

# Briefing Paper for Panel on Financial Affairs Special Meeting to be held on 18 December 2008

Submitted by Distributors (Listed in Annexure 1)

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## 1 Details of the proposal and the meaning of the “buy-back”

### 1.1 Instigation of the original Buy-back proposal

The dedicated Task Force of The Hong Kong Association of Banks (HKAB) has been in discussions with the Hong Kong Monetary Authority (“HKMA”) and the Government since October 2008 about purchasing Minibonds distributed by member banks (“Distributors”, the names of which are listed in Annexure 1 hereto) at their market value from investors in Hong Kong. This has commonly been referred to as the “Buy-back”.

On 2 October 2008, HKAB established its Task Force Re. Lehman Distributors to provide a platform for its members to facilitate their discussion of common issues in endeavouring to assist affected investors of Lehman-related investment products. On 17 October 2008, even though the Distributors have no legal obligation to buy the Minibonds from investors, the Distributors accepted the Government’s request that the Distributors offer to buy Minibonds from Minibond holders at their market value. In October, it was expected that the offer process for the Buy-back of the first batch of Minibonds could commence in early December 2008.

A consensus on the Buy-back proposal was reached on the following basis:

- (a) the Distributors would buy Minibonds from Minibond holders at ‘market value’. Market value would be established through the assistance of a financial adviser appointed by the Task Force;
- (b) the Distributors would have the option, at their discretion, to on-sell the Minibonds purchased from Minibond holders or otherwise dispose of or liquidate such Minibonds in an orderly manner in accordance with the terms of the Minibond documentation without undue delay, with any excess above the purchase price to be returned to Minibond holders;
- (c) the Buy-back is independent of any regulatory investigation in respect of the distribution of the Minibonds and the Buy-back would not oblige any investor to waive their right to allege a mis-selling claim. The Buy-back offer by the Distributors is not an admission or implication of liability in respect of any mis-selling claim;
- (d) there having not occurred any change or event which would prejudice materially the ability of the Distributors to redeem, on-sell or otherwise dispose of the Minibonds or liquidate the collateral underlying the Minibonds or which would be likely to have a material adverse effect on the financial condition, business, operations or prospects of the Distributors;
- (e) the Distributors have the right to not buy some series of Minibonds which are expected to have very little value;
- (f) the Distributors would work closely with the Government and the HKMA and an independent financial adviser appointed by the HKMA in finalising and implementing the details of the Buyback; and

- (g) no Distributor accepts any liability or responsibility in respect of any investor who purchased Minibonds from any other Distributor.

It was agreed amongst the Distributors, the Government, the HKMA and their respective financial advisers that the calculation of the market value would be based on certain key assumptions, including, an assumption that the proceeds from the sale of the collateral underlying the Mini-bonds will be applied as contemplated in the Minibond documentation.

Up to 27 November 2008, the Distributors were working towards finalising the offer documents and the market value of the Minibonds for the Buy-back proposal with their legal advisers, financial advisers, the Government and the HKMA with the aim of launching the Buyback offer in early December.

## **1.2 Why has the Buy-back stalled?**

The Distributors and all the parties involved were well progressed with the finalisation of the offering memorandum and the calculation of the market value of the Minibonds in the week of 24 November 2008.

On the evening of 27 November 2008, the Distributors received from HSBC (the trustee for the Minibonds) a copy of a letter sent from Weil, Gotshal & Manges LLP (“Weil”), a law firm that acts for Lehman, addressed to HSBC, challenging the basis on which the proceeds from the sale of the collateral for many series of the Minibonds could be applied.

Weil’s letter alleges that, as a matter of US law, the proceeds realised through the collateral underlying the Minibonds should be paid to Lehman first before the Minibond holders.

In view of the claims by Weil, the Distributors promptly sought legal advice from their advisors with respect to U.S., English and Hong Kong laws and have been working closely with the Government and the Hong Kong Monetary Authority to review the situation.

At this stage the Distributors are not able to proceed with the Buy-back on the consensus previously agreed between the Government, the HKMA and the Distributors. There are a number of reasons for this:

- (i) due to the complexities of the legal issues involved, the financial advisor to the Distributors has advised that it is impracticable to determine the market value of the Minibonds under the circumstances;
- (ii) the challenge by Lehman on the Minibond documentation and the issues arising therefrom are beyond the reasonable contemplation of the Distributors when they agreed to the Buy-back proposal as outlined in paragraph 1.1 above; and
- (iii) the Distributors must ensure that any deviation from the original Buy-back proposal is properly considered by their respective board of directors based on all relevant information and that any such decision is consistent with the interests of their shareholders.

The Distributors have therefore decided, after consultation with the Government, to delay the Buy-back until the above issues have been clarified and addressed and the market value of the Minibonds can be determined.

**1.3 Why is there no revised timeframe for the Buyback (i.e. why can't the legal issues be resolved?)**

Weil's claim involves the application of complex cross-border insolvency issues and conflicts of law rules, and it is difficult to predict the timing required to resolve those issues or the manner in which those issue will be resolved.

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**2 Disclosure of details of legal advices**

The Distributors have been working with their legal advisers with respect to the legal issues in Hong Kong, England and the United States. These efforts are continuing.

Disclosure of any legal advice obtained by the Distributors, or of the merits of Lehman's claim is likely to prejudice the interests of Minibond holders as those advices will then be public information and available to Lehman and its advisers.

The Distributors' legal advisers have strongly advised the Distributors against publicly disclosing the contents of their legal and advice. In addition, the legal advice received will require the consent of the relevant legal advisers in order to be disclosed. That consent has not been obtained.

All legal advices provided to the Distributors are protected by legal privilege.

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**3 Efforts made by the Task Force of HKAB and/or distributor banks to facilitate early commencement of the "buy-back"**

**3.1 What steps can the Trustee/noteholders take to resolve this issue?**

The trustee has announced that the swaps underlying the Minibonds were terminated on 15 December 2008. The Distributors are contacting the trustee to gauge what further action the trustee intends to take to protect the interests of Minibond holders.

The Distributors will continue to assess developments with respect to the Minibonds as they arise and to maintain a dialogue with all relevant parties, including their legal advisers, the trustee and the Government.

**3.2 Will Lehman's claim succeed?**

The issues involved are complex and involve international conflict of law rules. Discussion of the merits of Weil's claim in any public forum may prejudice the interests of Minibond holders and the Distributors as such information will be available to Lehman and its advisers for their use in their claim.

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**4 Alternative measures/plans, if any, being pursued or contemplated to assist the affected investors to recover their money**

The Distributors have been in a continuous dialogue with the Government and the HKMA to find ways to assist the Minibond holders.

A number of proposals are under discussion between the Distributors and the Government. Further information will be announced once the parties have reached consensus.

## **Annexure 1**

ABN AMRO Bank N.V.  
Hong Kong Branch

Bank of Communications Co., Ltd.  
Hong Kong Branch

Chiyu Banking Corporation Limited

CITIC Ka Wah Bank Limited

Fubon Bank (Hong Kong) Limited

MEVAS Bank Limited

Public Bank (Hong Kong) Limited

Wing Hang Bank, Limited

Bank of China (Hong Kong) Limited

The Bank of East Asia, Limited

Chong Hing Bank Limited

Dah Sing Bank, Limited

Industrial and Commercial  
Bank of China (Asia) Limited

Nanyang Commercial Bank, Limited

Shanghai Commercial Bank Limited

Wing Lung Bank Limited