

**Production of thematic examination reports as ordered by
the Subcommittee**

Information required by the Subcommittee

For the purpose of its study, in June 2009, the Subcommittee ordered Mr Y K CHOI, then Deputy Chief Executive of the Hong Kong Monetary Authority (DCE/HKMA), to produce to the Subcommittee 68 thematic examination reports on the registered institutions (RIs) examined in four thematic examinations conducted by HKMA from 2005 to 2008¹. The Subcommittee also agreed that the names of individual RIs might be covered up if necessary.

HKMA's response

2. DCE/HKMA declined to produce the 68 examination reports to the Subcommittee on account of the secrecy provision in section 120 of the Banking Ordinance (Cap.155) (BO), as the reports were prepared from information obtained by the Monetary Authority (MA) in the course of the exercise of his functions under section 55 of BO. DCE/HKMA also considered that even if the reports were produced in a redacted form as proposed by the Subcommittee, it would still be possible to work out which RIs were being referred to. The redacted reports would therefore still disclose information covered by sections 120(1) and (4) of BO.

3. Earlier on, Mr Joseph YAM, then MA, had stated that for the purpose of performing his key functions under section 7 of BO, he might use his powers under BO or the Securities and Futures Ordinance (Cap.571) (SFO) to obtain the necessary information during the examination or investigation process. Since such information was obtained by MA in performing his functions under BO, it was subject to section 120 of BO, irrespective of whether the information had been obtained by MA exercising his powers under BO or SFO.

¹ Mr Joseph YAM, then Monetary Authority, had provided the Subcommittee with a summary of the 68 thematic examination reports under section 120(5)(a) of BO on 1 June 2009. Nevertheless, for the purpose of its study, the Subcommittee ordered the production of the 68 thematic examination reports.

Action taken by the Subcommittee

4. The Subcommittee had the following observations on the matter:
 - (a) Section 120(4) of BO provides, inter alia, that MA cannot be compelled to produce in any court information obtained in the exercise of his functions in the course of an examination or investigation under section 55 of BO. It is doubtful whether the prohibition against disclosing information under section 120(4) would also apply to orders of the Subcommittee made under the Legislative Council (Powers and Privileges) Ordinance (Cap.382) (LCPPO).
 - (b) Section 55 of BO appears to be restricted to the examination of the books, accounts and transactions of any authorized institution (AI) which is defined to mean a bank, a restricted licensed bank or a deposit-taking company in section 2(1) of BO. It is doubtful whether section 55 of BO would also apply to the thematic examinations of RIs, as although all RIs are AIs, the regulatory regime applicable to RIs and AIs is different and separate from each other. For supervision of RIs and relevant individuals, MA may exercise the powers granted under section 180 of SFO which Ordinance contains a separate secrecy provision (i.e. section 378) not identical to section 120 of BO.
5. The Subcommittee also sought clarification from the Administration on the policy intent of whether section 55 of BO should only apply to AIs in relation to activities other than those within the meaning of "regulated activities" as defined in SFO. In response, the Administration advised that the regulatory framework promulgated by BO was intended to allow MA to exercise supervisory oversight over all businesses conducted by an AI. It did not agree that section 55 of BO should only apply to AIs in relation to activities other than "regulated activities" as defined in SFO.
6. In the light of the legal advice it had subsequently obtained, the Subcommittee took note of the following issues related to section 120 of BO:
 - (a) those parts of the thematic examination reports that consist of information obtained by MA in the course of carrying out the thematic examinations under section 55 of the BO would be within the scope of the privilege under section 120(4) of BO;

- (b) section 14(1) of LCPPO provides that a witness before the Legislative Council or any committee of the Council is entitled to invoke the same right or privilege to refuse to give evidence (including the production of any paper, record or document) as in a court of law. Such right and privilege would also include the statutory limitation under section 120(4) of BO; and
- (c) in so far as on-site examinations are concerned, the sources of MA's power are either section 55 of BO or section 180 of SFO. There is no valid ground to contend that MA is not entitled to exercise his power under section 55 of BO to carry out the thematic examinations.

7. In view of the above, the Subcommittee put questions to DCE/HKMA, when he next attended before the Subcommittee, on the use of section 55 of BO and section 180 of SFO when MA conducted on-site examinations.

8. In his written reply to the questions so put to him at the hearing on 10 November 2009, DCE/HKMA stated that MA had been using primarily section 55 of BO for all on-site examinations of AIs' businesses, including their banking, securities and insurance businesses. Use of section 180 of SFO alone could only cover SFO-regulated activities and did not provide sufficient power to allow MA to achieve all of its supervisory objectives. Therefore, section 55 of BO had always been used by MA in conducting all on-site examinations (including thematic examinations) of RIs.