FINANCIAL INTELLIGENCE ANALYSIS UNIT

ENFORCEMENT FACTSHEET TRAINING

QUESTIONS AND ANSWERS

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Disclaimer

This document contains a compilation of selected questions and corresponding answers that were raised during the Q&A session of the Enforcement Factsheet Training organised by the FIAU on 15 February 2024. Any additional enquiries on this document or the application of AML/CFT measures can be directed to queries@fiaumalta.org.

Q1: What should a subject person do when he tries to file an STR but does not have enough information to fill in the required information?

Subject persons are to gather all the required information to submit an STR. When this information is not readily available, the subject person is to try and acquire it from the source itself, paying close attention to the methods used to avoid tipping off. Subject persons are reminded that tipping off is a criminal offence. Therefore, they are expected to be tactful when requesting further information relating to the transaction that the customer is trying to effect. When information is not being provided, subject persons should submit the STR noting the difficulties in obtaining the required information/documentation. They should also consider whether to retain the relationship or not. Moreover, in cases where subject persons acquire further information in relation to a previously submitted STR, they can do so by submitting an 'additional information file' report through goAML.

Q2: Penalties are often imposed for administrative shortcomings which could have led to ML/FT but did not actually lead to ML/FT in practice. Can you clarify this further?

Subject persons are to remember the difference between ML/FT and AML/CFT. ML/FT are criminal offences which can be committed by anyone. AML/CFT are targeted measures, procedures, and processes to use by subject persons to detect and prevent possible money laundering and terrorism financing. They also to protect their operations from abuse by money launderers and to protect the jurisdiction from exposure to ill-gotten gains.

Administrative measures, including penalties, are imposed for the subject persons' lack of adherence to AML/CFT regulations. Compliance with AML/CFT obligations ensures that subject persons have the necessary risk understanding, and controls to manage and mitigate risks, as well as to report suspicious transactions or activities. The aim is to prevent ML/FT from happening, and therefore, subject persons must be vigilant for any red flags, trends and typologies of ML/FT. Money laundering, and the punitive acts for committing, attempting or aiding these crimes is outside the remit of the FIAU. The role of the unit is to ensure compliance with AML/CFT obligations. However, failure to abide with ones AML/CFT obligations can increase the risk of unintentionally facilitating ML/FT. Any gaps and deficiencies in a subject person's controls may facilitate ML/FT attempts by its customers. Therefore, subject persons must have adequate mitigation measures, controls, policies and procedures to reduce the chances/risks of ML/FT taking place. Proof of ML/FT is not required to confirm a breach. However, administrative penalties imposed for failures to implement the necessary controls, take into account the risk of unintentionally facilitating ML/FT.

Q3: When calculating penalties, does the tool take into consideration the high costs incurred by the SP to undergo a review and to ensure compliance in general?

Specific to this question, the tool considers several related factors. It factors in the overall level of regard to AML/CFT obligations, considers incidents of past non-compliance and the level of commitment to comply. In addition, the tool factors in the enhanced controls implemented or committed to be implemented by the subject person after having identified the failures. Furthermore, it factors in the level of cooperation by the subject person, throughout the whole supervisory review and enforcement process. The commitment to remediate or evidence of remediation having been undertaken is also considered as positive. Therefore, there is an element of proportionality, because the amount of the penalty imposed is commensurate to the breach committed by the subject person. However, it also factors in the level of compliance after the failures committed were identified and pointed out. In view of this, one of the administrative measures imposed by the Compliance Monitoring Committee is to issue directives to take remedial actions. This is aimed at increasing compliance, through guided and supported corrective actions. The intention of administrative penalties is to always be proportionate, effective, and dissuasive, thus ensuring that subject persons do not commit breaches in the future.

Q4: Do jurisdictions which are in the FATF list require EDD?

Subject persons must pay close attention to the jurisdictions their customers have links with. Jurisdictions included in the FATF list are to be considered as being non-reputable jurisdictions since they have deficiencies in the AML/CFT measures adopted. Non-reputable jurisdictions must always be regarded as high-risk jurisdictions since these have deficiencies in their national AML/CFT regimes or inappropriate and ineffective measures for the prevention of ML/FT. Therefore, in cases where subject persons are servicing customers with links to these non-reputable jurisdictions, they should consider this as a high-risk factor and are legally obliged to carry out EDD measures. The subject person must, however, assess the link with these jurisdictions. If, for example, the corporate customer is registered in such a jurisdiction and transactions are passing from it, that relationship poses a heightened risk. Therefore, it merits the implementation of EDD measures specifically focused on monitoring the transactions being made, their source and rationale. However, if the link materialises from the place of birth of the Beneficial Owner (BO) or Senior Management Official (SMO) of the company, and no other links are identified with that jurisdiction, there would be no need to implement enhanced due diligence measures but to remain vigilant in case of any subsequent exposure to the jurisdiction.

Q5: For insurance intermediaries, is the intermediary considered to have a business relationship or an occasional transaction with clients they are introducing?

This depends on the service being offered by the insurance intermediary, and the type of intermediary. If the intermediary has facilitated the initial sale of the policy, but is in no way involved in its renewal, servicing, or redemption (save for the annual brokerage fee) than this is considered to be an occasional transaction. However, if the insurance intermediary is involved in the policy renewal, servicing, or redemption than the intermediary would have a business relationship with the customer. It is also important to note that Tied insurance intermediaries who do not accept client monies but simply facilitate the sale of the policy do not fall under the definition of a subject person.

Q6: Does the Regulation require an annual re-approval/confirmation by the Senior Management for continuation of a business relationship with PEPs?

Senior management approval for a business relationship with a PEP is a legal requirement at onboarding. Once this approval has been granted, subject persons are to adopt a risk-based approach. Further senior management approval would be required in cases where material changes are identified within the business relationship, following its close monitoring. A change in the business relationship with the PEP, such as offering a new product/service, might also require re-approval by senior management, this should be done on a risk-sensitive basis.

Q7: Could we kindly get some clarity with regards to the consideration of recycled winnings in relation to the SOW of an igaming customer?

When establishing the source of wealth of a customer in the remote gaming sector, one must trace the origins of the funds being deposited by the player. When recycled winnings are involved, subject persons are to ensure that they understand the source of the original deposits (in cases where the deposits are of a substantial amount or do not align with the customer's profile). This must be seen considering the source of funds information at the subject person's disposal, including information on the player' income streams and employment. Generic statements are not sufficient and must be substantiated with more details and on a risk sensitive basis supported by documentary evidence. Therefore, subject persons are to ensure that they retain enough information on file to build a comprehensive customer business and risk profile. In cases where it is evident that the information provided does not cover the deposits transacted, the subject person is required to inquire further and determine how the funds originated.

Q8: Are Google searches together with an invoice, considered sufficient as an EDD measures?

This depends on from where the risk is originating. If the risk relates to transactions being effected by the customer, and the invoice obtained provides the necessary information on the transaction, and the google search carried out provides reassurance of either the veracity of the parties involves or the product being sold, then this would be deemed sufficient. Subject persons are to remember that the EDD documentation collected is to be reviewed and assessed to further understand the customer's behaviour and activity. In cases where this is not sufficient, additional documentation must be requested.

Q9: Regarding "non filing of financial statement" as a red flag. In many jurisdictions it is an administrative offence, not criminal. What is our responsibility?

The FIAU cannot go into the merits as to how this failure should be penalised as there are other Authorities responsible for this. There is also no obligation to report the non-filing of financial statements to the FIAU. However, this should be considered as a red flag to be considered in conjunction with other factors. If there are more red flags present which give rise to the suspicion of possible ML/FT occurring, subject persons are expected to submit an STR to the FIAU. Therefore, the non-filing of financial statements should not be seen independently, therefore, the subject person is expected to consider the customer's profile holistically, taking into consideration any possible further red flags.

Q10: When a SP submits a TRN requesting to transfer funds under Art28 (PMLA), if the FIAU does not object by 17:30 of the next day can the SP proceed to transfer those funds?

Article 28 of the PMLA allows the FIAU one working day following the day on which the TRN reporting takes place, for it to issue a suspension or postponement order (if required). There is no reference to any specific timeframe. However, the FIAU is conscious of this and issues these orders if necessary within a reasonable time. It is important to note that if the TRN Report is submitted on Friday, the next working day allowed to the FIAU would be Monday.

Q11: Identification and Verification (ID&V) of the BOs – there are 3 considerations one is to take to determine beneficial ownership. What would happen if there are three individuals each satisfying one of the considerations?

The definition of BO is based on a three-tiered test:

1. Tier 1 – Ownership through direct or indirect means, by holding 25% plus one of the shares, or more than 25% of the voting rights or of the ownership interest in the customer.
2. Tier 2 – Control through other means. This test is to be applied independently of whether an individual under Tier 1 was identified. It may result in the identification of additional BOs where the SP has reason to believe that another person/s is/are exercising ultimate control over the running of the body corporate or its management through means other than ownership.
3. Tier 3 – Senior managing official. If, after having exhausted all possible means, no BO as defined under the previous two tiers is identified, the senior managing officials are to be considered as BOs.

Therefore, although this is a 3-tier test, Tier 1 and Tier 2 are not mutually exclusive and it is possible to have situations where one or more BOs are identified under both tiers for the same body corporate. Even within Tier 1 there could be additional BOs in view of their voting rights or because of their ownership interest. It is important to emphasise that, SPs should consider whether there is anyone else exercising control over the body corporate, even when they have already identified one or more BOs under the Tier 1 test.

Q12: When a BO of the customer is listed on an EU/EEA stock exchange, what is the guidance for identification of the UBO since it would be considered low risk?

It is pertinent to clarify that companies would be listed on a stock exchange and not their BO. However, the FIAU understands that the respective BOs of a listed company would be known due to the applicable transparency requirements. In cases where the entity that is listed is the customer or is the holding company of the customer, then no BO identification is required. Subject persons are only obliged to ensure that the company is in fact listed on a regulated market with disclosure requirements in line with EU law. This said, subject persons must remain vigilant of any actions taken by the stock exchange, in relation to repeated failures by the listed entity to abide by the disclosure requirements.

Q13: How is the subject person expected to determine when close associates have links to adverse media?

There is no obligation to screen close associates of customers, or individuals/entities with whom the customer is transacting. However, this may be one of the measures the subject person opts to implement in the event a transaction is flagged for review.

Q14: What is considered complex in corporate structures? How many layers for example would be seen as complex? Can you give some guidance?

There is no single definition to define complexity in corporate structures. Legal arrangements such as trusts and foundations, as well as having multiple jurisdictions involved in a structure may be considered as elements constituting complex corporate structures. While having multiple layers in a particular structure may be a signal of complexity, it is more prudent to understand the details of the layers, especially in relation to any legal arrangements involved and the jurisdiction exposure. Servicing a complex structure which serves no legitimate commercial purpose could increase the risk of ML/FT. Therefore, subject persons would be expected to implement the necessary controls to mitigate arising risks.

Q15: How far back historically should adverse media be considered?

In line with Section 3.5.1(a) of the Implementing Procedures, subject persons are required to consider whether a customer and/or its beneficial owner has been the subject of adverse reports linking them to crime, especially financial crime, and/or terrorism. When considering adverse media, subject persons are expected to consider different factors including, the nature of the adverse media, its impact, the source of the adverse media and how persistent this is.

The Implementing Procedures do not provide a specific timeframe as to how far back historically should negative media be considered. This depends on the individual case, taking into consideration all its elements, as well as the abovementioned factors. Additionally, subject persons are expected to consider the availability of any new reports or more recent media information demonstrating that the information provided earlier had no basis or was not as serious as originally portrayed.

Q16: Wouldn’t the purpose and intended nature of the business relationship in the context of one-time subscription into a Professional Investor Fund (PIF) be obvious?

Whilst the purpose of the business relationship would be obvious, i.e. that of investing, subject persons are to keep in mind that the obligation of the purpose and intended nature of the business relationship attaches with it the obligation to collect information on the source of wealth and source of funds. This is especially important in the realm of PIFs since the amounts being invested are normally of a substantial nature.

Q17: Can you please provide statistics on penalties imposed on individuals in their capacity as MLROs or Directors?

The FIAU has only issued one penalty on a specific individual and this since normally, the breaches identified are the direct responsibility of the subject person. Even in cases where the MLRO does not have sufficient experience, it is the responsibility of the subject person to ensure that it appoints an individual who has sufficient seniority and command. Therefore, in these scenarios, the FIAU works closely with other authorities to either ensure that the officers are provided with more training, or else to ensure that the MLRO is replaced. For penalties to be imposed on individuals, it would require the actual hindering of or unwarranted intrusiveness into the compliance function of the entity, or gross negligence on the part of the individual leading to the failure to submit suspicious reports to the FIAU.

Q18: Can you please elaborate more on the AML breaches covered by the Directive due to Reporting and MLRO?

One of the administrative measures that may be imposed by the FIAU is the issuance of a directive on the subject person to ensure the remediation of breaches identified. When it comes to Reporting, a subject person may be requested to provide updated policies and procedures on STR/SAR reporting to the FIAU. For MLROs, further training may be required. There may be cases where, as explained in the previous question, action is taken on the MLRO itself independently of any action on the subject person. More information in relation to the MLRO can be found in the guidance note issued by the FIAU in April 2022 entitled ‘Common Issues related to the Money Laundering Reporting Officer’.

Q19: In relation to expected level of activity, how are gaming companies expected to obtain this information? Typically, gamblers do not know this kind of information themselves.

The collection of expected activity is mainly driven by the need to have a benchmark by which to compare transactional activity. This is particularly useful given that in the gaming sector there are instances where source of wealth information is not necessarily a requirement (when the customer is low risk).

Expected activity (frequency and value of transactions) tends to be collected directly from the customer. While, information pertaining to the customer's income and employment should be considered distinct from expected activity, if the subject person had collected such information on income and employment (including from statistical models when the customer is not high risk), this information is being considered as a sufficient proxy of the level of expected activity of their customers.

The FIAU is currently looking into this to provide additional clarity on the matter.

Q20: Regarding the expected level of customer activity, can subject persons rely on statistical models? What does the FIAU expect to see in this respect?

As per Section 3.1 (iii) of the Implementing Procedures Part II for the gaming sector, in developing a customer business and risk profile, licensees may also consider using statistical data to develop behavioural models against which to eventually gauge a customer's activity, rather than collect source of wealth information. Therefore, the subject person may make use of statistical models (in scenarios which do not present a high-risk) mainly to understand the source of wealth of the customer. There might be instances, however, in which such statistical models may also help in understanding the expected level of activity. More information in relation to this, can be found in Question 19 above.

Q21: Can you give more clarity on "inappropriately identified senior management officials as BOs"? Can you give more examples?

This refers to scenarios where the actual beneficial owner is not identified, since new shareholders are added to the structure so that no one holds 25% plus one of the shares. Senior management officials are then to be identified as the company's BOs (since as per Section 4.3.2.3 (v) of the Implementing Procedures, the Senior management official should be identified as BO when the subject person has exhausted all possible means to identify one through Tier 1 and Tier 2). This could be identified because the individual would be actively involved in the decisions of the company or is actively funding the operations of the company without having any apparent financial interest in it. Therefore, subject persons are reminded that if someone is believed to have retained control independently of the percentage of shares or voting rights held, then that individual is to also be identified as the BO of the entity.

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