

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

Further Information on Money Service Operators Licensing Regime

This note provides further information on the licensing regime for money service operators (“MSOs”) to be introduced by the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Bill (“the Bill”).

The Depth and Details of the Provisions on the MSOs Licensing Regime

2. A Member enquired why it is necessary to stipulate the licensing arrangements in such depth and detail in Part 5 of the Bill. The introduction of the MSO licensing regime seeks to address the deficiency highlighted in the Financial Action Task Force (“FATF”)’s mutual evaluation on Hong Kong that there is no formal anti-money laundering (“AML”)/ counter financing of terrorism (“CFT”) regulatory regime for MSOs. The licensing regime provided under the AML Bill comprises the following elements as stipulated by FATF -

- (a) there should be a designated competent authority to license MSOs, maintain a current list of the names and addresses of licensed MSOs and be responsible for ensuring compliance with licensing requirements;
- (b) the relevant authority must be empowered to apply effective, proportionate and dissuasive sanctions for failure to comply with the AML/CFT requirements applicable to MSOs and such sanctions should include the power to withdraw, restrict or suspend the MSO’s licence;
- (c) the relevant authority must take necessary measures to prevent criminals or their associates from holding or being the beneficial owner of a significant or controlling interest in an MSO.

3. The key elements of the MSO AML/CFT regulatory regime provided under the Bill are similar to the corresponding legislations on licensing regimes for MSOs in other FATF member jurisdictions, such as the United Kingdom and Singapore. These licensing regimes cover matters including, inter alia, the keeping of a register of licensees; the granting, renewal, revocation or suspension of licences; the imposition, varying or withdrawal of licensing conditions and the fit and proper requirements on licensees. In fact, the depth and detail of the proposed licensing is on par with other licensing regimes in respect of business with smaller set-ups, such as that under the Estate Agents Ordinance (Cap 511) and the Travel Agents Ordinance (Cap 218). It is relevant to note that many practitioners in the money services sector who attended the consultative sessions held in 2009 and 2010 on the legislative proposals for the Bill have requested that, for clarity and certainty, the licensing requirements and obligations on MSOs should be set out in detail under the Bill.

Mobile Operation of MSOs

4. The criminal offence under clause 29(1)(b) stipulates that it is an offence to operate a money service at premises other than those specified in a MSO licence. A Member raised concerns on whether such a provision will inhibit mobile operation by MSOs. Noting that there may be MSOs which wish to operate in mobile mode (i.e. do not conduct their money service business at a fixed location or premises), we will modify the relevant provisions in the Bill. The following gives an overview of the proposed revised arrangement -

- (a) under clause 30(1)(a), an application for the grant of an MSO licence must be made in the form and manner specified by the Commissioner of Customs and Excise (“CCE”). CCE will require applicants to declare whether they are going to operate under the mode of “mobile operation” or “fixed location”. CCE will issue guide to applicants on the factors to be considered in determining whether an MSO is considered to be operating under the mode of “mobile operation” or “fixed location”;
- (b) an applicant to be a “fixed location” MSO will be required to provide

relevant information on all premises at which they proposed to operate a money service in the application form. These premises must be premises suitable for such purpose. If, after the licence is granted, the licensee wishes to operate a money service at any premises other than those specified in the licence, the licensee must seek the prior approval of CCE as required under clause 38(1);

- (c) an applicant to be a “mobile operation” MSO would also be required to furnish an address to CCE in the application form. The address will appear on the licensed MSO register kept by CCE and be used for identification and correspondence purpose (e.g. for CCE to make arrangements for inspections and to serve notices). “Mobile operation” MSOs would not be subject to the requirement that they may only carry out their business at the premises specified in their application form, and the requirement for “fixed location” MSOs to seek prior approval from CCE for adding new business premises would not apply to “mobile operation” MSOs; and
- (d) if, subsequent to the grant of licence, a licensee wishes to change its mode of operation from “mobile operation” to “fixed location” or vice versa, the licensee must inform CCE of such change, as required under clause 39(1) and seek CCE’s prior approval in respect of the business premises (where appropriate);

There are sanctions under clause 51 against provision of false information to CCE in connection with an application for a licence.

5. To provide for the revised arrangements explained in paragraph 4, we suggest to amend the Bill as follows-

- (a) removing the criminal offence under clause 29(1)(b) such that “mobile operation” MSOs would not be caught for carrying on business at locations not specified in their licence and creating a new criminal offence under clause 38 to ensure compliance of “fixed location” MSOs with the requirement for seeking prior approval from the Commissioner for adding a new business premises;
- (b) amending clause 30(3)(b) from “the premises in respect of which the application is made are suitable to be used for the operation of a

money service” to “the premises proposed to be used for the operation of a money service are suitable for so used.” [*emphasis added*] to give effect to the proposed arrangement under paragraph 4(b) above, where the relevant requirement applies only to the specified location in the “fixed operation” mode of operation.

Level of Penalty for Unlicensed Operation under Clause 29(2)

6. A Member suggested the Administration to consider if the level of penalty under clause 29(2) should be increased having regard to the severity of the offence of unlicensed operation of money service business. We would like to point out that the penalty level (a fine at level 6 and 6-month imprisonment) is already higher than the current penalty for unregistered operation under the Organized and Serious Crimes Ordinance (Cap 455)(“OSCO”) (a fine at level 5), with the inclusion of a term of imprisonment. We consider the penalty level under clause 29(2) appropriate which should provide sufficient deterrence against unlicensed MSO operations.

Definition of “Ultimate Owner”

7. In respect of the definition of “ultimate owner” under clause 24 of the Bill, a Member expressed concern over whether the current formulation would cause confusion to applicants in applying for a MSO licence as a person may concurrently fall under paragraphs (a), (b) and (c) of the definition. As we have confirmed at the Bills Committee meeting on 14 March 2011 in response to the Member’s concern, an applicant would be required to provide the relevant information on all persons who fall within the definition of “ultimate owner” in the application form but he does not have to specify which category in the definition of “ultimate owner” does each of these persons belong to.

8. At the same meeting, a Member also requested the Administration to confirm that the CCE would only assess the ultimate owners as declared by the applicant in considering whether the ultimate owners are fit and proper. We confirm that this is the case. It should be noted that it is a criminal offence to provide false or misleading information

in connection with an application for licence under clause 51.

9. Before CCE may grant a licence to an applicant, CCE needs to be satisfied that the persons specified under clause 30(3)(a) are fit and proper persons to operate a money service. Where the applicant is a corporation, the persons specified include the ultimate owners of that corporation. Noting that the concept of “ultimate owner” is only applicable to an applicant which is a corporation under clause 30(3)(a), a Member suggested the Administration to consider whether the concept should also be applied to sole proprietors and partnerships.

10. We have considered carefully the suggestion and agreed that it would be prudent to extend the application of the concept of “ultimate owner” to sole proprietors and partnerships as well. Amendments will be proposed to the definition of “ultimate owner” under clause 24 and other relevant provisions, including clauses 30(3)(i) and (ii), 34(1)(a)(i) and (ii) and 36(1).

Lapse of licence under clause 41

11. As we have stated in response to Members’ enquiry at the meeting on 14 March 2011, the Bill does not impose any requirement on any person to report a licensee’s death to CCE. Clause 41(a) provides that where the licensee is an individual, the licence ceases to be valid on the death of that individual. In normal circumstances, the money service business operated by a licensee who runs the business as an individual would cease operation automatically upon the death of the licensee. In compliance with FATF’s requirement that only fit and proper persons should be allowed to operate or control a money service business, this provision on the lapsing of licence would ensure that only those responsible persons who has been vetted and passed the “fit and proper” test could operate a money service business in Hong Kong.

12. A Member also raised a question at the same meeting on how would CCE deal with cases where the licensee cannot be contacted by CCE or is suffering from mental incapacity. In such cases, CCE may consider revoking or suspending the licence on grounds that the person is no longer a fit and proper person to run a money service business under clause

34(1)(a).

Proposed New Criminal Offences in respect of MSO Licensing Regime

13. A Member suggested that there should be an offence for failure to return a licence pursuant to the requirement provided under clause 34(5)(c). Upon consideration, we agree with the suggestion. Given the relatively minor nature of the offence, we consider it appropriate to provide for a penalty of fine capped at level 5, as in the case of the offences provided under clause 39(4) and clause 40(4).

14. A Member also suggested that an offence should be provided for a breach of the regulations to be made under clause 50. In this regard, DoJ advised that section 28(1)(e) of the Interpretation and General Clauses Ordinance (Cap 1) which is applicable to the regulations to be made under clause 50 provides that “subsidiary legislation may provide that a contravention or breach of the subsidiary legislation is an offence punishable on summary conviction by such fine not exceeding \$5000 or by such term of imprisonment not exceeding 6 months as may be specified in the subsidiary legislation or by both such fine and imprisonment.” As such, there is already a power to provide for an offence for breaches of the regulations to be made under clause 50.

Other Amendments Proposed to Part 5

15. Pursuant to suggestions from Members, we will also propose the following CSAs to Part 5 of the Bill-

- (a) adding a provision under clause 30(4)(b) to the effect that offences in overseas jurisdictions mirroring those provided under clause 30(4)(a) which are not covered by clause 30(4)(b)(i) and (ii) would be covered;
- (b) adding a provision similar to clause 18 of the Bill under Part 5 so that the authorized person under clause 46 may require the production of a reproduction of a record or document in a legible form irrespective of whether the record or document recorded in the information

system is protected by a password or not to enable an authorized officer to retrieve the relevant record or document from a computer system under clause 46 in case the computer system is protected by a password;

- (c) amending clause 46(2)(d) such that the persons who may be detained would be limited to those who appear to the authorized officer to be, or likely to be, relevant to the investigation of the suspected offence; and
- (d) extending the application of clause 47(5), which as currently drafted only applies to an arrest, to also allow the authorized officer using force reasonably necessary to effect a detention if a person forcibly resists or attempts to evade detention.

Financial Services and the Treasury Bureau
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