

立法會 *Legislative Council*

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

Background Brief

Purpose

This paper highlights certain policy and regulatory issues arising from the Lehman Brothers-related minibonds and structured financial products, as well as summarizes Members' recent deliberations on the subject.

Background

2. The collapse of the US sub-prime market in 2007 triggered a spate of banking and financial crises. The Lehman Brothers Holdings Inc., one of the leading investment banks in the United States (US) and operating a network of offices around the world, filed for bankruptcy protection on 15 September 2008¹. One of the aftermaths is that the Lehman Brothers-related entities (Lehman Brothers) have defaulted in respect of their obligations under minibonds and other structured financial products. Here in Hong Kong, according to available information, some HK\$20.17 billion of Lehman-related products have been sold to over 43 700 investors, including HK\$11.2 billion in minibonds to 33 600 investors². These products have been sold to investors mainly through retail banks and brokerages. The minibonds in question are found to be structured financial products consisting of high-risk and complicated derivatives such as synthetic collateralized debt obligations (CDOs) or credit default swaps (CDS) contracts guaranteed by Lehman Brothers. The minibond investors were in fact not buying a stake in prominent corporations, but a basket of CDS or CDOs. By design, these structured financial products cater to the investment needs of sophisticated and seasoned investors, rather than to those of the average small investors. However, in actual practice, such products have often been sold by banks to their retail

¹ The bankruptcy petition was filed under Chapter 11 of the US Bankruptcy Code.

² The figures were provided by Hong Kong Monetary Authority for the special meeting of the House Committee on 13 October 2008. See LC Paper No. CB(2)49/08-09(07).

customers.

3. There was a public outcry following the collapse of Lehman Brothers as thousands of panicking investors fear substantial or total loss on their Lehman Brothers-related minibonds and structured financial products. Their predicament, which has been widely reported by the media, includes the following complaints:

- (a) The Lehman Brothers-related minibonds were promoted to them as low-risk products. The terminology used is highly misleading as the term "bonds" is often associated with capital-protected fixed-income products.
- (b) Many of the investors were not well-versed in financial knowledge and have purchased minibonds at retail banks. In the selling process, the bank staff have not apprised them of the investment risks involved, nor has the role of Lehman Brothers in the products ever been disclosed.
- (c) The regulatory authorities, namely the Hong Kong Monetary Authority (HKMA) and the Securities and Futures Commission (SFC), and the Government have not rendered prompt and effective assistance to aggrieved investors. The HKMA and SFC have not exercised sufficient oversight over banks' selling of structured financial products to their retail customers.

Concerns underlying the current statutory framework

4. The current framework governing the sale of financial products by banks to their customers is enshrined in the Banking Ordinance (Cap.155) (BO) and the Securities and Futures Ordinance (Cap.571) (SFO)³, following a scrutiny of the Securities and Futures Bill (SFB) and the Banking (Amendment) Bill 2000 (BAB) by a Bills Committee of the Legislative Council (LegCo)⁴. It should be noted that during the scrutiny and passage of the Bill, the relevant Bills Committee considered a number of policy and regulatory issues which are also relevant in the Lehman Brothers incident.

Regulation of securities business of banks

5. Under the BO, banks are referred to as "authorized institutions" (AIs). The major provisions under the BAB were to put beyond doubt that HKMA's regulatory powers would cover the whole of the AIs' businesses. This is an improvement over the past arrangement that AIs, being under the supervision of

³ The Securities and Futures Commission Ordinance and nine other securities and futures related ordinances were consolidated into the SFO, which came into operation on 1 April 2003.

⁴ The report of the Bills Committee submitted to the House Committee on 22 February 2002 is at LC Paper No. CB(1)1086/01-02.

HKMA, were granted "exempt status" by SFC to conduct activities regulated by SFC (such as securities business).

6. There was a suggestion from the Bills Committee that an AI should be required to conduct their securities business through setting up a subsidiary. In response, the Administration advised that this would not serve the interest of investors, nor address the supervisory overlap between HKMA and SFC. The banking sector held the view that investors should have the choice to conduct their securities trading through an AI or a broker. Regarding concerns about how AIs conducted their securities business, the Administration confirmed that AIs would be subject to the day-to-day front-line supervision by HKMA, using the regulatory standards set by SFC. The SFC rules and codes/guidelines would apply directly to such AIs and their securities staff unless there were equally or more stringent requirements under BO. The Bills Committee was also informed that HKMA would maintain a register of individuals performing securities-related activities for the AIs. HKMA would adopt the same "fit and proper" criteria promulgated by SFC for admitting AIs' representatives to the register. The HKMA also assured the Bills Committee that it had a duty to take all reasonable steps to ensure that any business of AIs would be conducted with "integrity, prudence and the appropriate degree of professional competence".

Dual-regulator versus single-regulator approach

7. Given the increasing business diversification in the financial industry, the distinction between banking and investment services has blurred. The Bills Committee noted that although HKMA's supervision of AIs would cover prudential and conduct supervision, the emphasis was on prudential supervision to ensure that AIs had adequate capital and liquidity to discharge their liabilities and to avoid systemic risks. HKMA had to rely on AIs to carry out conduct supervision of staff. On the other hand, SFC had maintained prudential supervision as a starting point, and had invested considerable resources in conduct supervision at both the corporate and individual levels. Despite the Administration's advice that the two regulators would work closely, one of the Bills Committee concerns was whether banks (as AIs under BO) and brokers (as licensees under SFO) would in effect be subject to different regulatory standards and requirements in respect of carrying out the same activity. If brokers were subject to more stringent regulation by SFC while banks were not, questions about unfair competition and different levels of protection for investors would arise.

8. The Bills Committee also considered the regulatory regimes in the United Kingdom (UK) and US. In UK, the Financial Services and Markets Act has established the Financial Services Authority as the single regulator for the entire financial services industry. In US, due to historical reasons, separate financial regulators are maintained for different trades. Some members maintained the view that it should be the appropriate approach for the same regulated activity to be regulated by the same regulator.

Protection for depositor-investors

9. Notwithstanding the enactment of the SFB and BAB in 2002, consumer/investor protection has remained an issue of concern. In a competitive business environment, the discernible trend is that since the full deregulation of the interest rates rules in 2001, banks have been diversifying more and more into other financial businesses, such as securities dealing and selling of investment products, many of which are regulated by SFC. At present, while HKMA is the frontline supervisor of the securities business of AIs and requires AIs to comply with the Code of Conduct for Persons Licensed by or Registered with the SFC in selling securities and futures products, HKMA does not authorize the issue of advertisements, invitations or documents relating to investments under the existing regulatory framework of SFO.

10. Under the existing regulatory regime, investor protection is the responsibility of SFC as provided under SFO. However, as evidenced in the Lehman Brothers incident, many investors who have bought the financial products are also bank depositors. Whether and how HKMA should be given a specific statutory duty on consumer/investor protection is a question that may need to be further considered.

Latest deliberations on the subject

11. Given the widespread concerns caused by the Lehman Brothers incident and the magnitude of its ensuing problems, the House Committee held a special meeting on 13 October 2008 to receive a briefing by the Government, HKMA, SFC, the Hong Kong Association of Banks (HKAB) and over 20 financial institutions on the latest state of play. The key issues raised by Members and their concerns are summarized in the following paragraphs.

Regulation of the sale of minibonds and structured financial products

12. On whether HKMA has adequately monitored banks' selling of structured financial products, Members have been informed that HKMA has issued additional guidelines on the sale of such products between May 2005 and the third quarter of 2007, before the breakout of the US sub-prime crisis. HKMA has also urged banks earlier this year to re-label products containing CDOs as high-risk investment products. The Chief Executive of HKMA has referred to his articles and public speeches in which he has reminded investors of the importance of risk management amidst changes in global markets.

13. Members note that HKMA, being the frontline supervisor of the securities business of banks, requires banks to comply with the relevant code issued by SFC in selling securities and futures products and to put in place adequate internal controls to ensure that banks properly assess the suitability of investment products for their customers and adequate disclosure of the nature and risks of the products. However, noting that in actual practice, banks are notified in advance of HKMA's

on-site examinations, Members have queried the effectiveness of HKMA's regulatory actions in detecting irregularities.

14. There has been discussion on whether the use of the term "minibonds", with its connotation of fixed-income and capital-protection, is misleading and amounts to misrepresentation. According to SFC, the term "minibonds" is a brand name which does not have a regulatory meaning. Investors should not rely solely on the product name or the marketing materials in making their investment decisions. Under the existing disclosure-based regulatory approach, SFC considers it incumbent upon the agent or distributor (e.g. bank staff) selling the product to disclose fully the nature and risks of a financial product to their clients. Members share the concern that SFC should not have authorized high-risk financial products being disguised as low-risk investment products.

15. On whether Hong Kong has adopted a lower regulatory standard than other jurisdictions such as US on the sale of minibonds and structured financial products, SFC has advised that in US, structured financial products are typically defined as only being able to be sold into options accounts or accounts for qualified derivatives. Hence, minibonds are not readily available to retail investors. Members have also been informed that in US, investors are wary of structured financial products. Meanwhile, Members note that the regulators may have difficulty in obtaining necessary information and taking regulatory actions when the issuers of the products in question are off-shore-based companies.

Alleged mis-selling by banks

16. Based on the complaints received so far, Members have found that many of the minibonds investors, being retirees or elderly persons, have the least aspiration for high-risk high-yield investments, but would look forward to receiving a stable income on their savings. Under such circumstances, some Members consider that banks should be required to explain why they have chosen to sell minibonds and structured financial products to these clients, instead of requiring the victims themselves to substantiate their allegations of mis-selling. Question has been raised on whether the contract between the investor and the bank will remain valid if there is proven mis-selling on the part of the bank.

17. Concern has been raised on whether some banks have in fact breached existing privacy legislation in using their depositors' personal data for the purpose of identifying them as potential investors in minibonds and other high-risk products.

18. Some Members express sympathy for frontline banking staff as they may have been under heavy pressure from management to sell structured financial products such as minibonds to customers. Members note that under a highly competitive market environment, banks are keen to find ways to boost their income and businesses.

Complaints investigation and imposing sanctions

19. Members are keen to ensure that complaints lodged by affected investors about mis-selling of Lehman Brothers-related minibonds and structured financial products are properly and promptly handled. According to HKMA, it has mobilized additional resources to deal with complaints and would refer substantiated cases to SFC for investigating whether there are breaches of relevant provisions in the code or legislation. In response to Members' concerns, HKMA and SFC have undertaken to make the best effort to complete investigation early. On possible sanctions that can be imposed, Members note that sanctions that SFC may impose on non-complying banks include suspension or revocation of registration, reprimands, fines or prohibition orders.

Assistance to affected investors

20. Members concur that one of the most important tasks at this juncture is to assist affected investors. To avoid lengthy litigation and help investors to get some of their money back quickly, the Government has put up a proposal under which the distributing banks and brokers of the minibonds would offer to buy back the minibonds at their estimated value⁵. The Government will also appoint an independent auditor to oversee the fair valuation of collaterals by banks.

21. Regarding compensation, if any, to affected investors, the Government has made it clear that it will not compensate individual investors by taxpayers' money. Individual banks have agreed in principle to consider compensating individual investors if it is proved that there is mis-selling on the part of their staff. Members also note that under the existing legislation, HKMA does not have the power to order banks to pay compensation to affected investors.

22. Members have also put forward suggestions for the consideration of the Government and regulators. They include :

- (a) exempting banks from disciplinary or legal liabilities in exchange for their setting up a special fund to provide timely compensation to vulnerable groups such as the elderly and those investors with investment not exceeding HK\$500,000; and
- (b) the Government to provide one-stop shop service to assist the affected investors, and to set up a panel comprising two to three independent members to provide mediation and, where necessary, arbitration for disputes between banks and the affected investors in the valuation of collaterals and refund payable.

⁵ The Task Force of the Hong Kong Association of Banks announced on 17 October 2008 that the distributor banks involved had agreed to the buy-back proposal made by the Government regarding the Lehman Brothers-related minibonds. The Task Force has appointed Ernst & Young as the independent financial adviser responsible for the buy-back process, including the establishment of the market value of such minibonds.

Maintaining stability in the financial and banking systems

23. Members have noted with concern that the recent bank run on Bank of East Asia may have been caused by the negative sentiments arising from the Lehman Brothers incident. The Government and HKMA have been urged to carefully assess the impact of the incident on Hong Kong's banking stability and to take effective measures to bolster confidence in the local banking system. There is concern that the Lehman Brothers incident has revealed regulatory loopholes and tarnished Hong Kong's reputation as an international financial centre.

24. According to the Administration, the Lehman Brothers incident has clearly indicated that Hong Kong's financial system and regulatory framework can withstand stress and remain sound and robust. Nevertheless, HKMA and SFC will conduct a review and submit reports to the Financial Secretary, by end of 2008, on their observations, lessons learned and issues identified during the process of investigating into the complaints regarding the minibonds. Upon receipt of their reports, the Government will undertake a systemic review at the policy level to further improve the existing regulatory framework and enhance investor protection and education.

Motion passed by Members

25. At the Council meeting on 22 October 2008, Members passed the following motion on "Assisting the victims of the Lehman Brothers incidents" :

"That, under the existing financial monitoring mechanism, there is still a large number of bank clients and investors complaining against the banks and securities companies using misleading marketing practices, which have led to their purchasing of financial products such as Lehman Minibonds and notes without knowing the potential risks, resulting in their suffering substantial losses when the company went bankrupt; this incident has not only caused many members of the public to lose confidence in the above financial institutions and the system for monitoring banks and the financial system, but has also seriously affected Hong Kong's reputation as an international financial centre; in this connection, this Council condemns the Government for its inadequate monitoring, and urges the Government to immediately take the following actions:

- (a) using all possible means, including setting up an inter-departmental response team to assume overall responsibility for providing comprehensive assistance to affected small investors and protecting their interest;
- (b) urging distributors to expeditiously disclose information on the underlying assets of Lehman Minibonds or related financial products, including the nature of the underlying assets, their prices and liquidity;

- (c) expeditiously completing a comprehensive investigation into whether the distributors of Lehman Minibonds and related financial products have violated the relevant regulatory rules or guidelines, including whether these distributors have used improper sales practices to mislead the investors and whether they have breached the regulations or deviated from the guidelines, and expeditiously disclose the nature and number of cases involving improper sales practices and violation of and deviation from the guidelines; if it is proved that they have violated the relevant rules or guidelines, the Government should pursue the matter and seek compensation on behalf of the victims;
- (d) urging the Police to expeditiously complete their investigations for the authorities concerned to institute prosecutions against illegal acts, so as to severely penalize such acts;
- (e) urging various distributors to expeditiously propose to their clients compensation options for improper sales practices and violation of regulations;
- (f) with reference to the practice of Singapore in handling disputes resolution in the financial sector, considering the setting up of an independent commission or institution to provide one-stop service for disputes resolution, so as to enable the victims to seek compensation through such means as mediation and adjudication;
- (g) supporting the Consumer Council to conduct a study of the suspected cases involving misleading practices and, where necessary, use the Consumer Legal Action Fund to seek compensation from the banks and securities companies concerned for the small investors;
- (h) demanding the authorities to urge the trustees and distributors concerned to appoint an independent notary agency to properly handle the assets of holders of Lehman Minibonds or related financial products, thereby providing the best protection for the interest of small investors; and
- (i) at the same time conducting an investigation into whether there is dereliction of duty on the part of the Financial Secretary, the Financial Services and the Treasury Bureau, the Hong Kong Monetary Authority and the Securities and Futures Commission in this incident, and making recommendations on how to improve the mechanism for monitoring the sales of financial products, strengthen the protection of investors' interests and prevent the recurrence of similar incidents;
- (j) expeditiously providing the details about implementing the plan for distributors to buy back the bonds from the bond-holders and the

implementation timetable;

- (k) also expeditiously completing a comprehensive investigation into the issuers and sponsors etc of Lehman Minibonds and related financial products and, if it is proved that they have violated the rules or regulations, the Government should pursue the matter and seek compensation on behalf of the victims; and
- (l) demanding the Hong Kong Monetary Authority to investigate the unreasonable management measures adopted by the relevant banks to coerce their employees to achieve sales targets of the bonds concerned, establish channels for employees of banks to reflect such situations to the Hong Kong Monetary Authority and, at the same time, monitor bank management not to use high-handed and target-oriented approach in marketing products to protect front-line employees from becoming scapegoats, so as to restore public confidence in banks; and
- (m) demanding the authorities to appoint, with the highest efficiency and within the shortest possible time, independent persons of credibility and authorize them to deal with the following tasks respectively:
 - (i) monitoring the process of various banks for investigating complaint cases; and
 - (ii) with the consent of the parties concerned, arbitrating those cases which cannot be settled by way of conciliation,

so as to reduce the anxiety and dissatisfaction of the affected persons."

Relevant papers

26. A list of relevant papers is in the **Appendix**.

List of Relevant Papers

Reports

Paper	LC Paper No.
Overseas duty visit report of the Financial Affairs Panel in June 2001 http://www.legco.gov.hk/yr00-01/english/bc/bc04/reports/fa_full_rpt.pdf	--
Report of the Bills Committee on Securities and Futures Bill and Banking (Amendment) Bill 2000 to House Committee meeting on 22 February 2002 Volume I – The Report http://www.legco.gov.hk/yr00-01/english/bc/bc04/reports/bc04cb1-1086-v1-e.pdf	CB(1)1086/01-02
Report of the Bills Committee on Securities and Futures Bill and Banking (Amendment) Bill 2000 to Council Meeting on 13 March 2002 Volume I – The Report http://www.legco.gov.hk/yr00-01/english/bc/bc04/reports/bc041303cb1-rpt-v1-e.pdf	CB(1)1217/01-02
Hansard on Second Reading debate on Securities and Futures Bill and Banking (Amendment) Bill 2000 of the Council meeting on 13 March 2002 (pages 94 – 233) http://www.legco.gov.hk/yr01-02/english/counmtg/hansard/cm0313ti-translate-e.pdf	--

Papers relating to the special meeting of the House Committee held on 13 October 2008

Paper	LC Paper No.
Administration's paper on Minibonds arranged by Lehman Brothers http://www.legco.gov.hk/yr08-09/english/hc/papers/hc1013cb2-25-1-e.pdf	CB(2)25/08-09(01)

Paper	LC Paper No.
Securities and Futures Commission's paper on questions from the Legislative Council for the meeting http://www.legco.gov.hk/yr08-09/english/hc/papers/hc1013cb2-25-2-e.pdf	CB(2)25/08-09(02)
Paper on note on Legislative provisions relating to the regulation of banking institutions engaging in the sale of financial products http://www.legco.gov.hk/yr08-09/english/hc/papers/hc10131s-5-e.pdf	LS5/08-09
Paper on complaints regarding the sale of investment products related to Lehman Brothers Holdings by banks (Chinese version only) http://www.legco.gov.hk/yr08-09/chinese/hc/papers/hc1013cp-22-ec.pdf	CP22/08-09
Fact Sheet on a summary of local press reports on Lehman Brothers Holdings filed for bankruptcy protection from 26 February 2007 to 16 September 2008 http://www.legco.gov.hk/yr08-09/chinese/sec/library/0809fs02-c.pdf	FS02/08-09
Fact Sheet on a summary of local press reports on Lehman Brothers minibonds from 15 September to 11 October 2008 http://www.legco.gov.hk/yr08-09/chinese/sec/library/0809fs03-ec.pdf	FS03/08-09
Letter dated 14 October 2008 from Hon KAM Nai-wai and Hon James TO (Chinese version only) http://www.legco.gov.hk/yr08-09/chinese/hc/papers/hc1017cb2-38-1-ec.pdf	CB(2)38/08-09(01)
Paper on major issues relating to Lehman Brothers' minibonds and the sale of structured investment products http://www.legco.gov.hk/yr08-09/chinese/hc/papers/hc1013cb2-49-1-c.pdf	CB(2)49/08-09(01)
Speaking note of Mr John C TSANG, Financial Secretary (Chinese version only) http://www.legco.gov.hk/yr08-09/chinese/hc/papers/hc1013cb2-49-2-c.pdf	CB(2)49/08-09(02)

Paper	LC Paper No.
Speaking note of Prof K C CHAN, Secretary for Financial Services and the Treasury (Chinese version only) http://www.legco.gov.hk/yr08-09/chinese/hc/papers/hc1013/cb2-49-3-c.pdf	CB(2)49/08-09(03)
Speaking note of Mr Joseph YAM, Chief Executive, Hong Kong Monetary Authority (Chinese version only) http://www.legco.gov.hk/yr08-09/chinese/hc/papers/hc1013/cb2-49-4-c.pdf	CB(2)49/08-09(04)
Speaking note of Mr Martin WHEATLEY, Chief Executive Officer, Securities and Futures Commission (English version only) http://www.legco.gov.hk/yr08-09/english/hc/papers/hc1013/cb2-49-5-e.pdf	CB(2)49/08-09(05)
Securities and Futures Commission's paper on Secured Continuously Offered Note programme - Minibond Series 36" (soft copy of paper not available)	CB(2)49/08-09(06)
Hong Kong Monetary Authority's paper on 經銀行發售與雷曼有關的結構性票據(Chinese version only) http://www.legco.gov.hk/yr08-09/chinese/hc/papers/hc1013/cb2-49-7-c.pdf	CB(2)49/08-09(07)
Letter dated 14 October 2008 from Hon Mrs Regina IP LAU Suk-ye (Chinese version only) http://www.legco.gov.hk/yr08-09/chinese/hc/papers/hc1013/cb2-100-1-c.pdf	CB(2)100/08-09(01)
Letter dated 14 October 2008 from Hon KAM Nai-wai (Chinese version only) http://www.legco.gov.hk/yr08-09/chinese/hc/papers/hc1013/cb2-100-2-c.pdf	CB(2)100/08-09(02)
A list of the information requested by Hon James TO Kun-sun, Hon LAU Kong-wah and Hon Paul CHAN Mo-po http://www.legco.gov.hk/yr08-09/english/hc/papers/hc1013/cb2-100-3-e.pdf	CB(2)100/08-09(03)
Administration's response to Hon Mrs Regina IP LAU Suk-ye's request http://www.legco.gov.hk/yr08-09/chinese/hc/papers/hc1013/cb2-100-4-ec.pdf	CB(2)100/08-09(04)