

# What is Expected of a Real Estate Settlement Attorney Under Executive Order 13224 and the USA Patriot Act?—A Reply to Myers and Rodio

by James M. McCauley, VSB Ethics Counsel

There is no doubt that OFAC interprets Executive Order 13224 (September 21, 2001) to require that persons involved in real estate closings run their clients names through the SDN lists. Nevertheless, nothing in Executive Order 13224 imposes such a requirement, and whether such a requirement is implied is a matter of interpretation and debate. Executive Order 13224 prohibits any transaction or dealing by persons in the United States in property or interests which are “blocked” under the terms of the order. While it is clear that the executive order imposes a general duty for all citizens to avoid transactions involving blocked property, there is nothing in the order that specifies any particular affirmative actions that must be taken to avoid prohibited transactions. Certainly the federal government cannot reasonably expect all citizens or persons in the United States to run the lists containing thousands of names every time a commercial, real estate or other transaction is contemplated. While regulated industries, such as banks and insurance companies, may be expected to implement procedures to detect and avoid transactions with suspected terrorists, the average citizen cannot reasonably be expected to understand or implement such procedures.

Further, notwithstanding OFAC’s aggressive and strict enforcement of Executive Order 13224, the Treasury Department, of which OFAC is a part, temporarily exempted “persons involved in real estate transactions” from the anti-money laundering rules applicable to other “financial institutions.” During and after my article (*Virginia Lawyer Register*, May 2003) was written, Treasury was seeking public comment on how the real estate industry might be affected if similar rules were applied to that industry. Although those rules and regulations were pursuant to the USA Patriot Act rather than Executive Order 13224, it is the federal government, and not

my article, that is to blame for the unnecessary and unfortunate confusion about what anti-money laundering procedures are expected of the real estate settlement industry.

That being said, lawyers and persons who conduct closings without checking the lists run the risk that the OFAC will pursue civil or criminal sanctions for dealing with blocked property or persons suspected of engaging in terrorist activity. If a settlement attorney or agent finds that a party to a transaction is on the list, he or she should not complete the closing and must notify the parties that the transaction cannot be closed. The attorney should withdraw from the engagement pursuant to Rule 1.16. However, until the federal government implements a final rule requiring a settlement attorney or agent to report a “match” on the SDN list to OFAC, an attorney cannot make such a report without violating Rule 1.6. Rule 1.6 permits disclosure of information detrimental or embarrassing to a client only if required by law or court order. Further, the “no tip off” rule applicable to other financial institutions conflicts with a lawyer’s duty under Rule 1.4 to inform the client of matters related to the representation. No such requirement can be implied from Executive Order 13224, and no regulations applicable to persons involved in real estate closings have included a “no tip off” provision.

If the federal government expects lawyers to breach their ethical and fiduciary duties to their clients, the federal government, at the very least, should be clear and explicit in terms of what is required of those who conduct real estate settlements. This, of course, has not happened and that is why there is confusion over the settlement attorney’s duties under Executive Order 13224 and the USA Patriot Act. 