

立法會
Legislative Council

LC Paper No. CB(1)292/08-09

Ref. : CB1/HS/1/08

Paper for the House Committee meeting on 28 November 2008

**Proposed Practice and Procedure for
the Subcommittee to Study Issues Arising from Lehman Brothers-related
Minibonds and Structured Financial Products**

Purpose

This paper invites members to endorse the proposed practice and procedure to be adopted by the Subcommittee to Study Issues Arising from Lehman Brothers-related Minibonds and Structured Financial Products (the Subcommittee), pursuant to Rule 75(18) of the Rules of Procedure.

Background

2. At the special meeting held on 13 October 2008, Members of the House Committee expressed support for the setting up of a subcommittee to look into issues related to the Lehman Brothers-related minibonds and structured financial products. On 17 October 2008, the House Committee formally endorsed the setting up of the Subcommittee with the following Terms of Reference :

"To study issues arising from Lehman Brothers-related minibonds and structured financial products and to make recommendations where necessary."

3. Pursuant to the decision of the House Committee on 17 October 2008, Ir Dr Hon Raymond HO, Subcommittee Chairman, moved a motion at the Council meeting on 12 November 2008 seeking authorization under section 9(2) of the Legislative Council (Powers and Privileges) Ordinance (Cap. 382) for the Subcommittee to exercise the powers conferred by section 9(1) of the said Ordinance for the purpose of performing its functions. The motion was passed.

4. The Subcommittee currently consists of 24 members¹ and has held two meetings to discuss, among other things, the scope of its study and the proposed

¹ Dr Hon David LI, Hon Tanya CHAN and Hon Albert HO withdrew from the Subcommittee on 27 October 2008, 30 October 2008 and 17 November 2008 respectively.

practice and procedure to be adopted by the Subcommittee in undertaking its work.

Proposed Practice and Procedure

5. Subject to the Rules of Procedure, the practice and procedure of subcommittees of the House Committee shall be determined by the House Committee². The House Committee has made House Rules on the practices and procedures of committees. These House Rules (Rule 20 to Rule 25) are applicable to the subcommittees of the House Committee where appropriate by virtue of Rule 26(f) of the House Rules. As procedures applicable to the exercise of the summoning powers conferred by section 9(1) of Cap. 382 are not set out in these House Rules, the Secretariat has assisted the Subcommittee in drawing up its proposed practice and procedure by drawing reference from the practices and procedures of previous Panels and select committees which were authorized by the Council to conduct inquiries with summoning powers conferred by section 9(1) of Cap.382.

6. At the meeting held on 25 November 2008, the Subcommittee considered and agreed that the proposed practice and procedure at the **Annex** should be forwarded to the House Committee for endorsement. The Subcommittee also proposes that in relation to any matter not provided for in the proposed practice and procedure, and without prejudice to the Rules of Procedure, the House Rules and the practice and procedure as endorsed by the House Committee, the Subcommittee is authorized to determine its own practice and procedure (Paragraph 38 of the **Annex**).

7. In the course of deliberation, members of the Subcommittee have raised questions on the operational details regarding matters including the handling of confidential materials, claims of public interest immunity, and safeguards against leakage of confidential information. Members noted that an internal briefing would be held on 4 December 2008 on the practice and procedure for conducting inquiries, and agreed that any matters which required further deliberation could be taken up at that briefing.

Advice sought

8. Members are invited to endorse the Subcommittee's proposed practice and procedure in the **Annex**.

Council Business Division 1
Legislative Council Secretariat
27 November 2008

² Rule 75 (18) of the Rules of Procedure.

**Subcommittee to Study Issues Arising from Lehman Brothers-related
Minibonds and Structured Financial Products**

Proposed Practice and Procedure

Introduction

The Subcommittee to Study Issues Arising from Lehman Brothers-related Minibonds and Structured Financial Products (the Subcommittee) is a subcommittee of the House Committee of the Legislative Council. Its practice and procedure are based on the relevant provisions in the Rules of Procedure and the House Rules applicable to subcommittees of committees of the Council. For the purpose of performing its functions, the Subcommittee has been authorized by resolution of the Council on 12 November 2008 to exercise the powers conferred by section 9(1) of the Legislative Council (Powers and Privileges) Ordinance (Cap. 382). Accordingly, its practice and procedure are also regulated by the relevant provisions of the Ordinance.

Principles

2. In determining its own practice and procedure, the Subcommittee has drawn reference from those adopted by subcommittees set up under the House Committee and by previous Select Committees. Due regard has also been given to the following principles -

- (a) the practice and procedure should be fair and seen to be fair, especially to parties whose interests or reputation may be affected by the proceedings of the Subcommittee;
- (b) there should be maximum transparency in its proceedings as far as practicable;
- (c) the practice and procedure should facilitate the ascertaining of the facts relevant to, and within the scope of, its study, as set out in the Subcommittee's Terms of Reference, which do not include the adjudication of the legal liabilities of any parties or individuals;
- (d) its proceedings should be conducted with efficiency; and

- (e) the cost of the proceedings should be kept within reasonable bounds.

Practice and procedure

Chairmanship

- 3. All meetings are chaired by the Chairman or, in his absence, by the Deputy Chairman. In the event of the temporary absence of the Chairman and Deputy Chairman, the Subcommittee may elect a chairman to act during such absence.

Quorum

- 4. The quorum of the Subcommittee shall be one-third of the members including the Chairman (a fraction of the whole number being disregarded). Unless a quorum is present within 15 minutes of the time appointed for the meeting, the meeting will not be held.

Voting

- 5. Decision of the Subcommittee shall be decided by a majority of the members present and voting. Abstentions are not counted for the purpose of determining the result of the vote, but the number of members who abstained from voting will be recorded. Where the Chairman so orders, any matter for the decision of the Subcommittee may be considered by circulation of papers to members of the Subcommittee.

- 6. Voting is done by a show of hands. If a member wishes to claim a division of the votes, the member must so request before the Chairman or the presiding member declares the result of the voting. Unless a division is called, it is the normal practice to record only the number of members who have voted for, voted against and abstained from voting.

- 7. The Chairman of, or any member presiding at, the Subcommittee shall not vote, unless the votes of the other members are equally divided, in which case he shall have a casting vote which shall not be exercised in such a way as to produce a majority vote in favour of the question put.

Power to compel evidence

- 8. Subject to the provisions of Cap. 382, the Subcommittee may order any person to attend before it and to give evidence or to produce any paper, book, record or

document in the possession or under the control of such person.

9. In obtaining evidence, the Subcommittee may request any person or body to attend a meeting to give evidence orally, invite any person or body to give evidence in writing or any person or body to produce specified documents to the Subcommittee.

10. The privileges and immunities provided in Cap. 382 are available only in proceedings before the Subcommittee which include hearings and deliberative meetings. In addition, every person not lawfully ordered to attend to give evidence or to produce any paper, book, record or document before the Subcommittee is not protected by section 14(1) of Cap.382 relating to privileges of witnesses.

Conduct of meetings

11. The relevant provisions in the Rules of Procedure and the House Rules shall apply to the Subcommittee. Where witnesses are examined and evidence is received pursuant to the exercise of powers under section 9 of Cap. 382, paragraphs 12 to 22 will apply.

Meetings for the examination of witnesses

12. Examination of witnesses will normally be conducted in public. Exceptions to open hearings may be made as decided by the Subcommittee, based on the individual circumstance of each occasion. During open hearings, members should only ask questions for the purpose of establishing the facts in connection with the study. Members should not make comments or statements during these hearings.

13. Public hearings are generally conducted in the following manners :

- (a) at the beginning of each open hearing, the Chairman reminds the public and the media that disclosure of the evidence given at the hearing outside the proceedings is not protected under Cap. 382. The media should obtain legal advice as to their legal responsibilities;
- (b) where it is decided that witnesses should be examined on oath, the Chairman will administer the oath under section 11 of Cap. 382 before the examination starts;
- (c) facts are established by questions and evidence given at hearings. Usually, the Chairman will first make an introduction and then ask the witness an appropriate opening question, giving him an opportunity to state his case;

- (d) members wishing to ask questions should so indicate by a show of hands, and are called upon to ask questions. The Chairman will ensure, as far as possible, that members have equal opportunities to ask questions and that the hearing is conducted in a structured manner;
- (e) the Chairman will decide whether a question or evidence is relevant to, and within the scope of, the Subcommittee's study, as set out in its Terms of Reference;
- (f) short follow-up questions may be allowed. Follow-up questions should be questions seeking further answers to the original questions or clarifications to the answers given. The Chairman has the discretion to decide whether a question is a follow-up question and whether it should be allowed or otherwise; and
- (g) all Members, including non-Subcommittee members, should refrain from making comments relating to the hearing outside the proceedings. Evidence given in closed meetings should not be made public by any members.

14. Unless excused under section 13(2) of Cap. 382 or justifiably claiming privilege under section 15, a witness summoned under section 9 of Cap. 382 must answer all lawful and relevant questions from the Subcommittee. If he refuses to do so, he commits an offence under section 17 of Cap. 382 and is liable to prosecutions. If the witness claims privilege from disclosure of evidence on grounds of public interest immunity, the procedure as set out in the Council's resolution concerning the usage and practice in regard to the determination of claims of public interest privilege in **Appendix I** will be followed.

15. Subject to the Subcommittee's decision, witnesses attending before the Subcommittee may be allowed to be accompanied by other persons, who may include legal adviser(s), to assist the witnesses concerned. However, such accompanying person(s) may not address the Subcommittee.

Measures taken to avoid possible prejudice to a person's interest in pending legal proceedings

16. In accordance with Rule 41(2) of the Rules of Procedure, a Member shall not make reference in his speech to a case pending in a court of law in such a way as, in the opinion of the President or the Chairman, might prejudice that case. This rule applies to the proceedings of the Subcommittee by virtue of Rule 43 of the Rules of Procedure.

17. If there are pending legal proceedings arising from matters which are related to the subject of the Subcommittee's study, the following measures will be adopted to avoid possible prejudice to a person's interest in pending legal proceedings -

- (a) the Department of Justice will be asked to keep the Subcommittee informed of the development of the criminal proceedings concerned, if any;
- (b) the Chairman would explain to each witness that the function of the Subcommittee is not to adjudicate on the legal liability of any party or individual and advise him of the Chairman's power to disallow the making of any reference to a case pending in a court of law if such reference might, in his opinion, prejudice the proceedings;
- (c) where it is considered necessary and justified, either on an application by a witness or on the Subcommittee's own motion, the Subcommittee may determine to hold closed meetings to obtain evidence from a witness; and
- (d) where the Subcommittee considers necessary, it will provide the Department of Justice with a copy of the draft findings and observations of the Subcommittee and request it to comment whether the contents of the draft might prejudice pending criminal proceedings, if any.

18. In respect of pending civil proceedings, the following principles also apply:-

- (a) references to matters awaiting adjudication in a court of law should be excluded if there is a risk that they might prejudice its adjudication;
- (b) references would include comments on, inquiry into and the making of findings on such matters;
- (c) matters awaiting adjudication would include matters in respect of which proceedings have been initiated by the filing of the appropriate documents; and
- (d) prejudice might arise from an element of explicit or implicit prejudgment in the proceedings of the Subcommittee in two possible ways -
 - (i) the references might hinder the court or a judicial tribunal in reaching the right conclusion or lead it to reach other than the right conclusion; and

- (ii) whether the court or judicial tribunal is affected in its conclusion or not, the references might amount to an effective usurpation of the judicial functions of the court or judicial tribunal.

Handling of information contained in classified documents or obtained at closed hearings

19. In fairness to persons who have provided classified documents for the Subcommittee, if information contained in such documents is to be used at a public hearing, the source of the information will only be disclosed if it is necessary to do justice to the witness or to enable him to understand a question.

20. If closed meetings are held to obtain evidence from a witness who is a party to pending legal proceedings, information obtained in these closed hearings should be used with care, and where possible, the identity of the witness who has provided the information should not be disclosed.

21. Where the Subcommittee is inclined to refer to information obtained in closed hearings in the Subcommittee's report, an extract of the relevant part of the report in draft form should be provided to the witness concerned for comment. The comments received will be carefully considered by the Subcommittee before its report is finalized.

22. Any information obtained by way of oral evidence or in the form of documents provided at closed hearings shall not be disclosed.

Internal deliberations

23. The Subcommittee may hold closed meetings to deliberate on procedural matters, progress of its work, the logistical arrangements for hearings, the evidence obtained, the draft report of the Subcommittee and any other matters relevant to the Subcommittee's work. Members including the Chairman and the Deputy Chairman should not disclose any information about the internal deliberations held or documents considered at these meetings. The Subcommittee Chairman or the Deputy Chairman should be the only persons authorized to handle media enquiries.

Handling of documents

24. All documents submitted to the Subcommittee are numbered: by document and by page. Each member of the Subcommittee will be given a copy of the documents produced to the Subcommittee, unless advised otherwise with the consent of the Subcommittee.

25. A room in the Legislative Council Building is reserved for keeping a complete set of documents produced to or compiled by the Subcommittee. Where a document is classified confidential, members should not remove it from the room, nor should they make photocopy of it, in whole or in part.

Disclosure of interests

26. Rules 83A and 84 of the Rules of Procedure relating to Members' pecuniary interest shall apply to the proceedings of the Subcommittee.

27. In addition, there may be situations in which a member wishes to declare non-pecuniary interests. In such a case, he should write to the Chairman to declare such interests. Where appropriate, the Chairman may announce at public meetings or hearings of the Subcommittee the nature of interests so declared by individual members.

Participation of Non-Subcommittee members

28. While meetings held in public shall be attended by members of the Subcommittee, non-Subcommittee members may also be in attendance at these meetings, but may not speak at the meeting. If a non-Subcommittee member wishes to direct any questions to a witness, he/she should put his/her questions in writing and pass them to the Chairman without interrupting the proceedings, and the Chairman will decide whether or not he will ask the questions.

29. Non-Subcommittee members are not allowed to be present at closed meetings of the Subcommittee or at hearings held at closed meetings.

Minutes of proceedings of the Subcommittee

30. All proceedings of hearings and meetings are sound-recorded. Members of the public may obtain copies of the sound recordings of hearings and meetings held in public upon the payment of a fee.

31. Minutes of evidence, usually in the form of a verbatim transcript, are kept for each meeting at which witnesses are examined. Relevant parts of the draft transcript are forwarded to the person or body giving evidence for sight and correction, if any, before being incorporated into the minutes of evidence, subject to their signing of an undertaking that they would not make any copy of the draft and would return it to the Subcommittee before a specified date. The procedures in **Appendix II**, which apply to witnesses, shall also apply to persons or bodies other than the witnesses giving evidence requesting copies of transcripts of evidence. Any person may obtain a copy

of the finalized form of transcript for meetings held in public upon the payment of a fee.

32. For hearings held in closed meetings, no transcripts will be provided for any person including the witnesses concerned. All witnesses however are provided with the relevant parts of the draft transcripts of evidence for sight and correction. The undertaking they are required to sign includes an additional requirement that any part of the draft transcript in question must not be divulged.

33. For meetings not attended by any outside party, the minutes of meetings are normally presented in a condensed form, recording the Subcommittee's decisions, follow-up actions required, procedural matters and declarations of interest made by members. Verbatim record of such meetings may be prepared on the direction of the Subcommittee.

Report of the Subcommittee

34. The draft report of the Subcommittee is considered by the Subcommittee at closed meetings. The relevant minutes record all proceedings on the consideration of the report and on every amendment proposed thereto, with a note of divisions, if divisions were taken in the subcommittee, showing the names of members voting in the division or declining to vote.

35. In order to ensure that the procedure is fair and seen to be fair to people whose interests or reputations may be affected by its proceedings, any party, person or organization against whom adverse comments are intended to be made in the Subcommittee's report will be given an opportunity to comment on relevant parts of the draft findings and observations of its report. The comments received will be carefully considered by the Subcommittee before its report is finalized.

36. The Subcommittee shall make a report to the House Committee after it has completed its work. Where necessary and if agreed to by the House Committee, the Subcommittee report may be tabled at the Council.

Premature publication of evidence

37. The evidence taken before the Subcommittee and documents presented to it shall not, except in the case of its meetings held in public, be published by a member of the Subcommittee or by any other person before the Subcommittee has presented its report to the House Committee.

Practice and Procedure of the Subcommittee

38. Without prejudice to the Rules of Procedure, the House Rules and the procedure endorsed by the House Committee, the Subcommittee is authorized to determine its own practice and procedure.

Council Business Division 1
Legislative Council Secretariat
27 November 2008

Appendix I

Resolution under Legislative Council (Powers and Privileges) Ordinance passed on 25 May 1994 and amended on 20 November 1996 and further amended on 16 April 1997

That with effect from 25 May 1994 the usage and practice in regard to the determination of claims of "public interest privilege" made by persons appearing before a committee of the Council shall be as set out in the Schedule annexed to this Resolution.

1. In this Schedule –

"relevant body", (有關方面) in relation to a committee before which a witness is attending to give evidence or to produce any paper, book, record or document, means -

- (a) the chairman and deputy chairman of the committee, where both are present (and references to the delivering of the opinion of the relevant body shall be taken to mean the opinion of the chairman where the chairman and deputy chairman disagree);
- (b) the chairman alone where the deputy chairman is absent;
- (c) the deputy chairman alone where the chairman is absent; or
- (d) where both the chairman and deputy chairman are absent, the member elected to act as chairman during such absence.

"witness" (證人) means –

- (a) a person lawfully ordered to attend to give evidence or to produce any paper, book, record or document before a committee; and
- (b) any public officer designated by the Governor under section 8A(2)(b) of the Legislative Council (Powers and Privileges) Ordinance (Cap. 382) for the purpose of attending sittings of a committee.

2. If, at a public sitting of a committee, a witness refuses to answer publicly or privately any question that may be put to him, or to produce any paper, book, record or document, and claims privilege on the ground that the giving of the answer or the production of the paper, book, record or document would be contrary to the public interest the following procedure will apply -

- (1) The chairman shall inform the witness that he may explain his reasons in confidence to the relevant body and that the relevant body will then deliver an opinion to the committee without disclosure of any information or paper, book, record or document claimed by the witness to be privileged from disclosure.
 - (2) If the witness agrees to explain his reasons to the relevant body the relevant body shall make arrangements to consider the reasons and deliver its opinion to the committee.
 - (3) If the relevant body delivers its opinion that the claim of privilege by the witness is justified in respect of an answer to a question or the production of any paper, book, record or document the committee shall excuse the answering of such question or the production of such paper, book, record or document.
 - (4) If the relevant body delivers its opinion that the claim of privilege by the witness is not justified in respect of any answer to a question or the production of any paper, book, record or document the committee may order the answering or production thereof.
 - (5) If the witness continues to refuse to answer any question or produce any paper, book, record or document the committee may take such action within its powers as it considers appropriate.
 - (6) If the witness does not agree to explain his reasons to the relevant body under subparagraph (2) the committee may take such action within its powers as it considers appropriate.
3. If, at a public sitting of a committee, a witness refuses to answer in public any question that may be put to him, or to produce in public any paper, book, record or document on the ground of public interest privilege, but requests to answer such question or produce such paper, book, record or document at a private sitting of the committee, the following procedure will apply -
- (1) The committee will deliberate in private whether to agree to the request by the witness.
 - (2) The decision of the committee will be taken by formal vote.
 - (3) If the committee decides to agree to the request by the witness no answer given by the witness at a private sitting nor any paper, book, record or

document produced by him thereat shall be made public unless the committee decides during the private sitting that the request by the witness for confidentiality is not justified. Before reaching such a decision the committee shall give the witness an opportunity to state the grounds upon which he claims public interest privilege in respect of the particular answer or paper, book, record or document.

Appendix II

Provision of Transcripts of Evidence

The following procedures shall apply to the provision of transcripts of evidence taken by the Subcommittee to Study Issues Arising from Lehman Brothers-related Minibonds and Structured Financial Products -

- (a) where considered appropriate, the Subcommittee may permit copies of the transcripts of evidence taken in public be provided to witnesses and prospective witnesses on request;
- (b) "witnesses" refers to persons on whom summonses have been served by the Subcommittee to order their appearance before it; "prospective witnesses" refers to witnesses whom the Subcommittee has decided to summon to appear before it;
- (c) where copies of transcripts of evidence taken in public are provided to witnesses or prospective witnesses, the unpublished and/or uncorrected status of the transcripts shall be stated clearly; and
- (d) the provision of unpublished and/or uncorrected transcripts of evidence taken in public to witnesses or prospective witnesses be made on the condition that they shall not make public use of the transcripts; shall not quote directly from the transcripts; and shall not use the transcripts in a manner prejudicial to the interest of the Subcommittee or other persons.