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

Matters Related to the Criminal Offence Provisions under Clause 5

This note seeks to-

(a) explain the circumstances intended to be covered in the provisions for criminal offence with the element of "with intent to defraud" under clause 5 of the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Bill ("the Bill");

(b) explain the purpose of clause 5(9) in respect of the liability of partnerships to pay criminal fines; and

(c) set out the Administration's response to the suggestion of a Member that consideration should be given to increasing the maximum level of fine for the offences under clause 5(6) and (8).

Circumstances covered by "with intent to defraud"

2. The Department of Justice ("DoJ") advised that "intent to defraud" means an intention to practise a fraud on another person, or an intention to act to the prejudice of another person's right. There is no specification of any particular person(s) to be defrauded under such criminal provision and there is no requirement that economic loss should be caused. A general intent to defraud is sufficient to constitute the mental element of the offence. An example in the context of the Bill is where a frontline staff of a financial institution intentionally omits the verification of a customer's identity to conceal the fact known to him/her that the customer was opening the account under a false identity. This can be contrasted with the case where a frontline staff omits the verification of a customer's identity because he/she is lazy which may constitute an offence for the "knowing" contravention of specified provisions. In prosecuting an offence under clauses 5(6) and (8), the prosecution needs to prove that the defendant has an "intent to defraud" and has performed the relevant criminal act (i.e. contravening specified provisions or causing or permitting a financial institution to contravene specified provisions).

Criminal liability for partnerships

3. DoJ advised that under the common law, an unincorporated association such as a partnership cannot be charged in criminal proceedings unless there is an express provision in the statute. As regards the criminal liability of the partnership and/or partners to pay criminal fines, the DoJ advised that while a case decided in the English Court of Appeal[1] established that "where a partnership alone is indicted, any fine imposed can only be levied against the assets of the partnership" , there is no relevant case law in Hong Kong.

4. Clause 5(9) seeks to make it clear that apart from individual partners, a partnership may also be prosecuted for an offence under the Bill for failing to observe the obligations set out under the specified provisions and that any fine imposed on the partnership should be paid out of the funds of the partnership. Under such circumstances, individual partners would not be liable for the criminal fine even in the event that the funds of the partnership are insufficient to cover the criminal fine.

5. In light of the above analysis and since the principle that any fine imposed on the partnership should be paid out of the partnership funds is not firmly established in Hong Kong case law, we consider that clause 5(9) of the Bill as currently drafted is necessary.

Maximum Level of Fine for Offences under Clause 5(6) and (8)

6. At the Bills Committee meeting on 13 January 2011, a Member suggested that the Administration should consider increasing the maximum level of fine for the offences under clause 5(6) and (8), given that the offences involve a mental element of "with intent to defraud". DoJ has taken note that the offences under clause 5(6) and (8) are more serious than the offences under clause 5(5) and (7) and advised that while the maximum level of fine upon indictment for the offences under clause 5(5) and (7) are the same with that under clause 5(6) and (8) (i.e. $1 million), the maximum imprisonment for clauses 5(6) and 5(8) is 7 years which is substantially higher than the maximum imprisonment of 2 years under clause 5(5) and (7). DoJ considered that the seriousness of the offence under clause 5(6) and (8) can be reflected in the maximum length of the imprisonment term that can be imposed by the court upon conviction, standing alone or in combination with fine, having regard to

[1] R v W. Stevenson & Sons (A Partnership) and Others [2008] 2 Cr. App. R. 14

the circumstances of the individual case. Having reviewed the proposed penalty level, DoJ considered that the proposed penalty level for clause 5(6) and (8) is proportionate and appropriate and need not be revised. In fact, the maximum penalty for these offences is the same as the maximum penalty level for a similar offence under section 151(4) and (6) of the Securities and Futures Ordinance (Cap 571).

Financial Services and the Treasury Bureau
8 February 2011