

commercial real estate bulletin

May 2009

the real estate developer and *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* (Canada)

The *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* (Canada)¹ (the “Act”) was enacted in 2000 to detect, deter and otherwise address activities that include money laundering and financing terrorist activities. The Act is applicable to specific businesses, professions and activities that are considered susceptible to being used for money laundering and financing terrorist activities.²

The Act is administered by the Ministry of Finance of Canada, however the Financial Transactions and Reports Analysis Center of Canada (“FINTRAC”) is Canada’s financial intelligence unit and is responsible for ensuring that all reporting entities comply with the record keeping and reporting requirements under the Act. FINTRAC reports to the Minister of Finance and provides information to CSIS, the Government of Canada’s primary intelligence gathering entity.

applicability to real estate developers

Effective February 20, 2009, the provisions of the Act were expanded to include “Real Estate Developers”, which term is defined in the Act as an individual or entity that, in any calendar year after 2007, has sold one of the following to the public:

- At least five new houses or condominium units;
- At least one new commercial or industrial building;
- At least one new multi-unit residential building, each of which contains five or more residential units; or
- At least two new multi-unit residential buildings that together contain five or more residential units.

For the purposes of this Bulletin, entities that come within this definition are referred to as “RED”. Once an entity becomes a RED, that entity will remain a RED until there is a substantial and permanent change to the entity’s operation. The reporting and record keeping requirements, discussed in more detail below, will apply to the RED from the day it qualifies as a RED under the Act.

real estate agent/broker exception

The record keeping and reporting requirements set out in the Act will not be applicable to a RED where a licensed real estate agent or broker (the “Agent”) acts as a sales representative for the RED and the Agent is not an employee of the RED. There are separate provisions under the Act with respect to record keeping and reporting requirements applicable to Agents. If the Agent is an employee of the RED, then the obligations to keep records and report under the Act are applicable to the RED.

¹ S.C. 2000, c. 17.

² Guideline 1: Backgrounder, www.fintrac-canafe.gc.ca.

reporting to FINTRAC

All REDs must submit Suspicious Transaction Reports, Terrorist Property Reports and Large Cash Transaction Reports to FINTRAC on the occurrence of certain events, set out in more detail below. These reports are submitted electronically to FINTRAC. Additional information regarding the frequency, form and content of the reports is available from FINTRAC on-line³.

suspicious transaction report

Where there are reasonable grounds⁴ to suspect that a transaction or an attempted transaction is related to a money laundering or terrorist financing activity, a report must be submitted to FINTRAC within thirty days.

terrorist property report

Where the RED knows or believes that there is property⁵ in its possession or control that is owned or controlled by or on behalf of a terrorist or terrorist group⁶, a report must be sent immediately to FINTRAC.

large cash transaction report

Any receipt by a RED of cash⁷ in the amount of \$10,000 or more in the course of a single transaction, or cash amounts of less than \$10,000 from the same person or entity within a 24-hour period and the cash amounts received by a RED within that 24-hour period total at least \$10,000, is classified as a Large Cash Transaction ("LCT") and must be reported to FINTRAC, within 15 days after receipt of the LCT.

record keeping requirements

In addition to the reporting requirements outlined above, the Act requires that the RED keep the following records with respect to specified transactions:

receipt of funds record

Where the RED received funds in any form, a receipt of funds record must be kept by the RED and should include the following:

- amount and currency of cash received;
- name, date of birth, address and principal business or occupation of individual from whom cash is received;
- date of transaction;
- purpose, details and type of transaction, including the above noted information of any other indi-

³ See Guideline 2: *Suspicious Transactions* for more details on *Suspicious Transactions Reports*; See Guideline 5: *Submitting Terrorist Property Reports to FINTRAC* for more details on *Terrorist Property Reports*; See Guideline 7: *Submitting Large Cash Transaction Reports* for more details on *Large Cash Transaction Reports* (www.fintrac-canafe.gc.ca).

⁴ "Reasonable Grounds to Suspect" is determined by what is reasonable in your circumstances, including normal business practices and systems within your industry". See section 3 of Guideline 2: *Suspicious Transactions* for more details on *Suspicious Transactions Reports*.

⁵ "property" means real or personal property in the possession or control of the RED and includes cash, bank accounts, insurance policies, money orders, real estate, securities and traveller's cheques. See Guideline 5: *Submitting Terrorist Property Reports to FINTRAC* at www.fintrac-canafe.gc.ca for more details.

⁶ Refer to section 3 of Guideline 5: *Submitting Terrorist Property Reports to FINTRAC* at www.fintrac-canafe.gc.ca for a definition of terrorist groups.

⁷ "Cash" means coins referred to in section 7 of the *Currency Act*, notes issued by the Bank of Canada pursuant to the *Bank of Canada Act* that are intended for circulation in Canada or coins or bank notes of countries other than Canada. See section 1(1), *Proceeds of Crime (Money Laundering) and Terrorist Financing Regulations*, SOR/2002-184, as amended.

- individuals involved in the transaction;
- if the funds were received in cash, details of how the cash was received; and
- if an account was affected by the transaction, including the account number and type, name of account holder and currency type of account.

client information record

A client information record must be kept by the RED for each transaction described in the definition of a RED set out above. The client information record must include the name, address and nature of the client’s principal business or occupation.

For individuals, the client information record should also include the date of birth of the client. Where the client is a corporation, evidence from the official corporate records of the company showing which of the officers have the power to bind the corporation must be collected. This evidence could be in the form of a certificate of incumbency, articles of incorporation or by-laws of the corporation. Note that where there is more than one individual or corporation purchasing, a separate client information record must be kept for each purchaser.

LCT record

Where cash in the amount of \$10,000 or more is received by the RED, a LCT record must be maintained, in addition to the LCT Report submitted to FINTRAC discussed above. The record must contain the amount of cash received, the date of the transaction, the account number of the affected account and the name, address and birth date and occupation of the individual from whom the amount is received or corporate records of the company, as described above.

These records are not submitted to FINTRAC, but must be maintained by the RED for a period of at least five years and must be in a form that can be easily converted into a paper copy.

compliance regime

Each RED is required to implement a compliance regime⁸, which will be tailored to fit the nature, size and complexity of the operation of the RED, but **must** include the following:

- appointment of compliance officer;
- development and application of compliance policies and procedures;
- an assessment and documentation of risks related to money laundering and terrorist financing;
- on-going training programme; and
- review of compliance policies and procedure to test effectiveness.

penalties for non-compliance

Under the Act, FINTRAC has the authority to examine records and the compliance regime of any RED. Criminal or administrative penalties can be issued against a RED for non-compliance with the Act. Criminal penalties include the following:

non-compliant action	penalty
failure to Report Suspicious Transaction or Terrorist Property Report	up to \$2 million and/or 5 years imprisonment

⁸ See Guideline 4: *Implementation of a Compliance Regime* at www.fintrac-canafe.gc.ca.

non-compliant action	penalty
failure to report LCT	up to \$500,000 for first offence, \$1 million for subsequent offences
failure to meet record keeping requirements	up to \$500,000 and/or 5 years imprisonment
failure to implement compliance regime	up to \$500,000 and/or 5 years imprisonment

As of December 30, 2008, FINTRAC is authorized to issue administrative penalties for non-compliance with the Act including the following:

non-compliant action	penalty
failure to implement compliance regime	up to \$100,000 for each violation
failure to provide review to senior management within 30 days	up to \$100,000 for each violation
failure to meet record keeping requirements, monitor and mitigate risk	up to \$100,000 for each violation

next steps for RED

The reporting and record keeping requirements under the Act are applicable to all REDs as of February 20, 2009. REDs should contact FINTRAC to enroll for access to the FINTRAC electronic reporting system.⁹ REDs should also ensure that internal policies and procedures are in place with respect to implementing a compliance regime and complying with the reporting and record keeping requirements under the Act.

Written by Rosalyn Wallace and George Payne

We would be pleased to answer any questions you may have regarding your obligations under the Act and to assist you with the implementation of policies and procedures to meet these obligations.

⁹ FINTRAC can be contacted at 1.866.346.8722.

For more information, contact any of the lawyers listed below:

Calgary	Michael Thackray QC	403.531.4724	michael.thackray@mcmillan.ca
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a cautionary note

The foregoing provides only an overview. Readers are cautioned against making any decisions based on this material alone. Rather, a qualified lawyer should be consulted. © McMillan LLP 2010.

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