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ASSOCIATION
OF
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2 March 2012 By Post and email: bc_58_10@legco.gov.hk

Bills Committee on Personal Data (Privacy) (Amendment) Bill 2011
Legislative Council
Legislative Council Complex
1 Legislative Council Road
Central
Hong Kong

Dear Sirs,

Personal Data (Privacy) (Amendment) Bill 2011

1. Introduction

We refer to our written submission on the Personal Data (Privacy) (Amendment) Bill 2011 (the "Amendment Bill") made on 21 October 2011 on behalf of our members. We have considered the Responses to Submissions by Deputations published by the Constitutional and Mainland Affairs Bureau ("CMAB") in December 2011 regarding our submission ("CMAB Responses"). Two key comments made in our submission related to new sections 14A and 58(6). We believe that these comments have not been fully addressed in the CMAB Responses and we would therefore like to write again to elaborate our members' concerns to put the Bills Committee in a better position in understanding and considering the need to amend the relevant provisions in the Bill in addressing our members' concerns.

2. Comments on sections 14A and 58(6)

New Section 14A - Verification of data user returns
Response: We beg to differ from CMAB's view that the purpose of section 14A being to verify the accuracy of information in a data user return will automatically mean that the request for information and the information requested will be reasonable.

New Section 14A - Verification of data user returns

We are concerned that the burden on data users to comply with the verification requirement significantly outweighs the need for such requirement and the result to be achieved by it. More specifically, we would stress the following practical issues in relation to the verification requirement:

(1) Section 14A requires a data user to provide documents or information for the purpose of verifying the accuracy of information provided by the data user in the data user return submitted by it under section 14 of the Personal Data (Privacy) Ordinance (the "PDPO"). We are concerned that, having regard to the information to be provided in a data user return, its accuracy may not be readily verifiable by documentary evidence.

(2) As set out in Schedule 3 of the PDPO, the information to be provided in a data user return include:

(i) description of the kind of personal data in respect of which the data user is a data user;

(ii) description of the purposes for which the personal data referred to in item (i) are or are to be collected, held, processed or used by the data user;

(iii) description of any classes of persons to whom the data user discloses, intends to disclose or may wish to disclose the personal data referred to in item (i); and

(iv) the names or description of any places outside Hong Kong to which the data user transfers, intends to transfer or may wish to transfer, the personal data referred to in item (i).

(3) Further, given that it is unlikely that the documentary evidence may come from an independent source, it is unclear whether it will satisfy the Privacy Commissioner and what the Privacy Commissioner's expectations are in this regard. Any request which entails a data user going to great lengths to gather information to satisfy the verification requirement contradicts the guiding principles on reviewing and proposing amendments to the PDPO: (i) to balance the right of individuals to privacy against other rights and public and social interest, and (ii) to avoid putting an onerous burden on business operations and individual data users, as stated in the Consultation Document on Review of the PDPO published in August 2009.

(4) We emphasize that the Privacy Commissioner's concern with the accuracy of the information provided by data users in data user returns is adequately addressed at present by sections 64(1) and 38 of the PDPO. According to section 64(1), it is an offence for a data user knowingly or recklessly to supply false or misleading information to the Privacy Commissioner. Further, section 38 empowers the Privacy Commissioner to carry out investigation in relation to contravention or suspected contravention of the requirements

under the PDPO. These existing sections provide strong deterrence to data users for non-compliance.

(5) In view of the above, we reiterate that there is no justification for introducing the new section 14A. If it is decided to introduce that section, it should be revised expressly to provide for the power to be exercised by the Privacy Commissioner in a reasonable manner. Please refer to our previous submission, enclosed as Annex 1, for our proposed changes to new section 14A in this regard. As pointed out previously, both the Hong Kong Monetary Authority and the Securities and Futures Commission are subject to a similar reasonableness requirement. Relevant sections of the Banking Ordinance and Securities and Futures Ordinance are enclosed as Annex 2 for your ease of reference. Further, in that event, we would appreciate some guidance from the Privacy Commissioner as to what documentary evidence is expected to be produced pursuant to the section.

New Section 58(6) - Crime, etc.

Response:

(1) We welcome the introduction of the new definition of "crime" in section 58(6) of the PDPO which adds clarity to the exemption under section 58(1)(a). However, we have genuine concerns over the second limb of the definition which significantly restricts the application of the exemption with respect to an offence outside Hong Kong. As currently drafted, the exemption will be available only where there is a "legal or law enforcement cooperation" between Hong Kong and the other place whereby personal data are held or used.

(2) The narrow wording of the second limb will give rise to significant issues in practice for financial institutions, especially those being members of an international group. The narrow wording is likely to render these financial institutions unable to comply with global anti-money laundering and anti-terrorist financing obligations and best practice policies.

(3) The need for financial institutions to implement policies and safeguards to fight against money laundering and terrorist financing activities has received heightened awareness and recognition in recent years. The Financial Action Task Force ("FATF") has recently published its revised recommendations for combating money laundering and terrorist financing (the "Recommendations") (http://www.fatf-gafi.org/document/17/0,3746,en_32250379_32236920_49656209_1_1_1_1,00.html). All the 36 FATF members, which include Hong Kong and other major financial centres, are obligated to comply with these recommendations.

(4) We would draw your particular attention to Recommendations 17 and 18 under which international financial institutions are permitted to exchange information with third-party financial institutions or overseas group members

to implement policies and procedures for countering money laundering and terrorist financing. Hong Kong, which strives to be and prides itself as an international finance centre, is expected to take part and implement the Recommendations.

(5) For the above reasons, we consider it necessary to revise the second limb of the definition of "crime" to cover any offence under the laws of a place outside Hong Kong. As an alternative, at a minimum, the second limb should be revised to cover any offence under the laws of a place outside Hong Kong that is punishable as an offence under the laws of Hong Kong. A similar concept is used in section 25(4) of the Organized and Serious Crime Ordinance, a copy of which is enclosed as Annex 3 for your ease of reference.

We are reviewing the CMAB Responses on the other comments raised in our submission and may write to the Bills Committee with our further views thereon.

If you have any further questions, please do not hesitate to contact Ivy Wong, Manager at 2526-8895.

Yours faithfully,

Ronie Mak
Secretary

Enc.

c.c. HKMA (Attn: Ms Meena Datwani)

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21 October 2011

By Post and email: bc_58_10@legco.gov.hk

Bills Committee on Personal Data (Privacy) (Amendment) Bill 2011
Legislative Council
Legislative Council Complex
1 Legislative Council Road
Central
Hong Kong

Dear Sirs

Personal Data (Privacy) (Amendment) Bill 2011

1. Introduction

We refer to the Personal Data (Privacy) (Amendment) Bill 2011 which was gazetted on 8 July 2011 and introduced to the Legislative Council on 13 July 2011 (the "**Amendment Bill**"). As banks are one of the largest groups of personal data users, the Hong Kong Association of Banks ("**HKAB**") would like to submit to the Bills Committee our members' views on the Amendment Bill, in particular, the wording of those provisions which affect our members.

We believe that the Amendment Bill largely reflects the spirit of the consultation conclusions published by the Constitutional and Mainland Affairs Bureau. Nevertheless, having regard to the far-reaching implications of some of the proposed changes on the banking and business community and the society as a whole, it is of critical importance that the statutory provisions are clear and not unduly broad to facilitate efficient compliance and implementation in practice.

2. Comments on the Amendment Bill

New Section 11A – Immunity
Response: The immunity applies in favour of the Privacy Commissioner or a prescribed officer where he performs any function or exercises any power in good faith. In order to put this beyond doubt, please revise new Section 11A(1) as marked in the following: "..... anything done or omitted to be done by the person or officer in good faith in the performance or purported performance of any function, or in

the exercise or purported exercise of any power, imposed or conferred on the Commissioner or officer under this Ordinance".

New Section 14A - Verification of data user returns

Response:

1. It remains our view that it is appropriate to maintain status quo and rely on the existing Section 64(1) of the Personal Data (Privacy) Ordinance (**"PDPO"**) which makes it an offence for a data user knowingly or recklessly to supply false or misleading information to the Privacy Commissioner. A similar mechanism applies under the Banking Ordinance and the Securities and Futures Ordinance.

2. In any event, new Section 14A should expressly provide for the power to be exercised by the Privacy Commissioner in a reasonable manner. The power conferred on the Hong Kong Monetary Authority and the Securities and Futures Commission to require production of documents or information by relevant persons for the purposes of performing their regulatory functions (including conducting investigations) is subject to similar reasonableness requirement. We consider that the Privacy Commissioner should be subject to the same reasonableness requirement as the financial regulators. We also note that a reasonableness requirement is incorporated in respect of the Privacy Commissioner's power under Section 15(3) of the PDPO.

   Further, the exemption from compliance specified in new Section 14A(3) is too narrow.

3. Accordingly, we propose to revise new Section 14A as marked below:

   (1) For the purpose of verifying the accuracy of information in a data user return submitted under section 14, the Commissioner may, by written notice, require any of the persons specified in subsection (2) -

      (a) to provide any document, record, information or thing reasonably specified in the notice; and

      (b) to respond in writing to any question reasonably specified in the notice, which the Commissioner has reasonable grounds to believe to be relevant for the purpose of verifying the accuracy of information in a data user return submitted under section 14.

(2) The persons are -

(a) the data user; and

(b) any other person whom the Commissioner has reasonable grounds to believe may be able to assist in verifying any information in the data user return.

(3) A person on whom a notice is served under subsection (1) may refuse to provide any document, record, information or thing, or any response to any question, specified in the notice, if the person is permitted, entitled or obliged under this or any other Ordinance, any legal or regulatory requirement or any direction or order of any regulatory authority or court to which that person is subject to do so.

(4) If, having regard to any document, record, information or thing, or any response to any question, provided under subsection (1), the Commissioner reasonably considers that any information in a data user return is inaccurate, the Commissioner may, by written notice, require the data user to correct the information in the data user return.

(5) Subject to subsection (3), a person on whom a notice is served under subsection (1) or (4) must comply with the requirement within the period reasonably specified in the notice.

(6) A person who, in purported compliance with a notice under subsection (1), knowingly or recklessly provides any document, record, information or thing, or any response to any question, which is false or misleading in a material particular, commits an offence and is liable on conviction to a fine at level 3 and to imprisonment for 6 months."

New Section 20(3)(ea) - Circumstances where a data user may refuse to comply with a data access request

Response:

We propose to revise new Section 20(3)(ea) as marked below:

"(ea) the data user is permitted, entitled or obliged under this or any other Ordinance, any legal or regulatory requirement or any direction or order of any regulatory authority or court to which the data user is subject not to disclose the personal data which is the subject of the request; or".

New Section 20(5) - Specified body to determine whether a data user shall or may refuse to comply with a data access request

Response:

Please revise new Section 20(5)(a) as marked in the following: "..... whether a data user is permitted, required or entitled to refuse to comply with a data access request .....".

New Section 32(5) - Offence for breaching any condition subject to which the Privacy Commissioner consents to a matching procedure request

Response:

We note that this point is new and was not covered in the consultation. The proposed new Section 32(5) should be considered carefully as it provides that a data user commits an offence if it contravenes any condition subject to which the Privacy Commissioner consents to its matching procedure request.

The usual consequence for breaching a condition subject to which a consent or approval is given is the suspension or revocation of the relevant consent or approval. That may, in turn, result in the commission of an offence if the person to whom the consent or approval was given continued to act without valid consent or approval.

In our view, it is appropriate to adopt the usual consequence in this case and we would suggest revising Section 32(5) as marked below:

"(5) The Commissioner may suspend or revoke any consent given in a notice under subsection (1)(b)(i) if a~~A~~ requestor ~~who~~ carries out a matching procedure in contravention of any conditions specified in thata notice ~~under subsection (1)(b)(i) commits an offence and is liable on conviction to a fine at level 3~~.".

Even if our suggestion is not accepted, the new Section 32(5) should be revised for the sake of clarity as marked below:

"(5) A requestor who carries out a matching procedure in contravention of ~~contravenes~~ any conditions specified in a notice under subsection (1)(b)(i) commits an offence and is liable on conviction to a fine at level 3.".

New Sections 35B to 35F - Sale of personal data

Response:

We propose the changes marked below for clarity and practicability:

1. Section 35B(3)
   "(3) The data user must take all practicable steps to provide the data subject with .....";

2. Section 35B(3)(b)
   "(b) a response facility through which the data subject may ..... objects to the intended sale.";

3. Section 35B(5)
   "(5) The information and response facility provided under subsection (3) must be presented in a manner that is easily readable and easily understandable by the standards of a reasonable, average person.";

4. Section 35B(7)
   "(7) In any proceedings for an offence under subsection (6), it is a defence for the data user charged to prove that the data user took all practicable steps ~~reasonable precautions and exercised all due diligence~~ to avoid the commission of the offence.";

5. Section 35C(3)
   "(3) A data subject may indicate whether the data subject objects to a sale of personal data through the response facility or other means as the data user may reasonably specify.";

6. Section 35D(1)
   "(1) ..... the data subject may subsequently object to such sale by sending a written notification to the data user through the response facility or other means as the data user may reasonably specify.";

7. Section 35D(3)
   "(3) A data user must, without charge to a data subject, comply with the requirement specified in a notification from the data subject under subsection (1). For the avoidance of doubt, a data user is deemed to have complied with this subsection (3) if the data user does more than the data subject specified in the notification."; and

8. Sections 35C(5) and 35D(7)
   The wording describing the defence in the above sections should be revised in the same manner as set out in paragraph 4 above.

We would also take this opportunity to re-iterate our strong support for an opt-out approach over an opt-in approach having regard to the major shortcomings of an opt-in approach as set out below:

(i) data subjects must actively engage in an opt-in approach. This approach may

not work for data subjects who prefer a hassle-free approach. Other data subjects may fail to respond for other reasons including that they may not understand the opt-in approach and confirmation process;

(ii) an opt-in approach which provides for data subjects to opt-in on a case-by-case basis or a complicated opt-in approach does not serve the interest of data subjects. If the model is not user-friendly, data subjects may not react to it and there is a further risk of desensitising data subjects if they are bombarded with opt-in requests thereby rendering the initiative ineffective;

(iii) requiring data subjects to opt-in on a case-by-case basis will be overly burdensome on data users and impossible to administer and upkeep in practice; and

(iv) the brunt of the opt-in requirement will be borne by data users especially if the requirement applies with retrospective effect to personal data already collected from data subjects. This will create an unbearable burden on costs and resources on data users.

Further, giving data subjects the right to opt-out any time should afford sufficient and appropriate protection to data subject.

New Sections 35G to 35Q - Use of personal data in direct marketing

Response:

We propose to make corresponding changes to Sections 35H, 35J, 35K, 35L(4), 35N, 35O and 35P as set out above in relation to Sections 35B to 35F.

We repeat our views above regarding the opt-out approach. We would also like to add that in the case of HKAB member banks, in conducting direct marketing for the first time, they will remind customers of their rights to opt-out and provide convenient channels (such as visiting branches, by e-mail or phone) for the customers to perform the opt-out request.

New Section 35R - Disclosure of personal data obtained without consent

Response:

We propose to revise new Section 35R(4)(b) as marked below:

"(b) the disclosure was permitted, required or authorized by or under any enactment, by any rule of law or by any legal or regulatory requirement or any direction or ~~an~~ order of a regulatory authority or court to which the person is subject;".

New Section 50B - Offences relating to failure to comply with requirements of Privacy Commissioner, etc.

Response:

We propose to revise new Section 50B as marked below:

"(1) A person commits an offence if the person-

(a) without lawful authority or reasonable excuse, obstructs, hinders or resists the Commissioner .....;

(b) without lawful authority or reasonable excuse, fails to comply with any lawful requirement of the Commissioner .....; or

(c) in the course of the performance or exercise by the Commissioner .....

(i) makes to the Commissioner ..... a statement which the person knows to be false or does not believe to be true; or

(ii) otherwise knowingly misleads the Commissioner or that other person in a material particular.".

New Section 58(6) - Crime, etc.

Response:

We are concerned that the new definition of "crime" in Section 58(6) significantly limits the scope of the exemption under Section 58. The current wording of paragraph (b) of the definition renders it applicable to law enforcement agencies only (and not data users in general). That would significantly reduce the ability of a data user such as an international financial institution in implementing global anti-money laundering and anti-terrorist financing measures. Such approach is inconsistent with the recommendation of the Financial Action Task Force (the **"FATF"**) (please see paragraphs 14 to 16 of its Consultation Paper on "The Review of the Standards - Preparation for the 4th Round of Mutual Evaluation" published in June 2011, copy attached for ease of reference).

The Review of
Standards - Preparatio

Having regard to the FATF recommendation, we are of the view the new definition is not necessary. If it is decided to introduce that definition, we propose to revise it as marked below:

"***crime*** means an offence under the laws of Hong Kong or any other jurisdiction;".

~~(a) an offence under the laws of Hong Kong; or~~

~~(b) if personal data is held or used in connection with legal or law enforcement cooperation between Hong Kong and a place outside Hong Kong, an offence under the laws of that place;"~~

New Section 63B - Due diligence exercise

Response:

We propose to revise the new Section 63B(4) for clarity and practicability as marked below:

"(4) If a data user transfers or discloses personal data to a person for the purpose of a due diligence exercise to be conducted in connection with a proposed business transaction described in subsection (1), the person -

(a) must only use the data for that purpose; and

(b) must, as soon as practicable after the completion of the due diligence exercise and provided that the data is no longer necessary for the purpose of the business transaction -

(i) return the ~~personal~~ data to the data user without keeping any record of the data; or ~~and~~

(ii) destroy any record of the ~~personal~~ data that is kept by the person."

Section 64 - repealing existing Section 64 on offences

Response:

We propose to revise Section 64(2) for clarity as marked below:

"(2) Subsection (1) does not apply in relation to -

(a) a contravention that does not constitute an offence including a contravention of a data protection principle or a contravention of any requirement under section 35B(1), 35H(1) or 35N(1); or

(b) a contravention that constitutes an offence under .....; ~~or~~

~~(c) a contravention of any requirement under section 35B(1), 35H(1) or 35N(1).~~"

New DPP2(3) and DPP4(2) in Schedule 1 - Data user's duty to monitor its data processors

Response:

We propose to revise the new DPP2(3) for clarity and practicability as marked below:

"[DPP2(3)] Without limiting subsection (2), if a data user engages a data processor, whether within or outside Hong Kong, to process personal data on the data user's behalf, the data user must adopt such contractual or other means as are practicable to prevent any ~~personal~~ data transferred to the data processor from being kept longer than is necessary for processing of the data.".

New DPP3(2) and DPP3(3) in Schedule 1 - Relevant person giving prescribed consent to use personal data for a new purpose on behalf of minor, mentally incapacitated person, etc.

Response:

As regards the data subjects in question, the relevant person in relation to the data subject in a particular case will be best placed to decide whether to give prescribed consent on behalf of the data subject having regard to the relevant circumstances including whether the use of data for a new purpose is clearly in the interest of the data subject. It remains our view that it is reasonable and appropriate to allow a data user to follow the judgment of the relevant person given that the data user is unlikely to be in a position in practice to form a view on this point.

In view of the above, the new DPP3(3) is unduly onerous on a data user. We propose the changes as marked below to make it more practicable for a data user to comply:

"(3) A data user may~~must not~~ use the personal data of a data subject for a new purpose ~~even~~ if the prescribed consent for so using that data has been given under subsection (2) by a relevant person, unless the data user has reasonable grounds for believing that the use of that data for the new purpose is clearly not in the interest of the data subject.".

Amendments to DPP4 in Schedule 1 - prevention of loss of personal data

Response:

As regards loss of data or any device holding the data, it remains our view that the critical question is whether the "loss" results in unauthorized access or use of data causing damage to the data subjects. Accordingly, we propose to revise DPP4(1) and new DPP4(2) as marked below:

"(1) All practicable steps shall be taken to ensure that personal data ..... held by a data user is protected against unauthorized or accidental access, processing, erasure~~, loss~~ or use, or loss actually resulting in unauthorized or accidental access, processing, erasure or use of data having particular regard to .....".

(2) Without limiting subsection (1), if a data user engages a data processor, whether within or outside Hong Kong, to process personal data on the data user's behalf, the data user must adopt such contractual or other means as are practicable to prevent unauthorized or accidental access, processing, erasure~~, loss~~ or use of the data transferred to the data processor for processing, or loss of the data actually resulting in unauthorized or accidental access, processing, erasure or use of the data.".

If you have any further questions, please contact our Manager Ms. Ivy Wong at 2521 1169.

Yours faithfully

Eva Wong
Secretary

Enc.

FATF • GAFI

Financial Action Task Force Groupe d'action financière

Consultation Paper

The Review of the Standards – Preparation for the 4th Round of Mutual Evaluation

Second public consultation

June 2011

THE FINANCIAL ACTION TASK FORCE (FATF)

The Financial Action Task Force (FATF) is an independent inter-governmental body that develops and promotes policies to protect the global financial system against money laundering and terrorist financing. Recommendations issued by the FATF define criminal justice and regulatory measures that should be implemented to counter this problem. These Recommendations also include international co-operation and preventive measures to be taken by financial institutions and others such as casinos, real estate dealers, lawyers and accountants. The FATF Recommendations are recognised as the global anti-money laundering (AML) and counter-terrorist financing (CFT) standard.

For more information about the FATF, please visit the website:

WWW.FATF-GAFI.ORG

The Review of the Standards – Preparation for the 4th Round of Mutual Evaluations

Consultation Paper, JUNE 2011

Foreword

The FATF has now completed its third round of evaluations, and is currently conducting a review of the 40+9 Recommendations to ensure they remain up-to-date and relevant, and to learn any lessons from implementing and evaluating the current Standards. This is a limited and focused review, seeking to address any deficiencies and emerging threats but to maintain the necessary stability in the Standards as a whole.

Work on this review has been underway for two years, and between October 2010 and January 2011, the FATF undertook a public consultation on the first phase of its review of the FATF Standards. The FATF would like to thank all those who submitted comments. The response to the consultation was very significant, both in terms of the number of submissions received and their content; and the FATF greatly values this input from the private sector and civil society.

Detailed work has continued since then on a second phase of the review of the Standards, and the results of that work are set out in this paper for consultation. The FATF is committed to maintaining a close and constructive dialogue with the private sector, civil society and other interested parties, as important partners in ensuring the integrity of the financial system. Following this consultation we will take the opportunity to have further discussions on the proposed revision of the Standards with the FATF's Consultative Forum later this year. I look forward to seeing our dialogue lead to stronger, clearer, and more effective FATF Standards.

Luis Urrutia,
FATF President

Preparation for the 4th Round of Mutual Evaluation

1. The FATF 40+9 Recommendations have been endorsed by more than 180 countries and jurisdictions, are recognised as the international AML/CFT Standards, and have been, or are being, successfully implemented. The FATF has now completed its 3rd Round of Mutual Evaluations, and is completing a review of its Standards. This review, which is taking place over a two-year period, is principally focused on addressing certain issues that have been identified during the 3rd round of mutual evaluations and from the practical implementation of the current FATF Standards.

2. In October 2009, the FATF Plenary agreed on a list of issues to be considered under the preparation for the 4th Round of Mutual Evaluations, and the work on that set of issues has been structured over two years. A public consultation was held in October 2010 based on the preliminary conclusions of the first year of work on the review of the FATF Standards, including the risk-based approach; customer due diligence, in particular measures relating to legal persons and arrangements, and life insurance; Politically Exposed Persons; reliance on third parties and reliance within financial groups; tax crimes as a predicate offense; wire transfers; and the usefulness of FATF reports.

3. A second phase of the review was undertaken between October 2010 and June 2011 and considered the following issues: the risk-based approach in supervision; Beneficial Ownership, including Recommendations 5, 33, and 34; Politically Exposed Persons; data protection and privacy; SRVII and wire transfers; International cooperation in the context of Recommendation 40; and adequate/inadequate implementation of the FATF Recommendations; and the role and functions of financial intelligence units. This document sets out the FATF's current proposals on each of these issues as a basis for comment.

4. The FATF wishes to receive the views of all interested parties on the proposals contained in this paper. Comments (in English or French only) should be sent to the FATF Secretariat **no later than Friday 16 September 2011**, preferably in electronic form to: fatf.consultation@fatf-gafi.org. Contributors should note that comments received will be made publicly available through the FATF Website.

5. The FATF will continue to consider its proposed revisions to the Standards, and the contributions to the consultation process, in the months after September, and will provide substantive feedback on its response to both rounds of consultation when the revised Standards are adopted in February 2012. The FATF expects to commence a new round of assessments towards the end of 2013.

1. Beneficial Ownership: Recommendations 5, 33, and 34

6. The current FATF Standards require transparency about legal persons and legal arrangements, including through Recommendation 5 which requires financial institutions to identify the beneficial owners of customers which are legal persons or legal arrangements; and through Recommendations 33 and 34 which require countries to prevent the misuse of legal persons and legal arrangements. However, the generally low level of compliance with these requirements in the third round of mutual evaluations has signalled some problems implementing the measures required.

7. It is not proposed to change the FATF Recommendations on beneficial ownership, but the FATF has sought to clarify what countries and financial institutions are expected to do to implement the requirements; and the types of measures which could be used to ensure beneficial ownership information is available.

1.1 Recommendation 5

8. The main change proposed in Recommendation 5 is to specify more clearly the types of measures that financial institutions (and through R.12, DNFBPs) would be required to undertake in order to (a) identify and verify the identity of customers that are legal persons or legal arrangements, and (b) understand the nature of their business and their ownership and control structure. The information that would normally be needed in order to satisfactorily perform these functions would include:

- To identify the customer and verify its identity: - the name, legal form, and proof of existence; the powers that regulate and bind the entity (*e.g.*, the memorandum and articles of association of a company) and the names of persons holding senior management positions (*e.g.*, senior managing directors); and the address of the registered office (or main place of business).

- To identify the beneficial owners of a legal person and take reasonable measures to verify their identity: - the identity of the natural persons (if any, whether acting alone or together) who ultimately have a controlling ownership interest in a legal person. If no natural person exerts control through ownership interests (*e.g.*, if ownership interests are widely dispersed), information would be required on the identity of the natural persons exercising control through other means; or in their absence on the identity of the senior managing official. These requirements would not apply if the customer or its owner is a company listed on a recognised stock exchange and subject to proper disclosure requirements.

- To identify the beneficial owners of a legal arrangement and take reasonable measures to verify their identity: - the identity of the settlor, the trustees, the protector (if any), the beneficiaries or class of beneficiaries and any other natural person exercising ultimate effective control over the trust (including through a chain of control or ownership).

9. The types of information listed above will in effect define what is meant by beneficial ownership, and what should be considered to be adequate information concerning beneficial ownership of a legal person or arrangement.

1.2 Recommendation 33 – Legal Persons

10. On Recommendation 33, the intention is to clarify the steps countries should take to ensure compliance – in particular the types of mechanisms which should be used to ensure timely access to beneficial ownership information regarding legal persons. An interpretative note is being considered which

would specify in more detail what is involved in an effective set of measures to prevent the misuse of legal persons, and what should be considered adequate, accurate, and timely information about beneficial ownership. These would include the following:

- The FATF is considering whether:

  (a) Companies should be responsible for holding both basic information and information about their beneficial ownership (as noted above in the context of Recommendation 5); and that beneficial ownership information should also be accessible in the jurisdiction to competent authorities through one or more other mechanisms, including financial institutions, professional intermediaries, the register of companies, or another body or authority which holds such information (*e.g.*, tax authorities or regulators), or

  (b) That competent authorities should be able to access beneficial ownership information from one or more of: the company itself; financial institutions, professional intermediaries, the register of companies, another body or authority which holds such information (*e.g.*, tax authorities or regulators); or by using the authorities' investigative and other powers.

- Requiring that certain basic information on legal persons should be available from Registers of Companies, including, at a minimum, the company name, proof of incorporation, legal form and status, the address of the registered office, basic regulating powers (*e.g.*, memorandum & articles of association), a list of directors.

- Preventing the misuse of bearer shares and bearer share warrants by either (a) prohibiting them; (b) converting them to registered shares or share warrants (for example through dematerialisation); (c) immobilising them by requiring them to be held with a regulated financial institution or professional intermediary, or (d) requiring shareholders with a controlling interest to notify the company, and the company to record their identity.

- Preventing the misuse of nominee shareholders by either (a) requiring nominee shareholders to disclose the identity of their nominator to the company and to any relevant registry, and for this information to be included in the register of directors, or (b) requiring nominee shareholders to be licensed, for their nominee status to be recorded in company registries, and for them to maintain information identifying their nominator.

11. Similar measures should be applied to foundations, anstalt, and limited liability partnerships as apply to companies, while for other types of legal person there should be some additional flexibility in interpreting the requirements of R.33. The following types of companies could be exempted from the requirements above, on the basis that they are subject to other requirements that ensure adequate transparency: companies listed on a recognised stock exchange; state-owned enterprises; and financial institutions or DNFBPs which are subject to AML/CFT supervision. Work is continuing on Recommendation 33.

1.3 Recommendation 34 – Legal Arrangements

12. For Recommendation 34, the FATF has broadly the same intention as R.33 – to clarify the types of measures which should be used to ensure timely access to beneficial ownership information, on the basis of the principle that there should be an equivalent level of transparency about the beneficial ownership of trusts and other legal arrangements, as there is about the companies and other types of legal persons. The FATF has also considered whether and how the requirements of R.34 should be applied in those countries whose laws do not provide for the creation of legal arrangements such as trusts. The FATF continues to

work on what would be required by Recommendation 34 and what would be an effective set of measures to prevent the misuse of trusts. This could include:

- Giving trustees a legal obligation to obtain and hold beneficial ownership information about trusts (as noted above in the context of Recommendation 5);

- Ensuring that competent authorities in all countries are able to access information on the identity of the trustee, the beneficial ownership of the trust, and the trust assets from one or more sources including financial institutions and DNFBPs; registries of assets or trusts; or other competent authorities (*e.g.*, tax authorities); of any trusts with a nexus to their country (*i.e.*, where trusts are managed; trust assets are located, or where trustees live in the country).

- Requiring trustees to disclose their status to relevant authorities; and to financial institutions and DNFBPs when entering a business relationship.

- Competent authorities should have powers to obtain information regarding trusts and share it as necessary; and

- Analogous requirements should also apply to other legal arrangements including Treuhand, Fiducie, and Fideicomisos.

13. The FATF will continue work to work on this issue. In particular, the FATF will consider what is the right balance of responsibilities between countries which are the source of law for legal arrangements and those which are not; what scope there is to apply additional measures (*e.g.*, registration) in the countries which are the source of trust law to ensure the availability of beneficial ownership information; and how these requirements should be adapted to the particularities of other types of legal arrangement.

2. Data protection and privacy: Recommendation 4

14. The FATF has considered the impact of data protection and privacy on the implementation of AML/CFT measures, and the potential for changes to the Standards to mitigate any conflicts between them. Data protection and privacy rules can in some cases limit the implementation of AML/CFT requirements, and a number of different FATF Recommendations may be affected. The FATF is aware that the interplay between AML/CFT and data protection requirements is of particular concern for international financial services groups seeking to transfer information across borders for consolidated AML/CFT risk management, and has considered how to ensure that such cross-border flows of information are permitted, subject to appropriate safeguards. It was also noted in the course of work on this issue that there is considerable scope to reduce any potential conflicts between AML/CFT objectives and data protection rules in many countries through better coordination.

15. The FATF is therefore considering adding a general requirement to Recommendation 4 that will address the issues raised above, including by requiring that the authorities responsible for AML/CFT and those responsible for data protection should have effective mechanisms in place to enable them to cooperate and coordinate on this issue.

3. Group-wide compliance programmes: Recommendation 15

16. Following earlier work on intra-group reliance, the FATF has considered changes to Recommendation 15. It is proposed that financial groups (which are subject to group supervision under the Core Principles) should be required to have group-wide programmes against money-laundering and

terrorist financing; and that these should include policies and procedures for sharing information within the group for purposes of global risk management. It is proposed that, at a minimum, group-level compliance, audit, and/or AML/CFT functions should be provided with customer, account, and transaction information from branches and subsidiaries when necessary for AML/CFT purposes. The FATF has sought to ensure its requirements on this issue are consistent with those of the Basel Committee on Banking Supervision.

4. Special Recommendation VII (Wire transfers)

17. On Special Recommendation VII, the objective is to enhance the transparency of electronic funds transfers (EFT), taking into consideration the following:

- SRVII should be applicable to all types of EFT, including serial and cover payments, taking into account the guidance issued by the Basel Committee on Banking Supervision[1].

- Ordering financial institutions (FIs) should be required to include, on all cross-border EFT, full originator information (name, account number or unique transaction reference number, and address, as currently required) and full beneficiary information (name, and account number or unique transaction reference number).

- Intermediary financial institutions (FIs) should be required to screen cross-border transactions in a manner which is consistent with straight-through processing[2].

- Beneficiary FIs receiving EFT which do not contain full originator or beneficiary information, as required, should be required to take measures that are consistent with automated processes.

- While FIs are expected to verify the identity of and relevant information about their customers[3], they are not in a position to verify the identity of parties to a transaction who are not their customer. For example, ordering FIs are not able to verify the identity of the beneficiary. Beneficiary FIs are not able to verify the identity of the originator. Intermediary FIs are not able to verify the identity of either the originator or beneficiary.

18. The FATF is also seeking input on: *(i)* what types of procedures are currently being used by intermediary FIs for dealing with EFT which lack full originator information as required, and whether any of these procedures are risk-based; *(ii)* whether and what kind of procedures FIs apply to cross-border EFT to detect whether information with respect to parties that are not their customers is meaningful[4]; and *(iii)* whether financial institutions apply screening procedures to cross border EFT below the threshold, and if so, how such procedures are applied.

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1 *Due diligence and transparency regarding cover payment messages related to cross-border wire transfers* (May 2009).

2 To take freezing action and comply with prohibitions from conducting transactions with prohibited parties, as per the obligations which are set out in the relevant UNSCRs, such as S/RES/1267(1999) and its successor resolutions, and S/RES/1373(2001).

3 Subject to a *de minimis* threshold for verification purposes, absent an indication of higher risk.

4 The term *meaningful* is used to describe information which has meaning on its face, but has not been verified for accuracy

5. Targeted financial sanctions in the terrorist financing and proliferation financing contexts

19. The main change proposed to Special Recommendation III is to focus entirely on the implementation of targeted financial sanctions (TFS) in the terrorist financing context, as prescribed in United Nations Security Council Resolutions (UNSCRs) 1267 and its successor resolutions, and UNSCR 1373. The obligation to take provisional measures and confiscate terrorist assets in other contexts (*e.g.*, in the course of an ordinary terrorist financing investigation or prosecution) would be made more explicit in Recommendation 3. The objective is not to widen the scope of the existing requirements. It is aimed at updating SRIII and its Interpretative Note (INSRIII) to explicitly reflect existing obligations to implement relevant UNSCRs that were issued after the current INSRIII was adopted in 2003.

20. To implement these obligations, countries should require all natural and legal persons within the jurisdiction, including financial institutions and DNFBPs, to:

- Freeze, without delay and without prior notice, the funds or other assets of designated persons and entities.

- Respect prohibitions on making any funds or other assets, economic resources, or financial or other related services, available, directly or indirectly, wholly or jointly, for the benefit of designated persons; entities owned or controlled, directly or indirectly, by designated persons; and persons and entities acting on behalf of or at the direction of designated persons, unless licensed, authorised or notified or otherwise, in accordance with the relevant UNSCRs.

- Report to the competent authorities of any assets frozen or actions taken in compliance with the prohibition requirements of the relevant UNSCRs, including attempted transactions.

21. Financial institutions and DNFBPs should be subject to monitoring for compliance with the relevant legislation, rules or regulations governing the obligations under SRIII. Failure to comply should be subject to civil, administrative or criminal sanctions.

22. The FATF is also discussing whether and to what extent it would be useful to extend similar requirements to TFS in the proliferation financing (PF) context, in line with the relevant UNSCRs (*e.g.*, UNSCR 1718, 1737, 1747, 1803 and 1929), to assist jurisdictions in implementing the targeted financial sanctions requirements of such UNSCRs.

6. The Financial Intelligence Unit: Recommendation 26

23. During previous work to update the texts of Recommendations 27 and 28 relating to 'law enforcement agencies', it became apparent that the role of law enforcement agencies could not be considered in isolation from that of the 'financial intelligence unit' (FIU). Furthermore, it was felt that the current standard relating to FIUs (Recommendation 26 and its interpretative note) did not adequately describe the role and functions that an FIU should have. It was therefore decided to update the Recommendation and interpretative note to clarify the current standard, as has been done for R.27 and R.28. The proposed changes take account of the standards of the Egmont Group of FIUs and focus therefore on the core functions of such units: receipt and analysis of STRs and other information, and dissemination of the results of that analysis. The revised standard takes into account the different types of FIU (administrative, law enforcement or judicial) and is intended to apply to all of them. The proposed interpretative note emphasises the analysis function – including both operational and strategic – and indicates that the FIU should be able to obtain additional information from reporting entities as needed to

perform this function properly. The note also incorporates more detail into the standard in such areas as access to and dissemination of information, information security, confidentiality, operational independence, undue influence and membership in the Egmont Group.

7. International cooperation: Recommendation 40

24. The FATF has looked at the exchange of information between competent authorities, and in particular at how Recommendation 40 can be revised in order to ensure more effective cooperation between competent authorities. This work has included clarifying the general principles applicable to all cooperation between competent authorities in general, and detailing the specific modalities for cooperation with their counterparts by FIUs, law enforcement authorities, and supervisors. This includes clarifying the safeguards on the use and confidentiality of the information exchanged; specifying more clearly what information competent authorities, including FIUs, law enforcement and supervisors, should be able to exchange; and describing the channels and mechanisms they should use.

25. Two particular difficulties have hindered cooperation in the past: the imposition of unduly restrictive measures or requirements by some competent authorities, and the lack of mechanisms or powers for some competent authorities to share information with non-counterparts. The FATF proposes to address these issues by setting out modalities for "diagonal cooperation" between non-counterpart authorities; and by prohibiting the use of unduly restrictive measures to constrain cooperation.

8. Other Issues included in the revision of the FATF Standards

8.1 Adequate/inadequate implementation of the FATF Recommendations

26. The current FATF Standards include several elements to be applied to countries which do not or do not adequately apply the FATF Recommendations, and to business relationships and transactions linked to such countries. These include, in particular, Recommendations 9, 21 and 22.

27. The proposed changes to the risk-based approach set out in the previous phase of consultation include strengthened obligations on financial institutions to identify and mitigate country risks, and these would overlap to some extent with existing obligations within the Standards. The FATF is, therefore, proposing to revise Recommendations 9, 21, and 22 to ensure that they are fully consistent with the risk-based approach. It is proposed that financial institutions should be required to apply enhanced due diligence measures on the basis of the overall risk posed by a country (taking into account its compliance with the FATF Standards), rather than only on the basis of adequate or inadequate compliance with the Standards; and that the type of enhanced due diligence measures applied should be effective and proportionate to the risks. This would take the place of the current requirement to apply "special attention" to countries that do not sufficiently apply the FATF Recommendations.

28. In addition, the FATF proposes to expand the set of examples of actions which countries could take when implementing countermeasures. Countries would not be required to be able to implement all such measures, but should have sufficient scope to enable a flexible response when a country is non-compliant and/or presents a risk to the financial system. The proposed additional examples of countermeasures include: prohibiting financial institutions from relying on third parties located in the country concerned; prohibiting the establishment of subsidiaries or branches or representative offices of financial institutions from the country concerned; enhanced relevant reporting mechanisms; constraining correspondent relationships with financial institutions in the country concerned; and applying increased supervisory examination and/or external audit requirements for branches and subsidiaries of financial institutions based in the country concerned.

8.2 Risk-based approach in supervision

29. The FATF has considered how the risk-based approach affects supervision, including risk as a basis for the allocation of supervisory resources, and the supervision of how financial institutions themselves apply a risk-based approach to AML/CFT. It is proposed that a risk-based approach should apply to the supervision of financial institutions and DNFBPs, including by Self-Regulatory Organisations.

8.3 Further consideration of Politically Exposed Persons;

30. Further to the consideration last year of the issue of PEPs, the FATF has considered two further issues regarding PEPs: the basis on which additional due diligence should be applied to family members and close associates of PEPs; and whether persons carrying out prominent functions for international organisations should be considered as PEPs. It is proposed that individuals who have been entrusted with prominent functions by an international organisation should be treated in the same way as domestic PEPs. It is also proposed that the requirements for foreign and domestic PEPs should apply equally to family members or close associates of such PEPs. This would mean that enhanced CDD measures would be required automatically for family members and close associates of a foreign PEP, and could be required (on a risk-based approach) for family members and close associates of a domestic PEP.

Annex 2

Section 2 of Banking Ordinance definition of "require"

Chapter:	155	Title:	BANKING ORDINANCE	Gazette Number:	L.N. 232 of 2006
Section:	2	Heading:	**Interpretation**	Version Date:	01/01/2007

(1) In this Ordinance, unless the context otherwise requires-

"accounts" (帳目) means any accounts, whether kept in writing or print or by any machine or device;

"advertisement" (廣告) includes every form of advertising, whether made orally or produced mechanically, electronically, magnetically, optically, manually or by any other means; (Replaced 32 of 2001 s. 2)

"Advisor" (顧問), in relation to an authorized institution, means the person appointed, pursuant to section 52(1)(B), to be the Advisor of the institution; (Added 49 of 1995 s. 2)

"approval" (核准)-

(a) in relation to a company proposing to act as a money broker, means the approval of the company under section 118C(1)
(a) to act as a money broker;
(b) in relation to a money broker, means the certificate of approval held by the broker; (Added 4 of 1997 s. 3)

"approved currency" (核准貨幣) means a currency-

(a) freely convertible into Hong Kong dollars; or
(b) approved by the Monetary Authority; (Added 64 of 1987 s. 2. Amended 82 of 1992 s. 11)

"approved money broker" (核准貨幣經紀) means a money broker which holds a valid certificate of approval; (Added 4 of 1997 s. 3)

"associate" (相聯者), in relation to a person entitled to exercise, or control the exercise of, voting power in relation to, or holding shares in, a company, means any other person in respect of whom that first-mentioned person has an agreement or arrangement, whether oral or in writing, express or implied, with respect to the acquisition, holding or disposal of shares or other interests in that company or under which they act together in exercising their voting power in relation to it; (Added 95 of 1991 s. 2)

"auditor" (核數師) means a certified public accountant (practising) as defined in the Professional Accountants Ordinance (Cap 50); (Amended 23 of 2004 s. 56)

"authorization" (認可) means, as the case requires-

(a) the authorization under section 16 of a company to carry on banking business, a business of taking deposits as a deposit-taking company or a business of taking deposits as a restricted licence bank, as the case may be;
(b) the banking licence, registration or restricted banking licence, as the case may be, held by an authorized institution; (Added 49 of 1995 s. 2)

"authorized institution" (認可機構) means-

(a) a bank; (Amended 3 of 1990 s. 2)
(b) a restricted licence bank; or (Replaced 3 of 1990 s. 2)
(c) a deposit-taking company; (Added 3 of 1990 s. 2)

"authorized institution incorporated in Hong Kong" (在香港成立爲法團的認可機構) means an authorized institution incorporated in Hong Kong by or under the Companies Ordinance (Cap 32) or any other Ordinance and any reference to a bank incorporated in Hong Kong, a deposit-taking company incorporated in Hong Kong or a restricted licence bank incorporated in Hong Kong shall be construed accordingly; (Amended 3 of 1990 s. 2)

"authorized institution incorporated outside Hong Kong" (在香港以外成立爲法團的認可機構) means an authorized institution incorporated by or under the law or other authority in any place outside Hong Kong; (Amended 3 of 1990 s. 2; 94 of 1993 s. 2)

"automated teller machine" (自動櫃員機) means a terminal device, whether installed by an authorized institution or by some other person, which is linked directly or indirectly to a computer system used by an authorized institution and which provides facilities to customers of the institution; (Replaced 32 of 2001 s. 2)

"bank" (銀行) means a company which holds a valid banking licence; (Amended 43 of 1990 s. 2)

"Banking Advisory Committee" (銀行業務諮詢委員會) means the Banking Advisory Committee established by section 4;

"banking business" (銀行業務) means the business of either or both of the following-

(a) receiving from the general public money on current, deposit, savings or other similar account repayable on demand or within less than the period specified in item 1 of the First Schedule or with a period of call or notice of less than that period; (Amended 4 of 1997 s. 3)
(b) paying or collecting cheques drawn by or paid in by customers;

"banking licence" (銀行牌照) means a banking licence granted under section 16; (Amended 43 of 1990 s. 2)

"capital adequacy ratio" (資本充足比率), in relation to an authorized institution, means the ratio of the institution's capital base to a value representing the degree of risk of the following kinds to which the institution is exposed-

(a) credit risk, that is to say, the risk of loss from-
  (i) default by counterparties in on-balance sheet and off-balance sheet items of the institution; or
  (ii) diminution in the value of such on-balance sheet items of the institution as may for the purposes of this paragraph be prescribed by the Monetary Authority in rules made under section 98A(1);
(b) market risk, that is to say, the potential losses arising from fluctuations in the value of positions held by the institution-
  (i) for trading purposes in debt securities, interest rater-elated contracts, equities and equity-related contracts; and
  (ii) in foreign exchange, exchange rate-related contracts, commodities and commodity-related contracts; and

(b) granted a certificate of registration; (Added 6 of 2002 s. 2)

"regulated activity" (受規管活動), in relation to a registered institution, means a regulated activity-

(a) within the meaning of Schedule 1 to the Securities and Futures Ordinance (Cap 571); and
(b) in respect of which the institution is registered-
(i) to carry on the activity; and
(ii) by virtue of-
(A) in the case of an institution falling within paragraph (a) of the definition of "registered institution", section 25(a) or 32 of Schedule 10 to the Securities and Futures Ordinance (Cap 571);
(B) in any other case, the certificate of registration granted to it; (Added 6 of 2002 s. 2)

"require" (要求) means reasonably require; (Added 32 of 2001 s. 2)
"reserves" (儲備), in relation to an authorized institution, means reserves which appear in the accounts of the institution, but does not include any reserves which are represented by the writing down of the value of assets or by provision for the depreciation of fixed assets; (Added 95 of 1991 s. 2)
"restricted banking licence" (有限制銀行牌照) means a restricted banking licence granted under section 16; (Added 3 of 1990 s. 2. Amended 49 of 1995 s. 2)
"restricted licence bank" (有限制牌照銀行) means a company which holds a valid restricted banking licence. (Added 3 of 1990 s. 2)
"Review Tribunal" (覆核審裁處) means the Capital Adequacy Review Tribunal established under section 101A; (Added 19 of 2005 s. 7)
"Securities and Futures Commission" (證監會) means the Securities and Futures Commission referred to in the Securities and Futures Ordinance (Cap 571); (Added 6 of 2002 s. 2)
"share" (股份) means share in the share capital of a company, and includes stock except where a distinction between stock or shares is expressed or implied; and the expression "shareholder" (股東) includes a stockholder;
"share premium account" (股份溢價帳)-

(a) in relation to a company incorporated in Hong Kong, means a share premium account referred to in section 48B(1) of the Companies Ordinance (Cap 32) maintained in respect of the company;
(b) in relation to a company incorporated outside Hong Kong, means an account having the same characteristics as a share premium account referred to in section 48B(1) of the Companies Ordinance (Cap 32) irrespective of its name; (Added 19 of 2005 s. 7)

"short-term deposit" (短期存款) means a deposit with an original term to maturity of less than the period specified in item 1 of the First Schedule or with a period of call or notice of less than such specified period; (Amended 3 of 1990 s. 2)
"single-purpose card" (單用途儲值卡) means a stored value card referred to in paragraphs (a) and (b)(i) of the definition of "stored value card"; (Added 4 of 1997 s. 3)
"specified sum" (指明款項), in relation to-

(a) a deposit-taking company, means the sum referred to in section 14(1)(a); and
(b) a restricted licence bank, means the sum referred to in section 14(1)(b); (Amended 3 of 1990 s. 2)

"stored value card" (儲值卡) means a card (or like thing) on which data may be stored (or otherwise recorded) in electronic, magnetic or optical form and for or in relation to which a person pays a sum of money to the issuer of the card, whether directly or indirectly, in exchange for-

(a) the storage of the value of that money, whether in whole or in part, on the card; and
(b) either-
(i) an undertaking (whether express or implied) by the issuer that, on the production of the card to the issuer, and whether or not some other action is also required, the issuer will supply goods or services (which shall not include money or money's worth); or
(ii) an undertaking (whether express or implied) by the issuer that, on the production of the card to the issuer or a third party, and whether or not some other action is also required, the issuer or the third party, as the case may be, will supply goods or services (which may include money or money's worth); (Added 4 of 1997 s. 3)

"The DTC Association" (DTC 公會) means The Hong Kong Association of Restricted Licence Banks and Deposit-taking Companies incorporated under the Companies Ordinance (Cap 32); (Added 19 of 2005 s. 7)
"The Hong Kong Association of Banks" (香港銀行公會) means the body corporate of that name incorporated by section 3 of The Hong Kong Association of Banks Ordinance (Cap 364); (Added 19 of 2005 s. 7)
"Tier 1 country" (第1級國家) means Hong Kong and any country or place other than Hong Kong which-

(a) is a member of the Organization for Economic Co-operation and Development; or
(b) has concluded a special lending arrangement with the International Monetary Fund associated with the International Monetary Fund's General Arrangements to Borrow,

but excludes any such country or place which-

(c) has rescheduled its external sovereign debt, whether to central government or non-central government creditors, within the previous 5 years; or
(d) is specified by the Monetary Authority by notice published in the Gazette as being a country or place that is not to be regarded as a Tier 1 country for the purposes of this definition; (Added 19 of 2005 s. 7)

"unsuccessful" (不成功), in relation to an appeal, includes any case where the appeal is abandoned or withdrawn; (Added 49 of 1995 s. 2)
"working day" (工作日) means a day other than a public holiday or a gale warning day within the meaning of section 2 of the Judicial

section 63 of Banking Ordinance

Chapter:	155	Title:	BANKING ORDINANCE	Gazette Number:	L.N. 148 of 2005
Section:	63	Heading:	**Returns and information to be submitted to the Monetary Authority**	Version Date:	02/12/2005

(1) Every authorized institution shall submit to the Monetary Authority-

(a) not later than 14 days after the last day of each calendar month a return showing the assets and liabilities of its principal place of business in Hong Kong and all local branches thereof at the close of business on the last business day or last day of that month; and
(b) not later than 14 days after the last day of each quarter ending on 31 March, 30 June, 30 September and 31 December respectively, or upon any other day which may be approved by the Monetary Authority, a return relating to its principal place of business in Hong Kong and all local branches thereof as at the close of business on the last business day or last day of the preceding quarter:

Provided that the Monetary Authority may by permission in writing allow the returns referred to in paragraphs (a) and (b) to be submitted at less frequent intervals. (Amended 95 of 1991 s. 16)
(2) The Monetary Authority may require an authorized institution to submit (including periodically submit) such further information, or require an approved money broker to submit (including Periodically submit) such information, as he may reasonably require for the exercise of his functions under this Ordinance and such information shall be submitted within such period (or, where such information is required periodically, within such periods) and in such manner as the Monetary Authority may require. (Amended 3 of 1990 s. 26; 49 of 1995 s. 20; 4 of 1997 s. 14)
(2A) The Monetary Authority may require-

(a) any holding company of an authorized institution;
(b) any subsidiary of any such holding company; or
(c) any subsidiary of an authorized institution,

to submit such information-

(i) in any case, as he may reasonably require for the exercise of his functions under this Ordinance;
(ii) in the case of paragraph (a) or (b), that the Monetary Authority considers is necessary to be submitted in the interests of the depositors or potential depositors of the authorized institution concerned; and
(iii) within such period and in such manner as the Monetary Authority may require. (Replaced 49 of 1995 s. 20)

(3) The Monetary Authority may require an authorized institution to submit to him, on or before such date as he may reasonably specify in the requirement, a report prepared by, subject to subsection (3B), an auditor or auditors appointed by the institution as to whether or not, in the opinion of the auditor or auditors, a return submitted to him pursuant to subsection (1), or information submitted to him pursuant to subsection (2), by the institution is correctly compiled, in all material respects, from the books and records of the institution and, if not so correctly compiled, the nature and extent of the incorrectness. (Replaced 67 of 1992 s. 5)
(3A) The Monetary Authority may require an authorized institution to submit to him, on or before such date as he may reasonably specify in the requirement and, subject to subsection (3C), in respect of the period specified in the requirement, a report prepared by, subject to subsection (3B), an auditor or auditors appointed by the institution as to all or any of the following-

(a) whether or not, during that period, in the opinion of the auditor or auditors, the institution had in place systems of control which were adequate to enable, as much as is practicable-
(i) the institution's returns or information to be correctly compiled, in all material respects, from the books and records of the institution;
(ii) the institution to comply with its duties under Parts XII, XV, XVII and XVIII;
(iii) if the institution is incorporated in Hong Kong, the institution to maintain adequate provision for depreciation or diminution in the value of its assets (including provision for bad and doubtful debts), for liabilities which will or may fall to be discharged by it and for losses which will or may occur,
and, if the opinion is that those systems were not adequate, the nature and extent of any inadequacies;
(b) subject to subsection (3D), whether or not, during that period-
(i) there appears to the auditor or auditors to be any material contravention by the institution of any of the duties referred to in paragraph (a)(ii), and, if it so appears, the nature of the contravention and the evidence therefor;
(ii) if the institution is incorporated in Hong Kong, it appears to the auditor or auditors that the institution has failed to maintain the adequate provision referred to in paragraph (a)(iii), and, if it so appears, the reasons or evidence therefor;

(iii) (Repealed 6 of 2002 s. 7)

(Added 67 of 1992 s. 5)
(3B) The auditor or auditors appointed by an authorized institution to prepare a report required under subsection (3) or (3A) shall be-

(a) an auditor or auditors appointed by the institution prior to the report being so required and approved by the Monetary Authority for the purpose of preparing the report;
(b) an auditor approved, or an auditor from amongst auditors nominated, by the Monetary Authority for the purpose of preparing the report after consultation with the institution; or
(c) an auditor referred to in paragraph (a) and an auditor referred to in paragraph (b),

as may be required by the Monetary Authority. (Added 67 of 1992 s. 5)
(3C) No period specified in a requirement under subsection (3A) shall exceed 12 months unless the Monetary Authority is satisfied that a longer period is required in the interests of depositors of the authorized institution concerned or the public interest. (Added 67 of 1992 s. 5)
(3D) No report shall be required under subsection (3A) as to a matter referred to in paragraph (b) of that subsection unless the report is also required as to a matter referred to in paragraph (a) of that subsection. (Added 67 of 1992 s. 5)
(3E) (Repealed 6 of 2002 s. 7)
(3F) In this section-

"adequate" (足夠), in relation to systems of control, includes operating effectively;

"systems of control" (管控制度) includes procedures. (Added 67 of 1992 s. 5)

(4) Notwithstanding section 120, the Monetary Authority may prepare and publish consolidated statements aggregating the figures in the returns furnished under subsection (1).

(5) Every director, every chief executive and every manager of an authorized institution which, without reasonable excuse, contravenes subsection (1) or fails to comply with any requirement under subsection (3) or (3A) commits an offence and is liable on conviction upon indictment or on summary conviction to a fine at tier 5 and, in the case of a continuing offence, to a further fine at tier 2 for every day during which the offence continues. (Amended 67 of 1992 s. 5; 4 of 1997 s. 27; 32 of 2001 s. 24; 19 of 2005 s. 12)

(6) Every director, every chief executive and every manager of an authorized institution or approved money broker which fails without reasonable excuse to comply with any requirement under subsection (2), and every director, every chief executive and every manager of a holding company of an authorized institution, subsidiary of such holding company or subsidiary of an authorized institution which fails without reasonable excuse to comply with any requirement under subsection (2A), commits an offence and is liable- (Amended 3 of 1990 s. 26; 49 of 1995 s. 20; 4 of 1997 s. 14; 32 of 2001 s. 24)

(a) on conviction upon indictment to a fine at tier 7 and to imprisonment for 2 years and, in the case of a continuing offence, to a further fine at tier 3 for every day during which the offence continues; or

(b) on summary conviction to a fine at tier 5 and to imprisonment for 6 months and, in the case of a continuing offence, to a further fine at tier 2 for every day during which the offence continues. (Amended 4 of 1997 s. 27)

(7) Any person who signs any document for the purposes of this section which he knows or reasonably ought to know to be false in a material particular commits an offence and is liable-

(a) on conviction upon indictment to a fine at tier 8 and to imprisonment for 2 years; or

(b) on summary conviction to a fine at tier 5 and to imprisonment for 6 months. (Amended 4 of 1997 s. 27)

(Amended 82 of 1992 s. 25)

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Section 183 of the Securities and Futures Ordinance

Chapter:	571	Title:	SECURITIES AND FUTURES ORDINANCE	Gazette Number:	L.N. 12 of 2003
Section:	183	Heading:	**Conduct of investigations**	Version Date:	01/04/2003

(1) The person under investigation or a person whom the investigator has reasonable cause to believe has in his possession any record or document which contains, or which is likely to contain, information relevant to an investigation under section 182, or whom the investigator has reasonable cause to believe otherwise has such information in his possession, shall-

(a) produce to the investigator, within the time and at the place the investigator reasonably requires in writing, any record or document specified by the investigator which is, or may be, relevant to the investigation and which is in his possession;
(b) if required by the investigator, give the investigator an explanation or further particulars in respect of any record or document produced under paragraph (a);
(c) attend before the investigator at the time and place the investigator reasonably requires in writing, and answer any question relating to the matters under investigation that the investigator may raise with him; and
(d) give the investigator all assistance in connection with the investigation which he is reasonably able to give, including responding to any written question raised by the investigator.

(2) An investigator may in writing require the person giving or making an explanation, particulars, answer or statement under this section to verify within a reasonable period specified in the requirement the explanation, particulars, answer or statement by statutory declaration, which may be taken by the investigator.
(3) If a person does not give or make an explanation, particulars, answer or statement in accordance with a requirement under this section for the reason that the explanation, particulars, answer or statement was not within his knowledge or in his possession, an investigator may in writing require the person to verify within a reasonable period specified in the requirement by statutory declaration, which may be taken by the investigator, that he was unable to comply or fully comply (as the case may be) with the requirement for that reason.
(4) Neither section 182 nor this section shall be construed as requiring an authorized financial institution to disclose any information or produce any record or document relating to the affairs of a customer to the investigator unless-

(a) the customer is a person whom the investigator has reasonable cause to believe may be able to give information relevant to the investigation; and
(b) the Commission is satisfied, and certifies in writing that it is satisfied, that the disclosure or production is necessary for the purposes of the investigation.

(5) The investigator may, and if so directed by the Commission shall, make interim reports on his investigation to the Commission, and on the conclusion of his investigation shall make a final report on his investigation to the Commission.
(6) The Commission may, with the consent of the Secretary for Justice, cause a report under this section to be published.

Annex 3

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Contents of Section Add to Printing List

Chapter:	455	Title:	ORGANIZED AND SERIOUS CRIMES ORDINANCE	Gazette Number:	
Section:	25	Heading:	**Dealing with property known or believed to represent proceeds of indictable offence**	Version Date:	30/06/1997

PART V

MISCELLANEOUS

(1) Subject to section 25A, a person commits an offence if, knowing or having reasonable grounds to believe that any property in whole or in part directly or indirectly represents any person's proceeds of an indictable offence, he deals with that property.
(2) In proceedings against a person for an offence under subsection (1), it is a defence to prove that-

(a) he intended to disclose to an authorized officer such knowledge, suspicion or matter as is mentioned in section 25A(1) in relation to the act in contravention of subsection (1) concerned; and
(b) there is reasonable excuse for his failure to make disclosure in accordance with section 25A(2).

(3) A person who commits an offence under subsection (1) is liable-

(a) on conviction upon indictment to a fine of $5000000 and to imprisonment for 14 years; or
(b) on summary conviction to a fine of $500000 and to imprisonment for 3 years.

(4) In this section and section 25A, references to an indictable offence include a reference to conduct which would constitute an indictable offence if it had occurred in Hong Kong.

(Enacted 1994. Replaced 90 of 1995 s. 22)

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