

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

**Further Information on the Inspection and Investigation Powers of
the Relevant Authorities**

This note provides further information on the inspection and investigation powers of the relevant authorities provided under the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Bill (“the Bill”).

International Requirements on Relevant Authorities’ Powers

2. The Financial Action Task Force (“FATF”), the international standard-setter for anti-money laundering (AML) and counter financing of terrorism (CFT), requires that regulators should have adequate powers to monitor and ensure compliance by financial institutions with the relevant AML/CFT requirements set out by FATF. Specifically, FATF requires the regulators to-

- (a) have the authority to conduct inspections of financial institutions, including onsite inspections, to ensure compliance. Such inspection should include the review of policies, procedures, books and records, and should extend to sample testing;
- (b) have the power to compel production of or to obtain access to all records, documents or information relevant to monitoring compliance. This includes all documents or information related to accounts or other business relationships, or transactions, including any analysis the financial institution has made to detect unusual or suspicious transactions;

FATF further requires that the regulator’s power to compel production of or to obtain access to records, documents or information for supervisory purposes should not be predicated on the need to require a court order.

Records and Documents Sought for Inspections and Investigations

3. The major difference between the records and documents which the relevant authorities would need access to in a routine inspection vis-a-vis an investigation does not lie in the types of records

and documents but in the depth and specificity of the information sought. Routine inspections are best seen as compliance audits for checking whether the financial institutions are meeting the requirements under the Bill. When conducting such inspections, the regulators need to review the relevant policies and procedures of the financial institution, and conduct sample checking on the customer due diligence process and record-keeping procedures and transaction monitoring to ascertain whether the financial institution has complied with the requirements under this Bill. In carrying out sample checking, the relevant authority may need to review the account opening documentation of customers, and account records recording transactions conducted etc.

4. For an investigation, the information that needs to be sought by the relevant authorities is more focused and in-depth, with the purpose of obtaining evidence for initiating disciplinary or criminal actions where appropriate. For example, a financial institution may be required to make available its internal policy that applied at a particular time in order for the relevant authority to ascertain whether an employee has contravened the financial institution's internal policy at that particular time when a statutory requirement has been breached, which was necessary for the relevant regulator to form a view on the respective liability (if any) of the employee and the financial institution. By contrast, during a routine inspection, the relevant authority will usually request for a copy of the prevailing internal policy only for the purpose of assessing whether the financial institution has put in place an internal policy which is in line with the statutory requirements.

5. In response to Members' suggestion, we have considered whether it is feasible to limit the types of records and documents that can be obtained under clause 9(1)(b) to say, documents or records required to be kept under the Bill. As stated in paragraph 3 above, regulators need to review the relevant policies and procedures of the financial institution, which does not fall under the ambit of clause 20 of Schedule 2 on the records or documents required to be kept. In addition, some records and documents are not severable and it may be the case that only part of the documents would fall under the scope of the documents that are required to be kept. This may attract challenges to the regulators' powers to obtain the documents and impede the effectiveness of the enforcement regime. As such, we do not consider it feasible to limit the types of record and documents covered under clause 9(1)(b). It should be noted that under clause 9 of the Bill, the exercise of the relevant authorities' powers to obtain records and documents are subject to safeguards, viz. the purpose of obtaining the records and documents must be to ascertain a financial institution's compliance with specified requirements (clause 9(1)), and

the record and document sought must relate to the business carried on or any transaction carried out by the financial institution (clause 9(1)(b)).

Handling of Copies of Records and Documents Obtained in an Inspection or an Investigation

6. All information obtained by the relevant authorities during inspections or investigations, including the copies of records and documents obtained, are to be treated in confidence in accordance with the secrecy provisions provided under the Banking Ordinance (Cap 155) (for the Monetary Authority), the Securities and Futures Ordinance (“SFO”) (Cap 571) (for the Securities and Futures Commission), the Insurance Companies Ordinance (Cap 41) (for the Insurance Authority) and clause 48 of the Bill (for the Commissioner of Customs and Excise). All the relevant authorities have internal procedure governing the treatment of copies of records and documents obtained, which requires these copies be destroyed or, where the copies are kept in the files, the records should be kept in safe custody and can only be accessed by authorised persons.

Rationale for the Requirement to Make Statutory Declarations

7. Clauses 9(9) and (10) empowers an authorized person to require a person to verify by statutory declaration –

- (a) the answer given; or
- (b) the fact that that person does not give an answer in accordance with a requirement imposed under clauses 9(3) or (5) for the reason that the information concerned is not within the person’s knowledge.

8. As explained at the Bills Committee meeting on 13 January 2011, there are occasions where a person may make conflicting statements at different times when being asked on the same subject or issue. The power to require the person to make statutory declarations would be necessary as the person would run the risk of committing perjury for making a false statutory declaration. In addition, if a witness proffers information in evidence during cross examination in a legal proceeding which conflicts with an earlier statutory declaration, it will impact adversely on the credibility of the witness.

Conditions for the Appointment of an Investigator

9. Clause 11(1) specifies the circumstances where a relevant authority may appoint an investigator to investigate into a suspected breach of a specified provision under the Bill. The investigator appointed under that clause may exercise powers provided under clause 12 of the Bill. The investigation power enables the relevant authority to investigate further into a possible breach identified during a routine inspection or otherwise come to its notice. Given that an investigation is only initiated when there is a prima facie case for a breach of a specified provision and that the powers provided under clause 12 will be available to an investigator appointed under clause 11, we consider it appropriate that the relevant authority can only appoint an investigator when the circumstances set out under clause 11(1) have been met. In fact, other legislations also provides for a similar threshold for the appointment of an investigator. For example, s23(3) of the Financial Reporting Council Ordinance (Cap 588) provides that the Council may direct the Investigation Board to exercise the investigation powers under that Ordinance to investigate an irregularity when there is a reasonable cause to believe that there is or may be a relevant irregularity.

**Financial Services and the Treasury Bureau
10 March 2011**