

COMMENTARY

FINANCIAL INTELLIGENCE UNITS *Confidentiality versus accountability*

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An integral part of the fight against money laundering is to have access to financial information in order to assist in investigations. The primary goal of financial investigations is to identify, trace and document the movement of funds; to identify and locate assets that are subject to law enforcement measures; and to support the prosecution of criminal activity.¹

Financial intelligence units (FIUs) have an increasingly important role to play in the international effort to detect and combat money laundering. They are defined as agencies that receive reports of suspicious transactions from financial institutions and other persons and entities, analyse them, and disseminate the resulting intelligence to local law enforcement agencies and foreign FIUs to combat money laundering.²

In 2003 the Financial Action Task Force on money laundering (FATF), which is a leading inter-governmental body in the development and promotion of policies to combat money laundering and terrorist financing, revised its Forty Recommendations on Anti-Money Laundering. The FATF adopted the revised Eight Special Recommendations on combating money laundering and the financing of terrorism. The revised recommendations included specific recommendations on the establishment and functioning of FIUs, in recognition

that reporting and record-keeping obligations required of countries by the FATF generate a lot of information that requires a specialised agency, such as an FIU, to process and analyse.

FIU Models

Various models of financial intelligence units exist in the world today. They generally perform the following basic functions:

- they act as a centralised repository of reports of suspicious transactions and other disclosures;
- they analyse these reports to determine which reveal potential criminal activity. In addition to reports, FIUs rely on information in their own databases, and from government databases and other public sources, additional information from reporting entities, as well as information that is held by other FIUs; and
- they disseminate the resulting intelligence as part of a country's effort to combat money laundering and the financing of terrorism. To be effective, an FIU should be mandated to share information with domestic and international authorities involved in the detection, prevention and prosecution of

money laundering and terrorist financing.³ In recent years the functions of FIUs have been broadened to cover the combating of terrorist financing. Their coverage has also widened from covering financial institutions to encompassing other non-financial entities. These additional responsibilities have resulted in FIUs facing new challenges in information analysis and institutional capacity.

There are four basic models of FIU:⁴

- the *intermediary/administrative model*, which is attached to a regulatory or supervisory authority, such as a central bank or a ministry of finance, or is an independent administrative authority;
- the *law enforcement model*, in which the agency is attached to a general or specialised police agency;
- the *judicial or prosecutorial model*, whereby the agency is affiliated to a judicial authority or the prosecutor's office. This model typically works well when strong bank secrecy laws necessitate a direct link with judicial or prosecutorial authorities to ensure cooperation from financial institutions; and
- the *hybrid model*, which is a combination of some or all of these models. This type of FIU attempts to fuse the advantages of the various models into one agency.⁵

The information processed by FIUs is often subject to secrecy. The duty of secrecy regarding disclosure of information submitted to an FIU is regarded as an important obligation which, among others, guards against abuse of privacy relating to financial information held by the FIU. The secrecy duty also serves to instil a sense of trust between the reporting institutions and the receiving unit.⁶

One of the disadvantages of the FIU law enforcement model is that financial institutions are generally reluctant to report suspicious financial activity to law enforcement agencies because they believe that this renders their clients vulnerable to criminal investigation, even if the reported activity turns out to have been a legitimate transaction. This reluctance is exacerbated by the belief that such information might be used to investigate crimes other than money

laundering and the financing of terrorism.

The secrecy duty also protects reporting personnel against any possible retaliation from individuals who are the subject of a report. It not only conceals the identities of reporting officers, but it goes some way towards preserving client privacy. It also facilitates the application of the specialty principle to information provided to the reporting institution. This principle restricts the purpose for which information can be used, but it can only be enforced in conjunction with the duty of secrecy.⁷

One of the roles of FIUs that is recognised by the FATF and set out in its best practice guidelines is providing feedback to financial institutions and other reporting institutions. The provision of feedback could be hampered by the secrecy obligation imposed on FIUs and this can have negative impact on financial institutions, particularly banks, which have allocated immense resources and time to filing reports about suspicious and unusual financial activity, but receive little or no feedback on the outcome of such reports. One argument in favour of the secrecy provision is that premature or inappropriate feedback could jeopardise on-going investigations. Other arguments relate to the existence of secrecy and privacy laws which prevail in most countries and prohibit disclosure of information by FIUs.

The FATF recommends that legal and practical limitations should not be used to avoid giving feedback to reporting institutions. Agencies that receive suspicious transaction reports are urged to devise appropriate feedback procedures which take limitations into account but facilitate feedback.⁸

By the nature of their work, FIUs have access to and generate massive financial information. The resulting intelligence and expertise in analysing such information could provide useful feedback to financial institutions. In most cases, however, feedback tends to be limited to general statistics on reports. It has been suggested that more detailed and specific information on money laundering operations would be more useful. Information could be broken down into such categories as the number of reports received per sector or institution, their monetary value, the geographical areas covered, and the number of cases investigated and

referred to prosecution. The use of sanitised cases in which identifying features have been removed is invaluable, as these provide examples of money laundering and the outcome of such cases.⁹

Such feedback would:

- enhance cooperation between financial institutions and the FIU. It would instil confidence in financial institutions that their reports are being taken seriously and are contributing to the fight against money laundering;
- enhance the capacity of reporting personnel in identifying suspicious transactions, including the ability of compliance officers to filter reports that warrant reporting from those that do not;
- provide financial institutions with useful information that would enhance their capacity to keep abreast of money laundering trends and therefore improve their anti-money laundering strategies;
- assist financial institutions to set up improved systems to prevent and detect money laundering and in the process protect the integrity of these institutions against money launderers; and
- enable the reporting institution to take appropriate action regarding its relationship with the customer following the outcome of the report.

The most common type of feedback takes the form of statistics published in periodic newsletters or annual reports. Factors such as the resources allocated by a country to its FIU for the compilation of statistics have a bearing on the frequency of such feedback. The Financial Intelligence Centre (FIC) of South Africa states in its annual report that it exchanges statistical information with supervisory bodies at regular meetings. It also issues statistics on suspicious

transactions in this annual report. The centre, however, only reports regular training and feedback to reporting institutions regarding suspicious transaction reports.¹⁰

The Mauritius FIU utilises data in its possession to offer feedback on trends and patterns in money laundering, which it generally shares with reporting institutions in forums such as conferences. It also disseminates information on suspicious transaction reporting in its annual report, but does not seem to provide any other feedback to financial institutions. In addition to statistics, FIUs could use tangible cases of money laundering in their feedback. One way of providing this information without infringing secrecy obligations is to use sanitised cases.¹¹ These cases reveal information that is useful in raising the awareness of tactics and emerging laundering methods.

The advantages of feedback to financial institutions cannot be overemphasised, but need to be balanced against prevailing secrecy and privacy obligations. A common complaint of financial institutions is still that they expend time and resources in filing suspicious transaction reports, but they do not know what happens to those reports. This can be disheartening, can contribute to a lack of vigilance in filing reports, and ultimately weakens efforts to fight the scourge of money laundering.

The question of resources being allocated to comply with reporting obligations and other issues is particularly pertinent to the issue of feedback from FIUs to banking institutions. A 2004 KPMG international survey showed that the costs of anti-money laundering compliance for banks in 41 countries had risen by 61 per cent since 2001. The rise in costs was attributed mostly to transaction monitoring and staff training, the indications being that these costs would continue to rise.¹²

