立法會
Legislative Council

Ref: CB1/BC/4/00/2

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

Verbatim transcript of meeting
held on Friday, 16 February 2001, at 10:45 am
in Conference Room A of the Legislative Council Building

Members present	**:**	Hon Margaret NG, (Deputy Chairman) Hon Albert HO Chun-yan Hon Eric LI Ka-cheung, JP Dr Hon David LI Kwok-po, JP Hon NG Leung-sing Hon James TO Kun-sun Hon 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
Member absent	**:**	Hon SIN Chung-kai, (Chairman)
Public officers attending	**:**	Miss AU King-chi Deputy Secretary for Financial Services Miss Vivian LAU Principal Assistant Secretary for Financial Services Miss Emmy WONG Assistant Secretary for Financial Services Mr David CARSE Deputy Chief Executive, Hong Kong Monetary Authority Mr Y K CHOI Executive Director of Banking Supervision Department, Hong Kong Monetary Authority

		Mr Arthur YUEN Division Head of Banking Supervision Department, Hong Kong Monetary Authority
		Mr Gilbert MO Deputy Law Draftsman
		Ms Fanny IP Senior Assistant Law Draftsman
		Miss Ada CHEN Senior Government Counsel
Attendance by invitation	**:**	Mr Andrew PROCTOR Executive Director of Intermediaries and Investment Products, Securities and Futures Commission
		Mr Leo LEE Director of Licensing Department, Securities and Futures Commission
		Mr Stephen PO Director of Intermediaries Supervision Department, Securities and Futures Commission
		Mr Andrew YOUNG Legal Consultant, Securities and Futures Commission
Clerk in attendance	**:**	Mrs Florence LAM Chief Assistant Secretary (1)4
Staff in attendance	**:**	Mr LEE Yu-sung Senior Assistant Legal Adviser
		Mr KAU Kin-wah Assistant Legal Adviser 6
		Ms Connie SZETO Senior Assistant Secretary (1)1

(註：由於主席單仲偕議員因事未能出席是次會議，因此是次會議由副主席吳靄儀議員暫代主席一職。)

主席：

我們現在開會。由於單仲偕議員一早已通知我們不能出席今次會議，所以我會替他主持今次的會議。

請各位注意，今天的會議有兩個議程項目，我們會在議程項目I討論條例草案第V部。至於議程項目II，法律顧問在上次會議席上告訴我們，當局採用了一種新方法草擬條例草案的中文本，也就是說，條例草案的中英文本並非完全對照，但當局指兩個文本所傳達的訊息是相同，他們對這做法非常關注。

我們會在下午12時10分討論議程項目II時，聽取法律草擬科的政府官員向我們解釋有關情況。然後我們會決定如何處理這問題，但未必能夠把問題解決。

請各位注意，如果我們今天未能把整個第V部討論完畢的話，可以安排另一時間再作討論。今次會議共有4份文件，第一份文件是胡經昌議員致委員會的信件，當中提到對條例草案第V部的意見。第二及第三份文件是委員會剛收到分別由Linklaters及Hong Kong Stockbrokers Association提交的意見書。由於政府當局及委員會未有時間閱覽該兩份意見書的內容，我建議不要強行討論有關問題，應安排另一時間繼續討論有關第V部這些仍未處理的問題。第四份文件是政府當局的回覆，以回應法律顧問就條例草案中文本的草擬方式提出的問題。

各位同事對我們今次會議的安排有沒有意見？如果各位大致接受的話，我們現請政府進入會議室，向我們簡介條例草案第V部。秘書剛剛提醒我，下次會議其實亦會討論條例草案第V部，所以如果我們

今天未有時間閱覽一些意見書，或沒有時間就某些意見書所提出的意見作出回應，我們下星期仍然有機會繼續討論這部分。不過，關於草擬方面的問題，我們必須第一時間瞭解有關情況，所以今天的會議共有兩個議程項目。

我們歡迎政府當局的代表出席這次會議。由於到了這個階段，彼此也相當熟悉，因此我不再逐一介紹。Welcome everybody and thank you for attending this morning's meeting。副局長，關於政府當局就條例草案第V部提交的文件，請問由哪位同事向我們介紹呢？

財經事務局副局長區璟智女士：

多謝，主席。讓我首先概括簡介這部分，然後請證監會及金管局的同事與各位重點討論今天的課題，即證券期貨市場中介人的規管制度。

主席：

法案委員會認為其中一個頗具爭議性的問題是：應由一個規管機構抑或兩個機構進行監察工作？政府當局在附表中作出詳細比較，說明有關情況在日後的處理方法。請你稍後作出介紹時，也講述附表的內容。由於該附表十分詳細列出各項處理方法，與其逐一討論各個項目，請你告訴我們，在哪些情況下對兩者採取不大相同或完全不同的處理方法？這對我們會有莫大的幫助。現請你先行向我們作出簡介。

財經事務局副局長區璟智女士：

多謝，主席。新的規管制度主要有數項大原則：第一，我們建議採用單一牌照，以取代現有的多重註冊制度，這做法可以精簡現時的審批程序。中介人再也不必要為他們不同的業務設立不同的法團來申

請註冊，我們相信這可以減輕中介人的規管負擔。此外，證監會亦可以為他們提供"一站式"的申請服務。

第二，在面對市場全球化及資訊科技急速發展的情況下，我們需要不斷提升中介人的服務水平，使其符合國際標準。根據條例草案的規定，中介人需要通過一些持續培訓的要求，並在風險管理及內部監控方面作出適當的安排，目的是希望為投資者提供更優質的服務，藉此吸引更多人士在本港市場進行買賣。這對於推動香港作為國際金融中心及集資中心會有幫助。

另一個主要大原則是，在新的規管制度下，無論是銀行的證券部或證券行的證券業務，最重要的一點是符合資格的申請者必須有一個公平的機會參與市場。他們本身需要符合"適當人選"的要求，即符合"fit and proper requirements"。

此外，在諮詢過程及草擬條例草案的過程中，為加深現有的中介人對擬議制度的瞭解，以及為使日後可順利過渡至新制度，證監會與業界已成立多個工作坊，政府及證監會亦會繼續與市場人士保持溝通。我們亦在條例草案中建議訂定一個為期兩年的過渡期，以便有關人士可以熟習新的制度。

政府亦希望在新的發牌制度中納入一些靈活性的安排，其中包括在第139條中增設一個通過附屬法例的渠道，以便日後市場推出新產品或新服務時，可透過附屬法例將該等產品或服務納入現時建議的規管範疇內。

正如主席剛才也提到，市場人士十分關注在新的規管制度下，銀行證券部所受到的規管，與證券行所受到的規管日後的安排會如何呢？規管方式與現時的有何分別？由證監會或金管局進行規管，兩者有甚麼不同或相同的地方？簡單來說，關於銀行證券業務的規管，金

管局將來會採用證監會的規管標準來執行前線規管者的工作。我們一直強調，其實"豁免"只是一個標籤，銀行如果有意從事證券業務，必須向證監會申請豁免。證監會在考慮銀行提出的申請時，一如考慮其他證券行申請牌照的情況，證監會有權列明銀行在申請獲批准後必須遵守的一些條件。一般來說，該等條件會訂明，證監會為證券行而制訂的規則及守則，將會同樣適用於獲豁免銀行的證券部。這就是我們所指"統一標準，分別監管"的安排。該項安排其實有以下數個主要目標：首先，在不影響投資者所獲得保障的大前提下，避免不必要的規管重疊；此外，為證券業提供一個公平競爭的環境；與此同時，我們希望保留一定程度的靈活性，讓業界可選擇以不同方式經營證券業務。這做法對投資者來說，也是為他們提供一項選擇。

條例草案第V部訂明，證監會可以倚賴金管局對銀行進行監管。第173條訂明，將證監會日常監管證券行的權力，同時賦予金管局，以便金管局作為一個前線的規管機構，可以對銀行證券部的日常運作進行有效監管。條例草案第124條亦將"負責人員"這概念，由證券行伸延至銀行的證券部。

關於我剛才所說"統一標準，分別監管"的大原則，其實《2000年銀行業(修訂)條例草案》亦有訂明這項原則。現時，證監會與金管局正草擬一份新的諒解備忘錄，藉此落實我剛才所說的新規管機制。

我會在稍後邀請我的同事，包括博學德先生和簡達恆先生向各位更詳細講解在單一牌照制度下的受規管範圍、"負責人員"的概念、有關的過渡安排，以及日後證監會和金管局會如何合作。此外，簡達恆先生亦會重點介紹現時銀行從事證券業務所受到的規管，以及在條例草案通過成為法例後，日後對該等銀行的規管安排。

在出席是次會議前，我們剛剛收到立法會秘書處的傳真文件，這是胡議員提交的意見書。我們的同事在稍後講解條例草案時，會盡可

能回應該份意見書提出的重點。由於我們剛剛收到這份意見書，因此或有需要在會後才作出書面回應，以作補充。

主席：

區女士，其實我們今天另外收到由Linklaters和Hong Kong Stockbrokers Association提交的兩份意見書。委員仍未有時間閱覽該兩份意見書的內容，而我們會在下次會議繼續討論條例草案第V部，所以政府無需急於在是次會議席上作出回應，可以留待下次會議再作回應。

財經事務局副局長區璟智女士：

好的。

CHAIRMAN:

Before I call on Mr PROCTOR and Mr CARSE, I notice that Mr Gilbert MO is there. I think that this has to do with item 2 of our agenda this morning, and we are looking forward to that item at 12:10 pm. I am afraid you will be kept waiting for sometime. I will call upon Mr PROCTOR.

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

It may be convenient if I take Members to the overview paper in respect of Part V, and directly to paragraph 6, the paragraph headed "The Nine Regulated Activities", and Members will also need to have regard to what is Schedule 6 of the legislation. It is in volume 2 on page C2447. That is the schedule that sets out those activities which are regulated. Those activities for which a licence or a grant of exempt status

is needed before they can be carried on as a business in Hong Kong. There are nine of them. Essentially they are the same activities for which a licence or exempt status would be necessary under the existing law, but with these changes and additions: first of all, there is a new category of providing automated trading services; that is type 7, and that is a category about which Members have heard a good deal in the context of Part III.

There is also a breaking-out of the existing category of advising on securities, to recognize that there are different ways in which advice might be given, different types of advice that might call for different types of skill. So, as paragraph 7 of the overview paper describes it, we thought it prudent to break that category of advising on securities out into three sub-categories. They are type 4 in Schedule 6, type 6, which is advising on corporate finance, and type 9, which is asset management. We recognize that those three types of advisory services did call for quite separate and distinct skill, and that in licensing and approving those people who provided those services, we ought to be looking at different requirements in terms of their education and experience qualifications.

Otherwise the definitions are, I think it is fair to say, not materially different from those under the existing law, although there is an important change in respect of the definition of collective investment schemes, and this is discussed at the bottom of paragraph 7 of the overview paper. The effect of that change is that any interest in a collective investment scheme would be regarded as a security. At the moment under the existing law, that is true for units in unit trusts and for shares in mutual funds. It is not as clear for other types of interests in other types of collective interest schemes. So what the proposed amendment does is to make that clear, that any interest in a collective investment scheme would be regarded as a security, and it follows in the context of licensing that anyone who advises on those interests or deals in those interests would need to be licensed either as an adviser or a dealer in securities, as the case may be.

Paragraph 8 of the overview paper recites the retention of certain exemptions to the licensing requirement, and I note in particular that it is intended that there be a continuation of the exclusion in respect of incidental advice given by accountants and solicitors, but that should now be extended to counsel at the Bar; and really that recognizes that in their ordinary day-to-day work accountants, solicitors and barristers, for that matter, might give advice which could technically be regarded as advising on securities, but that there is no regulatory benefit to be had from requiring them to be licensed, so long as it remains an incidental part of their business. As to what is incidental, that is a subject upon which the Commission has recently issued some updated guidelines.

In broad terms they are the activities for which a licence or exemption would be required. Paragraph 9 then describes the way in which applicants for licence or exemption would be considered. One significant change in respect of the proposals is that for licences, only corporations would be entitled to a licence. At the moment you might be a corporation, you might be a partnership or you might be an individual, and apply for a licence as the principal carrying on one of the regulated activities under the Securities Ordinance or the various other ordinances that have been consolidated; but in future it is intended that only corporations would be eligible.

I would note for Members' information that, for example, at the moment there are presently two partnerships in Hong Kong that are licensed. There are a larger number of individuals, but it was particularly in respect of individuals where we saw problems with intestate estates and with difficulties in cases of insolvency, and that caused us to think that it was appropriate for investor protection that in future we would limit licensees to corporations.

Clauses 115 and 116 of the Bill, which we might come to more detail shortly, set out the tests for licence, and in essence it is a continuing test, but it is continued from

the current law, as to whether the applicant is fit and proper to carry on the regulated activity for which they seek a licence.

Clause 118, though, in respect of exempt persons, is significantly different and new. It completely changes the test for when a person is entitled to be granted exempt status, and in effect aligns it with the test for when a person is entitled to be licensed. So the same requirement applies: is the applicant fit and proper to carry on the activities for which exempt status is sought? Members will also be familiar with the other significant change in respect of the exempt person category, and that is that only authorized institutions in future would be entitled to exempt status.

At the moment there are some insurance companies, there are some trustee company, some custodians, and a miscellany of other corporations that enjoy exempt status; but on reflection we thought there was an investor protection issue in respect of those other categories, because they were not, generally speaking, subject to a level of regulation that we regarded as acceptable. In the case of authorized institutions with a monetary authority available and willing to perform the role as regulator, it was acceptable to continue some form of exempt status for authorized institutions, albeit subject to a significantly different threshold test.

Clauses 119, 120 and clause 4 of the proposed amendment to the Banking Ordinance again carry through the test of whether or not an individual who is to provide services for a principle licence holder is fit and proper to provide the services for which they seek authorization. In summary, the threshold test for entry into the marketplace, to provide any one of those seven services, is "Is the applicant fit and proper?".

Paragraph 10 of the overview papers refers to one of the differences that is picked up subsequently in the schedule to the paper, between the arrangements in respect of SFC licensees and exempt persons who would be subject to frontline regulation by the

monetary authority; and that is that we would, in the case of the SFC, license those individuals, and in the case of the Monetary Authority, they would expect employees in the relevant areas of an authorized institution to be included on a register. It is a register with a statutory base, and I will leave it to Mr CARSE to describe in more detail how that register would work in practice.

In our introductory remarks Miss AU referred to a single licence concept and a single declaration of exemption, and that is discussed at paragraph 11 of the paper. The difference is essentially a difference between having a number of licences to carry on the full range of financial services that a complex group might want to provide; and having a single licence with endorsements on it, in the way that people would be familiar with, in respect of, say, a driver's licence. So in future there would be a single licence that would endorse upon the areas within the nine possible areas of activity for which the person was licensed or exempt, and therefore permitted, to carry on business in Hong Kong. It would also include the conditions that attach to that licence or exempt status. It might not seem a significant difference, but it has a number of practical consequences just in terms of the regulatory requirements in servicing the expectations under the legislation, the number of returns that need to be filed, and so on and so forth. We think it should result in significant savings to licensees, particularly those who hold a number of licences at present, without any reduction in investor protection.

Miss AU also referred to the executive officer concept. In fact in the Securities and Futures Bill the terminology is "responsible officer", and in the amendments to the Banking Ordinance "executive officer". It amounts to much the same thing, that those who have direct responsibility for the management of the operation which is licensed or exempt should themselves be subject to direct approval, and should themselves be held directly responsible by the regulator for the systems and controls and the performance of the principle licence holder or exempt person. So there is a specific requirement in both sets of legislation for approval of, in the one case,

"responsible officer", and in the other case, "executive officers".

As part of an effort to facilitate the carrying-on of business in Hong Kong, there are two new types of licence that are being introduced under the Bill. The first is the provisional licence, and the second is the temporary licence. The provisional licence recognizes that in practice it is often the case that we are able to determine that someone is fit and proper to be licensed, but that there is outstanding some relatively minor aspect of the approval process – typically the vetting process, and typically a reply from an overseas regulator. In some cases unfortunately the replies never come, and in some cases they take several years to come; and clearly it is unfair to have people sitting, waiting in the wings, before they can provide services. Where we do not have any particular concern and there is a remote possibility that we may hear something one day from a regulator in another jurisdiction, on that basis we think it is appropriate to grant provisional licences where people are otherwise fit and proper, but where the process is not entirely complete.

The second new type of licence is the temporary licence. As an international financial centre, it is often the case that people are flown in at short notice from other places, to provide specialized services in respect of some financial transaction; and often, with very little notice, we are asked at present to license someone so that they can provide those services in Hong Kong. We think it appropriate to directly recognize that as the reality, and to provide for the possibility of temporary licences. In effect we are recognizing that someone is adequately regulated and is approved to provide certain types of services in another jurisdiction; that other jurisdiction has a quality and level of regulation comparable to that in Hong Kong; that there are in place arrangements between ourselves and the regulators in those other jurisdictions that will allow for investor protection issues to be addressed if there is a problem in Hong Kong; and that we are satisfied on the information that we had about the applicant that they are fit and proper to provide the short term services that are proposed.

Typically also we are talking about services that do not involve risks to investors. Typically they are services to corporate clients; and so where someone seeks such a short term temporary licence for no more than 3 months, and for no more than 6 months in a two-year period, it would be possible for us to grant that form of licence.

The next part of the overview paper, paragraphs 15 and so on, refer to the sharing of responsibility between the HKMA and the SFC, and Miss AU has touched on that. I just add that in respect of clause 137 of the Bill, which is not referred to in the overview paper, there are some detailed procedural requirements set out, especially going to procedural fairness. So each of the approval processes to which I have referred are compendiously picked up in clause 137 and made the subject of express procedural fairness requirements.

When it comes to movement from the existing regime to the proposed regime, there are transitional provisions that are set out in what is Schedule 9. The effect of the transitional provisions is generous. It provides for a two-year transitional period. The practical consequence is that with some minor exceptions, people will be permitted to go on doing what they can do now; that is, they will be permitted to go on providing the services they can provide now. They will be deemed to be licensed or exempt under the new legislation, and therefore they will find themselves subject to the requirements of the new legislation. There are some exemptions to that. They are rather technical and, in the context of the discussion, perhaps not particularly important; but some of them are referred to in paragraph 17 of the paper. I am happy to come back to those if Members have particular concerns about the transitional provisions. The general effect and the overwhelming effect of the transitional provisions is that you have 2 years to seek a licence or to seek exempt status under the new arrangements, and in the meantime you are permitted to go on doing those things for which you are already licensed under the existing regime.

There are a number of market comments received in response to the White Bill,

and they are discussed at paragraphs 19 and following. Perhaps to just pick out the most important of those, one that was a concern in the White Bill proposal was that we expected someone to be in Hong Kong at all times, and available to supervise a licensed entity. That has been ameliorated somewhat, and now it is a requirement that there is someone available at all times to supervise, but that they need not physically be present in Hong Kong to carry out those supervisory responsibilities.

There was a concern also in respect of the White Bill requirements that would have imposed upon executive officers an obligation to report certain misconduct or breaches to the SFC, and that clause has been deleted. There was a concern about some of the time limits, and as we have discussed in respect of other Parts, generally the time limits have been extended. In the particular case of one of the time limits under Part V, relating to those who become substantial shareholders of a licensed entity, there is only a minor extension from 2 to 3 days; but that conforms with Part XV of the legislation, which is the disclosure of interest requirement.

As paragraph 23 of the paper describes, there has been a general review of the penalty provisions in respect of the provisions of Part V. For the most part the penalties have been reduced, and in one or two cases described in sub-paragraph (c) of paragraph 23, there has been an increase.

The paper has a brief section on international comparison. The reason that the comparison is not more extensive, particularly in respect of the way in which the securities operations of banks are dealt with in those other jurisdictions, is simply that it is so complicated. If we had set out, for example, a description of what the US does in its regulation of the securities operations of banks and banks' subsidiaries, it would have, even on a modest description, tripled the length of the paper.

Let me try and summarize it as briefly as I think I can fairly do. In the case of UK of course there is a single regulator, and so the UK regime under the new Financial

Services and Markets Act sets out a series of activities for which authorization is required. The activities are not expressed in quite the same way as the nine activities in Schedule 6 of this Bill, but the coverage, at least in the securities sector, is co-extensive. It does not matter for the purposes of the UK regulation who it is that is carrying out the activity. It does not matter whether it is a securities house or a bank or a subsidiary of a bank; they are all regulated, they are all approved, and they are all given authorization to carry out those activities by the same financial services authority. So there is no concept of exempt status in the way it has been discussed here, nor in the way that it exists under the existing Hong Kong legislation.

In Australia there is a very limited concept of exempt status for banking subsidiaries, but generally speaking, banks would be required to be licensed in respect of their securities dealing, by the Australian Securities Investments Commission. The picture in Australia is complicated further by the fact that there is a prudential regulator who would have responsibility for prudential supervision of banking operations, including risks associated with their securities operations. In that context "prudential" means things like regulatory capital requirements – in fact it means particularly things like regulatory capital requirements – and so there is a sharing of regulatory responsibility in respect of the securities operations of banks between, on the one hand prudential requirements and on the other hand conduct requirements between those two regulatory authorities.

In the US the position is so complicated that I would not even presume to begin to describe it, except to say that it changed about 13 months ago, when new legislation was passed by the US Congress. I think, Madame Chair, that the most sensible thing to do in respect of the US, would be to respond to any requests from Members of the Committee to provide a much more detailed paper; but it really is a very complex situation. It is not, as I said in answer to a question several committee meetings ago, a structure that we would put forward in any way as an acceptable model for Hong Kong in respect of the way the securities operations of banks or the subsidiaries are

regulated in the US. It is just too much the product of history, too much the product of turf battles between not two but four or five sets of regulators, and too much the product of a series of legislative compromises, as even the reform legislation was passed through Congress.

That I think takes me to the table to which you, Madame Chair, referred at the outset. I will try very briefly to highlight some of the differences, but I should say that in respect of the full picture of regulatory responsibilities and the division of those responsibilities between the SFC and the HKMA in respect of our licensees and exempt authorized institutions that carry on securities dealing, Part V is only the beginning of the story. It will be necessary to look in more detail at Parts VI to IX, to understand the full picture and the full way in which the responsibilities are to be divided.

I suggest to anticipate a little, Parts VI and VII, which deal with the imposition of conduct requirements and the making of rules in respect of conduct, and which we will discuss in subsequent weeks, generally speaking have rule-making powers that give the SFC power to make rules in respect of conduct that will apply both to our licensees and to exempt persons. There are one or two exceptions to that, but the exceptions are very much of a reflection of the fact that there is in place an existing set of requirements that would apply to authorized institutions. Parts VI and VII provisions that allow for those rules to have such a broad coverage also have a requirement in respect of consultation between the two regulators, where there is to be coverage that includes exempt persons.

Part VIII is the part that deals with inspections and investigations powers, and again there is a division of responsibility in respect of the day-to-day supervision or inspection to ensure compliance with, for example, the rules passed under Parts VI or VII, a division between the SFC and the HKMA; but in the second part of Part VIII the investigative powers very much fall to the SFC. So one can easily imagine a situation

in which the HKMA finds matters of concern that affect an exempt person, but where the investigation, because the particular powers given to the SFC and the SFC alone would have to be carried out by the SFC. Then Part IX is in respect of discipline and includes powers to sanction, the full range from reprimand to revocation. There also in respect of exempt persons, the power to revoke or suspend exempt status is given to the SFC. Again it is a power that is subject to consultation with the HKMA in respect of exempt persons, but the power itself is given to the SFC. Typically, I would imagine, the situation would be one in which the HKMA had a concern about the activities of an exempt authorized institution in its securities operations; it had sought to address those concerns through its extensive powers under the Banking Ordinance, but it nonetheless concluded that that was not possible or practical, and that therefore exempt status should be revoked. It is only when you look at Part V in the light of those later parts that we will come to discuss that you get the full picture of responsibility.

Having said that, let me go to the table then, and Part V. There is a little code to this table that members may have discerned already. Basically it sets out the primary provision in the left-hand column, and two columns in from the right there is a symbol. It is either a tick or a circle. Where it is a tick, that means the provisions as they apply to SFC licensees and to exempt authorized institutions carrying on one of the nine regulated activities, are entirely co-extensive; that is, there is no material difference. Where there is a circle it means that they are broadly similar, but that the source of power is probably slightly different. In most cases it will mean that the source of power is the Banking Ordinance, and in some cases it will mean that there is a slight distinction to be drawn in the way in which the powers are to be exercised. That is the key to the table.

CHAIRMAN:

There are a great many circles, Mr PROCTOR. Probably you will have to

exercise some selectivity.

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

Yes. I am going to do that as much as I can. I have already said that in respect of sections 115 to 118 the threshold test is the same, but that we rely upon the HKMA to tell us whether someone is fit and proper to be given exempt status. 115, 117 and 118 are worth noting, even though they are ticked, because they anticipate one of the points that is made in the paper that was tabled this morning from Mr MO. That relates to conditions. Although the way in which the approval of exempt status is worded appears to be an absolute one, and so the SFC does not have a discretion to refuse a recommendation that someone is fit and proper to be granted exempt status, the process is this: there is a consultation between the SFC and the HKMA in respect of the applicant. The HKMA then makes its judgment about fitness and properness, gives that advice to the SFC, and the SFC, on that advice, either does or does not grant exempt status. The very next set of provisions allows the SFC to attach a set of conditions to the exempt status, and that is important because those conditions will reflect judgments that the SFC make, based upon the information it has been given by the HKMA, and based upon the SFC's own knowledge of the applicant.

For example, if you took an exempt person who wanted to be granted exempt status in respect of corporate finance advice, we would take the HKMA's judgment about whether they were fit and proper to give advice, but we would also consult within the SFC as the regulator that deals with corporate finance matters, under the Takeovers Code and so on, to see whether the exempt person actually had relevant experience in the area. If we thought he did not, then our discussion with the HKMA would be that there had to be particular conditions that attached to the grant of exempt status. So although the primary decision appears to be one in which the SFC simply relies upon the HKMA's judgment call, it is a much more dynamic process than that.

I do not want to spend too much time going through this table. I think paragraphs 119, 121 and 122 are good examples of where there is a significant difference in the structure of the regulatory arrangements. It is the difference I referred to, where on the one hand the SFC licenses to the level of the individual. On the other hand the HKMA will require that the exempt authorized institution make a judgment about the fitness and properness of an applicant, and on that basis they would be included upon a register. The structure looks different, but the threshold requirements are exactly the same. The test, on the one hand for licence and on the other hand for inclusion on the register, is exactly the same test of fitness and properness as explained in codes and guidelines that the HKMA and the SFC would consult upon and promulgate for the guidance of industry.

Again, it looks like a structural and significant difference, but in practical terms those who are permitted to carry on the activity would be subject to the same requirements. The same is also true in respect of 125. Again you see that there is a responsible officer concept and an executive officer concept that looks different structurally – and certainly the approving body is different – but the prerequisites are exactly the same. So the practical content of what it is that has to be demonstrated is the same, and those that are approved in either case should have, broadly speaking, the same sets of skills.

129, Suitability of Premises, again looks different, but in fact in practical terms is the same. There is a requirement in both regimes for approval in respect of branch offices, and in respect of the SFC licensees we also have a particular requirement in respect of where records are kept. On the HKMA side – and Mr CARSE will perhaps come to this – there is a requirement that the authorized institution be able to produce records as and when required; and a requirement in respect of approval of branch offices. So there is not in practical terms a really material and important distinction, even though a circle appears. Likewise in respect of substantial shareholding, a

different regulator approves but in practical terms there is a requirement that all substantial shareholders be approved in both regimes.

In the following sections, again nothing of material difference occurs, although there is a different approval process. Going through, though, to what is a subject of some discussion, and that is section 141 – these are the capital requirements – there is no question that the capital requirements in respect of the banking sector are quite different to the financial resources rule requirements in respect of the securities sector. They are quite different now. They may be slightly less different in future, as the banking sector introduces the new Basel Accord which is a much more sophisticated cutting-up of risk against which capital has to be held; but they will remain different nonetheless. What I think is perhaps lost in some of the discussion of the differences, though, is that it is by no means clear which is the tougher and which is the easier. Certainly in the case of the banking sector, for example, a very much larger amount of start-up or of issued capital is required than is the case on the securities side. So banks have to have a much larger issued capital than on the securities side. On the securities side, though, the way in which assets have to be held in some cases can mean a slightly tougher regime in respect of the liquidity of those assets; but it depends very much on the type of risk, and I do not think one could say in the abstract that one regime was easier than the other, except in absolute terms in respect of authorized or paid-up capital – and there it is clear that on the banking side the regime is significantly tougher than it is on the securities side. So it is true that banks in respect of their securities operations, if they are carried out within the exempt authorized institutions, do not have to comply with the Financial Resources Rules, but it does not follow that they in some way get a significant benefit from that。

Clause 145, in respect of client money, is a difference that reflects differences in the way in which banks carry on business, and the nature of their business in respect of client money. I think it is a difference that speaks for itself, and I do not stay with it here. Over in what is Division 5, clauses 149 and following, the differences there are

good examples of where there is a circle because the Banking Ordinance and the requirements of the Monetary Authority are not exactly the same as the requirements of the SFC under the proposed legislation, but they are so similar and they reach such substantially similar ends, and they achieve the same level of investor protection, there is no regulatory benefit to be gained from requiring the authorized institutions that are exempt to comply with both sets of requirements. That is true in respect of general requirements for audited returns, the appointment of auditors and so on and so forth. That in fact takes us through to what is page 11, in respect of business conduct. I have said – and you can see on the face of the document – that there the requirements basically get ticks; and the requirements will basically be that the same sets of rules, the same sets of business conduct codes, will apply across the industry, unless we can be satisfied that there is in place some arrangement on the banking side, and satisfied on the basis of our consultation with the Monetary Authority that there is some arrangement on the banking side that will provide an equivalent level of investor protection. There is one example of that now, which may be useful to refer to, and that is in respect of some aspects of leveraged foreign exchange trading and cold-calling requirements, where the banks have in place regulatory requirements which mean that there would be no point in doubling up and making them subject to requirements imposed by the SFC on our registrants.

CHAIRMAN:

Thank you very much, Mr PROCTOR. I appreciate very much the spirit in which you prepared the table and have taken us through the significant parts. I will ask now Mr CARSE to go on with the banking side.

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

Thank you, Madame Chair. As Andrew PROCTOR has already set out, in some detail, some of the detailed arrangements involving the sharing of responsibility

between the HKMA and the SFC, I do not propose to repeat those, although obviously I will respond to any questions that Members may have. Just let me stress that the role of the HKMA, as I see it, is to monitor and enforce on a day-to-day basis regulatory standards that will be established by the SFC, in a number of cases in consultation with the HKMA.

The question has been raised as to why you do not separate the two responsibilities and allow supervision purely on a functional basis, with the HKMA looking after banking business and the SFC looking after securities business. The problem really is that in the real world the division between the two is not as clearcut as that. There is an obvious overlap between banking and securities business, and in any case, even if the SFC were to take on the responsibility for supervising the banks' securities business, we would have to do it as well, because we are responsible for the whole of the business of authorized institutions. Just as an indicator of that, under the new Basel Capital Accord which Andrew mentioned, which will greatly elaborate the capital requirements that apply to banks, in looking at the consolidated capital position of a banking group in the future, we will have to consolidate securities companies which are held by banks. I think that is recognition that the banking regulator has to take account of the whole of the business of the bank or the banking group, rather than just the purely banking business within that.

The other advantage of this arrangement from the banks' point of view is that they will only have to deal with one regulator. I think that will achieve compliance savings, compared with an arrangement whereby you have to deal with two regulators.

As Andrew mentioned, the ultimate authority rests with the SFC. I mean, they are the people who approve exempt authorized institutions that will be done on the same fitness and properness criteria as applied to brokers. They can mount their own investigations, if necessary, and they can also revoke exempt status after consultation with the HKMA. We believe this is a cost effective means of regulating the bank

securities business, which will deliver consistency of approach between the banks and the brokers. It is also continuation of the existing arrangements, so it is evolutionary. It is what we are actually doing in practice. Since 1995 we have told the banks that we expect them to comply with the SFC's code of conduct in relation to their securities business. We are already carrying out examinations of the banks' securities business.

What would be different under the new Bill is that these arrangements will be formalized and will be strengthened. Instead of asking them to comply with the code of conduct on a voluntary basis, the code of conduct will apply directly on a statutory basis to banks and other exempt authorized institutions. As Andrew mentioned, we will also maintain a register of these authorized institutions that are carrying out securities business on their behalf. There is a difference in that we will not directly approve the fitness and properness of those individuals.

To be honest, that would be quite a mammoth task. We are talking about potentially thousands of employees, going right the way down in a bank to a very junior level. We do not, for example, at the moment approve bank counter staff who are carrying out banking business on behalf of customers. We are trying to have a compromise which achieves an equivalence of treatment between the way in which we treat bank staff at the moment, which will also mirror the sort of requirements that the SFC is imposing upon brokers.

So it will be up to the individual institutions to ensure that their employees will be fit and proper. We will issue guidelines setting out the fitness and properness criteria, which will be based on those of the SFC. The same standards will be applied. If it turns out that an employee is not fit and proper by virtue of misconduct or incompetence, then we would certainly require the authorized institution to remove that employee from the register; and once that is done, by virtue of the Bill they are no longer in a position to conduct securities business on behalf of the authorized institution.

Let me just explain briefly how we actually go about supervising the banks' securities business. This is based partly on on-site examination and partly on off-site analysis. As part of the preparation for the coming into effect of the new Bill and to reflect the fact that we are already actually supervising the banks' securities business, we have set up three specialist examination teams which comprise nine examiners who have received training from the SFC. Those examiners are part of a division, which is headed by Arthur YUEN, who has appeared before this committee. He was originally with the SFC.

A number of our employees have actually gone to work for the SFC, so there is actually quite a bit of cross-fertilization between the HKMA and the SFC at the moment. In addition to those specialist nine banking examiners, of course we have got a larger number of banking examiners, and if necessary we would call upon those resources as well, to do securities examinations. Our examinations take several weeks each. They are quite intensive. They are carried out on a frequency which is agreed with the SFC, and we also talk to the SFC each year about the kind of risk areas that we should be looking at. We use the examination checklist and guidelines that are based on those of the SFC

Now, in addition to that on-site examination, which is actually going in and looking at the systems and controls in place with individual banks, we also conduct off-site reviews, and we do that on the basis of a new securities-related return which the banks submit to us every six months. We have just received the first return for the period covering the second half of the year 2000 and we are analyzing those figures at the moment. The figures are still preliminary, but I could give you a few basic numbers which would help to put this into perspective. The number of exempt authorized institutions – that is bank, DTCs and RLBs is 110, but only 79 of those are actually doing any securities business at the moment. Out of that 79 there are 53 exempt authorized institutions which are engaged in securities-dealing business on a

retail basis.

We have not got a precise definition of "retail". We have defined "retail" as being securities dealing other than for private banking clients. So it will probably include some retail customers, but also some corporate customers. The income which those exempt authorized institutions derived from their retail securities business in the second half of the year amounted to about $HK1 billion; and that amounted to about 2 per cent of the total income of the various exempt authorized institutions. You can see that for authorized institutions in general, the securities-dealing activities accounts for a very small proportion of their total income, so it is still incidental to their total income, despite the fact that some institutions have been stepping up their involvement in this business recently.

Apart from retail, the return also covers private banking; it covers underwriting, issuing and placing of securities and corporate finance activities. If you add on the income derived from those other activities besides retail securities business, then the percentage of income from securities business goes up a bit to about three and a half per cent of total income; so it is still relatively small.

As regards the relationship between the SFC and the HKMA, if we came across material concern arising from our on-site examinations or our off-site reviews, we would bring that to the attention of the SFC. We would either do that through our regular monthly meetings which are going on at the moment, or if it was a very serious matter, or even just a serious matter, we would probably bring it to the SFC's attention immediately.

There is an important provision in the Banking (Amendment) Bill, which is the companion to this Securities and Futures Bill, because that has removed all the secrecy constraints between ourselves and the SFC as far as the disclosure of information related to securities business is concerned. So there is no barrier on us disclosing

information to the SFC about the securities-related business of banks. There should be a seamless passage of information between the two of us, and we hope that that will achieve some of the advantages of a single regulator without having the disadvantages of putting in place a whole new structure.

I hope that this will show that the HKMA is determined to ensure that the securities business of the banks is properly supervised by the HKMA in line with the same standards as will be applied by the SFC, and that we are putting the necessary resources in place to achieve this. Thank you very much.

CHAIRMAN:

Thank you Mr CARSE. Members, you have been very patient. Any questions?胡經昌議員。

胡經昌議員：

多謝，主席。很多謝政府有關部門向我們詳細講解條例草案的內容。由於今天的議程並沒有包括第VI部，所以我並無準備提問有關條例草案第VI部的問題。主席，希望你不要介意我在此詳細提出我的意見，因為所涉及的事宜與我們業界有關。此外，讓我首先申報利益，我是證監會的註冊投資顧問。

很多人會以為我們業界與銀行界合不來，經常發生爭拗，但事實上並非如此。我相信在座各位，無論所代表的業界或自己本人也好，與銀行均有千絲萬縷的關係，所以其實大家的目標也是一致的。

很多時我們業界與銀行界可能受到其他方面影響，我不敢說是挑撥離間，但總之是受到影響，以致我們業界與銀行界的關係看似十分惡劣，但其實並非如此。這條綜合條例草案由現有多條法例組成，其

作用是精簡規管業界的法例，以堵塞現有法例所存在的任何漏洞。由於現時規管證券期貨業的安排太繁複，所以應該精簡規管架構，使規管架構不會太瑣碎和繁複。

今天我們討論條例草案有關發牌的部分。其實證監會一直是根據有關程序發牌，但為何需要批給豁免呢？政府剛才也就這方面作出解釋。Mr CARSE剛才提到，現時共有79間銀行從事證券業務，其中53間以exempt AI的status從事這類業務。也就是說，餘下的26間銀行……正確數目可能不是26間……但總之其餘銀行的做法，應該是開設附屬公司進行證券買賣活動。目前，這類公司的運作受證監會所監管。政府是否認為現時的做法有問題呢？這類公司受證監會所監管，如果政府認為這做法並無問題，也就是說，可以繼續採用這種監管安排。政府是否因應這類公司或所屬銀行的要求而訂定豁免條文？是否由於這類公司或所屬銀行認為受證監會監管並不妥當，因此不希望受證監會所監管？綜合條例草案的目的是精簡監管安排，清楚訂明從事證券業務須受到的規管。政府其實無需訂定多項豁免，令情況變得複雜。政府剛才概述了很多方面的情況，我也就某些方面提出一些意見，但我一直……

主席：

胡經昌議員，你剛才已經提出了一個問題，其他問題留待稍後發問好嗎？我會讓你繼續發問，我明白你就整個部分提出意見。

胡經昌議員：

好的。

CHAIRMAN:

Mr CARSE, I think you want to respond to part of the first question.

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

Yes, Madame Chair, it is really just to clarify the numbers. There are 110 exempt authorized institutions, but only 79 of those are actually doing business of various kinds. Out of that 79, there are 53 who are engaged in securities dealing business on a retail basis. So I think probably from the point of view of the concern of the broking industry, it is that 53 that is probably the most relevant number.

CHAIRMAN:

Mr CARSE, I think the question is rather "What is wrong with the present system? Why do they have to be exempted? Why don't they get regulated by the same body?" Is that right?

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

Yes, Madame Chair. If I could perhaps respond to that, first of all, if you are talking about the present system, the present system is basically one in which authorized institutions have an exemption, and we have a more informal arrangement for sharing responsibility. As I mentioned, we are already applying the SFC standards and we are monitoring and enforcing those standards on a day-to-day basis, but in a rather more informal way than is envisaged under the Bill. So actually the present practice is akin to what is proposed in the Bill, and the Bill formalizes and strengthens the current arrangement.

The question is: could you find some other way to do it? Of course, the answer is "Yes, you could find some other way to do it." There are various options, as Mr PROCTOR has mentioned. Some of those options are actually more complicated

than the one that is proposed in the Bill. If you take the American system, for example, that is vastly more complicated than what we are proposing here, and I do not think anybody would suggest that we go down that route.

You could also go down the route of having a single regulator, as a number of other jurisdictions have done, but if you go down that route then you are going to spend several years building a new single regulatory authority; and that would involve a lot more work and administrative effort, and a lot more upheaval for the industry, I might add. So what we are proposing is an evolutionary development of the current system. The point I was making was that yes, you could decide that you were going to separate off the responsibility for regulating banking business, which would be the responsibility of the HKMA, and the responsibility for regulating securities business, which would be the responsibility of the SFC. That would apply to the securities business done by banks, so the banks would be regulated in respect of their securities business by the SFC.

Now, that, you could say, is a reasonably logical approach, but the two points I would make are: first of all, from the banks' point of view they do not like it, because it would mean they would be dealing with two regulators. There would be an element of duplication of regulation. They would have to deal with us in respect of their banking business, and the SFC in respect of their securities business. We would still have regard, as banking regulator, to their securities business. We cannot disregard the fact that the bank was doing securities business, so an element of regulation of that securities business would have to be done by us anyway. As I mentioned, from the point of view of capital adequacy, under the new Basel Capital Accord we will be duty-bound to consolidate the securities business of banks in calculating the adequacy of group capital.

So I think that what we have ended up with is one of a possible range of options. We think it is actually quite a streamlined option. It seems to be a fairly logical

division of responsibilities, the SFC having a general standard-setting role, and us carrying out the day-to-day supervision and monitoring of those standards, which is something we would probably do in any case, and which is implied by our responsibility for consolidated supervision of the banks.

主席：

副局長希望作出補充，對嗎？

財經事務局副局長區璟智女士：

對。胡議員剛才還提到一點，就是據他觀察所得，現時某些銀行開設附屬公司，以從事零售證券業務，而這類附屬公司獲證監會發出牌照。

據我所理解，現時的運作是，一些銀行希望成為香港交易所的市場參與者。根據有關條例的規定，交易所參與者必須領有證監會發出的牌照。銀行其實亦利用所享有獲豁免的地位，透過其分行從事零售證券業務。不過，把這些零售業務集合一起時，該等銀行可選擇自行在交易所進行買賣，無需透過另一交易商，這就是胡議員剛才提到目前的現象。

胡議員的問題可能是：為何不強行把銀行各分行所進行的零售業務全部抽出來

由附屬公司處理？這其實是銀行經營業務的其中一種方式，亦是投資者的其中一個選擇，讓他們可透過銀行的分行買賣股票。

剛才Mr CARSE向各位解釋，即使銀行透過分行進行零售證券業務，無論在所受到的監管及所需符合的要求方面，政府務求採取一致

的做法。請問Mr PROCTOR或Mr CARSE有沒有補充……

主席：

請等一等。由於胡經昌議員表示我們誤會了他的意思，與其再利用更多時間解答這問題，我們先讓胡議員澄清他的問題。胡議員，請簡潔地提出你的問題，無需作出那麼多的解釋，使他們可以立即知道你所提出的問題。

胡經昌議員：

正如副局長剛才也提到，現時一些銀行開設附屬公司，作為市場參與者，從事證券買賣。這類公司的情況與我們經紀的情況一樣，我們開設公司進行證券買賣。

主席：

也就是說，銀行已開設附屬公司……

胡經昌議員：

對。我希望提出的問題是，既然這類附屬公司現時受證監會監管，為何當局還需要批給豁免呢……

主席：

……繼續讓證監會監管便可以了……

胡經昌議員：

對，繼續讓證監會監管便可以了。除非當局認為，現時由證監會監管從事證券買賣的附屬公司存在問題，否則無需訂明任何豁免，因為這是現時的運作方式。

主席：

明白。Yes, this is the question. Mr PROCTOR.

MR Andrew PROCTOR, Executive Director of Intermediaries and Investment Products, Securities and Futures Commission:

I think, Madame Chair, a much simpler question. Those subsidiaries that are currently licensed with the SFC would go on, presumably, being licensed by the SFC. It is a matter of choice as to how the bank structures its operations, how it manages its risk within the group, and a number of banking groups at the moment choose to set up subsidiaries that are licensed by the SFC, and no doubt the same reasons will mean that in the future a number of banking groups continue to choose to set up subsidiaries licensed by the SFC. So they provide differentiated services; in fact, some banking groups compete against each other within the group as a way of managing risk within the operations.

So it is not a question of exempting those bank subsidiaries in the future. They would not be entitled to exemption, in fact, because they would not be the authorized institution. They would have to be licensed to carry on securities operations.

胡經昌議員：

主席，我希望作出跟進。

主席：

好的。

胡經昌議員：

為何給予銀行這項選擇？為何銀行可以選擇成立附屬公司或以獲豁免身份進行證券買賣？這是沒有必要的。如果法例訂明銀行不可以成立附屬公司進行證券買賣，給予銀行獲豁免身份是合理的做法，但現時銀行可以開設附屬公司，進行證券買賣。這是目前的運作模式。為何銀行可享有特殊地位？難道其他公司是次等的？我相信情況應該不是這樣，如果情況是這樣的話，我便無話可說了。

CHAIRMAN:

Mr. PROCTOR, I think it is probably your question.

MR Andrew PROCTOR, Executive Director of Intermediaries and Investment Products, Securities and Futures Commission:

Yes. First, let us be very clear. The very thrust of this legislative reform package is to remove any sense of there being classes of regulated entities. The thrust of it is to ensure that everyone is regulated to the same level against the same set of standards. I think the reason why banks are differentiated in this way is a matter of history. It is the practical fact of the matter that banks are performing these services; they are providing these services to the public. So the question is, in fact, "Why should we, as an administration, or why should the regulators require banks to set up a subsidiary? Why should banks, for example, as a group be subject, as a matter of compulsion, to two regulators, to two regulatory environments, to two sets of costs?

The history is that they are providing these services. To move to a different

model and to require them to do certain things that will involve additional regulatory cost, there has to be a clear regulatory benefit. So the question is: "What is the regulatory benefit of requiring a change that would force banks to only carry out securities trading through a subsidiary?" It is very difficult, I think, to see any regulatory benefit in terms of investor protection or market risk or systemic risk, that would be achieved by requiring banks to set up a subsidiary, by requiring banks to be subject to two regulators or two sets of regulatory costs. That, I think, is the difficulty.

If we were to start now with a blank sheet, if we were a market being established in a new country where there was not the fact of history that banks were providing services through the bank that were in the nature of the securities business, then you would not have that question of justification. You would not need to explain why a certain structure was to be imposed. But that is not the reality.

主席：

你是否希望再跟進？

胡經昌議員：

我一定要作出跟進。其實文件第8段亦清楚提到，日後certain groups of persons will be excluded from licensing requirements。給予豁免的最主要原因，是由於有關業務屬於" incidental advice given by accountants and solicitors"，即執業時附帶的工作.....

主席：

這只不過是指其中一種.....

胡經昌議員：

對，我知道。現時銀行及其他專業人士享有exempt status，是因為以前銀行並沒有進行證券買賣。由於這只是附帶的工作，所以給予銀行exempt status，情況與專業人士如律師、會計師等一樣。由於這並非銀行的主要業務，所以銀行享有exempt status。因此，政府指這是歷史遺留下來的問題，這說法是不對的。問題的關鍵在於現時如果銀行進行證券買賣，便應循正確的程序行事，為何需要給予銀行豁免？讓我在此再次指出一點，這條綜合條例草案的目的是精簡監管安排。如果會計師亦希望進行證券買賣，那又應該怎辦呢？

CHAIRMAN:

I shall ask Mr. PROCTOR then Mr CARSE.

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

Perhaps for the benefit of Members I should go back and deal with Mr WU's observations about the history of exempt status. I think, broadly speaking, he is right, that when exempt status was first established not only for banks but for insurance companies, trustees and custodians, those parts of their business which would otherwise have required a licence, those parts of their business that might have been called "securities dealing" were very minor, very incidental. It was thought that there was no regulatory benefit in particular to be gained by requiring them to be licensed.

In that sense, that old historic position, when the category was established, is analogous to the current position of accountants and solicitors. They basically do a little bit that might just cross the line, but there is no regulatory benefit to be gained from licensing them. But since exempt status was first established for those banks,

trustees and insurance companies, the position has changed significantly. As a matter of percentage of their balance sheet, as Mr CARSE has said, it remains quite a small percentage, but as a matter of market share, it is a much larger share than it was when exempt status was first established. So it is now a matter of regulatory concern; it is now clearly a matter where banks have a share of the securities market which is large enough to make it a matter of regulatory concern and investor protection, that they be properly and adequately regulated.

The question is: how do you do that? That is the historic position in which we find ourselves now. They have a large share of the market, and so the only question is: which of the available choices do you make? That takes us back to the exchange we had a few minutes ago.

CHAIRMAN:

Yes. I understand, because you have addressed that second point. Mr CARSE.

財經事務局副局長區璟智女士：

主席，我也希望作出回應。胡議員剛才多次提到今次立法的目標是精簡現有的架構，其實這與監管銀行的制度是一致。如果政府硬性規定銀行必須成立分公司，規定銀行必須受兩間監管機構所規管，便會出現規管重疊的情況。這與我們剛才所說的原意相違背。

此外，各位也要明白到，政府希望業界可作出彈性安排，以不同的形式經營證券業務。同時，投資者亦可選擇各類公司為他們買賣股票。最重要的一點是，兩者對保障投資者權益方面必須一致。讓我交給Mr CARSE再作補充。

CHAIRMAN:

Mr CARSE.

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

Just to reinforce what Mr PROCTOR said, Madame Chair, the question is not whether the regulation of securities business by banks should be formalized and strengthened. We accept that fully. This business is becoming more important for banks. It does need to be properly regulated, and that is what the arrangements set out in the Bill are intended to achieve.

Part of the problem is that the whole discussion of this is bedeviled by the use of the term "Exempt AI". As we have mentioned on a number of occasions previously, exempt AI status does not mean exempt from regulation.

CHAIRMAN:

Yes. I think, Mr CARSE, we have moved on from there, because I think at this stage Members are clear that "they are exempted" does not mean they are not regulated; but Members' concern is really: why should they be regulated by two bodies, two institutions, and if you have two different institutions, would it result in a different sort of standards, whether in terms of implementation or in terms of structure? I think that is where we are at, so please do not worry about the implication of exemption.

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

The point I was making in my introductory remarks is that the standards are supposed to be the same. I mean, the standards will emanate from the SFC. They may have to be adapted in some respects in relation to banks, to fit in with the way in which they do business, and that is why there has to be consultation between the SFC

and the HKMA, but they are basically the SFC standards.

Now, our job is then to enforce those standards, and we will do that through liaison with the SFC. There will be a formal MOU, which will set out the respective responsibilities of the two parties. There will be cross-fertilisation between ourselves and the SFC in terms of training, examination check lists, etc. There may even be secondment of staff between the two organizations. I think that this achieves some of the advantages of a single regulator, without some of the disadvantages in terms of the administrative overhead of having to set one up.

CHAIRMAN:

Thank you. 胡經昌議員，你想不想再跟進？

胡經昌議員：

主席，我不想阻礙其他同事發問……

主席：

似乎並沒有其他同事舉手，表示希望發問問題，如果有其他同事……噢！對不起，胡議員，其他同事也希望提出問題……那麼……你先提出最後一條問題。

胡經昌議員：

Mr CARSE剛才提到，證券買賣漸漸成為銀行業務重要的一環。但他在會議剛開始時提到，就從事證券業務的銀行而言，從證券業務所得的收入，佔該等銀行的總收入百分之二。

主席：

兩者並無抵觸，雖然所進行的證券買賣越來越多，不過所佔的比例仍然很小。

胡經昌議員：

我的問題是，政府是否認為由於銀行從證券業務所得的收入，佔其總收入百分之二，因此便需要金管局調配人力資源進行監管？說到底，如果銀行希望從事證券業務，便向證監會申請牌照，銀行現時亦是這樣做。為何需要訂定豁免呢？主席，你剛才說得對，批給豁免並不表示銀行不受監管。不過，這豁免銀行無須受證監會監管，而是由金管局監管……

主席：

胡經昌議員，你已多次問及這問題，而他們亦已多次作出回覆。我們或者留待日後再作討論。他們的解釋是，由於以前證券買賣屬於附帶服務，因此不用進行規管，但目前的情況已有所不同。即使現時銀行所進行的證券買賣數目只輕微增加，所得收入亦佔銀行一定的營業額，所以需要進行監管。你所提出的問題是，既然需要進行監管，為何政府選擇由兩個不同的機構進行監管，而不是由同一個機構進行監管？這就是問題的關鍵。

政府已多次作出回覆，顯然你認為仍有問題存在，或者其他同事亦認為政府的答覆未能令人完全接受。讓我先請其他同事發問問題。陳智思議員。

陳智思議員：

多謝主席。主席，讓我先行申報利益。我是獨立的證券商，亦是獲豁免的AI，由於擁有多重身份，因此我首先要申報所有利益。我認為胡議員剛才提出的問題或多或少是從他們業界的角度來看，由於另外兩位Banker已離開，因此他們未能作出回應。他們所屬的銀行規模較龐大。

我有一個問題想問Mr CARSE的。胡議員剛才提到一點，既然條例草案的目的是精簡監管安排，為何仍然由兩個規管機構進行監管？其實現時的確由兩個規管機構進行監管。我想知道的是，假如銀行把資金投資在一間附屬公司，該附屬公司的運作受SFC監管，那麼HKMA會否基於該附屬公司屬於銀行的投資，亦同時對該附屬公司進行監管呢？我希望Mr CARSE澄清這一點。如果日後HKMA繼續監管銀行，並會基於有關附屬公司屬於銀行的投資為理由，繼續對該等附屬公司進行監管，而SFC又同時監管該等附屬公司的運作，這與制定條例草案之前的做法沒有太大分別。我希望政府澄清這一點，有關答覆或能夠解答胡議員提出的問題。

CHAIRMAN:

Mr CARSE.

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

The bank sets up a separate subsidiary to conduct securities business, which a number of them do at the moment – they already have broking subsidiaries – then that broking subsidiary is subject to the direct supervision of the SFC, which is responsible for supervising its conduct of business. We, I think, as part of our consolidated supervision, will still want to have an awareness of the business that was being done in that subsidiary. We will in future, as I mentioned, have to consolidate it for capital adequacy purposes, but in those cases, because the business is not actually being done

within the legal entity, which is the bank, the actual day-to-day supervision of that subsidiary would be left to the SFC.

CHAIRMAN:

In other words, you will not be involved in it?

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

We will not be involved directly on a day-to-day basis.

主席：

何俊仁議員。

何俊仁議員：

主席，其實我所提出的問題與兩位同事剛才提出的有關，我只是從另一角度提出有關問題。

副局長剛才提到，雖然兩個規管機構分別進行監管，但所採用的標準及要求會盡量一致。我質疑這做法是否可行。雖然我明白為何銀行不希望受到雙重監管，但如果由兩個機構分別進行監管時，可能會出現問題，因為金管局着重監管銀行的整體運作。即使金管局對銀行的證券業務進行監管時，亦只會將該項業務視作銀行運作的一部分。我所關心的是銀行的穩定性及整個銀行體系的風險問題。

另一方面，證監會着重監管證券商直接的業務，即使是銀行的附屬財務公司，證監會亦是着重監管該等公司的證券業務，確保股市的整體運作不受影響。兩者的監管目標會否有所不同？事實上，該兩個

機構採用不同的工具進行監管，我希望Mr PROCTER稍後向我們講解這方面的情況。當兩個規管機構採用不同的規則進行監管時，例如在監管證券業務時採用Financial Resources Rules，但在監管銀行時採用資本負債比率等工具，在這種情況下，能否做到監管一致？有意見或會認為，如果銀行大致上是穩健的，即使其他業務，例如證券業務出現問題，銀行亦可以完全承擔有關風險，這是另一回事。究竟兩者能否做到採用一致的監管方式及標準？我對此有所懷疑。政府可否解釋這方面的情況？

CHAIRMAN:

Mr. CARSE. Has it been fully interpreted?

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

Yes. I mean, all I can say is that we are already applying this approach at the moment. I do not think we have had any problems in making sure that the way in which we apply these standards is the same over the last few years when we have been doing this. So I do not really anticipate problems in the future. In fact the situation should be eased in the future, because there is a certain element of ambiguity at the moment. The SFC issues a code of conduct; we say that that should apply to banks, but there is no statutory backing for that, so there is this grey area, I suppose you can say, at the moment, which will be resolved under the Bill. The point of the matter is that it is not a question of us saying to the banks "You should voluntarily abide by this code of conduct". They will be subject to it on a statutory basis, directly under the legislation. It is not a question of us having discretion as to whether certain bits of the code apply to them or not. It will apply to them directly, and because of the close liaison between ourselves and the SFC, which will be enhanced by the removal of any constraints on secrecy, I do not see a practical problem in actually being able to apply the standards on a consistent basis.

As regards the question of the tools being different, yes, they are different, and the capital ratio requirements are different. But I would say that the requirements that apply to banks are extremely rigorous. I mean, you have the requirement, first of all, in relation to the absolute amount of capital. You are talking about $HK150 million minimum for banks, and for most banks the figure would be much, much bigger than. You have the capital ratio requirement which is an international standard established by the Basel Committee, which applies not simply to credit risk but also to market risk, which will be substantially expanded over the next few years, with the new revision to the Accord.

In addition to that you have a liquidity ratio requirement which makes sure that the banks have sufficient liquid resources to meet their obligations both to depositors and to investors. So I would say that that is the least of your worries. The issue here is not in relation to the Financial Resources Rules. The issue is in relation to conduct of business, because I think that given the scale of the securities business of most banks, as I said, for most banks you are talking about 2 per cent or probably in most cases less than 2 per cent of total income derived from retail securities business.

The financial resources available to the banks are more than enough to support that, so I do not think that is an issue on which the committee should be worrying too much. The main issue that you have really got to focus on is the conduct of business issue, and that is the one I talked about earlier in terms of applying the standards. I think in practice it will be possible for us to apply these standards on a consistent basis. I mean, Andrew might want to give his own view on that.

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

I think, Madame Chair, that Mr HO's question raises a very interesting aspect of

regulatory philosophy. He is right, I think, to identify that traditionally there has been a different regulatory philosophy underpinning regulation in the banking and securities sector. Traditionally that has given rise to two particular distinctions in the way in which the sectors are regulated. One is as to capital, and as to that, in fact it has meant that because the survival of the institution on the banking side, because of the systemic issues, is so emphasized, the capital requirements are much larger; so actually the banks get a bigger hit in terms of regulatory capital.

The other great distinction is in respect of the penalties, the disciplinary action that might be taken in the event of a breach. Traditionally on the banking side there is a concern about publicity, because publicity may cause a loss of confidence in the banking institution. So it is important actually to note that in this case there is an alignment of the penalties now in a way that did not occur before. I think you are right to identify a difference in regulatory philosophy. I think the two practical consequences traditionally have been capital and penalties. Capital hits the banking side harder. There is now to be an alignment of those penalties, and as Mr CARSE has said, and has been repeated several times today, the penalties are to be imposed against a common set of standards. I think that leaves just one outstanding area, and again something touched on in your question. That is whether in interpreting the common set of standards, the regulators, for reasons of regulatory philosophy or just because of the uncertainty in the requirement for interpretation, impose a different standard by reason of a different interpretation.

Actually that is true within a regulator anyway; it is difficult enough within a regulator. But in fact the practical experience has been that that has not been an issue. We actually have a body of practical experience built up over several years that demonstrates that we are able to discuss and agree upon a proper interpretation. So I think that leaves you with this risk of a differing interpretation, and you have got to weigh that against the negative impact in terms of regulatory cost which would arise if you were to try and eliminate that risk by forcing the regulator together, or requiring all

banks to put their securities business into a subsidiary. I do not think the risk of differing interpretations is a particularly great risk.

主席：

Thank you。現在還有兩位同事舉手表示希望提出意見，但其實討論議程項目I的時間已經過了，我們需要討論議程項目II，而委員會下星期還會繼續討論這部分。現請舉手表示希望提出意見的兩位同事——陳智思議員及胡經昌議員簡短地提出意見。在兩位同事提出意見後，委員會才請政府一併作出回覆，然後我們開始討論議程項目II。陳智思議員。

陳智思議員：

多謝，主席。我們剛才曾討論銀行應否進行證券業務，以及應由哪個機構監管銀行及證券商進行的證券業務。從市民的角度來看，其實他們最擔心的是，銀行提供買賣證券服務時，銀行所具備的qualification及對產品的認識，是否與證券商一樣？市民或會擔心前往一間銀行的分行買賣證券時，該分行的職員根本不熟悉有關證券。我相信市民較關心這方面的事宜。他們關注到，究竟兩者提供的服務是否一致？服務水準是否相同？銀行現時在這方面並沒有正式的規定。請副局長告訴我們，在條例草案通過成為法例後，兩者所提供的服務水平會否相近，甚至是一樣呢？

主席：

胡經昌議員。

胡經昌議員：

多謝，主席。我希望知道，現時銀行是否享有豁免，提供其他類似我們今天所討論的專業服務，例如提供保險服務？如果有的話，監管架構又是怎樣呢？如果沒有豁免的話，我相信這已解答了我的問題。

主席：

請副局長先行回答有關問題，如果其他與會代表希望作出補充，可於稍後提出。

財經事務局副局長區璟智女士：

讓我先回答陳議員提出的問題，胡議員提出的問題會交由簡達恆先生回答。陳議員剛才提出的問題，正是政府所關心的問題。政府所建議的制度，究竟對投資者有沒有影響呢？我剛才已提到，最重要的一點是，投資者享有同樣的保障，兩者均無損投資者所享有的保障。

簡達恆先生剛才已經清楚解釋，雖然該守則的適用範圍應該延伸至銀行的證券部，但現行法例並沒有明文作出這項規定。這可能會存在一些灰色地帶，或會引起一些問題。在條例草案通過成為法例後，連同對《銀行業條例》作出的修訂，屆時會明文訂定有關要求，包括陳議員剛才所說的，也就是說，銀行及證券公司負責處理證券業務的僱員，均須符合同樣的標準，例如"適當人選"的要求。屆時，法例會訂明有關人士需接受的培訓安排、有關的考試制度，以及需具備的經驗及資歷。該名人士無論在哪間機構工作，只要該人進行有關的受規管活動，便要遵守同樣的規定。此外，其他監管商業操守的守則，亦同樣適用。這是我對第一個問題的回覆，現交由簡達恆先生回答第二個問題。

主席：

Mr CARSE.

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

I think in relation to the first question that we accept the basic principle that bank staff who are doing securities business should be subject to the same fit and proper criteria as broker staff doing the same business, and should be properly qualified. That will go right down to the branch level. First of all, it is a question of "fit and properness". Obviously the requirements relating to counter staff who are only taking orders would be different from those who are giving investment advice; so the standards may differ, depending on the type of activity you are involved in. But the basic principle is that you should be subject to fit and proper criteria, and that is what we will aim to try to achieve.

In relation to insurance business, banks do get involved in insurance business in a number of capacities. Some of them have separate insurance companies, which is the norm. It is not usual for a bank to underwrite insurance business within the bank itself. Normally the underwriting arm would be separate, and I think that is the norm on a worldwide basis. You also have banks who act as agents for insurers and act as brokers for customers, in terms of obtaining insurance business.

At the moment all agents and brokers have to be registered, but that registration is done on a voluntary basis; it is basically a self-regulatory operation at the moment. So both the agents; i.e. the institution itself, has to be registered, and the employees who are engaged in business on behalf of the institution have to be registered with the appropriate industry body. I think the system we are talking about for bank staff is very similar. The institution will have to be approved as an exempt authorized institution, and its individual staff will have to be registered with the HKMA; and the institution will have to ensure that those staff are fit and proper.

So I think for both insurance business and MPF business the regimes will be broadly the same, and we have actually got a paper on the question of banks' involvement in insurance business and MPF business, which we can give to the Committee, which will set out the answer in a bit more detail.

CHAIRMAN:

Right. I am afraid we have to leave it at that, because we have to move to the second item, but next week we will continue to discuss Part V. Thank you very much. You are quite welcome to stay, but we are moving to the question of Chinese drafting. If you feel you would like to get on with other business, please feel free to do so.

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

Thank you very much.

主席：

各位同事，我們現在討論議程項目II有關中文本的草擬問題。由於法律顧問已向我們提及此事，相信各位也知道問題所在。副法律草擬專員毛錫強先生出席委員會今次的會議，向我們解釋此事。副局長，如果你沒有其他補充的話，我便請毛先生向委員會解釋此事。

副法律草擬專員毛錫強先生：

主席，各位議員，我今天以雙重身份出席是次會議。第一，我是這條例草案中文本的總負責人員。第二，我負責掌管律政司法律草擬科所有法例中文本的草擬工作。據我所理解，部分委員十分關注條例草案中英文本似乎出現差異的情況……

主席：

對不起，毛先生。請你詳細解釋有關情況，因為問題不只是條例草案中英文本的某些部分出現差異，而是政府所採用的草擬方式，也就是說，中英文本並非逐字對照，所以請你首先解釋這種新的草擬方式，然後才解釋中英文本在某些地方出現差異的問題。

副法律草擬專員毛錫強先生：

主席，各位議員，其實這並非一種新的草擬方式。我們並沒有將這麼重要的條例草案做實驗，藉此試行一些新方法。事實上，這條例草案中文本的草擬風格、體裁及行文，與我們近年在草擬其他法例的中文本時所採取的做法相若。此外，在這條例草案中，97%至98%的條文無論在行文、體裁或鋪排方面，中英文本並沒有任何不同。至於若干條文在行文或語句鋪陳方面可能有出入，讓我解釋出現這種情況的原因。

在解釋個別條文前，讓我首先概述政府在草擬法例時所依循的一些原則，希望先行取得委員的共識，綱舉目章，然後才討論細節。根據《釋義及通則條例》(第1章)的規定，任何條例的中文本及英文本均具有同等的效力，即屬同等真確。換言之，自該條例制定後，並不會出現某條例的中文本凌駕英文本，或條例的英文本凌駕中文本的情況。中英文本均屬法例的正本，並不是另一文本的譯本。也就是說，中文本無需忠於英文本的條文，反之亦然。當然，我們力求使中文本把有關政策、意念或規定傳達給中文讀者時，與英文本向英語讀者傳達的訊息完全相同。我們希望，當中文讀者參閱法例的中文本時，他們對該條例的內容及所訂政策的理解，與英語讀者參閱法例的英文本時所理解到的完全相同。

在這前提下，我們亦要顧及中文本作為有關法例的獨立文本，必須清晰表達該法例的政策，使讀者無需再參照英文本，因為部分中文讀者根本看不懂法例的英文本。在這兩項原則下(即中英文本的地位同等，以及由於法例的中文本作為獨立文本，因此必須同樣有效地傳達有關政策的意念)，當我們草擬法例時，若發現中文本在語句鋪陳或行文方面一旦採用與英文本近似的表達方式，會導致中文本不夠簡潔，未能清晰表達有關涵義的話，我們或會採用跟英文本不同的處理方法來草擬法例的中文本。就中文而言，句子越簡潔，便越容易理解。各位以往在參閱某些條例的中文本時，如果當中的句子冗長或結構複雜，便難以掌握有關條文的意思，所以我們的做法是盡量簡潔。

此外，就香港的特殊情況而言，據我觀察所得，如果一名讀者只能夠看得懂法例的中文本，而由於不懂英文的原因，故未能同時翻閱法例的英文本作參考，一般來說，這類讀者所接受的教育水平較低。我這樣說或會令部分人感到不高興，但我相信這是事實。在這種情況下，該等讀者無法像精通中英文的讀者般，同時參照有關法例的中英文本，以理解有關條文的規定。故此，我們必需留意這一特點，以照顧中文讀者的需要。當我們草擬法例時，在行文方面需要盡可能清晰表達有關概念。再者，由於中英文是兩種截然不同的語言，在文法上各有不同的要求。在一些情況下，為顧及中文的文法，我們可能會採用跟英文本不同的處理方法。

昨天我已代表政府致函高級助理法律顧問李先生，概述政府現時在草擬法例中文本方面的語文政策。該函件亦列舉一些例子，說明我們近年來所採用的方法，使法例的中文本更簡潔易明，在傳遞政策意念方面更具成效。不過，這做法可能會使中文本在表達方式上，與英文本有所不同，我在文中列舉了一些例子。

主席：

毛先生，在討論該等例子前，請你告訴我們，現時的草擬政策是否與過往的草擬政策有點不同？

副法律草擬專員毛錫強先生：

是。

主席：

政府在推行這項新的草擬政策時，有否諮詢司法及法律事務委員會、香港律師會及香港大律師公會的意見呢？為何我們似乎完不知情？

副法律草擬專員毛錫強先生：

這項政策轉變其實並不是突然採納的，事實上自政府在1989年開始採用雙語立法以來，草擬方式逐漸轉化，逐漸演變及轉型。也就是說，我們的草擬政策不斷演變，直至現時的情況。由於這是一個漸進的過程，我們也說不出這項轉變在何時發生。

主席：

毛先生，我記得在採用雙語立法時，政府在所發出的文件中亦提到，當時很多人對中英文本逐字對照有強烈的意見，認為這做法會令人難以理解有關條文的規定。你剛才說現時採用一種草擬方式，令條文的意思比較清晰，而且兼顧到中文讀者與英語讀者的水平可能有所不同的情況。也就是說，政府採用了兩種不同的做法。那麼政府有否向立法會及專業團體解釋這項轉變呢？政府有否採取這步驟？我只想知道這一點。

副法律草擬專員毛錫強先生：

政府並無正式向專業團體或立法會司法及法律事務委員會解釋有關情況。不過，近年來我們的同事在不同場合中，也盡量向不同人士解釋有關這方面的情況。

主席：

在甚麼場合呢？

副法律草擬專員毛錫強先生：

舉例來說，我和兩位同事去年曾到立法會，與法律顧問馬先生、李先生及多位助理法律顧問非正式地談論過這方面的問題。

主席：

這是不足夠的，我們稍後再商量應如何處理有關問題。我現時只想知道這方面的實際情況。各位同事，你們希望在現階段提出問題，還是希望先行聽取政府代表講解有關的例子呢？劉漢銓議員。

劉漢銓議員：

主席，由於我因事或有需要早點離開，我希望先行提出一些意見。我們現在討論草擬法例的方式，由於這是相當技術性的問題，我認為很難在這委員會討論。

雙語法例諮詢委員會在1987年成立，我和主席也是該委員會的成員，曾花了很多年的時間討論雙語立法的問題。該委員會最初研究怎樣雙語立法時，曾利用超過1年的時間來討論採用甚麼方式，我們亦曾

討論主席剛才提到的問題，即逐字對照所遇到的問題。我相信很難在這委員會討論有關問題。我建議由法律顧問先行與政府有關官員開會進行討論，探討有甚麼不能解決的問題，然後再交由我們討論，這樣或會得出成果。否則，即使我們利用很長時間討論這方面的問題，亦未必能夠得出任何結論。

據我記憶所及，在某一階段，在雙語法例諮詢委員會成立一段時間後，當時立法會的法律顧問亦有參與我們雙語法例諮詢委員會所舉行的會議,所以他們亦相當清楚有關雙語立法的方式、形式或格式等。這是我希望提出的意見。我認為這委員會很難決定誰是誰非，以及應採用甚麼形式進行雙語立法，否則便會變成討論應採用甚麼形式把雙語立法的工作做好。這是我的意見，主席。

主席：

我們不是進行價值審判，只是確定這方面出現轉變。其他同事有甚麼意見？梁劉柔芬議員。

梁劉柔芬議員：

主席，我十分同意劉漢銓議員的意見，亦認為不應在這委員會討論這問題。不過，作為layman，毛先生剛才所說的令我有點擔心。據我所理解，法律首要的原則是忠於立法原意及意思清晰，其次才是讓讀者看得明白。如果政府為了讓讀者能夠看得懂有關條文而不顧第一項原則，這令我有點擔心。

至於毛先生剛才提到，只懂中文的人，其學識水平可能較懂英文的人為低，我完全不同意這說法，亦希望政府不要以此作為理據。即使中文程度或英文程度很高的人，到底該人是否最好的法律詮釋者？答案是不一定的。法律是一門專業的學問，所以最重要的是忠於立法

原意，有關條文必須很清晰，即使需要使用一般人未必可以理解的字句，我亦希望有關條文能夠忠於立法原意。我只想表達上述的意見，但我們今天不會在此討論這問題。

主席：

毛先生，你希望現在作出回應，還是先行聽取其他委員的意見？

副法律草擬專員毛錫強先生：

我希望首先就梁劉柔芬議員提出的意見作出回應。如果我剛才的發言，使梁議員認為我不尊重中文使用者的話，我想澄清我絕對沒有這意思,這只是一個觀察。我絕對同意不能夠單從某人懂多少種語言，來衡量該人對法例的理解能力。我剛才所說的，是指可能出現的一個普遍現象。

此外，我亦希望重申一點，政府絕對不會為求條文簡潔，使法例未能如實反映政策意念。我們必須很準確地表達有關的法律意念，在符合這要求的前提下，盡量使用最簡潔的語句表達文意，但不會妥協或犧牲第一項原則，以換取行文簡潔。

再者，我們務求令中英文本的涵意絕對一致，也就是說，無論中英文本在行文方面是否相同，中英文本必須達致完全相同的效果。我們絕對不希望出現以下的情況：某些事物或情況只在某一個文本的條文中出現，而另一個文本並沒有包括這些事物或情況。中英本必須意義相同，在這前提下，政府才使用簡潔的語句表達有關的意念。

梁劉柔芬議員：

主席，我希望跟進一點，即使這是指普遍現象，我亦希望法律草

擬科不要有這種想法，這是我的建議。

主席：

由於時間所限，而且今次會議的目的並非要把問題解決，而是決定怎樣處理此事，所以我在現階段不會請政府作出詳細回應。余若薇議員及胡經昌議員均舉手表示希望提出意見，讓我們先聽取兩位發表意見。Audrey。

余若薇議員：

多謝主席。主席，我也同意劉漢銓議員剛才所說的，我們很難在這委員會深入研究此項目。其中一個原因是，這條例草案本身已是十分繁複及艱深的工作。根據法律顧問就這條例草案列舉的例子，最顯著的差異是，在英文本中某些條文提及上述的條款，但中文本的條文並無提及有關條款，而是把與該條款相若的意思寫在條文中。在一些情況下，我們可以理解為何政府這樣做。舉例而言，請各位參閱第210條……

主席：

頁數是……

余若薇議員：

第C1965頁。

主席：

C1965……第211條？

余若薇議員：

第C1965頁，第210條。該條文關乎證券及期貨事務上訴審裁處委任法官的情況。以第210(7)條為例，該條文的英文本列明是"section 209"，但中文本並沒有這樣做，中文本並無列明是第209條中"法官"一詞第(*a*)段的定義，中文本把第209(a)條的意思寫下來。在一些情況下，我們可以理解政府為何這樣做。然而，以第210(7)(*c*)條為例，英文本是"the terms and conditions to which the person is subject as a holder of that office"，中文本是"他擔任原訟法庭法官或暫委法官須遵守的條款"，兩者其實有頗大的分別。在英文本中，條例草案使用"terms and conditions"兩個字，但中文本只採用"條款"一詞。政府在草擬條例草案時，可能認為"terms and conditions"解作"條款"。不過，當我們參閱條例草案時，發覺在英文本中採用了兩個字，而中文本只使用一個詞語，我們不知道條例草案的中文本究竟是漏了一個詞語，抑或中文本的"條款"一詞，已經涵蓋"terms and conditions"的意思？我相信很多條例亦載有"terms and conditions"的字眼，在該等條例中，當英文本提到"terms and conditions"時，中文本採用"條款"一詞，還是使用了兩個詞語呢？政府是否只在這條例草案的中文本中，把"terms and conditions"簡略為一個詞語？

雖然我同意劉漢銓議員提出的意見，我們不應在此討論政府草擬法律的政策，但政府或律政司應就這條例草案向我們提供一個列表，清楚說明中英文本的不同之處，以及為何兩個文本有所不同，否則我們在審議條例草案時，會很難進行有關工作。

主席：

其實政府為委員會帶來一個很大的難題，因為政府同時進行立法，平衡立法，也就是說，問題的關鍵是，中英文本並非逐字對照。

根據毛先生剛才所說，政府務求使中英文本達致同樣效果。然而，兩個文本是否達致同樣效果，並非由法律草擬科決定，而是由立法會決定。以往的做法是，立法會在審議條例草案時，會首先審議條例草案的其中一個文本，很多時是英文本，因為會較為方便。委員會在研究條例草案的英文本後，會把將兩個文本的對照工作交給法律顧問處理，由他們完成這項艱巨的工作。如果法律顧問在進行對照工作時發現有問題，會告知委員會，否則委員會把兩個文本視作等同。

然而，政府現時的做法是使中英文本達致同樣效果，我不知道法律顧問是否認為能夠負起這責任，確實指出即使中英文本在行文方面有所不同，但兩個文本的法律效果是相同的。如果法律顧問認為這做法並不穩妥，我本人亦認為此舉並不穩妥，那麼就這條例草案而言，我們所需要做的，並不是平衡立法，而是雙重立法，也就是說，委員會在研究整條條例草案的英文本後，需要重新研究條例草案的中文本，以確定中英文本達致同樣效果。如果條例草案的篇幅很短，委員會即使這樣做，在時間方面不會有很大分別。然而，在研究篇幅浩繁的條例草案時，在時間方面便會有分別。如果條例草案的篇幅很短，我們很快便能夠確定中英文本是否達致同樣效果。不過，如果條例草案的篇幅浩繁,而且條文又互相呼應,委員會可能需要利用一段時間，才可確定兩個文本是否達致同樣效果。由於這是委員會的責任所在，委員會當然應該這樣做。我同意劉漢銓議員剛才所說，政府草擬法例的原則和方向應該交由另一個事務委員會詳細討論，甚至邀請法律界表達意見。至於如何處理這條例草案，必須由本法案委員會決定。

因此，余若薇議員剛才建議政府向委員會提供一個對照表，這做法並不一定能夠把問題解決。這只是我個人的意見，還須視乎各位同事的看法。我認為委員會很可能需要分兩次研究條例草案，即研究英文本後，再研究中文本。胡經昌議員。

胡經昌議員：

主席，我的看法與你的相若。雖然我代表金融服務界，但其實銀行業將來如要面對這問題時，亦會遇到同樣的情況。假如我們業界以條例草案的中文本作為參考，而中文本的規定並不像英文本的那麼詳細的話，我們可能會對條例草案的規定有不同的理解。一般人翻閱條例草案時，通常只查閱某部分的規定，不會像我們的做法，逐頁翻閱條例草案。當他們查閱條例草案某部分時，可能不知道需要參閱其他部分的規定，結果以為法例容許他們作出某作為，但其後又發現英文本有較詳細的規定。

我並不是法律界的人士，據我所理解，以往條例草案的中英文本是逐字對照，無論我參照哪個版本，亦沒有問題。如果現時已不再採取這做法，我所擔心的是，如果layman只參照中文本，而沒有查閱英文本，他們可能到法庭應訊時，才發覺自己錯誤理解有關條文。我擔心會出現這種情況。

主席：

這問題關乎應否以該種形式立法，也就是說，是一個general question，但在應用方面.....

胡經昌議員：

但我們審議這條例草案時需要考慮這問題。

主席：

.....研究怎樣處理這條例草案。李家祥議員亦舉手表示希望提出意見，待李家祥議員發言後，我請法律顧問向委員會概述他們經研究後對此事的意見,然後我們便決定怎樣做,因為會議時間已差不多了。

李家祥議員。

李家祥議員：

主席，我想提出個人的看法。我並非反對劉漢銓議員的意見，但詳情需要再作研究。我的看法是，如果一方面希望把法例寫得淺白，但同時又希望中英文本一致，這可能是互相矛盾的。作為一項政策而言，哪一項是主要原則，也就是說，哪一項是exception？哪一項是rule？這是一項很重要的決定。

根據這條例草案在行文方面所採用的方式，將法例寫得簡易明白似乎成為主要的原則。立法會如要假設草擬法例者完全明白整條法例的精神及內容，尤其是有關財經方面的運作，然後在草擬中英文本時，使兩者所表達的意思完全一樣，作出這樣的假設需要承受相當高的風險。正如主席所說，委員會可能真的需要在分別研究中英文本後，才可確定兩者是否相同。

如果需要協助讀者理解中文法例，我認為應該採取其他方法，不一定需要在草擬法例時顧及這一點。我認為首先要做到中英文本在用語方面一致。如果中文本某些部分的寫法實在很難令人明白，政府才採取例外的做法。立法會在審議有關條例草案時，可集中研究該等部分。法律顧問及法案委員會便可以較容易處理有關情況。

以這條例草案為例，由於內容是那麼複雜，即使採用較淺白的中文草擬，很多人可能亦未能理解箇中的規定。如果政府希望所有人均能夠理解有關的規定，有關的政策局或其他方面是否應該另行擬備小冊子，以淺白的文字簡單介紹有關法律，而不是在立法時採用兩種不同的表達方式？我認為這是較實際的做法。如果政府在立法時強行符合上述兩個目標，我認為所需承受的風險相當高，立法會亦很難承擔這風險。

主席：

我希望提出兩項建議。第一，委員會將政府草擬法例的政策及所依循的基本原則等問題，交由司法及法律事務委員會進行詳細討論。至於這條例草案的處理方法，委員會請法律顧問與法律草擬科的官員舉行會議，詳細討論有關問題，以便委員會可更清楚知道問題的嚴重程度。法律顧問與法律草擬科經商議後，就如何審議及通過這條例草案的中英文本，向委員會提出實質的意見。

我希望聽取各位對這兩項建議的意見，並會在稍後請各位表示是否同意這樣做。現首先請法律顧問提出意見，然後由毛先生作最後總結。法律顧問。

法律顧問顧建華先生：

多謝主席。這條例草案的中英文本在很多地方的寫法並不一致。我們認為，中英文本基本上希望達致相同的目的，就是表達相同的政策意念。然而，條例草案的中文本很多時會較為簡短，我們的顧慮是，在草擬法例時，英文本所採用的格式及措辭，與我們日常所採用的用語可能有所不同。如果要令一般人也可以理解條例草案的中文本，在草擬法例時可能需要採取不同的方向。

我們亦認為，如果中文本採用較簡單淺白的寫法，其實英文本亦可以採用較簡單淺白的方法來草擬。我們所關注的是，為何中英文本採用不同的表達方式？問題並非在於哪個文本的草擬方式較好，而是中英文本採用不同的表達方式，我們擔心日後法庭詮釋有關法例時，又或讀者在理解法例時，可能對法例有不同的理解。

即使我們認為，就這條例草案的內容而言，中英文本大致相同。

然而，日後法庭會否對這條例草案的中英文本有不同的看法，這是很難說的。即使我們認為中英文本所傳達的訊息是完全一樣，但日後法庭是否持相同的看法，我們未能確定這一點。

法律事務部可以與法律草擬科商討這問題，並向他們指出在行文方面，我們認為中英文本哪些條文有所不同，以及商討應如何處理有關問題。至於主席建議把有關事項交由另一事務委員會處理，兩者可以同時進行。

主席：

毛先生，請你作出回應。

副法律草擬專員毛錫強先生：

主席，我希望就此事的處理方法提出一項建議。這條例草案的立法時間表十分緊迫，而且篇幅浩繁，議員的時間亦很寶貴，我同意議員應關注條例草案的政策內容，但條例草案的修辭行文，其實屬於技術上的問題。我建議由法律草擬科與法律事務部商討這方面的問題，當雙方認為無法解決有關問題時，又或雙方無法同意有關條文的意思是否有出入時，才把有關問題交回委員會考慮。如果經解釋後法律事務部認為沒有問題，又或經商討後雙方認為作出修改是較適當的做法，政府便提出修正案，不論修改哪一個文本也好。

主席：

問題是在採用不同的文字時，究竟是屬於不同的表達方式，抑或會有不同的效果？當中英文本並非對照時，究竟這只不過是不同的表達形式，抑或實際上會有不同的效果？我不知道法律顧問認為本身可否就這一點作決定。當然雙方需要一起商討此事。我相信委員的意向

是，除非很明顯只是表達方式上的不同，否則也要交回委員會處理，因為最終由委員會負責。關於我所提出的兩項建議，第一項是把有關政府草擬法例的原則及政策等問題，交由司法及法律事務委員會處理。我相信同事對這一點應該沒有異議。第二項建議是，就這條例草案在草擬方式上出現差異的問題，委員會請法律顧問及法律草擬科的官員商討有關問題，然後擬備一份報告，或在適當時候盡早與委員會匯報情況。各位是否同意這項建議？余若薇議員，你對這項建議有意見？

余若薇議員：

不。由於劉漢銓議員因事需要提早離開，他請我向你表達他的意見，他表示十分贊同你的建議。我亦十分贊同你的建議，亦同意你剛才提出的一點，就是即使法律顧問與法律草擬科經討論後明白到問題所在，又或解決大部分的問題，但最終本法案委員會負責審議這條例草案。我仍然認為政府應提供一個列表，清楚告訴我們兩者在何處有分別。

副法律草擬專員毛錫強先生：

請容許我就李家祥議員提出的關注作出回應。我們並無嘗試在互相矛盾的原則之間取得平衡，我們的政策十分清晰。在草擬法例時，最重要的原則是清晰、有效及準確表達有關的政策意念。在這前提下，我們務求令行文簡潔。如果兩者有衝突，我們一定不會為求行文簡潔而犧牲準確表達政策意念。其實這並不只適用於中文法例的情況，我們在草擬英文法例時，現行的政策也是採用淺白的文體。

主席：

這可能是你們的主觀願望，但我們必須客觀地研究中英文本在法

律效力上是否完全相同。說到底，條例草案是由委員會負責審議。雖然我們明白立法時間表十分緊迫，但我們必須小心行事。我們今天的討論到此為止，下星期五繼續，多謝各位。

m2726