

The (USA) Patriot Act and Real Estate, A Canadian Perspective

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At the IREM Education Conference in Scottsdale, Arizona, Chris Myers of Holland & Knight, LLP spoke about three key laws that appear to extend beyond the United States borders. By the conclusion of his session, it was abundantly clear that American lawmakers had pulled out all the stops in the name of protecting Homeland Security.

First, it's important to identify that real estate is considered a prime target for money laundering in many countries. The fact that real estate provides a relatively stable long-term investment, that it can be used as a "safe house" for hiding from authorities, and can be well hidden behind an unsuspecting and legitimate real estate management company, make it the perfect target for organized crime or terrorists.

To prevent these issues in the USA, the Patriot Act has broadened or expanded the Money Laundering Control Act and the Bank Secrecy Act. A third law, referred to as the OFAC SDN List, provides the greatest concern for both Americans and non-Americans alike. Real Estate Professionals from many countries must now seriously consider their "due diligence" process when performing business that may involve US citizens, property, businesses, funding, property interests, and other tangible or intangible interests.

The Money Laundering Control Act provides for fines of \$500,000 (or two times the value of the property involved) and twenty (20) years of jail time for engaging in business with any person and/or business if you "know" or should know their money or property comes from a broad range of illegal activity, including certain illegal activity committed in *foreign* countries.

Combine this Act with the Bank Secrecy Act, which despite its misleading name, actually applies to twenty-four types of financial institutions that include loan and finance companies, investment companies, pawn brokers, and sales in boats, automobiles and planes. While the regulations have yet to be disclosed and definitions provided, this Act also covers "persons involved in real estate closings and settlements". The Bank Secrecy Act (as amended by the USA PATRIOT Act) now requires all "financial institutions," including the ones listed above, to implement formal anti-money laundering programs.

By far the most disturbing of the three laws is the design and management of the OFAC SDN List, from the "Office of Foreign Assets Control" in the Treasury Department. The wide sweeping powers relating to this list expressly prohibit "U.S. Persons" from performing business of any kind with persons or entities that are on the list. More importantly, the list is a compilation of countries, persons, groups and businesses considered to be terrorists (or their associates), money launderers, or narcotics traffickers, whose property and interests in property are "blocked" and may not be "transferred, paid, exported, withdrawn or otherwise dealt in". "U.S. Persons" includes all United States

citizens, U.S. companies, foreign companies doing business in the United States and foreign subsidiaries of U.S. companies.

The OFAC SDN list contains over 5000 names of individuals and companies located throughout the world. As an example, the list that was updated on November 23, 2005 is 220 pages long and includes 18 pages of internet addresses relating to Cuba. You will find sites with such innocent appearances as www.aboutcuba.com, or www.cuba-shopping.com. You will also find individuals named on the list, many with passport numbers and other clearly identifying numbers, but some with only an address or without any other identifying information. Consider the misfortune of merely having a similar name as someone on the list, as you could find that your travel through or into the US has suddenly been blocked.

So how does this affect the average law abiding Canadian? Imagine that you as an individual, or you as a small business owner/manager, inadvertently perform business with a company or person who is on this list. Now consider if your business transaction somehow crosses into US borders, perhaps because the transaction goes through a US call center, is cashed in a US financial institution, or is shipped from or through the US, or involves a US investor or US property. When that US business discovers the name matches one from the list, you could find that your purchase, your deposit, your delivery, your property, etc, has been blocked and/or seized.

Once the Treasury Department has begun the process of blocking or seizing the asset(s), a massive sea of red tape washes over it. After what will likely take many weeks or months, and possibly hundreds of thousands in legal fees, the innocent parties to this process may eventually obtain a “license” permitting them to proceed with their transaction. It is still possible, however, that assets will be seized in their entirety and fines levied.

Much like Canadian law, ignorance and “willful blindness” is not a defense against a violation. Fines for violation of the Act can range from \$50,000 to \$10 million, and imprisonment from 10 to 30 years.

Most importantly, the OFAC SDN list does not appear to be subject to the commonly accepted democratic standards of “due process”. Names are added to the list as a result of Executive Orders, but need not require a court hearing, an opportunity to dispute, or convictions of any crime.

For Canadian real estate businesses that engage in transactions with the US, the process of “due diligence” will require changes in business practice. You may now find your business comparing the OFAC SDN list against the names of all of your clients, your tenants, and anyone who holds a financial interest in the transaction going through the US. And because the law doesn’t stipulate how deep an investigation must be performed, you may find yourself checking not only your clients, but also their clients, their business owners, their business directors, and so on. Lastly, it’s important to note that the list is

updated on a random but frequent basis, which means re-checking all of these persons and businesses repeatedly throughout the year, time and time again.

Regardless of where we live, it is our responsibility as good citizens to do our part to protect our home country and participate in national security. As a Canadian, it appears that the role to be played by the average American has been expanded quite dramatically, and Uncle Sam considers that its citizens should pay rather traumatic penalties for failure.

Information on the OFAC SDN list can be found at:

<http://www.treas.gov/offices/enforcement/ofac/sdn/>

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