

For discussion on  
11 December 2003

**Bills Committee on  
Deposit Protection Scheme Bill**

**Confidentiality**

**Background**

At the meeting on 4 November 2003, Members requested the Administration:-

- (i) to provide the provisions in various Ordinances referred to in footnote 7 of the Administration's paper on "Confidentiality" (Paper No. CB(1) 220/03-04(03)) which were relevant to clause 44(1)(a) of the Bill<sup>1</sup>; and
- (ii) to review the drafting of clause 44(1)(a), particularly on the extent to which a person should preserve and aid in preserving secrecy under the Bill.

**Ordinances with provisions similar to clause 44(1)(a)**

2. Clause 44(1)(a) of the 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. Similar provisions can be found in a number of Ordinances. The relevant provisions are set out in detail in the Annex. References to "preserve and aid in preserving secrecy" are highlighted.

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<sup>1</sup> Clause 44 of the DPS Bill provides that –

- (1) Except so far as it is necessary for the performance of any function under this Ordinance or for carrying into effect the provisions of this Ordinance, every person to whom this subsection applies-
  - (a) shall preserve and aid in preserving secrecy with regard to all matters relating to the affairs of any person that come to his knowledge in the performance of any function under this Ordinance;
  - (b) shall not communicate any such matter to any person other than the person to whom such matter relates; and
  - (c) shall not suffer or permit any person to have access to any records in his possession, custody or control.

### **Drafting of clause 44(1)(a)**

3. In the light of the previous discussions, the Administration has reviewed the drafting of clause 44(1)(a).

4. Given that the Board will have access to sensitive information pertaining to Scheme members and their depositors, the DPS legislation should contain an effective secrecy provision to protect the confidentiality of such information. If clause 44(1)(a) were taken out, an officer of the Board or any other person performing functions under the DPS legislation could discharge his secrecy obligation simply by not communicating the confidential information to other persons and not permitting other persons to have access to such information under his control. This may not be adequate in some circumstances. The following example will illustrate this point.

5. Suppose that the Board has appointed an accounting firm as an agent to assist in the payout of compensation to depositors and thus has passed certain confidential information to the firm. The firm later reports that the information has, for some reasons, fallen into the hands of a third party who is proposing to disclose the information. Under such circumstances, the officers of the Board should take reasonable steps to recover the information and to prevent further disclosure of the information. Such steps may include, for example, reporting the incident to the Police or applying to the court for an injunction to prohibit disclosure by that third party.

6. It should also be pointed out that the secrecy provision under clause 44(1) only applies to:-

- (i) a member of the Board;
- (ii) a related person of the Board (i.e. a person employed by or authorised by the Board or a person appointed as an agent or adviser 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 the Exchange Fund Ordinance to assist the Monetary Authority.

Since these persons are either public officers or are performing public functions under the DPS legislation, it is not unreasonable to require them to observe a high standard in preserving secrecy.

7. The Administration has also examined the extent of the duty under clause 44(1)(a). A contravention of clause 44(1)(a) is an offence under clause 44(5). The defence under clause 48 does not apply to this offence. However, having consulted the Department of Justice, we believe that the offence under clause 44(5) is one that requires proof of mens rea (i.e. not a strict liability offence). Only a person who – intentionally or recklessly – fails to preserve or aid in preserving secrecy will commit the offence. A court should not find anyone who fails to preserve, or aid in preserving, secrecy guilty of an offence under clause 44(5), unless the prosecution has proved the person's intention or recklessness in doing so. Mens rea signifies that particular standards of conduct are to be complied with – in this case “intention” or “recklessness” as just mentioned.

8. Overall, the Administration considers it desirable to retain clause 44(1)(a) and it is not unreasonable to require public officers to observe a high standard in preserving secrecy.

Hong Kong Monetary Authority  
Financial Services and the Treasury Bureau  
December 2003

Annex

**List of Ordinances with Provisions  
Similar to Clause 44(1)(a) of the DPS Bill**

	Relevant Provisions
<p>1. Securities and Futures Ordinance (Cap. 571)</p> <p>Section 378(1)</p>	<p>(1) Except in the performance of a function under, or for the purpose of carrying into effect or doing anything required or authorized under, any of the relevant provisions, a specified person-</p> <p>(a) shall <b>preserve and aid in preserving secrecy</b> with regard to any matter coming to his knowledge by virtue of his appointment under any of the relevant provisions, or in the performance of any function under or in carrying into effect any of the relevant provisions, or in the course of assisting any other person in the performance of any function under or in carrying into effect any of the relevant provisions;</p> <p>(b) shall not communicate any such matter to any other person; and</p> <p>(c) shall not suffer or permit any other person to have access to any record or document which is in his possession by virtue of the appointment, or the performance of any such function under or the carrying into effect of any such provisions, or the assistance to the other person in the performance of any such function under or in carrying into effect any such provisions.</p>
<p>2. Insurance Companies Ordinance (Cap. 41)</p> <p>Section 53A(1)</p>	<p>(1) Except in the exercise of any function under this Ordinance or for the carrying into effect of the provisions of this Ordinance, every person to whom this subsection applies-</p> <p>(a) shall <b>preserve and aid in preserving secrecy</b> with regard to all matters relating to the affairs of any insurer that may come to his knowledge in the exercise of any function under this Ordinance;</p> <p>(b) shall not communicate any such matter to any person other than the person to whom such matter relates; and</p> <p>(c) shall not suffer or permit any person to have access to any records in his possession, custody or control or in the possession, custody or control of any other person so appointed or employed.</p>

	Relevant Provisions
<p>3. Banking Ordinance (Cap. 155)</p> <p>Section 120(1)</p>	<p>(1) Except as may be necessary for the exercise of any function under this Ordinance or for carrying into effect the provisions of this Ordinance, every person to whom this subsection applies-</p> <p>(a) shall <b>preserve and aid in preserving secrecy</b> with regard to all matters relating to the affairs of any person that may come to his knowledge in the exercise of any function under this Ordinance;</p> <p>(b) shall not communicate any such matter to any person other than the person to whom such matter relates; and</p> <p>(c) shall not suffer or permit any person to have access to any records in the possession, custody or control of any person to whom this subsection applies.</p>
<p>4. Professional Accountants Ordinance (Cap. 50)</p> <p>Section 32H(1)</p>	<p>(1) Subject to subsection (2), and except in the performance, or assisting in the performance, of a function under this Part, the Registrar, any reviewer, member of the Practice Review Committee or the Council or a person holding any other position who assists the Registrar, reviewer or a member of the Practice Review Committee or the Council in the performance of a function under this Part-</p> <p>(a) shall at all times after his appointment as the Registrar, a reviewer, or a member of the Practice Review Committee or the Council or to such other position, as the case may be, or during or after the performance of or assisting in the performance of such function, <b>preserve and aid in preserving secrecy</b> with regard to any matter coming to his knowledge in the performance or in assisting in the performance of any such function;</p> <p>(b) shall not at any time communicate any such matter to any other person; and</p> <p>(c) shall not at any such time suffer or permit any other person to have any access to any record, document or other thing which is in his possession or under his control by virtue of his being or having been so appointed or his having performed or having assisted any other person in the performance of such a function.</p>

	Relevant Provisions
Professional Accountants Ordinance (Cap. 50)  Section 42G(1)	<p>(1) Subject to subsection (2), and except in the performance, or assisting in the performance, of a function under this Part, the Registrar, any member of the Investigation Committee or the Council, any person to whom any of the powers of the Investigation Committee is delegated under section 42E(1) or any person holding any other position who assists any of such persons in the performance of a function under this Part-</p> <p>(a) shall at all times after his appointment as the Registrar, a member of the Investigation Committee or the Council, a person to whom any of the powers of the Investigation Committee is delegated under section 42E(1) or to such other position, as the case may be, or during or after the performance of or assisting in the performance of such function, <b>preserve and aid in preserving secrecy</b> with regard to any matter coming to his knowledge in the performance or in assisting in the performance of any such function;</p> <p>(b) shall not at any time communicate any such matter to any other person; and</p> <p>(c) shall not at any such time suffer or permit any other person to have any access to any record, document or other thing which is in his possession or under his control by virtue of his being or having been so appointed or his having performed or having assisted any other person in the performance of such a function.</p>
5. Hong Kong Examinations and Assessment Authority Ordinance (Cap. 261)  Section 15(1)	<p>(1) Except as may be appropriate for the exercise or performance of any duty or function under this Ordinance or for carrying into effect the provisions of this Ordinance, every person who has been appointed under or who is or has been employed in carrying out or assisting any person to carry out the provisions of this Ordinance-</p> <p>(a) shall <b>preserve and aid in preserving secrecy</b> with regard to all matters coming to his knowledge in the exercise or performance of any duty or function under this Ordinance;</p> <p>(b) shall not communicate any such matter to any person; and</p> <p>(c) shall not suffer or permit any person to have access to any records in the possession, custody or control of any person to whom this subsection applies.</p>

	Relevant Provisions
<p>6. Money Lenders Ordinance (Cap. 163)</p> <p>Section 5(1)</p>	<p>(1) Except as may be necessary for the exercise or performance of any function or duty under this Ordinance or for carrying into effect the provisions of this Ordinance, the Registrar and every person employed in carrying out or in assisting any person to carry out the provisions of this Ordinance-</p> <p>(a) shall <b>preserve and aid in preserving secrecy</b> with regard to all matters relating to the affairs of any person that may come to his knowledge in the exercise or performance of any function or duty under this Ordinance;</p> <p>(b) shall not communicate any such matter to any person other than the person to whom such matter relates; and</p> <p>(c) shall not suffer or permit any person to have access to any records in the possession, custody or control of any person to whom this subsection applies.</p>
<p>7. Hong Kong Science and Technology Parks Corporation Ordinance (Cap. 565)</p> <p>Section 31(1)</p>	<p>(1) Subject to subsection (3), a person who performs, or assists another person in the performance of, a function of the Corporation-</p> <p>(a) shall, at all times after he has performed or so assisted in the performance of any such function <b>preserve and aid in preserving secrecy</b> with regard to the information described in subsection (2) and which comes to his knowledge in the performance of, or in assisting in the performance of, any such function;</p> <p>(b) except while so performing or assisting, shall not at any time communicate any such information to any other person; and</p> <p>(c) shall not at any time suffer or permit any other person to have access to any record or other document which is in his possession or under his control by virtue of his performing or having performed, or assisting or having assisted any other person in the performance of, such a function.</p>

	Relevant Provisions
8. Inland Revenue Ordinance (Cap. 112)  Section 4(1)	(1) Except in the performance of his duties under this Ordinance, every person who has been appointed under or who is or has been employed in carrying out or in assisting any persons to carry out the provisions of this Ordinance <b>shall preserve and aid in preserving secrecy</b> with regard to all matters relating to the affairs of any person that may come to his knowledge in the performance of his duties under this Ordinance, and shall not communicate any such matter to any person other than the person to whom such matter relates or his executor or the authorized representative of such person or such executor, nor suffer or permit any person to have access to any records in the possession, custody or control of the Commissioner.
9. Business Registration Ordinance (Cap. 310)  Section 4(1)	(1) Except in the performance of his duties under the Inland Revenue Ordinance (Cap 112) or under this Ordinance, every officer of the Inland Revenue Department shall <b>preserve and aid in preserving secrecy</b> with regard to all matters relating to the affairs of any person that may come to his knowledge in the performance of his duties under this Ordinance, and shall not communicate any such matter to any person other than the person to whom such matter relates or his executor or the authorized representative of such person or such executor, nor suffer or permit any person to have access to any records in the possession, custody or control of the Commissioner.
10. Gas Safety Ordinance (Cap. 51)  Section 15(1)	(1) Except in the exercise of a function under this Ordinance or in carrying a provision of this Ordinance into effect, a person appointed under this Ordinance or who exercises or assists any other person in the exercise of a function under this Ordinance-  (a) shall <b>preserve and aid in preserving secrecy</b> with regard to any matter coming to his knowledge in the exercise of a function under this Ordinance or assisting any other person in the exercise of a function under this Ordinance;  (b) shall not communicate any such matter to any other person; and  (c) shall not suffer or permit any other person to have access to any record or other document which is in his possession or under his control by virtue of his- (i) appointment under this Ordinance; or (ii) exercising or assisting any other person in the exercise of a function under this Ordinance.



	Relevant Provisions
11. Monetary Statistics Ordinance (Cap. 356)  Section 4(1)	<p>(1) The Monetary Authority and every person who is or has been authorized by him to have access to returns and information submitted by banks and deposit-taking companies and restricted licence banks under this Ordinance shall <b>preserve and aid in preserving secrecy</b> with regard to all such returns and information.</p> <p>(2) Neither the Monetary Authority nor any other person shall disclose to any unauthorized person any return or information submitted by any bank or deposit-taking company or restricted licence bank under this Ordinance.</p> <p>(3) Neither the Monetary Authority nor any other person shall suffer or permit any unauthorized person to have access to any return or information submitted by any bank or deposit-taking company or restricted licence bank under this Ordinance.</p>