

IFSP

The Institute of Financial Services Practitioners

Keeping abreast of developments

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SUSPICION

"Case 2" (suspicion) means any case where,

- regardless of any exemption or threshold, in respect of any transaction,
- any person handling the transaction knows or suspects that the applicant for business may have been, is, or may be engaged in money laundering or the funding of terrorism, or
- that the transaction is carried out on behalf of another person who may have been, is, or may be engaged in money laundering or the funding of terrorism

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SUSPICION (CONT.)

To make a distinction, the above :

- a) prevents the subject person from applying simplified due diligence where this would otherwise be permitted;
- b) has a bearing on the length of time that this particular record should be kept.

The situation defined below triggers the reporting obligation. There is some difference in wording between the two.

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SUSPICION (CONT.)

Reg.15 (6): Where a subject person knows, suspects or has reasonable grounds to suspect that :

- (i) a transaction may be related to money laundering or the funding of terrorism, or
 - (ii) that a person may have been, is or may be connected with money laundering or the funding of terrorism, or
 - (iii) that money laundering or the funding of terrorism has been, is being or may be committed or attempted,
- that subject person shall disclose.. to the FIAU.

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SUSPICION (CONT.)

It is the subject person's role to identify suspicion; it is not his role to investigate and determine whether there is actually any criminal activity.

The Regulations, and the IFSP Guidance Notes, as other guidance notes, refer to indicators giving cause for concern, and your knowledge and common sense must always be capable of recognizing new indicators.

The more you know your client, the more likely you are to pick up suspicious activity, and the converse is equally true.

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SUSPICION (CONT.)

- View the client objectively. Ask yourself, is he / his transactions measuring up to what they should be?
- Taking on work which is outside your firm's normal range of expertise can be risky because money launderers might use such firms to avoid answering too many questions.
- One must not forget the risk of terrorist funding, even though this tends to be considered remote and is often forgotten. In the case of work in connection with trusts and charities, be aware of the purpose of the trust, the provider of the funds, those who have control of the funds, and the beneficiaries.

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SUSPICION (CONT.)

Reg 8(5) also requires that the subject person must, in the event that the client has not produced the required customer due diligence material that has been requested of him :

Either refrain from acting further and consider filing a STR

Or, if it's impossible to refrain, or if refraining is likely to frustrate an investigation, the business proceeds AND an STR is to be immediately filed

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REPORTING

Reg. 15(4) : Internal reporting procedures require the appointment of a senior member of your organisation as reporting officer – the MLRO, and to have procedures in place and known by all concerned, starting from the identification of causes for concern, onto internal reporting, if necessary, by members of your organization to the MLRO, and on to external reporting, if necessary, by the MLRO to the FIAU.

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REPORTING (cont.)

Internal reporting should be prompt, since if we are to satisfy the purpose of the Regulations, the stopwatch for making an external report to the FIAU starts from when the suspicion first arose. Of course, it depends on circumstances when a matter of concern becomes a suspicion.

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REPORTING (cont.)

- Document what is done. Notes taken at the time are far better than justifications provided later. In fact, the documenting by the MLRO of a decision not to make an external report is required by the regulations.
- Failure to maintain these procedures, or failure to file a reportable disclosure to the FIAU is an offence under the Regulations.

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REPORTING (cont.)

Suspicious Transaction Report (STR):

- not limited to suspicious transactions but also other suspicious activity
- Attached to the Guidance Notes (GN) and on the FIAU website is the preferred form to be used. Confidentiality attaches to the STR, (refer to Reg 15(13) and 15(14)) but obviously, filing an STR in respect of one's own client is a delicate situation, and the GN suggest that the MLRO should include his details in the covering letter enclosed with the STR and not in the STR itself, and the name of the person who internally reported the suspicion is not included.

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REPORTING (cont.)

- The report is made to the FIAU as soon as is reasonably practicable, but not later than five working days from when the suspicion first arose,
- The STR is to include all the information concerning the relevant identification and the transaction, including the period within which it is to be executed.

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ACTION FOLLOWING A REPORT

- Reg. 15(7): Subject persons shall refrain from carrying out a [suspect] transaction until they have informed the FIAU in accordance with this regulation and, where to refrain in such a manner is not possible or is likely to frustrate efforts of investigating or pursuing the beneficiaries of the suspected money laundering or funding of terrorism operations, subject persons shall accordingly inform the FIAU immediately the transaction is effected.
 - PML Act 29 : giving the reason why the FIAU was not so informed before executing the transaction.
- There are situations, therefore, when a decision has to be taken by the MLRO whether he should, or should not, delay the transaction. This also highlights the need to internally and externally report suspicion promptly.

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ACTION FOLLOWING A REPORT (cont.)

- PML Act 28 : [The STR is to include the period within which the transaction is to be executed.] Within this period, the FIAU may oppose the execution of the transaction for 24 hours.
- Where no opposition has been made by the FIAU , or, where opposition was made, upon the lapse of the 24 hours, the transaction may then be executed, unless in the meantime an attachment order has been served on the subject person.
- Reg.15 (11) :The FIAU may demand further information.
- PML Act Art. 4 : Keep in mind also that the Attorney General also has powers of investigation , and on obtaining an investigation order from the Criminal Court, may require access to material likely to be of substantial value to the investigation.

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CONFIDENTIALITY / TIPPING OFF

- The subject person has to carefully watch his step with regard to various obligations that pull in different directions: the duty to report suspicion or provide information to a supervisory / law enforcement authority, the duty of professional secrecy and the duty towards the client, and the duty not to disclose information to the wrong people.

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1. Exceptions to the obligation to report to the FIAU ■

Reg 15(10): Subject persons [auditors, external accountants and tax advisers, independent legal professionals] carrying out a relevant activity under paragraph (a) or paragraph (c) of the definition of "relevant activity" shall not be bound by the provisions of subregulation (6) or subregulation (7) if such information is received or obtained in the course of ascertaining the legal position for their client or performing their responsibility of defending or representing that client in, or concerning judicial proceedings, including advice on instituting or avoiding proceedings, whether such information is received or obtained before, during or after such proceedings.

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Exceptions (cont.)

There is similar wording in the proviso to Reg 8(5), and there is also the specific situation of the lawyer / client privilege, which is powerful, but at the same time applies to certain situations and not to others. This is an extremely intricate area, and cannot be elaborated on here. Suffice it to say that tensions do exist between the various duties, in spite of Regulation 15(12) below, and these situations will have to be considered very carefully when they arise.

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2. Professional Secrecy

Reg 15 (12): Any *bona fide* communication or disclosure made by a supervisory authority or by a subject person or by an employee or director of such a supervisory authority or subject person in accordance with these regulations shall not be treated as a breach of the duty of professional secrecy or any other restriction (whether imposed by statute or otherwise) upon the disclosure of information and shall not involve that supervisory authority or subject person or the directors or employees of such supervisory authority or subject person in any liability of any kind.

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3. Disclosure

- Reg 16(1) provides that a subject person, a supervisory authority or any official or employee of a subject person or a supervisory authority who discloses to the person concerned or to a third party, other than as provided for in this regulation, that an investigation is being or may be carried out, or that information has been or may be transmitted to the FIAU pursuant to these regulations shall be guilty of an offence and liable on conviction ...etc.
- The prohibition is not limited “to the person concerned” but also extends to third parties.

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Disclosure (cont.)

- PML Act 4(2): Where an investigation order has been made or applied for,
- whosoever, knowing or suspecting that the investigation is taking place, discloses that an investigation is being undertaken or makes any other disclosures likely to prejudice the said investigation shall be guilty ...etc:
- Provided that in proceedings for an offence under this subarticle, it shall be a defence for the accused to prove that he did not know or suspect that the disclosure was likely to prejudice the investigation.
- You can commit this offence even if you are unaware that a STR has been filed.

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Disclosure (cont.)

- 4 limited instances of permitted disclosure are stated in Reg.16(2). In certain cases, the FIAU can prohibit subject persons from making even these limited disclosures.
- The subject person may make enquiries with his client, or a third party, to obtain further information to help decide whether there is suspicion, but it must not be done in a way that discloses that an investigation or STR has been carried out or is contemplated.
- You should ensure records are not inappropriately disclosed to the client or third parties to avoid offences of tipping off and prejudicing an investigation, and to maintain a good relationship with your clients. This may be achieved by maintaining a separate file.

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Thank You

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