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Real Estate Attorneys: Orange Alert!

You Have Been Enlisted in the Fight Against Terrorism



Robert J. Pomerene is a partner and Chair of the Real Estate Practice Group at Perkins, Smith & Cohen, LLP. He represents clients buying, selling, financing, leasing, managing and developing real estate, including permitting and environmental matters.

Legislative and regulatory responses to the September 11 attacks have imposed upon real estate attorneys and their clients a duty to comply with many of the complex requirements of the U.S. anti-terrorism and anti-money laundering laws that previously had focused only on major money flows and had applied only to financial institutions. Today, real estate attorneys must be aware of ongoing federal developments that may have immediate and potential impacts on their practices, and may alter the real estate industry itself.

PROPERTY AND TRANSACTIONS INVOLVING THOSE DETERMINED TO BE TERRORISTS OR TO HAVE ASSISTED TERRORISM

Executive Order No. 13224 (the "Order"), issued September 23, 2001, directs the Office of Foreign Assets Control of the Department of Treasury ("OFAC") to block the transfer of property owned by foreign persons who have committed, or who pose a significant risk of committing, acts of terrorism against the United States or U.S. nationals, as well as the transfer of property owned by persons that they own or control. The Order further prohibits U.S. citizens and permanent resident aliens, entities organized under U.S. law, or any other person or entity located within the U.S., from participating in transactions involving such "blocked" property. This includes lawyers assisting clients with real estate transactions.

Under the Order and regulations, blocked property in the custody or control of a U.S.

person must be frozen and reported to OFAC. The regulations specify the custodial requirements for various categories of property, including real estate, and provide mechanisms for OFAC to remove a person from the identified persons list, lift a block on a particular asset, or grant a waiver to allow a transaction that would otherwise be blocked to go forward. But in the absence of specific OFAC action, the Order applies.

The legal consequences of failing to comply with the Order include the imposition of substantial criminal and civil sanctions. There are also real risks that a U.S. person participating in a blocked property transaction could end up with its funds or property frozen — for example, if a wire transfer were frozen by the bank because the transferee account stood in the name of an identified person.

Real estate lawyers must review OFAC's specially designated nationals and blocked persons list to assure that no payer/transferor or recipient/transferee is on the list, making that person's assets subject to freezing. The list is lengthy and changing, but is regularly updated and available at <http://www.treas.gov/offices/eotffc/ofac/sdn/index.html>.

ANTI-MONEY LAUNDERING PROGRAMS

Section 352(a) of the USA Patriot Act amended the federal Bank Secrecy Act ("BSA") to require every non-exempt "financial institution" to devise and implement a formal anti-money laundering program ("AML"). The required

By Robert J. Pomerene

program must include (i) the development of internal policies, procedures, and controls; (ii) the designation of a compliance officer; (iii) an ongoing employee training program; and (iv) an independent audit function to test programs.

The definition of a "financial institution" under the BSA includes "persons involved in real estate closings and settlements" ("PIIRECAS"). This may include lenders, investors, conveyancing attorneys, title and escrow companies, brokers, appraisers and others.

The Financial Crimes Enforcement Network in the Department of Treasury ("FinCEN") created and has maintained exemptions for PIIRECAS, but in April 2003, published an advance notice of proposed rulemaking requesting comments on how the new AMLP requirements of the BSA might and should affect PIIRECAS. Many comments were received, in most cases asserting that PIIRECAS should be exempt from the AMLP requirements. FinCEN has taken no action since the comment period ended in June 2003, and is not predicting if or

when it will pursue this line of regulation.

For the moment, PIIRECAS do not have to adopt formal AMLPs, but that could change at any time if FinCEN determines to take action. Developments may be tracked by visiting FinCEN's website at <http://www.fincen.gov/>.

CUSTOMER IDENTIFICATION PROGRAMS

Section 326 of the USA Patriot Act created a new section in the BSA requiring financial institutions to implement formal customer identification programs ("CIPs") for customers opening accounts or receiving loans. To date, the CIP requirement does not apply directly to PIIRECAS, but the lenders whom attorneys represent must have CIPs in place. This requires the lenders' closing attorneys to ensure compliance with the CIP requirement.

The practice of real estate law after 9/11 is different, and for the lawyers, vigilance is the key. Know who you are dealing with on both sides of the transaction and vet that data against OFAC's master list. ■