立法會
Legislative Council

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

Verbatim transcript of meeting
held on Friday, 14 September 2001, at 8:30 am
in Conference Room A of the Legislative Council Building

Members present	**:**	Hon SIN Chung-kai, (Chairman) Hon Albert HO Chun-yan Hon Eric LI Ka-cheung, JP Dr Hon David LI Kwok-po, JP Hon NG Leung-sing Hon James TO Kun-sun Hon Mrs Sophie LEUNG LAU Yau-fun, SBS, JP Hon Jasper TSANG Yok-sing, JP Hon Henry WU King-cheong, BBS Hon Audrey EU Yuet-mee, SC, JP
Members absent	**:**	Hon Margaret NG, (Deputy Chairman) Hon Bernard CHAN Hon Ambrose LAU Hon-chuen, JP Hon Abraham SHEK Lai-him, JP
Public officers attending	**:**	<u>Parts IX and X of the Securities and Futures Bill</u> Miss AU King-chi Deputy Secretary for Financial Services Miss Vivian LAU Principal Assistant Secretary for Financial Services Mr Michael LAM Acting Senior Assistant Law Draftsman Ms Beverly YAN Senior Government Counsel

		Part IX of the Securities and Futures Bill
		Miss Emmy WONG Assistant Secretary for Financial Services
		Mr David CARSE Deputy Chief Executive, Hong Kong Monetary Authority
		Mr Y K CHOI Executive Director (Banking Supervision), Hong Kong Monetary Authority
		Mr Arthur YUEN Division Head, Banking Supervision Department, Hong Kong Monetary Authority
		Part X of the Securities and Futures Bill
		Mr Frank TSANG Assistant Secretary for Financial Services
Attendance by invitation	:	Parts IX and X of the Securities and Futures Bill
		Mr Andrew PROCTER Executive Director, Intermediaries and Investment Products, Securities and Futures Commission
		Mr Paul R BAILEY Executive Director, Enforcement, Securities and Futures Commission
		Mr Eugene GOYNE Associate Director, Enforcement, Securities and Futures Commission
		Mrs Mary AHERN Legal Consultant, Securities and Futures Commission
		Mr Andrew YOUNG Legal Consultant, Securities and Futures Commission
Clerk in attendance	:	Ms Connie SZETO Chief Assistant Secretary (1)4

Staff in attendance	**:**	Mr LEE Yu-sung Senior Assistant Legal Adviser
		Mr KAU Kin-wah Assistant Legal Adviser 6
		Mr S C TSANG Senior Assistant Secretary (1)7

主席：

歡迎各位同事出席暑假後第一次《證券及期貨條例草案》及《2000年銀行業(修訂)條例草案》委員會會議。在暑假期間，各位已陸續收到由財經事務局發出的文件。在較早時，秘書處已向各位發出有關今天討論的第IX和X部的文件。我們今天會就該兩部進行討論。

在政府的代表尚未進入會議室前，我希望與各位重溫我們的工作時間表。有關文件是立法會CB(1)1886/00-01號文件。法案委員會秘書在8月15日暑假期間便已把該文件分發給各位。經商量後，現決定按條例草案不同部舉行會議。例如我們今天會以兩節的會議時間，就第IX和X部進行討論，下星期一亦會以兩節的會議時間，就第XI和第XII部進行討論，而星期三便會就第XIII和XIV部進行討論。其實，作出這項安排的目的，是希望在行政長官發表施政報告前，盡量完成逐項審議條文的工作，以免各位在行政長官發表施政報告後的工作高峰期間，忙於處理其他事務。希望各位體諒及支持有關工作安排。

如果各位對這項安排沒有異議，我們便可開始按議程進行討論。請政府官員進入會議室。我們在上次會議上已討論第IX部第185條。因此今天主要討論第186至195條。有關文件是CB(1)1807/00-01號文件和有關條例草案中文本第IX部的資料文件，即立法會CB(1)1811/00-01(01)號文件。

局長，歡迎妳和妳的同事。Before we start to jump into the agenda, I would like to congratulate Mr Andrew PROCTER on his new assignment in the Financial Services Authority in November. I hope that we can finish our job by that time.

我們現在討論第186條。有關文件是CB(1)1807/00-01號文件。為了幫助各位討論，請副局長簡短地介紹第IX部。

財經事務局副局長區璟智女士：

多謝主席。回顧在休會前的那個會議，我們已很詳細地把第IX部有關處分制度的修訂建議向各位解釋。我們在5月底向各位提交的第8D/01號文件，主要闡述了我們就市場和各位議員提出的意見所建議的修訂。這些修訂是我們就如何使銀行證券部和證券公司在觸犯某些違規行為下，可接受一致的處分安排所作出的建議。我們在上次會議上已就這些建議向各位解釋。為免浪費各位的時間，我建議現在開始討論第IX部，當談到有關我們就銀行和經紀間公平競爭的問題所作出的修訂時，我才請證監會或金管局的同事向各位解釋，使各位可較容易憶起我們當時提出的建議。

主席：

OK，接着是第186條。

財經事務局副局長區璟智女士：

主席，請容許我作出補充。在休會前，副主席和余若薇議員也曾提出，既然我們希望透過今次的改革，大力提升對銀行證券部的規管，如果我們仍沿用舊有的名稱，即獲豁免認可機構(exempt authorized institution)，似乎並不適合。為了正其名，我們可考慮採用更貼切的名字，以反映新的規管制度。我們跟法律顧問商議後，建議採用新的稱銜，即"註冊機構"(registered institutions)。由於現時只屬初步討論階段，我們只是向各位略為提出這點。條例草案草擬本仍未使用這個名稱，或許在下一輪會議，我們會把這個名稱加入條例草案之內。請各位考慮"註冊機構"這個名稱是否適合。由於這項註冊由證監批准，而銀行亦要就該註冊提出申請，所以我們認為，把這項批准稱為"註冊"更為貼切。

主席：

這跟一般經紀行採用"licensed"的名稱有何分別？

財經事務局副局長區璟智女士：

在名稱上存有一些分別，建議的名稱其實是反映出有關的規管安排跟過往的安排有所不同。我們可把Registered Institutions簡稱為"RI"。這只是一項建議，供各位考慮而已。

主席：

胡經昌議員。

胡經昌議員：

我們會就這項建議作出考慮。主席，其實這只是"換湯不換藥"的做法。名稱改變了並不表示內容亦會作出相應的改變。主席，我們過往也曾就第186條進行討論，但我仍希望重新提出一點。

相信各位也會同意，根據第186(1)條第(a)、(b)、(c)項，如果任何人違反這些規例或規則，也會被視為作出失當行為(misconduct)。但(d)項的涵蓋範圍很廣泛，只要證監會認為有關作為或不作為有損或相當可能有損投資大眾的利益或公眾利益，則有關人士便會被視為作出失當行為。這似乎已涵蓋所有情況。

我在較早時已提問，有關條文的涵蓋範圍這麼廣泛，是否合適和符合公平的原則。條例草案較後部分提到，在某些情況下，或當證監會認為出現某種情況時，有關人士可作出陳詞。雖然我認同這個做法，但我仍希望瞭解這部分的安排。我是同意(a)、(b)和(c)項的，但對(d)的涵蓋範圍表示值得商榷。如果我的記憶沒有錯誤，銀行的證券從業員也會受到相若的規管。所以，我們是否不應僅討論有關經紀的問題，而是應討論一個牽涉面

較廣泛的大題目，研究從事證券業的人士，不論是經紀或銀行的證券從業員，將來應否受到範圍如此廣泛的失當行為準則所規管呢？多謝主席。

主席：

局長。

財經事務局副局長區璟智女士：

多謝主席。其實我記得有議員也曾於3月底提出類似的問題。我們已就議員的提問，特別準備了第8C/01號文件。該文件於5月4日提交秘書處。文件已就我們所指的失當行為或違規行為作出詳盡的解釋。剛才胡議員提出有關失當行為的第186(1)(d)條，其實並不是新的條款，現行法例如《證券條例》、《期貨交易條例》和《槓桿式外匯買賣條例》亦訂有類似的條款。我們在該文件內亦嘗試提出一些例子，以解釋第186(1)(d)條如何協助證監會處理某些影響投資大眾利益的行為，並可收阻嚇作用。我把以下時間交由Mr Paul BAILEY解釋。

I would invite Mr BAILEY to explain to Members through a few examples as to what sort of misconduct he has in mind for the protection of investors.

主席：

文件是立法會CB(1)1174/00-01(05)號文件，即政府的編號第8C/01號文件。

Mr Paul R BAILEY, Executive Director, Enforcement, Securities and Futures Commission:

In fact, as regard to clause 181(1)(d), there are many examples where we have used this provision when we have taken disciplinary action in the past. I could refer Members to

the paper in the annex which has one or two examples. For misuse of clients' accounts funds or shares, I think it would clearly be prejudicial to the interests of the investing public. As for trading through nominee accounts to the detriment of clients, when we had the spate of rap trading, we used this provision because I think you would all agree that if a person was trading to the detriment of clients, it would be contrary to the interests of the investing public.

We have also had cases where people have marked the close. This is where, at the end of a trading day, people quite often use small board lots to manipulate the price of a share and, again, that raises the price to a level which is not by force of supply and demand in the true sense. Again, I am sure you would appreciate, that would be to the detriment of the investing public.

We have also done cases where people have abused the discretionary accounts of brokers where, again, if that had been an abuse, it is again to the detriment of the investing public. We had a couple of cases, going back a few years, where people applied for an IPO. In an IPO there is a prohibition on submitting multiple applications, purely so everyone can get a good chance of getting the shares rather than breaking down the application into numerous possible nominees. We had a couple of cases there that are quite detrimental to the investing public obtaining shares in an IPO on a fair basis.

I think that is probably enough to give you examples of where we have used it. I would stress that when we have used the equivalent of clause 181(1)(d) it has primarily been used under the Securities and Futures Ordinance under section 56. There is always the general process of where a person has to be told of our concerns. They have a full chance to make representations. Those representations have to be considered and then a notice of decision is issued.

So clause 181(1)(d) has been used quite a lot where you have actually got situations which do not actually fall into (a), (b) and (c), but it is clearly detrimental to the investing public. I would also state that misconduct is, in fact, a sort of – defined instances of where

fitness and properness has been impugned on the broader concept and clause 181(1)(d), I think, is clearly required by us and has been used on numerous occasions by us. From my memory, I would add that out of those cases I can remember under clause 181(1)(d), we have only had one appeal and on that particular appeal, the appeals panel on a case of rap trading said we had actually been too lenient. So I think we have got a case on appeal where the appeals panel has upheld us on using this particular provision.

So it has been in the law ever since the Securities Ordinance and Commodity Trading Ordinance were enacted in the seventies when there was the Leveraged Foreign Exchange Trading Ordinance although it has not been used. When that particular ordinance was enacted, a similar provision was put into the disciplinary regime in the Leveraged Foreign Exchange Trading Ordinance.

主席：

胡經昌議員。

胡經昌議員：

多謝主席。對於剛才政府所作的回應，我有兩個看法。第一，一些已獲通過的法例條文其實可能存有不妥善或不合適的地方。因此當出現問題時，有關法例應予修改，而法例並不是永遠也適用的。

第二，通過這條條款會為業界、和銀行界帶來憂慮。現在Mr BAILEY或證監會的高層人員仍任職於證監會時，他們可能會明白和瞭解這條條款的運作，並會作出適當的處理。但由於有關條款涵蓋範圍廣泛，日後難保負責執行或行使有關條款的人完全明白法例本身的用意，因此建議把有關的涵蓋範圍收窄。

該條款採用了很多如"證監會認為"和"作為或不作為"及"有損或相

當可能有損"等較含糊的寫法。Clause 181(1)(a)、(b)和(c)條是沒有問題的，因為有關條文對違規行為已有清晰的定義。但第(d)項的範圍則較為廣泛。可否考慮把這部分的範圍縮窄，以釋除各位的擔憂呢？我剛才也曾表示，這不單只是證券界的憂慮。雖然銀行業的證券從業員目前受金管局而非證監會所監管，但有關條文將導致銀行業的證券從業員日後也會同樣受到證監會的監管，為他們帶來憂慮。在這個情況下，我們需否把這些廣泛而不具體的字眼修正呢？

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

I think, Chairman, I understand the Member's concern about the general scope of the provision. The practical reality is that it is not possible to set down in advance the variety of conduct which we think should be considered unacceptable and should result in disciplinary action taken against members of the industry. But what we do and what significantly narrows the scope for misunderstanding and significantly improves the industry's understanding of what it is that we expect of them is to publish very clear guidance in the form of codes of conduct. There are now several of these codes of conduct which are specific to parts of the industry such as those relating to corporate finance advisers or fund management, but also a general code of conduct which applies to all practitioners.

There is no question that the SFC has laid out in those codes of conduct its expectations in the ordinary course of business of what it would require from those that it licenses; what it is it would expect of them to demonstrate their ongoing fitness and properness and I think that, whilst it is possible to say at the moment that the Members trust the senior executives of the SFC, in fact, you do not have to think of it in those terms. You can look at the entire history of this legislation in the way in which the SFC has dealt with it through the provision of these codes of conduct and you can see that, in fact, it works well. It has not been the cause of concern. It has not been the cause of any unfairness or prejudice to those whom we license and I do not think there is any reason to believe that it would be in

the future.

On the other hand, if we were to simply confine ourselves to things that we could specify in subordinate legislation in advance, then I think there is a real likelihood that the public would be prejudiced and that it would be impossible for us to take action against people who had committed the kind of misconduct that Mr BAILEY described.

There are many other examples and he did not, for example, refer to cases where we have taken disciplinary action against intermediaries who have assisted in breaches of the takeovers code. The examples can be multiplied and what we have done, though, is set out very clearly in all of our codes – and there are provisions in Parts VI and VII that allow us to do that – so that the industry knows exactly what it is to the best of our ability to express in advance what we expect of them.

主席：

余若薇議員。

Hon Audrey AU Yuet-mee, SC, JP:

Thank you, Chairman. It is also on clause 186(1)(d). I have two questions. The first question is, the words there, "in the opinion of the Commission" – my first question is whether it will make any difference if those words are deleted. The second question I would like to ask is that – first of all, I agree entirely with what was said earlier by the SFC that we need some provisions to protect the interests of the investing public and sometimes it may be difficult to say in advance in the legislation as to what these conducts can be but then the proposal is that they will be set out in the code. So my second question is, whether it is possible to put it very clearly, either in this particular provision or later on in clause 191A that it is really in relation to breaches of the code that you will be making it a misconduct. In other words, it is not just any conduct under the sun but it is breach of something in the code.

Of course, you can amend the code from time to time depending on the circumstances but, as presently drafted, if one looks at clause 191A, when it talks about "the code" it does not make it clear that it is only conduct such as breach of the code which gives rise to misconduct. Because it just says it gives you guidelines to indicate the manner in which it proposes to perform the functions and in performing the functions you have to have regard to the guidelines but it does not seem to be very specific that "misconduct" means breaches of the code. So those are the two questions, Mr Chairman.

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

Mr Chairman, I think if you take the second question first, that would change very much the nature of the codes. I think that would make the codes, in effect, subordinate legislation because they would be subject to the kind of scrutiny and interpretation and I think they would need to be drafted in the way that subordinate legislation is drafted. We have discussed this issue before. I think that would make the codes much less useful.

What we are discussing really is a balancing exercise in terms of the policy approach, degree of certainty versus degree of protection. You will remember in the earlier divisions, there are a series of almost mirror provisions in which it said the SFC can promulgate codes on the one hand and, on the other hand, promulgate rules, basically on exactly the same topics and what we have done in the past is very much to use the code provisions. Because of the additional degree of flexibility that you can use when drafting codes when compared to rules, they are not interpreted as statutes so I think that, although that is an attractive idea, it would in the end be less helpful and less protective of the public interest as a matter of balance.

The codes are not drafted as statutes. They are drafted with a fair degree of certainty. I do not think that anyone is really left with too much doubt about what is expected of them when they read the codes. But they are drafted in a way which is intended

to take into account what in Hong Kong is a very unusual demographic.

If you look at the size of the market and the number of participants, it is double the number of exchange members that they have in London. It is ten times what they have in Australia. It is 20 times what they have in Singapore and there is a huge diversity of firms and firm structures and firm sizes. So the codes are drafted in a way which is to cover that range of diversity and it would be very much more difficult to do that and achieve the same level of coverage in subordinate legislation.

財經事務局副局長區璟智女士：

關於第一條問題，在上次會議上亦曾有議員提出。我們亦嘗試藉一份文件，向各位解釋我們的看法。該文件的編號是第8F/01號文件，已於7月24日提交秘書處。簡單來說，我們的看法是：證監會作為專業的監管機構，訂立了一些指引、守則和行業人士應達致的專業水平。第一，證監會是最具資格監管行業人士能否達致應有水平的機構。所以，由證監會負責作出這項決定最適合不過，並無其他機構可決定有關人有否作出違規的行為。第二，我們亦參考了我們過往的監管經驗及海外的經驗。海外類似的監管機構現時亦訂有類似的安排，例如英國和美國等。這些國家亦交由監管機構作出有關的決定。香港其他的監管機構亦訂有類似的安排，例如電訊管理和廣播業管理等。事實上，這個做法是基於證監會是專業的監管機構。除證監會以外，我也想不到有否其他有能力作出這些決定的機構，在法例草擬方面，可清晰地指明由誰決定某人有否作出違規行為。

我們最需要考慮的問題，是處分過程本身能否達致專業水平和公平的原則，以及證監會是否作出有根據的決定。就程序方面，我們在其他條款已下了一些功夫，以確保有關程序能達致我所提到的要求。正如剛才Mr PROCTER提到，隨着市場的發展及為保護大眾的利益，證監會亦會不斷訂立指引，以幫助市場人士瞭解，究竟處分程序需達致甚麼水平才算適合。

主席：

第187條。

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

Mr Chairman, just run something aside, Miss YU was just wondering whether anybody else did it this way and it is also related to Miss YU's follow-up question. In fact they do and the policy balance exercise that I was describing before is exactly the same as is undertaken in other jurisdictions and so other jurisdictions do issue codes of this sort. If you take the UK, for example, they have a set of what they call the "general principles" that apply to firms and those general principles look very similar to the first section of our general code of conduct which sets out general principles and they also take disciplinary action by reference to breaches of those general principles, having made the judgment that – those that they register should be required to comply with general sets of standards and principles which are then elaborated on in some greater detail in codes that go to particular aspects of their conduct. So it is an exercise in policy judgment and balance but it is the same judgment made in other jurisdictions as well.

主席：

胡經昌議員。

胡經昌議員：

我剛才也是希望作出跟進，但亦多謝政府所作的回應。第一，Mr PROCTER提到，證監會可以參照一些如guidelines等來執行第186(1)(d)條。我亦同意余若薇議員剛才提到的意見，在這些情況下，我們可在該項列明那些要求，令大家有共識，知道該項究竟是甚麼意思，而使該項不致如此

空泛。其實，如果政府願意這樣做，這個做法並不困難。第一，政府可制訂schedule，加入一些guidelines，如果日後這些guidelines有所增加，亦可加入schedule中。最低限度，這做法可使受監管的人士清楚知道，證監會根據哪些準則進行監管。如果有關人士在證監會所訂立的指引下犯規，這便無話可說，否則證監會便應清楚解釋，才可作出指控。現時大家的擔憂是不知證監會根據哪些準則進行監管。剛才Mr PROCTER或政府所作的回應，證監會是基於某些準則進行監管，因此可否把那些準則列入條例之內？

如第191A條的做法，證監會可修改有關準則並刊登憲報，讓公眾人士得知有關情況。我十分同意區局長提到，必需由專業人士進行監管。但對於證券業務的監管，銀行進行的證券業務為何由金管局監管呢？金管局豈不是要再找專業人士負責監管的工作？在這個情況下，是否表示銀行進行的證券業務應由專業的監管機構即證監會所監管呢？多謝主席。

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

Just dealing with the first question, Mr Chairman, I think what Mr WU is describing is really very much what does happen. We obviously do not try and take people by surprise and we obviously try our best to set out in as much detail as we possibly can in codes the kind of conduct that we expect and, in fact, the codes are drafted and they begin with the statement to the effect that this is what we ordinarily expect. If you fall below these standards or are outside these standards, then you have to explain why to do so. You ought to tell us why it is that you are not able to meet these standards, and it is the basis on which we make judgments.

But that still leaves a question of drafting, in one sense, the degree of specificity in which you can draft those codes. I do not think there is a great difficulty in referencing disciplinary action to those codes. In fact, the codes do that but you have to be very careful about a linkage which would drive the codes into the class of subsidiary legislation and

require the codes to be interpreted as subordinate legislation because the other thing the codes say is that they are not to be read as statutes. They are to be understood as including statements of principle and standards that firms are expected to exhibit but, having said that, they still have a lot of details. They still try as best we can to give detailed guidance to firms in the way that you are describing.

主席：

曾鈺成議員。

曾鈺成議員：

主席，我希望跟進剛才局長就余若薇議員提出的問題所作的回應。就第186(1)(d)條，局長提到，在作出有關決定方面，證監會是最合適的機構，所以便需加入"證監會認為..."這些字眼。對於這方面，我有些疑問。根據這個解釋，即使是第(a)、(b)和(c)項也可加入這些字眼，即先要證監會認為有關人違反所指明條文的規定，該人才屬違規。事實上既然有關決定是由證監會作出的。若有關人士對證監會的決定有所爭議時，證監會大概也不會表示因這條條文訂有"證監會認為"的字眼，所以便作出有關的決定。證監會亦必須提出證明，解釋為何該人的行為有損投資大眾的利益。如證監會表示某人違反某些條文的規定，也要指明該人違反哪些條文的規定和如何違反有關的規定，而不會因證監會認為某人違反某條文的規定，該人便視為違規。

除了第(a)、(b)、(c)項訂明有關條文，而第(d)項沒有指明有關的條文外，我看不到這數項間的分別何在。為何第(a)、(b)和(c)項只提到一些事實，但第(d)項則要加入"證監會認為"的字眼呢？根據政府提供的文件，現行法例的對應條文亦沒有提到"證監會認為"的字眼。事實上，跟第(d)項對應的條文亦只是提到，有關作為或不作為是有損或相當可能有損投資者的利益。

財經事務局副局長區璟智女士：

多謝主席。曾鈺成議員說得對，有關人有否違反第(a)、(b)和(c)項，也是由證監會作出決定。我剛才徵詢了法律顧問的意見，瞭解到所不同的，是第(a)、(b)和(c)項本身是明文的規條，可使人較為清晰地知道，有關人有否違反這些規條。但第(d)項本身所指的，可能不是有關人違反某些條款，而是他在某個情況下所作的行為，危害了公眾或投資大眾的利益。所以，證監會可能要作出較為主觀的評估。因此，這項便要清楚地訂明，評估的工作須由證監會進行，而不是由其他人士進行。

主席：

曾鈺成議員。

曾鈺成議員：

剛才局長提到"主觀"兩個字。我相信業界所擔憂的，是證監會作出主觀的評估。即使第(a)、(b)和(c)項也可能會存在爭議。例如證監會指某人違反了某條條文的規定，而被指控的人卻認為他沒有違反這些規定，證監會亦要根據事實提出證明。同樣地，對於第(d)項，若證監會認為某人的行為損害投資者的利益，證監會亦要解釋其觀點，以及證明這項指控屬實，即該行為事實上或極有可能會損害投資者的利益。

主席：

何俊仁議員。

何俊仁議員：

就剛才的問題，政府是否已作出回應？

主席：

政府是否打算回應？

財經事務局副局長區璟智女士：

我只可重申，其實大家的看法是，哪些人有責任決定我們需要阻嚇哪些行為呢？制訂第(d)項的精神，是訂明應由SFC負上這項責任。既然證監會負責監察市場的活動和發牌給持牌人士，證監會便有責任監察有關人士有否作出違規的行為。證監會是具有專業地位和知識作出這項決定的，而這項現時的寫法便能體現這個精神。

主席：

何俊仁議員。

何俊仁議員：

對於胡經昌議員的憂慮，我是理解的。但如果我們在第(d)項較為清晰地列出有關條文，無論如何，最後的結果也需在該項提到剩餘條文的問題。我很難對這個做法提出反對，因為證監會必需處理一些從未遇過的情況。所以，結果也是相同的，條例草案必需訂有residual provision，賦權證監會處理一些預料不到的情況。所以我不會對此提出反對。

我所反對的，是從解釋第(d)項的角度來看，我們希望知道，所指的是哪類行為。Mr BAILEY和Mr PROCTER也曾提出一些有關失當行為的例子，而我們也可從有關守則中得知所指的是甚麼行為。其中一個可行的做法是，在理解哪些是損害投資者或公眾利益的行為時，第(d)項可指明證監

會或法庭必須參考有關的守則，並訂明任何被指控的人也可依賴有關守則作為答辯的理由。這樣做法會否較為清晰呢？因我們可以知道該項所提的是哪類行為，而不會流於天馬行空。當我們參考有關的行為守則時，便可以大致上知道證監會要求的水平。

主席：

這是一項較為正面的建議。

財經事務局副局長區璟智女士：

我們可以考慮這項建議，但這個做法亦未必可以解決剛才何議員提出的問題。無論指明須參考哪個指引，該指引永遠也不能盡列有關情況。因為市場是不斷發展的，我們也不能及時就新的情況制訂指引的內容。

主席：

何俊仁議員也同意這點，他亦接受賦予證監會一項剩餘的權力。

財經事務局副局長區璟智女士：

證監會的確也需要具有剩餘權力。我們雖可訂明，證監會可根據若干指引作出考慮，但不能排除有關指引未必完全適合。在那個情況下，證監會最終也需具有一項剩餘的權力。

何俊仁議員：

主席，我同意需在某個範圍內，賦予證監會較大的酌情權。但把守則變成附屬法例，可能會造成問題。因為如果把守則變成附屬法例，便要在守則中加入剩餘權力。我認為這個做法跟現時的情況並沒有分別。守則

的重要性在於將來可讓證監會或法庭作為參考，而我們大致上亦可以知道，證監會希望監管哪些類別的行為，以及證監會所要求的水平。這對法庭在解釋法例上，亦會有所幫助。我認為這個做法較為妥善。其實，很多法例也採取類似的寫法，訂明有關執法機構可根據有關守則作出考慮。另外，如有關人士完全按照有關守則行事，便可以它作為答辯的理由。這樣，業界對第(d)項的憂慮便會減少，而證監會的整體權力亦不會受到影響。

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

Mr Chairman, if I understood what Mr HO was asking, I think there were perhaps three things there. One was that, to the extent possible, we should set out our expectations in codes; secondly, that clause 181(1)(d) should in some way be linked to codes but not so as to create subordinate legislation and, thirdly, that people should be able to point to the code and say that they have done what you expected of them as expressed in the code and, therefore, a finding of misconduct would be inappropriate.

I think it may be possible to achieve all those things. It is important also, though, to keep in mind what I was saying earlier about the way in which codes are drafted. They are not drafted as subordinate legislation. They do contain high level principles and they need to contain high level principles. I think, in order to make sure that the public are properly protected so, even if we are able to achieve those three objectives, you will still have codes which, although they try to be specific, necessarily do continue to contain high level standards and principles.

I think it may be possible to formulate something which achieves those three objectives, or at least two of the three. I am not so sure about the defence point but I think the defence point actually follows from the first term. It may be rather problematic to draft that because I think that would drive you to subordinate legislation. So it is probably better to focus on the first two and allow the third to emerge as the inevitable consequence of the

first two, I think.

Chairman:

Audrey.

余若薇議員：

多謝主席。

我同意目的不是令有關守則的草擬方式跟法例一樣，而是希望使業內人士可預先知道失當行為的範圍，並使他們知道，一旦他們的行為被納入該範圍以內，便可能會觸犯有關法例。

主席，剛才當曾鈺成議員詢問區局長，因何第(a)、(b)和(c)項沒有加入這些字眼，而第(d)項則訂有這些字眼時，局長的解釋是，問題在於哪些人有責任作出有關的決定。其實，第(a)、(b)、(c)和(d)項也是證監會負責的事情，如果有關人士不服證監會的決定時，可向證券及期貨事務上訴審裁處提出上訴。所以，我認為第(d)項與其他3項的分別，在局長向我們提供的第8F/01號文件，即我們的文件編號CB(1)1836/00-01(02)號文件內，已經清楚表明。在該項加入這些字眼，造成的分別是很大的。如果不加入這些字眼，在決定有關人士有否觸犯該些條款時，便應採用一個合理的人的尺度，但把這些字眼加入後，所採取的尺度便變成純粹是證監會的尺度。如果有關人士希望向證監會的決定提出質疑，正如該文件第5段提到，他只可以質疑證監會在程序上是否不公平或偏頗。所以，如證監會根據其尺度，認為有關行為對投資者是有損害的，一般來說，有關人士便要接受證監會的結論和所採用的尺度。但對於第(a)、(b)和(c)項而言，證監會則會採用法庭較客觀的尺度來作出決定。這便是第(d)項與其他3項的分別。

所以，我的問題是：當局有否理由使第(d)項與其他3項的草擬方式

有所分別。尤其當第(d)項賦予證監會的權力範圍十分廣泛及不清晰時，當局可否容許業界人士或被指控的人士質疑證監會的程序是否公平或有否偏頗，而非證監會的決定是否合理？

財經事務局副局長區璟智女士：

主席，我希望先提出我的理解，稍後甄律師可以幫我作出補充。

該文件第6段亦有重申，我們的政策是，對於證監會所作決定，SFAT的上訴機制是可以覆檢的。如果第(d)項的寫法會令到這種情況不能發生，我們亦樂意作出檢討。這是法例釋義上的問題。

主席：

甄小姐有否補充？

高級政府律師甄文蕙女士：

我同意剛才Audrey對於"in the opinion of"的理解。據我所知，證監會的法律顧問亦曾作出一些research，法庭現時較為modern的interpretation，是會參考有關的條款，而不會只純粹聽取證監會的subjective意見。換句話說，法庭也會較為robust，研究可否apply一些objective standard。所以，我相信即使加入這些字眼，亦不表示SFAT沒有discretion就有關條款表達意見。

主席：

胡經昌議員。

胡經昌議員：

多謝主席。我認為我們所提出的意見是沒有分別的，即我所提出的問題，跟剛才余若薇議員及何俊仁議員提出的問題是相同的。我們同樣是希望在第(d)項訂明一些根據，使受監管的人士也可知道該項所涵蓋的範圍。我同意在很多情況下，當局也未必能夠把很多新的情況迅速地併入有關法例之內，但最基本也應訂有一個範圍。

例如，當局可在第1至10項列出整個範圍，然後在第11項才提到其他的情況，最低限度，受監管的人士也可以知道自己有否作出第1至10項所指的行為。如果法例並沒有訂明有關範圍，受監管的人士便無從知道是否違規。剛才余若薇議員及何俊仁議員所提到的意見，也是我的想法，或許政府可加以考慮。我們希望，日後當證監會根據某些條款向受監管的人士提出指控時，受監管的人士也能清晰地知道他們作出了甚麼失當行為。雖然我不知道應採用甚麼字眼較為適合，但不知政府會否考慮這個做法呢？最低限度，受監管的人士也可根據guideline行事，而不致犯錯。如果沒有訂立guideline，正如剛才所提到，由於該項存有"in the opinion of"的字眼，被指控的人根本無從提出異議。政府可否承諾落實這個做法呢？

多謝主席。

財經事務局副局長區璟智女士：

主席先生，我們剛才回應何議員提出的意見時，已表示感謝何議員提出的意見。我們稍後會考慮可否制定條款，訂明證監會在啟動某些機制時，在適當的情況下，須參考有關的指引和守則。

主席：

第187條。

吳亮星議員：

主席。我希望提問第187條中"曾在任何時間"這幾個字眼的主要意思。

主席：

哪一部分？

吳亮星議員：

第187(1)(a)條。

主席：

是否第187(1)(a)條"was at any time"的字眼？

吳亮星議員：

對。

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

I think though, it is really to pick up the situation a bit like the one I had to leave to discuss a moment ago, where there is a firm, for example, that is currently in breach of its Financial Resources Rules. Obviously that would be a situation where the regulated person is guilty of misconduct but if we were to discover that over a period of time in the past a firm had repeatedly been in breach of its financial obligations but it no longer was, then we should be able to take disciplinary action against it. Because we would be, I think, fairly able to

make a judgment that it posed a risk or that it behaved inappropriately. In fact, that would amount to a criminal offence if it had done it so it is really just to say that some time previous to the finding of misconduct, there had, in fact, been misconduct, no more than that. Not all conduct is continuing conduct in that sense. They may breach the obligations under the code or they may breach the obligations under the relevant provisions and subsequently remedy that breach. But their previous breach and their failure to report it or what it exposed by way of risk to their clients might still be sufficient to make a finding of misconduct and might still deserve some sort of sanction.

吳亮星議員：

換言之，這款使證監會對有關人士過往所作的行為具有追溯權力。我不知證監會日後訂立的有關守則，會否訂明有關的時間性。即證監能否追溯有關人在某段時間前所作出的行為呢？就這方面，有關守則與這條款間會否有所分別呢？

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

It is not retrospective in the sense that on the ordinary principles of interpretation it is not going to go back to cover periods prior to the enactment of the legislation but it certainly refers to prior periods but judged according to the standards at the time at which the conduct occurred. For example, it would be inappropriate – and I am sure we would be criticized if we were to make a finding of misconduct – in respect of conduct which had occurred at a prior time but judged against some new set of standards that we had introduced subsequently so it has got to be misconduct as at the time it occurred. I do not think the expression "…was at any time" allows for retrospectivity in the sense that you are implying. They would still have to be guilty of misconduct judged according to the standards at the time at which the conduct occurred.

主席：

胡經昌議員。

胡經昌議員：

多謝主席。雖然我不是提出有關追溯力的問題，但我也希望跟進有關字眼的問題。在文件的第7頁，第187(3)條的英文本是"The Commission, in determining whether a regulated person is a fit and proper person within...among other matters"。首先，"among other matters"的字眼十分空泛。中文本對應的部分是"除可考慮其他事宜外"。同樣，"其他事宜"的意思也不是十分清晰。接着部分的英文本是"...take into account such present or past conduct of the regulated person as it considers appropriate..."。這部分的涵蓋範圍十分廣泛，以致幾乎可以包括所有情況。其實這條其他部分是很清晰的，例如第(1)(a)和(2)(b)款等，但這款卻無故地加入"among other matters"，實在令人費解。這款接着還訂明，證監會會考慮有關人士現時和過往的行為是否適當。涵蓋的範圍似乎太廣泛。我不能說這是關乎追溯力，但由於這款提到"past"這個字，所指的時間便相當於由開始到現在。主席，另外，"other matters"是甚麼意思呢？

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

Mr Chairman, it is broad but I think it necessarily needs to be broad and I do not think it is unfair. Clearly there are a number of issues to do with a person or a firm's prior history which are both irrelevant and in respect of which it would be unreasonable to have regard. Those things cannot be taken into account as a matter of proper administrative law and practice but there are a lot of relevant things that might have occurred in the past which are appropriate to consider in the same way as when a court exercises its sentencing discretion in respect of someone who habitually comes before it. It has regard to the prior convictions

of the person and whether that person has shown any signs of remorse or capacity to be rehabilitated. So it is appropriate for us if we look at what might be conduct, for example, that in isolation would not result in a public reprimand or a suspension or even revocation but as part of a cumulative history of misconduct over a period of time would justify one of those sanctions. I do think we have to look and say, "Look, there's a series of breaches here. Each of them on their own and considered in isolation may not be critical but in their totality they cause us to have such doubt about someone that we ought to take disciplinary action against them."

The reason why, I think, it says, "amongst other things" that we can take into account there, is obviously because the particular event itself in isolation might also justify a sanction and, secondly, because we might know enough about the firm to know that, having regard to that issue and having regard to what we know about its future prospects and circumstances, it should be the subject of action.

So, for example, if, as a consequence of a particular action, a firm's financial circumstances are imperiled, then we ought to be able to take that into account. We ought to be able to say that as a matter of judgment, because the firm has acted in this way; because, for example, a whole lot of client assets have been stolen; because the dealing director has behaved in a certain way and then fled the country, we can know as a matter of common sense that the firm going forward is not a firm that we should allow to continue to operate. So we should take that into account as well.

You have to look at all the circumstances of a particular case and not at a particular breach in isolation and I really think that is all that this section is telling us to do; saying, "Use your common sense, look at all the circumstances and make the appropriate judgment."

主席：

胡經昌議員。

胡經昌議員：

主席。我明白在某程度上，"fit and proper"這個字眼也相當抽象。雖然這個字眼可有根據地指明一些情況，但在另一些情況下，這個字眼也很抽象。剛才也提到，在決定某人是否"fit and proper"的過程中，很多時也是in the opinion of the Commission。剛才當局也曾解釋，除非證監會在有關程序上出現問題，否則，證監會的決定是不容爭議的。既然是這樣，當局能否把"among other matters"的範圍縮窄呢？

至於證監會會考慮有關人士過往的行為是否適當方面，若該人在短期內作出不適當的行為，他很可能是not fit and proper。但對於"among other matters"，我也不清楚是甚麼意思。舉例來說，有人找我們幫忙，這情況會否屬於這個範圍呢？該人是否不應找我們幫忙呢？尤其我是業界的代表，若業界找我幫忙，我是否不應幫忙呢？這情況是否屬於這個範圍呢？我也想不到其他可能存在的問題，因為"among other matters"的範圍確實很廣泛。當局可否把這條條文的範圍收窄，讓大家也有清晰和相同的理解呢？既然該條已訂明in the opinion of the Commission，即由證監會作出決定，當局可否收窄證監會考慮的範圍呢？剛才討論第186(1)(d)條時已提到，該條的草擬方式可更為理想。同樣地，有否方法令這條的草擬方式也更為理想呢？多謝主席。

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

There are three aspects to this. One is that what is relevant to a consideration of fitness and properness goes back to the original licensing decision as set out in clause 115 where the Commission is not to grant a licence unless it is satisfied that someone is fit and proper and then, also in Part V, in clause 128, the Commission is given some guidance about matters that it should take into account when considering whether or not a person is fit and

proper so it refers to a series of things but they include financial status, solvency, education, ability to carry on activities competently, honestly and fairly, reputation, character, reliability, etc. In fact, there is quite a bit of guidance given in clause 128 but actually I would agree with Mr WU. That is not enough so what we have done beyond that is to publish again a code called The Fit and Proper Criteria and that makes very clear what we think fitness and properness means and it does so at a high level of specificity.

You could draft any section by saying, "The SFC shall only take into account relevant matters and shall only behave reasonably" and, really, that is what I think is the gravamen of Mr WU's question. You know, we have to behave reasonably and we should not take into account irrelevant matters. That is already the legal obligation imposed upon us as decision-makers, anyway. That is what administrative law principles require of us so to add those words would not really add anything but there are other ways in which we have sought to assist the industry through the publication of a fit and proper criteria and there is some specificity given in clause 128 as to what it means.

主席：

我希望請各位注意，其實大家在上次會議上表示關注的事宜，是有關AI的問題。大家可留意，在政府作出的修訂中，很多也涉及"exempt persons"的問題。各位可考慮這些修訂是否足夠。

胡經昌議員，你還有沒有問題？

胡經昌議員：

第187條。

主席：

第187條。請大家參考秘書處在上次會議上向大家發出的其中一份文件，立法會CB(1)1379/00-01(01)號文件。這份文件提及一些areas of concern，可提醒大家我們在上次會議上關注到的重要事情。

胡經昌議員：

主席，我希望簡單地提出一些問題，這部分的問題也挺複雜。第187(9)條提到受規管人士。剛才提及的"exempt persons"或"註冊機構"，是否已包括這些受規管人士在內？

財經事務局副局長區璟智女士：

我請Emmy作出解釋，我們這次就哪幾條特別針對銀行證券部違規行為的條款作出修訂，以便大家可集中參考那些條款及進行討論。

Chairman:

Emmy.

財經事務局助理局長黃國玲女士：

關於銀行方面，我們主要是新增了第189A條，列出.....

主席：

第189A條。

財經事務局助理局長黃國玲女士：

有關銀行方面，我們以第189A條獨立處理。這條等同於處理有關持

牌人士紀律問題的第187條。除了在名稱上的修訂外，這條款的內容大致上與第187條是相同的。就獲豁免人士而言，有關其他情況下就持牌人士等採取紀律處分行動的第188條，等同於第190條。接着是第191條。這條是適用於持牌人士與獲豁免人士的程序規定。至於第191A條有關罰款方面，我們提到會訂立指引。這條也是適用於持牌人士及獲豁免人士的。我們主要也是就這些條文作出修訂。

主席：

胡經昌議員提出的問題是，第(9)款提到的受規管人士，是否包括在"exempt persons"或"註冊機構"之內呢？

根據妳的解釋，第187條第(9)款是否表示.....

財經事務局助理局長黃國玲女士：

由於在第189A條才提到關於豁免人士這個term，所以第187條只包括持牌人士，而第189條才包括獲豁免人士。簡單來說，第187條只適用於持牌人士，對應的條款是第189A條。而第188條，正如剛才提到，適用於持牌人士，而適用於銀行證券部的對應條款是第190條。

主席：

胡經昌議員，我相信你應參考立法會CB(1)1811/00-01(02)號文件第21頁第8段。

胡經昌議員：

可以。

主席：

這部分的定義便equivalent to第187條的定義，是嗎？

胡經昌議員：

是相近的，但不完全相同，我要先行研究才可確定。

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

The clause to which referred to, clause 187(9) – you will find an equivalent in clause 189A(8), the definition of "regulated persons."

主席：

對於第187條，大家還有沒有問題？曾鈺成議員。

曾鈺成議員：

主席，我只想提出一個很小的問題。有關對第IX部中文本所提出修訂的資料註4A指出，"是項修訂旨在修正草案中文本和英文本不同之處"。這項修訂把"人"修正為"人士"。而英文本則一律採用"regulated person"的字眼。在同一條文內，有些"regulated person"翻譯為"受規管人士"，我不知為何把"人"改為"人士"，便能達致與英文一致？

財經事務局副局長區璟智女士：

我請林律師跟大家解釋。

主席：

好的，林律師。

署理高級助理法律草擬專員林少忠先生：

其實在條文內，"受規管人士"除第一次出現外，其後出現時也簡稱為"該人士"。因為在較後部分，持牌人的簡稱是"該人"，所以，為使中文本和英文本的意思對稱，有關部分在修改後，受規管人士可簡稱為"該人士"。即相對於持牌人會簡稱為"該人"，受規管人士會簡稱為"該人士"。

主席：

那麼，"該人"與"該人士"有甚麼分別呢？

署理高級助理法律草擬專員林少忠先生：

這只是一個標稱而已。

曾鈺成議員：

主席，英文本卻沒有這項簡稱。英文本每次提及有關人時，也採用"regulated person"的字眼。即此部分刪除了"受規管"這3個字的數處地方，在英文本中依然存有"regulated"這個字。然而現時的修訂提到，加入"士"字便能使有關的中文本與英文本一致。我認為既然要使中、英文本一致，為何不加入"受規管"這些字眼？

另外，你提到該稱銜第一次出現時，是採用"受規管人士"的字眼，其後便只採用"人士"的字眼。但情況也不見得是這樣。在第187(1)條中，第(a)及(b)款也是前後兩次採用了"受規管人士"的字眼。

署理高級助理法律草擬專員林少忠先生：

第(1)(b)款所指的，其實不是第(1)(a)款的"受規管人士"，而是指另一類"某受規管人士"。

曾鈺成議員：

是的，但問題是"受規管人士"的字眼在第(1)(b)款中也出現了兩次。我不明白為甚麼要省略這幾個字。這是個小問題，但既然你表示作出修訂的理由，是使有關的中文本跟英文本一致，為何英文本每處提到這個稱銜時也採用"regulated"的字眼？

財經事務局副局長區璟智女士：

曾議員說得對。我相信這項修訂的目的，是使中文本的前後部分一致，是嗎，林律師？

署理高級助理法律草擬專員林少忠先生：

應該是這樣吧。

財經事務局副局長區璟智女士：

就中文本前後是否一致的問題，我們可商榷需否加入"士"字。

主席：

對一般人而言，包括我在內，"人"與"人士"是沒有甚麼分別的。

第188條。顧先生。

秘書處助理法律顧問顧建華先生：

多謝主席。我只想提出，第187條第(1)款並沒有訂明一些程序上的要求。

主席：

這情況有甚麼引申意義？

秘書處助理法律顧問顧建華先生：

原來的《證券條例》第56條明確地訂明，證監會須作出有關的查訊，即inquiry，才可指稱有關人作出失當行為，或不再適宜作為從事有關業務的人士。但第187條則沒有清楚訂明，證監會需否先作出一些程序，才可確定存有這些失當行為的事實。

主席：

政府會否在第191條統一處理這個問題？

財經事務局副局長區璟智女士：

我們在進行諮詢期間，已經就這方面向市場解釋。我請Mr PROCTER再作解釋，因何作出查訊並不是證監會指稱某人作出失當行為的先決條件。

Chairman:

OK, Andrew.

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

The crucial thing is to make sure that people who are the subject of disciplinary action are given procedural fairness and that is what clause 191 covers. There is a formal process under section 56 of the Securities Ordinance in which an inquiry is instituted but it is purely a matter of formality that you do it. In fact, what happens in practice is that many cases come out of investigations and so they use the compulsory process of investigation and, at the completion of that, when tentative views have been formed, you then formally institute an inquiry under section 56. It does not add anything by way of process or protection because what follows from that is still a need to ensure that people are treated fairly.

So it is really recognition of that, that adding a step in which you formally institute an inquiry does not help. What helps is to make sure that the requirements under clause 191(1) for procedural fairness and requirements under the general law are complied with. It recognizes that we may be minded to take disciplinary action and, therefore, have to comply with clause 191 as a result of an inspection, an investigation, a complaint from the public, a referral from the police and so on and that it does not help anyone to simply call it an inquiry for formal purposes.

主席：

胡經昌議員。

胡經昌議員：

主席，我希望作出跟進。過往的法例訂有有關的程序規定，但現時的條例草案卻沒有訂明這些規定。對於這點，剛才政府已作出解釋。但如

果在條例草案訂明這些規定，會造成甚麼問題呢？

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

On the contrary, I think, what is there now is the procedure and the process of fairness. What is in the existing legislation is just a word that says you start an inquiry. It does not say anything about how you undertake the inquiry. It does not say anything about what you need to do to ensure fairness to those who are the subject of the inquiry or those who are the subject of concerns. So what you have under the proposed legislation is far better by way of explicit protection of those whose interests might be affected by disciplinary action. You actually have the substance now and not just the form. What you have in the existing law is the form and not the substance.

主席：

顧先生，你有沒有補充？

秘書處助理法律顧問顧建華先生：

多謝主席。其實第191條所訂的，只是有關人士將會有機會答辯或解釋。但我們知道所有這些答辯或解釋，也須循相當正規的程序進行。例如，警察或其他專業人士亦會就答辯或解釋訂有很完整的程序和流程。但對於這款，大家所知的，只是如果證監會對某人進行紀律處分，證監會只須給予他解釋的機會便行，而無須作公開聆訊，在法律上也沒有任何規定。

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

I still maintain my previous view that this is far better; far more explicit and far

better protection for those who are affected than the existing law. The existing law also does not say anything about how the inquiry is to be conducted. It says absolutely nothing about it and nothing at all about procedural fairness. It gives no powers to the Commission. It just says that we can start an inquiry.

What this does, though – it does say explicitly what the general law would provide. We have to give procedural fairness. The reason why it does not go on and say, "This is the way procedural fairness is to be given in a particular case" is for two reasons. One is, there is another clause that says what "a right to be heard" means. That is in Part XVI, I think but, secondly, what is necessary to ensure fairness in the particular case is a matter of the circumstances of the particular case so it is actually quite dangerous, I think, and actually counter-productive to set out in advance of a situation the details of how you ensure procedural fairness.

Having said that, there is some details given in that provision in Part XVI to say that the right to be heard does not ordinarily require the right to an oral hearing. It can normally be done on the papers but there are going to be situations where, notwithstanding that clause, procedural fairness does require an oral hearing; does require a meeting so that things can be dealt with clearly and that is why, I think, the clause here just insists on procedural fairness because it is a matter to be judged in the circumstances of the case. It does not say, for example, once the SFC notifies you of its concerns you have 2 weeks to reply because you may need 4. It does not say that you have at least 2 weeks because, in the circumstances, 48 hours may be what is appropriate given risk to the public. There are a whole lot of circumstances and factors that have to be taken into account and fairness is a matter, I think, of the individual case.

主席：

胡經昌議員。

胡經昌議員：

對於法律顧問提出的問題，政府也曾向我表示他們曾與業界討論，但我不知道討論的進展如何。業界曾向我提出，很多時候政府向他們解釋一些條例時，也會表示有關條例沒有問題，並要求業界對政府信任。如果情況真是這樣，我也希望瞭解，既然現有的機制可訂有程序，使證監會必須作出調查後，才可撤銷任何豁免，為何現時條例草案沒有訂明這些規定？那是否在某程度上不太妥善呢？如果我們希望保留有關調查程序的規定，而有關條文卻沒有訂明，我們大可把這項規定清楚訂明。

我很多謝法律顧問提出這點。既然政府表示已跟業界討論，而我卻不瞭解討論的情況，我真的需要清楚瞭解討論的進展。

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

I am happy to try and deal with that.

財經事務局副局長區璟智女士：

主席先生，請容許我作出澄清。我們在1999年7月發出的諮詢文件，已載有這些建議的詳情，而文件亦曾呈交市場考慮，這是事實。而白紙條例草案亦已把這項建議以條文的形式體現出來。所以，市場是獲得一定程度的諮詢的。我請Mr PROCTER補充。

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

I think, Mr Chairman, the industry also understands that it does not help at all to know that the SFC is conducting an inquiry. That is, as far as we are concerned, an

irrelevancy. What they need to know is the result of the inquiry and they need to be given a chance to answer any concerns arising from it and the way in which that is done now, as a result of a formal inquiry, is to, in almost every case, provide them with what is called rather inelegantly "a letter of mindedness" and a letter of mindedness sets out the firm but not concluded views of the Commission about the conduct that has been the subject of inquiry.

Under the procedures that we are talking about here and given the clause in Part XVI that describes the way in which a right to be heard is to be afforded, exactly the same process would be followed. There would be a formal process by which someone gets written notification of our concerns and the reasons for those concerns and is given an opportunity to answer them. So the substance as set out explicitly in the legislation here will be exactly the same as the practice which is implied in the existing legislation. Nothing will change and the industry understands that and I think they appreciate that it does not make any difference to them whether there is an inquiry under section 56.

主席：

余若薇議員。

余若薇議員：

多謝主席。我原本打算把問題留待討論第191條時才提出，但我們現在正討論第191條的內容，所以我想清楚瞭解第191條的條文。

第191條第(1)款提到"合理的陳詞機會"，第191條第(2)款提到"書面通知"。我讀起來時覺得有關的時間性不是很清楚。究竟證監會會首先進行哪個程序呢？每次證監會在行使這項權力時，是否須先發出書面通知，即首先進行第(2)款所訂的程序，然後才進行第(1)款所訂的程序，即給予有關人合理的陳詞機會呢？還是證監會會發出兩次書面通知後，才給予有關人一個合理的陳詞機會，然後再發出另一次書面通知呢？我不是很瞭解這些

安排。

除了次序外，還有關於時間的問題。例如書面通知方面，是否證監會今天作出書面通知，有關命令明天便會生效，還是在證監會作出書面通知後，有關人首先會有機會陳詞呢？當然，這亦涉及所給予的陳詞時間是否合理的問題，因為如果證監會給予有關人太少時間陳詞，便不合理。但根據這條文看來，有關安排可能是首先進行第(1)款所訂的程序，即首先給予有關人合理的陳詞機會，然後才進行第(2)款所訂的程序，即作出書面通知。

另外，第(2)款有關給予通知方面，這款的中文本已指明"證監會決定"，即"decide to exercise"。這跟過往所採用的letter of mindedness是否有些不同？過往證監會向有關人發出letter to mindedness，"minded"的意思是證監會可能會進行有關事情，但仍未作出決定。但現行的第(2)款卻表示，證監會已經作出決定，並向該人發出通知，告訴該人有關決定何時生效。這些條文看來便是這樣的意思。這情況是否跟過往有些不同呢？

我提出的，第一，是關乎次序的問題；第二，是關乎時間性的問題，即證監會會給予有關人多少時間通知；而第三，便是這個做法跟過往的做法，即letter of mindedness的做法有甚麼不同。

財經事務局副局長區璟智女士：

這個做法涉及兩個回合的。即證監會會首先發出letter of mindedness，然後給予該人陳詞的機會。證監會在研究受影響一方的解釋後，才會作出決定。但證監會在作出決定時，必須以書面通知的形式向有關人解釋。

我請Mr PROCTER解釋，證監會如何安排剛才余議員提出有關時間性的問題。另外，我亦希望就這條的草擬方式，研究可否清楚寫明有關的

次序。既然大家認為這條款讀起來不是很清晰，可能是草擬方面存有問題。我們可考慮能否改善這個草擬方式。

主席：

顧先生提出的問題，即現時這個程序安排是否比進行inquiry好。Mr PROCTER的意見是這個安排比過往inquiry的安排好。各位是否願意接受這個意見？Andrew.

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

On the earlier question, I think the timing is clear enough, that a letter of mindedness precedes the exercise of the power and the letter of mindedness sets out what the Ministry of Law Cases refer to as firm but not concluded views. I had not really appreciated, actually, that – and I think part of the difficulty may be in the way that clause 191 is worded. It is not, I suppose, in fact, giving the person in respect of whom the power is exercised a reasonable opportunity of being heard. It is in respect of whom the power may be exercised a reasonable opportunity of being heard, is really the sense of it and the next subclause is the notice of decision, in effect, with reasons. So subclause (1) is about the letter of mindedness in respect of – to give someone in respect of whom a power may be exercised a reasonable opportunity of being heard and subclause (2) is the notice of decision with reasons.

主席：

余若薇議員。

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

Mr Chairman, Mr PROCTER says that clause 191(1) is about the letter of

mindedness but, in fact, it does not say anything about giving a letter. It does not say anything about giving reasons. If you look at it – I mean, I certainly do not get the impression that this means a letter. It basically means a reasonable opportunity of being heard. Then I think both Mr PROCTER and also Miss AU say – clause 191(2) is the decision itself, giving you the reason but if you look at the wording of subclause (2) it does not look like a description of the decision because what it says is that the time at which decision is to take effect, the terms under the which the person is to be reprimanded and then also it talks about a pecuniary penalty to be imposed. I mean, it does not say that this is the decision telling you the pecuniary penalty imposed; this is the decision telling you the terms of the reprimand – to be reprimanded and to be imposed. That all sounds a bit in the future so when I read that I was not quite sure whether that was the decision or whether, in fact, it was supposed to be the letter of mindedness. In other words, I really read the two subclauses the other way around, different from what Mr PROCTER and Miss AU just said.

主席：

我相信如果情況是如區局長所提到，即證監會首先發出letter of mindedness，接着便會給予有關人答辯的機會，然後才作出決定，各位便會較為安心。問題是現時第191條的寫法是否與局長所提出的做法相同。

財經事務局副局長區璟智女士：

我要先考慮清楚這個概念。

主席：

接着我們可討論胡經昌議員提出的問題，即這個做法會否取代inquiry的做法。

胡經昌議員：

主席，我不敢斷言哪個做法較好，但如果規定證監會必須進行調查，即進行公開的hearing，最低限度證監會也須遵照正式的程序行事。

主席：

進行inquiry是否表示必須進行hearing呢？我想不是的，inquiry不是指立法會進行的那類inquiry。

胡經昌議員：

我提出這點的原因是，雖然我不知道過往的做法，但按照現時建議的做法，證監會必須給予有關人陳詞的機會。這裏所指的陳詞，是以書面形式進行的。"陳詞"的釋義是這樣的："陳詞的機會：就證監會須給予的機會而言，指透過作出書面申述而陳詞的機會"。

除非有關人找律師協助，否則他如何可作出書面申述呢？正如剛才的情況，由於我詞不達意，縱使政府希望瞭解我的意思，也沒有辦法。但當律師向他們解釋時，他們便很明白了。其實，律師所表達的意思，跟我的意思是相同的。我不知道inquiry是否可以口述的方式進行，但現時這款所指的，是給予有關人書面陳詞的機會。證券界人士不是作家，負責寫證券分析的才是作家。如果使inquiry亦包括口頭表達和解釋的機會，會否比單指以書面形式陳詞較好呢？這純粹是我作為業界人士提出的意見。

主席：

理論上書面陳詞總比口頭陳述好。

胡經昌議員：

我不是指口頭陳述。但在很多情況下，以講述的方式作出解釋，也較易溝通。原則上，證監會的人員是專家，應明白該人所表達的意思。但若要求該人把解釋寫下來，會否使他遇到困難呢？就inquiry方面，究竟有關法例所訂的程序是如何的呢？我需要首先作出比較才可提出意見。因為我不瞭解這個情況，所以才誤會inquiry是指類似立法會進行的inquiry。

主席：

這裏所指的inquiry只是指證監會進行的內部調查，區局長，我的說法是否正確?

財經事務局副局長區璟智女士：

主席，讓我嘗試作出解釋。現有的條例看來好像涉及兩個步驟。首先，證監會行使其調查權力進行調查。當證監會發現存有違規行為，而打算進行處分時，現有法例要求證監會進行紀律查訊(disciplinary inquiry)。但現有法例的不足之處，在於沒有訂明查訊的性質。證監會鑒於法例存有漏洞，作出了稱為查訊的公式化程序。這項查訊並非各位所理解由審裁處進行的查訊。所以，在這次法例改革中，我們嘗試把這個概念寫明，指出證監會在完成調查後須進行甚麼步驟，才可作出處分。

第191條只是把這個程序訂明，而不是指證監會在完成調查程序後，須再進行另一項小規模的調查工作，因為這個做法實在費時失事，也會浪費證監會的資源。最要緊的，是證監會在完成調查後，如何向當事人交待，即剛才我們所提到的發出letter of mindedness，表示證監會找到某些資料，並打算以怎樣的方式向當事人施以懲罰。接着，當事人便可作出解釋，證監會繼而便可再作決定，並以書面的形式通知當事人，證監會會維持原判或修訂原判等。換句話說，我們現在是以文字的方式，使第191條體現過往的概念。各位需考慮的，應是這個程序是否適當。

主席：

你希望證監會能進行類似立法會聆訊的調查，但這未必是證券界喜歡或接受的做法。試想想，當證監會向你發出書面通知後，你便要面對攝錄機作出答辯。這是否業界樂意見到的情況？胡經昌議員。

胡經昌議員：

主席，我不是律師，所以在表達上不太清楚。我剛才希望提出的問題是，既然政府表示，調查程序並無條例訂明，那麼現有的調查程序是怎樣的呢？剛才政府表示現行的調查程序等同第191條所訂的程序，這是否屬實呢？還是現行的程序與第191條所訂的程序有所不同呢？

主席：

政府可否再解釋現有的inquiry程序？

胡經昌議員：

即證監會如何進行inquiry。

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

One correction first. Just before Mr BAILEY answers that I should just correct something I said earlier and it is partly in response to some of the questions about opportunity of being heard. I said that was in Part XVI. In fact, it was defined in Schedule 1, "when required by the Commission means an opportunity of being heard through the medium of written representations."

Mr Paul R BAILEY, Executive Director, Enforcement, Securities and Futures Commission:

Perhaps I could just explain the existing legislation and how it works in practice. Using section 56 of the Securities Ordinance as an example, there is a requirement to have an inquiry. One could actually say quite openly that this is quite cosmetic because when the matter comes to discipline an investigation has often been completed and you have voluminous files with all the information you require to put your preliminary concerns in writing as to what you think an intermediary has done wrongly.

So, although we refer to an inquiry and a letter of mindedness, in effect that inquiry is just there because it is the law but we use the information we have obtained in investigation to draw together all the information required to commence a disciplinary action against an intermediary.

In the existing law, it is very similar to what you actually have in clause 191 except in the inquiry is cosmetic because the information is there. Clause 191 and section 56 then goes into a requirement to give a person an opportunity to be heard. Now, as we have explained to you before, the opportunity to be heard is through the medium of a letter of mindedness. Now, if I can explain to you what a letter of mindedness does – it sets out our concerns in the simplest possible terms so an intermediary knows exactly what our concerns are and what are our preliminary conclusions and I would stress they are preliminary conclusions.

Then going back to Miss EU's comment on the time frame concerned, we normally give a person 1 month to reply to a letter of mindedness. If that person requires additional information - we refer to sources of information in that letter of mindedness. If that person requires additional information and because of the common law requirements for natural justice, we give them the information on which we rely. So not only do they get the letter or mindedness but they also get the opportunity on request to get additional information.

If, after 1 month, that person is able to make representations, we then consider those representations and come with a written notice of decision which has to be a decision taking into account our preliminary conclusions, the representations to come up to a balanced conclusion of whether or not we think our original case has been made out. If, for example, a person requires additional time to make representations, we always give people a reasonable extension of time to make those representations.

My experience has been that, although laws do get involved in the disciplinary process. Quite often they do not and the representations we have had from intermediaries in their own right have been very succinct and clear and they know exactly where they are coming from. The reason probably is that one of the things we do try and do is to put in simple terms what our concerns are rather than taking a legalistic approach and making it a very complicated letter. This cannot be done in all cases but in most cases we take the simple approach so we put our preliminary findings down, draw the conclusions together and the person should know exactly what our concerns are.

So that is the process and, in fact, clause 191 does not change it at all. In fact, as Mr PROCTER says, it rationalizes the process without having the need for a cosmetic inquiry and, as I said before, investigation material could come out of an inspection; it could actually be from a complaint from the public but normally if it is from a complaint, it does require some verification and checking and that would be part of an investigatory process if certain grounds were made out for invoking the investigatory powers.

So the inquiry process has always been cosmetic. It has always been put there because it is required in law but I would stress again, it was not needed because we had the information already. It is very similar, if I could compare, to a criminal prosecution where you have the evidence for a criminal prosecution and if a person pleads guilty, you put a very simple statement of facts to the court to make out the charge. That is what a letter of mindedness is in the Ministry of Law scheme for the disciplining of intermediaries.

I hope that has explained the process of the time frames involved. We are very flexible on time frames. We understand that a person has to have the right to be heard and we are always flexible on giving extensions. Extensions can sometimes be 1 to 2 months. On other occasions we might sent out a further letter of mindedness giving a person a further opportunity of being heard based on what they said, and the whole process has to be to ensure that there is natural justice right the way through the process.

On that particular point, looking at appeals, I think probably not more than 10 per cent of our disciplinary decisions are appeals and I think in most of those cases we have been upheld on appeal to show that we do take this matter very seriously. We do take into consideration the intermediaries and it is a matter of pride as far as we are concerned that the disciplinary process is done fairly because it goes to the reputation of the Commission.

主席：

胡經昌議員，請你作出比較，看看兩種情況中哪種較好，可以嗎？

Hon Henry WU King-cheong, BBS:

OK.

主席：

最低限度，政府已清楚解釋有關程序。何俊仁議員。

何俊仁議員：

主席，我相信問題是現行第191條所訂的程序，是指一項紀律調查。但紀律調查的結果，可能是判定存有違規行為，即存有失當行為。證監會從而亦可施以懲罰。有關罰則也很嚴苛，可達至罰款1百萬元或3倍的利潤。

主席：

不是1百萬元，而是1千萬元。

何俊仁議員：

是1千萬元，對不起。就程序方面，當然我們瞭解到，受調查的人可以書面的形式作出解釋，但問題是需否制訂聆聽的程序。這條並沒有就這方面清楚寫明。雖然這條訂明，當事人有機會陳詞，即有"opportunity of being heard"，但這是否包括必定會進行聆聽的程序，讓當事人可在決策人面前解釋，並回答決策人提出的問題呢？我認為這是很重要的，否則當事人要待證監會作出判決，認為存有違規行為後，才可提出上訴。但上訴需依照很繁複的程序進行。而且，一旦證監會作出裁決，對當事人會造成很大的壓力，甚至會影響該人在業界中的聲譽。

就個別專業來說，例如律師的情況，若當事人受到紀律聆訊，他也可提出上訴。而紀律調查跟聆訊是分開的。當然，在調查過程中，決策人可作出很多決定，並要求當事人呈交很多文件。但在調查完成後作出決定前，通常也設有聆聽的程序。然而，這條款卻沒有訂明這個程序。需否就這方面對這條款作出輕微的修改呢？這個聆聽的程序可以是閉門進行的。雖然不是必需採取如立法會或醫學學會等採取的聆聽方式，但需否設有聆聽的程序呢？就警方而言，他們也設有disciplinary hearing，這也是聆聽的程序，並設有prosecutor。我不是說必需由一個人負責檢控，但規定證監會必須進行聆聽的程序，是否較為妥當呢？

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

Mr Chairman, the experience would suggest I think pretty clearly that in the vast

majority of cases a formal hearing process is not required to ensure fairness to the people who are the subject of these disciplinary actions but, on the other hand, it is pretty clear that sometimes you do need to sit down and discuss the issues and that happens very frequently. People do, as a result of getting letters of mindedness, ask to discuss issues with us.

I think the key thing is, to come back to what I was saying earlier, that fairness is something that has to be determined in the circumstances of the case. If the circumstances of the case required some kind of meeting – if, for example, they required a capacity on our part to have regard to expert evidence that was put forward by the person who was the subject of the disciplinary inquiry, then that would have to be done as a matter of law. We have to behave fairly in all the circumstances of the case but I do not think that – well, one can only say on the basis of assertion, having regard to one's own experience but I do not think that the fairness of the process in the vast majority of cases is in any way compromised by the absence of a formal hearing. I think that most cases are fairly dealt with on the papers with the opportunity for some discussion in respect of that exchange on the papers.

主席：

Sorry Andrew，區局長，剛才胡經昌議員提到一點，何俊仁議員也再次提到，在證監會作出最後決定前，如果被告提出要求，證監會須否給予當事人聆聽的機會呢？正如胡經昌議員所說，證監會須否讓業界人士可以面對面地向決策人表達意見呢？這不一定是必須的程序，但如果當事人要求進行這個程序，政府或證監會須否進行聆聽的程序呢？

財經事務局副局長區璟智女士：

我們在附表1解釋何謂陳詞機會時，提到陳詞機會是以書面形式進行的溝通。正如Mr PROCTER剛才提到，在現實情況中，如果當事人要求與證監會會晤，證監會必定會跟他會晤。既然情況是這樣，我們可考慮如何把這項實際的安排體現在法律條文之內。

主席：

何俊仁議員。

何俊仁議員：

主席，我想提出一點。聆聽並不一定只限於錄取口供或由當事人回答問題。若證監會的指控是基於別人提供的資料，當事人可否要求盤問該人呢？我相信設有正式聆訊程序的分別在於：第一，這些程序可能涉及文件的披露，即證監會須提出文件作為指控證據。第二，當事人可質疑有關指控是否屬實，或指控當事人的人是否提供真實證供。當事人可否要求質詢證人呢？

根據現時的做法，這些程序可能要推遲至當事人提出上訴時才可進行。即使在上訴時，這些程序亦不一定可以進行，因為上訴的程序也不太清楚。似乎當事人在上訴時，便可從頭開始進行這些程序吧。但當事人要待證監會作出決定後，提出上訴時才可盤問證人，似乎有欠公允。在大部分的情況下，這做法可能也不會造成問題。但在某些情況下，有關指控可能十分嚴重，而當事人可能被罰1千萬元或巨額罰款。該項指控亦可能會對他的聲譽影響很大。但這項指控可能只是基於一、兩個人向當事人作出的口頭投訴。那麼，為甚麼當事人不可要求盤問這些人呢？雖然這亦可能是很少機會出現的情況，但我相信這便是問題所在。

主席：

這個問題嚴重得多了。

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

Obviously the kind of process that Mr HO is describing is, in effect, quasi-judicial and we would have to have extra powers to compel people to attend and so on and none of that is there. I understand entirely and respect entirely what is motivating his suggestion. I just do not think on the experience I have seen that it is necessary in the great majority of cases. In fact, I do not think it is necessary as a power and a process.

The tribunal process is, in fact, a hearing process so parties involved do have opportunities there. I just do not think that the kind of cases we are talking about here are the kind of cases that would justify and necessitate giving the SFC a power to establish a hearing process to compel third parties to hear evidence and allow for cross-examination. I am just expressing a view based on there and I understand exactly what your motivation is.

Hon Albert HO Chun-yan:

Has the Commission in the past ever acted on complaint, heard a complaint, and then instituted an inquiry and eventually come to a conviction?

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

There are two aspects to that. This will sound obvious and I know that you will appreciate that but the decision to resource an investigation or an inquiry is a decision based partly on the prospects for an outcome in which the allegations are established and if what you get at the outset is a verbal complaint then you know that, unless the person who is making the complaint is prepared to substantiate the complaint and is an apparently credible witness of truth, you are not going to get to that point. There is a fairly high standard that is imposed in these cases so we almost never resource anonymous complaint, for example.

If there is a verbal complaint - there may be a perfectly legitimate and credible

verbal complaint, which is not able to be backed by documentary evidence. Sometimes actually that is because it is a credible complaint and that the firm has failed to properly document procedures so, in fact, it may be consistent with the complaint itself but you very often get into situations where you have one word against another, two versions and it is very, very difficult in the absence of some corroborating evidence of one version or the other to form a view to the relevant standard that someone has been guilty of misconduct. Those cases very often do not result in action for that reason alone in respect of the substantive complaint but to give you an example of what might come out of that. We have cases where we are not able to be satisfied as to the allegation; one person's word against another, nothing to corroborate it, no documentary evidence. You think one version looks more or less credible but on balance you cannot find that the standard has been satisfied.

So, in fact, in those cases we may conclude that we cannot take action against the individual who has been the subject of complaint, but we might very well take action against the firm, for example, for its failure to document its processes, for not recording instructions when they are given, all sorts of things, and we might take quite tough action against them because they have, at the very least, frustrated our ability to determine whether a claim has been valid but I think, as implied in your question, it can be very difficult in situations where you are faced with oral testimony to reach a conclusion and we do not in these typical cases.

Hon Albert HO Chun-yan:

Mr Chairman, there may be circumstances where the substantive complaint is initially supported by evidence which is corroborated by a witness and which is corroborated by another witness, but their evidence would collapse upon cross-examination. So, that is why there are problems in terms of hearing where the accused is given the opportunity to examine the witnesses.

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

I agree with you to this extent. That is the importance of the process of procedural fairness where people are given an opportunity to know the case against them and they are given access to materials upon which we rely and they are given an opportunity to call it into question and that will sometimes result in us going back to press again, to check again whether or not evidence upon which we felt we could rely was, in fact, reliable. So I mean it is critical to the process of procedural fairness. I do not think we are disagreeing about the possibilities. It is just the route by which you get to the level of satisfaction and the route by which you give the person who is the subject to inquiry a chance to respond and a chance to test the credibility of the allegations. They get plenty of opportunities.

There is often in those kinds of more complicated situations where they do not say, "Okay. I accept the facts. Now, let's discuss the inferences." In cases where they say, "I dispute the facts. That's not what happened", we often speak to people, several people, on both sides in an effort to try and get to a view about where the truth of the matter lies but we do also have, given the nature of the inquiry, a very high standard that has to be reached before we can be satisfied, before we can take disciplinary action against people and, of course, the tribunal watches over us in that regard; the panel now but the tribunal in future.

主席：

我認為討論到此也差不多了。

就第191條，我希望政府最低限度可考慮幾點：第一，怎樣才可使這條的草擬方式表明局長在第一次解釋時所指的那個程序，即由證監會發出letter of mindedness，然後由當事人答辯……

財經事務局副局長區璟智女士：

對不起，我打斷你的話。我相信第C2389頁解釋"陳詞機會"的部分

可能已足以做到這點。但我們會再作考慮。

主席：

第二，希望政府研究，是否可考慮何俊仁議員提到有關答辯程序的問題。我相信胡經昌議員也可能較為歡迎設有這個程序。最低限度，被告也有機會提出這項要求。希望政府可考慮這兩點。

第187條的討論到此為止。

第188條，即"在其他情況下就持牌人等採取紀律行動"。各位有沒有問題？胡經昌議員，你可以先行提出問題。

胡經昌議員：

我很高興政府關注到業界就《精神健康條例》或"被法庭裁斷為精神上無行為能力"等問題提出的意見。但我希望提出一個問題。雖然我不是法律界人士，但第188條第(a)(iv)款經修訂後的擬本，加入了"which in the opinion of the Commission impugns the fitness and properness of the licensed person to remain licensed"，這是否存在問題呢？但根據較前部分的條文，如果該人已被法庭裁斷為"mentally incapacitated"或"is detained in a mental hospital"，其中是否已有既定法律程序，裁斷該人是存有問題的呢？這款為何還訂明"證監會認為"該人在精神上出現問題呢？這是否代表證監會的判決比那兩項判斷更為重要呢？

財經事務局副局長區璟智女士：

主席，讓我嘗試解釋。就這項條款，我們曾與香港證券經紀業協會進行多次討論。他們的憂慮是雖然一名董事在精神上出現問題，但容許他在公司繼續留任，未必會對該公司構成嚴重的損害。在這個情況下，公司

會因保留一名精神出現問題的董事而遭證監會處罰，這做法好像較為武斷。我們經考慮後，也認為應在處罰方面加入一項條件。如果有關董事在精神上出現問題，而影響該經紀行在作為適當人選方面的表現，證監會便可能會採取措施。經紀業界也表示可以接受這項改善。

主席：

胡經昌議員。

胡經昌議員：

主席，我也同意區局長的說法，但我的論點是有關第(b)(vi)款。該款提到公司的"any of the directors"的問題。我們過往討論時提到，若公司其中一名director在精神上出現問題，便會受到證監會懲罰，這問題很嚴重。但這個問題現在仍然沒有得到解決。當時我們提出的意見，是證監會不應只因公司其中一名董事被判精神上無行為能力，或已被羈留在精神病院，便把該公司停牌。

因此，當時的意見是，證監會不應只因其中一名director在精神上出現問題，便把該公司停牌，因為其中一些directors可能是shadow directors或executive directors。我們的理解是，整間公司可能只有兩名董事，而現時的要求是公司最低限度要有兩名responsible persons，其中一名是executive director。所以，如果executive director出現問題，公司便會突然倒閉。我也不知道重新申請牌照需要多長的時間。所以，如果真的出現這個情形，公司應怎麼辦呢？這實在令人憂慮。另一方面，如果法庭已判斷有關董事在精神上存有問題，而證監會卻認為他沒有問題，那怎.....

主席：

其實這部分只是向業界提供靈活性吧。如果你們不需要，我們大可

把這部分刪除。即公司必須即時罷免有關董事。

胡經昌議員：

但我所指的是有關"any of the directors"的部分。

主席：

哪一條條文？

胡經昌議員：

第(b)(vi)款。當時我們是討論到有關"any"的字眼。如果法庭已判斷該董事在精神上出現問題，證監會沒有理由認為他沒有問題。由證監會的judgment決定他在精神上沒有出現問題，這做法並不合理。

主席：

對不起，我不明白你的問題。"Any of the directors of the licensed person has been found by a court to be..."這裏有甚麼問題呢？

胡經昌議員：

在該條較前部分訂明："may revoke a licensed person's licence...or suspend a licence"。如果該公司只有兩名directors，而有關的董事只是shadow director，而不是executive director，對公司的運作根本不會造成影響。但這條的意思是，只要一名director出現問題，不論他是shadow director還是executive director，證監會也要取消該名董事作為董事的資格。這做法會使公司即時缺乏一名director，公司整體的運作因而亦會停頓。

主席：

或許你正面說出，怎樣的情況才可以接受吧。

胡經昌議員：

正面來說，如果有關的董事是executive director，便應採取這個做法。我們只是希望公司可繼續運作而已。

主席：

在法例上有否把董事分為executive和非executive的呢？

胡經昌議員：

是有的。

財經事務局副局長區璟智女士：

主席，其實我們的草擬方式已是較為有彈性的了。以胡經昌議員提出的個案為例，如果該公司只有2名董事，而其中一名在精神上出現問題，根據我們的修訂，即使該名董事出現問題，證監會也需認為，若該名董事繼續保留在董事局的職位，會對該公司作為適當人選方面造成問題，證監會才會採取行動。這做法其實已是彈性的處理。如果刪除新加入的修訂，胡經昌議員剛才提出的情況便可能會出現。即證監會便毫無選擇地須要採取行動。

主席：

我相信胡經昌議員希望把這條款修改，使證監會在符合兩種情況下

才可吊銷有關公司的牌照：第一，是一名董事在精神上出現問題；第二，有關董事是executive director。

胡經昌議員：

主席，請你參考這款所採用的字眼。剛才我希望提出的問題，是倘若證監會認為該人可繼續任職董事，但法庭已裁斷該人在精神上出現問題，那如何.....

財經事務局副局長區璟智女士：

.....情況不是這樣，不是該人繼續任職董事。"證監會認為該項定罪....."，即該人在精神上出現問題，對該公司在繼續持牌上造成問題。即英文本"to remain licensed"的意思。

胡經昌議員：

我希望提出的問題是，即使法庭已判斷該人在精神上存有問題，證監會有否權力仍認為該人沒有問題？

主席：

根據這樣的寫法，證監會是擁有這項權力的。

財經事務局副局長區璟智女士：

是的。

胡經昌議員：

我姑且不用證監會可推翻法庭裁決的字眼……

主席：

情況不是這樣。法庭只是判斷該人mentally incapacitated。至於該人是否仍可持牌，則由證監會決定。這是不同的事情。你是否希望把這條款修改，使若法庭根據第136章判斷該人存有精神問題，他便自動不可成為licensed person？

胡經昌議員：

我提出的問題是，雖然這條款經修訂後似乎已有所改善，但證監會有否這項權力呢？這條款亦涵蓋有關董事"detained in a mental hospital"的情況。在這個情況下，如果該董事被裁斷在精神上出現問題，證監會會否提出，雖然該董事在精神上出現問題，但證監會仍認為他可以在該公司繼續擔任董事的職位呢？我希望提出的問題，是證監會究竟有否這項權力呢？

主席：

根據這樣的寫法，證監會確實擁有這項權力。

財經事務局首席助理局長劉利群女士：

主席，由於上次討論這項條款時我也有出席會議，我希望簡述我們當時的考慮和作出這項修訂的背景。議員當時提出，若一間持牌公司有多名董事，而只因其中一名董事被法庭判斷在精神上出現問題，證監會便可以這個原因，取消該公司的牌照或採取其他行動，這做法的彈性可能不足夠。

我們當時的解釋，是我們不會無故採取這個做法，也會考慮實際的情況。舉例來說，若一間公司共有6名董事，而若被法庭判斷在精神上存有問題的該名董事是負責人力資源的，這間公司的運作未必會受到影響。

在這樣的情況下，證監會也會考慮，即使該名董事在精神上出現問題，也未必會影響到公司的運作。因此，證監會便無需行使這項權力。我們當時是在這樣的背景下，對這條款作出修訂的。

主席：

胡經昌議員，如果刪除這部分，這款便會失去彈性。

胡經昌議員：

對，我同意這點。

主席：

這情況也很清楚，如果我們通過這項修訂，證監會便會擁有這項權力。

胡經昌議員：

主席，這項權力是否沒有抵觸其他法例？

主席：

這部分涉及兩件事：第一方面涉及該董事是否mentally incapacitated；第二方面涉及發牌的情況。法例並沒有訂明，若法庭已判斷該名董事是mentally incapacitated，他便不可從事某些活動。

財經事務局副局長區璟智女士：

主席，你的說法十分正確。這正是回應業界和議員在上次討論時提出的要求，即可否使條款具有彈性。既然我們在實際執行時具有這個彈性，倒不如把這個彈性較清楚地寫出來。但如果胡議員認為業界不需要這個彈性，我們可考慮把它刪除。

主席：

胡經昌議員。

胡經昌議員：

主席，我在開始討論時，已表示很感謝政府作出這項修訂。我只是擔憂在法例實施後才發現這個做法並不可行。

主席：

何俊仁議員。

何俊仁議員：

主席，我認為問題不是這條款是寬鬆還是嚴謹，而是考慮有關董事的情況。即對於精神有問題的人而言，一種情況是他進入精神病院，而另一種情況是法庭判斷他是mentally incapacitated。但後者是他既沒有進入精神病院，也沒有經法庭作出判斷，而是該董事可能由Mental Health Guardianship Board為他appoint guardian。這種情況是否視作在精神上出現問題呢？根據Mental Health Ordinance，除非該人擁有財產，否則有關情況無須交由法庭裁判。雖然我相信很多董事或registered person也是富有的人

士,但在一些情況不,有關董事的名下不一定擁有財產的。而由Mental Health Guardianship Board為他appoint guardian的董事會否計算在內呢?

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

Let us assume this person has had a guardian appointed, whether they are wealthy or not, the first question is in respect of the individual. That is covered by subclause (a)(iii). The court has made a finding. Then the Commission says, "Okay. We think in fact, having regard to that finding, that the individual's fitness and properness is impugned." At that point we then have a discretion. If we go to subclause (2) we may do certain things as a result of a court finding which leads us to conclude that fitness and properness is impugned. But if it is a finding, for example, that there is mental incapacity as a result of most traumatic stress disorder – maybe a temporary thing – we may not revoke their licence. We may seek undertakings that they do not participate in the activity for which they are licensed. We may suspend their licence. Likewise then you could go on to the corporation. Again, as Mr WU has explained, there may be several directors who are perfectly capable of managing and operating the business. We might get an undertaking from the firm that the person who is the subject of the court order will not participate in the business. We may or may not accept that but if we did, then we probably would not do anything in respect of the corporation. We have got discretion under subclause (2). We may do certain things as a result of these two trigger points.

Hon Albert HO Chun-yan:

Chairman, the problem is, a guardian may be appointed in respect of a mental patient without the need of going through a proper proceedings, so in that case, if a guardian is appointed for a certain person, would that trigger any suspension or whatever?

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

Securities and Futures Commission:

It could be. The thing about that - - -

Hon Albert HO Chun-yan:

How could you resolve the problem, because there is no court proceedings?

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

I understand that question. Neither subclause(a)(3) nor (b)(6) would be triggered in those circumstances because there is no court order. But that does not mean we are powerless because we always have a power where we think a person is not fit and proper.

Hon Albert HO Chun-yan:

I see, so there is residual power.

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

Yes, and likewise, if we think that an individual's position within the firm is such that their incapacity to carry on their activities prejudices the fitness and properness of the whole firm, we similarly have a power in respect of that firm. The easiest example of that is, there are quite a few investment advisers who are licensed who rely upon the particular skills of individuals and we usually, for example, insist that an investment adviser that is a fund manager have two people capable of managing the product. If one of them is, for whatever reason, incapacitated, including mentally incapacitated, and whether or not a court has made an order, we might judge that they cannot do their job, therefore the firm should not be

allowed to offer to the public so we might suspend or restrict that aspect of their activity.

So the absence of a court order means that we have to do some more work. We have to think more. There is not an automatic trigger point but it is not preclusion upon us acting.

Hon Albert HO Chun-yan:

So even the appointment of a guardian would not automatically trigger – and you do not think it is appropriate to make it a triggering point.

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

I think it is more likely than not that you would want to suspend, at least and possibly revoke, someone's licence but I am not a psychiatrist and know enough about the circumstances in which someone might be mentally unstable. It is maybe a transitory matter so you may, in fact, be content with a suspension.

主席：

第188條。我相信胡經昌議員不會反對有關修訂。

胡經昌議員：

我在較早時已表示歡迎這項修訂。

主席：

我們現在應該討論第189條。現在的時間是10時33分。我們應該作

中場休息。我們今天的會議會直至12時45分。現在中場休息10分鐘。

(會議暫停)

(會議恢復)

主席：

各位同事，我們繼續舉行會議。

讓我們繼續討論第189A條。第189條已經取消，內容已轉載於第191條。第189A條是有關規管獲豁免人士或將來稱為註冊人士的條文。這部分是針對銀行方面的情況而制定的。政府有否特別需要解釋的地方？

副主席：

Mr CARSE剛才沒有機會發言，現在有否補充？

Mr David CARSE, Deputy Chief Executive, Hong Kong Monetary Authority:

Thank you, Mr Chairman. This revision has been made really in response to comments from the Bills Committee previously. They would prefer to see a level playing field in terms of sanctions as between the licensed institutions and licensed persons, and exempt persons and their employees and, therefore, what we have done is basically to put exempt persons and the people involved in the management of regulated activities with any exempt persons on the same basis as the licensed persons.

So what clause 189A does is, first of all, it retains the ability of the SFC to revoke exemption. It adds a new provision in relation to suspension of exemption. We have transferred the powers of reprimand from the Banking Ordinance to the Bill in order to gather them in one place and also to give that power to the SFC rather than the HKMA because we

have no previous experience of issuing reprimands. We have also introduced the same provisions relating to prohibition orders and also in relation to pecuniary fines.

So basically now the provisions relating to sanctions are on the same basis as those which relate to licensed persons. Those powers will be exercised by the SFC and any appeals against those sanctions will be made to the Securities Futures Appeals Tribunal which should be another way of ensuring consistency relating to the decisions. As to how this will operate, as we have discussed previously HKMA will be the front line regulator for the securities business of authorized institutions and if we come across a problem in relation to that business we will pass that information on to the SFC using the gateway under the Banking Ordinance. Then the SFC will make inquiries in relation to that information and decide whether to exercise sanctions and they will do that after consultation with the HKMA.

Just a small point – we mentioned at the start the proposed change in the term from "exempt person" to "registered person" and I got the feeling, from Members, that this was regarded as something that was relatively trivial and cosmetic. That is true to some extent but I think it does recognize the fact that we have moved a long way from the concept of exempt dealer under the present securities legislation to the position that we now have in the Securities and Futures Bill because basically the banks will be subject directly to the various provisions within the Bill. They will be subject to the SFC's code of conduct. They will be subject to the other standards set by the SFC and they will be subject to the sanctions. The only difference is that HKMA will be the front-line regulator which we have done because basically this business has been undertaken within larger entities which are authorized institutions. Thank you.

主席：

就第189A條，大家有否特別的提問？

我希望就載於有關委員會審議階段修正案的文件第21頁第189A條

第(7)款提問。這款是關於證監會可向金管局作出建議的問題。這裏提到的第58A條和第71C條是怎麼回事？

Mr David CARSE, Deputy Chief Executive, Hong Kong Monetary Authority:

Mr Chairman, as I have said, the sanctions relating to pecuniary fines, reprimands, prohibition order, removal of exemption will be exercised by the SFC. There are two sanctions which have been retained in the Banking Ordinance. One of them in section 58A relates to a new provision which will enable the HKMA to remove individuals from the register. This is front line staff. They will be able to be removed from the register by the HKMA if, in the opinion of the HKMA, they have been guilty of misconduct or they are no longer fit and proper.

Section 71C(4) relates to the withdrawal of consent for individuals to act as executive officers, again for the same reason, that they have been guilty of misconduct or they are no longer fit and proper. We have retained those powers in the Banking Ordinance because the register for these front line staff has been retained by the HKMA so it seems reasonable for the HKMA to take them off the register if they are not fit and proper or if they have committed misconduct.

Similarly, in relation to executive officers who will be senior officials within the bank responsible for regulated activities, since the HKMA is the approving power for those individuals, it seems reasonable for us to withdraw consent if they are no longer fit and proper or they have committed misconduct. That is something of which we have experience already under the Banking Ordinance. Similar powers already exist in the Banking Ordinance in relation to chief executives or directors so I think, provided we apply the same standards as the SFC – which we will do because these standards are set by the SFC – and provided there is adequate consultation between the two bodies, then I think that that arrangement should work in a satisfactory fashion and what clause 189A(7) is doing is enabling the Commission to make recommendations to the monetary authority about

withdrawing these consents, although ultimately the decision will be taken by the HKMA.

主席：

我希望詢問法律顧問，你們在審查的過程中，認為第187條和第189A條、以及第188條和第190條間有否substantial differences？法律顧問如果現時不能作出回應，或許可於稍後再給我們advice。我相信大家也只是希望研究這些條款之間有沒有甚麼differences。似乎政府現時的假設是這些條文的內容是一致的，是嗎？

吳亮星議員。

吳亮星議員：

主席，第189A條第(1)(a)款跟我剛才提到有關"曾在任何時間"的問題是相關的。這種情況表示證監會可跟進有關人在過往任何時間內所作出的失當行為。我總是對這項追溯力是否太廣泛存疑。這款使人覺得，這項權力是並無規限的追溯力。由於有關人過往是以獲豁免人士的身份從事有關業務，雖然他未必是不注意有關規定，但他也未必須要完全跟循這些規定行事。但根據這款，證監會可追溯到很久以前的情況。當然，該人未必蓄意作出失當行為，但他當時可能是無須按照這些規則行事的。如果這款所指的失當行為，可引伸至該人當時所作的行為，會否令人憂慮到，今後業界人士在過往所做的事情，也會被一些條款引伸的範圍所涵蓋，以致有關人會被懲罰，或當局可行使權力把他制裁呢？就這點，政府或法律顧問是否同樣存有一定程度的疑慮呢？

財經事務局副局長區璟智女士：

Mr PROCTER也曾作出解釋，證監會在評估有關人的行為是否失當時，如該行為是兩年前作出的，便應以兩年前的規管標準來評估。這是較

為合理的做法。這或許能解決你剛才提出的第2部分的憂慮。你提出的問題的第1部分，是究竟證監會會追溯到有關人甚麼時間以前的行為。剛才Mr PROCTER也曾作出解釋。我相信不論證監會或金管局，在執行這條法例時，也必須根據普通法下行政法的安排，使整個過程合情合理，亦要確保整個過程跟規管事宜有關。不論這兩個測試有否在這條法例內訂明，執法機構也須按照這些原則行事。

吳亮星議員：

我基本上也認為有關執法機構也不會弄出冤案及濫用權力。但我總有一個憂慮：若有關人過往不是獲豁免人士，他便須要跟循證監會有關的條例行事。但若執法機構可行使追溯權，而倘若有關人過往是受金管局規管，因而並沒有清晰的規定可循，他可能無須跟循證監會有關的規定行事。至於企圖的問題，最後也要留待法官裁判。但將來由證監會根據新的規範決定該人兩年前所作的行為是否失當行為，會否出現問題呢？

我相信在一般的情況下，證監會也不會追溯太久以前的行為，但可否在條例中較為清晰地訂明這點，以免令人擔憂呢？我主要希望提出的，是我們需以甚麼方式，使業界明白政府不會這樣做，而不是只要求業界相信政府不會這樣做呢？這不是信與不信的問題，而是這條文會否使有關人幾年前以銀行身份所作出的行為，受到證監會以現時的標準來衡量，以致這些行為可能有失當行為之嫌呢？

財經事務局副局長區璟智女士：

我相信不論是證監會或金管局，在規管中介人士時，也會向業界發出指引。當時的行為便會以當時的指引和尺度來評估。這是清晰不過的做法。Mr CARSE有沒有補充？

Mr David CARSE, Deputy Chief Executive, Hong Kong Monetary Authority:

I think that is right. I think obviously it only takes effect from the time when the legislation was actually enacted. From that time there will be close cooperation between ourselves and the SFC and the SFC will consult the HKMA before exercising these powers in relation to individuals within authorized institutions. No doubt, they would take into account mitigating factors.

主席：

第189A條。第190條。至於第191條，似乎我們剛才已作討論。

第191A條——Guidelines。

胡經昌議員：

主席，我希望就第190條提問，問題很簡單。我也知道這條基本上跟較前部分的條文很相近。第190條第(1)(d)款，其中包括第(i)、(ii)、(iii)、(iv)和(v)項。除了第(vi)和(vii)項外，這條款跟剛才所提到的第11頁第188(1)(b)條第(i)至(vii)項十分相近。第(vi)項是剛才提到有關在精神上出現問題的條文，另一項是有關"convicted of an offence"的條文。這兩項也是第190(1)(d)條沒有提到的。為何不在第190(1)(d)條加入這兩項條文呢？這兩項所訂的也是較為特殊的情況，特別是第188(1)(b)(vii)條提到，若directors of the licensed person曾犯罪，便不會是適當人選。為甚麼第190(1)(d)條沒有提到第兩項呢？

財經事務局副局長區璟智女士：

你是指為甚麼這條沒有訂明有關"在精神上出現問題"的那項……

胡經昌議員：

……和有關offence的那項。

財經事務局副局長區璟智女士：

有關offence的那項是有的。

胡經昌議員：

對不起，那麼，只是缺少了一項吧。

財經事務局副局長區璟智女士：

對於因何第190(1)(d)條沒有訂明有關"在精神上出現問題"的那項，我的理解是，金管局根據現行的《銀行業條例》，已有相應的安排，所以我們沒有在這裏重複。

胡經昌議員：

那項安排是甚麼？載於甚麼條例？

Mr David CARSE, Deputy Chief Executive, Hong Kong Monetary Authority:

Well, there is no specific provision in the Banking Ordinance relating to mental capacity but it is the sort of thing that we would take into account in deciding whether an individual director of an authorized institution was fit and proper in much the way as Andrew said, that even if this was not in the Securities and Futures Bill, it would still be a general factor that you would take into account in fitness and properness.

Chairman:

OK.

胡經昌議員：

主席，第190條提到撤銷資格，而不是新申請作為董事的問題。如果該人是新申請作為公司董事，而該人在精神上出現問題，金管局可基於fit and proper的理由，不給予他作為董事的資格。但如果該人已經持有作為董事的資格，而被法庭判斷在精神上出現問題，現行的《銀行業條例》訂有甚麼處理方法呢？

Mr David CARSE, Deputy Chief Executive, Hong Kong Monetary Authority:

What I am saying is, if a director of a bank was suffering from mental problems that called into question whether that person was fit and proper, then we would have grounds for removing that person as a director. That is a general power that we have in the Banking Ordinance. Mental capacity is not specifically mentioned but it is an obvious criterion that one would take into account. So I am not quite sure what any specific reference to the mental capacity of a director in this context would actually bring.

I think there is a little bit of a distinction here between a brokerage company where the whole business of the brokerage company is regulated activities or dealing in securities and a bank where you have a much wider range of activities of which a securities department or division may be only one relatively small part. What I am saying really is, if the mental capacity of any director of an authorized institution is a problem, then that would be dealt with under the Banking Ordinance using our general powers in relation to fitness and properness of the directors of authorized institutions.

主席：

胡經昌議員。

胡經昌議員：

主席，我希望跟進的是：如果金管局只是把有關mental的元素併入fit and proper的範圍，而沒有在條例中另行註明有關mental的元素，為甚麼證監會把這個元素從fit and proper中特別抽取出來呢？這是否不必要的做法呢？是否證監會和金管局在fit and proper方面也有不同的準則呢？

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

Sorry, Chairman. I was not quite clear what the question was. I think that it really comes to this; that we have the same general powers as the HKMA and so we could actually, as I explained earlier, take action even in the absence of a court order or direction. The existence of the express provision is partly the result of history because it is in the existing law and it is a carry-over of that and partly, I think, a desire to add greater certainty and specificity. It is an express provision. It is the kind of certainty that the industry is often asking us to provide and this is an example of it, I suppose. Also, it means that in one important area it is not a matter for the SFC to make a judgment call. The court's judgment and the court's expertise - and, of course, the court calls upon expert witnesses in many of these sorts of cases – is substituted for a critical trigger point and so the SFC actually has less to do and is able to rely upon the expertise of others.

Chairman:

David.

Mr David CARSE, Deputy Chief Executive, Hong Kong Monetary Authority:

Thank you, Mr Chairman. Perhaps I can just elaborate on my previous answer in relation to the Banking Ordinance. There are two provisions which are actually relevant. One is that it is an authorization criterion under the seventh schedule of the Banking Ordinance which is a continuing requirement and which, therefore, relates to the ability of an authorized institution to remain authorized that all directors should be fit and proper. There is also provision in relation to individual directors that each of those directors should personally be fit and proper.

Although, as I have said, we do not have any specific reference to mental incapacity as such, we do have a reference in our guidelines to soundness of judgment. Soundness of judgment is a more general term. It could refer to the ability of a director to make sensible decisions but that ability could obviously be affected by the individual's mental capacity and, therefore, as I say, mental incapacity is something that we would take into account just like the SFC.

The only issue is that it is mentioned specifically in the Securities and Futures Bill. I think, as Andrew said, that is just giving a little bit more clarity and making it a little bit more explicit than in the Banking Ordinance and I do not think it does any harm to having it in the Securities and Futures Bill. You could argue that it is actually helpful to market participants to have it spelt out.

主席：

第191A條——Guidelines。

第192條

胡經昌議員。

胡經昌議員：

對不起，主席。我希望提問有關第191條第(1A)款。該款提到，"The Commission shall not exercise any power under section 189A(1) or (2) or 190(1) unless it has first consulted the Monetary Authority"。證監會consult金管局後，接着該如何處理呢？這部分並沒有訂明這點。

主席：

如果證監會consult金管局後，decision便在Commission，對嗎？

胡經昌議員：

這條訂明，"The Commission shall not exercise any power under..."，即證監會必須首先consult金管局。但如果證監會consult MA後，MA不同意證監會的意見，那怎麼辦？我記得當時我們曾經提到，如果the Commission consult MA，MA便會向Commission提供advice，是嗎？

主席：

我的理解是the Commission有權作出final decision。不知我的理解有沒有錯誤？

財經事務局副局長區璟智女士：

主席，你的理解是正確的。

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

It is the difference, Mr Chairman, between "in consultation" and "after

consultation". This is a case of after consultation. We make the decision after consultation.

Chairman:

David.

Mr David CARSE, Deputy Chief Executive, Hong Kong Monetary Authority:

It is the same point.

主席：

這個做法便體現了the Commission有權作出最終決定和唯一的決定。

OK，第191A條——Guidelines。所有guidelines也是會Gazette的，是嗎？現時的慣常做法是必定會Gazette所有guidelines的，對嗎？

財經事務局副局長區璟智女士：

你是指"公布"，是嗎？

主席：

但文件的第29頁指明"it has published, in the Gazette and in any other manner..."。

財經事務局副局長區璟智女士：

對於這一類的指引，我們屬意必須登憲，以確保所有人也可知道。

但第(3)款已訂明這些指引不是附屬法例。

主席：

第192條——Effect of suspension under Part IX。

第193條——General provisions relating to exercise of powers under Part IX。

胡經昌議員：

主席，可能我較早時亦曾提到，第193條第(1)款提到證監會在取得資料方面擁有很大的權力。當時我提到，該款的範圍很廣泛，基本上使證監會可以任何方法取得資料。可否限制證監會以某些不合法或不道德的方法取得資料呢？另外，證監會取得資料後，會否於法庭程序上使用呢？

主席：

我記得曾有同事提到這方面的問題。《委員在商議有關條例草案期間提出的關注事項》，即立法會CB(1)1439/00-01號文件亦提到這點。我記得我們亦曾經傳閱有關Information Gathering and Investigation的FSMA Part XI，希望各位注意。局長。

財經事務局副局長區璟智女士：

各位同事可以參考一份文件.....

主席：

應該是立法會CB(1)1420/00-01(03)號文件。

財經事務局副局長區璟智女士：

政府的文件編號是8E/01。

主席：

對，政府的文件編號是8E/01，即立法會CB(1)1420/00-01(03)號文件。

財經事務局副局長區璟智女士：

對，發出日期是6月1日。這份文件列舉出一些個案，向各位解釋證監會在甚麼情況下會考慮接納以不同途徑取得的證據或資料。例如一些所謂"whistle-blower"的人士向證監會舉報，即某些得到資料，知道有人作出違規行為的人士。當有關人士任職於該公司時，可能與該公司訂有協議，必須把這些資料保密。但若他已向證監會舉報，而如果有關資料是有根據的話，證監會為了公眾利益，也應考慮這些資料。類似這些資料便是循其他途徑取得的資料。我們在草擬法例時，沒有針對資料的來源，而只是針對資料是否跟證監會所作的決定有關，因為這才是最要緊的。

主席：

胡經昌議員。

胡經昌議員：

這跟我剛才討論有關失當行為的第186條的情況一樣。我們明白證監會需要搜集很多不同的資料，但如果採取這個草擬方式，我們的擔憂是不知證監會會以何種途徑取得資料，包括以不合法的方式取得資料。我相

信並希望證監會不會作出不合法的行為，但這個草擬方式實在過於廣泛。我不知其他政府部門，包括ICAC、警察等是否同樣擁有這麼廣泛的權力。如果不是，這項權力豈不是比很多政府部門的權力大得多嗎？各位是否要注意這些因素呢？

財經事務局副局長區璟智女士：

主席先生，我們在第8E/01號文件中列舉出的其他案例，也可給各位一個概念。這些例子提到，在一般的刑事程序，甚至民事程序中，類似的情況也是可以接納的。

主席：

第194條。我希望提醒各位，載於第34頁就第(4)款作出的修訂已在某程度上對證監會有一定的限制。

胡經昌議員。不知這項修訂可否解答你部分的疑問？

如果沒有問題，接着是第194條。

何俊仁議員：

我希望提出一個問題。第33頁第193(1)條提到，證監會可考慮該會管有的任何資料或材料，並依賴或考慮這些資料而作出決定。但有否制訂程序，容許被調查的人或最後被裁定作出違規行為的人知道證監會曾引用些甚麼資料，並向他提供評論這些資料的機會呢？這是要達致公正所需的程序。否則，當事人也可能不知道證監會曾採用甚麼資料，以及這些資料有否存在問題。這牽涉披露的問題。即證監會曾採用甚麼資料呢？這些資料對證監會所作決定是否十分重要呢？

主席：

這些是否第191(2)條提到的信件，即"by notice in writing"所需包含的內容呢？

何俊仁議員：

不一定，這款並沒有這樣指明。

財經事務局副局長區璟智女士：

我請Mr BAILEY稍後再作解釋。剛才我們解釋第191條時也曾提到，第一個步驟是給予當事人陳述的機會。就陳述的機會方面，證監會在第一封向當事人發出的信件中，已交待證監會將會懲處當事人，並解釋證監會根據甚麼資料作出這項決定。當事人收到這封信後，有權就證監會憑藉甚麼資料作出該項決定方面，向證監會索取進一步的資料。這可能已經解答了你剛才提出的疑問。

I would invite Mr BAILEY to explain.

Mr Paul R BAILEY, Executive Director, Enforcement, Securities and Futures Commission:

Just on the question of the use of evidence, wherever it comes from, in administrative law I understand there are no strict rules for what evidence can be adduced. So I think it would be safe to say, to answer Mr HO's question, that in the letters of mindedness or whatever the source of information, we would have to have it tested, verified and corroborated so the person – if we were relying on information, say, having been given to us by someone from whatever source, if we were going to use that in administrative disciplinary proceedings, that person would be given the opportunity to look at that information and answer what might be in that evidence in the letter of mindedness when he

sends in his representations. He would also be able to comment on its reliability. If we are going to rely on something, we would have to give it to that person to show them what information we have got and give them the chance to comment on it so they can challenge the veracity of what has been contained in that information. They could also comment on the source, of course.

Hon Albert HO Chun-yan:

Yes. Here, the wording used is, "Having regard to." Would that make any difference to "Relying on…"? If we do not entirely rely the material and information but we have regard to it?

Mr Paul R BAILEY, Executive Director, Enforcement, Securities and Futures Commission:

Well, it still has to be tested in the disciplinary process. It says, "regardless of the source of information." If, for instance, you took an example – if someone gave information to the Commission which could have been illegally obtained by them and we were going to use that information in a disciplinary action, we would have to give that person a chance to comment on that and, of course, we would also have to probably make inquiries as to what is contained in that information before we actually went to the disciplinary process. So what it really is saying is that if you have a piece of information you can use it but you have to give that person a chance to comment on it, comment on the veracity of it, comment on its source and anything else, so that we do not have to look at what he is saying about that information before we make a final decision having regard to the matter. In fact, that provision is based on existing legislation at the moment, I understand also that it is under the Insider Dealing Ordinance provisions as well.

It really is up to the process to look at the information at source, the veracity of it and give that person a chance to test it.

Hon Albert HO Chun-yan:

So in other words, it is implicit in the application of the rules of natural justice and, hence, would be a part of the opportunity of being heard.

Mr Paul R BAILEY, Executive Director, Enforcement, Securities and Futures Commission:

Yes, and also if, for instance, a person asks for a copy of the information and we had used it in a disciplinary process, we would be obliged by the natural justice process to give them a copy of that information in most instances. There might be a few exceptions but in most instances we would give people anything that we use to corroborate what we have put in the letter of mindedness if they request it.

主席：

有關第193條的問題已經得到解決了。第194條——Requirement to transfer records upon revocation or suspension of licence or exemption。Any questions?

第195條。法律顧問。

秘書處助理法律顧問顧建華先生：

多謝主席。我希望討論第193條第(2)款。我只是希望瞭解，第(2)款會否引致業界人士因有關的牌照被撤銷或暫時吊銷而不能履行對客戶的協議。而第(2)款亦訂明，有關的協議是不會被終止的。在這情況下，有關的業界人士除了要面對證監會的處分外，會否亦因而要對客戶方面負上民事責任呢？

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

Securities and Futures Commission:

I think that is right. What this subclause says is that by reason of the revocational suspension, contracts or agreements are not affected or avoided but that does not mean that it is, in fact, possible to give effect to those contracts without committing a further criminal offence and so if, as a consequence of that inability, there was a breach then they are liable in civil law. There is no question about that.

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

Under Clause 195 we can give a person whose licence or exemption has been suspended or revoked an allowance to conduct certain essential activities in the interests of either the business or in the interests of clients, so there is scope for them to be granted some dispensation of a limited nature to conduct essential activities in relation to the maintenance of client interests or the interests of the business itself.

主席：

OK，我們開始討論Part X。

胡經昌議員：

主席，我們會否一併討論Banking(Amendment)Bill 2000？

主席：

在Banking (Amendment)Bill 2000中有否相應的修訂？

胡經昌議員：

一併討論Banking(Amendment)Bill 2000會否較為方便。

主席：

就這部分而言，Banking(Amendment)Bill 2000有沒有任何部分受到影響？

財經事務局副局長區璟智女士：

Banking(Amendment)Bill 2000中也有一些修訂。

主席：

OK，那麼我們一併討論經修訂的部分吧。有關文件是立法會CB(1)1811/00-01(02)號文件。或許請政府指出曾就哪些條款作出修訂，好嗎？

財經事務局副局長區璟智女士：

我請Mr CARSE向各位介紹。

主席：

好的，David。

Mr David CARSE, Deputy Chief Executive, Hong Kong Monetary Authority:

Thank you, Mr Chairman. I think the main clauses relevant to the discussion we have just had are clause 58A, which I explained previously, which relates to the ability to

remove an individual from a register maintained by the HKMA or to suspend that individual and the grounds for doing so would be misconduct or lack of fitness and properness and clause 71C(4) which relates to the withdrawal of consent to an executive officer where the same grounds would apply. Now, both provisions would be exercised after consultation with the Securities and Futures Commission, so there is a mirror image with the provisions which exist in the Securities and Futures Bill. The same procedural requirements as in clause 191 would apply in that there would have to be an opportunity to be heard and there would have to be a notice in writing served on the individual informing him of the decision and giving the reasons for the decision, the time when it is due to take effect and, if we are talking about a suspension or withdrawal of consent, the duration and terms of that withdrawal or consent.

If I could turn your attention to page 26, subclause 4D, there is the same provision about making recommendations but this time it is for the HKMA recommendations to the Securities and Futures Commission concerned with executive officers and they may wish, based on those recommendations, to exercise their powers under clause 189A or 190 of the Securities and Futures Bill but again that decision would be a matter for the Securities and Futures Commission.

We have got a definition of "misconduct" which – perhaps I could direct your attention to page 28 of the Banking (Amendment) Bill 2000 in relation to executive officers which mirrors the equivalent provisions in the Securities and Futures Bill so it refers to a contravention of provisions in the Securities and Futures Bill on an act or omission of the executive officer relating to the carrying on of a regulated activity. So these are the same provisions that exist in clause 186 of the Securities and Futures Bill.

I think the other main change which ties in with this relates to the appeal provisions which we will be talking about later on but just to make the point, on grounds of consistency and taking into account the views previously expressed by the Committee, we decided that all the appeal provisions relating to regulated activities or authorized institutions, whether they are regulated under the Banking (Amendment) Bill 2000 or under the Securities and Futures

Bill should be directed to the Securities and Futures Appeals Tribunal. There are provisions relating to that later on in the Bill in page 37 onwards.

I think those are the main provisions, Mr Chairman.

主席：

OK，或者我們逐項條文研究，好嗎？Page 10 Clause 5——Reprimand in respect of exempt authorized institution已經完全被刪除。

胡經昌議員：

主席，我希望提出的問題可能不是整條條例草案的中心點，但我仍想提出。Page 5 Clause 4(a)(ii)提到，把"the capacity in which every relevant individual is employed"中"employed"這個字改為"engaged"，而Footnote 2提到 "front-line staff of exempt authorized institutions may not necessarily..."。為甚麼這裏不用"employed"這個字呢？

主席：

這個問題我也曾作出解釋。原因是一些人是根據"佣金制度"於有關公司工作的，而不是該公司直接僱用的僱員，對嗎？

Mr David CARSE, Deputy Chief Executive, Hong Kong Monetary Authority:

Well, simply because the relevant individual may not necessarily be employed by the authorized institution. They could be still performing the relevant activity but they may not necessarily be employed. The same point arises in relation to the Securities and Futures Bill. The relevant individuals under employment may not necessarily work for the brokerage company which is licensed.

主席：

就這個問題，當局已曾作出解釋。"Engaged"的涵蓋範圍比"employed"廣泛。

胡經昌議員：

主席，可能我沒有出席該次會議吧。

主席：

第10頁——Section added。第11和12頁已被刪除，所以我們無需再作討論。第13頁第58A條——Disciplinary action in respect of relevant individuals。這是新加入的條文。

第14頁。就這部分，我唯一希望提問的，是這條採用的寫法是"after consultation"。這是沒有問題的，但卻沒有體現到證監會可向金管局作出推薦的情況。

財經事務局副局長區璟智女士：

你的意思是否應訂明證監會可能會選擇向金管局作出推薦？我相信即使沒有明文規定，證監會也可以這樣做。

主席：

我同意。

財經事務局副局長區璟智女士：

為甚麼採用這樣的寫法呢？因為金管局是前線監管機構，即如果個別員工作出違規行為，第一個察覺到的，應該是金管局。

主席：

情況可能是這樣，但也可能不是這樣，因為當證券業人士作出投訴時，不一定向金管局提出，也很可能先向證監會提出。我相信採用"after consultation"這個寫法也沒有大問題，HKMA無論如何也會知道這些情況。

財經事務局副局長區璟智女士：

我相信MOU也可以包含這個情況。

Mr David CARSE, Deputy Chief Executive, Hong Kong Monetary Authority:

We would certainly take into account any recommendations made by the SFC and that would be done through the consultation process but you keep coming back to the basic point, that the relevant decision at the end of the day would be taken by the Monetary Authority, just as in the case of the SFC it would be taken by the SFC. So there is cross-referencing in relation to both recommendations and consultation in both the Securities and Futures Bill and the Banking (Amendment) Bill 2000.

主席：

第15頁。

胡經昌議員：

主席，有關disciplinary action方面，《2000年銀行業(修訂)條例草案》

與《證券及期貨條例草案》並不一致。即文件的第15頁第(4)款訂有(a)、(b)和(c)項；但有關《證券及期貨條例草案》的文件第28頁則訂有(a)、(b)、(c)、(d)和(e)項。即第15頁第(4)款卻沒有第(d)和(e)項。為甚麼呢？

主席：

即《證券及期貨條例草案》第191條。

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

That is because, Mr Chairman, the Monetary Authority does not have the power to impose the reprimand or the pecuniary penalty referred to in (d) and (e) of clause 191(1).

財經事務局副局長區璟智女士：

金管局可以進行的處分行動其實是很有限的。把有關人從名冊上除名，是由金管局進行的處分行動。但剛才胡議員提出的行動，包括譴責某人、罰款等，則一律由SFC全權負責。

主席：

第15頁。第16頁。第17頁。

胡經昌議員：

主席，第16頁提到失當行為。這裏訂有第(a)、(b)和(c)款……

主席：

但《證券及期貨條例草案》的對應條文則訂有第(d)款，是嗎？

胡經昌議員：

是的。

Mr David CARSE, Deputy Chief Executive, Hong Kong Monetary Authority:

Mr Chairman, you are talking about relatively junior staff, below the level of executive officer. You are basically talking about front-line staff here.

胡經昌議員：

那麼，如果是較高級的職員，而不是font-line的職員，情況會怎樣呢？

Mr David CARSE, Deputy Chief Executive, Hong Kong Monetary Authority:

To the extent that executive officers have been guilty of these acts or omissions, then they would be caught under the provisions which relate to the withdrawal of consent from executive officers.

主席：

哪一頁？

Mr David CARSE, Deputy Chief Executive, Hong Kong Monetary Authority:

If we go to clause 71C(4) which is on page 21 – actually we need to look at the definition of "misconduct" which is in subclause (8) on page 28.

主席：

我們首先看看第17頁有沒有問題。接着是第21頁Section 9：Section Added "71C——Executive officers of exempt authorized institutions require Monetary Authority's consent，直至第25頁。第24和25頁是否新加入的條文？

Mr David CARSE, Deputy Chief Executive, Hong Kong Monetary Authority:

These are the provisions about – we basically elaborated on the existing provisions relating to withdrawal of consent from executive officers to bring them fully into line with the Securities and Futures Bill.

主席：

接着是第26、27和28頁。吳亮星議員關心的問題，即有關"at any time"的字眼，在第29頁第(9)款也有出現。

第30頁。

胡經昌議員：

主席，我希望提出一些可能是關乎寫法的問題。我發現第29頁和第30頁中一些字，在《證券及期貨條例草案》Part IX已被刪除。舉例來說，第29頁最後一行提到"the commission of any conduct which occurred with the consent or...",，但《證券及期貨條例草案》Part IX不是用"which occurred"，而是用"occurring"。我不知道這些字是否很重要，但只是發現有不同的地方。《證券及期貨條例草案》Part IX也已改用"occurring"，而不是用"which occurred"，這修訂有否特別理由呢？第29頁最後部分和第30頁第一行提到"or was attributable to any..."，但《證券及期貨條例草案》Part IX卻沒有"was"

這個字。即該部分原本是存有這個字的，但現在已被刪除。不知道有否特別理由作出這些修訂呢？需否作出修改呢？

主席：

David 是嗎？

Mr David CARSE, Deputy Chief Executive, Hong Kong Monetary Authority:

I think it is just because of the changes made to Part IX which have not yet been picked up in the Banking (Amendment) Bill 2000 but the two in this context should just be the same. It is just a lag in the drafting of the Banking (Amendment) Bill 2000 because – we looked at an earlier version of Part IX and then Part IX was subsequently amended and we simply have not picked up these minor drafting changes.

主席：

接着應該是第36頁——Appeals。這裏訂明把上訴個案交由SFAT處理，是嗎？這部分的amendment包括第38、39、40和41頁。

胡經昌議員：

主席，我希望就第33頁提出一些問題。

主席：

好的。

胡經昌議員：

第33頁備註30提到，如果executive officer被withdraw，金管局便會給予銀行7天的grace period，以便銀行物色一名executive officer代替。我明白這個做法的原因，是銀行公會要求金管局給予一段時間，以便銀行進行這項工作。我希望提出一個很實際的問題，即在某些情況下，證券界可否也採取同樣的做法，使有關公司不會因而停止運作呢？即可否在《證券及期貨條例草案》也制定類似的條款呢？

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

We actually have a power as to when an order comes into effect, so we actually say in the terms of the decision when it will come into effect so we can cover that point.

胡經昌議員：

主席，是否需要明文訂明令業界安心？

主席：

但這裏只是以note的形式寫出來。

胡經昌議員：

我明白。即使是以note的形式寫出來，業界也可以根據這個note來討論，但現在的情況似乎是只以口頭形式表示這點。

主席：

在《銀行業條例》有否這個provision？

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

Actually, generally speaking, the decision does not come into effect for an even longer period because it does not come into effect until the appeal period expires. That is 28 days. We can direct that it comes into effect immediately in exceptional circumstances so the answer to your question as to whether or not it is expressly stated in the Securities and Futures Bill that there is a 7-day period is "No." In fact, in almost every case it is 28 days by virtue of the appeal period that is available and, in every case, we have the power to extend that period, anyway.

胡經昌議員：

主席，我相信7天或21天也沒有問題，因為就銀行而言，executive officer是由銀行推薦的，所以有關程序所需的時間會短得多。但就證券界而言，由於需提出申請，所需的時間便不只7天了。我並不是希望討論應給予7天或21天grace period。如果出現這個情況，證監會可否靈活處理，使業界的運作不會因某名董事被撤銷資格或在精神上出現問題而受到影響？

財經事務局副局長區璟智女士：

這是沒有問題的。

主席：

Part X第196條——Restriction of business。

何俊仁議員：

對不起，我希望討論第21頁第8(a)條。這條的寫法似乎是若核數師

發現存有違法的行為，便有責任舉報。

主席：

但對於今天的討論來說，這個問題是不相關的。

財經事務局副局長區璟智女士：

就證監會的情況而言，對於持牌人士的核數師的處理方法是一樣的，但所指的不是一般上市公司的核數師。這兩者涉及兩條不同的條款。

何俊仁議員：

如果有關核數師並沒有作出呈報，有甚麼後果呢？這兩個情況下的後果是否也是一樣呢？

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

The particular clause in the Securities and Futures Bill is clause 153 and I have to refresh my memory about what it says actually. I cannot remember.

財經事務局副局長區璟智女士：

應該是一樣的。

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

I think the only consequence is a potentially professional disciplinary action by

their body. There is not a criminal sanction that attaches to the failure, not in the Bill, anyway. Actually, Mr LI is probably better able to tell us. I mean, presumably, if they have an obligation under the statute and they do not comply with it, then they may be dealt with professionally.

Hon Albert HO Chun-yan:

So you had better use the word "should" instead of "shall".

財經事務局副局長區璟智女士：

"Shall"已是很強硬的字眼。

主席：

好了，現在討論Part X ——Powers of intervention and proceedings。第196條——Restriction of business。

胡經昌議員：

這部分已經討論完畢。

主席：

是的。政府已就第197條作出修訂，就"有關財產"方面加入解釋。政府這個做法亦是就我們在第一輪討論時提出的問題所作的回應。若各位參考有關委員提出的areas of concern的文件，便會發現這是我們在第一輪討論時提出的問題。各位是否滿意這個答案？這問題好像是李家祥議員提出的。你是否滿意現在的修訂？

李家祥議員：

我還沒有認真地研究清楚，所以我今天不會就此發言。

主席：

如果我的記憶沒有錯誤，這是你提出的問題，是嗎？

李家祥議員：

我亦記不清楚了。

財經事務局副局長區璟智女士：

不是，這是余議員提出的問題。

主席：

Miss EU？Audrey，這是妳提出的問題嗎？

余若薇議員：

是的。

主席：

妳對現時的修訂有甚麼意見？

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

I will actually borrow a definition from a later section, the definition of "relevant property" so it can find the scope of the property in respect of which a restriction order can be made.

Hon Audrey EU Yuet-mee, SC, JP:

Mr Chairman, clause 197(2)(a) – just on subclause (a) when it defines "relevant property", there are really three parts because, if you look at the comma, there is one part just before the comma and one part in between the comma which reads, "on behalf of any of the clients of the licensed corporation" and then the third part is just after the comma. Are you talking about three types of property? Is that right? I just wanted to clarify whether this was describing three types of situation or three types of property. In other words, the words in the middle, "on behalf of any of the clients of the licensed corporation" is one type on its own and it does not qualify the words before that or the words after that.

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

That is the way I would read it, so that the property held by the licensed corporation might be either its own property or the property it holds on behalf of clients and then the third category is the property that appears after that, held by another person on behalf or to the order of a licensed corporation. So there are three.

Hon Audrey EU Yuet-mee, SC, JP:

Then I would like to ask about the first category; that is, "property held by the licensed corporation acting within the capacity for which the licensed corporation is licensed." In order that I understand this properly, can you tell me, what is the difference between property which is held by the licensed corporation within the capacity and property

held by the licensed corporation which is not held acting within the capacity for which the licensed corporation is licensed? Can you give me two examples; one within the capacity and one held not within the capacity, so I understand exactly the end bit of this category.

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

It is very difficult actually to draw a dividing line in respect of property which is the property of the licensed corporation. It is not so difficult where it is property which it holds on behalf of clients, client assets and client money.

Hon Audrey EU Yuet-mee, SC, JP:

Yes, I understand. I am not asking about that. It is the first category.

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

I think the best way to explain it is to keep in mind that all licensed corporations will be able to carry on a variety of activities. In fact, in two senses, they may be licensed in several capacities and, secondly, they may do other kinds of business, entirely unrelated to that for which they are licensed. There is no sole business requirement, for example. You do not have to confine yourself to a business for which you need an SFC licence so an insurance company - or a bank, for that matter – could choose to get an SFC licence to carry on a certain activity. So could a computer company. Any sort of company could get a licence and continue to carry on its other business so the definition, as I would understand it, would be to confine our restriction notices to the property that is utilized in the conduct of the licensed business, not the other businesses. Of course, it is going to be quite difficult in practical terms sometimes to draw the distinction between the two. There may be really quite difficult questions of interpretation about whether or not the property falls on one side of

the line or the other as a matter of fact. I think that is what it is aiming to do, as I understand it.

Hon Audrey EU Yuet-mee, SC, JP:

Have there been previous decisions or previous examples as to how to draw the line because I find it very difficult, as you said, to draw the line.

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

The answer to the question is “No” because this is a new definition but I think you also have to keep in mind what would happen in the absence of this. We do not want a situation where we attempt to produce some kind of bright line test that says, "This is within” and “This is without” the conduct of the enterprise. I think that would be extremely difficult to do in practice and in the abstract and might frustrate our powers by trying to do that by reference to asset classes, for example, or anything like that, types of property. It is not a test which I think avoids any factual difficulty. I think there will be factual difficulties.

Hon Audrey EU Yuet-mee, SC, JP:

What happens, Mr Chairman, when there is a grey area and when there is a dispute? What happens if there is a property which is held by the licensed corporation which is partly within the capacity and partly outside?

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

I think if the SFC – and it is not just a question of this particular issue but any time when the SFC issues a restriction notice which is said to be ultra vires then we are obviously

liable to challenge in respect of that. Someone would have to challenge us.

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

There is a right of appeal in the Securities and Futures Ordinance, I think, in terms of issuing the notice I think if there was concern about where on the side of a line. I do not issue infringement notices but I am sure Andrew can correct me if I am wrong. If there are any concerns that related to the licensed business, it would probably be covered for protective reasons because you do not want clients' property to evaporate in some mysterious circumstance that you would not want to occur. There is the right of challenge and there is also the right of stay of the notice if a licensed person believes that the notice was improperly imposed and should not take operation until the appeal decision is actually heard and that would all be dealt with under Part XI.

Hon Audrey EU Yuet-mee, SC, JP:

So are you saying that if the property is held partly within the capacity for which the licensed corporation is licensed, then that is already in the description.

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

I am saying, I think, that the Commission would probably have to exercise a balancing test as to whether it would cover that and it would probably consider it in terms of was there sufficient reason to suspect it was sufficiently proximate to these licensed corporations' business or the interests of clients; that it was better to issue a notice in respect of that property than not. I think an example might be, say, for instance, a solicitor was licensed – it would be a hypothetical example. I do not think any solicitors hold licences – property within the capacity for which they were licensed would not, for instance, include

trust fund money that was in relation to conveyancing transactions or something like that. But, say, the solicitor was running their business badly and had not properly segregated their trust fund money for their pure solicitor's business from client assets which they are also required to hold separately under the Securities and Futures Bill. If there was a mixture of those assets and it was not possible to properly identify whether they were within the capacity for which the licensed corporation was licensed or if they were purely solicitor-client relationship assets that should be properly dealt with in another trust fund, the Commission would be obliged in those instances, I think, without stepping outside the legal limit of its powers but to the degree it was able to ascertain what nature those assets were, to potentially cover all of them and run the risk of being struck down on appeal.

Hon Audrey EU Yuet-mee, SC, JP:

Mr Chairman, can I ask about subclause (2)(b)? The words, "or connected with a business which constitutes a regulated activity for which the licensed corporation is licensed" – first of all, the words "connected with" is extremely wide. I am sure the Chairman remembers the previous occasion when we had a problem with the words, "connected with" and it can be as wide as you want it to be. My question, first of all, is, how wide is this intended?

My second question is this: the first part of (b) – "any other property which the Commission reasonably believes to be owned or controlled by the licensed corporation" – you are already talking about property which may or may not be held by the licensed corporation which can be compelled by the licensed corporation so that would cover, for example, properties which are held by its subsidiaries or even probably associated companies because there are similar directors and so on. So when you then go on to the next bit which is, "or connected with", that would cover property which is not under the control of the licensed corporation. My question is, if this restriction notice is really only directed to the licensed corporation, because this is what subclause 197(1)(a) says. This is a notice to the licensed corporation which prohibits the licensed corporation from doing something but if the property

is not within the control of the licensed corporation but is somehow connected, how can the restriction notice to the licensed corporation ask the licensed corporation to do something in relation to property which is not within its control?

The final question is, does it really matter if you delete the final bit, "or connected with"? Would it be sufficient if you just keep (b), which is, "a property which is reasonably believed to be under the control of the licensed corporation"?

財經事務局副局長區璟智女士：

我相信余議員的問題共有兩部分。第一，就第(2)(b)款的問題是，為何要把"受規管業務有關連的其他財產"併入這裏，以及較前部分是否足以包括這個範圍。我請Mr PROCTER解釋，就這方面有甚麼例子。What are the examples under the phrase "connected with the business"，而這些例子是可能不包括在較前部分以內的，以及投資者的利益可能會因而受損。另外，請Mr PROCTER解釋，第197(1)(a)條的現行寫法是否尚未足夠。剛才余議員提出的這點是很好的。第197(1)(a)條是否並未足以包括我們希望第(2)(b)款可涵蓋的範圍呢？我請Mr PROCTER列舉一些例子，解釋我們希望第(2)(b)款可以包括的範圍。

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

I am not sure I entirely follow that. In another sense, I suppose the question is, should it be "and" or "or connected", having regard to what we were just discussing in subclause 2(a) but I think what we had in mind is a concern that we should not draft this so widely that we should be issuing notices in respect of property held by third parties and the notice directed to one of our licensees where they could not, in effect, do anything about the property held by those third parties. We did have in mind situations where other parties to a breach may themselves be in possession of relevant property and we have discussed on

previous occasions that they may or may not hold that pursuant to a constructive trust because of their familiarity or awareness or knowledge of the breach on the part of the licensed corporation.

So it is true, of course, that if it is held by a third party at arm's length then the restriction notice that is directed to the licensed corporation will not have any content or substance because they will not be able to do anything in respect of that property but if it is held by someone who is an accomplice or complicit in their breach and may or may not be subject to constructive trust, then there may be some work to do for that second part. It may be that we can say "and you are not to deal with that property that is in the hands of that third party with whom you have, in our view, some sort of relationship."

So that is, I think, why that extra bit is there. It is to pick up that possibility, although you are quite right to say at arm's length there is not really anything the licensed corporation could do in respect of that property.

Hon Audrey EU Yuet-mee, SC, JP:

Mr Chairman, does that mean that you will perhaps reconsider the last bit, "connected with"?

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

Mr Chairman, we do think that there is a real possibility of property being shifted off to a third party. It is not able to be controlled in the sense of a subsidiary or corporate control in the usual sense and where we may want to say something in a restriction notice. So there are two ways of looking at it. You either accept that that is a valid concern, that a notice that is directed to property in the hands of a third party may not be able to be given effect to by a licensed corporation or you would have to change the preliminary words in

clause 197 and allow for restriction notices that extend beyond the licensed corporation to the other person, to a third party, which would be a significant extension.

Hon Audrey EU Yuet-mee, SC, JP:

Mr Chairman, I do not have the sort of in principle objection to extend it to third persons provided that is clearly circumscribed. For example, you mentioned "constructive trust". If you make it clear that it is only in relation to third parties who hold properties on constructive trust for clients or for the licensed corporation, then, of course, that is clearly understood but if you just extend it to third persons, someone who is connected with the business, then that is much too wide. In fact, that makes it worse rather than better.

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

I am not surprised to hear you to say that. It is actually quite difficult, of course, as you would appreciate for us to be able to make a determination of a constructive trust in advance at the sort of poignant time at which we would be making a judgment about whether to issue a restriction notice. It is not only difficult, probably impossible in a lot of cases. You just do not know enough about the conduct of those other parties. Restriction notices very often are issued in quite urgent circumstances, as a way of preserving a situation and preserving assets.

主席：

我希望提問：Are Clauses 196, 197 and 198 appealable？

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

Yes, they are.

Chairman:

Also going to the SFAT, right?

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

Yes, that is right.

主席：

雖然我也concern Audrey提出的concern，但如果情況是這樣，我的意見是我們也需作出平衡，因為倘若發生問題，證監會便需要很迅速地保護那些資產。如果這幾條所訂的情況是可以向SFAT提出上訴的話，會否已能提供保障呢？即如果真的涉及沒有關連的財產，便可以藉打官司的方法處理。

余若薇議員：

主席，不是可否以打官司的方法處理的問題，而是這條款的範圍的問題。這條款的範圍是很廣泛的。該條訂明，只要證監會有合理理由相信有關財產與持牌法團有關連便可。即使該持牌法團提出上訴，那又如何呢？當證監會作出通知時，證監會實在認為有合理理由相信有關財產與該持牌法團有關連。

由於這個尺度或測試點十分廣泛，即使上訴，有關的尺度或測試點也是同樣廣泛。我的意思是，證監會應清楚說明，有關連是指在甚麼方面有關連，因為很多事情也是有關連的。舉例來說，當警方逮捕某人時，指該人與案件有關連，但原來他是目擊證人，所以亦可說與案件有關連。所

以，"關連"這個詞的涵蓋範圍是很廣泛的。即使剛才Mr PROCTER提到constructive trust，也是可以接受的，因為最低限度，我們也可清楚知道所指的是甚麼。雖然在早期很難知道有關財產最終是否constructive trust，但這條款只要求證監會有合理理由相信有關財產與該持牌法團有關連，所以涵蓋範圍是很廣泛的。

主席：

是否可以作出一些字眼上的改動？

財經事務局副局長區璟智女士：

主席，你剛才說得對，有關的覆檢程序可重新制訂一項新的決定。另外，請余議員參考第200條。該條列出了一些先決條件。即在證監會還沒有啟動第197條等的機制之前，須首先考慮是否符合第200條的要求。

主席：

我明白有關第200條的情況，但"connected with"的範圍實在很廣泛。可否輕微地修訂為類似"間接擁有"或"曾經轉移"等的字眼呢？這是否已經足夠呢？

財經事務局副局長區璟智女士：

我需要就這方面徵詢律師的意見。

主席：

我的意思是修訂為"有理由相信有關財產曾經被轉移"，which means reasonably believe that the assets have been transferred or indirectly

controlled – some sort of these wordings。余若薇議員會否認為這些字眼較好呢？

財經事務局副局長區璟智女士：

律師可否提出意見？

余若薇議員：

主席，我不是考慮字眼的問題，而是考慮立法原意的問題。因為如果所針對的是held in constructive trust的物業，這個便是connection。如果政府希望使有關的範圍更加廣泛，以涵蓋正如主席提到有關"曾經擁有"或"試圖轉移"等的範圍，使所謂的有關連，是指有關財產是該持牌法團的物業，也需清楚說明。我不瞭解政府希望使"有關連"涵蓋甚麼範圍。所以，不應由我提議一些字眼，而是我希望提問政府的原意是使"有關連"達致甚麼程度。

主席：

我相信我剛才提出的兩種情況亦肯定是有關連的，但除此以外，還有沒有其他情況呢？

財經事務局副局長區璟智女士：

讓我們再作考慮吧，但我也不太樂觀，因為我們已經考慮了一段很長的時間，亦動用了很多法律資源，考慮如何把這條款的範圍縮窄。剛才Mr PROCTER列舉的例子，即通過第三者用constructive trust的方法來hold property是其中一種情況。

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

Securities and Futures Commission:

I think, Chairman, just as a matter of fairness and clarity; that is an example. What you have to try and do is think in the abstract about possible situations that might arise, and I have just been trying to think of cases where, for example, client assets deposited with nominee companies - - I think that is probably covered by subclause (2)(a) but I am not sure. Other situations are where the property may be deposited with an innocent party.

Let us put a constructive trust to one side. If the licensed corporation had, pursuant to some wrongful conduct, to use the wider sort of term, deposited property either with a bank or with a custodian or someone else. Then the party that receives the property may be acting entirely *bona fide*. They may not have any knowledge of the breach that has occurred, and we might nonetheless say to the licensed corporation "You're not to instruct that third party to deal with the property in any way". That would be property connected with the business.

Hon Audrey EU Yuet-mee, SC, JP:

Mr Chairman, with that there is no problem, because it is already covered. My point is that it is already covered under the first part of (b), because that is property owned or controlled by the licensed corporation, because with the examples Mr PROCTER just gave about a nominee, a bank, a custodian, an agent or an innocent third party, that is all covered by the first part, because that is a third party who is holding the property, and that property is under the control of the licensed corporation.

When you come to the next bit, "or connected", if you said "and connected" I have no problem with that, but you said "or connected with a business that constitutes a regulated activity for which the licensed corporation is licensed". So my point is that this hypothesis includes situations where the property is not controlled by the licensed corporation, is not under the control of the licensed corporation. My original question is: what are the

circumstances you envisage which are not already covered by the first part of (b), but where you need the second part of (b), which is very wide, to cover that situation.

Then you told me about constructive trust. I accept that, because if it is a constructive trust then the property is held by a third party, and that is not under the control of the licensed corporation. So if you say you want to include situations of constructive trust, I understand. But then all the other examples that you later gave would be covered by the first part of (b).

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

Probably; and there are some nominee arrangements where the property is held by the nominee, particularly in funds management, to the order of the client, but the order is communicated to the nominee through the licensed corporation, which is a kind of middle position.

Hon Audrey EU Yuet-mee, SC, JP:

Then that falls within (a) because that would be on behalf of any of the clients of a licensed corporation.

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

Probably right; yes.

Chairman:

Sophie.

梁劉柔芬議員：

我相信如果我們繼續就這點爭議，便會花很長的時間。請政府再考慮這點，尤其是剛才局長提到有關in connection with 的問題。請政府整體地研究"or connected with"是否有較好的解釋或可否採用其他字眼等。待政府作出考慮後，我們再就這點討論，好嗎？

財經事務局副局長區璟智女士：

我們再考慮這點吧。

主席：

好的。

余若薇議員：

主席，我可否提出最後一個問題？

主席：

可以。

余若薇議員：

我仍然是就第197條第(2)款提問。第197條第(2)款跟較後部分的第199條第(7)款比較，第199條第(7)款訂有一個proviso。為何第199條需要訂有proviso，而第197條不用呢？即"but does not include securities deposited by a clearing participant with a recognized clearing house in accordance with

the rules of the clearing house"。

財經事務局副局長區璟智女士：

請Mr GOYNE解釋。

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

In relation to clause 199, it is transfer of the custody. If they are already in the custody of C-CASS then that is okay, in effect. However, if you are trying to stop a brokerage dealing with property in a manner that is adverse to client interests, they may have a discretionary authority on behalf of their clients as to how to deal with property held on behalf of clients in C-CASS; and you may want to stop them from doing that.

Hence there is no qualification on the restriction notice in relation to securities and other instruments held at C-CASS and other bodies of that nature. You would want to stop the brokerage dealing with that property, because they may well have the legal power to deal with that property. There is no interest in taking property out of the custody of C-CASS, but there is an interest in stopping a brokerage that is up to something improper from dealing with client assets that they might have legal authority over within C-CASS.

主席：

顧先生。

秘書處助理法律顧問顧建華先生：

這款只訂明，證監會……

主席：

你是指哪條條款？

秘書處助理法律顧問顧建華先生：

第197條。這款完全沒有提及，證監會在行使這項權力後的結果。例如有關客戶或物主可否取回有關財產，或證監會處理有關財產的權力會否訂有期限，使證監會須在期限屆滿時，向法庭提出要求延長期限，還是證監會可無限期地處理有關財產，直至整個調查程序完成為止呢？這些情況似乎並無清晰訂明。

另外關於草擬方面，第(2)(a)款訂明，該法團須以其獲發牌的身分持有有關財產。例如該法團只獲發牌作為股票經紀，而亦同時進行一些並非獲發牌進行的活動，這個草擬方式會否使該法團以欺詐手段取得的財產，反而不會受到禁制呢？其實，整項權力的作用，是保障第三者或有關人士的財產，使這些財產不會被違反守則的持牌人士非法轉移，或使該第三者或有關人士不致無法取回有關財產。

所以，我的問題是：第一，對於在證監會行使該項權力後，會產生甚麼後果，我們並不清晰；第二，現在的草擬會否導致該項權力並不涵蓋該法團非法取得的財物呢？

主席：

法律顧問提出了一連串的問題。局長。

財經事務局副局長區璟智女士：

我請Mr PROCTER或Mr GOYNE回答這些問題。

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

I think in terms of the first question, if I understand it correctly, there is provision in clause 201 for withdrawal or variation of these restriction notices. In fact the restriction notices do not have to extend to all of the property of the registrant, of course. In fact, typically what restriction notices do is this: they are crafted rather like injunctions, and so there is a power of approval usually given to the responsible Executive Director, to allow for certain dealings in property if that is necessary to continue the conduct of the business, if any of the business is permitted to continue. I think there is not really a practical concern about ability to go on functioning or ability to withdraw or vary restriction notices.

So far as the second question is concerned, I am not sure I quite understand it, but again what the provision does is broadly define the property that can be the subject of a restriction notice, but not all of the property has to be the subject of a restriction notice. If some of it is being used and some of the assets, for example, of the clients, relate to an area of licensing that is not the area of concern, then they may be allowed to continue to deal in those assets, but not, for example, be allowed to continue to deal in the assets of commodities clients, if the securities business is the area of concern.

Chairman:

Audrey.

Hon Audrey EU Yuet-mee, SC, JP:

Mr Chairman, in connection with the point that Mr GOYNE has raised, the second point, I just wonder whether it also arose from the difficulties I had when looking at subclause (2)(a) where it says "...holding property within the capacity for which the licensed corporation

is licensed". It just occurred to me that maybe it is better to put it the other away around, that is that you catch the property save and except that the property held by the corporation in the course of some other legitimate activity or legitimate business that the licensed corporation is doing, or something like that, rather than to say it is property held by the corporation "acting within the capacity for which..."

I think Mr KAU's point is that if he used clients' money to do some illegal activity, should you not in fact catch it; but if you phrase it so narrowly to say "...any property held by the licensed corporation acting within the capacity for which the licensed corporation is licensed", would this not in fact allow the licensed corporation which is in fact illegally doing some other activities, to get away with that?

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

I do not think so, because that would still be property that they held on behalf of clients. I do not think it would let them get away with it.

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

It is a question of the use that I think is saying is ultra vires of the licensed purpose. However, the capacity in which they received those assets would be within the capacity for which they are licensed. I think the assets are covered. It is just that the use that is not within the capacity for which they are licensed. It is the use that is improper, not the capacity in which they have received it that is improper.

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

Even if that were wrong – and I think it is right – it would still be within the first part of (2)(b), would it not? It would still be property that they own or control. I think that would still be.

主席：

胡經昌議員。

胡經昌議員：

主席，關於Banking (Amendment) Bill 2000，我希望提出兩個問題。其中一個問題是：比較原來Securities and Futures Bill Part IX提到有關"exempt person"的部分，從第29頁開始的部分似乎欠缺了一個人選。第IX部第186(2)(b)條提到，"in the case of an exempt person, another person as an executive officer of the exempt person"，以及"or a person involved in the management:"，而有關Banking (Amendment) Bill 2000的文件第30頁只提到，"an executive officer of the institution"，但卻沒有提及有關"management"的人選。是否有所遺漏呢？理論上，這兩部分是應該對應的，但這部分是否缺少了一個呢？

主席：

阮先生，是嗎？

香港金融管理局銀行監理部處長阮國恆先生：

主席，第186(2)條提到，如果一名持牌人士作出失責行為，該持牌人士的高層人員是須要負責的。其實第189A條已包含類似的條款。我們希望《2000年銀行業(修訂)條例草案》第29頁所涵蓋的情況是，如果銀行本身犯了失責行為，銀行的負責人士，即executive officer或EO也須負責。你剛

才所提到的另一個情況，即如果銀行犯了失責行為，高層人士需否負責呢？他們同樣是須要負責的，但有關情況已包含在第IX部之內。

胡經昌議員：

第IX部的哪部分？

香港金融管理局銀行監理部處長阮國恆先生：

第IX部第189A條已經包括這個情況。

Chairman:

OK.

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

Clause 189 at the bottom, subclause (9).

胡經昌議員：

我亦希望就接下來的條款提問。載於第31頁的第(2)款，即"Every director and every manager of an exempt..."已經全被刪除。而有關Footnote指出，刪除這款的原因，是第124(3)條已就相同的罪行訂明罰則。

但第124條提到的，其實是"Requirement for executive officers"。Appointment of executive officer不應由executive officer自行負責的，而是應由有關institution作出的。所以，如果沒有作出appointment，不應是executive officer的問題，而是every director或every manager的問題。第124(3)條提到

的，是"Requirement for executive officers"，而這條提到的，是"Appointment of executive officer"。Executive officer不應自我委任，而高層人士是有責任作出委任的。這個Footnote refer to第124(3)條似乎不合情理。若要求directors負上責任，甚至可能要因而入獄，每名director也會感到震驚，這是我可以理解的，但是否基於這個原因，便可只訂有第124(3)條呢？

香港金融管理局銀行監理部處長阮國恆先生：

主席，我希望作出解釋。第124(3)條跟第71D條所提到的，其實是相同的情況。若銀行欲從事證券業務，必須取得現時稱為獲豁免地位或日後稱為註冊的地位，並必須委任負責人士。如果該銀行不作出這項委任，便屬違反規定。在這個情況下，第124條已對該機構本身訂有罰則。如果我們把第71D(2)條載於這部分，便會對相同的情況作出2次懲處。我們認為這不是合理的做法，所以便採用《證券及期貨條例草案》第124(3)條所訂的罰則。我們因而認為應取消第71D(2)條。

胡經昌議員：

主席， appoint executive officer需要甚麼程序呢？如果不involve Board或高層人士，也是合理的，但appointment的程序不應由有關的executive officer自己進行，是嗎？

香港金融管理局銀行監理部處長阮國恆先生：

主席，可能我們有些誤會。這個問題跟程序是沒有關係的。藍紙條例草案第124條第(2)款已經說明，任何獲豁免人士必須根據第71D條的規定委任負責人士。另外，第124(3)條說明，如獲豁免人士不作出這件事情，便是違反有關規定。有關不委任負責人士屬違規行為的情況，已包含在第124條之內，所以無需再次在《2000年銀行業(修訂)條例草案》內提出。

主席：

OK，我們再討論第196、197和198條吧。如果沒有問題，我們便可討論第199條——Requirement to transfer custody of property。我希望政府可研究可否改善"connected with"的definition。第199條。第200條。第199條的備註。

財經事務局副局長區璟智女士：

就第199條，請大家參考這份文件的附件3。記得在上次討論這條條款時，議員曾表達強烈的意見。議員擔憂就證監會的權力方面，第199條的草擬方式會否過於廣泛。我們曾與證監會進行了很詳細的檢討。其實第199條、第197條和第206條也有共同的目標：即盡量保護投資者的財產，使這些財產不會被違規的中介人士挪用。

第199條和第206條有不同之處。第206條訂明，證監會必須首先向法庭申請命令或禁制令，然後才決定如何處理有關資產，以防止有關資產被中介人士挪用。訂定第199條的原因，是擔憂證監會在申請法庭命令或禁制令的期間，中介人士會動用有關的資產。有見及此，在草擬條例草案的過程中，我們便引入了第199條。第199條的意思，是使證監會可要求暫時轉移有關資產，即由證監會暫時保管這些資產，然後才向法庭申請，以決定如何作出處理。

在上次討論的過程中，議員對第199條所訂的轉移有很大的疑問。雖然有關轉移只屬暫時性質，但大家也憂慮到，政府有否考慮到，這些財產的性質可能不同、政府會否考慮以不同的方法處理不同的財產，以及政府可否把這些不同的方法訂明在法例之內。

我們跟法律顧問和證監會很仔細地研究後，認為把不同的財產和處理方式在法例內訂明，其實是很繁複的工作，也是不切實際的做法。我們

跟證監會商討後，並鑒於議員的憂慮，得出的結論是：即使沒有第199條，證監會也可利用第206條暫時保管這些財產。但大家需要接受，那段很短暫的時間，即證監會向法庭申請命令的短暫時間，可能會存在風險。

我們認為這也不失為一個可行的方法。證監會唯一可以做的，是加速申請法庭命令的內部行政安排。根據過往的經驗，向法庭申請命令的程序也相當快捷。我們的建議是，如果各位對第199條仍存有這麼大的疑慮，我們只好讓證監會繼續根據第206條例作出處理。第199條和第206條的目標是相同的。

主席：

Audrey，我們在上次討論第199條時，亦有提到這點。

余若薇議員：

是的。主席，我希望弄清楚，第199條和第206條除了在向法庭申請命令方面有所分別之外，其他方面是否一式一樣？所謂一式一樣，是指這兩條使證監會可進行的事情也是相同的，而不會由於沒有制定第199條，而證監會根據第206條向法庭提出申請時，會缺少了一些權力，或無法涵蓋一些證監會希望涵蓋的物業或財產。換句話說，我只是希望瞭解，第199條和第206條的涵蓋範圍是否一式一樣。

財經事務局副局長區璟智女士：

第206條就須保護的財產的涵蓋範圍，應不少於第199條涵蓋的範圍。

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

The differences between the clauses are not confined to the need for us to go to the court under clause 206, although most of the differences flow from that distinction. Obviously under clause 199, in the absence of a court order and court directions fashioned as to how to deal with the property, clause 199 has to substitute for that the view of the Commission about certain things, and placing the property in the hands of a third party who holds that in effect on trust.

I think to answer your substantive question, the answer is "No. It is not really going to make any critical difference to us". We do not think that clause 206 is insufficient in terms of its scope, and as Miss AU has explained, there may be a time factor, but we think the time factor will be a very short one. So the risk of us not being able to get an order in respect of relevant property, and that property being dissipated before we can get to court we think is pretty minimal.

主席：

我希望詢問政府，你們何時會決定取消或不取消這條？

副主席：

我們今天便聽取議員的意見。如果大家也認為這是可行的辦法，我們便會這樣做。

余若薇議員：

主席，如果證監會確認第199條和第206條的範圍是一式一樣的，即第199條可以做到的事情，第206條也同樣可以做到，問題只是在時間上有所分別，我便傾向取消第199條。理由是：第一，證監會表示這兩條在時間上有少許分別，但其實分別是不大的。在一些情況下，直接向法庭申請可

能會較好。因為證監會可單方面向法庭提出申請，而無需向對方發出通知。證監會亦可能即時取得法庭的命令，然後便可向對方發出。這程序有別於要求證監會首先給予對方通知，然後才可向法庭提出申請，而期間也可能會產生爭拗。證監會也曾表示，若證監會在開始時便可向法庭提出申請，在時間上也不會相差很遠。

第二，第199條和第197條並不相同。第199條的範圍更為廣泛，以及證監會不僅可對licensed corporation行使這項權力，亦可對第三者，即"any other person"行使這項權力。另外，該條涵蓋多種不同的財產，而有關的範圍亦可能會較為廣泛，加上該條訂有"有關連"，即"connected with"這麼範圍廣泛的字眼，使該條的意思不太清晰。但如果向法庭提出申請，證監會通常也要作出誓章，具體地說明申請命令的理由。雖然時間可能很簡短，但證監會也需就這方面考慮。換句話說，整個過程也可以讓證監會和法庭清楚有關情況。所以，如果這兩條的涵蓋範圍是一式一樣的，而第206條已是足夠的話，我寧願取消第199條。

主席：

但政府剛才的回應是"不少於"，即第206條的涵蓋範圍不少於第199條的涵蓋範圍，即"not less than"。各位有沒有特別強烈的意見？如果沒有，我們便接受政府的意見，取消第199條。

第200條。

第201條——Withdrawal, substitution or variation of prohibitions or requirements under section 196, 197, 198。

胡經昌議員：

主席，第13頁第(7)款.....我們是否正討論第202條？

主席：

不是。大家對第201條有沒有問題？

第202條，胡經昌議員。

胡經昌議員：

第13頁第202(7)條，即我們曾討論有關"The Commission may publish in the Gazette"的部分，"may"是否較有靈活性？我們需否指定證監會必須這樣做呢？換句話說，把"may"改為"shall"。既然要訂明這點，便沒有理由採用"may"的字眼。

財經事務局副局長區璟智女士：

其實據我瞭解，根據證監會的政策，該會必須公布這些行動。但公布可以很多方式進行，不一定是刊憲。如果要刊憲，便只能在星期五進行。證監會可能會通過新聞稿等方式，向公眾發放有關的消息。但對於這方面，我是持開放態度的。我希望聽取Mr PROCTER的意見。

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

Chairman, the policy of the Commission is always to publish these actions. Some of them are new actions, but if we take restriction notices as an example that we have under existing legislation, we would always publicize it. The way in which we publicize it is also calculated to make sure that investors or clients of the affected firm are informed, and of course most people do not read the Gazette as a matter of habit, so we do tend to publicize it more generally.

However, we have to be careful as well, because the reputational damage to a firm through the publicity of this sort of action is very substantial. I cannot imagine a situation where we would not go ahead and publicize it, but there may be a situation at the borders, where the action we are taking is marginal, does not require wide publicity, and where we think the reputational damage to a firm and prejudice may outweigh the utility of publication. I think that is very, very hard to imagine, but I think the way the section is drafted now, at least it leaves open that flexibility if such a situation should ever occur.

主席：

如果立法會認為刊憲是很需要的話，政府也不會抗拒的。如果我們考慮所有因素後，仍然認為刊憲是必需的話，我相信政府亦可以接受。

胡經昌議員：

政府可否再作考慮？

財經事務局副局長區璟智女士：

業界有甚麼看法呢？

胡經昌議員：

我們當時曾就這方面討論……

主席：

The Hong Kong Stockbrokers' Association的comment是把這部分寫成"shall be obliged to publish"。

財經事務局副局長區璟智女士：

聽罷Mr PROCTER的解釋，你作為市場經營人士的一份子，對他剛才所提出的個案有何看法？我們認為，對於無需廣泛宣傳的個案，可能不用刊憲。但如果該條規定必須刊憲，即必須作出廣泛宣傳，對該行的名譽便會有負面影響。其實證監會是用心良苦的。

主席：

我們對於stockbrokers提出這樣的comment，也感到意外。從消費者的立場，應建議政府採用"shall"的字眼，而站在證券行的立場，則應建議政府採用"may"的字眼。

胡經昌議員：

主席，我相信Hong Kong Stockbrokers' Association不僅只顧及自己的利益。如果有關證券行確實存有問題，他們也希望瞭解有關情況。我認為既然他們提出這項要求，我們便應加以考慮。

主席：

或許他們認為，如果Broker A存有問題，另一些brokers也希望知道。那麼便採用"shall"吧。其實，透明度越高越好，我們也歡迎這個做法。

第203條——Cases of revocation or suspension of licensed corporations' licences。第18頁載有該條的一些修訂。

第204條。

余若薇議員：

主席，對於第204條，我希望就第204(1)(b)條提問。該款訂明，如果有關人不遵守證監會發出的通知，而並無合理理由，該人便會被視為藐視法庭，並會被施以藐視法庭的懲治。這款的意思是否會把有關情況視作刑事案件處理？而有關程序會否與懲罰"藐視法庭"行為的情況一樣？

在一般情況下，如果某人被視為藐視法庭，有關方面在向他作出通知時，須遵守很多規定，其中包括須向該人送達有關通知，並向他發出警告，表示如果他不遵守有關規定，便會被視為藐視法庭，而後果可能是被判入獄，或所有董事也會被判入獄等。

這款有否同樣的適當保障呢？另外，如果該人不遵守有關規定時，證監會又會怎樣做呢？其中所涉及的程序，是法庭在聆訊時，便會即時裁定該人"藐視法庭"，還是證監會亦會依照一般審理藐視法庭行為的程序，即特別的程序進行審理呢？這是我希望弄清楚的問題。

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

I think the answer is that the procedures are in fact determined by the originating process as described earlier in that same section, so by originating summons or origination motion it would set the procedures that would follow. I do not understand that to be implying that the procedures for contempt would apply. I do not know what happens here, but in most jurisdictions, the Registrar has to have special summonses that issue, and so on.

I do not think that subclause (b) is intended to pick up the full panoply of procedures. I do not know.

Hon Audrey EU Yuet-mee, SC, JP:

Mr Chairman, the reason I am asking is really that there are two aspects to it. First of all, if eventually a person can be guilty of contempt of court for failing to comply with certain directions, there are procedural requirements to make sure that he is suitably warned about the consequences of not following that direction, that they are going to be contempt of court, which is liable to imprisonment; and all the directors can be liable.

So there are precautionary steps to be taken at the time you serve the restriction notice, which is the notice under, for example, clause 197. That is the first part of the question. When you serve the restriction notice under clause 197 do you suitably warn people, and do you comply with all the requirements as to contempt of court provisions? Because it is not stated here, either in clause 204 or in 197. There are no procedural safeguards, and the first part of my question is: do you follow the same procedural safeguards, and is it necessary to make it clear?

The second part of my question is in relation to what happens under clause 204 when you got to court. Normally there are really two types of contempt. Either you have contempt in the face of the court, so the court punishes you immediately, or alternatively you have an application under Order 53 for contempt of court. What I am asking is "What is this, when you talk about (b), when you say that person had been guilty of contempt of court?" Does the judge hearing the application under clause 204 immediately sentence the person to contempt of court as in contempt in the face of the court – that is when you throw a shoe at a judge, or something like that, and are immediately sent to prison for that type of contempt of court – or do you have to have a separate procedure under Order 53 to make the person liable for contempt? That is the clarification I am seeking.

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

Okay. On the first point, the answer is: the restriction notices do refer to the

consequences of failure to comply with the notices themselves.

Hon Audrey EU Yuet-mee, SC, JP:

And it has got to be personally served?

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

Yes. Actually the service, the means for effecting service, are set out in Part XVI of the legislation.

Hon Audrey EU Yuet-mee, SC, JP:

Pre-existing?

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

Yes. So it does not have to be personally served if the restriction notice is - - they will all be to corporations, of course, in the future. You effect service on the corporation in the manner set out in clause 386. The notice itself does set out the consequences of the breach of the notice, or failure to comply with the notice.

We actually have had situations – to answer the second question – where people have not complied with notices, and they are dealt with by a motion brought by the Commission to bring them before the court. I guess Mr BAILEY can better describe to you what has happened to those people when they are brought before the court for failure to comply with SFC notices.

Mr Paul R BAILEY, Executive Director, Enforcement, Securities and Futures Commission:

There is only one case I can remember where a person has been done for contempt, and that was on a market manipulation case where we certified someone to the High Court. The court ruled that he had done it without reasonable excuse, and I think he was fined half a million dollars. I am not exactly certain of the process that got us to that half million dollar fine, but that is the only case I can remember in the whole of the Commission's time, where such an action has been taken.

We have certified people to the courts before, and they have actually complied. I think they have probably complied before the thing actually went to hearing. There is only one case I can remember where the whole certification process has gone through.

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

Yes. The only other guidance that is given in the legislation is that, if you look over the page, it says that the originating summons is to be in the form number 10 for the rules of the court, but that does not take it to the extent you were asking about.

Hon Audrey EU Yuet-mee, SC, JP:

Yes. Mr Chairman, I do not want to take up too much time. I think perhaps the Department of Justice can look into this particular question, because contempt gives rise to criminal sanctions, and then there are certain constitutional safeguards in relation to that. When you have a sort of hybrid situation like this, perhaps some thought can be given to it to make sure the procedure also complies with all the constitutional safeguards in relation to criminal sanctions and imprisonment.

主席：

顧先生。

Mr KAU Kin-wah, Assistant Legal Adviser:

I would make the observation that it seems that there may be a need to provide more in detail about how the prohibition notice should be served, and things like that, because for example, if a sum of money is put in a bank and the licensed person chose to ignore that notice, and transfer, would the bank be also liable for not complying with the prohibition? Would the Commission have a duty to serve that notice on the bank as well? I think this point may perhaps be considered by the Administration, because all we know now is that notice will be served on that person, who may intend to do whatever he wants irrespective of that notice. If the only requirement is for the notice to be served on that person, that would not be effective to achieve the purpose.

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

The restriction notice can only be issued to licensed persons, so there is no chance of a third party breaching a restriction notice in a manner that would cause them to be subject to certification proceedings under clause 204.

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

Actually, just to take that a little bit further, I think there is a possibility, because of course what we do to make sure that restriction notices are complied with is to make copies available to the bankers of firms, for example, so they get notice of the notice; and of course subclause (1)(b) does refer to the possibility of another person who has been involved in the failure themselves being susceptible to punishment. However, I do not think that requires

what you are suggesting – a formal obligation to serve notices on anyone before they could be the subject of a finding in the nature of contempt by the court. That must be a matter for the court to make a judgment on, and of course the court is certainly not going to make that finding and reach that conclusion in the absence of any notice to the other person.

A person may become aware that a licensed corporation is the subject of a restriction notice through a range of means. It may be that we actually do give them a copy of the notice – the banker or whatever; it may be that they hear about it from the licensed corporation themselves; maybe they read about it in the newspapers. As I say, there are lots of ways in which they can become aware, and then be complicit in a breach of that notice in a way which I think would render them liable to be punished as though they were guilty of contempt.

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

I agree with what Andrew has said. I also draw your attention in clause 202 subclause (5) on page 12, where the Commission imposes a requirement under clause 199, and it only relates to clause 199.

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

Certainly the practice is to serve copies on parties who may be able to assist us.

主席：

顧先生。

Mr KAU Kin-wah, Assistant Legal Adviser:

Thank you, Mr Chairman I would also draw Members' attention to clause 203.

Chairman:

Which part?

Mr KAU Kin-wah, Assistant Legal Adviser:

Clause 203, the whole clause. In fact the effect of that clause would be restricting the Commission's power to impose a prohibition notice and other things, after the licensed corporation's licence has been revoked. I am not sure whether that is desired effect as I read it, the clause would have that effect. If the unfortunate situation occurred that the Commission happened to overlook some property which was controlled by a corporation and his licence was subsequently revoked without any prohibition being issued in respect of a particular property, then the Commission may not be able to resolve under clause 197.

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

That construction of clause 203 I think is correct, but the way we deal with that, and the reason why we have not asked for the additional power, is that in the context of a revocation we do actually have additional powers to make consequential orders and give consequential directions that address the dealing with the property in that way.

We have suggested an amendment by the inclusion of a new subclause (4) that picks up the possibility of restriction notices after suspension. We do not think it is necessary for restriction notices after revocation, because of those additional powers we have in the case of revocation to make consequential orders anyway.

主席：

OK，會議討論的時間已經差不多到了，我們就在第204條結束吧。在下次會議上，我們會繼續就第205條進行討論。多謝各位。

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