

Locke Lord QuickStudy: FINCEN Adopts New Rule on Cash Sales of Residential Real Estate

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On August 29, 2024, the Financial Crimes Enforcement Network (“FinCEN”) published a final rule (the “Rule”) requiring reports by “reporting persons” concerning real estate transfers to a legal entity or trust of certain “residential real estate” (a “Reportable Transfer”).^[1]

The Rule will be effective December 1, 2025, and will require a suspicious activity report (a “Real Estate Report”) to be filed with FinCEN under the Bank Secrecy Act (“BSA”) for non-exempt transfers consummated without mortgage or financial institutional financing. The Real Estate Report is more extensive than the Beneficial Ownership Report (“BOIR”) filed under the Corporate Transparency Act (the “CTA”), but will contain some of the information in a BOIR.

FinCEN has determined that the Real Estate Report and the BOIR have two different purposes and will both be required to be filed timely with FinCEN for the applicable covered entities under the respective laws and rules. Real Estate Reports will be subject to the protections and limitations on access applicable to a suspicious activity report (“SAR”) under the BSA filed by financial institutions while the BOIRs will be subject to FinCEN’s rules relating to filings under the CTA.

A reportable transfer under the Rule is defined to include transfers of property located in the United States, where (i) the transfer is not financed (e.g., no mortgage, assignment of leases and rents, or deed of trust on the acquired property secures a loan), (ii) the property is “residential real property”, and (iii) the transfer is to a legal entity or trust. There are a number of exemptions from the filing requirement provided for under the Rule.

For purposes of the Rule,

- “residential real property” includes
 - improved real property intended for occupancy by one to four families;
 - real property to be improved with a structure designed principally for occupancy by one to four families;
 - a residential unit in a multi-unit structure designed principally for occupancy by one to four families;
 - any shares in a cooperative housing; and
 - mixed-use property where separate residential units within the building are designed for occupancy by one to four families (including condominium units).

In this regard, FinCEN specifically noted in its release of the Rule that:

“FinCEN further notes that the definition [*of residential real property*] is meant to include property such as single-family houses, townhouses, condominiums, and cooperatives, including condominiums and cooperatives in large buildings containing many such units, as well as entire apartment buildings designed for one to four families. Furthermore, transfers of such properties may be reportable even if the property is mixed use, such as a single-family residence that is located above a commercial enterprise.”

Since the Rule only requires Real Estate Report filing with FinCEN for a “non-financed transfer”^[2], the Rule makes clear that a Real Estate Report must be filed with FinCEN if there is no financing involved in the transaction (A) secured by the transferred property and (B) provided by a covered financial institution that is required to maintain an “anti-money laundering program” and file SARs itself under the BSA. However, FinCEN has advised in its promulgating release of the Rule that even if a transfer of Residential Property does not meet the two prong test for the filing of a Real Estate Report, it may still be reportable to FinCEN as a non-financed transfer. Thus, some partially financed transfers may meet the definition of non-financed transfer for Real Estate Report reporting purposes.^[3]

- The definition of a “transferee entity”^[4] includes any person (as such term is understood under the BSA) involved in real estate closings and settlements other than a transferee trust or an individual that is not exempt under the Rule.
- The definition of a “transferee trust” includes “any legal arrangement when a grantor places assets under the control of a trustee for the benefit of one or more persons for a specified purpose” whether formed under US law or the law of a foreign jurisdiction.
- FinCEN has adopted a “reporting cascade” with tiers ordered by function performed, or service provided, for determining who must file the “Real Estate Report” for a non-exempt transaction. The cascade identifies certain real estate professionals (each a “Reporting Person”) including closing or settlement agents, the person preparing the closing or settlement statement, the person that files the deed or other instrument transferring the property, the underwriter of an owner’s title insurance policy, the person that disburses funds (including from escrow or trust accounts), the person that performs a title search or renders a title report, and the person preparing the deed or other transfer document. Attorneys may fall into one or more of these categories when the attorneys perform real estate or closing functions. Financial institutions with an obligation to maintain an AML program are not included in the reporting cascade nor are real estate broker or agents, appraisers, transferees, transferors or their beneficial owners unless they play a real estate closing or settlement role.
- Designation agreements are permitted whereby persons involved in the transaction and listed in the reporting cascade as Reporting Persons may agree upon who will take responsibility for filing the Real Estate Report if no exemption is available. However, third parties not listed in the reporting cascade cannot take on reporting obligations under the Rule. Reporting persons will have recordkeeping requirements under the Rule as will any person that designates another reporting person under a designation agreement to file a report under the Rule.
- When filing a Real Estate Report with FinCEN, a Reporting Person may rely “reasonably” on information provided by other persons.
- The rule excludes from the definition of Transferee entity:
 - A securities reporting issuer defined in 31 CFR 1010.380(c)(2)(i);
 - A governmental authority defined in 31 CFR 1010.380(c)(2)(ii);
 - A bank defined in 31 CFR 1010.380(c)(2)(iii);
 - A credit union defined in 31 CFR 1010.380(c)(2)(iv);
 - A depository institution holding company defined in 31 CFR 1010.380(c)(2)(v);
 - A money service business defined in 31 CFR 1010.380(c)(2)(vi);
 - A broker or dealer in securities defined in 31 CFR 1010.380(c)(2)(vii);
 - A securities exchange or clearing agency defined in 31 CFR 1010.380(c)(2)(viii);
 - Any other Exchange Act registered entity defined in 31 CFR 1010.380(c)(2)(ix);

- An insurance company defined in 31 CFR 1010.380(c)(2)(xii);
 - A State-licensed insurance producer defined in 31 CFR 1010.380(c)(2)(xiii);
 - A Commodity Exchange Act registered entity defined in 31 CFR 1010.380(c)(2)(xiv);
 - A public utility defined in 31 CFR 1010.380(c)(2)(xvi);
 - A financial market utility defined in 31 CFR 1010.380(c)(2)(xvii);
 - An investment company as defined in section 3(a) of the Investment Company Act of 1940 (15 U.S.C. 80a-3(a)) that is registered with the Securities and Exchange Commission under section 8 of the Investment Company Act (15 U.S.C. 80a-8); and
 - Any legal entity controlled or wholly owned, directly or indirectly, by an entity described in paragraphs (n)(10)(ii)(A) through (O) of 31 CFR 101.380.
- The Rule provides for other specific exemptions to the Real Estate Report reporting requirement^[5] including:
 - Transfers of real property located outside the United States;
 - Grant, transfer, or revocation of an easement;
 - Transfers resulting from the death of an individual, whether pursuant to the terms of a decedent's will or the terms of a trust, the operation of law, or by contractual provision;
 - Transfers incident to divorce or dissolution of a marriage or civil union;
 - Transfers to a bankruptcy estate;
 - Transfers supervised by a court in the United States;
 - Transfers made for no consideration by an individual, either alone or with the individual's spouse, to a trust of which that individual, that individual's spouse, or both of them, are the settlor(s) or grantor(s);
 - Transfers to a qualified intermediary for purposes of 26 CFR 1.1031(k)-1; or
 - Transfers for which there is no Reporting Person.

Unless an exemption applies, a Real Estate Report must be filed electronically with FinCEN by the end of the month following the closing date or within 30 days from the closing date, whichever is later. While the Rule provides lists of information to be contained in the Real Estate Report for Residential Real Estate transfers, forms and links to allow for online filing are not yet available from FinCEN.

The reporting person will also need to provide extensive and detailed information when the Real Estate Report is filed regarding the real property, the transaction, the parties to the transaction, and the consideration paid or to be paid. It must also disclose whether or not credit was extended by a financial institution or secured by a mortgage, mortgages or deeds of trust or other real property security.

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[Anti-Money Laundering Regulations for Residential Real Estate Transfers](#)

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[2] 31 CFR 1031.320(n)(5).

[3] FinCEN has indicated that Reporting Persons may rely upon representations from the financial institution as to whether the institution has an AML program.

[4] 31 CFR 1031.320(n)(10)

[5] 31 CFR 1031.320(n)(10)(ii)(A-P)

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