

立法會
Legislative Council

LC Paper No. CB(1)2910/10-11
(These minutes have been seen
by the Administration)

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

**Ninth meeting on
Monday, 14 March 2011, at 8:30 am
in Conference Room B of the Legislative Council Building**

- Members present** : Hon CHAN Kam-lam, SBS, JP (Chairman)
Hon James TO Kun-sun (Deputy Chairman)
Dr Hon David LI Kwok-po, GBM, GBS, JP
Dr Hon Margaret NG
Hon Audrey EU Yuet-mee, SC, JP
Hon WONG Ting-kwong, BBS, JP
Hon CHIM Pui-chung
Hon Starry LEE Wai-king, JP
Hon Paul CHAN Mo-po, MH, JP
- Members absent** : Hon Albert HO Chun-yan
Hon Mrs Sophie LEUNG LAU Yau-fun, GBS, JP
Dr Hon Philip WONG Yu-hong, GBS
- Public officers
Attending** : Mr Patrick HO, JP
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 David LEUNG
Senior Assistant Director of
Public Prosecutions
Department of Justice

Mr Alan CHONG
Senior Government Counsel
Department of Justice

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

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

Mr CHAN Chi-keung
Head of the Special Project Planning Team
Trade Controls Branch
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 Hugo CHIU
Council Secretary (1)5

I Confirmation of minutes

(LC Paper No. CB(1)1441/10-11 — Minutes of meeting on 7
January 2011

The minutes of the meeting held on 7 January 2011 were confirmed.

II Meeting with the Administration

Follow-up to issues raised at previous meetings

(LC Paper No. CB(1)1124/10-11(03) — List of follow-up actions arising from the meeting on 13 January 2011 prepared by the Legislative Council Secretariat

LC Paper No. CB(1)1554/10-11(01) — Administration's paper on "Further Information on the Inspection and Investigation Powers of the Relevant Authorities"

LC Paper No. CB(1)1244/10-11 — Legislative provisions related to the execution of search warrants and claim of legal privilege prepared by the Legal Service Division

LC Paper No. CB(1)1554/10-11(02) — List of follow-up actions arising from the meeting on 24 January 2011 prepared by the Legislative Council Secretariat

LC Paper No. CB(1)1554/10-11(03) — List of follow-up actions arising from the meeting on 9 February 2011 prepared by the Legislative Council Secretariat

LC Paper No. CB(1)1554/10-11(04) — List of follow-up actions arising from the meeting on 17 February 2011 prepared by the Legislative Council Secretariat)

Clause-by-clause examination of the Bill (starting with clause 25)

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

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 taken by the Administration

3. The Administration was requested to provide the following information or response:
- (a) Prosecution Division of the Department of Justice to provide –
 - (i) examples where a person committing an offence under clauses 5(6) or (8) may have an intent to defraud persons other than the financial institution or a relevant authority and reconsider whether the formulation of the offences under clauses 5(6) and (8) may be revised to specify the person to be defrauded, for example, "with intent to defraud the financial institution or a relevant authority"; and
 - (ii) reasons with reference to case law, why an employee would be liable for the offence under clause 10(8) by "allowing" the financial institution to do the act specified under that sub-clause.
 - (b) In respect of clause 29
 - (i) advise whether the Bill allows the "mobile operation" of a money service business with no fixed address; and

- (ii) consider if the level of penalty under clause 29(2) should be increased having regard to the severity of the offence of unlicensed operation of money service business.
- (c) In respect of clause 30
 - (i) consider adding a provision under clause 30(4)(b) to include offences in overseas jurisdictions mirroring those provided under clause 30(4)(a) which are not covered by clause 30(4)(b)(i) and (ii); and
 - (ii) consider whether the concept of "ultimate owner" should also apply to applicants who are individuals or partnership.
- (d) To consider stipulating in the Bill the sanction against failure to return a licence pursuant to the requirement provided under clause 34(5)(c).
- (e) With reference to other similar licensing regimes, to explain why it is necessary to stipulate the licensing arrangements in such depth and detail in Part 5 of the Bill.
- (f) In respect of clause 41(a), to explain how the Commissioner for Customs and Excise ("CCE") would deal with cases –
 - (i) where a licensee who is an individual died, including who, if any, would be required to notify the CCE of the death of the licensee within any specified period; and
 - (ii) where the licensee cannot be contacted by CCE or is suffering from mental incapacity such that he/she can no longer run the business.
- (g) To explain the rationale for clause 42(5) which provides for the registration of an order to pay a pecuniary penalty made under clause 42(1) or (4) in the Court of First Instance.
- (h) To clarify whether a person would be required to make a statutory declaration under clause 12(5) immediately when being required and if so, why this is necessary as this may put undue pressure on the person being requested to make the statutory declaration.

III Any other business

4. There being no other business, the meeting ended at 10:39 am.

Council Business Division 1
Legislative Council Secretariat
16 August 2011

**Proceedings of the
Bills Committee on Anti-Money Laundering and
Counter-Terrorist Financing (Financial Institutions) Bill
Ninth meeting on Monday, 14 March 2011, at 8:30 am
in Conference Room B of the Legislative Council Building**

Time Marker	Speaker	Subject(s)	Action Required
000524 – 000705	Chairman	Introductory remarks and confirmation of minutes of the meeting held on 7 January 2011.	
000706 – 001606	Administration	Briefing by the Administration on the paper "Further Information on the Inspection and Investigation Powers of the Relevant Authorities" (LC Paper No. CB(1)1554/10-11(01)).	
001607 – 001758	Chairman Administration	The Chairman mentioned that pursuant to members' request made at the last meeting, a representative from the Department of Justice responsible for prosecution was present to answer members' questions arising from the papers LC Paper No. CB(1)1241/10-11(01) and (02).	
001759 – 002508	Mr James TO Administration Chairman	<p>Mr TO recapitulated his concern raised at the last meeting on whether revising the formulation of the offences under clauses 5(6) and (8) to specify the person to be defrauded, for example, "with intent to defraud the financial institution or a relevant authority" would create any problem/loophole and requested the Administration to provide relevant examples if such problem/loophole would arise.</p> <p>The Administration responded that the element of "with intent to defraud" was included in clauses 5(6) and 5(8) and it was uncommon in other legislations to specify the person(s) to be defrauded in the criminal offence provisions with a mental element of "with intent to defraud". The Administration also pointed out that narrowing the scope of the criminal offence provisions would make prosecution more difficult, although it could not provide in the meeting any concrete scenarios that could not be covered by the Bill if the person to be defrauded was to be specified.</p>	

Time Marker	Speaker	Subject(s)	Action Required
		<p>Mr TO expressed disappointment and requested the Administration to further study the issue. He remarked that given that general criminal offence provisions on frauds already existed in other relevant legislation, the criminal offence provisions in the Bill should be specific to breaches of the statutory obligations under the Bill. He requested the Administration to provide examples where a person committing an offence under clauses 5(6) or (8) might have an intent to defraud persons other than the financial institution concerned or a relevant authority, and reconsider whether the formulation of the offences under clauses 5(6) and (8) could be revised to specify the person to be defrauded, for example, "with intent to defraud the financial institution or a relevant authority".</p>	<p>The Administration to take action as per paragraph 3 of the minutes.</p>
<p>002509 – 004220</p>	<p>Dr Margaret NG Administration Chairman Mr James TO</p>	<p>In relation to clause 10(8), Dr NG asked the Administration to clarify with examples what would constitute an act of an employee that "allows ... that is false or misleading ..." as described in the clause.</p> <p>The Administration provided an example as follows: a senior ranking employee, A, found that the documents prepared by his subordinate, B, would contravene the Ordinance. With such knowledge, A still allowed B to continue to provide such documents to the relevant authority for inspection/ investigation purpose.</p> <p>Dr NG pointed out that clause 10(8) would apply to an employee regardless of whether he was a senior ranking staff or not, and sought clarification on (i) the act of "allow"; and (ii) what evidence would be required to establish that an employee committed an offence provided in clause 10(8).</p> <p>The Chairman enquired about the effect of deleting the word "allow" in clause 10(8). Dr NG clarified her concern by pointing out that in other legislations, a person carrying out the act of "allow" usually had the authority to conduct such act. She was concerned about how an ordinary employee could conduct the act of "allow" because he might not have such authority and thus requested the Administration to clarify such issue. Dr NG remarked that the</p>	

Time Marker	Speaker	Subject(s)	Action Required
		<p>Administration should not just devise measures that would facilitate itself to discharge its authority and should instead focus on explaining the legislation clearly to members of the public so that they know what acts would constitute a violation of the Ordinance.</p> <p>Mr TO said that the clause should apply only to a person with a certain degree of authority. Otherwise, an ordinary employee without actual authority who had remained silent in an event involving money laundering or terrorist financing would be regarded as having the intent to defraud. He asked whether there was relevant case law and requested the Administration to study the issue.</p>	<p>The Administration to take action as per paragraph 3 of the minutes.</p>
004221 – 004407	Chairman Administration	<p><u>Clause-by-clause examination of the Bill</u></p> <p>Part 5</p> <p>Regulation of Operation of Money Service</p> <p><u>Clause 25 – Persons to whom this Part does not apply</u></p> <p><u>Clause 26 – Delegation of functions</u></p> <p>Members raised no question on clauses 25 to 26.</p>	
004408 – 005118	Administration Mr James TO Mr WONG Ting-kwong Dr David LI Chairman	<p><u>Clause 27 – Commissioner to maintain register of licensees</u></p> <p>In reply to Mr TO's enquiry regarding clause 27(1)(b), the Administration confirmed that the provision of a residential address was allowed. Mr TO remarked that some money service operators (MSOs) might conduct their business in a mobile manner and suggested that the Administration should cater for such mode of business. The Administration replied that it would handle the issue on a case by case basis.</p> <p>Mr WONG opined that it might not be practical to require members of the public to inspect the register at the office of the Commissioner during normal office hours. The Administration replied that the Bill only sought to specify the minimum requirement on the Commissioner to provide a means for public inspection of the</p>	

Time Marker	Speaker	Subject(s)	Action Required
		<p>register. In practice, the register would be accessible via the internet.</p> <p>Dr LI queried why it was not specified in the Bill that online checking of the register should be provided. The Administration responded that relevant provisions in other legislation only specify where the register was physically located. The Chairman considered the present drafting acceptable, as it allowed flexibility for the Administration to provide other means for the public to inspect the register.</p>	
005119 – 005411	Administration Chairman Ms Starry LEE	<p><u>Clause 28 – Certified copy of register or entry in register admissible as evidence</u></p> <p>The Chairman enquired whether there would be a time lag between the grant of a licence and the inclusion of relevant information in the register. The Administration advised that the register would be updated immediately upon the grant of a licence.</p> <p>Ms LEE enquired whether a licensee was required to display the licence certificate in the business premises. The Administration responded that there was no such statutory requirement in the Bill.</p>	
005412 – 010543	Administration Mr James TO Chairman	<p><u>Clause 29 – Restriction on operating money service</u></p> <p>Mr TO questioned whether the requirements stipulated in clause 29(1)(b) were obsolete because some MSOs might conduct business through the Internet instead of in fixed premises. The Administration responded that to allow such mode of operation might affect the authority's detection/enforcement actions including inspections and covert operations.</p> <p>Mr TO opined that the Administration should create a favourable business environment. As such, other alternatives which could fulfill the Administration's aim of record checking, such as requiring the MSOs to provide information to the Commissioner within a certain time limit, might be considered. He requested the Administration to examine whether clause 29(1)(b) could be rephrased to allow the mobile</p>	The Administration to take action as per paragraph 3 of the minutes.

Time Marker	Speaker	Subject(s)	Action Required
		<p>operation of a money service business with no fixed address.</p> <p>In relation to clause 29(2), Mr TO remarked that an imprisonment term of up to six months might be too short for the offence of unlicensed operation of money service business. He suggested the Administration consider increasing the level of penalty like imprisonment of up to two years.</p>	<p>The Administration to take action as per paragraph 3 of the minutes.</p>
010544 – 011616	Administration Mr James TO Chairman	<p><u>Clause 30 – Grant of licence</u></p> <p>In reply to Mr TO, the Administration advised that membership of Triad Societies was covered by the offences specified in Schedules 1 and 2 of the Organized and Serious Crimes Ordinance (Cap 455).</p> <p>Mr TO suggested that a provision should be added under clause 30(4)(b) to include offences in overseas jurisdictions mirroring those provided under clause 30(4)(a) which were not covered by clause 30(4)(b)(i) and (ii).</p> <p>Mr TO suggested that the concept of ultimate owner might also apply to clauses 30(3)(a)(i) and 30(3)(a)(ii).</p>	<p>The Administration to take action as per paragraph 3 of the minutes.</p> <p>The Administration to take action as per paragraph 3 of the minutes.</p>
011617 – 012046	Administration Chairman	<p><u>Clause 31 – Renewal of licence</u></p> <p><u>Clause 32 – Amendment of conditions in licence</u></p> <p><u>Clause 33 – Form of licence</u></p> <p>Members raised no question on clauses 31 to 33.</p>	
012047 – 012519	Administration Chairman Mr James TO	<p><u>Clause 34 – Revocation or suspension of license</u></p> <p>In relation to clause 34(5)(c), the Chairman enquired whether a revoked licence had to be surrendered to the Commissioner. The Administration answered in the affirmative. The Chairman remarked that a sanction might be necessary and suggested that the Administration consider either providing in the Bill the sanction against failure to return a licence pursuant to the requirement provided under clause 34(5)(c) or</p>	<p>The Administration to take action as per paragraph 3 of the minutes.</p>

Time Marker	Speaker	Subject(s)	Action Required
		<p>deleting clause 34(5)(c). Mr TO suggested that a provision on a fine at level 1 or level 2 might be added.</p>	
<p>012520 – 013033</p>	<p>Dr Margaret NG Administration Chairman</p>	<p>Dr NG remarked that the provisions of the Bill were drafted in a very detailed manner, and queried whether such detailed provisions were required under the relevant international standard. Dr NG enquired whether the trades had expressed views during the public consultation that the Bill was too complex.</p> <p>The Administration remarked that the proposed licensing arrangements were set out in the relevant public consultation documents, and the Administration did not receive feedbacks that the proposed licensing system or the Bill was too complex. The Administration added that a number of other pieces of legislation relating to licensing also contained provisions of such depth and detail.</p> <p>Dr NG requested the Administration to explain, with reference to other similar licensing regimes, why it was necessary to stipulate the licensing arrangements in such depth and detail in Part 5 of the Bill. She considered that the Administration should consult the trades to ensure that they found such detailed provisions acceptable.</p> <p>Noting that the Administration could not provide substantive answers to a number of questions raised by members at the meeting and had to further study the issues in order to provide relevant information, Dr NG urged the Administration to be better prepared to explain the provisions in the Bill in future meetings.</p>	<p>The Administration to take action as per paragraph 3 of the minutes.</p>
<p>013034 – 013655</p>	<p>Administration Chairman</p>	<p><u>Clause 35 – Commissioner's approval required in respect of persons proposing to become licensee's directors</u></p> <p><u>Clause 36 – Commissioner's approval required in respect of persons proposing to become licensee's ultimate owners</u></p> <p><u>Clause 37 – Commissioner's approval required in respect of persons proposing to become licensee's partners</u></p>	

Time Marker	Speaker	Subject(s)	Action Required
		<p><u>Clause 38 – Adding new business premises</u></p> <p>Members raised no question on clauses 35 to 38.</p>	
013656 – 013951	Administration Chairman	<p><u>Clause 39 – Licensee's duty to notify Commissioner of changes in particulars</u></p> <p>On clause 39(1), the Chairman enquired whether a one-month period for the notification of changes in particulars would be too long. The Administration replied that reference had been made to relevant provisions in the Organized and Serious Crimes Ordinance (Cap. 455) and the proposed period in the Bill was considered appropriate.</p> <p>The Chairman enquired whether a time limit was set for notification of change in registered address. The Administration responded that as stipulated in clause 38, a licensee had to seek the approval of the Commissioner for the change in registered address.</p>	
013952 – 014114	Administration Chairman	<p><u>Clause 40 – Licensee's duty to notify Commissioner of cessation of business</u></p> <p>Members raised no question on clause 40.</p>	
014115 – 014721	Administration Mr WONG Ting-kwong Chairman	<p><u>Clause 41 – Licence ceases to be valid on death etc. of licensee</u></p> <p>Mr WONG enquired who would be responsible for notifying the Commissioner if the licensee who was an individual died. The Administration responded that the licence of a deceased licensee would become invalid and the operation of the licensee should be terminated and there was no obligation for reporting the death of the licensee to the Commissioner.</p> <p>Mr WONG remarked that if a licensee who was an individual was dead, the staff of the licensee's company might not be able to report to the Commissioner in time. This might result in an illegal operation because the licence concerned had become invalid. The Administration responded that the Commissioner would exercise discretion in handling such situation. Mr WONG remarked that the Commissioner should not possess too much discretionary power</p>	

Time Marker	Speaker	Subject(s)	Action Required
		<p>and suggested that the Bill should specify who would be obliged to notify the Commissioner of the death of the licensee within a specified period.</p> <p>The Chairman remarked that the Customs and Excise Department should enforce clause 41(a) in a reasonable manner, and requested the Administration to study the issue taking into account members' views.</p>	<p>The Administration to take action as per paragraph 3 of the minutes.</p>
<p>014722 – 020103</p>	<p>Administration Mr WONG Ting-kwong Dr Margaret NG</p>	<p><u>Clause 42 – Commissioner may take disciplinary actions</u></p> <p>On clause 42(2)(c), Mr WONG enquired who would be responsible for determining the pecuniary penalty. The Administration responded that the Commissioner was the relevant authority.</p> <p>Dr NG expressed concern about the appropriateness of empowering the Commissioner to determine the pecuniary penalty as the Commissioner was an enforcement authority under the Bill. The Administration responded that clause 42(2) mirrored clause 21(2) regarding the powers of a relevant authority to impose disciplinary sanctions. Dr NG remarked the Administration should make reference to the Court of Final Appeal's case on the Insider Dealing Tribunal in <i>Koon Wing Yee v. Insider Dealing Tribunal and Another</i>. The Administration responded that the ruling of that case have been duly considered when considering the provisions on disciplinary sanctions.</p> <p>Noting that clause 42(5) provided for the registration by the Commissioner of an order to pay a pecuniary penalty made under clause 42(1) or (4) in the Court of First Instance, Dr NG asked whether this was a new measure and whether this would make the disciplinary power of the Commissioner unlawful. Upon learning from the Administration that such measure had also been provided for in other parts of the Bill, Dr NG requested the Administration to explain (a) whether similar measure was present in other legislation and (b) the rationale and principles for adopting such measure.</p>	<p>The Administration to take action as per paragraph 3 of the minutes.</p>

Time Marker	Speaker	Subject(s)	Action Required
		<p>Dr NG requested the Administration to provide policy explanations for clauses 47(1)(b), 48(3), and 52 in the next meeting.</p>	
<p>020104 – 020557</p>	<p>Administration Mr WONG Ting-kwong Chairman</p>	<p><u>Clause 41 – Licence ceases to be valid on death etc. of licensee</u></p> <p>Mr WONG enquired if any person, such as the family of the licensee, has an obligation to inform the Commissioner of the death of the licensee. The Administration responded that there is no such requirement under the Bill.</p> <p>The Chairman enquired how the Administration would handle the situation where (a) a licensee was suffering from mental incapacity such that he/she could no longer run the business; and (b) a licensee could not be contacted. The Administration remarked that in such circumstances, the licensee may not be considered as a fit and proper person for running the MSO business.</p> <p>The Chairman considered that a mechanism should be in place to require a licensee to report on a regular basis whether he/she was fit and proper to run the business. The Administration advised that under clause 39, a licensee was required to notify the Commissioner of any changes in the particulars that were provided to the Commissioner at the time of licence application.</p> <p>The Chairman expressed doubt on the applicability of clause 39 to the situations that he and Mr WONG had mentioned. Mr WONG suggested that a mechanism for notifying the Commissioner when a licensee was no longer fit and proper to run the business should be provided in the Bill. The Administration agreed to study the issue.</p>	<p>The Administration to take action as per paragraph 3 of the minutes.</p>
<p>020558 – 020825</p>	<p>Administration Dr Margaret NG</p>	<p><u>Clause 12 – Powers of investigators to require production of records or documents, etc.</u></p> <p>Dr NG remarked that clause 12(5) and (6) required the person concerned to make statutory declaration in the presence of the investigator and this would put undue pressure on and was unfair to the person concerned. She requested</p>	<p>The Administration to take action as per paragraph 3 of the minutes.</p>

Time Marker	Speaker	Subject(s)	Action Required
		the Administration to clarify whether a person would be required to make a statutory declaration immediately when being required and if so, why this was necessary.	
020826 – 020849	Chairman	<u>Date of next meeting</u> The Chairman said that the next four meetings would be held on 17 March 2011, 31 March 2011, 14 April 2011 and 28 April 2011.	

Council Business Division 1
Legislative Council Secretariat
16 May 2011