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Proposed Suspicious Activity Report Requirements for Non-bank Residential Mortgage Lenders and Originators

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Proposed Regulation

The Treasury Department's Financial Crimes Enforcement Network (FinCEN) is in the process of establishing the requirement for Suspicious Activity Report (SAR) filings for non-bank residential mortgage lenders and originators.Currently under the Bank Secrecy Act (BSA), only banks and financial institutions are required to file SARs.

In December 2010, FinCEN published a Notice of Proposed Rulemaking in the Federal Register with the intent to extend the SAR requirement to include non-bank residential mortgage lenders and originators. In the past, the Mortgage Bankers Association (MBA) has worked to this end in the development of a Suspicious Mortgage Activity Report, or SMARt Form, for non-bank mortgage lenders and other mortgage professionals not currently covered under the BSA's financial institution SAR filing requirement.

Now however, FinCEN is seeking to bring the reporting requirement to the non-bank mortgage lenders and originators through the existing BSA SAR filing programs and once again the MBA has been providing assistance in the ultimate shaping of the final rule to best accommodate mortgage professionals.

The inclusion of non-bank residential mortgage lenders and originators in the SAR requirement has arisen from review of FinCEN's suspected mortgage fraud reports which have indicated that many of the SAR filings concerning mortgage related fraud were initiated by non-bank mortgage lenders and originators.

(http://www.fincen.gov/news_room/nr/html/20090715.html).

The notice of proposed rulemaking in the Federal Register explains "[r]esidential mortgage lenders and originators (e.g., independent mortgage loan companies and mortgage brokers) are primary

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providers of mortgage finance-in most cases dealing directly with the consumer-and are in a unique position to assess and identify money laundering risks and fraud while directly assisting consumers with their financial needs and protecting them from the abuses of financial crime." (75 CFR 76677)

Proposed Applicability

The proposed rule incorporated many of the same guidelines as the current SAR filing requirements for other financial institutions, however much of the BSA anti-money laundering provisions have not been included. The streamlining of the requirement is meant to be less burdensome to mortgage lending professionals and allow for customization specific to the mortgage lending industry.

The proposed rule is set to apply to loan or finance companies, limited at this time to residential mortgage lenders and originators. Under the proposed rule, a residential mortgage lender is defined as "[t]he person to whom the debt arising from a residential mortgage loan is initially payable on the face of the evidence of indebtedness or, if there is no such evidence of indebtedness, by agreement, or to whom the obligation is initially assigned at or immediately after settlement." A residential mortgage originator is defined as a person who "takes a residential mortgage loan application and offers or negotiates terms of a residential mortgage loan for compensation or gain." (75 CFR 76677)

Under the current definition, a SAR filing is required when: "A loan or finance company ... knows, suspects, or has reason to suspect that the transaction: (i) Involves funds derived from illegal activity or is intended or conducted to hide of disguise funds or assets derived from illegal activity; (ii) is designed, whether through structuring or other means, to evade the requirements of the BSA; (iii) has no business of apparent lawful purpose; or (iv) involves the use of the loan or finance company to facilitate criminal activity." (75 CFR 76677)

The rulemaking process concerning the mortgage lending SAR requirement is ongoing. Once the rule has been finalized, FinCEN will provide further guidance and instructions concerning applicability and compliance with the resulting new regulations.

Proposed Form

Although the initial comment period on FinCEN's December notice of proposed rulemaking has ended, the Mortgage Bankers Association has continued to follow up their submitted comments by most recently developing a model SAR form. In accordance with the February 2011 comments submitted by the MBA, the proposed SAR form has been drafted to specifically reflect suspicious activity that has arisen in a mortgage lending situation. The form is intended to be used within FinCEN's online SAR filing system as eventually SAR filings will be exclusively submitted electronically. The MBA intends to submit their model form to FinCEN staff for consideration.

The MBA proposed electronic SAR filing form consists of six sections, including two sections specifically tailored to mortgage lenders and originators. Using the existing financial institution SAR from as the base, the MBA has re-ordered a few sections for cohesion and two mortgage lending specific sections.

New additions to proposed SAR form for Mortgage Lenders

---*The Loan Information section (Part VI)* is a new section added specifically for this proposal. When filling out this section, lenders and originators will provide basic loan information including the loan number, property address, loan type and purpose, property type and occupancy information. Also included in this section will be the contact information for the real estate agent or broker, appraisal company, mortgage broker/loan officer and their NMLS identifier information, the title company used and their settlement agent, and the names of the buyers and sellers.

--*The Suspicious Activity Information section (Part V)* included a new drop down menu for submitters to choose mortgage lending specific fraud categories and a summary characterization of the suspicious activity. The 32 suggested categories of fraud include: Advance Fee Schemes, Buy and Bail, Distressed Homeowner, Double Sold Note, Equity Skimming, various False Documentation, Foreclosure Rescue Scheme and Strawbuyer among others. Part V also included the section to enter the loan amount and the amount of the current loss as well as the potential loss arising from the fraudulent activity.

View the MBA's original February comments submitted to FinCEN in response to the Notice of Proposed Rulemaking by visiting this link:

http://www.mortgagebankers.org/files/Advocacy/2011/MBACommentLetteronSARsforNonbankProposedRule.pdf

Proposed Results

The information contained in SAR filings by financial institutions has been instrumental in identifying trends and increases in mortgage fraud and in assisting in both regulatory and criminal investigations. The proposed rule outlined the benefit of a mortgage lender and originator SAR requirement as "potentially expand[ing] the kinds of activities being reported to FinCEN's Bank Secrecy Act database, thereby giving [FinCEN's] regulatory and law enforcement partners a more complete picture... of mortgage-related financial crimes." (75 CFR 76677)

View the most recent FinCEN fraud trend reports:

http://www.fincen.gov/mortgagefraud.html
http://www.fincen.gov/news_room/rp/files/MLF_Update_3rd_Qtly_10_FINAL.pdf

View the most recent Mortgage Asset Resource Institute (MARI) fraud report:

http://img.en25.com/Web/LexisNexis/MortgageFraudReport-13thEdition.pdf

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