Nov 22, 2022

Question On Information Sharing Regarding AML

Question: Money Laundering Bulletin
Answer: Ryu Nakasaki (Attorney At Law in Japan)

1 - Are obliged entities in Japan encouraged to share information and, if so, how are the financial authorities encouraging more sharing? More frequent reporting? Promotion campaigns? Seminars on compliance?

Answer to 1:
There are basically two situations for information sharing among specified businesses: information sharing with the government and with other private entities.

(1) Information Sharing with Government
(a) Suspicious Transaction Report

There is an obligation to report suspicious transactions for obliged entities excluding professionals.

Amendments to the law that would introduce the obligation to report suspicious transactions for professionals other than lawyers have been submitted to the current session of the Diet. If passed, they will also be obliged to report suspicious transactions.

Lawyers are the last ally in a criminal case when a defendant fights against a powerful state power, and if lawyers are obliged to report suspicious transactions, they cannot provide an effective criminal defense. The bar association and others strongly oppose imposing the obligation on lawyers to report suspicious transactions. The United States, too, does not impose on lawyers the obligation to report suspicious transactions, as I understand.

(b) Cooperation with Investigative Inquiries

The National Police Agency's interpretation is that financial institutions and other entities are obligated to respond to investigative inquiries by the police (Article 197 of the Code of Criminal Procedure). Although there is no penalty for violation of this provision, and there is some debate

as to whether such an interpretation is constitutional, many financial institutions and other obliged entities have responded to investigative inquiries in accordance with the NPA's interpretation.

(2) Information sharing between Private Parties
(a) Intra-group information sharing

There is no provision in the Act on Prevention of Transfer of Criminal Proceeds (hereinafter "Criminal Proceeds Act") that obligate intra-group information sharing. It may violate the prohibition clause against tipping off (Paragraph 3, Article 8 of the Criminal Proceeds Act), and I have heard of financial institutions being told that they have been refused by their EU sub to provide STR by their group companies due to GDPR and such.

I am proposing that the Criminal Proceeds Act be amended to (1) create an exemption to the provision prohibiting tipping off, and (2) include a provision requiring financial institutions to share information within their groups. (This is unlikely to happen in the near future.)

The FSA has established guidelines, and although there may be some doubt as to whether the guidelines can prevail over law, I believe that information sharing within a group is possible because it is considered "an act in the legitimate course of business" (Article 35 of the Penal Code), which precludes illegality, and I have strongly encouraged my past clients to share information in accordance with the FSA guidelines.

(b) Information sharing across groups
In this regard, unless there is a clear provision in the law, such as a merchant information exchange system under the Installment Sales Act, there is a question of whether it is really acceptable to provide such information, partly because of the relationship with the prohibition of tipping-off and because of the provisions of the Personal Information Protection Act. My impression is that financial institutions are quite reluctant to share information across groups.

In order to promote this, I believe it would be necessary to amend the law, as in the U.S., but there is no such movement.

In the additional questions, I discuss a joint monitoring system among banks.

Question 2

2 - Are obliged entities actually complying and sharing information more frequently than in the past? If not, why not?

(1) State - private parties

Yes, they are complying with the Criminal Proceeds Act and are reporting appropriately according to my understanding.

In terms of information sharing with the government, information has been shared quite a bit with them in the past. I do not think the FATF has pointed out any major problems in relation to the number of reporting to the government.

Rather, I recognize that improving the accuracy of reporting suspicious transactions is an issue. In this regard, I expect that the introduction of a joint monitoring system among banks will help to improve the accuracy.

(2) Private parties

It is my impression that information sharing among group companies has been promoted considerably more than before the establishment of the guidelines, due in part to the FSA guidelines, etc. However, there are some subsidiaries that refuse to share information due to the existence of the GDPR, etc. My personal opinion is that information sharing among group companies would increase if the Criminal Proceeds Act stipulated the sharing of information within a group as an obligation.

For information sharing across groups, I think it is not advancing much, but I am not sure about the factual figures.

3 - Is this a very onerous requirement for obliged entities? Is it complicated and time-consuming?

The first thing that must be cleared up is the legal aspect.

If the information is provided beyond the company, there are the issues of (1) provision of personal information to a third party, (2) confidentiality of customer information (especially in relation to confidentiality clauses with other companies), (3) privacy issues, and (4) Tipping Off issues, and (iv) overseas law issues such as U.S. law and European law (GDPR). Multiple issues arise. These issues must be considered, but there are various obstacles in the area of

clearing legal issues, partly because there are no explicit provisions in Japan's Criminal Proceeds Act.

Second, on the practical side, there is the issue of name identification. In Japan, National IDs ("My Number") cannot be used by financial institutions for anti-crime purposes. For this reason, names, addresses, and dates of birth are generally used for name identification, but names can be changed by marriage or adoption, and addresses can be easily changed. However, since there are many people with the same date of birth, the process of name identification is very difficult in many ways. Since it would be troublesome if there is a case of mistaken identity, a great deal of system development and effort is required for name identification.

The degree of difficulty in sharing information within a group differs depending on the depth of information sharing. If it is simply a matter of sharing an Excel file of customers who have reported suspicious transactions, there is little need to reconstruct the system, but if information is to be shared at a deeper level, there are various system reconstruction costs.

In summary, the above suggests that the obligation to share information is a rather difficult issue for financial institutions to deal with. At the very least, I personally believe that information sharing will not make much headway until the government amends the legal system and clarifies the interpretation of the law, referring to the U.S. law and other laws.

4 - Are there added complications with international transactions that make Japanese companies reluctant to comply?

FSA provides in section III-4 of the FSA AML Guideline (https://www.fsa.go.jp/common/law/amlcft/211122_en_amlcft_guidelines.pdf) to establish internal control to ensure information sharing among obliged entities in the same group. However, it is only in the above guideline and not in the Criminal Proceeds Act.

In the Banking Act, there is a provision that requires banks to ensure sound operation of banks and to establish internal control to ensure compliance, but there is no express provision that requires sharing of STRs and such.

For the above reasons, I have the impression that it may be difficult for Japanese parent companies to enforce their subs to share STRs and such to themselves when the sub refuses to do so.

5 - What new legislation on this has been introduced by the Japanese authorities in the last year?

I do not recognize any.

6 - What new legislation is presently being considered or planned?

In October, a new bill to deal with the issues that FATF has pointed out has been proposed. It is under discussion at the Diet and will likely be passed within a month or two.

The documents relating to the bill can be found below.
https://www.cas.go.jp/jp/houan/210.html

The bill includes the following content:

(1) Criminal Proceeds Act (“*Hanzai Shueki Iten Boushi Hou*”)

For professionals that fall under legal scrivener (Shiho Shoshi), administrative scrivener (gyosei-shoshi), tax accountant (zeiri-shi), they would be required to conduct CDD on the Beneficial Owner of the customer, and would be subject to obligation to file suspicious transaction report (“STR”). In relation with lawyers, the filing obligation of STRs will not be implemented.

For virtual asset service providers (“VASP”), they would be subject to (i) confirmation obligation similar to those imposed on correspondent banks, and (ii) travel rule (Article 10-4 and 10-5 of the Criminal Proceeds Act).

(2) Act on Criminalization of TF (“*Tero Shikin Teikyo Shobatsu Hou*”)

The Act on Criminalization of TF would be amended to criminalize acts of financing terrorist acts. Before only those terrorist act those were done to threaten the government or public were the subject of TF, but other acts defined as terrorist act under FATF Recommendations would become subject of TF (Article 2).

On the other hand, the act of making finance to terrorist or terrorist group will not be subject to TF crime unless the financing is conducted to facilitate terrorist act as specified above. The FATF recommended Japan to criminalize the financing to terrorist or terrorist group even in cases where there is no direct relation to terrorist act, but this was not implemented.

(3) Organized Crime Act (“*Soshiki Hanzai Shobatu Hou*”)

The crime of money laundering is punishable by imprisonment upto five years now and this will be raised to ten years (Article 10).

Under current law, confiscation of criminal proceeds, etc. is permitted only for real estate, cash and claims (Article 13). Virtual asset and other assets can not be confiscated.

This will be amended. This means that the government would be able to confiscate all kinds of assets including virtual asset and stable coins and such.

(4) Act on Foreign Exchange and Foreign Trade Act (“FEFTA”, or ”“*Gai Tame Hou”*)
Under the FEFTA, regulations on stable-coin exchanges would be introduced as follows.
- Prohibition of handling payment transaction with designated terrorists and such other person listed (Article 16-2);
- Obligation to confirm the legality of the underlying transaction when handling payment transaction (Article 17)
- Obligation to conduct customer verification (Article 22-2)
- Obligation to report financial transaction (Article 55-3)

Also, certain types of financial institutions would be obligated to establish internal control to ensure compliance with the FEFTA (Article 55-9-2).

(5) The Act on Freezing of Assets of Designated Terrorists

The name of the act would be amended and it would be applicable to those persons listed on the UN sanction list for PF in addition to TF.

7 - Are there any examples of how efforts to increase information-sharing have had a positive impact on anti-money laundering efforts?

Not that I know of.

Additional Question

(1) Does the FSA have anything on its web site about recent laws/recommendations on AML/CFT obliged entities sharing information with other obliged entities and making voluntary filings to law enforcement and the financial intelligence unit?

Answer:

The FSA guideline that I mentioned above obligates financial institutions to ensure information sharing within obliged entities belonging to the same group.

On the other hand, I cannot find any provision requiring financial institutions to ensure information sharing among financial institutions across groups.

However, collective monitoring scheme is planned to be implemented for the banking sector and this would enable banks to effectively detect those transactions with persons on sanction lists or related parties thereto, and to detect suspicious transactions.

To facilitate this, the Payment Services Act was amended this year and the amended act requires license for those institutions that would process the monitoring services for many banks.

Please note that this amendment does not permit banks to transfer STR data to other banks belonging to other groups.

The judgment to file STR or not should be made by each participating bank and sharing of STRs among participating banks are not basically anticipated.

There is an article prohibiting tipping off in the Criminal Proceeds Act of Japan, but there is no exemption clause. I think Japan should amend its law and clarify certain information sharing among financial institutions and DNFBP would not be subject to that prohibition of tipping off.

In relation with credit card transactions, Japan Consumer Credit Association ("JCA") which is a self-regulatory body, operates an information sharing scheme called JDM.

Under this scheme, registered credit card acquirers and registered PSPs are obligated to register those merchants that are suspicioned to be conducting crime and such. The registered information are shared with all the participants of the scheme, so all the registered card companies and registered PSPs in Japan would be able to detect those crime related merchants.

I have proposed to a Japanese government official to implement similar legislation, but it is very unlikely that such legislation would be implemented.

(2) If there is a web page with this information (even if it is in Japanese!), that would be a big help..... Also, have there been any media reports on this issue in specialist media in Japan? And, if so, might it be possible to get a link?

My presentation I made at a scholar meeting ("Kokusai Shoutorihiki Hou Gakkai") might be useful. "犯罪対策とプライバシー"

The file can be found below, but it is in Japanese. You might want to change the file to word file and then auto-translate.

https://nakasaki-law.com/wp-content/CBDC.pdf

I have made 100 pages proposal to the government to deal with FATF and the below might interest you on Nov 7, 2021 and some proposals were implemented by the government, but this is in Japanese as well.

https://nakasaki-law.com/wp-content/aml211107.pdf

The Japanese translation of the FATF recommendation is disclosed on FATF's website, but it is old.

The newest version of my translation can be found on my website below.

https://www.nakasaki-law.com/FATF

I am writing a book with the former head of AML Division of JFSA and a government official who was engaging in the negotiation with the FATF.

The book is a Japanese commentary of the FATF Recommendations that describes (i) how the Japanese government is complying with the FATF Recommendations and (ii) what the Japanese government does not comply with and (iii) legislative proposals to deal with those issues pointed out by the FATF mutual evaluation team.

Other than the above, there is nothing I know of that might benefit you about Japan's legislation surrounding this issue.