

**Responses to Follow-up Issues Arising from the Hearing on 10 November
2009**

1. *As stated in the second paragraph of the press release issued by the Securities and Futures Commission (SFC) and the Hong Kong Monetary Authority (HKMA) dated 22 July 2009 on the repurchase scheme on Minibonds by 16 distributing banks (S48), each of the banks will immediately implement special enhanced complaints handling procedures to resolve all complaints in relation to the sale and distribution of other structured products. Please provide:*
 - (a) *documentation containing details of the agreements between HKMA/SFC and all or any of the 16 distributing banks regarding the timeline within which all these complaints will be resolved by the banks; and*
 - (b) *the latest information on the number of complaints resolved through the aforesaid enhanced complaint handling mechanism implemented by the 16 distributing banks.*

Item (a)

- 1.1 There is no formal agreement between the HKMA/SFC and all or any of the 16 Distributing Banks regarding the timeline for completing the review of all relevant complaints under the enhanced complaints handling procedures. However, the banks have indicated to the regulators that

such review will generally be completed by the end of the first quarter of 2010.

Item (b)

1.2 According to information provided by the banks, as of 31 October 2009, 979 complaints had been handled under the enhanced complaints handling procedures.

2. *With reference to paragraph 3.2 of DCE/HKMA's responses to the range of issues raised by the Subcommittee for the hearing on 10 November 2009 (M35), please advise on:*

- (a) *HKMA's policy and procedures on the maintenance/destruction of reports and working papers relating to the on-site/thematic examinations conducted by it, including the level of staff who authorized the destruction of documents; and*
- (b) *whether a log book or register on destroyed documents is kept; if yes, whether the log book or register in respect of the Thematic Examinations on Retail Wealth Management Conducted in April to November 2005 (Annex 1(A) to M20) could be provided.*

Items (a) and (b)

2.1 The HKMA has adopted an internal document retention arrangement for on-site examination records. For working papers of each type of on-site examinations¹ on authorized institutions (AIs), the arrangement is to retain only those relating to the latest completed on-site examination except that working papers relating to problematic cases will be retained for a longer period. Examination reports on on-site examinations are retained permanently. The senior manager of the case team is authorized to give consent for the disposal of working papers.

¹ In relation to the retention of working papers, securities-related on-site examinations (including securities-related thematic examinations) have been regarded as one type of on-site examinations.

2.2 The HKMA does not maintain a centralised log book or register of destroyed on-site examination working paper documents. The document retention arrangement is simple and the key objective is to ensure that the working papers for the latest relevant on-site examinations are properly maintained.

3. *Before reaching the agreement on the repurchase of Minibonds by 16 distributing banks as announced on 22 July 2009, had HKMA assessed the number in each category of “professional investors” and “experienced investors”? If yes, please provide the detailed figures.*

3.1 Before reaching the repurchase agreement, the HKMA had asked the 16 Distributing Banks to provide relevant estimated figures which indicated that around 2,000 Minibonds investors would be neither eligible for the repurchase scheme nor entitled to the voluntary top-up offer to be provided by the Distributing Banks. This group of customers generally included “professional investors”, “experienced investors”, and corporate/non-individual investors².

² “Non-individual” does not include any sole proprietorship, exempt charitable body under section 88 of the Inland Revenue Ordinance (Cap.112) or not-for-profit organizations whose assets are not managed by an SFC licensed fund manager.

4. *DCE/HKMA is asked to provide clarification/supplementary information to the Monetary Authority's previous written responses to issues arising from the past hearings, if he considers it necessary to do so.*

4.1 The response to item 4 will be provided to the Subcommittee later as this item requires a review of all the relevant documents.

5. *The attached written questions raised by Mr LEUNG Kwok-hung at the hearing on 10 November 2009.*

梁國雄議員提問

(Nov 10, 2009)

關於招股章程

1. *HKMA 知不知道下述事實？*

1.1 *於2003-05年間，證監會就修改招股章程展開了三個階段的諮詢，在2005年最後一次諮詢文件中清楚指出，《公司條例》附表三是為監察具有實體業務的公司發債及招股而設的，不適合規管經營衍生產品的公司發債；*

1.2 *證監會於2006年9月就該諮詢發表總結報告，提出可考慮將含有CDS及CDO一類的結構性產品剔出債券的定義範圍，使其章程及廣告受《證券及期貨條例》、而非不合適的《公司條例》所規管。*

2. *若知，HKMA 有否通知銀行？及叫銀行通知客戶這個重要事實？*
3. *若不知，是否 SFC 與 HKMA 的溝通去了嚴重漏洞，遺漏了重要事實，而使投資者不能作出有依據的決定 (informed decision) ？*

Item 1

- 5.1 The HKMA was aware of the Consultation Paper on Possible Reforms to the Prospectus Regime in the Companies Ordinance (“the Consultation Paper”) and the Consultation Conclusions on the Consultation Paper on Possible Reforms to the Prospectus Regime in the Companies Ordinance (“the Consultation Conclusions”) issued by the SFC in August 2005 and September 2006 respectively.
- 5.2 The Consultation Paper does not mention that the Third Schedule to the Companies Ordinance (CO) is not suitable for regulating debt capital raising by companies operating a derivatives business. According to the Consultation Paper the inclusive nature of the definition of “debenture” in section 2 of the CO and particularly the reference to “any other securities” (rather than, for instance, “any other debt securities”) causes difficulty for market practitioners. Against this background, any investment arrangement or instrument that is structured as a debenture falls within the CO prospectus regime. Although many of these are not designed to raise capital for the issuer but are issued in the ordinary course of business of the issuer for revenue generation purposes, if they constitute “debentures” within the meaning of the CO then as a technical matter they fall within the CO prospectus regime. It should be noted that in October 2009, the SFC issued a Consultation Paper on Possible Reforms to the Prospectus Regime in the Companies Ordinance and the Offers of Investments Regime in the Securities and Futures Ordinance which proposes to align the regulation of structured products by

transferring the regulation of public offers of structured products in debenture form from the CO prospectus regime to the offers of investments regime in Part IV of the Securities and Futures Ordinance (SFO) so that public offers of structured products, irrespective of their legal form, will be regulated under the SFO. This will allow the SFC greater flexibility to regulate public offers of unlisted structured products in codes or guidelines setting out the SFC's regulatory policy on such products. It has been proposed that the SFC would issue a new Handbook that would contain a new Code on Unlisted Structured Products.

- 5.3 In addition, although the SFC proposed in the Consultation Conclusions to exclude "structured products" from the definition of "debenture" under the CO and the SFO, it did not make any specific reference to CDS or CDO in the proposed amendment.

Item 2

- 5.4 The Consultation Paper was issued by the SFC for public consultation in August 2005. The banking industry was aware of the consultation and the Hong Kong Association of Banks also submitted its comments on the Consultation Paper to the SFC (as mentioned in the list of respondents set out in the Consultation Conclusions).

- 5.5 With regard to the investing public, both the Consultation Paper and the Consultation Conclusions were made known to investors through press

releases issued by the SFC. As indicated in the Consultation Conclusions, the overall consultation process has not been completed³ and there was no timetable for implementation of the proposals.

Item 3

5.6 As mentioned in paragraph 5.1 above, the HKMA was aware of the Consultation Paper and the Consultation Conclusions issued by the SFC.

³ In addition, as mentioned in paragraph 5.2 above, a Consultation Paper on Possible Reforms to the Prospectus Regime in the Companies Ordinance and the Offers of Investment Regime in the Securities and Futures Ordinance was recently issued (October 2009) for public consultation.

關於SFO 第107 條

4. 對個別銀行的銷售手法違反 SFO 第 107 條關於，「欺詐地或罔顧實情地誘使他人投資金錢的罪行」，若銀行客戶向 HKMA 投訴，HKMA 是否會跟踪到直至向該銀行提出起訴為止，或只是轉了給 SFC 便算數？並且叫投訴人直接找 SFC 而 HKMA 的責任便完結？到目前為止，有沒有懷疑違反上述條例的個案。

- 5.7 According to the HKMA's securities enforcement procedures for handling all securities-related complaints against registered institutions and/or relevant individuals (including any alleged breach of section 107 of the SFO), the HKMA follows up on all securities-related complaint cases until they are closed and the necessary actions are taken (e.g. exercise of disciplinary action) irrespective of whether the cases have been referred to the SFC. In addition, the complainants are kept informed of the progress and outcome of their complaints at the appropriate stages during this process. So far, the HKMA has not received any complaint case in relation to any alleged breach of section 107 of the SFO.

關於投訴處理程序

5. 據你所知，若投訴是向 SFC 提出，而 SFC 轉交與 HKMA 處理。最後 HKMA 認為證據不足，並轉告 SFC，SFC 是否完全信賴 HKMA 的決定而不作覆查？
6. 若不是，請指出有多少個個案，SFC 是不同意 HKMA 的決定，從而作重新覆查？請列出個案。
7. 若 SFC 完全信賴 HKMA 的決定而不作質詢或審查，蔡生是否明白 SFC 若這樣做，它已經是 *acting under dictation of HKMA*，並且 HKMA 已經是 *fetter* 咗 SFC 的 *discretionary power*？而且你們雙方亦已違反了 MOU 第 4 條關於，SFC 權力並未有轉移給 HKMA 的規定（包括上述的對投訴理據是否成立的決定）？

Items 5 and 6

5.8 Procedures for handling complaint cases referred by the SFC to the HKMA are clearly documented in the Memorandum of Understanding between the HKMA and the SFC. According to the arrangement, both parties will consult one another as appropriate in relation to the complaints and how best to deal with them. In addition, the SFC has, inter alia, the authority to request relevant information (including the progress and decisions) from the HKMA in respect of the referred cases. In fact, the SFC had previously requested for the details of individual cases which were closed by the HKMA with no further action. After

reviewing the details of these cases, the SFC did not indicate any disagreement to the decisions of the HKMA in these cases.

5.9 Regarding the information on individual cases, section 120 of the Banking Ordinance (BO) imposes restrictions on the Monetary Authority's (MA) ability to disclose supervisory information of the type requested that was obtained in the course of the exercise of the MA's functions under the BO.

Item 7

5.10 Since the SFC has previously requested and reviewed the details of individual cases handled by the HKMA, the matters raised in the Question are not relevant. It should be mentioned that both the SFC and the HKMA are acting entirely in accordance with their respective powers granted under the SFO and/or the BO.