

**Bills Committee on
Anti-money Laundering and Counter-terrorist Financing
(Financial Institutions) Bill**

**Further Information on the Provisions Relating to
Investigatory Powers**

This note provides further information on the provisions relating to investigatory powers under the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Bill (“the Bill”).

The rationale for including “all other assistance” in clause 12(2)(d)

2. Clause 12(2)(d) of the Bill was modelled on s183(1)(d) of the Securities and Futures Ordinance (“SFO”)(Cap 571). From the enforcement experience of the Securities and Futures Commission (“SFC”) in exercising their powers under SFO, the inclusion of “all other assistance” in the clause enables investigators to get the necessary evidence and thus should not be dispensed with. For example, the SFC may request the person to assist the investigator to identify the useful documents out of a whole host of relevant records or documents which SFC can demand the person to produce. This will enhance the efficiency of the investigation process and save cost in particular when voluminous documents are involved in the investigation. Without this power to seek assistance from the person to identify the useful documents out of a whole host of relevant documents for which production may be required, the relevant authorities may have to require the production of much more documents than is necessary in using the power under clause 12(2)(a), which is not conducive to efficient investigation and may cause greater inconvenience to a person under investigation.

Offences for Non-compliance with clause 12

3. The criminal offences under clauses 13(7) and (8) cover “a person who is an employee of a financial institution or is employed to work for a financial institution or is concerned in the management of a financial institution”. A Member asked if there is any example of the use of “a person concerned in the management of [an institution] in other legislations.

4. There are a number of examples of the use of “a person concerned in the management of [an institution]” in other local legislations

such as section 36B(3) of the Prevention of Copyright Piracy Ordinance (Cap 544), section 11 of the Product Eco-Responsibility Ordinance (Cap 603) and section 33(2) of the Occupational Safety and Health Ordinance (Cap 509). Essentially it refers to a person who is in effect, or at least part of the directing mind of the company.

Application to Court of First Instance relating to Non-compliance with requirements imposed under Clause 9 or 12

5. Clause 14 of the Bill is similar to section 185 of SFO. SFC has exercised its power under section 185 of SFO to obtain a court order for a person to attend an interview with SFC and subsequently applied to the court to punish the person for contempt of court after the person failed to observe the court order to attend an interview. Details of the case are set out in the press release at **Annex**. From SFC's enforcement experience, there is a need for an authorized person or an investigator to apply to the Court of First Instance relating to non-compliance with requirements imposed under clause 9 or 12.

6. While non-compliance with a requirement imposed under clause 9 or 12 may amount to an offence under clauses 10 or 13, a conviction under clauses 10 or 13 does not carry the effect of mandating the person to comply with the requirements imposed. Hence, without the provision for the relevant authority to apply to the Court of First Instance for an order to comply with the requirements imposed, the relevant authority's ability to collect information for an inspection or investigation may still be hampered.

7. A Member enquired whether a person being required to comply with requirements made under clause 9 or 12 should be allowed to make an application to the Court of First Instance to set aside the requirements. Failing to comply with a requirement imposed under clause 9 or 12 is a criminal offence. We are not aware of any legislation where a person may apply to the Court to set aside requirements imposed on him. However, if a person considers that the relevant authority has abused its power by imposing an unreasonable requirement on him or her, he or she may lodge a judicial review against the relevant authority's requirement. The person may apply to the Court for interim relief pending the substantive hearing of the judicial review or he/she may request the relevant authority for a stay of execution. In fact, the relevant authorities would not take the decision to initiate a prosecution under clauses 10 or 13 lightly. If a person has reasonable and genuine reason for failing to comply with a requirement imposed on him, the relevant authorities would not initiate a criminal prosecution against the person.

8. A Member requested the Administration to clarify the need for clauses 13(10) and 14(4) given that there is already protection relating to res judicata under the common law. We wish to clarify that the main purpose of clauses 13(10) and 14(4) is to make it clear that the common law res judicata principle that applies to the proceedings under clause 14(2)(b) (i.e, application for punishment as if a person is guilty of contempt of court) would not apply to 14(2)(a) (i.e, application for a court order for compliance).

Other claims in relation to legal right do not affect the requirement to produce records or documents under Part 3

9. We have consulted internally and consider that clause 16 which provides that lien does not affect the requirement to produce records or documents under Part 3 is appropriate. However, if there is any specific suggestion that other legal rights should also be covered, we would be happy to consider such suggestion.

Execution of a Magistrate’s Warrants

10. Under clause 17 of the Bill, a magistrate may authorize a person specified in the warrant, a police officer and any other person as may be necessary to assist in the execution of the warrant to exercise the powers specified thereunder. The relevant authorities confirm that the warrants to be issued under clause 17 would not be executed by the Police alone.

11. An authorized person is empowered under clause 17(3)(b) to “take any other step that appears to the authorized person to be necessary for preserving the record or document or preventing interference with the record or document”. It is possible for the authorized person to require a person on the premises to perform a certain act, for example, opening a locked drawer in order to ascertain whether relevant records and evidence are kept inside. From SFC’s enforcement experience, this is necessary as the person may destroy the records and evidence kept in the locked drawer after the departure of the authorized person if the authorized person has not inspected the contents of the locked drawer.

Timing for Making a Statutory Declaration

12. A Member sought clarification on whether a person would be

required to make a statutory declaration under clause 12(5) immediately when being required. Under clause 12(5), a requirement for a statutory declaration has to be made in writing and the relevant authorities confirmed that a reasonable period of time will always be given for the person to make the statutory declaration required.

Financial Services and the Treasury Bureau
26 April 2011

Enforcement News

Person Avoiding Interview by SFC Found in Contempt of Court and Arrested (1 November 2007)

A man who failed to attend an SFC investigation interview despite a court order was arrested yesterday and imprisoned overnight.

On 6 September 2007, Mr Justice Reyes in the Court of First Instance heard an application by the SFC in respect of Mr Chan Chin Yuen's failure to comply with an SFC requirement to attend an interview in connection with a case of suspected market manipulation (Note 1). Granting that application, the court ordered Chan to attend an interview on 2 October 2007. However, Chan failed to do so.

On application by the SFC, Mr Justice Reyes yesterday found Chan to be in contempt of court and directed Chan's arrest and imprisonment. Chan was also ordered to pay the SFC's costs on an indemnity basis.

Chan was arrested last night by officers of the Immigration Department at the airport as he returned to Hong Kong. He was held in prison overnight until a further hearing which took place this afternoon. At the hearing, Chan gave an undertaking to the court to attend an SFC interview tomorrow morning. He agreed to surrender his travel documents. On that basis, the court released him from prison.

An application by the SFC to punish Chan for his failure to comply with the investigator's notice to attend for interview is pending.

Mr Mark Steward, the SFC's Executive Director of Enforcement, said: "We welcome the court's order which serves as an important reminder that persons asked to attend SFC investigation interviews are required to co-operate and that failure to do so may have serious consequences."

The SFC cannot comment on the market manipulation investigation which is continuing.

-Ends-

¹ The notice requiring Chan to attend an interview was issued under section 183 of the Securities and Futures Ordinance.