12-13-2017

Floating on a Sea of Funny Money: An Analysis of Money Laundering Through Miami Real Estate and the Federal Government's Attempt to Stop it

Gary McPherson

Floating on a Sea of Funny Money: An Analysis of Money Laundering Through Miami Real Estate and the Federal Government's Attempt to Stop it

Gary McPherson*

Miami is experiencing a money laundering controversy the likes of which have not been seen since the "Cocaine Cowboys" era of 1980's Miami. Condominiums and other mega developments are popping up at an unprecedented pace, immediately after the housing market crash that caused the Great Recession. Adding to this questionable boom in development is the fact that the vast majority of Miami's population cannot afford to live in places like these. So, the question presented is who is fueling this explosion in development? Criminals, that's who. Federal agents believe criminals are buying coveted Miami real estate through shell companies to launder their ill–gotten money.

In response to this crisis, the Department of the Treasury's Financial Crimes Enforcement Network (FinCEN) issued a Geographic Targeting Order (GTO) that requires Miami title insurers to report information about the identities of those hiding behind shell companies to buy real estate in cash purchases. Through the order, FinCEN aims to gain information about and deter potential money launderers. The GTO places Miami squarely in the cross–hairs of FinCEN's anti–money laundering regime. However, there is a problem: the GTO will not actually prevent money laundering. There are fundamental issues with the GTO: it is underinclusive and riddled with loopholes and

* J.D./LL.M in Real Property Development Candidate, University of Miami School of Law; Articles & Comments Editor, Volume 26, University of Miami Business Law Review. Thank you to all who helped me along the way. Your time, effort, and support were greatly appreciated.

ambiguities. These issues are easily resolved by a more inclusive, detailed drafting of the GTO that eliminates the many loopholes and clarifies the latent ambiguities inherent in it. However, as currently written, the GTO's many issues prevent it from effectively fighting money laundering in Miami, but they also shelter Miami's real estate market from the potential negative effects that many feared the GTO would cause.

I. INTRODUCTION

Miami is in the midst of a housing crisis, the likes of which have not been seen since the "Cocaine Cowboys" era of 1980's Miami. Biscayne's wondrous shore is once again awash with "funny money" that is driving the luxury real estate market.[1] Condominiums and other mega developments are rising at an unprecedented rate, immediately after the nation's worst housing crash in its history.[2] The vast majority of Miami's population cannot even afford to live in places like these, adding more suspicion to the already questionable boom in development.[3] These abnormalities raise a critical question: what is fueling this explosion of development? Federal agents hypothesize that criminals are buying precious Miami real estate, through the veil of shell companies, to launder their ill–gotten money.[4]

If this story sounds familiar, that is because it is; Miami has a long history of money laundering, dating back to the days of the "Cocaine Cowboys."[5] While imported Colombian cocaine flooded the streets of South Florida, drug traffickers and dealers laundered the proceeds of their enterprises through Miami real estate.[6] During this period in the 1980's, criminals laundered billions in ill–gotten gains through Miami banks and real estate.[7] This enormous influx of cash significantly shaped Miami's real estate industry and landscape.[8] The beautiful skyline that Miami is known for, "[c]ocaine was the currency that built that skyline."[9]

The reemergence of large–scale money laundering in Miami is partially a result of the real estate and banking industries' *laissez–faire* attitude toward acceptance of large sums of cash. Because Miami's real estate and banking industries "grew up in the [Cocaine Cowboys] era . . . the attitude here has always been to make a quick deal and don't ask any

---

1 *See* Nicholas Nehamas, *How Secret Offshore Money Helps Fuel Miami's Luxury Real–Estate Boom*, MIAMI HERALD (Apr. 3, 2016, 2:00 PM), http://www.miamiherald.com/news/business/real-estate-news/article69248462.html#storylink=cpy.

2 *See* Brian Bandell, *Cash, Condos & Criminals: The Big Loophole For Money Laundering*, S. FLA. BUS. J. (Aug. 30, 2013, 6:00 AM), http://www.bizjournals.com/southflorida/print-edition/2013/08/30/llcs-offer-secrecy-to-foreign-criminal.html.

3 *See* Nehamas, *supra* note 1 (stating that "[m]oney from people linked to wrongdoing abroad is helping to power the gleaming condo towers rising on South Florida's waterfront and pushing home prices far beyond what most locals can afford").

4 *See id.*

5 *See id*.

6 *See* Ken Silverstein, *Miami: Where Luxury Real Estate Meets Dirty Money*, THE NATION (Oct. 2, 2013), https://www.thenation.com/article/miami-where-luxury-real-estate-meets-dirty-money/.

7 *See id.*

8 *See id.*

9 *See id.*

questions."[10] This "anything goes" culture in Miami's real estate market makes Miami a perfect place to launder money.[11] So, it is no surprise that money launderers have reared their ugly heads once again.

In April 2016, Miami Herald coverage of the "Panama Papers," a leak of thousands of documents from the secretive Panamanian law firm Mossack Fonseca, revealed that criminals, including corrupt foreign government officials, were purchasing luxury real estate in Miami through shell corporations to launder their ill–gotten money.[12] The "Panama Papers" seem to be the missing piece in the puzzle allowing law enforcement to see the whole picture and understand exactly how criminals have been laundering their money undetected through Miami's real estate.[13]

Another catalyst for the federal government to take action was a case in September 2014 involving a Spanish drug lord who used companies to purchase thirteen Miami condos to launder money from his lucrative cocaine–smuggling business.[14] This case shined a spotlight on Miami's money laundering problem and exposed it to the world.[15] In January 2016, following that case and the Panama Papers leak, the Financial Crimes Enforcement Network (FinCEN)—a bureau of the U.S. Department of the Treasury tasked with safeguarding the financial system from illicit use, combating money laundering, and promoting national security—issued a Geographic Targeting Order (GTO) to crackdown on money laundering in Miami.[16]

The GTO requires title insurance companies to report the identity of the beneficial owners—individuals who, directly or indirectly, own 25% or more of the equity interests of a company[17]—of shell companies that purchase real estate with cash.[18] "In Miami–Dade [County], the rule applies to homes sold for $1 million or more."[19] The government sees the GTO as a start to a potentially larger crackdown on money laundering and

---

10 *Id.*

11 *See id.* (asserting that Miami appeals to money launderers because "banks and real estate developers have frequently played fast and loose with the rules").

12 *See* Nehamas, *supra* note 1.

13 *See generally id.* (describing how Mossack Fonseca structured real estate purchase deals in a manner that shielded their clients' money laundering from the government).

14 *See id.*

15 *See id.*

16 *See* Nicholas Nehamas, *Feds crack down on secret real estate deals in Miami–Dade and New York*, MIAMI HERALD (Jan. 13, 2016, 6:00 AM), http://www.miamiherald.com/news/business/real-estate-news/article54450795.html.

17 Jamal El–Hindi, U.S. DEP'T OF THE TREASURY, *Geographic Targeting Order* (July 27, 2016), https://www.fincen.gov/sites/default/files/shared/Title_Ins_GTO_Sample_072716.pdf [hereinafter GTO].

18 *See* Nehamas, *supra* note 1.

19 *See id.*

a means to collect information on people who may be money laundering.[20] However, many professionals in the South Florida real estate industry fear that the GTO could have a "chilling effect on the luxury [real estate] market."[21] The issuance of the GTO and the public's concerns raise important questions about the GTO's impact on Miami's real estate industry.

This comment seeks to answer whether the GTO will be an effective anti–money laundering (AML) tactic and whether the GTO will negatively impact Miami's real estate market through analysis of the GTO itself and the circumstances that led to the issuance of the GTO. Part II illustrates why AML policy is necessary in Miami by detailing the events that caused FinCEN's issuance of the GTO, including a depiction of Miami's history of money laundering in the "Cocaine Cowboys" era and a portrayal of Miami's current money laundering problem. Part III thoroughly explains the GTO itself by defining what a GTO is, what it is used for, and what it requires. Part IV identifies and explains the significance of various issues inherent in the GTO and offers suggestions to remedy them. Part V explains the GTO's effects on the real estate industry and argues that the GTO will neither prevent money laundering, nor have any significant negative impact on Miami's real estate market, because the GTO's many issues render it ineffective as an AML tool and mitigate its potential negative effects on the real estate market. Part VI synthesizes the analysis of the GTO and its impact on Miami's real estate industry.

II. WHY AML POLICY IS NEEDED—BISCAYNE'S WONDROUS SHORE IS AWASH WITH FUNNY MONEY

The question presented by the section—why anti–money laundering policy is needed in Miami—seemingly has a simple answer: Miami is awash in a sea of ill–gotten money that is fueling a boom in real estate development reminiscent of the "Cocaine Cowboys" era.[22] But, explaining why this explosion in money laundering is occurring is a more complicated, yet necessary, endeavor. Solving the money laundering problem requires an understanding of the cause of the problem, not just the problem itself.

---

20 *See id.*

21 Nehamas, *supra* note 16.

22 *See* Nehamas, *supra* note 1.

A. The Issue: Use of Shell Companies to Launder Money Through Miami Real Estate

The Department of the Treasury issued the GTO to combat criminals' use of shell companies to buy real estate and launder their illegally obtained profits. Money laundering "refers to financial transactions in which criminals, including terrorist organizations, attempt to disguise the proceeds, sources or nature of their illicit activities."[23] Money laundering is a serious concern because it "facilitates a broad range of serious underlying criminal offenses and ultimately threatens the integrity of the financial system."[24] Complicating this momentous issue further is criminals' use of shell companies to launder money through real estate undetected.[25] Shell companies are legal entities, such as Limited Liability Companies, that do not conduct business of their own but are often used to conduct illegal activities like money laundering or tax evasion.[26] Of course, however, not all legal entities involved in real estate transactions are nefarious.

B. Benefits of Common Legal Entities in Real Estate Transactions

Legal entities are commonly used in real estate purchases and have a wide range of benefits and protections. One of the most preferred legal entities used in real estate transactions is a Limited Liability Company ("LLC").[27] An LLC "is a hybrid business entity" that "has some features of corporations and some features of partnerships, offering all of its members limited liability as if they were shareholders of a corporation but treating the entity and its members as a partnership for tax purposes."[28] Put simply, an LLC "is a form of legal entity that has the attributes of both a corporation and a partnership but is not formally characterized as either one."[29] Another legal entity commonly used in real estate transactions is the Business Trust, which is defined as an "unincorporated business organization created by an instrument by which property is to be held and managed by trustees for the benefit and profit of such persons as may be

---

23 *Money Laundering*, *Resource Center*, U.S. DEP'T OF THE TREASURY, https://www.treasury.gov/resource-center/terrorist-illicit-finance/Pages/Money-Laundering.aspx.
24 *Id.*
25 *See* Nehamas, *supra* note 1 ("In Miami, secretive buyers often purchase expensive homes using opaque legal entities such as offshore companies . . . . [T]he secrecy that surrounds those companies makes it easy and tempting to break the law.").
26 *See* Nehamas, *supra* note 16.
27 Jeff Weaver, *Forming an LLC for Real Estate Investments: Pros & Cons*, LEGALZOOM, https://www.legalzoom.com/articles/forming-an-llc-for-real-estate-investments-pros-cons.
28 51 AM. JUR. 2D *Limited Liability Companie*s § 1, Westlaw (database updated 2017).
29 *Id.*

or may become the holders of transferable certificates evidencing the beneficial interests in the trust estate."[30] A final commonly used legal structure in real estate is the Limited Partnership, which

> is a type of partnership composed of one or more general partners, who manage the business and are personally liable for the partnership's debts, and one or more limited partners, who contribute capital and share in the profits but take no part in running the business and incur no liability with respect to partnership obligations beyond their contribution.[31]

These legal entities have various benefits and protections inherent in their construction that makes them attractive vehicles for real estate purchases. For most people, the primary benefit of holding real estate through one of the above legal entities is anonymity. The identities of people who purchase real estate through legal entities are not public record, only the names of the legal entities holding the properties are.[32] This is an important benefit for people in the public eye, such as "[a]ctors and athletes and politicians who don't want the whole world potentially camping out on their front step."[33] Anonymity is particularly important in Miami because of the high volume of foreign nationals who own real estate in the city.[34] "You see a lot of safety concerns with people from Brazil or Argentina," said Alan Lips, an accountant at Gerson Preston.[35] "They don't want people from their home country to go and look on the Internet and see that they paid a lot of money for a house and become a target for kidnapping."[36] Consequently, for many in Miami, anonymity is not just a benefit of using legal entities to purchase real estate, it is a matter of life or death.

Another reason people use legal entities for real estate holdings is tax benefits. First and foremost, many legal entities are pass–through entities, which means that the businesses themselves do not get taxed, but the profits and losses of the businesses are "passed through" to the owners of

---

30 13 AM. JUR. 2D *Business Trusts* § 1, Westlaw (database updated 2017).

31 8B FLA. JUR. 2D *Business Relationships* § 729, Westlaw (database updated Aug. 2017).

32 Steve Reilly & Nick Penzenstadler, *7 Reasons Property Buyers Use LLCs, From Legit to Not*, USA TODAY (Jun. 13, 2017, 4:38 PM), https://www.usatoday.com/story/news/2017/06/13/7-reasons-property-buyers-use-llcs-legit-not/102387054/.

33 Nehamas, *supra* note 16.

34 *See* Nehamas, *supra* note 1 ("Foreign buyers made a quarter of Miami–Dade County's home purchases in 2015.").

35 *Id.*

36 *Id.*

the business, who include their respective shares of the income on their individual tax returns.[37] Considering the high volume of foreign nationals that own property in Miami, a significant benefit of holding real estate through legal entities is an estate tax loophole for foreigners.[38] "Foreign buyers in particular are rarely advised to list their real names on deeds to protect against FIRPTA, an act by the IRS that subjects foreign investors to taxation for their U.S. real estate purchases," said attorney Scott Marcus of Becker & Poliakoff.[39] Accordingly, the primary reason most foreign real estate purchasers use legal entities to purchase real estate is to completely shield themselves from certain taxes.

C. Using Legal Entities in Real Estate Transactions Makes Money Laundering Easier

The widespread use of legal entities in real estate deals lets criminals launder money undetected through Miami real estate and creates a need for federal action against money laundering. The same benefits and protections that legal entities grant legitimate real estate purchasers shield criminals from federal law, allowing "people who utilize illegal funds" to "live a luxurious, unbelievable lifestyle."[40] Criminals use legal entities when purchasing real estate primarily because of the anonymity that legal entities grant all real estate purchasers. "The ownership privacy protections of LLC's have made it more difficult to verify ownership," said Michael McDonald, an international money laundering consultant and former IRS criminal investigator.[41] "Organized criminal groups often use LLCs to buy real estate and conceal their identities because most states don't require LLCs to list beneficial owners or changes in ownership."[42] These protections granted by laws and legal entities allow criminals to form companies and "bury" themselves so no one, especially the government, knows who they are.[43] This creates an especially difficult challenge for investigators tasked with uncovering money laundering schemes. The legal protections of entities like LLCs that cloak criminals

---

37 *See Partnerships*, INTERNAL REVENUE SERVICE (Oct. 24, 2016), https://www.irs.gov/businesses/small-businesses-self-employed/partnerships.

38 *See* Nehamas, *supra* note 16.

39 Sean Stewart–Muniz, *Government Tracking of Secret Miami Buyers Begins Tuesday*, THE REAL DEAL (Feb. 29, 2016, 2:15 PM), http://therealdeal.com/miami/2016/02/29/government-tracking-of-secret-miami-buyers-begins-tomorrow/.

40 Jay Weaver, *Spaniard López Tardón Sent to Prison for 150 Years in Miami Money–Laundering Case*, MIAMI HERALD (Sep. 29, 2014, 1:19 PM), http://www.miamiherald.com/news/local/crime/article2296479.html.

41 *See* Bandell, *supra* note 2.

42 *Id.*

43 *See id.*

with invisibility evinces why the Department of the Treasury needed to issue the GTO—money laundering was too easy for criminals, and detection was too hard for investigators.

D. Why Real Estate is a Common Vehicle for Money Laundering

Real estate is such a common vehicle for money laundering because there is no effective regulation of real estate transactions that deters or makes money laundering difficult. The real estate industry as a whole is more lightly regulated than financial institutions, which have strict anti–money laundering regulations.[44] For example, "banks are required to file a Suspicious Activities Report (SAR) with the Treasury Department if they suspect a client is depositing or transferring corrupt money."[45] Conveniently, real estate agents and title insurers have no such requirement.[46] Further, "there's much less regulation for putting cash into real estate transactions than for opening a deposit or securities account."[47] This lack of regulation makes real estate a particularly attractive way for criminals to launder their dirty money.[48]

"The regulation of real estate transactions for financial crime and money laundering is worse than Swiss cheese for all the holes it's got," said Charles Intriago, former assistant U.S. attorney and president of the Miami–based Association of Certified Financial Crime Specialists, which trains professionals to spot money laundering.[49] Intriago's scathing assessment of real estate regulation illustrates why money laundering through real estate is quite common—there is nothing deterring criminals. "You have criminal groups outside the U.S. trying to park money here. One of the best ways to do it is to buy real estate because no one asks who you are."[50] However, this is precisely what the government has begun to do.

E. History of Money Laundering in Miami: The Cocaine Cowboys' Effect on Miami Real Estate

Miami has a long history of money laundering dating back to the late 1970's when "Latin American drug lords turned Miami into a key hub of their operations."[51] The drug lords, now commonly known as the Cocaine

---

44 *See* Silverstein, *supra* note 6.
45 *Id.*
46 *See id.*
47 Bandell, *supra* note 2.
48 *See* Silverstein, *supra* note 6.
49 Bandell, *supra* note 2.
50 *Id.*
51 Silverstein, *supra* note 6.

Cowboys, "poured billions of dollars into the local economy, with much of it laundered into real estate."[52] During the "Cocaine Cowboys" era of the late 1970's to the 1980's, "[d]rug money tainted everything from law enforcement to real estate to banking."[53]

Looking back on Miami's history can explain why the city is experiencing a money laundering crisis today. The city's "banking and real estate industries grew up during the cocaine era."[54] The attitude in Miami has always been "to make a quick deal and don't ask any questions."[55] That is the culture of the Miami real estate industry in a nutshell.[56] This "fast money" culture combined with an influx of billions of dollars of drug money developed Miami's real estate industry into one of the nation's strongest.[57] In fact, while the U.S. was in the depths of a recession, the infusion of drug money into Miami's economy "provided demand for an estimated 25,000 legitimate jobs in banking, real–estate construction, and the service industries."[58] Proceeds from the drug trade caused a sharp increase in sales tax receipts for Dade County, giving the county $400 million extra per year.[59] Further, Miami's Federal Reserve branch had a "currency surplus of $5 billion, mostly in drug–generated $50 and $100 bills," which was more than the nation's twelve Federal Reserve banks combined.[60]

The abundance of drug money funneled through Miami real estate caused a development boom similar to the explosion in development that is being seen now.[61] Ten thousand building permits were issued and more than twenty skyscrapers were erected at a time when national construction was at a standstill.[62] '"Cocaine was the currency that built that skyline,"' said Alex Daoud, Mayor of Miami Beach during the "Cocaine Cowboys" era, while he looked at the dense clusters of mainland high–rises across Biscayne Bay.[63] One veteran real estate broker said that "it was one of the busiest times ever" in Miami.[64] "At a time when national interest rates

---

52 *Id.*
53 *Id.*
54 *Id.*
55 *Id.*
56 *Id.*
57 *See* Gerald Posner, *Cocaine Cowboys*, THE DAILY BEAST (Oct. 12, 2009), http://www.thedailybeast.com/articles/2009/10/12/cocaine-cowboys.html (explaining that the abundance of money from the drug trade helped fuel real estate development in a time where "national interest rates were high and real estate was in a tailspin").
58 *Id.*
59 *See id.*
60 Silverstein, *supra* note 6.
61 *See* Posner, *supra* note 57.
62 *See id.*
63 *Id.*
64 *Id.*

were high and real estate was in a tailspin, South Florida was the only market where housing prices boomed."[65] Adding even more suspicion to an already curious real estate boom, "[a]bout one–third of all property transactions were all cash," at the time.[66] To many outsiders, the growth in Miami's real estate industry might seem unexplainable, but the locals here knew that "[d]rug profits were clearly pumping up the price of property."[67] Adding to the money laundering crisis, the illicit money that drove up property values in Miami was "routed in different ways: through law firms, offshore corporations, and banks," which made tracking the sources of funds a difficult task for law enforcement agencies.[68]

History has seemingly repeated itself because law enforcement agencies today are experiencing precisely the same problem of tracking sources of funds in real estate transactions.[69] It is no surprise that a money laundering problem like this could resurface in Miami because the City's real estate and banking industries evolved during the "Cocaine Cowboys" era and in the process developed an attitude of making quick deals without asking any questions.[70] A *laissez–faire* attitude such as this, unchecked, could easily lead to a money laundering crisis, as evidenced by the rampant money laundering experienced in the "Cocaine Cowboys" era.[71] The current money laundering crisis in Miami, explained further in the following section, drove FinCEN to issue the GTO as an attempt to identify the source of funds for certain real estate transactions and prevent money laundering.[72]

F. Flooded by a Sea of "Funny Money": Miami's Money Laundering Crisis

Miami is awash with "funny money" that has fueled the luxury home market in a manner reminiscent of the "Cocaine Cowboys" era of 1980's Miami.[73] Within the past two years, the Panama Papers and a high–profile trial of an alleged international drug smuggler revealed that for many years criminals have been purchasing tens of millions of dollars in luxury Miami

---

65 *Id.*
66 *Id.*
67 Rebecca Wakefield, *Awash in a Sea of Money*, MIAMI NEW TIMES (Oct. 6, 2005, 4:00 AM), http://www.miaminewtimes.com/news/awash-in-a-sea-of-money-6339208.
68 *Id.*
69 *See* Nehamas, *supra* note 1.
70 *See* Silverstein, *supra* note 6.
71 *See generally* Posner, *supra* note 57 (detailing the many instances of money laundering during the "Cocaine Cowboys" era).
72 *See* Nehamas, *supra* note 1.
73 *See id.*

real estate through shell corporations to launder their ill–gotten money.[74] However, this is likely just a drop in the bucket for Miami's market.[75] The Panama Papers is a massive trove of leaked confidential files from the secretive Panamanian law firm Mossack Fonseca, which was obtained by the Miami Herald in association with the International Consortium of Investigative Journalists.[76] A Miami Herald analysis of the leaked documents revealed that "19 foreign nationals creat[ed] offshore companies and [bought] Miami real estate."[77] Of the nineteen, "eight have been linked to bribery, corruption, embezzlement, tax evasion or other misdeeds in their home countries."[78]

The Panama Papers is the key to understanding how criminals have been laundering money through Miami real estate undetected. The Panama Papers show that the law firm Mossack Fonseca created offshore shell corporations for its clients in tax havens, such as Panama or the British Virgin Islands, which do not require owners of the companies to disclose their names.[79] Those corporations would then purchase luxury real estate in Miami with ill–gotten cash, and the U.S. government would never know whose money actually purchased the property—until the Panama Papers exposed the anonymous buyers.[80]

Mossack Fonseca's conduct confirms what many law enforcement officials have long thought: "[m]oney from people linked to wrongdoing abroad is helping to power the gleaming condo towers rising on South Florida's waterfront and pushing home prices far beyond what most locals can afford."[81] However, this problem is likely much larger than the activities exposed by the Panama Papers. In fact, financial institutions in Miami "report more suspicious activity than any other major U.S. city besides New York City and Los Angeles, according to FinCEN data."[82] Further, 53 percent of all Miami–Dade home sales in 2015 were made with cash—double the national average—and a whopping 90 percent of new construction sales were made with cash, according to the Miami Association of Realtors.[83] And 2015 is no anomaly; "[i]n the first half of 2013, 73 percent of condo resales by dollar volume were cash deals, according to the Miami Association of Realtors."[84]

---

[74] *See id.*
[75] *See id.*
[76] *See id.*
[77] *Id.*
[78] *Id.*
[79] *See* Nehamas, *supra* note 1.
[80] *See id.*
[81] *Id.*
[82] *Id.*
[83] *Id.*
[84] *See* Bandell, *supra* note 2.

Much of the cash flooding the Miami real estate market is flowing from international buyers.[85] In 2012, nearly 90 percent of condo buyers were foreign and that trend has continued in recent years.[86] Additionally, "[f]oreign nationals bought nearly $6.1 billion worth of homes in Miami–Dade, Broward and Palm Beach counties [in 2015], more than a third of all local home spending, according to the Miami Association of Realtors."[87] And 25 percent of all home purchases in Miami are made by foreign buyers.[88] "City boosters touted the foreign investment as a sign that Miami had arrived on the world stage."[89] However, the influx of foreign money "sent home prices soaring beyond the reach" of many families.[90] "Locals trying to buy homes with mortgages can't compete with foreign buyers flush with cash and willing to pay the list price or more."[91]

Linked to the abnormally large amount of purchases in cash and purchases by foreign nationals is the tremendous rise in real estate development immediately after the nation's worst housing crash in its history.[92] In 2013, Peter Zalewski, a principal with Bal Harbour–based Condo Vultures LLC, commented that he was "astounded that, only two years after the first post–recession condo broke ground in South Florida, there are 152 towers planned, including 70 taking deposits and 32 under construction."[93] "That's one hell of a pace," Zalewski said.[94] Of course, not all of the new housing stock will be used for money laundering. Jack McCabe, an analyst who studies the Miami housing market, said, "it's impossible to know how many homes are purchased with dirty money."[95] However, "many people believe it could be a sizable portion of the new condominium market in Miami."[96]

Real estate developers also could be a part of the problem of illegal money driving the Miami real estate market. McCabe said, "even though developers and real–estate professionals suspect many of [their] units are bought with illegal funds, they realize their projects may not be successful without that support," which proves that the *laissez–faire* attitude of the "Cocaine Cowboys" era real estate industry is not only alive and well, but

85 *See id.*; *see also* Nehamas, *supra* note 1.
86 Bandell, *supra* note 2.
87 Nehamas, *supra* note 1.
88 *Id.*
89 *Id.*
90 *Id.*
91 *Id.*
92 *See id.*
93 Bandell, *supra* note 2.
94 *Id.*
95 Nehamas, *supra* note 1.
96 *Id.*

also driving the Miami real estate market boom.[97] However, Miami's current real estate boom is quite different from its last real estate boom, where developers asked for down payments of 10 to 20 percent. Now, "many developers ask for upward of 60 percent down—so depositors mostly fund buildings."[98] The requirement of such high down payments gives developers no reason to look into the source of purchasers' funds. In fact, because developers demand so much money up front, "they often aren't checking the buyer's source of income," said Gary Saul, "a Greenberg Traurig shareholder who has done legal work for condo developers . . . ."[99] "The developers don't know who's behind it, and I don't think they care," said Charles Intriago, former assistant U.S. attorney and president of the Miami–based Association of Certified Financial Crime Specialists, which trains professionals to spot money laundering.[100] "They want to make sales, regulations be damned."[101] This type of quick deal–making with no questions asked caused many problems during the "Cocaine Cowboys" era and continues to do so today. Real estate professionals have been playing fast and loose, allowing criminals to launder money unabated for too long, which is precisely why FinCEN needed to issue the GTO.

While there was a definite need for government intervention, the Miami money laundering crisis was not a sizeable blip on the federal government's radar until after the high–profile trial of alleged international drug smuggler Alvaro López Tardón in September 2014.[102] The alleged Spanish drug lord owned luxury condos in Miami through legal entities registered in his own name or the names of his associates.[103] Prosecutors argued that he was the leader of a violent drug ring, Los Miami, and that he was laundering the profits from his cocaine–smuggling business through his Miami condos.[104] López Tardón was found guilty of money laundering for purchasing luxury cars and real estate with $20 million of ill–gotten profits from his drug smuggling operation.[105] After his conviction, federal agents seized his illegally obtained assets, "including a fleet of luxury cars and 13 condos."[106] In late September 2014, when

---

97 *Id.*
98 Bandell, *supra* note 2.
99 *Id.*
100 *Id.*
101 *Id.*
102 *See* Nehamas, *supra* note 1.
103 *Id.*
104 *See id.*
105 *See* Jay Weaver, *Spaniard López Tardón Sent to Prison for 150 years in Miami Money–Laundering Case*, MIAMI HERALD (Sep. 29, 2014), http://www.miamiherald.com/news/local/crime/article2296479.html.
106 Nehamas, *supra* note 1.

López Tardón was sentenced to 150 years in federal prison for money laundering, U.S. District Court Judge Joan Lenard had this to say about López Tardón's $20 million dollar shopping spree: "I call it funny money, and we have a plethora of funny money here . . . . Miami is replete with people who utilize illegal funds and live a luxurious, unbelievable lifestyle."[107] Judge Lenard's scathing declaration shined a spotlight on Miami's money laundering issue, pressuring the federal government to take action. The government eventually took action by issuing the GTO in January 2016.[108] Miami condo market analyst, Peter Zalewski, commented that "López Tardón's case prompted the feds to take a hard look at Miami real estate."[109] "Locally, people have been talking about illicit money propping up the condo market since the 1980s," Zalewski said about Miami's money laundering problem; but "[t]he government usually needs a catalyst like this before it can act."[110]

The López Tardón case provided the stimulus the government needed to take action, but the totality of the circumstances demanded that swift action was necessary. As outlined above, for many years, criminals have been using shell companies to launder money through Miami real estate,[111] all cash purchases of Miami real estate have been exceedingly high,[112] and the Miami real estate market has boomed just after the worst housing crash in U.S. history.[113] These circumstances and the López Tardón case increased pressure on the federal government to crackdown on money laundering in Miami. Such a high–profile case involving tens of millions in drug profits flowing through the Miami real estate market could have reasonably made federal agents believe that Miami was in the midst of a "Cocaine Cowboys 2.0" money laundering crisis. To stem the tide of illegal money from flooding the Miami real estate market any further, the government needed to implement anti–money laundering policy in Miami. That is exactly what it did by issuing the GTO.

III. THE GTO: THE GOVERNMENT'S ATTEMPTED CRACKDOWN ON MONEY LAUNDERING IN MIAMI

In January 2016, after years of rampant money laundering and suspicious activities in the Miami real estate market, the Financial Crimes Enforcement Network (FinCEN)—a bureau of the U.S. Department of the

---

107 Weaver, *supra* note 105.
108 *See* Nehamas, *supra* note 16.
109 Nehamas, *supra* note 1.
110 *Id.*
111 *See id.*
112 *See id.*
113 *See* Bandell, *supra* note 2.

Treasury tasked with safeguarding the financial system from illicit use, combating money laundering, and promoting national security—issued a Geographic Targeting Order (GTO) in Miami–Dade County.[114] A Geographic Targeting Order is an "order that imposes certain additional recordkeeping and reporting requirements on one or more domestic financial institutions or nonfinancial trades or businesses in a geographic area."[115] A GTO derives its authority to impose these requirements from the following sources of law: 31 U.S.C. § 5326(a), 31 CFR § 1010.370, and Treasury Order 180–01.[116] In general, a GTO requires domestic financial institutions or nonfinancial trades or businesses

> to obtain such information as the Secretary [of the Treasury] may describe . . . concerning—(A) any transaction in which such [business] is involved for the payment, receipt, or transfer of United States coins or currency . . . the total amounts or denominations of which are equal to or greater than an amount which the Secretary may prescribe; and (B) any other person participating in such transaction.[117]

Additionally, a GTO requires businesses to "maintain a record of such information for such period of time as the Secretary [of the Treasury] may require" and "file a report with respect to any transaction described in paragraph (1)(A) in the manner and to the extent specified in the order."[118]

The U.S. Treasury Department was concerned with money laundering through Miami real estate, so it issued a GTO to track the transactions most vulnerable to manipulation: legal entities buying residential real property for at least $1 million using cash.[119] The purpose of the GTO is to prevent money laundering by collecting information about the identities of potential money launderers.[120] The issuance of the GTO represents the Department of the Treasury's "ceremonial first pitch" of its potentially larger crackdown on money laundering through real estate.[121]

The January 2016 GTO was effective from March 1, 2016 to August 27, 2016. During that time, FinCEN said that the GTO generated "useful data" that is "helping law enforcement identify possible illicit activity and

---

114 *See* Nehamas, *supra* note 16.
115 GTO, *supra* note 17.
116 *Id.*
117 31 U.S.C. § 5326(a)(1)(A)–(B) (2012).
118 *Id.* § 5326(a)(1)(B)(2)–(3).
119 *See* Nehamas, *supra* note 1.
120 *See id.*
121 *Id.*

informing future regulatory approaches."[122] Because the GTO has proven to be helpful, FinCEN extended the reach of the GTO to Broward and Palm Beach Counties, among others, on July 27, 2016.[123] The information obtained from the initial GTOs "suggests that we are on the right track," said Jamal El–Hindi, Acting Director of FinCEN.[124] "By expanding the GTOs to other major cities, we will learn even more about the money laundering risks in the national real estate markets, helping us determine our future regulatory course."[125]

The GTOs issued to title insurance companies initially generated useful information because they required covered businesses involved in covered transactions to report such transactions to FinCEN within 30 days.[126] A covered business under the GTO is a "title insurance company and any of its subsidiaries or agents."[127] A covered transaction under the GTO is a transaction made by (1) a legal entity, (2) which purchases residential real property for a total purchase price of $1,000,000 or more in Miami–Dade County, and (3) the purchase is made, at least in part, using currency or a cashier's check, a certified check, a traveler's check, a personal check, a business check, or a money order in any form, (4) without a bank loan or other external financing.[128] For the purpose of covered transactions, the GTO defines a legal entity as "a corporation, limited liability company, partnership or other similar business entity, whether formed under the laws of a state or of the United States or a foreign jurisdiction."[129]

The GTO imposes strict reporting requirements on title insurance companies involved in transactions where a legal entity purchases residential real estate in Miami–Dade County for $1 million or more in cash.[130] Specifically, the GTO requires that title insurers file a form 8300, which FinCEN provides, within 30 days of the transaction.[131] The form 8300 must contain (1) information about the identity of the individual primarily responsible for representing the purchaser, (2) information about the identity of the purchaser, (3) information about the identity of the

---

122 FIN. CRIMES ENF'T NETWORK, U.S. DEP'T OF THE TREASURY, *FinCEN Expands Reach of Real Estate "Geographic Targeting Orders" Beyond Manhattan and Miami*, FINCEN (July 27, 2016), https://www.fincen.gov/news/news-releases/fincen-expands-reach-real-estate-geographic-targeting-orders-beyond-manhattan.
123 *See id.*
124 *Id.*
125 *Id.*
126 GTO, *supra* note 17.
127 *Id.*
128 *Id.*
129 *Id.*
130 *See id.*
131 *Id.*

beneficial owner(s) of the purchaser, (4) information about the covered transaction, and (5) information about the title insurance company.[132] According to the GTO the following must be included in the information about the covered transaction: the date of closing of the covered transaction, the total amount transferred in the form of payment, the total purchase price of the covered transaction, and the address of real property involved in the covered transaction.[133]

The terms of the GTO are strict and must be followed by title insurers because they carry serious civil and criminal penalties.[134] The GTO provides that the "Covered Business and any of its officers, directors, employees, and agents may be liable, *without limitation*, for civil or criminal penalties for violating any of the terms of this Order."[135] The "without limitation" language suggests that civil and criminal penalties will be pursued to the full extent of the law in the event that a company violates the terms of the order. Accordingly, title insurers must pay careful attention to the GTO's requirements when reporting information to FinCEN to avoid potential civil and criminal liability. However, this task proves harder than it seems due to the many issues and ambiguities inherent in the GTO, which will be analyzed further in the following section.

IV. Potential Issues Arising out of the GTO

The GTO on its face seems like a good starting point in the Federal Government's battle against money laundering. However, the GTO is not without issues, some of which could render the GTO ineffective or more troublesome than it is worth. Similar to the regulation of real estate transactions for financial crime and money laundering, the GTO "is worse than Swiss cheese for all the holes it's got."[136] Also, the GTO is riddled with ambiguities that make it problematic and expensive to comply with. The GTO provides no guidance on many of the difficult situations title insurers will inevitably find themselves in while attempting to comply with the GTO. If the issues explained in this section are not addressed, the GTO will be a worthless weapon in the fight against money laundering.

---

132 *Id.*
133 GTO, *supra* note 17.
134 *See id.*
135 *Id.*
136 Bandell, *supra* note 2.

A. Loophole: Title Insurance is not Required Under Florida Law

The GTO requires only title insurers, their subsidiaries, and their agents to report information about covered transactions to FinCEN.[137] However, title insurance is not required under Florida law.[138] This loophole is probably the easiest way for someone to circumvent the reporting requirements of the GTO, though it is risky because the purchaser would be gambling that no future title dispute will arise. Title insurance is a protection policy against loss if any defect of title to property results in a claim against ownership.[139]

> If a claim is made against your property, title insurance will . . . assure you of a legal defense and pay all court costs and related fees. Also, if the claim proves valid, you will be reimbursed for your actual loss up to the face amount of the policy.[140]

However, in certain situations—like when purchasing new construction—title insurance may not be necessary; thus, many of the transactions the GTO aims to track are not covered by the GTO because title insurers will not be involved. When buying new construction, "the chance of a future title challenge appears low, thus further dimming the perceived need for purchasing insurance."[141] Purchasers can also obtain a "title search without buying any insurance to confirm there are no liens on the property," which would lower a buyer's risk of loss and need for title insurance.[142] New construction sales, the type of transactions with the least perceived need for title insurance, seemingly have the most suspicion of money laundering surrounding them, evidenced by law enforcement officials belief that illegal money is "helping to power the gleaming condo towers rising on South Florida's waterfront."[143] Further, cash deals accounted for 90 percent of Miami's new construction sales in 2015.[144] That exceedingly high rate of cash purchases of new construction supports the notion that there is rampant money laundering in new construction

---

[137] GTO, *supra* note 17.
[138] *The "Optional" Myth About Title Insurance,* SOUTHERN TITLE (Apr. 27, 2015, 2:55 PM), https://www.stitle.com/our-blog/entry/the-optional-myth-about-title-insurance.html.
[139] Ryan Phillips, *Title Questions and Answers*, TITLE PARTNERS OF SOUTH FLORIDA INC., https://titlepartnersofsofl.com/florida-title-insurance-qa.
[140] *Id.*
[141] Michelle Colman, *New LLC Disclosure Law Probably Won't Have Much Impact on the Condo Market*, 6SQFT (February 9, 2016), https://www.6sqft.com/new-llc-disclosure-laws-probably-wont-have-much-impact/.
[142] *Id.*
[143] Nehamas, *supra* note 1.
[144] *Id.*

sales. Because the vast majority of new construction sales are made in cash and there is no major need for title insurance in these transactions show that the GTO will not cover many of the transactions it was designed to track.

B. Loophole: The All–Cash Purchase Requirement is Easily Circumvented

A transaction is subject to the GTO only if it was an all–cash purchase—transactions made "at least in part, using currency or a cashier's check, a certified check, a traveler's check, a personal check, a business check, or a money order in any form."[145] The GTO does not cover purchases without a bank loan or other external financing, including electronic fund transfers (EFTs, or wire transfers).[146] Therefore, if a shell corporation purchases a property using a wire transfer, the transaction would not be covered under the GTO and a purchaser could avoid having their identity reported to FinCEN. However, "banks already collect information about the originator and recipient of EFTs and make that information available to regulators upon request," which could explain why FinCEN did not cover EFTs in the GTO.[147] Further, FinCEN likely wanted to start small and "could have been uncomfortable stretching its authority to cover wire transfers," said Theresa Van Vliet, a former federal prosecutor in the Southern District of Florida.[148] "This is a strategic move," said Van Vliet, who believes it was smart for FinCEN "to start small."[149]

While it may have been a smart strategic move for FinCEN to start small and not extend its power to cover wire transfers, "by not monitoring those financial instruments, investigators will miss out on most sales of new condos," said Alan Lips, a Miami accountant.[150] With the expansion of technology, it makes sense that buyers paying cash to purchase real estate would increasingly use wire transfers to pay for the property. This fact combined with the fact that wire transfers are not covered by the GTO creates a potentially large loophole that is so simple almost anyone could take advantage of it.

Additionally, people could hide their identities from bank regulators monitoring EFTs by using a network of LLCs to make a real estate purchase, which puts the federal government in a weak position to fight

---

145 GTO, *supra* note 17.

146 *Id.*

147 Kevin L. Shepherd, *The Newest AML Deputy in Town*, AM. BAR ASSOC. (Mar. 20, 2016), http://www.americanbar.org/content/dam/aba/publishing/rpte_ereport/2016%20eReport/2-March%202016/newest_aml_deputy.authcheckdam.pdf.

148 Nehamas, *supra* note 1.

149 *Id.*

150 *Id.*

money laundering. Remember, FinCEN likely did not extend its power to cover wire transfers under the GTO because "banks already collect information about the originator and recipient of EFTs."[151] Because people could also hide their identities from bank regulators, the loophole is likely more significant than FinCEN would have thought when it decided not to cover EFTs in the GTO. To avoid having their identities disclosed to federal regulators under wire transfer regulations, people could structure the transaction using a network of LLCs. For example, someone using a wire transfer to purchase a property in Miami could have the funds transferred to the seller from a Florida LLC, owned by an LLC formed in the British Virgin Islands, which does not require owners to disclose their identities to form an LLC.[152] Consequently, the identity of the purchaser could not be discovered.

Because of the simplicity of avoiding federal regulations, the loophole created by not including EFTs in the GTO is potentially much more substantial than FinCEN may have realized. If FinCEN wants to improve its position in the fight against money laundering, it should expand the GTO to include EFTs, as a FinCEN spokesperson said it would if "it becomes apparent buyers are using [wire] transfers to skirt regulations."[153] Though, to be fair, anyone tasked with finding information about the identity of a purchaser in the situation described above would be hard pressed to find anything, which raises important questions about what title insurers should do when they face a similar situation. That issue is analyzed further later in this section.

C. Loophole: Trusts are not Subject to the GTO's Requirements

The GTO does not cover trusts.[154] Accordingly, beneficiaries of trusts would not have their identities disclosed if the trusts purchased residential real property for $1 million or more in cash, creating a loophole for money launderers and anyone else who may want their identity concealed from federal regulators.[155] The GTO only covers transactions in which the buyer of residential real property is a legal entity.[156] Under the GTO, "Legal Entity means a corporation, limited liability company, partnership or other similar business entity, whether formed under the laws of a state or of the

---

151 Shepherd, *supra* note 147.
152 *See* Nehamas, *supra* note 1.
153 *See* Sean Stewart–Muniz, *Government Tracking of Secret Miami Buyers Begins Tuesday*, THE REAL DEAL (Feb. 29, 2016, 2:15 PM), http://therealdeal.com/miami/2016/02/29/government-tracking-of-secret-miami-buyers-begins-tomorrow/.
154 *See* GTO, *supra* note 17.
155 *See* Nehamas, *supra* note 16; *see also* Stewart–Muniz, *supra* note 153.
156 *See* GTO, *supra* note 17.

United States or a foreign jurisdiction."[157] Noticeably absent from this definition are trusts. This drafting exclusion creates a loophole that people can take advantage of to circumvent the GTO, thus making the GTO less effective in combating money laundering.[158] FinCEN should include trusts in the GTO's definition of "Legal Entity" to fill in this gaping hole in the GTO.

D. The GTO Does Not Define "Residential Real Property"

A transaction is a "covered transaction" under the GTO if the transaction is for the purchase of "residential real property."[159] However, the GTO never defines "residential real property." The lack of a definition creates an ambiguity in the GTO and makes classifying a transaction as "covered" a difficult task for title insurers. This is a problematic situation for title insurers because violating the terms of the GTO can result in civil or criminal liability, without limitation.[160]

On February 1, 2016, after the American Land Title Association wrote a letter raising various concerns with the GTO,[161] FinCEN issued guidance on the question of what "residential real property" is.[162] Unfortunately, its answer was not sufficiently precise to clarify the ambiguity.[163] According to FinCEN guidance, "'residential real property' means real property (including individual units of condominiums and cooperatives) designed principally for the occupancy of from one to four families."[164] This definition provides some guidance, but it still does not clarify whether entire apartment complexes or condominiums are considered "residential real property." In general, these types of property are "considered commercial real estate, albeit residential in nature."[165] However, FinCEN's definition includes individual units of condominiums, but does that mean that entire condominium buildings are excluded?[166] The definition also includes property "designed principally for the occupancy of from one to four families," but would a four–unit condominium be included in this definition?[167] Technically, such a property is designed for

---

157 *See id.* (quotations omitted).
158 *See* Nehamas, *supra* note 16; *see also* Stewart–Muniz, *supra* note 153.
159 GTO, *supra* note 17.
160 *Id.*
161 Shepherd, *supra* note 147.
162 *See generally* FIN. CRIMES ENF'T NETWORK, U.S. DEP'T OF THE TREASURY, *Frequently Asked Questions*, FINCEN (Feb. 1, 2016), http://www.alta.org/file.cfm?code=a7x7x2 [hereinafter *Questions*] (answering the question of what residential real property means).
163 *See generally id.* (answering the question of what residential real property means).
164 *Id.*
165 Shepherd, *supra* note 147.
166 *See Questions*, *supra* note 162.
167 *Id.*

the occupancy of four families, but, for an owner, the purpose of this type of property likely would be commercial in nature.[168] Further, FinCEN's definition neglects to mention how a commercial aspect of a property would affect its classification.[169] Assuming a four–unit condo is considered "residential real property," how would the presence of offices or retail shops in the building affect its classification?[170] Under FinCEN's guidance, it is still unclear whether the above described properties would be considered "residential real property." This ambiguity can cause significant problems for title insurers that face civil and criminal penalties if they violate the terms of the GTO.

E. Can Title Insurers Bear the Additional Costs of Complying With the GTO?

Complying with the GTO will surely impose additional costs on title insurers, but "are title insurance companies equipped to perform the AML functions set forth in the GTOs?"[171] Kevin L. Shepherd, "chair of the American Bar Association Real Property, Trust & Estate Law Section's Working Group on Anti–Money Laundering/Counter–Terrorist Financing Efforts Affecting Lawyers,"[172] and others in the legal community have identified this issue and raised questions about its effect.[173] "Banks and financial institutions are accustomed to implementing and maintaining sophisticated AML procedures and protocols, but it remains to be seen whether the title insurance industry will be able to do so—at least in the short term."[174] Finding the required information about the parties in the transactions, reporting this information, training employees, and extra time spent on due diligence will all impose significant costs on title insurers. It is unclear what costs the title insurers will bear and what costs, if any, will be passed on to the consumer.[175] It is clear, however, that complying with the requirements of the GTO will impose substantial costs on those involved in covered transactions.

---

168 *See* Shepherd, *supra* note 147.
169 *See id.*
170 *See id.*
171 *Id.*
172 *Id.*
173 *See id.*; *see also* Colman, *supra* note 141.
174 Shepherd, *supra* note 147.
175 *See id.*

F. The GTO Provides No Guidance on Compliance or the Consequences of Noncompliance

The GTO provides no guidance on what efforts title insurers should use to ensure compliance with the GTO or the consequences of noncompliance with the GTO. The Order merely says that noncompliance subjects title insurers to criminal and civil liability.[176] What happens if a title insurer is involved in a transaction where compliance is impossible, such as when the beneficial owner's identity cannot be discovered? Should title insurers not participate in these types of transactions? The answer to that question is unclear. On one hand, transactions with anonymous purchasers are not inherently suspicious as anonymity is a real concern for many purchasers.[177] The Panama Papers leaks show that even confidential documents are at risk for public exposure, which would put purchasers' anonymity at risk. So, it is not accurate for a title insurer to categorize all transactions with anonymous purchasers as suspicious, and thus avoid them. On the other hand, noncompliance with the GTO when involved in covered transactions subjects insurers to serious liability.[178] To be safe, title insurers must weigh these risks and try to identify the required information under the GTO before issuing insurance.

The GTO also gives no guidance on how title insurers should comply with the order. This raises an important question: do title insurers have an obligation to find beneficial owners before issuing a policy, or do they need only to use best efforts to find and report the information? Luckily, FinCen has provided some guidance on this.[179] Stephen Hudak, the Public Affairs chief for FinCEN, said "we don't expect [title insurance companies] to do investigations, we ask that they make the inquiries and report the information provided."[180] "Even if they are lied to by the buyer, that information could be useful to law enforcement."[181] Hudak's statement is helpful, but it does not address what the title insurer should do if no information about the identity of the purchaser is discovered. Should a title insurer leave that part of the Form 8300 blank, or should it remove itself from the transaction? Would leaving a part of the Form 8300 blank be considered noncompliance? It seems prudent to avoid such a transaction, as noncompliance carries potential civil and criminal punishment, but the obligations of the title insurer involved in such a transaction still remain unclear.

---

176 GTO, *supra* note 17.
177 *See* Nehamas, *supra* note 1.
178 GTO, *supra* note 17.
179 *See* Colman, *supra* note 141.
180 *Id.*
181 *Id.*

The various issues identified and explained in this section will considerably affect the usefulness of the GTO as an AML tactic and those forced to comply with the GTO. The many loopholes in the GTO may eventually make it an ineffective weapon in the government's fight against money laundering. The ambiguities in the GTO and the other problems stemming from the GTO may ultimately make it more troublesome than it is worth. FinCEN must address these issues to ensure that title insurers comply with the GTO.

V. EFFECTS OF THE GTO—MIAMI REAL ESTATE WILL CONTINUE TO FLOAT ON A SEA OF ILLEGAL CASH

The many loopholes and issues inherent in the GTO or resulting from the GTO will have various effects on the Miami real estate industry, but these loopholes in the GTO will render it ineffective as a means to prevent money laundering and will prevent the GTO from negatively impacting the Miami real estate market—as many feared it would.[182] While the GTO may be successful in gathering some information helpful to law enforcement agencies,[183] it probably will not deter criminals from laundering their ill–gotten profits through Miami real estate. The numerous loopholes in the GTO, as explained in Section IV, provide too many avenues for money launderers to circumvent the reporting requirements of the GTO. For instance, someone could make a purchase from a trust instead of a covered legal entity, use a wire transfer instead of cash to make a purchase, or elect not to purchase title insurance to completely avoid having their identity reported to FinCEN under the GTO.[184] Though these loopholes may stop the GTO from preventing money laundering in Miami, they will likely affect how people choose to structure certain real estate transactions.

An increased use of trusts and wire transfers in all–cash real estate transactions of $1 million or more should be expected as a result of the loopholes in the GTO. The GTO requires information about a legal entity to be reported to FinCEN when it buys real estate in an all–cash purchase for more than $1 million in Miami, but wire transfers are not covered transactions under the GTO and the GTO's definition of legal entity does

---

182 *See* Nehamas, *supra* note 16.

183 *See* Fin. CRIMES ENF'T NETWORK, U.S. DEP'T OF THE TREASURY, *FINCEN Expands Reach of Real Estate "Geographic Targeting Order" Beyond Manhattan and Miami*, FINCEN (July 27, 2016), https://www.fincen.gov/news/news-releases/fincen-expands-reach-real-estate-geographic-targeting-orders-beyond-manhattan. [hereinafter *FINCEN*].

184 *See* GTO, *supra* note 17 (Under the GTO, only title insurers are required to report information about "covered transactions," but transactions involving trusts or wire transfers are not included.).

not include trusts.[185] These gaps in the GTO's coverage provide ways for people to avoid having their identities reported to FinCEN. Thus, people that wish to remain truly anonymous in a real estate transaction, for legitimate or illegitimate reasons, are now likely to use one of these avenues to maintain their anonymity when involved in a transaction that would otherwise be covered by the GTO.

Further, the limited coverage of the GTO could cause an increase in money laundering through commercial properties in Miami, as these are not covered by the GTO. The GTO covers purchases of "residential real property,"[186] which FinCEN has defined as "real property (including individual units of condominiums and cooperatives) designed principally for the occupancy of from one to four families."[187] Most commercial real estate would not be covered by this definition of "residential real property" because seemingly only one– to four–unit apartment complexes or condominiums could fall into this definition.[188] Because commercial properties are not covered by the GTO, criminals may seek to launder money through commercial real estate, which would protect their anonymity from the reporting requirements of the GTO, potentially shielding them from law enforcement.[189] If money laundering through commercial real estate grows significantly, then commercial real estate prices could be propped up by illegal money similar to what happened in the residential market.[190] Miami already has a problem with the price of real estate being too high for most locals to afford, and propping up commercial real estate values would further that problem.[191]

Commercial real estate prices likely will not be the only prices on the rise. The GTO may also drive the cost of title insurance up in Miami. The GTO requires title insurance companies to find and report information about the parties involved in covered transactions.[192] These responsibilities impose substantial additional costs on the title insurers.[193] Finding the required information about the parties in the transactions, reporting this information, training employees, and the extra time spent on due diligence will all cost title insurers money. The title insurance companies will likely pass these additional costs down to consumers, if possible, which would surely increase title insurance costs for covered

---

185 *See id.*
186 *Id.*
187 *Questions*, *supra* note 162.
188 *See id.*
189 *See* GTO, *supra* note 17.
190 *See* Nehamas, *supra* note 1.
191 *See id.*
192 *See* GTO, *supra* note 17.
193 Shepherd, *supra* note 147.

transactions and could even increase title insurance costs for all transactions.

The GTO and the many loopholes and issues inherent in it may affect how certain real estate transactions are structured and some other aspects of the real estate industry. However, it will not have a significant negative impact on Miami's luxury real estate or new condo markets—as many feared it would.[194] Initially, many industry professionals feared that the GTO would scare off buyers who desire to remain anonymous in real estate transactions.[195] However, title insurance is not required for real estate purchases. Purchasers that wish to preserve their anonymity can choose not to purchase title insurance and completely avoid the GTO's reporting requirements because no title insurer would be involved in the deal.[196] Deciding against purchasing title insurance may seem risky, but "you can get a title search without buying any insurance" to confirm there are no clouds on the title of a property.[197] Further, the risks title insurance protects against—clouds on titles—are extremely minimal when purchasing a new condo from the developer.[198] So, purchasers don't have a pressing need for title insurance in many cases and have alternatives to confirm there is no liens on the property. Thus, for purchases of new condos, the portion of the market the GTO was feared to affect the most,[199] title insurances companies are not even needed.[200] Not purchasing title insurance would exempt the transaction from the GTOs reporting requirement, preventing any significant negative effect.[201]

Furthermore, even if title insurance is purchased, a substantial portion of new condo purchases still will not be subjected to the GTO's reporting requirements.[202] "By not monitoring [wire transfers and personal checks], investigators will miss out on most sales of new condos, said Alan Lips, a Miami accountant."[203] Because the GTO will not cover the majority of new condo sales, the fears of many real estate professionals that the GTO would have a "chilling effect" on the luxury market seemingly were an overreaction.[204] "'I think this is really blown out of proportion,'" agreed Carlos Rosso, president of the condo division for local mega–developer Related Group. 'Everything is done through the banking system for new

194 *See* Nehamas, *supra* note 16.
195 *See id.*
196 *See* GTO, *supra* note 17.
197 Colman, *supra* note 141.
198 *See id.*
199 *See* Nehamas, *supra* note 1.
200 *See* Colman, *supra* note 141.
201 *See* GTO, *supra* note 17.
202 *See* Nehamas, *supra* note 1.
203 *Id.*
204 *See* Nehamas, *supra* note 16.

construction.'"[205] These statements from industry professionals make clear that the GTO will not affect most real estate transactions, and thus will not have a significant negative effect on the Miami real estate market.

The downturn currently seen in Miami's market for new condos, and its housing market in general, is more likely attributed to over–supply and a strengthening dollar relative to foreign currencies.[206] Currently, Miami condo prices are declining and likely will continue to fall in the coming months.[207] "In the latest Q3 condo market statistics for the Greater Downtown Miami and the Miami Beaches, prices declined slightly by 1.4%, and all other leading indicators are soft."[208] "In other words, the market is likely to take a further hit," said Sep Niakan, Owner of HB Roswell Realty, a brokerage firm in the Edgewater neighborhood of Miami.[209] "This latest quarter's numbers expose a year–over–year 25% decline in condo sales volume in the Greater Downtown Miami and the Miami Beaches, with 1,213 sales in Q3 2016 versus 1,615 sales in the same quarter in 2015."[210] One cause of this downturn is the over–supply of condos, as evidenced by Miami's unprecedented pace of development in recent years[211] and its exceedingly high absorption rate—"the number of months it would take to sell all the properties currently on the market."[212] The absorption rate for "a balanced market in Miami is 6–12 months of inventory depending on the type and price point."[213] However, as of October 24, 2016, the absorption rate for Miami condos was "a whopping 24.5 months overall inventory."[214] This overabundance of supply causes "downward pressure on prices until the inventory dissipates."[215]

The other cause of the current downturn in the Miami condo market is the growing absence of foreign buyers due to the strengthening dollar relative to other foreign currencies.[216] Since the summer of 2014, "the U.S dollar started to climb against most foreign currencies, which started a

---

205 Nehamas, *supra* note 1.

206 *See generally* Sep Niakan, *Miami Condo Market is Stumbling and Likely to Take a Further Hit*, MARKETWATCH (Nov. 4, 2016, 12:32 PM), http://www.marketwatch.com/story/miami-condo-market-is-stumbling-and-likely-to-take-a-further-hit-2016-11-04 (explaining the causes of the current downturn in Miami's condo market is because of over–supply and the strengthening dollar relative to foreign currencies).

207 *See id.*

208 *Id.*

209 *Id.*

210 *Id.*

211 *See* Bandell, *supra* note 2.

212 Niakan, *supra* note 206.

213 *Id.*

214 *Id.*

215 *Id.*

216 *See id.*

slow but steady decline of buyers from those continents."[217] From then until November 2016, "the euro has lost 36% of its value, the Brazilian real 43% and the Colombian peso 59% against the U.S. dollar."[218] This is significant because Miami's real estate market is driven, in part, by foreign investment, which is now much more expensive to do because of the strength of the dollar relative to foreign currencies.[219] In fact, 25% of home purchases in Miami and $6.1 billion worth of real estate in the tri–county area were purchased by foreign nationals in 2015.[220] So, it makes sense that the market would take a downturn when the strong U.S. dollar, in relation to weak foreign currencies, caused a significant diminution in demand for real estate.

The GTO's many issues will render it ineffective as a means of preventing money laundering, but those issues also ensure that the GTO will not have a "chilling effect"[221] on the Miami real estate market. The GTO's under–inclusiveness not only indicates that money launderers have many avenues to circumvent the GTO's reporting requirements, but it also signifies that the GTO will not cover many of the transactions it was feared to have the worst effect on.[222] While the GTO will have various effects on the real estate industry, it will not have a major negative impact. The fear of a "chilling effect"[223] on the Miami real estate market was overblown because the current downturn in the Miami market is easily explained by the foundational laws of economics—supply and demand.[224]

VI. CONCLUSION

Miami is experiencing a money laundering problem that has not been seen since drug money flooded the City's streets during the "Cocaine Cowboys" era of the 1980s. The money laundering crisis derives from the *laissez–faire* attitude towards accepting large sums of cash that developed in Miami during the "Cocaine Cowboys" era. The money laundering problem has become so sizable because of the lax regulations of cash real estate transactions, compared to other means of laundering money, and the anonymity that legal entities can provide criminals.

---

217 *Id.*
218 *Id.*
219 *See* Nehamas, *supra* note 1.
220 *Id.*
221 *See* Nehamas, *supra* note 16.
222 *See id.*
223 *Id.*
224 *See generally* Niakan, *supra* note 206 (explaining the causes of the current downturn in Miami's condo market is because of over–supply and the strengthening dollar relative to foreign currencies).

To crackdown on the money laundering crisis in Miami, the Department of the Treasury, through the Financial Crimes Enforcement Network (FinCEN), issued a Geographic Targeting Order (GTO).[225] Targeted specifically at the causes of the money laundering crisis—lax regulations of cash real estate transactions and the anonymity of legal entities—the GTO requires title insurance companies to report the identity of the beneficial owners of shell companies that purchase real estate with cash.[226]

While many professionals in the South Florida real estate industry believe the GTO would have a "chilling effect on the luxury [real estate] market," the GTO, has many flaws that, if unaddressed, will prevent it from stemming the tide of illegal money that is flooding the Miami real estate market.[227] The GTO's under–inclusiveness provides money launderers with too many avenues to circumvent its reporting requirements, and the GTO's ambiguities will cause problems for title insurers that must comply with it.

The same issues that make the GTO ineffective in preventing money laundering also ensure that the GTO will not have a significant negative impact on the Miami real estate market—as many feared it would.[228] Because the GTO is under–inclusive, it will not cover most of the transactions it was feared to affect the most.[229] The current downturn the market is experiencing is not due to the GTO and is easily explained by the laws of supply and demand.[230] While the GTO will have various effects on the real estate industry, the fear that it would have a "chilling effect"[231] was overblown.

VII. GTO UPDATE

Just before this article was set to be published, FinCEN issued a revised GTO that addresses the preceding GTO's underinclusiveness.[232] "FinCEN is revising the GTOs to capture a broader range of transactions

---

225 *See* Nehamas, *supra* note 16.
226 *See id.*
227 *See id.*
228 *See id.*
229 *See id.*
230 *See generally* Niakan, *supra* note 206 (explaining the causes of the current downturn in Miami's condo market is because of over–supply and the strengthening dollar relative to foreign currencies).
231 *See* Nehamas, *supra* note 16.
232 *See* FIN. CRIMES ENF'T NETWORK, U.S. DEP'T OF THE TREASURY, *FinCEN Targets Shell Companies Purchasing Luxury Properties in Seven Major Metropolitan Areas*, FINCEN (Aug. 22, 2017), https://www.fincen.gov/news/news-releases/fincen-targets-shell-companies-purchasing-luxury-properties-seven-major.

and include transactions involving wire transfers."[233] These revisions further my argument that a more inclusive drafting of the GTO is necessary to FinCEN's success in combatting money laundering. Armed with a more powerful weapon—a revised GTO—I believe FinCEN finally has what it needs to prevail in the fight against money laundering.

[233] *Id.*