

Under the Perspective of Financial Institutions in China Anti-money Laundering Laws and Regulations

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Abstract

With the rapid development of China's economy, economic crimes in China show a trend of rapid growth. As a typical crime of upstream and downstream money laundering, as an economic crime (such as the crime of embezzlement, damage to financial rank. The downstream crime of order crime has been concerned by the society, so how to correct from the level of supervision of financial institutions. The effective regulation of money crime has become a hot issue in academic circles. This paper focuses on money laundering and Anti-money laundering. This paper analyzes the concept, analyzes the problems existing in China's Anti-money laundering system, and draws lessons from some effective back washing abroad Money measures, in view of these problems, from the perspective of financial supervision put forward some suggestions to improve Anti-money laundering.

Keywords

Money Laundering; Criminal Dilemma; Financial Supervision.

1. Summary of Anti-money Laundering

1.1. Money Laundering and Anti-money Laundering

1.1.1. Money Laundering Concept

In the modern sense of money laundering first appeared in the 30 s of the 20th century, when the crime is very large, a criminal group in order to meet for the purpose of the legalization of the large amounts of cash through illegal means, through the use of the money laundering of illegal money to create a large number of legal store, will illegally obtained funds together with the laundry legally operating income tax to the tax authority, In order to legitimize illegal funds, academics generally believe that this is the first case of money laundering in modern times.

The constitution of the crime of money laundering includes the following aspects. The subject of the crime of money laundering is the perpetrator of money laundering. The subjective aspect of the crime of money laundering requires that the perpetrator knows well that it is organized crime of underworld nature and corruption and bribery crime (i.e. the upstream crime of the money launderer). If the perpetrator's subjective mentality is negligent, it will not constitute the crime. The object of money launderers is the infringement of China's economic order and the legal interests of China's financial supervision. The objective aspect of money launderers is the means of legalizing illegally obtained funds in certain ways. According to the general theory of criminal law in China, "the object of the crime of money laundering is a complex object, including the national financial management order and the normal activities of judicial organs".

1.1.2. Anti-money Laundering Concept

As a measure against money laundering, money laundering and Anti-money laundering are closely related. Anti-money laundering is the general term of a series of activities that the relevant departments of the state investigate and sanction money laundering through administrative and judicial means. The Anti-money Laundering Law promulgated by China clearly defines the concept of Anti-money laundering: "The Anti-money laundering referred to

in this law refers to the use of state power by the relevant departments to carry out the sabotage of financial activities, terrorist activities, corruption and bribery as measures to counter money laundering. Money laundering and Anti-money laundering are closely related to the two concepts. Anti-money laundering is the general term of a series of activities that the relevant state departments investigate and sanction money laundering through administrative and judicial means."

1.2. The Basic Principles of Anti-money Laundering

There are two basic principles of Anti-money laundering in China, namely "risk-based" principle and "rule-based" principle, both of which must meet the compliance requirements of Anti-money laundering. It is undeniable that China has made progress in the field of Anti-money laundering in recent years, and is developing towards the direction of international mature Anti-money laundering system. The principle of "risk-based" emphasizes the emphasis on risk prevention under the premise of Anti-money laundering compliance, which is also based on Anti-money laundering regulations. In practice, Anti-money laundering compliance requirements are embodied in two specific principles: "risk-based" principle and "rule-based" principle, while emphasizing subjective initiative is an important criterion to distinguish these two basic principles.

The "risk-based" principle requires financial institutions to develop implementation standards of Anti-money laundering work with subjective initiative according to their own actual situation and requirements of Anti-money laundering work on the basis of obeying relevant oriented rules, and focus on strengthening internal risk control and risk management. Financial institutions can use their own advanced assessment technology to accurately grasp the risk of money laundering. Different from the "risk-based" principle, the "rule-based" principle emphasizes that Anti-money laundering subjects should rely on the current Anti-money laundering regulations, and financial institutions should carry out specific Anti-money laundering work under the requirements of relevant government departments and laws. Therefore, financial institutions are in a passive and negative position under this rule.

2. The Operational Mechanism of Anti-money Laundering in Chinese Financial Institutions and its Difficulties

2.1. Operation Mechanism of Anti-money Laundering in Chinese Financial Institutions

2.1.1. Financial Institutions in Anti-money Laundering System

Anti-money laundering is divided into two concepts, broad and narrow, and the Anti-money laundering dominated by financial institutions is the narrow concept of Anti-money laundering. Our country money laundering prevention and control system is mainly divided into three levels, namely the industry within the spontaneous formation of the Anti-money laundering system, the administrative organ to monitor financial institutions in Anti-money laundering money laundering prevention and control system and construction of money laundering crime by criminal law system of money laundering prevention and control system, the three system, dominated by financial institutions in Anti-money laundering control system at the core.

In order to achieve the purpose of industry development and management, a certain industry selects its internal personnel to form a neutral organization to evaluate and supervise the behaviors of its members, so as to improve the service level of the industry. At present, China's financial institutions have not played their due role in Anti-money laundering. For example, banking association plays the role of "messenger" between commercial banks and regulatory agencies, only passing on regulatory documents and meeting arrangements between them, without playing the role of evaluation and supervision.

As a typical upstream and downstream crime, money laundering involves a variety of forms of crime vertically and crosses different fields horizontally. In China, money laundering is usually carried out in financial institutions. For example, criminals divide a large amount of cash into small amounts and deposit them in different financial institutions. Due to the historical influence of China, financial institutions are administrative. Although China is now a socialist market economy, the administrative degree of financial institutions has decreased, but they still show a strong administrative color. This administrative color is reflected in the leadership responsibility system in financial institutions, that is, the leadership is responsible for accidents, but the leadership has absolute power. In administrative organs, there is usually a problem of power checks and balances, because the authorities themselves to conduct supervision, will inevitably lead to the abuse of power, which is also one of the reasons for the Anti-money laundering dilemma of financial institutions in China. This question will be discussed below.

Absolute power leads to absolute corruption. As discussed above, financial institutions are supervised by superior and subordinate leaders. If there is no supervision of external laws, the management system of industry internal monopoly will be formed, which is obviously not conducive to the prevention and control of money laundering. Conceal, conceal the crime of the money laundering crime system mainly by the law of the People's Republic of China criminal law "article 191, article 191 and article 349, thanks to this system to prevent and attack money laundering crime, but the effect is not very good, to money laundering crime in judicial actual case the quantity is not many, This is in sharp contrast to money laundering and upstream crimes, which have always been high, leading to a large number of administrative regulations related to money laundering in China, but the adjustment of criminal law is relatively single. Mainly did not play the role of financial institutions in Anti-money laundering, just use administrative measures such as using a variety of laws and regulations on money laundering rules and regulations, not grasp the essence of the problem of money laundering that financial institutions as the main body of the regulatory responsibility not to effectively implement, resulting in money laundering like weeds, wildfires burn.

In general, financial institutions play an important role in the Anti-money laundering prevention system, because they have complex roles in the system. Specifically, financial institutions are the subject of obligation in the Anti-money laundering system formed spontaneously within the industry, the object of supervision in the money laundering prevention system supervised by administrative organs, and the subject of responsibility in the money laundering prevention system constructed through criminal law.

2.1.2. Financial Institutions in Anti-money Laundering Criminal Function

The so-called criminal function refers to the role played by the criminal in the legislative and judicial process, which specifically refers to: first, the prevention and attack of money laundering crimes; Second, protect the legal interests of China's economic order. The Anti-money laundering criminal function of financial institutions is mainly manifested in the first aspect, that is, preventing and combating money laundering crimes.

The criminal function of financial institutions against money laundering mainly includes three aspects: first, to curb the upstream crime of money laundering crime; Second, to ensure the stability of China's economic order; Third, to protect the overall security of the country. The criminal function of financial institution against money laundering is divided into general function and special function. General function refers to the prevention function of money laundering crime and its upstream crimes. Money laundering and Anti-money laundering as a thing of the positive and negative, the most direct purpose of financial institutions Anti-money laundering is to prevent and combat the crime of money laundering; The special function includes two parts: one is to give full play to the sanction function of Anti-money laundering malfeasance of financial institutions; the other is to use international Anti-money laundering

organizations to pursue the function of overseas stolen goods. Anti-money laundering sanctions need to identify and evaluate the Anti-money laundering measures taken by financial institutions. If the financial institutions fail to reach the standard in the identification and evaluation, they will be punished with large fines or even criminal sanctions. Therefore, in order to reduce the probability of being punished, countries should strengthen the Anti-money laundering measures of financial institutions. To achieve this goal, it is necessary to effectively link up with criminal law and strengthen the crackdown on Anti-money laundering dereliction of financial institutions by criminal means. The second special function requires national Anti-money laundering legislation to give financial institutions the power to legitimize the pursuit of money laundered goods. For example, In order to maximize the function of financial institutions to recover stolen goods overseas, Australia and Britain have promulgated the proceeds of crime recovery law, legalized Anti-money laundering and recovered stolen goods, and severely punished financial institutions for Anti-money laundering and recovered malfeasance.

The reason why financial institutions can play a great role in the Anti-money laundering system depends on their functions. Whether these functions can operate smoothly also determines the role of the Anti-money laundering prevention system.

2.2. The Plight of China's Financial Institutions in Anti-money Laundering

2.2.1. Legislation: Money Laundering the Narrow Scope of Application

As there is light where there is darkness, money laundering is a dark place, and Anti-money laundering is a place where there is light, suffers from the co-existence of the two is, money laundering is mainly done by financial institutions, while the financial institutions in Anti-money laundering to strike and prevention of money laundering, accompanying birth, inhibit each other, both two relations like Chinese taiji diagram. At present, there are loopholes in the law cited in the Anti-money laundering work, and there are gaps in China's existing Anti-money laundering legal system. China's criminal law stipulates the upstream crime of money laundering crime, which to some extent broadens the scope of legal application of money laundering crime in China, but its effectiveness level is low. In judicial practice, it can neither be used as the basis for judging the constitution of money laundering crime nor the nature and source of the income obtained from related upstream crimes. The direct basis for judicial organs to judge whether it constitutes the crime of money laundering is the upstream crime of money laundering. Too narrow provisions of upstream crime will lead to too narrow scope of money laundering crime. There are repeated provisions between Article 191 and Article 312 of The Criminal Law of China, and many of the elements of crime have common characteristics, that is, the act of covering up and concealing the proceeds of crime. However, article 191 of the Criminal Law stipulates only seven specific charges as the upstream crime of money laundering. For these crimes with the same circumstances as money laundering crimes, they can only be convicted according to 312 articles of lighter legal punishment, which will lead to a lack of deterrence against money laundering crimes.

2.2.2. The Lack of Incentive Mechanism on Anti-money-Laundering by Financial Institutions

In the market economy, the resources are limited, so in order to maximize profits, the degree of competition in all industries is constantly upgrading, and financial institutions located in the market economy also have to compete. In order to pursue their own development, financial institutions can only continuously absorb large amounts of deposits from the society to consolidate their dominant position. Therefore, financial institutions absorb the existing funds in the society through various ways, and expand their scale through these funds. The Anti-money laundering obligation that financial institutions should fulfill and the behavior that they

need to absorb a large amount of deposits will be contradictory. How to effectively adjust the contradiction between the two, China's legal system has not made relevant provisions.

At present, the performance of Anti-money laundering obligations by financial institutions is inversely proportional to their earnings. The Anti-money laundering obligations to be undertaken by financial institutions will increase their operating costs, management costs and technical costs and reduce their earnings. For the losses caused by financial institutions fulfilling Anti-money laundering obligations, China has not stipulated relevant compensation system, and there are no specific provisions on personal safety protection and reward measures of relevant responsible persons of financial institutions. In consideration of their own benefits, financial institutions will be worried when performing Anti-money laundering obligations. In addition, it is unreasonable to not compensate financial institutions for their losses. For a profit-oriented financial institution, participation in or assistance in money laundering may bring certain business risks, but the huge benefits brought by money laundering cannot be ignored by financial institutions, which leads to financial crisis, the staff of financial institutions often risk their own lives. As there is no corresponding mechanism to make up for the losses of financial institutions, financial institutions are unwilling to undertake the useless obligation of Anti-money laundering, which also leads to the failure and delay of financial institutions in combating money laundering.

2.2.3. Money Laundering Regulations Compulsory Subject Responsibility is Lighter

The money laundering perpetrator transfers his illegal income by opening accounts in financial institutions. In China, the money laundering crime against financial institutions is a deliberate crime. If the money laundering is successful due to the fault of the staff, it will not be held responsible. This leads to even if the relevant subject violates the relevant provisions, the punishment is relatively light. For financial institutions, the penalty is mainly reflected in the fine, which ranges from 200,000 yuan to 5 million yuan, and for individuals, the penalty is 10,000 yuan to 50,000 yuan. Nowadays, money laundering is rampant in China, so financial institutions are given greater supervision power. Therefore, compared with the responsibility borne by financial institutions and the harm brought by money laundering, this kind of punishment is too slight. In addition, China's criminal law stipulates that as long as the upstream behavior of the crime of money laundering is not enough to become a crime, then its behavior is legal and does not constitute the crime of money laundering.

Light punishment for financial institutions with regulatory responsibilities will lead to the imbalance of the Anti-money laundering system, thus affecting the extent to which the Anti-money laundering system plays a role. Therefore, the provisions related to Anti-money laundering in relevant criminal law and regulatory regulations should be further refined, which is an urgent problem to be solved in China's Anti-money laundering work.

3. The Perfection of Financial Institutions in Anti-money Laundering in China

In different historical periods, China has different legal requirements for financial institutions against money laundering, in which criminal law plays a crucial role. The following is mainly to provide corresponding solutions to its dilemma.

3.1. Expand the Scope of Upstream Crime of Money Laundering

Some scholars believe that as long as the behavior is in line with the legalization of the proceeds of crime, it should be included in the scope of the upstream crime of money laundering. The scope of upstream crime of money laundering identified by FATF also includes money laundering without financial institutions, as long as it interferes with the investigation of the source of funds, it can also be identified as money laundering. In the author's opinion, criminal

law determines whether a crime is constituted according to the danger of an act, while money laundering itself is dangerous and can be separately identified as a crime. It is too narrow to only identify the upstream crimes of money laundering as those seven crimes. For example, the statutory punishment in Article 191 of the Criminal Law is obviously higher than that in Article 312 of the Criminal Law, but its application is only based on whether the act belongs to the upstream crime of money laundering, which obviously does not conform to the principle of adaptation of crime to punishment stipulated in the criminal law. Since the offence under section 191 is roughly the same as the offence under section 312 in terms of dangerous degree, it is clearly unreasonable.

Based on these reasons, the author thinks that we should expand the scope of upstream crimes of money laundering crime in our criminal law, and at least include the serious crimes of concealing and concealing the proceeds of crime into the money laundering crime system, so as to fight against money laundering more efficiently and effectively.

3.2. Improve the Anti-money Laundering Incentive Mechanism

In the context of China's socialist market, although the administrative attributes of financial institutions are higher than their social attributes, they are also for the purpose of profit. Under the condition of not violating laws, financial institutions will also pursue the goal of cost minimization and benefit maximization. In the Anti-money laundering activities, if the increased costs and losses caused by financial institutions are not compensated, the enthusiasm of financial institutions for Anti-money laundering is not strong, thus affecting the follow-up national Anti-money laundering work, leading to the legalization of a large number of illegal gains through money laundering, and finally shaking the national economic order.

Therefore, while cracking down on money laundering, China should also pay attention to profit distribution and loss compensation mechanism to make up for the increased costs and losses caused by financial institutions in the Anti-money laundering work, so as to effectively crack down on money laundering. Specific measures are as follows:

First, incentive regulations should be formulated in China's Anti-money laundering related systems to reward financial institutions with excellent performance in Anti-money laundering and give them preferential policies such as Refinance. At the same time, the money confiscated from Anti-money laundering can not be returned to the state Treasury, and it will continue to be deposited in the bank. Secondly, a quantitative assessment mechanism for financial institutions against money laundering should be established to evaluate the Anti-money laundering measures of financial institutions and give corresponding rewards according to the evaluation. Third, rather than receiving the illicit income to the state Treasury so that it is not in circulation, it is better to put it in financial institutions to assist Anti-money laundering, so as to maximize its profits and make it have sufficient funds to carry out Anti-money laundering work.

3.3. Grading Penalties for Financial Institutions in Anti-money Laundering Malfeasance

According to fit for the principle of criminal law, Anti-money laundering graft degree is different, the degree of legal interests violation is different also, to carries on the classification.

First, the crime of dereliction of duty against money laundering of financial institutions is a result crime. The degree of danger of the behavior determines the degree of damage to the legal interests of financial institutions, and the degree of damage to the legal interests determines the severity of punishment. Second, in China's criminal law, negligence can be divided into general negligence and gross negligence, so the malfeasance crime of financial institutions as a negligent crime should also be divided into general negligence and gross negligence. General negligence refers to the violation of obligations stipulated by regulations, while gross

negligence refers to the behavior of financial institutions still providing services to users blacklisted by administrative authorities. The damage caused by gross negligence is far greater than that caused by general negligence, and they should be punished in different degrees.

China's criminal law pursues the protection of human rights, so it should also classify the harm degree of financial institutions' Anti-money laundering malfeasance crime. The principle of adaptation to crime and punishment is the best principle to protect human rights, that is, the degree of punishment should be adapted to its crime, and the classification of punishment for financial institutions' Anti-money laundering malfeasance crime is the embodiment of the principle of adaptation to crime and punishment.

China should formulate feasible quantitative standards for financial institutions' Anti-money laundering malfeasance crime: First, the seriousness of the malfeasance crime should be clearly divided, and the risk level of customers should be taken as the standard to be assessed. The malfeasance of customers with high risk should be severely punished, while the malfeasance of customers with low risk should be lightly punished. Second, the use of different means of punishment, such as the lesser crime, the application of fines and other means of punishment; If the crime is serious, punishment means such as deprivation of liberty should be applied.

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