

立法會
Legislative Council

LC Paper No. CB(1)2909/10-11
(The minutes have been seen
by the Administration)

Ref : CB1/BC/1/10/2

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

**Seventh meeting on
Wednesday, 9 February 2011, at 10:45 am
in Conference Room A of the Legislative Council Building**

- Members present** : Hon CHAN Kam-lam, SBS, JP (Chairman)
Hon James TO Kun-sun (Deputy Chairman)
Dr Hon David LI Kwok-po, GBM, GBS, JP
Dr Hon Margaret NG
Hon Audrey EU Yuet-mee, SC, JP
Hon WONG Ting-kwong, BBS, JP
Hon Paul CHAN Mo-po, MH, JP
- Members absent** : Hon Albert HO Chun-yan
Hon Mrs Sophie LEUNG LAU Yau-fun, GBS, JP
Dr Hon Philip WONG Yu-hong, GBS
Hon CHIM Pui-chung
Hon Starry LEE Wai-king, JP
- Public officers
Attending** : Mr Patrick HO, JP
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

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

I Confirmation of minutes

(LC Paper No. CB(1)1220/10-11 — Minutes of meeting on
22 December 2010)

The minutes of the meeting held on 22 December 2010 were confirmed.

II Meeting with the Administration

Follow-up to issues raised at the meeting on 7 January 2011

(LC Paper No. CB(1)1051/10-11(01) — List of follow-up actions arising from the meeting on 7 January 2011 prepared by the Legislative Council Secretariat

LC Paper No. CB(1)1236/10-11(01) — Administration's paper on "Criminal Liability of Employees"

LC Paper No. CB(1)1241/10-11(01) — Administration's paper on "Matters related to the Criminal Offence Provisions under Clause 5")

Follow-up to issues raised at the meeting on 13 January 2011

(LC Paper No. CB(1)1124/10-11(03) — List of follow-up actions arising from the meeting on 13 January 2011 prepared by the Legislative Council Secretariat

LC Paper No. CB(1)1236/10-11(02) Administration's paper on "Rationale for the Arrangement under Clause 9(8) of the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Bill"

LC Paper No. CB(1)1241/10-11(02) — Administration's paper on "Provision of a Statutory Defence under Clause 10"

LC Paper No. CB(1)1236/10-11(03) — Administration's paper on "Protection of Legal Professional Privilege")

Clause-by-clause examination of the Bill (starting at clause 22)

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

- LC Paper No. CB(1)863/10-11(03) — Administration's paper on "Information on Reference Materials"
- 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

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

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Follow-up actions to be taken by the Administration

3. The Administration was requested to provide the following information or response:
- (a) The Prosecution Division of the Department of Justice is requested to –
 - (i) advise whether revising the formulation of the offences under clauses 5(6) and (8) to specify the person to be defrauded, for example, "with intent to defraud the financial institution or a relevant authority" will create any problem/loophole;
 - (ii) explain clearly why it is not appropriate to place the defence of reasonable excuse in the context of clause 10(3), (5) to (8); and
 - (iii) attend the relevant Bills Committee meeting to discuss the above matters.
 - (b) In relation to clauses 5(6) and (8), to reconsider setting the maximum fine at a higher level to be in proportion to the possible profits gained by the financial institution or person convicted of an offence under either of the clauses.

- (c) In relation to clause 5(9), to consider whether individual partners should also be liable for the criminal fine imposed on a partnership.
- (d) To advise the handling of possible cases whereby a financial institution, being a limited company, has been convicted for a breach of the statutory requirements under the Bill but is unable to pay the criminal fine handed down by the Court.
- (e) In relation to clause 9(8), to reconsider whether the same arrangement should apply to those financial institutions regulated by authorities other than the Monetary Authority.
- (f) To consider whether clause 80(2) can be amended to refer to the "name and correspondence address" of a client of a legal practitioner, instead of the "name and address".
- (g) In relation to clause 22, to provide samples of notices issued under the corresponding section under the Securities and Futures Ordinance (Cap. 571) ("SFO") for members to better understand the level of details expected to be provided in a statement of reasons for the decision to impose supervisory sanctions for inclusion in a notice to be issued under clause 22(2).
- (h) In relation to clause 23, to provide-
 - (i) a copy of the guideline issued under the corresponding section under SFO for members' reference; and
 - (ii) information on the background to the provision in the context of SFO
- (i) In relation to the definition of "ultimate owner" under clause 24 and other relevant provisions in Part 5, -
 - (i) to review whether the current formulation of the definition of "ultimate owner" will cause confusion to applicants in applying for a money service licence since a person may concurrently fall under paragraphs (a), (b) and (c) of the definition; and
 - (ii) to confirm that in considering whether the ultimate owner(s) of an applicant for a money service licence is/are fit and proper for the purpose of considering whether to grant a

licence to the applicant, the Commissioner for Customs and Excise would only assess the ultimate owner(s) as declared by the applicant in the application form.

III Any other business

4. There being no other business, the meeting ended at 12:29 pm.

Council Business Division 1
Legislative Council Secretariat
16 August 2011

**Proceedings of the
Bills Committee on Anti-Money Laundering and
Counter-Terrorist Financing (Financial Institutions) Bill
Seventh meeting on Wednesday, 9 February 2011, at 10:45 am
in Conference Room A of the Legislative Council Building**

Time Marker	Speaker	Subject(s)	Action Required
000859 – 001139	Chairman	Introductory remarks and confirmation of minutes of the meeting held on 22 December 2010.	
001140 – 001457	Administration Mr James TO	<p>Briefing by the Administration on the paper on "Criminal Liability of Employees" (LC Paper No. CB(1)1236/10-11(01)).</p> <p>Mr TO enquired about the difference between "knowingly" and "with intent to defraud" as an element of offence. The Administration responded that the issue would be addressed in the paper on "Matters related to the Criminal Offence Provisions under Clause 5" (LC Paper No. CB(1)1241/10-11(01)).</p>	
001458 – 003428	Administration Mr James TO Chairman	<p>Briefing by the Administration on paragraphs 1-2 of the paper on "Matters related to the Criminal Offence Provisions under Clause 5" (LC Paper No. CB(1)1241/10-11(01))</p> <p>Mr TO asked why the person to be defrauded was not specified in the relevant offence provisions. The Administration responded that there could be a variety of possible scenarios in real life and it might not be appropriate to specify that the person to be defrauded was the financial institution or a relevant authority.</p> <p>Mr TO disagreed and considered that the scope of the criminal offence provisions in the Bill should not be too wide and should be framed to confine to offences pertinent to money laundering and counter-terrorist financing. Mr TO asked apart from the financial institution concerned or a relevant authority, what other entities could possibly be the subject to be defrauded in the contexts covered by the Bill.</p> <p>In reply to the Chairman, the Administration advised that criminal offence provisions with similar wording (i.e. without specifying the person(s) to be defrauded) were present in a</p>	

Time Marker	Speaker	Subject(s)	Action Required
		<p>number of ordinances.</p> <p>Mr TO reiterated his concern and asked the Administration to explain whether revising the formulation of the offences under clauses 5(6) and (8) to specify the person(s) to be defrauded, e.g. "with intent to defraud the financial institution or a relevant authority", would create any problem/loophole. He also requested that government counsel responsible for prosecution of fraud cases should participate in the next meeting to clarify the issue.</p>	<p>The Administration to take action as per paragraph 3 of the minutes.</p>
003429 – 004134	Administration Mr James TO	<p>Briefing by the Administration on paragraphs 3-5 of the paper on "Matters related to the Criminal Offence Provisions under Clause 5" (LC Paper No. CB(1)1241/10-11(01)).</p> <p>Noting that any fine imposed on a partnership would be paid out of the funds of the partnership, Mr TO enquired whether this contradicted with the fact that partnership had unlimited liability.</p> <p>The Administration responded that the arrangement was restricted to criminal proceedings against partnerships only and reference had been made to a case decided in the English Court of Appeal as mentioned in the paper.</p> <p>Mr TO opined that while he agreed that apart from individual partners, a partnership might also be prosecuted for an offence under the Bill, he considered that individual partners should also be liable for the criminal fine imposed on a partnership. The Administration undertook to study Mr TO's suggestion.</p>	<p>The Administration to take action as per paragraph 3 of the minutes.</p>
004135 – 004340	Administration Mr WONG Ting-kwong	<p>Mr WONG requested the Administration to advise the handling of possible cases whereby a financial institution, being a limited company, had been convicted for a breach of the statutory requirements under the Bill but was unable to pay the criminal fine ordered by the Court. Mr WONG also expressed concern that an entity might form a limited company with little capital to circumvent the fines imposed by the Bill.</p>	<p>The Administration to take action as per paragraph 3 of the minutes.</p>

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004341 – 005423	Administration Mr James TO Mr WONG Ting-kwong	<p>Briefing by the Administration on paragraph 6 of the paper on "Matters related to the Criminal Offence Provisions under Clause 5" (LC Paper No. CB(1)1241/10-11(01)).</p> <p>Mr TO considered that the maximum level of fine of \$1 million was disproportionate to the potential amount of money involved in and profit gained in money laundering activities. Mr WONG concurred with Mr TO's view.</p> <p>The Administration clarified that the act of money laundering was criminalized under the Organized and Serious Crimes Ordinance (Cap. 455) and the object of the Bill was to provide a legislative framework to implement the preventive measures in accordance with the international anti-money laundering standard. The Administration was requested, in relation to clauses 5(6) and (8), to reconsider setting the maximum fine at a higher level to be in proportion to the possible profits gained by the financial institution or person convicted of an offence under either of the clauses.</p>	The Administration to take action as per paragraph 3 of the minutes.
005424 – 010302	Administration Mr James TO	<p>Briefing by the Administration on the paper on "Rationale for the Arrangement under Clause 9(8) of the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Bill" (LC Paper No. CB(1)1236/10-11(02)).</p> <p>Mr TO remarked that all financial institutions had the duty of confidentiality to their customers and it was inappropriate for the requirement of certifying the necessity of disclosure of information to be applied to the seeking of information from banks only. The Administration undertook, in relation to clause 9(8), to reconsider whether the same arrangement should apply to those financial institutions regulated by authorities other than the Monetary Authority.</p>	The Administration to take action as per paragraph 3 of the minutes.
010303 – 010721	Administration Mr James TO	<p>Briefing by the Administration on the paper on "Provision of a Statutory Defence under Clause 10" (LC Paper No. CB(1)1241/10-11(02)).</p> <p>Mr TO considered the explanation set out in the paper unclear. In anticipation that the</p>	The Administration to

Time Marker	Speaker	Subject(s)	Action Required
		<p>Prosecution Division of the Department of Justice would attend the next meeting, Mr TO requested the officials of the Prosecution Division of the Department of Justice to explain clearly why it was not appropriate to place the defence of reasonable excuse in the context of clause 10(3), (5) to (8).</p>	<p>take action as per paragraph 3 of the minutes.</p>
<p>010722 – 011651</p>	<p>Administration Mr James TO</p>	<p>Briefing by the Administration on the paper on "Protection of Legal Professional Privilege" (LC Paper No. CB(1)1236/10-11(03)).</p> <p>Mr TO said that based on paragraph 5 of the paper, the main purpose of collecting the address of a legal practitioner's client was to identify the whereabouts of the client in order to serve information production notices, interview notices and summonses. The formulation of the phrase "name and address" might require a legal practitioner to provide all addresses of the client known to the legal practitioner, and this might violate the principle of legal professional privilege. As such, Mr TO suggested that Administration consider whether clause 80(2) should be amended to refer to the "name and correspondence address" of a client of a legal practitioner, instead of the "name and address". The Administration explained that the reference to "name and address" in provisions on legal professional privilege is common, but undertook to consider the suggestion.</p>	<p>The Administration to take action as per paragraph 3 of the minutes.</p>
<p>011652 – 012410</p>	<p>Administration Mr James TO</p>	<p><u>Clause-by-clause examination of the Bill</u></p> <p>Part 4</p> <p>Disciplinary Actions by Relevant Authorities</p> <p><u>Clause 22 – Procedural requirements in respect of exercise of powers under Section 21</u></p> <p>In relation to sub-clause (3)(a), Mr TO remarked that "a statement of the reasons for the decision" might contain less information than "the reasons for the decision" and enquired about the effect of deleting "a statement of" from the sub-clause.</p> <p>The Administration responded that reference had been drawn from the relevant provision in the Securities and Futures Ordinance (Cap. 571)</p>	

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		<p>("SFO") in drafting this clause, and the length of "the statement of the reasons for the decision" was not specified in SFO.</p> <p>Mr TO requested that Administration to provide samples of notices issued under the corresponding section under SFO for members to better understand the level of details expected to be provided in a statement of reasons for the decision to impose supervisory sanctions for inclusion in a notice to be issued under clause 22(2).</p>	<p>The Administration to take action as per paragraph 3 of the minutes.</p>
012411 – 012743	Administration Mr James TO	<p><u>Clause 23 – Guidelines on how relevant authorities exercise power to impose pecuniary penalty</u></p> <p>Noting that the Administration had drawn reference to relevant guidelines issued under SFO and that few organizations had authorities to impose pecuniary penalty, Mr TO requested the Administration to provide-</p> <ul style="list-style-type: none"> (a) a copy of the guidelines issued under the corresponding section under SFO for members' reference; and (b) information on the background to the provision in the context of SFO. 	<p>The Administration to take action as per paragraph 3 of the minutes.</p>
012744 – 014256	Administration Mr James TO	<p>Part 5</p> <p>Regulation on Operation of Money Service</p> <p><u>Clause 24 – Interpretation of Part 5</u></p> <p>Regarding the definition of "ultimate owner", Mr TO enquired, apart from SFO, what other legislation the Administration had referred to in formulating (a) the threshold of "not less than 10% of the issued share capital/voting rights"; and (b) the criterion of "exercising ultimate control over the management of the corporation".</p> <p>The Administration responded that apart from SFO, reference had also been drawn from the existing guidelines on anti-money laundering issued by financial regulators. Regarding the threshold of "not less than 10% of the issued</p>	

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		<p>share capital/voting rights", the Administration remarked that reference had been drawn from the concept of "substantial shareholder" in SFO. As for the criterion of "exercising ultimate control over the management of the corporation", the Administration stated that the criterion was specified to comply with the international requirement with a view to preventing criminals from controlling money service operators behind the scene.</p> <p>Mr TO remarked that the criteria under paragraphs (a) and (b) of the definition of "ultimate owner" were objective standards, but the criterion under paragraph (c) involved subjective judgment. While he agreed to the rationale for inclusion of paragraph (c), he was concerned about the operation of the definition based on paragraph (c). The Administration advised that under clause 30(3)(a)(iii), the Commissioner for Customs and Excise ("the Commissioner") may grant a licence to an applicant which is a corporation only if the Commissioner is satisfied that each director and each ultimate owner of the corporation is a fit and proper person to be associated with the business of operating a money service. If an application was rejected, the Commissioner would specify the reason(s) for the rejection in the notice to the applicant.</p> <p>Mr TO stated that there might be more than one ultimate owner of a corporate money service operator and enquired how such case would be handled. The Administration responded that the applicant would be required to declare the ultimate owner(s) in the application form and the Commissioner would only assess the ultimate owner(s) as declared by the applicant.</p> <p>Mr TO requested the Administration to confirm that in considering whether the ultimate owner(s) of an applicant for a money service licence is/are fit and proper for the purpose of considering whether to grant a licence to the applicant, the Commissioner would only assess the ultimate owner(s) as declared by the applicant in the application form.</p>	<p>The Administration to take action as per paragraph 3 of the minutes.</p> <p>The Administration to take action as per paragraph 3 of the minutes.</p>

Time Marker	Speaker	Subject(s)	Action Required
		Mr TO considered that the current formulation of the definition of "ultimate owner" might cause confusion to applicants in applying for a money service licence since a person might concurrently fall under paragraphs (a), (b) and (c) of the definition, and requested the Administration to review the definition. While undertaking to review the definition, the Administration remarked that the Customs and Excise Department would in future issue guidelines on how to complete the application form and applicants would not be required to specify which paragraph in the definition of "ultimate owner" did the person fall under.	The Administration to take action as per paragraph 3 of the minutes.
014257 – 014329	Chairman	The Chairman said that the next meeting would be held on 17 February 2011.	

Council Business Division 1
Legislative Council Secretariat
16 August 2011