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Please Address Reply to:

April 15, 2024

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

RE: Docket Number: FINCEN-2024-0005 and RIN 1506-AB54
Submitted electronically at: www.regulations.gov

Dear Ladies and Gentlemen,

The American College of Trust and Estate Counsel (“ACTEC”) is pleased to submit comments in response to an Advance Notice of Proposed Rulemaking (the “ANPRM”) RIN 1506-AB-54, dated February 16, 2024, by the Financial Crimes Enforcement Network (“FinCEN”) seeking public comments regarding potential requirements by certain persons involved in real estate closings and settlements to submit reports and keep records on identified non-financed transfers of residential real property to specified legal entities and trusts on a nationwide basis. Transfers made directly to an individual would not be covered by this proposed rule.

ACTEC is a professional organization of approximately 2,400 lawyers from throughout the United States, including 100 international members. Fellows of ACTEC are elected to membership by their peers on the basis of professional reputation and ability in the fields of trusts and estates on the basis of having made substantial contributions through lecturing, writing, teaching, and bar activities. Fellows of ACTEC have extensive experience in providing advice to taxpayers. As such, most of the Fellows of ACTEC are involved on a day-to-day basis with the creation and administration of trusts. ACTEC offers technical comments about the law and its effective administration but does not take positions on matters of policy or political objectives.

If you would like to discuss these comments, please contact the members of the ACTEC FATF Task Force: Lyat Eyal at lyat@are-legal.com, Glenn G. Fox at glenn.fox@bakermckenzie.com, John A. Terrill, Jr., at jterryll@htts.com, or Deborah O. McKinnon, ACTEC Executive Director, at domckinnon@actec.org.

Respectfully submitted,



Susan D. Snyder, President

Attachment:

The American College of Trust and Estate Counsel (ACTEC) Comments to Notice of Proposed Rule Making—Anti-Money Laundering Regulations for Residential Real Estate Transfers (Regulatory Identification Number FINCEN-2024-0005 and RIN 1506-AB54)

Executive Director

DEBORAH O. MCKINNON

April 15, 2024

Bank Secrecy Act
Notice of Proposed Rulemaking (NPRM) Anti-Money Laundering Regulations for Real Estate Transfers
ACTEC Comments In response to Request for Comments on Proposed Rule under The Bank Secrecy Act (BSA)
Docket Number FINCEN-2024-0005
RIN 1506-AB54

I. INTRODUCTION

On February 16, 2024, the Financial Crimes Enforcement Network (“FinCEN”) of the Department of the Treasury issued a Notice of Proposed Rulemaking (the “NPRM”). The NPRM seeks public comments regarding potential amendments to the Bank Secrecy Act (“BSA”) that would require reporting of specific information by certain persons regarding a broad category of non-financed real estate transactions. The NPRM followed the issuance on December 2, 2021 of an Advanced Notice of Proposed Rulemaking (the “ANPRM”) broadly addressing the same topic. Section VI of the NPRM titled “Request for Comment,” includes a list of 50 questions as to which comments are invited. Paragraph F. of Section VII, titled “Regulatory Analysis”, contains an additional list of 11 questions under the title “Additional Requests for Comment.” This response will address a few of the 50 questions to the extent that Fellows of ACTEC are specifically involved in the issues to which those questions pertain. This response will not address the 11 questions in the Additional Requests for Comment, since Fellows of ACTEC do not have specific expertise relating to these questions which are more properly addressed by commenters more directly involved in real estate transactions. Instead, similar to the response to the ANPRM, ACTEC will summarize for FinCEN the nature of the transactions in which ACTEC Fellows are typically employed and will then address a number of matters highlighted in the first set of 50 questions.

As noted in the cover letter accompanying this response, and in the comments to the ANPRM, ACTEC is a professional organization most of whose members are involved in representing clients in the field of trust and estate law, among other related areas of practice. As such, most of the Fellows of ACTEC are involved on a day-to-day basis with the creation and administration of trusts. Fellows of ACTEC are also regularly involved in the creation of certain legal entities, including LLCs, partnerships and corporations. In some cases, ACTEC Fellows are involved in the transfer of residential real property to such entities and/or to trusts. ACTEC Fellows can therefore provide assistance to FinCEN in identifying particular areas of risk raised by the involvement of a trust in these transactions. Since ACTEC Fellows do not typically engage directly in real estate transactions separate and apart from those that are part and parcel of the planning and administration of estates and trusts, our responses will be targeted to those areas only.

II. BACKGROUND

It is our hope that the following description of the relevant matters in which ACTEC Fellows are involved will be of assistance to FinCEN in the rule-making process.

In a typical situation, an ACTEC Fellow will represent an individual, a couple or, sometimes, multiple members of the same family. As part of the process of conducting estate planning and related tax planning, certain situations commonly arise which include the transfer of residential real estate of the nature described in the NPRM. The following are common examples.

- a. An individual is a fee simple owner of residential real estate. For a variety of reasons, it is considered beneficial for the residence to be owned not by the individual but by either an entity (such as an LLC or partnership) or by a common law trust. There is a wide variety of legal and geographic variation in the reasons behind such a change in ownership (protection from creditors and avoidance of probate, among others). In the vast majority of such cases, the transfer occurs without cash or other financial consideration. The transferor individual is often the sole beneficial owner of the entity or the sole beneficial owner of the trust. In other cases, the transferee entity or trust may have other beneficial owners, such as the transferor's spouse and/or other family members (typically descendants). These sorts of transactions occur under the auspices of ACTEC Fellows literally thousands of times a month. While ACTEC Fellows may or may not have a separate expertise in real estate law, it is common for Fellows to prepare not only the transferee entity or trust but also the deed by which the residential real estate is transferred. In those cases it is also common for a Fellow to arrange to file the deed with the appropriate governmental authorities.
- b. A variation on this first and most common example is the creation of a so-called "Qualified Personal Residence Trust" or "QPRT" under U.S.C. § 2702(b). This common transaction would technically be a reportable transfer under the NPRM notwithstanding that the planning technique includes a trust solely for the benefit of the individual transferring the residential real estate for a period of years, typically followed by a transfer of the real estate to the individual's family members.
- c. In other cases, the same individual owning residential real estate transfers the property into an entity or a trust for cash or other financial consideration which might be paid by assets already in the entity or trust or might be paid by way of a promissory note executed by the purchasing entity. This sort of planning would typically be conducted for certain estate tax planning benefits including the removal of appreciation from the transferor's estate.
- d. ACTEC Fellows may also be involved in the sale and purchase of residential real estate by an entity or a trust as an investment or personal-use property. A typical example would be where an existing trust purchases residential real estate from a third person, with the purpose of providing a residence or a vacation home for the benefit of one or more beneficiaries of the trust. The

purchase price would typically come from assets already owned by the trust. In some cases, the purchase may be financed by a loan to the trust by another member of the family for which the trust is created or by a loan to the trust by a third party financial institution. While it is perhaps more typical in this sort of situation for other actors in the “cascade” of reporting persons to be involved, particularly if the residential real estate is being purchased from an unrelated third person, ACTEC Fellows may still have a role in the preparation and filing of a deed and/or related transfer documents.

ACTEC'S COMMENTS

1. Transfers with Limited Money Laundering/Terrorism Financing Risk

The examples set forth in subparagraphs a. and b. above include situations in which there is (i) no change in beneficial ownership of the real estate; or (ii) the transfer is for the benefit of the family of the transferor yet, under the NPRM, these would be considered reportable transactions, even when there is no cash or other financial consideration paid.

We do not believe that capturing such transfers as reportable transactions will achieve the goal of combating money laundering and terrorism financing. The transferor already owns the real estate, and this information is already available to FinCEN through the public records of the applicable jurisdiction. Transfers made to entities owned solely by the transferor are particularly numerous and particularly inappropriate to subject to a reporting requirement. Transfers made to entities in which the transferor may or may not be a beneficial owner but the beneficial owners are members of the transferor’s immediate family are similarly unlikely to be at risk of misuse. Therefore, we suggest providing exceptions to the reportable transaction requirement under circumstances where there is no cash or other financial consideration paid for the real estate, and either no change in beneficial ownership of the real estate or where the beneficial owners of the transferee entity or trust are members of the family of the transferor, as defined in 26 U.S.C. § 2704(c)(2).

2. Determination of Reporting Person

The proposed creation of a “cascade” of persons who have a reporting obligation will, in many cases, leave the obligation on a lawyer, either as the drafter of the deed, the recorder of the deed or the person whose escrow account used for funding. Questions about this proposed reporting obligation are set forth in questions 5, 6 and 7 in the preamble to the NPRM. As can be seen from the examples set forth above, such a reporting obligation may arise for a lawyer where residential or other real estate is transferred to an LLC or other legal entity or to a trust. Most of such transfers are without consideration, made by clients routinely as part of the ordinary estate planning process, and do not include the formalities of title companies and settlement agents.

All American lawyers are required to act in accordance with their own jurisdiction’s version of the Model Rules of Professional Conduct. Model Rule 1.6 (the provisions of which may vary by jurisdiction), provides as follows:

Rule 1.6: Confidentiality of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(6) to comply with other law or a court order; or

(7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

When a reportable transfer involves, for example, the transfer of an individual's vacation home into a revocable trust of which the transferor is the sole beneficiary during his or her lifetime

(which is often done for practical planning reasons such as the avoidance of multiple state probates at death) it is probable that the only reporting person available is the client's lawyer who provided the legal service of deed preparation and/or recording. In such a case, the information required in the report pertaining to the transferor, the transferee and the reporting person (counsel) will inevitably include confidential information about the lawyer's client.

In many other cases, inside and outside of an estate planning context, the application of the reporting cascade will cause ACTEC Fellows and other lawyers who are involved in reportable transfers under the NPRM to risk violating this Rule. We also note that lawyers are the only individuals listed in the cascade who have a legally mandated obligation of confidentiality.

While this comment on the NPRM does not specifically address the likely violation of this Rule in many of the pertinent situations, understanding as we do that others will comment on this specific problem, we simply bring to the attention of FinCEN that application of the reporting cascade will create real risks to lawyers involved in reportable transfers. Estate planning decisions are some of the most important, private, and confidential decisions that a client makes. We firmly believe that rules which require lawyers to publicly disclose information about their estate planning clients' intentions and beneficiaries discourages clients from engaging in necessary and candid discussions with their counsel and, more importantly, from engaging in planning to allow for the efficient transfer of family wealth. The lawyers' ethical obligations, including those which prohibit a lawyer from knowingly counseling or assisting a client in committing a crime or fraud, generally make lawyers a critical line of defense against money laundering. The additional burdens of disclosure in the proposed rule (which snare routine single party estate planning transactions) make it less likely not more likely that lawyers will be in a position to fulfill that critical function. We therefore urge FinCEN to reconsider the inclusion of attorneys in the reporting cascade.

3. Identification of Beneficial Owners of Transferee Entities and Trusts

Question 16 in the NPRM asks for comments regarding the identification of beneficial owners of transferee trusts. As ACTEC has described in prior submissions to FinCEN, including most recently, ACTEC's responses to FinCEN's request for comments to the CTA regulations issued in September of 2022, the trustee of every common law trust is required by state law and, in some cases, federal law, to know the identity of those individuals or entities that control a trust and the identity of the beneficiaries of the trust. As noted in our prior submissions, we assert that identifying the trustee provides FinCEN with the source of accurate and verifiable beneficial ownership information, including when there is a reportable transfer to a transferee trust. While the regulations under the CTA require reporting companies to "look through" certain trusts to determine beneficial ownership, it continues to be ACTEC's view that identifying trustees of common law trusts is sufficient to provide FinCEN with a clear point of contact when seeking information about the beneficial owners of trusts.

4. Definitions on which comment is requested in Questions 26 and 28

ACTEC has nothing to add to the definition of transferee trusts in the NPRM. We note that with regard to the definition of beneficial ownership of transferee trusts, given the incorporation of definitions from the CTA regulations, and given ACTEC's prior comments in this regard, we have nothing new to add here except to assume that if the CTA regulations are modified as a result of pending challenges, the incorporation by reference will take any such modifications into account.

5. Consideration of Price Thresholds

Question 44 raises an important question that bears on ACTEC's concerns set forth above. Unlike FinCEN's existing Geographic Targeting Order program, the NPRM includes a vast segment of transfers used everyday in estate planning, and in the context of trusts, would capture potentially millions of transfers of residential real estate into trusts or entities such as LLCs. As such, we urge Treasury to exclude transfers into trusts or entities made without cash or other financial consideration where there is either no change in beneficial ownership of the real estate or where the beneficial owners of the transferee trust or entity are members of the family of the transferor.

6. Exceptions

In the proposed definition of reportable transfer, the NPRM includes as an exception "[t]ransfer resulting from the death of an owner of residential real property." ACTEC believes that this definition inadvertently fails to include those transfers where the property is already owned by a revocable trust of which the decedent was the settlor and the beneficiary during his or her lifetime. In such a case, the decedent is not technically the "owner" of the property at death, but the consequences of his or her death are precisely the same as they would be had the decedent owned the property directly. We suggest that the definition be broadened to address this inappropriate limitation.

ACTEC appreciates that the task of preparing these proposed regulations is complex and would very much appreciate the opportunity to participate in an open and on-going dialogue with FinCEN on a regular basis to assist in the process of formulating the new rules. We thank FinCEN for the invitation to participate in the virtual roundtable with Under Secretary Brian Nelson on April 5, 2024, which we found to be very informative.

Respectfully submitted by on behalf of ACTEC by Task Force members Ed M. Manigault, Carolyn A. Reers, John A. Terrill, II, Kevin Packman, and David Diamond; Task Force Co-Chairs Glenn G. Fox and Lyat Eyal; and ACTEC Executive Director, Deborah McKinnon, all of whom are available for further comment. Contacts for this purpose are:

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