



**CONFUSION MAY CAUSE TIMESHARE COMPANIES
TO VIOLATE ANTI-TERRORISM REGULATIONS:
NEW ARDA PARTNERSHIP CAN HELP AVOID PROBLEMS**

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Multiple regulatory schemes and often conflicting advice regarding compliance with anti-terrorism regulations have caused considerable confusion in the real estate industry, including timeshare companies. This article is written to help clarify the situation and to describe a compliance solution being offered through a new ARDA partnership. Unfortunately, uncertainty about obligations arising from the war on terrorism may result in failure to comply, and subject timeshare companies and their executives to substantial civil and criminal penalties, blocked, frozen or forfeited assets, and the possibility of jail.

In the wake of the September 11 attacks, the government has enlisted private businesses as agents and allies in the war on terrorism. Most Americans are happy to assist in this effort, but overlapping agencies and differing requirements have caused considerable confusion about what it is the government expects us to do.

Since September 11, two significant regulatory actions have been implemented. First, on September 24, 2001, President Bush issued Executive Order 13224 (the "Executive Order"), which prohibits all "US Persons" from engaging in business of any kind with persons or entities designated as terrorists or their associates. Compliance with the Executive Order is overseen by the Treasury Department's Office of Foreign Assets Control ("OFAC"). The terrorist list provided on September 24, 2001, has since been supplemented more than 50 times. In addition, it has been combined with another list of "Specially Designated Nationals (the "SDN List") also supervised by OFAC. (We will refer to these combined lists as the "OFAC List.") The OFAC List now is nearly one hundred pages long and contains several thousand names, aliases and "doing business as" designations. It is updated and revised frequently.

Second, in October 2001, the Congress passed the USA PATRIOT Act (the "Patriot Act"). Among other things, the Patriot Act created substantial new anti-money laundering obligations on entities identified as "financial institutions" under the Bank Secrecy Act ("BSA"). "Persons involved in real estate closings and settlements" are designated as BSA "financial institutions." There is a problem, however: the BSA does not define what it means by "persons involved in real estate closings and settlements." The Treasury Department (through the Financial Crimes Enforcement Network, or "FinCEN") is working on such regulations through a Notice of Proposed Rulemaking issued on April 10, 2003. Final regulations are not expected for

several months. In the meantime, real estate entities are exempted from the Patriot Act requirements to have full anti-money laundering programs integrated into their businesses.

The problem is that many people in the real estate industry think that the temporary exemption from anti-money laundering program requirements of the Patriot Act also means they are exempted from compliance with the Executive Order and OFAC regulations. This misperception by many businesses has the potential to expose timeshare and other real estate companies to civil, and possibly criminal, sanctions. While it is true that the Department of Treasury has not yet proposed Patriot Act-specific regulations for persons involved in real estate closings, the requirement to check persons involved in real estate transactions against the OFAC List is not a Patriot Act requirement.

Pursuant to the Executive Order and related OFAC regulations, all US Persons, including those associated with timeshare transactions are prohibited from conducting any kind of business with persons or entities on the OFAC List. Failure to comply with OFAC requirements could subject all parties to substantial civil and potentially criminal penalties.

The President's authority to issue executive orders such as 13224 comes not from the Patriot Act, but from the Trading with the Enemy Act and the International Emergency Economic Powers Act, both of which have been in place for many years. OFAC prohibitions are in effect now, and have been since September 2001 and before.

In a recent discussion with a representative of the Chief Counsel's office at OFAC, it was made clear that OFAC expects all real estate entities to run checks against the OFAC List of all persons and entities involved in each real estate transaction, including residential transactions. Although there is no affirmative obligation to run OFAC List checks, OFAC violations are a "strict liability" offense in that knowledge is not an element of a civil OFAC violation. Persons conducting prohibited transactions are subject to significant fines, asset freezes and potential forfeiture of the property involved in the illegal transaction. Criminal violations require an element of knowledge, but that requirement may be satisfied by a finding of "willful blindness," a deliberate failure to check the OFAC List.

As a benefit to its members, ARDA has recently entered into a partnership with KnightGUARDIAN LLC to offer an integrated solution to compliance with the OFAC regulations and other prohibited party transactions. The KnightGUARDIAN solution includes:

- (1) guidance on how to establish appropriate compliance procedures,
- (2) specially designed software that provides for electronic searches of the most current government lists,
- (3) scalable services for compliance program development and due diligence for the full range of ARDA member companies from small start-ups to the largest multi-site, mixed-use branded companies, and
- (4) a case management system that documents compliance and provides a ready response in the event of a government investigation or audit.

Through ARDA, KnightGUARDIAN will offer its solution at a discount to ARDA members. The timeshare industry engages in a large number of transactions each day and therefore faces unique challenges. Name checking to avoid banned transactions is increasingly important in the current regulatory and enforcement regimes. An added complexity to this task is the frequency with which the lists are updated by the government. There are economic advantages to erring on the side of caution.

For further information, contact the authors or Lisa Kuca at KnightGUARDIAN (877) 522-9097; lisa.kuca@knightguardian.com; or visit the KnightGUARDIAN website which is found directly through the ARDA website at: www.arda.org.

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