

IMPLEMENTATION OF THE CONCEPT OF POLITICALLY EXPOSED PERSONS (PEPs) IN THAILAND¹

1. Introduction

Nowadays, in the world of finance and banking the issue of “politically exposed persons” (PEPs) has become more and more pronounced, especially when it comes to the crime of money laundering (ML) and its predicate offences. Even before any risk assessment of a particular customer is undertaken, the mere mention of the word PEPs would make a financial institution hesitant to engage in any transaction with such a potential customer. The pertinent question is: why such hesitation on the part of the financial institution? The obvious reason that will be readily given is: PEPs are such a type of customer that will pose a reputation risk to the financial institution. Then, the next question is: Do all PEPs pose the same risk to financial institutions? To find a fair answer to this question, it is necessary to trace back the development of the PEP concept and look at the definition of a PEP.

It is generally agreed that the PEP concept started with the Swiss financial houses some a couple of decades or more ago when several Swiss banks engaged in business dealings with some of the world notorious political dictators of certain developing countries who had defrauded their respective governments of millions of dollars and deposited the proceeds in Swiss bank accounts. The banks suffered much public embarrassment and learnt the value of PEP due diligence the hard way. The financial scandal that resulted and the lingering bad publicity illustrated the need for knowing who your customers are and their financial background. In other words, it pointed to the crucial components of KYC/CDD (know-your-customer and customer due diligence) process and the source of funds.

This scandal is generally credited as the beginning of PEP compliance legislation as we know it today. The term “PEP” has since become accepted in the Swiss banking community and was originally created to define a category of high-profile customers whose business warranted a higher level of risk management. PEP due diligence has thus evolved within the financial services generally.

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Over time, emerging anti-money laundering (AML) and PEP-specific legislation would make PEP due diligence a legal requirement for most regulated financial service providers and, more recently, many other sectors and industries as well.

II. Formulation of PEP Definition

(A). FATF Definition

Following the bitter experiences of banking institutions, particularly those of the Swiss banks, the situation demanded a proper mechanism to deal with PEP customers. To help with the mechanism, it calls for a suitable definition which the financial institutions could fully understand and take appropriate preventive measures to protect the industry.

In this regard, FATF² Recommendation 6 prescribes the recommendation for financial institutions as follows:

FATF recommendation 6:

“Financial institutions should, in relation to politically exposed persons, in addition to performing normal due diligence measures:

- a) Have appropriate risk management systems to determine whether the customer is a politically exposed person.*
- b) Obtain senior management approval for establishing business relationships with such customers.”*

As for the qualifying criteria of a PEP, the FATF formulated the following definition:

‘Politically Exposed Persons’ (PEPs) are individuals who are or have been entrusted with prominent public functions in a foreign country, for example Heads of State or of government, senior politicians, senior government, judicial or military officials, senior executives of state owned corporations, important political party officials. Business relationships with family members or close associates of PEPs involve reputational risks similar to those with PEPs themselves. The definition is not intended to cover middle ranking or more junior individuals in the foregoing categories.”

While the above definition, as it is, applies only to PEPs of foreign origin, the accompanying Interpretative Note states “Countries are encouraged to extend the

² FATF = Financial Action Task Force, established in Paris in 1989 by the G7 Summit and currently composed of 31 members countries and two regional organizations, serves as an international standard setter in matters relating to money laundering and terrorist financing.

requirements of Recommendation 6 to individuals who hold prominent public functions in their own country.” This, in effect, provides an opening for countries to exercise their discretion in dealing with domestic PEPs as well.

(B). Definition of Thailand And International Financial Institution Organization

Based on its domestic requirements, regulatory authorities of Thailand have attempted to define PEPs despite the fact that there admittedly was a lack of consistency in harmonizing the term. This inconsistency can be seen in the varying definitions as follows:

- **AMLO³ Policy Statement of 27 February 2007**

“Specially Attended Customer” means a customer relating to politics, or any person having relationship with such a customer, or a customer coming from a country that does not comply or insufficiently complies with the Financial Action Task Force Recommendations, or a customer from a country not having anti-money laundering measures, or a customer undertaking suspicious transactions or listed as having relationship with a person that may commit a predicate offence or money laundering, or a customer that the Anti-Money Laundering Office has informed a financial institution to treat as such accordingly, or a customer that has been listed as a high risk business or profession such as trading in metals or precious stones, money exchange or illegal loans, etc.

- **BOT⁴ Policy Statement of 19 January 2007**

“Customers Requiring Special Attention” means customers who are or have been entrusted with prominent public functions in a foreign country (Politically Exposed Persons : PEPs), or whose residence or source of fund is from countries that do not use or apply the Financial Action Task Force on Money Laundering (FATF) Recommendations or do not have anti-money laundering measures, or customers who undertake suspicious transactions, or customers whose names appear on the list of or who have relation with a person who may conduct predicate offense or offense on

³ AMLO = Anti-Money Laundering Office, an independent Government agency responsible for implementation of the AMLA and also acting as a national FIU.

⁴ BOT = Bank of Thailand, acting as a regulatory authority for banking institutions, except Specialised Financial Institutions.

money laundering, or customers with high risk profession such as jewelry or precious metal, foreign exchange, or informal lending business, etc.

• **OSEC⁵ Notification of 1 March 2007**

Clause 14. To facilitate the KYC process, securities company shall monitor public and media releases as well as establish and maintain databases or put in place procedures so as to gain access to external databases on the following information:

*...(2) list of name of **politically exposed persons (PEPs)**, either Thai or foreign, including their associates.*

(C). **Wolfsberg⁶ Definition**

The term "politically exposed persons" ("PEP") applies to persons who perform important public functions for a state.

The term should be understood to include persons whose current or former position can attract publicity beyond the borders of the country concerned and whose financial circumstances may be the subject of additional public interest. In specific cases, local factors in the country concerned, such as the political and social environment, should be considered when deciding whether a person falls within the definition.

The following examples are intended to serve as aids to interpretation:

- *Heads of state, government and cabinet ministers;*
- *Influential functionaries in nationalized industries and government administration;*
- *Senior judges;*
- *Senior party functionaries;*
- *Senior and/or influential officials, functionaries and military leaders and people with similar functions in international or supranational organizations;*
- *Members of ruling royal families;*
- *Senior and/or influential representatives of religious organizations (if these functions are connected with political, judicial, military or administrative responsibilities)*

(D). **Dow Jones Watchlist Definitions**
National

⁵ OSEC = Office of the Securities and Exchange Commission, acting as a regulatory authority for securities industry.

⁶ The Wolfsberg Group, an association of 11 leading global banks formed in 2000 in Switzerland, which aims to develop financial services industry standards.

- *Heads & Deputies State/National Government*
- *National Government Ministers*
- *Members of the National Legislature*
- *Senior Civil Servants-National Government*
- *Embassy & Consular Staff*
- *Senior Members of the Armed Forces*
- *Senior Members of the Police Services*
- *Senior Members of the Secret Services*
- *Senior Members of the Judiciary*
- *State Corporation Executives*
- *State Agency Officials*

Regional

- *Heads & Deputy Heads of Regional Government*
- *Regional Government Ministers*
- *Senior Civil Servants-Regional Government*
- *EU Member of European Parliament*

National-Non-Government

- *Religious Leaders*
- *Political Party Officials*
- *International Organization Officials*
- *Political Pressure and Labour Officials*
- *National NGO Officials*

Local

- *City Mayors (population over 100,000 inhabitants)*

Slight variations in the above respective definitions clearly point to the fact that more refinement is needed in the FATF definition so as to: (1) cope with the ever-growing complexity of customer-service provider relationship and (2) meet specific local factors, such as the political and social environment, when deciding whether a person falls within the definition. In terms of today's prevailing situation, mere expansion of the scope of PEP definition to cover foreign PEPs would not suffice; mere application of the definition to domestic and foreign politicians would not be enough; and mere interpretation of the objective of money launderers, including corrupt PEPs, as the avoidance of detection, prosecution and confiscation of their criminal proceeds. It is observed to be much more than that. The issue of PEPs should be viewed from such various aspects as: (1) individual aspect covering ***primary officeholder (PEP)*** and ***exposed persons*** that surround the PEP; (2) form aspect covering not only actual money but also any type of asset or property; and (3) laundering aspect covering not only converting property but also disguising ownership of the property. If a thoroughly refined PEP definition can be formulated, a sound and effective due diligence framework can be established. This, in turn, can be a contributory factor in bringing about a compliance culture. Furthermore, a refined definition will enable the decision-makers to distinguish between law-abiding potential PEPs and risk-posing corrupt PEPs.

III. Thailand and PEP Factor

There is no specific reference to PEPs in Thailand's anti-money laundering (AML) laws. As outlined earlier, the definition of PEPs and due diligence requirements are dealt with in others such as the abovementioned Policy Statements and Notification, which unfortunately are devoid of consistency in their terminology and explanation. Besides, the Policy Statements are being seen as legally unenforceable, so it becomes necessary to make a new law or regulation to deal with PEPs in order to comply with the international standards.

However, in the context of anti-corruption measures, there is an organic law, i.e. *The Organic Act on Counter Corruption, B.E. 2542 (1999)*, that defined PEPs and their duties to report their assets and liabilities. Under this Act, PEPs include: (1) persons holding political positions; (2) civil servants; (3) judicial officers; and (4) military officials. The asset reporting requirement is just meant for transparency in the public view, and not for investigating the income and movement of finances in order to prove good conduct and good faith.

As regards defining PEPs according to international standards, in the case of Thailand – unlike other developed countries with federal state structure where they have strong anti-corruption mechanisms – there is obviously a need to start at the local level to define the characteristics of local PEPs. For instance, persons who can manage local budgets are not only the local administration officials, i.e. provincial administrative organization and district administrative organizations inclusive of members of such organizations. Then, it can go on to the next level – central level – where PEPs will include persons holding political positions in government and those in opposition, members of the House of Representatives and the Senate, cabinet ministers – inclusive of the prime minister – and civil servants holding executive positions at any department, bureau, or office. In addition, the role of persons who have retired from political positions or executive positions needs to be considered as well. For, although they may have already retired, they could still exert some great influence or have relationship with existing PEPs in the ruling party or the opposition for about 3-5 years. In view of this, it may need to define a retired person as a PEP in a 5-year span.

Regarding the issue of family and close person – who can be termed as “*exposed persons*” (*EPs*) – under Thai family relationship concepts they include: spouse, children, children's spouses, parents, brothers and sisters (inclusive of parents, brothers and sisters of their spouses). Besides, there are two other types of persons required for financial scrutiny: (1) staff or servants of PEPs, who received transfers of securities or huge amounts of money larger than their relationship could suggest; and (2) any other person having no relationship with PEPs but received the transfer of securities or properties from PEPs. These two types of persons are “*nominees*” of PEPs; they are the ones PEPs now use as a trick to transfer their securities or properties.

In defining a Thai PEP, there is however a point worthy of note. There may be objections on the grounds of restriction of personal right and liberty under the Thai Constitution. But, in the world today, it is evident that any law stipulated for protection of State security always overrides the law protecting civil rights. Furthermore, PEPs are in fact persons who take an oath to the country and the people before accepting a position that they will perform their duties in good faith. Consequently, they are aware that their holding of the position connects the interest of the people and the State. Accordingly, subjecting them to financial scrutiny will not affect their daily life provided they act in good faith under oath.

At this moment, legislative scrutiny of a KYC/CDD draft law, including the PEP issue, is in progress at Thailand's current Parliament. It is expected that the law will be enacted soon and that a sound and effective due diligence process will be in place, hopefully meeting the requirements of the international standards.

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