

立法會
Legislative Council

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**Paper for the House Committee meeting on
7 January 2000**

**Report of the Bills Committee on
Organized and Serious Crimes (Amendment) Bill 1999**

Purpose

This paper reports on the deliberations of the Bills Committee on Organized and Serious Crimes (Amendment) Bill 1999.

The Bill

2. The Bill seeks to amend the Organized and Serious Crimes Ordinance (Cap. 455), in the interest of detecting and suppressing money laundering, to require money changers and remittance agents, inter alia, to inform a designated public officer of their names and business addresses, and to keep records of transactions, including the identity of customers, when the transaction amounts to HK\$20,000 or more or an equivalent amount in any other currency. The Bill also imposes criminal sanction upon the remittance agents, money changers or their employees for failing to keep such records.

The Bills Committee

3. At the House Committee meeting held on 23 April 1999, Members decided to form a Bills Committee to study the Bill. Under the chairmanship of Hon James TO Kun-sun, the Bills Committee held three meetings with the Administration. The membership list of the Bills Committee is in **Appendix I**.

Deliberations of the Bills Committee

4. The main deliberations of the Bills Committee are summarized below.

Setting of threshold

5. Under the Bill, all money changers and remittance agents will be required to keep records of transactions which concern amounts of HK\$20,000 or more.

6. In response to members' question on whether the threshold could be lowered, the Administration has advised that the \$20,000 threshold is adopted having regard to the need to minimize disruption to the businesses concerned and the operational need of the enforcement agencies. Although the proposed threshold is quite low, the Secretary for Security is empowered under proposed section 24C(5) to amend the threshold by notice in the Gazette. Any amendment to the threshold would be subject to the scrutiny by the Legislative Council.

Definition of remittance agent

7. Members consider that the definition of "remittance agent" is not clear. They have asked whether a person is within the meaning of remittance agent if he provides remittance service occasionally.

8. The Administration has explained that a remittance agent means a person who provides a service to another person or persons as a business. The crucial point is that the remittance service provided must be a chargeable service irrespective of the number of transactions carried out in a certain period of time. The Administration will make clear the definition in the administrative guidelines to be issued to the trade.

9. Members have pointed out that a person could receive other forms of reward in providing remittance service. It is not uncommon in dealing business with the Chinese enterprises in the Mainland that a person may provide service to another person without asking for a benefit with a view to promoting mutual relationship. They have sought clarifications on whether the provision of remittance service in such context falls within the meaning of remittance agent.

10. The Administration has explained that if there is a benefit arising from a transaction, irrespective of its form and nature, such transaction will be regarded as a business. If a person provides remittance service to another person without asking for a benefit, he is not providing a remittance service under the Bill.

Proposed exemption under the definition of "remittance agent"

11. The Bill proposes to exempt authorized institutions regulated by the Hong Kong Monetary Authority (HKMA), authorized insurers regulated by the Insurance Authority (IA) and registered persons regulated by the Securities and Futures Commission (SFC) from the definition of "remittance agent". The Administration also proposes to move Committee Stage amendments (CSAs) to add to the exemption list authorized insurance brokers and licensed leveraged foreign exchange trader which are under the purview of IA and SFC respectively. Members question the reasons for the proposed exemptions.

12. The Administration has explained that the primary objective of the Bill is to introduce anti-money laundering measures for the non-bank financial institutions, i.e. money changers and remittance agents, which are presently unregulated. HKMA, SFC and IA have put in place a robust and comprehensive regime for the institutions under their purview. The regime comprises, inter alia, legislation, anti-money laundering guidelines, circular on updated developments in money laundering, regular examinations and reviews as well as special training programmes for employees. The Administration considers that the regime is adequate to prevent these institutions from being used for money laundering operations. Moreover, the efforts made by the financial regulators and the regulated financial sectors in Hong Kong are well recognized by the Financial Action Task Force on Money Laundering. The proposed exemptions are in line with international practice.

13. The Administration has pointed out that non-compliance by financial institutions with anti-money laundering guidelines would cast doubt on whether such institutions are fit and proper to continue business. In such a case, regulators would request remedial action by the institutions concerned, failing which their licences may ultimately be revoked. In the Administration's view, this ultimate sanction should be a sufficient and effective deterrent to ensure compliance with the respective guidelines issued by their regulators.

Banking institutions

14. Regarding customer identification and record keeping requirements of banking institutions in business transactions, the Administration has advised that the anti-money laundering guidelines issued by HKMA require banks to apply the "know your customer" principle to all customers irrespective of the value of transaction. Banking institutions are required to issue internal instruction manuals which cover record keeping relating to remittance and money changing business with both account and non-account holders. Major banks have specific guidelines on identification of walk-in customers involved in significant transactions. In addition, regulated institutions are required under the law to report suspicious transactions.

15. While members consider that the regime put in place by financial regulators has served to guide the institutions under regulation in compliance with the requirements in respect of anti-money laundering, members have expressed concern that if banking institutions are exempted from the Bill, the difference in the statutory requirements between money changers and remittance agents and banking institutions in respect of keeping records of customer identification in business transactions would give rise to unfair competition. They are also concerned that such a difference in the statutory requirements of banking institution in money changing transactions, particularly those involving walk-in customers, may create a loophole in anti-money laundering measures.

16. The Administration has responded that it is inappropriate to compare money changers and remittance agents with banking institutions solely in terms of the customer identification and record keeping requirements. As the mode of operation between regulated banking institutions and money changers and remittance agents is different, comparison should be made by reference to the overall regime in the respective sectors. The regime in banking institutions serves to prevent these institutions from being used for money laundering operations and ensure that an audit trail of businesses conducted is available when such a need arise. Moreover, the cost of complying with the comprehensive regulatory requirements of adopting anti-money laundering measures by banking institutions would not be lower than the cost of complying with the statutory requirements under the Bill. The question of unfair competition between the banking institutions and the remittance agents and money changers should not arise.

17. As regards members' concerns over the customer identification and record keeping requirements of banking institutions in respect of walk-in customers involved in money changing transactions, the Administration has explained that most banking institutions have formulated internal guidelines on identification of walk-in customers involved in significant transactions which are based on HKMA's guidelines on prevention of money laundering. The threshold above which the requirements for customer identification and record keeping would apply varies amongst different banks. The Administration has assured members that customer information required by individual banks is in compliance with that required under the guidelines issued by HKMA. Suspicious transactions would be reported by banks regardless of the amount involved. The anti-money laundering measures adopted by banking institutions are considered to be sufficient. To allay members' concerns, the Administration would review in conjunction with HKMA the specific guidelines put in place by banking institutions on walk-in customers involved in money changing transactions.

Registered persons

18. The Administration has advised that during the course of business of financial intermediaries, registered persons may have to settle overseas securities transactions of clients and make arrangements for remittance for overseas clients. All registered persons are required to know their clients and keep sufficient records on all money transactions with or for their clients under the existing law and anti-money laundering guidelines. In addition, such transactions would normally settle through banking institutions. These requirements are effective to provide an audit trail for investigation into suspected money laundering offence.

Insurance brokers

19. Regarding members' concern about the proposed exemption of insurance brokers, the Administration has explained that insurance brokers in Hong Kong are required to comply with the provisions of the Insurance Companies Ordinance (Cap. 41) and are subject to the prudential supervision of IA. They are subject to comprehensive regulatory requirements, including being a fit and proper person, keeping proper books of accounts, taking out professional indemnity insurance and conducting annual audit. IA has the power under Cap. 41 to withdraw the authorization of an insurance broker or the approval of a body of insurance brokers. For non-compliance of any anti-money laundering requirements, the insurance broker, together with the directors or controllers concerned, may be considered as not fit and proper, and can be debarred from entering into the business or profession again.

20. The Administration has further explained that the nature of insurance business requires that the insured must have an insurable interest recognized by law in the subject matter under the insurance contract. To fulfil this principle, the identity of the insured or the beneficial owner of the policy is therefore essential and must be clearly established by the insurance broker to ensure that the insurance contract is legally enforceable. It follows that an insurance broker must identify customers and maintain proper records of the insurance transactions.

21. Members agree to the Administration's proposals to exempt authorized institutions and registered persons from the definition of "remittance agent" as set out in proposed section 24A and the CSAs to add to the list of exemption licensed leveraged foreign exchange traders and insurance brokers. The Administration has assured members that it would review in conjunction with the financial regulators, viz. HKMA, SFC and IA, the anti-money laundering guidelines for financial institutions in the light of the proposals under the Bill.

Register of remittance agents and money changers

22. Under the Bill, a register will be kept to enable the Administration to keep a comprehensive and up-to-date list of money changers and remittance agents for the purpose of enforcing the requirements. All money changers and remittance agents would be required to inform a designated public officer of their names and business addresses. The Administration has advised that the Chief Superintendent (Narcotics Bureau) of the Hong Kong Police Force, who supervises the work of the Joint Financial Intelligence Unit, would be appointed as the designated public officer responsible for maintaining the register.

23. Given that there is no licensing system for money changers and remittance agents, members have expressed concerns about the implementation of the proposed statutory requirements.

24. The Administration has responded that the administrative guidelines for the trade would contain as much operational details as possible. The Administration considers that it is not necessary to introduce a licensing system for the purpose of countering money laundering, which may unnecessarily increase the operators' operational costs. A notification system as currently proposed, is considered sufficient, appropriate and readily acceptable to the trade concerned. The Administration has also advised that similar notification systems are being used in France and the United States to regulate money changers and remittance agents to prevent these business from engaging in illegal activities, including money laundering.

Criminal liability

25. Members have pointed out that under the Bill, an employee of a money changer or remittance agent would be subject to criminal liability for non-compliance with the proposed statutory requirements. However, an employee of a banking institution would not be held criminally liable for committing the same act. Members have expressed concern about the disparity in treatment.

26. The Administration has explained that if a banking institution fails to comply with anti-money laundering guidelines issued by HKMA, it would be subject to the revocation of its operating licence. Internal instructions would be issued by banking institutions to ensure compliance with HKMA's guidelines. The Administration considers that there is no need to extend the proposed statutory requirements to banking institutions.

27. Despite the Administration's explanation, a member still has reservations about the disparity in treatment. He considers that as a matter of principle, every person should be held criminally liable for committing the same offence on equity ground.

28. Under proposed section 24D(1)(b), a remittance agent would have committed an offence for non-compliance with the statutory requirements of customer identification or keeping records of transactions unless he has taken reasonable steps to prevent the commission of the offence. Members consider that a similar defence should be provided for persons employed by money changers or remittance agents. The Administration has agreed to introduce CSAs to the effect that such persons would be liable unless he shows that he exercised reasonable diligence to avoid the commission of the offence.

29. Under the proposed section 24D(1)(c), where the employer is a corporation, each director, manager, secretary and other similar officer of the corporation would be held criminally liable for non-compliance with the statutory requirements. Proposed section 24D(4) provides that if a partner in a partnership of remittance agents commits an offence for non-compliance with the statutory requirements and it is proved that the offence was committed with the consent or connivance, or was attributable to any neglect on the part of any other partner of the partnership, that other partner shall be guilty of the like offence. As an inactive director or partner may not participate in the routine operation of a corporation or partnership, members suggest that only persons who are occupying management positions be subject to the provisions.

30. The Administration has responded that omission of any of the corporate figure stated in proposed section 24D(1)(c) would create a loophole, giving rise to manipulation of the corporation by perpetrators. The liability of the corporate figures proposed is consistent with that covering corporate figures in other types of business affected by legislation of a similar regulatory nature. In addition, a safeguard, "unless he has taken reasonable steps to prevent the commission of the offence", is already provided in the proposed provision. Similar considerations also apply to proposed section 24D(4) since a partner, no matter how inactive he is, has a responsibility towards his partnership. The Administration has pointed out that this provision only makes another partner liable for the offence committed by the directly guilty partner if the offence was committed "with the consent or connivance of or was attributable to any neglect on the part of" the other partner. The onus of proof is on the prosecution. The Administration is of view that to make the legislation effective, it is necessary for the scope of liability in these provisions to remain as proposed.

Power of authorized officers to enter premises

31. Members have asked whether premises include domestic premises under proposed section 24E and whether a judicial warrant would be required for entering domestic premises.

32. The Administration has explained that from operational experience, some remittance agents do operate from premises used for residential purpose. "Premises" therefore include domestic premises. To address members' concerns, the Administration has agreed to add a definition of "domestic premises" which is based on the one used in the Import and Export Ordinance (IEO), and a requirement for judicial warrant to be issued prior to entry to domestic premises. The relevant CSAs would be made by the Administration.

33. In respect of entering composite residential/commercial premises for suspected money laundering operations, the Administration has advised that if the residential part of the premises is separated clearly from the area used for commercial purpose, the Police would not enter the area used for residential purpose. From the experience of the Customs and Excise Department in enforcing IEO, it would apply for a judicial warrant prior to enter a domestic premise if there is doubt on whether the premise in question is within the meaning of domestic premises. The Administration has assured members that the enforcement authorities would be cautious in exercising their power to enter premises for suspected money laundering operations.

Consultation with the trade concerned

34. Members have expressed concerns over the consultation with the trade concerned on the proposed statutory requirements. The Administration has explained that as money changers and remittance agents do not have any trade associations, the Administration had consulted individual money changers and remittance agents through questionnaires whose names and addresses were obtained by the Police in the course of its investigations into suspected money laundering operations. Two questionnaire surveys in relation to the proposed statutory requirements were conducted in 1997 and 1998. The 1997 survey covered 94 money changers and 78 remittance agents, while the 1998 survey covered 92 money changers and 87 remittance agents. Notwithstanding that the Administration does not have a comprehensive list of money changers and remittance agents operating in Hong Kong, it is confident that the findings of the 1997 and 1998 surveys could fully reflect the cross-section of the trade.

35. As operational details of the proposed requirements are not make known to the trade concerned in the course of the two surveys, members suggest that clear instructions and guidelines should be provided to them. Members also urge the Administration to step up publicity efforts on the proposed requirements.

36. The Administration has advised that guidelines would be issued to the trade after the enactment of the Bill. Publicity efforts would be targeted at those money changers and remittance agents which carry out money changing and remittance transactions as their principal business. Follow-up visits would be conducted with a view to explaining to remittance agents and money

changers the statutory requirements.

Committee Stage amendments

37. The draft CSAs to be moved by the Administration, which have the support of the Bills Committee, are in **Appendix II**.

Recommendation

38. The Bills Committee recommends that subject to the CSAs to be moved by the Administration, the Second Reading debate of the Bill be resumed at the Legislative Council meeting on 19 January 2000.

Advice Sought

39. Members are invited to note the recommendation of the Bills Committee in paragraph 38 above.

Legislative Council Secretariat

5 January 2000

附錄 I
Appendix I

《1999 年有組織及嚴重罪行(修訂)條例草案》委員會

**Bills Committee on
Organized and Serious Crimes (Amendment) Bill 1999**

Membership List

涂謹申議員(主席)	Hon James TO Kun-sun (Chairman)
朱幼麟議員	Hon David CHU Yu-lin
何秀蘭議員	Hon Cyd HO Sau-lan
何俊仁議員	Hon Albert HO Chun-yan
周梁淑怡議員	Hon Mrs Selina CHOW LIANG Shuk-ye, JP
夏佳理議員	Hon Ronald ARCULLI, JP
程介南議員	Hon Gary CHENG Kai-nam, JP
單仲偕議員	Hon SIN Chung-kai

合共 : 8 位議員
Total : 8 Members

日期 : 1999 年 7 月 21 日
Date : 21 July 1999

ORGANIZED AND SERIOUS CRIMES (AMENDMENT) BILL 1999

COMMITTEE STAGE

Amendments to be moved by the Secretary for Security

Clause

Proposed Amendment

2

(a) In the proposed section 24A, in the definition of “remittance agent”,
in paragraph (b) -

(i) in subparagraph (ii), by adding “or authorized
insurance broker after “insurer”;

(ii) by adding -

“(iv)a licensed leveraged foreign exchange trader
within the meaning of the Leveraged Foreign
Exchange Trading Ordinance (Cap. 451);”.

(b) In the proposed section 24D(1) (a), by adding “, unless the person
shows that he exercised reasonable diligence to avoid the
commission of the offence” after “agent”.

(c) In the proposed section 24E -

(i) in subsection (1) -

(A) by deleting “Where” and substituting “Subject to subsection (6), where”;

(B) by adding”, with such assistants as may be necessary,” after “he may”;

(ii) by adding -

“(6)An authorized officer shall not exercise his power under subsection (1) in respect of premises which are domestic premises except pursuant to a warrant issued under subsection (7).

(7) A magistrate may, if satisfied by information upon oath that there are reasonable grounds for the suspected offence, issue a warrant authorizing an authorized officer, with such assistants as may be necessary, to exercise his power under subsection (1) in respect of any domestic premises where the activities of the remittance

agent concerned are being carried on.

(8) In this section, “domestic premises” () means any premises or place used exclusively for residential purposes and constituting a separate household unit.”.