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Roles of Company Secretary and the Board on AML Compliance

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Content

- Overview of Anti-money laundering laws in HK and AML offences
- Overview of duties of directors and company secretary
- Anti-money laundering and Counter-Terrorist Financing Guideline of the HKICS
- Recent AML cases



What is money laundering?

- An act intended to have the effect of making any property
 - That is the **proceeds** obtained from the commission of an **indictable offence** under the laws of Hong Kong, or of any conduct which if it had occurred in Hong Kong would constitute an indictable offence **under the laws of Hong Kong**;
or
 - That in whole or in part, directly or indirectly, represent such proceeds,

not to appear to be or so represent such proceeds

Financial Action Task Force (“FATF”)

- Independent inter-governmental body
- Develops and promotes policies to protect global financial system against money laundering and terrorist financing
- FATF recommendations:-
 - Guidance on the countries’ anti-money laundering policies and co-operation to identify, assess and understand the money laundering and terrorist financing
 - Suggest various preventive measures to financial institutions and non-financial businesses and professions



Financial Action Task Force (“FATF”)

There is a high level Central Coordinating Committee on Anti-Money Laundering and Counter-Financing of Terrorism (CCC), chaired by the Financial Secretary, to give steer on the formulation of AML/CFT policies and the implementation of the AML/CFT regime.

The Financial Services and the Treasury Bureau (FSTB) provides secretariat support to the CCC and coordinates the implementation of AML/CFT policies and strategies in Hong Kong.

Financial Action Task Force (“FATF”)

FSTB maintains close working liaison with the relevant policy bureaux, departments and agencies on various aspects of the AML/CFT regime, including:

- Security Bureau
- Commerce and Economic Development Bureau
- Hong Kong Police Force
- Customs and Excise Department
- Department of Justice
- Hong Kong Monetary Authority
- Securities and Futures Commission
- Insurance Authority
- Independent Commission Against Corruption

Financial Action Task Force (“FATF”)

FATF mutual evaluation of Hong Kong in 2018

- FSTB public consultation – Enhancing Transparency of Beneficial Ownership of Hong Kong Companies
- FSTB consultation – enhancing Anti-money laundering regulation of designated non-financial businesses and professions
 - Proposes to extend customer due diligence (CDD) and relevant record-keeping requirements to DNFBPs – solicitors, accountants, real estate agents, trust and company service providers

Financial Action Task Force (“FATF”)

- Consultation conclusions – April 2017
- Gazettal of Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) (Amendment) Bill 2017 and Companies (Amendment) Bill 2017 – June 2017
- HKMA – aim to implement the amendments on 1 March 2018



Financial Action Task Force (“FATF”)

- AML/CTF(FI) - apply statutory CDD and record-keeping requirements to designated non-financial businesses and professions (solicitors, accountants, real estate agents, and trust or company service providers (“TCSPs”) when they engage in specified transactions.
- Introduce a licensing regime for TCSPs to require them to apply for a license from the Registrar of Companies and satisfy a “fit-and-proper” test before they can provide trust or company services as a business in Hong Kong.

Financial Action Task Force (“FATF”)

- removing a sunset clause in the AMLO so that financial institutions will have the flexibility to rely on solicitors, accountants, TCSP licensees as well as other financial institutions (including a foreign financial institution in the same parent group) as intermediaries to carry out CDD measures.

Financial Action Task Force (“FATF”)

- C(A) Bill - require companies incorporated in Hong Kong to maintain beneficial ownership information.
- propose requiring all companies incorporated under the Companies Ordinance in Hong Kong to keep a register of people with significant control (“PSC register”) over the company. Listed companies will be exempted from the requirement as they are subject to more stringent disclosure requirements under the Securities and Futures Ordinance (Cap. 571).

Financial Action Task Force (“FATF”)

- Restricting access to the PSC to competent authorities
- reserve a general rule-making power in the legislation for the Secretary for Financial Services and the Treasury to promulgate further exemption by way of subsidiary legislation should the need arise in future.
- Non-compliance with the requirement of keeping a PSC register is an offence.

Financial Action Task Force (“FATF”)

Propose adopting a regime such that a beneficial owner (a person having significant control) in relation to a company is an individual who meets one or more of the following specified conditions :

- (a) directly or indirectly holding more than 25% of the shares;
- (b) directly or indirectly holding more than 25% of the voting rights;
- (c) directly or indirectly holding the right to appoint or remove a majority of directors;
- (d) otherwise having the right to exercise, or actually exercising, significant influence or control;
- (e) having the right to exercise, or actually exercising, significant influence or control over the activities of a trust or a firm that is not a legal person, but whose trustees or members satisfy any of the first four conditions (in their capacity as such) in relation to the company, or would do so if they were individuals.

Financial Action Task Force (“FATF”)

- To facilitate contact between companies and the competent authorities in investigating beneficial ownership, we also propose requiring companies to enter into the PSC register an authorised person who will serve as a contact point for providing information about the PSC register and further assistance to law enforcement agencies if necessary. Companies have the flexibility to designate either a natural person resident in Hong Kong or a DNFBP which is subject to proper AML/CTF regulation as the authorised person.
- the authorised person should not provide deceptive, false or misleading information.

Financial Action Task Force (“FATF”)

Companies are required to take reasonable steps to identify beneficial owners, obtain and confirm their required particulars before entering them into the PSC register. Such reasonable steps to be taken may include reviewing a company register of members, articles of association, statement of capital, relevant covenants or agreements, and serving a notice on any person or any legal entity that (i) the company knows or has reasonable cause to believe to be registrable in relation to the company; or (ii) the company knows or has reasonable cause to believe to know the identity of someone who/which is a registrable individual/registrable legal entity in relation to the company.

Financial Action Task Force (“FATF”)

- Addressee of notice needs to comply with the notice within 1 month from the date of the notice concerned, otherwise the addressee of the notice, and (if the addressee is a legal entity) every related person of the entity, commit an offence.
- A statutory defence will be added such that an addressee not responding to a company’s notice can argue on the ground of it a frivolous or vexatious claim. It is for the person to prove that the requirement was frivolous or vexatious.

Relevant Hong Kong Legislations

- Drug Trafficking (Recovery of Proceeds) Ordinance (Cap. 405) (“**DTRPO**”)
- Organized and Serious Crimes Ordinance (Cap. 455) (“**OSCO**”)
- United Nations (Anti-Terrorism Measures) Ordinance (Cap. 575) (“**UNATMO**”)
- Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance (Cap. 615) (“**AMLO**”)



Possible offences

- Failure to report
- Dealing with property
- Tipping off
- Terrorist financing
- Prejudicing investigation

Failure to report

S.25A(1) of DTRPO and OSCO

- Any person who **knows or suspects** that
 1. Any property
 - a. In whole or in part directly or indirectly represents any person's proceeds of;
 - b. Was used in connection with; or
 - c. Is intended to be used in connection with
drug trafficking or an **indictable offence**
 2. **Disclose** that knowledge or suspicion, together with the relevant information to the authorized officer
- Timing of disclosure: as soon as it is reasonable for him to do so

Failure to report

S.12(1) of UNATMO

- Any person who knows or suspects that any property is terrorist property
- Disclose the relevant information to an authorized officer
- Timing of disclosure: as soon as is practicable after the information comes to the person's attention

Failure to report

- “terrorist”, “terrorist act”, “terrorist property” and “terrorist associate” are defined in UNATMO
- List of designated terrorists, terrorist associates and terrorist properties published in Gazette (s.4 of UNATMO)

Failure to report

- “authorized officer”:-
 - Police officer/ member of the Customs and Excise Service/ officer of Joint Financial Intelligence Unit (“**JFIU**”) (s.2 of DTRPO and OSCO)
 - Police officer/ member of the Customs and Excise Service/ member of the Immigration Service/ officer of ICAC (s.2 of UNATMO)

Failure to report

- Disclosure under DTRPO, OSCO and UNATMO:-
 - NOT a breach of any restriction on disclosure imposed by contract, enactment or rule of conduct
 - Person making such disclosure shall not be made liable for damages for any loss arising out of such disclosure
 - Disclosure made by employee to an appropriate person in accordance with the procedure established by his employer for making such disclosure: protected

(s.25A(3) and s.25A(4) of DTRPO and OSCO and s.12(3) and s.12(4) of UNATMO)

Failure to report

Punishment

- Imprisonment of 3 months
- Fine of HK\$50,000

(s.25A(7) of DTRPO and OSCO, s.14(5)
UNATMO)

Dealing with property

S.25(1) of DTRPO and OSCO

- A person commits an offence if:-
 1. **Knowing or having reasonable grounds to believe** that any property in whole or in part directly or indirectly represents any person's **proceeds of drug trafficking** or **an indictable offence**; and
 2. **Deals** with the property

Dealing with property

- Drug trafficking
 - Doing or being concerned in, whether in HK or elsewhere, any act constituting a drug trafficking offence or an offence punishable under a corresponding law (s.2 of DTRPO)
- Indictable offence
 - Includes conduct which would constitute an indictable offence if it had occurred in HK (s.25(4) of OSCO)

→ The place where the drug trafficking or indictable offence occurred is irrelevant!

Dealing with property

- “Dealing” (s.2 of DTRPO and OSCO)
 1. Receiving or acquiring the property
 2. Concealing or disguising the property
 3. Disposing of or converting the property
 4. Bringing into or removing from HK the property
 5. Using the property to borrow money or as security
- Property may include cash, flats, jewellery, stocks, insurance proceeds etc.
- Examples:-
 - Receiving deposits from investors for investment;
 - Investing in the securities market upon client’s instructions; or
 - Disposing of securities upon client’s instructions

Dealing with property

Punishment (s.25(3) of DTRPO and OSCO)

- Indictment: imprisonment of 14 years and fine of HK\$5,000,000
- Summary: imprisonment of 3 years and fine of HK\$500,000

Defence (s.25(2) of DTRPO and OSCO)

- He **intended to disclose** such knowledge, suspicion or matter to an authorized officer; and
- There is **reasonable excuse for his failure to make disclosure** in accordance with s.25A(2)

Dealing with property

- If a person who has made necessary disclosure does any act in contravention of s.25(1) and the disclosure relates to that act, he does not commit an offence of s.25(1) if:-
 1. That disclosure is made before he does that act and the act is done with the consent of the authorized officer; or
 2. That disclosure is made after he does that act on his initiative and as soon as it is reasonable for him to make it

(s.25A(2) of DTRPO and OSCO)

Tipping off

S.25A(5) of DTRPO and OSCO and s.12(5) of UNATMO

- A person commits an offence if:-
 1. He **knows or suspects that a disclosure has been made** under s.25(1) or s.25(4) of DTRPO or OSCO or s.12(1) or s.12(4) of UNATMO
 2. He **discloses** to any person any matter which is likely to prejudice any investigation which might be conducted following that first-mentioned disclosure

Tipping off

Punishment (s.25A(8) of DTRPO and OSCO)

- Indictment: imprisonment of 3 years and fine of HK\$500,000*
- Summary: imprisonment of 1 year and fine of HK\$100,000

*amount of fine for contravention of s.12(5) of UNATMO: not stipulated

Defence (s.25A(6) of DTRPO and OSCO and s.14(7) of UNATMO)

- He **did not know or suspect that the disclosure concerned was likely to be prejudicial** to the investigation; or
- He had **lawful authority or reasonable excuse** for making such disclosure

Terrorist financing

S.7 of UNATMO – Prohibition on provision or collection of property commit terrorist acts

- A person shall not:-
 1. Provide or collect, by any means, directly or indirectly, any property:-
 - a. With the intention that the property be used; or
 - b. Knowing that the property will be used
 2. In whole or in part, to commit one or more terrorist acts (whether or not the property is actually so used)

Terrorist financing

S.8 of UNATMO – Prohibition on making property available to or collecting property for terrorists and terrorist associates

- A person must not:-
 1. Make any property or financial services available or collect property or solicit financial services;
 2. By any means, directly or indirectly;
 3. For the benefit of a person know that, or being reckless as to whether, the person is a terrorist or terrorist associate



Terrorist financing

- Making available any property or financial (or related) services, by any means, directly or indirectly, to or for the benefit of a person **knowing** that, or **being reckless** as to whether, the person is a terrorist or terrorist associate;
 - e.g. accepting the request of an individual from the Middle East to open an account at a brokerage firm in highly suspicious circumstances
- Collection of property or solicitation of financial (or related) services, by any means, directly or indirectly, for the benefit of a person knowing that, or being reckless as to whether, the person is a terrorist or terrorist associate

Terrorist financing

Punishment (s.14(1) of UNATMO)

- Indictment: imprisonment of 14 years and fine
- Summary: imprisonment of 2 years and fine of HK\$100,000

Defence (s.12(2) of UNATMO)

- If a person who has made necessary disclosure under s.12(1) of UNATMO, does any act in contravention of s.7 or s.8 and the disclosure relates to that act, he does not commit an offence of s.7 or s.8 if:-
 1. That disclosure is made before he does that act and the act is done with the consent of the authorized officer; or
 2. That disclosure is made after he does that act on his initiative and as soon as it is reasonable for him to make it

Prejudicing investigation

S.7 of OSCO and s.24(1) of DTRPO

A person commits an offence if he:-

- Knows or suspects that an investigation by the authorities is taking place
- Makes any disclosure which is likely to prejudice the investigation

Prejudicing investigation

Differences between s.7 of OSCO and s.24 of DTRPO

- S.7 of OSCO
 1. **Without lawful authority or reasonable excuse**, makes any disclosure **intending to prejudice** the investigation; or
 2. Falsifies, conceals, destroys or otherwise dispose of, or cause or permits the falsification, concealment, destruction or disposal of any material:-
 - a. knowingly or suspecting that the material is likely to be relevant to such investigation; or
 - b. intending to conceal the facts disclosed by the material from persons carrying out the investigation.
- S.24 of DTRPO: disclosure which is **likely to prejudice** the investigation

Prejudicing investigation

Punishment

- S.7(3) of OSCO (“*intending to prejudice*”)
 - Indictment: imprisonment of 7 years and fine
 - Summary: imprisonment for 3 years and fine of HK\$500,000
- S.24(3) of DTRPO (“*likely to prejudice*”)
 - Indictment: imprisonment of 3 years and fine of HK\$500,000
 - Summary: imprisonment of 1 year and fine of HK\$100,000

Defence (s.24(2) of DTRPO)

- He did not know or suspect that the disclosure was likely to prejudice the investigation; or
- He had lawful authority or reasonable excuse for making the disclosure

Role of the Board and Directors' duties

- In general, the directors have the duty to act for the best interest of their company and liability may arise from the breach of such duty.

Role of the Board and Directors' duties

Reasonable Care, Skill and Diligence

- Common law duty
- Codified in Companies Ordinance (s.465, Cap 622) – owed to the company
- What is “reasonable”?
 - Assessed against the knowledge, skill and experience that one would reasonably expect a Hong Kong company director to have
- Failure to meet standard
 - Director’s liability

Role of the Board and Directors' duties

Rule 3.08 of the Listing Rules:

A director is responsible for fulfilling his duties of skill, care and diligence to a standard at least commensurate with the standard established by Hong Kong law and was further required to, inter alia, apply such degree of skill, care and diligence as may be reasonably expected of a person of his knowledge and experience and holding his office within the company.

A director is required to follow up anything untoward that comes to his attention.

Role of the Board and Directors' duties

Directors' duties under the CG Code (Main Board and GEM Listing Rules)

- Chairman should provide consistent leadership for the Board and ensure that Board works effectively and performs its responsibilities.
- NEDs should:
 - Bring independent judgment to issues of strategy, policy, performance, accountability, resources, and standard of conduct;
 - Scrutinize the company's performance in achieving agreed corporate goals and objectives, and monitoring performance reporting.

Role of the Board and Directors' duties

- Given that directors are responsible for directing a company's business effectively, and this includes ensuring compliance with all relevant Hong Kong laws, AML laws among them, a director with reasonable care, skill and diligence would need to comply with AML laws by being able to:
 - understand AML laws and risks
 - ensure that the company's systems and personnel (for example identifying a director to be the responsible director) are capable of addressing the AML risks identified, having regard to the specific nature and business of the company, and
 - appoint a director or proper senior company personnel to be the central reference point for suspicious transaction reporting.

Role of the Board and Directors' duties

If an officer of a company (whether a director, company secretary or manager) has a suspicion that monies that he or she has received or needs to deal with may be crime proceeds and makes a suspicious transaction report to the JFIU (or other authorised officers as defined under the law) before dealing with the monies, if the JFIU has no objection, then it would be safe for the company and the company's staff to continue with the transaction.

Duties of a company secretary

- Ensuring that the company complies with relevant laws and regulations, reviewing current developments on good corporate governance practice in order to advise the directors.
- Hong Kong Corporate Governance Code Section F of Appendix 14 of the HKSE Listing Rules
 - The company secretary plays an important role in supporting the board by ensuring good information flow within the board and confirming that board policy and procedures are followed.
 - The company secretary is responsible for advising the board, through the chairman and/or the chief executive, on governance matters and also facilitating the induction and professional development of directors.
 - The code also requires all directors to have access to the advice and services of the company secretary to ensure that board procedures, and all applicable law, rules and regulations, are followed.



Duties of a company secretary

For company secretaries, a main role and duty is to ensure that the company complies with relevant laws and regulations, which includes AML laws and practices, and to advise the board and directors on such developments.

Accordingly, not only does a company secretary need to be apprised of AML laws to ensure that company policy and procedures is in compliance with those laws, but he or she also has the duty to ensure that the board and its directors are also apprised of the relevant AML laws with proper training and understanding of such laws.

Anti-money laundering and Counter-Terrorist Financing Guideline of the HKICS

- HKICS issued an *Anti-Money Laundering and Counter-Terrorist Financing Guideline* in May 2016 pursuant to its AML/CFT (Charter) for corporate service providers (CSPs) to adopt to achieve a high standard of AML measures.
- While the guideline is aimed at CSPs, it provides a practical guidance to company secretaries, directors and senior management of companies in designing and implementing their own policies, procedures and controls in the relevant operational areas, taking into consideration the size and industry of the specific company to meet the relevant AML statutory and regulatory requirements.

Anti-money laundering and Counter-Terrorist Financing Guideline of the HKICS

Assist senior management in designing and implementing policies, procedures and controls in the relevant operational areas, taking into consideration their special circumstances to meet the relevant statutory and regulatory requirements.

High Standard – based on AML compliance requirements for FIs under AMLO

Anti-money laundering and Counter-Terrorist Financing Guideline of the HKICS

Useful advices extracted from the Guideline:

Para 2.9

Appointment of a Compliance Officer (CO) and a Money Laundering Reporting Officer (MLRO)

- Automation? A.I.?

Para 2.11

Senior Management should:

- (a) be satisfied that the AML/CFT systems are capable of addressing the ML/FT risks identified;
- (b) Appoint a director or senior manager as a CO who has overall responsibility for the establishment and maintenance of the AML/CFT systems; and
- (c) Appoint a senior member as the MLRO who is the central reference point for suspicious transactions reporting

Anti-money laundering and Counter-Terrorist Financing Guideline of the HKICS

Para 2.14

- Reporting numbers within the systems, both internally and disclosures to the JFIU
- The mitigation of ML/FT risks arising from business relationships and transactions with persons from countries which do not or insufficiently apply the FATF Recommendations
- Changes made or proposed in respect of new legislation, regulatory requirements or guidance;
- AML/CFT staff training

Anti-money laundering and Counter-Terrorist Financing Guideline of the HKICS

Para 2.15

Principal functions of the MLRO:

- a. Reviewing all internal disclosures and exception reports and, in light of all available relevant information, determining whether or not it is necessary to make a report to the JFIU
- b. Maintaining all records related to such internal reviews
- c. Providing guidance on how to avoid “tipping off” if any disclosure is made
- d. Acting as the main point of contact with the JFIU, law enforcement, and any other competent authorities in relation to ML/FT prevention and detection, investigation or compliance

Anti-money laundering and Counter-Terrorist Financing Guideline of the HKICS

Para 3

Risk Factors

- Country risk – e.g. UN sanctioned countries
- Customer risk – e.g.
 - undue level of secrecy with a transaction
 - involvement in cash-intensive business
 - Where the origin of wealth or ownership cannot be easily verified.
- Product/service risk
 - Services that inherently have provided more anonymity; and
 - Ability to pool underlying customers/funds
- Delivery/distribution channel risk
 - Sales through online, postal or telephone channels where a non-face-to-face approach is used.
 - Business sold through intermediaries

Anti-money laundering and Counter-Terrorist Financing Guideline of the HKICS

Para 5.10

- Where transactions that are complex, large or unusual, or patterns of transactions which have no apparent economic or lawful purpose are noted, the background and purpose should be examined, including where appropriate, the circumstances of the transactions.
- The findings and outcomes of these examinations should be properly documented in writing.

Para 5.12

- Where cash transactions (including deposits and withdrawals) and transfers to 3rd parties are being proposed by customers, and such requests are not in accordance with the customer's known reasonable practice, such situations must be approached with caution and relevant further enquiries should be made.

Anti-money laundering and Counter-Terrorist Financing Guideline of the HKICS

Para 7.8

Knowledge vs Suspicion

STR

Generally speaking, knowledge is likely to include:

- a. Actual knowledge
- b. Knowledge of circumstances which would indicate facts to a reasonable person
- c. Knowledge of circumstances which would put a reasonable person on inquiry

Para 7.9

Suspicion is more subjective. Suspicion is personal and falls short of proof based on firm evidence.

Anti-money laundering and Counter-Terrorist Financing Guideline of the HKICS

Para 7.13

For a person to have knowledge or suspicion, he does not need to know the nature of the criminal activity underlying the money laundering, or that the funds themselves definitely arose from the criminal offence.

Para 7.14 – Examples of situations that might give rise to suspicion in certain circumstances

- a. Transactions or instructions which have no apparent legitimate purpose and/or appear not to have a commercial rationale
- b. Where, without reasonable explanation, the size or pattern of transactions is out of line with any pattern that has previously emerged
- c. The extensive use of trusts or offshore structures in circumstances where the customer's needs are inconsistent with the use of such services
- d. Unnecessary routing of funds or other property from/to 3rd parties or through 3rd party

Cases

HKSAR v Pang Hung Fai (2014) 17 HKCFAR 779

- CFA laid down a **2-limb test** on whether an accused has “**reasonable grounds to believe**”
 1. The accused had **grounds for believing** that the property in question represented proceeds of an indictable offence; and
 - 2. Grounds must be reasonable**

Cases

HKSAR v Pang Hung Fai (2014) 17 HKCFAR 779

- **Grounds for believing** that the property in question represented proceeds of an indictable offence
 - The accused's perception and evaluation can be taken into account; and
 - Test of reasonableness to determine the amount of weight to be given to such perception and evaluation

Cases

HKSAR v Pang Hung Fai (2014) 17 HKCFAR 779

- **Grounds must be reasonable**
 - Whether any reasonable person looking at the grounds “would believe” (rather than “could believe”) that the property dealt with represents the proceeds of an indictable offence
 - “believe” should be used in the sense of “know”

Cases

HKSAR v Pang Hung Fai (2014) 17 HKCFAR 779

HKSAR v Yeung Ka-sing, Carson (FACC 5 & 6/2015)

CFA confirmed again the test articulated in *Seng Yuet Fong v HKSAR* is the proper test for the mens rea (mental element) of s.25 OSCO cases:

“To convict, the jury had to find that the accused had grounds for believing; and there was the additional requirement that the grounds must be reasonable: That is, that anyone looking at those grounds objectively would so believe.”

Cases

HKSAR v Yeung Ka-sing, Carson (FACC 5 & 6/2015)

Yeung was convicted of 5 counts of money laundering involving a total sum of HK\$721 million

Prosecution case:-

- There was significant discrepancy between the credit balance of over HK\$721 million in 5 bank accounts of Yeung and his father and the amount taxable income of HK\$1.7million
- The numerous deposits into the Bank Accounts could not have been from the sources of income declared by Yeung and his father in their tax documents

Cases

HKSAR v Yeung Ka-sing, Carson (FACC 5 & 6/2015)

Prosecution case:-

- Prosecution further relied upon the following peculiarities to show that the movement of funds in the bank accounts bore the hallmarks of money laundering:-
 1. HK\$95 million was deposited into various bank accounts by way of cash transactions
 2. Various deposits totaling about HK\$48 million were deposited by a securities firm into bank accounts of Yeung and his father, which were alleged to be sale proceeds of certain shares (which were sold at substantial undervalue)
 3. Transfer of around HK\$74 million from securities accounts of Yeung and his father to securities account of a third party, who did nothing except to connect Yeung with purchasers of the above said shares → unreasonable in the circumstances to give such huge sum of money to this third party

Cases

HKSAR v Yeung Ka-sing, Carson (FACC 5 & 6/2015)

Prosecution case:-

- Prosecution further relied upon the following peculiarities to show that the movement of funds in the bank accounts bore the hallmarks of money laundering:-
 4. 10 Cash cheques in the total sum of around HK\$62million issued by a Macau casino operator were deposited into the bank accounts just within several weeks without any reasonable explanations; any reasonable person would be immediately suspicious of cash cheques issued by a casino operator
 5. Deposits from other third parties in total sum of around HK\$265 million with no apparent reason

Cases

HKSAR v Yeung Ka-sing, Carson (FACC 5 & 6/2015)

Prosecution case:-

- The above circumstances of deposits must be known to Yeung and any right thinking member of the community would, knowing these circumstances, have reasonable grounds to believe that the deposits being dealt with represented proceeds of an indictable offence.

Cases

HKSAR v Yeung Ka-sing, Carson (FACC 5 & 6/2015)

Dealing with proceeds of crime – question for the CFA

On a charge of dealing with proceeds of crime contrary to s25 of OCSO, is it necessary for the prosecution to prove, as an element of the offence, that the proceeds being dealt with were in fact proceeds of an indictable offence?

UK position different - must in fact be “criminal property”

But there is significant differences between the HK and UK legislative schemes

Cases

HKSAR v Yeung Ka-sing, Carson (FACC 5 & 6/2015)

CFA ruled that it is not necessary for the prosecution to prove, as an element of the offence, that the proceeds being dealt with were in fact proceeds of an indictable offence.

CFA also considered that there were strong policy reasons favouring this conclusion – the predicate offence is likely to have taken place in one or more jurisdictions, not susceptible to proof in Hong Kong, and the proceeds of crimes are likely to have passed through various layers and transformations aimed at concealing their provenance.

Business Email scam cases – overseas companies or individuals scammed and monies in bank accounts in Hong Kong

Cases

Director charged with conspiracy to defraud and money laundering.

Facts

- In 2008, D1, D2 and X signed a commission sharing agreement in respect of the sale of overseas property
- In 2009, the chairman of Listco Y was approached by D1 and the acquisition of the overseas property was raised. Listco Y was not doing well and the Chairman was eager to find new projects for the Listco
- D1 introduced D2 to the chairman re the intended acquisition but D2 did not respond. D2 was said to be the owner of the overseas property although D2 was not so at the material time. The Chairman turned to D1 for assistance and as a result, D1 was appointed as the co-chairman and director of the Listco. Thereafter the negotiation between the Listco and D2 went smoothly.

Cases

Director charged with conspiracy to defraud and money laundering – ICAC case

- Eventually, Listco's board of directors approved the acquisition of the overseas property at the price of USD 12M.
- In this connection, an announcement and a circular were issued on the Stock Exchange website. In both the announcement and the circular were statements to the effect that D1 and D2 were independent parties in respect of the acquisition.
- After the approval of the acquisition by the Listco's shareholders and in order to raise funds for the purchase of the overseas property, convertible notes and optional bonds were issued, and money started coming into the Listco.
- Out of the money raised for the acquisition, some funds were used to purchase some overseas properties which were then put under the name of D1's company and that at least another sum of HK\$73.7M was paid into a bank account controlled by D1.

Cases

Director charged with conspiracy to defraud and money laundering – ICAC case.

- The prosecution’s case was that D1 and D2 were working together in the acquisition for their own dishonest gains, and that they had concealed from the Listco and the Stock Exchange of such working relationship and had concealed the existence of the commission sharing agreement
- D1 and D2 were charged with “conspiracy to defraud” – conspiracy to defraud HKSE and conspiracy to defraud the Listco, respectively.
- D1 was charged with a further count of “dealing with property known or reasonably believed to represent proceeds of an indictable offence.”
- Convicted

Cases

- Your company has provided services to client
- When client pays, client says that there is exchange control restriction and other legal restrictions in their home jurisdiction and they need to arrange payment to your company via some “underground” arrangements
- The client informs you that the full payment will be coming through some 3rd party company
- Any issues or risks?

Cases

- You expect some payment from some “underground” arrangement
- Some funds arrived via the bank account of a company Z in tranches. You expect the last tranche from the account
- The funds did not come. You learned that the account of company Z was “frozen” by the bank as the Police was investigating a business email scam case where funds of that case had gone into the bank account of company Z
- You received a call from the Police for an interview on their investigation and your receipt of funds from the account
- What do you do?

Cases

- Your company's computers have been hit by ransomware and the files have been encrypted and the criminals ask for a ransom to be paid in Bitcoins for decrypting the files
- To have access to the files, Bitcoins were paid and the files were decrypted
- Any issues or risks?

Cases

Bitcoin – is it a property?

OSCO – “property” includes both movable and immovable property within the meaning of s3 of the IGCO.

IGCO – “property” includes

- (a) money, goods, choses in action and land; and
- Obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, arising out of or incident to property as defined in paragraph (a)

“immovable property” means –

- Land, whether covered by water or not;
- Any estate, right, interest or easement in or over any land; and
- Things attached to land or permanently fastened to anything attached to land

Cases

- US Court in 2016 – for the purpose of a bankruptcy case treats bitcoin as a kind of “intangible personal property”.
- US IRS treats bitcoin as property for tax purposes.
- Dealing?
- Reporting?

Cases

- Company C has a securities account in brokerage firm D
- Upon opening the account, Company C has deposited some funds into the account but there have been no transactions since then
- One day, Company C instructs Firm D to invest in some stocks. On the same day, Company C instructs Firm D to sell all stocks and transfer the sale proceeds to the bank account of a third party (which is different from the designated account specified in the account opening form)
- What should Firm D do?

Cases

- High volume of trading amid the relative dormant track record
→ indication of suspicious activity
- Firm D should enquire about:-
 1. Reason for conducting the transactions;
 2. Reason for transferring the sale proceeds to a third party account;
 3. Relationship between Company C and the third party
- Firm D should also verify the identity of the third party
- Keep proper record of CDD
- Make a STR to JFIU if necessary

Takeaways

If not sure whether to report, report!



Q & A



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THANK YOU



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