

# 23 TIPPING OFF

## 23.1 INTRODUCTION

It is easy for books on money-laundering deterrence and terrorist financing to focus almost entirely on the steps taken to identify, monitor and investigate criminal activity. However, there are other obligations which are also important. Tipping off is one area where specific additional attention must also be given to the direction of a firm's employees and also those who work internally within a firm. Such obligations extend to contractors, interim staff and also outsourced service providers.

So, what is tipping off? It is letting the customer know that they are, or might be, the subject of a suspicion. The objective of making tipping off illegal is clear: it is to ensure that nothing is conducted which might hamper an investigation. If a money launderer is tipped off, they are often able to hide their tracks and disappear before the appropriate investigations can be conducted. Clearly, this severely inhibits the objectives of money-laundering deterrence and consequently the sanctions for getting this wrong can be draconian, but vary between jurisdictions.

Money-laundering deterrence is also dependent on the discretion of those who investigate and report suspicions of money laundering. The prevention of money laundering would be severely undermined if money launderers were alerted by the staff of the firm as soon as a suspicion arose, since the funds would most likely disappear to another jurisdiction. So, tipping off could occur at the stage of initial contact with the customer, during the processing of transactions or obtaining information, when investigations are being conducted on a suspicion or even after reporting to an appropriate agency.

## 23.2 LETTING THE CUSTOMER KNOW

Letting the money launderer find out that they are under suspicion is generally referred to as tipping off. Generally, once an internal or external suspicion report has been made, it is a criminal offence for anyone to release information which is likely to prejudice an investigation. Persons entrusted with investigating and reporting duties must essentially conduct customer enquiries in a tactful manner regarding the background to a transaction or activity that is inconsistent with the normal pattern of activity, and carry out enhanced customer due diligence measures in a way which does not give rise to the customer being aware that they are under suspicion.

Typically, the offence of tipping off is defined as follows:

A person commits an offence if:

- (a) He knows or suspects that a disclosure has been made, and
- (b) He makes a disclosure which is likely to prejudice any investigation which might be conducted following the disclosure referred to above.

A person does not normally commit an offence if he did not know or suspect that the disclosure was likely to be prejudicial. However, perhaps we should add that in court the requirement would generally be whether a reasonable person might judge that the employee did not know or suspect. Remember that in a court there is always a measure of hindsight to take into account, so the employee will need to be in a position to justify the actions taken.

It is normally an offence for a person to make a disclosure to a customer or associate that was likely to prejudice any investigation that might be brought following making a suspicious activity report (SAR) to the relevant reporting agency, when that person knew or suspected that a SAR had been made. An offence would not be committed unless a SAR had been filed, since, in the absence of reporting, there is no actual confirmed suspicion.

What this means is that all members of staff at a financial institution need to be fully aware of their personal obligations under tipping-off legislation. They need to know what to say to a customer and what to do to avoid alerting them to the concerns that they may actually be harbouring. This needs training and role play to enable staff to better appreciate the issues that may arise in practice.

### 23.3 THE PROBLEMS IN PRACTICE

One of the concerns is what an employee should actually do when they need to conduct investigations to confirm a potential case of money laundering or terrorist financing. Naturally, they will wish to obtain further information and to undertake enhanced due diligence, but they need to do this in such a way as to ensure that the customer does not become unduly suspicious. Often, they will fall back on standard comments such as “our standard procedures require me to ask the following question” or “this is one of the general compliance things we have to deal with”. By attempting to make the due diligence processes appear standard, the employee will attempt to obtain relevant information without unnecessarily alerting the customer. An employee should never say that “we are doing this as part of our money-laundering-deterrence checks”, since this could take the conversation along a line that might become uncomfortable.

If a customer is undertaking inappropriate activity, it is often junior staff that are the first to speak to the customer. Even moving responsibility unusually up the line of command could potentially alert the customer to concerns and potentially be considered tipping off. Therefore, front-line staff need to be extremely vigilant in what they do and be fully aware of the processes and procedures that are to be undertaken. They may be

provided with a script which they should follow in such cases, although showing the script to the customer would also clearly be tipping off.

To illustrate how difficult matters can get, consider the following example:

If a bank manager learns from the bank's MLRO that the relevant regulatory body is contemplating making an investigation into a customer's transactions and no report has yet been made by the firm, the bank manager shall normally commit an offence if they disclose the fact that a report is even being contemplated in light of the customer's transactions. In such a case, a SAR will not have been issued, yet the bank manager is still at risk.

If a customer turns up with cash funds and laughingly says, "Do you think I am laundering money?", then the bank employee has a problem. Clearly, they must fall back on the procedures that they are required to conduct and should state that these are normal procedures, trying to show that no additional procedures are being conducted. Indeed, the same approach should be taken when additional procedures are, in fact, being undertaken. Saying that everything is being conducted in line with regulation and is the same in all cases is the normal defence used to defray awkward questions.

#### **23.4 PENALTIES FOR TIPPING OFF**

There are normally major penalties on individual employees for tipping off, since this could prevent the criminal funds being seized. If the customer is tipped off, they will continue to launder their funds through another medium and typically from another place. Five years' imprisonment and unlimited fines are quite normal penalties to have imposed for tipping off, so all employees do need to take their responsibilities seriously. However, it should be noted that cases where tipping off has actually been penalised are few and far between.

#### **23.5 COMMUNICATIONS WITH CUSTOMERS UNDER INVESTIGATION**

Once a suspicion has been notified through the submission of a SAR to the relevant agency, the condition of the tipping-off offence continues. Firms cannot tell the customer the real reason why their transaction is being delayed, as informing the customer that a report is awaiting consent from the relevant agency would obviously give rise to the offence of tipping off. The issue is clear. If the bank has received instructions from its relevant authority to freeze an account, then it cannot tell the customer why the account is frozen. As you would expect, it would run out of excuses relatively quickly and the customer would then become suspicious. For how long can you blame the bank's IT systems for failing to process a transaction or transfer? While the customer may, at that stage, disappear, at least the frozen funds will be available for the enforcement officers to investigate.

The harder case is where a report has been made but there has been no response from the relevant agency. Normally, if the bank or financial institution is acting in good faith

and failing to conduct a transaction would have the effect of tipping off the customer, then regulations will normally specify that the firm should undertake the transaction; even though the effect of this may be moving the funds to another jurisdiction.

In all cases, the MLRO should be involved to ensure that the actions taken by the bank or financial institution are in accordance with the regulations applying in the relevant jurisdiction.