.³

Commentators have raised concerns about the “chilling effect” the Orders could have on the luxury residential market by deterring legitimate buyers due to the disclosure concerns. Although the Orders are temporary, Calvery has stated that if the Orders are found to be effective in identifying money-laundering issues, permanent regulations may be implemented that could potentially cover other major metropolitan markets.⁴

For more information, please contact a member of Ropes & Gray’s [real estate investments and transactions team](#) or another Ropes & Gray attorney.

²The *New York Times* series is available [here](#).

³The ALTA letter published on January 13, 2016 is available [here](#).

⁴The *New York Times* article published on January 13, 2016 includes statements from Calvery regarding the Orders, and is available [here](#).