



May 25, 2018

Director General
Financial Systems Division
Financial Sector Policy Branch
Department of Finance Canada
James Michael Flaherty Building
90 Elgin Street
Ottawa ON K1A 0G5

RE: *Reviewing Canada's Anti-Money Laundering and Terrorist Financing Regime*

By Email: fin.fc-cf.fin@canada.ca

Dear Sir or Madam:

The Canadian Real Estate Association (CREA) is one of Canada's largest single-industry trade associations. Our membership includes over 125,000 real estate brokers and sales representatives, working through over 90 real estate Boards and Associations across Canada.

CREA welcomes the opportunity to provide its views on the Department of Finance Canada's *Reviewing Canada's Anti-Money Laundering and Terrorist Financing Regime* consultation paper (2018 Consultation Paper).

CREA consents to the disclosure of these comments in their entirety.

1. Introduction

REALTORS® continue to be frustrated with the current application of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* (PCMLTFA).

Many find the Act, its regulations, and Financial Transaction and Reports Analysis Centre of Canada (FINTRAC) guidance to be opaque, vague and confusing. REALTORS® are discouraged with the instability of Canada's anti-money laundering and terrorist financing (AML/TF) regime due to the continuous changes applied to the law and related guidance on a yearly basis. REALTORS® are required to comply with complex requirements while obvious loopholes in the law are not addressed. They find FINTRAC's assertions that it is "sympathetic"¹ to their compliance expenses to be meaningless platitudes.

REALTORS® recognize that, given the size, importance and stability of the real estate market, money launderers and terrorists may attempt to funnel their illicit funds in Canada. Further,

¹ Luc Beaudry, Assistant Director, Collaboration, Development and Research Sector, Financial Transactions and Reports Analysis Centre of Canada, House of Commons Standing Committee on Finance, February 14, 2018.



REALTORS® understand that given the relationships they have with their clients, they have a role to play in helping to detect and report money laundering and terrorist financing. That said, they ask that the obligations placed on them by Canada's AML/TF regime be representative of their business, realistic, clear, and efficient in light of the compliance costs.

2. Compliance Burden

Before examining the specific proposals in the 2018 Consultation Paper, it is worth considering REALTORS®' AML/TF compliance regime costs, which are significant. CREA has received feedback from its members that compliance costs per year for small brokerages can be approximately \$10,000 per year (expenses include professional services, time and effort) while large brokerages can spend over \$100,000 per year in AML/TF compliance.

Compliance costs are particularly problematic in the real estate sector since many REALTORS® operate small businesses. This is in contrast to other reporting entities covered by the Act, such as banks and casinos, who have the resources to retain a dedicated AML/TF compliance team. Despite the obvious differences between REALTORS® and other entities, the Act imposes many of the same obligations across different sectors. For example, REALTORS®, like banks, are expected to:

- Have a compliance program in place, which includes:
 - identifying a compliance officer,
 - writing and maintaining AML/TF compliance policies and procedures,
 - conducting risk assessments of their business activities and relationships,
 - developing and maintaining a written ongoing compliance training program, and
 - conducting an effectiveness review to test their compliance program at least every two years.
- Ascertain the identity of their clients.
- Conduct ongoing monitoring of their business relationships.
- Make third party determinations and keep records regarding third parties.
- Report suspicious and attempted suspicious transactions.
- Report large cash transactions.
- As well as many other obligations.

As noted in the 2018 Consultation Paper, REALTORS®, unlike banks, are not currently required to determine a client's beneficial ownership structure or whether the client is a politically exposed person (PEP) or Head of International Organization (HIO). The 2018 Consultation Paper proposes to eliminate this distinction - thus further levelling the compliance burden between entities in the two sectors despite the inequality of resources



between them.

It would be some consolation if the 2018 Consultation Paper clearly analyzed how the benefit of imposing these obligations justified the compliance cost to REALTORS®. However, no such analysis is included. This raises a question: why is that?

The answer appears to be because no effort has been made to determine (or at least articulate) the compliance costs. Indeed, as acknowledged by FINTRAC to the House of Commons Standing Committee on Finance on February 14, 2018, FINTRAC does not aggregate compliance costs for the private sector.²

The 2018 Consultation Paper notes that any review of the Act “must strive to minimize the compliance burden and cost associated with the measures required to detect and deter money laundering and terrorist financing activities.”³ The imposition of significant, new and time-consuming obligations on REALTORS® renders these words meaningless.

The importance of weighing compliance costs was recognized in the last five-year Parliamentary review of the Act conducted by the Standing Senate Committee on Banking, Trade and Commerce in 2012-2013 (2013 Parliamentary Report). In its report, the Committee noted:

The proper balance must exist between providing useful and adequate information to FINTRAC on one hand, and ensuring that the compliance burden on reporting entities is not onerous in terms of time, money or other resources on the other hand...

Consequently, the Committee recommends that:

9. the federal government and the Financial Transactions and Reports Analysis Centre of Canada, in consultation with entities required to report under the Proceeds of Crime (Money Laundering) and Terrorist Financing Act and its regulations, annually review ways in which:

- the compliance burden on reporting entities could be minimized; and*
- the utility of reports submitted by reporting entities could be optimized.⁴*

Yet here we are, five years later, with more demands being placed on REALTORS® and no evidence that the compliance burden has been considered, weighed or minimized at all. It is hardly surprising that REALTORS® are frustrated.

² Luc Beaudry, Assistant Director, Collaboration, Development and Research Sector, Financial Transactions and Reports Analysis Centre of Canada, House of Commons Standing Committee on Finance, February 14, 2018.

³ Consultation Paper, page 16.

⁴ *Follow the Money: Is Canada Making Progress in Combatting Money Laundering and Terrorist Financing? Not Really*, Report of the Standing Senate Committee on Banking, Trade and Commerce, March 2013, pages 14-15.



3. Beneficial Ownership and PEP/HIO

Given the challenges with the current regime, it should come as no surprise that CREA is concerned that the proposals to extend beneficial ownership and PEP/HIO requirements to REALTORS® will further aggravate and exasperate the existing situation.

For the reasons mentioned herein, CREA strongly recommends that they not be adopted.

CREA's concerns with REALTORS® being obligated to determine beneficial ownership and PEPs are not limited to the significant new compliance costs in time, money and energy that CREA's members would be forced to bear.

The challenges with obtaining beneficial ownership information have been noted by reporting entities currently required to gather such information and several witnesses in the ongoing Parliamentary Review of the Act.⁵ Another indication of the challenge is the fact that FINTRAC's website has 34 policy interpretations⁶ explaining how to determine beneficial ownership under the Act (keep in mind that policy interpretations are in *addition* to FINTRAC's guidance on beneficial ownership⁷). This is not a straightforward obligation. Taken together, this evidence highlights how difficult it will be for REALTORS® to determine this information without significant assistance.

If determining beneficial ownership merely required looking up the information in a freely accessible public database, accessible by all reporting entities, CREA would have fewer concerns with the proposals. Unfortunately, no such database currently exists in Canada.

Similarly, to CREA's knowledge, there is no freely available database in Canada of PEPs/HIOs. While CREA understands that PEP/HIO databases are commercially available, mandating that REALTORS® make PEP/HIO determinations but leaving it to them to purchase access to such

⁵ Investment Industry Association of Canada, *Re: Statutory Review of the Proceeds of Crime (Money Laundering) and Terrorist Financing Act* dated March 27, 2018: "At present, IIAC member firms devote significant resources to customer due diligence, including beneficial ownership research. In some cases, multiple firms conduct due diligence on the same entities. For more sophisticated corporations, institutions and trust relationships, it is a complicated and time-consuming process ..." Ms. Sheila MacPherson (President, Federation of Law Societies of Canada), House of Commons Standing Committee on Finance, March 21, 2018: "As I've already mentioned, the proposed amendments to the federation's model rules would add a requirement for legal counsel to obtain and verify information on the beneficial owners of organizations and the beneficiaries of trusts...we urge the government to move forward quickly with legislative amendments that would not only require organizations and trusts to record beneficial ownership information and to provide it to the government, but also to establish a publicly accessible registry of that information for lawyers across the country to use." Ms. Mora Johnson (Barrister-Solicitor, As an Individual), House of Commons Standing Committee on Finance, March 21, 2018: "Third, all designated non-financial businesses and professions should be required to inquire about beneficial ownership of corporations, entities, and arrangements as part of their due diligence obligations, but only when processing large cash transactions. Obviously this would be a huge burden on businesses, but not if there's a public beneficial ownership registry that's convenient and contains all the information. That would make it a very simple task."

⁶ <http://www.fintrac-canafe.gc.ca/guidance-directives/overview-apercu/FINS/2-eng.asp?s=7>

⁷ <http://www.fintrac-canafe.gc.ca/guidance-directives/client-clientele/bor-eng.asp>



databases is not minimizing the compliance burden. If the Government can create freely available databases of terrorist groups and listed persons⁸, why not a database of PEPs/HIOs?

In sum, without easy-to-use and easily accessible databases, CREA fears that imposing these challenging new obligations on REALTORS[®] will lead to confusion and will likely have a demoralizing effect on the sector.

4. Lack of Legislative and Regulatory Stability

It is worth recalling the shifting legislative and regulatory landscape in which new beneficial ownership and PEP/HIO obligations would be introduced.

A review of CANLII⁹ indicates 17 different versions of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, and 12 different version of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Regulations*, have been in force since December 31, 2005. While some of the changes reflect minor or transitory changes, the fact is that the Act changes frequently and REALTORS[®] are struggling to keep up. Further, these statutory and regulatory changes are in addition to the constant guidance changes that FINTRAC makes to its guidance materials. In a little over a year, FINTRAC has revised its website (which resulted in numerous small changes to existing guidance) and published:

- *Operational brief: Indicators of money laundering in financial transactions related to real estate* (Nov 2016)
- *Risk-Based approach workbook Real Estate Sector* (June 2017)
- *Methods to identify individuals and confirm the existence of entities* (June 2017)
- *When to identify individuals and confirm the existence of entities* (June 2017)
- *Compliance program requirements* (Dec 2017)

Significant changes to other FINTRAC guidance are also anticipated in the short term as a result of the work of FINTRAC's *Guidance and Policy Interpretation Working Group*.

Such a constantly changing legal landscape makes it difficult for REALTORS[®] to keep up with their existing obligations, much less the proposed new obligations with respect to beneficial ownership and PEPs/HIOs.

CREA recognizes that Canada is a respected member of the Financial Action Task Force (FATF) and needs to carefully review and analyze recommendations put forward by the FATF's mutual evaluations. Rather than adopting most of the FATF recommendations, CREA supports an approach that is mindful of the Canadian context – including compliance costs.

⁸ Available online at <http://www.osfi-bsif.gc.ca/Eng/fi-if/amlc-clrpc/atf-fat/Pages/default.aspx> and <http://www.publicsafety.gc.ca/cnt/ntnl-scrct/cntr-trrrsm/lstd-ntts/crrnt-lstd-ntts-eng.aspx>.

⁹ <https://www.canlii.org/en/>: The Canadian Legal Institute's online legal database.



As noted in the 2013 Parliamentary Report:

The Committee believes that an approach involving incremental legislative and regulatory changes must end. Consequently, ongoing efforts are needed to ensure that the resources committed to detecting, deterring, investigating and prosecuting money laundering and terrorist financing offences have the best “results” in the least costly, burdensome and intrusive manner. While it is virtually impossible to eliminate the illegal activities that lead to the need to launder money, a continuation of the current incremental approach – which appears to involve changes to fill gaps by adding reporting entities and to meet evolving FATF recommendations that may or may not have relevance for Canada – is not the solution that Canada needs at this time.¹⁰

5. Legislative Gaps

Imposing additional obligations on REALTORS® does nothing to mitigate the money laundering or terrorist financing risks of a real estate purchase and sale that do not involve a REALTOR®. For that reason, CREA is encouraged that the Consultation Paper proposes to expand the types of entities that would be covered by Canada’s AML/TF regime to include mortgage insurers, land registries, title insurance companies and non-federally regulated mortgage lenders. CREA further supports the Government’s attempts to develop constitutionally compliant legislative and regulatory provisions that would subject legal counsel and legal firms to the PCMLTFA.

An obvious gap in the law continues to be ignored. Currently, real estate can be sold directly by individuals. Such transactions are vulnerable as they can be conducted without the transparency and examination required when using a REALTOR®. CREA believes that AML/TF obligations applicable to brokers and sales representatives should be extended to the “for sale by owner” companies who facilitate such transactions. Failure to do so provides money launderers and terrorists with a road map on how to easily launder money in the real estate sector.

6. Easing the Compliance Burden

There are numerous ways that the PCMLTFA, its regulations, and FINTRAC guidance and practices could be amended to ease the compliance burden on REALTORS®, while still maintaining a strong and effective AML/TF regime. For example:

- Recognizing safe but commonly used virtual face-to-face software as a method to ascertain the identity of clients in non-face-to-face situations.
- Clarifying the *Proceeds of Crime (Money Laundering) and Terrorist Financing Regulations* to explicitly state that a “business relationship” is not established until after two purchase or sale real estate transactions within a five-year period. Until

¹⁰ *Follow the Money: Is Canada Making Progress in Combatting Money Laundering and Terrorist Financing? Not Really*, Report of the Standing Senate Committee on Banking, Trade and Commerce, March 2013, pages 14-15.



recently, this was CREA's understanding of the law, which CREA communicated to its members in its template materials after having the materials reviewed by FINTRAC and Finance Canada. FINTRAC even published a policy interpretation consistent with this interpretation.¹¹ However, it has come to CREA's attention that FINTRAC has now adopted a different policy interpretation, one that breaks a purchase or real estate transaction into component parts, and which effectively results in most (if not all) REALTORS® being in a "business relationship" with their clients even for common situations such as a client purchasing and selling a home with the same REALTOR® in a short period. Depending on the facts, a "business relationship" may even be formed within one purchase or sale transaction. The consequence of this interpretation is that REALTORS® may be required to perform ongoing monitoring obligations, such as asking their clients if their occupation has changed, despite no time having elapsed between purchase and sale transactions. Such a result is nonsensical and will only increase REALTORS®' frustration with the law with no additional intelligence being provided to FINTRAC. A possible amendment to the *Proceeds of Crime (Money Laundering) and Terrorist Financing Regulations* to fix this issue is:

- 59.21** A real estate broker or sales representative that is required to ascertain a person's identity or confirm an entity's existence shall
- (a) subject to section 59.22, conduct ongoing monitoring of their business relationship with that person or entity; and
 - (b) keep a record of the measures taken and the information obtained under paragraph (a).
- 59.22** The obligations of a real estate broker or sales representative under paragraph 59.21(a) commence upon the requirement under these Regulations for that real estate broker or sales representative to ascertain the person's identity or confirm the entity's existence in a third proposed purchase or sale of real estate in respect of which the real estate broker or sales representative is acting as agent.

- Modernizing FINTRAC's F2R online suspicious transaction report (STR) portal. Many REALTORS® find the portal confusing and difficult to use. For example, in order to submit a report they are presented with options that are not applicable to their sector.¹² A user-friendly portal that presents REALTORS® with the options that are applicable to their sector, using language they are familiar with, would make the reporting process faster and less intimidating and thereby encourage more STR reports to be submitted.
- Mandating that FINTRAC compile and provide more detailed, standardized, granular

¹¹ PI-6403: "So it has to be "at least the second time the client has conducted a purchase or sale transaction with the brokerage in the past five years.", date answered: 2016-03-14, online at: <http://www.fintrac-canafe.gc.ca/guidance-directives/overview-apercu/FINS/2-eng.asp?s=14>.

¹² For example, under "Transaction, "Night Deposit indicator".



compliance statistics to industry associations. FINTRAC has provided CREA with general compliance statistics based on its assessments of real estate brokerages in the past. However, they have been at a high level or anecdotal. Further, FINTRAC has cautioned that the compliance statistics provided in one year cannot be compared to statistics in the previous year. The statistics FINTRAC provides cannot be used by CREA to promote compliance amongst REALTORS® in any meaningful way. It is in Canada's best interest for FINTRAC to do better. Not only was a similar recommendation made during the last Parliamentary review of the Act¹³, but by compiling better compliance statistics, FINTRAC will have a more sophisticated understanding of compliance deficiencies (for example, whether the problems are localized to one part of the country or systematic). Moreover, by providing better statistics to CREA, FINTRAC can leverage CREA's communications vehicles to deliver targeted compliance messages to a wide audience in the real estate sector.

In sum, with creativity and a willingness to move away from a one-size-fits-all approach, there are tangible ways to ease the compliance burden on REALTORS® without jeopardizing the safety and security of the real estate sector.

7. Conclusion

For the foregoing reasons, CREA recommends that the Government:

- Create legislative stability by limiting further changes to the PCMLTFA, its regulations and FINTRAC guidance to the extent possible.
- Create a level playing field by extending PCMLTFA obligations to “for sale by owner” companies who facilitate real estate transactions without the use of a REALTOR®.
- Not extend PEP/HIO and beneficial ownership obligations to REALTORS® or, in the alternative, only impose such obligations following the implementation of an easily accessible database that REALTORS® can access and use to validate such information.
- Implement the recommendations identified in Section 6 herein to ease the burden

¹³ *Follow the Money: Is Canada Making Progress in Combatting Money Laundering and Terrorist Financing? Not Really*, Report of the Standing Senate Committee on Banking, Trade and Commerce, March 2013, pages 15-16: “FINTRAC should provide reporting entities with feedback and information that educates them about the importance of their contributions and that enhances their role. FINTRAC is well-placed to provide reporting entities with a range of support including sector specific feedback to enhance effectiveness and achieve better “results.” For these reasons, the Committee recommends that: 10. the Financial Transactions and Reports Analysis Centre of Canada provide entities required to report under the Proceeds of Crime (Money Laundering) and Terrorist Financing Act with: - on a quarterly basis and specific to each entity, feedback on the usefulness of its reports; on a quarterly basis and specific to each sector, information about trends in money laundering and terrorist financing activities; and tools, resources and other ongoing support designed to enhance the training of employees of reporting entities in relation to the Proceeds of Crime (Money Laundering) and Terrorist Financing Act and its obligations.”



with complying with Canada's AML/TF regime.

cc: The Honourable Wayne Easter, P.C., M.P, Chair, House of Commons, Standing Committee of Finance