



Real Estate Money Laundering Rule

Impact on your business



AGENDA:

- The basics about FinCEN and Money Laundering
- The proposed rule
 - Who is covered
 - Which transactions
 - What to collect
 - How to report
- Potential Impact on Your Business
- What happens now

The lawyers make me add this

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Background



What is FinCEN

- Established in 1990
 - Department of the Treasury
 - Bank Secrecy Act (BSA)
- Its mission is “to safeguard the financial system from illicit use and combat money laundering and promote national security through the collection, analysis, and dissemination of financial intelligence and strategic use of financial authorities.”

What does FinCEN do

- Receiving and maintaining financial transactions data
 - Suspicious Activity Reports
 - Currency Transaction Reports
- Data analysis and dissemination for law enforcement purposes,
 - Works with: U.S. Department of Homeland Security, U.S. Internal Revenue Service, the U.S. Securities and Exchange Commission, the Federal Deposit Insurance Corporation, the Federal Bureau of Investigation, and U.S. Immigration and Customs Enforcement.
 - Identify sanction evasion with Office of Terrorism and Financial Intelligence (TFI)
- Cooperation with international bodies and foreign governments
- FinCEN Exchange
 - FinCEN's voluntary public-private partnership brings together law enforcement, national security agencies, and financial institutions to help combat financial crime.



The Three stages of money laundering



Placement

Illegitimate money is introduced into the economy via bank deposits. Smaller deposits below threshold levels are made to subvert reporting.



Layering

Bank deposits pass through multiple domestic and off-shore transactions, making it cumbersome for the authorities to follow the audit trail.



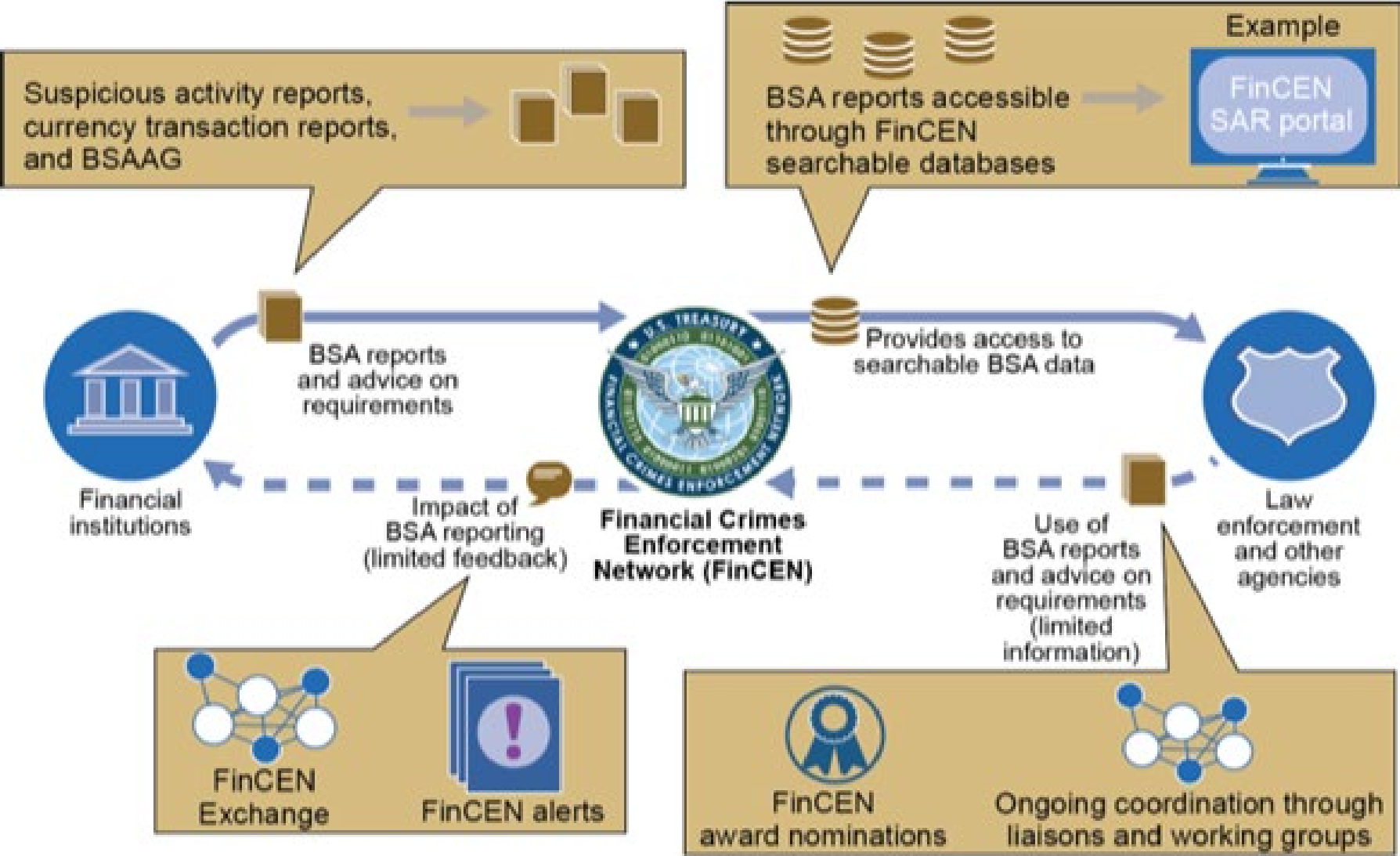
Integration

The laundered criminal proceeds get legitimate origins and are integrated into banks and financial institutions as clean money.

The Bank Secrecy Act

- Primary U.S. anti-money laundering (AML) law
 - 31 USC 5311
 - Passed in 1970
 - California Bankers Assn. v. Shultz, 416 U.S. 21 (1974): Holding that enactment was within the legislative authority of Congress and did not violate First, Fourth, and Fifth Amendments.
- Purpose
 - detecting, deterring and disrupting terrorist and criminal financing networks
- How it works
 - Paper trails of transactions are created that law enforcement and others can use in criminal, tax and regulatory investigations.
 - Generated by banks and other financial institutions

Figure 1: Feedback Loop Between Financial Institutions, FinCEN, and Users of BSA Reports



BSA = Bank Secrecy Act
BSAAG = BSA Advisory Group
SAR = Suspicious Activity Report

Source: GAO analysis of agency documentation and interviews. | GAO-22-105242

Money Laundering & Real Estate

Real Estate and Money Laundering

- “Illicit actors are exploiting the U.S. residential real estate market to launder and hide the proceeds of serious crimes with anonymity, while law-abiding Americans bear the cost of inflated housing prices,” - FinCEN Dir. Andrea Gacki
- Real estate has been consistently indicated as a risk in National Money Laundering Assessment since at least 2015
- Customer due diligence for real estate has been part of Financial Action Task Force recommendations since 2012
 - “[t]he purchase of real estate allows for the movement of large amounts of funds all at once in a single transaction as opposed to multiple transactions of smaller values.” See Financial Action Task Force, Guidance for a Risk Based Approach: Real Estate Sector (July 2022)
- Anticorruption group Global Financial Integrity estimated “at a minimum, US\$2.3 billion was laundered through the real estate sector in the U.S.” between 2015-2020

Some of the headlines

- Justice Department Seeks Forfeiture of Two Bal Harbour Condos for Violations of Russia-Related U.S. Sanctions – Feb 2024
- New York Attorney Pleads Guilty to Conspiring to Commit Money Laundering to Promote Sanctions Violations by Associate of Sanctioned Russian Oligarch – April 2023
- Delaware Man Sentenced to 45 years in Federal Prison for Trafficking over 150 Kilograms of Cocaine and Laundering the Proceeds – Nov 2022
- Justice Department Secures Forfeiture of Maryland Property Purchased with \$3.5 Million in Alleged Corruption Proceeds Linked to Ex-President of The Gambia – May 2022
- Justice Department Seeks Forfeiture of Los Angeles Mega-Mansion Purchased with Proceeds of Armenian Corruption Scheme – May 2022
- Justice Department Seeks Forfeiture of Two Commercial Properties Purchased with Funds Misappropriated from PrivatBank in Ukraine – August 2020
- Las Vegas Real Estate Broker Arrested On Money Laundering Charges – July 2018
- Anonymous Inc. 60 Minutes Expose – January 2016

Real Estate and BSA

- Real estate closing professionals first added to BSA definition of a financial institution in 1988 as part of Anti-Drug Abuse Act
- USA Patriot Act required all financial institutions to have AML programs
- Industry given a temporary exemption from need to have full AML program in 2003
 - Main reason given for exemption is that it would be duplicative of mortgage banker reporting

Geographic Targeting Orders

- Background
 - Started in 2016
 - Covered Miami and NYC originally but expanded to 69 counties
 - Focused on all cash residential transactions by legal entities
 - Originally was high dollar but later changed to \$300k (\$50k in Baltimore)
- GTOs proved highly valuable to FinCEN
 - 40% of GTO reports correlated to a bank SAR
 - FinCEN Director during Congressional Testimony
 - 7% involve a subject of an ongoing FBI investigation

The Proposed Rule

The Basics

- **What is Covered?**
 - All cash purchases of residential real estate where the buyer is a legal entity or trust
- **What must be Reported?**
 - Basic transaction information (closing date, purchase prices, parties names, etc.)
 - Beneficial ownership info (focused on buyer)
 - Payments information
- **Who must Report?**
 - Generally the settlement agent, with guidelines if there is no settlement agent
- **When?**
 - 30 days after closing

What Is Covered

- How does Rule define Residential Real Estate?
 1. real property designed for 1-4 family occupancy, including condos and dual use properties
 2. vacant or unimproved land zoned (or permitted) for construction for 1-4 family occupancy
 3. shares in a cooperative housing corporation
- Includes sales anywhere in the US (50 states), DC, Puerto Rico, overseas territories, and Indian lands.
- Questions to think about
 - How do you determine a deal is residential today?
 - What documents/data are available to you in a cash deal to support a conclusion?
 - Vacant land versus improved property?
- FinCEN expected to issue commercial real estate rule later this year

What is Covered

- What constitutes an all cash deal
 - In general: a lack of any funding coming from a bank, mortgage broker or mortgage banker or other source that has an AML obligation
 - Funding must be secured by the property
- What is not included
 - Private or seller financing
- Questions to consider:
 - How will you determine if a lender has an AML obligation?

What is Covered

- Buyer (or transferee) is a **legal entity or trust**
 - Defines transferee entity as anyone other than a trust or individual
 - Transferee trust is any arrangement where a person places assets under the control of a trustee for the benefit of one or more persons
 - Reporting still applies even if a co-purchaser is not someone that must report
- There are limited exceptions for certain entities
 - Similar to CTA exceptions: companies that have beneficial ownership registered with other federal or state regulators
- Questions:
 - How will you know if an exception applies to the buyer/transferee?
 - What will you do if an individual buyer decides late in process to use LLC or trust to hold title?

What transactions are Exempt

1. Grant, transfer, or revocation of an easement;
2. Transfer resulting from the death of an owner of residential real property;
3. Transfer incident to divorce or dissolution of a marriage;
4. Transfer to a bankruptcy estate; or
5. Transfer for which there is no reporting person.

Who Must Report

Defining a Reporting Person

- Primary responsibility is on settlement agents
- Lays out a waterfall or cascade (similar to 1099 report) for deals where there is no settlement agent
 - First choice: the person who is listed as the settlement agent on a settlement statement
 - Second choice: the person that prepares the settlement statement.
 - Third choice: the person that files the deed for recordation
 - Fourth choice: the person that issues the owner's title insurance policy
 - Fifth choice: the person that dispenses the greatest amount of funds
 - Sixth choice: the person that did a title examination
 - Final choice: the person that prepares the deed.
- Applies to attorneys the same as non attorney agents

Designation Agreement

- The parties in the waterfall can agree to designate someone lower on the waterfall to do the reporting
- Agreement must be in writing and be specific to each transaction
 - Requirements
 1. The date of the agreement;
 2. The name and address of the transferor;
 3. The name and address of the transferee entity or transferee trust;
 4. Information described in in paragraph (g) identifying transferred residential real property;
 5. The name and address of the person designated through the agreement as the reporting person with respect to the transfer; and
 6. The name and address of all other parties to the agreement.

What is Reported

Transaction Info

- Information concerning the property
 - Street address
 - Legal description (section, lot, block)
- Information about reporting person
 - Full legal name
 - Category under the waterfall
 - Business address
- Information about seller/transferor
 - If individual: Full legal name, date of birth, current residential address and IRS TIN
 - If Entity: Full legal name, DBA, current business address, TIN or foreign equivalent
 - If Trust: Full name of trust as listed on trust agreement; date trust agreement executed, TIN (if available) and legal name, address and TIN for Trustee

Transferee/buyer Info

- Entities
 - Legal Name of entity & DBA
 - Current address for principal place of business
 - Unique identifying number either IRS TIN, foreign equivalent or entity registration number
- Beneficial owner and Signor info
 - Full legal name
 - Date of birth
 - Current residential address
 - Citizenship
 - Unique ID (either IRS TIN, foreign equivalent)

Transferee/Buyer Info

- Trust
 - Full name as shown on trust instrument
 - Date instrument is executed
 - Street address for trust administration
 - Unique identifying number either IRS TIN, foreign equivalent or entity registration number
 - Whether trust is revocable
- Trustee info
 - Legal name, any DBA, address, unique ID
- Beneficial Owner info
 - Legal name, date of birth, residential address, citizenship, unique ID
 - How do they qualify as a beneficial owner
- Signor info
 - Same as trustee info plus indication of capacity

Beneficial Owners

- Same definition as under Corporate Transparency Act
 - any individual who, directly or indirectly, either exercises substantial or owns or controls at least 25 percent of the ownership interests
 - Substantial control includes
 - Senior officer
 - Authority to appoint board or senior officers
 - Directs decision making on important financial decisions including transfers of assets
- For Trusts:
 - Trustee
 - Beneficiary that is the SOLE recipient of income/principal
 - Grantor/settlor under a revocable trust
 - If an entity holds one of the covered positions, then the BO of that entity
- Both for profit and non profit entities or trusts are covered

CERTIFICATION OF BENEFICIAL OWNER(S)

The information contained in this Certification is sought pursuant to Section 1020.230 of Title 31 of the United States Code of Federal Regulations (31 CFR 1020.230).

All persons opening an account on behalf of a legal entity must provide the following information:

1. Last Name of Natural Person Opening Account	2. First Name	3. Middle Initial	3a. Title
4. Name and type of Legal Entity for Which the Account is Being Opened			
4a. Legal Entity Address	4b. City	4c. State	4d. ZIP/Postal Code

SECTION I

(To add additional individuals, see page 3)

Please provide the following information for an individual(s), if any, who, directly or indirectly, through any contract arrangement, understanding, relationship, or otherwise owns 25% or more of the equity interests of the legal entity listed above. **Check here** ☐ **if no individual meets this definition and complete Section II.**

5. Last Name	6. First Name	7. M.I.	8. Date of birth (MM/DD/YYYY)
9. Address	10. City	11. State	12. ZIP/Postal Code
13. Country	14. SSN (U.S. Persons)	15. For Non-U.S. persons (SSN, Passport Number or other similar identification number)	
15a. Country of issuance:			

Note: In lieu of a passport number, Non-U.S. Persons may also provide a Social Security Number, an alien identification card number, or number and country of issuance of any other government-issued document evidencing nationality or residence and bearing a photograph or similar safeguard.

SECTION II

Please provide the following information for an individual with significant responsibility for managing or directing the entity, including, an executive officer or senior manager (e.g., Chief Executive Officer, Chief Financial Officer, Chief Operating Officer, Managing Member, General Partner, President, Vice President, Treasurer); or Any other individual who regularly performs similar functions.

16. Last Name	17. First Name	18. M.I.	18a. Title
19. Date of birth (MM/DD/YYYY)	20. Address	21. City	22. State
23. ZIP/Postal Code	24. Country	25. SSN (U.S. Persons)	26. For Non-U.S. persons (SSN, Passport Number or similar identification number)
26a. Country of issuance:			

Note: In lieu of a passport number, Non-U.S. Persons may also provide a Social Security Number, an alien identification card number, or number and country of issuance of any other government-issued document evidencing nationality or residence and bearing a photograph or similar safeguard.

I, _____ (name of person opening account), hereby certify, to the best of my knowledge, that the information provided above is complete and correct.

Signature: _____ Date: _____
(MM/DD/YYYY)

How to collect info

Rule allows reporting person to collect information from the transferee as long as they get a written certification of the information

Payments information

- Total purchase price
 - Includes any amount paid outside of closing
- Each payment by Transferee to the settlement agent
 - Amount of payment
 - Method of payment (wire, ACH, certified check, etc.)
 - Name of financial institution payment was drawn on and the account number
 - Name of any payor on the wire or check if payor is not the transferee
- Info on if there is any private or hard money lending

Impact on your business

FinCEN Estimate

- First Year costs: between \$267.3 million and \$476.2 million
 - Estimates 75 minutes for initial training per staff person
- Each year costs: between \$245.0 million and \$453.9 million.
 - Estimates 850,000 filings per year
 - Estimates 4,604,167 hours of staff time to issue reports per year
 - Estimates 30 minutes annually of training

Recordkeeping

- Five years from date of filing the report
- Must maintain reports and compliance documents
 - Certifications and copies of records for beneficial ownership reporting
- Expected cost is \$28m/year

What to think about

- How are you going to identify transactions covered by the rule?
- At what point in your workflow will you begin collecting information?
- How will you collect information?
- What will you do when you get customer push back?
- Who on your staff will be responsible for filing? Will your partners be willing to use designation agreements?
- How will you store records?
- How will you determine a fee for compliance?
- How will insurance regulator feel about passing cost through to the customer?

Penalties

What do you do if you can't get the info?

- No good faith attempt provision
 - However, you will have a lot of reportable info in your file
- Industry can always file voluntary suspicious activity reports
- Attorney client privilege likely does not apply
 - Most US circuit courts have held that the identity of a client is not subject to the privilege
 - See ***United States v. Goldberger & Dublin, P.C.*, 935 F.2d 501 (2nd Cir. 1991).**

Criminal Liability

Type of Violation	Penalty
Willful violation	Up to \$250,000 fine and 5 years in prison
Willful violation while violating another law of the United States	Up to \$500,000 fine and 10 years in prison
Structuring or assisting in structuring a transaction to avoid the currency transaction reporting	Fine and up to five years in prison

Civil Liability

Type of Violation	Penalty
Willful violation (a separate violation occurs for each day the violation continues and each location a violation occurs)	Greater of the amount involved (up to \$100,000) or \$25,000
Failure to file a report, material misstatement or omission	Not to exceed the amount involved in the transaction
Structuring or assisting in structuring a transaction to avoid the currency transaction reporting	Not to exceed the amount involved in the transaction
Negligence	Not to exceed \$500 or \$50,000 if a pattern of negligence is found

Questions?



Thank You