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Processing Reports, Investigation, Prosecution and Confiscation

9.1 Establishing a Central Reporting Agency

The development of a centralised unit (i.e. a financial intelligence unit) for the collection, analysis and dissemination of suspicion reports and intelligence to the investigation agencies has come to be regarded as an essential component of the anti-money laundering system.

FATF Recommendations 26 and 27 state that:

26. *Countries should establish a FIU that serves as a national centre for the receiving (and, as permitted, requesting), analysis and dissemination of STR and other information regarding potential money laundering or terrorist financing. The FIU should have access, directly or indirectly, on a timely basis to the financial, administrative and law enforcement information that it requires to properly undertake its functions, including the analysis of STR.*

27. *Countries should ensure that designated law enforcement authorities have responsibility for money laundering and terrorist financing investigations. Countries are encouraged to support and develop, as far as possible, special investigative techniques suitable for the investigation of money laundering, such as controlled delivery, undercover operations and other relevant techniques. Countries are also encouraged to use other effective mechanisms such as the use of permanent or temporary groups specialised in asset investigation and co-operative investigations with appropriate competent authorities in other countries.*

9.1.1 Formation or Strengthening of Financial Intelligence Units

FIUs need to be tailored to the requirements of the country in question, taking into account the statutory reporting requirements that have been imposed on the financial sector. There is no one model that can be set; at the simplest level, an FIU may comprise one person and an assistant with one desktop computer and may exist solely to process suspicion reports from the financial institutions, passing them on to a Financial Investigation Unit. At the more comprehensive and complex level, an FIU might comprise a number of staff, utilising complex computer systems to collect, analyse and collate intelligence from several sources. The nature of the FIU will depend upon the extent of computerised records in the jurisdiction that can be accessed and the nature of the reporting requirements within the money laundering legislation. The larger, more

sophisticated FIUs should network with the Egmont Group's International Secure Web System and enter the Statement of Purpose permitting the sharing of intelligence with other FIUs within and outside the region.

It is likely that some countries will be unable to provide the institutional support to establish an FIU independent from an existing structure. In such cases, it is recommended that the FIU be established as a part of a Financial Investigation Unit (see section 9.3.1 below)

The FIU, as a sub-unit of a Financial Investigation Unit, can function effectively if the functions and responsibilities remain separate and distinct. While this may not be the ideal structure for the two entities, in light of their different roles, it would provide the infrastructure support necessary to obtain, analyse, and use information and evidence relating to money laundering and other financial crimes.

9.2 Processing Reports

The use of a standardised format in the reporting of disclosures is valuable and should be followed wherever possible; such a standard form should be provided to all institutions and duplicated in guidance notes. Completed forms can then be sent by post (or in urgent cases by facsimile message) to the central reporting agency. In more technologically advanced countries, financial institutions submitting regular high volumes of disclosures could transmit the information directly onto the reporting agency's financial database by means of secure data transfer, thus removing the need for paper disclosures.

Sufficient information should be disclosed to indicate the nature of, and reason for, the suspicion to enable the investigating officer to obtain a court order if necessary. If a particular offence is suspected, this should be stated to enable the report to be passed to the correct agency for investigation with the minimum of delay.

The use of a standard form should not, however, prevent a financial institution from disclosing any other relevant information or relevant backing documents. Where the reporting institution has additional relevant evidence that could be made available, the nature of this evidence should be clearly indicated.

The receipt of a disclosure should be acknowledged by the central reporting agency, and, if applicable, written consent should be given to the reporting institution to continue with the transaction or to operate the customer's account. However, in exceptional circumstances, such as the imminent arrest of a customer and consequential restraint of assets, consent to continue operating the account might not be given. The reporting institution concerned should at all times be kept apprised of the situation. Consent that may be given to continue with a transaction or to operate the customer's account should not be seen as a directive; the financial institution should still be able to apply management judgement as to whether it wishes to do so or not.

9.3 Investigating Reports

The effective implementation of anti-money laundering initiatives and regulations by law enforcement officials in many countries has, to date, been impeded by unfamiliarity with money laundering techniques, a lack of expertise in the conduct of complex financial investigations and asset tracing, and shortage of material and personnel resources. More specifically, there is a widespread need for the training of investigators in such areas as money laundering methodologies, financial investigations, asset tracing, the operation of domestic and international financial institutions, the acquisition and development of evidence from domestic and foreign sources, and case preparation and presentation. The lack of such expertise has often affected all areas of law enforcement related to money laundering and the investigation and prosecution of the underlying predicate offence, and has resulted in many cases not being pursued by the police. Consequently, the view is now generally held that specialist Financial Investigation Units or combined Financial Intelligence/Financial Investigation Units are needed.

9.3.1 Formation or Strengthening of Financial Investigation Units

Financial Investigation Units are units of police (and in some countries customs) investigators brought together and trained to conduct financial investigations. Such investigations may be relatively simple, such as that required to support confiscation of the proceeds of a crime from a local criminal upon conviction where money laundering has not taken place. Other investigations will be far more complex and require the analysis of financial and computer-generated records. Financial investigations are frequently the only means of collecting the information necessary to support money laundering and asset forfeiture prosecutions. Successful implementation and use of trained Financial Investigation Units are dependant upon the commitment to adequately staff these units with personnel, provide the necessary training and management support and make available sufficient equipment and materials to achieve the unit's goals.

Financial Investigation Units need to work in co-ordination with FIUs, where they are organisationally separate, and have access to information and analysis obtained by the FIU.

9.4 Establishing Confidentiality and Controls

Following receipt from the Financial Intelligence Unit or other central agency, access to disclosure reports should be restricted to trained financial investigators. Discreet enquiries may need to be made to confirm the basis of the suspicion and supplementary information may need to be obtained from the reporting institution or other sources. However, the customer should never be approached unless criminal conduct is identified.

Arrangements for handling suspicion reports should ensure that:

- When suspicions are passed on to investigators, they are passed only to known contacts within investigating authorities, who are themselves aware of the sensitivity of the information that they receive and respect the need for confidentiality;
- All information that is not either relevant to ongoing investigations or might provide leads for future investigations is destroyed at the earliest possible opportunity;
- Financial institutions are kept informed of developments relating to disclosures that they have made as quickly and as fully as possible; and
- Procedures are adopted to prevent, so far as possible, the names of those making the reports getting into the hands of money launderers.

9.5 Obtaining Evidence for Use in Investigations

FATF Recommendation 28 states that:

When conducting investigations of money laundering and underlying predicate offences, competent authorities should be able to obtain documents and information for use in those investigations, and in prosecutions and related actions. This should include powers to use compulsory measures for the production of records held by financial institutions and other persons, for the search of persons and premises, and for the seizure and obtaining of evidence.

Enquiries will be necessary by the investigating team for the purpose of obtaining evidence to support a prosecution or to support an application for an order to restrain, freeze or confiscate criminal assets.

Requests for information to be used in evidence should be made to financial institutions, professional firms and other businesses under relevant court orders, thereby ensuring that any initial intelligence contained in a suspicion report can be treated as confidential information and not disclosed to the defendant.

In the event of a prosecution, existence of the suspicion report and the source of the information should be protected, as far as the disclosure of evidence rules allow. Maintaining the integrity of the confidential relationship between the law enforcement agencies and the financial institutions is of paramount importance.

The partnership between law enforcement and the financial sector is a vital part of the overall prevention strategy, but it must be recognised that the partnership cannot be developed overnight. The strengths and weaknesses of each partner need to be recognised and compensated for by the other, and the respected skills complemented. The financial sector must recognise that financial investigators cannot be fully cognisant with all the intricacies of the financial markets and, in turn, law enforcement officers must not expect to treat financial sector staff as unpaid detectives to compensate for scarce resources.

9.6 Providing Feedback from the Investigating Agency

The provision of feedback by the investigating authorities to the financial institution by whom suspicions are reported is an important element of any reporting system. The provision of general feedback to the financial sector on the volume and quality of disclosures and on the levels of successful investigations arising from the disclosures should be provided on a regular basis by the reporting agency.

This feedback is a vital part of the education process and is necessary if suspicion is to be removed from a possibly innocent customer. If a significant number of disclosures are being made that cannot lead to more than superficial investigation, then the reporting institutions need to be informed and advised as to how the situation can be improved.

The FATF has drawn up best practice guidelines on providing feedback to reporting institutions; these can be accessed through the FATF website (www.fatf-gafi.org).

9.7 Compilation of Statistics and Trends

The effectiveness of money laundering legislation can best be maintained by ongoing assessment of its impact. Not only will governments wish to know what impact the legislation is having, but financial institutions will also benefit from feedback about the disclosures that they make, in aggregate as well as on a case by case basis.

Such assessment might usefully take a number of forms:

- Statistical information detailing the number of disclosures made, the percentage which have been of value and the classes of institution that made the disclosures;
- Information on convictions obtained and assets confiscated, both domestically and as a result of international co-operation;
- Regular appraisals of the costs of the anti-money laundering regime to government and to the financial sector;
- Trends in laundering, both domestic and international.

Responsibility for analysis and feedback is best placed with the central reporting agency. The information should be provided regularly to the appropriate government department, to supervisors and to the financial sector institutions.

9.8 Powers to Trace, Freeze and Confiscate the Proceeds of Crime

Most crime is motivated by profit. The pursuit and recovery of the proceeds of crime can make a significant contribution to crime reduction and the creation of a safe and just society. Confiscating the proceeds of crime can:

- Send out the message that crime does not pay;
- Prevent criminals from funding further criminality;
- Underpin confidence in a fair and effective criminal justice system and show that no-one is above the law;
- Remove the influence of negative role models from communities;
- Deter people from crime by reducing the anticipated returns;
- Decrease the risk of instability in the financial markets.

Criminal asset confiscation also has the potential to be a cost-effective law enforcement intervention. A number of jurisdictions have demonstrated that effective confiscation policies can generate significant revenue flows that reduce the net costs to the criminal justice system.

For criminal assets to be removed, they must first be located and the beneficial owner identified. An asset confiscation programme will only work if accompanied by sound financial sector customer identification systems and a financial investigation capability to follow complicated money trails. The pursuit of criminal assets can also help to build a deeper understanding of criminal networks, improve detection rates generally and assist in linking individuals apparently unconnected with crimes to the underlying predicate offences from which the proceeds were generated.

9.8.1 Exchange of Information

The laundering process for criminally generated funds will cross many national boundaries. Mutual assistance and exchange of information between jurisdictions is therefore essential if the proceeds of crime are to be traced and confiscated.

FATF Recommendation 40 states that:

Countries should ensure that their competent authorities provide the widest possible range of international co-operation to their foreign counterparts. There should be clear and effective gateways to facilitate the prompt and constructive exchange directly between counterparts, either spontaneously or upon request, of information relating to both money laundering and the underlying predicate offences. Exchanges should be permitted without unduly restrictive conditions. In particular:

- a) *Competent authorities should not refuse a request for assistance on the sole ground that the request is also considered to involve fiscal matters.*
- b) *Countries should not invoke laws that require financial institutions to maintain secrecy or confidentiality as a ground for refusing to provide co-operation.*
- c) *Competent authorities should be able to conduct inquiries; and where possible, investigations on behalf of foreign counterparts.*

Where the ability to obtain information sought by a foreign competent authority is not within the mandate of its counterpart, countries are also encouraged to permit a prompt and constructive exchange of information with non-counterparts. Co-operation with foreign authorities other than counterparts could occur directly or indirectly. When uncertain about the appropriate avenue to follow, competent authorities should first contact their foreign counterparts for assistance.

Countries should establish controls and safeguards to ensure that information exchanged by competent authorities is used only in an authorised manner consistent with their obligations concerning privacy and data protection”.

When the competent authorities in any Commonwealth member state have information that is officially requested by another jurisdiction, measures should be taken to ensure that the information is exchanged promptly whenever possible. Restrictions on the exchange of information should be linked to the following circumstances:

- The requesting authority should perform similar functions to the authority to which the request is addressed;
- The purpose and scope of information to be used should be expounded by the requesting authority and the information transmitted should be treated according to the scope of the request;
- The requesting authority should be subject to the same obligation of professional or official secrecy as the authority to which the request is addressed;
- The exchange of information should be reciprocal.

9.8.2 Mutual Legal Assistance and Extradition

The focus of mutual legal assistance and extradition is covered in FATF Recommendations 36–39 as follows:

36. *Countries should rapidly, constructively and effectively provide the widest possible range of mutual legal assistance in relation to money laundering and terrorist financing investigations, prosecutions, and related proceedings. In particular, countries should:*

- a) *Not prohibit or place unreasonable or unduly restrictive conditions on the provision of mutual legal assistance.*
- b) *Ensure that they have clear and efficient processes for the execution of mutual legal assistance requests.*
- c) *Not refuse to execute a request for mutual legal assistance on the sole ground that the offence is also considered to involve fiscal matters.*

d) *Not refuse to execute a request for mutual legal assistance on the grounds that laws require financial institutions to maintain secrecy or confidentiality.*

Countries should ensure that the powers of their competent authorities required under Recommendation 28 are also available for use in response to requests for mutual legal assistance, and if consistent with their domestic framework, in response to direct requests from foreign judicial or law enforcement authorities to domestic counterparts.

To avoid conflicts of jurisdiction, consideration should be given to devising and applying mechanisms for determining the best venue for prosecution of defendants in the interests of justice in cases that are subject to prosecution in more than one country.

37. *Countries should, to the greatest extent possible, render mutual legal assistance notwithstanding the absence of dual criminality.*

Where dual criminality is required for mutual legal assistance or extradition, that requirement should be deemed to be satisfied regardless of whether both countries place the offence within the same category or denominate the offence by the same terminology, provided that both countries criminalise the conduct underlying the offence.

38. *There should be authority to take expeditious action in response to requests by foreign countries to identify, freeze, seize and confiscate property laundered, proceeds from money laundering or predicate offences, instrumentalities used in or intended for use in the commission of these offences or property of corresponding value. There should also be arrangements for co-ordinating seizure and confiscation proceedings, which may include the sharing of confiscated assets.*

39. *Countries should recognise money laundering as an extraditable offence. Each country should either extradite its own nationals, or where a country does not do so solely on the grounds of nationality, that country should, at the request of the country seeking extradition, submit the case without undue delay to its competent authorities for the purpose of prosecution of the offences set forth in the request. Those authorities should take their decision and conduct their proceedings in the same manner as in the case of any other offence of a serious nature under the domestic law of that country. The countries concerned should co-operate with each other, in particular on procedural and evidentiary aspects, to ensure the efficiency of such prosecutions.*

Subject to their legal frameworks, countries may consider simplifying extradition by allowing direct transmission of extradition requests between appropriate ministries, extraditing persons based only on warrants of arrests or judgements and/or introducing a simplified extradition of consenting persons who waive formal extradition proceedings.

FATF has firmly stated that mutual legal assistance should be granted as promptly and completely as possible if formally requested. Laws or regulations prohibiting inter-

national exchange of information between judicial authorities (notably specific reservations formulated to the anti-money laundering provisions of mutual legal assistance treaties or provisions by countries that have signed a multilateral agreement), or placing highly restrictive conditions on the exchange of information will be considered to be detrimental. Obvious unwillingness to respond constructively to mutual legal assistance requests (e.g. failure to take the appropriate measures in due course or long delays in responding) will also be considered by the FATF to be a detrimental practice.

9.8.3 Commonwealth Secretariat Guide to National Procedures

The Commonwealth Secretariat provides a *Guide* to member countries practices and procedures relating to mutual assistance in criminal matters. The *Guide* provides details of the department or agency to whom requests for assistance should be directed within each member country.