

The Essential Characteristics and Judicial Determination of New Financial Crimes

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Abstract: The finance is an indispensable part of the quotidian business and daily life, also plays a vital role in the flourish and prosperity of the nation. A stable financial system and a healthy financial market is the prerequisite of the financial innovation and the backbone to become the financial powerhouse, which strengthening the financial competitiveness and enhancing the international financial clout. Simultaneously, science and technology advance by leaps and bounds, the deep integration and coalescence of the financial industry and the internet with other state-of-the-art technologies and devices catalyze the new financial crimes to become the cynosure which draws the prodigious attention and contentious debate around the academics and the professional practitioners. The financial crimes always have the idiosyncrasies that involving a wad of money, inflicting a passel of victims, and wreaking tremendous havoc toward the financial system and is doing an enormous disservice to the social stability and harmony. In recent years, the perpetration which involve the financial means is also increasingly rampant and prevalent, posing great challenge to the innovation and financial regulation. To prevent and defuse the huge financial risk caused by the new financial crime, the response from the criminal law and criminal policies is pivotal and valuable.

To combat this kind of sinister crime and safeguard the steady progress of financial market and the tranquility of the society, the priority is to pinpoint the conception and purview of the new financial crime to ensure that the relevant party has an accurate and precise understanding of the features belong to the new financial crime to make sure do not let a single involved get loose or the innocent to fall to the justice. The current penal policies are the tool to learn the contemporary understanding of the new financial crime and how to confront and defeat it, to assist the academics perceive whether or not the nowadays tactic toward this treacherous crime is commensurate to its complexity and severity, or whether or not the strategy we have adopted is compatible to the principles and dicta stipulated by the Criminal law. The judiciary authority can also apply the policies into the judicial praxis and garner the useful feedback or the outcome of the practice to embellish the policies to better tackle the autochthonous and epochal challenge.

This article will also delve into the distinct characteristics of the new financial crime, including the crime object, the target of the crime, *actus reus*, *mens rea*, et cetera. The meticulous dissection of new financial crime is beneficial for the judiciary practice to have a better identification and implementation of the relevant statutes and rules. Some salient and archetypal quandaries or conundrums have been succinctly and pithily displayed and discussed in this article to look forward finding the loose end of the entangled skein related to the new financial crimes.

To form a permanent, stable, effective and reliable financial security in conjunction with the sophisticated and formidable governance of new financial crimes is the best way to spur the momentum of the financial industry, rectify the systematic and inveterate glitches and loopholes, establish a resilient and robust financial system and platform, and simultaneously, to some extent get rid of the miasma spewed from the specter of the new financial crimes.

Keywords: New financial crimes; Penalty policies; Financial compliance; Financial regulation; Financial system

1 The conception and scope of new financial crimes

1.1 Genesis and differentiation of the concept of new financial crime

Financial crime is a kind of crucial infraction stipulated in the Specific Provisions of Criminal Law in China. Since the reform and opening up, especially since the 1990s, with the meteoric development of socialist

market economy, financial crime has been catapulted to a more salient and conspicuous position among the miscellaneous crimes codified by the Criminal Law, and there is a myriad of germane and incisive analyses and researches since then. As for the definition of new finance, there has not been a consensus reached in the academic, but the Supreme People's Procuratorate of the People's Republic of China has a perspicuous and terse

expatriation in the Summary of the Symposium on Issues related to the Handling of Internet Financial Crimes (Supreme Procuratorate [2017] No. 14 June 2, 2017), that is, "Internet finance is a new financial business model formed by the integration of finance and the Internet."^[1] Internet finance plays a pivotal role in achieving innovation-driven, promoting economic transformation and upgrading in the new era, and facilitating high-quality development. However, the rapid development of Internet finance has also led to the frequent occurrence of Internet financial crimes, which seriously disturbs the normal financial order, damages the fundamental interests of the broad masses of the people, and threatens social stability and harmony. It can also be discerned and construed that the understanding of new finance is mainly linked to the burgeoning development of the Internet.

In fact, before this kind of explanation, there are some professionals in the financial industry and the legal realm have already mentioned new financial crimes, but it mainly refers to the overseas committing financial crimes in the name of foreign institutions in China.^[2] Ergo, there is no the so called "innovation or breakthrough" in the means and methods of new financial crimes *sensu stricto*. Rather than a serious legal definition, it is more like a preliminary summation of an unusual phenomenon.

Academically, some scholars express the opinion that whatever the financial crimes or the so called new financial crime is rather than the technically strict legal dicta, but an academic definition or discussion. The financial crime is the terminology which designated to the perpetration in the process of financial and pecuniary activities, which is detrimental to the financial stability and monetary system and should be assigned with the commensurate criminal penalties. In comparison, the new type financial crime not only entail the perpetration in the process of financial activities, but also the behavior which indirectly or implicitly harmful to the financial and monetary system and regulation. The normal functioning of the financial system is important to a country's national security and economic stability, to better protect and

preserve the prosperity of the financial system, maintain the financial market's order shipshape, Combating the perpetration which jeopardize the normal functioning and mechanism of financial system and regulation is the imminent task for the professional practitioners and academicians. The damage caused by the financial crime is in toto controllable and mainly confined into the financial professional bailiwick, the danger posed by the financial crime mainly concentrated on the order of the financial market; but the new financial crime emanated a more insidious and sinister omen, the wicked tentacle of the new financial crimes not only destabilize the holistic financial system, but also impinging the healthy fabric of national security and the whole economic development and social stability, its danger is systematic and holistic compared to the traditional financial crime.^[3]

For example, from 2008 to the end of 2009, Shanghai procuratorial organs handled a total of nine new financial crime cases, involving a total amount of more than 8.2 billion yuan. All these cases occurred in investment management companies or offices set up in Shanghai by foreign institutions or entities, four of which were representative and liaison offices or offices set up in the semblance of foreign agencies in Shanghai; Four is in the name of investment and financial management, established in Shanghai Foreign Investment consulting Management Co., LTD.; One is that overseas companies set up illegal operations in the country and engage in illegal underground banking activities.^[4] In this stage, the understanding of the new financial crime per se is actually defined according to its foreign-related nature. But from the severity of this specific case and the using the foreign entities as a camouflage, it is apparently that the means and method do not belong to the traditional financial crime.

In fact, some scholars (such as Professor Liu Xianquan) have already pointed out the intellectualization of financial crimes for a long time,^[5] but they have not yet summarized it as a new type of financial crime. With the evolution of the Internet and the renewal and iteration of

the financial industry, financial crime is no longer a one-dimensional and isolated crime which solely involved physical currency or bills. Internet finance and industrial upgrading make this kind of crime more cunning and elusive in means. One's whereabouts are hard to track; and evidence collection is more herculean and strenuous, the technique and subterfuge are more complicated and arcane, which showing an ominous proclivity toward intellectualized crime and put a more somber kibosh on the judiciary authority trying to curb and crack it.

At present, the attention and research on the concept of new financial crimes in theory is still insufficient and shallow, which cannot holistically and thoroughly reflect the needs in the reality to redound to the current governance. A few scholars accepted the definition of the Supreme People's Procuratorate which made in the above minutes. Some scholars have pointed out that the so-called "new type" is compared to financial crimes in the traditional sense, and its criminal *modus operandi* is different from Section 4, Section 5 of Chapter 3 of the Specific Provision of Criminal Law or other provisions on financial behaviors in criminal aspects, which has distinct characteristics of the development of the times and the brand of science and technology. Some people accept the following views, such as "new financial crimes refer to crimes that have new factors different from traditional financial crimes in terms of criminal means, criminal objects, target of a crime, etc., and are enough to be called" financial crimes "as wrongdoings that violate the financial management order, considering the resulting relationship, violate the financial management order and other economic orders closely related to the financial management order. This extends to include new financial crime methods enabled by fintech."^[6] Some commentators point out that this definition is actually the view of the financial industry. With the rapid development of Internet +, it has also had a subversive and revolutionary impact on existing industries, especially the deep integration of Internet and finance, which makes the connotation and extension of financial crimes continue to expand, and a

series of new technologies and new means have emerged, making it very different from traditional financial crimes. Therefore, it is necessary to classify it as a new financial crime.^[7] This kind of categorization is not superfluous as some scholars complain about, and the telos of the specific new definition is not intending to befuddle the professionals and the judiciary authority or flaunting the terminological prowess and forte, the aim for the coinage is assist the academics or the judiciary authority to better combat this type of crime in the new era and tackle the difficulties related to the identification or definition.

1.2 The definition of the scope of new financial crimes

From the point of view of the scope of the crimes, the charges involved in the summary (June 2017) are not many, only includes the crimes of illegally absorbing public deposits, illegal fund-raising, and illegal business operation. However, from the guidance cases or typical examples involving financial crimes issued by the Supreme People's Procuratorate, the scope of coverage is very wide. From the 46th batch of guiding cases recently released by the Supreme People's Procuratorate, the new misdeeds of taking advantage in the duty in the financial field are actually incorporated in the scope of this concept. Therefore, it can be believed that this is not a stringent concept of criminal law or criminology, but only a generalization of such criminal phenomena by judicial practice organs. Some scholars accept this relatively broad definition. For example, new financial crime is not a formal academic definition, but covers the organic combination of traditional crime and the financial praxis, the expansion of the connotation and extension of the original crime with the development of the Internet and the update and iteration of the financial field, or the crime with new characteristics that occurs under the specific circumstance of the new financial format.^[8] This means that, in accordance with the provisions of the Criminal Law, the use of the Internet or intelligent means to commit the crime of undermining and sabotaging the order of financial management, the crime of financial fraud, or

the use of Internet + financial methods or means to carry out related economic crimes (such as the crime of illegal business operation and the crime of organizing pyramid schemes) are all new types of financial crimes. Even the public security organs have included frequent and serious telecommunications fraud crimes (mainly involving fraud crimes) in the scope of new financial crimes.

For example, in the practice, some fraud gangs disguise themselves as professional and officially accredited financial service companies or platforms and develop some sophisticated but malicious software apps on their own, providing victims with small loans and services to eliminate bad credit records, and then bamboozle the gullible. All of these can be included in the evaluation of new types of financial crimes in judicial practice.

However, scholars who have proposed that there is a trend of intelligent development of financial crimes (such as Professor Liu Xianquan) still regard and strictly define the scope of financial crimes in the context of the Internet era with the provisions of Sections 4 and 5 of Chapter 3 of the Criminal Law, and exclude related crimes from them, that is, "we cannot simply understand the main object of corruption and bribery in the financial field as the financial management order because of the provisions of Articles 183, 184 and 185 in China's Criminal Law. Moreover, it cannot be considered that the criminal law classifies the crimes of corruption and bribery in the financial field as financial crimes; Article 183 of the Penal Code specifically regulates the crime of official embezzlement (or crime of corruption) by an employee of an insurance company, and to some extent is considered mainly from the perspective of helping judicial officials to correctly determine the nature of the act of fraudulently obtaining insurance money" (2008).^[9]

1.3 The response from the judiciary authority and the financial industry

Although the Supreme People's Court mentions the identification and handling of financial crimes in the relevant documents, it does not provide any definition of

whether it is a new type of financial crime. On September 22, 2022, the Supreme People's Court held the fourth press conference of the "People's Courts in the Past Decade" to release the work of the people's courts in punishing financial crimes in accordance with the law and archetypal cases. The financial crimes involved mainly include illegal fundraising, manipulation of securities and futures markets, money laundering, fraudulent issuance of stocks, and illegal disclosure of important information. Therefore, it can be considered that the people's courts still define and deal with financial crimes within the scope of Sections 4 and 5 of Chapter 3 of the Specific Provisions of the Criminal Law, and do not discuss much about new types of financial crimes, let alone have a legal definition.

The financial industry also discussed the scope of financial crimes, mainly believing that "the crime of using undisclosed information, crime of insider trading, disclosing insider information, crime of illegal absorption of public deposits, crime of credit card fraud, crime of illegal business operations and other eight types of cases are more prominent, these cases have a large impact, high amounts of asset, many legal disputes, and it is difficult to maintain stability, and the problems reflected in them have become hot spots of concern for the public and the financial community" (Lang et al., 2017).^[10] 《The crimes discussed in the White Paper on Crimes by Employees of Financial Institutions (2021)》 include crime of illegally absorbing of public deposits, crime of fraud, crime of illegally issuing loans, crime of official embezzlement, accepting bribes, crime of misappropriating funds, crime of insurance fraud, and crime of fraud in financing.

To sum up, the formulation of new financial crimes is very general, but there are also ambiguities, and it is recommended to distinguish them into three categories: traditional financial crimes, Internet financial crimes, crimes using finance as a means, and crimes in the financial field. In recent years, the Supreme People's Procuratorate has issued relevant documents and has begun to pay attention to the standardization of terms and

references.

2 The penal policies related to new financial crime

The minutes have been relatively clear and perspicuous on the attitude towards and handling of new types of financial crimes, and we can understand them from several aspects in terms of logical relationship:

(1) Characteristics of new types of financial crimes. Compared with traditional financial crimes, it is more difficult to detect and supervise because of the complexity and clandestine nature, and has a greater impact on the stable development of the financial market and the normal life of the people, even the national security, and the victim group is often relatively large and indiscriminate. When targeting this type of case, it is necessary to promptly ascertain and accurately characterize the perpetration, so as to strike and crush at it with precision (Minutes of the Symposium on Issues Concerning the Handling of Cases Involving Internet Financial Crimes, Supreme Procuratorate [2017] No. 14, June 2, 2017.).^[11]

(2) The goal of dealing with new types of financial crimes. Efforts should be made to achieve the organic unity of the legal, social, and political effects of judicial case handling. The investigation of cases should not only obtain a favourable legal effect, but also take into account the social effect. The negative impact and spillover effects of new types of financial crimes are often relatively large, and the victim groups are also relatively extensive. On the other hand, it is also necessary to recover or reduce the losses of victims to the greatest extent, protect the interests of investors, maintain the overall stability of society, and safeguard judicial justice. Firmly implement the concept of serving the overall situation and administering justice for the people (Minutes of the Symposium on Issues Concerning the Handling of Cases Involving Internet Financial Crimes, Supreme Procuratorate [2017] No. 14, June 2, 2017.).^[12]

and (3) policy attitudes towards perpetrators of new types of financial crimes. “Properly grasp the scope and boundaries of criminal prosecution. Cases involving internet financial crimes involve a large number of

people, and should be handled in accordance with the principle of differentiated treatment, comprehensively using criminal prosecution and non-criminal means to address and resolve risks, cracking down on the minority which belongs to the linchpin and educating and saving the majority which crimes or wrongdoings are venial or less harmful compared to the former. It is necessary to adhere to the principle of unifying subjectivity and objectivity, and comprehensively judge the severity of responsibility and the necessity of criminal prosecution on the basis of subjective and objective circumstances such as the criminal suspect's status and role in criminal activities, the amount of money involved, the harmful consequences, and subjective fault, so as to ensure that the criminal responsibility is appropriate and the punishment is appropriate to the crime. Strictly crack down on persons whose crimes are serious, have great subjective malice, and who play a major role in the crime, especially core management personnel and key personnel, in accordance with law; Persons whose circumstances are relatively minor, whose subjective malice is relatively small, and who play a minor role in the crime, are to be given lenient punishment in accordance with law”(Minutes of the Symposium on Issues Concerning the Handling of Cases Involving Internet Financial Crimes, Supreme Procuratorate [2017] No. 14, June 2, 2017.).^[13]

It can be seen that although the criminal policy of blending leniency and severity is not explicitly mentioned in this document, judging from its dictions, such as differential treatment, adaptation of criminal responsibility, and suit the punishment for crimes, the Supreme People's Procuratorate has fully incorporated the spirit of the criminal policy of blending leniency and severity into the above-mentioned normative documents.

The Supreme People's Court has not promulgated a special normative document for new types of financial crimes, but in the process of releasing typical cases and in relevant archetypal examples, it has expressed its basic attitude towards financial crimes, that is, the criminal policy of blending leniency and severity, which in the

specific and daily work practice of the people's courts, it has focused on cracking down on serious crimes in the capital market that disrupt the country's economic order, increasing the financial retribution's intensity of money laundering crimes, and focusing on cracking down on crimes against elderly care services. Judging from the verdict results of specific cases, the people's courts' handling of financial crimes clearly reflects the criminal policy of blending leniency and severity, but financial crimes have their own idiosyncrasies, one involves a huge amount of money, and the other is easy to involve the public and the safety of people's property, so the people's courts first uphold a severe punishment attitude in terms of policy orientation, especially for situations that "seriously jeopardize the legitimate rights and interests of investors and severely imperil the country's financial security and stability"; For those who admit guilt and repentant for the harms the inflicted, and actively cooperate in the recovery and compensation of stolen goods and losses, they will be given lenient punishments (and even the probation may be applied). However, from the point of view of prevention, this approach has a certain consequentialist orientation. Cases can only be dealt with after the fact, and it is impossible to prevent the occurrence of such crimes in advance, let alone effectively prevent the loss of people's property. Judging from the occurrence of such cases, although the crackdown has been intensified gradually since 2015, the number of cases has not decreased accordingly, and the amount of money involved is getting larger and larger. Therefore, the policy of criminal law has a strong ex-post character.

Some professionals also believe that the lack of internal management of financial institutions, the weak awareness of the legal system, and the inveterate bad habits within the industry are prone to lead to the occurrence of financial crimes. In this regard, strengthening supervision is an inevitable countermeasure. From the perspective of industry management, the state adheres to a strict management attitude towards the financial industry, especially Internet financial activities.

In 2021, China's relevant legislation in the financial sector adhered to a problem-oriented approach and carried out precise regulation, not only focusing on the overall situation of preventing financial risks, but also focusing on areas with frequent loopholes. For example, on February 10, 2021, the State Council promulgated the 《Regulations on the Prevention and Handling of Illegal Fundraising》, on September 24, 2021, the People's Bank of China and other ministries and commissions jointly issued the Notice on 《Further Preventing and Handling the Risk of Speculation in Virtual Currency Trading》, and on January 8, 2021, the China Securities Regulatory Commission issued the Several Provisions on 《Strengthening the Supervision of Private Investment Funds》. These documents play a positive role in preventing financial crimes and resolving major financial risks.

On the whole, the theoretical understanding and consensus is to severely punish financial crimes, resolve financial risks, and respond to new types of financial crimes, the first is to make a full throttle in the accurate monitoring and identification of all kinds of new criminal methods, conscientiously grasp the nature and characteristics of various types of crimes, and achieve precise crackdowns and proper handling. Second, it is necessary to prevent the fragmentation of the understanding of new types of financial crimes, smoothing the organic connection between administrative law and criminal law, unifying the interdepartmental understanding and construal, so that various organs can strengthen cooperation and form a joint force. Third, the public security, courts, and procuratorates should establish cooperation with relevant financial entities, guide relevant units to carry out financial activities in accordance with the law, strengthen internal management and supervision, monitor the flow of funds, give early warning of anomalous and abnormal behavior, assist the public procuratorate and law enforcement organs to expeditious fulfill their duties in preventing crimes and post-event crackdown and the subsequent remedial

measures, augmenting the intensity of the crackdown on new financial crimes, and enhance the ability to deal with related crimes.

If taking a rigorous scrutiny toward the current on-stage repertoire of the criminal policy and penalties, the palpable chasm between the current criminal judiciary tactic and the imminent needs in the reality is tremendous. Naturally, the law and policy have some extent lag behind the development of the society, especially in terms to the new financial crime, enhanced by the modern internet and technology, many complex and new-fangle products and the subsequent spinoffs always difficult to find a clear and suitable regulation in the respect law, the perpetrators always take advantage of the grey area in the respect financial inspection ad policy to defraud the victim and circumvent the punishment, which pose a serious threat to the financial system and market and make the public dubious about the effectiveness of the respect law in combating the new financial crime. The relevant regulation and inspection are also insufficient or flawed in confronting the new financial crime, the lack of relevant legislation and supervision in the areas hardest hit by new financial crimes, such as securities and futures markets, makes it impossible to effectively deal with financial risks under the new normal. The sluggish supervision and response to new financial market entities fails to form long-term effective supervision and fails to put forward corresponding regulatory early warning and response plans for new financial business models. In addition, within the emerging financial market entities, the quality of practitioners is varied, and in the fields with a high incidence of related crimes, often concealed professionalism is strong, and it is difficult to achieve effective early warning and supervision. At the same time, new financial crimes often have the support of advanced technology and means, and more often occur in financial enterprises, which is easier to evade supervision and increase the difficulty of investigation.^[14]

3 Infringement of legal interests and essential characteristics

Sections 4 and 5 of Chapter 3 of the Specific Provisions of Criminal Law articulately stipulate financial crimes which is compatible to our usual sense, that is, the crimes of undermining the management of financial order and financial fraud. According to the characteristics of different types of crimes, they can be divided into the following categories.

(1) Crimes against the currency management system. This type of crime mainly includes the crime of counterfeiting currency, the crime of selling, purchasing, and transporting counterfeit money, the crime of financial personnel purchasing counterfeit money, the crime of exchanging counterfeit money, the crime of possessing and using counterfeit money, and the crime of altering currency.

(2) Crimes that endanger the establishment and management system of financial institutions. This type of crime mainly includes the crime of establishing financial institutions without authorization, and the crime of forging or altering or transferring business licenses and approval documents of financial institutions.

(3) Crimes endangering the deposit and loan management systems of financial institutions. This type of crime mainly includes five perpetrations: the crime of usurious on-lending, the crime of fraudulently obtaining loans and accepting financial bills, the crime of illegally absorbing deposits from the public, the crime of illegally issuing loans, and the crime of absorbing customer funds without recording them in the accounts.

(4) Crimes endangering the management system of financial instruments and securities. This type of crime mainly includes the crime of forging or altering financial documents, forging or altering state securities, forging or altering stocks, companies, and enterprise bonds, issuing stocks, companies, and enterprise bonds without authorization, obstructing credit card management, stealing, buying, and illegally providing credit card information, issuing financial bills in violation of regulations, and accepting, paying, and guaranteeing illegal bills.

(5) The crime of undermining the order of financial management by endangering the management system of the securities and futures markets. This type of crime mainly includes the crimes of insider trading and leaking inside information, fabricating and disseminating false information on securities and futures trading, deceiving investors to buy and sell securities and futures contracts, and manipulating the securities and futures markets.

(6) Crimes that endanger the management system of customer and public funds. This type of crime mainly includes the crime of using entrusted property in breach of trust and the crime of illegally using funds.

(7) Crimes against the foreign exchange management system. This type of crime mainly includes the crime of evading foreign exchange and the crime of fraudulent purchase of foreign exchange.

(8) Crimes endangering the financial business operation and management system. The only crime in this category is the crime of money-laundering

From the perspective of criminal law theory, the crime of financial fraud is basically a consequential crime, which is a direct intentional crime. Including fundraising fraud, loan fraud, bill fraud, financial certificate fraud, letter of credit fraud, credit card fraud, securities fraud and insurance fraud.

Some crimes are also related to crimes stipulated in other chapters, such as crime of financial fraud and crime of fraud; The crime of establishing a financial institution without authorization and the crime of illegal business operation, etc. Specifically, Article 225 of the Criminal Law stipulates illegal business operations involving financial institutions, such as illegally engaging in securities, futures, and insurance business without the approval of the relevant competent state authorities, or illegally engaging in fund payment and settlement business. While studying new types of financial crimes, attention should be paid to combining and comparing them with other crimes. There is a myriad of specific crimes codified by the criminal law have somewhere similar or semi-identical, it is paramount for the academics and the

practitioner to differentiate the nuances in definition or identification to better grasp the essence and gist of each specific crime and better apply it into the practice.

In judging whether a new type of financial harm meets the provisions of the crime and establishes a perpetration, it is necessary not only to judge the exterior harmful manifestations of the act, but also to fully analyze whether it conforms to the essential characteristics of a specific crime.

Where some illegal acts clearly meet the constitutive elements of specific financial crimes as provided for in the provisions of the Criminal Law, such as the existence of counterfeiting and fraud, they shall be convicted and punished directly in accordance with the provisions of the Criminal Law. However, for some other cases, the judgment of the essence of the act is the key to whether or not to convict and punish.

Therefore, in our analysis and evaluation, we should adhere to two ideas: one is the legality of acts and elements, and we must adhere to the principle of legality of crimes, for example, in monetary crimes, no matter what its value, it should be legal currency issued by China or other countries or regions in accordance with the law.

The second is to construe and define the connotation of "other" in which stipulated to the specific provisions in essence. Financial crimes in which there are other behavioral agents, modes of conduct, and other targets of conduct in the criminal and criminal provisions include the crimes of fraudulently obtaining loans, acceptance of bills, and financial instruments (Article 175-1 - Subjects), illegally absorbing deposits from the public (Article 176 - Disguised absorption), forging or altering state securities (Article 178 - Targets of Conduct), using non-public information to trade (Article 180, Paragraph 4 - Targets of Conduct), and manipulating securities and futures markets (Article 182 - Methods of Conduct); illegal issuance of loans (Article 186 - subjects); absorption of customer funds without recording them in the accounts (Article 187 - subjects); illegal issuance of financial bills (Article 188 - subjects); acceptance, payment and guarantee of illegal

bills (Article 189 - subjects), evasion of foreign exchange (Article 190 - subjects), money Laundering (Article 191 - Conduct Methods); loan Fraud (Article 193 - Conduct Subjects and Methods); letter of Credit Fraud (Article 195 - Conduct Methods); securities fraud (Article 197 - Object of Conduct) and illegal Business Conduct (Article 225 - Mode of Conduct). There are also "other aggravating circumstances" that establish the crime.

The understanding and definition of other modes of conduct and other serious circumstances shall adhere to the principle of legality of crimes, strict interpretation, and prohibit the presumption of guilt; It is based on the essential characteristics of the crime. That is, to adhere to the principle of equal harm and the principle of infringing on the interests of the law and not allowing it by the specific statute.

In many typical cases, the relevant laws and judicial interpretations do not have a clear definition and understanding of acts and means, especially for today's new types of financial crimes, whose specific behaviors and methods are diverse and heterogeneous, and sometimes break through the limitations and boundaries of traditional definitions and adumbration. It cannot go beyond the scope of the constitutive elements of the existing crime, nor can it be confined to the traditional or even hackneyed interpretation of the crime. In the typical case of Easton's manipulation of the futures market, although the relevant laws and judicial interpretations do not clearly and explicitly explain and stipulate its concrete methods, the substantive judgment based on the nature of its behavior can ultimately be determined to be the use of other methods and means to manipulate and undermine the futures market.^[15]

At the same time, in practice, the attention should also be paid to the substantive determination of other crimes committed by financial means, which is more delusional and harder to detect. Without the adequate discretion and circumspection, it always easily to fall prey to the muddling of different crimes when it comes to

the identification and be disoriented toward the nuanced difference between methods and the ultimate *telos*.

4 Difficult issues in judicial determinations

4.1 The illegality of the conduct

The new type of financial crime is closely related to the country's financial supervision and management order, and it can be said that it violates the corresponding financial supervision and management order. Therefore, for specific detrimental acts, whether they are financial innovations or not, and whether or not they use the Internet, there is a problem of prior violation of administrative law.

Wan Chun, then director of the Law and Policy Research Office of the Supreme People's Procuratorate, pointed out in July 2018 that the incidence of new financial cases is expanding, and the degree of difficulty and complexity has increased significantly, showing the characteristics of constant transmutation of criminal methods and means, the wide impact, and great arduousness in handling.

In the theoretical circles, there is controversy over whether the criminal justice procedure is initiated when the new financial crime involves a double violation of both the prior administrative law and the criminal law, and some scholars believe that there is no necessity to take the violation of administrative law as a prerequisite for entering the field of criminal law evaluation.

Then, judging the illegality of the new type of financial harm is a relatively complex issue.

From the perspective of judicial practice, the reason why the new type of financial harm has entered the purview of the assessment mechanism of criminal justice is that the amount of illegal lucre is extremely huge, or it has caused extremely tremendous economic losses to others, or it has caused enormous financial risks. Then, this kind of illegality judgment is the primary problem.

The financial industry has proposed the concept of penetrating judgment. In fact, in criminal law, whether the act itself simply violates the administrative law, or whether it is socially harmful and then criminal in the case

of violating the administrative law is a more controversial topic.

In judicial practice, judicial personnel have similar confusion. For example, the 《Opinions on Several Issues Concerning the Application of Law in Handling Criminal Cases of Illegal Fundraising》 (March 25, 2014) issued by the Supreme People's Court and the First Session of the Supreme People's Court pointed out that in the process of responding to illegal fundraising cases, the determination of the conduct by the administrative department is not a prerequisite for the case to enter the criminal justice process (Opinions on Several Issues Concerning the Application of Law in Handling Criminal Cases of Illegal Fundraising (March 25, 2014)).^[16]

In fact, in the face of the development of Internet finance, the means and methods of financial crimes are becoming more and more hidden and elusive, plus the integration and penetration of different financial fields have put forward new requirements for closer contact and cooperation among judicial and administrative organs.

However, in the author's opinion, it cannot be considered that the illegal nature of the new type of financial harm should not be judged on this basis. Judicial personnel can determine for themselves and do not have to wait and rely on administrative law enforcement departments to make judgments from administrative misdemeanor to criminal wrongdoing. This is because the new type of financial behavior is not found to be criminally illegal simply because it causes huge economic losses or obtains enormous gains, but because it does not have the legitimacy of administrative law and has criminal illegality in the case of great harm has been inflicted upon. This kind of judgment can even provide a reference basis for analysis and understanding for administrative law enforcement departments.

4.2 The hot debated and difficult issues

In the field of new types of financial crime, there are still some urgent problems to be solved, both in practice and in theory. For example, in the case of counterfeit currency, how should it be determined that counterfeiting

small amounts of currency is used for change and storage of ordinary small transactions or high-cost production, and only results in low value and a small amount of counterfeit money? Is it a crime of fraud to purchase counterfeit money and use it in actual transactions to obtain the property of the other party? and how to deal with the act of repaying debts with counterfeit money, which deserves further discussion.

At the same time, among the types of crimes of illegally establishing financial institutions or engaging in financial business, how to distinguish between the crime of usury and the crime of fraudulently obtaining loans? In the crime of illegal fundraising, is there a pool of funds? How to determine the purpose of illegal possession? What is borrowing money from an illegal fundraiser? should be carefully discussed and judged.

In terms of the crime of illegally obtaining financial services or financial certificates by fraudulently obtaining financial certificates for loans and bill acceptance; It is important to distinguish and discreetly identify the crime of forgery or alteration of financial instruments, crime of forgery or alteration of State securities, crime of forgery or alteration of stocks, corporate and enterprise bonds, crime of obstructing credit card management, crime of stealing, buying or illegally providing credit card information.

The distinction between the crime of defrauding loans and the crime of swindling loans also draws a myriad of debate from the professional practitioner and the academicians. It is crucial to determine whether the crime of defrauding loans constitutes the preparatory crime of the crime of swindling loans, and whether the crime of swindling loans is the downstream crimes of the former.

When it comes to the crimes of illegally engaging in financial business by financial institutions, This kind of crime shows a higher degree of specialization, the harm is greater than the traditional crime, and is often committed by internal personnel which always take advantage of the leaked intelligence and information, the degree of concealment is relatively high. The specific provisions of the criminal law also stipulate the specific

name of the crime, which needs to be judged according to the different behavior types of the perpetrator when the specific application and determine the nexus with crime of corruption; appropriation, misappropriation of public funds; misappropriation of funds. In many cases, the crime of financial institutions illegally engaged in financial business is not only suspected of a single crime, but often presents the situation of interweaving between different charges. Some crimes that often occur in the field of financial institutions are always accompanied by other traditional crimes of property infringement and embezzlement and bribery. It is necessary to carefully analyze the differences between different crimes and distinguish between this crime and other infringements. The boundary between sin and non-sin. Under the premise of maintaining the internal stability of the financial system, crimes should be punished to the maximum extent and financial security should be upheld.

For some financial institutions or enterprises suspected of illegal acts should also be carefully judged, for the relevant justification or reasons of acquittal to give adequate and reasonable consideration, especially to find out whether there is subjective intent and whether it has been misled by the corresponding administrative authorities; In practice, it is also necessary to find out the nature of the work of the corresponding institutions and enterprises, that is, whether it is a service or a business, and if it is a business act, it should generally be considered a crime.

It is also important to determine should financial institutions be convicted and punished for denying crimes committed by certain units? Crime of illegally issuing financial certificates -- the reduction of illegal attribute judgment; The definition of legal elements Insider trading, the crime of disclosing insider information -- the identification of insider information; and the presumptive problem of fact finding. In the case of insider trading crime of merger and acquisition regrouping, the most difficult problem lies in whether the information that the perpetrator relies on when carrying out the trading

behavior is significant.

In practice, new types of financial crimes manifest themselves in various forms, and complex and difficult problems emerge one after another, so it is all the more necessary for all parties concerned to strengthen research, make prudent judgments, and ensure that the characterization is accurate, and that social stability is maintained while cracking down on crimes.

5 Financial security and governance of new financial crimes

In the face of new types of financial crimes, it is necessary to adhere to the principle that the penalty should be severe if the mass victims are inflicted or the enterprises' core interest has been embroiled by the misdeeds. At the same time, the judiciary should promote financial innovation and financial regulatory innovation - the implementation of financial compliance. Through the implementation of financial compliance, guide enterprises to standardize the use of modern technology and means, consciously abide by industry norms and existing laws and regulations, stimulate enterprises and institutions to self-correct and consciously abide by the awareness of norms, which is beneficial to promote the healthy development of industry enterprises, promote the construction of a healthy, stable, open and transparent financial capital market.

At the same time, it is also necessary to clarify whether "tacitly authorized if not prohibited by law" or "forbidden if not authorized by law", "whether overly strict supervision will curb financial innovation", and it is necessary to expedite the establishment of financial compliance, prevent the occurrence of financial crimes, and optimize the governance of financial crimes. While strictly preventing the systemic financial risks brought by new financial crimes, encouraging relevant financial enterprises and entities to make bold innovations, and promote the innovation of relevant financial supervision and operation systems under the aegis of relevant financial capital platforms and systems, so as to better serve the

construction of a strong financial country.

Although there are only 38 financial crimes in the criminal law, the field of financial crimes involve a large amount of financial expertise, and know-how, among which securities, banking, insurance, funds, trusts, etc., all have their own professional fields and industry characteristics. At the same time, it is also necessary to take into account the issue of convergence with the existing criminal law and judicial interpretations.

In the meantime, in the practice, private enterprise financing crimes account for the ascendant and primary position, in 2016 statistics of cases, involving illegal absorption of public deposits, fund-raising fraud and other financing crimes account for nearly one-third of the total, of which the "E-rental treasure case", "Zhongjin system" and other cases involve a wide range of victims, astronomical funds, to the society has a great adverse repercussion. In the future, the special attention will need to be paid to the governance of this type of crime. It is necessary to encourage the development and growth of private capital at the same time to prevent the occurrence of black swan events, prevent the emergence of large financial risks, and bring impact to the financial system and related industries.

Last but not the least, it is important to make the penal policy adapting to the economic development reality and trend. The new financial crime always happens in the enterprises which have enormous impact to the employment and economic outlook, which link with the livelihood of the ordinary people, such as the Internet company, financial institutions and some innovative corporations. The core of the problem is how to instruct the company to obey the financial regulation and circumvent the financial risks. The financial compliance is the antidote to the crux, diverting the attention from the punishment after the infraction to the prevention before the unexpected blunder and through the rectification to prescind the companies from the prolonged litigation hassle and have the opportunity to remedy the mistake

and repair the damage.

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