BCRELinks.com®
The Deal Maker's Toolbox®

Developed By:
CLARK WILSON LLP
BC's Law Firm for Business
Commercial Real Estate Group

Thursday, September 18
Bookmark Us! (Ctrl+D)

THE IMPACT OF NEW ANTI-MONEY LAUNDERING INITIATIVES ON REAL ESTATE TRANSACTIONS

By Kyle Wilson July 25, 2008

Because of the large dollar values involved in real estate transactions, and with the possibility that purchasers may attempt to pay substantial down payments in cash, the real estate industry has long been identified as being vulnerable to money laundering and, more recently, terrorist financing.

Money laundering is a process whereby "dirty money" that was produced through criminal activity is transformed into "clean money", the criminal origin of which is difficult to trace. Essentially, the money laundering process involves placing the proceeds of crime into the financial system, converting them into another form and creating complex layers of financial transactions to hide the audit trail and the source of the funds, with the laundered proceeds eventually being placed back into the economy to create the perception of legitimacy.

In 1999, the National Initiative to Combat Money Laundering was launched as part of the Canadian government's effort to deter money laundering in Canada. In 2001, this initiative was expanded to include the fight against terrorist financing activities. In 2000, the ***Proceeds of Crime (Money Laundering) and Terrorist Financing Act*** (the "Act") was passed and its **various related regulations** enacted. However, money laundering and terrorist financing are moving targets, and in recent years laundering trends and techniques have changed. **Bill C-25**, which received Royal Assent in December 2006, was introduced to strengthen the Act and bring it into line with new international standards and the recommendations of the **Financial Action Task Force**.

Many of the measures introduced by **Bill C-25** became effective in June, 2007 and June, 2008, with further amendments to the Act and its regulations set to come into force on December 30, 2008, February 20, 2009 and September 28, 2009.

Under the Act and its regulations, reporting entities must implement a compliance regime, keep certain records, complete reports, undertake client identification procedures and report suspicious and other prescribed transactions to the **Financial Transactions and Reports Analysis Centre of Canada** ("FINTRAC"), an independent government agency created to collect, analyze and disclose information to help prevent and deter money laundering and the financing of terrorist activities in Canada and abroad. While the amendments will serve to extend the coverage of the Act and are

expected to close perceived gaps in the enforcement regime, increase compliance and monitoring requirements and strengthen the intelligence function of FINTRAC, the amendments will also impose greater regulatory burdens and new obligations on reporting entities, including financial institutions (banks, loan companies, etc.), insurance companies, securities dealers, money service businesses, real estate brokers, casinos - and in February 2009, on real estate developers.

Impact for Real Estate Brokers

Real Estate Brokers and Sales Representatives are already subject to the Act and its related regulations. Real Estate Brokers and Sales Representatives are subject to the obligations set out in **Guideline 6B** of the FINTRAC Guidelines when acting as agents with respect to the purchase or sale of real estate, whether or not they receive a commission from the transaction and whether or not they have fiduciary duties regarding the transaction.

The new regulations require Real Estate Brokers and Sales Representatives to collect and verify more information from purchasers and vendors than previously set out. Real Estate Brokers and Sales Representatives must now keep a "**receipt of funds record**" for all amounts received related to a single transaction, unless the amount is received from a financial entity (such as a bank to which the ***Bank Act*** applies, a credit union, a trust company or a loan company) or a public body, or unless a "**large cash transaction record**" is created for that transaction. A "large cash transaction record" means a record that indicates the receipt of an amount of $10,000 or more in cash in the course of a single transaction. If the "receipt of funds record" relates to a company, partnership, or other entity, the Real Estate Broker will have to include the entity's principal address and nature of their business. In addition, if the "receipt of funds record" relates to a corporation, the broker will also need to keep a copy of the part of the corporation's corporate records relating to the power to bind the corporation regarding the transaction.

A Real Estate Broker or Sales Representative will also have to maintain a "client information record" for every purchase or sale of real estate. The "**client information record**" will set out the broker's client's name, address, date of birth and the nature of the client's principal business or occupation. If the "client information record" relates to a corporation, the broker will once again need to keep a copy of the part of the corporation's corporate records relating to the power to bind the corporation regarding the transaction. If there is any doubt about the information collected concerning an individual purchaser's previous identification, the Real Estate Broker or Sales Representative will have to identify that individual again.

Finally, under the old regime, the requirement for a broker to report a **suspicious transaction** applied only when the financial transaction was completed. This has now changed, with the requirement now applying to attempted suspicious transactions as well. As an example, an attempted suspicious transaction would include a situation where a client of the broker begins to make an offer on the purchase of a condominium with a substantial deposit, but decides not to finalize the offer to purchase when asked to provide identification. The broker must report on transactions where he or she has reasonable grounds to suspect that the transaction was related to money laundering or terrorist financing. An attempt to conduct a transaction does not necessarily mean the transaction is suspicious. However, the circumstances surrounding it might contribute to the broker having reasonable grounds for suspicion.

Impact for Real Estate Developers

Bill C-25 includes a number of amendments that will come into force on February 20, 2009 that will extend the coverage of the Act and regulations to real estate developers.

Most of the record-keeping and reporting requirements are contained within **Part 1** of the

Act. Under the new regulations, the coverage of those sections of the Act and its associated regulations will apply to real estate developers. A "Real Estate Developer" is defined to include, on any given day in a calendar year, a person or entity who, in that calendar year and before that day or in any previous calendar year after 2007, has sold to the public, other than in the capacity of a real estate broker or sales representative:

a. five or more new houses or condominium units;

b. one or more new commercial or industrial buildings; or

c. one or more new multi-unit residential buildings each of which contains five or more residential units or two or more new multi-unit residential buildings that together contain five or more residential units.

The impact on Real Estate Developers is significant. Every Real Estate Developer will be subject to the client identification, record keeping and reporting requirements of **Part 1** of the Act when they sell a new house, new condominium unit, new commercial or industrial building or new multi-unit residential building.

Real Estate Developers will be required to keep a "receipt of funds record" in respect of every amount received in the course of a single transaction, unless the amount is received from a financial entity or a public body, and a "client information record" in respect of every sale of a house, condominium unit, commercial or industrial building or a multi-unit residential building. Also, where the "receipt of funds record" or the "client information record" is in respect of a corporation, Real Estate Developers will need to keep a copy of the part of the corporation's corporate records relating to the power to bind the corporation in respect of transactions with the Real Estate Developer.

For Real Estate Developers, this will involve:

a. ascertaining the identity of every person who conducts the transaction;

b. confirming the existence of and ascertaining the name and address of every corporation on whose behalf the transaction is conducted and the names of the corporation's directors; and

c. confirming the existence of every entity, other than a corporation, on whose behalf the transaction is conducted.

Additionally, a two-pronged reporting obligation exists for reporting entities under the Act - the reporting of **suspicious transactions** and the reporting of certain prescribed transactions.

If a Real Estate Developer receives an amount in cash of $10,000 or more in the course of a single transaction, it will have to keep a **large cash transaction record** unless cash is received from a financial entity or a public body. Real Estate Developers will be required to report large cash transactions to **FINTRAC** together with additional required information, unless the cash is received from a financial entity or a public body.

Real Estate Developers will also be required to report suspicious transactions and attempted suspicious transactions to **FINTRAC** where there are reasonable grounds to suspect that the transaction is related to the commission of money laundering or terrorist financing.

The amendments to the Act and regulations will undoubtedly have implications for Real Estate Developers in British Columbia. Every Real Estate Developer will be required to implement policies and procedures to address client identification, record keeping and, where applicable, reporting requirements. Real Estate Developers will also have to develop and implement a compliance program and provide employees with training on

the implementation of office policies and procedures.

Finally, reporting entities that don't comply with the Act and its regulations are subject to penalties. A new administrative monetary penalty scheme will allow for penalties that are proportionate to the violation, with the stated purpose of encouraging compliance with the Act, rather than punishing the violator. Violations under the scheme are classified as being minor, serious or very serious, with the maximum penalty amount that can be imposed under the administrative monetary penalty scheme for violations classified as very serious being, in the case of a person, $100,000 and in the case of an entity, $500,000. The changes affecting administrative monetary penalties will be effective December 30, 2008.

Kyle Wilson

More Coverage:

Stewart, Monte, "New money laundering rules target developers", Business Edge, September 5, 2008.