

## Chapter VII

# The Financial Intelligence Unit

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If the international community is to fight money laundering and terrorist financing, it must have access to certain kinds of financially related information in order to conduct financial investigations. In this regard, the financial intelligence unit (FIU) plays an increasingly important role in this process. Launderers and those who finance terrorism manipulate their illicit proceeds in an endeavor to conceal or disguise their true nature, source, location, disposition, and movement, with the ultimate objective of integrating these proceeds into, and through, the legitimate economy.<sup>1</sup> Financial investigations are greatly assisted by a country's comprehensive regime (a) requiring the reporting of certain information and record keeping, and (b) facilitating information sharing among competent authorities, both domestically and internationally. The primary goals of financial investigations are to identify,

1. *United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* (1988) (*Vienna Convention*), art. 3(b)(i) & (ii). <http://www.incb.org/e/conv/1988/>.

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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.

Financial investigations seek to discover the financial trail left by criminals. As part of this process, investigators analyze financial institution account records, real estate records, documents on liens and judgments, corporate registries, brokerage and mutual fund accounts, insurance contracts and a full spectrum of other financial and business relations records. Illicit financial operations have recently grown more sophisticated and complex, requiring traditional investigators to acquire new and specialized financial intelligence tools.

The Financial Action Task Force on Money Laundering (FATF), which is recognized as the international standard setter for anti-money laundering (AML) and combating the financing of terrorism (CFT), recommends that financial institutions be required to report certain information and keep certain records. In general, in its *The Forty Recommendations on Money Laundering (The Forty Recommendations)*, FATF urges countries to impose measures on financial institutions requiring them to maintain records on the identities of their clients and their transactions,<sup>2</sup> as well as to report any suspicious activity.<sup>3</sup> Information generated by these reporting and record keeping requirements is used to reconstruct transactions, to establish the link between individual clients and a particular business, to prove the “state of mind” of an offense (see Chapter V, Criminalizing Money Laundering and Terrorist Financing, and State of Mind), and, finally, to identify the role of an individual in a criminal or terrorist financing enterprise.

Information reporting and record-keeping requirements generate substantial financial data, much of which is not easily useable by competent authorities without further analysis. If a country’s AML and CFT institutional frameworks are to be at all effective, the country must institute a reliable, efficient system for processing, analyzing, and disseminating this data. Without such a system in place, investigators have a much more difficult time detecting criminal or terrorist financial dealings. The pressing need for effective data analysis explains the proliferation of FIUs and the growing impor-

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2. *The Forty Recommendations*, Recs. 11–25, [http://www.oecd.org/fatf/40Recs\\_en.htm](http://www.oecd.org/fatf/40Recs_en.htm).

3. *Id.*, at Rec. 12.

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tance of their roles in the international effort to prevent, detect and prosecute money laundering and the financing of terrorism.<sup>4</sup>

### A. Definition of a Financial Intelligence Unit

All FIUs possess a number of basic functions, consistent with concepts utilized by FATF in *The Forty Recommendations*, even though FATF does not use the name FIU in describing these financial intelligence authorities. The Egmont Group adopted the following definition of an FIU in November 1996:

A central, national agency responsible for receiving (and, as permitted, requesting), analyzing, and disseminating to the competent authorities, disclosures of financial information (i) concerning suspected proceeds of crime, or (ii) required by national legislation or regulation, in order to counter money laundering.<sup>5</sup>

The *United Nations Convention against Transnational Organized Crime* (2000) (*Palermo Convention*) adopted this definition, stating:

Each State Party...shall...consider the establishment of a financial intelligence unit to serve as a national center for the collection, analysis and dissemination of information regarding potential money laundering.<sup>6</sup>

Thus, an FIU has four essential functions related specifically to detecting and countering the laundering of money: the “repository” function, data analysis, domestic information sharing, and international information sharing to the proper authorities. These functions are performed by a centralized unit—the FIU.

4. As of March 2003, sixty-nine countries have established financial intelligence units that are members of the Egmont Group. The Egmont Group, Financial Intelligence Units of the World, available at [http://www1.oecd.org/fatf/Ctry-orgpages/org-egmont\\_en.htm](http://www1.oecd.org/fatf/Ctry-orgpages/org-egmont_en.htm).
5. The Egmont Group is an informal organization of financial intelligence units named after the location of the group's first meeting at the Egmont-Arenberg Palace in Brussels. The goal of the group is to provide a forum for FIUs to improve support to their respective national anti-money laundering programs. See Egmont Group, “Information Paper on Financial Intelligence Units and the Egmont Group,” available at [http://www1.oecd.org/fatf/pdf/EGinfo-web\\_en.pdf](http://www1.oecd.org/fatf/pdf/EGinfo-web_en.pdf). See also Chapter III, the Egmont Group.
6. The *Palermo Convention*, Article 7(1)(b).

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### **B. Core Functions**

The role of an FIU varies from country to country; most of them, however, share four core functions. For a candidate FIU to qualify for membership in the Egmont Group, it must be able to satisfy these core function. Because money laundering is largely a cross-border activity, however, it is important for FIUs to join forces with other national intelligence units. Money laundering often involves cross-border channels for funds transfers. Thus, even the best domestic laws and regulations against money-laundering, including those for an FIU, need an effective international information sharing mechanism in order to combat effectively money laundering and terrorist financing.

#### **1. Centralized Repository Function**

Financial institutions must report all suspicious activity reports and other required disclosures (such as cash transaction reports) to their country's FIU. The centralization of this "repository function"—designating the FIU as the recipient of financial disclosures—is a prerequisite for an effective preventive national and international framework against money laundering.

The use of a centralized repository for the reporting of information and required disclosures ensures that all of the relevant information is in one place, facilitating the processing of information and analysis on a consistent basis. Centralization also ensures greater efficiency in information gathering.

#### **2. Analytical Function**

FIUs are more than mere databases for financial information required by other national regulatory or investigative authorities. FIUs must analyze the data they receive because so many suspicious transaction reports and other financial disclosures often appear to be innocent transactions. Ordinary deposits, withdrawals, fund transfers, or the purchase of a security or an insurance policy may, however, be important pieces of information in detecting and prosecuting money laundering and terrorist financing.

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Only through examination and analysis can FIUs detect criminal financial transactions. Distinguishing truly suspect transactions from those that are only benignly unusual requires informed analysis. Without it, the most sophisticated data gathering in the world will not be productive.

FIU staff members perform three specialized analytical functions. In general, they (1) screen the reported cases in order to identify those that are truly suspect as a step toward directing them to the competent investigative or prosecutorial authorities; (2) provide investigative support by conducting financial analysis upon request in support of an ongoing criminal or regulatory investigation; and (3) conduct “strategic analysis” both to advance the understanding of money-laundering mechanisms and to help invent new ways to prevent and detect them.

These analytical functions require countries to vest their FIUs with the necessary legal authority, proper human resources, and sufficient technical capacity. In particular, the FIU’s analytical functions require extended powers to access information. These powers should include: access to certain commercial or government databases; the authority to request additional information from reporting entities and other sources as necessary; and access to advanced intelligence techniques and apparatus, such as wire tapping and covert operations, subject to domestic legal principles.

In doing so, each country must balance very real privacy concerns against the FIU’s need for an effective analytical function. While resorting to publicly available commercial databases does not raise privacy concerns, increasing the power of these centralized intelligence units to request additional information does. The same caution applies to FIU surveillance and other intelligence techniques.<sup>7</sup> In this regard, financial institution privacy laws should be drafted so as not to interfere with their functions of the FIU.<sup>8</sup>

The analytical function makes the FIU a buffer between the financial community and the criminal justice system and serves to help protect innocent customers. This kind of buffer is generally enhanced in cases where the FIU is not acting as an investigative authority with criminal justice powers. Furthermore, its intermediary role could be undermined if investigative and criminal justice agencies have direct and unregulated access to the FIU’s

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7. *The Forty Recommendations*, Rec. 2.

8. *Id.*

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financial information databases. Thus, FIUs must be vigilant to ensure that sensitive financial information is never used inappropriately to damage the reputation of innocent persons.

### 3. Domestic Information Sharing

If it suspects money laundering and the financing of terrorism, the FIU should have the authority to share, or route, financial information and intelligence to other domestic authorities for investigation or action. It should also be authorized to cooperate and coordinate its actions with the other domestic authorities devoted to the prevention and detection of money laundering.

The importance of timely information sharing with the proper authorities cannot be overstated. Effective measures against money laundering rely on getting the information available to the appropriate authority. For some FIUs, the sharing of information usually follows some analysis of reported financial disclosures. For other FIUs, especially those that receive an enormous volume of financial disclosures, they make the financial disclosures available to law enforcement authorities immediately; these FIUs conduct analysis on financial disclosures and other financial information upon request or as needed at a later time. In either case, the key is for the FIU to provide competent authorities with financial intelligence as quickly as possible so that they can pursue the leads provided by the FIUs.

Domestic coordination is vital. The FIU has to be an essential partner in domestic coordination and could even be empowered to assume the lead role in coordinating the relevant authorities that fight money laundering—which is to say, the FIU, regulators and supervisors of the financial sector, the police, the judicial authorities, and other relevant ministries or administrations.

### 4. International Information Sharing

Because so much of money laundering and the financing of terrorism are cross-border activities, FIUs must be able to share financial intelligence with

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other FIUs worldwide in order to be effective partners in the international fight against these crimes. A core feature of an FIU is its ability to cooperate in an efficient and rapid manner with all of its foreign counterparts. Information sharing at the international level should occur through direct and secure communication with the competent foreign authorities.<sup>9</sup>

### C. Possible Additional Functions

#### 1. Regulatory/Supervisory Function

The FIU or another competent authority should be granted the power to supervise financial institutions and to control their compliance with the record keeping and reporting requirements. The FIU or another competent authority should also be authorized to impose sanctions or penalties against financial institutions for failing to comply with their reporting or record-keeping obligations—for example, meaningful fines and/or license suspensions. The FIU could be authorized to issue financial sector regulations as necessary for the implementation of laws against money laundering.

Some authority within the country needs to be responsible for these compliance matters. In most countries, this responsibility belongs to the supervisory authority of each financial sector. But because the FIU is the unique recipient of financial intelligence, in addition to which it analyzes financial intelligence, the FIU is well placed to monitor compliance with anti-money laundering obligations. Some countries have opted to give the compliance-control responsibility to the FIU. In certain countries, some reporting institutions are not subject to any supervision other than that of the FIU, which makes it the most suitable body to address the cross-disciplinary issues raised in this context.

In addition, the FIU could be authorized to issue financial sector regulations for the implementation of laws against money laundering. Giving such responsibilities to the FIU, however, should take into account issues of capacity, funding and of prioritization. To be effective, an FIU must receive adequate resources and appropriate government support for the FIU to accomplish its core functions and any additional responsibilities. If the FIU's

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9. See Chapter VIII, International Cooperation.

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staffing capacity is limited, additional supervisory or regulatory function could undermine its core functions.

### 2. Law Enforcement Function

Even though most of the FIUs have no law enforcement powers, an FIU could be given some enforcement functions based on its direct access to financial information and its ability to deal efficiently with cases where urgent and/or provisional enforcement action is needed.

Countries may grant their FIU the function of providing investigative support to other law enforcement agencies in the course of ongoing investigations on money laundering. In this case, the FIU will be expected to share information with investigative authorities upon request.

Countries may also grant their FIU the power to take provisional measures to deal effectively with cases where urgent action is needed. Because the FIU is a crucial governmental point for identifying suspicious transactions, one could make the case for granting the FIU provisional powers to preserve assets that might become subject to confiscation. Such measures could include the temporary freezing of assets as well as other measures that restrain any legal disposition of these assets.

Such provisional powers require, however, that the FIU be able to identify any assets vulnerable to confiscation under the laws against money laundering and terrorist financing. These powers may entail the exercise of additional powers that would enable the FIU to request additional information from financial institutions or even to carry out investigations for the purpose of identifying such assets. In doing so, however, particular care should be taken to assure that the FIU has sufficient resources to perform its core functions—that is, receiving and analyzing the suspicious-transaction reports, as well as sharing information with domestic and international counterparts.

### 3. Prosecution Function

If FIUs were given prosecutorial duties in addition to their core functions of data collecting, data storing, analysis, and information sharing and routing—

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which is to say, the authority to conduct criminal investigations and to prosecute money-laundering, terrorist financing, and other related crimes, this authority might pose problems the FIU's vital intelligence function. It could also undermine the FIU's capacity to cooperate at the international level, especially with FIUs that do not prosecute those they are investigating. The added prosecutorial responsibility could also impact the FIU's role as a buffer between financial institutions (and other reporting parties) and the criminal justice system. In this regard, the FIU would not be able to serve as strong an intermediary between the two systems.

### 4. Consulting and Training Functions

Because of focused and multidisciplinary expertise of an FIU, it could easily serve as the best governmental unit to advise and train personnel from financial institutions in measures to fight money laundering and combat terrorist financing.

Again, countries must consider resource limitations in deciding whether to attach this function to the FIU.

## D. Organizational Structure

### 1. The Various Types of FIUs

Countries generally choose one of three basic models in establishing an FIU:

- a. the *administrative agency model*, which is either attached to a regulatory/supervisory authority, such as the central bank or the ministry of finance, or as an independent administrative authority;
- b. the *law-enforcement model*, whereby the agency is attached to a police force, whether general or specialized; or
- c. the *prosecutorial model*, where the agency is affiliated with the prosecutor's office as a judicial authority.

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With regard to these three different organizational models, the following general conclusions can be drawn. The administrative model creates a less-independent FIU, but it tends to enjoy the trust of the financial sector, possess greater expertise about the financial system itself, and is better able to exchange information with its counterparts around the world (most of whom are administrative-model financial intelligence units). The law enforcement model, too, lacks certain independence. Add to this the drawback that its financial expertise—and thus the trust of the financial sector—is not as great as that enjoyed by FIUs based on the administrative model. Financial institutions are more reluctant to report suspicious activity to a police-based FIU if they know their clients immediately become subject to police investigation.

The prosecutorial model, the third option, enjoys independence, but lacks trust as well as actual contact with the financial sector. In many instances, it also lacks the ability to exchange information with foreign counterparts through FIU communication channels because most of these are administrative. Purely prosecutorial FIUs may not be able to take part as effectively in the international exchange of information among FIUs because their duties and obligations as judicial authorities do not allow them to exchange intelligence information on an informal, flexible, rapid, and/or confidential manner, unless specific legal provisions permit otherwise.

Although these conclusions simplify discussion, they also run the risk of oversimplification. For instance, attaching an FIU to a certain agency does not necessarily determine its entire nature. Staffing, functions, powers, and governing procedures are very important in this regard. Indeed, most existing FIUs actually use a mixed model, with administrative as well as some law enforcement and/or prosecutorial functions.

In addition, assessments of the different models are based on psychological perceptions about a host of matters, such as the degree of trust between the financial industry and a given model. Such impressions may vary greatly depending on the country and its culture. Thus, each of these issues is an important consideration.

Moreover, there is the distinction, although not at all clear cut, between the law enforcement/prosecutorial and the administrative models. If the police unit is a law enforcement agency whose primary responsibility is to gather evidence for the purpose of criminal prosecution, such definition could apply equally to many administrative departments with law enforce-

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ment responsibilities, such as customs. Furthermore, a number of existing police or judiciary-based FIUs are given purely administrative powers (for example, depository and analytical functions) without any law enforcement powers, which makes them function more like FIUs based on the administrative model.

Identifying the various options for creating FIUs should not proceed from simple categorizations. The appropriate institutional base is but one of many questions that needs to be addressed when countries set about to establish effective financial intelligence units.

### 2. Choosing the Right Model

Good decisions about the proper model to adopt when setting up an FIU proceed from equally sound knowledge about a country's cultural and economic characteristics and its legal and law enforcement traditions. Although no single model will work for all countries, some criteria are essential; they are given below in the form of questions:

- Does the proposed FIU possess relevant capacity and expertise in financial operations?
- What is the relationship between this particular institution and the financial industry in the domestic context?
- Does the institution possess a culture conducive to protecting the confidentiality of financial information and to mitigating potential harm to individual privacy?
- Does the proposed FIU possess the actual legal authority, technical capacity, and experience to provide appropriate and timely international cooperation?
- Would the legal framework applicable to the proposed FIU allow it to take part in the international administrative type of cooperation and would the legal framework allow for rapid, efficient, spontaneous and/or "upon request" international information exchanges relating to suspicious transactions?

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### 3. Capacity Considerations

Financial investigations are only as good as the individual investigators and the technological infrastructure that supports their efforts. A country must make policy determinations on how the FIU can make the best use of the financial analysis skills of its staff members. In this regard, the country must also determine the best institutional setting for these skills—the central bank, ministry of finance, the police, the judiciary. Fashioning an FIU as a wholly separate agency from a country's existing regulatory, administrative, or law enforcement agencies could also have serious resource implications.

### 4. Staffing Considerations

Recruitment policies have implications for matters relating to resources, privacy, and institutional effectiveness. The relative rarity of investigatory financial expertise means that staffing considerations should be driven by the multidisciplinary nature of financial investigations in order to make recruitment as diverse as possible.

Staff background and the terms of employment are both important. On the one hand, treasury or finance ministry officials, banking supervisors, and customs officers could bring their respective financial expertise and their comprehension of reporting entities, to the extent that the entities are financial institutions. On the other hand, police or judicial officers bring useful law enforcement experience, particularly if the FIU has been granted law enforcement powers.

The terms of employment also impact the degree of independence, and the degree of confidentiality in the work of the FIU. The rarity of the high-level skills/experience required of FIU investigators means that some countries might opt for staffing their units with experts seconded from other agencies. Although a less-costly staffing option—and probably one that is more conducive to effective information sharing—governments need to weigh the privacy and longer term implications of such decisions.

## E. Privacy Safeguards

FIUs are repositories, as well as guardians, of highly sensitive information, a fact that calls for constant vigilance regarding legal and systemic safeguards.

### 1. The Main Policy Tension: Privacy versus Efficiency

Certain policy tensions emerge as FIUs take shape; these stem mostly from the ambitious goals of AML and CFT laws and regulations, which compete with or erode rival privacy interests.<sup>10</sup>

Laws against money laundering have emerged, in part, as a response to the obstacles that bank secrecy laws posed to supervisory and law enforcement efforts. In some jurisdictions, strong bank secrecy requirements have frequently defeated investigative efforts to obtain financial information required to detect crimes and regulatory breaches, or for tracing or confiscating assets. Such a result is contrary to the FATF recommended structure, which provides that financial institution privacy laws should not inhibit any of the FATF recommendations.<sup>11</sup> Cumbersome procedures also hamper investigative efforts to gather information and/or evidence abroad. With financial globalization, such concerns have become even more acute. Money laundering laws can be seen as an attempt to ensure efficient information exchange and evidence gathering, both nationally and internationally, as prerequisites for effective regulatory and criminal law enforcement in today's globalized economy.

The very sensitive and confidential nature of individual financial information means that FIUs need to institute stringent procedural safeguards for their important financial evidence gathering and information sharing functions. Effective law enforcement rests on efficient and speedy access to financial information. But this law enforcement need pushes the boundaries

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10. The Egmont Group's statement of purpose, in the preamble, provides that it is "mindful of...the sensitive nature of disclosures of financial information." The Group also holds that "FIUs should work to encourage that national legal standards and privacy laws are not conceived so as to inhibit the exchange of information, in accordance with these principles, between or among FIUs; see The Egmont Group, Principles for Information Exchange between Financial Intelligence Units for Money Laundering Cases, (June 13, 2001), Principle 7. [http://www1.oecd.org/fatf/pdf/EGstat-200106\\_en.pdf](http://www1.oecd.org/fatf/pdf/EGstat-200106_en.pdf).

11. *The Forty Recommendations*, Rec. 2

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of financial privacy concerns, raising legitimate concerns about the potential for abuse.

In its roles as repository, processor, and clearinghouse of financial information relating to the crime of money laundering and terrorist financing, FIUs are at the forefront of this debate about efficiency versus privacy. This tension is reflected in the choices countries make about the structure, functions, powers, and procedures of their financial intelligence units. Countries need to make realistic assessments of the costs to privacy inherent in each of the choices they make about the FIU's authorities and restrictions.

### 2. Confidentiality Principle

Imposing the confidentiality principle on FIUs is the most important protection against abuse of private financial information. This principle will also enable the FIU to exercise its functions as an intermediary between the reporting financial institutions and the criminal justice system.

In cases where the FIU is part of another agency, such as the police or the office of the public prosecutor, the unit is usually governed by a general duty of confidentiality. In the absence of such a general duty, however, a specific duty of confidentiality should be expressed in the legal provisions governing and creating the FIU,<sup>12</sup> and should be enforced by criminal and/or effective civil sanctions. The duty of confidentiality may also be contained in domestic privacy laws of general application.

The FIU's duty of confidentiality, however, should be drafted so as not to restrict unduly the possibility of providing feedback to the reporting institutions, as feedback is important both for the relationship between the FIU and the financial intermediaries and for enabling the reporting institutions to develop efficient reporting mechanisms.<sup>13</sup> Confidentiality requirements should be drafted in a way that does not inhibit international cooperation among FIUs.<sup>14</sup>

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12. Guy Stessens, *Money Laundering: A New International Law Enforcement Model* (Cambridge, England, and New York, New York, United States: Cambridge University Press, 2000), 191.

13. FATF, Providing Feedback to reporting Financial Institutions and Other Persons: Best Practice Guidelines, ¶ 6, available at [http://www1.oecd.org/fatf/pdf/FEEDB\\_en.pdf](http://www1.oecd.org/fatf/pdf/FEEDB_en.pdf).

14. The Egmont Group, *Principles of Information Exchange between Financial Intelligence Units for Money Laundering Cases* (June 13, 2001), Principle 7.

### 3. Specialty Principle

To complement the duty of confidentiality, FIUs can adopt a “specialty principle,” which serves to limit the use of information reported to it from financial institutions, or requested by the FIU from such institutions. If an FIU is prohibited from using information provided to it for any purpose other than fighting money laundering and terrorist financing, countries can develop a sense of trust between reporting institutions and the FIU.

The specialty limitation necessarily depends on what it means to be “fighting money laundering and terrorist financing.” The restriction could be drafted to mean the financial information managed by the FIU could be used only for the performance of the unit’s duties, as described in the law that established the FIU. It could also be expressed in a specific statutory or regulatory stipulation regarding the conditions for the dissemination of information by the FIU.

The specialty principle should be drafted in sufficiently broad language so that the FIU is not prevented from enforcing the laws and regulations against money laundering and terrorist financing. In addition, if the specialty principle applies to international information exchanges among FIUs, it should be drafted so as not to inhibit or damage the efficiency of international cooperation among FIUs.<sup>15</sup>

Breaches of the specialty limitation should be sanctioned by procedural laws about inadmissibility of the evidence before the courts, and/or by some form of civil or statutory liability for breach of confidentiality.

### 4. Independence and Accountability

Countries must assure the independence of the FIU from political influence, as well as independence from the competent or other supervisory authority in deciding which transactions to analyze or what information to disseminate. Independence provides another measure of protection against the abuse or misuse of financial disclosures. Independence is not an absolute concept, there will always be some measure of accountability, but the FIU should not

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15. *Id.*, at Principles of Information Exchange between Financial Intelligence Units for Money Laundering Cases (June 13, 2001), Principles 11 and 12.

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be subject to abuse or undue influence from other government authorities. This sense of independence also supports a sense of trust between the FIU and reporting financial institutions, which promotes the prevention and detection of money laundering and terrorist financing.

This independence could be guaranteed in several ways. In certain instances it could be accomplished by creating the FIU as a separate agency with an autonomous budget and staff without accountability to any agencies that might be inclined to use the system beyond its proper limits. This independence should, however, be accompanied by proper accountability mechanisms, such as parliamentary reporting, audits, and/or judicial oversight.