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FINCEN AGAIN EXTENDS ITS GEOGRAPHIC TARGETING ORDER TO ADDRESS MONEY LAUNDERING THROUGH REAL ESTATE

To Our Clients and Friends:

On May 8, 2020, the Department of the Treasury Financial Crimes Enforcement Network (“FinCEN”) again extended the Geographic Targeting Order (“GTO”) requiring title insurance companies to report non-financed purchases of residential real estate in certain major metropolitan areas.^[1] Recent Congressional activity evinces an interest in money laundering through real estate, as well as an apparent satisfaction with the GTO approach. Bills introduced in both the House and Senate propose expanded use of GTOs, including application to commercial real estate, with one bill going so far as to make GTOs nationwide and permanent.^[2]

Background

Law enforcement contends that money laundering through investment in real estate, often through opaque legal structures, is a major problem in the United States and other Western countries. The contention is that criminals are attracted to desirable real estate markets in which to live and to the stability of real estate as an investment.^[3]

The Financial Action Task Force (“FATF”) on money laundering tackled the issue of money laundering through real estate in 2007 and 2008 with a study followed by a guidance paper for a “risk-based approach” for governments and the real estate industry.^[4] The FATF recommendations provide that formal anti-money laundering (“AML”) measures, including customer due diligence (“CDD”) and suspicious activity reporting, should be imposed by governments on real estate agents, a category of Designated Non-Financial Businesses and Professions (“DNFBPs”).^[5]

The United States has not squarely implemented the FATF recommendations and has chosen to address the problem since January 2016 through the temporary measure of Bank Secrecy Act (“BSA”) GTOs. Under the GTOs, the regulatory obligations are placed on title insurance companies, and the focus is only on higher-end residential real estate in designated locations. In the 2016 Mutual Evaluation of the United States, FATF commented favorably on the use of GTOs, but concluded that the United States had failed to implement the FATF recommendations with respect to the real estate sector.^[6]

The GTOs

On May 8, 2020, FinCEN extended for six months (effective May 8, 2020 through November 5, 2020) the GTO requiring title insurance companies in some geographic areas to report non-financed purchases of residential real estate in named major metropolitan areas.^[7] No new geographic areas were added.

The GTOs address a law enforcement concern about persons anonymously purchasing higher-end residential real estate in these areas through shell companies using illegal source funds. Under the current GTO, title insurance companies must, within 30 days of closing, report any non-financed residential real estate sales of \$300,000 or more to legal entity buyers other than U.S. public companies making the purchase all or in part with currency, money instruments, wire transfers, and/or crypto currency.[8] Residential real estate includes properties with four or fewer units. The reports must include beneficial ownership information at a 25% threshold for the purchasing legal entity, and the title insurance companies must verify the identity of the beneficial owners and their representatives using documentary means. FinCEN provides a model Currency Transaction Report (“CTR”) electronic filing format instructing title insurance companies how to report the required information.[9]

Similar GTOs have been issued every six months since January 2016, beginning with only two jurisdictions (New York City and Miami). Prior to November 2018, the GTOs required reporting at different thresholds for different geographic areas, rather than the same \$300,000 monetary threshold across the board. After January 2016, additional metropolitan areas were added, and the GTOs were extended several times for periods of six months (August 2016, February 2017, August 2017, August 2018, May 2019, and November 2019). There also were press reports that FinCEN extended the GTO in March 2018, but that extension was not officially confirmed.[10]

The orders originally were limited to cash and monetary instrument sales, but on August 2, 2017, an amendment to the BSA GTO statutory authority, 31 U.S.C. § 5326, was enacted allowing GTOs to cover transactions involving “funds,” not just currency and monetary instruments.[11] This allowed FinCEN to require reporting of transactions involving wire transfers (beginning with the August 2018 GTO), and to include transactions in cryptocurrency (beginning in November 2018).[12]

In a speech in June 2019, the Director of FinCEN, Kenneth Blanco, discussed the usefulness of GTOs and of adding new markets to the coverage: “GTOs have provided FinCEN with valuable insight into the ways that illicit actors move money in the U.S. residential real estate market, and help us better understand how actors in markets with relatively fewer AML protections respond to new reporting requirements.”[13]

In the *National Strategy for Combating Terrorist and Other Illicit Financing 2020* issued by the Department of the Treasury on February 6, 2020, Treasury reaffirmed the utility of the GTOs, but also acknowledged that the GTOs did not address all money laundering vulnerabilities and that the GTO requirements sometimes could be evaded.[14] Notably, in the discussion of expanding the coverage of the BSA requirements to other financial institutions and professions, Treasury did not suggest that there were any near term plans to propose regulations to extend the BSA requirements to real estate professionals or implement the GTOs on a permanent basis.[15]

Should the GTOs Be a Permanent Solution?

Under the BSA, the Secretary of the Treasury, on his own initiative or at the request of law enforcement, may authorize special BSA reporting and recordkeeping for a set period of time, not to exceed six months, for some or all categories of financial institution or trades or businesses in a designated

geographic area. If the law enforcement need continues, GTOs may be extended for another six months. There is no explicit statutory limitation on the number of extensions. The renewal period was extended to six months by a BSA amendment in 2001 in the USA PATRIOT Act. Originally, GTOs could only be issued for 60 days subject to extension.

The authority to issue GTOs was enacted in 1988. While there may have been other GTOs that did not become public, it appears that authority was not used extensively for many years. FinCEN began publicly issuing a series of GTOs in 2014 to address various law enforcement concerns.[16] The residential real estate GTOs have been the longest standing GTOs based on public information.

After four years, the continued use of the GTOs appears to be FinCEN's answer to applying the BSA to the real estate industry, at least in the near future. There is a legal question whether Treasury is authorized to use what was clearly intended to be a temporary tool under the statute on a permanent basis and whether at some point, there would be a requirement for formal notice and comment on the reporting requirements because they have become in effect a permanent regulation. This is largely a theoretical concern – a challenge after all this time by the title insurance industry appears unlikely. Except for possible future criticism by the FATF, there is no discernable pressure on FinCEN to use the authority of the BSA more widely or the GTO authority on a permanent basis.

The Real Estate Industry – The BSA History

There is additional authority under the BSA statute, 31 U.S.C. § 5312(a)(1)(U), for FinCEN to take further measures with respect to the real estate industry and to meet the FATF recommendations. The BSA was amended in 1988 to include the very broad category “persons involved in real estate closings and settlements” in the definition of financial institutions potentially subject to BSA requirements by regulation. Under a 2001 BSA amendment in the USA PATRIOT Act, Treasury has been required to implement regulations requiring AML programs for all the businesses listed in the BSA statutory definition of financial institution unless exempted by Treasury.[17] In 2003, FinCEN issued an Advance Notice of Proposed Rulemaking relating to potential implementation of BSA requirements for the real estate industry, but there has been no further action towards permanent BSA regulatory requirements for the industry.[18]

On August 22, 2017, FinCEN issued an Advisory on the money laundering risks of real estate transactions, including purchases of luxury property with shell companies and all cash real estate transactions, and affirmed the utility of the initial GTOs.[19] The Advisory stated that as of May 2, 2017, over 30% of the real estate transactions reported under the GTOs involved either a beneficial owner or purchaser representative that had been the subject of Suspicious Activity Reports (“SARs”). FinCEN advised that real estate transactions could mask the origins of the proceeds of public corruption, drug trafficking or fraud. The guidance reiterated earlier FinCEN statements that real estate brokers, escrow agents, title insurance companies, and other real estate professionals are encouraged to file SARs voluntarily if certain red flags for money laundering were present. Such voluntary reporting is consistent with the AML guidance of the National Association of Realtors.[20]

Congressional Interest and Pending Legislation to Extend GTOs to Commercial Real Estate

There is Congressional interest in money laundering through real estate and apparent satisfaction with the GTO approach.

On May 4, 2019, the House passed H. Res. 206, a statement by Congresswoman Maxine Waters (D-CA), the Chairman of the House Committee on Financial Services, about the “loopholes” in addressing the problem of money laundering, including with respect to the real estate industry. The pending BSA improvements bill titled the *Corporate Transparency Act of 2019*, H.R. 2513, put forward by the Committee on Financial Services and passed by the House on October 22, 2019, however, would only expand the use of the GTOs. Section 212 directs the Secretary of the Treasury to issue a GTO similar to the residential real estate GTO covering commercial real estate with a different threshold for reporting. In the markup, Congresswoman Carolyn Maloney (D-NY) spoke of the need to address commercial real estate, noting that criminals were using commercial real estate in her Manhattan district like a “bank account,” often leaving the office buildings they purchased vacant.[21]

The parallel BSA improvements bill, S. 2563, the *Improving Laundering Laws and Increasing Comprehensive Information Tracking of Criminal Activity and Shell Holding Act* or the ILLICIT CASH Act, introduced on September 29, 2019, in the Senate, has an identical provision (Section 402). While there is widespread bipartisan support for the BSA improvements legislation, its path forward in this session of Congress is uncertain.

Another pending bill would make the GTOs nationwide and permanent, while leaving the reporting threshold to be set by FinCEN. This provision is included in Section 702 of S. 482, the *Defending American Security From Kremlin Aggression Act of 2019* (“DASKAA”). DASKAA, a bill aimed to increase economic and political pressure on Russia for election interference, was introduced by Senator Lindsay Graham (R-SC) and others on February 13, 2019. Section 702 is included in a title called “Other Matter Relating to the Russian Federation” and apparently responds to the prevalence of Russian kleptocrats investing in U.S. real estate through shell companies.

Likewise, in a letter dated October 3, 2018, Senators Chris Van Hollen (D-MD) and Sheldon Whitehouse (D-RI) requested a Government Accountability Office report about money laundering through U.S. real estate to include assessing the effectiveness of the GTOs and whether BSA requirements should be applied to the real estate industry permanently.[22]

Conclusion

The GTOs and the FinCEN Advisory have raised the profile of money laundering issues in the real estate industry and highlighted the importance of filing voluntary SARs if it is suspected that a purchaser (or seller) may be involved in money laundering.

Nevertheless, beyond the likely deterrent impact in the designated geographic locations, there are questions about the long term utility of the GTOs as a solution to address money laundering through real estate. After four years, will bad actors risk government attention by purchasing real estate through a shell company in one of the designated areas?[23] Will persons with illegal-source funds move to one

of the many geographic areas not covered or avoid real estate investments? Would mandatory suspicious activity reporting and compliance programs for real estate agents be useful? If there is continued law enforcement utility for the GTOs, should there be permanent BSA requirements on the real estate industry nationwide, at least with respect to non-financed sales?

At this point, it appears FinCEN has confidence in the GTOs' continued utility and has no immediate plans to take further regulatory action based on the existing authority to permanently apply the AML program, CDD, and SAR requirements to the real estate industry.

[1] Fin. Crimes Enf't Network, U.S. Dep't of the Treasury ("FinCEN"), *Geographic Targeting Order Covering Title Insurance Company* (May 8, 2020), https://www.fincen.gov/sites/default/files/shared/Generic%20Real%20Estate%20GTO%20Order%20FINAL%20508_2.pdf.

[2] *See infra* pp. 8-10.

[3] For example, in May 2019, the government of British Columbia released a study which concluded that money laundering through real estate is so widespread in British Columbia that it was fueling the rise in home prices. It was estimated that five percent of real estate purchases involved money laundering and that 72% of all money laundering in British Columbia involved real estate. The study was released to the public on May 9, 2019. Maureen Maloney, et al., *Combating Money Laundering in BC Real Estate* (Mar. 31, 2019), <https://www2.gov.bc.ca/assets/gov/housing-and-tenancy/real-estate-in-bc/combating-money-laundering-report.pdf>.

[4] Fin. Action Task Force, *Money Laundering & Terrorist Financing Through The Real Estate Sector* (June 29, 2007), <https://www.fatf-gafi.org/media/fatf/documents/reports/ML%20and%20TF%20through%20the%20Real%20Estate%20Sector.pdf>; Fin. Action Task Force, *RBA Guidance for Real Estate Agents* (June 17, 2008), <https://www.fatf-gafi.org/media/fatf/documents/reports/RBA%20Guidance%20for%20Real%20Estate%20Agents.pdf>.

[5] FATF Recommendation 22 provides that the CDD recommendation applies to real estate agents with respect to the buying and selling of real estate, and Recommendation 23 provides that the recommendations relating to suspicious activity reporting also apply. Fin. Action Task Force, *International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation, The FATF Recommendations*, 17-19 (Updated June 2019), <http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202012.pdf>.

The European Parliamentary Research Service issued a briefing paper in February 2019 on the problem. Cécile Remeur, *Understanding Money Laundering Through Real Estate Transactions* (Feb. 2019), https://www.europarl.europa.eu/cmsdata/161094/7%20-%202001%20EPRS_Understanding%20money%20laundering%20through%20real%20estate%20transactions.pdf.

In a 2017 report, Transparency International was critical of the U.S. (and Canada, the UK and Australia) for not taking more comprehensive measures to address the problem of public corruption proceeds being invested in real estate and for failing to implement their FATF commitments. Maíra Martini, *Doors Wide Open: Corruption and Real Estate in Four Key Markets* (Mar. 29, 2017), http://files.transparency.org/content/download/2121/13496/file/2017_DoorsWideOpen_EN.pdf.

[6] Fin. Action Task Force, *Anti-Money Laundering and Counter-Terrorist Financing Measures - United States, Mutual Evaluation Report* (Dec. 2016), <https://www.fatf-gafi.org/media/fatf/documents/reports/mer4/MER-United-States-2016.pdf>. The FATF also issued a 3rd Enhanced Follow-Up Report & Technical Compliance Re-Rating on the United States in March 2020. Fin. Action Task Force, *Anti-Money Laundering and Counter-Terrorist Financing Measures - United States, 3rd Enhanced Follow-Up Report & Technical Compliance Re-Rating* (Mar. 2020), <http://www.fatf-gafi.org/media/fatf/documents/reports/fur/Follow-Up-Report-United-States-March-2020.pdf>. That report was limited and did not discuss compliance with all the recommendations, including Recommendation 22.

[7] The areas covered are (1) Bexar (San Antonio), Tarrant (Fort Worth), and Dallas counties, Texas; (2) Miami-Dade, Broward, and Palm Beach counties, Florida; (3) New York City; (4) San Diego, Los Angeles, San Francisco, San Mateo, and Santa Clara counties, California; (5) the City and County of Honolulu, Hawaii; (6) Clark County, Nevada (Las Vegas); (7) King County, Washington (Seattle); (8) Suffolk and Middlesex counties, Massachusetts (Boston); and (9) Cook County, Illinois (Chicago). *See* FinCEN, *supra* n.1.

[8] Public companies are excepted. *Id.* at 4 (“[A] corporation, limited liability company, partnership, or other similar business entity . . . other than a business whose common stock or analogous equity interests are listed on a securities exchange regulated by the Securities Exchange Commission (‘SEC’) or a self-regulatory organization registered with the SEC, or an entity solely owned by such a business.”) (emphasis added).

[9] *FinCEN Form 49342G*, https://bsaefiling.fincen.treas.gov/docs/GTO/RealEstate_GTO%20Template.pdf; *see also* https://www.fincen.gov/sites/default/files/shared/ctrfaq_ex2.pdf.

[10] *See, e.g.,* Nicholas Nehamas & Kevin G. Hall, *The Hunt for Dirty Money in Miami Real Estate Is Working — and Will Continue, Feds Say* (March 21, 2018), <https://www.miamiherald.com/news/business/real-estate-news/article206232819.html>.

[11] *Countering America’s Adversaries Through Sanctions Act*, PL 115-44, § 275, 131 Stat 886, 938 (2017).

[12] The BSA GTO regulations, 31 C.F.R. § 1010.370, have not been updated to reflect this change.

[13] Kenneth Blanco, *Prepared Remarks of FinCEN Director Blanco at the NYU Law Program on Corporate Compliance and Enforcement* (June 12, 2019),

<https://www.fincen.gov/news/speeches/prepared-remarks-fincen-director-blanco-nyu-law-program-corporate-compliance-and>.

[14] U.S. Dep't of the Treasury, *National Strategy for Combating Terrorist and Other Illicit Financing 2020*, 16-18 (Feb. 6, 2020), <https://home.treasury.gov/system/files/136/National-Strategy-to-Counter-Illicit-Financev2.pdf>.

[15] *Id.*, at 40-41.

[16] See, e.g., Fin. Crimes Enf't Network, U.S. Dep't of the Treasury, *FinCEN Issues Geographic Targeting Order Covering the Los Angeles Fashion District as Part of Crackdown on Money Laundering for Drug Cartels*, (Oct. 2, 2014), <https://www.fincen.gov/news/news-releases/fincen-issues-geographic-targeting-order-covering-los-angeles-fashion-district>; see also Fin. Crimes Enf't Network, U.S. Dep't of the Treasury, *FinCEN Targets Money Laundering Infrastructure with Geographic Targeting Order in Miami*, (Apr. 21, 2015), <https://www.fincen.gov/news/news-releases/fincen-targets-money-laundering-infrastructure-geographic-targeting-order-miami>.

[17] 31 U.S.C. § 5318(h).

[18] U.S. Dep't of the Treasury, *Financial Crimes Enforcement Network; Anti-Money Laundering Program Requirements for "Persons Involved in Real Estate Closings and Settlements"*, 68 Fed. Reg. 17569 (proposed Apr. 10, 2003), https://www.fincen.gov/sites/default/files/federal_register_notice/352_real_estate_04102003.pdf. Although no official action has been taken to date, Treasury's proposal that attorneys representing purchasers or sellers be included in the definition of "Persons Involved in Real Estate Closings and Settlements" sparked some debate. See, e.g., Am. Bar Ass'n, *Comments of the ABA Task Force on Gatekeeper Regulation and the Profession on the Financial Action Task Force Consultation* (Aug. 23, 2002) (opposing the imposition of suspicious activity reporting obligations on attorneys) <https://www.fincen.gov/sites/default/files/shared/krauland.pdf>; see also Andrew A. Lance et al., *Do Not Pass Go, Do Not Collect \$200: FinCEN Imposes Temporary Reporting Requirements on Title Insurance Companies for All Cash Luxury Real Estate Transactions in Manhattan and Miami* (Feb. 11, 2016) <https://www.gibsondunn.com/do-not-pass-go-do-not-collect-200-fincen-imposes-temporary-reporting-requirements-on-title-insurance-companies-for-all-cash-luxury-real-estate-transactions-in-manhattan-and-miami/>.

[19] Fin. Crimes Enf't Network, U.S. Dep't of the Treasury, FIN-2017-A0003, *Advisory to Financial Institutions and Real Estate Firms and Professionals* (August 22, 2017), https://www.fincen.gov/sites/default/files/advisory/2017-08-22/Risk%20in%20Real%20Estate%20Advisory_FINAL%20508%20Tuesday%20%28002%29.pdf.

[20] Nat'l Ass'n of Realtors, *Anti-Money Laundering Guidance to Real Estate Professionals* (Nov. 15, 2012), <https://www.nar.realtor/articles/anti-money-laundering-guidelines-for-real-estate-professionals>.

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[21] This was at the May 2019 markup of another bill that was ultimately combined into the *Corporate Transparency Act, the Coordinating Oversight, Upgrading and Innovating Technology, and Examiner Reform (“COUNTER”) Act*, H.R. 2514, 116th Cong. (2019).

[22] *Letter from Senators Chris Van Hollen and Sheldon Whitehouse to Comptroller General of the United States* (Oct. 3, 2018), <https://www.moneylaundering.com/wp-content/uploads/2018/10/Congress.Letter.HollenWhitehouseRealEstateLaundering.100318.pdf>.

[23] According to a research study conducted by C. Sean Hundtofte, at the time of the study an economist at the New York Federal Reserve Board, and Ville Rantala, an Assistant Professor of Finance at the University of Miami, the GTOs have been effective in lowering the number of non-financed sales to legal entities in the markets targeted by the early GTOs. The authors speculate buyers behind the legal entities may be purchasing property in their individual names, or have moved into other markets or other asset classes. This study was cited in the *National Strategy for Controlling Terrorist and Other Illicit Financing 2020*. See *supra* note 11. C. Sean Hundtofte & Ville Rantala, *Anonymous Capital Flows and U.S. Housing Markets* (May 28, 2018), <https://papers.ssrn.com/sol3/>.



Gibson, Dunn & Crutcher’s lawyers are available to assist in addressing any questions you may have regarding these developments. If you would like to discuss this alert in greater detail, please contact the Gibson Dunn lawyer with whom you usually work, any member of the firm’s White Collar Defense and Investigations, Anti-Money Laundering, Real Estate, or Financial Institutions practice groups, or the following authors:

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