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Anti-Money Laundering and Counter Financing Terrorism Legal and Regulatory Framework in Afghanistan

Money Laundering is the process to conceal or disguise the proceeds of crime such as drug trafficking, corruption, illicit arms trafficking, extortion, fraud, insider trading, organized crime, and other predicate offenses and to make them appear legal. Based on the International standards, including Financial Action Task Force Recommendation, Palermo Convention, and European Union Directives, jurisdictions should criminalize money laundering and enable its competent authorities to confiscate the proceeds of crime.

The existence of legal and regulatory framework to combat money laundering and terrorist financing is the crucial and an integral element of a sound anti money laundering and terrorist financing regime. Financial Action Task Force recommends that countries should criminalize money laundering and terrorist financing with a view to include the widest range of predicate offenses.

Although Afghanistan is not a financial center, but proceeds of drug, corruption and bribery, illegal extraction of mines, tax evasion, forgery, contraband, and usurpation of lands are the key ingredients of money laundering.

Afghanistan's first anti money laundering and proceeds of crime law was passed in 2004 with the purpose to prevent the use of financial institutions for money laundering and terrorist financing. Mutual Evaluation of Afghanistan undertaken in 2011¹, identified significant deficiencies in the legal and regulatory framework of anti-money laundering regime. Thereafter, Afghanistan adopted the new anti-money laundering and terrorist financing laws and regulations to meet FATF recommendations.

LEGAL FRAMEWORK

1: Anti-Money Laundering and Proceeds of Crime Law

The Anti-Money Laundering and Proceeds of Crime Law (AML-PC) was adopted and published in official Gazette # 1142 in July 2014. The law was then amended in April 2015.² The purpose of the AML-PC law is to protect and promote the financial

integrity of Afghanistan and fight against the use of financial institutions and designated non-financial businesses and professions (DNFBPS), for money laundering, proceeds of crime, the proliferation of weapons of mass destruction and the financing of terrorism. The amended AML-PC law meets the action plan items agreed with the International Cooperation Review Group of Financial Action Task Force (ICRG/FATF)³. The law defines the predicate offense as:

"Predicate offense means any criminal acts resulted in funds or properties, whether directly or indirectly irrespective to whether the offense is committed inside or outside the country. These offenses shall include all categories of offenses prescribed by FATF standards, including piracy in the high sea."

The categories of offenses listed by FATF are;

- "Participation in an organized criminal group and racketeering;
- Terrorism, including terrorist financing;
- Trafficking in human beings and migrant smuggling;
- Sexual exploitation, including sexual exploitation of children;

- *Illicit trafficking in narcotic drugs and psychotropic substances;*
 - *Illicit arms trafficking;*
 - *Illicit trafficking in stolen and other goods;*
 - *Corruption and bribery;*
 - *Fraud;*
 - *Counterfeiting currency;*
 - *Counterfeiting and piracy of products;*
 - *Environmental crime;*
 - *Murder, grievous bodily injury;*
 - *Kidnapping, illegal restraint and hostage-taking;*
 - *Robbery or theft;*
 - *Smuggling; (including in relation to customs and excise duties and taxes);*
 - *Tax crimes (related to direct taxes and indirect taxes);*
 - *Extortion;*
 - *Forgery;*
 - *Piracy; and*
 - *Insider trading and market manipulation.”⁴*
- Counterfeiting of currency;
 - Environmental crimes;
 - Murder;
 - Kidnapping;
 - Robbery;
 - Goods smuggling;
 - Tax crimes;
 - Extortion;
 - Forgery;
 - Electronic forgery;
 - Piracy;
 - Market manipulation;
 - Cyber crimes;
 - Illegal extraction of mines; and
 - Illegal competition in trade affairs.

In addition to the definition of the predicate offense provided in AML-PC law, another set of dominated laws in Afghanistan criminalizes most of the predicate offenses listed above.

The new Penal Code of Afghanistan was endorsed by President of Afghanistan in March 2017 and shall come into force after nine months starting its publication date in the official gazette (OG-1260)⁵. The new Penal Code includes the criminal provisions of other laws into a single gazette in a modern way and standard clusters, defining the offenses and punishments.

The new penal code, criminalizes:

- Organized crime and participation in an organized criminal group;
- Terrorism;
- Terrorist financing;
- Trafficking in person and sexual exploitation;
- Smuggling of immigrants;
- Drug trafficking;
- Firearms trafficking;
- Corruption offences including bribery;
- Fraud;

Market manipulation is also criminalized in the Law on Protection of Competition (OG-1010).⁶ This law introduces set of fines and penalties both for natural and legal persons who commit market manipulation. Meanwhile, Counterfeiting of Goods is criminalized in Patent Law (OG-1005).⁷

Money Laundering Offense: The money laundering offense defined in article # 4 of the Anti-Money Laundering and Proceeds of Crime Law, criminalizes money laundering in compliance with recommendation # 3 of the FATF and meets the international standards, particularly the elements of article # 6 of the United Nations Convention Against Transnational Organized Crime (Palermo Convention).⁸ In general the money laundering offense includes; (i) the conversion or transfer to conceal the illicit origin of the property, (ii) concealing the true nature of the property, (iii) possess and use the property derived from predicate offenses, (iv), engage, participate, attempt or enter into arrangement knowing that the property is derived from illicit activity, and (v) assisting, organizing, supporting or facilitating another person to do so.

An important element of the money laundering offense is “knowledge” which may be inferred from the objective of factual circumstance. As Afghanistan had few money laundering convictions, hence the use of the legal principles to infer “willful blindness” or “deliberate avoidance of the

knowledge of facts” would be an exercising gap for investigators and prosecutors.

2: Counter Financing of Terrorism Law

Counter Financing of Terrorism (CFT) law had been passed in September 2014 and was then amended in April 2015⁹. The CFT law criminalizes terrorist financing in compliance with recommendation # 5 of the FATF. The purpose of this Law is implementing the International Convention for the Suppression of Financing of Terrorism (1999) and its successor conventions, prevent the provision of funds or property for terrorist acts, terrorist organizations, or terrorist (s); and Implement UN Security Council Resolutions on combating the financing of terrorism and the financing of proliferation of weapons of mass destruction.

In addition to the CFT law, the new penal code also criminalizes terrorist financing. Terrorism offenses defined in the new Penal Code include acts such as suicide attack, crimes against persons, use of explosive or lethal devices, dissemination or destruction of the nuclear or radioactive materials, destruction of infrastructure, acts against airport, ship or fixed platform safety, control over an aircraft or ship, hostage taking for terrorism purposes and establishment of terroristic organization and its membership. The above acts against the Government of the Islamic Republic of Afghanistan or foreign country, national and international organizations are criminalized. The punishment for accomplice, accessory, starter, and conspirator are the same as principle offender.

REGULATORY FRAMEWORK

Da Afghanistan Bank Law, Banking Law and Anti Money Laundering and Proceeds of Crime Law empower Central Bank and other competent bodies to issue regulations, procedures, and circulars for better implementation of the AML/CFT legal framework. Currently, below regulations are utilized by relevant authorities in Afghanistan.

1: Cash & BNI Control Regulation

The Regulation Governing the Reporting and Control of Physical Transfers of Currency, Bearer

Negotiable Instruments, Gold, Other Precious Metals or Precious Stones through the Borders of The Islamic Republic of Afghanistan was adopted in April 2015 (OG-1170). The regulation was then amended in February 2016 and came into force in March 2016 (OG-1203)¹⁰. The regulation governs the scope of application, declaration system, prohibition of transfer, duties and responsibilities of competent authorities, consequences of false declaration, and procedural issues.

As per the regulation, it is prohibited for any person to leave Afghanistan in possession of cash, BNI, gold or other precious stones with the value exceeding USD 20,000 or its equivalent. This threshold is set not only in person, but also via cargo and postal service. The reporting threshold for the outbound declaration is USD 10,000 – 20,000. There is no limit to bring any amount of cash, BNI, gold or other precious stones into Afghanistan. The declaration threshold for inbound starts with any amount exceeding USD 10,000 or its equivalent.

Currently, Afghanistan has four International airports where the Afghanistan Customs Department (ACD) implements the regulation. The plan for official Border Crossing Points (BCP) is underway by ACD.

2: Counter Financing of Terrorism Regulation

The Counter Financing of Terrorism Regulation was approved by the Cabinet of Afghanistan in February 2015 (OG-1161)¹¹. The regulation highlights the rules of competent authorities about; (i) how to designate the persons, entities or organizations convicted to terrorism financing, (ii) alteration to the sanction list, (iii) coordination and cooperation among public and private stakeholders, (iv) implementation of UNSCR on combating terrorism financing, and (v) improving effectiveness implementing CFT Law.

The key issue regulated in CFT regulation is freezing/unfreezing of the funds and properties of persons, legal entities or organizations designated under UNSCR 1267 and 1988 without delay.

The CFT law provides the legal basis for targeted financial sanctions, which was followed by the CFT regulation for the freezing of terrorist assets. The requirement under the law and regulations is to freeze the funds and properties as well as the prohibition of making funds, financial services available for the benefit of the designated persons or entities. However, until July 2016, Afghanistan had administrative hold-ups in implementing the process without delay.

In July 2016, Attorney General's Office issued the Standing Instruction (Freezing Order)¹² for the current 1267 & 1988 designations and subsequent updates clearing up the procedural delays and providing the basis for the automatic translation of UN designations into domestic obligations. The standing freezing order is broadly distributed and published.

Financial Intelligence Unit developed an electronic notification mechanism and internal database; as soon as the UN list gets updated, a notification email, along with the update notice is immediately dispatched to the relevant authorities to freeze the funds and properties without delay.

Based on the current legal, regulatory and freezing order requirement;

"All relevant persons and institutions shall continuously comply with the freezing order, avoid any type of transaction and immediately freeze the cash, bank account, movable and immovable assets and any other type of funds, properties and transaction of designations. Frozen funds and properties shall be immediately reported to the Office of Afghanistan National Security Council and Attorney General's Office through the relevant regulatory bodies. Any person who makes any funds, property, economic resources or financial or other related services available to or for the benefit of the designated persons, shall commit an offense and on conviction shall be punished by law. Meanwhile, whoever fails to implement the freezing order shall commit an offense."

In addition to the adoption of AML/CFT legal framework, the above-mentioned standing freezing order and institutional framework played vital role in delisting Afghanistan off FATF Compliance Document¹³.

3: AML/CFT Responsibilities and Preventative Measures Regulation

The fourth group of Financial Action Task force recommendations (9-23) prescribes preventative measures both for financial and non-financial businesses and professions. This set of recommendations covers the customer due diligence and record keeping, secrecy laws and tipping off, correspondent banking and MVTs, new technologies, reporting of suspicious transactions, reliance on third parties and internal controls, high-risk countries and additional measures for specific customers and activities.

The Regulation was approved by the Supreme Council of DAB in April 2016¹⁴. The regulation requires all financial institutions to develop effective frameworks, preventive measures, systems, controls, and practices to manage their potential money laundering/terrorist financing (ML/TF) risks. Financial institutions licensed to operate in Afghanistan, should have adequate controls and procedures in place that they know their customers with whom they are establishing business relationships. Adequate due diligence on new and existing customers is a key part of these controls.

This regulation applies on financial intuitions. As defined; financial institution for the purpose of aforesaid regulation includes banks, money service providers, foreign exchange dealers, electronic money institutions, depository micro finance institutions, brokers and prepaid card issuing companies.

A good AML/CFT compliance program for a financial institution includes;

- Policies, Procedures, and Internal Controls;
- Compliance function;
- Comprehensive training program; and
- Independent audit function.

The regulation mandates the existence of AML/CFT policies, procedures, internal controls, appointment of a compliance officer at management level, establishing training programs, the audit function, and role of the board of directors.

4: Fit and Proper Regulation

As criminals are adapting new methods of money laundering and may try to own the financial institution as front business or laundering machine, therefore it is very important for the AML/CFT supervisory authority to set the requirements for the fit and proper person mainly for the executive officers, high-level managerial positions, or any other person or legal entity who exercises influence or degree of control over the management and/or ultimately owns the business.

The legal basis for the Fit and Proper Regulation¹⁵ is the Banking Law of Afghanistan. By issuance of this regulation, Central Bank aims that financial institutions are well managed and those who own, control, and participate in the establishment, operation and management of the financial institution should be a fit and proper person. The regulation applies to the financial institutions regulated by the Central Bank of Afghanistan.

Banking Law of Afghanistan¹⁶ defines the fit and proper person as:

“Fit and Proper Person” means a person who in the judgment of Da Afghanistan Bank is of honesty, trustworthiness, fairness, integrity and has the ability to make sound and effective decision in his personal, financial and business activities and possesses good skills and experience for conducting the intended activities of the bank. A legal person is considered to be a fit and proper person if in the judgment of Da Afghanistan Bank all members of its board of supervisors and management board, or equivalent governing bodies, and persons with qualifying holdings in such enterprise have these qualities.”

As per the banking law; no person (individual and legal entity) shall be considered fit and proper if he/she has been convicted to imprisonment by a competent court for an offense other than his/her political or religious views, declared bankrupt, disqualified or suspended by a competent authority, and is an associate, beneficial owner or representative of a person declared not to be fit and proper.

5: Money Service Providers and Foreign Exchange Dealers Regulation

Financial Action Task Force recommends that jurisdictions should take measures to ensure that legal or natural persons that provide money services are regulated, supervised and are subject to effective systems for ensuring compliance with stated recommendations. In general, MVTS are carrying services such as foreign exchange, check cashing, money transfer, issuing money orders or travelers check and distributor or seller of prepaid access cards. In Afghanistan, MSBs have been providing financial services while there were no sophisticated financial services. Traditionally, MSBs and FXDs have been more attractive because they are cheap, fast, easy and due to traditional preferences and trust.

Money Service Providers and Foreign Exchange Dealers Regulation was amended and passed by the Supreme Council of DAB in 2016¹⁷. As per the regulation, Financial Supervision Department of Central Bank is the licensing and supervisory body for MSPs and FXDs. In addition to the supervisory approach, suspicious transaction reports and large cash transaction reports should be reported to the Financial Transactions and Reports Analysis Center of Afghanistan (Financial Intelligence Unit).

6: Electronic Money Institutions Regulation

Based on the Electronic Money Institutions Regulation¹⁸ approved by the Supreme Council of DAB, Electronic Money Institution (EMI) means a legal entity, other than a Commercial Bank or Depository Microfinance Institution (DMFI) that accepts banknotes, coins, or other means of payment in exchange for e-money, and facilitates the transfer of e-money to make payments.

To see other relevant laws and regulations, visit the below addresses.

Ministry of Justice: www.moj.gov.af

Da Afghanistan Bank (Central Bank): www.dab.gov.af

Attorney General's Office: www.ago.gov.af

Financial Intelligence Unit : www.fintraca.gov.af

ENDNOTES:

¹ IMF, 2011. "Islamic Republic of Afghanistan: Detailed Assessment Report on Anti-Money Laundering and Combating the Financing of Terrorism." <https://www.imf.org/external/pubs/ft/scr/2011/cr11317.pdf>

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³ ICRG, 2012. "Action Plan." <http://apgml.org/my-app/default.aspx>

⁴ FATF, 2012. "The FATF Recommendations." http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf

⁵ MOJ, 2017. "Penal Code." http://moj.gov.af/Content/files/OfficialGazette/01201/OG_01260.pdf

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⁷ MOJ, 2009. "Patent Registration Law." http://moj.gov.af/Content/files/OfficialGazette/01001/OG_01005.pdf

⁸ UN, 2000. "United Nations Convention Against Transnational Organized Crime." https://www.unodc.org/documents/middleeastandnorthafrica/organised-crime/UNITED_NATIONS_CONVENTION_AGAINST_TRANSNATIONAL_ORGANIZED_CRIME_AND_THE_PROTOCOLS_THERETO.pdf

⁹ DAB, 2015. "Counter Financing of Terrorism Law." <http://dab.gov.af/Content/Media/Documents/CFTLawEnglish1212015113829829553325325.pdf>

¹⁰ FinTRACA, 2016. "Cash and BNI Control." [http://fintraca.gov.af/assets/Regulations/The%20Regul](http://fintraca.gov.af/assets/Regulations/The%20Regulation%20Governing%20the%20Reporting%20and%20Control%20of%20Physical%20Transfers%20of%20Currency.pdf)

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¹¹ FinTRACA, 2015. "Counter Financing of Terrorism Regulation." http://fintraca.gov.af/assets/Regulations/CFT%20Regulation_English.pdf

¹² AGO, 2016. "Standing Freezing Order." [http://fintraca.gov.af/assets/Freezing%20Orders/Standing%20Instruction_\(Freezing%20Order\)_English\(1\).pdf](http://fintraca.gov.af/assets/Freezing%20Orders/Standing%20Instruction_(Freezing%20Order)_English(1).pdf)

¹³ FATF, 2017. "Improving Global AML/CFT Compliance: On-going Process - 23 June 2017." <http://www.fatf-gafi.org/publications/high-riskandnon-cooperativejurisdictions/documents/fatf-compliance-june-2017.html#afghanistan>

¹⁴ DAB, 2016. "AML/CFT Responsibilities and Preventative Measures Regulation." <http://dab.gov.af/Content/Media/Documents/AML-CFTResponsibilitiesandPreventiveMeasureRegulationFinal2642016155033416553325325.pdf>

¹⁵ DAB, 2015. "Fit and Proper Regulation." <http://dab.gov.af/Content/Media/Documents/FitandProperRegulation163201615121224553325325.pdf>

¹⁶ DAB, 2015. "Banking Law of Afghanistan." <http://dab.gov.af/Content/Media/Documents/BankingLawofAfghanistanEnglishTranslation6122015122139846553325325.pdf>

¹⁷ DAB, 2016. "Money Service Providers and Foreign Exchange Dealers Regulation." <http://dab.gov.af/Content/Media/Documents/MSPFXDRegulation-FinalVersion12412017133239887553325325.pdf>

¹⁸ DAB, 2016. "Electronic Money Institution's Regulation." <http://dab.gov.af/Content/Media/Documents/EMIsRegulation-201616112016153619417553325325.pdf>