

立法會
Legislative Council

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(These minutes have been seen
by the Administration)

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**Bills Committee on Anti-Money Laundering and
Counter-Terrorist Financing (Financial Institutions) Bill**

**Fifth meeting on
Thursday, 13 January 2011, at 4:30 pm
in Conference Room B of the Legislative Council Building**

- Members present** : Hon CHAN Kam-lam, SBS, JP (Chairman)
Hon James TO Kun-sun (Deputy Chairman)
Dr Hon Margaret NG
Hon Mrs Sophie LEUNG LAU Yau-fun, GBS, JP
Hon Audrey EU Yuet-mee, SC, JP
Hon WONG Ting-kwong, BBS, JP
Hon CHIM Pui-chung
Hon Starry LEE Wai-king, JP
Hon Paul CHAN Mo-po, MH, JP
- Members absent** : Hon Albert HO Chun-yan
Dr Hon David LI Kwok-po, GBM, GBS, JP
Dr Hon Philip WONG Yu-hong, GBS
- Public officers
Attending** : Mr Patrick HO
Deputy Secretary for Financial Services and the
Treasury (Financial Services)
- Miss Melo MAN
Acting Principal Assistant Secretary for Financial
Services and the Treasury (Financial Services)
- Ms Monica LAW
Senior Assistant Law Draftsman
Department of Justice

Mr Alan CHONG
Senior Government Counsel
Department of Justice

Mr Trevor KEEN
Head (Banking Conduct)
Hong Kong Monetary Authority

Mr Hon CHAN
Senior Manager (Anti-money Laundering)
Office of the Commissioner of Insurance

Mr CHAN Chi-keung
Head of the Special Project Planning Team
Trade Controls Branch
Customs and Excise Department

Attendance by Invitation : Mrs Yvonne MOK
Director (Intermediaries Supervision)
Securities and Futures Commission

Clerk in attendance : Ms Anita SIT
Chief Council Secretary (1)5

Staff in attendance : Miss Kitty CHENG
Assistant Legal Adviser 5

Mr Daniel SIN
Senior Council Secretary (1)7

Ms Haley CHEUNG
Legislative Assistant (1)8

I Meeting with the Administration

Clause-by-clause examination of the Bill (starting at clause 9(4))

(LC Paper No. CB(3)122/10-11 — The Bill

- LC Paper No. CB(1)705/10-11(06) — Letter from Assistant Legal Adviser to the Administration dated 7 December 2010
- LC Paper No. CB(1)863/10-11(03) — Administration's paper on "Information on Reference Materials" (members may just bring Annex F to the paper)
- LC Paper No. CB(1)979/10-11(03) — Paper on "Hong Kong legislative reference used by the Administration in drafting the Bill" prepared by the Legal Service Division
- LC Paper No. CB(1)979/10-11(04) — Marked-up copy of the consequential and related amendments of the Bill prepared by the Legal Service Division)

Discussion

The Committee deliberated (Index of proceedings attached at **Appendix**).

Admin Follow-up actions to be taken by the Administration

2. The Administration was requested to provide the following information or take the following actions:

- (a) in relation to the provision on the protection of legal professional privilege under clause 80 of the Bill, to-
- (i) advise whether provisions similar to clause 80(2) can be found in other local legislation related to anti-money laundering; and
 - (ii) explain by reference to examples of the possible circumstances under which a legal practitioner would be required under the Bill to disclose the name and address of his/her client, and review the need for the exception under clause 80(2) and the drafting of this provision.

- (b) with reference to clause 9(1), to-
 - (i) provide information on the relevant international requirements regarding routine inspections at the business premises of financial institutions;
 - (ii) provide an account of the types of records and documents which the regulators would need access to in a routine inspection as distinguished from those required under an investigation;
 - (iii) explain how the regulators would handle the copies of the records and documents made under sub-clause (b); and
 - (iv) consider the feasibility of limiting the types of records and documents that can be obtained under sub-clause (b) without prejudicing the effectiveness of the enforcement of the relevant authorities.
- (c) to explain the rationale for the arrangement specified under clause 9(8);
- (d) to explain the rationale for the requirement to make statutory declaration under clause 9(9) and (10);
- (e) to clarify whether paragraph (a)(iii) of the definition of "business premises" under clause 9(15) covers premises outside Hong Kong; and if so, how the requirements would be enforced;
- (f) to consider whether the maximum level of fine for the offences under clause 5(6) and (8) should be increased, given that the offences involve a mental element of "with intent to defraud";
- (g) To consider whether the criminal provisions under clause 10(3), (5) to (8) should allow for a defence of "reasonable excuse" in the same way as provided for in clause 10(1); and
- (h) to review the current drafting of clause 11(1)(a) and (b) as to whether it is appropriate and necessary to stipulate in the law that a relevant authority must have "reasonable cause to believe" or "has reason to inquire" before the relevant authority can conduct an investigation.

III Any other business

Date of next meeting

3. The Chairman reminded members that the next meeting would be held on 24 January 2011.
4. There being no other business, the meeting ended at 6:30 pm.

Council Business Division 1
Legislative Council Secretariat
28 April 2011

**Proceedings of the
Bills Committee on Anti-Money Laundering and
Counter-Terrorist Financing (Financial Institutions) Bill
Fifth meeting on Thursday, 13 January 2011, at 4:30 pm
in Conference Room B of the Legislative Council Building**

Time Marker	Speaker	Subject(s)	Action Required
000635 – 000750	Chairman	Introductory remarks	
000751 – 001922	Chairman Administration Deputy Chairman Department of Justice (DoJ)	<p><u>Clause 9 – Power to enter business premises etc. for routine inspection</u></p> <p>The Deputy Chairman asked if a financial institution or the person concerned, when required by an authorized person to provide access to, or produce any record or information, or answer questions about the record or information under clause 9(3)(b), could claim legal professional privilege. He also queried whether any self-incriminating evidence gathered during the process could be used against the informant. The Deputy Chairman was also concerned that clause 9(3)(b) covered any person whether or not connected with a financial institution (FI).</p> <p>The Administration explained that legal professional privilege was preserved in clause 80 and privilege against self-incrimination was provided in clause 15. Clause 9(3) was modelled on the Securities and Futures Ordinance (Cap. 571) (SFO) to facilitate the regulators in discharging their duties to ascertain financial institutions' compliance with the statutory obligations. The powers under clause 9(3) might only be exercised for the purposes of ascertaining compliance by FI with the requirement specified under clause 9(2) and might only be exercised when the information cannot be obtained from the financial institution.</p>	
001923 – 002926	Ms Audrey EU Administration Securities and Futures Commission (SFC) DoJ	Ms EU sought confirmation that, under clauses 9(3) and 80(2), a legal practitioner would not have to disclose any information subject to legal professional privilege to an authorized person, with the exception of the name and address of a client of a legal practitioner. She queried the rationale and circumstances where the proposed exception was necessary in tackling money-laundering activities.	

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		<p>The Administration confirmed Ms EU's understanding and explained that:</p> <ul style="list-style-type: none"> (a) the provisions were modelled on SFO; and (b) the provision of a legal practitioner's clients' names and addresses might be required in answering questions made by the authorized person under clauses 9(4) and 9(5)(b). <p>The Administration was requested to:</p> <ul style="list-style-type: none"> (a) advise whether provisions similar to clause 80(2) could be found in other local legislation related to anti-money laundering; and (b) explain by reference to examples of the possible circumstances under which a legal practitioner would be required under the Bill to disclose the name and address of his/her client, and to review the need for the exception under clause 80(2) and the drafting of this provision. 	<p>The Administration to take action as per paragraph 2 of the minutes.</p>
<p>002927 – 004204</p>	<p>Administration Deputy Chairman</p>	<p>The Deputy Chairman queried:</p> <ul style="list-style-type: none"> (a) the need for clauses 9(3) and 9(5) when clauses 9(1)(b) and (c) had already provided for an authorized person to inspect and obtain information from FIs or other persons to ascertain compliance with the specified requirement; and (b) the reasons that clause 9(3) required an authorized person to have a "reasonable cause to believe" that a person possessed certain information, while such condition did not appear in clause 9(5). <p>He considered the absence of such precondition would give the authorized person too wide an inspection power.</p> <p>The Administration explained that:</p> <ul style="list-style-type: none"> (a) Clause 9(1) provided for the powers of an authorized person. The purpose of 	

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		<p>clauses 9(3) and 9(5) were to impose an obligation on an FI or any other person to observe the authorized person's requirements, the contravention of which would be subject to criminal prosecutions under clause 10;</p> <p>(b) Clause 9(5) empowered an authorized person to obtain information from the FI or the other person in exercising the power under clause 9(1)(c). The exercise of that power was bounded by the condition under clause 9(1)(c) which required the authorized person to have a "reasonable cause to believe" that the other person possessed the necessary information. It was not necessary to repeat such condition in clause 9(5); and</p> <p>(c) Clause 9(3) allowed the authorized person to obtain information from a FI or any other person in exercising the power under clause 9(1)(b). However, clause 9(1)(b) did not contain the condition that the authorized person should have a prior "reasonable cause to believe" that the other person possessed the information. It was therefore necessary to specify the condition in clause 9(3).</p>	
004205 – 005226	Ms Audrey EU Administration SFC Hong Kong Monetary Authority (HKMA) Chairman	<p>Ms EU was concerned that the Bill seemed to give the authorized persons unfettered power to obtain documents and information from FIs without any safeguard for customers' privacy. Ms EU:</p> <p>(a) asked for specific examples of "any other person" in clause 9(3)(b) from whom the relevant authorities could obtain documents or information;</p> <p>(b) queried the types of document the authorized person might seek; and</p> <p>(c) suggested that the Bill should restrict the types of information or document that an authorized person could require an FI to provide.</p>	

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		<p>The Administration explained that:</p> <ul style="list-style-type: none"> (a) the purpose of obtaining information from FIs under clause 9 was to ensure that the record keeping and other requirements imposed under the future enacted Ordinance were complied with and not to investigate possible money laundering offence; (b) the Bill sought to implement the international anti-money laundering requirements. It would defeat this objective if excessive restrictions were imposed on the authorized person's powers; and (c) the Bill would allow an authorized person to obtain documents from an FI and any other person so that the authorized person could cross-check any inconsistencies. 	
005227 – 005550	Deputy Chairman HKMA	<p>The Deputy Chairman was concerned that the Bill would weaken the protection for FIs' customers as the authorized person might inspect and make copies of individual records arbitrarily, and even refer suspicious cases for investigation. He asked if the Administration would circumscribe the authorized person's powers by adding appropriate provisions in the Bill, or by issuing suitable guidelines or codes of practice.</p> <p>HKMA explained that staff who carried out routine inspections would not be looking for records of individual customers and would not be acting on suspicion of money-laundering offences by specific persons. Such investigations of money laundering cases would be a matter for the Police. The objective of HKMA's routine inspections was to ensure FIs' compliance with the requirements of or imposed under the future enacted Ordinance.</p> <p>The Deputy Chairman opined that the powers of the authorized person under clause 9 should be suitably circumscribed.</p>	
005551 – 005956	Ms Audrey EU Administration Chairman	Ms EU said the Administration should explain the types of documents an authorized person would examine during a routine inspection	

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	Deputy Chairman	<p>vis-a-vis those examined during an investigation, and how the authorized persons would handle copies of the documents or records obtained under clause 9(1)(b).</p> <p>The Chairman requested the Administration to provide a paper to address members' concerns with respect to the powers of the authorized person under clause 9(1).</p> <p>The Deputy Chairman said there were many ways to handle copies. For example, only certain senior personnel of the regulators would be authorized to make copies. However, he cautioned that in critical stage of an investigation, the practical value of making copies of document was limited.</p>	The Administration to take action as per paragraph 2 of the minutes.
005957 – 010505	Administration Deputy Chairman DoJ	<p>The Deputy Chairman said that under clause 9(6) an authorized person could only require an individual to provide document and information if the concerned FI could not provide such information. He queried why clause 9(5) was not similarly constructed.</p> <p>The Administration explained that the precondition specified in clause 9(6) also applied to clause 9(5), because it was specified in clause 9(1)(c)(ii), to which clause 9(5) related, that an inquiry of "any other person" was subject to clause 9(6).</p>	
010506 – 011319	Administration Deputy Chairman SFC	<p>With regard to clause 9(8), the Deputy Chairman queried why, in ascertaining compliance with the anti-money laundering measures, the Bill did not require HKMA, as it did for other regulators, to certify in writing that HKMA was satisfied that the disclosure or production of information was necessary for the purpose.</p> <p>The Administration explained that:</p> <p>(a) according to legal advice, the provision was necessary to preserve a bank's common law obligation to protect the confidentiality of the affairs of its customers; and</p> <p>(b) the certification requirement did not apply to HKMA because it was the statutory</p>	

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		<p>regulator of banks and it needed to access the information to ascertain the banks' compliance with the statutory obligation.</p> <p>The Deputy Chairman was unconvinced and requested the Administration to provide further information to explain the rationale for the arrangement specified under clause 9(8).</p>	<p>The Administration to take action as per paragraph 2 of the minutes.</p>
011320 – 011553	Administration Deputy Chairman	<p>The Deputy Chairman requested the Administration to explain the rationale for the requirement to make statutory declaration under clauses 9(9) and (10) when a person had to verify the answer he had provided in response to the authorized person's inquiries.</p> <p>Members raised no question on clauses 9(11) to (14)</p>	<p>The Administration to take action as per paragraph 2 of the minutes.</p>
011554 – 012130	Deputy Chairman Office of the Commissioner of Insurance HKMA	<p>The Deputy Chairman enquired whether a "place of business" in clause 9(15)(a)(iii) included a place outside Hong Kong.</p> <p>HKMA explained that the reference to a "place of business" was drafted along the same line as the Banking Ordinance (Cap. 155) which included any place where a bank conducted business, and it could include a place outside Hong Kong.</p> <p>The Deputy Chairman said allowing an authorized person under the Bill to search for documents in a location outside Hong Kong involved extraterritorial power and should be carefully justified.</p> <p>The Administration was requested to clarify whether paragraph (a)(iii) of the definition of "business premises" under clause 9(15) covers premises outside Hong Kong; and if so, how the requirements would be enforced.</p>	<p>The Administration to take action as per paragraph 2 of the minutes.</p>
012131 – 012349	Ms Audrey EU Chairman HKMA Office of the Commissioner of Insurance	<p>In response to enquiries of Ms EU and the Chairman, HKMA explained that there were co-operative arrangements with overseas regulatory authorities through which authorized persons could obtain information from an overseas branch of an FI. The arrangements would have to be consistent with the local</p>	

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		<p>regulation of the respective overseas jurisdiction.</p> <p>Citing paragraph (d) of the definition of “business premises” under clause 9(15), the Deputy Chairman was concerned whether an authorized person could access domestic premises for inspection purposes if some business operations were conducted there.</p> <p>The Office of the Commissioner of Insurance confirmed that the "premises" referred to in clause 9(15)(d)(i) - (ii) did not include domestic premises.</p>	
012350 – 012809	Ms Audrey EU Administration SFC Deputy Chairman	<p>Clause 5(8)(a)</p> <p>Ms EU considered that the maximum fine of \$1 million under clause 5(6)(a) for contravention by an FI of a specific provision with intent to defraud might be too low, since the same maximum fine was applied to the contravention under clause 5(5)(a) which did not have the element of fraud. She questioned whether the pecuniary penalty was proportionate to the severity of the offence.</p> <p>The Administration undertook to review whether the maximum level of fine for the offences under clause 5(6) and (8) should be increased, given that the offences involve a mental element of "with intent to defraud".</p>	The Administration to take action as per paragraph 2 of the minutes.
012810– 013746	Administration Deputy Chairman	<p><u>Clause 10 – Offences for non-compliance with requirements imposed under section 9</u></p> <p>The Deputy Chairman asked the Administration to consider whether the criminal provisions under clauses 10(3), (5) to (8) should allow for a defence of "reasonable excuse" in the same way as provided for in clause 10(1).</p>	The Administration to take action as per paragraph 2 of the minutes.
013747 – 014754	Administration Deputy Chairman SFC	<p><u>Clause 11 – Relevant authorities may appoint investigators</u></p> <p>The Deputy Chairman commented that it was unusual that the law should require a law enforcement body to establish a reasonable cause to believe that an offence or a breach had been committed, and to have obtained the consent from the Financial Secretary (FS), before it</p>	

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		<p>could initiate an investigation. He was concerned that such provision might hamper the authorities' ability to take enforcement actions.</p> <p>The Administration clarified that FS's consent was required only when a relevant authority intended to appoint any person outside of its organization to carry out the investigation. The provision was also modelled on the relevant provision in SFO which enabled SFC to engage external experts to assist in its investigation.</p> <p>The Chairman requested the Administration to review the current drafting of clause 11(1)(a) and (b) as to whether it was appropriate and necessary to stipulate in the law that a relevant authority must have "reasonable cause to believe" or "reason to inquire" before the relevant authority could conduct an investigation.</p>	The Administration to take action as per paragraph 2 of the minutes.
014755 – 014817	Chairman	The Chairman said that the next meeting would be held on 24 January 2011.	