Friday, May 17, 2013

FinCEN: Accountant and Elder Abuse

We have been keeping track of FinCEN's SAR Activity Review – Trends, Tips & Issues virtually from its inception.

In its just issued May 2013 report, FinCEN provides new information regarding two areas of importance:

1) The Suspicious Activity Report (SAR) filing patterns related to elder financial exploitation before and after the publication of FinCEN's Advisory to Financial Institutions on Filing Suspicious Activity Reports Regarding Elder Financial Exploitation ("Advisory"), in February 2011, and

2) An analysis of trends related to SAR filings involving accountants and involving insider abuse within depository institutions.

In this newsletter, I would like to provide you with some insights regarding each of these areas of concern reviewed in the FinCEN report, with a brief review of elder abuse trends and a much more extensive review of suspicious financial activity involving accountants.*

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Elder Abuse - Trends

A comparison of the filing rates pre- and post-advisory of SARs with narratives containing the two key search phrases "elder financial exploitation" and "elder financial abuse," shows a very significant increase in relevant filings post-Advisory.

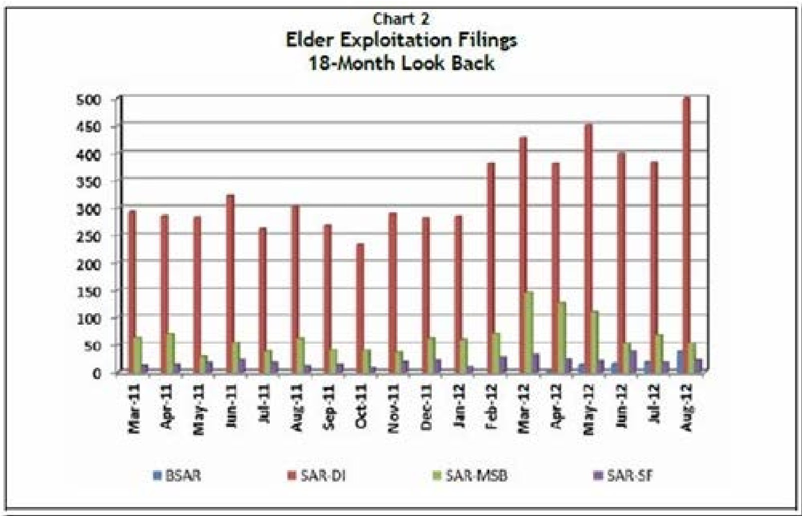
Between March 1, 2011, and August 31, 2012, filers submitted 7,651 total SARs, a 382 percent increase from the 12-month period prior to the release of the Advisory during which filers completed 1,589 relevant SARs. Post-Advisory filing trends showed continued increases in filing incidences.

SARs generally reported patterns of financial exploitation perpetrated by a relative or caregiver against elderly victims. Narratives most frequently described the perpetrator coercing or cajoling the victim into completing financial transactions that benefited the perpetrator at the expense of the victim.

There are reported instances where the perpetrator reportedly abused a power of attorney over the victim's account.

Furthermore, so-called "sweetheart scams" were on the rise. A "sweetheart scam" involves the fraudster feigning romantic intentions towards a victim, thus gaining the victim's affection. The perpetrator then uses the goodwill engendered to defraud the victim. This fraud may impact the victim's financial accounts and/or identity security, and may even cause the victim to unwittingly facilitate financial fraud against others on the perpetrator's behalf.

An increased trend in elder financial abuse was noted in the 18 month period after the issuance of the Advisory. Depository Institutions filed 6,026 elder financial exploitation-related SARs in this period. FinCEN determined that institution filers identified "abuse by a relative or caregiver" as the most reported months post-Advisory



Monthly post-Advisory filing numbers indicate that filers continued to increase their submissions of SARs related to elder financial exploitation more than a year and a half after issuance of the Advisory. FinCEN reports that this trend suggests that many filers have incorporated FinCEN's elder financial exploitation guidance into their AML monitoring programs. Sample narratives showed filers checked "Other" most often as the characterization of suspicious activity when describing suspicious transactions involving elderly customers.

Most narratives described the perpetrator engaged in identity theft, misuse of position or self-dealing, check kiting, counterfeit checks, or embezzlement/theft, to defraud elderly victims. Many SAR narratives revealed that filers were careful to assess suspicious transactions, often questioning an elderly customer if his transactions appeared out of character. These precautions usually spared the filer and the customer any significant losses.

Accountant Abuse - The Gatekeeper

Dubbed euphemistically as the "gatekeeper" type, FinCEN places accountants in the group of scammers that, due to their position, have the ability to furnish access (knowingly or unwittingly) to the various financial transactions that might help a criminal move or conceal illicitly obtained funds. Gatekeepers have been of concern to the U.S. Department of the Treasury, due to their ability to facilitate or assist in money laundering while engaged in their professional duties for a client. Going all the way back to 1996, the Financial Action Task Force noted the increasing number of professionals, including accountants, whose services were used to effectuate the placement and layering aspects of money laundering.

To be clear, in addition to accountants, other professions identified as gatekeepers include attorneys, trustees, and service providers, notaries and other fiduciaries that assist clients with certain activities like buying and selling real estate, managing assets, or creating, operating or managing companies.

Accountants are not defined as "financial institutions" under the Bank Secrecy Act (BSA). Thus, they have no responsibility to report suspicious activities conducted by their clients, including knowledge or suspicion that the purpose of a client's transaction is to launder funds. Accountants have asserted that such reporting could potentially encroach on the customer-client relationship, including the duty of client confidentiality.

Nevertheless, the accountancy profession has developed codes of conduct and business ethics (PDF) by which their members abide, including specifying exactly how a professional can provide specific information to law enforcement (PDF) without divulging confidential client information when he or she reasonably believes that certain client transactions represent an undue risk of money laundering.

According to Federal Financial Institutions Examination Council (FFIEC), the definition of accountants includes not only accountants and CPAs but also lawyers, investment brokers and other third-parties that act as financial liaisons for their clients as "professional service providers," whose participation in illegal or questionable financial transactions may produce increased risk to financial institutions.

A professional service provider may have access to multiple accounts of multiple clients,

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but a financial institution may not have a direct relationship with or knowledge of the beneficial owners of those accounts. Thus, transactions involving professional service providers present third-party risks that can raise a financial institution's vulnerability to money laundering, structuring, or hiding beneficial ownership of an account holder.

As mentioned above, accountants have no suspicious activity reporting requirements; however, depository institutions holding accounts for accountants may detect financial activities and transactions that the institution knows or suspects may require reporting to FinCEN.

I would add that the degree of control attorneys and accountants hold over their clients' finances in routine transactions can be quite different. For instance, attorneys generally conduct financial transactions on their clients' behalf, and assume control over the clients' funds to do so. Lawyers must "hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property." Except in unusual circumstances, client funds are pooled in a general client trust account over which the attorney acts as trustee. The accounts are referred to as "interest on lawyers trust accounts" (IOLTAs) and the interest earned on these accounts is transferred to state funds established to cover legal expenses for indigent people.

Although accountants do sometimes hold client funds in trust accounts over which they serve as trustee (which, FinCEN reports, can result in some of the most egregious suspicious financial activities involving accountants), most general activities by an accountant are done in an advisory capacity, or in preparation of financial reports, which do not require the accountant or CPA to take control of client funds. Consequently, there is no legally mandated accountant-client fund pooling in the accounting industry equivalent to IOLTA accounts for attorneys.

Sampling the Data

FinCEN recently undertook an assessment of depository institution SAR filings which described possible money laundering activities involving accountants, certified public accountants (CPAs) and others within the accountancy profession. The range of accountants' improper financial activities runs the gamut of illicit financial activities which, states FinCEN, involves "every category of activity available on the SAR form, facilitated both on their own behalf as well as in assisting others."

In addition some SARs alleged that accountants or CPAs embezzled money from legal trusts over which they had been legitimately appointed as fiduciary to administer the funds, established bogus trusts for various nefarious purposes (i.e., such as to entice terminally ill or elderly persons to enter into joint investments that only benefitted the accountant trustees or other co-investors), or sold bogus documents that promised to declare mortgages illegal and void a borrower's obligation under his mortgage.

SARs filed by depository institutions during 2011 where the word "accountant" or "CPA" appeared in either the subject or narrative section of the SAR showed up in nearly 10,000 relevant SARs. To build a statistical review, FinCEN selected a random sample of 350 SARs for in-depth analysis.

The research focused on accountants or CPAs, who (1) act in their capacity as professional service provider, trustee, or fiduciary; (2) manage, direct, organize, establish or conduct transactions for their clients or on their own behalf in matters involving; and (3) were involved in trust accounts, shell companies, real estate transactions, incorporations, and other matters.

A search in the FinCEN database, using key search terms, shows hits related to accountants and CPAs as 9,631 SARs filed in CY 2011. Banks, savings institutions or credit unions filed the majority of the SARs. However, mortgage companies, mortgage service companies, credit card servicers and processors, and other financial service companies indicates a sizeable percentage of the 9,631 accountant or CPA-related SARs.

Table 1 – CY 2011 SARs: Characterization of Suspicious Activity

Suspicious Activity Description	*Total SARs*
A – BSA/Structuring/ Money Laundering	6,029
C – Check Fraud	455
D – Check Kiting	168
E – Commercial Loan Fraud	125
G – Consumer Loan Fraud	163
M – Defalcation/ Embezzlement	122
N – False Statement	408
P – Mortgage Loan Fraud	1,993
R – Wire Transfer Fraud	175
S – Other	1,237
U – Identity Theft	100

Note that the second larges category, nearly 21 percent reported (Category P) was

Mortgage Loan Fraud, after over 62 percent of all SARs filed in BSA/Structuring/Money Laundering as the characterization of suspicious activity (Category A).

Table 3 – Characterization of Suspicious Activity (350-SAR Sample)	
Suspicious Activity Category	*Total SARs*
A – BSA/Structuring/ Money Laundering	184
C – Check Fraud	14
D – Check Kiting	5
E – Commercial Loan Fraud	7
G – Consumer Loan Fraud	9
M – Defalcation/ Embezzlement	8
N – False Statement	35
P – Mortgage Loan Fraud	66
R – Wire Transfer Fraud	9
S – Other	92
U – Identity Theft	8

In the random sample of 350 SARs filed, filers most frequently cited the suspicious activity characterization BSA/Structuring/Money Laundering (52 percent). Twenty-six percent reported fell into Other. Yet the third largest activity category, at almost 19 percent, was Category P, Mortgage Loan Fraud. The table above identifies total filings in the most significant activity categories.

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Separating the Wheat from the Chaff

Note that the SARs in the random sample mimic the same top three activity categories in the statistical review of all 9,631 SARs filed in 2011 (which mentioned accountants or CPAs in either the occupation or the narrative field). The following table identifies the percentages of the top three activity categories in the original search of 9,631 compared to the 350 SARs which were reviewed in their entirety for this analysis.

Table 4 – Top Three Activity Categories – A Comparison				
Suspicious Activity Category	*Original Statistical Search Only – All Relevant SARs filed in 2011 (9,631 SARs)*	*Percentage of Total*	*SARs with Full Review and Analysis (350 SARs)*	*Percentage of Total*
A – BSA/Structuring/ Money Laundering	6,029	63%	184	53%
S – Other	1,237	13%	92	26%
P – Mortgage Loan Fraud	1,993	21%	66	19%

The involvement in accountants in mortgage loan fraud is unusually high, given that "Other" (Category S) tends to be a broader category for suspicious activity. FinCEN found in this review that some SARs reported accountants or CPAs committed money laundering transactions for their own benefit, such as simple structuring or tax evasion. Other SARs, as well as indictments and other legal documents, also show that accountants or CPAs facilitated money laundering on behalf of others by helping to hide aspects of transactions through various schemes. (Accountants or CPAs may sometimes also act as directors, trustees or partners in these transactions.)

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Accountants Abuse - Trend

Let's now turn to an evaluation of the trends associated with suspicious financial activities that filers described in SARs involving accountants. I will provide a selected outline of the types of such actions by accountants, in order to highlight the scope of these illicit activities.

BSA/Structuring/Money Laundering

-Wire transfers to and from foreign countries, including high-risk countries and professions; inconsistent account activity; multiple transfers between accounts; transaction purposes that could not be verified; shell company activities; and improper trust activities.

-Non-accountant subjects structure in order to deceive their accountant from full facts about a transaction or having been done on the advice of their accountant.

Tax Fraud or Evasion

-Improperly received electronic deposits of income tax refunds that were due to other persons. (Filers sometimes identified this activity as ACH fraud. In other cases, accountants submitted tax returns for deceased persons and deposited the tax refund to their own account.)

-Withholding tax information from the subject's accountant.

-A group of individuals, several of whom were current or former CPAs, conducted seminars where they sold “tax-exempt trusts” for $500-$1,000.

Mortgage Loan Fraud
-Accountant borrowers committed mortgage loan fraud on their own behalf by providing false financial or occupancy information with their loan application.

-Non-accountant borrowers committed mortgage fraud by altering documents that had been prepared by their accountant (in order to appear better qualified for a mortgage loan).

-Altered or falsified “CPA letters,” a requirement for approval of some mortgage loans.

-Accountants or CPAs involved loan modification, debt elimination or short sale fraud schemes in cases of pending foreclosure.

-Accountant/owner of a tax preparation business suspected of structuring cash deposits and withdrawals. (According to the indictment, the accountant helped clients of complicit realtors to obtain mortgage loans by creating fraudulent tax letters stating the borrowers had self-employment income and owned their own businesses, by preparing, among other things, fraudulent tax returns with the knowledge that they were not intended to be filed with IRS.)

Defalcation/Embezzlement/Theft

-Accountant customer involved in money laundering, check fraud, credit card fraud, and embezzlement. (The customer, employed in a CPA firm, obtained access to the business checking accounts of one of the firm’s clients. The accountant forged several of the client’s checks, payable to the filer, and used the funds to pay a personal credit card.)

-CPA allegedly embezzled and mishandled funds of over $500,000 due to access to multiple trust accounts. (The subject also served as Chairman of the Board of another local bank.)

-A bank filed a SAR against its own accountant employee upon discovering that the accountant embezzled funds by making transfers from the bank’s general ledger account into a personal account.

-A large bank filed several SARs on its customer, a United Arab Emirates (UAE) trading company with affiliate companies, stating that the affiliate companies are apparent shells using addresses in offshore jurisdictions about which no information could be found.

Improper Trust Activities
BSA filings and indictments show that some of the most egregious and expensive financial crimes involving accountants or CPAs occur when they steal from clients or investors to whom they owe a fiduciary duty based on access to or control of the clients’ funds held in trust.

Investments with Terminally-Ill Persons
Subjects included attorneys, accountants, CPAs, end-of-life care companies, and investors. The subjects coerced terminally ill or elderly persons to agree to participate in transactions in which the dying person received cash payments or other concessions. Instead, subjects used the individuals’ personal information to establish joint investment vehicles with unknown conspirator investors.

Theft and Embezzlement from Trustee Accounts
-A CPA sometimes worked with a close relative. For nearly a decade, the CPA, while living a lavish lifestyle, wrote unauthorized checks to himself or his company from the receiverships or accounts over which he served as trustee.

-An investment advisor and CPA, who had many high profile and high net worth clients, including socialites and well known entertainment and business figures - managed his clients’ finances, paid their bills, provided tax advice and made investments on their behalf - misappropriated over $7 million from client accounts over which he had access. The CPA’s attorney was charge with aiding and abetting the CPA’s fraud by using his own attorney trust account to hide the scheme. The complaint stated that millions of dollars belonging to the CPA’s clients flowed through the attorney’s accounts. To perpetuate the scheme, the CPA stole money and transferred funds without authorization from the client funds into the attorney trust accounts. The attorney subsequently transferred the stolen funds to the CPA and entities controlled by him.

-One bank filed several SARs to report an accountant and auditor’s activities involving defalcation/embezzlement, larceny, BSA/Structuring/Money Laundering and other actions regarding multiple businesses and trusts of various individuals of which he was a signer or associated with. The subject also served as chairman of another local bank, and institutions had filed previous SARs on him for kiting funds between the two financial institutions. He was arrested and charged with multiple offenses.

Elder Fraud

Multiple SARs reported situations in which accountants or CPAs acted as trustee on behalf of an elderly individual and diverted trust assets to themselves. According to FinCEN, the following are several patterns detected from the activities described by filers.

-CPA prepared tax returns for an elderly individual. sing this individual's personal information, the CPA established a trust whose purpose was to purchase investment rental properties. He then fraudulently established himself as trustee. In this capacity, the subject obtained a loan in a significant dollar amount for investment purchases. The CPA's fraudulently prepared tax returns inflated his elderly client's income and assets in order to create the appearance that the trust qualified for the loan. The SAR filer further reported that a relative of the CPA, a realtor, received a commission from one of the purchases.

-Another SAR described a CPA who opened an account as trustee for a family life insurance trust account, the owner of which was an elderly female. The subject deposited forged checks payable to the trust and subsequently wrote a check against the trust payable to him. He also made online transfers to his account at another bank. There is no indication in the SAR that the subject was related to the elderly victim or her family.

Challenges

The FinCEN report may help to identify trends, patterns or possible "red flag" indicators obtained from SARs reporting suspected money laundering activities by accountants or CPAs. FinCEN clearly has demonstrated that accountants and CPAs may be involved in all aspects of money laundering, facilitated both on their own behalf as well as in assisting others. They may knowingly participate in suspected money laundering activities, or unwittingly be used to give an appearance of legitimacy to a transaction.

Furthermore, the reported activities are similar to at least nine of the IRS' "Dirty Dozen Tax Scams for 2012."

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BSA Advisory Group

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