



February 17, 2022

Global Investigations Division  
Financial Crimes Enforcement Network  
P.O. Box 39  
Vienna, VA 22183

Re: Docket Number FINCEN-2021-0007; 1506-AB54: Anti-Money Laundering  
Regulations for Real Estate Transactions

To Whom It May Concern:

The American Land Title Association<sup>1</sup> believes it is time to transition from the series of temporary real estate related Geographic Targeting Orders (GTO) to a more permanent and tailored solution. While the GTOs have proved to be moderately valuable for law enforcement, the temporary nature of the regime and use of non-real estate specific forms and practices has made the GTOs costly and difficult to implement for the title industry.

Therefore, we recommend FinCEN develop tailored and specific transaction reporting requirements for the all-cash real estate transactions involving corporate entities, instead of imposing a traditional anti-money laundering regime like those imposed on banks. Additionally, FinCEN should wait to take further action on this topic until it has completed the regulations and protocols to implement the beneficial ownership database under the Corporate Transparency Act (CTA).

As the national trade association for the title insurance and settlement services industry, we have unique insights in this area given our members' experience with the real estate GTOs. These GTOs, first implemented in 2016 and extended until April, require ALTA members to report all cash real estate purchases by corporate entities in select cities where the purchase price exceeds \$300,000. Our comments below are based on these experiences, especially the way in which collaboration with other real estate professionals is instrumental in the success of this program.

<sup>1</sup> ALTA represent title insurers, title agents and attorneys that provide peace of mind to Americans by insuring their property rights and closing their real estate transactions. Our members range from range from small, one-county operations to large national title insurers in the United States. The mission of ALTA is to improve the skills and knowledge of providers in the real property transaction, effectively advocate member concerns, and standardize products for industry use.

## **FinCEN Should Hold Off on Proposing a Rule Until it Finalizes its Implementation of the Corporate Transparency Act**

The success of the GTOs is directly related to the reporting of beneficial ownership data.<sup>2</sup> Given this reliance on beneficial ownership reporting for measuring the value of any real estate reporting regime, ALTA believes that FinCEN should finalize its regulations related to the CTA before taking any further action on this topic. It would be counterintuitive to design a real estate regime until FinCEN understands how the CTA's beneficial ownership database will work.

Under the GTO regime, FinCEN has issued orders directly to the roughly 40 title insurers licensed to do business by a state. These orders require the insurer to impose those requirements on their authorized agents. For a reportable transaction, title insurers are required to send FinCEN three key pieces of information: (1) basic transaction information (closing date, property address and purchase price); (2) the name of the purchasing entity; and (3) beneficial ownership information about the purchasing entity. These requirements only apply when a title insurance policy is issued in the transaction.

The first two pieces of information are relatively easy for title companies to provide. This is necessary information collected in the ordinary course of a real estate transaction. The beneficial ownership data is the most costly and difficult piece to collect because it is not necessary to close the deal. The title industry is often not in the best position to collect beneficial ownership information because it doesn't have as direct of a relationship with the customer and often is engaged only at the later stages of the transaction. Further, the title company must rely on the parties that represent the buyer (either the real estate broker/agent or the buyer's attorney) to obtain the information. Often those parties will resist assisting the title company because of a lack of awareness of the GTO or because the information is sensitive (or privileged).

As FinCEN notes, the thing that is "highly useful for FinCEN and law enforcement" is the ability to obtain "greater insight regarding assets held by persons of investigative interest." Thus, law enforcement's asset tracing capabilities will be greatly enhanced when the CTA is implemented.

The collection of beneficial ownership data under the CTA should reduce (if not eliminate) the need for real estate and title professionals to collect and report this duplicative information. Instead, reporting companies should be able to rely on information already collected under the CTA and only require reporting of beneficial owner data when it is not otherwise collected under the CTA.

Further, given the data coverage of many title data providers, it is possible that FinCEN could develop more targeted real estate programs given those commercial options. The burden is currently falling on small businesses and title insurers to gather information and function as "private investigators." Once implemented, the CTA should ensure that most law enforcement asset tracing is possible using those commercial sources. This would make it possible for a real estate rule to focus on specific coverage gaps. A narrower set of real estate specific data would be less costly and time consuming to collect and provide.

<sup>2</sup> See 86 FR 69595 <https://www.federalregister.gov/d/2021-26549/p-105>. "In evaluating reporting from the Real Estate GTOs issued since 2016, FinCEN and law enforcement agencies believe that a substantial proportion of the reported transactions for the purchase of property involved a beneficial owner who was also the subject of a SAR. For example, a FinCEN advisory published in May 2017 stated that the proportion of such overlap was more than 30%"

## **FinCEN Should Develop a Real Estate Specific Transaction Reporting Program**

As FinCEN puts in place a permanent set of anti-money laundering regulations for real estate transactions, it should commit to developing industry specific requirements. Given the lessons of the GTO, law enforcement best benefits from a real estate transaction reporting regime instead of subjecting real estate and title companies to the suspicious activity reporting and customer due diligence requirements borne by banks.

The real estate industry is highly fragmented and mostly comprised of small businesses. In the title industry alone, ALTA estimates there are roughly 20,000 title companies, escrow companies, and attorneys that conduct real estate settlements across the country. According to the Census Bureau, 63% of title companies have five or less employees and 94% have less than 20 employees. Imposing a bank-like anti-money laundering regime on these businesses does not make sense functionally and would be unnecessarily costly.

Over the past six years, the GTOs have been renewed and expanded. The temporary nature and constant changes have placed a significant burden on the industry due to the labor and details these reports require. ALTA members report that the cost to comply with the GTO ranges anywhere from \$45 to \$250 per reportable transaction. This is a significant expense that is often passed on to customers. The largest portion of this expense is due to the collection of beneficial ownership data, which should become duplicative once the CTA is implemented.

In most transactions, title insurers must rely on other parties like real estate agents and attorneys who have a direct contractual relationship with the buyer to obtain information. Given the sensitivity of the beneficial ownership data, title companies often receive pushback from the buyer's representatives and confusion over the need for the information and how it will be used. However, if the regulations limited the data reported to transaction information that title companies already collect to complete the deal, like the closing date, purchase price, address, buyer, and seller's names, it would reduce the difficulty and cost of compliance. Further, if there is still a need for beneficial owner data because the company is not in the CTA database (or exempt from inclusion), then the requirement to collect and report that data should be on the buyer's contractual representative, either the real estate broker or attorney.

While most of the expense cited above relates to the time it takes to obtain beneficial ownership data, other process improvements would further reduce costs. One necessary area of improvement is real estate specific forms. Currently, the GTO requires title companies to file reports using the currency transaction report form. Under the GTO, title companies must ignore the instructions on the CTR and instead follow complex instructions. This makes it difficult to complete the forms, meaning specially trained staff are required to file the forms and often must go back and make revisions. This is an unnecessary hardship for the title industry that could be resolved with forms designed specifically for this requirement.

Additionally, the temporary nature of the GTOs makes it difficult for companies to invest in technology to automate transaction review and reporting. As part of any permanent regime, FinCEN should commit to investing in updating its E-Filing system to aid in the development of APIs and other automated transfer protocols to make reporting easier and more systematic.

We believe a future regulation should continue to focus solely on all-cash transactions and shell companies. The GTOs have always been focused on entities. Adding reporting on transactions involving natural persons would drastically increase the volume of reports. Without the ability to automate reporting directly into FinCEN's E-Filing system by API, the cost on

industry would be extraordinary. Further, adding reporting of transactions involving natural persons would be duplicative of data that law enforcement could otherwise purchase from commercial data providers.

Lastly, we already experience significant customer hesitation to provide sensitive non-public information (NPI), like their social security number, during a closing. Companies in the title industry have worked hard to reduce the amount of NPI they store and retain to assuage customer concerns about data breaches. FinCEN should not expose the industry to those increased risks when commercially available data exists to meet the same need.

### **Subjecting Title Companies to Bank-Like AML Requirements is Unnecessary and Overly Costly**

FinCEN acknowledges the main rationale of imposing due diligence and anti-money laundering requirements on banks and other financial institutions is to “enhance financial transparency.” It does not make sense to subject title companies to a similar regime because all the money utilized in a real estate transaction (whether financed or not) is already flowing through U.S.-based financial institutions that have anti-money laundering requirements. Additionally, title companies do not have a continuing relationship with the buyer or seller (like a bank has with the holder or owner of an account), given that the average buyer will own their home for 13 years after purchase. Thus, imposing similar requirements on ALTA members would not enhance transparency and only add unnecessary and excessive costs to real estate transactions.

Under existing regulations, bank and non-bank residential mortgage lenders and originators must file suspicious activity reports (SARs) and establish AML/CFT programs. As FinCEN stated in the ANPRM, around 80 percent of residential real estate transactions involve some form of mortgage financing. For these transactions, there is already a program in place that is sufficient to meet the goals of the national anti-money laundering regime. This is why the GTOs focused on non-financed or all-cash transactions.

However, even non-mortgage financed transactions are already exposed to a significant portion of the national AML regime. The term “all-cash” is a bit of a misnomer. Title companies and other parties conducting real estate settlements do not accept hard currency for use in completing a real estate transaction. Instead, the collection and transmission of funds in a real estate transaction is done entirely using bank-provided services. Most commonly, this is through the use of wire transfers but can also include limited amounts transferred using certified or personal checks, or an automated clearing house. The overwhelming majority of payments in a real estate transaction (if not in all cases) are being sent to the settlement provider from a customer’s account at a U.S.-based financial institution. These payments should already be subject to an AML/CFT program that includes customer due diligence.

Under the laws in the most states, title companies are legally prohibited from accepting funds unless they are transferred via wire transfer or other bank-provided transfer systems. These so-called good-funds laws are in place to ensure that funds are irrevocably cleared before used in financially completing the real estate transaction. Most title companies utilize wire transfers exclusively because the final settlement amount is often not known until the day before the closing.

Given this reality, subjecting title companies to the same SAR and AML/CFT requirements as a bank or other financial institution will not enhance financial transparency. It will duplicate efforts being done by other financial institutions. Instead, a real estate requirement should focus on providing law enforcement with additional ownership data that would not be gleaned from bank

records or CTA data.

### **FinCEN Should Meet with Industry Software Providers and Commercial Title Data Providers**

Most title and settlement companies use software to prepare necessary transaction documents and disclosures. FinCEN should meet with these companies to understand the data standards used by these systems and the types of data that is easily extractable for transaction reports under a permanent regulation.

Under the GTO, much of the requested transaction data (outside of beneficial ownership data) is already collected in these software systems. As FinCEN puts permanent rules in place, understanding what additional data is easily extracted from these systems can help it best design the regulation to ensure that FinCEN is receiving high quality data that would be useful to law enforcement.

Additionally, we believe that FinCEN should not require the industry to provide data when it is readily available from commercial sources. Thus, we recommend FinCEN contact commercial title data providers to learn about the data they have available and the ability to match it to information that will be collected under the CTA. This outreach will hopefully minimize the collection of the same data multiple times.

Both national and local title plants regularly capture transactional data from every residential real estate transaction in their covered area. These software systems pull information from recorded documents like deeds and mortgages. This includes information like the grantor (seller) name, grantee (buyer) name, property address, legal description, settlement date, recording date, mortgage lender's information, etc. They index this information both by individual and entity names and by each address. Most if not all the information law enforcement would need to start a forfeiture action can be provided by these title plants. This readily available nationwide data could reduce the cost, burden, and pressure on title companies in a future reporting regime.

### **Residential and Commercial Real Estate Should Be Addressed by Different Rules**

In the ANPRM, FinCEN asked several questions about the residential and commercial real estate markets. Those questions recognize the numerous differences between the two markets. Because of these differences, the rules of both markets should be developed separately.

While both residential and commercial transactions involve the sale of real estate, that is where the similarities end. There is no such thing as a typical commercial real estate transaction. Deal structures, financing options, and number of participants can vary greatly in a commercial deal.

While title insurance is often purchased in a commercial deal, title professionals do not often play the central role of conducting the settlement like in residential deals. That is often done by the buyer's or seller's attorney or law firm. Additionally, those law firms provide extensive title opinions that are used to help design insurance coverage. However, in some deals, those opinions will compete with the title insurance product.

By contrast, residential deals are simpler and more standardized across the country. The participants are the same – buyer, seller, real estate broker/agent, title insurer, and person conducting the settlement (either title agent or attorney depending on the state). A much higher percentage of residential buyers obtain title insurance (including all buyers that use mortgage

financing).

If FinCEN is looking for more data on commercial real estate transactions it should develop a specific regime for these deals. Given the complexity of these transactions, the number of participants, the variations on ownership structures, and the mix of debt and equity used in these transactions, it makes the most sense to place requirements on the parties closest to the deal such as the buyer's or seller's attorney. Further, FinCEN would need to examine an appropriate reporting threshold amount given the wide variety in commercial transactions from sales of quad plex homes in rural and exurban areas to high rise office towers in city centers. The very nature of commercial transactions often means new entities are created with the sole purpose of managing commercial deals or serving as intermediate title holders as the transactions move forward – which makes tracking down this information tedious and sometimes unfeasible.

The financing of commercial deals makes a single rule for all real estate nearly impossible. Deal and debt structures can be set up much more easily to avoid a reporting requirement like those required under the GTOs. If FinCEN is concerned about money laundering in commercial real estate, it should develop regulations unique to that market.

### **FinCEN Should Place Direct Requirements on the Professionals in the Best Position to Collect the Information**

As we learned under the GTOs, oftentimes title insurers are not in the best position to possess or collect the requested data. FinCEN should ensure any permanent regime places requirements on the parties in the best position to collect the data.

The agency should use the guiding principle that any reporting obligation should be directly placed on the party most likely to possess or collect that data or be in the most direct contractual relationship with the customer. Thus, if FinCEN wants data about the transaction (closing date, address, etc.), then it should impose requirements directly on the person conducting the settlement, whether they be title agents, direct operations of the title insurers, or attorneys.

If FinCEN wants additional information about the buyers, then the agency should impose the obligation on their representatives – the buyer's real estate broker/agent and their attorney. According to a 2021 Global Financial Integrity (GFI) report<sup>3</sup> on money laundering and real estate, the top two gatekeepers and facilitators of real estate money laundering by high-net-worth individuals are 1) Lawyers/law firms and 2) Real estate agent/brokers. For any reporting requirement to succeed, all parties need to have some skin in the game to either directly report or cooperate in the filing of a report.

This data further shows title insurers may or may not be the best person to have these details on hand because they do not always have a direct relationship with the customer. The customer is not opening an account with the title insurer, and the title insurer does not typically represent them. Often, the title insurer only becomes aware of the transaction at the end as it prepares to (or has already closed) and a policy is submitted. Asking title insurers to gather data that they do not already have is what drives up the cost of the collection effort.

Lastly, under the GTOs title companies must rely on lawyers and real estate agents for certain personal information on a customer. Because they do not have a legal obligation or

<sup>3</sup> Global Financial Integrity, "Acres of Money Laundering: Why U.S. Real Estate is a Kleptocrat's Dream." August 2, 2021. <https://secureservercdn.net/50.62.198.97/34n.8bd.myftpupload.com/wp-content/uploads/2021/08/Acres-of-Money-Laundering-Final-Version-2021.pdf?time=1643307533>

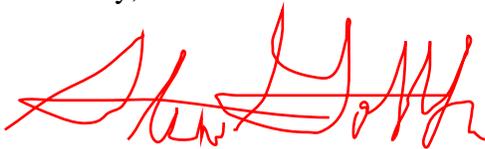
independent duty to file or cooperate, they are often hesitant to help, hide behind customer confidentiality questions, or threaten to forego title insurance to avoid reporting. The result is a more costly process and increased risk of incomplete reports or possible avoidance schemes. FinCEN could reduce this risk by directly placing requirements for reporting and cooperation on all professionals in a real estate transaction.

## **Conclusion**

After the past six years of complying with the temporary GTOs, ALTA believes now is the time to explore how to transition to a more permanent regulatory regime for subjecting real estate transactions to additional anti-money laundering requirements. As FinCEN explores its options, we believe that FinCEN should design narrowly tailored rules for real estate instead of subjecting title companies to expensive and unnecessary bank-like requirements. Further, given the importance of beneficial ownership data to the success of the GTO, FinCEN should wait until it completes the rulemaking under the CTA before designing a rule for real estate to minimize the need to provide duplicative data.

The title industry has appreciated the strong working relationship with FinCEN as we comply with the GTO. FinCEN has proved to be a model regulator when it comes to providing guidance and answering transaction specific questions. We look forward to continuing to work with FinCEN on potential new requirements for real estate transactions. Please reach out to Steve Gottheim, General Counsel at ALTA, with any questions at [sgottheim@alta.org](mailto:sgottheim@alta.org).

Sincerely,



Steve Gottheim  
General Counsel