

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 Tuesday, 17 July 2001, at 2:30 pm
in Conference Room B of the Legislative Council Building**

- Members present** : Hon SIN Chung-kai, (Chairman)
Hon Margaret NG, (Deputy Chairman)
Hon Eric LI Ka-cheung, JP
Hon NG Leung-sing
Hon Mrs Sophie LEUNG LAU Yau-fun, SBS, JP
Hon Abraham SHEK Lai-him, JP
Hon Audrey EU Yuet-mee, SC, JP
- Members absent** : Hon Albert HO Chun-yan
Dr Hon David LI Kwok-po, JP
Hon James TO Kun-sun
Hon Bernard CHAN
Hon Jasper TSANG Yok-sing, JP
Hon Ambrose LAU Hon-chuen, JP
Hon Henry WU King-cheong, BBS
- Public officers attending** : Parts VI, VII & VIII of the Securities and Futures Bill

Miss AU King-chi
Deputy Secretary for Financial Services

Miss Vivian LAU
Principal Assistant Secretary for Financial Services

Miss Emmy WONG
Assistant Secretary for Financial Services

Mr Arthur YUEN
Division Head, Banking Supervision Department, Hong
Kong Monetary Authority

Mr Danny LEUNG
Division Head, Banking Development Department, Hong
Kong Monetary Authority

Ms Sherman CHAN
Senior Assistant Law Draftsman

Part VIII of the Securities and Futures Bill

Mr Frank TSANG
Assistant Secretary for Financial Services

Ms Beverly YAN
Senior Government Counsel

Mr Michael LAM
Senior Government Counsel

Attendance by invitation : Parts VI, VII & VIII of the Securities and Futures Bill

Mr Andrew PROCTER
Executive Director, Intermediaries and Investment
Products, Securities and Futures Commission

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

Mr Joe KENNY
Consultant, Securities and Futures Commission

Mrs Mary AHERN
Legal Consultant, Securities and Futures Commission

Part VIII of the Securities and Futures Bill

Mr Paul R BAILEY
Member of the Commission and Executive Director,
Securities and Futures Commission

Mr Eugene GOYNE
Associate Director, Enforcement, 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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1 **主席：**

2
3 會議正式開始，現請政府的代表進入會議室。

4
5 請各位同事留意，由於半數委員表示未能出席7月27日的會議，委
6 員會在上次會議席上經徵詢各位的意見後，決定把該次會議取消。此外，
7 因應實際的需要，委員會將會在9月第二個星期開始復會。有關的會議通告
8 已由秘書處發給各位。政府在昨天就條例草案第VIII部提交了一份新的文
9 件，即立法會CB(1)1791/00-01(01)號文件。至於有關第IX部的資料，委員
10 會在今天已收到該份文件。委員會秘書稍後會透過cc mail將該份文件送交
11 各位，並會盡快把hard copy交給各位。

12
13 讓我們繼續討論條例草案的條文。委員會在上次會議完成第156條
14 的討論，而政府已答應會考慮委員就第156(8)條提出的意見。

15
16 我們現在討論第157條。關於第157條的英文本，各位有沒有問題？

17
18 **副主席：**

19
20 沒有。

21
22 **主席：**

23
24 那麼中文本呢？

25
26 **副主席：**

27
28 沒有。

29
30 **主席：**

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1

2 關於第158條的英文本，各位有沒有問題？那麼中文本呢？現在討
3 論第159條。關於這條文，各位有沒有問題？那麼這條文的中文本呢？

4

5 **副主席：**

6

7 沒有。

8

9 **主席：**

10

11 現在討論第160條。

12

13 關於第160條，我希望提出一個問題。這可能屬於技術問題。關於
14 該條文中的“excluded person”(“豁除人士”)，請問可否採用一個較好的字
15 眼？

16

17 **副主席：**

18

19 主席，這已經算是很不錯了，否則可能需要譯作“已被豁除的人
20 士”。

21

22 **財經事務局副局長區環智女士：**

23

24 主席，你所指的是這用語的中文譯法，對嗎？

25

26 **副主席：**

27

28 他認為這用語的中文譯法不好。

29

30 **主席：**

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1
2 對。“豁除人士”的說法有點奇怪。從草擬的角度來看，這是否普遍
3 採用的字眼？

4
5 **高級助理法律草擬專員陳子敏女士：**

6
7 為求簡潔，我們盡量把用語精簡。此外，該用語是一個界定詞，有
8 特別的意思。不過，我們可再作考慮。

9
10 **主席：**

11
12 好的。現在討論第161條。關於這條文的英文本，各位有沒有問題？
13 那麼中文本呢？

14
15 如果沒有問題，我們便討論第VII部。有關第VII部的文件亦已……

16
17 **副主席：**

18
19 主席，法律顧問希望作出補充。

20
21 **主席：**

22
23 法律顧問。

24
25 **助理法律顧問顧建華先生：**

26
27 多謝，主席。我希望提出一個技術問題。第158(2)條訂明，除核數
28 師外，獲核數師授權的人亦可行使第(1)款所提述的權力。除核數師可作決
29 定外，獲核數師授權的人也有權作決定。我所擔心的是，由於條例草案並
30 沒有界定獲授權人士的資格，讓這些人士可決定是否要求有關的附屬機構

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1 進一步交出資料，這做法是否適當？

2
3 **主席：**

4
5 副局長。

6
7 **財經事務局副局長區璟智女士：**

8
9 我們正等待傳譯員完成翻譯的工作。

10
11 **Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,**
12 **Securities and Futures Commission:**

13
14 I am just following through. Sorry, Chairman.

15
16 **財經事務局副局長區璟智女士：**

17
18 顧先生，你是否就第158(1)條提出問題？

19
20 **Mr KAU Kin-wah, Assistant Legal Adviser:**

21
22 Section 158 subsection (2) in relation to the power being also granted to a person
23 authorized under subsection (1)(g).

24
25 **Miss AU King-chi, Deputy Secretary for Financial Services:**

26
27 Is it on how the person is to be authorized under (1)(g)?

28
29 **Deputy Chairman:**

30

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1 No, Mr Chairman, I think the question is a simple one which is that it provides for
2 someone delegated by the auditor to carry out certain decisions but there is no specification as
3 to the qualifications of the person who would act upon delegation. I think this is the Legal
4 Adviser's question.

5
6 ***Mr KAU Kin-wah, Assistant Legal Adviser:***

7
8 Yes. That is the observation and my question is whether this delegation is
9 appropriate. In my personal opinion, it seems that the decision perhaps should be retained –
10 I mean, the power to decide should be exercised by the auditor instead of the person being
11 delegated.

12
13 ***Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,***
14 ***Securities and Futures Commission:***

15
16 It is important to note, though, the words appearing at the end of subparagraph (1)(g)
17 that that person who is delegated – “delegated” is not quite the right word but that person who
18 “is employed” – is not permitted to exercise some of the key powers, particularly the
19 examination of another person or to exercise any powers conferred by this paragraph; that is,
20 paragraph 1.

21
22 So what the person is doing is basically doing the nuts and bolts work, not the key
23 work of examination and requiring production of documentation. I think it is a relatively
24 safe provision in that respect. You are not giving that person any compulsory powers. You
25 are just putting the auditor in a position where they can engage staff to help them on the task,
26 using the kind of technical skills that you would expect them to need for that task, but it is
27 only the auditor who has what I think can fairly be called “special and exceptional powers”
28 under (1).

29
30 ***Mr KAU Kin-wah, Assistant Legal Adviser:***

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1
2 Thank you, Chairman. I think I would disagree on the point that the authorized
3 person's powers only are restricted to the examination, as I suppose. Actually, the only
4 power that is excluded is the power to further delegate. The authorized person would have
5 the authority to exercise all other powers specified in subsection (1) and I think this is really
6 confirmed by the wording of subsection (2).

7
8 ***Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,***
9 ***Securities and Futures Commission:***

10
11 I am just looking at the words, "except to examine a person on oath under
12 paragraph (a) or to exercise any power conferred by this paragraph."

13
14 ***Mr KAU Kin-wah, Assistant Legal Adviser:***

15
16 Which means paragraph (g)?

17
18 ***Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,***
19 ***Securities and Futures Commission:***

20
21 Yes, so that the person is not permitted to examine on oath.

22
23 ***Mr KAU Kin-wah, Assistant Legal Adviser:***

24
25 Apart from that, the other powers specified in subsection (1) would be exercisable
26 by the authorized person.

27
28 ***Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,***
29 ***Securities and Futures Commission:***

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1 Yes.

2
3 **Mr KAU Kin-wah, Assistant Legal Adviser:**

4
5 But it is not my query. My question is, in subsection (2), “the person authorized is
6 empowered to make the decision whether, for the purpose of carrying out the examination and
7 audit of the accounts and records of the licensed corporation and any of its associated entities
8 which the auditors is appointed to carry out, to exercise the powers referred to in subsection
9 (1), in relation to the other matters which are specified in the following paragraph of
10 subsection (2)”

11
12 **Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,**
13 **Securities and Futures Commission:**

14
15 I understand the question and I do not think it is a problem, in the sense that the
16 person has to be able to practically perform the work. I think that the difficulty is, you could
17 not have a situation where only an individual person was asked to conduct what could be a
18 very sizeable exercise. You actually have to be able to have a team of people who can do the
19 work. I understand the concerns but I think that the terms of reference of appointment of the
20 auditor and the SFC’s supervision of the audit function and examination function I think
21 ought to be a sufficient safeguard.

22
23 **主席：**

24
25 現在討論Part VII。關於第162條，當局建議改用“engaged”一字。各
26 位同事，關於這條文的中文本，請問是否有問題？第VII部的中文本隨附於
27 後。

28
29 現在討論第163條。關於這條文第(2)(e)款的修訂，即“to take
30 specified steps before providing...”，請問在政策上，這是否有特別的意思？

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1

2 **副主席：**

3

4 第163條？

5

6 **主席：**

7

8 對，第163條第(2)(e)款。

9

10 **Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,**
11 **Securities and Futures Commission:**

12

13 Mr Chairman, I could not answer the question before it was translated.does
14 this have anything to do with the policy but it did not say which policy.

15

16 **Chairman:**

17

18 What I mean is that section (2)(e) – what do you mean by, “to take certain steps”?
19 What is the implied meaning?

20

21 **Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,**
22 **Securities and Futures Commission:**

23

24 If you look at the whole of (e), where it goes over the page, there is actually a series
25 of provisions that all fit together. It starts with (c) on information to be provided to client.
26 But then (d) is about the things about the client that the intermediary should ascertain. That
27 is colloquially called “to know your customer requirement.” Having found out about the
28 customer and the customer’s financial circumstances and their risk appetite, then the
29 expectation is that the intermediary will act in the interests of the client and make sure that
30 they properly understand risk issues that attach to any recommendation. For example, that

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1 they might make a recommendation which is appropriate to the client.

2
3 Now, in fact, what has been removed from the end of that subparagraph by a
4 proposed amendment is a reference to suitability but, although those words are out, in fact it
5 really does still set something of the tone for what “take specified steps” means, the words
6 that are added. It is really about making sure that you understand the nature of the
7 investment advice that has been given, the product, the instrument, the risk that is associated
8 with it.

9
10 That links then again – you can skip over (ea) which is about conflicts of interest,
11 down to (f) which is about specific risk disclosure. So, in other words, you find out about
12 the client, you find out about the product and then you tell the client about the product. That
13 is the way it works. That is the sort of thing that would be covered in (e).

14
15 **主席：**

16
17 關於第163條的中文本，各位有沒有問題？現在討論第164條。

18
19 **Deputy Chairman:**

20
21 Mr Chairman, can I ask a question? The code of conduct – please remind me
22 whether the code of conduct would also go through the consultation. Thank you.

23
24 **Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,**
25 **Securities and Futures Commission:**

26
27 Yes.

28
29 **Deputy Chairman:**

30

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1 Thank you. It seems to me that in (4), you said you set out the effect of breach of
2 code of conduct but, apart from (4), does it have any other effect, any effect relevant to legal
3 processes and decisions?
4

5 ***Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,***
6 ***Securities and Futures Commission:***
7

8 I think the answer is probably “Yes”, but not as far as the SFC’s legal processes and
9 decisions are concerned. Let me explain that. Certainly as far as the SFC is concerned we
10 have certain powers that principally are predicated on a judgment that someone has been
11 guilty of misconduct and is no longer fit and proper so, as described in paragraph (4) the code
12 sets out the circumstances in which we would – a doubt might be raised in the ordinary
13 circumstances. It calls into question whether or not someone remains fit and proper. It sets
14 out what we regard as appropriate standards of behaviour in all the areas that are described in
15 the preceding paragraphs.
16

17 Now, I think actually you would expect that if there was a claim for negligence, for
18 example, or indeed for breach of contract, what the SFC had said in a code might be
19 something that was put before the court but in that limited sense only I think the answer to
20 your question is “Yes”.
21

22 ***Deputy Chairman:***
23

24 Mr Chairman, would it be right that as far as the SFC’s own operations are
25 concerned, you consider that to be binding on you but as far as the Court is concerned, that is
26 evidential.
27

28 ***Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,***
29 ***Securities and Futures Commission:***
30

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1 It is slightly different. We certainly consider the code to be the way in which we
2 would ordinarily exercise discretion in the absence of some reason to depart so in that
3 administrative law sense it is binding.

4
5 **Deputy Chairman:**

6
7 Yes. Outside it is only evidential.

8
9 **Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,**
10 **Securities and Futures Commission:**

11
12 That is right.

13
14 **Deputy Chairman:**

15
16 Thank you. That is why (6) you said this is not subsidiary legislation. We get a
17 little queasy when we see “this is not subsidiary legislation” and we ask why. My
18 understanding is that that is why, because of the limit of the effect.

19
20 **主席：**

21
22 關於第164條的中文本，各位有沒有問題？

23
24 現在討論第165條。關於這條文的英文本，各位有沒有問題？那麼
25 中文本呢？

26
27 現在討論第166條。關於這條文的英文本，各位有沒有問題？那麼
28 中文本呢？

29
30 現在討論第167條。各位有沒有問題？那麼第168條呢？

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1
2 法律顧問。

3
4 **Mr KAU Kin-wah, Assistant Legal Adviser:**

5
6 Thank you, Mr Chairman. In respect of section 167 subsection (3), page 18, this
7 clause deviates from the existing provision in that it appears that the defence of lawful excuse
8 is somewhat limited to the inadvertence, carelessness or negligence of the person, which
9 means a licensed person himself.

10
11 **Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,**
12 **Securities and Futures Commission:**

13
14 Our view would be the opposite.

15
16 **財經事務局副局長區璟智女士：**

17
18 我們的看法卻是相反的。我請陳律師從法律方面作出解釋。

19
20 **主席：**

21
22 好的。

23
24 **高級助理法律草擬專員陳子敏女士：**

25
26 主席，我們在這條文加入“without limiting the circumstances in
27 which lawful excuse may be established”一句，是希望藉此說明“lawful
28 excuse”在其他情況下也可以由被告人去證明。我們亦在這條文中特別訂
29 明，在某些情況下，“lawful excuse”亦可以當作是成立的。至於註解所提到
30 的情況，據我所知，去年在通過一條新條例時，立法會曾就這問題進行討

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1 論，當時議員要求加入這項規定，即“inadvertence, carelessness or
2 negligence”這3種情況都可以作為“lawful excuse”。我們在第(3)款加入
3 “without limiting the circumstances in which lawful excuse may be
4 established”，是希望藉此說明“lawful excuse”並非只限於這3種情況才可以
5 成立。事實上，我們曾與法律顧問進行討論，並就他所提出的問題而加入
6 這一句。

7
8 ***Mr KAU Kin-wah, Assistant Legal Adviser:***

9
10 Thank you, Mr Chairman. I do not believe that the addition of the clause that is
11 added in the CSA would fundamentally change the tone of that clause. I would say it is still
12 doubtful whether a licensed person could rely on the inadvertence or carelessness or
13 negligence of his staff or agent to set up a defence of reasonable lawful excuse.

14
15 ***Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,***
16 ***Securities and Futures Commission:***

17
18 Mr Chairman, can I just say, whilst members consider that, I understand the context
19 in which this discussion took place. Normally, of course, the expression that would be used
20 is “reasonable excuse” and we would not normally regard someone’s inadvertence,
21 carelessness or negligence as a reasonable excuse. So a different phrase is being used,
22 “lawful excuse” and it has been specifically defined to include, without limiting the
23 circumstances in which it might be established, inadvertence, carelessness and negligence.

24
25 In the existing law, section 80(c) subsection (4) of the Securities Ordinance, it says,
26 “For the purposes of subsection (3)” – which is the reference to lawful excuse – “lawful
27 excuse includes inadvertence, carelessness or negligence”; so I think, in substance, it is the
28 same. The reason why this rather extraordinary excuse exists is that on the facts as they arise
29 in dealings on market, in a hectic and fast market, where the requirement includes a
30 requirement to notify the market and prospective buyers of a short sale and literally to key in

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1 the symbol of short sale, there is a risk and it is not an insubstantial risk of inadvertence,
2 carelessness or negligence, meaning that the little “s” symbol does not accompany the trade
3 instructions.

4
5 It was regarded in early discussions on this legislative amendment as inappropriate
6 to expose someone to criminal sanctions where that was the circumstance they had failed to
7 indicate a short sale. So that is why there is this rather unusual provision because, as I say,
8 normally, of course, it would be reasonable excuse and normally we would not countenance
9 someone’s carelessness as a basis for saying they should not be liable.

10
11 **Chairman:**

12
13 Audrey?

14
15 **Hon Audrey EU Yuet-mee, SC, JP:**

16
17 Can I just check and ask Mr PROCTER to confirm that there is no intended change
18 in policy? In other words, what this provision is intended is exactly the same as the earlier
19 provision you read out in the existing law. Can I ask, what is the problem with the existing
20 law? Why do you want to change that?

21
22 **高級助理法律草擬專員陳子敏女士：**

23
24 原因是現有的條例第80C(4)條訂明，“lawful excuse includes
25 inadvertence, carelessness or negligence”。我們的看法是，這樣的寫法表面
26 上無法讓人清楚知道，當有關人士能夠證明違反規定是由於不小心或疏忽
27 所致，這是否算是一個辯解，抑或因不小心或疏忽而違反規定，便沒有辯
28 解。我們認為，“includes”(“包括”)的意思並不是很清楚。因此，我們希望
29 透過文字清楚訂明，假如有關人士只是由於疏忽或不小心而違反條文的規
30 定，該人須視為有合法辯解。也就是說，我們希望詳細訂明這一點，而不

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1 是簡單地說“辯解”包括某種情況。

2
3 **副主席：**

4
5 可否再讀一次現有的條文？

6
7 **Ms Sherman CHAN, Senior Assistant Law Draftsman:**

8
9 For the purposes of subsection (3), “lawful excuse” includes “inadvertence,
10 carelessness or negligence”.

11
12 **Deputy Chairman:**

13
14 I think the original is clearer.

15
16 **余若薇議員：**

17
18 主席，我同意副主席的意見。我也認為原有的條文較現時建議的寫
19 法好。現時建議的寫法問題可能在於“only”一字，這是較難理解的。我也明
20 白為何法律顧問提出這個問題。“Only”這個字可能會引起混淆，反而舊有
21 的寫法會較清楚，因為“include”的意思必定是“包括”，除了“inadvertence,
22 carelessness or negligence”這3種情況外，還可以包括其他情況。因此，我也
23 認為舊有的寫法較好。

24
25 **高級助理法律草擬專員陳子敏女士：**

26
27 或許由於我反反覆覆參閱這條文，所以覺得“辯解”包括疏忽的寫法
28 有點奇怪。如果議員認為舊有的條文令人容易明白……我其實純粹是因為
29 bundles of caution而加入這些字眼，把條文寫得詳細一點。

30

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1 **副主席：**

2

3 可否改為採用原本的寫法？

4

5 **高級助理法律草擬專員陳子敏女士：**

6

7 好的，沒有問題。

8

9 **主席：**

10

11 OK，這只是technical drafting。現在討論第168條，各位有沒有問題？

12

13 **副主席：**

14

15 沒有問題。

16

17 **主席：**

18

19 關於第169條 —— cold call，各位有沒有問題？

20

21 **副主席：**

22

23 關於第169A條，這條文原為第108條。我們在討論該部分時，並沒有
24 有詳細研究這條文。現請政府向我們詳細解釋這條文。

25

26 **主席：**

27

28 請政府向我們解釋第169A條的條文。

29

30 **Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,**

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1 *Securities and Futures Commission:*

2
3 I think perhaps, Chairman, the place to begin is with subsection (5). Subclause (1)
4 begins, "Subject to subsection (5)" and subsection (5) sets out the circumstances in which this
5 provision does not apply. It does not apply – let me summarize – to offers that are made in
6 accordance with the listing rules - that is, on the exchange; to offers made under the take-
7 overs code; to offers that complies with the Companies Ordinance provisions - that is, with a
8 prospectus; to offers made to existing shareholders; to offers made to persons with whom the
9 intermediary has had three dealings or not less than three dealings in the past 3 years; to offers
10 made to solicitors and accountants acting in their professional capacity; to offers made to
11 professionals as defined and to offers made on market.

12
13 Now, actually what that leaves is that the possibility of individually communicated
14 offers – sorry, there is another category to which it does not apply and that is offers that are
15 authorized under Part IV.

16
17 So it leaves the possibility of targeted offers at individuals and basically it is to
18 avoid the possibility of the innocent victim being the subject of a scam. That is a rather
19 crude summary of the effect of the legislation but that is what is left. It is about individual
20 dealing between someone who is intent upon ripping somebody off and, in order that the
21 potential victim is protected in those circumstances. It is actually quite a narrow set of
22 circumstances – there are a whole lot of provisions that follow about the information that has
23 to be provided to the other party; that is, the non-registrant.

24
25 So it begins by describing what form the offer has to take. It has to be in a written
26 document or, if it is communicated otherwise than a written document, then it has to be
27 reduced to writing in not later than 24 hours. Then, in subclause (1)(b) it sets out all the things
28 that have to be set out in that offer; description of the securities, the terms of the offer,
29 whether it is dividend or not, whether someone is going to be liable for stamp duty and in
30 what amount, if they are. What fees might be payable and so on.

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1
2 Then if you go on to what is subclause (6), the name and address of the offer or
3 making the offer, the capacity in which they act. It has to be relatively contemporaneous as a
4 document. Not more than 3 days before the offer is communicated it has to be dated. It has
5 to satisfy requirements that are set out in Schedule 6A. Schedule 6A is the old Schedule 5
6 and there is a further list of quite detailed requirements that have to be included in the offer.

7
8 Where an expert report is relied upon – as it sometimes will be, particularly in
9 respect of valuation – then the expert has to have given appropriate consent and not
10 withdrawn that consent, and it continues. But essentially it is a long detailed description of
11 what has to go into the offer in order that the person who is the recipient of the offer is in a
12 position to understand what they are getting themselves in for. So it is protective section in
13 that respect.

14
15 ***Deputy Chairman:***

16
17 Mr Chairman, may I ask a question about subsection (6) on page 33? Here it says
18 that “without prejudice to section 384(9) and (10), the Commission may make rules to add to,
19 waive or modify any of the requirements specified in subsections (1), (2) and (3)”. So
20 presumably (1), (2) and (3) are part of the primary legislation.

21
22 ***Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,***
23 ***Securities and Futures Commission:***

24
25 That is right.

26
27 ***Deputy Chairman:***

28
29 What you are proposing here is to, in effect, amend the primary legislation by
30 means of a subsidiary legislation. Would that be appropriate?

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1
2 **Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,**
3 **Securities and Futures Commission:**

4
5 (1), (2) and (3) are the primary requirements. They are the requirements that I
6 have just taken you briefly through. The waiver and modification power before we come to
7 addition to rules is a power that is similar to powers that appear elsewhere in the legislation.
8 I am not sure I have with me the other waiver and modification power that is the general one.

9
10 I think, Chairman, if I understand the question, it is a proposal that subsidiary
11 legislation would modify the content of (1), (2) and (3). But it would, of course, be subject to
12 negative vetting in the usual course but that is the effect of it; that it would add to the
13 requirements for disclosure. I should say, it only adds to the requirements, not to the basic
14 obligation to make an offer in a written form and so on.

15
16 **Deputy Chairman:**

17
18 Mr Chairman, I am slightly uneasy because it does not suggest to me that it is a
19 logical sort of thing to do because the amendment of the legislation should go through a
20 legislative process, although subsidiary legislation is also a kind of legislative process. I
21 cannot help feeling that it does not sound quite logical. Perhaps Legal Adviser can give us
22 some help as to whether this is the standard sort of thing to do, although it sounds slightly
23 weird.

24
25 **Mr KAU Kin-wah, Assistant Legal Adviser:**

26
27 I am only aware that sometimes schedules in principal legislation would be
28 amended by certain appointed officials of the Administration. But to allow subsidiary
29 legislation to make such a change may totally change the effect of certain provisions. It is a
30 bit unusual.

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1

2 *Deputy Chairman:*

3

4 Mr Chairman, I do not want to make a meal out of what may turn out to be a
5 technical means of achieving the purpose but what is it that the Administration want to
6 achieve by (6)? I know it has got something to do with flexibility but what is it that you
7 want to achieve?

8

9 *Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,*
10 *Securities and Futures Commission:*

11

12 There are obviously two parts. I understand your question to be referring to the
13 additional requirement rather than the waiver and modification requirement.

14

15 *Deputy Chairman:*

16

17 Or to add to, because I think it also involves some kind of criminal liability but
18 even if that is not involved, I would say if it is a matter of application. The detail of the
19 application is supplied, say, in the schedule and then the primary legislation allows you to
20 change the schedule, modify the schedule or provide for the application of the schedule by
21 means of subsidiary legislation, then I am content because it is done on the same level. You
22 cannot have a high level of primary legislation and then use the subsidiary legislation to
23 modify it. Then you may have yet another subsidiary legislation which may waive some
24 other part. That does not seem right. The legislative powers of the provisions are reversed.
25 This is a technical comment but I am sure you can - -

26

27 *Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,*
28 *Securities and Futures Commission:*

29

30 I guess in one sense it is technical but it is also an extremely important one for us

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1 because if you look at a clause like 131 which is an extensive list of modification or waiver
2 provisions or requirements, then the Commission depends critically on its ability to apply
3 some of this legislation flexibly. To take account of vastly different circumstances as they
4 apply to particular applicants or intermediaries once they are registered and it is quite
5 common for the Commission to have to waive or modify requirements under the substantive
6 legislation and, indeed, under rules. When we come to Part XVI and clause 384, the general
7 provision on rules, there is also there a reference to our ability to waive or modify through
8 further rules the application of those rules.

9
10 **Deputy Chairman:**

11
12 Mr Chairman, looking at 131 – page C1749 where we find 131 – does Mr
13 PROCTER refer to (1)?

14
15 **Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,**
16 **Securities and Futures Commission:**

17
18 Yes.

19
20 **Deputy Chairman:**

21
22 If that is what you are referring to – you see, here, it says, “The Commission may,
23 upon application, in the prescribed manner and payment of the prescribed fee by so-and-so
24 grant a modification or waiver.”

25
26 **財經事務局副局長區環智女士：**

27
28 主席先生，副主席所提出的論點是正確的。我們會再作研究，探討
29 第(6)款是否只應就個別個案作出豁免或修訂。如果是這樣的話，有關規定
30 便會與第131條所賦予證監會的權力相若，這樣可能會減少副主席的憂慮。

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1

2 **副主席：**

3

4 對，因為……

5

6 **財經事務局副局長區璟智女士：**

7

8 我明白。

9

10 **副主席：**

11

12 ……第131條的寫法是不同的，請政府再作研究。

13

14 **財經事務局副局長區璟智女士：**

15

16 這是關乎對個別個案作出的修訂。副主席剛才提到，關於主體條例
17 所訂定的一些基本要求，條例草案已賦予行政長官會同行政會議權力，對
18 附表6A作出修訂，這是第二個層次的內容。我們現在所談到的是第一個層
19 次，證監會需要享有若干程度的靈活性，以決定是否就個別個案作出豁免。
20 我們會再作研究，探討第169A(6)條所賦予證監會的權力，是否只適用於對
21 個別個案作出豁免或修訂。

22

23 **Deputy Chairman:**

24

25 Mr Chairman, I have no quarrel with the aim, the objective and generally what you
26 want to do and why you want to do it, if you can avoid my concerns of reversing - -

27

28 **Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,**
29 **Securities and Futures Commission:**

30

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1 I think I understood your question earlier. I apologize – the distinction between an
2 individual and a general application.

3
4 **主席：**

5
6 余若薇議員。

7
8 **余若薇議員：**

9
10 關於這一點，我希望作出補充。舉例來說，Buildings Ordinance也
11 有一些條文訂明，雖然該條例訂定一些要求，但屋宇署有權向個別申請人
12 作出豁免。這條例草案其實也有一些條文作出這樣的規定。我認為，賦予
13 證監會權力就個別人士的情況作出豁免，訂明這條例草案的規定對該人來
14 說並非全部適用，或給予該人某些彈性，這是可以的。然而，第169A(6)款
15 的寫法是前所未見。這是原則性問題。副主席說得對，在制定法例或修改
16 法例時，並不可以跳級、越級或不經過某個程序行事。賦予證監會權力就
17 個別個案作出豁免，這做法並沒有問題。

18
19 **主席：**

20
21 關於第169A條的其他部分，各位有沒有問題？這項修訂所佔的篇幅
22 頗長。如果沒有問題的話……法律顧問。

23
24 **助理法律顧問顧建華先生：**

25
26 關於該條文第(1)(a)(ii)款，頁數是第27頁，the provision requires
27 delivery of an offer reduced into a written document to be delivered not later
28 than 24 hours after the communication of the offer". I doubt whether this is
29 always practicable in view that there may be many intervening holidays?
30

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1 *Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,*
2 *Securities and Futures Commission:*

3

4 Chairman, I think the answer is not, but it is the dealer that is at risk. The dealer
5 has the obligation and the dealer will have to make sure that they are in a position to effect
6 delivery of the document. That is the existing law actually under section 72(1)(a)(ii) and it
7 has not proved to be problematic but the purpose of the section is to protect the person who is
8 the recipient of the offer.

9

10 The difficulty of delaying the delivery of a written document that provides all the
11 information that is required under the section is that it exposes the recipient of the offer to
12 actually accepting the offer, dealing in the securities in a position of some ignorance. There
13 being further on sale potentially to innocent third parties for value without notice which may
14 frustrate any attempts to redress the loss that might have been suffered by the recipient of the
15 offer, except in damages, of course, but the dealer may not be good for damages.

16

17 So it is actually about trying to get the information that the recipient needs as soon
18 as possible. It is the existing law. It will certainly be difficult, holidays or not, to reduce
19 some of these offers to writing in 24 hours if the dealer has not yet prepared the
20 documentation but that is the obligation that we judge is appropriate, having regard to the
21 primary protective purpose of the section.

22

23 **主席：**

24

25 關於第169A條的中文本，各位有沒有問題？

26

27 現在討論第170條。關於這條文，各位有沒有問題？那麼第170A條
28 —— Amendment of Schedule 6A呢？我們是否需要先行參閱Schedule 6的內
29 容？

30

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1 **財經事務局副局長區璟智女士：**

2
3 主席，Schedule 6A其實是原來的Schedule 5。由於我們將第108條改
4 置為第169A條，因此附設於原來第108條的附表需要重新編排次序。

5
6 **主席：**

7
8 Schedule 5……對，有關第1類和第4類的受規管活動。

9
10 **余若薇議員：**

11
12 主席，我們可否請政府解釋第169(6)條的規定？這條文關乎取消協
13 議。根據有關文件，有意見認為，28天的期限過長，5天的期限已足夠了。
14 然而，政府並沒有採納以5天作為期限。當局在第(6)款訂明，在訂立協議當
15 日後28天內或在察覺該項違反當日後7天內(兩者以較早者為準)，有關人士
16 可藉向違反規定的人發出書面通知而撤銷協議。政府可否告訴我們，為何
17 當局認為應以7天作為期限，以及為何保存28天這個alternative，而沒有採
18 納以5天作為期限的建議？

19
20 **財經事務局副局長區璟智女士：**

21
22 第23頁，對嗎？

23
24 **主席：**

25
26 對，第23及24頁。這裏載有一個註解。

27
28 **余若薇議員：**

29
30 市場人士認為，由於市場價格經常波動，因此給予有關人士28天的

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1 時間作考慮，這期限過長。他們認為，以5天作為期限便已足夠。政府在參
2 考他們的意見後，對條文作出目前的修訂。當局可否解釋為何建議作出這
3 樣的規定？

4
5 **財經事務局副局長區璟智女士：**

6
7 不好意思，我正要求律師研究5個工作天與7天的分別有多大。

8
9 **Chairman:**

10
11 Yes, please.

12
13 **高級助理法律草擬專員陳子敏女士：**

14
15 主席，關於剛才提到計算時間方面，《釋義及通則條例》載有條文，
16 訂明如果有關期限不超過6天，便不會把公眾假期計算在內。在這條例草案
17 中，根據“營業日”(business day)的定義，“營業日”指不屬公眾假期的日子，
18 因此兩者其實是相當接近。

19
20 **主席：**

21
22 關於這個附表，各位還有沒有問題？

23
24 **副主席：**

25
26 沒有，因為第C2439頁訂明，如有疑問，應諮詢律師，因此無需太
27 清楚……(眾笑)

28
29 **主席：**

30

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1 好的，那麼委員會便倚賴法律事務部研究這部分的中文本。關於第
2 171條，各位有沒有問題？

3
4 如果沒有問題，我們便討論 Division 2 —— Powers to require
5 information, etc.的部分。關於第172條 —— Power to require production of
6 records and documents concerning listed corporations，各位有沒有問題？第
7 172條有多項條款，我們逐一討論每條條款，好嗎？

8
9 **副主席：**

10
11 主席，可否把討論範圍縮小？我們可以逐頁進行討論。我建議先討
12 論第172(1)條。

13
14 **主席：**

15
16 好的。關於subclause (1)，各位有沒有問題？那麼subclause (2)呢？

17
18 現在討論subclause (3)，各位有沒有問題？那麼subclause (4)呢？

19
20 關於subclause (5)，各位有沒有問題？那麼subclause (6)呢？

21
22 關於subclause (7)，各位有沒有問題？那麼subclause (8)呢？現在討
23 論subclause (9)。關於這條文，各位有沒有問題？那麼subclause (10)呢？

24
25 關於subclause (11)，各位有沒有問題？那麼subclause (12)呢？關於
26 subclause (13)，各位有沒有問題？那麼subclause (14)呢？

27
28 **Deputy Chairman:**

29
30 Mr Chairman, subclause (13) which is the criminal provision specifies: “A person

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1 without, reasonable excuse, fails to comply with the requirement imposed on him by an
2 authorized person under the section commits an offence and is liable on conviction on
3 indictment to a fine of \$200,000 or imprisonment for 1 year”, and so on. What sort of
4 offence does the Administration have in mind in practice? What sort of conduct is being
5 punished?

6
7 ***Mr Paul R BAILEY, Member of the Commission and Executive Director, Enforcement,***
8 ***Securities and Futures Commission:***

9
10 This would be a failure to comply with a request made by an authorized person
11 under the section; for instance, to produce records or documents, to give explanations on the
12 records or documents and this would apply across the board to any person where such a
13 requirement was made.

14
15 ***Deputy Chairman:***

16
17 How does one fix the level of the penalty for criminal conduct? How is it
18 comparable to other kinds of failure to comply? This is non-compliance of the requirement
19 without reasonable excuse.

20
21 ***財經事務局副局長區璟智女士：***

22
23 就這條例草案而言，這條款所訂的最高刑罰與其他部分所載的條文
24 訂定的最高刑罰比較，屬於較輕的。

25
26 ***Deputy Chairman:***

27
28 What sort of persons are these people likely to be?

29
30 ***財經事務局副局長區璟智女士：***

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1
2 根據這條向證監會提供資料的人士，包括上市公司本身的有關人
3 士、核數師、交易對手及銀行等等。

4
5 **副主席：**

6
7 也就是說，核數師及銀行也包括在內。如果他們不能夠……

8
9 **財經事務局副局長區璟智女士：**

10
11 如果他們無合理理由而沒有提供資料，即屬犯罪。關於這方面，我
12 可以向各位提供一些資料。在進行諮詢時，大部分的專業團體的意見是，
13 訂定刑罰對他們來說，壓力是存在的，但他們同時認為，訂定刑罰的做法
14 也有好處，因為他們較容易向上市公司，亦即他們的客戶解釋為何必須向
15 證監會提供有關資料。假如他們無合理解釋而沒有提供資料，便會觸犯法
16 例。這項規定能夠方便他們協助證監會。在諮詢過程中，我們所獲得的意
17 見，其中一些是我們當初沒有想到的。

18
19 **主席：**

20
21 關於第(14)款，各位有沒有問題？

22
23 **副主席：**

24
25 主席，區小姐剛才提到，就這條例草案而言，第(13)款所訂的刑罰
26 是較輕的。事實上，我們也可看到，刑罰只有兩種，分別是罰款\$200,000
27 及\$1,000,000。第(13)款所訂的刑罰屬於較輕的一種，這是事實。

28
29 然而，就一般情況而言，第(13)款所訂的刑罰水平又怎樣呢？我明
30 白在這條例草案內，第(13)款所訂的刑罰屬於較輕的。然而，與香港其他法

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1 例比較，這刑罰水平又怎樣呢？我相信政府在訂定這刑罰水平時，也曾考
2 慮有關情況。政府可否向我們解釋，與其他一般情況比較，這刑罰水平是
3 否out of line？舉例來說，根據其他法例，假如核數師或銀行沒有遵從有關
4 要求，這是否屬於違法呢？

5

6 **財經事務局副局長區璟智女士：**

7

8 我現時沒有相關的資料。不過，我們當時確曾與刑事檢控科的同事
9 討論這問題。我們所參考的條文，都是關乎欺詐或協助警方調查欺詐行為
10 的條文。

11

12 **副主席：**

13

14 也就是說，有關人士本身並無作出欺詐行為？

15

16 **財經事務局副局長區璟智女士：**

17

18 我們曾參考的資料包括沒有提供充分協助的人所需面對的後果。

19

20 **副主席：**

21

22 亦即不盡力協助的情況。

23

24 **主席：**

25

26 Mr BAILEY，請問以往……

27

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

30

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1 Can I just add something to that? I think, if you look at the clauses in question –
2 (13), (14) and (15) – in fact what has happened in the ordinance, in many places is that the
3 failures have been divided into different stages of gravamen as far as the conduct is concerned.
4 The first one is, “without reasonable excuse.” The second one would be “recklessly
5 providing false information.” The third one is “to defraud.” The levels of penalties, I think,
6 were done in consultation with the Director of Public Prosecutions and it has tried to give a
7 balance of the different gravamen of the conduct involved, rather than, as in the current
8 legislation, of having one offence which covers every type of conduct. This is why it has
9 been divided down into three sections and you will see this is recurring in many places
10 throughout the ordinance. The dual route in summary conviction really would be to take
11 into account the gravamen of the particular failure without reasonable excuse.

12
13 In my experience I do not think we have ever prosecuted under the equivalent of
14 section 29(a) for this and it really is to give a different level of offence in case there are people
15 that are for failure, so we have teeth to the power itself for any failure without reasonable
16 excuse. If a person just says, “I am not going to give it to you”; then, of course, you need
17 something to make sure he complies.

18
19 Of course, the other avenue open is the certification process as well in which you
20 could certify the non-compliance to the High Court. Whereby you would not be able to do
21 the criminal route – either do the one route or the other. So it really is to give teeth to the
22 provision and the penalties have been actually put into that context with the three different
23 levels for the different stages of the offence; from the pure failure to comply, the reckless
24 behaviour when you fail to comply and then actually with an intent to defraud.

25
26 ***Deputy Chairman:***

27
28 Yes, Mr Chairman. Mr BAILEY, thank you for explaining this. Actually, I am
29 quite comfortable with this because as you pointed out it has occurred in earlier parts of the
30 ordinance, too. It has just occurred to me, maybe because Mr Eric LI is not there so I feel a

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1 little guilty about not looking after his accountants. So it struck me to ask the question
2 whether, in absolute terms, the \$200,000 for non-compliance without reasonable excuse in
3 terms of a general situation in Hong Kong, whether this is a suitable level. Whether you
4 have considered whether it is a suitable – I am not suggesting that it is not. I am just
5 wondering if you have considered it and, if so, what did you compare it with. That is really
6 the gist of my question.

7
8 ***Mr Paul R BAILEY, Member of the Commission and Executive Director, Enforcement,***
9 ***Securities and Futures Commission:***

10
11 I think, subject to correction, from my recollection these were all passed to the
12 Director of Public Prosecutions and he looked at them in comparison with other legislation
13 and he was of the view they were reasonable. Again, I would stress that even on a summary
14 conviction it is the maximum and it is very rare that - in fact, we have seen cases – even if you
15 have a maximum penalty that the courts will use that maximum penalty. So it gives the
16 courts flexibility into what they can actually find.

17
18 ***Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,***
19 ***Securities and Futures Commission:***

20
21 Mr Chairman, the other thing is, of course, it has been compared to the existing
22 legislation and there are comparable provisions but, as Mr BAILEY said, it is a rolled up
23 provision which does not break down the levels of intent. It does not have distinctions based
24 on the mental element of the offence. The existing provisions provide for fines on
25 conviction on indictment at \$1,000,000 and imprisonment for 2 years. So I think in that
26 context the lightest penalty of \$200,000 looks about right, if \$1,000,000 some time ago was
27 the right level for the most serious offence.

28
29 ***Deputy Chairman:***
30

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1 Thank you.

2

3 **主席：**

4

5 現在討論第(15)款。各位有沒有問題？

6

7 關於新加入的第(15A)款，各位有沒有問題？

8

9 **Deputy Chairman:**

10

11 Mr Chairman, could we ask the Administration to explain this amendment to us,
12 please?

13

14 **Chairman:**

15

16 Yes, please. It is a relatively long explanation.

17

18 **財經事務局副局長區環智女士：**

19

20 讓我嘗試簡單地解釋第(15A)款。就政策而言，其實是沒有改變的。
21 我們與律師進行詳細商討後，認為明文訂定有關規定，有助向用家清楚解
22 釋當局的政策。

23

24 我們的政策是，當證監會根據第172條進行初步查訊，或根據第177
25 條進行全面調查時，證監會可要求有關人士提供資料。該等人士不能夠以
26 提供資料會使自己入罪為理由，拒絕提供資料。然而，我們為該等人士提
27 供足夠的保障，訂明假如該等人士提供有關資料，有關當局日後不得使用
28 這些資料對該等人士提出刑事檢控。第180條已清楚訂明，有關當局不得使
29 用這些資料對該等人士提出刑事檢控。市場人士在參閱第180條後，認為之
30 前的條文的規定並不清晰，所以我們在該等條文中清楚訂明有關情況，使

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1 該等條文與第180條的規定相呼應。

2
3 **主席：**

4
5 好的。委員會在審議第180條時，會再研究有關情況。關於第(15)
6 款提到的“intent to defraud”，請問以往有否出現這種情況？

7
8 **Mr Paul R BAILEY, Member of the Commission and Executive Director, Enforcement,**
9 **Securities and Futures Commission:**

10
11 So far as I am aware none at all. I have been in the SFC since it started and I was
12 also in the old office of Commissioner for Securities and we have never had anything under
13 an equivalent investigatory power of an intent to defraud.

14
15 **主席：**

16
17 關於第(16)款，各位有沒有問題？關於第173(1)條，各位有沒有問
18 題？那麼第173(2)條呢？

19
20 關於第173(3)條，各位有沒有問題？那麼第173(4)條呢？現在討論
21 第173(5)條，各位有沒有問題？那麼第173(6)條呢？

22
23 關於第173(7)條，各位有沒有問題？那麼第173(8)條呢？關於第
24 173(9)條，各位有沒有問題？

25
26 **Deputy Chairman:**

27
28 Chairman, I am not too sure if I understand the amendment. Can the
29 Administration explain what these words mean?

30

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1 **主席：**

2
3 在第18頁的第173(9)條。

4
5 **財經事務局副局長區璟智女士：**

6
7 同事們，請問哪位可以volunteer作出解釋？HKMA？陳律師？

8
9 **香港金融管理局銀行監理處處長阮國恆先生：**

10
11 我們對這條文作出修訂，是由於有市場人士認為，原本的寫法，即
12 “which is not an intermediary”並沒有說明有關人士／公司作為中介團體的
13 身份，是否屬於第(1)款所提述的中介團體。也就是說，只要有關人士／公
14 司是一個中介團體，無論該名人士／公司是否被調查對象，第(9)款的規定
15 也是適用的。現時建議的新寫法，使條文更清晰地反映有關情況。假如有
16 關人士／公司根據第(1)款，屬於被調查的中介團體，第(9)款的規定便適
17 用。這其實是一項技術修訂，也許該條的註解未有清楚解釋有關情況。

18
19 **副主席：**

20
21 對這方面的事宜並不熟悉的人，要理解條文的意思較為困難，多謝
22 你作出解釋。

23
24 **主席：**

25
26 現在討論第19頁。關於subclause (10)，各位有沒有問題？那麼
27 subclause (11)呢？

28
29 關於subclause (12)，各位有沒有問題？那麼subclause (13)呢？

30

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1 現在討論 subclause (14)。關於這條款，各位有沒有問題？那麼
2 subclause (15)呢？

3
4 **副主席：**

5
6 主席，可否慢一點？

7
8 **主席：**

9
10 好的。關於第(14)款，各位有沒有問題？

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

14
15 (14), (15) and (16) are basically the same provisions as in the earlier section, the
16 same graduated scale for the same offences; same penalties.

17
18 **主席：**

19
20 關於第174條第(1)款，各位有沒有問題？那麼第(2)款呢？關於第(3)
21 款，各位有沒有問題？那麼第(4)款呢？

22
23 現在討論第(5)款。關於這條款，各位有沒有問題？那麼第(6)款呢？

24
25 第(7)、(8)及(9)款關乎penalty。該等penalties都是similar？

26
27 **Mr Paul R BAILEY, Member of the Commission and Executive Director, Enforcement,**
28 **Securities and Futures Commission:**

29
30 Similar penalties.

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1

2 **主席：**

3

4 關於第(10)款，各位有沒有問題？

5

6 我們現在討論第175條 —— Investigations。關於這條文，各位有沒
7 有問題？

8

9 **余若薇議員：**

10

11 關於提供資料及文件或回答問題方面，有關人士可否提出上訴？

12

13 **Chairman:**

14

15 Is it appealable?

16

17 **Miss AU King-chi, Deputy Secretary for Financial Services:**

18

19 No.

20

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

23

24 Sorry, on which clauses?

25

26 **Hon Audrey EU Yuet-mee, SC, JP:**

27

28 On all these powers of investigation, the request for information, the request for
29 documents and so on – I mean, if a person refuses to provide the information or the document,
30 is that appealable?

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1

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

4

5 It is not appealable, no. On enforcement, if it goes to certification to the High
6 Court, they could then raise their grievances to the High Court.

7

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

9

10 Is there any opinion from the industry? Unfortunately Henry is not here,

11

12 *主席 :*

13

14 業界人士並沒有就第175條提出意見。

15

16 *Hon Audrey EU Yuet-mee, SC, JP:*

17

18 As to whether they prefer the certification process to the courts or whether they
19 prefer appealing the request for information to the Securities and Futures Appeals Tribunal.

20

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

23

24 I think on this particular provision the reason why it is not included in the Securities
25 and Futures Appeals Tribunal is, if you have an appeal mechanism, this has no conclusive
26 effect. The provision in fact is really a fact-finding provision and is normally used to find
27 out who is dealing in shares in a particular share when, for instance, there has been unusual
28 movement. If there were an appeal mechanism to the SFAT it would actually thwart us in
29 our investigations and could be used by people to prolong investigations and prevent us from
30 looking at matters.

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1
2 A person would have an appeal if it came to a conclusive result. For instance, if it
3 went into a full investigation and it came to an outcome either to prosecution, where they
4 would have the courts to hear the case or if it went to discipline, they would have the full
5 disciplinary process and they would have the appeal mechanism on the back of that. It is
6 like any of the investigatory provisions. They do not have a conclusive outcome and,
7 therefore, it would not be applicable as far as we are concerned to put it to the appeals tribunal
8 because it could be used to thwart investigations.

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

11
12 Mr Chairman, if a person refuses to provide the information or the document and
13 say, "Take me to court for the specification", would that be considered as an unreasonable
14 excuse or would that be considered as a kind of reasonable excuse?

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

18
19 I think if a person blatantly refused, we would have to either certify or prosecute
20 and, in either case, you would have the courts adjudicate on the outcome, whether it be by
21 prosecution or by certification and that would give a check and balance in the process.

22
23 ***Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,***
24 ***Securities and Futures Commission:***

25
26 There are two other things perhaps worth bearing in mind. First, that the
27 judgment that Mr BAILEY described about. It is essential for the appeal mechanism not to
28 frustrate the investigative process is one that was also reached by the FSA in the UK and by
29 the Australian Securities and Investments Commission in Australia. They have very
30 extensive appeal mechanisms but both carved out the investigative process for that reason.

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1
2 However, what has not happened very much in Hong Kong but which has happened
3 in both those other jurisdictions is that people who are concerned about the way in which the
4 investigative powers are exercised and complain that they are ultra vires have taken a number
5 of judicial review proceedings and, of course, that would be available here as well. So that
6 is actually the mechanism that people have tended to use to challenge the bona fides of the
7 exercise of the investigative power.

8
9 There is a mechanism that is available. It is not the appeal mechanism but the
10 policy judgment that has been made here. In both those other jurisdictions, there is a
11 reasonable balance, having regard to the not unrealistic grip, I think that people would use to
12 frustrate the conduct of an investigation; not everyone, of course, but some would and it
13 would seem to be enough of a threat to take that judgment.

14
15 **Chairman:**

16
17 The Commission has used this power before?

18
19 **Deputy Chairman:**

20
21 I expect this is really the bread and butter of your investigatory power. So has
22 there been a great deal of response in the industry? Do they quite accept that this is what
23 you need to do?

24
25 **財經事務局副局長區璟智女士：**

26
27 或者讓我嘗試回答這問題。雖然今天李家祥議員與胡經昌議員都沒有
28 出席，但我可以告知各位他們曾向我反映的意見。我相信市場人士本身
29 也明白有需要賦予證監會進行調查的權力。至於第173條有關進行初步查訊
30 或日常的監管工作方面，他們詢問有否任何制衡措施，確保證監會在行使

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1 這項權力時，必須根據一些合理程序行事，例如不會進行一些漫無目標的
2 調查。因應市場人士的意見，當局成立了程序覆檢委員會。

3
4 他們也瞭解到，進行調查本身未有作出決定，那麼怎可以提出上
5 訴？在作出決定後，有關人士才可提出上訴。假如讓有關人士在證監會展
6 開調查前，就該會進行調查提出上訴，證監會實在無法有效行使其調查權
7 力，這一點大家也理解的。因此，我們的做法是，在作出決定前，有關人
8 士不得提出上訴。證監會必須展開調查，才可知道有關人士有否進行不法
9 活動。如果不容許證監會這樣做，證監會便無法進行調查。有鑒於此，我
10 們建議成立程序覆檢委員會，該委員會已在去年年底成立。程序覆檢委員
11 會的工作範圍廣泛。舉例來說，假如證監會就某些個案進行了一年的調查，
12 但仍沒有結果，即使這些個案的調查工作仍未完成，證監會也需要把這些
13 個案提交委員會研究。委員會將探討證監會的工作程序，例如證監會揀選
14 這些個案的原因，以及調查工作遲遲仍未完成的理由。

15
16 我們希望嘗試找出一個解決方法，以回應市場人士所提出的意見。
17 此外，世界各地的監管機構也沒有訂定這樣的制衡措施。

18
19 **主席：**

20
21 對於這項權力，我沒有很大意見，不過.....我還是留待討論第176
22 條時才提出。Any more questions?

23
24 我希望就第176(6)條提出一個問題.....我們還是逐項條款研究。第
25 176條關乎調查的進行。關於第(1)款，各位有沒有問題？那麼第(2)款呢？

26
27 關於第(3)款，各位有沒有問題？那麼第(4)款呢？現在討論第(5)
28 款。關於這條款，各位有沒有問題？

29
30 關於第(6)款的寫法，我明白在某些情況下，需要得到律政司司長批

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1 准，又或律政司司長在一些情況下，認為基於實際需要而不公布有關報告。
2 然而，第(6)款的寫法是，“the Commission may, with the consent of the
3 Secretary for Justice, cause a report under this section to be published”。也就
4 是說，如沒有得到 consent，便不能夠 publish，對嗎？當局是否應該訂定一
5 些規限……

6
7 **財經事務局副局長區璟智女士：**

8
9 說明在甚麼情況下給予 consent？

10
11 **主席：**

12
13 ……說明在甚麼情況下不給予 consent。從另一角度來看，公眾的期
14 望是，當證監會完成調查後，該會便應該把報告公布。然而，根據第(6)款
15 的寫法，律政司司長有權決定不公布有關報告。

16
17 **財經事務局副局長區璟智女士：**

18
19 主席先生，現有的法例也載有這項條文。律政司的同事稍後可協助
20 我解答這問題。為何讓律政司可決定暫時不公布有關報告呢？我相信這是
21 因為律政司可能會採取進一步的行動，例如提出刑事檢控，因此有關報告
22 暫時未能向外公布，這可能是其中一個原因。讓我請SFC的同事向各位講解
23 實際上有否這方面的經驗，或者由律政司的同事講解律政司司長究竟怎樣
24 行使這項權力。

25
26 **Mr Paul R BAILEY, Member of the Commission and Executive Director, Enforcement,**
27 **Securities and Futures Commission:**

28
29 Again, this is not in the legislation. In fact, in my experience it has been used very,
30 very rarely indeed. That is when there is interest in a particular case and, even in those

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1 cases, one has to be very careful that you might take the names out of the people involved,
2 when there is public interest in the case. The reason why the consent of the Secretary for
3 Justice is required is in case that any publication could prejudice possibly a prosecution by
4 that publication. But normally we would not use this provision because the majority of our
5 cases where we want to make the public aware of what we have done is when we can do it.
6 For instance, on the back of a prosecution or on the back of disciplinary action when we put
7 out press releases to explain what has been done, why it has been done and if it has a market
8 impact or if we want to send a message to the market we will certainly make a point of that as
9 well.

10
11 So this provision, I think, has only been used in my experience twice. In one of
12 those cases the names of the people involved – because there was nothing found wrong in that
13 case. It was just purely to let the market know what had happened because there were
14 allegations in the market. We took the names of the parties out and with the consent of the
15 Secretary for Justice it was published. In the other case, there was publication with names in
16 because of certain difficulties we had had in obtaining any information from another
17 jurisdiction.

18
19 **財經事務局副局長區璟智女士：**

20
21 甄律師，你是否希望作出補充？

22
23 **Chairman:**

24
25 Yes, please.

26
27 **高級政府律師甄文蕙女士：**

28
29 我本身並無參與這些調查工作，我主要負責根據《公司條例》對有
30 關公司進行調查。根據我的個人經驗，律政司通常都是因為擔心會 prejudice

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1 against criminal proceedings而沒有即時公布有關的調查報告。

2
3 **主席：**

4
5 其實我剛才提出問題時已顧及這種情況。然而，第(6)款的寫法，即
6 “with the consent of the Secretary for Justice”是否可取呢？當局可否更改這
7 條款的drafting，例如訂明律政司司長可基於這些因素而決定暫時不公布有
8 關報告？這條款的寫法是否應該假設當局有obligation公布調查報告，但在
9 某些情況下，律政司可決定遲一點才公布有關報告？

10
11 **Mr Paul R BAILEY, Member of the Commission and Executive Director, Enforcement,**
12 **Securities and Futures Commission:**

13
14 I think, possibly, to add to that, there might be other. It is not just criminal
15 prosecutions. There might be public interest matters that might have to be taken into
16 account. You cannot tie it down specifically to criminal prosecutions. You have to give
17 some leeway so that the Government has control over what might be published if it is
18 prejudicial to the public interest.

19
20 **主席：**

21
22 讓我再提出另一意見，假如政府向外公布進行調查，由investigator
23 調查某事件，待調查工作完成後，當局並沒有公布調查報告。在這情況下，
24 公眾有甚麼期望，有甚麼反應呢？政府也需要作出解釋的。假如當局表示，
25 根據第(6)款的規定，律政司司長沒有給予consent，這樣反而會給予律政司
26 司長一個更大的難題。

27
28 **Deputy Chairman:**

29
30 She takes quite a good deal of money. She can take that sort of pressure. Mr

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1 Chairman, I am content to leave it to the checks and balances of the political system because I
2 think it is of tremendous public interest.

3

4 **Chairman:**

5

6 Why do we not add some wording like, “considering public interest”, etc.

7

8 **Deputy Chairman:**

9

10 I am very allergic to the words “public interest”. So please do not add them. I
11 think the way clause (6) is drafted allows a certain give and take between the Commission and
12 the Secretary for Justice, between whom the public interest should be considered.

13

14 **主席：**

15

16 那麼讓我提出最後一個問題。律政司的同事剛才提到《公司條例》，
17 請問有關條文是否 exactly 採用這樣的寫法？

18

19 **財經事務局副局長區璟智女士：**

20

21 主席，當局會再行研究《公司條例》內相若的條款。同時，亦會考
22 慮副主席的意見。我擔心在加入有關字眼後，副主席要求我再解釋何謂
23 “public interest”，屆時我真的不知道應怎樣草擬這條款才好。

24

25 **Chairman:**

26

27 OK.

28

29 **Deputy Chairman:**

30

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1 Mr Chairman, may I ask a general question? This all sounds very well, you know,
2 if the Commission has reasonable cause to believe something wrong is going on that it
3 investigates. What about when the securities business is carrying out in the banks? What
4 is the equivalent situation? What kind of investigation is monitored? How does it do? I
5 forgot what provisions you have?

6
7 **Miss AU King-chi, Deputy Secretary for Financial Services:**

8
9 We do not differentiate banks or brokerage houses in this section.

10
11 **Deputy Chairman:**

12
13 So the Commission will still do the investigation, is that right?

14
15 **財經事務局副局長區璟智女士：**

16
17 阮先生希望作出解釋。

18
19 **香港金融管理局銀行監理處處長阮國恆先生：**

20
21 讓我解釋有關情況。請各位參閱第31頁第175條第(1)(e)款。這條款
22 載有註解9。根據現時的草擬方法，證監會的調查權力只伸延至涵蓋獲發牌
23 人士的高層人員或獲發牌機構。然而，我們已在註解9清楚說明，因應第IX
24 部.....稍後當我們討論第IX部時，各位也會知道，證監會日後對獲豁免人
25 士、獲豁免人士的高層人員或甚至前線人員，均有多項作出懲處的權力。
26 證監會在行使該等權力時，必須作出調查。其實，我們打算將第(e)段的範
27 圍擴闊，以包括銀行的證券業務。由於我們現時還沒有草擬這方面的修訂，
28 所以這條款並無顯示有關情況，但我們已在這條款加入註解。

29
30 **副主席：**

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1

2

有關註解在第30頁。

3

4

香港金融管理局銀行監理處處長阮國恆先生：

5

6

因此，根據將來的寫法，做法會是一樣的。

7

8

副主席：

9

10

也就是說，現時的情況並不是這樣的，但當局將會提出一項修正案。根據該項修正案，證監會進行調查的權力不會只針對證券行，假如銀行提供證券業務，證監會亦一樣可對銀行進行調查。

11

12

13

14

主席：

15

16

關於第176條，各位有沒有問題？

17

18

現在討論第177條。關於第177條第(1)款，各位有沒有問題？那麼第(2)款呢？現在討論第(3)款。關於這條款，各位有沒有問題？

19

20

21

余若薇議員：

22

23

主席，我希望政府告訴委員會，這裏所提到的“reasonable excuse”包括甚麼呢？如果有關人士不願意提供資料或文件，箇中原因是其他人士提出反對，例如他的客戶提出反對，又或由於不熟悉法例，但未能負擔聘請律師的費用，所以不知道是否真的需要提供有關資料等，這些理由是否屬於“reasonable excuse”？

24

25

26

27

Mr Eugene GOYNE, Associate Director, Enforcement, Securities and Futures Commission:

28

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1
2 I think that is ultimately for the courts to decide. As far as I am aware there is UK
3 case law expanding on what reasonable excuse is. So there is some predictability to the
4 phrase. I think it is generally used to encompass things like, “The documents aren’t
5 unavailable. They were destroyed some time ago without any intention to frustrate any
6 investigation” and things like that that are clearly beyond the powers of the person who was
7 requested to produce the information.

8
9 I think questions of cost and things like that might be a difficult one or questions of
10 impracticability. But the courts would ultimately balance. In some areas, for instance, with
11 the banks there are powers for us to reimburse the banks for the cost of copying documents
12 and so forth on an ex gratia basis and where they are regularly approached for documents to
13 certify in relation to client records and so forth, and bank accounts. Oppressive requests and
14 things of that nature, the illegality of the request, legal professional privilege, public interest,
15 things of that nature would all be encompassed within that.

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

19
20 Public interest in the narrow sense in which it is used, to protect state secrets of
21 witnesses and so on, not in the wider sense that upset some people.

22
23 **主席：**

24
25 關於第(3A)款，各位有沒有問題？第(4)及(5)款與costs有關。

26
27 ***Deputy Chairman:***

28
29 Mr Chairman, just pausing there. I think behind Audrey’s question, there may be
30 a need to do something at some appropriate time and in some appropriate form to explain to

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1 your potential audience what sort of things are not covered by “without reasonable excuse”.
2 So that people have some sort of idea because on the face of it, it is not easy to understand
3 what would count as a “reasonable excuse”. What a layman finds perfectly reasonable as an
4 excuse may not be acceptable in law as a reasonable excuse.

5

6 ***Mr Paul R BAILEY, Member of the Commission and Executive Director, Enforcement,***
7 ***Securities and Futures Commission:***

8

9 In practice, people get indulgences. If they come back and say they have a
10 problem or if they explain to us that they have problems, we always give them additional time.
11 In fact, in many, many cases both on investigations and obtaining information on transactions,
12 we will give people two weeks extra if they give us a genuine reason why they cannot comply.
13 So I think, in practice, I do not think we have ever taken people to prosecution. I think we
14 have only certified three times in ten years. We are very reasonable as far as indulging
15 people of these things and trying to make it clear to them and explaining to them their legal
16 obligations. In fact, I would think in 99.99 per cent of the time they actually comply, so I
17 think the Commission itself behaves very reasonably, if I can use that word, in using these
18 provisions.

19

20 ***Hon Audrey EU Yuet-mee, SC, JP:***

21

22 Mr Chairman, I am really in back of my mind thinking of something equivalent to
23 what lawyers call “interpleader situations”. Because quite often you may be put on the spot,
24 put in the middle because the Commission requires certain information or certain documents
25 but you have difficulty producing them because maybe there is objection from somebody else
26 and the owner, so you do not really want to decide basically. Ordinarily, if the middle man
27 can go to court and get an interpleader like “Don’t make me decide” but I just wondered
28 whether in this sort of case the chap in the middle holding the information or the document
29 can plead and say, “Provided you convince the other chap, don’t bother me”, whether that
30 would be some form of reasonable excuse. He does not really want to have to make a

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1 decision. He does not really want to pay a lawyer to advise him. If he says, "Well, okay.
2 You can take me to court under the certification process" – whether that would be a sort of
3 reasonable excuse. I am really thinking of that sort of person who is caught in the middle.

4
5 **Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,**
6 **Securities and Futures Commission:**

7
8 If, for example, a notice was served upon an individual who was told by a third
9 party that the notice was in some way defective but the person upon whom it had been served
10 owed a contractual obligation to that third party not to disclose. That would be the sort of
11 situation where, as a matter of law, that may amount to reasonable excuse. Obviously, it
12 would depend upon all the facts and circumstances and you could have a variation on that.
13 If someone, again a third party, asserted that there was a claim of public interest immunity or
14 legal professional privilege that attached to the documents, that could put the recipient of a
15 notice in a difficult position but that would on the facts potentially amount to reasonable
16 excuse to refuse. In fact, I guess we would actually have standing to apply for interpretation
17 of the effect of the legislation. We could get a ruling from the court on that as well.

18
19 **Hon Audrey EU Yuet-mee, SC, JP:**

20
21 That is under 178.

22
23 **主席 :**

24
25 現在討論第178條。關於第(1)款，各位有沒有問題？那麼第(2)款
26 呢？

27
28 **Deputy Chairman :**

29
30 I am not perfectly clear. I think we just touched upon it. When does the

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1 Commission go for certification and when does it take it to prosecution?

2

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

5

6 I think in all the cases we have done to date, we have always gone for the
7 certification process because we are more interested in getting the information then putting a
8 person into court. Using the certification process, the court can then direct the person to
9 produce and if they then fail to produce, they can be dealt with for contempt so the
10 certification is the preferred route because we have got more chance of getting the
11 information.

12

13 ***Deputy Chairman:***

14

15 Thank you.

16

17 ***主席：***

18

19 關於第178條第(3)款，各位有沒有問題？

20

21 現在討論第179條 —— Assistance to regulators outside Hong
22 Kong。關於第(1)款，各位有沒有問題？那麼第(2)款呢？

23

24 關於第(3)款，各位有沒有問題？那麼第(4)款呢？

25

26 關於第(5)款，各位有沒有問題？

27

28 第(5)(b)款訂明，“.....subject to adequate secrecy provisions”，請問
29 有沒有一些較客觀的標準？

30

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1 **財經事務局副局長區璟智女士：**

2
3 我請Mr BAILEY稍後講解有關情況。我相信，最客觀的標準是參考
4 本港法例內的保密條款，這就是基準。

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

8
9 Basically, when we are assessing whether or not there is adequate secrecy
10 provisions, we do compare it with our own legislation and, in every case, we go to the
11 legislation from the jurisdiction who is requesting it from the investigatory system. The same,
12 of course, would apply to information sharing. I think it is under clause 366 – to make sure
13 that the secrecy provisions are basically on par with what we have got in Hong Kong.

14
15 We have, in fact, declined to assist in certain cases until people have, in fact, got
16 adequate secrecy provisions in place. It is done very, very meticulously on a case-by-case
17 basis and a lot of analysis is done. If necessary we go back to the other jurisdiction to
18 explain the provisions, how they actually operate in practice and only when we are satisfied
19 that they are very similar to ours would we then accept that they are suitable for investigatory
20 systems or, in fact, sharing the information.

21
22 **主席：**

23
24 關於第(6)款，各位有沒有問題？那麼第(7)款呢？關於第(8)款，各
25 位有沒有問題？那麼第(9)款呢？

26
27 現在討論第180條。關於這條文，我們需要政府稍作解釋。

28
29 **Deputy Chairman:**

30

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1 Really, the first thing I ask the Government to explain is whether there has been any
2 substantive changes. Is it just idealistic?

3
4 **財經事務局副局長區璟智女士：**

5
6 我請陳律師解釋一下。

7
8 **主席：**

9
10 好的。

11
12 **高級助理法律草擬專員陳子敏女士：**

13
14 多謝，主席。我們把在第46頁第(2)(b)款下首3行刪除，其實是將有
15 關規定移至剛才所討論的第172及177條中，亦即“a person is not excused
16 from complying with a requirement.....”一句。我們將有關規定移至第172及
17 第177條，是希望在個別條文中更明確訂定有關規定。至於第180條其餘被
18 刪除的文字，其實我們將之移至下文第(i)節。有關的內容主要是，任何人
19 如要享有這項特權，他在作證前必須make a claim。我們將這項規定只載於
20 第(i)節。在作出這項聲稱後，所有證據不得在刑事法律程序中接納為針對
21 該人的證據。然而，這項規定並不適用於第(ii)節，因為第(ii)節關乎根據第
22 XIII部提起的民事法律程序，亦即有關市場失當行為(market misconduct)的
23 法律程序。因此，要求有關人士作出聲稱的規定，只適用於第(i)節。至於
24 第(ii)節有關市場失當行為的法律程序，則無需作出這項聲稱。這其實是一
25 項技術修訂，以便更清楚反映原本政策的要求。

26
27 **主席：**

28
29 Margaret.

30

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1 **副主席：**

2
3 當委員會討論政策時，我對這部分有很大意見。雖然當局現時提出
4 修訂，這只不過是採取另一說法而已，問題仍然是存在的。根據這條文的
5 規定，當局可強制他人提供資料。我們所關注的是，當局可否使用這些資
6 料將有關人士入罪？第(i)節訂明，有關資料不得在刑事法律程序中使用。
7 然而，第(ii)節訂明，有關資料可在就市場失當行為而提起的法律程序中使用。
8 當委員會討論政策時，我所提出的憂慮是，關於就市場失當行為而提
9 起的法律程序，在這過程中，所獲得的資料全部都可以在提出刑事檢控時
10 使用。也就是說，雖然改了另一說法，但實際情況仍然是，當局強制他人
11 提供的資料，將來亦可用作把有關人士入罪，對嗎？

12
13 **財經事務局副局長區璟智女士：**

14
15 第XIII部主要關乎審裁處在進行研訊時，可使用有關資料。這情況
16 相當於現時內幕交易審裁處在行使調查權力時，也可使用證監會所獲得的
17 資料，作為在研訊過程中可考慮的證據。這其實對現時內幕交易審裁處的
18 研訊程序具關鍵作用，讓審裁員可聽取有關資料作為證據。我們希望將現
19 有的安排伸延至日後市場失當行為審裁處展開的民事法律程序。

20
21 **Deputy Chairman:**

22
23 In one way, what is new about this ordinance is that what you gathered at this stage
24 can be used for the purpose of Part XIII, market misconduct, and once it is there then this Bill
25 provides that it can be used in any civil action, but does it also not mean that what is stated as
26 a record in market misconduct can also be adduced in criminal proceedings? Can you also
27 use that for criminal investigation?

28
29 **Mr Eugene GOYNE, Associate Director, Enforcement, Securities and Futures**
30 **Commission:**

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1
2 Perhaps I can clarify these things and if you could correct me if I have
3 misinterpreted you. (ii) – the “criminal” there only refers to criminal proceedings for the
4 purposes of Part XIII which are ancillary provisions, criminal provisions to the operation of
5 the Market Misconduct Tribunal and the proceedings before that Tribunal are quite clearly
6 civil. The criminal offences that appear in Part XIII are not the substantive criminal
7 provisions for the criminal punishment of market misconduct as such as in 10 years’ jail or a
8 \$10,000,000 fine. Rather they are the more minor offences that go towards whether orders
9 of the MMT to compel evidence have been complied with or to misleading evidence as given
10 to the Market Misconduct Tribunal and so forth.

11
12 ***Deputy Chairman:***

13
14 Mr Chairman, may be the substantive question could better be dealt with when we
15 come to Part XIII but the relative part here is, what is the ultimate effect of clause 180,
16 whether there has been any change. My question is really this. If we are concerned with
17 self-incrimination, it is not good enough to say that it will not be used directly in criminal
18 proceedings against you. Because it can be used in market misconduct, and I do understand
19 that that is not criminal. That is intended to be a kind of civil procedure and I think I can
20 still remember the kind of sanction you are liable to if you are found guilty before the Market
21 Misconduct Tribunal.

22
23 Nevertheless, because the proceedings and the materials used in the Market
24 Misconduct Tribunal is available for civil claims then (1) it can be used for civil claims. But
25 I believe that that once being open and publicly available material, that material can also be
26 used as a foundation for other criminal sanctions against you. Would that not be the case?

27
28 ***Mr Eugene GOYNE, Associate Director, Enforcement, Securities and Futures***
29 ***Commission:***

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1 No, not that I think, derivatively. Certainly the statement itself compelled under
2 clause 180 – compelled under the investigatory provisions or the information governing the
3 powers under Part VIII could not be used. Derivative evidence, I think, if that is what you
4 are referring to – derivatively obtained evidence in terms of documents obtained flying from
5 that statement – Clause 180 clearly does not govern those, if that is what you are asking about.
6 If you are asking about the derivative use of the statement as tendered before the MMT, I
7 think again (i) would prohibit the use of that in any other criminal proceedings. We can
8 look at that and examine it if further changes need to be made to that clause.

9
10 In this respect, clause 247 is relevant. If I can summarize it - that any evidence in
11 term tendered before the MMT is not available in criminal proceedings against that person
12 other than proceedings in the nature of the falsity of the statement for perjury or the ancillary
13 criminal offences in Part XIII, that I referred to earlier going to the mechanics of the operation
14 of the MMT in giving false evidence, failing to provide information.

15
16 ***Deputy Chairman:***

17
18 I will have another look.

19
20 ***主席 :***

21
22 關於第181條，各位有沒有問題？那麼第182條呢？

23
24 ***Mr KAU Kin-wah, Assistant Legal Adviser:***

25
26 Thank you, Mr Chairman. Could I come back to 180? The progress of this
27 afternoon is faster than I expected and I have not got with me the copy of the United Kingdom
28 Financial Services and Markets Act. There is a similar provision as to the prohibition of the
29 use of evidence – statements obtained by compulsion, of using them in criminal proceedings.
30 I think the wording there is quite different and I would suggest that we follow the wording in

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1 the Act.

2
3 *Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,*
4 *Securities and Futures Commission:*

5
6 The wording is very different in several respects. It is both wider and narrower,
7 depending on which part of the provision you are looking at. In the UK you do not have to
8 make a claim for privilege. It is based on the fact that the evidence is elicited under
9 compulsion. But the use that can be made of the evidence in one respect is significantly
10 wider because if the person who has made the statement and at a subsequent criminal trial
11 puts in evidence – in other words, leads evidence – about the making of the statement, then it
12 is all open. Then the prosecution can lead evidence about the interrogation and question and
13 answer.

14
15 So if, for example, at a subsequent trial the defendant is putting forward a defence
16 and on cross-examination there was a suggestion that this was a recent invention and the
17 defendant says, “No, it isn’t. I told the FSA this when they asked me some questions and
18 this is what I told them”, it would all be in then. You could actually lead all the other
19 evidence. So there are very significant differences, not just about whether this is based on
20 privilege or compulsion and I think the scope of the UK section is quite different to the scope
21 of these provisions. It would be a very significant change and we would want to consult the
22 industry very carefully on.

23
24 *Mr KAU Kin-wah, Assistant Legal Adviser:*

25
26 I just would like to make a point. I only referred to that part of the UK provisions
27 that is the actual prohibition, which, if I remember correctly, states that such statement cannot
28 be used and no questions should be put in relation to this thing.

29
30 *Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,*

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1 ***Securities and Futures Commission:***

2
3 I think actually again this provision is tighter and it is a wider protection for the
4 person. It is not just a question of asking questions. I think we would need to look very
5 carefully at whether that UK provision, in fact, was a broader protection. I think this is a
6 broader protection. It is a much more general expression of the prohibition. It is obviously
7 a question of interpretation.

8
9 ***Mr Eugene GOYNE, Associate Director, Enforcement, Securities and Futures***
10 ***Commission:***

11
12 Basically, we spoke to the FSA in relation to clause 174(2)(b) which the Legal
13 Adviser is referring to. It is, in some respects, a little bit broader in that no question may be
14 asked in relation to the statement. I think, as Mr PROCTER has said, the situation in the UK
15 in relation to evidence law is significantly different. Particularly in relation to admission of
16 guilt and also late defences as is referred to.

17
18 As we understand it, the Court of Final Appeal in a case that was handed down in
19 about May of this year comprehensively ruled out questions that the UK legislation was
20 dealing with there and we feel that the legal foundation in Hong Kong common law as set out
21 in the case is somewhat different to that that exists in the United Kingdom. Hence, the
22 provision is somewhat inappropriate for Hong Kong on the basis of the differences in
23 common law between Hong Kong and the United Kingdom.

24
25 The situation is a little bit complicated and I think it is somewhat difficult to
26 explain orally and if you need further we may be able after appropriate research to set
27 something up.

28
29 ***Deputy Chairman:***

30

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1 Mr Chairman, I think really the better way to deal with this question is to take it as
2 a separate and self-contained problem so that we can have the Legal Adviser perhaps provide
3 us with the exact wording of the UK Act that we have been referring to; and also the
4 appropriate authorities so that we can look at it together because this is a rather serious point.

5
6 Mr Chairman, I just turn forward to clause 247 about the use of evidence received
7 for the purpose of market misconduct proceedings. There is no question that evidence
8 gathered under clause 180 can be used in market misconduct proceedings. Now, you see
9 here under (2) – of course, (2)(b) I can see that criminal proceedings - where the evidence
10 cannot be used in criminal proceedings where the person is charged with an offence under
11 Part V of the Crimes Ordinance, or for perjury, and so on, but (3) is rather difficult to
12 understand. (3) says: “The evidence given by any person at or for the purpose of any
13 proceedings instituted under section 244” – that is, market misconduct proceedings – “as
14 referred to in subsection (1) is admissible in evidence against that person in any other
15 proceedings, civil or criminal, in a court of law where, had there been no such proceedings
16 instituted under section 244, the same evidence would have been admissible in evidence in
17 such other proceedings under the law or proceedings applicable to such other proceedings in
18 that court.” I just find it frightfully difficult to understand, so I do not know exactly to what
19 extent one is protected under clause 180. That is a difficult point because clause 180 is
20 where you exercise a power to compel someone to give you - -

21
22 ***Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,***
23 ***Securities and Futures Commission:***

24
25 The proposal is to delete that provision, actually. I think...

26
27 ***財經事務局副局長區璟智女士 :***

28
29 我們上次進行討論時，副主席其實也提出同樣的問題。當局在作出
30 檢討後，認為無需訂定第247條第(3)款。由於我們還未討論第XIII部，所以

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1 沒有向各位提出這一點。關於這方面，確實有令人混淆之處。

2
3 **Deputy Chairman:**

4
5 Sorry. I have not quite remembered that.

6
7 **Chairman:**

8
9 Mr LI has come back.

10
11 **Deputy Chairman:**

12
13 I have no further questions on clauses 180, or 181, for that matter. In fact, I have
14 no questions for the rest of this Part.

15
16 **余若薇議員：**

17
18 關於第(2)(b)(i)款，副主席在今天早上表示對“聲稱”一詞感到十分
19 敏感，我希望就這方面提出問題。為何需要規定有關人士在作出解釋或提
20 供資料前，必須作出“聲稱”，才可享有不使自己入罪的權利？為何在時間
21 上訂定這樣的要求？

22
23 **Mr Eugene GOYNE, Associate Director, Enforcement, Securities and Futures**
24 **Commission:**

25
26 Basically, this is what we understand the situation is at common law. If the claim
27 of privilege against self-incrimination is not made, all the evidence is then subsequently
28 admissible in criminal proceedings. So all we are seeking to do is state that you must, before
29 answering questions, do what you would have to do in the ordinary situation at common law
30 and say, “I claim privilege against self-incrimination.” The difference under the statutory

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1 provisions is, of course, that you must answer the question or provide the document or
2 whatever and that at common law the privilege is obviously a complete answer to a request to
3 give the statement or produce whatever you are asked to produce.

4
5 So all we are asking is that a person indicate, as they must at common law, that they
6 are, in fact, claiming the privilege and then they will have the defence's use amenities
7 available to them under clause 180 in respect to the use of that in subsequent criminal
8 proceedings against them.

9
10 ***Mr Paul R BAILEY, Member of the Commission and Executive Director, Enforcement,***
11 ***Securities and Futures Commission:***

12
13 Could I add, as a matter of practice we always advise people we are interviewing of
14 these provisions and these are explained to them. They are asked if they understand so they
15 are fully aware of their rights under this provision. It is a matter that every investigator is
16 trained to deal with.

17
18 ***Hon Audrey EU Yuet-mee, SC, JP:***

19
20 The reason I asked is that when I look at section 180(1), it says, "The investigator
21 shall ensure that the person has been informed of the limitations". I was not quite sure what
22 the limitations are referred to in (2), whether you really mean his rights not to incriminate
23 himself or whether you mean some other limitations.

24
25 ***Mr Eugene GOYNE, Associate Director, Enforcement, Securities and Futures***
26 ***Commission:***

27
28 In effect, as Mr BAILEY said, during an interview there is a very long preamble
29 before even any first question such as, "What is your name?" is asked that goes through and
30 recites the statutory provisions. They are, with the notice that goes out inviting them to

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1 attend an interview, given a copy of those statutory provisions and it draws their attention to
2 all the relevant provisions. At the beginning of an investigation or of an interview, the
3 investigator will be required, as a matter of practice – and also obviously as a matter of law –
4 to go through the provisions and tell them that they have the right to claim privilege before
5 answering a question. Also what use may be made of that evidence. If they claim privilege
6 they will have to still answer the question. However, the evidence will not be admissible
7 against them in criminal proceedings other than perjury and so forth but it will be admissible
8 against them for the purposes of, at present, insider dealing; under the new Bill for the
9 purposes of market misconduct proceedings and so forth. That will all be read out to
10 somebody who is interviewed at the time of the interview, before they are even asked what
11 their names are and where they live.

12
13 ***Hon Audrey EU Yuet-mee, SC, JP:***

14
15 Mr Chairman, my concern is, if you give somebody a caution at the very beginning
16 when the person does not understand or does not realize or does not appreciate what is going
17 to hit them next, they may not at that point claim a privilege because they really think that
18 there is not much that can be revealed. But really, when it comes to the crucial point - when
19 you start off asking people their names, their addresses, then, of course, the person is going to
20 tell you his name and address and so on and it is really maybe into the fifth hour when you
21 ask them the crucial question that they are a little bit caught by surprise and not really
22 prepared and they give you the answer.

23
24 My concern is, at what stage would they be told, I mean, would they be advised to
25 claim privilege anyway, even before they tell you their name. Or whether you would remind
26 them when it comes to the critical bit, “Look, this is where you have to claim privilege against
27 self-incrimination.”

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

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1
2 If you look at the context of the investigation, there are really two categories of
3 people. There are witnesses and persons under investigation. Now, if a person under
4 investigation – well, anybody under this ordinance, or currently a person under investigation
5 is allowed legal representation. As a matter of practice, we allow anybody to have legal
6 representation. If, during an interview, a witness suddenly finds himself in deep water, he
7 will be advised there and then of the concerns and advised that he has now become a person
8 under investigation and again reminded of his rights at that point in time. We have an
9 instruction out on that.

10
11 So the investigators are aware that a witness can change to a person under
12 investigation; exactly the same as in the context of the Police. A person might be a witness
13 and then suddenly he starts incriminating himself and you caution him. So the same sort of
14 procedure is followed in our investigation. Investigators are fully aware of the possibility –
15 there are two classes to start with but there is one class where the witness may become a
16 person under investigation and that is when they are reminded of their obligations and again
17 reminded of the rights to claim privilege on self-incrimination.

18
19 ***Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,***
20 ***Securities and Futures Commission:***

21
22 I think, in the scenario you describe, the lapse of time is something which courts
23 have taken into account, as to whether a statement remains voluntary, for example. So you
24 do have to repeat periodically and remind periodically that someone is entitled to certain
25 protection if you want to ensure the admissibility of the information at a later stage. So that
26 is the practice.

27
28 Actually, what usually happens is, people do claim privilege in respect of their
29 name and they write the word “Privilege” and they put it down in front of them on the desk
30 and they state “Privilege” before every single answer. Practically it does not very often arise

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1 that people start with full and frank disclosures without the claim and then suddenly begin to
2 claim it. They almost invariably claim it from the outset.

3
4 ***Mr Paul R BAILEY, Member of the Commission and Executive Director, Enforcement,***
5 ***Securities and Futures Commission:***

6
7 Again, for instance, five hours is probably a very long interview and we would not
8 normally conduct them for that length of time but if a person adjourns, say, after an hour or
9 two hours of an interview and wants to start again tomorrow, he will be again reminded of his
10 rights at that point in time when he starts again.

11
12 ***Hon Audrey EU Yuet-mee, SC, JP:***

13
14 I think that is very important because, of course, here you make the right
15 conditional upon the person making the claim. My concern is that this is very different from
16 a Police interview because if I am asked by the Police to assist in a police investigation, I am
17 very cautious of this question of self-incrimination and so on. You are not really obliged to
18 assist. But because the Commission has all these powers where you are really obliged to
19 provide the information and the person would be less conscious of the right to refuse to give
20 any information and the right to claim any privilege. So it is very important, therefore, that
21 the person is reminded to make the claim at the crucial moment. Otherwise, he loses it.

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

25
26 We are fully conscious of your concerns and, in fact, we do have a procedure that
27 should hopefully allay any fears you have in that regard.

28
29 ***Deputy Chairman:***

30

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1 Mr Chairman, may I suggest that the Administration consider a slightly different
2 form of wording? Instead of saying on page 45, the fifth line, “shall and show that the
3 person has first been informed of the limitation imposed by subsection (2)”, may I suggest
4 that you remove the word “limitation” and simply ensure that the person has been first
5 informed or reminded of subsection (2). Because when you say, “reminded of the limitation
6 of subsection (2)”, then that may be misunderstood. That is not easy to understand. What
7 are the limitations in subsection (2). Could you see if it is really necessary for you to use the
8 word “limitation”?

9
10 **財經事務局副局長區璟智女士：**

11
12 我們會加以考慮。

13
14 **主席：**

15
16 好的。現在討論第183條 —— Inspection of records or documents
17 seized, etc.。關於這條文，各位有沒有問題？

18
19 **副主席：**

20
21 沒有問題。

22
23 **主席：**

24
25 現在討論第184條 —— Magistrate’s warrants。關於第(1)款，各位有
26 沒有問題？那麼第(2)款呢？

27
28 關於第(3)款，各位有沒有問題？那麼第(4)款呢？

29
30 關於第(5)款，各位有沒有問題？那麼第(6)款呢？關於第(7)款，各

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1 位有沒有問題？

2
3 現在討論第185條。關於這條文，我希望知道，實際情況會不會是
4 以下這樣：當某人知道自己干犯了某項罪行，但由於銷毀文件的罪行的刑
5 罰是監禁2年及可處罰款\$1,000,000，該人或會選擇毀滅有關證據，以逃避
6 更重的刑罰。不過，純粹就銷毀證據的行為而言，刑罰可能不應該那麼重。
7 請問當局有何方法處理這問題？這條文已清楚訂明，“a person commits an
8 offence if he destroys.....”，當有關人士銷毀證據時，該人很可能藉此逃避
9 更重的刑罰。

10
11 **Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,**
12 **Securities and Futures Commission:**

13
14 I think, Chairman, the person may well be trying to evade charges under a more
15 serious offence but obviously, as you well know, they are innocent until they are proven guilty.
16 You could not punish them on the assumption that they had committed that other offence, just
17 by reason of the fact that they had destroyed the document. We might have some difficulty.
18 It may cause us to be extremely skeptical about the other matter but that would be a rather
19 unfair basis, I think, on which to proceed.

20
21 **主席：**

22
23 我們已完成第VIII部的討論。委員會今天收到當局就第IX部提供的
24 資料，並已透過cc mail發給各位。我相信秘書處已為各位準備了該份資料
25 的複印文本，各位在離開前，可先行索取有關的複印文本。李家祥議員，
26 你所關注的第VII部，據我所知，應該並無重大改動，有關修訂是relatively
27 minor。假如你真的希望提出問題，你可以書面形式把具體情況列出。

28
29 **李家祥議員：**

**Bills Committee on
Securities and Futures Bill and Banking (Amendment) Bill 2000
《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，我其實已通知委員會秘書，我未能出席今天的會議。不過，
2 在切實可行的情況下，我亦盡可能出席今天的會議。即使我缺席是次會議，
3 亦不等於我沒有把工作做好。事實上，我們已經與政府就第VII部進行多次
4 討論，尤其是就有關我們業界的部分與當局進行多輪磋商。據我理解，當
5 中並沒有重大改動。如果是沒有改動的話，我們基本上是接受的。

6

7 **主席：**

8

9 我也認為並無重大改動。今天的討論到此為止。委員會在明天上午
10 9時30分舉行另一次會議。雖然有關第IX部的資料已透過cc mail發給各位，
11 但如果可能的話，請委員會秘書在委員離開前，把該份資料的複印文本發
12 給各委員。

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