

HONG KONG SOCIETY OF ACCOUNTANTS

(Incorporated by the Professional Accountants Ordinance, Cap. 50)



Our Ref.: M/NC, C/AUG

22 May 1996

Dear Member,

Drug Trafficking (Recovery of Proceeds) Ordinance and Organised and Serious Crimes Ordinance ("Ordinances")

The Drug Trafficking (Recovery of Proceeds) (Amendment) Ordinance 1995 and the Organised and the Serious Crimes (Amendment) Ordinance 1995 ("Amendment Ordinances") were gazetted on 4 August 1995. The Amendment Ordinances became effective on 1 September 1995.

In connection with the money laundering provisions of the Ordinances, your attention is drawn to the following:

1. The Amendment Ordinances have substantially amended the money laundering provisions of the Ordinances by repealing the old section 25 "Assisting another to retain the benefit of drug trafficking" and substituting it with a new section 25 "Dealing with property known or believed to represent proceeds of drug trafficking".
2. The Amendment Ordinances have introduced a new section 25A "Disclosure of knowledge or suspicion that property represents proceeds, etc. of drug trafficking".
 - a. This section imposes a statutory obligation on a person, who knows or suspects that any property in whole or in part directly or indirectly represents the proceeds of drug trafficking or of an indictable offence to make a disclosure to an authorised officer. Failure to make such a disclosure constitutes an offence.
 - b. This section protects a person making such a disclosure in that it is not treated as a breach of any restriction upon disclosure of information imposed by contract or by any enactment, rule of conduct or other provision, and a person making disclosure is not thereby liable in damages for any loss arising out of the disclosure.

A copy of the new sections 25 and 25A of the Ordinances is enclosed for your information.

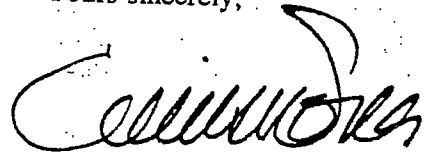
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香港會計師公會

香港灣仔告士打道七十七至七十九號華比大廈十三樓及十七樓

The Society will update Technical Bulletin 13 "Drug Trafficking (Recovery of Proceeds) Ordinance 1989" and Statement 1.204B "Unlawful acts or defaults by clients of members" in due course, which provide guidance to members with respect to the Ordinances. Prior to the issue of the revised guidance by the Society, you are requested to make reference to the attached copy of the relevant sections of the Ordinances for the exact requirements of the new money laundering provisions.

Yours sincerely,



LOUIS L.W. WONG
REGISTRAR

HONG KONG SOCIETY OF ACCOUNTANTS

LW/JF/SC/jc
Encl.



HONG KONG SOCIETY OF ACCOUNTANTS

TECHNICAL BULLETIN

DRUG TRAFFICKING (RECOVERY OF PROCEEDS) ORDINANCE 1989

Introduction

The Drug Trafficking (Recovery of Proceeds) Ordinance, the "Ordinance", was enacted on 1 September 1989 and became fully effective on 1 December 1989. The Ordinance provides for the tracing, restraining, confiscation and recovery of the proceeds of drug trafficking. Wide powers have been given to law officers and the courts to enforce the provisions of the Ordinance. The law enforcement agencies primarily responsible for narcotics enforcement are the Royal Hong Kong Police Force (RHKP) and the Customs and Excise Department (C&E) and as such they have each set up a Financial Investigation Group (FIG) to deal with all investigations under the Ordinance. To avoid duplication of enquiries and to handle all disclosures, the Joint Financial Intelligence Unit (JFIU) has been established and is manned by one Police Officer and one Customs and Excise Officer.

The purpose of this Technical Bulletin is to summarise those aspects of the legislation which are relevant to members of the Society and to recommend guidance as to how to fulfill the reporting requirements of the Ordinance.

The Legislation

The Ordinance itself is split into five sections:

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| Part I
Preliminary | — Sets out the date of commencement of the Ordinance and the basic definitions contained within it. |
| Part II
Confiscation
of Proceeds
of Drug Trafficking | — This is done by means of obtaining confiscation orders against convicted drug traffickers for the recovery of proceeds of drug trafficking activities. |
| Part III
Enforcement,
etc, of Confis-
cation Orders | — This section deals with the enforcement of orders for the realisation of property and also gives powers to restrain the transfer of assets. |
| Part IV
Investigations
into Drug
Trafficking | — Deals with the powers to obtain information and the authority to search for evidence during an investigation. |
| Part V
Miscellaneous | — Contains one of the most important sections which deals with the duties of reporting suspected drug trafficking activities and money laundering. |

The first three parts of the Ordinance relate to the legal process under which the proceeds will be confiscated or recovered. It is the last two which relate to the conduct of an investigation which have a bearing on the general public, businesses, and in particular accountants.

Implications for Members

The most important sections of the Ordinance so far as concerns members are sections 20, 21 and 24 of Part IV, which affect members particularly those in practice, and sections 25 and 26 of Part V which apply to all members. These are reproduced in full in the Appendix but are summarised below along with the relevant guidance offered by the Society.

(a) *Members in Practice*

Under section 20 the court can order a person, including a professional accountant, to produce all relevant material, other than those subject to legal privilege, for an authorised officer to take away or to allow access by an authorised officer within 7 days. The length of the period may be shorter or longer depending on the circumstances. This affects members in two ways. First, they must comply with the orders in terms of releasing material and, second, they have to be able to produce the information within the required period.

Section 21 gives the court the power to issue a search warrant allowing an authorised officer to enter specified premises to perform a search and to seize and retain any material, other than items subject to legal privilege.

Items subject to legal privilege include communications between a legal adviser and an accountant representing his client, or legal advice on behalf of his client and may include items enclosed with or referred to in the privileged communications.

In relation to the sections above members should be aware of section 24. An offence is committed under section 24, where any person knows or suspects that an investigation is taking place and makes disclosure to the relevant party thereby prejudicing the investigation. Disclosure to a client, directly or

indirectly or to the media will likely be considered prejudicial to the investigation and render the accountant, upon conviction, liable to a fine of \$500,000 and a 3-year prison sentence.

Disobedience under sections 20 and 21 amounts to contempt of court. Obstruction of an officer executing a search warrant granted under section 21 is an offence the maximum penalty for which, upon conviction, is a fine of \$250,000 and imprisonment of 2 years.

(b) *All Members*

Section 25 of the Ordinance has a wide application to all members whether practising or non-practising. Those who are involved in handling clients' funds are particularly vulnerable. Those who provide other services to clients are also affected owing to their access to clients' books and records and therefore their knowledge of the clients' affairs obtained.

This section provides that a person commits a criminal offence if that person:

- (i) knows or has reasonable grounds to believe that a client carries on or has carried on drug trafficking or has benefitted from drug trafficking; and
- (ii) enters into or is otherwise concerned in an arrangement to facilitate the retention or movement of the proceeds of drug trafficking on behalf of a client (whether by concealment, removal from the jurisdiction, transfer to nominees or otherwise) or to secure loans against the security of the proceeds, or to acquire property by way of investment.

The maximum penalty for an offence under section 25, upon conviction, is a fine of \$5,000,000 and imprisonment for 14 years.

This is a heavy penalty and accountants must be especially careful. Claiming ignorance or disregarding suspicious transactions may not provide a credible defence as it is likely the courts will expect a higher standard of skill and care from an accountant, than from an ordinary member of the public.

Therefore, reasonable steps to ensure that the Ordinance is not breached, even unwittingly, should be taken and this is the purpose of issuing the guidance below which seeks to take advantage of the provisions of section 25(3).

Section 25(3) offers protection against the other provisions of section 25 in that no offence is committed under section 25 if disclosure of the transactions is made to an authorised officer under the following circumstances:

- (i) that person's suspicion or belief of drug trafficking involvement is disclosed before that person enters into the arrangement and the arrangement has been undertaken with the consent of the authorised officer; or
- (ii) having entered into the arrangement, that person's suspicion or belief is disclosed to an authorised officer as soon as it is reasonable for him to make it.

It should be pointed out that disclosure does not need to be supported by incriminating or conclusive evidence of drug trafficking or money laundering. All disclosures made will be followed up based on the judgement of the authorised officer given the amount of information available both from the disclosure and from police and customs records.

In addition to this defence further protection is given by section 26 which ensures the complete confidentiality of all disclosures made under section 25(3) during civil or criminal proceedings. The section makes it an offence to reveal in any publication or broadcast that any disclosure had been made or the identity of the person making the disclosure. A disclosure will not constitute a breach of contract nor will the person be liable for any damages or loss arising out of a disclosure.

Guidance in Relation to Providing Information under Sections 20 or 21 of the Ordinance

Guidance relating to the action to be taken by members where unlawful acts or defaults by clients of members have occurred is contained in State-

ment 1.204B. This statement is currently being reviewed and will contain a section dealing with the special points in connection with investigation procedures under the Drug Trafficking (Recovery of Proceeds) Ordinance.

Recommended Guidelines in Relation to Section 25 of the Ordinance

These Guidelines have been prepared as under section 25 of the Ordinance every member of staff of a Certified Public Accountants' practice and members not in public practice are obliged to report suspicions or knowledge to an authorised officer. The Secretary for Security has confirmed to the Hong Kong Society of Accountants that where an individual complies with these arrangements for reporting relevant knowledge or suspicions, he or she will have discharged his or her personal duty under section 25 of the Ordinance and will not be at risk of prosecution by continuing to perform his duties in relation to that client in good faith. Furthermore, the Attorney General has considered these Guidelines and will have regard to their existence and content when considering whether to prosecute in an individual case under the section.

1. Each firm of Certified Public Accountants, whether a partnership or sole proprietorship should appoint a person designated as a Compliance Officer who should be responsible for reporting to the Joint Financial Intelligence Unit (JFIU), where necessary, in accordance with the section. All internal reports should be made to the Compliance Officer.
2. Compliance Officers should keep a register of all reports made to the JFIU under the section and all reports made to him by employees of the firm. Compliance Officers should, on request, provide a written acknowledgement of reports made to them by employees.
3. All cases where an employee of a firm has knowledge that a client has carried on or carries on drug trafficking or has benefitted from drug trafficking or where the proceeds at drug trafficking are deposited, transferred or otherwise invested in the clients' bank account, used to obtain credit for the client

against the security of such funds, used to invest in any property on behalf of the client, used to extinguish a liability or expense of the client or where the firm holds such funds on behalf of the client, must promptly be reported to the Compliance Officer. In turn the Compliance Officer must immediately report the case to the Joint Financial Intelligence Unit.

Note: In addition to appointing a Compliance Officer, firms should establish their own internal reporting procedures.



4. All cases where an employee of a firm **suspects or has reasonable grounds to believe** that a client has carried on or carries on drug trafficking or has benefitted from drug trafficking or where the proceeds of drug trafficking are deposited, transferred or otherwise invested in the client's bank account, used to obtain credit for the client against the security of such funds, used to invest in any property on behalf of the client, used to extinguish a liability or expense of the client or where the firm holds such funds on behalf of the client, must promptly be reported to the Compliance Officer. The Compliance Officer must promptly evaluate whether there are reasonable grounds for belief and must then immediately report the case to the Joint Financial Intelligence Unit unless he considers, and records his opinion, that such reasonable grounds do not exist.
5. Any employee having reported in accordance with the guidance above should seek permission from the JFIU through the Compliance Officer to continue to perform his duties in relation to the client. Those responsible for client matters who have knowledge of the report should ensure that no direct knowledge or suspicion of the report is given to the client or any other person.
6. All firms of Certified Public Accountants should take steps to ensure that all employees concerned with client work of any description are aware of these Guidelines and that it is a criminal offence to fail to report either knowledge or circumstances which give rise to a reasonable belief in the existence of an offending act.

APPENDIX

Excerpt from the Drug Trafficking (Recovery of Proceeds) Ordinance

This appendix reproduces only some sections of the Ordinance for convenience. If in any doubt, members should refer to the full text of the Ordinance.

Part I Preliminary

Section 1: Short Title and Commencement

1. (1) This Ordinance may be cited as the Drug Trafficking (Recovery of Proceeds) Ordinance 1989.
- (2) This Ordinance comes into operation on 1 September 1989 except for the provisions of section 25 which come into operation on 1 December 1989.

Section 2: Interpretation

2. (1) In this Ordinance, unless the context otherwise requires —
“authorized officer” (獲授權人) means —

- (a) any police officer;
- (b) any member of the Customs and Excise Service established by section 3 of the Customs and Excise Service Ordinance (Cap. 342); and
- (c) any other person authorized in writing by the Attorney General for the purposes of this Ordinance;

“confiscation order” (沒收令) means an order made under section 3(6);

“corresponding law” (相應的法律) has the same meaning as in section 2(1) of the Dangerous Drugs Ordinance (Cap. 134);

“dangerous drug” (毒品) has the same meaning as in section 2(1) of the Dangerous Drugs Ordinance (Cap. 134);

“defendant” (被告) means a person against whom proceedings have been

instituted for a drug trafficking offence (whether or not he has been convicted of that offence);

“drug trafficking” (販毒) means doing or being concerned in, whether in Hong Kong or elsewhere, any act constituting —

- (a) an offence specified in Schedule 1 (other than an offence under section 25); or
- (b) an offence punishable under a corresponding law, and includes entering into or being otherwise concerned in, whether in Hong Kong or elsewhere, an arrangement whereby —
 - (i) the retention or control by or on behalf of another person of that other person's proceeds of drug trafficking is facilitated; or
 - (ii) the proceeds of drug trafficking by another person are used to secure that funds are placed at that other person's disposal or are used for that other person's benefit to acquire property by way of investment;

“drug trafficking offence” (販毒罪行) means —

- (a) any of the offences specified in Schedule 1;
- (b) conspiracy to commit any of those offences;
- (c) inciting another to commit any of those offences;
- (d) attempting to commit any of those offences;
- (e) aiding, abetting, counselling or procuring the commission of any of those offences;

“interest” (權益); in relation to property, includes right;

“material” (物料) means any book, document or other record in any form whatsoever, and any container or article relating thereto;

“property” (財產) includes both movable and immovable property within the meaning of section 3 of the Interpretation and General Clauses Ordinance (Cap. 1);

“Registrar” (經歷司) means the Registrar of the Supreme Court.

**Part V
Miscellaneous**

Section 25: Assisting Another to Retain the Benefit of Drug Trafficking

25.(1) Subject to subsection (3), a person who enters into or is otherwise concerned in an arrangement whereby —

- (a) the retention or control by or on behalf of another (“the relevant person”) of the relevant person’s proceeds of drug trafficking is facilitated (whether by concealment, removal from the jurisdiction, transfer to nominees or otherwise); or
- (b) the relevant person’s proceeds of drug trafficking —
 - (i) are used to secure that funds are placed at the relevant person’s disposal; or
 - (ii) are used for the relevant person’s benefit to acquire property by way of investment,

knowing or having reasonable grounds to believe that the relevant person is a person who carries on or has carried on drug trafficking or has benefitted from drug trafficking, commits an offence.

(2) In this section, references to any person’s proceeds of drug trafficking including a reference to any property which in whole or in part directly or indirectly represented in his hands his proceeds of drug trafficking.

(3) Where a person discloses to an authorized officer a suspicion or belief that any funds

or investments are derived from or used in connection with drug trafficking or any matter on which such a suspicion or belief is based —

- (a) if he does any act in contravention of subsection (1) and the disclosure relates to the arrangement concerned, he does not commit an offence under this section if the disclosure is made in accordance with this paragraph, that is —
 - (i) it is made before he does the act concerned, being an act done with the consent of the authorized officer; or
 - (ii) it is made after he does the act, but is made on his initiative and as soon as it is reasonable for him to make it;

(b) the disclosure shall not be treated as a breach of any restriction upon the disclosure of information imposed by contract or by rules of professional conduct; and

(c) he shall not be liable in damages for any loss arising out of —

- (i) the disclosure;
- (ii) any act done or omitted to be done in relation to the funds or investments in consequence of the disclosure.

(4) In proceedings against a person for an offence under this section, it is a defence to prove —

(a) that he did not know or suspect that the arrangement related to any person’s proceeds of drug trafficking; or

(b) that he did not know or suspect that by the arrangement the retention or control by or on behalf of the relevant person of any property was facilitated or, as the case may be, that by the arrangement any property was used as mentioned in subsection (1); or

- (c) that —
 - (i) he intended to disclose to an authorized officer such a suspicion, belief or matter as is mentioned in subsection (3) in relation to the arrangement; but
 - (ii) there is reasonable excuse for his failure to make disclosure in accordance with subsection (3)(a).
- (5) A person who commits an offence under this section is liable —
 - (a) on conviction upon indictment to a fine of \$5,000,000 and to imprisonment for 14 years; or
 - (b) on summary conviction to a fine of \$500,000 and to imprisonment for 3 years.

Section 26: Restriction on Revealing Disclosure under Section 25

- 26.(1) Subject to subsection (2), no witness in any civil or criminal proceedings shall be obliged —
 - (a) to reveal that a disclosure was made under section 25 (3);
 - (b) to reveal the identity of any person as the person making the disclosure; or
 - (c) to answer any question if the answer would lead, or tend to lead, to the revealing of any fact or matter referred to in paragraph (a) or (b).
- (2) Subsection (1) shall not apply in any proceedings —
 - (a) for an offence under section 25 or this section; or
 - (b) where the court is of the opinion that justice cannot fully be done between the parties without revealing the disclosure or the identity of any person as the person making the disclosure.
- (3) Subject to subsections (4), (5) and (6), no person shall publish or broadcast any information so as to reveal or suggest —
 - (a) that a disclosure was made under section 25 (3); or
 - (b) the identity of any person as the person making the disclosure.
- (4) In subsection (3) “information” —
 - (a) includes a report of any civil or criminal proceedings;
 - (b) does not include information published for statistical purposes by, or under the authority of, the Government.
- (5) Subsection (3) shall not apply in respect of proceedings —
 - (a) against the person making the disclosure for an offence under section 25; or
 - (b) for an offence under this section.
- (6) The court or a magistrate may, if satisfied that it is in the interests of justice to do so, by order dispense with the requirements of subsection (3) to such extent as may be specified in the order.
- (7) If information is published or broadcast in contravention of subsection (3), each of the following persons —
 - (a) in the case of publication as part of a newspaper or periodical publication, any proprietor, editor, publisher and distributor thereof;
 - (b) in the case of a publication otherwise than as part of a newspaper or periodical publication, any person who publishes it and any person who distributes it;
 - (c) in the case of a broadcast, any person who broadcasts the information and, if the information is contained in a programme, any person who transmits or provides the programme and any person having functions in relation to the programme corresponding to those of the editor of a newspaper or periodical publication,

commits an offence and is liable on conviction to a fine of \$50,000 and to imprisonment for 6 months.

(8) Proceedings for an offence under this section shall not be instituted except with the consent of the Attorney General.

(9) In this section —

“broadcast” includes broadcast by radio, film, videotape or television;

“publish” means publish in writing.

