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 Saturday, 3 February 2001, at 9:30 am
in the Chamber of the Legislative Council Building

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

Ms Sherman CHAN
Senior Assistant Law Draftsman

Ms Beverly YAN
Senior Government Counsel

Attendance by invitation : Mr Mark DICKENS
Executive Director, Supervision of Markets

Mr Andrew PROCTER
Executive Director of Intermediaries and Investment Products

Mrs Alexa LAM
Chief Counsel

Mr Andrew YOUNG
Legal Consultant

Hong Kong Society of Accountants

Mr David SUN
Vice President

Mr Alvin WONG
Vice President

Mr James FAWLS
Director of Professional Standards

Hong Kong Association of Banks

Mr Peter WONG
Chairman

Mr David WAN
Secretary

Mr Marc HARVEY
Legal Adviser

Linklaters & Alliance

Ms Pauline ASHALL
Partner, Linklaters

Mr David GRAHAM
Head of Asia Pacific Law Division, Morgan Stanley Dean Witter Asia Limited

Mr Rob EVERETT
Director and Senior Counsel, Merrill Lynch (Asia Pacific) Limited

Mr LEE How-chih
Vice President, Financial Products, Credit Suisse First Boston (Hong Kong) Limited

Mr Wilfred YEUNG
Vice President, JP Morgan Chase

The Law Society of Hong Kong

Ms Pauline ASHALL
Chairman of the Law Society's Securities Law Committee

Mr Peter BRIEN
Member of the Law Society's Securities Law Committee

Hong Kong Stockbrokers Association

Mr Paul FAN
Chairman

Mr Kenny LEE
Vice Chairman

Mr Dannis LEE
Committee Member

Mr KWAN Yee-kwong
Legal Adviser

Mr Richard YIN
Member

The Institute of Securities Dealers Limited

Ms CHEN Po-sum
Chairman

Mr Vincent LEE
Director

Mr Gilbert CHU
Director

Mr Kenneth LAM
Director

Individuals

Prof Stephen CHEUNG
Chair Professor of Finance, Department of Economics and Finance, City University of Hong Kong

Dr Larry H P LANG
Chair Professor of Finance, Department of Finance, Faculty of Business Administration, The Chinese University of Hong Kong

Ms Christine LOH
(to accompany Dr LANG)

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

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

Mr KAU Kin-wah
Assistant Legal Adviser 6

Ms Connie SZETO
Senior Assistant Secretary (1)1

主席：

各位金融及證券界的朋友，首先，很高興及歡迎大家今天蒞臨法案委員會的會議，讓我們有機會聽取大家的意見。今年是蛇年，我代表法案委員會恭祝大家生意興隆，事事如意，身體健康。

請大家戴上置於你們前方的耳筒，及一個很細小的麥克風，以方便大家發言，亦方便負責翻譯的同事。大家可以廣東話或英語發言，但為了方便負責翻譯的同事，希望大家在發言的時候，盡可能或利用英語或只用廣東話，使到負責翻譯的同事較為方便。

今天我們邀請了8個團體出席，向我們提出意見。除了這8個團體出席外，我們亦接獲其他團體提交的5份意見書。我們會將所有的意見書上載法案委員會的網頁。如果大家希望瞭解其他團體的意見，亦可於該網頁上瀏覽。如果在座的團體尚未提交有關意見書的電腦檔案文本，亦歡迎大家向立法會的同事提交，以方便我們上載網站。

我們今天的發言大致分為兩部分，第一部分是由各團體輪流發言，大約以10分鐘為基礎。委員會聽取這8個團體的意見後，便會讓立法會的同事向大家發問。如果你們在發言完畢後有事情要辦，當然可以自由離場。但如果你們有空，最好能留下，給予我們的同事發問的機會。

政府也曾承諾在今天第一部分及第二部分完畢後作出簡單及初步的回應。如果大家有興趣知道政府對大家所提出意見的看法及初步回應，亦歡迎大家留下。

為我們發言的第一個團體是香港會計師公會。請問由誰來發言呢？孫先生。

Mr. David SUN, Vice President of Hong Kong Society of Accountants：

Thank you, Chairman. Thank you for this opportunity to present the views of the Society to the Bills Committee. Good morning, Ladies and Gentlemen.

We have written to the Bills Committee last month and provided our written comments on the Blue Bill. Let me take this opportunity to highlight a few salient points that affect the accounting profession, which includes our members in the public practice of auditing, receivership and liquidations, and also those in private industry.

Our comments revolve around 3 points. The first one is in relation to the requirement to produce audit working papers in order to facilitate a preliminary enquiry into a listed corporation. We recognize the need of the SFC to conduct preliminary enquiries into listed corporations, and to review certain documents of a listed corporation when it appears to the SFC that there is fraud or other misconduct. We believe that our profession has an excellent track record in promoting better corporate governance in Hong Kong, and in working with regulators in improving the integrity of our financial market. However, the proposed power requiring auditors to produce audit working papers has been a matter of concern to our profession.

The concerns of the profession can be categorized into 3 areas:

First, the audit working papers are the property of the auditors and contain documentation of the audit work performed and the conclusions reached. Quite often working papers contain, among other things, financial information of the clients' companies that is considered sensitive and confidential in nature, for a variety of reasons. Some information may directly or indirectly affect the company's competitiveness. Other information may be sensitive and affects individuals' privacy. For these reasons, auditors are under a contractual duty to keep the information obtained during the course of the audit confidential. Additionally, in order for audits to be performed effectively and efficiently, there is a need for auditors to establish a level of trust with our clients, so that information divulged to us during the course of the audit would be guarded with great care. This need is

generally acknowledged and accepted in all major international financial centres, and any erosion of confidentiality has always caused great anxiety on the part of the accounting profession as well as the businesses affected. It is important therefore that sufficient safeguards are installed to prevent any abuse of power and any requirements to compel auditors to turn over client's confidential information are framed with caution and restraint. We are comforted by the Administration assurances that the proposed enquiry power is not intended for fishing expeditions.

Secondly, the potentially significant amount of time and cost involved in entertaining the request to produce audit working papers and respond to enquiries of regulators should not be underestimated. Most of these costs may not be recoverable from the company under investigation and will have to either be absorbed by the auditor or be spread. This is also an additional element that if the enquiry and request is made during the course of the audit of the listed company, there is a possibility that the ongoing work will be disrupted and possibly delayed.

Lastly, we are also dismayed by the level of penalty, especially the criminal one, for the mere refusal or retardation to produce the required audit working papers, even though the Administration has provided some assurances in our discussions with their representatives that penalty would only be triggered as a last resort and without just cause. As auditors are not a party to the investigation, but merely providing assistance to the regulators, the penalty should be lighter than those imposed.

In spite of the concerns I just mentioned, we are prepared to work with the SFC in developing guidelines for our members on the basis that request to produce audit working papers and respond to SFC's enquiries will only proceed with the knowledge of the auditor's client.

The second point I want to make with respect to the Bill is in relation to the clause on protecting auditors who choose to report suspected fraud. We appreciate

Administration's effort in working with our profession by taking into account our earlier comments and have been working with us since then. We welcome the assurance given by the Administration for the choice to report is entirely voluntary and the Bill does not impose any duty for the auditor to report suspected fraud.

Lastly, the point under preparation of subsidiary legislation. We note that in the Legislative Council brief prepared by the Financial Services Bureau in November last year, there will be nearly 70 sets of rules, codes and guidelines to be made under the Bill and a number of the Administration's responses to the specific comments on the White Bill referred to these rules and they are to be drafted in the next few months. While we are unclear about the legislative timetable of the Bill, we are of the view that the Bill should not be passed into law until these rules are drafted and exposed for consultation.

Finally, we appreciate this opportunity to present our views to the Committee and my colleagues and I are pleased to answer any questions later on.

Thank you, Chairman.

主席：

多謝。香港會計師公會還有需要補充嗎？

第二位為我們發言的代表是張仁良教授。

香港城市大學經濟及金融學系講座教授張仁良教授：

多謝，主席。當今國際金融市場發展得相當迅速，交易工具及方式日益更新，要想保持及鞏固香港的國際金融中心地位，令香港擁有開放、高透明度、公平及高效益的證券及期貨市場，新制定的《證券及期貨條例草案》顯得十分有意義。新的體制必須致力提高監管水準，具有預期及回

應市場急速變化的靈活性，並力求在保護投資者及促進市場發展之間達致平衡。

眾口難調，希望使條草案既能滿足大部分市場人士的需要，亦無損新規定或新制度的整體成效，在制定的時候，便要考慮多方面的要求。我在以下會提出數個看法：第一，是建立健全的公司管治架構。我已設一個示例，投資者如果將資金投資於公司，即購買上市公司發行的股票，由該公司的管理者進行經營，管理者最重要的目標是實現股東的利益最大化，即“maximize shareholder's wealth”。他們應盡他們最大的努力，為股東賺取金錢。但在一些情況下，該公司可能會虧蝕，其中有兩個最主要的原因。第一是管理者決策失誤，作出wrong business decision，造成公司運作不良、投資損失及利潤減少。第二是管理者喪失職業道德、中飽私囊，騙取股東的錢財。

出現這兩種情況的原因雖然不同，但結果卻相同，即造成股東在利益上的損失。當股東沒有獲得應有的投資回報，而希望歸根究底地找出原因，決定是管理者的失誤或是管理者騙財時，有時會是頗為棘手的問題，因為這兩者頗難區分，亦頗難鑒別。在這種情況下，健全及良好的公司管治架構便顯得十分重要。

接下來我希望提出，事實上很多國際組職，例如OECD等已着手研究公司管治的guidelines。OECD已於1999年5月通過一系列的公司管治原則。我有數項意見：第一是應該強化教育。在這方面，教育的對象是指一般的投資者及公司的董事。就對投資者的教育而言，我們可透過一些課程培訓，教導他們如何分析公司企業的年報或財務報表等信息資料，以及提高投資者的專業分析能力和自我保護能力。同時亦培養投資者的自我保護意識，以及他們作為股東的權利。就對公司董事的教育而言，我們可透過培訓方式，使他們能瞭解本身的權利和義務。

對於新上市公司的董事，當局可否實施董事發牌制度，使他們必

須透過不同形式獲取資格，或需修讀課程，或先要認清本身的權益及責任，才可成為董事?在公司上市後，當局可否要求董事定期接受培訓，使他們每年可繼續獲得發牌。如有任何問題，監管者可以不發予牌照，使他們不能繼續成為公司董事。

第二項意見是提高獨立董事的獨立性。自1995年開始，當局規定每間上市公司必須最少有兩名獨立的非執行董事，目的是加強對執行董事的監管。到目前為止，這個規定具有一定的效用。但我們可以察覺到很多獨立董事及董事局的執行董事，也可能與該公司的股東有些群帶關係，使這些獨立董事的獨立性受到質疑。大家也能看到一些例子，就是一位人士身兼多間公司的獨立董事職務。問題在於他們可花多少時間在其中一間公司上，以瞭解該公司的業務呢？

為盡量避免出現上述的情況，公司可將獨立董事的出席紀錄及投票情況載於公司的年報。投票情況並不是指投“Yes”or“No”，而最重要是載列他們有沒有參與投票，以便投資者對這些獨立董事進行評估及審核。另外，就非專業的獨立董事，上市公司應提供必要的培訓，使他們能更瞭解這間上市公司的情況。

第三是重視整個亞太區的監管合作。整個亞太區在監管上的合作，可加強單一地區的監管。我認為，如果有某些公司的董事在某些國家犯錯，整個區內的監管者可考慮會否不再容許他在區內任何一個經濟體系執行董事的職責。這是有關懲罰的提議。

第四，是加強法律建設及執法的監管。我認為，如果監管者在法律上沒有權力，便很難成為好的監管者。當然，如果他們擁有太大權力，當局必須制訂適當的監管制度，使他們不致權力過大。

上述四點是我對上市公司管治的意見。對於Bill，我尚有另外三項意見。第二，是避免市場的監管過於嚴格。作為良好的市場監管機構，最

重要是充分保障投資者的權益，並且確保市場的公平運作及信息具有高的透明度。但另一方面，又要避免出現過分監管的情況。因為如果監管過於嚴格，雖然投資者的利益會受到很大程度的保障，但卻會限制了上市公司管理者的權力。這便會造成管理者為了避免承擔這些責任，而不作具有風險但可能會帶來很高盈利的投資決定，而會採取低風險而會產生利潤的投資策略。這些情況會導致上市公司的發展步伐緩慢和業績下降，以致降低市場的活躍性。

第三，是確保投資者的信息溝通。據我的意見，金融市場主要由三個基本單元構成：投資者、證券商及監管機構。監管機構制定條例草案的主要目的，是保障投資者的利益。但要達致這個目標會有一定的困難，因為小投資者比較分散，使監管者頗難獲得投資者的信息，即頗難知道一般小投資者對這條條例草案有何意見。即使小投資者有甚麼不滿，亦未必會向監管者提出。缺乏這些小投資者對市場滿意程度的數據，監管者便不能準確地判斷投資者的需求，因而難以制訂真正可以保障投資者利益的法規。

倒過來說，由於證券商較具規模，以及他們比較集中，他們的信息比較容易達至監管者。由於證券商有數個不同的團體代表，他們往往把他們對市場的要求和本身的利益納入政策及法規的制定中。所以，為確保這些條例草案能達致保護投資者利益的作用，監管者須增加與小投資者的溝通，從多方面收集小投資者的信息，籍以瞭解投資者的需要。

第四，我想提出而市場上亦有些人提到，因為銀行和證券商的業務可能會有所重疊，在監管上可能會出現重疊的情況。香港現時實際上有數間銀行可以向投資者提供買賣證券的服務，這無形中對傳統的證券投資公司會構成威脅，因為這些銀行會帶來頗激烈的競爭。為了加速市場的發展，銀行的監管機構是金融管理局，而傳統證券投資公司的監管機構是證監會。在監管證券行業上，事實上證監會已具有豐富的經驗及完善的監管制度，並在不斷改善中。而金融管理局在監管證券業務的經驗方面，可能

不及證監會那麼豐富，還有待改善及須提高監管的方針。

據我的看法，現在金管局在監管銀行方面通常比較嚴格。而在實際經驗上，銀行擠提的情況，或銀行因證券業務經營不善而被拖垮的情況也不多。但我們可以觀察到，在於過去數年，證券機構或證券行出現問題的例子也頗多。

所以從這個很簡單的比較，雖然這可能並非一個很好的比較，亦可以顯示出實際上金管局監管這些證券行業的水平也不低。所以到現時為止，在我看來，在監管銀行從事證券行業的過程中出現問題的可能性並不高。

由此看來，銀行從事證券投資行業利多於弊。他們的參與亦會增加市場的競爭及加速整個證券行業的發展。所以，我認為新制訂的條例草案亦可鼓勵銀行從事多些證券買賣服務，以就發展證券行業，即金融服務行業方面，提供一些便利的條件。

多謝主席。

主席：

多謝張博士。接下來發言的是郎咸平博士。

Dr. Larry H P LANG, Chair Professor of Finance, Department of Finance, Faculty of Business Administration, The Chinese University of Hong Kong：

Good morning, everybody. I am an independent professor. Why am I here for? Which party am I representing? I would like to give an answer later. Before I go into further on my argument, I want to raise a question. I see all the interested parties here and their represented lawyers. I am pleased to see that. Why? Because it is a democratic

system. All the interested parties should have representation here to present their views to public. Having thought about paradox, what is the objective of this Bill?

The primary objective of this Bill is to create an orderly market to protect minority shareholders. Have we given a second thought? Do they have any representation in this room? I have to say "no". Why not? Because they have no time, no money. Who are the minority shareholders? My parents, my sisters and my friends. But they have no time, no money; therefore under this democratic system, they have no voice. Anything wrong with our legal system that creates this paradox? I have to say "Yes". What is the problem of our legal system in Hong Kong?

I would like to raise 3 points in comparison with the US system :

1. There is no class action suit.
2. There is no contingent payment.
3. There is no default rule.

These are legal jargons. I would like to explain it using layman's language. Each shareholder can only represent himself. He is too small. You expect this person to read several hundred pages of Blue Bill. He has to struggle for life. He can only make like $10,000 a month at most. Why? – Because this is no class action. We cannot combine it together into one huge entity. That is the reason why they have no representation in this room.

Second, if they ask me to represent them; they have to pay me. In Hong Kong, there is no contingent payment system. You have to pay your representatives by hours. They are not in a single entity. They cannot afford it. In the U.S., there is no default rule. Each party pays for their own expense, as all the lawyers usually know that. It is not the case in Hong Kong. You have so many different kinds of fees as Court fee. It is very expensive. Therefore, this system creates a paradox.

The objective of the Bill is to protect shareholders and there is no representation from minority shareholders. Since they cannot pay, there must be somebody who is neutral enough to come here to say something for them. That person is me. Even though nobody hires me, I would like to say I want to represent their interests, to present our view on this Bill.

From the protection of minority shareholders, I want to give a comment on this Bill. From my point of view, the key to the protection lies on 3 facts :

1. The proof of intent should be replaced by other things, say substantial evidence or other things.
2. The burden of going forward with evidence should be on the defendant.
3. The Securities and Futures Commission (SFC) should be further empowered by law as the US Securities and Exchange Commission to compel evidence.

I would like to talk about the procedures for the following 5 sequences. What I am trying to say is the following :

1. The burden of proof is of course on prosecution. However, when prosecutions identify a wrong doing, they don't have to prove intent because it is virtually impossible to prove. Fact and substantial evidence should be enough.
2. The SFC should have the power to initiate a hearing. Then the burden of going forward with evidence should be transferred to the defendant, who has to prove innocence to the SFC.
3. Investigations done by the US Securities and Exchange Commission are protected by the US Constitution. Therefore, I would like to suggest that the SFC should be also protected by law to compel evidence being

provided.

4. The SFC should be able to prosecute civil suits, but not criminal suits. For the civil suits, the burden between the defendant and the plaintiff should be fifty-fifty. In the criminal suits, the burden on prosecution should be around, say, 90%.

5. That is the most important part I want to raise here. I prefer to incorporate the following clause into the Blue Bill. The first one is no default rule. The second one is class action suit; and the third one is contingent payment.

As a professor, I may be biased; I may be wrong. But my conscience and my patience, I know, this ought to be the key to success in protecting minority shareholders. In doing finance, a lot of people have taken the course like this. We always like to predict the future. We want to know what the future stock price and the future inflation rate is. Therefore, I want to predict the future success in protecting minority shareholders. Unfortunately, I feel that I am one of the very few people that can voice specifically for minority shareholders. I do not expect my voice to be heard by most people because I also have other things to do.

Toward the end, I believe the Bill will be ultimately drafted by interested parties because we have no strong representation from minority shareholders. Can we fulfill our primary objective as to have an orderly market to protect minority shareholders？ My answer is "no" and pessimistic. I know toward the end, the Bill will balance the benefits of interested parties.

Thank you.

主席：

多謝。接着為我們發言的是香港銀行公會的代表王先生。

Mr. Peter WONG, Chairman, Hong Kong Association of Banks：

Mr. Chairman and Honourable LegCo Members, I am Peter Wong. I am the Chairman of the Hong Kong Association of Banks (HKAB). I am accompanied by David WAN, the Association Secretary and Mark Harvey of Linklaters, who is our legal advisor. We are here to represent the Hong Kong Association of Banks.

I would first like to thank you for giving Hong Kong Association of Banks this opportunity to present to you the views of its membership in respect of Securities and Future Bill and the Banking (Amendment) Bill.

The HKAB strongly supports the government objective of seeking to modernize the regulatory regime of the securities and futures industry in Hong Kong to maintain the competitiveness of Hong Kong as a major international financial centre. Inevitably, with draft legislation of the length and complexity of the Security and Futures Bill and the Banking (Amendment) Bill, the HKAB has a number of comments. However, the HKAB would like to emphasize its support for the overall framework created by the draft legislation.

I hope you have an opportunity to review the written submission from the HKAB dated 22 January 2001. You have noted that the written submission comments upon some broad conceptual issues and also makes some detailed drafting suggestions. Given the limited time available today, I do not intend to reiterate in much of the details contained in the written submission. Rather I intend to focus on the issue of fundamental importance to the Hong Kong banking industry. That is the framework for regulation of authorized institutions conducting securities and futures business in Hong Kong. Notwithstanding the focus of this presentation, I hope you will appreciate the time and effort that has been invested in the written submission and I trust that it will be given careful consideration.

The draft legislation permits authorized institutions to conduct regulated activities

as exempt persons. Subsidiaries of authorized institutions, many of which currently with exempt dealers status, will need to become licensed by the SFC to continue to conduct investment related activities after the Bill is enacted. This is accepted by the HKAB.

In the case of authorized institutions, HKAB welcomes the fact that the Bill will enable them to continue conducting investment related business as exempt persons, with the HKMA acting as their front-line regulator. However, since a number of concerns have been raised on this before the Bills Committee and the press, I thought that it would be useful to comment further on this aspect.

It is entirely appropriate that the principle front line regulator of Hong Kong banking industry should be the HK Monetary Authority (HKMA). The HKMA has the most detailed knowledge of the authorized institutions as a consequence of being responsible for the consolidated supervision of the entirety of our businesses. Basically, the HKMA knows the banks and our industry best. Consequently, it must be the case that the statutory and regulatory framework within which the banking sector should operate and is administered by HKMA rather than by the SFC. The discontinuance of the exempt status would inevitably result in significant regulatory overlap between the HKMA and the SFC. In turn, that would result in duplication of course for the banks and the regulators and can only lead to confusion. Such confusion could result in loss of customer confidence. The "exempt person" label is something of a misnomer. The regulatory framework currently envisaged in the draft Bill will, in my view, ensure that the regulation of the investment related activities of authorized institution is at least equivalent to that applying to licensed corporations.

Exempt authorized institutions in conducting their securities related activities are already required by the HKMA to comply with the code of conduct and internal control guidelines issued by the SFC. Further, exempt authorized institutions are already subject to the supervision of the HKMA to ensure that their business conduct is of a comparable standard to that of broking industry. Under the Bill, the degree of regulation of exempt authorized institutions will be enhanced in the following ways :

Exempt authorized institutions will have to apply to the SFC for exempt status, and to qualify for such status, would have to meet the same fit and proper criteria as brokers. Individuals involved in the investment related business of exempt authorized institutions will have to be individually registered on a new register to be maintained by the HKMA. Authorized institutions will be required to ensure that all such staff are properly trained and are fit and proper for their particular type of business in which they are engaged. Such arrangements will ensure that only properly qualified staff conducts securities business on behalf of the authorized institutions.

The new rules, codes and guidelines to be issued by the SFC will accept and clearly define areas such as financial resources applied directly to exempt authorized institutions. Exempt authorized institutions will need to appoint executive officers to be approved by the HKMA to supervise the investment related activities. This mirrors an equivalent requirement for brokers under the Bill and it is in addition to the existing requirement that the directors, controllers and chief executives of authorized institutions should be approved by the HKMA. In the event of misconduct, exempt authorized institutions status may be revoked or suspended by the SFC, or the HKMA may issue public or private reprimands or withdraw executive officers status. I hope I have demonstrated how the rules and guidelines applying to exempt authorized institutions would be such as stringent as those applying to the licensed corporations.

It has been argued that authorized institutions enjoy a competitive advantage because they can conduct investment related business through they branch network. From the outset, it is essential to note that as I hope I have already demonstrated even if such advantage did exist and I do not believe that it does, then it is not a function of any differences in the regulatory framework that applies to banks and brokers. Authorized institutions have to satisfy very stringent requirements regarding capital, liquidity, internal controls and the like in conducting their daily operations. Individual branches of authorized institutions must be approved by the HKMA under the Banking Ordinance and the ability of a bank to open and

operate through new branches is subject to significant constraints. Subject to similar issues as to system and control, brokers are also free to open branches.

It has also been suggested that the licensing fee structure in the banking and securities industries favours the banks. Once again, I do not accept this proposition. Under the Banking Ordinance, authorized institutions already have to pay an annual fee for maintaining their licence as well as an annual fee for each branch in addition. Exempt person under the new Ordinance will be subject to further annual fee.

Mr. Chairman and Honourable LegCo Members, thank you for giving me this opportunity to address to you on certain concerns of the Hong Kong banking community. As I said at the outset of my presentation, our written submission covers a number of further issues and specific drafting comments. I would commend it to you.

Finally, I would like to reiterate the support of the HKAB for the Government in seeking to ensure that Hong Kong maintains in the vanguard of the World's financial market. We would be pleased to answer any question that you may have.

Thank you.

主席：

多謝。接着是Linklaters & Alliance，請問由誰來發言呢？Pauline。

Ms Pauline ASHALL, Partner, Linklaters：

I am very grateful for the opportunity to make comments to the Bills Committee. We also want to emphasize that on the outset we very much support the objectives of the Hong Kong Government in bringing this Bill forward, to achieve a user-friendly legal and regulatory framework for a fair, orderly and transparent financial market in Hong Kong and to

support Hong Kong's competitive position as an international financial center.

We have made comments on the earlier consultation draft of the Bill and having such a consultation process has been extremely useful and resulted in a constructive dialogue with the Financial Services Bureau and the SFC. We acknowledge that some helpful improvements have been made in the Blue Bill as compared to the earlier consultation draft. However we believe the Bill still needs further refinements in a number of areas in the interest of achieving the Bill's objectives as a whole.

Our comments are set out in a detailed written submission and highlighted in the Executive Summary, which you should have both in English and in Chinese. In view of time constraints, I am not going to attempt to summarize all the points made in our submission. However, I want to spend a few minutes discussing the provisions of the Bill in two areas:

1. Market misconduct and misrepresentations; and
2. Disclosure of interests in shares.

The group of financial institutions I represent wholeheartedly support the view that a successful financial market needs to be fair and open, and to provide protection to investors against market malpractices. And we agree that appropriate measures to achieve this should be in the legislation. However we also believe that it is essential that the law does not disparage the conduct of legitimate market activities in Hong Kong by creating the risk of serious legal and regulatory consequences for such activities.

The first issue I want to touch on in relation to the market misconduct provisions relates to the burden of proof. It has been suggested that in recent press coverage and earlier this morning that the Government should not have shifted the burden of proof from the defense to the prosecution and that the Bill is contrary to practice in other markets such as the United States of America. However we do not accept first that the changes to the Bill go as far as being suggested or that what needs to be established by the prosecution goes beyond

what is required in most other countries.

There are quite a number of market misconduct provisions in the Bill and you need to look effectively at each of those separately to establish what are the elements of the offence and where does the burden of proof lie. The Bill does contain a number of market misconduct provisions imposing strict liability, where the prosecution only has to prove that the defendant did something and not that they had any particular intention. This applies for example to "wash" trades, trades not involving a change in beneficiary ownership - placing matching purchase and sale orders in the market at the same time.

Strict liability also applies to offences relating to disclosure of information about prohibited transactions and offence relating to false representation of futures contracts. In some of these cases, but not others, a defense may be available but this is up to the defendant to prove. In relation to insiders dealing, which will become a criminal offence under the Bill, the prosecution must prove that the defendant knew that he had inside information at the time he dealt but unlike for example the current position in Singapore, the prosecution need not prove intent to use the information to make a profit or avoid a loss. Instead, under the existing law and under the Bill, it is up to the defense to establish that it was not the defendant's purpose to make profit or avoid loss by the use of the information.

In relation to certain other types of transactions, it is true that conduct will only amount to market misconduct under the Bill if carried out with intention, or reckless as to whether the transaction would manipulate the market. It is only one of the categories that requires intention. Most of the other categories refer to intention or recklessness. I believe that in these situations it will always, even under the previous version of the Bill, meant to be the case that the burden of proof would be on the prosecution. And only a very minor drafting change has been made in the Blue Bill.

In our view, if the burden of proof did not fall on the prosecution in these cases, every large transaction that had an impact on the market would be illegal unless the relevant

person could prove the contrary. In our view this would be objectionable and would be contrary to the position in other markets such as the US. There has been a lot of discussion about the US but I think it is clear that to establish a violation of the anti-manipulation provisions in the US legislation, the Securities Exchange Act, the prosecution must prove that the defendant acted for the purpose of manipulating the market. And in the case of the more general anti-fraud provisions in that legislation, the prosecution must prove *Si Ante* intention or recklessness.

The only significant change in the Blue Bill as regards to the burden of proof relates to misrepresentations, the prosecution must now prove that the misrepresentation was made knowingly, recklessly or negligently rather than the burden being on the defendant to prove that they were not negligent. This change in the burden of proof is to be welcomed. However, as a second point on market misconduct, we are still troubled by the fact that negligent misrepresentations are treated as market misconduct attracting serious criminal penalties. Creating criminal liability for inadvertent mistakes, even if they were negligent mistakes, goes against the position in the US, in the UK, and as far as we are aware, most other international markets.

Thirdly, on market misconduct, we still have some issues over the scope of the drafting. Some of the categories are very widely drafted and they would prohibit, for example, transactions that create an artificial price in the market. The meaning of this is quite unclear, and we are concerned that it will create doubts before a transaction is carried out as to whether if it should move the market price, the SFC would subsequently treat it as being market misconduct. It would be difficult for lawyers to advise their clients or for market participants to know in advance of a transaction whether it is likely to be questioned by the regulator. And if no changes are made to the bill in this area, we believe that guidance from the SFC and the creation of safe harbours for accepted market practices, such as hedging and arbitrage, will be essential.

Finally, we accept that investors who suffer loss from market misconduct or

misrepresentations should have a right of action. However the Bill contains several different rights of action for investors. Some of these are in our view unduly wide in their scope and could potentially encourage notorious lawsuits. And again we believe that some drafting refinements are needed and we have made proposals in this respect to the FSB and the SFC.

Turning quickly to the topic of disclosure of interests in shares, Part XV of the Bill greatly expands the scope of the current disclosure requirements. We do see that the disclosure threshold to an interest of 5 per cent or more of a company shares is in line with international practice and we have no problems with this. However the Bill goes well beyond international practice by treating as a disclosable interest positions in cash-settled derivatives and certain other interests that give the holder of that interest absolutely no control over any shares in the company. The Bill will also require separate disclosure of any short positions and disclosure of any changes in the nature of a person's interest even though the economic interest does not itself change. And the combined effect of all these changes is that the new disclosure requirements are immensely complex and they may apply quite extensively because the definition, the new definition of "an interest", is so wide that someone could easily be deemed to have a 5 per cent interest even though his actual stake in the company's shares is much smaller than 5 per cent. We believe there will be real practical difficulties in complying with the new requirements, however many resources are devoted to this; yet any errors or delays in compliance, even if inadvertent, are a criminal offence.

We believe that extending disclosure to cash-settled positions and to short positions, and requiring disclosure of the nature of a person's interest is unduly burdensome. To the extent that the regulators need information on these matters, they already have extensive powers to make inquiries, and in our view a blanket obligation of disclosure by any substantial shareholder is unnecessary.

Thank you and we would be happy to answer any questions on these remarks or on our submission later.

主席：

Thank you。接着是香港律師會的代表發言。

Ms Pauline ASHALL, Chairman of the Law Society's Securities Law Committee, The Law Society of Hong Kong：

Chairman, I am also the Chairman of the Securities Law Committee of the Law Society. As you have already just heard from me, I will not bore you again. I will hand over to Peter BRIEN, who is a member of the Law Society's Securities Law Committee, to give the comments of the Securities Law Committee. I just want to make a couple of brief introductory remarks.

I have noted on the submission that the Committee has put forward that we are very supportive of the objective of the Bill. Modernization and reform of the existing securities and features of the legislation, we believe, is of vital importance to the development of the financial markets in Hong Kong, and for the protection of investors against market malpractices. With that draft legislation of the size and complexity of the Bill, it is not surprising that very many comments have been made on it by the legal community and others. Again, the Securities Law Committee has already made submissions on the draft consultation Bill, and welcomes the changes to be made in light of that consultation process.

In going through the remarks, we are going to highlight a number of issues that are set out in our submission on the Bill. That submission is focused on the Bill itself. I think some of the remarks that were made earlier this morning, about class actions and so forth, go well beyond the actual scope of the Securities and Features Bill, and we are not really going to comment on those remarks, except perhaps to say that going over to the US-style legal system might be very good news for the lawyers, but perhaps not everyone in Hong Kong would regard that as an unmixed blessing. I will hand over to Peter.

Mr Peter BRIEN, Member of the Law Society's Securities Law Committee :

Thank you. We are grateful for the opportunity to raise some of the key points that we made in our submission. The first point relates to the additional rule-making powers or the SFC, which are now contained in the Bill. We entirely accept that financial markets regulators need to have wide rule-making powers to provide flexibility to deal with market developments. What is unusual about the Bill is that the SFC is given broad powers to create rules, a breach of which is a criminal offence, punishable with fines and imprisonment. We are not suggesting we believe the SFC would abuse such powers. Nevertheless, as a matter of principle we question the appropriateness of a regulatory body effectively having the power to create serious criminal offences.

Turning to the market misconduct provisions of the Bill, a subject on which a great deal has already been said today, from the point of view of the Securities Law Committee, we just have a few points to add. The provisions in Parts XIII and XIV of the Bill are complex and extensive. We feel you must look separately at each category of misconduct addressed in the Bill, to determine where the appropriate balance lies as between the matters that must be proved by the prosecution and the defences or safe harbours that may be available to the defence. In our view, this legislation does not lend itself to broad generalizations about whether the burden of proof should fall on the prosecution or the defence. We think that the Bill largely achieves the right balance, but we have raised a number of points on some of the sections in Parts XIII and XIV, in our submission. Some of these include the following: in relation to the Insider Dealing rules, while we support strengthening the existing law by making insider dealing a criminal offence, we believe that some additional safe harbours may be justified because of the change. In example, if a substantial shareholder in a company is planning to buy or sell a stock, it seems that knowledge of the proposed transaction could technically be insider information, even though the substantial shareholder does not have any other inside information. There is an express safe harbour in the law in the UK covering this situation, and we understand a similar exemption is being proposed in Singapore.

Secondly, another comment on Parts XIII and XIV, related to the general position on misrepresentations: under the laws of Hong Kong and of most other countries, the general position is that misrepresentations only attract criminal liability if made intentionally or recklessly. The Bill would make any negligent misrepresentation a criminal offence if it was likely to induce financial transactions or to affect market prices. This, in our view, goes too far. We believe it should be limited to misrepresentations made intentionally or recklessly, and which are made for the purpose of inducing transactions or affecting market prices, or if the person was reckless as to whether or not the misrepresentation would have such effect.

In relation to offers of investments, our submission makes a number of comments on Part IV of the Bill, relating to the offers of investments procedures. In particular, the current safe harbour for marketing to professionals appears to have been made narrower in the Bill, because of a new definition of "professional investor". We have suggested that the old concept of "market professional" and the new definition be combined to create a broader category of persons to whom investments can be freely marketed. As a general point, the Bill leaves the existing law as set out in the Protection of Investors Ordinance largely intact. Central to the provisions of that ordinance is the question as to when marketing activities amount to marketing to the public and we question if there is an opportunity to review this area of law at the same time.

In relation to the investigations, the SFC has wide powers under the Bill, to make investigations and require the production of information. In relation to SFC inquiries and investigations the Bill explicitly extends the secrecy provisions relating to such inquiries, and extends them to those people who are the subjects of the inquiry, and their advisers. This is achieved through a new list of persons in the Bill who are to be regarded as assisting the regulator in the performance of its functions.

In our submission, we have noted that these secrecy provisions can cause practical problems. We consider that the breadth and effect of section 366 of the Bill require careful

consideration, particularly in relation to the blanket secrecy provisions applying to this newly defined group, without any apparent exemptions.

Finally we deal with disclosure of interests. We welcome the changes that have been made to the disclosure of interest part of the Bill. This improves the navigation of the reader through this complex legislation. However this part of the Bill is still difficult and complex for any reader. In addition, the extension of the legislation to cash-settled derivatives and short positions has increased the complexity of the legislation. Our submission has detailed a number of points of drafting and interpretation which we are happy to discuss upon request.

In addition to these detailed points, our submission has noted whether the exemption for stock borrowing and lending activities is wide enough. This exemption is limited to those who are a qualified stock borrower and lender. There is an active stock lending and borrowing market in Hong Kong, which is conducted by many securities market participants who may well not fall within this new exemption as drafted; and they therefore will be subject to additional disclosure obligations, to which they were not subject before.

We also noted in our submission that there is a broad policy question of extending the disclosure obligations to cash-settled derivatives, a subject on which you have already heard. These are the key areas of our submission, and we thank you for allowing us to highlight some of them to you. We welcome the opportunity to answer questions later.

主席：

多謝。下一個團體是香港證券經紀業協會有限公司。

香港證券經紀業協會有限公司主席范佐浩先生：

主席，香港證券經紀業協會代表我們的同業在較早前的White Bill

中，也跟當局作了很多溝通，也非常高興看見藍紙條例草案作出修改，使有關人士無須就在多方面的實際業務操作上作出的失誤或疏忽，負上刑事責任。

證券同業亦非常同意政府需要制定適當的監管制度，保障投資者的利益，因為實際上投資者的利益與證券商的利益是相同的。絕大部分的證券商也希望他們的客戶能在投資方面獲得利益，使他們的業務得以維持及發展。所以證券商與投資大眾的利益是完全相同的。

我們亦已向大家提供意見書的英文本。由於今天的時間短促，不能詳細解釋有關細節，因為在條例草案的17個分部中，除了一些有關上市公司的部分與證券同業的日常操作無關外，絕大部分也與我們的日常業務有關。我們會在日後的會議席上，就每分部的內容向大家發表詳細的意見。

今天我們主要希望提出三個原則性的問題：第一，證券同業希望這條條例草案能提供公平競爭及統一監管的環境，因為現時除了剛才王先生代表銀行界提出有關exempt status的問題外，證券同業也能看見市場上有些並非交易所的參與者以大型廣告宣傳其他網上的買賣。這也會令某些投資者不清晰究竟市場上哪一類買賣得到適當的保障，特別是賠償基金。

我們並非因銀行處於競爭優勢而妒忌，我們承認這已是事實。我們除了加強服務，提高本身經營的質素，以應付這個挑戰外，亦希望這條條例草案能提供公平競爭及統一監管的環境。所有同業希望能爭取到的，是大家處於相同的競爭環境。在現階段，我們所觀察到的不同之處，是有關登記註冊及財政資源方面，甚至所有經紀也要跟銀行合作。在利益上或其他業務上或許會有衝突。所以我們在submission中提出了一個較小建議，在這情況下，銀行可否成立一個獨立的法定機構，以專營證券業務，並獲得相同的監管，這是否可行呢？這是我們在submission中提出的其中一項建議。

另一個原則性的問題是，我們同意證監會作為監管機構，需要很大的權力才可扮演監管的角色，但也需要適當的制衡，使監管不會窒礙市場的發展。舉例來說，過往就期貨外匯交易的新監管制度，已使期貨公司在香港絕跡，可能已遷往別的地方繼續經營。所以我們希望當局能取得平衡，在監管之餘亦不會窒礙市場的發展，特別是根據這條條例草案，證監會可透過立法或立例，行使執行、審查，甚至檢控的權力，甚至在某些情況下可作出判決，以及罰款1,000萬元，也可說是提供"一條龍"的服務，獨力負責所有工作。

同業雖然有上訴的渠道，白紙條例草案訂有57項可予上訴的事項，藍紙條例草案增加至64項。但除了這64項外，如果我們對有關事項有不同意的地方，已經沒有上訴的途徑，我覺得在制衡方面，應該給予同業多些上訴的機會。

最後，我剛才談及的，是關乎我們和所有普羅投資者利益的問題，我們亦很痛心投資者因投資無辜受損。條例草案訂有關於做市的條文，即section 291。該條說明若有人意圖買入股份，並進行超過兩宗交易，而希望令價格上升，或希望投資者不要沽售或多些投資者會買入有關股份，便會構成做市的意圖，亦要負上刑事責任。同樣地，若該人已沽出有關證券，並已進行兩宗交易，希望價格下跌，或希望多些人會沽售或少些人會買入有關股份，亦會構成刑事責任。

如果細心閱讀這項條文，便會發現這是很廣泛的定義，廣泛的程度可使幾乎所有進行買賣的人都很容易掉進這個陷阱，儘管他們沒有能力做市。因為常人的心態是買了股票後，當然希望股市上升，沽出股票後亦會希望股市回跌，待價格下跌後再購入。這是市場上很普遍的心態。若有關定義那麼廣泛，只要再不用prove intention，可能所有進行買賣的人亦須同樣負上刑事責任。

同業面對的，是大眾投資者、上市公司及交易所三方面，特別如

果在市場失當行為方面需要證明自己沒有intention，會令證券經營者及大眾投資者存有介心，因而影響整個行業的發展。

我們今天在這大原則上所提出的便是這三點。第一，有關公平競爭的問題；第二，有關權力制衡的問題；第三，大眾投資者會否太容易觸犯有關市場失當行為的刑事罪行。這三點便是我們今天所提出意見的大綱。希望日後有機會時，可就每點作出補充。正如我剛才所言，因為在條例草案的十多部分中，大部分都跟我們的日常工作有關，我們還會就其他環節作出補充。現時藍紙條例草案已經發表，由證監會發出的rules & guidelines涉及我們日常操作上更具體的情況，我們需要更具體地研究應怎樣遵守及避免違反這些rules。多謝大家。

主席：

接着最後一位是證券商協會有限公司主席陳葆心女士。

證券商協會有限公司主席陳葆心女士：

主席，多謝你給予證券商協會表達意見的機會。這條條例草案是很重要，尤其對我們行業。因為當局已花上數年時間才能完成這兩冊條例草案，諮詢期亦不太長，後來已延長諮詢期。可惜今天容許我們發言的時間亦不是太長。我先作開場白，亦必須長話短說。

我們主要是需要一個公平及公正的環境來營商。至於銀行為何獲得豁免？容許我作少許複述。在1975年之前，銀行不能從事證券業務，經紀需要銀行的服務，所以銀行需要獲得豁免。今天既然大家進行相同業務，我們認為應有相同的監管，使大家能進行公平及公正的競爭。由於商會是分工合作的，大家各自負責不同的事情，然後一同代表商會作出決定，所以以下時間交由我們商會的董事李君豪先生向大家講解。多謝。

主席：

李君豪先生。

證券商協會有限公司董事李君豪先生：

Honourable Members of the Legislative Council, as the last person to speak today, I will try not to waste any of your time in repeating what has already been said or submitted to you earlier, in writing. Instead, I would like to focus on only two very important issues. They are:

1. Level playing field; and
2. Protecting the civil rights and liberties of our citizens.

First, level playing field: we are not against banks getting involved in the securities business. However, we are strongly against the double standard under Part V of the Bill, where financial institutions will be granted exemption status. You have heard the history of why the banks were granted exemption in the past – the securities business was only an ancillary business. You know very well that it is certainly no longer true. In fact banks are moving into the securities business in a very big way.

You have heard that there is no need for duplication of monitoring, because that is already under the supervision of the monetary authority. Then why do banks, who offer the mandatory provident fund services, have to be subject to the MPF Schemes Authority licensing regulations, if it is not in order for them to be on an equal footing with the insurance and securities industry? Why should the securities business be treated differently from MPF?

We are certainly not questioning the financial soundness of the banking industry, nor the capabilities of the monetary authority, but let me ask you, Members of the LegCo, who are not brokers: you no doubt have years of valuable experience in your own fields, yet

how comfortable are you in offering investment services or advice? That is not very comfortable. Then how do you expect a bank employee, who has no prior experience whatsoever in dealing in securities, to properly serve the interests of the investing public? A bank no doubt may be fit and proper, but that does not necessarily mean each and every one of its employees are properly trained to provide investment services. Yet under this double standard, such employees would be allowed to serve the public in the securities business. On the other hand, the same employee, the very same person, would be committing an offence if he or she is working for a securities firm, without first being registered and licensed with the SFC. That same person would have to fulfil continued education requirements, pay annual licensing fees, and be subject to the many rules and regulations under this Bill – of course, all to be waived if you are working for a bank instead, regardless of your previous relevant experience. This is only one example. Do you think this is a level playing field?

All we are asking is that any institutions or persons who wish to participate in the securities business should be governed by the same set of rules and regulations under the relevant authority – in this case the SFC. Similarly, if a large firm like Morgan Stanley ever decided to enter the banking business, it would not be reasonable to ask the monetary authority to grant exemption simply because Morgan Stanley is already being monitored by the SFC, based on the argument of duplication of supervision.

Therefore we ask that you remove the exemption status for banks in the name of fairness and competitiveness. Furthermore, if you believe that this Bill is really for the overall interests of the investing public, then by the same token you should exempt any party from this Bill – in the interests of the investing public.

The second point I wish to emphasize is with regard to the Part XIII of the Bill. We find clauses 245, 246 and 259 to be objectionable. Clause 245(1)(a) allows the FSC to "receive and consider any material by way of oral evidence, written statements, documents or otherwise, even if the material would not be admissible in evidence in civil or criminal proceedings in a court of law". If approved, this will represent a major step backward in our

legal systems towards the protection of civil rights of our citizens. The fact that certain materials will not be admissible as evidence in civil or criminal proceedings in a court of law is to protect the integrity of our civil rights. This clause is totally against the legal system of Hong Kong, and must be deleted.

Under clause 246-Further Powers of Tribunal Concerning Evidence, this whole clause removes an individual's right to remain silent. It forces a person to provide statements for evidence, even if it is self-incriminating. A person who would not self-incriminate himself would be committing an offence under the section, which is subject to a fine and/or imprisonment terms, because it is contrary to the protection of civil liberty of the Hong Kong people, and should not be allowed.

Under clause 259-No Stay of Execution, an innocent appellant would not have the right of a stay of execution despite the fact that he may have been wrongly accused in the first place. It is grossly unfair, especially in a case where business may have to be terminated as a result of a decision by the Tribunal. Even though such decision may be wrong and later overturned by the Court of Appeal, the damage done would be irreversible. We suggest that the Court of Appeal should be given the power to grant a stay of execution if it deems appropriate.

Honourable Members of the LegCo, I think we need to put things under proper perspective. We are not dealing with hard-core murderers or drugs criminals here. We are dealing in most cases with legitimate business and professional people who are the roots and foundations of the financial centre of Hong Kong. Is such power being requested, which is far beyond those of the Police, the ICAC and even Interpol, really necessary? Especially when you take into account that some of the most serious offences are not even considered to be an offence under a different jurisdiction.

For example, market making under Part XIV is a serious offence under this Bill, whereas in the United States it is not only common practice, but in most cases, a requirement

for listing the market makers, to maintain price stability and volume. Even within Hong Kong, you have heard earlier, the same offence under this Bill is not an offence if you are exempted. We are not against regulation. We are for regulation. But to over-regulate to the point of stifling our industry is an entirely different matter. Therefore we respectfully request that clauses 245 and 246 and other similar clauses throughout the Bill be removed, as well as the many other valid points raised today and submitted earlier by other parties be seriously considered by Members of LegCo. The future of Hong Kong surviving as a financial centre rests in your hands. Please make your decision not based on self-interests, not based on a power struggle and not based on any other reason than for the overall good of Hong Kong. Thank you very much.

主席：

多謝各位發表意見的證券及金融界朋友。作為委員會主席，我向大家保證，委員會會很小心處理大家的意見，特別各位所提出的細節。我們亦會要求政府於稍後就每部分作出回應，我們亦會將這些資料全部上載互聯網，希望大家能繼續跟進有關事情的發展。委員會歡迎大家在直至三讀辯論之前的任何階段，以書面形式提出補充的意見。

胡經昌議員：

多謝主席。今天很高興這麼多團體及人士能蒞臨表達意見。其實多位人士也提到條例草案的篇幅很長，發言的時間不是十分充足，所以大家未必能詳細說出有關事情，但亦已討論了大綱。我沒有聽到有人認為政府制訂這條條例草案的目標是錯誤的，這代表無論大家有什麼意見，制訂條例草案也是正確的。我認為這點很重要。

相反，我希望向剛才發言的張教授提出一些問題，不過他已經離場，我只好不向他提問。剛才發言的Law Society曾提交一份文件，文件第21頁最後一行提到有關證監會時，表示Law Society感到很奇怪。英文是這

樣寫的 "Somewhat strange that it is the SFC which has the power to grant exempt authorized institution status but it is the HKMA which approves the appointment of executive directors"等。

我希望向香港律師會提出問題。既然他們感到奇怪，是否表示他們的看法是認為應由一個監管機構將所有事情辦妥。這裏提到證監會及金管局兩者的權責問題。若是如此特別，是否表示他們也感到不應分別設有兩個監管機構?是否由一個機構做事比較理想？多謝主席。

Chairman:

Peter or Pauline?

Ms Pauline ASHALL, Chairman of the Law Society's Securities Law Committee, The Law Society of Hong Kong:

I think from the position of the Securities Law Committee, we have no particular issues as a matter of policy as to how the banks should be regulated as compared with the stockbrokers. It is a matter of policy which is not really that the lawyers should comment on specifically. I think the point of that comment is what is obviously in the Bill. It is a compromise in the sense whereby the HKMA maintains its front-line regulator status with respect to banks, whereas banks will be subject to many of the SFC's rules and regulations and so on. In some minor areas, we thought the balance has been struck, maybe over the question not immediate from the policy and just in terms of the practicality as if a bank is applying to terminate a person. It would make its application as it is then an institution to the SFC, who would grant that on the advice of the HKMA. The individuals within the bank would apply to the HKMA rather than the SFC. It is not meant to be a major point of policy, it is more just a practical point of view, as if it were a way in which the application would be handled partly by the SFC and partly by the HKMA.

主席：

余若薇議員。

Hon Audrey EU Yuet-mee, SC, JP：

Mr. Chairman, first of all, I would also like to reiterate the point that has been made and that we are very grateful to all those who came here today to make submissions, both orally and written, on this very complex Bill. I would like to ask their representatives from the Institute of Securities Dealers and also the Hong Kong Stockbrokers Association, because both of their representatives spoke about the question of level playing field. The fact that we are going to two regulators does not mean necessarily that there is no level playing field, if the control of the regulations were the same standard. I wonder whether they could elaborate further as to why the fact that there are going to be two regulators would create non- level playing field?

主席：

朱先生。

Mr. Gilbert CHU, Director of the Institute of Securities Dealers Limited :

Let me give more specific examples as to why the two associations today are very strongly making the point that we should have the level playing field. We had actual experienced last year that there were a number of instances where it came down to issues between how the bank operates as a stockbroker – a business, and how the stockbroker operating a stock broking firm – a service. In certain instances, we discovered that we had certain areas that we need the SFC to approve, and then the banks were able to get exemption in doing things. And there is an issue between the HKMA and the SFC in the sense of a co-ordination who actually should be making the decision on what is exactly proper, and not

exactly proper in the procedure. What we are saying is that if we have one particular organization, and in this particular instance the SFC can make a decision on the issue, it would be much easier rather than co-ordinating two different organizations.

To be very specific, I would like to draw attention to the MTRC's issue. When the MTRC came to the market four months ago, and the banks were able to handle certain transactions without even the clients opening specific accounts with the securities. And obviously there are many, many issues regarding the responsibilities and liabilities that the client should be aware of. These were not required in certain instances, where the banks were able to immediately offer their banking clients the ability to deal in shares. For example, if somebody applied for the MTRC shares and successfully got 500 shares out of it. They were able to sell it through the bank without opening a specific broker account. In that particular instance, the decision then we found, we voiced our concern about the decision to the SFC, and the SFC actually made the point and referred it back to the HKMA, and because of time being of the essence, we were not able to get it resolved. At the end of the day the clients were able to sell the shares through the bank, even without a particular account being opened for dealing in securities.

Now, that's what we call a double standard. If everything was centralized in the SFC, it is like a judge in a court. You cannot have two judges making the decision, so you have a panel and everything goes back to one court. That is what we are saying. We made the example that indicates for MPF, being the banks also have to apply to the MPF authority for licensing and everything. In actual fact, many of the banks in Hong Kong operate their broker operation as a separate subsidiary. Now, we are not questioning the financial part of the regulations. The banks separately have their own financial regulatory body and capital adequacy and all that, regulated by the HKMA, but when it comes down to the actual operating, overall advices and the conducting of the business of being a stockbroker, we question that. Today, once somebody wants to be a stockbroker, you have to sit for an examination. Now, does that mean that the bank managers are now being exempted from sitting for the examination? We do not think that is proper.

In the case of MPF, all bank personnel who are involved in the MPF businesses have to sit for the examination, so they are the brokers themselves. So we see that a level playing field can only be achieved if it is all regulated by one particular party and not by two organizations. You are not talking about duplication effect. You are talking about a serious issue of co-ordination between two particular organizations.

It is the case we are arguing – that if the banks want to deal in securities, we welcome them to the business. It is just as if they were opening a restaurant, they are welcome to have a restaurant as a subsidiary, but they have to go through hygiene licensing.

主席：

有沒有補充？

證券商協會有限公司董事林建興先生：

政府的角度是希望整個證券行業趨向專業化，以提高香港整體金融業的競爭力，所以現時很多法例的目的，是提升從業員的服務質素，使他們能令投資者作出更好及更有效的投資，令該投資有利。這是這些法例的總出發點。

作為證券商必須專業，不能一方面進行證券買賣，另一方面進行樓宇買賣。這是業務上不容許的。所以，若可在這方面清晰地使整個行業內每個服務員也用同等水平服務顧客，亦是level playing field 的原則。

當然，我亦提到經紀實際上需要依靠銀行進行日常支付的工作，當中涉及很多業務上的資料，造成利益衝突。剛才朱先生亦提到，地鐵及盈富基金上市時，亦曾出現銀行將經紀的客戶轉移到銀行的情況，當然並沒有人作出投訴，而我亦不能即時列出具體證明，但這絕不是虛構的。

另一方面，將來證券行除了跟銀行一樣，最低限度需要有兩名responsible officers 外，證券商所有licensed representatives也要通過證監會考試、審核及發牌。但銀行只需由兩位經銀行的responsible officers 認可的銀行同事進行這些工作。銀行只須將他們的名字submit便可以，不需要再通過發牌的程序。所以這做法本來便是不同的處理方法。我們一向的要求是，如果大家在每項做法上也相同，便是最公平的做法。這是我們所提出的最重要原則。若有100項規定，便要求大家遵守100項規定，而不是要求某些機構遵守100項要求，有些需要遵守80項便可。這便是我們的要求。

主席：

吳靄儀議員。

Deputy Chairman:

Thank you, Mr. Chairman. I am very interested to explore the provisions on market misconduct and other criminal offences. One area of controversy is that the burden of proof, the requirement of proof of intention and so on, it is very different in the US as a matter of international practice. I found that there are many institutions with international practice and perhaps a great deal of US experience present today, I would like to ask them whether in the practice in the United States, the requirement of burden of proof and proof of intent is very different from what is provided in the Bill.

主席：

如果我剛才看到你的表示，我應該先讓你發言。我現在先讓你發言。郎先生，稍後才讓你發言，好嗎？Mr HARVEY。

Mr Marc HARVEY, Legal Adviser, Hong Kong Association of Banks :

Mr WONG has asked me to respond to certain comments made by the Stockbrokers' Association, and also the Securities Dealers Institute. There have been some concerns expressed that even after the enactment of this particular legislation, we will not have a level playing field in Hong Kong as between the stockbrokers and the banks. Obviously we disagree with that proposition, and what we actually think happens is that the legislation will ensure that. Certainly the playing field will become even more level, as it were, and perhaps I can just take a few points in a little while to take you through why I think that is the case.

The point has been made that the exempt dealers' status was introduced some time ago, because at that particular juncture dealing in securities was not a majority part of the banks' business. The first thing to note is that dealing with securities is still not a majority part of the banks' business. Deposit-taking remains the majority part of the banks' business.

As a consequence of that, we would say that it is absolutely appropriate that the HKMA be the frontline-regulator for the banks. As Mr WONG puts it, the HKMA knows the banks best. It is also important that the HKMA remains the frontline regulator, to avoid duplication of regulation. We have heard, I think, Mr CHU this morning suggesting even perhaps that we would have some sort of super-regulator. I am not sure that that is something we need to go, in actual fact, because I think the division of the regulatory burden as between the SFC and the HKMA is about right at the moment.

The obvious consequence of subjecting authorized institutions to further direct regulation by the SFC would be duplication of regulation, which would lead to confusion and would not be a good thing. The other thing to note – I think it is something we should actually look at very carefully – is the fact that the proposed legislation will ensure that exempt authorized institutions are exempt persons, as they will be known under the new legislation, are subject to a degree of regulation that we would say is entirely commensurate with that of the licensed persons. Mr WONG in fact referred to various instances which illustrate precisely that point. I may as well reiterate them.

Firstly, under the new legislation, exempt persons will have to apply to the SFC for exempt status. To qualify for that status, they will have to meet the same fit and proper criteria as brokers; so the idea of fitness and properness applying to the banks is now going to be statutorily enshrined.

Secondly, individuals involved in the investment-related business of exempt authorized institutions will have to be individually registered on a new register to be maintained by the HKMA. In fact those people who are in the bank, doing investment-related work, will have to be registered. As a consequence of that registration and the maintenance of that register, the authorized institutions will be required to ensure that all staff are properly trained and are fit and proper for the particular type of business in which they are engaged. Such arrangements, we say, will certainly ensure that only properly qualified staff conduct securities business on behalf of the authorized institutions.

Thirdly, new rules, codes and guidelines to be promulgated by the SFC will be directly applicable to exempt persons; and the next point is a point actually made by Mr FAN, about the appointment of executive officers. There is an argument, in actual fact that the requirements in the new legislation for the appointment of executive officers with any exempt persons, are actually more stringent than those requirements that relate to the appointment of responsible officers in the investment institution.

The other point I can make is the fact that the legislation now extends the disciplinary powers available to the HKMA and the SFC in the event of misconduct on the part of exempt persons. There are some instances that demonstrate in fact that the new legislation will ensure a level playing field as far as regulation is concerned.

The final point I would like to make on this is really to echo the sentiments of Professor Stephen CHEUNG. He did say things to the effect that in actual fact the HKMA has done a very good job of regulating the investment activities of the banks. He suggested

in fact that the work of the banks in the investment industry, or in the investment side of business, has actually facilitated the development of the market in Hong Kong. It seems to work well, and the customers seem to appreciate the opportunities that doing investment business through banks affords them.

主席：

郎博士，剛才對不起。

Dr Larry H P LANG, Chair Professor of Finance, Department of Economics and Finance, City University of Hong Kong:

I would like to answer the question raised by Miss Margaret NG. I did not sleep until 3 o'clock this morning, because I called the attorney and economists from United States Securities and Exchange Commission. On the two questions that were raised about the proof of intent and the burden of proof issue. The standard textbook answers for them are: the proof of intent is required in the US for the sixth misconduct documented in the Blue Bill. However, in practice it is not enforceable. What they say is that substantial evidence or actions deemed to be done knowingly and recklessly can be substituted for the proof of intent.

Now, as a professor, I always like to give examples. What is substantial evidence, and what is action deemed "knowingly and recklessly"? Assume someone drives a car in a school zone at 90 miles an hour, and he kills a person. Even though we know it is unintentional, his behaviour in driving at 90 miles an hour in the school zone is considered reckless. That is the meaning of "reckless".

What is substantial evidence? Even though no one sees a person was killed by his car, a policeman standing two blocks away, stops him because he drove too fast; and coupled with evidence that no other cars are running through this street, this evidence is considered substantial evidence. "Reckless" and substantial evidence can be replaceable.

It can replace the proof of intent.

The second question is about the burden of proof. According to the standard answer from the USSEC, burden of proof does not really mean "proof". It is what they say is an action variable. It means prosecutors have to initiate it. Of course they want to win the case. That is the burden of proof. If you talk about it, they do not really use this term. If you talk about burden of proof, it has to be on the prosecution. The things USSEC focus on are the next – the burden of going forward with the evidence. This is on the defendant. As long as USSEC pick up a suspicious case, as soon as it is "knowingly, recklessly", or they have substantial evidence, they can start a hearing; and the person has to come. I will tell you later how they enforce this. The person has to come to the hearing, and the burden is on the defendant. He has to rebut whatever evidence he can, to the USSEC. Unfortunately in Hong Kong, the SFC has no power.

I would like to read a paragraph faxed to me by United States Securities and Exchange Commission. 1997 Securities Regulations state the following, and I read a quote:

"SSEC staff has the power to issue subpoenas nation-wide against any person or records significant to the investigation".

Listen carefully.

"By and large, the Commission's power to investigate suspected cases of security law violation is unrestricted".

In the US, constitutional protection is not even Federal Law. Constitutional protection applies USSEC investigations. Any challenges to the SEC subpoenas are regularly rejected by courts. This is how they can easily, arbitrarily, pick up anybody from the securities houses. By sending them subpoenas, they have to come. If they do not come, they can submit this to the court. I will read another one to you.

"If a person refuses to comply with a subpoena then SEC staff must apply to the Federal District Court to enforce the subpoena".

The SFC has no power compared with this one. I do not want to give cardinal numbers about the relative power of these two institutions. However, I would like to give it a try. If I give 100 score to USSEC in terms of power, The SFC power is 10. It is 10. During the whole session I have heard about all the interested parties raising the issue of the over-power of the SFC. Sometimes I even read in the newspapers what it says about it. They worry about the quality and whatever, but that is another issue. I do not want to discuss it.

If we want to protect minority shareholders, the SFC has to have power and has to be protected by law, according to the US practice. That is my answer. Thank you.

主席：

吳靄儀議員有一個補充問題，接著才到Pauline發言。

Deputy Chairman:

I just wonder whether other people present today would like to give their views or is that generally accepted as the right view?

Chairman:

Pauline ASHALL.

Ms Pauline ASHALL, Partner, Linklaters:

The investment banks present have asked me to respond on their behalf. I think

from what Professor LANG has just said that it is clearly accepted and understood that in the US, where there is an allegation of breach of the anti-manipulation provisions in the Securities Exchange Act, the burden of proof is on the prosecution to establish that the defendant acted for the purpose of manipulating the market, and it did so with *Si Ante*, which is the US term that can encompass intention or a high degree of recklessness. That is the standard in the US, and the burden is on the prosecution. If it is a criminal case brought by the Department of Justice, that would have to be proved beyond reasonable doubt. If it is an administrative case brought by SEC, it is effectively the preponderance of the evidence, which is really the same as the position would be in Hong Kong under the Bill. If there is a criminal prosecution the case would have to be proved beyond reasonable doubt. If it is a case before the Market Misconduct Tribunal, then it is on the balance of probabilities, which is the usual civil standard of proof.

It seems to me that, although I hesitate to make comments in the presence of some very eminent members of the Bar here, in Hong Kong as well as in the US, if the prosecution or the SEC bringing a case before the tribunal can show that the defendant did something that had a serious effect on the market, and did not seem to have any legitimate explanation, then effectively the defendant would be at risk of the tribunal or the court finding that "yes, they had done the conduct intentionally or recklessly" as to whether it would move the market. Effectively, just as a matter of evidence, the burden would be on the defendant to explain why he actually did that highly suspicious transaction.

I do not think we actually need specific provisions in the legislation to address the fact that the court may well conclude that someone did something intentionally and recklessly, just based on evidence of the fact that they had on the market and the fact that they could come up with no valid explanation for what they had done. As far as the powers of the SFC are concerned, I am sure the SFC themselves will want to respond to that, and I will leave it to them to do so later; but the SFC does have very extensive powers under the Bill, to obtain information from registered people and from anyone else participating in the market. I do not believe there is a significant gap there in terms of the ability to bring cases where

appropriate.

Chairman:

Dr LANG.

Dr Larry H P LANG, Chair Professor of Finance, Department of Economics and Finance, City University of Hong Kong:

I shall give my response to the comments from Linklaters and Alliance. We all know that they represent these 10 investment banks, and that these 10 investment banks are the most prestigious banks in the world. There are several issues I want to raise.

First, do you realize the fact that after the White Bill was published, you are the only group that sent in an opinion? Because of your only opinion, the White Bill was revised to the Blue Bill. Of course I agree with the burden of proof issue. On this part I am with you, but this word, the "burden of proof" should be on the prosecution. They say it will be on the defendant, but that is another issue. I do not want to argue with that. Because of your consensus of opinion by these 10 investment banks, therefore the Financial Services Bureau revised this White Bill, and they totally satisfied your requests.

In the second comment which is raised by Linklaters. I read it, and I found out that this is something they say, "we welcome the decisions to remove the burden of proof issue on the defendant". Is it not clear that the Financial Services Bureau only complied with the comments from securities houses? I would like to ask one question for King-chi AU. Have you received any other comments, say, from minority shareholders who are just on the opposite side of these 10 investment banks?

主席：

我相信政府會於稍後作出回應。Margaret。

Deputy Chairman:

I would like to follow up with Dr LANG. From what you just said about the substitution of proof of intent with substantive evidence, if I remember correctly, it sounds very like our system, the Hong Kong system, of drawing inferences where it is justified by the evidence. There are very strict rules as to when the tribunal is permitted to draw an adverse inference of intent, but the way I understand the Hong Kong system, it is that intent is frequently proved by means of inference; but it has to be an inevitable inference in the matter of criminal law. There is no way of explaining certain things. Are you referring to the same sort of practice in the US?

Dr Larry, H P LANG, Chair Professor of Finance, Department of Economics and Finance, City University of Hong Kong:

Yes. Let me answer this question. Let me put it this way: the reason why USSEC can - I do not want to use the word "accurately" perceive this action as reckless, done knowingly, or as substantial evidence, is simply because they are a case law country. They have accumulated cases over hundreds of years. Therefore almost any actions nowadays where you can find a case in the past. That is the difficult part in Hong Kong. We cannot adopt the US case law system. Therefore that is different from what Linklaters suggested. We cannot have the provisions of each violation. What else can you do? What else are you going to do? The precise execution of identifying the reckless or substantial evidence can only lie on the cases. If you do not have these cases, I agree with Linklaters. I am also aware myself. Our Monetary Authority may over-do or under-do. Therefore we cannot just learn these things, transplant these things, from the US. To impose this rule of substantial evidence, you have to have experience; you have to have cases to enforce it. These are the things we do not have.

On this part I am with them.

主席：

Mr Peter BRIEN 是否有補充？

Mr Peter BRIEN, Member of the Law Society of Hong Kong :

Thank you, Mr Chairman. On behalf of the Law Society's Securities Law Commission, I would like to make two points. The first is that we provided a detailed submission on the White Bill in July last year. We spent quite a lot of time in that submission, dealing with our concerns on the various new criminal offences. I think with many of the points that have been made today we tried to reflect earlier in that, in relation to clarification of the offences and making sure that the offences reflected the complexity of the securities law and the securities market.

The second point I would like to make is that under the current SFC Ordinance, the Securities and Futures Commission does have wide powers of investigation, and also can go to the court for a court order if anyone refuses to supply information or documents as requested by the SFC. In our experience we find that the SFC has used their powers of investigation in an effective manner. We believe that the new legislation actually expands and reinforces the SFC's current power. Thank you.

Chairman:

Dr David LI.

Dr Hon David LI Kwok-po, JP:

Mr Chairman, first of all I would like to say that I am very heartened to see so many eminent people from the accounting, finance broking and investment, and legal entities

here today, to give us their words of wisdom. One thing I would like to mention is this: if you look at the world and look at the regulatory authorities around the world, most of it has been consolidated. In England, for instance, rather than having many authorities looking at different aspects, they have just one financial service authority looking into insurance, banking, broking, everything. The Americans are now also going that route, and in Europe that route is also taking root - in Germany, for instance, and also in France.

I think we are looking at a more developed economy. That may well be the way it is going. To argue about whether banks should be subject to more authorities looking at them I think is a step backwards. We value a free society. We value freedom. We do not want more rules and regulations. What we want is a healthy and clean market where everyone can make money, where everyone is subject to the same standards. I think we are really wasting our time arguing about whether banks are taking over from the brokers or whether brokers are taking over from the banks. I think what we should concentrate more on is what is the best regulation for the industry as a whole, for the whole industry. I also know that the Financial Secretary has already set up a committee that consists of the Hong Kong Monetary Authority, the SFC, the MPF and the Insurance Authority, to make certain that there is a level playing field within themselves, and that there is co-ordination within themselves. To argue that there is no co-ordination I think would be silly, because I think we are going backward. One mistake or one oversight on some issue does not basically say that we are going down the wrong path. I hope everybody will be sensible and actually look at what is good for Hong Kong as a whole, for the Hong Kong financial market as a whole, rather than our particular interests. Thank you.

主席：

多謝李國寶議員的意見。Audrey。

Hon Audrey EU Yuet-mee, SC, JP:

Mr Chariman, I would like to follow up on what Mr HARVEY said on behalf of the Association of Banks, and what, in a way, I suppose our colleague has just mentioned on the same point. I think what both Mr CHU and Mr FAN, on behalf of the Securities and Stockbrokers' Association, said that one point they raised, is a question of examination. I think Mr HARVEY's answer was: "Well, we all have to satisfy fit and proper criteria". My question would be then: "What is the objection to requiring people in the banks, who are going to do securities business, also to have examinations?" That is, I think, the point that Mr CHU and Mr FAN have been making.

The other point is about co-ordination. I think everybody here agrees that there has to be a level playing field, and I am sure what rules can be worked out between the various regulatory authorities would ensure that the same standards would be set. But I think the point that has been made is the question of the implementation and the co-ordination. If you have two sets of people who are applying the rules, would there not be at least questions of interpreting the same set of rules in different ways, and therefore leading to some form of unfairness? I am raising the point not as a criticism; I am just trying to understand the point, and I hope my question can be regarded in that light.

Other than this, Mr Chairman, I think Dr LANG of course has raised a very important point, which is that we have very eminent people here representing lots of interested parties. However, it is very difficult for the poor investors on their own to be represented. I wonder whether, for example, LegCo could consider asking its own research department to look into the question of the Bill from the point of view of investors, or whether we can engage our own expert to look into the question from the point of view of investors, or whether we can invite the Consumer Council or some other appropriate bodies to come here to make representations from the point of view of investors.

The third point I want to make, Mr Chairman, is that we are grateful today, as I said, for all these people who come here to make these points. Many of them are very detailed points on technical drafting aspects. I wonder whether they will continue carrying

on the dialogue with the Government, and try to resolve as much as possible, many of these points – not just drafting points but also points of substance and points of principle. I think if it is all left to the Bills Committee to deal with, it is going to take forever, and it is very inefficient. I just wonder whether the various parties who are sitting on the left today will continue carrying on a dialogue with the various parties sitting on the right, so that at least some of the differences can be resolved, so that it will make our work easier. Thank you very much.

主席：

我相信第三部分關於政府與機構代表間的接觸如何進行，他們有空間及時間可隨時進行接觸。我相信委員會的工作是處理接獲的意見。稍後我也會與大家商量如何跟進各位人士提出的意見。但是，我剛才也已向大家保證，我們會小心處理這方面的意見。

第二，關於資料研究及圖書館服務部的問題，我也會在其他事項的環節處理。有沒有機構代表希望回應余議員第一部分的意見？Mr Richard YIN。

Mr Richard YIN, Member of Hong Kong Stockbrokers Association:

Thank you, Chairman. Our Hong Kong Stockbrokers' Association shares the same ideals. It should be one Hong Kong; we should have a free and fair society. But similarly, in the same vein, that we will also manage to be on a level playing field for different institutions of the society. Equally we are the same stakeholders as any other person. Audrey raised a very important point in relation to the implementation.

We have different regulators, starting with different ordinances. They have different responsibilities. For the banking regulators, obviously with banking, safety and stability of the system is of paramount importance. For the securities regulators, the fair,

efficient and transparent market is probably their most important function. Each regulator has a different starting point, so obviously when they look at separate issues they think in terms of different things. If you look at it in a different way, where issues come up, banking regulators will think in terms of materialities. That is basically what the SFC rules and regulations talk about, applied in a pragmatic manner, looking in terms of materiality.

Our colleagues from the Hong Kong Association of Banks mention that securities trading is not a material part of their trading activities. Any infringement, in their definition, would probably be a minor infringement. Our friends talk about disciplinary powers. I believe there is a memorandum of understanding reached between the Securities Futures Commission and the HKMA, where implementation of any disciplinary proceedings would need to be in consultation with each other. We see instances of reprimands whether private or public, being freely given to our Stockbroker Association members, to the individuals and registered persons. We have never seen such instances to the banks. No officers of the banks have ever been reprimanded. No banks have ever been reprimanded.

We will talk about the executive officers. Our colleagues talk about a very much heavier burden, that of being an executive officer of the bank. I suppose the banking operations would need to be considered by the HKMA. Would they consider whether they have advising experience, securities experience? We are just asking that they go through the same type of examinations that we need to take. We need to prove the same experience in securities advising; no more, no less.

It talks about the banks also needing to comply with the fitness and properness, but it does not talk about the individual officers also needing to comply with the fitness and properness. All of us, whether as an organization or an individual, need to go through the fitness and properness test. We are asking for the same thing to be done. Our proposal is to talk about the HKMA or each individual bank maintaining the register. That does not mean that they will need to be fully fit and proper.

In terms of rules and regulations, the implementation of rules and regulations, we always about overlap of regulations. There is such a thing as underlap of regulations. For banking regulators, when they do an examination, they can only stop where the bank's activities are. They cannot have a look at the clearing houses; they cannot have a look at the outside organizations, unlike the Securities Futures Commission. In terms of examinations, they go through from the beginning to the end, where they can actually match up the trades. They will be able to see the whole picture. For banking regulators, they will look at their own bank activities. They will not be able to see the whole picture, whether there are malpractices being conducted. I think we just want to have a level playing field.

Chairman:

Mr CHU.

Mr. Gilbert CHU, Director of the Institute of Securities Dealers Limited :

I just want to elaborate a little bit. The whole issue about whether there is a duplication effort by the HKMA and the SFC in regulating the stockbroking industry boils down to this: there may be some overlapping only on a financial resources basis, whether the banks have the financial resources or the stockbrokers have the financial resources. When it comes down to the actual supervision of the daily activities of the trading, insider dealing and all that, if you have to ask the HKMA and also look at maybe the banks' broker handling certain activities for the client, not exactly in accordance with the rules, then you are talking about a duplication effort by the HKMA to have exactly the same people doing what the SFC is doing.

The other point I want to make is that Professor LANG probably addressed the issue in concern about protecting the investment public. Most of the people who have come here today, I believe, also see the importance of securities business in Hong Kong not just for ourselves, but for Hong Kong overall, in the way of creating foreign exchange income for

Hong Kong, tax revenue, job employment, and all that. We are all proposing and actually support such establishment of rules and regulations so that we can continue to lead at the forefront of the development in the securities industry.

So in a way, there may be certain self-interest that we are discussing today about whether you do with the brokers what you do with the banks. Primarily speaking, if we do not have a good investment environment that is conducive to the securities business, we will be out of business pretty soon. It is not going to be good for Hong Kong; it is not going to be good for the stockbrokers; it is not going to be good for the banks, either. It all comes down to this: we want to get everybody to understand that the stockbroking industry is a professional industry. It is by no means less or more than the legal industry, or the accounting profession. We should all look at, and treat, the profession as a very good profession itself.

Just take an example. Consider a chartered accountant sitting for the CPA examination in the United States. We also have the CFA examination. Not everybody who is an accountant will necessarily be able to get the CFA qualification. There is a profession we would like everybody to look at something where definitely regulation is important, to make sure that the profession will be policed and that they will be conducted in the best interests of everybody.

It is a profession that is of dignity and grace, and we want the public to address and respect it. As such, we see that there is an absolute importance to us to get a Bill that is going to put Hong Kong ahead of everybody else, so that when the world becomes really boundary-less in trading, Hong Kong will continue to prosper as the leading securities market in the world.

主席：

多謝。Christine LOH。

Ms Christine LOH:

Thank you, Chairman. I would just like to respond to one of the points made by Miss Audrey EU. First of all, the voice of the investing public is not here for the reasons that Professor LANG has already said. I sense that in Hong Kong generally consumer rights and investor rights are actually not very well developed, and there is a long way we can go in terms of public education. The Bill has come this far. Anything more that can be done in this Bill to protect investors' rights I am afraid will have to be done in this Chamber, because this is now the last stage.

I would urge LegCo first of all not to push this Bill through with undue haste. I am aware that the government is very keen to get this Bill passed as soon as possible, but if the Committee is willing to give a little bit more time, then I certainly welcome Miss EU's suggestion of trying to create an occasion for investors to actually come and address the Council. My suggestion is this: in terms of this investor public interest group, if we can call it that, my sense, in contact with people in that circle, is that it is at the very earliest germination stage, but that there are now people in Hong Kong who are interested in the issue, who do not represent any particular interest. I think that in the future we will have a growing movement of small investors. Many of them are very shy. They are not familiar with the legislative process, and that is why today we only have Professor LANG here.

However, I assure members that there are other people out there who, if there were the right occasion, would be happy to come and share their insight. So if the Committee is able to consider perhaps reserving another Saturday morning to listen to a wider group of people, I think that would be very useful. Further, if indeed the committee is willing to ask its own independent research unit to look the subject, then perhaps having spoken to some of this small group of people, it might help legislators ascertain the parameters of such a piece of research. Thank you.

Chairman:

Yes.

Hon Audrey EU Yuet-mee, SC, JP:

Mr Chairman, I would like to respond briefly to the point made by Miss LOH. Much as we would like to be assisted by representatives from all sectors, the decision fairly and squarely rests with this Committee, with LegCo. The Bill that LegCo is going to enact is very much the responsibility of LegCo, and LegCo must do the job of balancing interests. Each and every one of us who are elected one way or another have to represent not only such polar interests, but also the public interests, and the public must include small investors.

Although the point is well taken, that their voice is not as concerted, not as well organized as professionally presented as the interests of a larger institution, I think the public can be assured that LegCo recognizes this as its duty – to take that into consideration. I think I would be assured by the crowd that this hearing has been advertised also on an individual basis; that is to say that individuals are always welcome, as Miss LOH is very well aware, to give their views. Perhaps we should do a survey or something of the type, to be more pro-active. Even if we had the Consumer Council here today, the Consumer Council does not have the monopoly of the input of the small investors, because every organization comes with its own burden, comes with its own interests, and the only thing you can do is to try to hear as widely as possible; and that each legislator should take it upon himself or herself to consult their constituent to make sure that the individual man and woman in this community is represented.

主席：

我剛才亦已提到，直至三讀通過這條條例草案前的任何時間內，委員會亦歡迎任何公眾人士提供任何書面意見。

接着有數位人士希望發言，包括Mr HARVEY、Dr LANG，然後是Henry WU及吳亮星議員。

Mr HARVEY.

Mr Marc HARVEY, Legal Adviser of Hong Kong Association of Banks:

In fact, I have got a number of points I would like to address from the bank's and investors' side: the first one I think would have been today Miss EU who asked the question of whether or not in fact the apparent overlap between the regulations to which the authorized institutions will be subject to by the HKMA and the SFC might lead to some confusion. I consent the Association of Banks is of the view that in fact the legislation, the proposed legislation, is quite effective in ensuring that the two regulators do work together in the most appropriate manner. Perhaps an appropriate example of how they are supposed to work together is in relation to the registration as an exempt person. An application goes to the SFC. The authorized institution applies to the SFC; the SFC will then consult with the HKMA, who will then revert to the SFC, but it is for the SFC to impose any conditions on the registration as an exempt person. I think that is an example of how the two will work quite well together.

Questions arose as to whether we should have one starting point. I think we do, and I think there still is the one starting point, because this does govern investment activities, or will govern all investment activities in Hong Kong. If you have a single starting point, and that is this legislation, the question is then raised – and I hope I am doing justice to all these points; I am trying to. As to whether or not we can be assured that in fact individual people who are registered with the HKMA on the HKMA register will be fit and proper people, I think we can be assured that they will be. I am sure that the HKMA will ensure that those people will be. Of course to the extent that people do not prove to be fit and proper people, that will impinge upon the impact on the fitness and properness of the exempt

institution itself. The SFC will then have the power to remove that exempt status, but I think this register will ensure that these people are fit and proper to be doing the sort of work they are doing.

The next point I think was about examinations. At the moment we are looking forward to guidance to be issued by the HKMA as to exactly what the authorized institutions must do to ensure that their people are properly trained for the purpose of conducting investment business. I am sure that guidance for those rules will be forthcoming very shortly.

Finally, there has been a lot of talk about over-regulation and under-regulation. I think the intimation or what is implicit in that comment is that somehow the brokers may be over-regulated and the banks may be under-regulated. The Association of Banks simply does not think that is the case. I hope I am about to do this justice. I have had a quick flick at the written submission from the Stockbrokers' Association, and one of the things that they refer to there, of course, is the Financial Resources Rules, to which the stockbrokers are subject. The Financial Resources Rules basically go to capital adequacy, and of course as we are all aware, in actual fact the authorized institutions themselves are subject to extremely stringent capital adequacy and liquidity rules as a consequence of the Banking Ordinance. At the moment, what I have not heard is a particularly compelling case of the brokers being over-regulated in circumstances where the banks are under-regulated.

主席：

接著是Dr LANG。

Dr Larry, HP LANG, Chair Professor of Finance, Department of Finance, Faculty of Business Administration, The Chinese University of Hong Kong:

Thank you. I want to raise two points. The first point is a reply to Mr CHU on

his view. You know, I agree with all your points, and I very much appreciate your opinions. I have to make it clear that I also respect all the representatives here, because they do their job. I have no problem with that. However, I have a small problem. We cannot determine the fate of the public by interested parties without their presentation.

I am sure if they are here they will also agree with Mr CHU, because financial sectors are so important in Hong Kong. They create the wealth; they create salaries; they create jobs for the general public. How could they disagree with these points? But they have to be here. That is my point.

The US economy protects people as well. We can agree that their financial system is more advanced than ours. Therefore the point is that regulation must not mean damage to financial companies. What is regulation? It is to help everybody, including the public, to start from the same point. Let me give you one simple example. How did the USSEC capture those insider traders? According to 1934 Security Law, nobody is allowed to trade before an official announcement, including insiders; but after this information is released officially, everybody is allowed to trade. Why? – Because we want to be fair to the interested parties and the public as well, everybody starts from the same point. That is the meaning of regulation. This regulation will not hurt this economy. Let us look at US economy.

The second point I want to add to what Miss NG has said is that I do appreciate her recognition of the public interest. Even though I may not be qualified to speak up for the public, this cannot be just done by a slogan: "Oh, we will fight for the public". They have this meeting, and everybody goes home and has lunch. That is what I predict will happen, because the design of these consultations is geared towards the benefit of interested parties. Think about this case. Who has the time and the money to read several thousand pages of the White Bill and offer an opinion to you? Once we have a consultation, you have to gear your system towards the benefit of interested parties. You cannot avoid it.

That is what I try to fight for; I want to hear the voice of the general public. It is not a consumer. A consumer has little to do with a secret all and you are the LegCo Members, you need to fight for the public. Let me throw an idea to you. Under your jurisdiction – I am layman on these things; it is just a sort of academic notion of these organization – you create an organization called "Association of Protecting Minority Shareholders". They can have representatives here and that is my view. Thank you.

主席：

由於時間關係，我只可容許以下三位同事發言，然後我們便要結束這個部分。Henry WU、吳亮星議員及Vincent LEE。

胡經昌議員：

多謝主席。首先我希望提出有關Dr LANG和陸恭蕙女士剛才提出的問題。其實剛才副主席也提到，委員會已在報章上刊登廣告。我相信主席也記得我們登報的原因，是希望多些人知道這條條草案的影響力，希望多些人能提供意見，而不但是由數十個團體提出意見。如果我沒有記錯的話，那數十個團體包括消費者委員會。所以我希望澄清，我們其實是有關注投資者的利益的。

第二，我認為作為議員，不論是代表業界或是由直選所產生，其實也有責任接受市民的投訴或意見，不論那些市民是否投資者。我亦不怕在這裏說明，我除了是代表業界外，假如任何市民或投資者遇上問題，希望提出意見，亦歡迎向我提出。

另外，剛才郎博士曾經提到為何要保障投資者，我也希望稍作回應。如果將來真的實施這條條例草案，以兩個監管機構監管同一業務，當投資者遇到問題時，會出現很多問題，例如他們應向誰投訴?由誰處理有關投訴?處理後又如何呢？實在會頗為複雜。為何只應設有一個監管機構呢？

業界在這方面亦已提出很多意見，我也不再重複。

我希望再提出一點。剛才李國寶議員提到，有些國家實行超級監管制度。我在1999年親自到過英國的SFA跟他們討論，知道原來他們也遇到很多困難。現在的情況可能已得到改善，因為我跟他們進行討論已是1999年的事情。這是由於超級監管制度在組織上，包括他們審議SFA那條條例草案所需的時間很長。他們亦曾作出很多修改。我不是說我們現在必須進行這麼多工作，但我認為在這麼短促的時間內要進行這麼複雜的工作，真的要小心處理。

設立超級監管機構是否可行?是否好的做法呢？其實尚有很多未知之數。雖然已有國家實行這個做法，而我們看不到是否得到好的成效，但也是個試點，可讓我們考慮需否採取這個做法。說不定將來可能是由於銀行進行很多樓宇買賣，便把地產代理監管局取消。多謝主席。

主席：

議員之間的辯論，暫時留待三讀時再進行。

吳亮星議員。

吳亮星議員：

多謝主席。實際上，我們今天應該盡量聆聽，所以我到現在才發言，因為我一直在留心聆聽。

當然，有很多書面意見早已提交，我們亦可預先看到很多要點，聆聽時亦聽到那些整體關注的事項。我認為在審議這麼複雜的條例草案期間，應該多聽及多收集意見。我甚至很贊成不論哪類投資者，甚至這條條例草案涉及的所有有關方面，包括執行者、監管者及各方面，也要聽取各

自提出的關注事項。

從今天的討論或反映出的意見，我亦留意到條例草案很可能有不足之處，但這亦是個很好的討論場合。

好像今天這樣的場合是其中一種討論場合。另外，委員會今後亦會舉行很多公開會議，就條例草案進行討論。條例草案委員會進行的討論是公開的。政府雖然直接跟委員會討論，但你們亦可以公眾或代表公眾的各個角度，或代表業界的角度，在聆聽的過程中隨時根據你們的瞭解作出反映，或當討論過程涉及你們關注的事項時向我們反映。因此，以書面及口頭提出意見的機會還是存在的。

但是我亦提議政府可利用政府經營的電台，提供發表意見的時間，因為現時大大小小的投資者的確不少。我完全贊同，大小投資者，不論投資金額多少，也應有機會發表意見。既然香港電台是政府經營的電台。我仍然堅持透過香港電台，給予公眾一些時間及機會，就這條這麼重要的條例草案發表意見，亦給予政府當局或業界機會，透過這個途徑提出意見。

在討論條例草案的整段期間，委員會應該是完全開放地多聽取意見。但至於整體利益的平衡，即使我本身是從事銀行業的，也很贊成最終應令整體市場得益。如果只保障某個行業能仍然在其範圍內營運，而最終不是整體市場得益，倘若只有一個行業得益，香港整體的經濟也未必得益，在國際市場上競爭時亦未必得益。我不妨提出這點讓大家考慮，亦很希望政府稍後能作出回應。

剛才張教授提出意見後便很匆忙地離開，但是他提交的意見書最後第4段提到鼓勵銀行證券服務業發展。其中兩句提到，銀行從事證券業投資服務的利大於弊，它們的參與增強了市場的競爭機制，即產生競爭，加速了這個行業的發展。我亦在另一個場合上聽說過，當證券經紀進行買賣時，銀行亦大開方便之門，而證券經紀的客人又想沽出證券，同時有很多

人在銀行購入證券，兩方面便有機會得到平衡。

這些只是很粗略的看法。我也希望市場可以較為公開和公平。剛才吳靄儀議員提出的是整體利益。我認為整體利益不可從單方面作出考慮，乃是透過良好的監管及公平的機制，使最後達致總體發展的效果。所以我今天只是略作表示，政府亦可就怎樣促進整體香港經濟的發展作出回應，使各行業能平衡發展。多謝。

主席：

好。區璟智小姐稍後可考慮出席電台主辦的「政經星期六」節目。

最後一位嘉賓是李君豪先生。

Mr Vincent LEE, Director of The Institute of Securities Dealers Limited:

I would like to make a quick response to the Association of Banks, and I also agree with the Honourable Mr Henry WU's point. I do not think anybody is arguing that the MA should be regulating banks, but I think it is only common sense that if the banks should get involved with the securities business, they should be regulated. That part of the business should be regulated by the SFC. Similarly if the banks should get involved in the hospital business, they should be under the Hospital Authority. If they in the law business they should become part of the Law Society; in accounting, and so on.

Similarly, if brokers want to get into the banking business they should comply with the MA. Up to now we have not heard any compelling reasons as to why banks' securities subsidiaries or securities operations should not be regulated by the SFC. We are not arguing about the capabilities of the MA, but certainly I think overall it is only common sense that certain businesses should be regulated by one authority.

The second point I would like to make is regarding minority interests. We are all minority interests ourselves at times. For every minority interest that lost money equally, if not more, who made money in the market, who have not been victims. Similarly one cannot assume that all brokers are necessarily bad. For each brokerage firm that went bankrupt, equally there are at least 200 that have been around for a long time, doing proper business and providing a service to our community. I think we have to be very careful with assumptions.

One more point is that the bank employees can, at this point, solicit clients outside the bank branches, which we cannot do. Stockbrokers cannot solicit new clients at the MTR stations or on a street, or even at the point of advertising. Thank you very much.

主席：

我們現在邀請財經事務局副局長區璟智女士作初步回應。

財經事務局副局長區璟智女士：

多謝主席。今天大家已經在這裏坐了大約兩個半小時，相信已很疲倦，多謝大家仍然耐心地聽政府作出回應，我們會盡量精簡。

未作出回應之前，對於今天各業界以個別人士的身份或以團體的身份出席這個會議所發表的意見，我向大家表示謝意。

我們很高興，政府在今年進行了很詳細的諮詢工作，得到大家的肯定，同時亦很高興聽到大家支持今次法例改革的目標。

事實上，自從我們於去年4月公布白紙條例草案之後，我們不斷跟社會各界進行多次討論，我們亦因為大家提出的意見，已按照原來的建議作出若干修訂。其實，我們在較早的諮詢期間，已經很詳細地聆聽過大部分大家在今天所發表的意見，亦一一作出解釋。我們明白條例草案涵蓋的

範圍比較廣闊，不同的人士會因應自己的利益而發表意見，正因如此，政府是扮演一個平衡的角色，希望能夠平衡大家的意見，制訂合理的方案，交由立法會考慮。

我要指出，在諮詢過程中，我們覺得政府、監管機構和業界之間，其實也有一個共同的目標，就是怎樣提升香港作為主要國際金融中心的地位。大家也知道，我們的證券及期貨業現時面對的挑戰，不單是本地同業間的競爭，最重要的是隨着全球市場一體化和科技的日益發達，使競爭越來越國際化。所以我們要盡快裝備自己，研究怎樣可達致國際的規管水平和國際的服務水平。

主席先生，關於這個法律改革的內容，我們其實已討論了好一段時間。現在不單是討論的時候，我們也要把它付諸實行。這樣才可令我們把握着這個國際化及全球化的新機遇。

我們相信條例草案已經在保障投資者和促進市場發展兩者之間，取得一個合理的平衡。今天我們聽到有人批評條例草案中的建議規管過嚴，亦有意見認為規管過寬，這可能已能印證我們已經取得一定的平衡。

由於今天時間比較緊迫，我們只會就一些主要的意見作出一些綱領性的回應。至於大家所提出關於個別條文的具體意見，我們打算在條例草案委員會日後討論條例草案有關條款的時候，再作出詳細的交代。

同時，剛才余議員也提出，希望我們就草擬的細節提出意見，她並詢問我們可否於會外跟個別團體進行溝通。主席先生，我們肯定會繼續進行這方面的工作。如果得出任何結果，也會向委員會報告。

首先，或許容許我就數個課題作簡短的回應。

剛才亦有學者和其他議會人士討論到，就香港企業管治，我們可

在哪些方面做得更好呢？政府相信良好的企業管治是每個成功的國際集資中心的主要基石，可以用來建立市場的信心，以及吸引優質的長線投資者。根據國際貨幣基金組織和其他海外機構的研究，其實香港在企業管治方面的水平，在亞洲已是數一數二。但作為國際金融中心，我們同意我們不應因為這樣而感到滿足，應該有決心把這項工作做得更好。

舉例來說，其實在這條條例草案中也有若干建議是跟企業管治有關的，包括證券權益的披露制度、建議成立一個新的市場失當行為審裁處、擴大現有以刑事方法來檢控市場失當行為的建議，以及賦權證監會調查上市公司的失當行為，包括可以向上市公司的核數師索取審計底稿等等。我們覺得這些建議對提升企業管治也有幫助，但是我們須要明白，這條條例草案並不能全面處理企業管治引伸出來的各樣課題。

或許在這裏，我也可以簡單地向議員報告我們在其他方面，即在條例草案以外推展企業管治的有關措施。其實有關措施主要包括兩個渠道，第一是在立法方面。立法會很快便會收到有關政府對公司條例修改的建議。我們其中一項建議是希望容許上市公司為股東擬備簡單的財務報表摘要，令股東能更容易掌握和分析有關上市公司的財政狀況。同時我們亦預期公司法改革常務委員會會於未來1至2年內，就有關董事權責、股東權益和公司資料披露等三方面的事宜，陸續提出改革的建議。

除了立法之外，我們亦透過另外一些不需要立法的渠道，研究可否盡快落實一些措施。其中有兩個比較重要的發展，第一，香港交易所現正全面檢討上市規則，和有關規則的執行細節，尤其着重數方面的檢討，第一方面是如何增加市場的透明度；第二是保障股東的權益，尤其是小股東；第三是怎樣精簡現時違反上市規則的處分程序。我們預期可於本年內分批落實這些改善措施。

另外，證監會已經完成有關公司收購和合併守則的初步檢討工件，計於稍後時間可以向公眾諮詢。

主席先生，企業管治其實是一個很大的課題，我們要明白不可單靠這條條例草案完全解決有關問題，但我可向大家保證，對於政府來說，這是一項首要的政策工作，我們會透過其他渠道繼續努力。

另外，剛才有很多團體就市場失當行為的建議提出意見，亦有很多不同的相反意見。或許我在這裏簡單說明政府的立場。對於條例草案中有關市場失當行為的條文的草擬工作，其實我們在早期時主要是參考英國和澳洲的經驗。經過考慮後，我們覺得《澳洲公司法》較為可取，因為澳洲有關市場失當行為的法例清楚列明哪些是市場失當行為，而且澳洲的制度已實行10多年，並可以看到是有效的，而且當地累積的案例亦可供法庭作為參考。

記得我們早於1999年的諮詢過程中，曾經向公眾作出承諾，制訂這項市場失當行為政策的大原則，是在合理及可能的情況下，盡量把與控方須要舉證的行事意圖有關的條文清楚列明。這個做法的目的，其實是希望一些無心犯法而又已遵守證監會和有關專業操守運作的業界人士可以釋疑。在其後的諮詢過程中，我們其實也是按照這項原則就有關條文作出改善。

剛才郎先生曾經問及，於諮詢過程中，有否其他業界人士或社會人士曾跟我們商討這個問題。答案是有的。剛才香港律師會也曾指出。其實就有關舉證責任的條款來說，不單是市場失當行為，在整個條例中有關舉證責任的條款亦是這樣。其實我也聽到一些很清晰的聲音，表示當局在制訂法例時，在合理的情況下必須清楚列明，除非證明被告有罪，否則必須首先假定被告是清白的。

其實在草擬過程中，我們也作出一些研究調查，亦曾跟海外的監管機構進行討論。我們的理解是英國、澳洲和美國在有關市場失當行為的法例下，無論是刑事、民事或私人訴訟，在大部分情況下的舉證責任也是

在檢控當局或與訟人身上。這點跟我們現時條例草案的取向是一致的。

另外，剛才也有些與會人士提到，究竟證監會的權力是否過大。其實另一個相反的問題，是究竟現有的制衡是否足夠。我們相信倘若一個監管機構要切實執行監管工作，必須具有足夠的權力。反而大家須要研究的，是既然證監會具有這些權力，我們怎樣可以防止證監會濫用這些權力。舉例來說，條例草案有甚麼問責或制衡的措施，例如審計署署長可以審查證監會的紀錄，並在有需要時進行一些衡功量值的調查；舉例二，申訴專員公署可以接受有關對證監會的行動或職員的投訴。

亦有人向我們詢問，如果監管失效，濫用權力錯失，政府應怎辦呢？證監會是你們成立的，最終負責人是你們，你們可作出些甚麼補救呢？回應這些聲音的時候，我們早於1989年亦在法例中訂定制衡措施。當時的香港總督，現在是行政長官，在需要保障公眾利益的情況下，可以向證監會發出指令。這項權力從沒有被行使，我亦不希望將來會行使，這只是一項備用的權力而已。

值得一提的，是政府於去年11月已經成立了一個證監會的程序覆檢委員會，目標其實也是希望檢討證監會現時的運作程序，確保證監會可以公平、公正地運用他的權力。委員會會定期向財政司司長提交報告。我們亦預期會向公眾發表有關報告。

剛才亦有團體質疑或提問，有關賦權證監會可以制定規則這個安排是否合理。我們其實曾作過調查，賦權監管機構將具體的規管要求列於規則之內的做法，在其他國際金融中心是頗為普遍的安排。其實這做法也是因為市場瞬息萬變，如果所有的規管細則也要列於主體法例內，可能會失卻靈活性，所以我們希望監管機構也具有足夠的彈性，可以處理這些日新月異的市場發展。其實這個制定規則的安排，在我們現行的證券及期貨法例也有先例。當然，最重要是究竟有甚麼制衡措施。

我希望澄清一點，所有由證監會制定的規則也是附屬法例。必須交給立法會省覽，譬如最近的《財政資源規則》便是個很好的例子。立法會會開會討論，研究內容是否受到社會各界的支持。

同時，證監會於制定各項規則的過程中，無論是過去、現在或將來，必須諮詢市場。我看不到如果證監會不徵詢市場的意見，如何能落實一些新的規則。舉例來說，即使是這條條例草案，我們現在只是在立法會討論。但事實上，證監會已作出偷步，提早於去年成立了多個工作小組，跟業界磋商在這條條例草案下的規則草擬工作應該怎樣進行，現在已有一些進展。

我剛才亦聽到一些意見，詢問究竟證監會擔任各個不同的規管角色，其中有沒有衝突。這方面其實我們亦已作出一些研究及調查。無論是香港或世界各地的監管機構也會制定規則、落實一些細節上的安排，並在持牌人士違規時採取一些紀律處分。這些安排其實是希望能令監管機構更加有效率地工作，以保障投資者。這個安排於其他國家亦很普遍。

於實際運作上，證監會其實會安排不同部門獨立執行這些不同的工作。舉例來說，譬如證監會調查一宗個案後，紀律處分會交給另一個部門的同事處理。即使決定紀律處分某一位人士，現行的條例草案也要求證監會必須給予該位人士陳詞的機會。即使證監會聽過這些陳詞後仍然不信納有關解釋，證監會亦必須以書面形式向該位人士解釋為何要作出制裁、怎樣制裁，才可以進行制裁。當然，還有一個很詳細的上訴機制，日後我們可以跟立法會再詳細討論上訴的安排。同時，我剛才提及的程序覆檢委員會，也可以檢討證監會的處分及制裁過程是否恰當。

主席先生，我已說了很多，以下時間請金管局和證監會的同事分批按照大家提及的主要課題，作出一些簡單的回應。

首先，金管局的阮國恆先生會就銀行證券部的規管作出回應；SFC

的Mr PROCTER會就新的發牌制度作出回應；SFC的Mr Mark DICKENS會就市場失當行為和證券權益披露的新制度作出回應；最後，林太會就核數師報告和上訴機制作出很簡短的回應。多謝。

主席：

阮先生。

香港金融管理局銀行監理處處長阮國恆先生：

多謝主席先生。今天其實我們已聽到很多關於獲豁免交易商的安排的一些意見。我希望藉着這個機會在這裏作少許總結和一些簡單回應。

我很高興在剛才的討論中聽到有人很清晰地指出了一點，就是獲豁免交易商的安排不代表銀行不受監管。因為以往我們一直也很擔心"豁免"這個字會給人一個誤解，誤以為銀行完全不受監管。其實不是，當這個法案委員會審批第V、第VI及第VII分部時，我們便可很清晰地看到，其實銀行所受到的監管，跟申請牌照的人士所受的監管是一樣的。

剛才提到，監管的日常運作會否因為由兩個監管機構進行監管，而導致出現雙重標準呢？我們認為是不會出現這情況的。我們可從條例草案看到有關權力的來源。其實給予豁免的地位，是由證監會負責的。條例草案所有直接應用於獲豁免交易人士的規則，亦是由證監會負責制定。當然，規則的詮釋權最後亦會落在證監會身上。

金管局負責的部分，其實是日常的前線運作及前線的監管工作。關於前線監管工作方面，其實我們設有三組特別的隊伍專門負責監管銀行的證券業運作。這些員工大部分已曾接受證監會的培訓。所以，他們在瞭解證監會在推行監管工作上的過程、步驟及如何解釋某些要求時，也跟證監會有很密切的聯繫，亦知道證監會有甚麼想法。所以在監管過程中，我

們不相信會出現雙重標準。

再加上正如剛才也提到，其實在監管銀行業的證券業務方面，金管局和證監會已簽訂《諒解備忘錄》。這份《諒解備忘錄》將來亦會作出修訂，以充分反映新機制的一些特色。在這份《諒解備忘錄》下，其實金管局跟證監會在監管上有很密切的聯繫。倘若我們認為在監管方面有任何問題需要知道證監會的看法，我們亦會提升至這個層次，跟證監會討論。

剛才舉出一些關於銀行運作的例子，例如地鐵招股，我們沒有公開譴責銀行，是否代表我們的監管力度跟證監會的監管力度不同呢？我不想在這裏就每宗個案詳細逐一回應，但總括來說，我們跟證監會之間有一個很密切的監管聯繫，而在剛才提及的個案中，我們從來沒有發現銀行違反了證監會訂立的規則。

剛才提到另一個問題，是有關銀行聘請的個別員工為何可由證監會審批而獲得牌照，這是否不公平呢？現行條例草案訂有的規則，是由金管局負責制定一個名冊，列出銀行裏負責證券業務的員工名字，而銀行的高層亦須要確認及確定這些員工符合我們發出的要求，而我們發出的要求將會是證監會對持牌人士所發出的適當人士準則的要求。這兩個制度可能在形式上有所分別，但我們不認為在監管結果方面會有任何分別，因為我們仍然要求銀行審批他們的員工，確定他們有足夠的培訓及經驗，以達致我們對他們要求的適當人士準則，而這個適當人士的準則是由證監會訂定的。

同樣地，若果銀行發現某員工不符合適當人士準則，金管局會運用《銀行業條例》賦予的權力，要求銀行採取適當的行動，例如將有關員工從證券業務中剔除。所以我希望大家考慮這個問題的時候，研究監管效果，而不是監管形式。

最後，我想回應一點，銀行為何不可由獨立公司經營證券業務呢？

我們的立場是只要監管的模式能夠為市場的監管，以及為大眾投資者帶來足夠的保障，我們看不到有甚麼政策或監管上的原因，必須強迫銀行將他們的證券業務分拆出來，以獨立的形式運作。相反地，我們認為若果我們真的要設立這些人工化的壁壘，對投資者的保障其實並不會帶來正方的影響。

所以我們最終考慮的問題，是究竟我們現在提出這個監管模式，能否充分監管銀行的證券業務，以及能否為投資者提供足夠的保障呢？而我們在這兩點上的看法也是肯定的。再加上我們不認為這個監管模式會為銀行帶來任何競爭上不公平的優勢，所以我們希望大家研究這條條例草案的時候，從監管效果的角度出發。

Chairman:

Mr Andrew PROCTER.

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

Thank you, Chairman. Some brief observations about the question of competitive neutrality, or level playing field: it is clear, Chairman and members of the committee, that we are in agreement with the Stockbrokers' Association, with the Institute of Securities Dealers, with the Association of Banks, and with others who have spoken on this question of competitive neutrality. It is clear that there must be a level playing field as between different participants within the industry. It is clear also that there must be improvements to the current regulatory regime if that is to be achieved. The question arises then as to how best to achieve it.

We are satisfied that it is possible to achieve competitive neutrality on a level playing field through the provisions of this Bill, when read together with the proposed

amendments to the Banking Ordinance; and it is very important to understand that the two proposed sets of legislative amendments be read together. We do not think, for example, that it is necessary that there be a single regulator; nor do we think that it is necessary that there be an exact identity of the content of regulation as between the authorized institutions and our registrants. But it is clear that there must be a substantial similarity in the content of that regulation. So on certain critical points there has been much discussion this morning. Certainly at the level of the institution it is clear that there will be the same test, the same threshold requirement of fitness and properness.

At the level of the individual there has been some discussion of the distinction to be drawn between licensing on the one hand and admission to a register on the other hand. What will be clear is that again the same threshold requirement will apply in both cases – that is to be licensed by the SFC or to be admitted to the register that is to be maintained by the Monetary Authority, it will be necessary to demonstrate that an individual is fit and proper, and fit and proper according to a set of criteria that the SFC will prepare in consultation with the Monetary Authority. It is clear also that having been admitted to that register or licensed by the SFC, the same standard of ongoing confidence, the same standard of ongoing training and education will apply across the sectors.

Having been admitted, it is clear that there should be a virtual unanimity and similarity in the content in the rules and regulations and guidelines that apply across the industry. We are satisfied that that will be the case. We are satisfied also that through consultation with the broking community and the banking sector that the content of that regulation will be reasonable. And indeed it is already confirmed by members of this morning. There are already working groups, comprising representatives of the broking industry and the banking sector who are working with us on the content of those rules and on the content of those guidance notes and other regulations.

The product of those working groups will apply to all intermediaries regardless of whether they are SFC registrants or exempt persons, and that will be true with very few

exceptions. And where there are exceptions it will be on the basis that there are already sufficiently robust and strong regulatory environment in which the authorized institutions operate. It is clear that there is a best example about the cost and the area of the financial resources.

I think it does clearly arise though for consideration as to whether or not the content of the regulation will be consistently interpreted as between the two regulators. Whether or not the same sort of regulations could be differently interpreted by the monetary authority on one hand and the SFC on the other. And the question of co-ordination – I think is a question that does fairly arise.

Consistency of course will be aided by uniformity of regulation. Mr. YUEN has already referred to the Memorandum of Understanding that exists and the Memorandum that will be updated in the light of the exhibits and forms that are proposed.

The example of apparent inconsistency that has been presented to the Committee this morning has to be considered very carefully. If one considers for example that in respect to the MRTC, it demonstrates rather the opposite. When those issues arose there is extraordinarily close co-operation and co-ordination between the SFC and the Monetary Authority, very frequent calls over the course of a few days exchange of e-mail and correspondence to determine and to agree amongst ourselves what the appropriate standard required. We were satisfied for our part that nothing that any of the banks were doing contravened our code of conduct if it had been done by an SFC registrant. But rather what the banks were doing was exploiting with competitive advantage they had by reason of an existing relationship with their customers. Brokers could have done exactly the same thing if they had been in a position to exploit a pre-existing relationship. So one must be very careful about looking at apparent examples of inconsistency and assuming that there will be a real difficulty and a practical difficulty when two regulators are administering a common body of regulation.

So far as the regulation is concerned, the premise must be that regulation imposes a cost and a burden on those who are regulated and it must be necessary and is clearly justifiable. So in respect of what we see as a competitively neutral level playing field, then it is going forward as a regulatory environment, we are intent that there should be minimum barrier to entry. We are intent that there should be proper standards of operational control and that they should be the subject of consultation with the industry. We are intent that there should be a streamlined framework for licensing and administration which reduces cost without compromising investor protection. We are intent that there should be a full and rather flexible approach to the products and services that are themselves registered and regulated.

So the new legislation will allow for, we think, all of those things to be achieved within a regulatory framework which is essentially rule-based but where the rules themselves were the subject of consultation with the industry and with the wider investment community.

Chairman:

Mr DICKENS.

Mr Mark DICKENS, Executive Director, Supervision of Markets of Securities and Futures Commissions:

On the practical questions of burden of proof between the civil and criminal regimes in Hong Kong and in the United States, all I can say is as an experienced litigation law and jurisdiction in relation to those very questions, I and my colleagues have an interest and satisfy ourselves, we have very similar powers to convey a product of evidence to those that the SFC has, so our evidence gathering powers are strong enough that we would need to prove on much the same evidence and to much the same degree what would need to be proved in the American scenario. In other words you prove intent or recklessness under circumstances and from drawing of inferences allowing a very strict standard in the criminal

conflict.

We believe that the way the proceedings will work from the regulators' point of view or the prosecutors' point of view will be the same. It is true that the individual litigant deprived of the benefits of class action contingency will not lose a pace and will not be as well placed as those in the United States. That raises fundamental questions about the design of the administration of justice in Hong Kong, which goes well beyond the securities aspect. But from the point of view of the practical effectiveness for the regulator, we believe he will be at the same standard as our United States counterpart.

The powers of the Market Misconduct Tribunal to consider evidence that would be inadmissible in formal legal proceedings and the powers to override the privilege against self-incrimination are the same as those the Insider Dealing Tribunal has now and they are the same as those enjoyed by our overseas counterpart. The admissions thus made cannot be used in criminal proceedings. They are a way of gathering the fact so the Tribunal or the Regulator can take appropriate action. The market misconduct provisions are more complex and the states of mind vary from provision to provision. Some provision afflict liability, some provisions afflict liability subject to the verifying of defences. Most of our cases prove of intentional recklessness. We will go through them very carefully, one by one, in the light of the comments made when we get the Parts XIII and XIV. But again, we have calibrated them very carefully against the experience in other jurisdictions and for everything we have done, there will be a respectable precedent.

Bearing that there are no unintended consequences on legitimate business activities, one of the reasons for staying within the framework of the overseas models, is to make sure that we know there will be no unintended consequences because the legislation has been tried and tested in a similar sized market and a similar legal system for at least a decade. We are still discussing with the industry about whether we need to provide clearer guidance so that they will not be unduly affrayed in the legislation and whether we will need to provide some safe harbours. That process is an ongoing one.

In relation to disclosure of interest the points made all revolve around whether or not you should apply the legislation to cash-settled derivatives, and whether or not the stock buying and lending should be caught, and if so how? We say the answer in principle is "yes", because otherwise investors only get a partial picture of what the large investors are doing. And a partial picture can sometimes be more dangerous than no picture at all.

The practical compliance problems frankly are the practical compliance problems of the handful of very large intermediaries. We have spent considerable time, many many hours in the firms, talking to the dealers and the compliance staff, understanding our reporting system to refine the operations of the provisions, to reduce the undue compliance burden. The proposals in the Blue Bill are quite different from those in the White Bill.

We are still working through that process with the international investment houses and large Hong Kong banks trying to find a way to streamline compliance. But we firmly believe that the principle of full transparency, full disclosure and equal access to information about what the large players are doing, this for all players would be the right principle for the Bill. Even though we have taken it a little further in Hong Kong than overseas, because we have such small public floats here and our markets in some stocks so easily made.

主席：

副局長，有沒有補充？

財經事務局副局長區璟智女士：

沒有。

Chairman:

Alexa.

證券及期貨事務監察委員會首席律師林張灼華女士：

多謝主席，首先我希望回應香港會計師公會對於工作底稿的疑慮。其實證監會和香港會計師公會就這個問題已經進行了若干次積極的商討。證監會根據第172條可以進行的查詢，其實是涉及一個非常有限度的範疇，並會盡速進行，目的是讓證監會可盡快確立是否需要採取更嚴厲的進一步措施。因此，查詢會盡量針對特定的目標，而不會是一些漫無目的、旨在查探虛實的手法。而且因為我們是集中和針對目標，而查詢必須非常迅速地進行，所以香港會計師公會關注到有關拖延時間的問題，相信可以盡量將之減至最低。

另外，我希望代表證監會向香港會計師公會再次保證，我們會跟香港會計師公會聯手制訂指引，說明香港會計師公會應如何對證監會的要求作出回應。

至於另外一個疑慮，是工作底稿裏涉及的商業或其他機密資料的保密問題。我相信香港會計師公會可以放心，因為證監會在法律上是有責任將這些資料保密的。

我希望就剛才證券商協會對將來的證券及期貨上訴委員會可以覆核的64項的證監會的決定的疑慮，作出一些回應。

該64項決定，是對個人或團體的利益有影響，而是概括性的決定。這些決定包括了一切發牌的決定，以及對中介人士進行處分的決定，亦包括很多其他的決定。我相信我要再三解釋，證券及期貨上訴委員會是一個負責覆檢的委員會。其實不是證監會每一個決定也適合交由他們進行覆檢和向他們提出上訴的。讓我舉出一些例子，第一，如果有關決定已存有另外一個足夠和獨立的上訴渠道和機制，該等決定也應交由該渠道處理。例

如處理公司收購的上訴委員會會處理公司收購的決定。這決定不應交由證券及期貨上訴委員會處理。

另外，證監會經常會作出很多決定，有些是過渡性的決定，或是預備性的決定。我們認為這些決定不應交由一個機構負責覆核，例如就證監會的決定判斷是非曲直的工作不應交由證券及期貨上訴委員會負責。例如證監會決定對一件事件進行調查。我們認為這項決定不適宜交由證券及期貨上訴委員會處理。當然，就該項調查作出的所有決定，例如要作出處分，當然要交由證券及期貨上訴委員會覆核。

另外，條例草案說明，對證監會所作決定感到不滿的人士，可以向行政長官會同行政會議提出上訴。我們認為這些決定亦同樣不適合交由證券及期貨上訴委員會處理，而應該交由行政長官會同行政會議處理。舉例來說，在某些情況下，證監會對交易所作出的一些決定，應該由上訴的渠道處理。

我們亦希望再次重申，我們將所有決定全部列出來的原因，是希望使情況清晰，以致不會有誤解。但業界如果看過這64項決定後，認為尚有其他證監會的決定應該納入上訴的範疇，很歡迎大家向我們提出，我們是很樂意考慮的。多謝主席。

主席：

副局長，是否沒有補充？

首先再次多謝政府和金融及證券業人士今天出席委員會這個會議。委員會向大家承諾，會繼續聽取及收取大家的意見。如果大家在任何時間有任何書面意見，歡迎向我們遞交。我們再次保證，我們會要求政府把有關意見作詳細的分類，於適當的時候回應大家的意見。

委員會亦已計劃了未來4至5個月的會議時間表，討論的部分亦已載於該文件之內，大家應該可以從我們的網頁上取得。我們現在只是剛開始討論一些具爭議性的部分，例如包括豁免或市場失當行為等部分。由於我們已聽取大家的意見，待我們討論該些部分的時候，我們會特別留意。無論是技術上的問題或比較困難的條文。由於大家已給予我們意見，我們亦會特別就這些方面作出跟進。一些對於細節上的意見，往往是特別重要的意見，因此當我們審議Cash-settled derivatives的有關條文，我們會特別參考大家的意見，歡迎大家緊密地跟進委員會的工作。由於這項工作比較重要，委員會已決定尋求機會跟美國證監會或英國的一些監管機構接觸，進行意見上的交流。這亦是我們在審議法案的工作方面首次作出的決定。很多謝各位今天出席會議。委員會今天的會議到此為止，多謝。

我希望提醒各位委員，下次會議的日期是2月9日，我們會繼續討論第IV分部。另外，由於3月2日和3月9日的會議時間，正是當局就財政預算案的開支和收入部分舉行簡報會的時間，委員會的會議時間會由上午10時45分改為8時30分。秘書處稍後會派發修訂時間表給大家。有關日期沒有變動，只是將會議時間提早而已。

多謝各位。

m2699