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Prep Your Operation for FinCEN's AML Rule

Dec. 11, 2024

Today's
ALTA Insights
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Closinglock

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Agenda

- **The basics about FinCEN and Money Laundering**
- **The Rule**
 - Transactions covered
 - Information required to be reported
 - Who must report
 - How to report
- **Potential Impact on Your Business; how to prepare**



The Lawyers Made Us Add This

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Background





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.



Real Estate & BSA

- Real estate closing professionals were 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



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.

Money Laundering & Real Estate



Real Estate & 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



Geographic Targeting Orders

- **Background**

- Started in 2016
- Covered Miami and NYC originally but expanded to 69 counties in 13 states plus DC
- Focused on all cash residential transactions by legal entities
 - Originally was high dollar but later lowered to \$300k (\$50k in Baltimore)

- **GTOs proved highly valuable to FinCEN**

- 40% of GTO reports correlated to a bank SAR
- 7% involve a subject of an ongoing FBI investigation



Final Rule: The Basics



The Basics

- **Effective date: December 1, 2025**
- **What transfers must be reported?**
 - All non-financed/cash transfers of residential real estate where the transferee is an entity or trust
 - There are several categories of exempt transfers
- **Who must Report?**
 - Generally it's the settlement agent, with guidelines if there is no settlement agent named on closing statement.



The Basics

- **What must be Reported?**

- Basic transaction information (closing date, purchase price, parties' names, etc.)
- Transferor information, including Beneficial Ownership information if applicable
- Transferee information; including Beneficial Ownership information
- Information about payment of purchase price

- **When?**

- The later of the last day of the month following “closing” or 30 calendar days after closing

- **How do you report?**

- Electronically through a website using the “Real Estate Report”
 - **FinCEN will issue the form to be used.**



What Is Covered

- **How does Rule define Residential Real Estate?**
 - Real property containing a structure designed for 1-4 family occupancy, including condos and dual use properties
 - Vacant land on which the transferee intends to build a house
 - Shares in a cooperative housing corporation
 - Includes sales anywhere in the US (50 states), DC, Puerto Rico, overseas territories, and Indian lands.
- **Practice corner:**
 - How would you document that the transferee “intends to build a house” on the land?



What Is Covered

- **What constitutes a “non financed transfer?”**
 - In general: the absence of a loan coming from a bank, mortgage broker or mortgage banker or other source that has an AML obligation and whose loan is secured by the property
 - Private or seller financing does not exempt the transaction
- **Practice corner:**
 - How will you determine if a lender has an AML obligation? NMLS number?



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
- **Practice corner:**
 - How will you know if an exception applies to the buyer/transferee?



What Transactions are Exempt?

- Grant, transfer, or revocation of an easement;
- Transfer resulting from the death of an individual, *whether under a will, trust, by operation of law or by contract;*
- Transfer incident to divorce or dissolution of a marriage;
- Transfer to a bankruptcy estate;
- *Transfer “supervised by a court;”*
- *Transfer for no consideration to certain trusts;*
- *Transfer to a QI for purposes of a Sec. 1031 exchange; or*
- Transfer for which there is no reporting person.



What Transactions are Exempt?

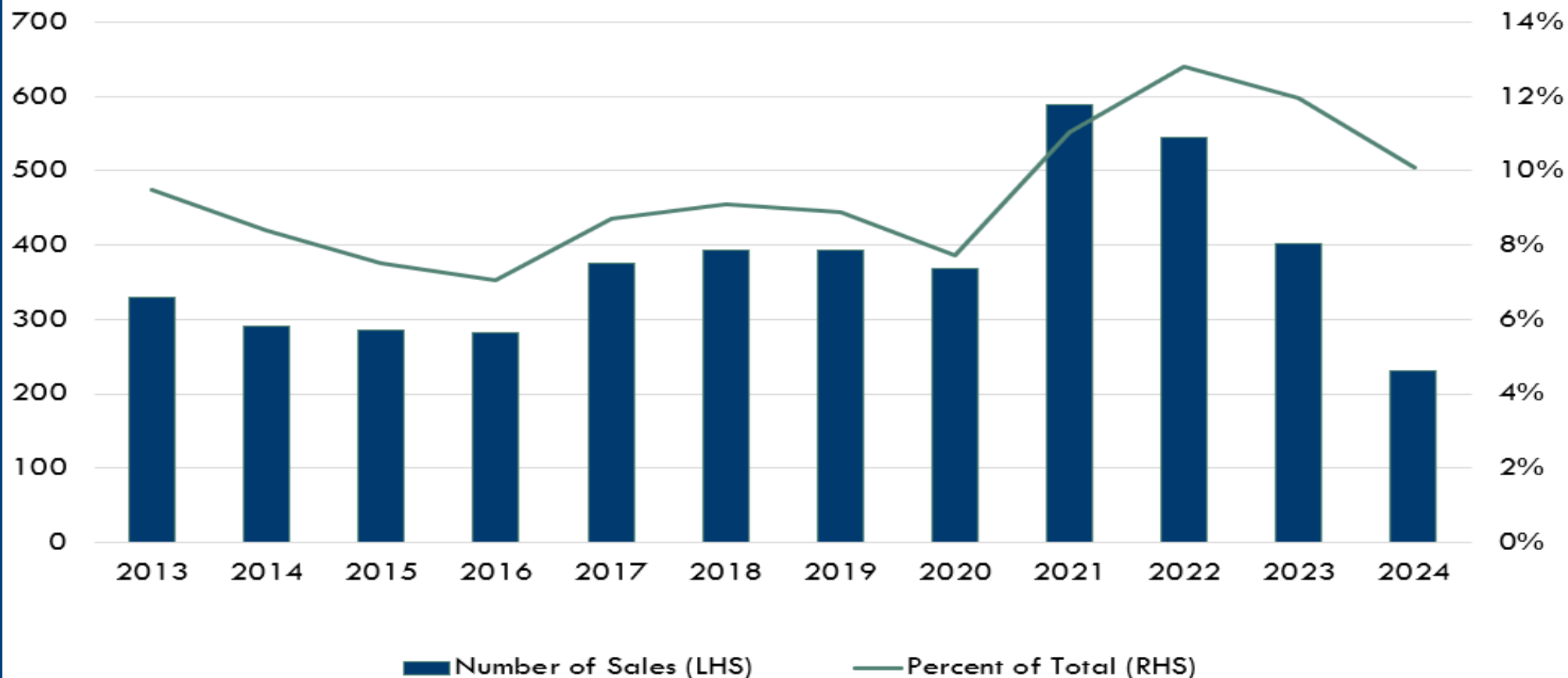
- **Transfer “supervised by a court”**
 - Mortgage foreclosure? Judicial vs. non-judicial
 - Quiet Title final judgment?
 - Rule commentary uses the phrase “transfers required by a court” rather than simply “supervised”
- **Transfers from an individual, their spouse, or both of them, to a trust of which the same individual(s) are the settlor/grantor**
- **“Corrective” deeds are “not transfers” and therefore not reportable.**



Expected Volume

U.S. All-Cash Home Sales to Legal Entities or Trusts

Number of Sales that Meet FinCen Criteria (LHS, 000's) and Percent of Total (RHS)

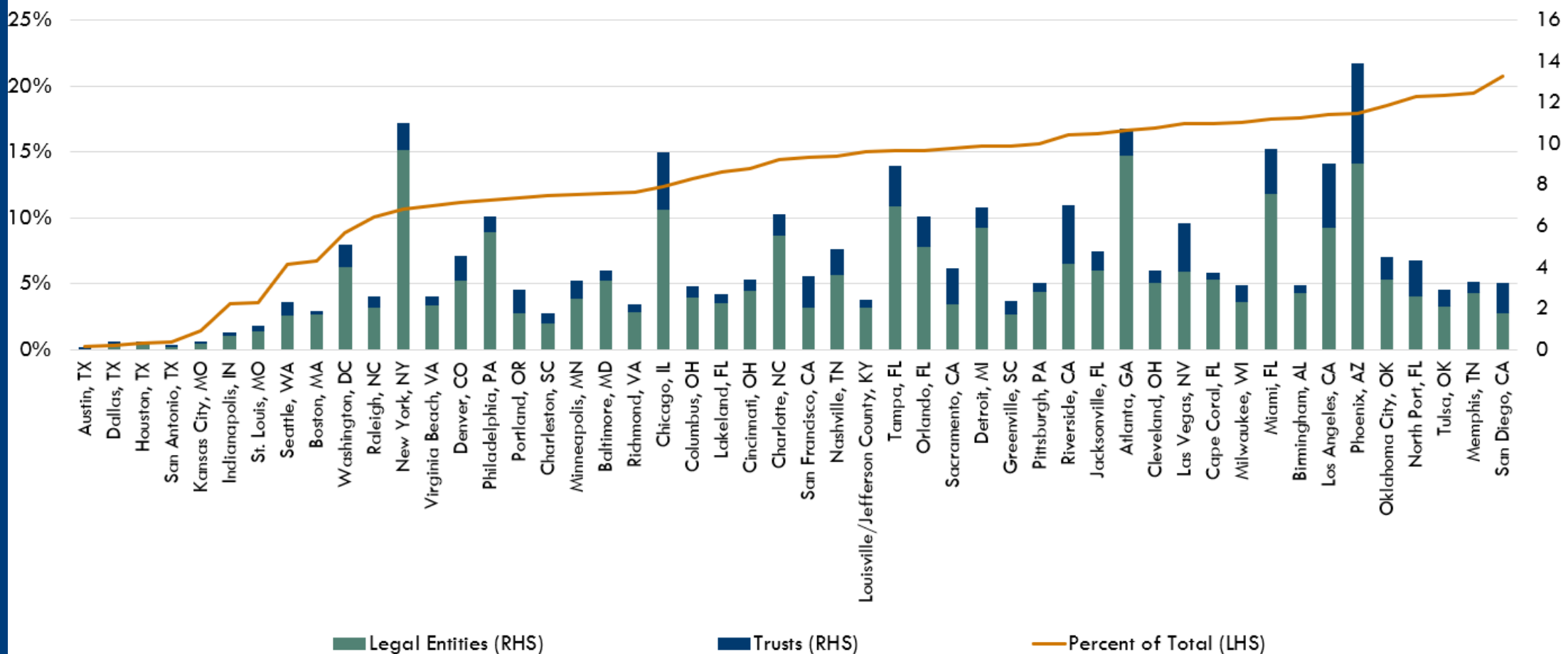


Source: First American Data & Analytics, First American Calculations, Oct. 2024



2023 All-Cash Home Sales to Legal Entities and Trusts for Top 50 CBSAs

Sales that Meet FinCen Criteria ('000s, RHS) and Percent of Total by CBSA (LHS)



Source: First American Data & Analytics, First American Calculations, Oct. 2024



Reasonable Reliance

- **“Reasonable Reliance” standard**

- Final rule adopts a “reasonable reliance standard” that allows reporting persons to “reasonably rely” on information provided by the parties

- Examples:

- Buyer intends to build a house
- Address of the party
- Is Lender required to have AML program?
- Transferee entity is “excepted” from the rule

- Stricter application for beneficial ownership info of transferee entities or transferee trusts.

- Can rely on information “certified,” in writing, by entity representative to be accurate “to the best of their knowledge.”



What Is Reported



Transaction Information

- **Information concerning the property**
 - Street address/Legal description (section, lot, block)/Date of Closing/Purchase price
- **Information about reporting person**
 - Full legal name/Category under the “waterfall” /Address for principal place of business
- **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 (both individuals and entities)



Entity 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(s) and Signor info**

- **BO(s):** Full legal name, Date of birth, Current residential address, Citizenship, Unique ID (either IRS TIN, foreign equivalent)
- **For signor:** The capacity in which the individual is authorized to act (and if this is as part of their employment, then the name of their employer)



Entity Beneficial Owners

- **Entities:**

- Any individual who, directly or indirectly, either exercises substantial control 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
 - Both for profit and non-profit entities are covered
- Substantial control includes
 - Both for profit and non-profit entities are covered



Trust Transferee/Buyer Info

- **Trust**
 - Full name as shown on trust instrument
 - Date of instrument
 - Unique identifying number; either IRS TIN, foreign equivalent or entity registration number
 - Whether trust is revocable
- **Trustee info (entity trustee)**
 - Legal name, any DBA, address, unique ID



Trust Transferee/Buyer Info

- **Beneficial Owner info (includes individuals acting as Trustee)**
 - Legal name, date of birth, residential address, citizenship, unique ID
 - How do they qualify as a beneficial owner (i.e., what “category” do they fall within)
- **Signor info**
 - Legal name, date of birth, residential address, unique Tax ID
 - The capacity in which the individual is authorized to act (and if this is as part of their employment, then the name of their employer)



Trust Beneficial Owners

- **For Trusts:**
 - Individual Trustee
 - An individual other than a trustee with the authority to dispose of trust assets
 - Beneficiary that is the SOLE recipient of income/principal or has right to demand distribution of substantially all of the assets (implies just one such person)
 - Grantor/settlor under a revocable trust
 - If an **entity** holds one of the covered positions, then the BO of that entity



Payments Information

- **Total purchase price**
 - Includes any amount paid outside of closing
- **Each payment by Transferee, or on their behalf, 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 whether there is any private or hard money lending**
- **Practice corner:** How will you get the needed info on a wire?
- **Practice corner:** What if a portion of the contract includes personal property?



Who Must Report



Defining a Reporting Person

- **Primary responsibility is on settlement agents**
- **Lays out a waterfall or cascade of responsibility:**
 1. the person who is listed as the settlement agent on a settlement statement*
 2. the person that prepares the settlement statement
 3. the person that files the deed for recordation
 4. the person that issues the owner's title insurance policy
 5. the person that dispenses the greatest amount of funds
 6. the person that did a title examination
 7. the person that prepares the deed

*defined to mean the settlement statement prepared for the transferee
- **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
 - The date of the agreement;
 - The name and address of the transferor;
 - The name and address of the transferee entity or transferee trust;
 - Information described in in paragraph (g) identifying transferred residential real property;
 - The name and address of the person designated through the agreement as the reporting person with respect to the transfer; and
 - The name and address of all other parties to the agreement.



Impact on Your Business



Real Estate Report

NOTE:

Fields with an asterisk (*) symbol are required by default (*i.e.*, in the report's initial state, fields with an asterisk symbol must contain an entry); however, field requirements may change based on certain data entry conditions (as noted in *italic text* throughout this document). Data entry conditions may also result in fields becoming non-required or disabled/not applicable. That fields are not labeled with an asterisk does not imply that they are optional; rather, all fields must contain a valid entity if the data is available (unless otherwise directed by FinCEN).

Filing Information

1. *Type of filing (*select one*)
 - a. Initial report
 - b. Correct/Amend prior report
 - i. BSA Identifier (BSA ID) of/associated with the prior report
(*If Correct/Amend prior report is selected, the BSA ID assigned to the previously filed report must be entered; otherwise, must be blank.*)
 - c. FinCEN directed back-filing
(*Select only if FinCEN directs the reporting person to file the report for a reportable transfer that was not previously reported.*)
2. *Date prepared
(*This is the date on which the report preparation is complete and it is ready for submission to FinCEN.*)
3. Note to FinCEN
(*Must be blank unless otherwise directed by FinCEN.*)



The screenshot shows the BSA E-Filing System website. At the top, it says "An official website of the United States government" and features the U.S. Treasury Department seal. The main header is "BSA E-Filing System" with the subtitle "Financial Crimes Enforcement Network". There are navigation links for HOME, ABOUT, RESOURCES, NEWSROOM, FILE FBAR, ENROLL, and HELP. A search bar is present on the right. The main content area includes a "Welcome to the BSA E-Filing System" section with a brief description and a link to learn more. Below this are two call-to-action boxes: "BSA E-Filing" with a "GET STARTED" button and "BOI E-Filing" with a "BOI E-FILING" button. A "News" section lists recent updates with dates and headlines.



FinCEN Cost Estimate

- **Cost to the settlement industry:**
 - First Year costs: between \$428.4 million and \$690.4 million
 - Estimates 75 minutes for initial training per staff person
- **Each year costs: between \$401.2 million and \$663.2 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
- Reporting person must only retain certification obtained from transferee and copy of any applicable designation agreement
- No requirement that reporting person keep the Real Estate Report that is filed with FinCEN
- Practice corner: Are you REALLY not going to keep this???



What to Think About

- How many cash transactions to an entity or a trust do you think you will handle?
- At what point in your workflow will you begin collecting information?
- How will you collect information?
- What will you do if an individual buyer decides late in process to use entity or trust to hold title?
- Who on your staff will be responsible for filing?
- How will you store the compliance records?
- How will you determine a fee for compliance?



What If You Can't Get Info?

- No guidance in the final rule.
- No provision for filing a Real Estate Report with “blanks.”
- 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).



Next Steps

- **FinCEN needs to finalize the Real Estate Report form.**
 - Preliminary form issued
- **ALTA working on:**
 - Intake form
 - Certification Form for transferee information
 - Suggested FAQs for FinCEN to consider
 - Education and training resources



Penalties



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

Q&A



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