

立法會
Legislative Council

LC Paper No. CB(1)1441/10-11
(These minutes have been seen
by the Administration)

Ref : CB1/BC/01/10/2

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

**Fourth meeting on
Friday, 7 January 2011, at 10:45 am
in the Chamber of the Legislative Council Building**

Members present : Hon CHAN Kam-lam, SBS, JP (Chairman)
Hon James TO Kun-sun (Deputy Chairman)
Hon Albert HO Chun-yan
Dr Hon David LI Kwok-po, GBM, GBS, JP
Dr Hon Philip WONG Yu-hong, GBS
Hon Audrey EU Yuet-mee, SC, JP
Hon WONG Ting-kwong, BBS, JP
Hon CHIM Pui-chung
Hon Starry LEE Wai-king, JP

Member attending : Hon CHEUNG Man-kwong

Members absent : Dr Hon Margaret NG
Hon Mrs Sophie LEUNG LAU Yau-fun, GBS, JP
Hon Paul CHAN Mo-po, MH, JP

**Public officers
Attending** : Mr Patrick HO
Deputy Secretary for Financial Services and the
Treasury (Financial Services)

Miss Melo MAN
Acting Principal Assistant Secretary for Financial
Services and the Treasury (Financial Services)

Ms Monica LAW
Senior Assistant Law Draftsman
Department of Justice

Mr Alan CHONG
Senior Government Counsel
Department of Justice

Mr Trevor KEEN
Head (Banking Conduct)
Hong Kong Monetary Authority

Attendance by Invitation : Mrs Yvonne MOK
Director (Intermediaries Supervision)
Securities and Futures Commission

Ms Carol HUI
Acting Assistant Commissioner of Insurance
(Policy and Development Division)

Mr CHEUNG Sai-yan
Head of Trade Controls
Customs and Excise Department

Clerk in attendance : Ms Anita SIT
Chief Council Secretary (1)5

Staff in attendance : Miss Kitty CHENG
Assistant Legal Adviser 5

Mr Daniel SIN
Senior Council Secretary (1)7

Ms Haley CHEUNG
Legislative Assistant (1)8

I Confirmation of minutes and matters arising

(LC Paper No. CB(1)933/10-11 — Minutes of meeting on 30 November 2010)

The minutes of the meeting held on 30 November 2010 were confirmed.

II Meeting with the Administration

Follow-up to issues raised at the meeting on 22 December 2010

(LC Paper No. CB(1)979/10-11(01) — List of follow-up actions arising from the meeting on 22 December 2010 prepared by the Legislative Council Secretariat

LC Paper No. CB(1)979/10-11(02) — Administration's paper on "Money Service Operators' Access to Banking Services Further Response")

Clause-by-clause examination of the Bill (starting at clause 5(5))

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

LC Paper No. CB(1)705/10-11(06) — Letter from Assistant Legal Adviser to the Administration dated 7 December 2010

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

LC Paper No. CB(1)979/10-11(03) — Paper on "Hong Kong legislative reference used by the Administration in drafting the Bill" prepared by the Legal Service Division

LC Paper No. CB(1)979/10-11(04) — Marked-up copy of the consequential and related amendments of the Bill prepared by the Legal Service Division)

Discussion

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

Admin

Follow-up actions to be provided by the Administration

3. The Administration was requested to provide the following Information/response:

- (a) a comparison, with explanation on the differences, between the current guidelines issued by the Hong Kong Monetary Authority and the relevant provisions under the Bill in respect of the definition of politically exposed persons ("PEPs") and the special customer due diligence ("CDD") requirements applicable to PEPs. (cf. clauses 1 and 10 of Schedule 2 to the Bill);
- (b) explanation, with reference to real-life examples, the circumstances intended to be covered in the provisions for criminal offence with the element of "with intent to defraud". (cf. clause 5(5) to (8) of the Bill);
- (c) examples of other legislation which contains provisions that subject employees of an institution to criminal liability for non-compliance of that institution with the relevant legislation. (cf. clause 5(7) to (8) of the Bill);
- (d) the purpose of clause 5(9) and the need or otherwise to retain/refine that provision in the Bill with regard to the liability of partnerships to pay criminal fines;
- (e) the intended scope and contents of the guidelines to be issued by the relevant authorities under clause 7 of the Bill, in light of the detailed provisions on CDD and record-keeping requirements in the Bill;
- (f) the policy of the relevant authorities with respect to the possible authorization of persons who are not their members as "authorized persons" under clause 9(12), especially where such an authorization is made, whether the inspection team is to be led by a member of the authority concerned; and
- (g) the rationale for the scope of clause 9(3)(b) to cover, inter alia, persons not connected with the financial institution. The Administration was requested to consider narrowing down the scope of the persons covered in that provision as appropriate.

(Post-meeting note: The list of follow-up action was issued to members vide paper CB(1)1051/10-11(01) on 14 January 2011.)

III Any other business

Date of next meeting

4. The Chairman reminded members that the next meeting would be held on 13 January 2011.
5. There being no other business, the meeting ended at 12:35 pm.

Council Business Division 1
Legislative Council Secretariat
28 February 2011

**Proceedings of the
Bills Committee on Anti-Money Laundering and
Counter-Terrorist Financing (Financial Institutions) Bill
Fourth meeting on Friday, 7 January 2011, at 10:45 am
in the Chamber of the Legislative Council Building**

Time Marker	Speaker	Subject(s)	Action Required
001058 – 001343	Chairman	Confirmation of minutes of meeting on 30 November 2010 (LC Paper No. CB(1)933/10-11) Introductory remarks	
001344 – 001645	Administration	Briefing by the Administration on the proposals in the Bill (LC Paper No. CB(1)1012/10-11) (tabled at the meeting) regarding the operation of clause 15 of schedule 2 to the Bill in respect of persons entrusted with prominent public functions but are not "Politically Exposed Persons".	
001646 – 002729	Deputy Chairman Chairman Administration	With reference to the Administration's paper on "Politically Exposed Persons" (LC Paper No. CB(1)881/10-11(02)), the Deputy Chairman requested and the Administration agreed to provide a detailed comparison, with explanation on the differences, between the current guidelines issued by the Hong Kong Monetary Authority (HKMA) and the relevant provisions under the Bill in respect of the definition of politically exposed persons (PEPs) and the special customer due diligence ("CDD") requirements applicable to PEPs. (c.f. clauses 1 and 10 of Schedule 2 to the Bill)	The Administration to take action as per paragraph 3 of the minutes.
002730 – 003011	Administration	Briefing by the Administration on the proposals in the Bill (LC Paper No. CB(1)979/10-11(02)) regarding Members' questions and suggestions on possible additional measures to ensure that authorized institutions ("AIs") would not close MSOs' accounts without reasons.	
003012 – 003723	Deputy Chairman HKMA	Referring to HKMA's position that money service operators (MSO) that were licensed under the new Ordinance and fully complied with the relevant statutory CDD and record-keeping requirements should, in principle, be able to obtain banking services, the Deputy Chairman asked:	

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		<p>(a) how HKMA would follow up if an AI did not provide sufficient notice and reasons in closing a MSO's account; and</p> <p>(b) whether an AI could still cancel an MSO's account for commercial reasons.</p> <p>HKMA responded that:</p> <p>(a) it would ascertain the specific circumstances of each case from the AI concerned and ensure that the AI acted reasonably;</p> <p>(b) however, AIs were entitled to handle their business relationship with their clients based on commercial considerations. Although licensed MSOs that were fully compliant with the requirements under the Bill should, in principle, be able to obtain banking services, problems with individual accounts could not be ruled out.</p> <p>The Chairman remarked that MSOs should be able to obtain an explanation from the AI concerned or through HKMA as to why their accounts were closed by the AI.</p> <p>HKMA responded that within the constraints of the law, HKMA would expect AIs to give adequate notice and explain the reasons for closing account where possible.</p>	
003724 – 003921	Mr WONG Ting-kwong HKMA	<p>Mr WONG asked if an MSO could lodge a complaint to HKMA against an AI for having closed its account without providing sufficient reasons.</p> <p>HKMA responded that complaints against banking practice could be lodged to the Banking Services Complaints Unit of HKMA for follow up.</p>	
003922 – 004135	Chairman Administration	<p>Part 2</p> <p>Requirements Relating to Customer Due Diligence and Record-keeping</p> <p><u>Clause 5 –Schedule 2 has effect with respect to financial institutions</u></p>	

Time Marker	Speaker	Subject(s)	Action Required
		Administration's briefing on clause 5	
004136 – 005104	Mr WONG Ting-kwong Administration Deputy Chairman Chairman	<p><u>Clauses 5(5) and 5(6)</u></p> <p>Mr WONG sought clarification on the difference between "knowingly contravenes a specific provision" in clause 5(5) and "with intent to defraud, contravenes a specified provision" in clause 5(6).</p> <p>The Deputy Chairman asked, if clause 5(6) was intended to catch a fraudulent act,</p> <ul style="list-style-type: none"> (a) what parties such an FI might intend to defraud; (b) whether there were similar enactments in other legislation; (c) whether there were relevant past court cases, either locally or overseas; and (d) whether the Administration intended that clause 5(6) would apply only if a party suffered damages. <p>The Administration explained that</p> <ul style="list-style-type: none"> (a) the main difference between clause 5(5) and 5(6) lied in whether there was an intent to defraud; (b) it was considered that an offence committed with an intent to defraud should attract a heavier penalty. <p>The Chairman asked the Administration to explain, with reference to real-life examples, the circumstances intended to be covered in the provisions for criminal offence with the element of "with intent to defraud".</p>	The Administration to take action as per paragraph 3 of the minutes.
005105 – 010306	Administration Deputy Chairman	<p><u>Clauses 5(7) and 5(8)</u></p> <p>The Deputy Chairman expressed concern that the proposed provisions imposed criminal liability on an employee of an FI for the institution's non-compliance with the legislation, irrespective of the position/level of responsibility</p>	

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		<p>of the employee within the institution. He asked whether there were similar provisions in other ordinances.</p> <p>The Administration responded that:</p> <p>(a) there were similar provisions in the Insurance Companies Ordinance (Cap. 41) and the Securities and Futures Ordinance (Cap. 571), although in those cases, the criminal liabilities applied to more senior level employees; and</p> <p>(b) customers' accounts of FIs were often directly handled by frontline staff. The company would be liable to legal sanction for any contravention under the Bill due to an employee's negligence or fraudulence. The employee concerned should also be held liable for their fault.</p> <p>The Deputy Chairman pointed out that an employee's contravention of a specified provision might not, by nature, be related to money-laundering, but might still be caught by clauses 5(5) and 5(6).</p> <p>The Chairman asked the Administration to provide examples of other legislation which contained provisions that subject employees of an institution to criminal liability for non-compliance of that institution with the relevant legislation.</p>	<p>The Administration to take action as per paragraph 3 of the minutes.</p>
<p>010307 – 011110</p>	<p>Administration Deputy Chairman ALA5</p>	<p><u>Clauses 5(9) and 5(10)</u></p> <p>The Deputy Chairman asked:</p> <p>(a) whether clause 5(9) would relieve individual partners in a partnership of the liability to pay fines when the funds of the partnership were insufficient to meet the fine payment; and</p> <p>(b) if the relevant principle was already laid down in existing law, whether the provision in clause 5(9) was indeed necessary.</p> <p>The Administration responded that:</p>	

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		<p>(a) clause 5(9) served to put beyond doubt that the fine should be paid out of partnership fund; and</p> <p>(b) situations where the partnership funds were insufficient to settle a debt would be dealt with in accordance with the existing partnership law.</p> <p>The Chairman asked the Administration to provide information on the purpose of clause 5(9) and consider the need or otherwise to retain/refine that provision with regard to the liability of partnerships to pay criminal fines.</p>	<p>The Administration to take action as per paragraph 3 of the minutes.</p>
011111 – 011347	Administration	<p><u>Clause 6 – Amendment of Schedule 2</u></p> <p><u>Clause 7 – Relevant authority may publish guidelines</u></p> <p>Briefing by the Administration on the clauses</p>	
011348 – 012827	Deputy Chairman Administration HKMA	<p><u>Clause 7(6)</u></p> <p>Noting that the requirements in Schedule 2 and some other provisions in the Bill were based on existing guidelines on anti-money laundering for FIs, the Deputy Chairman enquired about the aspects that would be covered by the future guidelines issued under clause 7(6). He also expressed concern that it might be too onerous for FIs to have to follow too many guidelines and hence had to incur high compliance costs. He further enquired whether FIs' employees would also be required to observe the future guidelines.</p> <p>The Administration and HKMA responded that</p> <p>(a) the existing guidelines would be replaced by the new guidelines issued under clause 7(6) and relevant provisions under the existing guidelines which had not been codified into the Bill would be included in the new guidelines issued under the proposed clause 7(6) after the Bill was enacted;</p> <p>(b) the guidelines, which did not have legislative effect, served to explain what the</p>	

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		<p>regulators expected of FIs in compliance with the Bill;</p> <p>(c) the court might consider whether an FI had followed the guidelines in determining whether there was contravention of any statutory requirements;</p> <p>(d) an example of what would be set out in the guidelines was the types of documents that could be accepted for verifying a customer's identity for CDD purposes;</p> <p>(e) the regulators would engage the respective sectors in formulating detailed requirements in the guidelines; and</p> <p>(f) the guidelines were mainly targeted at FIs rather than individual employees. However, it would be stated in the guidelines that FIs were expected to ensure that their employees understand the anti-money laundering requirements and procedures.</p> <p>The Chairman requested the Administration to provide information on the intended scope and contents of the guidelines to be issued by the relevant authorities under clause 7 of the Bill, in light of the detailed provisions on CDD and record-keeping requirements in the Bill.</p>	<p>The Administration to take action as per paragraph 3 of the minutes.</p>
<p>012828 – 013159</p>	<p>Administration Mr WONG Ting-kwong</p>	<p>Part 3</p> <p>Supervision and Investigations</p> <p><u>Clause 8 – Interpretation of Part 3</u></p> <p><u>Clause 9 – Power to enter business premises etc. for routine inspection</u></p> <p>Mr WONG asked if the regulator's authorized person was permitted under clause 9(1)(a) to enter a business premises by force for routine inspection and whether the business premises included domestic or home-office premises.</p> <p>The Administration explained that clause 9(15) defined what a "business premises" was and clause 9(1)(a) did not empower the relevant authority to enter a business premises by force.</p>	

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013200 – 014332	Deputy Chairman Administration Securities and Futures Commission (SFC)	<p>The Deputy Chairman asked if the "authorized person" in clause 8 might be a person other than an employee of the relevant regulator, such as personnel of an out-sourced service provider.</p> <p>As the powers of the authorized person specified in clause 9(1)(a) and (b) were quite wide, the Deputy Chairman said the range of duties that could be handled by out-sourced personnel appointed by the relevant regulator should be suitably confined.</p> <p>The Administration explained that clause 8 was modelled on the relevant provision in the Securities and Futures Ordinance (Cap. 571). Even if out-sourced personnel appointed by the relevant regulator were involved in routine inspections, they would always be supervised by the relevant regulator's staff.</p> <p>Securities and Futures Commission (SFC) pointed out that at present, accountant firms were occasionally engaged to assist in conducting routine inspections. It was therefore intended that an "authorized person" might not necessarily be an employee of the regulator.</p> <p>SFC explained that as a matter of practice, such personnel would be supervised by SFC staff and would not be involved in raiding unlicensed operators .</p> <p>In the light of the Deputy Chairman's comments, the Chairman asked the Administration to provide information on the policy of the relevant authorities with respect to the possible authorization of persons who are not their members as "authorized persons" under clause 9(12), especially where such an authorization was made, whether the inspection team was to be led by a member of the authority concerned.</p>	The Administration to take action as per paragraph 3 of the minutes.
014333 – 015409	Administration Deputy Chairman SFC Chairman	<p><u>Clause 9(2), (3) and (4)</u></p> <p>The Chairman and the Deputy Chairman:</p> <p>(a) queried whether regulators should be given such wide powers as to be able to require any person unconnected with the FI under</p>	

Time Marker	Speaker	Subject(s)	Action Required
		<p>routine inspection to provide documents and answer questions;</p> <p>(b) sought clarification as to the circumstances where a regulator might need documents or information from a third party that could not be obtained from the FI under inspection;</p> <p>(c) suggested that the Bill should restrict the application of clause 9(3) to persons who had certain business relationship with the FI under inspection; and</p> <p>(d) suggested that the regulators should specify the "reasonable cause to believe" that the person had certain records/documents in his/her possession when requiring a person to provide the necessary document or information.</p> <p>SFC and the Administration explained that:</p> <p>(a) the Bill provided three tiers of safeguard against abuse as laid down in clause 9(3)(b) and 9(7);</p> <p>(b) SFC might, for example, in the course of conducting a routine inspection on a fund manager, need to get a direct copy of the custodian statements from the relevant custodian if it had any reason to doubt whether custodian statements obtained from the fund manager had been falsified; and</p> <p>(c) it would be difficult to specify exhaustively in the law all types of persons that might be connected with FI for the purpose of obtaining documents or information for an inspection.</p> <p>The Chairman requested the Administration to explain the rationale for the scope of clause 9(3)(b) to cover, inter alia, persons not connected with the financial institution. The Administration was requested to consider narrowing down the scope of the persons covered in that provision as appropriate.</p>	<p>The Administration to take action as per paragraph 3 of the minutes.</p>

Time Marker	Speaker	Subject(s)	Action Required
015410 – 015506	Chairman	Date of next meeting The Chairman said that the next meeting would be held on 13 January 2011	

Council Business Division 1
Legislative Council Secretariat
28 February 2011