

At Risk Cash Transaction for Business Clients – The Computers Are Watching

It is Monday morning at your law office, and you get a telephone call from one of your smaller business clients. He is frantic to say the least. Over the weekend, his employee payroll checks bounced at the bank as well as several checks to suppliers. He assures every skeptical recipient of a business check that the checks should be good. In fact, more than a couple of threats of violence along with threats of going to the police are mixed into the conversation.

After the local bank branch opens, the branch manager tells your client that there was a seizure of the business accounts, and that is all that the manager is willing to say. The mystery for your client soon ends when two federal special agents arrive (usually IRS–Criminal Investigation, but sometimes Secret Service) and tell your client that the currency was seized because the currency was involved in a transaction, or attempted transaction, in violation of 31 USC 5324(a) regarding “structuring.” Your client, desperate to clear up the “misunderstanding,” speaks to the special agents further. They explain that the U.S. Department of the Treasury received information that the pattern of cash deposits of the business were suspicious and appear to have been structured to avoid depositing more than \$10,000 at one time. See IRS Form 8300 required under IRC 6050I.

Your client assures you that all of his business income is 100 percent legal. In addition, your client swears on all that is precious to him that every penny of income is properly reported. For purposes of this column, you can assume that your client is completely truthful in those representations. *It does not matter.* The special agents are not conducting an examination of the business or even investigating the business—at least not yet. They are investigating the nature of the cash deposits. The reason is that it appears that your client deposits cash

in round numbers, i.e., \$6,000, \$8,000, \$9,900 but never in excess of \$10,000 at one time. In fact, sometimes there are multiple cash deposits in one day; i.e., \$6,000 at 10:00 a.m. and \$6,000 at 4:00 p.m. Sometimes at the same branch and other times at different branches.

The special agents tell your client that the suspicious deposits total \$153,000 and that is the amount that was already seized. That is right—seized. Your client told you that he did not say “much” to the special agents but he did talk to them for about one hour. The special agents left their business cards and your client—eager to cooperate—signed a few forms. Your client also tells you that he did get a letter from his bank a few weeks ago about his banking but he threw it away because it was no problem to his mind.

The scenario just described is happening with increasing frequency in Michigan and across the country. Special units of criminal investigators are using ever more sophisticated computer algorithms to process suspicious activity reports (SAR) from financial institutions looking for unusual cash deposit activity. Financial institutions are more than happy to comply with the requirements of the Federal government’s anti-money laundering statutes and regulations related to the Bank Secrecy Act (BSA). Basically, no financial institution will risk its charter to protect customers.

The complexity of the BSA and other criminal and civil statutes, exposures and liabilities potentially at issue are beyond the scope of this column. This discussion focuses solely on the seizure and potential forfeiture of the money. 18 USC 981(a)(1)(A) and (C) provide that any property involved in a transaction, or attempted transaction may be seized and forfeited to the United States Government.

Assuming that the special agents (and United States Attorney’s Office)

believed that a structuring violation took place, administrative proceedings will be brought to perfect the forfeiture of the property. A writ will be signed by a Federal Magistrate before seizure. There will be a public legal notice (usually the local legal news).

Your client(s) (it could be the business, and/or individuals) will need to file a claim of ownership within 30 days from the date of last publication. Assuming a claim is filed (practitioner’s note: careful consideration of who makes a claim must be undertaken), then a judicial or administrative review is available to the claimant. Remember though, that during this entire procedure, your client does not have the cash. The inconvenience and stress is significant. An exception under 18 USC 983(f) is possible for undue hardship but it is limited in practice. Simple inconvenience is not hardship.

At this point, you and your client will have to determine if an administrative review by the IRS for remission or mitigation of forfeiture should be pursued, or alternatively seek judicial review which will be handled by the United States Attorney’s Office. Both processes will have heavy involvement by the special agents and are lengthy, potentially expensive, and could include the waiver of important constitutional rights. They will want to interview your client to explain the deposit activity for consistency with the business activity.

The challenge for professionals in these circumstances is that the structuring is usually evidenced by months of banking transactions. Clients will sometimes tell you that they thought there was a tax or penalty if cash deposits were more than \$10,000 so they did structure the deposits. More than one client has told me that bank tellers discouraged cash deposits of over \$10,000 because the teller had to file reports. Recall that our sce-

nario above assumed full tax compliance.

Each factual scenario is different. You will need to determine if your client ever received a warning letter or even a termination from a bank because of the deposit activity. How did your client respond? Did the deposit activity change? If so, how? You will need to carefully review your client's cash sales. If your client routinely has cash sales of \$3,000-\$7,000 daily, that presents a different and more defensible situation than if there are \$12,000 of daily cash sales. You will have to investigate the procedures for banking transactions. Always talk to the accountant, bookkeeper, and manager(s) if applicable, and look at the banking records yourself as the government already has done so. Lastly, because of the potential for criminal sanctions, consult with an experienced practitioner in this area of the law—one who is familiar with both the civil and criminal implications.

As we march to an ever more "cashless" and electronic society, large cash transactions are becoming more rare but easier to track. The sophisticated algorithms in software that automatically review deposit activities at financial institutions are incredibly vigilant about spotting and reporting anything remotely suspicious regardless of how "friendly" the local teller and branch manager may be. Your clients need to be advised that forfeiture is an ever-present and growing reality.



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