

Why Is Treasury Cracking Down on Big, Cash-Only Real Estate Transactions?

Joe Mont | January 20, 2016

For all its efforts to combat money laundering—and there have been many in the United States—the real estate sector has remained strangely untouched by them. Efforts to suss out the beneficial owners behind shell companies is an ongoing concern, one repeatedly flagged in assessments by the international Financial Action Task Force and its task force on money laundering, as post-crisis real estate bargains attract a flurry of multinational buyers.

Concerns that all-cash purchases of residential properties, lacking bank financing, may be used to hide illicit assets through limited liability companies or other opaque structures has prompted the enforcement arm of the Treasury Department—known as the Financial Crimes Enforcement Network, or FinCEN—to issue new Geographic Targeting Orders (GTOs). Starting on March 1, it will temporarily require title insurance companies to identify and report the natural persons and beneficial owners behind companies that pay in cash for high-end residential real estate in Manhattan and Miami-Dade County, Florida. The orders, barring an extension, expire on Aug. 27, 2016.



Calvert

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Jennifer Shasky Calvery said in a statement. “But cash purchases present a more complex gap that we seek to address.”

FinCEN says it will take this approach because title insurance is a common feature in the vast majority of real estate transactions.

The recent GTO is the latest in the increasing use of that investigative tool by FinCEN. In April 2015, the agency targeted Miami-area businesses in its pursuit of money laundering plots. It did so by targeting electronics exporters in Miami-Dade County, focused on suspicions of trade-based money laundering schemes that used drug cartel proceeds to buy electronics that were later sold in South America, effectively converting ill-gotten gains into local currency. The GTO lowered the standard \$10,000 reporting threshold for currency transactions to \$3,000 (in either a single transaction, or series of related transactions) for covered businesses. The Treasury Department has a specific protocol, Form 8300, for filing those reports.

In little more than a year, other GTOs have targeted various potentially problematic businesses. One GTO targeted check cashing services in south Florida. Another GTO expanded the reporting and record-keeping obligations to garment and textile businesses, show stores, flower shops, and beauty supply businesses in the Los Angeles garment district. And yet another GTO targeted businesses based near the San Ysidro and Otay Mesa ports of entry on the California/Mexico border.

While there is nothing inherently illegal about all-cash real estate purchases or the use of shell companies to ensure buyer anonymity, the practices can be a go-to tool for money laundering. Investigative reports by the *New York Times* have uncovered not only a large number of questionable real estate deals, but also this tidbit: nearly half of all homes purchased across the U.S. valued at \$5 million or more were made through transactions with shell corporations. A recent investigation by officials in New York City led to the discovery that Bank Melli, owned by the government of Iran, was the 40 percent owner of an office tower in midtown Manhattan.

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“For those trying to hide their identity, this is going to be a major blow,” says Fred Curry, a principal in Deloitte’s anti-money laundering consulting practice. “Hiding illegal assets and concealing the identity of bad actors has been a way to use the real estate market to launder the proceeds of illegal activity. This is a very important step for law enforcement that gives them greater transparency into the transactions. As money launderers become more sophisticated in how they move their funds through LLCs and other opaque vehicles, FinCEN must be proactive in addressing it. That is what they are doing here.”



Delston

Concerns regarding the GTO include fears it will slow the pace of real estate transactions or, conversely, lead to a flurry of cash transactions before the March 1 deadline. Ross Delston, a Washington-based lawyer and AML compliance expert, poses another concern: Does targeting title insurance amount to a wild goose chase? Buyers who are paying in cash generally don’t need title insurance, especially if they are simply recycling corrupt money. “I don’t think anyone’s going to be worried about title insurance in that situation,” Delston says.

NOT SO LITTLE GTO

The following is from a Geographic Targeting Order issued by FinCEN to title insurance companies in Manhattan.

Reports Required to be Filed by the Covered Business

1. If the Covered Business is involved in a Covered Transaction, then the Covered Business shall report the Covered Transaction to FinCEN by filing a FinCEN Form 8300 within 30 days of the closing of the Covered Transaction. Each FinCEN Form 8300 filed pursuant to this Order must be: (i) completed in accordance with the terms of this Order and the FinCEN Form 8300 instructions (when such terms conflict, the terms of this Order apply), and (ii) e-filed through the Bank Secrecy Act E-filing system.²

2. A Form 8300 filed pursuant to this Order shall contain the following information about the Covered Transaction:

Part I shall contain information about the identity of the individual primarily responsible for representing the Purchaser. The Covered Business must obtain and record a copy of this individual's driver's license, passport, or other similar identifying documentation. A description of such documentation must be provided in Field 14 of the form.

Part II shall contain information about the identity of the Purchaser. The Covered Business should select Field 15 on the FinCEN Form 8300, which will enable reporting of multiple parties under Part II of the form.

Part II shall also contain information about the identity of the Beneficial Owner(s) (as defined in Section III.A of this Order) of the Purchaser. The Covered Business must obtain and record a copy of the Beneficial Owner's driver's license, passport, or other similar identifying documentation. A description of such documentation must be provided in Field 27 of the form.

Retention of Records

The Covered Business must: retain all records relating to compliance with this Order for a period of five years from the last day that this Order is effective (including any renewals of this Order); store such records in a manner accessible within a reasonable period of time;

and make such records available to FinCEN or any other appropriate law enforcement or regulatory agency, upon request.

Compliance

The Covered Business must supervise, and is responsible for, compliance by each of its officers, directors, employees, and agents with the terms of this Order. The Covered Business must transmit this order to each of its agents. The Covered Business must also transmit the Order to its Chief Executive Officer or other similarly acting manager.

Penalties for Non-compliance

The Covered Business and any of its officers, directors, employees, and agents may be liable, without limitation, for civil or criminal penalties for violating any of the terms of this Order.

[Source: Fin-CEN](#)

In the meantime, expect officials to continue their struggle regarding beneficial ownership due diligence. FinCEN's own rule proposal, lingering for nearly a year, may not go far enough in Delston's opinion because it only requires self-certification by owners. "There are large swaths of the real estate sector that are currently not covered at all under the regulatory regime," he says. Real estate agents, in particular, are targeted by FATF's international standards, as embodied in its AML recommendations. The U.S. is not in compliance with international standards, Delston explains, because FATF has stated in its mutual evaluation of the U.S. that they are going to find, as they have in the past, that large sectors, including real estate agents, are not covered by measures such as the requirement for an AML program, the filing of Suspicious Activity Reports, and appointment of an AML compliance officer.

"It can be easy to determine if the buyer is a nominee or is a straw buyer in some cases," Delston adds. "A simple internet search will uncover the fact that they are a lawyer accountant or consultant who wouldn't ordinarily be buying this level of real estate. What's really difficult, and sometimes impossible, is when the nominee is a family member, a close family friend, a business associate, and perhaps someone with a different

last name and from a different country. When you have the kind of wealth this order is aimed at, you can find lots of people who will help you do things.”



Berg

The limited scope of the GTO suggests that FinCEN wants to evaluate its effect before deciding to broaden its attack, says Eric Berg, special counsel with Foley & Lardner and a former trial attorney at the Department of Justice, who conducted financial and real estate investigations connected to foreign corruption with the DOJ’s “Kleptocracy Initiative,” and who is an expert on the use of electronic surveillance in undercover criminal investigations. “They will certainly look at the effect it has because it is only a temporary measure. Future moves will be based upon it,” he says.



“It is sensible to use GTOs because they can help FinCEN determine whether there really is a problem, and whether further regulation of a segment is necessary,” says Stephen Heifetz, a partner with the law firm Steptoe & Johnson. “The industry might say, as they often do, that if there may only be one in 10,000 transactions by some bad seed, then is this really the most efficient way to use society’s resources? That’s a fair query.”

FinCEN, however, needs to determine whether there is a problem, and with these GTOs and the increased transparency they provide to be able to determine whether further regulation is necessary, he says. “It is a way FinCEN can be active and properly demonstrate they are keeping their eye on the ball, but doing so in a measured way.”

As for future FinCEN targets, Heifetz sees a likely increase of scrutiny related to casinos, Bitcoin-related businesses, crowdfunding initiatives and money services businesses.

“An important thing for any financial institution under the very broad FinCEN definition is that you can come into compliance pretty easily,” he says. “It generally doesn’t take a lot of work to have a basic compliance program that is a satisfactory and reasonable deterrent. I don’t think that in these areas the federal government is playing a ‘gotcha’ game. They are expecting a fairly basic level of compliance, even by smaller institutions.”