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

Further Information on the Criminal Offences Provisions

This note provides further information on matters relating to the criminal offences provided under the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Bill ("the Bill").

Possible impact on Hong Kong's compliance with the international standards if the criminal offences are removed

2. A Member requested the Administration to advise on the possible impact on Hong Kong's ability to seek the agreement of the Financial Action Task Force ("FATF") to remove Hong Kong from its regular follow-up process, if the criminal offences in relation to the statutory customer due diligence and record-keeping requirements are removed.

3. FATF requires member jurisdictions to ensure that "effective, proportionate and dissuasive" sanctions are available to deal with non-compliance of the anti-money laundering ("AML")/ counter financing of terrorism ("CFT") requirements. It would be difficult for Hong Kong to justify that the sanctions available are "effective, proportionate and dissuasive" if no criminal offences are provided at all, especially having regard to the examples of other jurisdictions, as the United States, the United Kingdom, Australia and Singapore etc. have provided for criminal sanctions in their AML/CFT regime.

Maximum level of fine for the offences provided for under clauses 5(6) and (8)

4. A Member suggested the Administration to consider setting the maximum fine under clause 5(6) and (8) to be a certain proportion to the possible profits gained by the financial institution or person convicted of an offence.

5. The maximum penalty for the offences under clause 5(6) and (8), which is a fine of $1,000,000 and imprisonment for 7 years, is the same as the maximum penalty for similar offences under section 151(4) and (6) of the Securities and Futures Ordinance (Cap 571) ("SFO"). We consider

the proposed penalty level for clauses 5(6) and (8) in light of the relativity of the penalty for offences of similar nature appropriate and see no compelling policy ground for modification. The purpose of imposing criminal sanction is to punish the person who contravened the law and to deter future non-compliances. Apart from pecuniary penalty, the convicted persons are also liable for imprisonment. We believe that the composite penalty of a criminal fine and imprisonment are effective in dealing with the concerned contravention.

Handling of cases where a limited company convicted is unable to pay the criminal fine

6. The handling of cases where a limited company convicted for a breach of the statutory requirements under the Bill but is unable to pay the criminal fine is governed by the relevant provisions under the Magistrates Ordinance (Cap 227) ("MO"), the District Court Ordinance (Cap 336) ("DCO") and the High Court Ordinance (Cap 4)("HCO").

7. Under section 51 of MO, a magistrate may issue a warrant of distress for enforcing the payment of a fine. Section 21E of HCO and section 23 of DCO allow the Court of First Instance and District Court respectively to enforce a fine imposed in the same manner as a judgment for the payment of money. To enforce the payment of a fine as a judgment debt, the writ of fieri facias or other writ of execution may be issued under sections 21C and 21D of HCO and sections 68A and 68 of DCO. Under a warrant of distress or a writ of fieri facias, distrained property may be sold to pay the fine handed down.

Examples of the use of "causes or allows [an institution] to fail to comply" in other legislation

8. The provision of "causes or allows [an institution] to fail to comply" has also been used in section 184(3)(b) of SFO and section 31(3)(c) of the Financial Reporting Council Ordinance (Cap 588). Clause 13(7) and (8) of the Bill seeks to capture circumstances where the requirement to provide information or produce documents or records was imposed on the financial institution.

9. As illustrated in the example below, the financial institution's failure to comply with the requirements imposed by an investigator may be caused by an individual. For example, an investigator may require a financial institution to produce the account opening documentation of a customer for which the relevant authority suspected that the necessary

CDD measures have not been completed. If the employee who represents the financial institution in dealing with the relevant authority is the person who has not followed the financial institution's internal procedures to complete the necessary CDD measures, he may claim that the document required had been lost causing the failure to produce the documents. In such circumstance, the person would be guilty of an offence under clause 13(7). The act of the person in such case where the requirement to produce the documents was imposed on the financial institution would otherwise not be caught by clause 13 (1), (3), (5) or (6).

10. A Member raised a question at the meeting on 14 March 2011 on whether, for a person who knows that the material to be provided to the relevant authority by his colleague is false but he takes no step to stop the material from being provided to the relevant authority because he wanted to see his colleague committing wrong-doing, that person would be caught under clause 10(8) for "allowing" a financial institution to produce false record or document with an intent to defraud. The Member opined that criminal liability should not arise if it is not within the person's power to stop his colleague from performing certain act even if he is aware that the act could lead to a breach.

11. According to DoJ's advice, while a direct authority on the meaning of the word cannot be identified, the word "allow" has been interpreted in a court judgement as connoting "elements of awareness and capability of control". In the above-mentioned example, depending on the facts and circumstances of the case, if the person does not have any power to control the provision or otherwise of the information, he would not be caught by the offence under clause 10(8).

Specifying the person to be defrauded in the formulation of the offences under clauses 5(6) and (8)

12. We have considered Members' suggestion that the person(s) to be defrauded under the criminal provision should be specified in the legislation for certainty, and would agree to amend clause 5(6) to add "a relevant authority" after "with intent to defraud" and amend clause 5(8) to add "the financial institution or a relevant authority" after "with intent to defraud".

Financial Services and the Treasury Bureau
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