DEVELOPERS AND MONEY LAUNDERING LEGISLATION
Recent changes and their impact on developers

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Since February 20, 2009, real estate developers have been subject to Canada's *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, 2000, c.17 and its regulations (collectively, the "**Act**"). The Act imposes new requirements for reporting, record-keeping and client identification on real estate developers in order to prevent money laundering and terrorist financing.

APPLICATION OF THE MONEY LAUNDERING LEGISLATION

Definition of Real Estate Developer

The reporting regulations of the Act define a "real estate developer" as any individual or entity (other than a real estate broker or a real estate sales representative) that has sold to the public, in a given year (after 2007), any of the following:

- Five or more new houses or condominium units;
- One or more new commercial or industrial buildings;
- 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 term "real estate developer" is somewhat of a misnomer. The Act does not apply to traditional "developers" – i.e. those persons involved solely in the sale of vacant or serviced land – but to those persons typically considered "builders" and are engaged in the sale of dwellings or buildings to the public.

FINTRAC guidelines state that a new house or building is one that was constructed within the past two years and was not occupied for its intended purpose before its sale. As well, homes that are substantially renovated will also be considered "new" under the Act.

A sale to the "public" would include a sale to an individual, a corporation or any other kind of entity, such as a partnership. However, a sale to the "public" excludes sales between affiliates and sales between a subsidiary and its owner.

Real Estate Brokers and Sales Representatives

If a real estate developer hires an outside licenced real estate broker or a sales representative to sell new houses, units and buildings, the real estate developer itself will not have reporting or record-keeping obligations under the Act and these obligations shall be the responsibility of the broker or sales representative. The only exception to this is if a real estate developer hires a sales representative as its employee - at that point, the obligations under the Act would fall on the developer.

RECORD KEEPING

Developers will now be subject to specific record-keeping provisions of the Act and will be required to compile "client identification records" for all buyers and "receipt of funds records" for all amounts received towards the sale of a home or building.

Client Information Records

Developers must maintain a 'client information record' for every client. The type of information that must be obtained from clients depends on whether the client is an individual, a corporation or another entity.

If the client is an individual, the "client information record" shall include the purchaser's name, address, date of birth and occupation. Ascertaining a purchaser's identity requires the developer to refer to government-issued identification such as a birth certificate, driver's licence, passport, record of landing or permanent resident card.

If the client is a corporation or another entity, the "client information record" shall include the name, address, date of birth and occupation of the person acting on behalf of the corporation or other entity as well as the name, address and type of business of the corporation or entity. As well, within 30 days of entering into a purchase agreement, developers must obtain evidence verifying the existence of the corporation or other entity, the name and address and list of directors (if a corporation) and evidence that the person acting on behalf of the corporation or other entity has the power to bind same.

Client identification records must be kept for a period of 5 years from the completion of a transaction.

Receipt of Funds Record

Developers must maintain a 'receipt of funds record' for every amount received in the course of a purchase transaction unless:

- the amount is paid directly to another party such as a developer's outside real estate broker or sales agent or to the developer's lawyer, in trust; or,
- the amount is received from a financial institution or a public body. An amount is *not* received from a financial institution if such amount is merely in the form of a cheque drawn on an account held at a financial institution.

The receipt of funds record shall include the following:

- the amount paid and the method of payment,
- if payment was made by cash, how the cash was received (in person, by mail, by courier etc.); and
- if funds were drawn on an account, the account number, account holder's name and financial institution the payment is drawn on.

Receipt of funds records must be kept for a period of 5 years from the completion of a transaction.

REPORTING OBLIGATIONS

Large Cash Transactions

Should real estate developers receive $10,000 or more in cash from a client (including two or more cash transactions of less than $10,000 made within a 24 hour period by or on behalf of the same client), the developer shall submit a 'large cash transaction report' to FINTRAC within 15 days of receipt of the cash. Such reports are not required if the developer receives cash from a financial entity or a public body.

Suspicious Transactions

If a developer has reasonable grounds to suspect that a transaction or attempted transaction is related to a money laundering or terrorist activity financing offence (as defined in the *Criminal Code*), the developer is required to:

- report the transaction or attempted transaction to FINTRAC within 30 days following the event that gave rise to the suspicion; and,
- take reasonable steps to determine the identity of the individual conducting or attempting to conduct the suspicious transaction.

FINTRAC has suggested a number of indicators of suspicious transactions to consider, as follows:

- Client purchases property in someone else's name such as an associate or a relative (other than a spouse).
- Client negotiates a purchase for the market value or above the asked price, but requests that a lower value be recorded on documents, paying the difference "under the table".
- Client pays initial deposit with a cheque from a third party, other than a spouse or a parent.
- Client purchases multiple properties in a short time period, and seems to have few concerns about the location, condition, and anticipated repair costs, etc. of each property.
- Client insists on providing signature on documents by fax only.
- Client uses a post office box or General Delivery address where other options are available.
- Transactions in which the parties are foreign or non-resident for tax purposes and their only purpose is a capital investment (that is, they do not show any interest in living at the property they are buying).
- Transactions in which payment is made in cash, bank notes, bearer cheques or other anonymous instruments.
- Transaction is completely anonymous–transaction conducted by lawyer–all deposit cheques drawn on lawyer's trust account.

Further suggested indicators of suspicious transactions can be found at FINTRAC's website at http://www.fintrac-canafe.gc.ca/publications/guide/Guide2/2-eng.asp#662

Terrorist Property Reporting

A developer must send a "terrorist property report" to FINTRAC without delay if the developer has property in its possession or control and the developer:

- know**s** that such property is owned or controlled by or on behalf of a terrorist or a terrorist group; or
- believes that such property is owned or controlled by or on behalf of a listed person.

"Property" means any type of real or personal property in the developer's possession or control. This includes any deed, agreement or instrument giving title or right to property as well as any cash, money orders and traveller's cheques in possession or control of the developer.

A "terrorist" or "terrorist group" includes anyone that has as one of their purposes or activities facilitating or carrying out any terrorist activity and includes anyone on the "*Regulations Establishing a List of Entities"* issued under the *Criminal Code* as found on Public Safety Canada's Web site at http://www.ps-sp.gc.ca .

A "listed person" includes anyone listed in the *Regulations Implementing the United Nations Resolutions on the Suppression of Terrorism* issued under the *United Nations Act*, as found on the list of names on the Office of the Superintendent of Financial Institutions Web site at http://www.osfi-bsif.gc.ca under the "Terrorism Financing" link.

COMPLIANCE PROGRAM

Under the Act real estate developers are required to develop and implement a compliance program to ensure compliance with the Act. This requires that the developer:

- appoint a compliance officer to be responsible for implementing the compliance program;
- conduct a risk assessment of the developer's activities and the vulnerability of those activities to money laundering a terrorist activity financing offences;
- develop written policies and procedures with regards to compliance with the Act;
- develop and maintain a compliance training program for employees and persons acting on behalf of the developer; and,
- review the risk assessment, policies and training program every two years.

ENFORCEMENT

FINTRAC has the authority to monitor and audit a developer's compliance with the Act. The consequences of not complying with the Act may include administrative monetary penalties and criminal penalties.

Violations giving rise to administrative monetary penalties are classified "Minor", "Serious" or "Very Serious", and carry maximum penalties of $1,000, $100,000 and $500,000 as follows:

- Minor (individual / entity): $1 to $1,000
- Serious (individual / entity): $1 to $100,000
- Very Serious (individual): $1 to $100,000
- Very Serious (entity): $1 to $500,000

Criminal penalties may include the following:

- Failure to report suspicious transactions: up to $2 million and/or 5 years imprisonment.
- Failure to report a large cash transaction or an electronic funds transfer: up to $500,000 for the first offence, $1 million for subsequent offences.
- Failure to meet record keeping requirements: up to $500,000 and/or 5 years imprisonment.
- Failure to provide assistance or provide information during compliance examination: up to $500,000 and/or 5 years imprisonment.
- Disclosing the fact that a suspicious transaction report was made, or disclosing the contents of such a report, with the intent to prejudice a criminal investigation: up to 2 years imprisonment.

WEB RESOURCES

Below are some of the web resources to assist you with this topic:

http://www.fintrac.gc.ca/re-ed/real-eng.asp - FINTRAC's summary of the new rules

http://www.chba.ca/fintrac/ - Canadian Home Builders' Association's summary of the new rules and samples of various forms