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

Outstanding Issues on the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Bill

This note provides further information on the remaining outstanding issues arising from previous meetings of the Bills Committee on Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Bill ("the Bill") as the Administration's response.

Prosecution Powers

2. The Administration was requested to explain why clause 78(1) only includes the offence of conspiracy to commit an offence under this Bill but not also other inchoate offences such as the offences of attempt or incitement to commit an offence under this Bill. We would like to point out that while clause 78(1) does not explicitly cover the inchoate offences, by virtue of section 101C of the Criminal Procedure Ordinance (Cap 221), the reference to "offence" in clause 78(1) of the Bill includes a reference to aiding, abetting, counseling or procuring that offence and an incitement to commit the offence. Moreover, since the offence of conspiracy to commit an offence is not covered by section 101C of Cap 221, it is necessary to provide an express reference in the Bill to the offence of conspiracy under clause 78(1).

3. A Member suggested the Administration to consider establishing a mechanism for appointment of officers eligible to exercise the power provided under clause 78(2). Clause 78 is modeled on section 388 of SFO which does not provide for such a mechanism. The operation of that provision under SFO does not give rise to any problem and we do not see ground for departing from the arrangement under SFO. In all circumstances, the relevant authority will ensure that the employee or staff responsible for bringing a prosecution in its name is fit to do so.

Procedures for Sealing of Documents

4. A Member suggested the Administration to consider if provisions on the procedures for sealing documents pending determination by the court on legal professional privilege should be incorporated under clause 17. The Assistant Legal Advisor to the Bills Committee has provided some examples of legislative provisions on the sealing of documents, including Part XII of the Interpretation and General Clauses Ordinance (Cap 1) (which concerns journalistic material) and Order 116 rule 7 & 8 (in relation to the Organized and Serious Crimes Ordinance (Cap 455)) and Order 117A rule 16 & 17 of the Rules of the High Court (Cap 4A) (in relation to the United Nations (Anti-Terrorism Measures) Ordinance (Cap 575)). Apart from the abovementioned provisions, we are not aware of any other legislation containing provisions on sealing of documents.

5. According to the regulators, persons subject to a search warrant occasionally claims legal professional privilege on certain documents. In the event that a person claims legal professional privilege over materials during the execution of a warrant, the authorized person will follow the common law in dealing with the material, and the procedure to be adopted that has been considered by the Court of Appeal[1]. The authorized person will exercise his power of seizure in the presence of the person asserting the claim of privilege and will place the disputed items in a container which is then sealed. The authorized person will inform the person asserting the claim of privilege that he must take steps to establish his claim within a specified period of time, failing which the sealed container will be opened and the seized items inspected. Given that there is established practice governing the handling of claims for privilege, we do not consider it necessary to include a specific provision in this regard under the Bill.

Rationale for Clause 77

6. Clause 77 is modeled on section 387 of the Securities and Futures Ordinance ("SFO") (Cap 571). It seeks to make it expressly clear that the standard proof for the regulatory/disciplinary proceedings referred to under clause 77 is a civil one. It gives certainty to the standard of proof

[1] Philip PH Wong, Kennedy YH Wong & Co and Philip (Nominees) Limited v The Commissioner of Independent Commission Against Corruption [2009] 5 HKLRD 379

and avoids unnecessary challenge or dispute on whether the proceedings for matters stated in clause 77(a) to (f) should be criminal in nature, particularly, in view of the possible severe consequences of the matters. As such, we consider that clause 77 should not be deleted.

7. A Member suggested that the standard of proof should be higher than the civil standard when the legal proceedings involved may substantially affect an individual's right. We have consulted the DoJ on this issue. DoJ quoted a Court of Appeal case[2] in which it was held that "it is not necessary to apply a criminal standard in disciplinary proceedings since the civil standard is adequate to meet the requirements of justice in any given case". As such, DoJ advised that there is no need to apply another standard of proof that is higher than the civil one but lower than the criminal one.

Criminal Liability for Individual Partners of a Partnership

8. In relation to clause 5(9), the Administration was requested to consider whether individual partners should also be liable for the criminal fine imposed on a partnership. In fact, should an individual partner of a partnership "who is concerned in the management of the financial institution" possess the requisite mental element in respect of the breach, he/she would be liable under clause 5(7) or (8) of the Bill. The liability is similar to a shareholder controller, director or officer (of a corporation) "who is concerned in the management of the financial institution". We consider it inappropriate to impose additional criminal liability on individual partners.

Exception from Legal Professional Privilege

9. A Member suggested the Administration to consider whether clause 80(2) can be amended to refer to the "name and correspondence address" of a client of a legal practitioner, instead of the "name and address". As explained in Bills Committee Paper CB(1)1236/10-11(03), the relevant authorities may need to obtain the name and address of a client of a lawyer for various purposes, including for example to identify the

[2] A Solicitor v The Law Society of Hong Kong (CACV107/2005(unreported) and confirmed by the Court of Final Appeal in FACV 24/2007 and reported in (2008) 11 HKCFAR 117.

whereabouts of the client in order to serve information production notices, interview notices and summonses. Restricting the scope of disclosure under clause 80(2) to "correspondence address" which is unprecedented in other legislation may hamper the effective discharge of the relevant authorities' duties. For example, the correspondence address of a client of a lawyer may be a post office box which the relevant authority cannot validly serve a summons. Given the possible adverse impact on the relevant authorities' effective enforcement of the Bill, we do not consider it appropriate to pursue the proposed amendment.

Politically Exposed Persons ("PEPs")

10. In relation to the definition of PEPs, a Member suggested that the special requirements under section 10 of Schedule 2 to the Bill should apply to PEPs outside the Hong Kong Special Administrative Region, instead of PEPs outside the People's Republic of China as currently proposed. As we have stated in a previous Bills Committee paper (CB(1)705/10-11(02)), the definition of PEPs is crafted having regard to the prevailing international standards which only covers foreign PEPs, which, in Hong Kong's context, would mean PEPs outside the People's Republic of China. In any event, where a customer or a beneficial owner is a person entrusted with prominent public functions but are not PEPs as defined under the Bill, financial institutions should assess whether the business relationship is considered as presenting high money laundering/ terrorist financing risks having regard to all factors and circumstances. If so, the financial institution must comply with the special customer due diligence requirements as provided under section 15 of Schedule 2. Therefore there are already requirements in the Bill for financial institutions to carry out special customer due diligence on customers who are PEPs and in other high risk situations, which can effectively mitigate the money laundering/ terrorist financing risks.

11. In respect of section 10(1)(b) and (2)(b) of Schedule 2, a Member requested the Administration to explain how financial institutions may establish the source of wealth and the source of funds of a PEP. The requirement to establish the source of wealth and the source of funds of a PEP is a current requirement for financial institutions in the guidelines issued by the financial regulators. Financial institutions do not have specific compliance problem with such requirements. Take the banking

sector as an example, banks obtain information on the source of wealth and source of funds from the PEP and verify it against publicly available information, such as published information on official salaries, declarations of assets made by public officials. Generally speaking, banks adopts a risk-based approach in deciding the extent of the enquiries they need to make, taking into account a number of factors including the account's purpose and proposed level of activity and the complexity of the ownership structure of any customer which has a PEP as a beneficial owner.

Record-keeping Obligations

12. A Member suggested the Administration to consider specifying under section 21 of Schedule 2 that a copy of the records required to be kept under the section must be kept in Hong Kong in order to facilitate inspection by the relevant authority. Under clauses 9(5) (for an inspection) and 12(2)(a) (for an investigation), the authorized persons or investigators are empowered to require production by financial institutions or other persons concerned of specified record or document within the time and at the place specified. Since financial institutions are obliged to meet the requirement for production of records or documents, with relevant sanctions for failure to comply with the obligations, we do not consider it necessary to mandate that the records required to be kept under section 21 to be kept in Hong Kong.

Other Issues

Clause 3 on the Bill's Application to Government

13. In response to a Member's suggestion, we will, in line with the drafting of similar provisions in other local legislations, revise clause 3 to expressly provide that the Ordinance applies to the Government (without specifying the particular service and government department to which the Ordinance shall apply), with corresponding changes to be made to clauses 21 and 25 to exclude the application of clauses 21(2)(c) and (4) and Part 5 to the Government.

Application of Clauses 9(8) and 12(7) to financial institutions regulated by a relevant authority other than the Hong Kong Monetary Authority

14. In response to a Member's suggestion, we will revise clauses 9(8) and 12(7) to expand the coverage to include financial institutions other than authorized institutions, such that the relevant requirements apply to all financial institutions instead of authorized institutions only.

Notice for resignation under Schedule 4 not to take effect retrospectively

15. In response to a Member's suggestion, we will amend sections 3(4)(a) and 4(4)(a) of Schedule 4 to ensure that a notice for resignation given by the Chairman and Members of the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Review Tribunal cannot take effect retrospectively.

Financial Services and the Treasury Bureau
1 June 2011