

¹ FinCEN may issue orders that impose recordkeeping and reporting requirements on domestic financial institutions or nonfinancial trades or businesses in a geographic order pursuant to 31 U.S.C. § 5326(a), 31 CFR § 1010.370 and Treasury Order 180-01.

² <http://www.cbsnews.com/videos/anonymous-inc-part-i>

³ Former FinCEN Director Jennifer Shasky Calvery touched upon this in her speech to the ACAMS AML and Financial Crimes Enforcement Conference in Hollywood, Florida on April 12, 2016 stating that these GTOs were really “pilot efforts” to “gather information while furthering [FinCEN’s] incremental, risk-based approach to regulating” the real estate industry. <https://www.fincen.gov/sites/default/files/shared/20160412.pdf>

⁴ It is likely obvious that the GTOs discussed in this article only focus on “all cash” transactions as transactions involving institutional financing are already subject to extensive “know your customer” and “customer due diligence” requirements to identify beneficial ownership when an entity is involved.

⁵ The January 13th GTOs define a “legal entity” as a corporation, limited liability company, partnership or other similar business entity, whether formed under the laws of a state, the U.S. or a foreign jurisdiction.

⁶ “All cash” includes currency, cashier’s checks, certified checks, traveler’s checks, or money orders for any part of the purchase price. Business checks, personal check, and wire transfers do not trigger the requirement under the January 13th GTOs, but business checks and personal checks were subsequently included with the extension of such GTOs on July 27, 2016.

⁷ Natural persons and trusts are not subject to the GTOs.

⁸ GTOs are only permitted to last 180 days, but are routinely extended.

⁹ <http://www.wsj.com/articles/u-s-expands-real-estate-data-targeting-order-1469647229>

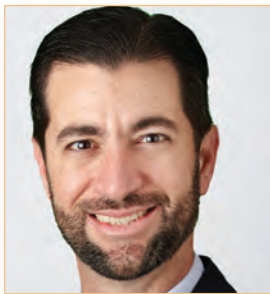
¹⁰ <http://www.dailybusinessreview.com/id=1202752553014/Pace-of-Cash-Luxury-Sales-Suffers-Little-After-Feds-Take-Look>

¹¹ Former FinCEN Director Jennifer Shasky Calvery noted this in her speech to the ACAMS AML and Financial Crimes Enforcement Conference in Hollywood, Florida on April 12, 2016. It is also worth noting that since April 2003, when FinCEN issued its first rulemaking in this area, this has been an area of concern for FinCEN and that concern has only increased with time. <https://www.fincen.gov/sites/default/files/shared/20160412.pdf>

¹² As noted by Former FinCEN Director Jennifer Shasky Calvery, the “current regulatory structure covers approximately 78 percent of real estate purchases nationwide”. <https://www.fincen.gov/sites/default/files/shared/20160412.pdf>

¹³ Former FinCEN Director Jennifer Shasky Calvery stated that the reporting stemming from the GTOs in conjunction with regularly filed suspicious activity reports (SARs) were “helping to provide greater clarity on suspicious activity taking place in this sector of the real estate markets” in her speech to the ACAMS AML and Financial Crimes Enforcement Conference in Hollywood, Florida on April 12, 2016. <https://www.fincen.gov/sites/default/files/shared/20160412.pdf>

¹⁴ As this article goes to print, there is uncertainty as to the promulgation of additional regulations in this area in light of the moratorium on further rule-making. However, on February 23, 2017, the GTOs were extended for an additional six months confirming that FinCEN and law enforcement will continue to seek clarity with respect to real estate transactions.



Andres “Andy”

Fernandez is a partner in Holland & Knight’s Miami office and leader of the firm’s Cuba Action Team. He practices in the area of banking law and financial services, with a focus on licensing,

regulatory and compliance matters. With an emphasis on issues pertaining to the Bank Secrecy Act (BSA), anti-money laundering (AML) and Office of Foreign Assets Control (OFAC), Mr. Fernandez counsels a broad range of clients such as domestic community banks, foreign banks, broker dealers and money service businesses (including virtual/digital currency and Bitcoin). Mr. Fernandez has represented financial institutions in such diverse matters as the establishment of U.S. offices and branches of foreign banks, the de novo formation of financial institutions, the resolution of regulatory enforcement actions against financial institutions, the representation of financial institutions before various regulatory or enforcement agencies.



Elena Otero is a Miami attorney who practices in the areas of real estate, finance and banking law, with a focus on commercial lending transactions, and the acquisition and disposition of assets. Ms. Otero counsels financial institutions

and lenders in commercial lending transactions, including construction and permanent real estate financing, healthcare real estate finance and asset-based lending. She also represents borrowers, purchasers and sellers in the acquisition, disposition and financing of commercial and residential real estate. She assists clients with regulatory and compliance matters, management of real estate assets and a multitude of contractual agreements, including leases, subleases, licenses and assignment agreements.

FinCEN Targets South Florida’s Skyline

By: **Andres (Andy) Fernandez** and **Elena Otero**



Business Review reported in March that the pace of cash acquisitions in Miami-Dade County, Florida had not suffered since such January 13th GTOs were issued, citing brokers and attorneys as saying transactions were continuing and reporting “business as usual”.¹⁰

So, where does all this leave us? There has been much speculation about the reach of these GTOs and whether they will, in fact, be temporary or whether they are the beginning of an expansion of the current regulatory framework covering banks and the nonbank real estate sector. There has also been much talk about the limitations posed by the GTOs. For example, a buyer who is intent on hiding their identity via the use of a shell company can simply forego title insurance or can use an offshore trust to acquire the asset, neither of which would trigger any reporting requirements since the GTOs are limited, at this time, to title insurance companies and their agents and entity purchasers, respectively. Such buyer may also limit their ownership in the entity to less than 25%, which would not trigger the reporting requirements. Lastly, the GTOs do not cover “all cash” transactions where payment was rendered by the buyer via funds transfer, leaving a noticeable gap in what is likely the most commonly used method of payment in “all cash” transactions by buyers.

Based on FinCEN’s comments that the GTOs have provided relevant information, its longstanding concerns related to money laundering through real estate¹¹, and the fact that these GTOs are meant to cover the approximately 22% of real estate purchases nationwide not captured by financial institutions which are required by FinCEN to maintain and implement an anti-money laundering compliance program (“AML Program”)¹², it seems we can accurately speculate that the GTOs will remain in effect in some form permanently and will not be a temporary requirement.

It can also be noted that the reach of the GTOs may be further expanded, since the Panama Papers have led to a debate as to whether lawyers, law firms and realtors should also be subject to “know your customer” and “customer due diligence” requirements to effectively hinder money laundering and provide the “greater clarity”¹³ in real estate transactions sought by FinCEN in issuing these GTOs. We are then left with the question: Will FinCEN seek to impose the requirement of maintaining and implementing an AML Program on more players involved in the real estate sector?

In light of the foregoing, many may feel that this will affect the real estate markets that are the targets of the GTOs, but it seems that the GTOs have not had such an effect, and most buyers who do not have malicious intent will continue to acquire real estate assets in the ordinary course. While it will be interesting to see how FinCEN and any future GTOs/regulations shape real estate transactions, it seems we can now say with certainty that FinCEN and law enforcement will continue to target real estate transactions as they seek greater transparency in such transactions.¹⁴

2016 brought forth much discussion regarding “know your customer,” “customer due diligence,” and beneficial ownership transparency, including the lack thereof, in “all cash” real estate transactions. Last year began with the first Geographic Targeting Orders¹ (the “GTOs”) issued by the U.S. Department of Treasury Financial Crimes Enforcement Network (“FinCEN”) on January 13, 2016. Shortly thereafter on January 31, 2016, CBS’ 60 Minutes aired *Anonymous Inc., Part I*, which showcased New York lawyers being offered the opportunity to give prospective clients questionable advice in connection with their real estate acquisitions². And just a few months later, the Panama Papers, an unprecedented leak of 11,500,000 files from the database of Panamanian law firm Mossack Fonseca took the world by storm. The Panama Papers included a laundry list of politicians, national leaders, celebrities and high net worth individuals and the myriad of ways in which they used offshore tax regimes to hide assets and purchased real estate under shell companies that did not reveal the true ownership of the entity. While FinCEN later issued a second set of real estate focused GTOs expanding the reach of the January 13th GTOs, the impact has been seemingly minimal,³ and much is left to be desired with respect to the identification of beneficial ownership for entities acquiring real estate in “all cash” transactions⁴.

In particular, the January 13th GTOs temporarily required various United States title insurance companies to identify the natural persons behind companies⁵ used to pay “all cash”⁶ for high-end residential real estate purchased in Manhattan, New York and Miami-Dade County, Florida. The title companies subject to the January 13th GTOs were required to collect data as to the beneficial ownership of entities⁷ purchasing residential real estate in an amount in excess of \$1,000,000 in Miami-Dade County, Florida and \$3,000,000 in Manhattan, New York. The January 13th GTOs were effective for one hundred eighty days⁸

as of March 1, 2016 and expired on August 27, 2016. The GTOs required that the affected title companies file FinCEN Form 8300 within thirty days from the closing date reporting the identity of the individual primarily responsible for representing the buyer entity and the beneficial ownership of the entity, defined in the January 13th GTOs as the individuals who own, directly or indirectly, 25% or more of the equity interests in the entity.

Subsequently, on July 27, 2016, FinCEN took additional action and issued supplemental GTOs, effective as of August 28, 2016, that expanded the reach of the January 13th GTOs. The July 27th GTOs were directed to all boroughs of New York City, including Manhattan, Miami-Dade, Broward and Palm Beach counties in Florida, Los Angeles, San Francisco, San Mateo, Santa Clara, and San Diego counties in California and Bexar County in Texas. The July 27th GTOs also set monetary thresholds per county ranging from \$500,000 to \$3,000,000. In both the January 13th and July 27th GTOs, FinCEN noted that it remained concerned that “all cash” purchases were being conducted by individuals seeking to hide assets and launder money through opaque entity structures. Notably, FinCEN Acting Director Jamal El-Hindi stated that the information obtained through the January 13th GTOs had provided valuable information regarding possible illicit activity and shell companies. Additionally, the July 27th GTOs noted that the information, thus far, received by FinCEN was already being used by federal and state law enforcement agencies to discover potential assets held by persons of interest to them. Treasury officials quoted in *The Wall Street Journal* justified the expanded reach of the July 27th GTOs citing that “more than a quarter of transactions reported in the original orders involved someone listed in at least one of the 17 million suspicious activity reports filed with the government by financial institutions since shortly after the September 11, 2001 terrorist attacks.”⁹ And yet, after the January 13th GTOs, the *Daily*