

Processing Reports, Investigation, Prosecution and Confiscation

8.1 Establishing a Central Reporting Agency

FATF Recommendation 15 states:

If financial institutions suspect that funds stem from a criminal activity, they should be required to report promptly their suspicions to the competent authorities.

FATF Recommendation 18 further requires that:

Financial institutions reporting their suspicions should comply with instructions from the competent authorities.

The FATF Recommendations do not define what ‘the competent authorities’ should be, but it has been the experience of governments implementing the recommendations that the most effective approach is to designate a single central unit to receive and process money laundering disclosures.

An effective anti-money laundering regime will necessarily involve the law enforcement agencies, the criminal justice ministry, the financial sector regulators and, where the system is also used to address tax evasion, the revenue authorities. It would be possible to locate a specialised central unit in any one of these bodies, or to set one up as a free-standing agency. There are examples of most of the options among countries that have already introduced an anti-money laundering legislation strategy.

The choice of approach for each country will depend upon a range of factors. These include:

- ❖ **Institutional capabilities and resources** – there is no point in establishing a central unit within an agency that lacks the resources, powers, motivation or

competence to carry out the required role. It is essential that the central unit be backed by clear political commitment to assist it in combating money laundering.

- ❖ **Inter-agency relationships** – the central unit will need to work with all the other agencies which have a role in combating money laundering. It should therefore be located where it is capable of commanding the respect of those agencies.
- ❖ **Relationship with the financial sector** – the central unit will need to deal on a day-to-day basis with financial institutions, and achieve their co-operation, rather than their grudging enforced compliance.
- ❖ **International contacts** – most laundering operations are international in nature. The central unit will need to use existing international channels of communication, or else have the powers to establish its own, in order to co-operate with money laundering investigations in other countries, and to obtain assistance from other countries in its own investigations.
- ❖ **Public confidence** – it is essential not only that financial institutions have confidence in the capabilities of the central unit, but that there is general public trust in it. The unit will have access to confidential information about individuals which could be used improperly to do political, financial or even physical harm to those individuals. Misuse of personal information would

undermine public faith not only in the unit itself, but also in the financial institutions that made reports to it. Under these circumstances the system would do more harm than good.

Whichever option is chosen, the unit must be adequately funded and adequately resourced to fulfil its role.

While a number of options have been adopted by different Commonwealth member states, the general preference that has developed is for the establishment of a financial intelligence unit. This can be separate from, or combined with, the agency tasked with investigating the disclosures, generally termed financial investigation units.

8.1.1 Formation or Strengthening of Financial Intelligence Units

Financial Intelligence Units 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 prescribed; at the simplest level, an FIU may comprise one person and an assistant with one desk-top computer and may exist solely to process suspicion reports from the financial institutions, passing them on to an FIU. At the more comprehensive and complex level, an FIU might comprise a number of staff, using complex computer systems to collect, analyse and collate intelligence from several sources. The nature of the FIU will depend upon the extent to which records in the jurisdiction are computerised and accessible, and the nature of the reporting requirements within the anti-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. A Copy of the Egmont Group's Statement of Purpose is set out in Appendix F.

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 paragraph 8.3.1 below).

The FIU, as a sub-unit of a Financial Investigation Unit, can function effectively if its 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.

8.2 Processing Reports

The use of a standard format in the reporting of disclosures is valuable and should be followed wherever possible; such a format 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 indicating 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 upon which to disclose suspicion 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.

8.3 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.

8.3.1 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 is dependent upon the commitment to staff the units adequately and to provide the necessary training and management support. The units must also be provided with sufficient equipment and materials to achieve their goals.

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

8.4 Establishing Confidentiality and Controls

Following their 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 will 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;
- ❖ procedures are adopted to prevent, so far as is possible, the names of those making the reports getting into the hands of money launderers.

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

The partnership between the law enforcement agencies 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 their respective 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.

8.5 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 are set out in Appendix G.

8.6 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.

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

Most crime is motivated by the desire for 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 detec-

tion rates generally and assist in linking individuals apparently unconnected with crimes to the underlying predicate offences from which the proceeds were generated.

8.7.1 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 32 states:

Each country should make efforts to improve a spontaneous or 'upon request' international information exchange relating to suspicious transactions, persons, or corporations involved in those transactions between competent authorities. Strict safeguards should be established to ensure that this exchange of information is consistent with national and international provisions on 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 a similar obligation of professional or official secrecy as the authority to which the request is addressed;

- ❖ the exchange of information should be reciprocal.

8.7.2 Mutual Legal Assistance

FATF Recommendations 34 and 35 state:

International co-operation should be supported by a network of bilateral and multilateral agreements and arrangements based on generally shared legal concepts and with the aim of providing practical measures to affect the widest possible range of mutual assistance.

Countries should be encouraged to ratify and implement relevant international conventions on money laundering, such as the 1990 Council of Europe Convention on Laundering, Search, Seize and Confiscation of the Proceeds of Crime.

Recommendation 33 recognises that there will be differences in the standards and definitions of criminal offences between member countries and the interpretative note to Recommendation 33 requests that:

Subject to the principles of domestic law, countries should endeavour to ensure that differences in the national definitions of the money laundering offences – e.g. different standards concerning the international element of the infraction, differences in the predicate offences, differences with regard to charging the perpetrator of the underlying offence with money laundering – do not affect the ability or willingness of countries to provide each other with mutual legal assistance.

The focus of mutual legal assistance is covered in FATF Recommendations 36–40:

Recommendation 36 encourages all countries to take appropriate steps to further the use of controlled delivery techniques;

Recommendation 37 covers the need for procedures for search and seizure and the obtaining of evidence and records for use in criminal prosecutions;

Recommendation 38 recommends that there should be arrangements for co-ordinating seizure and confiscation procedures including the sharing of confiscated assets;

Recommendation 39 recommends that countries should determine the best venue for prosecuting defendants that are subject to prosecution in more than one country;

Recommendation 40 covers the need for extradition procedures.

The FATF has firmly stated that mutual legal assistance should be granted as promptly and completely as possible if formally requested. Laws or regulations prohibiting international 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 (for example 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.

8.7.3 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.