

Suspicious transactions and activities

Lawyers will soon need to file reports about suspicious activities with the Police.

On 1 July 2018, lawyers will become reporting entities under the Anti-Money Laundering and Countering Financing of Terrorism (AML/CFT) Act 2009.

At this point, lawyers must file reports about suspicious activities. Lawyers will need to be familiar with GoAML which is the reporting tool for suspicious activities (<http://www.police.govt.nz/advice/business-es-and-organisations/fiu/goaml>).

Lawyers and incorporated law firms must currently report any suspicious transaction when that lawyer or firm receives, in the course of their business, funds as a deposit or investment or to settle a real estate transaction. This is provided in sections 3 and 15 of the Financial Transactions Reporting Act 1996. The AML/CFT requirements to report will replace the current Financial Transactions Reporting Act requirements.

SUSPICIOUS TRANSACTIONS

Lawyers who provide services or carry out transactions covered by the AML/CFT Act, will have to monitor client accounts for suspicious transactions.

Suspicious transactions are generally transactions that are inconsistent with a client's usual activities or what you would expect for that type of client.

If a lawyer notices suspicious transactions, a suspicious activity report ('SAR') will need to be submitted to the Police's Financial Intelligence Unit (FIU) if there are reasonable grounds to suspect it is relevant to a criminal offence and might help an investigation or prosecution.

SUSPICIOUS ACTIVITIES

Changes to the AML/CFT Act mean lawyers are required to report suspicious activity. This is because a lawyer might notice things that could provide valuable financial intelligence for detecting crime, even if the customer does not complete a transaction. For example, a firm may suspect a customer is seeking to establish trusts or company structures in order to launder money or evade tax. However, no "transaction" may necessarily be involved in the instruction.

OBJECTIVE TEST

The test of whether a transaction is "suspicious" is objective, and not subjective.

This was confirmed by the High Court in the first determination of pecuniary penalties under the AML/CFT Act, *Department of Internal Affairs v Ping An Finance (Group) New Zealand* [2017] NZHC 2363. This case involved a money remitter.

Reporting entities need to report any transaction that is "objectively suspicious," the Court said (at [64]).

"Where an objective observer would conclude that reasonable grounds for suspicion were known to the reporting entity, it is no defence that the reporting entity did not actually consider the transaction to be suspicious" (at [64]).

A subjective test would "seriously undermine" the purpose of section 40 of the AML/CFT Act, which is "to ensure the prompt reporting of suspicious transactions when there are reasonable grounds to suspect there

is potential criminal activity.

“A reporting entity might argue that, although it may have been aware of grounds a reasonable, objective observer would consider sufficient to warrant suspicion, the entity did not in fact reach that conclusion and so the period for reporting never began.

“It follows that the obligation to report must be held to arise when the reporting entity either becomes aware of the facts constituting the reasonable grounds for suspicion, or by reasonable diligence would have become aware of them,” the Court said (at [67]).

WHAT GIVES RISE TO “SUSPICION”?

What, then, are the factors that can give rise to suspicion about an activity or a transaction?

There are “red flags” lawyers can look out for that suggest some criminal behaviour may be involved. These “red flags” are noted in *A Lawyer’s Guide to Detecting and Preventing Money Laundering* – a collaborative publication of the International Bar Association, the American Bar Association and the Council of Bars and Law Societies of Europe. The Financial Action Task Force (FATF) publication *Money Laundering and Terrorist Financing, Vulnerabilities of Legal Professionals* (2013) is also a key resource for lawyers.

The existence of a “red flag” may have a legitimate explanation, but international experience shows that there are certain indicators lawyers should look out for. These “red flags” include (but are not limited to):

- Once funds received into a trust account, the transaction is aborted;
- Client requests that deposited funds are sent to a third party or parties, rather than returned to the client;
- Client avoids personal contact without good reason;
- Unusual manner of execution – eg, the deposit of funds for the purchase price occurs unusually early in the transaction and before the purchase price is agreed between the parties;
- Amount being deposited is large compared to client’s modest income;
- Surplus funds are deposited;
- Back-to-back property transactions, which are out of sync with normal market dynamics – the purported value of each property rapidly increasing with each subsequent transaction;
- Client changes legal advisor a number of times in a short time period for no apparent reason;
- The purchase price is paid entirely in cash;
- Client has no proper identification papers;
- There is no information available about the client and his or her business;
- Purported legal documentation is too simplistic for the relevant transaction;
- Client’s connection with the jurisdiction is unclear;
- No mention of the activity by the client initially, followed by an over willingness to provide a lot of documentation; and
- Urgency in getting the deal done.

As the Court said (at [68]) in the *Ping An Finance* case: “reasonable grounds for suspicion may be proved to exist inferentially, by reference to external indicia” (such as the above “red flags”).

The Court listed the following external indicators, taken from the *FIU Suspicious Transaction Guidelines 2013*:

- Cash deposits or withdrawals that fall consistently just below “occasional transaction” thresholds;
- Several transactions conducted on the same day;
- High value cash deposits;
- Transactions that appear unnecessarily complex;
- The use of multiple bank accounts or foreign currency accounts without any apparent legitimate reason;
- Frequent or unscheduled cash deposits to loan accounts; and
- The account receives a large number of small cash deposits and a small number of large cash withdrawals.

FURTHER INFORMATION

This guide has been prepared by the New Zealand Law Society to assist the legal profession with its preparation for becoming reporting entities under the Anti-Money Laundering and Countering Financing of Terrorism Act 2009 from 1 July 2018.

Further information on AML/CFT requirements is available on the Law Society website at <https://www.law-society.org.nz/practice-resources/practice-areas/aml-cft>.