

Alert

September 30, 2024



FinCEN Issues Final Regulation Requiring the Reporting of Certain Non-Financed, Residential Real Estate Transfers

On August 28, 2024, the Financial Crimes Enforcement Network (FinCEN) of the U.S. Department of Treasury (Treasury) issued a final rule requiring real estate professionals involved in real estate closings and settlements to report information about non-financed, residential real estate transfers (the Final Rule).

This Final Rule is another example of FinCEN's efforts to combat illicit actors from using entities and trusts to anonymously launder proceeds through real estate transfers in the United States. The burden of filing the report (Real Estate Report) will fall largely on title companies and escrow agents but will require the cooperation of the buyer and seller in such transactions.

The Final Rule is effective as of December 1, 2025.

Reportable Transfers

A Reportable Transfer is any “[1] non-financed transfer [2] to a transferee entity or transferee trust [3] of an ownership interest [4] in residential real property.” The definition of non-financed, transferee entity, transferee trust, ownership interest, and real property is discussed below.

Certain non-financed transfers to a transferee entity or transferee trust of ownership interest in residential real property are specifically excluded from the reporting requirements under the Final Rule. Those excluded transfers are transfers:

- i. of easements;
- ii. pursuant to a will, trust, or the operation of law resulting from the death of an individual;
- iii. incident to a divorce or dissolution of marriage;
- iv. to a bankruptcy estate;
- v. supervised by a court in the United States;
- vi. for no consideration from an individual, alone or with the individual's spouse, to a trust of which that individual or that individual's spouse, or both of them, are the settlor(s)/grantor(s);
- vii. to a qualified intermediary in a 1031-exchange; or
- viii. for which there is no reporting person.

Non-Financed Transfer

A non-financed transfer is a transfer that does not involve an extension of credit to all transferees that is both:

- i. secured by the real property subject to the transfer and
- ii. extended by a financial institution that has
 - a. an obligation to maintain an anti-money laundering program and
 - b. an obligation to report suspicious transactions.

FinCEN specifically notes that partially financed transfers involving one transferee would not be included in the definition of non-financed and thus would not be reported. However, the definition would result in reporting transfers in which there are multiple transferees and some, but not all, of



Steven P. Katkov

Member

skatkov@cozen.com
Phone: (612) 260-9037
Fax: (214) 462-3299



Matthew Sacchetta

Associate

msacchetta@cozen.com
Phone: (215) 665-4108
Fax: (215) 665-2013

Related Practice Areas

- Business
- Real Estate

the transferees secure financing.

Seller-financed transfers where the seller is not a financial institution obligated to maintain an anti-money laundering program and obligated to report suspicious transactions are considered non-financed under the Final Rule and thus would be subject to the reporting requirements.

Transferee Entity or Transferee Trust

A transferee entity is any person other than a transferee trust or an individual.

There are sixteen types of entities that are specifically excluded from the definition of a transferee entity and thus are not subject to the reporting requirements in the Final Rule. The sixteen exempt entities are:

- i. securities reporting issuers;
- ii. governmental authorities;
- iii. banks;
- iv. credit unions;
- v. depository institution holding companies;
- vi. money service businesses;
- vii. brokers or dealers in securities;
- viii. securities exchange or clearing agencies;
- ix. Exchange Act registered entities;
- x. insurance companies;
- xi. state-licensed insurance producers;
- xii. Commodity Exchange Act registered entities;
- xiii. public utilities;
- xiv. financial market utilities;
- xv. investment companies that are registered with the Securities and Exchange Commission under Section 8 of the Investment Company Act; and
- xvi. legal entities controlled or wholly owned, directly or indirectly, by any of the foregoing exempt entities.

A transferee trust is defined as “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, as well as any legal arrangement similar in structure or function to the above, whether formed under the laws of the United States or a foreign jurisdiction.” A transferee trust includes trustees that hold title to residential real property in the trustee’s name in the trustee’s capacity as trustee of the trust.

There are four types of trusts specifically exempt from the definition of a transferee trust and, thus, are not subject to the reporting requirements. These specific exempt trusts include a(n):

- i. trust that is a securities reporting issuer;
- ii. trust in which the trustee is a securities reporting issuer;
- iii. trust created or authorized under the Uniform Statutory Trust Entity Act or as enacted by a State; or
- iv. entity that is wholly owned by any of the foregoing exempt trusts.

Ownership Interest

Under the Final Rule, transfers of ownership interests in residential real property are demonstrated:

- i. through a deed; or
- ii. through stock, shares, membership, certificate, or other contractual agreement evidencing ownership in a cooperative housing corporation.

Residential Real Property

To constitute real property that is subject to the requirement of filing a Real Estate Report with FinCEN, the real property must be:

- i. “real property located in the United States containing a structure designed principally for occupancy by one to four families;
- ii. [f]and located in the United States on which the transferee intends to build a structure designed principally for occupancy by one to four families
- iii. [a] unit designed principally for occupancy by one to four families within a structure on land located in the United States, or
- iv. [s]hares in a cooperative housing corporation for which the underlying property is located in the United States.”

Required Reporting Person and Designation Agreements

The individual or company that is required to file the Real Estate Report with FinCEN (the Reporting Person) is determined by either a cascading approach or through a designation agreement.

To determine the Reporting Person under the cascading approach, starting at the top and working down the following list, the first person who meets the criteria is deemed to be the Reporting Person. The Reporting Person is the person engaged within the United States as a business in the provision of real estate closing and settlement services:

1. That is listed as the closing or settlement agent on the closing or settlement statement.
2. Absent such a person, the Reporting Person is the person that prepares the closing or settlement statement.
3. If no person prepared the closing or settlement statement, then the Reporting Person is the person who files with the recorder’s office the deed or other instrument that transfers ownership of the residential real property.
4. If the deed or other instrument was not recorded, then the Reporting Person is the person who underwrites the owner’s title insurance policy for the transferee.
5. If the Transferee did not obtain an owner’s policy, then the Reporting Person is the person that disburses the greatest amount of funds in connection with the transfer (including escrow accounts, trust accounts, lawyer’s trust accounts, etc.).
6. If no person exists that disbursed the greatest amount of funds in connection with the transfer, then the Reporting Person is the person who provides an evaluation of the status of title.
7. Finally, absent any such person described above, the Reporting Person is the person that prepares the deed or the instrument that transfers ownership of the residential real property.

If an individual who provided one of the services described above was acting in the scope of the individual’s employment, agency relationship, or partnership, then the individual’s respective employer, principal, or partnership is deemed to be the Reporting Person.

Alternatively, a Reporting Person can enter into a designation agreement with another person who meets the criteria set forth in the cascade described above to be responsible for filing the Real Estate Report with FinCEN. Financial institutions that have an obligation to maintain an anti-money laundering program, whether they meet the criteria described in the cascade or not, cannot be the Reporting Person.

Contents of Real Estate Report

The Real Estate Reports must include information about:

1. the Reporting Person;
2. any transferee entity or transferee trust and its respective beneficial owners;
3. the signing individuals;
4. the transferor;
5. the residential real estate being transferred; and
6. the method and manner of payment including the total consideration.

The Final Rule borrows the definition of beneficial owners from FinCEN’s Beneficial Ownership Information Reporting Rule. Briefly, a beneficial owner is any individual that directly or indirectly

- i. owns 25% or more of the ownership interests in the entity or
- ii. exerts substantial control over the entity.

The personal information that individuals will need to supply to the Reporting Person includes their: full legal name, date of birth, residential address, and unique taxpayer identification number. FinCEN recognizes that the Reporting Person will be responsible for collecting a large amount of information from those involved in the transfer, and thus the Reporting Person is held to a reasonable reliance standard such that the Reporting Person is entitled to rely on information provided by other persons unless the Reporting Person has knowledge of facts that would reasonably call into question the reliability of such information. FinCEN does not plan to accept any incomplete results and plans to issue guidance to Reporting Persons if any individual, transferee entity, or transferee trust subject to the Final Rule refuses or fails to provide the Reporting Person with the information needed to complete the report.

Deadline to File the Real Estate Report and Record Retention

For any Reportable Transfer that takes place on or after December 1, 2025, the Real Estate Reports must be submitted by the Reporting Person to FinCEN by the later of:

- i. the final day of the month following the month in which the date of closing occurred; or
- ii. thirty calendar days after the date of closing.

Reporting Persons must retain for a period of five years

- i. any certification received from a transferee or any transferee's representative as to the accuracy of the reported information that the Reporting Person relied on; and
- ii. the designation agreement, if any.

Penalties

Any Reporting Person that negligently violates the Final Rule is subject to a fine of not more than \$1,394 for each violation and an additional penalty of up to \$108,489 for a pattern of negligence. Willful violators are subject to imprisonment of not more than five years, a fine of up to \$250,000, or both. Willful violators may also be subject to civil penalties of up to \$278,937.
