

# FATF & Real Estate

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# FATF Mutual Evaluation of the US

- On December 1, 2016, the Financial Action Task Force (FATF - a global organization that evaluates AML/CFT<sup>1</sup> regimes) published their evaluation of the US AML/CFT framework<sup>2</sup> - and identified several gaps in the US's AML/CFT program



1 - AML/CFT – Anti Money Laundering/Counter Financing of Terrorism

2 - <http://www.fatf-gafi.org//publications/mutualevaluations/documents/mer-united-states-2016.html>

# What is a “Mutual Evaluation”?

- Peer reviews, where members from different countries assess another country.
  - Evaluates its members’ levels of implementation of the FATF Recommendations
  - For the US evaluation representatives from the Netherlands, Malaysia, Australia, Switzerland and Belgium
- A country is only deemed compliant *if it can prove this* to the other members - the onus is on the assessed country to demonstrate that it has an effective framework to protect the financial system from abuse.
- There are two basic components, **effectiveness** and **technical compliance**.
  - *Effectiveness* is the primary focus of the on-site visit to the assessed country. The assessment team requires evidence that the assessed country’s measures are working and deliver the right results.
  - The assessment of *technical compliance* requires the assessed country to provide information on the laws, regulations and any other legal instruments it has in place to combat money laundering and the financing of terrorism and proliferation.

# Identified US Gaps

*Risk mitigation through the regulatory framework is less well-developed and has some significant gaps, including minimal coverage of investment advisers, lawyers, accountants, real estate agents, trust and company service providers (other than trust companies).*

*... However, while the U.S. placed a strong supervisory focus on the casino sector in recent years, the lack of comprehensive AML/CFT supervision for other designated non-financial businesses and professions is a significant supervisory gap.*

*Lack of timely access to adequate, accurate and current beneficial ownership (BO) information remains one of the fundamental gaps in the U.S. context.*

# What are the risks?

- FATF publication on money laundering using real estate in 2007
  - Recommended that countries extend the current ANL/CFT measures to key players in the real estate sector, including: real estate agents, legal advisors and notaries
- As early as 2008 FinCEN published its findings based on SARs<sup>3</sup> filed by banks
  - Structuring activities
  - Tax evasion
  - Fraud and identity theft
  - Public corruption
- In 2012 FinCEN published a subsequent paper addressing the abuse of Title and Escrow companies by money launderers
- In May 2016 the National Association of realtors published an article entitled “Spotlight on Real Estate Money Laundering”, focusing on the abuse of shell companies and international real estate deals

3 – Suspicious Activity Reports



# Current Environment

- Both residential and commercial real estate are of growing concern as vehicles for laundering money globally
- In London and Canada, realtors are required to file SARs
- In 2016 FinCEN ran a pilot data collection and reporting program in Miami-Dade County and the Borough of Manhattan
  - Designated title insurance companies had to determine and confirm the UBOs with 25% or more ownership of legal entities
  - These names and proof of identity had to be reported to FinCEN
- DOJ's reaction to report states that legislation is needed to provide transparency into ownership behind legal entities

# Implications

- Last Mutual Evaluation in 2006 addressed lack of transparency, as well
  - New Treasury and FinCEN requirements on ownership identification were driven by these findings
- US will need to implement some level of controls to address gaps
  - Need to address public findings of FATF
  - Increased focus of FinCEN on the real estate factor
- Real estate industry and all players – including banks – need to plan for changes

# Regulatory Landscape

- No federal regulator nor licensing agency for these types of businesses
  - At best, license are held from individual states, where they practice
  - Any “regulation” is self-regulation by the various associations
- Most of these small and mid-size real estate and legal firms are not aware that the requirements of the Bank Secrecy Act (BSA)<sup>4</sup> apply to them – amongst others

4 - <https://www.occ.gov/topics/compliance-bsa/bsa/index-bsa.html>

# Options to Regulators/Administration

- Add the oversight to responsibilities of existing regulators
  - Already overworked and challenged with their current obligations
- Create a new regulatory agency
  - Unlikely, given the current administration's stance on regulation
- Place the largest portion of the burden on the banks, which they oversee directly
  - This would mean that banks will need to do a similar level of CDD on these types of companies, as they currently do on casinos and correspondent banks



# Impact on Realtors, Title/Escrow Companies & Legal Firms

Firms and businesses involved in real estate transactions would be well-served to begin the process of implementing and/or enhancing their AML/CFT programs. What does this include?

At a minimum:

- Policies – the entities will need specific AML/CFT policies for their businesses
- Procedures – how they are creating and maintaining their records for their customers/clients
- CDD Records – retaining and filing the CDD information in a way that can be easily updated and retrieved
- Beneficial Ownership – this was part of the FinCEN pilot in Miami and New York cited above, as well as one of the FATF findings as a gap in the US AML/CFT regime – for the second time
- Training – ensure that the staff receive both annual training, as well as at the start of their employment

# Challenges with Implementation

- For small and medium sized companies involved in real estate transactions - this represents a sea change for the industry.
  - Not only are many unaware of their current legal requirements, they are ill-prepared for implementing them.
  - Hiring a full-time AML/CFT Compliance professional is not a viable option for them.
- Banks need to review their policies and procedures for completing CDD on participants in real estate transactions

***However, the consequences of non-action can be severe, as seen with the penalties imposed on banks, as well as for those held responsible.***

# Conclusion

Real estate companies, title companies and legal firms need to begin planning on how they will prepare to meet these requirements, before the regulators and/or banks come knocking on their doors.