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

Rationale for the Arrangement under Clause 9(8) of
the Anti-Money Laundering and Counter-Terrorist Financing
(Financial Institutions) Bill

This note explains the rationale for the arrangement specified under clause 9(8) of the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Bill ("the Bill").

2. Clause 9(8) was drafted based on section 180(9) of the Securities and Futures Ordinance (Cap 571). Similar provisions can be found in other Ordinances such as section 152F(2) of the Companies Ordinance (Cap 32) and section 28(5) of the Financial Reporting Council Ordinance (Cap 588).

3. Clause 9(8) is a saving provision which seeks to preserve the confidentiality duty of an authorized institution (AI) unless the relevant authority certifies that the disclosure is necessary for the purpose of Clause 9. The Department of Justice (DoJ) advised that there is case law establishing that the banker's duty of confidentiality is an implied term in every contract when a bank account is opened and there is no need for a prospective customer to ask the bank to keep his affairs confidential. To preserve the duty of confidentiality AIs owe to their customers, clause 9(8) is to provide safeguards such that a relevant authority needs to certify that the disclosure is necessary before an authorized person (other than an authorized person authorized by the Monetary Authority ("MA")) can exercise the powers provided under clause 9 in respect of the confidential information of AIs' customers. DoJ advised that the duty of confidentiality is not implied in cases other than banker-customer relationship and as such they advised that there is no need to extend clause 9(8), which is a saving provision, to other financial institutions covered under the Bill.

4. Under the Bill, MA is the relevant authority for ascertaining the compliance of AIs. To seek disclosure of the relevant information, documents or records from AIs to ascertain their compliance is part and parcel of MA's responsibility in discharge of that duty. On the other hand, a relevant authority other than MA seeking information from AIs under clause 9 would be seeking the information for the purpose of ascertaining the compliance of the statutory obligations under the Bill of another financial institution (which is not the AI), which is more indirect. As such, it is appropriate to require the relevant authority to certify in writing

that the disclosure sought from the AI is necessary. The saving provision of clause 9(8) strikes a balance between preserving the banker's duty of confidentiality towards its customers and the need for the relevant authorities to obtain necessary information or record or document to fulfil its duty under the clause.

Financial Services and the Treasury Bureau
2 February 2011