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**ІНСТРУМЕНТИ ІНФОРМАЦІЙНОГО ОБМІНУ В СИСТЕМІ
ФІНАНСОВОГО МОНІТОРИНГУ США ТА БЕНЧМАРКІНГ ДЛЯ
УКРАЇНИ**
**INFORMATION EXCHANGE TOOLS IN THE FINANCIAL
MONITORING SYSTEM OF THE USA AND BENCHMARKING FOR
UKRAINE**

Анотація У статті досліджено інструменти взаємодії між учасниками системи фінансового моніторингу США, які не використовуються в Україні. Дані інструменти допомагають підрозділу фінансової розвідки отримувати більш якісну інформацію, швидше реагувати на злочини шляхом замороження коштів або повернення їх законному власнику. Актуальність дослідження зумовлена високими ризиками легалізації коштів та проведенням фінансових операцій, пов'язаних з державами, які здійснюють агресію проти України.

Abstract. The article examines the tools of interaction between the participants of the US financial monitoring system, which are not used in Ukraine. These tools help the financial intelligence unit to get better information, to respond faster to crimes by freezing funds or returning them to their rightful owner. The relevance of the study is determined by the high risks of legalization of funds and financing of terrorism in the Ukrainian economy and the risks of conducting financial transactions related to states that carry out armed aggression against Ukraine.

To reveal possible ways of increasing the effectiveness of the financial monitoring system of Ukraine by introducing information exchange tools operating between the participants of such a system in the USA.

An important element of the US financial monitoring system is the ability of financial institutions to exchange restricted information about the clients of such

institutions. This right is granted to them under Section 314(b) of the USA PATRIOT Act of 2001. In addition, associations of financial institutions have a similar right. When appropriate, financial institutions also have the authority to create a joint suspicious activity report, which is then forwarded to the US Financial Intelligence Unit. Another important element of rapid interaction is the ability of US law enforcement agencies to transfer information about cybercrimes to the US financial intelligence unit through the Rapid Response Program, introduced in 2015. This practice allows the financial intelligence unit to quickly contact financial intelligence units in other countries and effectively block illegally obtained funds abroad or return them to victims in the United States.

The current legislation of Ukraine in the field of financial monitoring does not allow primary financial monitoring entities to exchange information with limited access among themselves or between specialized associations. This prohibition leads to an increase in the time for processing a suspicious transaction and reduces the quality of the final conclusion reached by the primary financial monitoring entity. Also, the current legislation of Ukraine does not allow law enforcement agencies to provide information to the financial intelligence unit of Ukraine regarding open criminal cases (except for cases that were opened based on generalized and additional generalized materials of the financial intelligence unit), which limits the ability of financial intelligence to fully perform its functions in international cooperation.

Key words: *financial monitoring, Rapid Response Program, financial intelligence unit, suspicious activity report, tools of information exchange, benchmarking, financial transactions, risks of financial transactions*

Ключові слова: *фінансовий моніторинг, програма швидкого реагування, підрозділ фінансової розвідки, звіт про підозрілу діяльність, інструменти інформаційного обміну, бенчмаркінг, фінансові операції, ризиками проведення фінансових операцій*

Introduction. The increase in the level of crime and the intensification of terrorism leads to the strengthening of the processes of legalization of proceeds obtained through crime and the financing of terrorist activities. Financial monitoring is a tool to protect against this threat. Since the economy of the United States of America is the largest in the world in terms of volume, the volume of criminal activities in the field of money laundering in this country is large-scale and is carried out using the latest methods. The USA was the first to face the problem of money laundering and implemented an

effective financial monitoring system to combat organized crime in the segment of combating money laundering and financing of terrorism (hereinafter – Anti-Money Laundering/Combating the Financing of Terrorism or AML/CFT). The main coordinating element of the financial monitoring system in any country is the financial intelligence unit (hereinafter – FIU). This division in the USA has a logic of work that has many common features with the Ukrainian division of financial intelligence - the State Financial Monitoring Service of Ukraine. Therefore, the experience of

the USA regarding AML/CFT is clearly useful for use in the financial monitoring system of Ukraine.

Analysis of recent research and publications. Studies of international experience in the field of legalization (laundering) of proceeds from crime were paid attention to by such domestic experts as: O. Hrabchuk, I. Suprunova, Z. Zhyvko, T. Holovach, Y. Goncharov, O. Martyn, Y. Borutska, T. Kuchmii [5-6; 8]. But these works do not reveal the tools of information exchange between participants of financial monitoring system in the USA and the effectiveness of such exchange, which in turn affects the effectiveness of the entire financial monitoring system.

The purpose and objectives of the article. Investigate effective information exchange tools between financial monitoring entities in the US that are not used in Ukraine, and the prospects for their implementation in the domestic financial monitoring system.

Presentation of the main research material. The US Financial Intelligence Unit is called the Financial Crimes Enforcement Network (hereinafter - FinCEN). As the FIU of the United States, FinCEN serves as a governmental national center that receives and analyzes suspicious transaction reports and other information relevant to money laundering, associated predicate offences, and terrorist financing, and disseminates the results of its analysis to competent authorities. FinCEN obtains information from reporting entities pursuant to the Bank Secrecy Act and collaborates with foreign FIUs and law enforcement (domestic and

foreign), among other things, to detect and deter financial crime. FinCEN is a member of The Egmont Group, which is a global network of FIUs that exchanges financial intelligence and other information to combat money laundering, associated crime, and terrorist financing [2, p. 1].

The Financial Intelligence Unit of Ukraine is represented by the State Financial Monitoring Service of Ukraine. According to the Provision on State Financial Monitoring Service of Ukraine, the main tasks of this state body are to submit for consideration proposals to ensure the formation of state policy in the field of AML/CFT, implementation of this policy, collection, processing, analysis of information about financial transactions which are related to financial monitoring. The state body also ensures the functioning of a unified information system in the AML/CFT sphere, conducting a national risk assessment. In addition, the State Financial Monitoring Service of Ukraine is authorized to exchange information with national state bodies and financial intelligence units of foreign countries [9]. That is, both FinCEN and State Financial Monitoring Service of Ukraine belong to the administrative type of financial intelligence units.

The main regulatory documents that regulate the financial monitoring system in the USA are The Currency and Foreign Transactions Reporting Act of 1970, the USA PATRIOT Act of 2001, and the Anti-Money Laundering Act of 2020. The Currency and Foreign Transactions Reporting Act of 1970 – which legislative framework is commonly referred to as the “Bank

Secrecy Act” (hereinafter - BSA) – requires from financial institutions to assist government agencies in the USA in the matter of detection and prevention money laundering. The USA Patriot Act affected the BSA significantly, expanding its scope and adding new legal requirements to it. The main element of information that comes to FinCEN from the subjects of primary financial monitoring is the completed Suspicious Activity Reports (hereinafter - SARs). Certain financial institutions are required to file SARs for certain activity. For example, banks are required to file SARs in the following circumstances:

- Transactions conducted or attempted by, at, or through the bank and aggregating \$5,000 or more, if the bank knows, suspects, or has reason to suspect that the transaction:
- Involves potential money laundering or other illegal activity (e.g., terrorism financing).
- Is designed to evade the BSA or its implementing regulations.
- Has no business or apparent lawful purpose or is not the type of transaction that the particular customer would normally be expected to engage in, and the bank knows of no reasonable explanation for the transaction after examining the available facts, including the background and possible purpose of the transaction [3, p. 7].

The characteristic that qualitatively distinguishes the USA Patriot Act from similar legal acts in Ukraine is contained in Section 314(b). Regulations of FinCEN under section 314(b) permit financial institutions, after giving notice to FinCEN, to share information with each other in order that identify and report to the U.S.

government concerning activities that may involve risk of money laundering or terrorist activity. This information exchange is free from criminal liability as long as financial institutions submit a mutual notice to FinCEN concerning AML/CFT purposes of such interaction. Another condition for such interaction is that both financial institutions must be registered in Secure Information Sharing System of FinCEN (hereinafter - SISS). In addition, according to this clause of the law, associations of financial institutions also have a similar right.

In particular, financial institutions or associations of financial institutions that share information under the safe harbor established by Section 314(b) may share information relating to activities that the financial institution or association believes may involve possible financing of terrorism or money laundering. This can happen, for example, when a financial institution or association shares information about specific transactions involving the proceeds of one or more specified unlawful activities (hereinafter - SUAs). However, in order to rely on the safe harbor of section 314(b), a financial institution or association of financial institutions need not have specific information indicating that the activity for which it proposes to share information directly relates to proceeds of SUA or transactions related to with the proceeds of money laundering. In addition, a financial institution or association should not reach the final conclusion that the activity is suspicious. Instead, it is sufficient that the financial institution or association has reasonable grounds to believe that

the information provided relates to activities that may include risk of money laundering or terrorist activity. Therefore, a financial institution or association may share information under the Section 314(b) safe harbor regarding activities that it believes may be related to money laundering or terrorist activity, even if the financial institution or association cannot identify specific SUA income that is being laundered. [4, p. 3-4].

Another important difference of the financial monitoring system in the USA, compared to Ukraine, is the possibility of submitting joint reports on suspicious activity to the financial intelligence unit. FinCEN's regulations concerning SAR allow financial institutions to submit joint SARs. When financial institutions identify suspicious activity through Section 314(b) cooperation, they may consider whether a joint SAR would be the most effective way to provide useful information to law enforcement

agencies. Of course, Section 314(b) does not relax the prohibition against disclosure of SARs, nor does it address the confidentiality of SARs. Financial institutions participating in Section 314(b) exchanges remain prohibited from disclosing SARs or any information that may reveal the existence of a SAR despite Section 314(b). However, financial institutions which participate in Section 314(b) and that are considering or already have filed a joint SAR are free to discuss among themselves a joint SAR project or already filed joint SAR [4, p. 7].

Unfortunately, FinCEN's most recent Section 314(b) reporting was for 2016. However, even when analyzing the information, shown in Figure 1, a trend toward active growth in number of market participants who applied Section 314(b) when submitting information to the Financial Intelligence Unit becomes clear [1, p. 1].

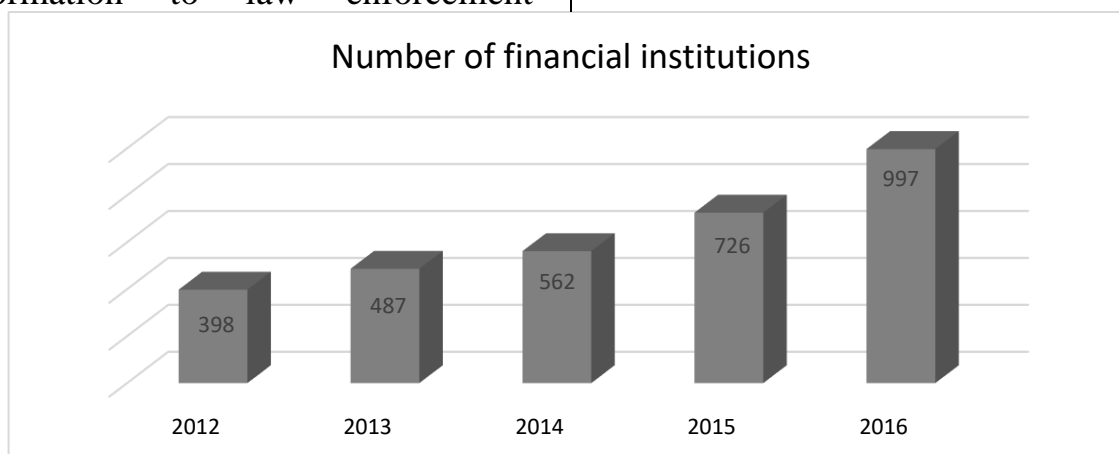


Fig. 1. Number of financial institutions that filed SARs citing 314(b) between 2012 and 2016 years

Most SARs reporting the use of the 314(b) Program in the description list money laundering as a category of suspicious activity, with "suspected source of funds" as the subcategory most frequently cited. A review of SAR

reporting shows that financial institutions often use the 314(b) program to obtain clarity from other 314(b) participants about the source of funds moving through their financial institutions. In most of these SARs, the

financial institution contacted another financial institution through the 314(b) Program to receive additional information concerning one or more transactions [1, p. 2].

Another effective element of the US financial monitoring system is the program to combat cybercrime – Rapid Response Program (hereinafter - RRP). With the help of this program victims and / or their financial institutions can receive help from FinCEN and recover their funds stolen in the result of cyber-enabled financial crime schemes, which also include compromising business email.

RRP is a partnership program which include:

- between FinCEN;

- law enforcement agencies (FBI, the U.S. Secret Service (USSS); Homeland Security Investigations (HSI); the U.S. Postal Inspection Service (USPIS));
- the financial intelligence units from other jurisdictions.

By using its authority to rapidly share financial intelligence data with FIU partners, FinCEN encourages foreign authorities to disrupt fraudulent transactions, freeze funds, and stop and revoke payments. The Rapid Response Program has been used to counter cyber threats affecting around 70 foreign jurisdictions to date, and has the ability to reach over 160 foreign jurisdictions through FIU-to-FIU channels. Operational Flow of RRP is shown in Figure 2 [2, p. 2].

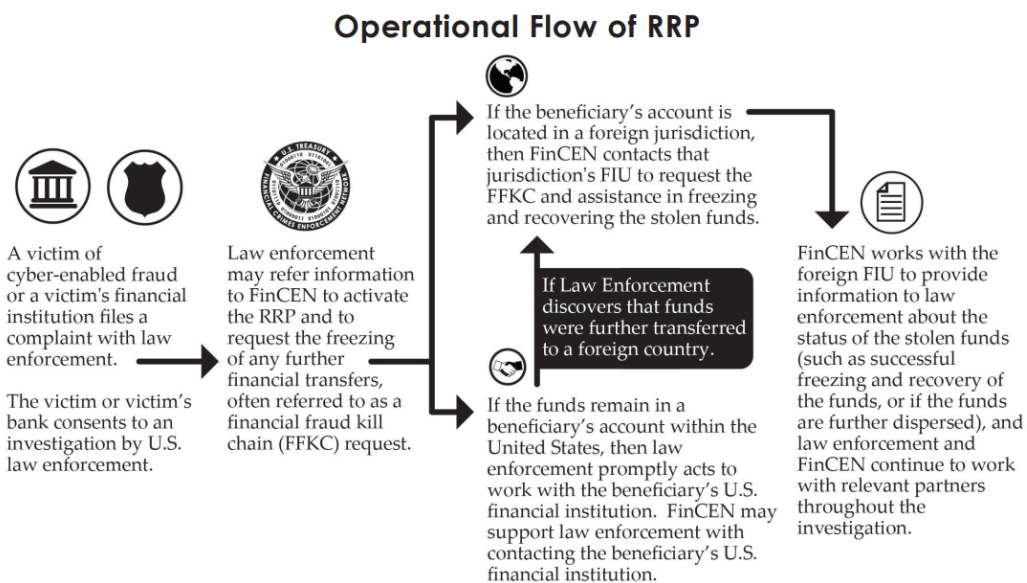


Fig. 2. Operational Flow of Rapid Response Program

A victim of cybercrime or a financial institution that served the victim must file a complaint with law enforcement to initiate an RRP. In addition, at the same time as submitting a statement to the law enforcement agencies, victims must also immediately contact the financial institution that serves them. According

to the rules, affected individuals should not contact FinCEN directly.

As shown in the flowchart above, RRP activation begins with a complaint to law enforcement. After law enforcement obtains the victim's consent, they will begin an investigation and may request assistance from FinCEN in forwarding

information about the crime to foreign FIUs to recover crime proceeds.

In the event of a referral to law enforcement, the victim or the financial institution serving the victim should provide as many details as possible regarding the financial transaction and the cyber information related to the criminal scheme. FinCEN cannot guarantee the recovery of stolen funds to victims of cybercrime. However, U.S. Financial Intelligence Unit statistics show that the Rapid Response Program is more effective in recovering funds when victims or financial institutions serving victims report fraudulent bank transactions to law enforcement within 72 hours of making such transfers. Since RRP's inception in 2015, the program has helped recover more than \$1.1 billion for victims of crime in the United States. [2, p. 1].

Current Ukrainian legislation prohibits the exchange of AML/CFT information between primary financial monitoring entities. In particular, Article 8 of the Law of Ukraine "On Prevention and Counteraction of Legalization (Laundering) of Criminal Proceeds, Financing of Terrorism and Financing of the Proliferation of Weapons of Mass Destruction" (hereinafter - Law 361-IX) allows the primary financial monitoring entity to provide access to information and documents only to entities of state financial monitoring, that, in accordance with the law, perform the functions of state regulation and supervision of the subjects of primary financial monitoring, and upon reasonable requests of law enforcement agencies made within the scope of their powers.

The subject of primary financial monitoring itself, in order to fulfill the tasks assigned to it by law, has the right to submit requests to the National Bank of Ukraine, the National Commission for Securities and the Stock Market, executive authorities, law enforcement agencies, and state registrars, who are obliged within ten working days from the day of receiving the corresponding request to provide the requested information and/or documents (their copies, extracts from documents).

The only option in which a primary financial monitoring entity has the right to exchange information on AML/CFT with another primary financial monitoring entity is the situation when both companies are part of the same financial group and have uniform financial monitoring rules. This right is recorded in Article 17 of Law 361-IX.

According to current Ukrainian legislation, law enforcement agencies do not provide the State Financial Monitoring Service of Ukraine with information on criminal cases under investigation. Information is directed from the financial intelligence unit to law enforcement agencies. If there are sufficient grounds to believe that a financial transaction or a client is related to a criminal offense, the State Financial Monitoring Service of Ukraine submits information to the relevant law enforcement or intelligence agency as generalized materials or additional generalized materials. Only with regard to such materials, the State Financial Monitoring Service of Ukraine has the right to receive information about the progress of cases from law enforcement and intelligence agencies [7].

Conclusions and prospects for further investigations. In order to effectively counteract the legalization of criminal funds and the financing of terrorism in modern conditions, the issue of quickly obtaining sufficient information and transferring it to the relevant authorities is of primary importance. Among the tools of information exchange in the field of AML/CFT in the USA the following can be distinguished:

1) the right of financial institutions to exchange restricted information about the clients of such institutions in the field of AML/CFT until the moment of submitting a suspicious activity report;

2) exchange of information in the field of AML/CFT regarding clients can be carried out not only by financial institutions, but also by associations of financial institutions;

3) financial institutions or their associations have the right to submit joint suspicious activity reports to the financial intelligence unit;

4) law enforcement agencies may request assistance from FinCEN in forwarding information about the crime to foreign FIUs to recover crime proceeds.

The introduction of such tools into the Ukrainian system of financial monitoring will allow to improve the quality of information and speed up the state's response to offenses.

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