LOOK WHO'S SAR-ING NOW (ALMOST)

FinCEN proposal pulls nonbank lenders under the SAR umbrella

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It's still only a proposal, but look who's next in line to get suspicious activity reporting—the nonbank residential mortgage lenders and originators.

If the proposal is adopted in final form (and most likely it will be), the Bank Secrecy Act regulations will be amended to include residential mortgage lenders and originators within the scope of financial entities that are required to file suspicious activity reports (SARs) with FinCEN. FinCEN is accepting comments on this proposal through Feb. 7, so if you have an opinion about including or not including these groups in the coverage of SAR reporting, get those comment letters submitted. [Read an ABA comment letter on this issue.]

Looking at FinCEN's proposal

The rules of SAR reporting, as proposed, look very much the same as the SAR reporting rules for other financial institutions. A SAR (either a new version or, as rumor has it, a new generic version) would be required for a transaction that:

• Involves funds derived from illegal activity, or that is intended or conducted in order to hide or disguise funds or assets derived from illegal activity.

• Is designed to evade any BSA reporting requirements.

• Has no business or apparent lawful purpose, or is the type of transaction in which the particular customer would not normally be expected to engage, and there is no reasonable explanation for the transaction or

• Facilitates criminal activity.

The SAR must be filed no later than 30 calendar days after the initial detection of the facts that may constitute a basis for the filing. SARs must be kept confidential and must be retained along with supporting documentation for 5 years. There is also a $5,000 minimum amount for reporting. Anything less than that, even if it meets one of the above requirements, would not have to be reported.

The proposal also would mandate that the residential mortgage lenders and originators develop and implement anti-money laundering compliance programs in the same fashion as banks, money services businesses, broker-dealers, mutual funds, etc.

The compliance programs would have to include a designated compliance officer; an on-going training program; independent testing and policies; procedures; and internal controls reasonably designed to prevent money laundering and terrorist financing.

Who the rule would cover—and who it wouldn't

The substance of the rule is not a departure from existing SAR reporting requirements for other groups. The most important element of the proposal is the scope of its coverage.

The proposed rule would apply to "loan or finance companies." However, at this point, the term "loan or finance company" would be limited to residential mortgage lenders and residential mortgage originators. FinCEN wants to approach expansion of the SAR rules to these industries in an incremental fashion. The agency proposes starting with the residential mortgage lenders and originators, as defined.

• A residential mortgage lender would be a person to whom the debt is initially payable on its face, or to whom the obligation is initially assigned at or immediately after settlement.

• A residential mortgage originator is a person that takes a residential mortgage loan application and offers to negotiate terms of the loan for compensation or gain. Individuals who meet these definitions would not be covered, as explained by FinCEN in the proposal. (Employees of loan or finance companies would not be covered, in other words. However, a sole proprietor would be covered.) In a seller-financed residential mortgage transaction, the individual seller would not be covered.

These distinctions may be short-lived, however.

At some future point, FinCEN plans to expand the scope of coverage to the rest of the "loan or finance company" industry. The residential mortgage lender and originator will be the pilot (guinea pig) to see how it works.

Questions raised by FinCEN's proposal

There are some interesting questions that hopefully will be clarified through this public comment process. Among them:

• Who'll check for compliance? Who is going to make sure all these residential mortgage lenders and originators comply with the rules? FinCEN has specifically asked for input on this question from the commenters.

• What's "normal"? If a SAR must be filed for transactions that are not normal for a particular customer, who's to say what is "normal" for a particular customer when there is typically only a single transaction and not an ongoing basis for comparison?

• How can efficacy be measured? Consider how long it has taken, and how much effort it has taken to get SAR reporting to the level and quality where it is today for financial institutions, casinos, securities firms, insurance companies and money services businesses. How does FinCEN plan to get the latest group of widely diverse residential mortgage lenders and originators up and running with the new requirements-and use the experience of the new reporting to make a determination regarding expansion to all loan and finance companies?

Have you sent in your idea for a compliance t-shirt yet?

See Nancy's blog of Dec. 1, "Time for a compliance t-shirt?," for details

About Nancy Derr-Castiglione

“Lucy and Nancy’s Common Sense Compliance” is blogged by both Lucy Griffin and Nancy Derr-Castiglione, both ABA Banking Journal contributing editors on compliance.

Nancy, a Certified Regulatory Compliance Manager, is owner of D-C Compliance Services, an independent regulatory compliance consulting services business that has provided expertise in compliance training, monitoring, risk assessment, and policies and procedures to financial institutions since 2002.

Previously, Nancy held compliance positions with Bank One Corporation and with United Banks of Colorado.

In addition to serving as a Contributing Editor of ABA Banking Journal, Nancy has served on the ABA Compliance Executive Committee; National and Graduate Compliance Schools board; conference planning committees, and the Editorial Advisory Board for the ABA Bank Compliance magazine. She can be reached at nancycastiglione@comcast.net

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