



Fall | 22



# INTERNATIONAL LAWYERS NETWORK



**FOGLER RUBINOFF LLP**

**BUYING AND SELLING REAL ESTATE IN CANADA - ONTARIO**

**ILN REAL ESTATE GROUP**



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## KEY FACTS OF REAL ESTATE ACQUISITIONS UNDER CANADIAN (ONTARIO) LAW

### INTRODUCTION

Canada, a bijural country, utilizes both common and civil law. Except for Québec, a civil law jurisdiction, the common law operates in all remaining provinces and territories. Real estate transactions conducted in Ontario are governed by laws and rules that are specific to the province. This requires buyers and sellers to remain considerate of the Province's particularities when transacting. This guide will provide a brief overview of important considerations when buying or selling property in Ontario.

#### **I. PURCHASE AND SALE AGREEMENT**

All real estate sales in Ontario require a formal written contract between the buyer and seller in order to comply with the *Statute of Frauds* and must contain the elements of a binding contract including offer, acceptance, consideration, and the meeting of the minds. The purchase agreement outlines all the obligations, responsibilities, and procedures in accordance with contract law. It also must accurately identify and describe the real property being purchased and usually includes both the municipal address and the legal description.

Buyers and sellers are typically bound to certain terms and conditions upon agreeing to make the purchase. For instance, a buyer who makes an offer cannot then revoke it until a specified period of time has elapsed. Within that time period the seller can accept, reject, or make a counteroffer. If no counteroffer is made, and the seller accepts the buyer's offer, the offer becomes a legally binding agreement. A deposit is security for the performance of the buyer's obligations and is usually held in the seller's brokerage's or lawyer's trust account. It is not a limitation on damages in the case of a default by the buyer unless expressly stated as

so in the purchase agreement. On closing, the deposit is credited to the buyer as partial payment of the purchase price.

The agreement of purchase and sale may contain conditions in favour of the buyer and/or seller. For example, a buyer may have a defined period of time in which to arrange suitable financing, conduct due diligence of the property and to be satisfied with their investigations of the property. If so satisfied, the buyer may waive their conditions and the agreement would then be legally binding. If the conditions are not waived, the agreement may terminate, and any deposits paid returned to the buyer in accordance with the terms of the agreement.

The agreement of purchase and sale may contain a clause on the right to assign the contract to a third party. If the agreement is silent on the right to assign, then under contract law, either party's "benefits" can be assigned without the other party's consent, but not their "burdens." The buyer may need flexibility for tax planning, liability reasons or compliance with the *Planning Act* and so if the need to assign the agreement is important, it should be included as a term to the purchase agreement.

The Ontario Real Estate Association ("**OREA**") is most commonly known for providing the standard forms for the purchase, sale, and leasing of residential and commercial properties. Each local real estate board within Ontario has adopted the standard OREA forms which may be used for residential and commercial real estate transactions. While these forms may be typically used, especially in a residential transaction, they are not mandatory and other forms of agreements and sales may be drafted. The standard forms may also be easily amended by adding a schedule



with further clauses that are tailored to the particular transaction. The type of property being purchased also needs consideration such as freehold, leasehold or condominium. Great care must be undertaken when drafting the purchase agreement to accommodate local requirements in addition to the needs of the party the lawyer is representing.

### **Commercial**

Many similar principles apply to a commercial real estate transaction as to a residential real estate transaction, although the dollar figures are usually larger. Additional considerations are required by the nature of the property, such as tenants and their leases, service contracts and employment contracts of salaried workers, future revenues from the property and future development plans for the property.

The commercial buyer normally requests in the purchase agreement that pertinent due diligence materials be provided by the seller such as realty tax records and appeals, environmental reports, surveys, building engineering reports, copies of all tenant files including leases, maintenance contracts, development files, etc. so that it can evaluate the property, its financial feasibility and intended use. The commercial buyer may need to evaluate cost sharing arrangements, easements, zoning, and environmental issues. The due diligence conditions and other conditions, if any, and timing of same are negotiated with the seller and must be detailed in the purchase agreement. The buyer's lender may also have due diligence requirements, such as an appraisal and satisfactory environment reports. The buyer should ensure these are met prior to any waiver of conditions. Closing documents that will be required and if the seller or buyer are responsible for drafting same are also listed in the purchase agreement.

Since commercial properties come in a variety of forms such as vacant land, commercial, retail, industrial, mineral, and agricultural property, tailoring the transaction to satisfy the buyer and seller, based on the type of business that was being conducted on the property or the buyer's intended use of the property, is an integral part of the purchase agreement.

### **II. BROKERS AND AGENTS**

Real estate agents and real estate brokers are governed by the *Real Estate and Business Brokers Act, 2002* (Ontario) and its regulations. In Ontario, a real estate agent will have obtained the minimum mandated education, have passed a set of tests required by OREA, and be registered with RECO. To become a broker, in addition to the requirements to become an agent, an individual will have completed the Real Estate Broker Program and have been registered as a salesperson for at least 24 months. It is not mandatory to use a real estate agent or broker on a transaction.

Listing a property in Ontario is making it known to potential buyers that the seller is looking for offers. The listing agreement is a contract between a seller and a real estate agent or brokerage. The agreement will specify a time period in which the brokerage will have exclusive access to list the property - usually 90 days. The price, while being stated on the agreement, will only be an estimate. The commission, often a percentage of the sale price to be given to the brokerage for its services, is also listed in the agreement and is often paid by the seller. If the buyer and seller have separate agents, the commission is typically split between the agents as may be set out in the agreement of purchase and sale or the listing agreement. Additionally, if the brokerage intends on collecting a flat fee or a finder's fee, this must be stated in the listing agreement. A *holdover clause* is a clause that sometimes allows a brokerage to collect its



commission after the expiry of its listing period if the brokerage introduced a buyer to a seller and such a clause can be stipulated in a listing agreement.

### III. BUYER'S INSPECTION

#### **Residential**

When purchasing a home or commercial property the seller is required to disclose some, but not all, physical defects. Patent defects are defects that can be easily detected through reasonable inspection and ordinary vigilance. If a buyer fails to detect a patent defect, '*caveat emptor*' - buyer beware prevails. Conversely, latent defects are defects that are not detectable through reasonable investigation. In Ontario, sellers are only liable for not disclosing latent defect if the property they sold is later found to make (1), the property unfit for habitation or poses future danger and (2) if the repair would be so expensive that it would severely reduce the property value. Failure by the seller to disclose latent defects when the aforementioned criteria are met may constitute fraud.

The buyer's lawyer will examine title to the property for items such as mortgages (which are to be paid out by the seller or assumed by the buyer if agreed-upon in the purchase agreement), restrictive covenants and easements. The buyer's lawyer may also determine whether there are government work orders or deficiency notices against the property, confirm if the present use as specified may be lawfully continued and if there are any arrears of realty tax or utilities that may form a lien. The buyer will also confirm if fire insurance can be obtained for the property. Any issues arising from title and off-title searches are called requisitions and are submitted to the seller's lawyer in a requisition letter by the requisition date as stipulated in the purchase agreement.

Most acquisition transactions are financed with a lender. The buyer will typically obtain a loan from a bank or other lender and agree to register a charge or mortgage in favour of the lender against the property on closing. If the purchase agreement contains a condition for the buyer to arrange financing during the due diligence condition period, the buyer will be responsible to ensure all terms of the lender's conditions, such as an adequate appraisal, are met prior to the waiver date.

In a heated real estate market, a buyer may submit an unconditional offer to the seller to gain an advantage over other prospective buyers. However, the buyer should be aware of the risks, including potential damages if the buyer cannot complete the transaction on closing, of such an offer as the offer becomes a binding contract if accepted by the seller.

#### **Commercial**

A buyer of a commercial property will conduct searches regarding the physical integrity of the building and soil, legal searches relating to title, executions, zoning and work orders, property tax and utility arrears, reviews of surveys (if available), similar to residential transactions. The buyer will evaluate the pertinent due diligence materials provided by the seller as aforementioned. The commercial buyer should assess all leases and related tenant files, and do off-title searches which may comprise of assessing zoning and work orders, development and cost sharing agreements, Phase 1 and 2 environmental reports, and fire and health department documents, etc. In other words, a buyer has the additional responsibility of ensuring the commercial feasibility of the property.

For a leased property, a tenant acknowledgment, also known as an estoppel certificate, is routinely obtained from the commercial tenants prior to closing. These are



not usually obtained for an apartment building as the rental income is usually less significant and parties do not want to disturb the residential tenants. The tenant acknowledgement confirms the material facts about the lease, including, but not limited to, any outstanding landlord work, arrears of rent, rent amounts (including additional rent), square footage, the existence of any amendments to the lease, the lease term, expiry date, renewal rights, escalations in rent, deposits, prepaid amounts and that there are no disputes or rights of set off, or if there are, details of such claims. The tenant acknowledgement is important as it confirms the lease information but may limit the potential for disputes post-closing with the buyer as the tenant will be estopped from later asserting a different interpretation of the lease terms. It is important for the buyer and seller to assess and determine what the consequence will be if the seller is unable to provide the estoppel certificates, or if the certificates materially differ from the leases and disclosures made by the seller. Examples may include termination of the transaction without either party being liable for damages, an abatement of the purchase price or a temporary hold-back.

Since commercial properties come in a variety of forms, it is prudent to hire professionals such as engineers, planners, appraisers, and surveyors to assist in the transaction who have expertise in the type of property being sold or purchased, and to determine if the intended future use of the property is allowed. In some instances, the professional may have to contact various third parties, such as utility providers, conservation authority, fire department, building department, and municipal zoning departments to determine if encumbrances that are not registered on title exist or if historical environmental violations exist. The carriage of business on the property warrants a

higher level of scrutiny for commercial real estate transactions than for residential transaction.

#### IV. HOLDING TITLE

There are several ways in which title to a property can be held. Consideration should be given to the *Planning Act*, liability, and tax planning. A buyer should consult with its counsel and tax advisors prior to determining how title will be held.

When multiple parties are registered owners on title, the ownership can be as "joint tenants" or "tenants in common." Joint tenancy is used when the owners want that if one of them dies, the survivor(s) become the owner(s) by right of survivorship. Joint tenancy is frequently used by spouses for their matrimonial home. Tenancy in common means each owner owns a percentage of the registered title. If one owner dies, that owner's share is then an asset of the deceased owner's estate and may eventually be transferred to the heirs of the estate in accordance with the deceased's will or intestate laws of their jurisdiction.

Individuals contracting regarding property must be 18 years old, not be incapable, and not be an undischarged bankrupt. If the party does not have such capacity, legal representatives such as estate trustees, attorneys under power of attorney, the Public Guardian and Trustee, the Office of the Children's Lawyer and others may be required to be a part of the transaction.

Corporations must be authorized by resolution of its directors and, if required, shareholders. The purchase agreement and closing documents must accurately set out the names of offices of the signing officers.

Real property in Ontario must be held by a legal person or corporation. Partnerships are not a legal person and therefore cannot hold registered title. Limited liability partnerships



are formed under the *Limited Partnerships Act*. In limited partnerships, the only entity legally capable of holding title to the real property is the general partner. Alternatively, partnerships can use a nominee, as discussed below.

A nominee or trustee, usually a corporation, may hold registered title to a property on behalf of a beneficial owner. A nominee agreement or declaration of trust would stipulate the terms on which the nominee or trustee holds the property. Nominee companies offer flexibility when there are multiple beneficial owners of real estate as it allows for a single legal title holder and, for example, new joint venturers can acquire an interest in the nominee without having to register changes at the land registry office. This is also sometimes used for privacy reasons.

Starting from May 6, 2017, it has been mandatory for most buyers to fill out an information form disclosing beneficial owners and certain other information in connection with the purchase of residential and agricultural properties. The completed form is submitted electronically to the Minister of Finance and is not made public.

In both residential and commercial transactions, title insurance is a contract with a title insurer that may protect the buyer and mortgagee from possible financial losses such as:

- title to the estate or interest insured being held other than as shown in the policy;
- any title defect and charge, lien, or encumbrance on the title, including defects that may have been disclosed by an up-to-date survey;
- unmarketability of title;
- certain types of fraud; and

- lack of a right of access to and from the land.

Separate owner and lender policies are available. Owner policies are generally a one-time purchase and protects a buyer for as long as they, or their heirs, hold title to the property. Similarly, a lender policy is usually a one-time purchase and effective while the mortgage loan is outstanding. An owner is not covered by a lender's policy as only the mortgagee's interest is insured. Title insurance can be beneficial in that it allows buyers and lenders to "insurer over" selected problems and may reduce legal fees as certain searches may be waived by the title insurer.

It is imperative that the buyer's lawyer discuss the benefits and limitations of a title insurance policy with their client, including, but not limited to, whether the buyer has an knowledge of a title defect, their intended future use of the property and the usefulness of a current survey of the property.

## **V. RECORDING REAL ESTATE DOCUMENTS**

In Ontario, the Land Titles system has replaced the old Registry System, although approximately 30,000 properties have not yet been converted to Land Titles. The Land Title system is an electronic registry housing all private property ownership information in Ontario. It contain official records of title, deed, mortgage, and other land documents. Under the Land Titles system, search results are certified by the government, with no requirement to look any further into prior registrations of the property, with certain exceptions. The Land Titles system provides a statement of title. Each separately owned piece of land is called a "parcel" and each parcel has an assigned number or a "PIN".

On closing, the transfer of the property is usually registered electronically by the buyer's



lawyer, along with any related instruments such as a mortgage.

#### **VI. THE PLANNING ACT**

The purpose of the *Planning Act* is to regulate how land can be developed and used. Subdivisions are used to divide one large parcel of land into two or more smaller parcels for further development. Careful consideration must be given to the *Planning Act* in any conveyance as a violation can be fatal in that that no interest in land is created or passed. S. 50 of the *Planning Act* pertains to the subdivision of land and prohibits an owner from the sale, transfer, or mortgage of a property if they also retain an interest in the abutting lands, unless certain exemptions to the basic prohibition are met. A buyer's lawyer must search the chain of title and adjoining properties to ensure the owner does not own abutting lands unless an exemption under the *Planning Act* applies.

An important amendment was introduced with S.50(22) of the *Planning Act* in that there was an inclusion in the transfer document of optional statements by the seller and their solicitor and by the buyer's solicitor regarding compliance with the *Planning Act*. If these statements are completed on the transfer, any prior contraventions of the subdivision control provisions of the *Planning Act*, which otherwise would have voided the interest in land, are deemed to be no longer and never to have had this effect; in essence the violation is "cured." The requirement for *Planning Act* statements ought to be included as a required term in the agreement of purchase and sale as otherwise the statements are not compulsory.

#### **VII. CONSTRUCTION LIENS AND WRITS**

Construction Liens are governed by the *Construction Act*. When work is performed or materials are supplied to the property, the party doing so, which can include contractors

and sub-contractors can place a construction lien on title against the property if they are not paid. A construction lien acts as an encumbrance to the title, giving aggrieved parties a right to be paid and a right to sue under the *Construction Act*. The buyer of the property may be liable to pay if the lien is not removed from title upon transfer.

#### **VIII. WRITS OF EXECUTION**

An execution search is automatically conducted against the vendor by the electronic registration system prior to the registration of a transfer. In a lawsuit, the successful party is awarded a judgement in its favour against the other party. The successful party can then obtain a writ to be filed against the unsuccessful party in any district in which the other party owns property pursuant to the Execution Act. The writ of execution allows for the seizure and sale of real property, amongst other rights. Buyers should not close the purchase of lands if the registered owner is subject to a writ of execution, as the property will be noted as being subject to the writ of execution.

#### **IX. THE ONTARIO NEW HOME WARRANTIES PLAN (ONHW) ACT**

Defects in newly build homes are subject to the *Ontario New Home Warranties Plan Act*. The *Act* was implemented to protect new home buyers from defective and faulty construction by the builder. All builders and all new homes have to be registered under the *Act*. Tarion, a crown corporation, is responsible for implementing the *Act* and indemnifying new buyers in case of loss.





## X. HST

The Harmonized Sales Tax ("**HST**") is a 13% tax on the sale of all goods and services across Ontario, with certain exemptions. HST does not apply to used housing (i.e., any residential home where the buyer is not purchasing a new build.) However, HST is payable for the purchase of new homes and substantially renovated homes, where 90% or more of the interior has been renovated and was inhabited for less than one year. Since May 7, 2022, HST is also applicable to all assignments of agreements of purchase and sale for new houses and condominium units and is chargeable by the assignor and payable by an assignee on the portion of the assignment purchase price representing the assignor's profit, over and above what the assignor agreed to pay the vendor but excluding the reimbursement of deposits by the assignee to the assignor.

HST applies to most commercial transactions, subject to some exceptions. The purchase agreement stipulates whether HST is included in the purchase price or not. If the buyer is an HST registrant, the buyer may self-assess, claim input tax credits, and remit any HST owing to the Canada Revenue Agency ("**CRA**") directly. The seller will require an indemnity from the buyer on closing to protect the seller from the buyer's failure to remit the tax. The seller should confirm the buyer's HST registration number with CRA prior to closing.

## XI. RESIDENCY STATUS OF THE SELLER

Residential property that is designated as a primary residence of seller who is not a non-resident of Canada is usually exempt from income taxes with CRA.

Section 116 of the *Income Tax Act* imposes liability on both the seller and buyer during the property transaction. The seller is responsible for potential tax liability for profits earned from

selling the property. This section imposes the same liability on the buyer if a non-resident, as defined in the *Income Tax Act*, fails to remit the tax to CRA.

The buyer is obligated under the *Income Tax Act* to make reasonable inquiry as to the residency of the seller. A statutory declaration from the seller confirming the seller is not a non-resident is obtained on closing and delivered to the buyer. This is usually sufficient to protect the buyer from the tax liability. However, if the seller has signed the documents outside of Canada or provides an address outside of Canada for service, further inquiries must be made, or the buyer may become liable for the tax amount owing. If the buyer has actual notice that the seller is a non-resident, the buyer cannot rely on the statutory declaration.

If the seller is a non-resident, the seller must provide a "certificate of compliance" (CRA form T2062, often referred to as a "compliance certificate or "s. 116 certificate") on closing certifying that all tax has been paid to CRA or security has been given for payment. If the certificate of compliance is not available on the closing date, the buyer's lawyer must withhold in trust from the sale price the maximum amount of the tax liability for which the buyer could be responsible for if the seller failed to pay the tax (currently 25% of the sale price) until receipt of the certificate of compliance is received. In practice, if a large tax amount is owing, the seller may need to use the holdback to pay the tax liability and will apply to CRA for a certificate of compliance. When CRA sends a tax statement/letter to the seller's lawyer or accounting stating that upon its receipt of the unpaid tax it will issue a certificate of compliance, the buyer's lawyer will issue payment to CRA of the unpaid tax from the holdback. The seller's lawyer usually



undertakes to deliver the certificate of compliance upon its receipt of same.

## **XII. CLOSING COSTS**

In addition to legal fees and disbursements and title insurance policy premiums paid by the buyer, purchase transactions in Ontario are subject to land transfer taxes as set out below. The seller is typically responsible for their own legal fees and the agent/brokerage commission, if applicable.

### **Land Transfer Tax**

A buyer in Ontario is required to pay a land transfer tax on the registration of any transfer/deed. For commercial properties, the tax is currently calculated at the following rates:

- one-half of 1% on the first \$55,000 of the purchase price;
- 1% on the balance of the purchase price up to and including \$250,000;
- 1.5% on the balance of the purchase price up to and including \$400,000; and
- 2% on the balance of the purchase price at \$400,001 and above.

For residential properties, the tax is calculated at the same rates as for commercial properties, except where the land contains one or two single-family dwellings, and the property is valued at more than \$2,000,000. For such transactions, the 2% tax rate only applies from \$400,001 up to and including \$2,000,000, and a 2.5% tax rate applies to the balance of the purchase price for the property.

In the City of Toronto, a municipal land transfer tax is also due on the registration of a transfer/deed in addition to the provincial land transfer tax. This municipal land transfer tax is calculated as follows:

- for properties containing at least one but no more than two single-family residences, one-half of 1% on the first \$55,000 of the purchase price, 1% on the balance of the purchase price up to and including \$250,000, 1.5% on the balance of the purchase price up to and including \$400,000, 2% on the balance of the purchase price up to and including \$2,000,000, and 2.5% on the balance of the purchase price at \$2,000,001 and above; and
- for all other properties, one-half of 1% on the first \$55,000 of the purchase price, 1% of the balance of the purchase price up to and including \$250,000, 1.5% of the purchase price up to and including \$400,000, and 2% on the balance of the purchase price at \$400,001 and above.

First-time homebuyers (buyers that have not owned real estate anywhere else in the world) may be eligible for a refund of all or part of the tax, up to a limit. Certain transfers, such as between spouses for no consideration, may be exempt from the tax.

### **Non-Resident Speculation Tax**

Effective April 21, 2017, and recently changed on October 25, 2022, a non-resident speculation tax (NRST) of 25% has been imposed on the purchase or acquisition of an interest in a residential property located in the Province of Ontario by an individual or corporation controlled by a person who is not a citizen or permanent resident of Canada or by foreign corporations and taxable trustees. The NRST is owed in addition to the land transfer tax in Ontario and Toronto, if applicable, and applies to the value of the consideration for a transfer of residential property. The transfer contains statements identifying whether the transfer is subject to the NRST and applicable



explanations.

### **XIII. CLOSING DOCUMENTS**

Some examples of commonly used documents on the closing of the residential transaction are:

#### **1. Transfer/deed of land**

This document transfers ownership of the real property to the buyer, lists the consideration paid and contains the land transfer tax affidavit completed by the buyer. If the seller is an individual, the transfer must contain *Family Law Act* statements, which are designed to protect spousal rights of the matrimonial home. If a party is selling the matrimonial home and the spouse is not listed on title, the non-titled spouse must give consent to the transaction. *Planning Act* optional statements may also be included in the transfer. The buyer will advise the seller how it is taking title.

#### **2. Statement of adjustments**

The statement of adjustment is prepared by the seller for the buyer, and calculates the amount of money the buyer owes the seller on the closing date and will show the purchase price due to the seller and credits for any deposits already paid by the buyer. It should include an adjustment all ongoing expenses and revenues, such as property taxes, rents and damage deposits from tenants, condominium strata fees, etc., that are due or paid by the seller prior to closing. It includes all costs up to the day before closing for the seller, and the day of closing for the buyer. An undertaking from the buyer and seller to readjust the statement of adjustments after closing for any errors discovered post-closing or for a

recalculation of realty taxes once the final tax bill is issued post-closing is commonly included in the closing documents.

- 3.** Document Registration Agreement ("DRA") – To accommodate electronic registration, the DRA outlines the terms of escrow under which the transaction is completed, including the transfer of funds and registration of documents.
- 4.** bill of sale – to be delivered when chattels are being transferred to the buyer along with buildings and land;
- 5.** vendor take-back mortgage, if applicable;
- 6.** vendor direction as to funds;
- 7.** vendor declaration of possession;
- 8.** buyer's direction re: title;
- 9.** vendor's certificate or statutory declaration pursuant to s. 116 of the *Income Tax Act*;

Commercial transactions would also use the above-noted documents, but may also require the following documents, and other documents specific to the terms of the transaction:

- 10.** assignment and assumption of leases;
- 11.** notice and direction to tenants;
- 12.** assignment and assumption of warranties and guarantees;
- 13.** assignment and assumption of contracts;
- 14.** mortgage assumption agreement, if applicable;
- 15.** tenant estoppel certificates (pre-closing), if applicable;
- 16.** general conveyance;



17. purchaser's covenant to self-assess, pay HST and indemnify vendor.

**XIV. ANNUAL PROPERTY COSTS**

Property owners in Ontario can expect to incur the following annual costs:

1. Realty taxes – Each property's value is assessed for municipal tax purposes under the *Assessment Act* and the local municipality determines the tax rates to be paid based on the assessed value. Realty taxes can be comprised of local and regional amounts, school amounts, and special assessments.
2. Insurance - Not mandatory but is typically obtained to cover property damage and liability. If the property has a mortgage, the lender will require insurance as an ongoing condition of the loan.
3. Strata fees if a condominium; and

4. Operating expenses, such as utilities, maintenance, and repairs.

**XV. PROHIBITION ON THE PURCHASE OF RESIDENTIAL PROPERTY BY NON-CANADIANS ACT**

Introduced in the 2022 federal budget, this Act was passed by the Parliament of Canada on June 23, 2022, and will come into effect on January 1, 2023. This Act prohibits non-Canadians (including individuals and individuals using corporations) from purchasing residential property anywhere in Canada, for a period of 2 years, with certain exceptions for persons who enjoy protected status or are married to a Canadian. Contraventions of this Act may result in the residential property being sold by court order, and/or imposing a fine of up to \$10,000 on offenders and those that counsel, induce, aid or abets in the contravention of this Act. At this point, the government is still finalizing the details of this legislation and it is expected that there will be additional regulations under this Act to provide further details of this legislation.