

For discussion on
4 November 2003

**Bills Committee on
Deposit Protection Scheme Bill**

Confidentiality

Background

At the meeting on 25 September 2003, Members requested the Administration to provide a paper explaining the rationale behind, and the application of, Clause 44, with particular reference to Clause 44(1)(a).

Rationale behind Clause 44

2. Clause 44 aims to achieve two policy objectives:-
 - (i) it requires those persons performing any function under the DPS legislation to preserve the secrecy of information obtained in the course of performing their functions under the DPS legislation; and
 - (ii) it requires the Scheme members to keep confidential their supervisory ratings or any information from which their supervisory ratings can be ascertained or inferred.
3. There are strong policy grounds for imposing a secrecy obligation on the relevant persons referred to in 2 above. Under the DPS legislation, the Hong Kong Deposit Protection Board (“Board”) may require the Scheme members to submit such information as it may require for the performance of its functions under the Bill. In particular, the Board may require a Scheme member to submit returns showing the amount of the protected deposits maintained with the Scheme member. It will also have access to sensitive information such as the supervisory

ratings of individual banks assigned by the Monetary Authority from time to time¹. In addition, the Board and the persons appointed as agents of the Board or authorised by the Board will have access to the premises and records of a failed Scheme member. These records would include individual depositors' information. It will be in the public interest that such proprietary information of the Scheme members and their customers will not be disclosed without good cause. The secrecy obligation as contained in Clause 44 is also in line with the long-standing duty of confidentiality owed by banks to their customers. If a deposit protection scheme fails to recognise and protect well-recognised rights to privacy enjoyed by customers and banks internationally, this could not only turn banks away from Hong Kong, but also discourage depositors, both local and overseas, from doing business with banks in Hong Kong.

4. It should also be pointed out that all regulators in the financial services sector are required to preserve the secrecy of the information obtained in the course of performing their functions and duties. The Administration does not see any reason why the relevant persons referred to in paragraph 2(i) above should be exempt from this requirement.

5. Equally, there are sound policy reasons for requiring Scheme members to keep their supervisory ratings confidential. Overseas experience shows that, in the absence of a clear requirement, banks with good supervisory ratings would tend to disclose information from which their ratings can be inferred (e.g. the amount of contribution paid by them). Such a practice, if left unchecked, could create instability in the banking sector, as banks which do not follow a similar practice would be regarded as having a poor supervisory rating. To curb such a practice, both the U.S. and the Canadian schemes² have imposed a statutory

¹ The supervisory rating assigned to a Scheme member by the Monetary Authority reflects his assessment of the overall financial condition of the Scheme member as well as the quality of its management. Such information is extremely sensitive. If the supervisory rating of a Scheme member were leaked to the public and were misinterpreted by them, this could potentially lead to a run on the Scheme member by depositors. Obviously, this would not be in the interest of maintaining the stability of the banking system.

² The scheme in the U.K. does not use a differential system to assess contributions payable by individual banks. Moreover, the Financial Services Authority, the regulator in the U.K., no longer uses a rating system to measure the relative riskiness of individual institutions. Therefore, a restriction not to disclose supervisory ratings or other pertinent information is not relevant to the U.K. scheme.

requirement on their respective members not to disclose their supervisory ratings or any pertinent information from which those ratings may be inferred. The Administration believes that there should also be a similar restriction in the DPS legislation.

Application of Clause 44

6. Clause 44(1) and (2) imposes a secrecy obligation on the following persons:-

- (i) a member of the Board;
- (ii) a related person³ of the Board;
- (iii) a person employed by or assisting a related person of the Board;
- (iv) a person performing any function under the DPS legislation; and
- (v) the Monetary Authority, or a person appointed under section 5A(3) of the Exchange Fund Ordinance (Cap.66) to assist the Monetary Authority.

7. These persons are expected:-

- (i) to preserve and aid in preserving secrecy⁴ with regard to all matters relating to the affairs of any person that come to their knowledge in the performance of any function under the DPS legislation;
- (ii) not to communicate any such matter to any person other than the person to whom such matter relates; and

³ As defined in Clause 2, a related person means a person employed by or authorised by the Board under the DPS legislation or a person appointed as an agent or adviser of the Board under the DPS legislation.

⁴ Please see the next section for a detailed discussion of the phrase “aid in preserving secrecy”.

- (iii) not to suffer or permit any person to have access to any records in their possession, custody or control.

8. To enable the Board to properly discharge its duties and functions, the prohibition in Clause 44(1) does not apply to disclosure of information which is necessary for the performance of any function under the DPS legislation or for carrying into effect the provisions of the DPS legislation. Furthermore, Clause 44(3) specifies a number of cases in which confidential information may be disclosed to specified persons under specified circumstances. These include, for example, disclosure of information in summary form and disclosure of information with a view to the institution of criminal proceedings.

9. Clause 44(4) gives effect to the proposed restriction on disclosure of supervisory ratings. Under this provision, no person shall, without the written consent of the Monetary Authority given generally or in any particular case or class of cases⁵, disclose to any person other than the Board:-

- (i) any information regarding a Scheme member's supervisory rating or the amount of a Scheme member's contribution⁶; or
- (ii) any other information that would, by itself or together with other information, enable a Scheme member's supervisory rating or the amount of a Scheme member's contribution to be ascertained or inferred.

10. Clause 44(5) and 44(6) prescribes the penalty for breach of the requirements in Clause 44(1) and 44(4).

⁵ There would be a need for Scheme members to disclose their supervisory ratings to certain third parties such as their auditors. However, these persons should in accordance with this provision keep the information confidential.

⁶ Since the amount of contribution is assessed on the basis of each individual member's supervisory rating, disclosure of the amount of contribution paid by a Scheme member will make conjecture of the member's supervisory rating much easier. Moreover, by comparing the amount of contribution paid by a Scheme member over time, one would know whether there is any change in the supervisory rating of that member. For these reasons, there is a need to prohibit the disclosure of the amount of contribution paid by a Scheme member.

Clause 44(1)(a)

11. As noted above, Clause 44(1)(a) of the DPS Bill requires a person subject to this provision to preserve and aid in preserving secrecy with regard to information received by him in the performance of functions under the DPS legislation. It is drafted along the lines of other Ordinances which impose a similar secrecy obligation⁷.

12. Members of the Committee have previously questioned how the phrase “aid in preserving secrecy” is construed in practice. Our legal research shows that there is no case law on the exact scope and actual application of this phrase.

13. The common usage of the word “preserve” in this context is recorded in The Oxford English Dictionary as:-

“To keep safe from harm or injury; to keep in safety, save, take care of, guard”

and the word “aid” is recorded as:-

“To give help, support, or assistance to; to help, assist, succour”.

14. It therefore follows that those covered by this provision have two obligations:-

⁷ Section 120(1) of the Banking Ordinance (Cap. 155), sections 32H(1)(a) and 42G(1)(a) of the Professional Accountants Ordinance (Cap. 50), section 378(1)(a) of the Securities and Futures Ordinance (Cap. 571), section 53A(1)(a) of the Insurance Companies Ordinance (Cap. 41), section 15(1)(a) of the Hong Kong Examinations and Assessment Authority Ordinance (Cap. 261), section 5(1)(a) of the Money Lenders Ordinance (Cap. 163), section 31(1)(a) of the Hong Kong Science and Technology Parks Corporation Ordinance (Cap. 565), section 4(1) of the Inland Revenue Ordinance (Cap. 112), section 4(1) of the Business Registration Ordinance (Cap. 310), section 15(1)(a) of the Gas Safety Ordinance (Cap. 51) and section 4(1) of the Monetary Statistics Ordinance (Cap. 356).

- (i) where he/she is in a position to directly control the maintenance of the confidentiality of the protected information, there is a personal duty on his/her part to maintain the confidentiality; and
- (ii) where he/she is not in a position to directly control the maintenance of the confidentiality of the protected information but can help maintain secrecy of the same (or prevent or reduce the likelihood of disclosure of the same inconsistent with the secrecy regime) by rendering assistance that is within his/her control or capability, there is a duty to provide such assistance or help as may be necessary to maintain the confidentiality.

15. The level of “aid” required in each case is likely to be different and depends on its own facts. The actual application of this provision can be illustrated in the following paragraphs.

16. To take a simple example, officer A and officer B of the Board are each given a copy of certain confidential documents. Officer A leaves the office without storing the same properly, leaving the same on his desk. A visitor to the office is attempting to browse the documents left on the desk and officer B is aware of that. Officer B should not turn a blind eye to that, but should aid in preserving secrecy by telling that visitor that the documents are confidential and he should not read them. If practicable, officer B should store the same in a safe place. Similarly, if officer A’s safe is full and he asks for officer B’s assistance to store the documents in his safe overnight, officer B should help officer A if his safe has spare storage space.

17. Another example would be that an officer of the Board passes certain confidential information to an accounting firm which has been appointed to assist the Board in calculating and making compensation payments. That firm reports that the information has gone missing from its offices, perhaps due to the subornation or bribery of one of its employees, and has fallen into the hands of a third party who is proposing to disclose the same. The officer of the Board can and should aid in preserving secrecy by taking such steps as may be necessary to help that firm to recover the information and to prevent disclosure, for example, by ensuring the

matter is reported to the police and cooperating with the police, courts and such other agencies as may be necessary to obtain its return and preserve secrecy.

18. A further example would be that under Clause 7(b) of the Bill, the Board has power to claim, from the liquidator of a failed Scheme member, reimbursement of the amount of compensation paid to relevant depositors. In order to obtain reimbursement from the liquidator, it is likely that the Board will have to disclose to the liquidator certain information in respect of the depositors concerned. The making of such disclosure does not end the Board members' responsibility to protect the confidentiality of that information. The Board members need to consider whether, given that the liquidator's position towards onward disclosure is probably neutral, the liquidator should be asked to provide appropriate confidentiality undertakings.

19. The above examples show that the phrase "aid in preserving" is necessary. If this phrase were taken out, the effectiveness of the secrecy obligation imposed on the relevant persons would be called into doubt. The above examples also illustrate the differences between the obligations referred to in paragraph 14(i) and (ii). It is the policy to ensure that the relevant persons have the responsibility to aid in protecting confidentiality. There should be no doubt about this and given that a breach of this duty is a criminal offence and that any ambiguity in relation to the existence of this duty will be resolved in favour of the defendant, it is desirable to state this duty as clearly as the draftsman can and in accordance with the precedents in other Ordinances where the policy appears to be the same.

Hong Kong Monetary Authority
Financial Services and the Treasury Bureau
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