

## **Anti-Money Laundering and Counter Financing of Terrorism Regulation of Banking Institution in Malaysia**

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**Abstract:** The Anti-Money Laundering and Anti-Terrorism Financing Act 2001 (AMLATFA) is the sole legislation dealing with this matter in Malaysia. Part 4 of this Act is the basic regulation for 'reporting institutions', including all types of bank. As Part 4 is only general, the Malaysian Central Bank as the 'Competent Authority' has issued detailed Guidelines. All 'reporting institutions, banks included, must follow the Standard Guidelines (UPW/GP1). There are ten Sectoral Guidelines UPW/GP1[1] is for banks. Failure to follow the Act and the associated Guidelines could result in severe legal consequences.

**Key Words:** Banks, money laundering, legislation, regulation, guidelines.

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### **INTRODUCTION**

The basic money-laundering legislation in Malaysia is the Anti-Money Laundering and Anti-Terrorism Financing Act 2001 (AMLATFA), with effect from 15 January 2002. Part 4 of the Act is directed at 'reporting institutions', which include banks. This article will therefore concentrate on the relevant sections of Part 4.

As Part 4 only gives a framework for banks and other institutions to follow, detailed instructions are given in Guidelines issued by the Malaysian Central Bank pursuant to AMLATFA.

Of all 'reporting institutions' banks should have the most experience in the area of anti-money laundering procedures as they have operated under various money-laundering guidance for nearly twenty years.

#### **Materials And Discussion:**

##### **AMLATFA:**

Money Laundering and Anti-Terrorism Financing Act was enacted in 2001 to provide the legal framework to combat money laundering and came into force in January 2002 with banks covered from the outset. A 2007 Amendment Act extended the Anti-Money Laundering Act, as it then was, to cover terrorism financing. The purpose of the Act, as in the Preamble, is to provide for the offence of money laundering, the measures to be taken for the prevention of money laundering and terrorism financing offences and to provide for the forfeiture of terrorist property and property involved in, or derived from, money laundering and terrorism financing offences, and for matters incidental thereto and connected therewith. Procedures for banks to carry out fall squarely under "the measures to be taken for the prevention of money laundering and terrorism financing offences"

##### *First Schedule*

*[Section 3, definition of "reporting institution"]*

##### *Part 1*

*1. Banking business, finance company business, merchant banking business, discount house business and money-broking business as defined in the Banking and Financial Institutions Act 1989.*

*2. Islamic banking business as defined in the Islamic Banking Act 1983.*

A 'reporting institution' is, as found in section 3 (Interpretation), therefore:

*any person, including branches and subsidiaries outside Malaysia of that person, who carries on any activity listed in the First Schedule;*

As such, Malaysian banks are bound by the regulatory provisions of Part 4 of AMLATFA.

#### **Part 4 – (Reporting Obligations), Regulations and Guidelines:**

Part 4 of AMLATFA contains 16 sections (13-28), most of which are directly relevant to reporting institutions in their day-to-day business. Banks have been subject to all provisions of Part 4 since 15 January 2002 when AMLATFA came into force.

Some sections of Part 4 – 14(b), 16 and 17 - have been subsequently 'modified' by Regulations issued by the Minister pursuant to S84(1) of AMLATFA. These Regulations must be read together with the relevant section. The Regulations appear to have been issued to help these sections of AMLATFA conform with the terminology of the Bank Negara(Central Bank) Guidelines.

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Detailed implementation for all Part 4 reporting institutions is given by the Standard Guidelines on Anti-Money Laundering and Counter Financing of Terrorism (AML/CFT), (UPW/GP1) issued by Bank Negara in November 2006 and amended February 2009. These have force of law as they are issued pursuant to s83 of AMLATFA.

Bank Negara also currently issues 10 Sectoral Guidelines, to be read together with the Standard Guidelines, for particular types of reporting institution. UPW/GP1[1] 'Anti-Money Laundering and Counter Financing of Terrorism (AML/CFT) Sectoral Guidelines 1 for Banking and Financial Institutions' covers banks.

The 'competent authority' in this and other sections of Part 4 is defined in S3 as "the person appointed under subsection 7(1)." Therefore, pursuant to 7(1) the Minister of Finance appointed the Malaysian central bank as the 'competent authority'.

S13 deals with 'Record Keeping by Reporting Institutions'. It is important to keep records of transactions so that an investigator of any Malaysian law enforcement agency is able to follow the 'paper trail' of any laundered criminal assets. The specific information that the legislation requires is:

(3) The record referred to in subsection (1) shall include the following information for each transaction:

- (a) the identity and address of the person in whose name the transaction is conducted;
- (b) the identity and address of the beneficiary or the person on whose behalf the transaction is conducted, where applicable;
- (c) the identity of the accounts affected by the transaction, if any;
- (d) the type of transaction involved, such as deposit, withdrawal, exchange of currency, cheque cashing, purchase of cashier's cheques or money orders or other payment or transfer by, through, or to such reporting institution;
- (e) the identity of the reporting institution where the transaction occurred; and
- (f) the date, time and amount of the transaction,

In 13(1), it implies that records only need to be kept that relate to transactions "exceeding such amount as the competent authority may specify". Whether these are the same amounts as are specified in S14 is unclear. In subsection (4), transactions by one person within a certain time must be counted as one transaction. This is to avoid 'smurfing', where transactions are broken up in order to attempt to avoid the reporting requirements of S14.

S14 (Report by reporting institutions).

*A reporting institution shall promptly report to the competent authority any transaction -*

- (a) exceeding such amount as the competent authority may specify; and*
- (b) where the identity of the persons involved, the transaction itself or any other circumstances concerning that transaction gives any officer or employee of the reporting institution reason to suspect that the transaction involves proceeds of an unlawful activity.*

S14(a) is known as a Cash Transaction Report (CTR). Any transaction above the threshold must be notified. (Currently RM50,000 which is equivalent to USD20,000).

S14(b) is known as a Suspicious Transaction Report (STR). A report must be made if there is a suspicion of money laundering.

A Regulation (PU(A) 104/2007. Anti-money laundering and anti-terrorism financing (Reporting Obligations) Regulations 2007) has been issued to modify s14(b) to make it a requirement to make an STR if the transaction is only attempted and also to make it clear that the amount of any attempted or actual transaction is irrelevant:

*"A reporting institution shall promptly report to the competent authority any attempted transaction or transactions where the identity of the persons involved, the transaction itself or any other circumstances concerning that transaction gives any officer or employee of the reporting institution reason to suspect that the transaction involves proceeds of an unlawful activity regardless of the amount of the transaction".*

The Standard Guidelines (S8) have information on the submission of an STR to the Financial Intelligence Unit of Bank Negara. This is standard for all reporting institutions. As the Sectoral Guidelines states:

*6.1." The reporting institution shall be subject to the requirement and mechanisms on reporting of suspicious transactions as set out in the Standard Guidelines on AML/CFT".*

Section 15 states:

*"A reporting institution shall provide for the centralisation of the information collected pursuant to this Part".*

At its most basic, this section means that the bank must have the material that is kept pursuant to s13 in such a way that an investigator can easily access it.

Section 16 is concerned with the identification of the account holder:

*(1) A reporting institution-*

- (a) shall maintain accounts in the name of the account holder; and*
- (b) shall not open, operate or maintain any anonymous account or any account which is in a fictitious, false or incorrect name.*

This subsection is self-explanatory. An account must be in the name of the actual holder.

(2) A reporting institution shall-

(a) *verify, by reliable means, the identity, representative capacity, domicile, legal capacity, occupation or business purpose of any person, as well as other identifying information on that person, whether he be an occasional or usual client, through the use of documents such as identity card, passport, birth certificate, driver's licence and constituent document, or any other official or private document, when establishing or conducting business relations, particularly when opening new accounts or passbooks, entering into any fiduciary transaction, renting of a safe deposit box, or performing any cash transaction exceeding such amount as the competent authority may specify; and*

(b) *include such details in a record.*

This subsection is advisory regarding the documentary material to be used to verify the identity of a customer. Specific guidance on what documents should be used are given in Bank Negara's Guidance.

Subsection (3) deals with what is now known as 'Customer Due Diligence' (previously 'Know Your Customer'). This is covered in detail in the Bank Negara Guidelines.

(3) *"A reporting institution shall take reasonable measures to obtain and record information about the true identity of the person on whose behalf an account is opened or a transaction is conducted if there are any doubts that any person is not acting on his own behalf, particularly in the case of a person who is not conducting any commercial, financial, or industrial operations in the foreign State where it has its headquarters or domicile".*

A Regulation (PU(A)104/2007) has been issued which is to be read with S16 which emphasizes on Customer Due Diligence (CDD):

(1) *A reporting institution shall conduct customer due diligence measures on its account holders, including when:-*

(a) *there is a suspicion of money laundering; or*

(b) *it has doubts about the veracity or adequacy of information on the identity of the account holder which it has obtained previously.*

(2) *The reporting institution shall verify, by reliable means or from any independent source of document, data or information:-*

(a) *that any person who is purporting to act on behalf of the account holder is so authorized and the identity of that person; and*

(b) *a beneficial owner on whose behalf an account is opened or a transaction is conducted and the identity of that person.*

(3) *The reporting institution shall conduct ongoing due diligence on all its business relationship with any account holder.*

There appears to be no specific definition of CDD in AMLATFA or the Guidelines. It is presumed to be essentially the same as the previous 'know your customer' (KYC) policy. CDD basically knows all about the customer so that a potential money launderer is detected at the initial account opening stage, or if not then by an ongoing CDD process.

The issuance of this Regulation appears to have been done to ensure greater compatibility with the Bank Negara Guidelines.

The Standard Guidelines (S4) have introduced the concept of Customer Acceptance Policy (CAP), which basically cover what needs to be done when deciding whether to accept a prospective customer. Little information is given as this will be in the bank's own internal procedures, which has to be done.

The Guidelines (4.2.1) ask for 'risk profiles' of customers to be made, which means that the following has to be taken into account:

- the origin of the customer and location of business;
- background or profile of the customer;
- nature of the customer's business;
- structure of ownership for a corporate customer; and
- any other information suggesting that the customer is of higher risk.

The Sectoral Guidelines require further that:

*"In addition to the risk profiling requirements set out in the Standard Guidelines on AML/CFT, the reporting institution should review and update its customers' profiles regularly especially when there are changes in their employment or nature of business".*

A large part of the Standard Guidelines (S5) relate to CDD, and cover various aspects of this. The specified requirements, which give more detail than the Act, are:

5.1.2. Every reporting institution must conduct customer due diligence, when:

- establishing business relationship with any customer;
- carrying out cash or occasional transaction that involves a sum in excess of the amount specified by Bank Negara Malaysia under its sectoral guidelines or relevant circular;
- it has any suspicion of money laundering or financing of terrorism; or
- it has any doubt about the veracity or adequacy of previously obtained information.

5.1.3. The customer due diligence undertaken by the reporting institution should at least comprise the following:

- identify and verify the customer;
- identify and verify beneficial ownership and control of such transaction;
- obtain information on the purpose and intended nature of the business relationship/transaction; and
- conduct ongoing due diligence and scrutiny, to ensure the information provided is updated and relevant.

Documentary material to be provided in CDD is given in 5.2.1. For instance an individual customer needs to provide at least: full name; NRIC/passport number; permanent and mailing address; date of birth; and nationality.

Likewise, the Sectoral Guidelines are mainly devoted to CDD procedures. For example, in the case of individual customers, the following extra material is required for banks: occupation type/self employed; name of employer or nature of self-employment/nature of business; and contact number (home, office or mobile).

Section 17 specifies the policy on retention of records. Documents relating to STRs and CTRs must be kept for a minimum of six years, along with any associated material.

*17. (1) Notwithstanding any provision of any written law pertaining to the retention of documents, a reporting institution shall maintain any record under this Part for a period of not less than six years from the date an account has been closed or the transaction has been completed or terminated.*

*(2) A reporting institution shall also maintain records to enable the reconstruction of any transaction in excess of such amount as the competent authority may specify, for a period of not less than six years from the date the transaction has been completed or terminated.*

A Regulation (PU(A)104/2007) has been issued for s17 which requires additional material on the account to be kept and to be available for Bank Negara to access:

*(1) " A reporting institution shall ensure that any records under Part IV of the Act including account holder identification records are maintained and any information relating to such records are made available on a timely basis when required by the competent authority".*

The Standard Guidelines (6.1) emphasise that all transaction and CDD documents be kept for at least six years, and longer if there is an on-going investigation or prosecution.

Section 18(1) states that:

*(1) " No person shall open, operate or authorise the opening or the operation of an account with a reporting institution in a fictitious, false or incorrect name".*

The section refers to a 'person' involved with an account in a reporting institution which is a wider term and can include any of the bank's staff, the customer or customers, as well as the bank itself.

The Act's definition of a false name is given in (4):

For the purposes of this section-

*(a) a person opens an account in a false name if the person, in opening the account, or becoming a signatory to the account, uses a name other than a name by which the person is commonly known;*

*(b) a person operates an account in a false name if the person does any act or thing in relation to the account (whether by way of making a deposit or withdrawal or by way of communication with the reporting institution concerned or otherwise) and, in doing so, uses a name other than a name by which the person is commonly known; and*

*(c) an account is in a false name if it was opened in a false name, whether before or after the commencement date of this Act.*

Clearly, bank staffs need to avoid allowing a customer account in a false name, which is a requirement of CDD (Norhashimah, 2008)

Section 19 (Compliance programme) is the basis of all the procedures specified in the Standard and Sectoral Bank Negara Guidelines:

*(1) A reporting institution shall adopt, develop and implement internal programmes, policies, procedures and controls to guard against and detect any offence under this Act.*

*(2) The programmes in subsection (1) shall include-*

*(a) the establishment of procedures to ensure high standards of integrity of its employees and a system to evaluate the personal, employment and financial history of these employees;*

- (b) on-going employee training programmes, such as “know-your-customer” programmes, and instructing employees with regard to the responsibilities specified in sections 13, 14, 15, 16 and 17; and  
(c) an independent audit function to check compliance with such programmes.

The section further requires that the procedures etc, also apply to all domestic and foreign branches and subsidiaries, and that all of them also have a money laundering compliance officer responsible for ensuring that the bank carries out all its Part 4 duties. The bank must have its own ‘audit functions’ to test all procedures as well as the independent audit in 2(c).

Part 10 of the Standard Guidelines gives more detail on compliance, ie:

- 10.1. Policies, Procedures and Controls
- 10.2. Staff Integrity
- 10.3. Compliance Officer
- 10.4. Staff Training and Awareness Programmes
- 10.5. Independent Audit

Section (7) of the Sectoral Guidelines has some specific requirements for banks regarding the independent audits, i.e.:

- ensure that independent audits are conducted to check and test the effectiveness of the policies, procedures and controls for AML/CFT measures;
- ensure the effectiveness of internal audit function in assessing and evaluating the AML/CFT controls;
- ensure the AML/CFT measures are in compliance with the AMLATFA, its regulations and the relevant Guidelines; and
- assess whether current AML/CFT measures which have been put in place are in line with the latest developments and changes of the relevant AML/CFT requirements.

S20 (Secrecy obligations overridden), states:

*“The provisions of this Part shall have effect notwithstanding any obligation as to secrecy or other restriction on the disclosure of information imposed by any written law or otherwise”.*

As far as banks are concerned, S97 of the Banking and Financial Institutions Act (BAFIA) does not apply regarding any matter relating to AMLATFA. However, banking secrecy does not apply in a criminal investigation in any case under BAFIA. Matters of compliance with AMLATFA and the Guidelines are conducted by Bank Negara in its role as the supervisory authority for banks and as the competent authority under AMLATFA (Norhashimah, 2007, 2008)

S21 is indirectly relevant to banks as it lays out the role of Bank Negara as the ‘relevant supervisory authority’ of banks in regard to money laundering:

*(1) The relevant supervisory authority of a reporting institution or such other person as the relevant supervisory authority may deem fit may-*

- (a) adopt the necessary measures to prevent or avoid having any person who is unsuitable from controlling, or participating, directly or indirectly, in the directorship, management or operation of the reporting institution;*
- (b) examine and supervise reporting institutions, and regulate and verify, through regular examinations, that a reporting institution adopts and implements the compliance programmes in section 19;*
- (c) issue guidelines to assist reporting institutions in detecting suspicious patterns of behaviour in their clients and these guidelines shall be developed taking into account modern and secure techniques of money management and will serve as an educational tool for reporting institutions’ personnel; and*
- (d) co-operate with other enforcement agencies and lend technical assistance in any investigation, prosecution or proceedings relating to any unlawful activity or offence under this Act.*

The section also gives the power to revoke or suspend a licence if the reporting institution is convicted of an offence under AMLATFA.

S21(1) states:

*“An officer of a reporting institution shall take all reasonable steps to ensure the reporting institution’s compliance with its obligations under this Part”.*

This subsection has the effect of placing a legal obligation on the money laundering compliance officer. Subsection (4) states that anyone contravening (1) commits an offence.

Subsection (2) allows Bank Negara as the competent authority to apply to the High Court for an Order against individuals at a reporting institution to force compliance with AMLATFA. Bank Negara can also have an agreement, under (3), with a reporting institution for it to become compliant. Failure to comply with a subsection (3) directive is an offence, as also stated in (4). Oddly, Bank Negara does not appear to be able to simply issue a fine for non-compliance, as under (4), a conviction is required.

S24 essentially gives legal immunity to anyone who makes a report under Part 4, presumably a s14(b) STR:

*(1) No civil, criminal or disciplinary proceedings shall be brought against a person who-*

- (a) discloses or supplies any information in any report made under this Part; or*
- (b) supplies any information in connection with such a report, whether at the time the report is made or afterwards; in respect of-*
  - (aa) the disclosure or supply, or the manner of the disclosure or supply, by that person, of the information referred to in paragraph (a) or (b); or*
  - (bb) any consequences that follow from the disclosure or supply of that information, unless the information was disclosed or supplied in bad faith.*

It should be noted that an STR is strictly confidential and there ought not to be any circumstances where such information becomes public.

To avoid legal proceedings for contravention of Part 4, if it can be shown that all required procedures were followed, which would include the Guidelines, this would be a defence. To some extent, the long-standing tests of what is a 'reasonable banker' could apply as well.

*(2)" In proceedings against any person for an offence under this Part, it shall be a defence for that person to show that he took all reasonable steps and exercised all due diligence to avoid committing the offence".*

Section 25 allows Bank Negara as the competent authority to appoint a person – known as an Examiner to inspect all aspects of a reporting institution's compliance with anti-money laundering. In practice, for banks, the examiner will usually be from Bank Negara's Special Investigation Unit (SIU) as they already inspect Bank's compliance with other Guidelines and BAFIA. This investigation is a purely regulatory one.

*(1) For the purposes of monitoring a reporting institution's compliance with this Part, the competent authority may authorise an examiner to examine-*

- (a) any of the reporting institution's records or reports that relate to its obligations under this Part, which are kept at, or accessible from, the reporting institution's premises; and*
- (b) any system used by the reporting institution at its premises for keeping those records or reports.*

*(2) In carrying out the examination under subsection (1), the examiner may-*

- (a) ask any question relating to any record, system or report of a reporting institution; and*
- (b) make any note or take any copy of the whole or part of any business transaction of the reporting institution.*

Section 26 allows the examiner to examine persons who are connected with a reporting institution. This could include a customer, but this seems unlikely in the context of a bank's anti-money laundering procedures.

*(1) An examiner authorised under section 25 may examine-*

- (a) a person who is, or was at any time, a director or an officer of a reporting institution or of its agent;*
- (b) a person who is, or was at any time, a client, or otherwise having dealings with a reporting institution; or*
- (c) a person whom he believes to be acquainted with the facts and circumstances of the case, including an auditor or an advocate and solicitor of a reporting institution,*

*and that person shall give such document or information as the examiner may require within such time as the examiner may specify.*

Section 27 gives the examiner the power to request a person to attend for an interview about compliance with anti-money laundering.

*(1)" A director or an officer of a reporting institution*

*examined under subsection 25(1), or a person examined under subsection 26(1), shall appear before the examiner at his office upon being called to do so by the examiner at such time as the examiner may specify".*

Section 28 is not relevant to reporting institutions: The competent authority may destroy any document or copy of such document made or taken pursuant to an examination under sections 25 and 26 within six years of the examination except where a copy of the document has been sent to an enforcement agency (Norhashimah, 2002).

It should be noted that as well as the various sanctions applied by Bank Negara, failure to carry out the anti-money laundering requirements can result in the dismissal of staff by a bank. This can be seen in the Industrial Court case of *Southern Bank Berhad v. Yahya Talib* (Award No. 1692 of 2006 [Case No: 4/4-626/05] 25 September 2006).

The claimant was held to have broken the bank's procedures established under the then BNM/GP9 (which was replaced by UPW/GP1(1)) by failing to know his customer as he had acted as the introducer for a prospective customer despite not knowing anything about him.

### **Conclusion:**

As Malaysian banks have been subject to varying degrees of money laundering regulation for nearly twenty years there should be no excuse for failure to follow their legal requirements. The fact that no Malaysian banks have been prosecuted to date does not mean that they can just sit back, as being found to be non-compliant can have serious consequences.

Major banks in countries such as the UK and US have been given multi-million Pound and Dollar fines for compliance failures and Malaysian banks should not think that they are immune to failures. Therefore, constant oversight of the various systems is very important.

It is a defence that an institution took all reasonable steps and followed due diligence process in the event of proceedings against it. Following the legislation and the Guidelines would back-up this defence. It is not just a legal requirement, but is also good business practice.

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