Anti-Money Laundering Rules

Ethical Requirements for Attorneys as Reporting Persons

BY HERRICK K. LIDSTONE AND VICTORIA B. BANTZ

This article explains the requirements of a new anti-money laundering rule that, when effective on December 1, 2025, will require suspicious activity reporting from advisors (including attorneys) who assist clients with certain residential real estate transfers.

On August 29, 2024, the Department of Treasury Financial Crimes Enforcement Network (FinCEN) adopted a new rule entitled "Anti-Money Laundering Regulations for Residential Real Estate Transfers," which will become effective December 1, 2025 (the AML real estate rule).[1] This is a replacement for a series of six-month geographic targeting orders (GTOs) issued by FinCEN commencing in January 2016.[2] The initial GTO targeted unfinanced residential real estate transactions in Miami-Dade County, Florida and the boroughs of Brooklyn, Queens, Bronx, Staten Island, and Manhattan, New York. The most recent GTO affecting title insurance companies and related persons (renewed on April 14, 2025, and expiring on October 9, 2025[3]) requires the title insurance company involved in the transaction to file reports under the Bank Secrecy Act for any "Covered Transaction." The existing GTO includes covered transactions in a number of jurisdictions, including the Colorado counties of Adams, Arapahoe, Clear Creek, Denver, Douglas, Eagle, Elbert, El Paso, Fremont, Jefferson, Mesa, Pitkin, Pueblo, and Summit.

The AML real estate rule requires reporting persons involved in real estate closings and settlements to file reports and keep records on certain non-financed transfers of residential real property to legal entities and trusts on a nationwide basis. According to the adopting release, these reports are expected to (1) assist the US Department of the Treasury, law enforcement, and national security agencies in addressing illicit finance vulnerabilities in the US residential real estate sector; and (2) curtail the ability of illicit actors to anonymously launder illicit proceeds through transfers of residential real property, which threatens US economic and national security.[4] This article explains what transactions are covered, who must report, and what must be reported under the AML real estate rule.[5]

Bank Secrecy Act

The Bank Secrecy Act (BSA)[6] is the authority pursuant to which FinCEN adopted the AML real estate rule. The BSA is intended to combat money laundering, the financing of terrorism, and other illicit financial activity. The purposes of the BSA include requiring financial institutions to keep records and file reports that "are highly useful in criminal, tax, or regulatory investigations or proceedings" or in the conduct of "intelligence or counterintelligence activities, including analysis, to protect against international terrorism." The secretary of the treasury delegated the authority to implement, administer, and enforce compliance with the BSA and its implementing regulations to the director of FinCEN.[7]

The BSA requires "financial institutions" to establish anti-money laundering programs and programs that counter the financing of terrorism. The programs must include, at a minimum, "(A) the development of internal policies, procedures, and controls; (B) the designation of a compliance officer; (C) an ongoing employee training program; and (D) an independent audit function to test programs."[8] The BSA also authorizes the secretary to require financial institutions to report any suspicious transaction relevant to a possible violation of law or regulation. Among the financial institutions subject to these requirements are "persons involved in real estate closings and settlements."[9]

In particular, section 5318(g) of the BSA authorizes the secretary to require financial institutions to disclose in a Suspicious Activity Report any "suspicious transaction relevant to a possible violation of law or regulation." However, the BSA affords the secretary flexibility in implementing such requirement, and indeed directs the secretary to consider "the means by or form in which the Secretary shall receive such reporting," including the relevant "burdens imposed by such means or form of reporting," "the efficiency of the means or form," and the "benefits derived by the means or form of reporting." A provision added to the BSA by section 6202 of the Anti-Money Laundering Act of 2020 (AML Act) further directs FinCEN to "establish streamlined . . . processes to, as appropriate, permit the filing of noncomplex categories of reports of suspicious activity." In assessing whether streamlined filing is appropriate, FinCEN must determine, among other things, whether such reports would "reduce burdens imposed on persons required to report" yet "not diminish the usefulness of the reporting to Federal law enforcement agencies, national security officials, and the intelligence community in combating financial crime, including the financing of terrorism . . . ."[10]

What Kind of Transactions Does the AML Real Estate Rule Cover?

As currently written, the AML real estate rule will not be limited by jurisdiction and will apply to any "reportable transfer"[11] and to any lawyer who meets the definition of a "reporting person"[12] with respect to any transaction where

- residential real property[13] is purchased in a reportable transfer[14] by a transferee entity[15] or a transferee trust[16] as defined in the AML real estate rule;
- such purchase is made without a bank loan or other similar form of external financing by a financial institution that has both an obligation to maintain an anti-money laundering program and an obligation to report suspicious transactions under FinCEN regulations under the BSA;[17] and
- such purchase is made, at least in part, using currency or a cashier's check, a certified check, a traveler's check, a personal check, a business check, a money order in any form, a funds transfer, or virtual currency.[18]

Transfers made directly to an individual are not covered by the AML real estate rule.

Who Are Reporting Persons?

The prior GTOs only applied to title insurance companies and their subsidiaries or agents involved in covered residential real estate transactions. Effective December 1, 2025, the AML real estate rule applies to all "persons involved in real estate closings and settlements."[19] It also sets forth a "reporting cascade" in 31 CFR § 1031.320(c) to determine which person providing real estate closing and settlement services in the United States must file a report for a given reportable transfer. As an alternative, the persons described in the reporting cascade could enter into an agreement to designate a reporting person.

Section 6102(c) of the AML Act also amended 31 USC § 5318(a)(2) to give the secretary the authority to

> require a class of domestic financial institutions or nonfinancial trades or businesses to maintain appropriate procedures, including the collection and reporting of certain information as the Secretary of the Treasury may prescribe by regulation, to . . . guard against money laundering, the financing of terrorism, or other forms of illicit finance . . . .

FinCEN believes this authority also provides an additional basis for the reporting requirement adopted in the final AML real estate rule.[20]

As a result, the AML real estate rule goes far beyond obligating title insurance companies, their subsidiaries, and agents to report unfinanced residential real estate transactions as in the GTOs. The reporting cascade is set forth in section 1031.320(c)(1) generally as follows:

> (i) . . . the person listed as the closing or settlement agent on the closing or settlement statement for the transfer;
> (ii) . . . the person that prepares the closing or settlement statement for the transfer;
> (iii) . . . the person that files with the recordation office the deed or other instrument that transfers ownership of the residential real property;
> (iv) . . . the person that underwrites an owner's title insurance policy for the transferee with respect to the transferred residential real property, such as a title insurance company;
> (v) . . . the person that disburses in any form, including from an escrow account, trust account, or lawyers' trust account, the greatest amount of funds in connection with the residential real property transfer;
> (vi) . . . the person that provides an evaluation of the status of the title; [and finally]
> (vii) . . . the person that prepares the deed or, if no deed is involved, any other legal instrument that transfers ownership of the residential real property . . . .

"The AML real estate rule does not differentiate between attorneys and non-attorneys when they perform the same functions involving transfers of residential real property. Attorneys who are included in the reporting cascade should consider a designation agreement by which the parties involved in a reportable transaction agree on which party will be filing the report."

Attorneys could potentially be subject to the reporting requirement under section 1031.320(c)(1) if they perform any of the real estate closing and settlement functions described above. The AML real estate rule does not differentiate between attorneys and non-attorneys when they perform the same functions involving transfers of residential real property. Attorneys who are included in the reporting cascade should consider a designation agreement by which the parties involved in a reportable transaction agree on which party will be filing the report. A designation agreement is specifically authorized by section 1031.320(c)(4).

Many comments to the proposed rule opposed the inclusion of attorneys performing certain closing and settlement functions in the cascade as reporting persons because to require them to report would either breach the attorney's professional ethical obligations to maintain client confidentiality or violate attorney-client privilege. FinCEN adopted the AML real estate rule as proposed, including attorneys as potentially obligated to report under the BSA. In its commentary explaining its decision to retain the obligation on attorneys, quoting ABA Model Rules on Professional Conduct 1.6(b)(6) (Colo. RPC 1.5(b)(8)), FinCEN stated that

> "[a] lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary . . . to comply with other law or a court order." The annotations to the Model Rules further elaborate that "[t]he required-by-law exception may be triggered by statutes, administrative agency regulations, or court rules."[21]

Comment [15] to Colo. RPC 1.6(b)(8) provides that "[a]bsent informed consent of the client to do otherwise, the lawyer should

assert on behalf of the client all nonfrivolous claims that" might avoid disclosure. However, because the AML real estate rule was published in August 2024 and clearly imposes the obligation on reporting persons (whether or not lawyers), lawyers involved in real estate transactions where they may be "reporting persons" should seek the informed consent of their client before engaging in any transaction potentially involving AML real estate rule disclosure.

What Must Be Reported?

The substantive reporting requirements of the AML real estate rule are found in various subsections of 31 CFR § 1031.320 as follows:

- Subsection (d) sets forth the information required to be reported concerning the reporting person, including name and business address.
- Subsection (e) sets forth information required about the transferee entity and each beneficial owner of the transferee entity (which must be an individual).
- Subsection (f) sets forth a disclosure requirement for the transferor.
- Subsection (g) sets forth the information that must be disclosed about the residential real property that was transferred.
- Subsection (h) sets forth information required to be reported concerning any payments being made by or on behalf of the transferee entity or transferee trust regarding a reportable transfer.
- Subsection (j) sets forth a reasonable reliance standard for the reporting person regarding the reported information. Clause (j)(1) states that the reporting person may rely upon information provided by other persons, absent knowledge of facts that would reasonably call into question the reliability of the information provided to the reporting person. Clause (j)(2) provides that when reporting beneficial ownership information, the reporting person may rely on the transferee's written certification "absent knowledge of facts that would reasonably call into question the reliability of the information provided to the reporting person."

Litigation

On May 20, 2025, Fidelity National Financial Inc. and an affiliated entity filed a 61-page complaint in the US District Court for the Middle District of Florida (Jacksonville Division)[22] seeking a permanent injunction against the enforceability of the AML real estate rule and alleging that the rule "requires reporting a raft of intrusive information on every residential real estate transaction in the country that does not involve financing (like a mortgage) and that transfers real estate to a trust or certain other legal entities. Millions of perfectly lawful transactions are swept into FinCEN's dragnet."[23]

The plaintiffs argue that the AML real estate rule exceeds FinCEN's authority under the BSA and was adopted in violation of the Administrative Procedures Act. The complaint concludes (in paragraph 180) by stating:

> Compliance with the Rule will cause immediate, irreparable harm to Plaintiffs because they will be unduly burdened by the monetary cost of reporting these purely intrastate transactions to FinCEN. Plaintiffs are thus entitled to a declaration, pursuant to 28 U.S.C. § 2201, that FinCEN cannot enforce the Rule against Plaintiffs because such enforcement would violate the United States Commerce Clause.

The plaintiffs are not seeking a nationwide injunction in this case, but only one prohibiting enforcement against their businesses. As in the litigation involving the federal Corporate Transparency Act (CTA),[24] which started with a narrow case in the Northern District of Alabama, this is likely to spawn a number of other similar federal complaints.[25]

Conclusion

The requirements under the existing GTO (which expires on October 9, 2025, unless further extended) continue to apply to covered transactions and title companies involved in those transactions. Attorneys involved in real estate transactions must be aware of those requirements where applicable and any amendments or extension of the GTOs.

Of course, it remains to be seen whether FinCEN or the Department of the Treasury may amend the AML real estate rule to eliminate the majority of the reporting responsibilities in the same manner as the rules issued in March 2025 interpreting the CTA. Regardless, attorneys involved in residential real estate transactions, or who have clients involved in residential real estate transactions, must pay attention to the pending effectiveness of the AML real estate rule on December 1, 2025. CL


Herrick K. Lidstone is a shareholder of the Greenwood Village firm of Burns Figa & Will PC, where he practices in the areas of business transactions, limited liability company and corporate formation and organization, mergers and acquisitions, ethics, and securities—hklidstone@bfwlaw.com. **Victoria B. Bantz** is a shareholder of Burns Figa & Will PC, where she advises clients on business and securities law—vbantz@bfwlaw.com.

Coordinating Editors: Amy Brimah, amy@brimahlaw.com; Josh McMahon, jmcmahon@anm-law.com

NOTES

1. Anti-Money Laundering Regulations for Residential Real Estate Transfers, 89 Fed. Reg. 70,258 (Aug. 29, 2024), codified at 31 CFR § 1031.320, https://www.federalregister.gov/documents/2024/08/29/2024-19198/anti-money-laundering-regulations-for-residential-real-estate-transfers.

2. *See* Lidstone, "Geographic Targeting Orders Take Aim at Entity Secrecy," 46 *Colo. Law.* 29 (May 2017), updated version available at https://ssrn.com/abstract=2923842.

3. *See* https://www.fincen.gov/sites/default/files/shared/RRE-GTO-Order-April-14-2025-FINAL508.pdf.

4. Anti-Money Laundering Regulations for Residential Real Estate Transfers, 89 Fed. Reg. 70,258.

5. This article originally appeared online at https://ssrn.com/abstract=5218370 (Apr. 15, 2025), and any updates will appear there.

6. As used in this article, the BSA refers to "(A) section 21 of the Federal Deposit Insurance Act (12 USC § 1829b); (B) chapter 2 of title I of Public Law 91–508 (12 U.S.C. 1951 et seq.); and (C) subchapter II of chapter 53 of title 31, United States Code." *See* Pub. L. No. 116-283, 134 Stat. 4548,

div. F, § 6003 (Jan. 1, 2021), which is cited at the end of 31 USC § 5311.

7. Treasury Order 180-01, ¶ 3(a) (Jan. 14, 2020), https://home.treasury.gov/about/general-information/orders-and-directives/treasury-order-180-01.

8. 31 USC § 5318(h)(1)(A)–(D).

9. 31 USC § 5312(a)(2)(U).

10. *See* AML Act § 6202, 31 USC § 5318(g)(5)(D)(i)(I).

11. "Reportable transfer" is broadly defined in 31 CFR § 1031.320(b).

12. "Reporting person" is broadly defined in 31 CFR § 1031.320(c).

13. "Residential real property" is defined in 31 CFR § 1031.320(b)(1) as "real property located in the United States containing a structure designed for occupancy by one to four families," "land located in the United States on which the transferee intends to build a structure designed principally for occupancy by one to four families," and "shares in a cooperative housing corporation for which the underlying property is located in the United States."

14. A "reportable transfer" does not include a grant, transfer, or revocation of an easement; a transfer resulting from the death of an individual; a transfer incident to divorce or dissolution of marriage; or certain other transfers. 31 CFR § 1031.320(b)(2).

15. See 31 CFR § 1031.320(e)(1) for the information required where a transferee entity is involved. A "transferee entity" means "any person other than a transferee trust or an individual," subject to some exceptions, such as a securities reporting issuer, a governmental authority, and a bank or credit union, among other exceptions. 31 CFR § 1031.320(n)(10).

16. See 31 CFR § 1031.320(e)(2) for the information required where a transferee trust is involved. Subject to some limited exceptions defined in the rule, a transferee trust means "any legal arrangement created when a person (generally known as a grantor or settlor) places assets under the control of a trustee for the benefit of one or more persons (each generally known as a beneficiary), or for a specified purpose . . . whether formed under the laws of the United States or a foreign jurisdiction." 31 CFR § 1031.320(n)(11).

17. A number of non-financed transactions are exempt, such as transfers resulting from death (whether pursuant to a will or trust or operation of law, such as intestate succession and surviving joint owners). 31 CFR § 1031.320(b)(2)(ii). There is also an exception for a transfer pursuant to divorce or dissolution of marriage or civil unions (31 CFR § 1031.320(b)(2)(iii)) and for court supervised transfers (31 CFR § 1031.320(b)(2)(v)), among other things.

18. Unlike the current GTO, the AML real estate rule has no monetary threshold for the transaction price. FinCEN stated that "incorporation of a dollar threshold could move illicit activity into the lower priced market, which would be counter to the aims of the rule." Anti-Money Laundering Regulations for Residential Real Estate Transfers, 89 Fed. Reg. 70,258, 70,269.

19. 31 USC § 5312(a)(2)(U).

20. See Section II.A.1 of the background for the final rule, 89 Fed. Reg. 70,258 at 70,259, n.11.

21. Anti-Money Laundering Regulations for Residential Real Estate Transfers, 89 Fed. Reg. 70,258, 70,263.

22. Complaint, *Fid. Nat'l Fin., Inc. v. Bessent*, No. 3:25-cv-00554 (M.D.Fla. filed May 20, 2025).

23. *Id.* at ¶ 2.

24. On January 1, 2021, Congress adopted the CTA which, as adopted would have required significant disclosure to FinCEN about "reporting companies"—small entities formed in or doing business in the United States. These reports were also intended to assist the Department of Treasury in its anti-money laundering efforts. *See* Lidstone and Bantz, "Ping Pong With the Corporate Transparency Act," Burns, Figa & Will, P.C. (Mar. 2025), https://ssrn.com/abstract=5157747, and "Corporate Transparency Act—Where Are We? And Do We Care?," (May 14, 2025), https://ssrn.com/abstract=5254409.

25. *Nat'l Small Bus. United v. Yellen*, 721 F.Supp. 3d 1260 (N.D.Ala. 2024), currently on appeal to the Eleventh Circuit Court of Appeals.