

EXPLANATORY NOTE ON ANTI MONEY LAUNDERING
(AMENDMENT) ACT 2003

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Abstract

This article discusses some of the changes brought about by the amendments of Anti Money Laundering (Amendments) Acts 2003. It examines whether the legal principles under this law are able to address the scandals which have emerged in recent years pertaining to auditors. It also investigates whether the legal principles under criminal law impose additional duties and obligations on auditors as opposed to those duties and obligations imposed under the company law. The study finally examines whether action can be brought against the auditors and the difficulties faced in doing so. These issues are extremely crucial because auditors' profession is becoming a high-risk profession. This study suggests that the current legal framework under criminal law governing auditors must be reassessed in the wake of the scandals involving auditors both in the domestic and international forefront.

INTRODUCTION

Money laundering is the process by which criminals create the illusion that the money they are spending is actually theirs to spend.¹ Section 3 of Anti Money Laundering Act 2001 defines money laundering as the act of a person who engages, directly or indirectly in a transaction that involves proceeds of an unlawful activity, and who enquires, receives, possesses, disguises, transfers, converts exchanges, carries, disposes, uses, remove from or brings into

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¹ Guy Stessens. 2000. *Money Laundering a New International Law Enforcement Model*. Cambridge: Cambridge University Press. p.82.

Malaysia proceeds of any unlawful activity. It includes a person who conceal disguises or impedes the establishment of the true nature, origin, location, movement, disposition, title of right with respect to or ownership of proceeds of an unlawful activities, whereas may be inferred from objective factual circumstances, the person knows or has reason to believe that the property is proceeds from any unlawful activity. In short, the term of money laundering involves three main activities namely the conversion of illegal ash into another asset, the concealment source of the illegally acquired proceeds and with the creation of the perception of legitimacy of source and ownership.

The money laundering process comprises three main stages. The first stage is placement, which means illegal profits which introduced into the financial system. The illegal profits may derive from drug trafficking, prostitution rings, smuggling, illegal arms sale, kidnapping for ransom, embezzlement, insider trading, bribery, computer-fraud schemes, get-rich-quick schemes, and sale of children and smuggling of human beings and organs. Secondly, layering of funds, which have entered the financial system, are then distanced from their source through transactions such as purchase and sales of investment instruments or through multiple transfers of funds from different accounts around the world disguised as payments for goods or services. The last stage is integration, i.e. to integrate the illegal proceeds back into the economy as legitimate funds through legitimate transactions such as business ventures, luxury assets, lending and investing.²

It is a matter of vital important for every country as well as Malaysia to combat money laundering in preventing the criminals from utilizing the existing financial instrument for their benefits. The integrity of the financial system depends heavily on the perception that it functions within a framework of high legal, professional, moral and ethical standards. If there is no effective mechanism in handling money laundering activities, it may affect the economic development and also negate the public confidence.

The Malaysian government took a step in combating money laundering by introducing the Anti-Money Laundering Act in July 2001 (herein after referred to as the AMLA). The AMLA gives certain agencies authority to trace, seize, and ultimately confiscate criminally derived wealth and enabling inter government exchange of information with counterparts in other countries.

The amendments to the AMLA have been passed by the Parliament on 20th November 2003 and gazette as law on 25th December 2003. The effective

² <http://www.maicsa.org.my>. Retrieved on 18th July 2006.

date of amendments will be notified by way of Gazette Notification. This is the first amendment since the enforcement of the AMLA in 2001. The purpose of the amendment is to cover the element of terrorist financing in combating terrorism activities in Malaysia.

Before the amendment, the AMLA consisted of only 92 sections with 2 schedules. The amendment inserted new provision in Part VIA which covers suppression of terrorism financing offences and freezing, seizure and forfeiture of terrorist property.

Basically, the reason for the amendment is to accede to the United Nation Convention for the Suppression of the Financing of Terrorism. In fact, there are no specific provisions to address terrorism financing offence and it provides ancillary amendments to current provisions so as to strengthen a legal mechanism in combating money laundering and terrorist financing.

The objective of this article is to discuss some of the changes brought about by the amendment. Under the amendment there are 22 sections, which have been amended. In line with the strong tendency of terrorism around the globe, the government made some amendment to the AMLA so that it may become one of the effective legal mechanisms for combating money laundering and terrorist financing. By this amendment, the AMLA shall be construed as Anti-Money Laundering and Anti-Terrorism Financing Act 2001 (hereinafter referred to as The Amendment Act).

2.0 FEATURES OF THE AMENDMENT ACT

Part I	Preliminary (commencement, application, interpretation)	Amendments to section 1,2 and 3 of the AMLA
Part II	Money Laundering Offences	No amendment
Part III	Financial Intelligence	Amendments to section 10 and 12 of the AMLA
Part IV	Reporting Obligation	Amendment to section 14 of the AMLA
Part V	Investigation	Amendment to section 32 of the AMLA
Part VI	Freezing, seizure and forfeiture	Amendment to section 44, 45, 47, 48, 49, 50, 51, 52, 53, 55, 56, 59, 61 of the AMLA and insertion of new part VIA –

		Suppression of terrorism financing and freezing, seizure and forfeiture of terrorist property.
Part VII	Miscellaneous	Amendment to section 67 and 82 of the AMLA.
1 st Schedule	Reporting Institutions	Anti Money Laundering (Amendment) of First Schedule Order 2003. Insertion of additional reporting institutions.
2 nd Schedule	Serious Offences	Anti Money Laundering (Amendment) of Second Schedule Order 2003. Insertion of new predicate offences.

3.0 LEGAL PROVISIONS TO ADDRESS TERRORISM FINANCING

The Amendment Act substitutes the long title by inserting the provision on terrorist financing. It includes 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 derived from money laundering and terrorism financing offences.³

The Amendment Act amended the name of AMLA and renaming it as Anti-Money Laundering and Anti-Terrorism Financing Act 2001. All references to the AMLA 2001 in any written law or document shall be construed as Anti-Money Laundering and Anti-Terrorism Financing Act 2001.⁴

It also provides additional explanation on certain terms. The definition of “accounts” includes records of any financial transactions conducted by any reporting institution listed in the First Schedule. The term property also has been redefined to include assets of every moveable or immovable, electronic or digital, banking instruments such as cheques, shares, securities, bonds and terrorist property which has the same meaning as in section 130B of the Penal Code. The foreign serious offence also includes “terrorism financing offence” referred under section 130N, 130O, 130P or 130Q of the Penal Code.⁵ The

³ Section 2 of the Amendment Act.

⁴ Section 3 and 25 of the Amendment Act.

⁵ Section 4 of the Amendment Act.

Amendment generally inserts the words terrorism financing offence and terrorist property in the provisions throughout the AMLA.⁶

4.0 ANCILLARY AMLA AMENDMENTS TO CURRENT PROVISIONS

4.1 DISCLOSURE OF INFORMATION BETWEEN GOVERNMENTS

The Amendment Act makes clear the circumstances under which the disclosure of information between the competent authority and any corresponding authority of a foreign state or between governments would be permitted.⁷ The Minister has the following power regarding with the exchange of information between governments:-

- (a) May enter into an agreement with the government of a foreign state;
- (b) May communicate any information to a corresponding authority of a foreign state; and
- (c) May enter into an agreement or arrangement with that foreign state under which the corresponding authority of the foreign state has agreed to communicate to the competent authority, upon the competent authority's request.⁸

In this circumstance the competent authority shall ensure that the corresponding authority has given appropriate undertakings for protecting the confidentiality of anything communicated and for controlling the use that will be made of it, including an undertaking that it will not be used as evidence in any other proceedings.⁹ The competent authority has to record in writing the reasons for all decisions made to communicate any information.¹⁰

4.2 THRESHOLDS REQUIREMENT FOR REPORTING

Paragraph 14 (a) of the AMLA differentiates the threshold requirement for reporting from the threshold requirement for reporting from the threshold

⁶ Section 12, 44, 45, 47, 49, 50, 51, 52, 53, 55, 56, 59, 61, and 67 of the Amendment Act.

⁷ Section 5 of the Amendment Act.

⁸ Section 5(2) of the Amendment Act.

⁹ Section 5(3)(c) of the Amendment Act.

¹⁰ Section 5(4) of the Amendment Act.

requirement for record keeping.¹¹ Section 14 of the AMLA is amended by providing paragraph (a), which states that ‘exceeding such amount as the competent authority may specify’. Here, the competent authority has the power to specify the threshold requirement to the reporting institution for reporting purpose.

4.3 REQUIREMENTS OF STATEMENT TO BE IN WRITING

Section 8 of the Amendment Act amended section 32 (7) of the AMLA whereby it requires statements to be reduced into writing to facilitate prosecution. This will assist a prosecutor during the court proceedings. The requirements of statement to be documented are in line with the nature of the criminal proceedings on the AMLA.

4.4 SUPPRESSION OF TERRORISM FINANCING OFFENCES AND FREEZING, SEIZURE AND FORFEITURE OF TERRORIST PROPERTY

4.4.1 *Interpretation*

The AMLA is amended by inserting Part VIA. Section 66A of the Amendment Act provides interpretation for terms of specified entity which means an entity in respect of which an order has been made and relevant regulatory or supervisory authority to include Bank Negara Malaysia, the Securities Commission and the Labuan Offshore Financial Services Authority.

4.4.2 *Declaration of Specified Entities*

The Minister of Home Affairs is empowered to issue orders publish in the Gazette to declare an entity as a “specified entity”.¹² Every person shall disclose immediately to the Inspector General of Police the existence of a property of a specified entity including information about a transaction or proposed transaction in respect of said property.¹³ The sanction for those who fail to comply with section 66B (3) may be liable on conviction to a fine not

¹¹ Section 7 of the Amendment Act.

¹² Section 66B (1) of the Amendment Act.

¹³ Section 66B (4) of the Amendment Act.

exceeding Ringgit Malaysia one million or to imprisonment for a term not exceeding one year or to both.

A specified entity may, within sixty days of publication of the order in the *Gazette*¹⁴, make an application in writing to the Minister of Home Affairs for the revocation of the order and the Minister may decide to revoke the order or refuse the application.¹⁵ It is important to note that the Minister's decision shall be final.¹⁶ The Minister's order shall not apply to funds and other financial assets or economic resources that necessary for basic expenses or extraordinary expenses.¹⁷

4.4.3 *Implementation of Measures of UN Security Council Resolutions*

The Security Council of the United Nations may direct the Government of Malaysia to apply certain measures¹⁸ in combating money laundering or terrorist financing and the Minister of Home Affairs may give an order to enable those measures to be effectively applied.¹⁹ Malaysia may adopt those measures besides implementing 40 recommendations of the Financial Action Task Force.²⁰

The FATF's objectives focus on spreading the anti message to all continents and regions of the globe on anti money laundering and to monitor the implementation of its 40 recommendations.²¹ The FATF adopted these 40 recommendations as preventive measures in combating money laundering around the globe. Malaysia also has taken these measures by introducing Anti Money Laundering Act 2001 and also Guidelines on Money Laundering and Know Your Customer Policy issued by Central Bank of Malaysia.²² This will provide a comprehensive framework for combating money laundering and terrorist financing.

¹⁴ Section 66B (6) of the Amendment Act.

¹⁵ Section 66B (7) of the Amendment Act.

¹⁶ Section 66B (8) of the Amendment Act.

¹⁷ Section 66B (10) (a) and (b) of the Amendment Act.

¹⁸ Article 41 of the Charter of the United Nations.

¹⁹ Section 66C (1) of the Amendment Act.

²⁰ The G-7 Industrial group established the FATF as a global money-laundering watchdog, as a response to mounting concerns over money laundering.

²¹ Norhashimah Mohd Yasin. 2003. Akta Pencegahan Penggubalan Wang Haram. *Dewan Masyarakat*. Kuala Lumpur: Dewan Bahasa dan Pustaka. April 2003. p.19.

²² Noorazman A. Aziz. Pelaburan Wang Haram LOFSA Berisiko Renda. *Dewan Masyarakat*. Kuala Lumpur: Dewan Bahasa Dan Pustaka. April 2003. p.21-22.

4.4.4 *Minister's Power to Obtain Information*

The Minister of Home Affairs may require any person to determine whether they are in possession of control of terrorist by reporting to the relevant authority including the number of persons, contracts or accounts involved, the total value of the property involved, the manner by which the property came to be in their possession and such other particulars as may be specified in the order.²³ The punishment for those who contravenes the above order may be liable to a fine not exceeding Ringgit Malaysia one million or to imprisonment for a term not exceeding one year or both.²⁴

This provision overrule the requirement of secrecy or other restriction on the disclosure of information on the disclosure of information imposed by any written law²⁵ such as in section 97 of Banking and Financial Institutions Act 1989 and Section 34 of the Islamic Banking Act 1983.

4.4.5 *Directions and Guidelines to discharge Government's international obligations*

This provision provides power of the relevant regulatory or supervisory authority to give directions in order to discharge any obligation binding on Malaysia subject to a decision of the Security Council of the United Nations²⁶ and they shall report to the Minister of Home Affairs and the Minister of Finance on the action taken.²⁷ There will be heavy penalty to any institution that fails or refuses to comply, contravenes or discloses a direction or guideline issued.²⁸ The punishment for those who contravenes this provision may be liable to a fine not exceeding Ringgit Malaysia one hundred thousand.²⁹

4.4.6 *Savings for orders made under the Exchange Control Act 1953 and the Labuan Offshore Financial Services Authority Act 1996*

Section 66F states that the orders made under section 44 of the Exchange Control Act 1953 and subsection 4(5) of the Labuan Offshore Financial

²³ Section 66D (1) and (2) of the Amendment Act.

²⁴ Section 66D (5) of the Amendment Act.

²⁵ Section 66D (6) of the Amendment Act.

²⁶ Section 66E (1) of the Amendment Act.

²⁷ Section 66E (6) of the Amendment Act.

²⁸ Section 66E (5) of the Amendment Act.

²⁹ *Ibid.*

Services Authority Act 1996 shall be deemed to have been lawfully made under section 66C and shall remain in full force and effect until they are revoked or replaced. The purpose of this amendment is to implement counter-terrorism measures required by the Security Council of the United Nations. It will strengthen the legal mechanism in preventing terrorist from utilizing offshore financial institutions instruments.

4.5 ADDITIONAL GROUNDS ON EXTRA TERRITORIAL JURISDICTION

The Amendment Act provides additional ground on which extra-territorial jurisdiction may be exercised. Subsection 82(1) of the principal Act is amended and cover the following person:-

- (a) any person against a citizen of Malaysia;
- (b) by any person against property belonging to the Government of Malaysia, or the Government of any State in Malaysia located outside Malaysia, including diplomatic or consular premises of Malaysia;
- (c) by any person to compel the Government of Malaysia or the Government of any State in Malaysia to do or refrain from doing any act;
- (d) by any stateless person who has his habitual residence in Malaysia;
- (e) by any person against or on board a fixed platform while it is located on the continental shelf of Malaysia; or
- (f) by any person who after the commission of the offence is present in Malaysia.³⁰

This provision extends the territorial jurisdiction over a person in Malaysia and enhances the effectiveness of the implementation of the AMLA.

4.6 ADDITIONAL REPORTING INSTITUTIONS

Anti Money Laundering (Amendment) of First Schedule Order 2003 provides the additional reporting institutions. The amendment adds other reporting institutions namely Development Financial Institutions, Lembaga Tabung Haji, postal financial services and gaming house. By this amendment all these

³⁰ Section 24 of the Amendment Act.

institutions have to report to the competent authority on any suspected transaction involving money laundering or terrorist financing.

4.7 NEW PREDICATE OFFENCES

Anti Money Laundering (Amendment) of Second Schedule Order 2003 provides the insertion of new predicate offences in Banking and Financial Institutions Act 1989, Betting Act 1953, Customs Act 1957, Future Industry Act 1993, Kidnapping Act 1961, Penal Code and Securities Industry Act 1983.³¹

CONCLUSION

In conclusion, the amendment of the AMLA by invoking the phrase terrorist financing is in line with the UN Convention for the Suppression of the Financing of terrorism. Malaysia, in fulfilling its international obligations and commitment to establish the FATF's 40 recommendations has passed the Anti Money Laundering Act 2001 and also the Anti Money Laundering (Amendment) Act 2003.

The Amendment inserted new definitions and phrase of "terrorist property" and "terrorism financing offence". It extends the anti-money laundering mechanism to include reporting of suspected terrorism financing activities, measures for the detection and prevention of terrorism financing and freeze, seize and forfeiture of terrorist property.

The amendment provides new Part VIA (sections 66A to 66F) that enables a specified entity to be deemed as a terrorist where its properties can be frozen, seized and forfeited according to the provisions under the AMLA. The former Anti Money Laundering Act 2001 did not provide specific provisions for preventing terrorist financing. The Minister of Home affairs is empowered to issue orders publish in the Gazette to declare an entity as a "specified entity", to implement measures required by the UNSC, to obtain information on terrorist property and to discharge Malaysia's international obligations. The Amendment Act required all reporting institutions including Lembaga Tabung Haji, Development financial institutions and gaming houses

³¹ Section 2 (a) until (h) of the Anti Money Laundering (Amendment) of Second Schedule Order 2003.

to comply strictly with all the provisions of the AMLA. This is to provide a comprehensive and integrated approach from various institutions in preventing money laundering activities.

It appears from the amendment that Malaysia has taken serious efforts in combating money laundering. The need for a effective legal mechanism through an integrated approach to prevent money laundering is the very essence in ensuring the public confidence on the economic and political stability. With the said amendment, it may further enhance the effectiveness of the legal mechanism for combating money laundering and also terrorist financing particularly in Malaysia.

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