

立法會
Legislative Council

Ref: CB1/BC/4/00/2

**Bills Committee on
Securities and Futures Bill and Banking (Amendment) Bill 2000**

**Verbatim transcript of meeting
held on Friday, 20 April 2001, at 10:45 am
in Conference Room A of the Legislative Council Building**

- Members present** : Hon SIN Chung-kai, (Chairman)
Hon Margaret NG, (Deputy Chairman)
Hon Albert HO Chun-yan
Hon NG Leung-sing
Hon Mrs Sophie LEUNG LAU Yau-fun, SBS, JP
Hon Jasper TSANG Yok-sing, JP
Hon Ambrose LAU Hon-chuen, JP
Hon Henry WU King-cheong, BBS
Hon Audrey EU Yuet-mee, SC, JP
- Members absent** : Hon Eric LI Ka-cheung, JP
Dr Hon David LI Kwok-po, JP
Hon James TO Kun-sun
Hon Bernard CHAN
Hon Abraham SHEK Lai-him, JP
- Public officers attending** : Miss Vivian LAU
Principal Assistant Secretary for Financial Services
- Mr Y K CHOI
Executive Director, Banking Supervision Department,
Hong Kong Monetary Authority
- Mr Arthur YUEN
Division Head, Banking Supervision Department, Hong
Kong Monetary Authority
- Mr Charles BARR
Deputy Law Officer (Civil Law)

Ms Beverly YAN
Senior Government Counsel

Ms Sherman CHAN
Senior Assistant Law Draftsman

Mr Michael LAM
Senior Government Counsel

Attendance by invitation : Mr Paul R BAILEY
Member of the Commission and Executive Director,
Securities and Futures Commission

Mrs Alexa LAM
Executive Director and Chief Counsel, Securities and
Futures Commission

Mr Stephen PO
Director, Intermediaries Supervision Department,
Securities and Futures Commission

Mr Andrew YOUNG
Legal Consultant, Securities and Futures Commission

Clerk in attendance : Mrs Florence LAM
Chief Assistant Secretary (1)4

Staff in attendance : Mr LEE Yu-sung
Senior Assistant Legal Adviser

Mr KAU Kin-wah
Assistant Legal Adviser 6

Ms Connie SZETO
Senior Assistant Secretary (1)1

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《證券及期貨條例草案》及
《2000年銀行業(修訂)條例草案》委員會**

1 **主席：**

2
3 各位同事，現在開始進行《證券及期貨條例草案》及《2000年銀行
4 業(修訂)條例草案》委員會會議。

5
6 首先向大家作出一些簡報，法案委員會和財經事務委員會曾一同前
7 往倫敦、紐約及華盛頓進行職務訪問，以瞭解當地在規管金融機構方面的
8 情況，並取得很多有用及具參考價值的資料。法律顧問及委員會秘書亦有
9 同行。委員會希望能盡快完成報告的擬本，發給大家參閱。

10
11 另外，委員會在這次職務訪問中亦取得很多資料，可供各同事參
12 考，並會透過秘書，就有關資料擬備冊錄。如果我和副主席認為其中一些
13 資料具有重要參考價值，便會送交大家傳閱。其餘的資料會存放在圖書館
14 內。我們會把文件分為兩類，第一類文件會存放在圖書館內；而第二類具
15 有參考價值的文件會派發給大家傳閱。由於我們把其中一些文件郵寄回
16 港，有關的文件冊錄可能須於5月初或5月中旬才可完成。待有關冊錄完成
17 後，便會盡快發給大家。這是關於職務訪問的簡報。

18
19 請副主席作補充。

20
21 **副主席：**

22
23 多謝主席。我希望向各位簡報，委員會今次前往3個地方進行職務
24 訪問。胡經昌議員和劉漢銓議員也一同前往。我們今次的訪問非常有用，
25 我們也有就委員會曾討論的問題，與美國及英國交換意見。他們的經驗與
26 我們也有很直接的關係。所以我希望向主席建議，我們可在聽取署方提出
27 意見時，在某階段稍作停頓，使我們可作出中期的總結及報告，同時也可
28 將有關的主要項目及經驗向大家匯報。

29
30 Pauline(助理秘書長1)亦與我們同行，法律顧問也有參與職務訪問。希望她

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1 亦能盡早完成報告的擬稿，使我們能早日取得有關報告。我們可參考這些
2 主要的項目，研究委員會在這些主要政策中，能取得多大程度的共識，然
3 後才繼續進行下一個階段的工作。委員會秘書可徵詢Pauline的意見，了解
4 她何時可完成初步的報告，然後定出日期，讓大家討論這些問題。今次訪
5 問絕對不是交換友好的意願，而是進行實質的討論。多謝主席。

6

7 **主席：**

8

9 在此向大家匯報另外一個事項。關於條例草案的中文及英文本的問題，
10 法律顧問已於4月6日跟政府的Law Draftsman舉行首次會議，稍後亦會
11 繼續舉行會議。我希望請法律顧問在他們接近把有關問題完全解決的階段
12 時，提醒我們尚有任何問題須要處理。

13

14 現在開始就議程項目I進行討論。請政府的代表進入會議室。我們
15 會先行討論第IX部。第IX部的文件在上次會議前已派發給大家，文件編號
16 是立法會CB(1)896/00-01(01)、CB(1)896/00-01(02)及CB(1)925/00-01(01)號
17 文件。

18

19 由於上次會議的時間較為緊迫，並無發問時間，所以今天讓各同事
20 提出相關的問題。

21

22 胡經昌議員。

23

24 **胡經昌議員：**

25

26 多謝主席。我希望就第IX部作出跟進。其實第16段也曾提到，倘若
27 任何董事受精神病的影響.....，但當該份文件提到持牌法團時，.....

28

29 **主席：**

30

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1 你可否具體說明是文件中的哪一段？

2
3 **胡經昌議員：**

4
5 對不起。文件編號應是第8/01號，即立法會CB(1)896/00-01(01)號文
6 件——政府於2001年3月30日就第IX部提供的文件，第5頁第16段。該部分提
7 到，證監會在持牌法團(即經紀)的任何董事受精神病影響時，可採取的措
8 施。該部分亦提到這做法沒有引伸至獲豁免認可機構，即銀行方面，而原
9 因與銀行的主要業務有關。

10
11 我希望詢問，因何這部分提到“任何董事”？例如一間經紀行共有3
12 名董事，只是其中一名受精神病影響，請問是否仍然構成相同情況？第二，
13 可能該名董事是非執行董事，為何證監會仍會具有這項權力？雖然銀行業
14 並不受證監會所規管，但與銀行業有關的法例是否訂有這種規限？如果一
15 個持牌法團共有10名董事，而其中一名董事受精神病影響，該持牌法團會
16 否暫時被吊銷牌照？請問為何要特別指明“任何董事”，尤其是其中一些董
17 事是非執行董事？

18
19 **Chairman:**

20
21 Vivian. OK, Mr BAILEY.

22
23 **Mr. Paul R BAILEY, Member of the Commission and Executive Director, Securities and**
24 **Futures Commission:**

25
26 I will answer the question as far as the SFC is concerned. I will stress that under
27 section 188 that it is a discretionary power and in the situation that – I only got the first part of
28 it because I did not get the translation, but as far as I understand it, the question is what would
29 happen if there were several directors. Because it is a discretionary power, it therefore does
30 not mean that the revocation or suspension will automatically follow. In reaching any

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1 decision on this matter, the Commission would look at all the relevant circumstances and the
2 matter in particular, whether the person in question has a key position in the organization,
3 whether or not the company can function without him and whether or not there is a suitable
4 replacement.

5
6 I think on that particular point, it would be logical to say that if you had two or even
7 three responsible directors who were running the company, you certainly would not have to
8 revoke or suspend the company. In those grounds it would look to resolve the matter and
9 perhaps find someone to replace the person whom had become mentally incapacitated for any
10 reason.

11
12 I would stress this is purely a discretionary power. I think the Commission would
13 act in the circumstances appropriately.

14
15 **主席：**

16
17 胡經昌議員。

18
19 **胡經昌議員：**

20
21 主席，我剛才所提出的問題，是因何須要採用有關“任何董事”的字
22 眼。有關人士亦已作出回應，當局須視乎該董事有何職責才作決定。所以，
23 須否列明“任何董事”？雖說當局會視乎當時的情況而定，而政府經常亦促
24 請業界信任政府，並表示不會出現問題。但一旦產生問題時，情況便會變
25 得很複雜。既然政府亦認為只是當執行董事出現問題時，才會造成較大的
26 影響，可否只在執行董事出現問題時，才採取這個做法，而不是在“任何董
27 事”出現問題時也採取這個做法？另一個方法是修訂有關字眼，以只涵蓋具
28 影響力的董事。即有關款是否必須涵蓋“任何董事”？可否把字眼加以修
29 訂，使大家較為安心？

30

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1 **Chairman:**

2
3 Mr BAILEY.

4
5 **Mr. Paul R BAILEY, Member of the Commission and Executive Director, Securities and**
6 **Futures Commission:**

7
8 Can I stress again that this is the existing law. It is protective in nature and as far
9 as I am aware, it has never been actually used in the past. It is purely there for protective
10 purpose, to protect investors. I would stress again that it would only be used in exceptional
11 circumstances. I would have thought in any case, there would be a resolution whereby you
12 would be able to allow the company to carry on business either by appointing another director
13 or the existing directors, who were not mentally incapacitated, to take over the responsibilities.
14 It is, therefore, investor protection and I would personally think the likelihood of it ever being
15 used is pretty remote.

16
17 **胡經昌議員：**

18
19 主席，他只是指過往的情況，但現時的情況跟過往的情況有所不同。因為過往的經紀甚至可以個人的形式營業，而經紀行的董事人數亦沒
20 有現在的那麼多，所以情況已有很大的轉變。其實，在條例草案中亦清楚
21 指明，這是針對性的做法，你剛才也提到，這做法只是針對具有實際執行
22 權力的董事。在很多其他條文中亦提到，如果工作人員並非實際執行有關
23 權力，無論是responsible officer或其他人士，他們亦可避免那些罰則。所以
24 當局可否就這方面作出考慮？剛才我亦提問，就銀行方面有否相同的條
25 文。我不是指證券業務，而是指就銀行的整體業務方面，有否相同的條文。
26

27
28 **主席：**

29
30 Mr BAILEY，跟着是蔡先生。

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1
2 **Mr. Paul R BAILEY, Member of the Commission and Executive Director, Securities and**
3 **Futures Commission:**

4
5 Chairman, I would again just stress that this is a discretionary power. If you had a
6 non-executive director who had little or no responsibility within the company, the
7 Commission would have to take that into consideration and the chance of it taking action
8 under this provision, I would have thought, would be quite remote. Every case would have
9 to be considered on its own merits, especially as regards to the responsibilities of the directors.
10 I would take your point that as a non-executive director, it would really depend on if he did
11 have any duties, the Commission would not exercise this discretion under this provision. It
12 would just let the company resolve the matter and perhaps appoint another non-executive
13 director in his place. Again, I would stress that the whole basis of this provision is
14 discretionary.

15
16 **主席：**

17
18 其他監管機構有否這項權力？可否解答我這個問題？例如《上市規
19 則》，即Listing Rules中有否訂明這項權力？首先請就銀行方面作出解答，
20 好嗎？

21
22 **香港金融管理局銀行監理部助理總裁蔡耀君先生：**

23
24 在銀行的一般運作和事務上，董事局是最高的權力架構。董事局有
25 責任向管理階層提供政策上的指引，讓管理階層知道如何進行銀行本身的
26 業務。假如銀行本身在經營業務時出現違規的情況，根據《銀行業條例》，
27 原則上董事局本身亦要負上責任。當然，究竟是整個董事局也須負責，還
28 是由部分成員負責，便要視乎每件事件的實際情況而定。所以《銀行業條
29 例》列明，directors也有這項責任。

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1 **主席：**

2

3 胡經昌議員提出的問題是，在《銀行業條例》下，當法庭根據《精
4 神健康條例》(第136章)裁定某董事精神上無行為能力時，金管局有否免除
5 該董事職責的權力，即金管局有否與證監會相同的權力？金管局可否免除
6 該董事的職責，或撤銷其職務？

7

8 **香港金融管理局銀行監理部助理總裁蔡耀君先生：**

9

10 可以，因為每名董事的人選也須符合我們所謂.....

11

12 **主席：**

13

14 雖然金管局有權罷免董事，但金管局有否根據這個原因罷免董事的
15 權力？

16

17 **香港金融管理局銀行監理部助理總裁蔡耀君先生：**

18

19 你的意思是否當法庭已裁定該名董事沒有判斷能力，.....

20 **主席：**

21

22 請參閱有關文件第16段註解4。我相信胡經昌議員是希望直接詢問
23 金管局有否這項權力。我相信金管局有權根據其他理由免除董事的職務，
24 但金管局是否有權根據這個原因免除董事的職責？

25

26 **香港金融管理局銀行監理部助理總裁蔡耀君先生：**

27

28 有的，因為假如該名董事本身的判斷能力已出現問題，我們當然會
29 考慮他是否仍是適合擔任董事的人選。這是我們會考慮的。

30

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1 **主席：**

2

3 這並不是會否考慮的問題。金管局可能會就很多方面進行考慮，但這條條
4 例草案上列明，有關原因是受精神病影響。胡經昌議員，這是否你的問題？
5 問題是證監會和金管局兩者的權力是否對稱、對等、相等。

6

7 **胡經昌議員：**

8

9 對。

10

11 **香港金融管理局銀行監理部助理總裁蔡耀君先生：**

12

13 我相信金管局須按每宗個案的實際情況而定，因為當任何人作為董
14 事時，判斷能力.....

15

16 **主席：**

17

18 簡單來說，即是沒有，對嗎？

19

20 **香港金融管理局銀行監理部助理總裁蔡耀君先生：**

21

22 我們並無白紙黑字列明這個情況。

23

24 **主席：**

25

26 有沒有補充？何俊仁議員。

27

28 **何俊仁議員：**

29

30 主席，剛才Mr BAILEY已很清楚表示，假如某董事的精神出現問

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1 題，影響整間公司的整體運作，甚至影響投資大眾的利益，金管局便會撤
2 銷該公司的牌照，這情況我當然理解……

3
4 **主席：**

5
6 ……不是撤銷該公司的牌照，而是撤銷該名董事的職務。

7
8 **何俊仁議員：**

9
10 不對，是撤銷該公司的牌照。行使這項權力時，這做法當然絕對合
11 理，但問題是在法例上應否這樣列明？因為假如該名董事出現問題，金管
12 局便會撤銷該名董事的資格，當該名董事的資格被撤銷後，該公司便無法
13 運作，並自然會結業，對嗎？那麼需否在條例草案上這樣列明，即因該名
14 董事的問題而撤銷該公司的牌照？

15
16 **Chairman:**

17
18 Alexa.

19
20 **證券及期貨事務監察委員會執行董事兼首席律師林張灼華女士：**

21
22 多謝主席。第188條列明，倘若出現以下情況，證監會可決定撤銷
23 或暫時吊銷有關牌照中全部或部分的受規管活動。

24
25 若持牌人是註冊公司而並非個別人士，正如剛才Mr BAILEY也曾解
26 釋，便要視乎該公司董事在公司實際扮演的角色而定。雖然該名董事可能
27 是在董事局5位董事中的其中一位，但若他負責管理某部分的受規管活動，
28 該部分受規管活動的牌照便可能須被暫時吊銷或撤銷。Mr BAILEY也曾指
29 出，其實最終的目的也是為了保障投資者。

30

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1 但剛才何議員的意見很有道理，其實我相信我們可以這樣理解，當
2 一間公司的其中一名董事出現這個問題時，會否導致該公司不適合進行有
3 關活動？如果會的話，為了保障投資者的利益，我們亦須考慮應否撤銷或
4 暫時吊銷部分或全部受規管活動的牌照。

5
6 **Chairman:**

7
8 Vivian.

9
10 **財經事務局首席助理局長劉利群女士：**

11
12 保障投資者的問題，是一個平衡的問題。其實所謂董事在“精神上
13 無行為能力”的意思，即是指他沒有自主能力，不明白自己所作的事。假如
14 某公司有一名董事，他不明白自己所作的事，但他仍然擁有權力，在這情
15 況下，我認為正常的做法是該公司須撤換該名董事。假如該公司已撤換該
16 名董事，證監會根本不會由於這個原因而撤銷或暫時吊銷該公司的牌照。
17 但如果該公司明知該名董事不明白自己所作的事，但仍不採取撤換董事的
18 行動，為了保障投資者的利益，我認為賦予證監會這項權力是適當的。

19
20 **主席：**

21
22 不對，何俊仁議員提出的問題其實很簡單：為何證監會不撤銷該名
23 董事的職責。證監會撤銷該名董事的職責後，該公司自然需要撤換該名董
24 事，對嗎？假如該公司不撤換該名董事，證監會便可再撤銷該公司有關部
25 分的牌照。問題在於證監會現時的做法不是撤銷該名董事的職責，而是撤
26 銷該公司的牌照。

27
28 何俊仁議員。

29
30 **何俊仁議員：**

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1
2 其實這問題爭議不大。我相信大家對這個問題也相當瞭解。問題是
3 因何該條款不清楚列明有關做法。從表面看來，情況很簡單，即董事的資
4 格影響公司的資格。其實可以很簡單地在條款中列明剛才提到的情況，為
5 何不採用較清晰的寫法？

6
7 **財經事務局首席助理局長劉利群女士：**

8
9 主席，其實你剛才說得很正確，如果該名董事個人出現問題，根據
10 《證券及期貨條例》第IX部第188(1)(a)(iii)條，證監會亦會撤銷他的資格。
11 問題是撤銷該名董事的資格之餘，該公司應如何處理。所以，我們便要再
12 決定該公司是否仍可繼續營運。

13
14 **主席：**

15
16 我相信情況不是這樣。Mr Bailey, do you want to supplement?

17
18 **Mr. Paul R BAILEY, Member of the Commission and Executive Director, Securities and**
19 **Futures Commission:**

20
21 I will just answer that.

22
23 I think you have to look at it in the context. It goes back to the point: you have the
24 director has action taken against him firstly and then you have to look at the position of the
25 director in the licensed corporation.

26
27 If the loss of that director in the licensed corporation would affect that business of
28 the corporation, then there has to be a provision to take action to protect investors from that
29 corporation carrying on business.

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1 Personally, as I said before, I think the chance is this is quite remote but there could
2 be remote situations where this is required because the company acts through its directors. If a
3 director with a large responsibility who is suddenly found incapacitated for whatever reason,
4 whether it be mental health or anything else, there has to be a provision to take action against
5 the corporation to protect investors if that corporation cannot act properly without this
6 director in place.

7
8 In practice, one would seek to remedy a situation like this, as we have done many
9 times in the past, where you have actually taken action against a sole proprietorship, we have
10 actually tried to incorporate that business and get responsible directors in.

11
12 I do not think there would be any difference in a case like this. If you had a
13 corporation where there was a director incapacitated and even if that were going to affect the
14 company for a short time, we would try and resolve the issue by getting the company to
15 appoint another director to take his place and resolve the matter. So I think this meant as far
16 as the corporation and investor protection, the chance of it being used is quite remote.

17
18 But I think the action against the director has to be looked up in the context of the
19 corporation itself because the corporation has to have directors to function properly. That is
20 the explanation. That, as far as I can see, we have to have this provision, even though it is
21 barely used. As far as I can see you have to have it – in the remote case where you would
22 have to look at investor protection.

23
24 **主席：**

25
26 我不知道可否這樣理解，請大家參考第188(1)(a)條和第188(1)(b)
27 條。這兩部分是有所不同的。根據第188(1)(a)條，“the licensed person is an
28 individual”；而根據第188(1)(b)條，“the licensed person is a corporation”。
29 如果“the licensed person is an individual”，處理的方法是remove該人；如果
30 “the licensed person is a corporation”，做法似乎是remove該corporation。是

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1 否應這樣理解？

2

3 換句話說，何俊仁議員，根據你的說法，於法例中便可能會這樣列
4 明，對嗎？

5

6 **何俊仁議員：**

7

8 主席，立法會CB(1)896/00-01(01)號文件第16段是這樣列明的。

9

10 **主席：**

11

12 我知道。對不起，我不知道是否這份文件出現問題。立法會
13 CB(1)896/00-01(01)號文件第16段跟第188條(1)(a)、(b)條是有輕微分別的，
14 對嗎，Mr BAILEY？

15

16 **Mr. Paul R BAILEY, Member of the Commission and Executive Director, Securities and**
17 **Futures Commission:**

18

19 In a licensed corporation, you have to have licensed individuals to run that
20 corporation and amongst those licensed individuals there will be responsible officers who will
21 normally be directors. So you actually have the position where directors are actually taking
22 active part in the business of the licensed corporation within their own right be registered for
23 licence as representatives.

24

25 So clause 188(a) would cater for the director who was licensed in his own capacity
26 and as a director of that corporation and then the corporation itself would be a licensed entity
27 as well.

28

29 **主席：**

30

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1 胡經昌議員，你是否滿意這個答案？

2

3 **胡經昌議員：**

4

5 我不滿意，因為他還沒有解答這個問題。這份文件指明，該項規定
6 並沒有引伸至包括銀行在內，即是說銀行無須遵守這項規定。

7

8 **主席：**

9

10 其實現在你是不滿意有關銀行的情況，對嗎？

11

12 **胡經昌議員：**

13

14 不是，我剛才問他銀行的情況是否相同。

15

16 **主席：**

17

18 讓我們按部就班地解決問題。很抱歉，我希望首先解決何俊仁議員
19 剛才提出的問題，才討論有關銀行的事宜。何俊仁議員，你現在是否滿意？

20

21 **何俊仁議員：**

22

23 剛才Mr. BAILEY提到證監會怎樣運用這項權力，我認為這方面沒有
24 問題。但證監會在很少情況下才運用這項權力是另一個問題。雖然證監會
25 現時很少運用這項權力，但我不知道證監會日後會否經常運用這項權力。
26 我所關心的，是怎樣草擬這項條款。我不知有否看漏，但現時在表面看來，
27 如果一名董事精神失去能力，即mentally incapacitated時，證監會便有權考
28 慮吊銷該公司的牌照，但卻沒有說明尚要考慮甚麼因素。正如剛才Mr.
29 BAILEY提到的因素，例如該名董事影響整間公司的運作，或影響投資者的
30 利益等。其實我認為應把這些考慮因素在條款中列明，有關法例才算是清

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1 晰和完整，而不是單告訴有關公司證監會會考慮這些因素。這是不能使我
2 感到滿意的。

3
4 **財經事務局首席助理局長劉利群女士：**

5
6 主席，當我翻看實際條文第188(1)(a)(iv)條時，發現其實第188(1)(b)
7 條的情況也是一樣。該條最後的部分提到一個carve out，即訂有condition，
8 若“監證會認為該項定罪損害該人作為繼續持牌的人選的適當性”。我認為
9 我們可考慮將同樣的字句應用於第188(1)(a)(iii)條，亦可在第188(1)(b)(vi)
10 條加入類似的字眼，以確保證監會在作出考慮時，會考慮有關情況會否影
11 響該人作為適當人選的問題。

12
13 **主席：**

14
15 何俊仁議員，這樣可行嗎？

16
17 **何俊仁議員：**

18
19 行。將這些條件加入法例內無論如何也會好一點，最低限度該條款
20 會指出證監會須考慮甚麼因素。

21
22 **主席：**

23
24 這部分沒有問題了。接着可再討論有關銀行方面的問題。蔡先生。

25
26 **香港金融管理局銀行監理部助理總裁蔡耀君先生：**

27
28 主席，我們在發牌給銀行時，其中一個條件是必須滿意每名作為董
29 事的人士均為適當人選，每名董事也是一樣。故此，假如某銀行的董事局
30 中其中一名成員被法庭裁定為沒有判斷能力，我們便會考慮他是否仍是適

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1 當人選。假如我們決定他不再是適當人選，我們一般的做法是與銀行洽談，
2 指出該名董事已不再符合我們有關適當人選的要求。我們一般的做法是要
3 求銀行撤換該名董事。

4
5 在正常情況下，我認為大部分的問題也可透過撤換董事得到解決。
6 但在極端的情況下，若我們明顯覺得該人已不再適合擔任董事，而在我們
7 跟銀行洽談後，銀行仍不願意撤換該名董事，並表示會保留其職位，我們
8 有權根據《銀行業條例》，撤銷該銀行的牌照。

9
10 **主席：**

11
12 胡經昌議員。

13
14 **胡經昌議員：**

15
16 主席，能否告訴我這是哪一條條例，讓我在會議後可仔細研究。

17
18 **香港金融管理局銀行監理部助理總裁蔡耀君先生：**

19
20 《銀行業條例》附件7訂明金管局發牌的條件。其中第4段列明每名
21 董事也須為適當人選。而附件8訂明金管局在甚麼情況下才可撤銷銀行的牌
22 照。其中第2段訂明，如銀行未能符合金管局發牌時的要求，金管局可撤銷
23 其牌照。因此，附件7和附件8應一併理解。

24
25 **Chairman:**

26
27 Schedule 7 & 8? Ok.

28
29 **香港金融管理局銀行監理部助理總裁蔡耀君先生：**

30

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1 對。

2

3 **胡經昌議員：**

4

5 主席，我希望多問一句。其實《銀行業條例》並沒有訂明，如果一
6 名董事受到精神病影響，後果會如何，對嗎？其實金管局只是以適當人選
7 作為衡量的準則，但在法例上並無就這方面訂明，對嗎？

8

9 **香港金融管理局銀行監理部助理總裁蔡耀君先生：**

10

11 對。有關法例中並無這樣訂明，但我們在考慮有關人士是否適當人
12 選時，即該人本身有沒有……

13

14 **主席：**

15

16 ……這是其中一個條件，對嗎？

17

18 **香港金融管理局銀行監理部助理總裁蔡耀君先生：**

19

20 對。這是其中一個條件。

21

22 **主席：**

23

24 那麼因何金管局和證監會的做法會有所不同？因何需要存在分
25 別？

26

27 **財經事務局首席助理局長劉利群女士：**

28

29 主席，我認為如果我們深入研究，便會發現剛才提到有關證監會下
30 的制度與《銀行業條例》下的制度，在監管的效果上其實是相同的。若以

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1 這個情況作為大前提，我認為未必須要在《銀行業條例》中同樣訂明有關
2 情況，正如剛才蔡先生也提到。

3
4 **主席：**

5
6 不對，我們可從另一個角度來看。既然對銀行董事的主要要求是符
7 合 fit and proper 的規定，因何證監會不能只主要要求有關人士符合 fit and
8 proper 的規定，而卻要特別訂明有關精神問題的情況？其實解決方法很簡
9 單，要不是金管局跟隨證監會的做法，便是證監會跟隨金管局的做法。

10
11 **財經事務局首席助理局長劉利群女士：**

12
13 主席，其實我們在草擬《證券及期貨條例草案》相關的條款時，基
14 本上是參考現時的法例。即有關條款是從現時的法例中轉載。實際上，在
15 《槓桿式外匯買賣條例》第11條第(1)(d)款下亦有類似的條款。我們先前進
16 行綜合工作時，便將該條款載於這裏。

17
18 **胡經昌議員：**

19
20 主席，那麼我們會否考慮將兩者的做法統一？因為根據有關 fit and
21 proper 的規定，證監會已有權撤銷董事的職務，但金管局卻沒有這項條款所
22 訂的權力。既然兩者也行，是否必須加入這項條款？最主要是因為該項條
23 款指明“任何董事”。如果有關董事實際上會影響有關公司的日常運作，即
24 使遭撤職亦是活該，但現在的情況是就任何一位非執行董事而言，證監會
25 亦有權撤銷其牌照。所以我的要求是：第一，不採用“任何”的字眼；第二，
26 既然我們知道金管局現時也是以有關 fit and proper 的規定行事，而證監會亦
27 有權要求有關人士符合 fit and proper 的規定，須否訂明這個情況？

28
29 **Mr. Paul R BAILEY, Member of the Commission and Executive Director, Securities and**
30 **Futures Commission:**

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1
2 I think this actually adds into the law something which is in existence. It actually
3 gives clarity to matters which the Commission could consider and I think if the director was
4 mentally incapacitated, it would have a relevance to the company. I would add that as far as
5 any action under this path is concerned, there would have to be due process. You have to
6 give a chance to a person to make representations to have a reasonable hearing. Of course
7 any action under here would be appealable to the SFAT.

8
9 So there are checks and balances that the Commission has the discretion first of all
10 and that is going to be to take action under this provision and if it was going to take action, it
11 has to give due process. There is an appeal mechanism as far as that action is concerned. It
12 does add clarity to matters that the Commission can take into account rather than having the
13 vague concept of all this fitness and properness.

14
15 **胡經昌議員：**

16
17 主席，金管局也只是以有關fit and proper的原則行事，沒理由證監
18 會卻不然。

19
20 **主席：**

21
22 那是否很不平衡？要不是兩者也具有這項權力，便是兩者也沒有這
23 項權力，這是否較為合適？即若證監會不獲賦予這項權力，其理由應與金
24 管局不獲賦予這項權力的理由相同。

25
26 剛才蔡先生已說得很清楚，如果金管局沒有這項權力，其理由應與
27 證監會沒有這項權力的理由相同。請政府提出一個理由，解釋因何金管局
28 無需這項權力，而證監會卻需要擁有這項權力？

29
30 **財經事務局首席助理局長劉利群女士：**

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1
2 主席，我剛才已指出，我們認為在兩種制度下的監管作用也是相同
3 的。雖然兩者的做法不同，但監管果效卻是一樣。而我們認為在保障投資
4 者或存戶方面，效果亦是一樣。

5
6 **副主席：**

7
8 問題是既然這些方面也是一樣，因何在權力上不相同呢？

9
10 **胡經昌議員：**

11
12 問題就是這麼簡單而已。

13
14 **財經事務局首席助理局長劉利群女士：**

15
16 我的意思是既然果效是相同，為何仍須追求在字眼上相同呢？

17
18 **主席：**

19
20 為何追求在字眼上相同？我認為在邏輯上應是恰好相反。如果後果
21 是一樣，出發點也應是一樣。根據相類似或非常相似的條文出發，便會達
22 致同樣的後果。但現在妳卻表示字句雖然不同，但後果卻是一樣……

23
24 **財經事務局首席助理局長劉利群女士：**

25
26 主席，我明白議員的關注，能否給我們一點時間考慮這個問題，研
27 究兩者的做法，在文字上應否完全相同？讓我們加以考慮吧。

28
29 **主席：**

30

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1 可以。我不清楚MPFA或其他監管機構，有沒有採用有關mentally
2 incapacitated的字眼。如果妳們能參考與金融界有關的法例，align類似的
3 字句，會較為適合。這只是我的意見。相信妳們的做法也有歷史性的因素，
4 《槓桿或外匯買賣條例》已從93或94年沿用至今。

5
6 請提出第2個問題。胡經昌議員尚有問題嗎？其他同事有問題嗎？
7 胡經昌議員。

8
9 **胡經昌議員：**

10
11 我希望提出的另一個問題是，在同一份文件第7頁第26段提到，證
12 監會有權處以罰款，款項不超過1,000萬元。我們的理解是，有關情況通常
13 涉及一些較嚴重的失當行為，舉例來說，從事內幕交易等。

14
15 如果我們參考第IX部第186條有關interpretation的條款時，便會發現
16 有很多情況只涉及很輕微的失當行為，所以問題是應否將這些嚴重罪行與
17 這些輕微的失當行為一併處理，並賦予證監會這項權力呢？為何我會提出
18 這點？其實我們可參考第187條第(7)及第(8)款。這兩款提到證監會會發表
19 一些指引。第一，證監會可在憲報刊登有關指引，“published in the Gazette
20 and in any other manner it considers appropriate”。接着下一款亦訂明這些
21 guidelines並不是subsidiary legislation。其中很多所謂“失當行為”也並不是
22 十分嚴重的事宜。將來當局賦予證監會這項權力時，第一，證監會可以刊
23 登憲報或其他方式發表有關指引，但大家亦不清楚何謂“其他方式”，而且
24 有關指引亦不是附屬法例。所以，證監會的權力會否過大，並且是否無須
25 經立法會審批？

26
27 我提出這個問題的原因，是由於今早聽到有關醫管局的新聞，楊局
28 長提到，有關罰則應否由同一機構制訂及執行的問題，即應否由同一機構
29 處理這些罰款和罰則。其實這個情況正與第187(7)條的情況一樣。有關罰款
30 的條文既無須gazette，又不是附屬法例，但涉及的款額也不算少。對我來

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1 說，擁有1000萬元，已相當可觀。

2
3 **財經事務局首席助理局長劉利群女士：**

4
5 主席，就民事罰款方面，其實證監會已草擬guideline，並正諮詢市
6 場，諮詢期至5月初才結束。guideline中已說明證監會根據甚麼準則，以及
7 如何考慮處理民事罰款方面的問題。或許我請Mr BAILEY就有關準則及諮
8 詢方面的問題作出補充。

9
10 **Chairman:**

11
12 Mr BAILEY.

13
14 **Mr. Paul R BAILEY, Member of the Commission and Executive Director, Securities and**
15 **Futures Commission:**

16
17 Can I just say that as far as the fines are concerned, it is only one of the penalties
18 that the Bill proposes to be available to the SFC, in the case of improper conduct by
19 intermediaries.

20
21 I would stress that the maximum fine of ten million dollars or three times profit
22 gain loss avoided, is the maximum. When the working group considered in draft guidelines,
23 and I would add that there were two of your constituents on that working group who had input
24 into them. Out of the things that was actually put in at the instigation of the working group
25 was the statement – the more serious the conduct the greater likelihood that the SFC would
26 impose the fine and the size of the fine would be larger.

27
28 So I think implicit in that, if you actually get a minor conduct, you would not
29 necessarily be looking at fining in every instance and other remedies such as reprimands
30 which you could use in those circumstances. So these guidelines are available, they have

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1 been put out for public consultation. As I said, they are actually produced with a working
2 group from a broad base of market practitioners, including small brokers, large brokers and
3 even the Consumer Council. I think that as far as I could say, the working group were pretty
4 satisfied with what came out as the draft and of course, we will see when the consultation
5 period finishes on the 11th May, the comments on that and we do appreciate market
6 participation in this.

7
8 It does set out the considerations, the seriousness of the matters and all sorts of
9 considerations the SFC will have to take into account before coming to a decision whether or
10 not to impose a fine, and if so, how large that fine will be.

11
12 As I said, for a minor conduct, I think you have got the other penalties of reprimand
13 which probably would be used and that of course, can be private or public. The fining tends
14 to be an intermediate sanction between the reprimand and the suspension where a suspension
15 could be too draconian. And of course the other one is if the person is involved in, for
16 example, rat trading, which is quite reprehensible conduct. One would not expect a person
17 to be able to benefit from that conduct and this would give us a means of fining on the basis
18 of that conduct because the other element of it is profit gained or loss avoided. So whether a
19 circumstance is a misappropriation or there has been conduct which has disadvantaged clients
20 of a broker, there is a provision of using this fining power to take action in that regard. As I
21 said, for minor conduct, my personal view is the fines would not be used very much and of
22 course, we would be guided by these guidelines. I think, subject to my legal adviser telling
23 me, I understand that guidelines will be binding on the Commission and they will also have to
24 be taken into account from the SAFT. If we do not follow the guidelines, in coming to a
25 disciplinary decision, then we could be subject to appeal.

26
27 We have to look at these guidelines on every case if we are going to impose a fine.
28 If we don't, then we can certainly be subject to scrutiny.

29
30 **主席：**

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1
2 我希望提出一個問題。若我們參考同一份文件附件C，無論是中文
3 本或英文本，據文件所載，與香港、英國、澳洲和加拿大比較，美國的做
4 法是使違反規定的罰款分級遞增。個人最高罰款每項10萬美元，而法團則
5 為50萬美元。

6
7 胡經昌議員的問題是，剛才你的答案也提到，既然有些情況是較為
8 嚴重，而另一些則不太嚴重，不太嚴重的情況無須罰款，或只須reprimand，
9 但在須予罰款的情況下，需否分等級？第187(2)條似乎沒有制定分等級的機
10 制，是否值得參考美國的制度，把罰款分等級？或許先讓政府回答這個問
11 題。

12
13 ***Mr. Paul R BAILEY, Member of the Commission and Executive Director, Securities and***
14 ***Futures Commission:***

15
16 When the working group considered the possibility of a tiered system, in fact it was
17 decided by the group, that it was not the practical solution. There are, in fact, many different
18 types of conduct that can vary in degree in the same type of conduct. If you take for
19 example, failing to keep proper audit trail in a broker, that can have dire consequences if it has
20 been a failure resulting in misappropriation, or it might be an inadvertent failure, which would
21 at the most require a private reprimand.

22
23 The working group, when they considered the guidelines, did take into account and
24 did consider the possibility of a tiered system, and actually considered that it would be better
25 to put out broad brush guidelines which the Commission would have to be bound to, for the
26 matters to take into consideration on a case by case basis, given the wide variation of the
27 different types of conduct which could actually fall under the same category.

28
29 In the United States, as far as I am aware, the penalties are per violation. In fact
30 the penalties can actually come up to a much larger amount than the actual amount pursuant

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1 per violation. In fact I think the one I recall is Summer Henry Koffer. I think it was a case
2 done by the Commodity Futures Trading Commission. That went into, I think, tens of
3 millions of dollars in fines, because it was a multiple violation. This is subject to my
4 memory, of course. I would say that we did consider a tiered system, and because of the
5 conduct involved and the wide variation of degree of conduct on what basically could be put
6 under the same category, did not make it a practical solution. So the working group, as I said,
7 which comprised members throughout the industry, agreed that we should try and do the
8 guidelines on the principles of setting out matters that must be taken into consideration and
9 the guidelines set out as general considerations, and then specific considerations. They go
10 into three pages.

11

12 I just cleared it with Vivian. I would have no objection. We can give you a copy
13 of the guidelines which are out for consultation at the moment, if you would like it.

14

15 **主席：**

16

17 有關的working group是由甚麼人士組成？

18

19 ***Mr. Paul R BAILEY, Member of the Commission and Executive Director, Securities and***
20 ***Futures Commission:***

21

22 Of the working group? We have representatives from different brokers. We have
23 the large intermediary representatives from the large American houses. We then have
24 smaller brokers. We have them from quite small brokers, in fact. Then we have them from
25 the intermediate sized brokers, which would be in-between the large American houses. They
26 would be local brokers. So we try to have a cross-section of all the different stratas of the
27 market, and we also involve the Consumer Council, who is a member as well. We tried to
28 get as much input as we could, as to the suggested approach that we finally adopted.

29

30 The group met, I think, on two occasions, and the drafts went backward and

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1 forward between the members, for input, on quite a lot of occasions in-between those
2 meetings.

3

4 ***Deputy Chairman:***

5

6 I would like to ask about the mechanism of producing guidelines and eventually
7 changing them. At the moment you are producing the guidelines for the first time, and at the
8 end of the day this Bills Committee may be able to see actually a draft guideline. What I
9 am interested in is the mechanism of producing guidelines and amending them. Is there
10 anywhere in the Bill? Do we have the provisions? Do you just make them? Are there
11 any constraints? I only know that you publish them, and they are not subsidiary legislation,
12 but are there any provisions as to your power of drawing up guidelines?

13

14 ***Mr. Paul R BAILEY, Member of the Commission and Executive Director, Securities and***
15 ***Futures Commission:***

16

17 Yes. The purpose of putting out the guidelines would be going out on consultation
18 and then getting the feedback and modifying it.

19

20 ***Deputy Chairman:***

21

22 Is there any provision for the necessity of consultation and what kind of
23 consultation? Is there any express provisions here, that we can look at?

24

25 ***Miss Vivian LAU, Principal Assistant Secretary for Financial Services:***

26

27 Chairman, we do not have explicit provisions in the law. Actually, I think the
28 present system has been working well. The SFC issues guidelines, codes, this sort of non-
29 statutory instruments. So far, actually as a matter of practice, SFC goes out to consult the
30 market every time when they make important guidelines or codes, or whatever.

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1

2 *Deputy Chairman:*

3

4 Mr Chairman, just to follow up, if there is any provision to that, in fact, which you
5 found in the legislation or the Bill afterwards, I would be very grateful if you could draw my
6 attention to it. But in the meantime, what this suggests is that although you will be bound to
7 some extent by your guidelines, this “being bound” is just any public authority bound by the
8 policy it publishes to that extent; and I think we are familiar with the flexibility of that. But
9 at the same time, it is a matter for you to issue guidelines as far as the law is concerned. In
10 other words, you are telling us that you will be bound by what you say you will be bound, and
11 it may well be thought that this is not good enough.

12

13 So, Mr Chairman, what we suggest is that we should discuss at some point how the
14 drafting of guidelines, or how the issuing of guidelines, may have some kind of mechanism
15 which is acceptable, so that we know that these guidelines are not just what the SFC wishes to
16 be bound by, but that it has taken into consideration the views both of practitioners and of
17 consumers.

18

19 **主席：**

20

21 我認為副主席的建議非常好，相信委員會會有機會處理這方面的問
22 題。我記得接下來有一個section是關於證監會的rules making power的。請
23 秘書處提醒我們，在討論有關section時討論有關guidelines的問題。證監會
24 有權進行很多事情，包括訂定rules和guidelines。待我們討論那方面的問題
25 時再行討論吧。

26

27 **副主席：**

28

29 主席，我們最關心的，是如何增加指引的透明度及問責性。證監會
30 只是說他們必會遵守那些指引，但至於制定甚麼指引，則差不多是由證監

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1 會自行決定。當然，合理的做法是證監會作出諮詢，但事實上並沒有任何
2 法例規定證監會必須作出諮詢，或諮詢任何人。所以，可能我們將來討論
3 這部分時也須討論這個問題。

4
5 **主席：**

6
7 我希望再集中討論胡經昌議員提出的問題，即有關1,000萬元的問
8 題。你現時的答案只是tiered system不practical。我並不是說等級制度較彈
9 性制度優勝，但對市場來說，因為有關罰則最主要是針對市場失當行為，
10 但市場失當行為亦可能有很多種類。證監會能否編製一個附表或table，清
11 楚列明每類失當行為的最高罰款，因為或許在證監會的立場，失當行為亦
12 可能分為很多不同的嚴重程度。證監會能否這樣做？這個做法會否令市場
13 更清楚哪類失當行為較為嚴重？我相信很多條例也會就罰款訂有頗為詳細
14 的規定，對嗎，Mr BAILEY？

15
16 **Mr. Paul R BAILEY, Member of the Commission and Executive Director, Securities and**
17 **Futures Commission:**

18
19 Again, I would go back to the point. It is very, very difficult, given the types of
20 conduct, to actually put into any form, whether it be a list, and then giving penalties for that
21 type of conduct, because each type of conduct can vary so much, depending on the
22 circumstances of that conduct. For instance, you might have a rat trading case which
23 involved one trade, where one client has been disadvantaged, and the amount involved is
24 \$500. Then you might have a rat trading case that involved multi-millions of dollars. Of
25 course, to try and set tariffs for different types of amounts for improper conduct like that
26 would not be feasible.

27
28 That is why the working group – and I would stress again that the working group
29 was across the market – actually agreed that it would be really impossible to come up with a
30 tabulated tariff system, because of the different types and different scales of conduct that are

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1 involved in any particular circumstance. Also, the other problem would be this: again I hate
2 to keep going back to rat trading, but before rat trading occurred and we actually knew about
3 it, we did not even realize it was going on. We did not even realize the type of conduct it
4 would involve.

5
6 You have to be able to cater for misconduct and conduct that affects fitness and
7 properness, which evolves over the years; and so to have a flexible system to cater for this –
8 and again, the flexible system involves a large range of considerations that you must go into –
9 is the most practical method. This is basically the method that is going to be used by the
10 Financial Services Authority in the UK, and to a certain extent is the one used in the United
11 States. Again, I would emphasize that I do not think a tariff system is a feasible option,
12 because of the wide-ranging types of conduct.

13
14 **主席：**

15
16 胡經昌議員。

17
18 **胡經昌議員：**

19
20 主席，我希望先提出以下數點：第一，其實在上次會議上我也曾提
21 到，政府應先向我們提供一份清單，說明證監會須訂定甚麼 rules 或
22 guidelines，以及列出訂定這些 rules 或 guidelines 的 working group 的名單，而
23 不單是提供有關這方面的 working group。第二，其實我們也有收到……

24
25 **主席：**

26
27 ……我相信是你收到，而不是我收到有關資料。

28
29 **胡經昌議員：**

30

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1 或許是業界收到.....

2

3 **主席：**

4

5 因為你是經紀。

6

7 **胡經昌議員：**

8

9 是consultation吧。我估計他們也應向你提供有關資料。他們沒
10 理由不給你這些資料。

11

12 **主席：**

13

14 沒有，我們沒有收到。

15

16 **胡經昌議員：**

17

18 每本資料是這麼厚的，但諮詢期只是一個月。

19

20 **主席：**

21

22 但對象並不是立法會議員，而是經紀。

23

24 **胡經昌議員：**

25

26 我現在只是向你解釋，如果證監會向市場進行consultation，並涉及
27 那麼厚的資料，但諮詢期只是一個月，還要同時就3、4套資料進行諮詢，
28 市場如何可在一段短時間內作出consultation呢？其實這是很重要的問題，
29 業界也曾多次作出反映。當業界向證監會提供意見後，證監會只是說一句
30 多謝，便繼續有關的制定程序，而他們的解釋是證監會認為業界的意見不

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1 合理。

2

3 我為何要提出這點呢？如果我沒有理解錯誤，當我們參考美國的情
4 況時，便會發現這些罰則是一項法例。這部分會列明，根據《證券交易法》
5 哪一條，罰則是……等，證明有關罰則是一項法例。如果有關罰則是一項法
6 例，我們便可加以討論；但如果只是guidelines，即使觸犯了也不知道是甚
7 麼原因。

8

9 第二，我希望當局再澄清一點，在美國的情況，其實有關罰款的條
10 例所訂的懲罰是甚麼？究竟有關人士在甚麼情況下才會被懲罰呢？是在該
11 人作出嚴重如內幕交易的失當行為時才施加這些罰則嗎？

12

13 **Chairman:**

14

15 Mrs Alexa LAM.

16

17 **證券及期貨事務監察委員會執行董事兼首席律師林張灼華女士：**

18

19 讓我回應胡議員的問題。美國的tiered system是這樣的，以公司為
20 例，最高的罰則是50萬元，並分為3個等級。第1個等級的罰款是10萬元，
21 不論有關公司是否存心作出失當行為，只要是作出不當行為便會被罰款10
22 萬元。第2個等級的罰款是25萬元，若有關公司存心作出不當行為，便會被
23 罰款25萬元。有甚麼情況下才會被罰款50萬元呢？若有關公司存有意圖地
24 作出不當行為，而導致有人受害，便會被罰款50萬元。根據美國的制度，
25 罰款是按照受害人的人數計算的。例如有關公司今次作出一個不當行為，
26 使共有20名人士受害，當局便會把罰款額乘以20計算。

27

28 胡議員說得很對，這些罰則是在法例中列明的，但有關法例是在
29 1991年所制訂，跟現在已相隔10年。美國亦曾多次考慮需否修改這條法例、
30 如何修改及應否修改這條法例。相信大家也知道，根據美國的情況，修改

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1 法例並不容易。

2

3 讓我們研究在過去一、兩年間其他國家怎樣處理這個問題。以英國
4 為例，大家也可以看到英國也容許監管者訂定罰則，而且有關罰則並沒有
5 上限。英國當局亦同樣察覺到，在法例中列明作出第1類不當行為須處以這
6 個罰款額，作出第2類失當行為須處以那個罰款額等，是不可行的，所以當
7 局也訂出一些 *fining guidelines*。其實我們亦曾參照當中大部分的
8 *guidelines*。

9

10 讓我們再討論我們可否制定 *tiered system* 吧。其實我們在 *guidelines*
11 中已清楚指明，有關失當行為越嚴重，罰款額便會越高，或如果有關公司
12 經常犯錯，情況便會較為嚴重，以及若有關公司存心犯錯，即存有 *fraud* 時，
13 情況亦會變得嚴重。所以，我們其實已將 *tiered system* 的精神放在 *guidelines*
14 內。

15

16 但我們為何不說明這類個案須處以這個款額的罰款，那類個案須處
17 以那個款額的罰款呢？因為現今市場的變化實在太大和太快，而這條法案
18 經通過後，會 *serve* 香港很長的時間，那麼我們能否於現在想出一個 *format*，
19 預知將來出現的情況呢？我覺得這點很難做到。

20

21 如果我們嘗試這樣做，將來可能會出現更加不透明和導致公眾和
22 *intermediaries* 產生更多疑惑的問題。所以，我認為採用制定 *guideline* 的形
23 式，就好像一幅大的 *picture* 一般，制定整體的情況，對市場的幫助會更大。

24

25 **胡經昌議員：**

26

27 我希望知道美國的罰則，是怎樣執行的。須否經法庭審訊，由法庭
28 裁定該人觸犯何等程度的罪行後才執行，還是以定額罰款的形式執行，就
29 像我們被抄牌後須罰款450元一樣？還是以其他形式執行？

30

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1 **主席：**

2

3 是否由SEC執行有關懲罰？

4

5 **證券及期貨事務監察委員會執行董事兼首席律師林張灼華女士：**

6

7 是由SEC執行有關懲罰的。

8

9 **Chairman:**

10

11 Margaret.

12

13 **副主席：**

14

15 主席，按照林太剛才所提出，其實儘管美國的做法是把罰則分等
16 級，但原則是很清楚的。如果有關人士只是犯規，懲罰會較輕，如果該人
17 故意犯規，懲罰便會較重。反過來說，假如要把該人處以較重的罰則，必
18 須證明該人存心作出失當行為，而故意導致他人受害，便須受到較重的懲
19 罰。但可否也在指引中把這些原則清楚地表達出來呢？這不但能對業界作
20 出監管，對公眾亦較為公允，公眾亦會較有信心。因為如果證監會可證明
21 該人確實故意作出失當行為而導致他人受害，便會受到較重的懲罰，這亦
22 可給予公眾較大的信心。

23

24 第二，據我的理解，有關罰則涉及兩個原則。證監會也應讓公眾知
25 道，哪類事情是嚴重的不當行為，哪類是不嚴重的失當行為。即使證監會
26 不能編製列表，清楚列明不同的罰款額，最低限度也應將原則說明，讓公
27 眾知道。

28

29 我同時亦注意到另一方面。1,000萬元的罰款額真的很龐大，而3倍
30 利潤的罰款額也相當龐大。我們在英國時曾聽到很多人就這方面表示關

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1 注。由於調查和判罰的工作也是由同一個機構進行，即由證監會獨自進行，
2 而牽涉的罰款亦那麼龐大時，會否影響到該人本身的人權呢？這些亦是有人
3 曾經提出的問題。關於這方面，證監會怎樣解決呢？當罰款額高達接近
4 1,000萬元，也很接近利潤的3倍時，證監會怎可確保這個程序仍是純屬紀律
5 上的處分呢？

6

7 **Chairman:**

8

9 Mr. BAILEY, guidelines and the tiered system.

10

11 **Mr. Paul R BAILEY, Member of the Commission and Executive Director, Securities and**
12 **Futures Commission:**

13

14 If I could answer you on the guidelines, when the working group worked on this, in
15 fact they took your points on board, because initially we were going to just do it as matters to
16 take into consideration specifically – one of the things they wanted to do was to put matters
17 that had to be general considerations that the SFC was going to look at, as far as the conduct
18 was concerned. If I can just read you the general considerations as they are at the moment,
19 the SFC generally regards the following conduct as more serious: “Conduct that is
20 intentional or reckless; conduct that damages the integrity of the market; conduct that causes
21 loss to, or imposes costs on, others; conduct which provides a benefit to the firm or individual
22 engaged in the conduct, and their related parties. The SFC generally regards the following
23 conduct as less serious, and so generally deserving a lower fine: inadvertent conduct -
24 however, the SFC will impose disciplinary sanctions, including fines for negligent conduct in
25 appropriate circumstances; conduct which only results in a technical breach of a regulatory
26 requirement or principle in that, causes little or no damage to market integrity, and causes
27 little or no loss to, or little or no costs on others; and conduct which produces little or no
28 benefit to the firm or individual engaged in the conduct and their related parties. These are
29 general considerations and will not bind the SFC. The circumstances of each individual case,
30 including the specific considerations described below, will be determined...”

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1
2 When it goes into specific considerations it goes into much more detail on the
3 nature and seriousness of the conduct. It deals with the question of the amount of profit
4 accrued or loss avoided. It also then looks at the size, financial resources and other
5 circumstances of the firm or individual. I am giving you the broadbrush headings to these,
6 and there are a lot of criteria under each of these sets that are set out.

7
8 And other relevant factors which would, for example - - has the SFC issued any
9 guidance in relation to the conduct in question; what action the SFC has taken in previous
10 cases; any punishment imposed or regulatory action taken or likely to be taken by other
11 competent authorities, and the result or likely result of any civil action taken or likely to be
12 taken by third parties. That is the broadbrush way we have drawn up these guidelines. As I
13 said, we are very happy to give you a copy of these. Of course, any input that we can be
14 given would be very much appreciated. We have tried to, in fact, encapsulate, I think, your
15 major concerns in these guidelines.

16
17 ***Chairman:***

18
19 Mr BAILEY, may I ask, with regard to your guidelines which have a similar effect
20 on the American system, in the American system are these guidelines stated in the legislation
21 itself, or just the guidelines as you do them?

22
23 ***Mrs Alexa LAM, Executive Director and Chief Counsel, Securities and Futures***
24 ***Commission:***

25
26 It is in the legislation in the UK. In the United States they do not have guidelines.
27 The SEC has his tiered system in the legislation, but they have no guidelines.

28
29 ***Chairman:***

30

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1 They have the tiered system in the legislation.

2
3 ***Mr. Paul R BAILEY, Member of the Commission and Executive Director, Securities and***
4 ***Futures Commission***

5
6 The FSA has guidelines, and in fact we actually looked at the FSA guidelines when
7 drawing up ours. I think I can safely say that the working group was quite insistent on
8 putting it right upfront for general considerations. From memory, I do not think that was in
9 the FSA guidelines. So we have expanded on those slightly.

10
11 ***Deputy Chairman:***

12
13 Mr Chairman, to begin with, those very general points that were just read out
14 should really not be changeable. I mean, they are general. If that is the case, that is the sort
15 of thing which would be suitable for express provision, whether as subsidiary legislation or as
16 a schedule, or in fact part of the provisions. You want a flexible power because of a change
17 in market practice, but these principles are not changeable. You do not intend to change
18 these principles, so I would ask the Administration to consider expressly providing these in
19 the body of the legislation. Also, Mr Chairman, I asked a question about the human rights
20 considerations. Were these also discussed? Because as you go to the higher end of the
21 fines and the penalties, then the person being disciplined would have - - these are much more
22 serious sanctions, and so I believe that questions of rights and due process, and the standard of
23 proof and all that sort of thing, may have to be taken into consideration.

24
25 ***Miss Vivian LAU, Principal Assistant Secretary for Financial Services :***

26
27 Chairman, the proposals now before members regarding the civil fines have
28 actually been cleared with the Department of Justice. Our proposals are not inconsistent
29 with the human rights provisions. May I now invite Ms Beverly YAN of the Department of
30 Justice to elaborate on the advice?

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1

2 **主席：**

3

4 稍後我會讓妳作答，但我希望先請大家參考編號8A/01的文件，或
5 立法會CB(1)896/00-01(02)號文件。吳靄儀議員提出的問題，其實Hong Kong
6 Stockbrokers Association亦曾於comments中提出，“The SFC is the
7 investigator, prosecutor, judge and jury. There must be more checks and
8 balances.”。

9

10 **副主席：**

11

12 哪一頁？

13

14 **主席：**

15

16 Paper 8A/01 page 2。市場人士曾提出這個憂慮，政府亦已提供初步
17 的答覆。或許請Department of Justice作出補充。

18

19 **高級政府律師甄文蕙女士：**

20

21 主席，我們主要是根據《香港人權法案條例》其中的兩條，研究第
22 IX部——Discipline的機制。第一條是該條例的第十一條，即一個人不可作
23 出導致自己入罪的權利。簡單來說，由於罰款額那麼高，整個regime會否成
24 為一個criminal proceedings呢？就這方面，我們人權組的同事和證監會也取
25 得英國的QC opinion，大家也認為雖然罰款很重，但這個制度不會成為一個
26 criminal proceedings，因為根據第IX部最主要的原則，罰款的主要目的不是
27 punitive的，而是確保intermediaries是fit and proper。另外一個原因，是這
28 項罰款並沒有general application to the public，而只是licensed intermediaries
29 才受制於這項罰款。所以，我們的意見是這制度並非一個criminal
30 proceedings。因此，在一般criminal proceedings中的protection，例如standard

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1 of proof或不可迫使自己入罪等的權力，也是不適用的。

2
3 另外，我們也曾參考《香港人權法案條例》第十條：每人均有權接
4 受公平、公開及公正的審訊。雖然證監會就這方面會作出罰款，但這決定
5 是可予上訴的。我們亦有案例指出，如果有關decision是可予上訴，而上訴
6 機制是符合審裁署公平、公正及公開的條件時，便不會視作違反《香港人
7 權法案條例》第十條的規定。

8
9 **副主席：**

10
11 主席，我認為就這方面，這個解釋仍是不足夠，因為如果罰款是有
12 關利潤的3倍時，便不單是作出賠償那麼簡單，而最低限度亦會牽涉到阻嚇
13 的問題。如果牽涉到阻嚇作用時，其實已是刑事懲罰的其中一種。但我們
14 其實有很多判例，或許法律顧問可以告訴我們這些案例，就是如果有關懲
15 罰非常嚴厲，例如令到一個人失去謀生能力，或令到該人失去所有的退休
16 金等，無論稱之為民事、刑事，或紀律處分，其實也會觸動剛才提到的《香
17 港人權法案條例》第十或十一條。主席，可否請我們的法律顧問就這點進
18 行少許搜集資料的工作？因為我認為剛才署方所提出的資料不太完備。如
19 果要使有關制度符合fair trial的原則，即符合公平、公正及公開聆訊的要求
20 時，不是單設有上訴機制便能達致這個目的。

21
22 **主席：**

23
24 我相信法律顧問可以跟進這個問題。但我希望大家也參考《證券及
25 期貨條例草案》第189條——Procedural requirements in respect of exercise of
26 powers under section 187 or 188。我相信這條所訂的規定跟其他機構仍有相
27 當的差距。所謂其他機構，可能包括美國的SEC或英國的金融管理當局。我
28 不清楚是否不論英國或美國的監管機構，其內部也有規定，把工作segregate
29 在不同的部門進行，即並無監管機構單獨進行所有的工作。我們須否也制
30 訂這些safeguard呢？這正是法律顧問可以研究的問題之一。我只是即時想

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1 到有關safeguard的最低水平吧，但在這個水平以上會否仍能制定更多
2 safeguard呢？即第189條的procedure只是一個初步的水平，讓該人有陳詞的
3 機會，能表白其理由。但這是否已足夠呢？而當局怎樣可監控證監會內部
4 的運作呢？

5

6 吳靄儀議員。

7

8 **副主席：**

9

10 主席，我們前往英國與FSA及下議院議員進行討論時，他們也表示
11 在通過有關法例時，亦曾就這個問題進行很多討論。我不知道我們有否參
12 考那些討論，如果有，香港的做法與英國或美國的做法有甚麼顯著的不同
13 呢？以及為何會存有這些不同呢？可否向我們提供這方面的背景？首先的
14 問題是我們有沒有參考這些討論？

15

16 **財經事務局首席助理局長劉利群女士：**

17

18 主席，其實我們也曾參考英國國會當時討論的Financial Services and
19 Markets Bill，我們也知道英國國會議員曾就這個問題徵詢英國政府的意
20 見。1999年5月14日，英國的HM Treasury曾向國會提交一份文件，討論這
21 個問題。其實我們也曾參考這份文件。就如剛才甄小姐提到，有關內容提
22 到，“Financial markets support enterprises, helping to provide funds for
23 investment and growth. The source of these funds is the public savings
24 which are entrusted to the industry, there is therefore a strong and shared
25 interest in having clear, robust and effective regulation.”。就如我在上次會議
26 開始時也提到，必須領牌的持牌人士處於一個很獨特的地位。我們發牌給
27 他們，而公眾對他們亦具有信心。我們稱這些人為a specific class of
28 persons。對於這些人，譬如當我們對他們作出罰款時，我們其實可處以高
29 於他們的利潤的罰款額，例如three times。從法律的角度分析，這種做法並
30 不屬刑事。這是我們的意見，這份文件上亦載有這種看法，我們亦曾作參

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1 考。如果議員們有興趣研究這份文件，我們亦可把文件的副本交給大家參
2 考。

3

4 **主席：**

5

6 他們應有帶備這份文件。Mr. BAILEY.

7

8 ***Mr. Paul R BAILEY, Member of the Commission and Executive Director, Securities and***
9 ***Futures Commission:***

10

11 Could I just clarify the disciplinary process for you, how it actually carries on? In
12 fact, the disciplinary process has been in existence since the Securities Ordinance and the
13 Commodities Trading Ordinance were brought in, I think in 1972 and 1974. The process is
14 basically that the Commission has to set out its concerns to a person it is going to discipline,
15 and we do this by means of a letter of mindedness. That has to set out in detail where we are
16 coming from, and the preliminary conclusions we have. We then have to give that person a
17 chance to be heard, to make representations. We normally give a person at least one month.
18 If they ask for an extension, then that extension can sometimes occur. For example, if they
19 are legally represented and they want the material on which we base our letter of mindedness,
20 which we are obliged to do as part of the natural justice process, we will extend it, to give
21 them a chance to make representations.

22

23 Once the representations come in, we are then obliged to do a notice of decision
24 which must set out a detailed analysis of, first of all, our preliminary conclusions, their
25 response and a considered decision on whether or not we accept what they have said, whether
26 or not we stand by our original letter of mindedness, or we change the penalty or change the
27 decision, or say “We find you guilty of A, B, but not C”. So we have to make that
28 considered decision. It then has to go out to them. At the present point in time they are
29 allowed 30 days in which to make an appeal. As far as the suspension and revocation goes,
30 there is no appeal on public reprimands, but as a matter of policy we always give people a

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1 chance, if we do a public reprimand and they indicate they want to consider the judicial
2 review option. We give them a chance. We do not publish immediately. We give them a
3 few days to make that decision.

4
5 Under the proposed legislation, public reprimands – any type of reprimand – will
6 become appealable; so that will give one more additional avenue, additional safeguard, and
7 check and balance on the operation of the SFC, as far as the disciplinary process is concerned.
8 The question of the SFC being investigator, judge and jury: the disciplinary unit in the SFC - -
9 there are two areas for discipline. One is licensing, which does a number of cases; and one
10 is a disciplinary unit within enforcement division. That is manned primarily by lawyers, and
11 it reports to a senior director who actually has nothing to do with the investigative process at
12 all. The investigation is a separate unit. Either he or myself – and I am very remote from
13 investigations, purely from an administrative level – are the ones who are empowered to make
14 the decisions on behalf of the Commission and the enforcement division. It is director and
15 above, I think, in licensing, who can make those decisions.

16
17 We always have to follow that process. We cannot afford not to make a decision
18 that is done on a rational basis, or we will be appealed; and we have been appealed on a
19 number of occasions. The procedure where you might have an independent appeal authority
20 certainly puts checks and balances on our operations, plus the checks and balances you have
21 enshrined in law, which are actually operated, I would say, very efficiently over the years
22 since they were brought in the 1970s.

23
24 That is really the procedure. It does not change in the new legislation, except that
25 the matters that can be appealed have been widened, and will be dealt with in Part XI. The
26 main thing as far as discipline is concerned is that reprimands will become appealable.

27
28 **主席：**

29
30 我明白，我相信我們也明白，第189條所訂的步驟，基本上在很多

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1 現行的條例中已經存在，證監會亦已加入第(2)(d)及(2)(e)款，這已是一項改
2 善。我們所考慮的問題，是這項改善是否已達致現時英國法律上的最新水
3 平，更能符合人權的要求。因為英國就人權問題方面已進行很多工作，並
4 提交一個supplementary report。你們剛才只是根據現有的水平作出答覆，但
5 是否仍能做得更好呢？我認為這便是分別所在。

6

7 **副主席：**

8

9 主席，我特別關心有關嚴厲罰則的問題，所以我希望詢問，證監會
10 過往有否提高罰則。新的法例與過往法例的分別何在？證監會過往在何等
11 情況下曾處以這麼大額的罰款？

12

13 **主席：**

14

15 或許我們在此暫停，讓我們的法律顧問提供一些意見。

16

17 **助理法律顧問顧建華先生：**

18

19 主席，我不是提供意見。剛才政府方面提到，他們曾就罰則和人權
20 法例方面尋求法律意見。我希望各位委員考慮，需否請政府向委員會提供
21 他們獲得的法律意見作為參考。

22

23 **主席：**

24 好。或許剛才你們到.....

25

26 **財經事務局首席助理局長劉利群女士：**

27

28 就人權法例方面，我請Mr. Charles BARR再作補充，好嗎？

29

30 **Chairman:**

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1
2 OK, Mr. Charles BARR.

3
4 *Mr. Charles BARR, Deputy Law Officer (Civil Law):*

5
6 We would be happy to let you have a list of our cases which go to the point that
7 when you are regulating a disciplined class – and that is a key distinction between a
8 disciplined class and the general public – you may impose heavy sanctions on that disciplined
9 class if they contravene the rules, without it constituting a badge of criminality. We are very
10 appreciative of getting it right, that we are on the right side of the human rights line; and
11 where that line is a little brambly and we are not sure where it is, we want to be on the right
12 side of it.

13
14 I think I am right in saying, with the SFC present, that nothing has given us more
15 debate internally than this issue; at least nothing that I am aware of. With the disciplined
16 class we are now talking about in this part of the Bill, we feel that the three times penalty will
17 not be one of the indicia of a criminalizing, and therefore we can treat this as a civil matter,
18 providing therefore the other safeguards appropriate to a civil regime are satisfied.

19
20 We will be, I know, returning to this when we look at Part XIII, which is dealing
21 with market misconduct, and the sanctions that are to be imposed. The same points, I think,
22 that I am making will come up then. We took a different view because there there was a
23 regulation that was imposed on the public at large. It could be the wives; it could be the
24 husbands; it could be their friends and colleagues, not just those people who are licensed
25 intermediaries. But for the purposes of this part, Part IX, we are confident that we are on the
26 right side and that the times three penalty will not be a badge of criminalization. We will list
27 our cases, and by all means let us know your dialogue and your view on them, if you feel that
28 we are being unnecessarily cautious or perhaps not sufficiently cautious on those cases. We
29 would be grateful for your views.

30

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1 **Chairman:**

2
3 I think our legal advisers are asking whether we would like to have your - - because
4 since you did seek some QC opinion, we did want to have the opinion, the result, from these
5 external parties. We would like to have a copy of that document.

6
7 Margaret?

8
9 **Deputy Chairman:**

10
11 Mr Chairman, may I just ask this? I think the answer we have just been given is
12 that the crux of the matter is that you are targeting a special group of people whom you
13 authorized, and therefore by implication have the right to discipline. You say that within this
14 class of person you do not think that three times the profit gained or the loss incurred would
15 attract the badge of criminality. I think that is the principle. Have I got it right? What is
16 the limit in that case? I mean, you say "three times" or "\$10 million". It still keeps you
17 within that kind of range. Is there any principle as to how far you can go, or can you just do
18 anything you like to people whom you have authority to discipline? This is quite an
19 important point, because ultimately we have to answer to the legality of this, the
20 constitutionality of this whole legislation that we are examining.

21
22 **Chairman:**

23
24 Yes?

25
26 **Mr. Charles BARR, Deputy Law Officer (Civil Law):**

27
28 Chairman, as with these things, I do not think it would be correct to say there is just
29 one badge of what constitutes criminality or does not constitute criminality. You look at a
30 range of factors, according to the advice we have got from our bill of rights people in the

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1 department, and from outside counsel. This includes how the sanction will be treated
2 publicly. Will the person be treated as a criminal? Will it be treated as a criminal record
3 for any purposes, and if so, which purposes? How far can we go? Could we go to times
4 100, to take it to absurdity? That I think would then put in question the other badges,
5 because a person who was perhaps fined times 100 might well be treated in substance as a
6 criminal, and therefore we would be looking at the other badges to see whether, in the
7 balancing exercise, that might constitute in the large, looking at all of the factors, the badge of
8 criminality. As far as we are aware, it has never been seriously questioned that times three
9 the profit gained or loss avoided would constitute a criminal badge by itself, for the purposes
10 of Part IX discipline.

11

12 ***Deputy Chairman:***

13

14 Mr Chairman, we are told that it is not just one single factor but a number of factors.
15 I do not want to rely on our own reading of the legal opinion, because really it is not assumed
16 that the Bills Committee is composed of lawyers; but perhaps the other badges and how the
17 matter is balanced could be explained to us, please?

18

19 ***Mr. Charles BARR, Deputy Law Officer (Civil Law):***

20

21 Indeed. What I would suggest is that we list our cases. We are happy to send
22 you the copies of those cases, and I think from those, the badges of criminality will appear.

23

24 ***Deputy Chairman:***

25

26 Why is it not possible to explain to us here and now, you know? I mean, after all,
27 we may not be terrifically good at reading cases, so since the Administration has gone through
28 the process of considering these matters, and weighing and balancing, and coming up with a
29 conclusion which you are happy with, having regard to all the principles that you have to
30 consider, could this process be explained to us?

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1

2 *Mr. Charles BARR, Deputy Law Officer (Civil Law):*

3

4 I will do the best I can.

5

6 *Deputy Chairman:*

7

8 Thank you.

9

10 *Mr. Charles BARR, Deputy Law Officer (Civil Law):*

11

12 We looked at the nomenclature. It carries some weight, but not a lot, we feel.
13 We looked at the penalties, how grave and how serious they were, in relation to the wrong
14 done. We do not think in this case that the penalties are disproportionate. Of course they
15 are penalties, but they are not disproportionate in the circumstances. We looked at whether
16 the society would treat these people as criminals, the disciplined class as a criminal class, and
17 we concluded that they probably would not. We looked to see whether the police kept any
18 record in these circumstances – negative. We looked to see whether people's movements
19 internationally would be affected; generally speaking, not so. Those are the main badges, as
20 far as I can recall.

21

22 Then the weighing process went into play, and the conclusion was that for Part IX
23 purposes we were on the side of the view that discipline in these circumstances, with times
24 three penalties, did not constitute a criminal offence, and therefore did not require the
25 protections that would be entirely appropriate for a criminal offence.

26

27 **主席：**

28

29 委員提問的輪候名單中有數位同事的名稱，何俊仁議員，接着是……

30

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1 **何俊仁議員：**

2
3 我稍後才發問。

4
5 **主席：**

6
7 余若薇議員，妳是否希望跟進這一點？OK, Audrey. 接着請胡經
8 昌議員提問。

9
10 **Hon Audrey EU Yuet-mee, SC, JP:**

11
12 The discussion has been on the human rights aspect, but I think it would also be
13 helpful if perhaps the Administration or the SFC could also explain the considerations as to
14 why you think three times the profit would be appropriate as the maximum, in terms of, for
15 example, the public interest angle, and maybe also questions of whether it be an effective
16 penalty, and things of that sort. Perhaps you can also explain that angle as well. Thank you,
17 Mr Chairman.

18
19 **Chairman:**

20
21 SFC, three times ?

22
23 **Mr. R Paul BAILEY, Member of the Commission and Executive Director, Securities and**
24 **Futures Commission:**

25
26 I think, to be quite honest about this, it was really based on the old insider dealing
27 provision where we saw that a three times disgorgement would also send a deterrent message
28 to the market that certain types of conduct would not be tolerated, and I think as far as that is
29 concerned, if it were mere disgorgement, say for cases of misappropriation, it would not send
30 a message to the market that that was unacceptable conduct. There had to be some sort of

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1 punitive element in it. I think, being quite frank about it, that it was based on the Securities
2 Insider Dealing Ordinance, and that was based on the three times profit gained, loss avoided
3 pecuniary penalty. That was the reason behind the three times.

4
5 **Chairman:**

6
7 Audrey?

8
9 **Hon Audrey EU Yuet-mee, SC, JP:**

10
11 Thank you, Mr Chairman. Thank you for that. Other than the historical factor, at
12 the time, of course, when this three times profit limit was first mooted, was there a lot of
13 public consultation? Was there a response, and how did the market generally react to that?
14 Did it think, for example, three times would be appropriate or effective? I mean, if, for
15 example, it is just the limit of the profit, or twice the amount of the profit, it would not have
16 been an effective maximum limit? That is what I am trying to find out. Other than that,
17 that is the historical figure.

18
19 **Mr. Paul R BAILEY, Member of the Commission and Executive Director, Securities and**
20 **Futures Commission:**

21
22 From my memory when we did the consultation, and perhaps Vivian can correct me
23 if I am wrong, there was general support for the fining power; and from memory I do not
24 recall any criticism of the three times profit gained, loss avoided. In fact, in general there
25 was support for this as an intermediate sanction, to have an in-between between the public
26 reprimand and suspension.

27
28 **Deputy Chairman:**

29
30 How about the 10 million? Is that new or is that old?

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1

2 ***Mr. Paul R BAILEY, Member of the Commission and Executive Director, Securities and***
3 ***Futures Commission:***

4

5 That is new. In fact that was the figure, quite honestly, that was thought
6 appropriate to take into account any possible conduct. It was the level really just picked
7 out – 10 million – in very early discussions on the Bill.

8

9 ***Deputy Chairman:***

10

11 Were there any other figures suggested, or did someone think “Oh, let’s have a nice
12 round figure. Ten million will do?”

13

14 ***Chairman:***

15

16 It is always very hard to come up with figures, and when figures come up, they are
17 hard to justify. If any of us puts it as 8 million, it is also very difficult to explain why it is 8
18 million.

19

20 ***Mr. Paul R BAILEY, Member of the Commission and Executive Director, Securities and***
21 ***Futures Commission:***

22

23 In the early days of the Bill we had a steering committee which comprised members
24 of high repute, and I think in the early discussions on this we had probably a lower figure, and
25 someone said it was not big enough to take into account all the possible conduct that might
26 have to be catered for. The figure was in fact then upped to 10 million. I think the FSA
27 actually has unlimited fining powers. They do not have any cap on their fining power at all,
28 so 10 million, as far as we see it, does put a cap on it. But it is really – one has to be quite
29 frank about it – is a figure that was just arrived at through discussions in the very early stages
30 of the Bill.

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1

2 **Chairman:**

3

4 Sorry. As Chairman, even I do not understand the sentiment of the Bills
5 Committee. Is it too low or is it too high?

6

7 **Deputy Chairman:**

8

9 Mr Chairman, let me explain why. I have no idea whether it would be too high or
10 too low, unless we are looking at the facts of the case, but what personally I am driving at in
11 this whole series, whole line of questioning, is to make the process of discipline as open and
12 transparent and rational as possible. That is to say, if a figure is decided on, then there has
13 to be some basis for the figure. The basis can be a matter of actual figure, because
14 everybody finds that sort of figure - - or because it may have been justified by a process of
15 consultation, or it may have been justified in some other way. Mr Chairman, what I am
16 trying to see in this Bills Committee is what is the rationality, whether it has gone through a
17 transparent process, and how accountable the SFC is in using the powers under the Bill to
18 discipline whoever has transgressed the guidelines.

19

20 **Chairman:**

21

22 Yes, Mrs Alexa LAM.

23

24 **Mrs Alexa LAM, Executive Director and Chief Counsel, Securities and Futures**
25 **Commission:**

26

27 Thank you, Mr Chairman. Perhaps I could let Honourable Members in on a bit of
28 the history. Now, there was a steering committee back in 1999, to help analyze the proposals.
29 One of the proposals was this disciplinary fine and how much it should be. We originally
30 drew wisdom from the Insider Dealing Tribunal, which is three times profit or loss. Then

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1 the issue arose: what happens if we cannot quantify the profit or the loss? We looked at the
2 FSA. At that time they had already proposed unlimited fining. We discussed that at length,
3 and it was decided that for Hong Kong it is probably not a good idea, and probably not
4 acceptable, for us to have unlimited fines. So we had to find a figure.

5
6 The steering committee, after back and forth - - actually some members even
7 thought the \$10 million was too low in the Hong Kong context. It really depends on how
8 you look at it. We decided that we would go to consultation. In July 1999 we actually
9 went to the public to consult. At that time it was a consultation on the policy proposals that
10 we planned to bring in, in the Bill. If I remember correctly, we actually did not get feedback
11 in terms of whether or not the public thought that \$10 million was too high or too low,
12 although we did get feedback that they generally supported the idea of a fine.

13
14 **主席：**

15
16 我不知道其中一個字眼是否存在錯誤。請參考第187(2)(b)條，其中
17 採用“which is the greater of”的字眼。這是一個很普通的邏輯，如果有人賺
18 取的利潤是500萬元，這筆款項3 times便是1,500萬元。那麼罰款應是1,500
19 萬元，對嗎？那麼在何等情況下罰款才會是1,000萬元呢？

20
21 **Mr. Paul R BAILEY, Member of the Commission and Executive Director, Securities and**
22 **Futures Commission:**

23
24 When you cannot quite find the amount.

25
26 **主席：**

27
28 OK. 如果是這樣的話，為何是“which is the greater of”呢？

29
30 **財經事務局首席助理局長劉利群女士：**

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.....賺得或loss avoided的款額是少於1,000萬元的情況下。

主席：

我不明白。

副主席：

主席，我也可想像這種情況。在一些情況下.....

財經事務局首席助理局長劉利群女士：

.....即有關款額的3 times是少於1,000萬元的情況。

主席：

.....3 times是少於1,000萬元時，證監會便會處以罰款1,000萬元？

證券及期貨事務監察委員會執行董事兼首席律師林張灼華女士：

不對，最高罰款是1,000萬元。

財經事務局首席助理局長劉利群女士：

.....“not exceeding”，即這款額是ceiling。

副主席：

不對。

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主席：

如果是“which is of the lower”，意思便是最高不可超過1,000萬元。

證券及期貨事務監察委員會執行董事兼首席律師林張灼華女士：

對。因為如果profit & loss是少於1,000萬元，最高罰款可達至1,000萬元。但如果profit & loss是多於1,000萬元，便可根據該profit & loss釐定罰款額。

主席：

我不明白。

財經事務局首席助理局長劉利群女士：

可否讓我將整條條文解釋一遍？

主席：

好。

財經事務局首席助理局長劉利群女士：

因為該條中間的部分那句訂明，“the Commission may, separately or in addition to any power exercisable under subsection (1), order the regulated person to pay a pecuniary penalty not exceeding the amount which is the greater of – (i) \$10,000,000 ; or (ii) 3 times the amount of the profit secured or increased or loss avoided...”。

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1
2 換句話說，“not exceeding”這個字眼已說明，於下文中提到的便是
3 上限，那個上限可是1,000萬元或所得利潤的3倍，以較大者為準。所以，換
4 句話說，那個上限便要視乎究竟1,000萬元的款額較大，還是所得利潤的3
5 倍的款額較大，然後選取較大的款額作為上限。不知道我的解釋是否清楚？

6
7 **主席：**

8
9 解釋清楚，但我並不認為這做法符合邏輯。假設在具體數字上，有
10 關利潤是500萬元時，罰款便是1,500萬元，對嗎？

11
12 **財經事務局首席助理局長劉利群女士：**

13
14 對。

15
16 **主席：**

17
18 那麼在甚麼情況下才會罰款1,000萬元呢？

19
20 **財經事務局首席助理局長劉利群女士：**

21
22 如果有關利潤是100萬元，3倍便是300萬元，而300萬元是少於1,000
23 萬元，所以便會以1,000萬元作為上限。

24
25 **主席：**

26
27 即1,000萬元便是最低罰款額？

28
29 **財經事務局首席助理局長劉利群女士：**

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1 1,000萬元是上限，然後證監會便會決定有關罰款額——“a pecuniary
2 penalty not exceeding” 1,000萬元。總而言之，我們第一個步驟是要知道有
3 關的盈虧，然後將該款額的3倍與1,000萬元作出比較，將較大的款額作為上
4 限，然後證監會便會以這個款額作為上限，決定罰款額。

5
6 **主席：**

7
8 大家真的明白嗎？

9
10 **副主席：**

11
12 對。

13
14 **主席：**

15
16 其實我不是不明白，我只是覺得這做法不合理。

17
18 **副主席：**

19
20 可否要求證監會為我們列舉一些例子？

21
22 **主席：**

23
24 請妳再說一遍。我覺得這做法不合理。

25
26 **副主席：**

27
28 可否給我們列舉一些實例？

29
30 **主席：**

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1
2 我是明白的，但我認為大家尚未明白。

3
4 **財經事務局首席助理局長劉利群女士：**

5
6 因為有關字眼方面，採用了“to pay a pecuniary penalty not exceeding
7 the amount”，然後於下文中再解釋“amount”的意思。“amount”的意思是the
8 greater of 1,000萬元或a 3 times-penalty，然後於1,000萬元和a 3 times-
9 penalty中選出greater amount。如果是以500萬元的利潤計算，3倍便是1,500
10 萬元，便以1,500萬元作準。但如果情況是只得100萬元的利潤，便以100萬
11 元乘以3，便得出300萬元。由於我們剛才提到是要以the greater of 1,000萬
12 元or利潤的3倍為準，所以我們便以1,000萬元作為上限。然後由於條文訂明
13 “pecuniary penalty not exceeding”這個上限，所以證監會便可決定以0元至
14 1,000萬元作為罰款額。

15
16 **胡經昌議員：**

17
18 主席，這條款的意思是若要犯案，不要犯輕微的案件，而是要犯嚴
19 重的案件。如果利潤是100萬元，按照該條款，便是以1,000萬元作為ceiling，
20 但罰款額不是300萬元，而是可罰款500萬元。你剛才所提出意見的意思是，
21 如果……

22
23 **主席：**

24
25 ……這便不合乎邏輯。

26
27 **胡經昌議員：**

28
29 ……不對，即鼓勵人們干犯嚴重的案件。

30

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1 **主席：**

2
3 即根據你的邏輯，不訂明1,000萬元便行了，不是嗎？

4
5 **副主席：**

6
7 不對，不行。

8
9 **主席：**

10
11 為何不行？

12
13 **財經事務局首席助理局長劉利群女士：**

14
15 或許讓我提出一點。其實我剛才所說的1,000萬元已接近刑事罪行的
16 罰款額。例如一個人犯了刑事罪行，罰款是1,000萬元……

17
18 **主席：**

19
20 容許我重述有關邏輯。假設有兩人分別犯罪，一人干犯涉及500萬
21 元的案件，另一人干犯涉及100萬元的案件。對於干犯涉及500萬元案件
22 的人，最高罰款是1,500萬元；而對於干犯涉及100萬元案件的人，最高罰款是
23 1,000萬元。相對而言，干犯涉及100萬元案件的最高罰款，相等於有關利潤
24 的10倍。這在邏輯上有所不同，對嗎？

25
26 **財經事務局首席助理局長劉利群女士：**

27
28 主席，我明白你的問題。

29
30 **主席：**

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1
2 妳明白嗎？現在是妳明白，不是我不明白了。

3
4 **財經事務局首席助理局長劉利群女士：**

5
6 我一直也明白，只是大家討論不同的事宜，而不存在明白與否的問題。我們在會後再作考慮吧，我明白你的邏輯。

7
8
9 **副主席：**

10
11 主席，我希望加上一句。其實我對1,000萬元的款額並無成見，我不
12 認為它是太高或太低，因為我們要考慮其切實性。所以在討論的過程中，
13 我們似乎也沒就一些地方認真深入地作出考慮。

14
15 我懷疑到，在一些情況下，有關行為本身是很嚴重的行為，但由於
16 舉證的問題，無法證明該人究竟獲得多少利潤，或可予證明的利潤的部分
17 不大，但該行為本身卻應受到嚴厲的懲罰時，我們可如何處理？在這情況
18 下，很可能會出現胡經昌議員剛才提到的現象，即如果涉及的款額越大，
19 最低限度該人也會知道最高的罰款額。所以，我認為我們似乎應考慮這點。

20
21 **主席：**

22
23 我明白妳的意思，但其實事情很簡單，讓我稍作解釋。其實寫法應
24 是就有關利潤無法quantify的情況，罰款額可能是1,000萬元；就利潤可以
25 quantify的情況，罰款便可能是3乘以有關的profit，那便可能更為合理。如
26 果我們翻閱第(2)(ii)款，該款很清楚地指出，罰款額是所獲利潤的3倍。但
27 對於無法計算利潤的個案，便可set一個fixed amount，可能證監會心目中的
28 fixed amount便是1,000萬元。或許你們在會議後作出處理吧，而剛才Margaret
29 提出的意見，亦請你們note，然後決定怎樣回應，好嗎？

30

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1 **胡經昌議員：**

2

3 主席，……

4

5 **主席：**

6

7 先請Audrey發言。很抱歉，我每次也是讓你先發言的，但若有其他
8 同事希望發言，我通常會讓其他同事先發言。Audrey.

9

10 **胡經昌議員：**

11

12 我輪候發言也是一樣吧。

13

14 **主席：**

15

16 我必定會讓你發言。

17

18 **余若薇議員：**

19

20 我對1,000萬元或利潤的3倍也沒有任何成見，但不知日後會否出現
21 問題，因為一些喜歡爭拗的律師會提出爭拗。我不知道有關利潤是否必定
22 可以計算及很容易計算，因為有時會有就利潤的款額出現爭拗的情況。若
23 出現爭拗時，亦不知問題出於哪裏。因為根據這條款所訂，是以其中一個
24 數額為罰款額，並以較大者為準。但當出現爭拗及不同意有關利潤的款額
25 時，會否出現有些喜歡爭拗的律師告訴證監會，整條法例也存有不清楚的
26 地方或灰色地帶的情況呢？

27

28 就3倍利潤的問題，應否清楚訂明如果無法計算有關利潤時，應以
29 甚麼為準，或在何種情況下應以1,000萬元的款額為準？因為如果只訂明以
30 兩者中較大者為準時，便好像表示該兩個數目也必定可以計算。所以，若

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1 無法計算有關款額時，便會出現灰色地帶。喜歡爭拗的律師便會指出，整
2 條條例也不清晰，並存有問題，所以不可執行。

3
4 **主席：**

5
6 **Audrey**，我明白你的問題，但其實也是重覆我剛才提出的那個問
7 題，即只涉及兩類情況，一類情況是可以計算有關利潤，而另一類情況是
8 無法計算有關利潤。就可以計算有關利潤的情況，如果當局認為3倍是合
9 理，便一律以3倍計算，無論有關利潤是100萬元或500萬元，即number of
10 times of有關的amount，如果3倍是適當的便是3倍。

11
12 若是無法計算利潤的情況又怎樣呢？可能在一些case下，有關利潤
13 確實無法計算。例如進行insider trading時，沽出股票的數量會有消息公布，
14 證監會便可根據買賣紀錄，證明有關利潤的款額。但在很多情況下，是無
15 法知道所作出的行為帶來的利潤的。在這些情況下，便可訂定最高罰款額。
16 倘若證監會認為1,000萬元是合理的最高罰款額，便可把這款額在條款中訂
17 明。

18
19 **余若薇議員：**

20
21 主席，尤其關乎買賣股票的事宜，交收時間十分重要，所以對於利
22 潤的款額必然會出現爭拗。如果控辯雙方也無法同意利潤的款額，其中一
23 方認為款額大於1,000萬元，而另一方認為款額少於1,000萬元時，便不知道
24 哪個款額才是正確，因而會出現問題。

25
26 **財經事務局首席助理局長劉利群女士：**

27
28 我請Mr. BARR就這點提供一些意見。

29
30 **Chairman:**

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1

2 Yes, Mr BARR.

3

4 ***Mr. Charles BARR, Deputy Law Officer (Civil Law):***

5

6 We have been to the Court of Final Appeal on profit gained, loss avoided, for the
7 purposes of insider dealing, and in the course of the preparation of this part we gave quite a
8 lot of thought to whether we should articulate the views expressed judicially. We thought it
9 better not to, because this is dynamic, we have enough at the moment, it has worked in a
10 dozen or so insider dealing cases where we are addressing profit gained and loss avoided; and
11 I think the feeling was that we were comfortable with what we had.

12

13 On the second point of whether the quantifiable loss versus the unquantifiable loss,
14 I have been involved in a couple of cases and I know the SFC will have been involved in
15 many more, where through the diligence of the regulator or just the incompetence of the
16 market sometimes, not very much profit is made and not very much loss is avoided. But
17 you can still detect misconduct behaviour, and that is when you want to have the high or
18 higher penalty.

19

20 So perhaps that goes some way to answering your question of why we have got the
21 higher of the two different formulas.

22

23 **主席：**

24

25 我們又回到討論的開端。若是這樣，證監會真的要再考慮，現時的做法是否正確。假設採用現時的寫法，就可以計算利潤的情況而言，若有關利潤是200萬元，最高罰款是1,000萬元，若有關利潤是400萬元，最高罰款是1,200萬元，.....

29

30 **副主席：**

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1
2 主席，我認為Mr. BARR剛才提出的問題是值得委員會作出考慮的。
3 假設由於監管有力，所以能及時避免有關失當行為對投資者造成很大的損
4 失，而該損失仍是可以計算的，雖然損失的款額輕微，但仍可計算。但損
5 失款額輕微的原因，並不是由於該人貪污情況不嚴重，而只是由於及時被
6 制止。因此，如果要使罰則取得阻嚇作用或反映有關行為的嚴重程度，純
7 粹以計算所得的利潤乘以3，或許不足以反映或不足以達致制裁的作用。所
8 以，即使在可以計算損失或盈利的情況，也不能採用乘以3的方法。相信我
9 們也需考慮這個相當現實的情況。

10
11 **財經事務局首席助理局長劉利群女士：**

12
13 其實我們只集中討論罰款的問題，但罰款只是整套制裁措施的其中
14 一項措施。在某些情況下，可只處以這個款額的罰款，但當情況嚴重時，
15 證監會可施加其他額外的制裁措施，例如暫時吊銷牌照等。

16
17 從我們剛才的討論，我明白主席提出的邏輯。在草擬有關條款時，
18 我們亦曾作出一些考慮。待我們在會後再作考慮後，才繼續有關討論，好
19 嗎？

20
21 **主席：**

22
23 好了，接着由胡經昌議員發言。

24
25 **胡經昌議員：**

26
27 多謝主席，……

28
29 **主席：**

30

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1 這是最後一個問題了，Sorry.

2
3 **胡經昌議員：**

4
5這是我提出的最後一個問題了，或許我希望當局澄清一些事
6 宜。對於當局如何訂定1,000萬元或3倍利潤的罰款額，政府剛才已清楚說
7 明。這款額是根據內幕交易的情況訂定的。內幕交易是很嚴重的罪行。剛
8 才他們也提到，1,000萬元已是接近刑事罪行的罰則。很明顯地，若罰款額
9 是有關利潤的3倍，剛才主席也提到，罰款便是1,500萬元，這已超越1,000
10 萬元的款額了。

11
12 若我們參考第186條——interpretation，該條中第(1)(a)款已清楚訂
13 明，倘若有關人違反“任何”有關條文，便須受到這些嚴苛條文的制裁。所
14 以，我懷疑應否輕率地把這麼嚴重刑事罪行的罰則水平用於一些很輕微的
15 失當行為。這是第一點。

16
17 第二點是有關我剛才所提出的問題。如果情況真的這麼嚴重，我們
18 應否賦予證監會權力，使證監會可自行考慮以其他的適當方式發表指引，
19 而無須刊登憲報？如果在這麼嚴重的情況下，應否隨便將責任交給證監
20 會，任由證監會作出處理？或應否作出適當的規管？既然事情這麼嚴重，
21 即使不應使有關權力須透過subsidiary legislation的形式通過，也應gazette，
22 而不可輕率處理。

23
24 **財經事務局首席助理局長劉利群女士：**

25
26 主席，我希望就這點作出即時的澄清。若參考第187條第(7)款，該
27 款訂明，證監會所作出關於罰款的指引，必須刊登憲報，並須以該會認為
28 適當的其他方式發表。所以刊登憲報是必須的程序。至於其他方式，證監
29 會可能會把有關指引上載該會的website，方便公眾查閱，亦可以小冊子的
30 形式，送交相關的人士或持牌機構或人員參閱。所以刊登憲報是必須的程

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1 序。

2

3 **胡經昌議員：**

4

5 但我們應否考慮如果涉及嚴重罪行，便不應以subsidiary legislation
6 的形式通過。這是第一點。第二點，我希望當局澄清，這項罰則或第187條
7 所訂的罰則是否只適用於持牌人士。

8

9 **主席：**

10

11 只適用於持牌人士嗎？對。Ok.....

12

13 **胡經昌議員：**

14

15 是否銀行不受這些罰則規管？

16

17 **財經事務局首席助理局長劉利群女士：**

18

19 對。現有的條例並不涵蓋獲豁免的人士，即如果銀行從事證券業
20 務，是不受這條例所規管的。

21

22 **主席：**

23

24 即它們無須受有關1,000萬元罰款所規管？

25

26 **財經事務局首席助理局長劉利群女士：**

27

28 主席，我希望提出一點。其實在上次會議席上，我已聽取議員的意
29 見。我們在現階段正與銀行業商討有關適用於銀行證券部的制裁制度。待
30 我們花一些時間與他們商討後，再以文件形式向大家作出解釋。

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1

2 **主席：**

3

4 好的。我相信不單是作出解釋，我們也必會作出跟進。今天的會議
5 到此為止。但我希望提醒各位，大家即將開始一個更艱辛的階段，因為由
6 下星期開始，委員會會由每星期舉行一次會議，改為每星期舉行兩次會議，
7 委員會較早時已通知各位有關事宜。

8

9 我知道部分委員是公營房屋建築問題專責委員會的成員，所以你們
10 每月會有兩個大的工事包。祝你們身體健康。多謝各位。

11

12 m2752