

## The Financial Services Act 2012 - Directions of Compliance

(Part 2 of 4)

By Gopal Sundaram  
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***This series of articles are written to introduce and explain significant features of the Financial Services Act 2012 which was recently passed by Dewan Rakyat and Dewan Negara of the Malaysian Parliament. The Royal Assent to the Bill has not been announced yet. Neither has the new Act been gazetted. The Bill provides that the Act will come into force on a day determined by the Minister of Finance.***

In an era of gentlemen bankers, the City of London folklore has it that the Governor of the Bank of England could correct irresponsible behaviour with the raise of his eyebrows. The discretion, competency, and moral authority of the regulator in Malaysia, Bank Negara Malaysia, in most cases oils the wheels of the regular business of compliance among banks and financial institutions (FIs) in Malaysia. The regulator regularly engages with the management and staffs of the FIs on issues of concern at the institution level and these are sort out with maximum consultation between the FIs and the regulator. The regulator hardly resorts to the statute book or its statutory powers to enforce compliance, relying rather on what has termed "moral suasion" based on superior logic, research and hard work.

However with the proliferation of financial institutions, a rapidly advancing financial system and new work cultures and non-traditional workforce, moral suasion may not produce the results needed. In the past, the regulator has mostly intervened in FIs when the liquidity or solvency of the FI concerned was at stake. A whole new set of provisions in Part XII of the FSA now provide for the regulator to intervene more pre-emptively even liquidity or solvency issues set in. These are called Directions of Compliance or DOCs for short. DOCs are like a bridge or an intermediate step between moral suasion and highly intrusive actions bordering on resolution like action on FIs.

Section 156 of the FSA enables the regulator to issue a direction in writing to an FI, its director, chief executive officer or senior officer, to cease or refrain from committing an act or pursuing a course of conduct or to do any act, in relation to its business, affairs or property. Such directions may –

- (1) require the FI to vary or terminate any agreement or arrangement entered into by the FI with any person in relation to its business, affairs or property;
- (2) require the FI to dispose of all or any of the investments or assets held by the FI in any body corporate;
- (3) prohibit the FI from carrying on any part of its business including, imposing any limitation on or prohibiting the giving of credit facilities, the making of investments, or in the case of a licensed bank or licensed investment bank, the acceptance of deposits, or in the case of a licensed insurer, the effecting of policies;
- (4) prohibit the FI from entering into any other transaction or class of transactions, or to enter into it subject to such restrictions or conditions as may be specified by the regulator;
- (5) require the FI which is a licensed bank, licensed insurer or licensed investment bank to increase its capital to such amount as may be specified by the regulator.

DOCs may be issued for the following purposes if the regulator is of the opinion that an FI, its director, chief executive officer or senior officer:

- (a) is committing or is about to commit an act, or is pursuing or is about to pursue any course of conduct, that is unsafe or unsound or has failed to commit an act or pursue a course of conduct that is necessary to maintain the safety and soundness of the FI;
- (b) is carrying on business in a manner detrimental to the interests of depositors, policy owners, participants, users, creditors or the public generally;
- (c) has failed to manage its business or affairs in a manner that is consistent with sound risk management and good governance practices;
- (d) has failed to comply with any standards, notice, condition, specification, requirement, restriction, direction or code specified, issued or made under FSA or a direction under subsection 214(6) or section 216 of the FSA regardless that there has been no prosecution or other action in respect of such non-compliance;
- (e) has breached or contravened any provision of FSA, the Central Bank of Malaysia Act 2009 or any written law regardless that there has been no prosecution or other action in respect of the breach or contravention.
- (f) The failure of the FI, its director, chief executive officer or senior officer to comply with a DOC is an offence and shall, on conviction, be liable to imprisonment for a term not exceeding ten years or to a fine not exceeding fifty million ringgit or to both.

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Gopal began his highly distinguished career in Bank Negara Malaysia (BNM) in 1982, pursuant to graduating from University of Malaya on a Bank Negara scholarship. He was appointed as Assistant Governor in 2006. As Assistant Governor he was responsible for the Legal Department, Finance Department and the IT Services (Computer) Department as well the Money Museum and the Art Gallery. During his tenure, he was a member of various committees chaired by the Governor, inter alia, the Management Committee, the Monetary Policy Committee, the Financial Stability Committee, the Budget Committee, the Risk Management/ Committee and in attendance at the Malaysia International Islamic Financial Centre Executive Committee (MIFC), a multi-agency committee appointed by the Prime Minister.

Upon his retirement in 2011, he was appointed as Project Advisor to BNM to advise and supervise the drafting of an omnibus legislation for banking, insurance, payments systems and exchange control as well as an omnibus Islamic legislation for Islamic banking, takaful, payment systems and exchange control proposed to be tabled in Parliament later this year.

Gopal is the only member of the International Monetary Law Committee of the International Law Association (MOCOMILA) from Malaysia. He is also in the Executive Committee of the Malaysian Chapter of ASIL (Asian Society for International Law). Gopal sits on the Board of Directors of Kuwait Finance House (Malaysia) Berhad, the Board of Management of Methodist College Kuala Lumpur, the Council of Education, Methodist Church in Malaysia and the Judicial Council, Methodist Church in Malaysia.

He is a leading adviser on the new Financial Services Act (FSA) and Islamic Financial Services Act (IFSA).

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